

HOUSE BILL REPORT

E2SHB 2533

As Amended by the Senate

Title: An act relating to attachments to utility poles of locally regulated utilities.

Brief Description: Concerning attachments to utility poles of locally regulated utilities.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives McCoy, Chase and Quall).

Brief History:

Committee Activity:

Technology, Energy & Communications: 1/18/08, 1/25/08 [DPS];
Appropriations: 2/11/08 [DP2S(w/o sub TEC)].

Floor Activity:

Passed House: 2/18/08, 94-1.
Senate Amended.
Passed Senate: 3/6/08, 46-3.

Brief Summary of Engrossed Second Substitute Bill

- Specifies how pole attachments rates must be calculated for utility poles owned or controlled by a public utility district (PUD).
- Provides time frames under which a PUD must respond to a licensee's request to enter into a pole attachment contract.

HOUSE COMMITTEE ON TECHNOLOGY, ENERGY & COMMUNICATIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives McCoy, Chair; Eddy, Vice Chair; Crouse, Ranking Minority Member; Hankins, Hudgins, Hurst, Kelley and Morris.

Minority Report: Without recommendation. Signed by 4 members: Representatives McCune, Assistant Ranking Minority Member; Herrera, Takko and Van De Wege.

Staff: Kara Durbin (786-7133).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Technology, Energy & Communications. Signed by 23 members: Representatives Sommers, Chair; Dunshee, Vice Chair; Anderson, Cody, Conway, Darneille, Ericks, Fromhold, Grant, Green, Haigh, Hunt, Kagi, Kenney, Kessler, Linville, McIntire, Morrell, Pettigrew, Priest, Schual-Berke, Seaquist and Sullivan.

Minority Report: Do not pass. Signed by 9 members: Representatives Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Haler, Assistant Ranking Minority Member; Chandler, Hinkle, Kretz, Ross, Schmick and Walsh.

Staff: Wendy Polzin (786-7137).

Background:

Pole Attachments Generally: Gaining access to potential customers often requires telecommunications service providers to use poles, ducts, conduits, or rights-of-way that a competitor, another type of utility service provider, or a governmental entity may possess.

In Washington, attachment to poles owned by telecommunications or investor-owned utilities (IOUs) are regulated by the Washington Utilities and Transportation Commission (UTC). Attachments to poles owned by consumer-owned utilities are regulated by the Utility's Governing Board.

Federal Law: Federal law requires the Federal Communications Commission (FCC) to regulate the rates, terms, and conditions for pole attachments by cable systems, unless a state has adopted its own program for regulating such pole attachments. Federal law defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."

The FCC's jurisdiction does not apply, however, to attachment to facilities owned by consumer-owned utilities, such as municipal utilities or public utility districts (PUDs), as the federal pole attachment statutes define "utility" to exclude consumer-owned utilities.

State Law: In 1979, the Legislature enacted legislation authorizing the UTC to regulate, in the public interest, the rates, terms, and conditions for pole attachments by licensees or utilities. All rates, terms, and conditions must be just, fair, reasonable, and sufficient. While the UTC may regulate pole attachment rates, terms, and conditions for IOUs, it has no regulatory authority over consumer-owned utilities such as PUDs, municipal utilities, or rural electric cooperatives.

In 1996 the Legislature enacted legislation pertaining to pole attachments made by consumer-owned utilities. It required that all pole attachment rates, terms, and conditions made, demanded, or received by a consumer-owned utility be "just, reasonable, nondiscriminatory,

and sufficient." Rates must be uniform for the class of service throughout the utility's service area. The UTC is specifically prohibited from regulating the activities of consumer-owned utilities.

When a dispute arises regarding the rates, terms, or conditions of attachment to poles owned by a telecommunications company or an IOU, the aggrieved party can appeal to the UTC for resolution of the dispute. If dissatisfied, a party to the dispute can appeal a decision of the UTC to the courts.

When a dispute arises regarding the attachment to poles owned by a consumer-owned utility, the aggrieved party has no recourse through the UTC, but can appeal to the utility's jurisdictional authority (such as the city council or PUD's board of commissioners) or file a lawsuit.

Summary of Engrossed Second Substitute Bill:

Pole Attachment Rates: A public utility district (PUD) may establish a rate for a pole attachment in one of two ways: (1) according to the Federal Communications Commission's (FCC) Cable Formula, as it exists on the effective date of the bill, or as it may be amended by the FCC by rule; or (2) according to the "just and reasonable rate" calculation outlined in the bill.

Just and Reasonable Rate Defined: A just and reasonable rate for a pole attachment to a utility pole owned or controlled by a PUD must be calculated as follows:

One half of the rate will consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses attributable to the portion of the pole used for the pole attachment, 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 or that remain available.

One-half of the rate will consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses attributable to the share of the required support and clearance space, divided equally among all attachers, in which the sum is divided by the height of the pole.

Request to Make an Attachment: A request to attach to a PUD's pole may only be denied on a nondiscriminatory basis where: (1) there is insufficient capacity; or (2) there are reasons of safety, reliability, and generally applicable engineering purposes.

If a licensee makes a request to attach to a PUD's pole, the PUD must respond, except in extraordinary circumstances, within 45 days of receipt. The PUD must indicate that either the application is complete, or the application is incomplete, and if so, include a statement of what information is needed to complete the application.

A PUD must notify an applicant as to whether the application has been accepted or rejected within 60 days of an application being deemed complete. If the application is rejected, the PUD must provide reasons for the rejection.

EFFECT OF SENATE AMENDMENT(S):

Specifies the intent of the Legislature is to establish a cost-based formula for calculating pole attachment rates. Makes technical changes to the method for calculating pole attachment rates under Section 2(3)(b) of the bill to clarify that: (1) the space used for the pole attachment is included in the calculation; and (2) that the support and clearance space is divided equally among the public utility district (PUD) and all attaching licensees. Allows a PUD to choose the Federal Communications Commission's cable formula in lieu of the formula set forth in Section 2(3)(a). Allows a PUD to extend the timeframe for reviewing a complete application in extraordinary circumstances, if the applicant approves.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony: (Technology, Energy & Communications)

(In support) We need to find a reasonable solution to this issue. Pole owners should be able to recover their costs, but we have a responsibility to ratepayers to keep rates as low as possible. Problems over pole attachment rates first emerged in Oregon. The American Public Power Association (APPA) formula for pole attachment rates concerns us. We feel the inputs in the APPA formula result in a profit center for the pole owner. We have had a long, protracted dispute with one PUD in particular where we really wanted to work out a rate, but they filed a lawsuit against us in superior court for trespass.

Extending the pole attachment formula in Chapter 80.54 of the RCW that already applies to the investor-owned utilities makes public policy sense. We rely on pole owners to share their facilities. We need reasonable terms and reasonable rates. We think future disputes could be avoided by having a consistent pole attachment formula for parties to follow. Since 1979 only one pole attachment dispute has been brought before the UTC. Providing the UTC as a possible avenue for resolving disputes will help us minimize disputes in the first place.

We have, at times, been denied a reasonable rate or outcome with the locally regulated utilities. It is difficult to negotiate with the locally regulated utilities because there is not a level playing field; the pole owner has all the bargaining power.

(Opposed) There is a need for this revenue stream in order to reduce the safety hazard to line workers. Pole attachment disputes are not happening in our area. We are concerned about costs when disputes go to the UTC. Overall, we don't feel pole attachment disputes are an issue for cities. Putting cities under the UTC does not seem necessary and is unprecedented.

This bill goes against the spirit of Initiative #1, which created PUDs: local control. Current law already requires that pole attachment rates be "just, reasonable, nondiscriminatory, and sufficient."

An independent consultant was hired in our county to calculate the rate under the various pole attachment formulas. We are not using our poles as a profit center. We held rate hearings, but the licensees did not attend. We tried to work out a final agreement with the attaching entities, but they would not sign the rate agreement, so we filed a lawsuit against them. Prior to this, we had not adjusted rates since 1986.

This is an issue of contract negotiation. We are concerned about the change from a per attachment to a per space basis. The UTC could be overwhelmed with the volume of disputes over pole attachments. This bill raises safety concerns and concerns over the definition of attachment.

Staff Summary of Public Testimony: (Appropriations)

(In support) While supporting this bill, it is still a work in progress. There is support for the proposed amendment because it would eliminate expenditures for the Utilities and Transportation Commission (UTC) and the Public Utility Districts (PUD), by allowing disputes to be settled in court. Under current law investor owned utilities are subject to review by the UTC for pole attachment rates, since 1979 only one dispute has gone before the UTC under this statute.

(Opposed) While supportive of the amendment, there is still opposition to the bill itself. The bill proposes a formula be put into statute that PUDs follow when setting rates for their pole attachments. The PUDs in the state were designed to be independent, and adopting a formula in statute is a precedent that should not be taken lightly. Currently, the Federal Communication Commission (FCC) is reviewing their pole attachment formula. It could be premature to set a state formula in statute when they are reviewing the issue. It would be better to wait and see what the FCC recommendations are. Costs and rates charged by PUDs vary by location. Imposing an arbitrary consideration onto what local areas do to determine actual costs of service will set a bad precedent.

Persons Testifying: (Technology, Energy & Communications) (In support) Representative McCoy, prime sponsor; Jim Jesernig and Mary Taylor, CenturyTel; Terrence Stapleton, Washington Independent Telephone Association; Johan Hellman, Verizon; Ron Main, Cable Association; and Al Hernandez, Comcast.

(Opposed) Lou Walter, International Brotherhood of Electrical Workers LU 77; Jeff Hall, Benton Public Utility District; Victoria Lincoln, Association of Washington Cities; Robert Mack, City of Tacoma; Vicki Austin and Dave Warren, Washington Public Utility Districts Association; and Doug Miller, Pacific County Public Utility District.

Persons Testifying: (In support) Ron Main, Broadband Cable Association.

(Opposed) Vicki Austin, Washington Public Utilities Districts Association; and Tom Casey, Grays Harbor Utility.

Persons Signed In To Testify But Not Testifying: (Technology, Energy & Communications) None.

Persons Signed In To Testify But Not Testifying: (Appropriations) None.