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FCC Amends Pole Attachment Rules to Promote Broadband Deployment

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On April 7, 2011, the Federal Communications Commission (FCC) unanimously adopted an Order reforming the FCC's pole attachment rules to limit rates and improve access to investor-owned utility poles in the 30 states where it regulates pole attachment rates, terms and conditions. The Order:

- Lowers the telecommunications pole rate formula to approximate the cable pole attachment rate in most cases;
- Creates timelines to govern virtually every step of the pole attachment make-ready process for wireline and wireless attachments, with the right to use contractors if timelines are not met;
- Provides wireless carriers with improved access to poles, including to pole-tops;
- Adopts new guidelines that could increase potential penalties for unauthorized attachments;
- Maintains the "sign and sue" rule and modifies FCC enforcement processes; and
- Allows incumbent local exchange carriers (ILECs) to petition the FCC for lower regulated attachment rates on a case-by-case basis.

Background

Recent attention to pole attachments began, oddly enough, with a 2007 effort by former FCC Chairman Kevin Martin to *increase* the rate that cable operators pay for pole attachments when used for broadband and an effort by electric utilities to apply the higher telecommunications rate for VoIP attachments. (For complete discussion see Davis Wright Tremaine's Nov. 21, 2007, and Aug. 18, 2009 advisories.) The National Broadband Plan reversed direction, recognizing that poles were a critical bottleneck to broadband deployment, and recommending setting rates "as low and close to uniform as possible" and streamlining the pole attachment process. The FCC's May 2010 FNPRM proposed those changes (See May 21, 2010 advisory).

Order

1. Revised telecom pole rate formula

The Order concludes that pole attachment rent plays a significant role in broadband deployment decisions and that broadband deployment and adoption can be encouraged by directly cutting such costs. In addition, the Order finds that charging different pole attachment rates to different attachers based on historic regulatory classifications (cable vs. telecommunications) deters broadband deployment and investment by competitors increasingly providing converged video, voice and data services over shared networks.

The Order modifies the telecommunications rate formula to set the rent within a "zone of reasonableness" traditionally upheld by the courts in reviewing agency ratemaking decisions. The upper end of this zone is the existing telecom rate based upon fully allocated costs and the lower end of the zone is a rate that excludes costs that are not caused by the attachment (e.g. capital costs and taxes). The existing cable rate will almost always fall within this zone of reasonableness. The Order provides a new formula to calculate a "just and reasonable telecom rate" that, as a practical matter, almost always results in the new telecom rate approximating the existing cable rate. To reach this result, the FCC interprets the ambiguous term "cost" in the telecom formula context to be a percentage of the "fully allocated" cost that has historically been used in the pole formula. In urbanized areas, the percentage is 66, and in non-urbanized areas the percentage is 44. By defining costs in this way in the telecom formula, and then allocating those costs using the FCC's presumptions for the number of entities sharing the costs, the new formula produces almost exactly the same rate as the cable formula.

The FCC further provides that the rent charged for commingled services provided by cable and telecom attachers cannot exceed the new telecom rate. The Order does not disturb the Gulf Power decision, which applies the cable rate to broadband attachments and leaves VoIP service unclassified thus retaining the status quo applicability of the cable rate to such attachments. The Order does not classify VoIP as "telecommunications" in this decision but

indicates that if unclassified services are later classified as telecom then the new telecom rate would apply at that time.

As explained in the Order, the cable formula has been repeatedly upheld by the courts (including the Supreme Court) and the FCC as "just and reasonable" and fully compensatory to utilities. For this reason, the Order concludes that the new telecom rate formula appropriately balances the FCC's goal of promoting broadband with the need to protect investors' interest to maintain pole infrastructure. The Order rejects utility arguments that the language and legislative history of the Pole Attachment Act require that the telecom rate be higher than the current cable rate.

2. Improving attachers' access to poles

The FCC has reformed its rules to significantly reduce the potential for delay in the pole attachment application process and to provide attachers the ability to complete most make-ready using utility-approved contractors if the new deadlines are missed.

Make-Ready Timeline

The Order adopts a four-stage timeline that, for most attachment requests, provides a maximum of 148 days (just under five months) for attachers to access utility poles. This timeline applies to requests for attachments in the "communications space" on a pole—for both wireline and wireless attachments—but does not apply to ducts, conduits and rights-of-way. The general timeline applies to applications for up to the lesser of 0.5 percent of the utility's total poles or 300 poles within a state on a monthly basis.

- *Survey:* The FCC retains its current rule that requires pole owners to respond in detail to requests for access to poles within 45 days and clarifies that any denial must include an explanation of the specific capacity, safety, reliability or engineering concern.

- *Estimate:* The FCC requires pole owners to tender an estimate of make-ready charges to attachers within 14 days of receiving the results of the engineering survey.

- *Acceptance:* The FCC allows applicants *14 days* to accept a tendered estimate of make-ready charges and provide payment.

- *Performance of Make-Ready:* The FCC provides that once applicants have paid estimated make-ready charges, pole owners must complete make-ready work within 60 days (with exceptions for large orders or conditions outside the utilities' control such as emergencies requiring federal disaster relief). For wireless attachments located above the communications space on a pole—*i.e.*, wireless pole-top attachments—the Order adopts a longer make-ready period of 90 days (or 135 days for larger orders).

The Order notes that the adopted timelines are the maximum reasonable limits, that necessary work can often proceed faster than the timelines provide, and that these timelines may not be considered reasonable for smaller or relatively routine requests.

Coordination and efficient management of the make-ready process required

After an attacher has paid for make-ready work, but before work has begun, the Order requires pole owners to provide written notice to all entities with existing attachments that may be affected by the planned make-ready work. The notice must also specify the scope of the planned make-ready work and thus will give all attachers the opportunity to add to or modify their existing attachments during the process.

Remedy: Utility-approved contractors or FCC complaint

The Order creates an important self-help remedy for attachers in situations where pole owners delay the make-ready process without justification. If make-ready is not completed within 60 days, the new rules require a pole owner, prior to the expiration of the 60-day period, to notify the attaching party that it intends to complete all remaining work within 15 days. In such cases, the pole owner has an additional 15 days to complete make-ready. If the work is unfinished at the end of the 15-day extension, then the attacher may assume control of make-ready at that point, and may hire utility-approved contractors to complete the work in the communications space. Attachers may also hire approved contractors to perform surveys if the pole owner does not perform this task within 45 days. Utilities are required to make available a list of contractors authorized to perform surveys and make-ready work. Finally, the Order holds that the contractor remedy does not apply for pole-top wireless attachments and the only recourse for delay is an FCC

complaint.

Rejected proposals

The FCC declined to adopt several other proposals in the FNPRM. First, the FCC decided not to require utilities to offer a schedule of unit charges for common make-ready tasks. Second, the FCC declined to provide for make-ready payments to be made over time, rather than up-front, because it concluded that the traditional up-front payment arrangement is not a barrier to broadband deployment. Finally, the FCC declined to require joint owners of poles to consolidate authority in one managing utility. However, the Commission emphasized that it expects joint pole owners to coordinate and cooperate among each other and with attachers, and to avoid duplicate application processes.

3. Pole attachment enforcement process

The Order implements a number of changes to the FCC's current enforcement procedures, including new pre-complaint procedure requirements, rules that give attachers greater flexibility on when they may commence litigation before the FCC, and rules that will encourage arbitration prior to litigation. However, the FCC declined to weaken its "sign and sue" policy, which protects attachers from take it or leave it pole attachment agreements.

Procedures

The FCC adopted an "executive level negotiation" requirement as a prerequisite to filing a pole attachment complaint with the Commission. The new rule requires complaining parties to certify that they held or attempted to hold negotiations between senior executives of the parties with authority to resolve the dispute. The FCC declined to adopt its earlier suggestion that it create specialized forums to handle pole attachment disputes, keeping the complaint process before the FCC Enforcement Bureau.

Informal dispute resolution

While not requiring alternative dispute resolution prior to formal complaints, the FCC held that including alternative dispute resolution processes in pole attachment agreements would not be unreasonable as long as they do not prevent an attacher from seeking relief at the Commission. Finally, the FCC eliminated the current rule that requires an attacher to file an FCC complaint within 30 days of a utility's denial of access reasoning that this deadline only served to force litigation prematurely.

Remedies

The Order allows the FCC to require refunds or payments of pole attachment rents or other amounts owed as far back in time as the relevant statue of limitations will permit, rather from the date the complaint is filed. Under the old rule, utilities would often argue that the FCC could not grant backwards-looking relief on complaints in an attempt to keep attachment disputes in the courts as contract breach matters. The FCC declined to adopt its earlier proposal to award compensatory damages to attachers if a utility denies access or imposes an unreasonable rate, term or condition.

Unauthorized attachments

The Order modifies the FCC's existing policy that limits financial penalties for unauthorized attachments to five years' back rent. In response to utility complaints that this policy did not provide an adequate deterrent for attachers to avoid unauthorized attachments, the Order finds it is presumptively reasonable for new or renewed pole agreements to follow the complex penalty structure provided by the Oregon Public Utility Commission for unauthorized attachments. The FCC noted that it was not adopting the Oregon PUC penalty structure as federal law, but only that the inclusion of such terms in a negotiated agreement would not be considered unreasonable upon complaint to the FCC as long as the agreement also contained associated attacher protections afforded under Oregon law (e.g. self reporting, participating in joint walk-outs, notice, cure, specific identification of poles claimed to be unauthorized and reasonable dispute resolution process). Significantly, the FCC held that the Oregon penalties would only be deemed reasonable contractual provisions to new agreements after this Order. In limiting new penalties in this fashion, the Commission said it was mindful of the problem of attachments that merely appear to be unauthorized or in violation due to poor historical recordkeeping or other intervening events.

Sign and sue

The FCC has long protected its pole attachment jurisdiction by serving as a forum for adjudicating pole attachment disputes even after the complainant has signed a pole attachment agreement to access or stay on the pole. This so-called "sign and sue" policy came under review in the rulemaking, but has once again been affirmed. In addition, the FCC refused to limit the rule with a requirement that attachers give notice of all provisions they may wish to challenge

prior to signing an agreement. The Commission reasoned that such a notice rule would only lead to lengthy blanket formal objection letters, which would increase the costs of negotiations without concomitant benefit. In addition, the new requirement for good faith, executive-level negotiations (described above) is expected to more effectively inform the parties of key issues that could be challenged at the FCC.

4. ILEC attachment rights under the Pole Act

Since the 1996 Act extended the protections of the Pole Act to "telecommunications carriers," in addition to cable television systems, the FCC has interpreted the law to exclude ILECs from those protections, and the ILECs' ownership of poles themselves has historically provided protection against electric utility abuses. However, over the strenuous objections of the electric utility industry, the Order extends certain of Section 224 protections to ILECs (excluding the right of access to poles) and allows ILECs to petition the FCC to obtain "just and reasonable" rates, terms and conditions.

Specifically, while the FCC declined to extend the cable and telecom formula rents to ILECs, they opened the door for complaint proceedings in which the FCC will analyze, on a case by case basis, whether a particular rate and agreement are just and reasonable. The now superseded telecom formula will be the starting point for measuring reasonableness. (This higher telecom rate typically is significantly less than what ILECs are nominally paying for their attachment space on a per pole basis). Significantly, the evidentiary burden on ILEC complainants will be fairly significant. ILECs will have to prove that they are similarly situated to cable or CLECs. ILEC complainants are expected to provide evidence that overall deals offered to other attaching entities are more favorable than the overall terms and conditions that they are afforded. And, the Commission may consider the ILEC's own attachment agreements with utility joint users and third party attachers as further evidence of what is reasonable. Highly relevant to the FCC's consideration will be the ILEC's lack of bargaining power vis-à-vis the pole owner. ILECs are also free to pursue complaints before state commissions.

Reconsideration Issues

On request for reconsideration by a group of cable associations and operators of part of the May 2010 Pole Order concerning pole replacements as a make-ready technique, the FCC said it had actually made no "finding" relative to pole replacement and therefore had nothing to reconsider. The effect is to put attachers and pole owners back where the law stood after the *Southern Company* decision in 2002 (where pole owners continued to perform technically possible and reasonable pole changeouts on request and at cost). The Commission also rejected various pole owners' petitions to allow them to assert "insufficient capacity" and thus deny access to a pole if rearrangements in the electric or communications space had to be made. The Commission also upheld the requirement to allow boxing and extension arms as a make-ready technique but clarified that while the pole owner must allow the use of make-ready techniques it uses for itself, the pole owner may reduce or eliminate particular methods of attachments and does not necessarily have to use the same attachment techniques in the communications space as it uses in the electric space.

Next Steps

The new rules will become effective 30 days after publication in the Federal Register. Reconsideration of the Order at the FCC, or a petition for review of the Order in a U.S. Court of Appeals, will be due within 30 or 60 days respectively of publication. Electric utilities have already signaled their intention to appeal the Order, including specifically the revised telecom pole rate formula, the provision of expanded pole rights to ILECs and certain make-ready reforms benefiting wired and wireless attachers.