

Practical Impacts of the FCC's New Pole Attachment Rules

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Introduction

- FCC's Pole Attachment *Order* is first comprehensive review in ten years
 - Orders implementing Section 224 following the 1996 Telecommunications Act
 - Orders establishing the details of today's pole attachment rate formulas in the FCC's rules in 1992, 2000 and 2001
- FCC's Pole Attachment *Order* is over five years in the making
 - 2005 Petitions for Rulemaking
 - 2007 and 2010 NPRMs
 - 2010 National Broadband Plan
- FCC's Pole Attachment *Order* affects all attacher types on investor owned utility poles and incumbent LEC poles

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Agenda

- Effectiveness of New Rules
- Application Timelines/Use of Contractors
- Changes to Telecom Rate Formulas
- New ILEC Complaint Rights
- Other Complaint and Enforcement Matters
- Unauthorized Attachments
- Clarifications of 2010 *Order* and Areas Where the FCC Declined to Act

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Effectiveness of *Order*

- Rules take effect June 8, 2011 (unless stayed), with three exceptions
- All negotiations now have the new rules and *Order* as a backdrop
- Impact on existing agreements depends on specific terms of the agreements

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Pole Access Process and Timelines

- FCC adopted Four-Stage Timeline for Different Phases of Process
 - Stage 1: Survey
 - Stage 2: Estimate
 - Stage 3: Attacher Acceptance and Payment
 - Stage 4: Make-Ready Work
- Clock Starts After Submission of “Complete” Application
- A Negotiated Master Agreement Not Prerequisite to Starting Clock
- If request involves unfamiliar attachments, engineering specifications must be established before making request

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Four-Stage Process

- **Stage 1: Survey.** Pole owner has 45 days to conduct engineering study to determine if attachment feasible, what make-ready is required, and respond in writing to attacher
 - If request denied, utility must provide written explanation that is specific; includes all supporting evidence and information; and explains how evidence and information relate to reasons of lack of capacity, safety, reliability, or engineering standard
 - Capacity is not “insufficient” if facilities can be rearranged (either in communications or electric space) to accommodate attachment
 - If deadline missed, attacher may hire utility-approved contractor to conduct survey does not apply to attachments above communications space – must file complaint at FCC)

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Four-Stage Process (cont'd)

- **Stage 2: Estimate.** Pole owner has 14 days to provide estimate of make-ready charges
 - Clock may be stopped if no master agreement
- **Stage 3: Acceptance and Payment.** Attacher has 14 days to approve estimate and provide payment
 - Estimates do not expire automatically – must be actively withdrawn by pole owner
 - If estimate withdrawn, prospective attacher must resubmit application

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Four-Stage Process (cont'd)

- **Stage 4: Make-Ready.** Pole owner has 60 days to perform make-ready; for wireless attachments above communications space, make-ready deadline is 90 days
 - Upon receipt of payment, pole owner (not its contractor) must immediately notify (with specific information) in writing all known attachers that make-ready to be performed
 - Pole owner may take 15 additional days to complete make-ready, if notice of intent to do so given before end of 60 day period
 - If deadline missed, attacher may hire utility-authorized contractor to perform make-ready (does not apply to attachments above communications space – must file complaint at FCC)

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Four-Stage Process (cont'd)

Timelines extended for Large Orders and for Wireless Attachers above the Communications Space

Stopping the Clock

- Pole owner may stop clock for “good and sufficient cause”
 - Includes emergencies requiring federal disaster relief
- Pole owner may not stop clock for:
 - repairing damage caused by seasonal storms
 - repositioning existing attachments
 - bringing poles up to code
 - lack of resources
 - awaiting resolution of regulatory proceedings

Four-Stage Process (cont'd)

Use of Self-Help Contractor Remedy

- Attachers right to hire contractor occurs only when pole owner fails to complete survey or make-ready within deadlines
- Pole owner must prepare and publish list of contractors
 - Attachers may only hire contractors from list
 - If no list, use “same qualifications” standard

Timelines

Access Timeline for Pole Attachment in the Communications Space (*days*)

| Stage | Regular Orders | Large Orders |
|----------------------|----------------|----------------|
| Survey | 45 | 60 |
| Estimate | 14 | 14 |
| Acceptance & Payment | 14 | 14 |
| Make-Ready | 60 - 75 | 105 - 120 |
| TOTAL | 133-148 | 193-208 |

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Timelines

Access Timeline for Wireless Pole Attachment Above the Communications Space (*days*)

| Stage | Regular Orders | Large Orders |
|----------------------|----------------|------------------|
| Survey | 45 | 60 |
| Estimate | 14 | 14 |
| Acceptance & Payment | 14 | 14 |
| Make-Ready | 90 - 105 | 135 - 150 |
| TOTAL | 163-178 | 223 - 238 |

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Rates

- Limited Scope of New Rate Changes:
 - FCC declined to adopt a uniform broadband rate
 - Rate formula for cable attachers unchanged
 - No right of access or specific rates adopted for ILECs
 - Commingled scenarios unchanged
 - Conduit rate formula unchanged
 - Make ready charges need not be published

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Pole Attachment Rates for Telecom Carriers (excluding ILECs)

- Commission adopted two new telecom rate formulas
 - The higher rate will apply
 - As a practical matter, telecommunications carrier rate \geq cable rate
- Formula 1 (1.1409(e)(2)(i))
 - Simply the old formula times a factor
 - New telecommunications carrier rate \approx cable rate when all the presumptions are used
 - Reduces rates in urbanized areas by 34%
 - Reduces rates in non-urbanized areas by 56%
- Formula 2 (1.1409(e)(2)(ii))
 - Adjusts the pre-existing formula for both urbanized and non-urbanized areas by removing the depreciation, taxes, and rate of return elements from the carrying charge

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New Complaint Rights for ILECs

- Commission interpreted term “provider of telecommunications services” in definition of “pole attachment” to apply to ILECs as well as other telecommunications carriers
- FCC noted that statute gave it the authority to ensure just and reasonable rates, terms and conditions for pole attachments generally.
- As a result, FCC conferred rights on ILECs to file complaints in certain situations
 - Just and reasonable rates, terms, and conditions
 - Case-by-case analysis
 - Prospective effect only
- The FCC declined to confer rights on ILECs pertaining to access

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Scope of New ILEC Rights

- The FCC will review ILEC rates and other agreement provisions in complaint proceedings based on “totality of circumstances”
 - Existing agreements (as of effective date of *Order*) presumed reasonable
- The Commission did not adopt rules governing rates, terms and conditions for ILECs
 - FCC set upper and lower bounds of what would be considered just and reasonable rates on poles for ILEC attachments
 - The new *Order* suggests that, generally ILECs *may* be entitled to a pole rate roughly no higher than telecom rate under the old (current) rules
 - ILECs *may* be entitled to the new telecom rate if they demonstrate they are “comparably situated”
- Availability of a state proceeding not a bar to filing a complaint at the FCC

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Complaints and Enforcement

- New rules - inapplicable in the states that have reverse preempted the FCC
- “Sign and sue” rule confirmed
- Prerequisites to a complaint re access to or rates, terms, and conditions for access to poles, conduits, and rights-of-way
 - Certified letter outlining allegations and “reasonable” time for response
 - Invitation to engage in “executive level discussions”
 - Refusal to enter into agreement because of dispute resolution provisions may be deemed a rule violation
- 30-day limit eliminated for complaints related to denial of or delayed access

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Complaints and Enforcement (cont'd)

- Same content requirements for a complaint and complaint process as before
 - Meetings
 - Additional evidence
 - Hearings
- Specific remedies articulated
 - Commission may order access within specified time frame
 - Relief on rates prospective only for ILECs
 - Other attachers may seek relief for entire limitations period
 - Compensatory damages not available

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Unauthorized Attachments

- Pre-existing penalty cap under current precedent and policy removed
 - Lesser of five times the approximate fee or that fee for the number of years since the last pole inventory
- Presumption adopted for more substantial penalties.
 - Fines for unauthorized attachments deemed presumptively reasonable if they do not exceed those implemented by the Oregon PUC
 - Even more substantial penalties may be deemed reasonable
- Limited to new agreements or amendments to existing agreements

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Clarifications of 2010 *Order*

- Blanket prohibitions on pole top access not permitted
- Cannot prohibit boxing, bracketing, or any other attachment technique if pole owner employs such techniques for itself at time of request
- Use of attachment technique in electric space does not require use in communications space
- Joint owners may apply more restrictive attachment standards, but must apply single set

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What FCC Rejected or Declined to Address

- Did not address issues regarding wireline attachments above the communications space
- Did not address proposals calling for collection and availability of information about location and availability of poles
- Did not address proposed rules dealing with a schedule of charges, phased payment of make-ready, and the designation of a single managing utility for jointly-owned poles
- Rejected capping timeline orders based on size of utility's workforce or complexity of request
- Rejected request to reconsider or clarify utility's obligation to perform pole change-outs

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Final Observations

- Assess Existing Agreements
- Opportunity to Inject Increased Certainty
- Continued Use of FCC's Rebuttable Presumptions
- Closer Look at Make Ready Costs Possible
- ILEC Activity
- State Responses
- Prospects for Appeal

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Thank You

- Questions?

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