FCC Addresses Nondiscriminatory Use of and Timely Access to Poles and Seeks Further Comment on Pole Access Rates, Timelines, and Enforcement Issues

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On May 20, 2010, the Commission adopted an Order and Further Notice of Proposed Rulemaking ("FNPRM") concerning the pole attachment process with the aim of furthering key recommendations of the National Broadband Plan ("NBP") for promoting competition and the rapid deployment of broadband. In the *Order*, the Commission clarified that, pursuant to statute, utilities – meaning, generally electric companies, local exchange carriers, and other public utilities that own or control poles, conduits, and other rights of way used for wire communications – must permit attachers to use the same attachment techniques that the utility itself uses in similar circumstances, while maintaining the utility's right to deny their use on certain grounds. The Commission also concluded that the statutory right of timely access applies to the entirety of the pole attachment process. The Order did not, as many interested parties had anticipated, resolve a central issue in the proceeding and adopt a uniform broadband rate or rule whether incumbent LECs have specified rights to access utility poles under the Pole Attachment Act (Section 224 of the Communications Act, as amended (the "Act")).

In the *FNPRM*, the Commission proposes rules to clarify application of the "just and reasonable" and "nondiscrimination" legal requirements to terms and conditions of access. The FCC seeks comment regarding a comprehensive timeline for the attachment process. The Commission also seeks comment on ways to improve the enforcement and pole attachment dispute process and continues its examination in this docket of whether and how the pole rental rate formulas can be modified to support broadband deployment. Comments are due 30 days and reply comments are due 60 days after Federal Register publication of the FNPRM.

The *Order*

In the *Order*, the Commission examined the nondiscriminatory pole access obligation established in Section 224(f)(1) of the Act and articulated a presumption that any established attachment technique that a utility uses or allows to be used – such as boxing or bracketing – is appropriate for use by attachers under comparable circumstances. Although this appears to be a significant win for attachers, such access will be limited by the right of a utility to rebut the presumption for reasons of "safety, reliability or generally applicable engineering purposes." The FCC underscored that, if a

utility disallows a technique in a particular circumstance, the disallowance must be clear, objective and public with respect to the limiting circumstances. The Commission expressly rejected the argument that utilities can deny access when there is “insufficient capacity” when a new attachment can be added to an existing pole using conventional attachment techniques. In other words, where a pole can accommodate new attachments via conventional techniques, there is not “insufficient capacity” under Section 224(f)(2).

In addition to beefing up the nondiscriminatory access obligation, the Commission also held that attachers have a statutory right to timely action by pole owners at each stage of the pole attachment process, including during the “make-ready” process. Currently, Commission rules expressly require a utility to provide a response to an application within 45 days, but do not otherwise provide deadlines for other phases of the attachment process.

The *FNPRM*

1.**Timelines.** In the FNPRM, following the recommendation of the NBP, the Commission proposes a comprehensive time-line for the entire pole attachment process. For wired attachments, the Commission proposes deadlines that apply to utilities and applicants in the following five stages: survey and response to a request for attachment, estimate of charges for make-ready work after completion of the survey, acceptance or rejection of the estimate, performance of make-ready work following the applicant’s payment, and, as needed, multi-party coordination. The Commission notes the potential need for adjustments to the timeline in certain circumstances and seeks comment on what situations would warrant stopping the clock or interrupting or extending the timeline. In addition, the Commission seeks comment on whether a timeline appropriate for wireline attachment applications would be equally appropriate for wireless attachers.

2. **Additional Issues Regarding Access.** With respect to access to pole attachments, the Commission also seeks comment on the following issues:

Use of outside contractors. In terms of the basic right to use contractors, the Commission proposes to differentiate between surveys and make-ready work and post-make-ready work attachment of lines. For surveys and make-ready work, the FNPRM proposes that attachers may use contractors if a utility has failed to perform its obligations within the timeline or as otherwise agreed to by the utility, and that during such surveys and make-ready work the utilities and attachers will be entitled to manage and supervise such work jointly. With respect to electric utilities and other non-incumbent LEC pole owners, the FCC proposes that attachers may use contractors that a utility has approved and certified for purposes of performing such work. With respect to incumbent LECs, the Commission proposes that attachers may use any contractor that has the same qualifications, in terms of training, as the utilities’ own workers. For post-make-ready work, the Commission envisions that the existing rules would remain in place; that is, attachers may choose contractors with the same qualifications as the utilities’ own workers. The FCC seeks comment regarding the approval and certification of contract workers, the direction and supervision of outside contractors, and contract work in proximity to electrical lines.

Other options to expedite pole access. The Commission proposes that applicants be allowed to pay for make-ready work in stages, withholding partial payment until the work is complete; that pole owners make available a schedule of common make-ready charges; and, where there are multiple pole owners, that they determine which one is the managing utility.

Improving the availability of data. The Commission seeks comment on a variety of issues focused on

how it can improve the collection and availability of information regarding the location and availability of poles, including what categories of data should be maintained, whether the Commission itself or one or more third-party entities should collect the data, and whether there should be a national database of such information.

Applicability of standards. The Commission made clear that, as under the current rules, it does not propose to adopt or endorse national engineering standards, noting that "no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment." The Commission intends that none of its proposals suggest modification to the reliance utilities today can place on the National Electric Safety Code and similar codes, or modification to FERC and OSHA regulations.

3. Dispute Resolution and the Enforcement Process. In addition to improving access to pole attachments, the Commission hopes to improve the enforcement process and proposes in the FNPRM the following areas for improvement:

Revising pole attachment dispute resolution procedures. The Commission seeks general comment on modifications to its existing rules governing pole attachment complaints.

Efficient informal dispute resolution process. Because the Commission prefers informal dispute resolution, it seeks comment on whether and how such resolution should be encouraged. The Commission also proposes to eliminate the 30 day rule regarding informal dispute resolution in Rule 1.1404(m), which the Commission claims may encourage formal litigation.

Remedies. The Commission proposes to amend its rules to enumerate the remedies available to an attacher when the utility has unlawfully delayed or denied access to its poles, including a Commission order directing access within a specific time frame or under specific rates, terms or conditions. Further, the Commission proposes to amend its rules to allow for compensatory damages for unlawful denial or delay of access or where a rate, term or condition is found to be unjust or unreasonable.

Unauthorized attachments. Because of the prevalence of unauthorized attachments, the Commission seeks comment on means of increasing compliance through the availability of more substantial penalties for unauthorized attachers.

The "Sign and Sue" rule. Because of concerns that some utilities may potentially abuse their monopoly power in negotiating pole attachment agreements, the Commission proposes to retain the "sign and sue" rule, but modify the rule so that an attacher is required to provide a pole owner notice, during contract negotiations, of the terms it considers unreasonable or discretionary. Nevertheless, the *FNPRM* proposes that there be an exception in any such rule if a provision that may not have been unreasonable on its face becomes so in practice through a utility's application of that provision.

4. Pole Attachment Rates. Many interested parties expected the Commission to take action on the pole attachment rates in its *Order*, specifically addressing the issue of whether there should be a uniform rate applicable to all broadband providers. The Commission declined to do so primarily because of concerns about the statutory framework, which it concluded bounds the ways in which the Commission can interpret and apply the telecommunications rate formula in Section 224, which envisions different cable and telecommunications rates. The Commission also expressed concerns that increasing the cable rate for the sake of uniformity would push up prices and deter broadband deployment. Nonetheless, the Commission tentatively concludes that it has the discretion to

reinterpret the ambiguous term “cost” in Section 224(e) and modify the cost methodology underlying the telecommunications rate formula to yield a different approach that promotes broadband. Accordingly, the agency seeks further comment on the matter of rates.

The Commission requests comment on the revision of pole attachment rates to make them “as low and close to uniform as possible,” and reducing the disparity between existing telecommunications and cable rates. The FCC seeks comment on the United States Telecom Association (“USTelecom”) and AT&T/Verizon broadband rate proposals submitted in the record which would establish a uniform rate for all pole attachments used to provide broadband Internet access services. These proposals, the *FNPRM* explains, would establish rates for all attachers between 11 and 18.67% of the annual cost of the pole. The Commission also seeks comment on the TWTC proposal to reinterpret the telecommunications formula using a marginal cost analysis, but at the same time questions its statutory foundation.

As an alternative to increasing cable operators’ rates, which would be the result of the proposed USTelecom and AT&T/Verizon formulas, and perhaps the result for telecommunications carriers’ rates as well, the Commission proposes to reinterpret the telecommunications rate to a lower level. The Commission’s rate proposal for telecommunications carrier attachers is intended to establish a range of “just and reasonable” rates, from the current application of the telecommunications rate formula (based on a fully distributed cost methodology and including a full range of costs regardless of the number of attachments) as the upper bound rate, to an alternative application of the telecommunications rate formula based on cost causation principles as the lower bound rate. For purposes of identifying the lower bound rate, capital costs (including taxes) would be excluded, but certain administrative costs would be included. Under the FCC’s proposal, utilities would calculate the lower bound telecommunications rate and the current cable formula rate and proceed to charge telecommunications carriers no less than whichever is higher.

5. Treatment of Incumbent LECs. The Commission declined in the Order to rule on an issue initially raised in a petition for declaratory ruling filed by USTelecom, which sought a declaration that incumbent LECs have certain statutory rights to access utility poles and conduit as “providers of telecommunications” even though they are not “telecommunications carriers” as defined in Section 224. Although the Commission did not make a determination that would affect or clarify the access rights of incumbent LECs, it seeks comment on a variety of issues concerning incumbent LECs as well as possible interrelated approaches to the reinterpretation of the telecommunications rate formula.

For further information on this case and its implications, please contact your Kelley Drye attorney or any member of the Communications Practice Group. For more information on the Communications practice group, please click here.