

# FCC Launches Efforts to Foster Wireline Broadband Deployment

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On April 20, 2017, the Federal Communications Commission ("Commission" or "FCC") initiated a new wireline infrastructure docket to "better enable broadband providers to build, maintain, and upgrade their networks" hoping to promote "more affordable and available Internet access and other broadband services." The docket consists of three interrelated parts: a [Notice of Proposed Rulemaking \("NPRM"\)](#), [Notice of Inquiry \("NOI"\)](#), and [Request for Comment \("RFC"\)](#) (collectively, the "Wireline Infrastructure Proceeding"). The FCC seeks comment in the NPRM on proposed regulatory measures to better facilitate deployment, maintenance, and upgrading of wireline broadband networks in three basic areas: pole attachment reform, copper retirement and network change notifications, and streamlining the Commission's Section 214 discontinuance process. The NOI focuses on issues of preemption of state and local laws affecting broadband deployment and copper retirement. And the RFC seeks input on several discrete issues concerning the discontinuance process under Section 214 of the Communications Act ("the Act").

The Wireline Infrastructure Proceeding complements another docket that is looking at wireless broadband infrastructure, also adopted at the FCC's April 20 Open Meeting. Please review our [blog](#) and [advisory](#) on the wireless counterpart for details on those proceedings.

**Comments on the NPRM, NOI, and RFC are due June 15, 2017, and reply comments are due July 17, 2017.**

## NPRM

The NPRM proposes reforms to the Commission's wireline infrastructure rules affecting pole attachments, copper retirement and network change notifications, and the Section 214 discontinuance process:

**Pole Attachments Reform.** The NPRM examines a variety of issues concerning access to poles and make ready charges. As an overarching principle, the FCC states its desire to balance "the legitimate needs and interests of new attachers, existing attachers, utilities, and the public."

**Speeding Access to Poles.** The Commission proposes to accelerate the timeline for processing pole attachment requests. The current rules allow for up to a five-month process, assuming the full time periods in the Commission's rules are utilized and all contemplated deadlines are met. In the NPRM, the Commission considers numerous reforms to its approach to accelerate access, including the following:

- Require a utility to review and decide on a pole attachment application within a time shorter –

thirty or even fifteen days – than the current 45 day deadline;

- Eliminate the 15 day automatic extension for response in the case of large orders, and cap the total review time for large orders at 45 days; the FCC seeks comment on alternatives in the case of large orders;
- Allow reasonable extensions for review of any application in certain situations;
- Include time for the utility to survey the poles for which access has been requested as part of the application review period;
- Handle the cost estimate and acceptance steps of the process in a streamlined way by, for example, combining the two steps into a shortened period (such as 14 days) or to eliminate one or both of these steps altogether from the overall time frame by, as one possibility, combining them into the make-ready phase; and
- Shorten the 60-day maximum time period (and refine the bases for extensions) that utilities must give existing pole attachers to make modifications after they receive a “make-ready” notice that they must modify their pole attachments to accommodate additional communications facilities.

**Other Process Reforms.** Apart from modifications to the deadlines of the current four-stage process, the FCC seeks comment on other reforms such as:

- Allowing new attachers to, more rapidly than is currently permitted, use a utility-approved contractor (taking into account safety, property, and liability concerns) to complete make-ready work that is either routine or complex in nature (meaning it would reasonably cause an outage) when an existing attacher fails to complete the necessary work in a timely fashion or even in lieu of the existing attacher performing the work for routine make ready;
- Alternatives to allowing the new attachers to perform make-ready work that shorten the timeline; and
- Establishing post make-ready timelines and process for inspections and corrections when new attachers (using approved contractors) perform make ready on existing attachers’ facilities.

**One Touch Make Ready.** The FCC also seeks comment on the benefits and challenges of adopting a pole attachment regime that would incorporate several of the proposals above for what is called a “one-touch, make-ready” (“OTMR”) approach, generally deemed to be helpful for speeding up the broadband deployment rate.

The FCC seeks additional comment on the benefits and drawbacks of several varied OTMR approaches that have been adopted in certain cities,<sup>1</sup> and what concepts from these models it should incorporate into new pole attachment rules.

**Access to Conduits.** The NPRM also seeks comment on ways to make the process of gaining access to utility conduits more transparent, including information about databases or resources that assist telecommunications and cable providers in assessing where available conduit exists.

**Reducing Costs for Make-Ready Work.** The NPRM seeks input on ways to reduce make-ready costs and make such costs more transparent. Section 224(b)(1) requires make-ready charges to be

“just and reasonable” but these charges are not subject to any mandatory rate or fee schedule under the Commission’s current rules. In an effort to ensure charges are just and reasonable, the Commission proposes requiring utilities to provide potential new attachers a schedule of common make-ready charges and seeks suggestions on the best way to make such schedules available. The FCC believes that imposing this type of requirement could provide broadband providers with certainty and predictability about the costs of any broadband deployment efforts.

The NPRM proposes to place limitations on the make-ready fees charged by utilities to attachers. Some of the proposed changes raised in the NPRM are as follows:

- Limit make-ready fees to the actual costs incurred for allowing a new attachment;
- Codify the holding that new attachers are only responsible for the cost of *necessary* make-ready work;
- Allow utility and/or new attacher to choose between a standard charge per pole or a cost-allocated charge; or
- Expand section 1.416 (b) rule that requires existing attachers to share in cost of make-ready work if they receive a direct benefit from the change to include utilities when they subsequently benefit from the improvement.

The Commission is also considering codification of a rule that would exclude capital costs that utilities already recover through make-ready fees from pole attachment rates. An example of such a cost would be the capital expenses from the replacement of a pole in order to provide space for a new attachment. The NPRM suggests that the make-ready cost should be a one-time, non-recurring cost that the utility is directly compensated for and, thus, that cost should not be calculated into the recurring rates a provider pays for attaching to a pole.

***ILEC Access to Poles.*** The NPRM raises the issue of setting the just and reasonable rate for incumbent LEC (“ILEC”) attachers to a utility’s poles to the rate paid by other telecommunications attachers on the utility’s poles, “i.e., a rate calculated using the most recent telecommunications rate formulate.” This proposal is intended to address the regular disputes that have arisen between ILECs and utilities that the Commission has to adjudicate.

***Reciprocal Access to Poles Owned by non-ILECs.*** Under Section 251(b)(4) of the Act, every [LEC] has “the duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, conditions consistent with section 224.” In section 224, a “utility” is defined to include a LEC and that LEC must provide “telecommunications carriers” nondiscriminatory access to its poles at regulated rates. However, the telecommunications carrier definition does not include ILECs. As a result, the FCC inquires whether it is possible to construe the statutory provisions so that they provide ILECs a reciprocal right to access poles. The NPRM suggests a concern that ILECs may be denied reciprocal protection and access to other carriers’ poles. The NPRM seeks comment about whether ILECs should receive reciprocal access rights.

### **Expediting the Copper Retirement and Network Change Notification Process**

The Commission proposes revisions to its Part 51 network change disclosure rules that would allow incumbent providers greater flexibility in the copper retirement process to reduce regulatory hurdles. The *2015 Technology Transitions Order* adopted rules that extended the time from 90 to

180 days that an ILEC needs to wait before implementing a planned retirement of copper networks after the release of the FCC public notice. The 2015 rules also require ILECs to provide notice to retail customers, states, Tribal entities and the Secretary of Defense of the copper retirement plan.

The Commission seeks comment on its proposal to eliminate the different treatment of copper retirement and other network change notices. These proposed rules would eliminate some or all of the changes to the copper retirement process adopted by the Commission in 2015, including repealing Section 51.332 which instituted the stricter prior copper notice rules. Some of the possible modifications of Section 51.332, rather than its general repeal, on which the Commission seeks comment are, as follows:

- Require an ILEC to serve its notice only to telephone exchange service providers that directly interconnect with the ILEC network, as was the case under the predecessor rules, rather than “each entity within the affected service area that directly interconnects with the ILEC’s network;”
- Return the waiting period to a 90 days public notice release before the planned copper retirement implementation;
- Reduce the waiting period to 30 days where the copper facilities being retired are no longer being used to serve any customers in the affected service area.

If the Commission returns the waiting period to 90 days before retirement, it asks whether affected competitive local exchange carriers should be able to object and seek a delay to the retirement.

The Commission inquires about whether it should harmonize copper retirement notices and procedures with other network change notice requirements generally. The FCC specifically proposes eliminating Section 51.325(c) of its rules, which prohibits ILECs from disclosing any information about planned network changes to affiliated or unaffiliated entities prior to providing public notice. The Commission also seeks comment on several alternative modifications short of elimination of the rule, such as permitting disclosures to other entities in certain delineated cases.

The NPRM also seeks comment on possible elimination or modification of the rule in Section 68.110(b), which says that if changes to a wireline provider’s facilities can be “reasonably expected” to cause customer terminal equipment to be incompatible with the facilities provided, the customer must be provided “adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service.”

### **Streamlining the Section 214(a) Discontinuance Process.**

The Commission also seeks to shorten timeframes and eliminate certain process elements under Section 214(a) that it believes may force carriers to maintain legacy services longer than they otherwise would. Section 214(a) requires carriers to seek permission from the FCC before discontinuing or reducing service to any community. The new proposals would streamline the Section 214(a) discontinuance process as it relates to applications that are seeking to “grandfather” low-speed legacy services for existing customers – situations where no new customers are accepted for a service while existing customers continue to be served.

The Commission also proposes to streamline the process to discontinue services that have already been grandfathered for a period of at least 180 days. This would involve a uniform, streamlined comment period of 10 days and an auto-grant period of 31 days for dominant and non-dominant

carriers (and a potentially shorter auto grant period where no comments are received in response to the public notice of the discontinuance application).

The proposed rules seek also to reverse a 2015 FCC decision in the *Technology Transitions* proceeding that clarified the meaning of Section 214(a) to include a broader scope of end users – including customers of wholesale customers – that must be considered by a carrier when deciding if its network change requires Section 214 discontinuance authority from the Commission. Among other related issues, the NPRM asks if the Commission should revert to the regulatory framework that apparently existed prior to the *2015 Technology Transitions Order*, where the Commission had held that discontinuances to wholesale purchasers were not cognizable under Section 214(a).

The NPRM seeks comment on the scope of services to which streamlining would apply and proposes, at a minimum, to apply the streamlining to grandfathered TDM services at lower than DS1 speeds. The NPRM inquires whether higher speed grandfathered services – say, 10 or 25 Mbps or higher – should also qualify for streamlined treatment. The Commission also inquires whether in some scenarios, it should dispense with need for public notices or even applications entirely to discontinue and grandfather existing services.

Finally, the FCC seeks comments on a range of other proposed changes and issues related to the Section 214(a) regime including

- Whether to streamline the discontinuance process more generally;
- How the FCC should take into account the needs of federal, state, local, and Tribal government users of legacy services in deciding whether and how best to streamline the discontinuance process for lower speed services;
- Proposed FCC determination that Section 214(a) discontinuances will not adversely affect the present or future public convenience and necessity and will not require approval under Section 214, provided that fiber, IP-based, or wireless services are available to the affected community;
- Modify the streamlined treatment of Section 214 discontinuance applications for all services that have not had customers for a period of six months prior to the submission of the discontinuance application; and
- Revise Section 63.71(i) to allow automatic discontinuance authority, subject to certain conditions, for CLECs that must discontinue service on a date certain due to an ILEC's effective copper retirement.

## NOI

In the NOI, the Commission seeks comment on whether it should adopt rules, using its authority under Section 253, that would promote the deployment of broadband infrastructure by preempting any state or local laws that may inhibit such deployment. The FCC seeks comment about the scope of its authority under Section 253 to prospectively prohibit, rather than preempt, state and local laws that might hinder broadband deployment. Alternatively, the Commission inquires how it might collaborate with state and local governments to help achieve results that such preemptions or prohibitions would be designed to achieve. The Commission also seeks comment on its adoption of rules that would

- Prohibit state or local governments from placing moratoria on the ability enter the market or

deploy telecommunications facilities;

- Eliminate excessive delays with regard to negotiating and approving rights-of-way agreements and permits for telecommunications services;
- Prohibit excessive fees and unreasonable conditions adopted by state and local governments for allowing rights-of-way access;
- Adopt rules banning bad faith conduct by state and local governments in the context of deployment, rights-of-way, permitting, construction, or licensure negotiations and processes; and
- Promulgate rules that otherwise preempt state or local legal requirements or practices that prohibit the provision of telecommunications service.

The FCC further inquires about any state laws that govern the maintenance or retirement of copper facilities that serve as a barrier to deploying next-generation technologies that the Commission should seek to preempt. For instance, the NOI notes that there are some states that require carriers to maintain legacy service quality and copper facilities. Additionally, the FCC is inquiring about laws that restrict the ability to retire legacy copper networks.

## RFC

The RFC seeks comments in two areas. First, the FCC requests comment on whether it should revise the scope of the Commission's 2014 Declaratory Ruling and subsequent 2015 Order on Reconsideration expanding what constitutes a "service" for purposes of a Section 214(a) discontinuance review. In November 2014, the FCC adopted a Declaratory Ruling that applied a "functional test" to determine whether network changes being proposed by a carrier constitute a discontinuance, reduction or impairment of service under Section 214(a) that require discontinuance authority. The test requires the FCC to evaluate more than just the terms of a carrier's tariff and also assess the discontinuance action from the perspective of the relevant community. Particularly of interest to the Commission in the RFC is the impact on investment in next-generation services and on consumers of its proposal to designate a carrier's description in its tariff or customer service agreement as "dispositive as to what comprises the 'service' within the meaning of the Section 214(a) discontinuance requirement." The Commission asks a myriad of other questions about how best to define "service" in multiple contexts for discontinuance purposes, asking commenters to consider, for example, tariff principles and contract law.

Second, the RFC seeks comment on how the word "service" should be construed in the context of Section 214's discontinuance requirement. The Commission proposes to view the term as "encompassing the entire range of offerings that are available to a community or part of a community" which would mean if a carrier decides to stop a particular offering it would be allowed to do so without first getting permission from the FCC. This allowance would be contingent upon there still being other service offerings available to the community. The RFC asks commenters to take into account prior determinations of the Commission on these and similar issues.

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[1] For instance, Nashville, TN's OMTR policy involves the new attacher using a utility-approved contractor to perform the necessary make-ready work. The new attacher gives existing attachers 15 days' notice before beginning efforts to make the pole ready and then provides notice within 30 days after work is complete to afford existing attachers the opportunity to inspect within 60 days. If an existing attacher finds a problem with the make-ready work, then it may notify the new attacher in

writing (within the 60-day inspection window) and elect to either fix the problem itself at the new attacher's expense or instruct the new attacher to fix the issue. When the attachment involves "complex" make-ready work, then the attacher must provide existing attachers longer notice before beginning work to allow the existing attachers the opportunity to rearrange their equipment to accommodate the new attacher.

The NPRM similarly considers the OTMR policy in Louisville, KY which eliminates the requirement that new attachers provide pre-make-ready notice to existing attachers when the work is routine and it shortens the inspection period after completion of make-ready work. Alternatively, under CPS Energy's policy in San Antonio, TX, CPS is afforded 21 days to review completed pole attachment applications (with a unilateral option for an additional 7 days), survey affected poles, and produce a make-ready cost estimate. CPS will provide notice to existing attachers of impending make-ready work and CPS will have 60 days to complete such work in the electrical space. The new attacher has 90 days to finish all other routine make-ready work using a utility-approved contractor after they give 3 days' notice to existing attachers of upcoming make-ready work that notes whether the work will be complex, meaning it "poses a risk of disconnection or interruption of service to a Critical Communications Facility." Thereafter, the process has 15 day timelines for notice of make-ready completion, opportunity for inspection, and fixes after a complaint from an existing attacher.