

Joint Use & Pole Attachments Newsletter

“Year In Review”

December 2009

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Overview

This year began with the joint use community awaiting a final rule in the FCC’s Pole Attachment NPRM. The national pole attachment debate took on new life in April 2009 when the FCC released its National Broadband Plan Notice of Inquiry (“NOI”) which specifically asked about the connection between pole attachments and broadband deployment. In May 2009, one of the nation’s largest ILECs announced plans to divest its wireline operations in 14 states. By late July 2009, there were three new FCC Commissioners, and a new team at the FCC dedicated solely to developing the National Broadband Plan. In August 2009, a group of electric utilities sought a definitive answer from the FCC on the question of whether CATV attachments used to provide VOIP are subject to the telecom rate. As 2009 draws to a close, there are more questions than answers at the FCC; the major ILEC mergers/sales remain pending; and we await the FCC’s National Broadband Plan (due to Congress by February 17, 2010). This “Year In Review” newsletter captures these (and a few other) highlights from 2009.

National Broadband Plan May Address Pole Attachments

The National Broadband Plan NOI, released by the FCC in April 2009, asked whether pole attachments “stand as impediments to further broadband deployments where such deployments would be made by market participants in the absence of government-funded programs.” Numerous interested parties submitted comments and reply comments addressing this issue. The FCC held 30+ broadband workshops from August 2009 through November 2009 with a stated purpose “to promote an open dialogue between the FCC and key constituents on matters important to the National Broadband Plan.” Though pole attachments and rights of way were two specific agenda items for an August 2009 workshop at the FCC, there was no meaningful discussion of pole attachments (and no voices from the electric utility industry) at this workshop.

On three separate occasions during the second half of 2009, the FCC’s Broadband Team reported to the FCC on its progress toward the Broadband Plan. The first report, delivered September 29, 2009, stated: “The costs of obtaining pole attachments and rights of way may have a significant impact on fiber deployment. [\[LINK\]](#) The second report, delivered November 18, 2009, declared: “Efficiency gaps exist in infrastructure placement including trenches, pole attachments, and rights of way.” [\[LINK\]](#) The most recent report, delivered December 16, 2009, stated that the National Broadband Plan “should explore reducing cost of ROW and pole attachments” and listed a handful of options under consideration including the following:

- Establishing a “uniform and fair” rental rate for pole attachments
- Adopting rules to “lower make-ready costs and speed access to poles, ducts conduits, and Right of Way”
- Creating a “streamlined dispute resolution mechanism”
- Amending the Pole Attachment Act to establish a “consistent national framework for all pole, ducts and conduits.”

[\[LINK\]](#) [\[LINK TO AUDIO FILE FROM 12/16/09 PRESENTATION\]](#)

Interested parties, including many electric utilities, continue to hold *ex parte* meetings with FCC staff to express their viewpoints on these issues. Under the American Reinvestment and Recovery Act of 2009, the FCC is due to submit its National Broadband Plan to Congress by February 17, 2010. The National Broadband Plan, as it relates to pole attachments, could take a number of different forms ranging from general recommendations to specific new rules.

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Final Rule in NPRM Unlikely to Precede Broadband Plan

The Pole Attachment NPRM, released by the FCC in November 2007, has taken a back seat to the National Broadband Plan. Though the pole attachment issues being discussed in connection with the National Broadband Plan are similar (if not identical) to the issues raised in the NPRM, the general consensus is that the FCC is unlikely to issue a final rule in the NPRM before it presents the National Broadband Plan to Congress in February 2010. The National Broadband Plan NOI has given attaching entities another docket (and probably a more important docket from the FCC's perspective) to air their grievances on pole attachment issues. CLECs, in particular, have taken full advantage of the additional opportunity through their comments, proposals and *ex parte* presentations.

Electric Utilities Seek Declaratory Ruling on VOIP Attachments

In August 2009, AEP, Duke, Southern and Xcel filed a petition with the FCC seeking a declaratory ruling on a very narrow issue: whether CATV pole attachments used to provide VOIP phone service are subject to the FCC's telecom rate. The petition does *not* ask the FCC to address the more difficult question of whether VOIP should be classified as "telecom" for broader regulatory purposes. Soon after the petition was filed, the FCC established a comment and reply cycle, which closed in October 2009. Comments were filed by various electric utility, ILEC, CATV and CLEC interests. Electric utility commenters supported the petition; ILEC commenters criticized the petition as offering only a "piecemeal" solution to broadband rate disparities; CATV commenters argued the requested relief would slow broadband deployment and raise consumer costs; and CLEC commenters said the FCC should focus its efforts on access issues (make ready deadline, construction standards, etc.). The FCC has not yet ruled on the petition. Like the NPRM, the general consensus is that the FCC is unlikely to rule on the VOIP petition (if at all) prior to presenting the National Broadband Plan to Congress in February 2010.

More Changes in the Rural Telephone Industry

Windstream Consolidates Rural Telephone Presence

"CenturyLink" was created this year through the merger of CenturyTel and Embarq (completed on July 1, 2009). CenturyLink focuses its

business on rural telephone service in 33 states. Windstream is also making moves to consolidate its position in the rural telephone business. Windstream recently announced the purchases of NuVox Communications (a CLEC in South Carolina) and Iowa Telecom. These are the latest of several acquisitions announced by Windstream in the past few months. When all deals are closed, Windstream will operate in 23 states (up from 16). Windstream has obtained, or announced plans to issue notes for, more than \$1 billion in private financing to finance its expansion. Windstream may also be looking to purchase some or all of the assets of Fairpoint Communications out of bankruptcy.

Verizon Sale to Frontier Remains Pending

In early 2009 Verizon agreed to sell all of its wireline assets in Arizona, Idaho, Illinois, Indiana, Michigan, Nevada, North Carolina, Ohio, Oregon, South Carolina, Washington, West Virginia and Wisconsin, as well as some assets in California, to Frontier Communications. While this sale has been approved by regulators in several states, it is generating substantial objections from the Communication Workers of America and other groups in West Virginia and elsewhere. The objections focus, in part, on the belief that Frontier is not adequately prepared to maintain the new infrastructure. The objectors point to Fairpoint Communication's inability to successfully operate rural wireline assets obtained from Verizon in a similar transaction in 2007. Assuming the objections are resolved, the sale is expected to close in the first half of 2010 (with April 30, 2010 as the current target date). All affected pole owners with Verizon and/or Frontier joint use agreements need to evaluate those agreements in light of this pending sale.

Fairpoint Communications Files For Bankruptcy

Fairpoint Communications filed for bankruptcy in October 2009. Fairpoint describes itself as the nation's seventh largest ILEC with operations in 18 states. Fairpoint publicly blamed its bankruptcy on complications arising out of its \$2.3 billion purchase of Verizon's land-line business in New Hampshire, Maine and Vermont in 2007. As of September 30, 2009, Fairpoint had lost more than \$100 million this calendar year. Any pole owner with joint use agreements with Fairpoint should closely monitor these bankruptcy proceedings.

New Hampshire Adopts Final Pole Attachment Rules

On December 9, 2009, the New Hampshire PUC adopted final pole attachment rules. [\[LINK\]](#) The final rules, adopted after nearly two years of rulemaking, are considerably different from the Interim Rules discussed in our December 2008 Pole Attachment Update. Some notable provisions of the final rules are as follows:

- Make-ready estimates due within 45 days of application (for jobs of 200 poles or less)
- Make-ready deadline of 150 days following payment for jobs affecting more than 10 poles
- Make-ready deadline of 45 days following payment for jobs affecting 10 poles or less (where no pole replacements are required)
- Restrictions on boxing practices by attaching entities (consistent with pole owner's boxing restrictions for its own facilities)
- Limited allowance of extension arms.

What To Watch In 2010

Whether and to what extent the National Broadband Plan will impact FCC pole attachment policy?

Will the National Broadband Plan recommend amendments to the Pole Attachment Act? If so, how will those proposed amendments impact electric utilities? How will electric utilities respond on Capitol Hill?

Whether the FCC will answer the question raised in the VOIP Declaratory Ruling Petition, or whether the question will be mooted by the FCC's other initiatives?

Whether additional states will join Arkansas and New Hampshire in a new wave of states certifying jurisdiction over pole attachments?

If the FCC implements pro-deployment policies, will there *really* be new deployment to underserved/underserved areas? What access issues will it create?

Practice Pointer

Reduce your agreements, practices, and understandings to writing. Many of you have good relationships (built on mutual trust) with your attaching entity counterparts. Sometimes, a request to reduce an accepted practice to writing can be viewed as distasteful or a threat to the mutual trust. But you will save yourself and your company future headaches by ensuring these understandings are not "forgotten" over time. Such writings need not be formal contracts (although formal contracts and amendments are always good). They can be informal letters of understanding. Talk to your joint use counsel about which approach is best for you.



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