

Joint Use & Pole Attachments Newsletter

“Year In Review”

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2011 was a watershed year for joint use and pole attachments. In April, the FCC released a comprehensive pole attachments order, revising its rules relating to access, enforcement and rates (“April Order”). By mid-year, challenges to the April Order were initiated through appellate filings in federal court and petitions for reconsideration at the FCC. Later in the year, the proposed AT&T/T-Mobile merger came unglued and Connecticut officials proposed a novel “pole administrator” approach to managing pole maintenance and access. As the year comes to an end, the appeal of the April Order is in full swing while petitions for reconsideration remain pending at the FCC. This “Year In Review” newsletter captures these and other 2011 highlights.

[Appeal of Pole Attachment Rulemaking Moving Forward in 2012](#)

Last May, a group of electric utility pole owners (including some of the largest in the country) filed an appeal of the April Order in federal court. The electric utilities gave notice of their intent to challenge three of the FCC’s new rules: (1) the rule allowing ILECs to file FCC pole attachment complaint proceedings; (2) the reduced telecom rate formula; and (3) the rule extending the refund period in complaint proceedings back to an undefined point “consistent with the applicable statute of limitations.” More than 25 companies and trade associations intervened in support of the FCC’s new rules, including USTA, NCTA, Verizon, AT&T, Charter and Comcast. Nine electric utilities intervened in support of electric utility interests, and EEI has been granted leave to file a brief as *amicus curiae* (“friend of the court”) in support of the electric utility interests.

The electric utilities initially asked the federal court to stay implementation of the

new telecom rate rule pending appeal. Similarly, the FCC requested that the court suspend the entire appeal indefinitely while the FCC addressed reconsideration petitions. In August, the court decided to let the telecom rate rule take effect while the appeal is pending. The following week, FCC Chairman Julius Genachowski remarked in an unrelated matter: “This is consistent with our 94% success rate where a direct statutory challenge is made to an FCC order and with our success rate in the D.C. Circuit, where in 3 of every 4 cases the Commission wins on every single issue presented, and we prevail on some or all issues 91% of the time.” [\[LINK\]](#) Then, in September, the court denied the FCC’s motion attempting to stall the appeal. The Chairman did not comment publicly on this loss, or its impact on the FCC’s overall win-loss record.

The court-imposed appellate briefing schedule is as follows:

- The appealing electric utilities and EEI must file initial briefs by **January 3, 2012**; their supporting intervenors must file by **January 18, 2012**.
- The FCC must file its response brief by **February 17, 2012**; its supporting intervenors must file by **March 5, 2012**.
- The appealing electric utilities and their supporting intervenors must file reply briefs by **March 19, 2012**.

Oral argument, if ordered, will likely take place no sooner than summer 2012, and no decision is expected before late 2012.

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Reconsideration Petitions Remain Pending at FCC

In June, two separate groups filed petitions for reconsideration of the April Order. One of the petitions, filed by CATV and CLEC interests, asks the FCC to further lower the telecom rate. The other petition, filed by a group of electric utilities (different than the electric utilities that appealed the April Order), requests that the FCC: (1) reconsider the new make-ready deadlines, attacher rearrangement provisions, and processes for joint pole owners; (2) specifically allow pole owners to impose penalties for safety violations; and (3) clarify that the adoption of retroactive refunds applies only from the effective date of the April Order forward. The FCC has not indicated if or when it intends to rule on the reconsideration petitions.

Connecticut Proposes State-Wide Pole Attachment Administrator

In June, in a ratemaking proceeding before the Connecticut Public Utilities Regulatory Authority ("PURA"), Connecticut Power & Light Company ("CP&L") requested that that PURA approve higher attachment rates (necessitated by AT&T's termination of its long-standing role as CP&L's administrator of third-party pole attachments to jointly-owned poles). [\[LINK\]](#) In response, several attachers argued for appointment of a third-party, statewide pole administrator to oversee the attachment process. PURA referred consideration of the issue to an internal working group.

In December, Connecticut's Attorney General and the state's Office of the Consumer General proposed that PURA appoint an independent pole administrator. [\[LINK\]](#) The recommendation was in response to massive power outages following an October storm (during which 800,000 CP&L customers lost power) and Tropical Storm Irene (during which more than a million customers lost power). Under the proposal, the independent administrator's duties would include: (1) implementation and enforcement of standards for pole maintenance and replacement; (2) coordination of restoration resources for pole repair and replacement

during major outages; (3) management of temporary repairs during major storms; and (4) administration of the pole attachment process in non-storm settings.

Government officials favoring a pole administrator argue that the current system of self-regulation by pole owners contributed to many prior delays in establishment, repair and restoration of utility and communications services, and that failure by pole owners to maintain their infrastructure contributed to the damage caused by the fall storms. Opponents, including CP&L and The United Illuminating Company, argue that appointment of a pole administrator would exceed the state's regulatory authority and result in unnecessary costs to electric ratepayers. PURA has now opened an investigation for the sole purpose of determining the merits of an independent pole administrator. [\[LINK TO DOCKET\]](#) This is certainly a state-level proceeding worth watching.

AT&T/T-Mobile Merger Called Off

The most significant event in the wireless industry during the second half of this year was the failure of the AT&T/T-Mobile merger. Despite AT&T's aggressive lobbying and marketing campaign, the deal was rejected by the FCC and the U.S. Department of Justice. Both agencies cited decreased wireless competition as their primary concern. AT&T and T-Mobile officially terminated the deal on December 19. AT&T may look for a different solution to the issues it was attempting to address with the merger, primarily a lack of spectrum to support the "mobile internet." With mobile internet use continuing to rise, look for AT&T to continue pursuing strategic opportunities.

Practice Pointer

Since the effective date of the April Order's ILEC rules (July 2011), many electric utilities report that ILECs are attempting to terminate long-standing joint use agreements. The ILECs are generally seeking to renegotiate rates, terms and conditions consistent with those applicable to CATV and CLEC attachers. Most joint use agreements contain a six-month or one-year notice of termination provision, meaning the agreements do not actually terminate until expiration of the notice period.

Q: What happens upon the effective date of termination if the parties have not executed a new agreement?

A: It depends entirely on the language in the terminated joint use agreement. Many joint use agreements prohibit further joint use (meaning, neither party can make new attachments to the other's poles) but provide that existing attachments continue to be governed by the terms of the terminated agreement until such attachments are removed.

Q: What happens if the parties execute a new agreement, but the appellate court later reverses the rule allowing ILECs to file FCC complaint proceedings?

A: Depending on the type of agreement reached, it might be appropriate to include a provision stating that, in the event the ILEC rule is reversed, either (a) the prior agreement is automatically restored, or (b) the new agreement is automatically terminated.

What To Watch in 2012

- How will the court resolve the electric utilities' appeal of the FCC's new rules?
- Will the FCC act on the pending petitions for reconsideration? If so, will the FCC make the rules better or worse?
- How will electric utilities and ILECs address joint use during this period of uncertainty?
- Will the flurry of recent telecom mergers subside in the wake of the failed AT&T/T-Mobile merger?
- How will electric utilities respond to the increased demand for wireless antenna pole top attachments?
- Will the FCC hear a pole top access complaint proceeding?
- Will Connecticut regulators appoint a state-wide pole administrator?
- What joint use/pole attachment issues will arise from continued expansion of Smart Grid infrastructure?

