

Joint Use & Pole Attachments News Flash

FCC Releases Pole Attachments Order

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On April 7, 2011, the FCC released a Report and Order and Order on Reconsideration (“Order”) reforming the FCC’s access, rates and enforcement rules for attachments to utility poles. [\[LINK\]](#). The ostensible purpose of the Order is to promote broadband deployment and competition. The Order is the culmination of more than five years of activity at the FCC by various stakeholders. More specifically, the Order resolves the issues raised in the FCC’s May 20, 2010 Order and Further Notice of Proposed Rulemaking. [\[LINK\]](#).

As expected, the Order contains many rules that are unfavorable for electric utilities, particularly the rules creating a new telecom rate and a process by which incumbent local exchange carriers (“ILECs”) can file complaint proceedings against electric utilities at the FCC. There are also a few rules that could have been worse for electric utilities. For example, the make-ready deadlines (and an attacher’s self-help remedy of hiring qualified contractors to perform the work when deadlines are not met) are largely restricted to *communications space* make-ready. Because there is no way to give full coverage to the entirety of this extremely dense, 144-page Order by way of summary, ***we strongly encourage all affected parties to read the Order carefully and in its entirety.*** The sections below capture some of the highlights of the Order.

Access Timeline

The Order adopts a four-stage access timeline for wireline attachments impacting up to 300 poles or 0.5% of the utility’s in-state poles.

Stage 1 (Survey): 45 days, which begins to run upon acceptance of a complete permit application.

Stages 2 and 3 (Estimate and Acceptance): Utility must provide make-ready estimate

within 14 days of receiving results of survey; attacher has 14 days to accept.

Stage 4 (Make-Ready): Immediately upon receipt of payment, pole owners must notify existing attachers that make-ready must be performed within 60 days. Pole owner may take an additional 15 days after the deadline to perform the make-ready itself.

Use of Approved Contractors: If the deadlines are not met, an attacher may exercise the self-help remedy of hiring a qualified contractor to perform the survey and/or communications space make-ready work. Utilities are required to identify and publish a list of authorized contractors.

Scope of Timeline: Additional time is added to the survey (15 days) and make-ready (45 days) stages for larger permit applications impacting up to the lesser of 3,000 poles or 5% of a utility’s in-state poles. Wireless pole top attachments are also allowed additional time, but there is *not* a self-help remedy for failure to meet the wireless pole top attachment deadlines.

Stopping the Clock: The Order applies a “good and sufficient cause” standard for stopping the clock on various stages of the access timeline, but does not articulate what constitutes “good and sufficient cause.”

Pole Top Attachments

The Order states: “[b]lanket prohibitions are not permitted under the Commission’s rules.” But the Order also makes it clear that electric utilities retain the right to deny pole top access for reasons of insufficient capacity, safety, reliability, and generally applicable engineering purposes. The Order further provides that denials of pole top access must be written and specific.

The Enforcement Process

The Order removes the 30-day time period for filing access complaints, and also adds an “executive level” negotiation

requirement prior to filing complaints. The Order further endorses the unauthorized attachment regime implemented by the Oregon PUC as presumptively reasonable (on a prospective basis only). Perhaps the most dramatic change to the FCC's enforcement rules is the abolition of the rule that restricted an attachers' refund for an unjust/unreasonable rate to the period beginning with the filing of a complaint. The new rule allows recovery of a refund "consistent with the applicable statute of limitations." This change could pose significant financial risk to electric utilities.

New Telecom Rate

The Order adopts a new telecom rate formula that lowers the rate, in most instances, to an amount roughly equivalent to the cable rate. The FCC determined, using its claimed broad discretion to redefine the term "cost" as used in section 224(e) (the statutory parameters for the FCC's telecom formula), that "cost" means 66% of fully allocated costs in urban areas and 44% of fully allocated costs in non-urban areas. These percentages were carefully chosen to achieve the FCC's desired result. Under the FCC's presumptions, these percentages yield urban and non-urban telecom rates of 7.4% of fully allocated costs – in other words, the same percentage of fully allocated costs paid under the cable rate formula. The Order spends numerous pages explaining the economic and legal basis for its dramatic shift in thinking, likely as a prelude to the almost-certain legal challenges that await.

New ILEC Process

The Order does not set a rate for ILEC attachments on electric utility poles, but it does afford ILECs a right to file FCC complaint proceedings against electric utilities to challenge the rates, terms and conditions in joint use agreements (a right heretofore unavailable). This represents a major shift in policy and law for the FCC, which has held for nearly fifteen years that ILECs do not enjoy the right to regulated rates, terms and conditions of attachment. Though the limitations on the applicability of the process and the guidelines under which ILEC complaints will be evaluated are vague, the FCC cautioned that it is "unlikely to find the rates, terms and conditions in existing joint use agreements unjust and unreasonable" and that

"evidence that a term or condition was contained in the parties' prior joint use agreement will carry significant weight" in future disputes regarding new agreements. For the most part, the FCC glossed over the legal issue of whether the Pole Attachments Act even allows it to regulate the relationship between ILECs and electric utilities at all.

Clarification of May 2010 Order

In response to certain new rules set forth in the May 2010 Order, several electric utility groups and one cable television group filed petitions for reconsideration or clarification with the FCC. The electric utilities asked the FCC, among other things, to clarify that its new rule allowing attachers to use the same attachment techniques as the utility itself uses did not mean that electric supply construction configurations (such as triangular framing and cross-arm construction) subjected a pole to boxing and bracketing in the communications space. The FCC granted this request, and clarified its rules accordingly. Cable television petitioners asked the FCC to reconsider its rule that utilities were under no obligation to change out poles to accommodate new attachment requests. The FCC dismissed the cable television petition, and declined to grant the requested relief.

What's Next?

The Order (and its new rules) become effective 30 days after publication in the Federal Register, which could take anywhere from a few days to a few months. Petitions for reconsideration of the Order can be filed with the FCC within 30 days from the date of publication in the Federal Register. The deadline for filing an appeal in federal court is 60 days after publication. An appeal, standing alone, does not stay the effectiveness of the new rules, but parties can ask the FCC or the appellate court to enter a stay pending resolution of the appeal. It is more likely than not that at least some portions of the Order will be appealed by electric utility interests.