

Joint Use & Pole Attachments Newsletter

“Year In Review”

December 22, 2010

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This has been another active year in the joint use and pole attachment community. In March, the FCC Broadband Team released the National Broadband Plan – a series of recommendations on all things broadband including an entire (and foreboding) chapter on pole attachments and infrastructure access. In May, the FCC Wireline Competition Bureau issued a comprehensive Order and Further Notice of Proposed Rulemaking (“FNPRM”) that could fundamentally alter the economics and operations of joint use and pole attachments. [\[LINK\]](#) The Order and FNPRM spawned several petitions for reconsideration, voluminous written comments from all stakeholders, and a resurgence in ex parte activity at the FCC. In July, Frontier’s acquisition of Verizon ILEC assets in fourteen states was completed, making Frontier one of the largest ILECs in the country. As the year comes to a close, the FNPRM remains pending, the petitions for reconsideration of the Order remain unresolved, and stakeholders continue to advocate their positions to the FCC. This “Year In Review” newsletter captures these and other highlights from 2010.

FNPRM Comment Cycle Closed

The May 20, 2010 FNPRM proposed major changes to the FCC’s pole attachment access and enforcement rules, as well as a substantial reduction of the telecom rate. Initial comments were due August 16, 2010. More than 40 sets of comments were filed by various stakeholders (CATV, CLEC, ILEC, Wireless/DAS, electric IOU, electric cooperative and others). More than 25 sets of reply comments were filed. Numerous electric cooperative interests also submitted letters in opposition to the FNPRM’s proposed rules. Though the FNPRM comment cycle officially closed on October 4, 2010, interested parties

continue to submit letters and other materials addressing key issues at stake in the proceeding.

Stakeholders also are ramping-up ex parte activity at the FCC. Since the close of the comment period, stakeholders have conducted more than 20 separate ex parte meetings with FCC staff. On November 16, 2010, representatives of 32 electric utilities met with Wireless Competition Bureau staff to discuss operational implications of certain proposed rules related to the make-ready process. Stakeholders likely will continue ex parte activity through the first quarter of 2011. At this point, it remains unknown whether or when the FCC will issue a final order on the FNPRM.

FCC Order Yields Petitions for Reconsideration and Clarification

The May 20, 2010 Order set forth three new pole attachment rules: (1) attachers may use space and cost saving attachment techniques, such as boxing and bracketing, where practical and consistent with a pole owner’s use of those techniques; (2) where a pole can accommodate new attachments through boxing, bracketing, or similar attachment techniques, there is “sufficient capacity” within the meaning of section 224(f)(2) of the Pole Attachments Act (the section that allows electric utilities to deny access where there is “insufficient capacity”); and (3) access to poles, including the make-ready process, must “be timely in order to constitute just and reasonable access.” On September 2, 2010, three electric utility groups and a CATV group filed petitions for reconsideration and clarification of certain aspects of the Order. [\[LINK TO PETITIONS\]](#) The electric utility groups requested clarification that the rules apply only to attachment techniques in the communications space (as

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opposed to the electric supply space) and that a utility can deny access based on “insufficient capacity” where access would require rearrangement or modification in the electric supply space. The CATV petition argued that utilities should not be allowed to deny access in situations where accommodating an attachment would require a pole changeout.

CATV and CLEC interests filed several oppositions to the electric utility petitions. The oppositions argued that there was no legal basis for distinguishing between communications space and electric supply space for the purposes of determining whether certain attachment techniques are acceptable. A number of electric utility groups opposed the CATV petition, arguing that controlling legal precedent barred the FCC from requiring electric utilities to changeout poles. With the official pleadings cycle closed, interested parties are now waiting for the FCC to rule. After a ruling is issued, the entities who sought reconsideration may appeal the FCC decision to a federal appellate court.

FCC Adopts Controversial “Net Neutrality” Rules at December Meeting

The FCC adopted controversial “net neutrality” rules by a 3-2 vote along party lines at its December 21, 2010 meeting. Though the adopted order was not available to the public as of the date of this newsletter, it appears the order does *not* reclassify broadband transmission as a “telecommunications service.” [\[LINK TO FCC NEWS RELEASE\]](#) Chairman Genachowski had previously suggested reclassification of broadband as a means of expanding the FCC’s authority over the Internet. Instead, the majority appears to premise its jurisdiction on Title I “ancillary” authority – a tenuous legal position given the recent decision in *Comcast v. FCC* striking down the FCC’s last attempt to adopt “net neutrality” rules. At least for the time being, this appears to mean that pole attachment rates will not become entangled within the “net neutrality” web.

Fairpoint Asks FCC to Box-Out Maine PUC

On November 3, 2010, Fairpoint Communications (an ILEC) filed a petition for declaratory ruling asking the FCC to wrest jurisdiction from the Maine PUC over a pending dispute between Fairpoint and one of its attachers related to the use of boxing techniques on Fairpoint’s poles. [\[LINK\]](#) Maine is a “certified” state that regulates pole attachments at the state level. Fairpoint argued that the Maine PUC no longer had jurisdiction over the dispute due to its failure to resolve the dispute within 180 days as required by federal law. Fairpoint also asked the FCC to reaffirm that pole owners need not allow boxing by third party attachers unless the pole owner utilizes boxing in its own operations.

After Fairpoint filed its FCC petition, the attacher withdrew its PUC complaint and the Maine action was dismissed (which should moot Fairpoint’s FCC petition). On December 15, 2010, however, the Maine PUC initiated a general Notice of Investigation (“NOI”) relating to all ILECs’ make-ready practices. [\[LINK\]](#) The language of the NOI focuses on “non-discriminatory access” for ILEC competitors, and the general tone of the NOI is unfavorable to ILEC pole owners.

Cox Agrees to \$444 Million Settlement in Connection With California Wildfires

On December 13, 2010, Cox Communications agreed to pay San Diego Gas & Electric (“SDG&E”) \$444 million to settle SDG&E’s claims that Cox’s improperly attached equipment was a contributing factor in the devastating 2007 California wildfires. The 2007 wildfires destroyed approximately 1,400 homes, burned more than 200,000 acres, killed 2 people and injured more than 40 firefighters. The California Public Utilities Commission had previously determined that lax inspection programs and faulty overhead facilities sparked three of the fires. To date, individual, business and governmental entity claims against SDG&E total approximately \$920 million. SDG&E has stated that its settlement of claims and defense costs already have exceeded its \$1.1 billion in liability insurance coverage.

The fallout from the wildfires demonstrates the importance of maintaining poles and all attached facilities in a manner compliant with the NESC and other applicable standards and specifications. The wildfires and the ensuing legal proceedings provide a sobering and expensive example of the potential consequences of non-compliance.

Who Said Pole Attachments Weren't Sacred?

An "Eruv" is the demarcation of a certain land area (the creation of a "wall") within which Sabbath-observant Jews may freely carry items on the Sabbath. In areas outside the Eruv, observant Jews may not carry items out of their homes on the Sabbath.

What does an Eruv have to do with joint use and pole attachments? A generally accepted method of defining the land within an Eruv is by using overhead power and/or telephone lines to form the boundaries. If the enclosure necessary for the Eruv can utilize existing wires, as well as existing natural boundaries and fences, then an appropriate perimeter may already exist. If a sufficient boundary does not already exist, one can be created by the stringing of a wire (such as a fishing line) to utility poles to create the symbolic enclosure. The creation of an Eruv often necessitates obtaining permission from the utility pole owner. There are a number of legal and operational questions presented by such requests: Does this require an executed pole attachment agreement? Who makes the attachments? What standards/rules govern the construction and maintenance of the attachments? What rental fee, if any, should be charged? At a minimum, pole owners should ensure there are clear standards and processes by which such new attachments are made, and consider whether appropriate protections are in place (specifically, insurance and indemnity).

Practice Pointer

Most joint use and pole attachment agreements include a provision requiring notice and/or consent before a licensee can assign or transfer its rights under the agreement. But does a general "assignment" provision encompass a change in the ownership of the licensee

(like a stock sale)? Because state law may vary in its treatment of the legal import of a stock sale, why not include a "change of control" provision just in case? If your goal is to require approval and/or notice before a change in the ownership/control of the licensee, consider adding a specific "change in control" provision to your general assignment language.

What to Watch in 2011

Will the FCC release final rules flowing from the FNPRM? What appellate challenges will ensue?

How will the FCC resolve the pending petitions for reconsideration filed by CATV and electric utility interests? What impact will the resolution have on pole attachment make-ready and construction practices?

If the FCC adopts final rules that undermine the safety and reliability of electric distribution infrastructure, will electric utilities seek state PUC/PSC intervention?

Will stakeholders (or the FCC itself) seek changes to the Pole Attachments Act? If so, what changes will they seek and how will Congress respond?

Will FCC rule changes or other external forces lead to significant contract renegotiation activity? What will be the pivotal issues in those negotiations?

Are there more telecom mergers on the horizon?

