

# Joint Use & Pole Attachments Newsletter

## “Mid-Year Review”

July 8, 2011

### What’s Inside...

#### Page 1

**FCC Releases Pole Attachments Rulemaking Order on April 7, 2011**

#### Page 2

**Electric Utilities Appeal April 7 Order**

**Two Groups of Stakeholders Seek Reconsideration of Certain Parts of April 7 Order**

**CCTA and SDG&E Settle California PUC Pole Attachment Rate Proceeding**

#### Page 3

**New York PSC Adopts Order to Address “Double Wood” Problem**

**AT&T and T-Mobile Announce Merger of Wireless Giants**

**What to Watch in the Second Half of 2011**

The first half of 2011 has been active in the world of joint use and pole attachments. In March, two of the largest wireless providers announced yet another major telecom merger. In April, the FCC released an order adopting significant changes to its access, rate and enforcement rules for pole attachments, some of which reverse course on more than 15 years of regulatory precedent. Electric utilities already have appealed the FCC’s order and intend to challenge some of the new rules. Numerous ILEC, CLEC, CATV, wireless and electric utility interests have sought to intervene in the appeal. Some electric utilities and CATV/CLEC interests also have asked the FCC to reconsider certain parts of the April order. In June, the New York PSC tackled the growing “double wood” problem by adopting a program specifically targeted to eliminating unnecessary delays in the transfer of communications facilities. This “Mid-Year Review” captures these and other highlights from the first half of 2011.

### **FCC Releases Pole Attachments Rulemaking Order on April 7, 2011**

On April 7, 2011, after a nearly three-and-a-half year rulemaking proceeding, the FCC adopted a 140+ page Report and Order and Order on Reconsideration (“Order”) changing many of the FCC’s access, rates and enforcement rules. [LINK](#) Some of the major rule changes are summarized below:

**Access:** adopts a timeline governing the pole access process from start to finish; allows 45 days to perform survey work and 60 days (after payment of make-ready estimate) to perform make-ready work; additional time is allowed for “large” applications, defined to mean applications

for 301-3,000 poles (larger orders are subject to individually negotiated timelines); if deadlines are not met, attachers can hire contractors to perform the work, but pole owners are allowed to exclude contractors from work in the electric supply space in most instances; states that “blanket prohibitions” against pole top access are not permitted, but electric utilities retain the right to deny access on a case-by-case basis for reasons of insufficient capacity, safety, reliability and generally applicable engineering purposes.

**Rates:** adopts a new telecom rate designed to yield, in most instances, rates nearly identical to the current cable rate; gives ILECs a brand new right to file complaint proceedings at the FCC to challenge rates, terms and conditions in joint use agreements, but does not establish a specific rate applicable to ILEC attachments on electric utility poles.

**Enforcement:** revises the existing rule limiting refunds in FCC complaint proceedings to a period beginning with the date of filing the complaint; new rule allows refunds “consistent with the applicable statute of limitations,” but is completely silent on what this means or how it applies; implements an “executive level” negotiation requirement prior to filing FCC complaint proceedings; removes the existing 30-day deadline for filing complaints arising out of denials of access; acknowledges importance of “unauthorized attachment” penalties and states that contracts with provisions equal to or less severe than those used by the Oregon PUC are presumptively reasonable.

The majority of the Order’s rules became effective on June 8, 2011. The make-ready

## For Further Information Contact:

[Russ Campbell](mailto:rcampbell@balch.com)  
(205) 226-3438

[rcampbell@balch.com](mailto:rcampbell@balch.com)

[Eric Langley](mailto:elangley@balch.com)  
(205) 226-8772

[elangley@balch.com](mailto:elangley@balch.com)

[Allen Estes](mailto:aestes@balch.com)  
(205) 226-8717

[aestes@balch.com](mailto:aestes@balch.com)

## Visit our Website

[www.jointuselaw.com](http://www.jointuselaw.com)

[www.balch.com](http://www.balch.com)

This newsletter is provided as an informational resource for clients and friends of Balch & Bingham LLP. It does not contain legal advice, and it is not a solicitation to perform legal services. No representation is made that the quality of legal services performed by Balch & Bingham LLP is greater than the quality of legal services performed by other lawyers. Design, logo, and content ©2011 Balch & Bingham LLP.

deadlines, the contractor rule, and the new right for ILECs to file FCC complaint proceedings will become effective after the FCC publishes notice in the Federal Register that the rules have been approved by the Office of Management and Budget under the Paperwork Reduction Act. That publication is expected soon. Though the Order includes several important “wins” for electric utilities, it is generally viewed as unfavorable to pole owners (especially electric utility pole owners).

### Electric Utilities Appeal April 7 Order

On May 18, 2011, a group of nine electric utility pole owners (including some of the largest electric utilities in the country) filed an appeal of the April 7 Order in the federal court of appeals for the District of Columbia. More than twenty companies and trade associations have moved to intervene in the proceeding, including the major CATVs, the major ILECs, several CLECs and wireless providers, and another group of electric utilities. On July 1, 2011, the electric utility appellants filed a statement of the specific rules they intend to challenge in the appeal: (1) the new/lower telecom rate; (2) the new right allowing ILECs to file FCC complaint proceedings; and (3) the new rule allowing communications companies to recover refunds “consistent with the applicable statute of limitations” in FCC complaint proceedings. The appeal is unlikely to be resolved prior to the second half of 2012.

### Two Groups of Stakeholders Seek Reconsideration of Certain Parts of April 7 Order

On June 8, 2011, two separate groups filed petitions for reconsideration of the April 7 Order at the FCC. One of the petitions, filed by NCTA, COMPTTEL, and tw telecom, asks the FCC to lower the telecom rate even further. [\[LINK\]](#) The other petition, filed by a group of electric utilities different than the group that filed the appeal, requests that the FCC: (1) reconsider the Order’s 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 Order does not allow refunds in FCC complaint proceedings dating back earlier than the effective date of

the new refund rule. [\[LINK\]](#) The deadline for comments on the petitions for reconsideration has not yet been set. On July 5, 2011, the FCC asked the court of appeals for the District of Columbia to delay the pending appeal of the April 7 Order until the FCC addresses the two petitions for reconsideration. The court has not ruled upon what effect, if any, the petitions for reconsideration will have on the pending appeal.

### CCTA and SDG&E Settle California PUC Pole Attachment Rate Proceeding

In January 2011, the California Cable and Telecommunications Association (“CCTA”) and San Diego Gas & Electric (“SDG&E”) settled a pole attachment rate proceeding that had been pending before the California PUC (“CPUC”) for nearly a year. In March 2010, CCTA filed a complaint requesting that the CPUC (1) find SDG&E’s 2009 pole attachment rate unreasonable, and (2) set a lower rate for its members’ attachments to SDG&E poles. SDG&E increased its pole attachment rate from \$11.24 in 2007 to \$20.13 for 2009. CCTA argued that the 2009 proposed rate was much higher than rates charged by other utilities, both locally and nationally. CCTA further alleged that, during negotiations, SDG&E provided inconsistent or incomplete backup data to substantiate the new rate. SDG&E contended that its proposed 2009 rate was consistent with California’s cost-based default rate regulations, and that the rates charged by other utilities were irrelevant because the default rate is cost-based (and different utilities have different costs). SDG&E further contended that its increased costs were based in part on the replacement of poles damaged by the massive 2007 California wildfires. Before the case was heard by the CPUC, the parties reached a settlement agreement that set specific rates for 2009 through 2016 for specific named CCTA members. The 2009 rate was set at \$11.54 for Cox, \$5.86 for Time Warner Cable and \$11.54 for Cable USA. Under the settlement agreement, the rates for all three entities increase to \$16.35 by 2016. The deal is contingent upon all of CCTA’s other members joining in the agreement.

## **New York PSC Adopts Order to Address “Double Wood” Problem**

On May 25, 2011, the New York PSC (“NYPSC”) issued an order implementing a Standardized Facility and Equipment Transfer Program (“SAFET”). [\[LINK\]](#) SAFET is designed to enhance the coordination, communication, monitoring, and notification process relating to equipment transfers on utility poles. Recognizing the need to address the public safety and monetary concerns relating to “double wood” poles, the NYPSC instituted a process whereby major pole-owning utilities, attachers, and government agencies collaborated with NYPSC staff on developing a program to remedy the problems. The NYPSC adopted a “pilot” format for the first two years of SAFET, but is requiring utility pole owners and attachers within its jurisdiction to use the pole notification service provided by the SAFET software. This required notification service is available at no cost to users for the first six years. Although the order does not establish an actual deadline for facility transfers and pole removals, it noted that a 60-day deadline (measured either from the day a pole owner receives notice that a pole needs to be removed, or from the day the pole owner informs the first attacher that its equipment must be removed) was a reasonable target. The order also requires each pole owner to submit a report by January 1, 2012, describing efforts that it will undertake to reduce the number of “double wood” poles currently in existence.

## **AT&T and T-Mobile Announce Merger of Wireless Giants**

On March 20, 2011, AT&T announced a \$39 billion takeover of T-Mobile USA. If approved, the merged company will become the nation’s largest mobile network provider, passing Verizon Wireless. The merger is currently being reviewed by the Department of Justice, FCC, and state regulators, among others. On June 27, 2011, Arizona became the first state to approve the deal. At least four other states – California, Hawaii, Louisiana and West Virginia – have expressed interest in reviewing the deal. At the FCC, numerous competitors, trade groups and consumer organizations have objected to the merger on the grounds that the new company will have too much power through market share.

Other groups, including the U.S. Cattleman’s Association, have filed comments supporting the merger. Thus far, the FCC has received more than 39,000 comments on the merger (including comments from the general public) – over 5,000 more comments than the FCC received on the Comcast/NBC Universal deal. AT&T and T-Mobile expect to complete the merger in the first quarter of 2012.

## **What to Watch in the Second Half of 2011**

Will ILECs avail themselves of the new right to file FCC complaints against electric utilities? How will the FCC address joint use relationships, many of which predate the FCC itself?

Will the FCC’s pro-broadband policies actually yield any additional private infrastructure investment or any upgrade in services offered by incumbent providers?

How will state regulators respond to the FCC’s increased visibility in matters impacting electric system safety and reliability?

How will the FCC resolve the pending petitions for reconsideration of the April 7, 2011 Order? Will it get better or worse for pole owners?

Will the court of appeals move quickly on the electric utilities’ appeal of the April 7 Order, or will it delay resolution while the FCC considers the pending petitions for reconsideration?

Will stakeholders in non-“certified” states seek state regulation of pole attachments?

Will the AT&T/T-Mobile merger obtain the necessary regulatory approvals? If so, how will this impact wireless infrastructure deployment?