

# Joint Use & Pole Attachments Newsletter

## “Mid-Year Review”

July 1, 2010

### What's Inside...

#### Page 1

##### Overview

##### National Broadband Plan Yields Pole Attachment Order & FNPRM

##### Proposed New Broadband Regulatory Framework Could Impact Pole Attachments

#### Page 2

##### DOE Seeks Information on Smart Grid Implementation

##### New Hampshire PUC Says State Law Controls Scope of Easements

#### Page 3

##### Frontier Completes Acquisition of Verizon Wireline Operations

##### CenturyLink and Qwest Announce Merger

##### California Wildfire Settlements Emphasize Importance of Compliant Facilities

##### What to Watch in the Second Half of 2010

### Overview

The first half of 2010 has been action-packed in the world of joint use and pole attachments. The National Broadband Plan, released in March 2010, recommended significant changes to FCC pole attachment policy. The FCC already has begun the process of adopting the recommendations in the Plan with an Order and Further Notice of Proposed Rulemaking (“FNPRM”), released in May 2010, touching access, remedies and rates. The FCC also proposes to re-regulate broadband as a telecom service, with potential implications to pole attachments and beyond. Meanwhile ILECs continue their trend of consolidation. This Mid-Year Review captures these and other highlights from the first half of 2010.

### National Broadband Plan Yields Pole Attachment Order & FNPRM

After recommending significant changes to pole attachment policy in the National Broadband Plan (changes generally viewed as bad within the electric industry), the FCC wasted little time implementing many of the recommendations. On May 20, 2010, the FCC adopted an Order and comprehensive FNPRM addressing pole attachments. Neither the Order nor the FNPRM have been published in the Federal Register (the event that triggers the effective date of the Order and the comment deadline for the FNPRM). We expect the items will be published in early July 2010.

The Order adopts two new rules: (1) requiring utilities to allow communications attachers to use the same cost and space saving techniques that the utility itself uses under “comparable circumstances;” and (2) granting communications attachers a right to “timely” pole access (leaving the details of “timely” access to the FNPRM). The Order also redefines the term “insufficient capacity,” as used in the Pole Attachments

Act, in a way that may constrict the circumstances under which electric utilities can deny access to poles.

The FNPRM proposes three broad categories of new/amended rules for comment: (1) access rules; (2) enforcement rules; and (3) a reconfigured telecom rate. The access rules relate primarily to make-ready timelines and the use of outside contractors. The enforcement rules propose expanded remedies for attachers and a revised “sign and sue” rule, among other things. The proposed new telecom rate formula would, in most instances, yield a rate lower than the current cable rate. For more information on the pole attachment recommendations in the National Broadband Plan and the issues raised in the recent Order and FNPRM, please see our March 17, 2010 [\[LINK\]](#) and May 21, 2010 [\[LINK\]](#) News Flashes.

There is also a possibility Congress will entertain amendments to the Pole Attachments Act or perhaps even a rewrite of the 1996 Telecom Act. Importantly, one of the FCC’s recommendations in the National Broadband Plan was that Congress amend the Pole Attachments Act to establish “a harmonized access policy” for all poles, ducts, conduits and rights-of-way across the country.

### Proposed New Broadband Regulatory Framework Could Impact Pole Attachments

On June 17, 2010, the FCC released a Notice of Inquiry (“NOI”) [\[LINK\]](#) seeking comment on the consequences of classifying broadband service as a “telecommunications service” for regulatory purposes. The FCC’s proposal comes on the heels of a major court decision limiting the FCC’s power to regulate broadband. The proposal involves changing the classification of broadband service from an “information service” to a “telecommunications service,” while



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forbearing application of many statutory provisions and regulations that apply to traditional telecom carriers. The NOI specifically seeks comment on whether the FCC can forbear from applying Section 224 (the Pole Attachments Act). If the FCC cannot forbear from applying Section 224, and it goes forward with the plan to reclassify broadband as a telecom service, this will create a new mandatory right of access for broadband providers but also require that all broadband providers (including cable providers providing broadband) pay the telecom rate. Because most cable providers also provide broadband, this could mean higher pole attachment rates for a large number of attachers – subject to the FCC’s proposed reinterpretation of the telecom rate. Comments on the Broadband Regulatory NOI are due by July 15, 2010.

## DOE Seeks Information on Smart Grid Implementation

In May 2010, the Department of Energy (“DOE”) released two requests for information (“RFI”) in connection with implementing the National Broadband Plan’s Smart Grid recommendations. The first RFI, [LINK](#) poses 18 questions seeking information on: (1) State efforts to enact Smart Grid privacy and data collection practices; (2) individual utility practices regarding data access and collection; (3) third party-access to energy information; (4) the consumer’s role in balancing the benefits of access and privacy; and (5) the policies/procedures that should guide policymakers in determining who can access consumer information. The second RFI [LINK](#) poses 9 questions focusing on the changing nature of communications infrastructure on utility poles. The requested information is designed to enhance DOE’s understanding of communications technologies that serve the needs of the nation’s electric infrastructure “from both a critical infrastructure and business standpoint.” Importantly, the DOE acknowledges that there is not a “one-size-fits-all” solution for either utility or communications solutions to “accommodate all reasonable Smart Grid implementations and applications.” Responses to both RFIs are due July 12, 2010.

## New Hampshire PUC Says State Law Controls Scope of Easements

segTEL, a certificated CLEC in New Hampshire, sought to make attachments on poles owned by Public Service Company of New Hampshire (“PSNH”) and located within easements on private property. PSNH denied segTEL’s request based on lack of adequate authority under its easements. The New Hampshire PUC, in an April 2010 Order [LINK](#), concluded that PSNH did not have authority to permit the segTEL attachments under easements “for the transmission of high or local voltage electric current” (older easements) or “for transmitting electric current and/or intelligence” (later easements). segTEL argued that, notwithstanding the actual scope of the easements, it had a right under the federal Pole Attachments Act and the federal Cable Act to access PSNH’s easements. The New Hampshire PUC squarely rejected segTEL’s argument stating: “we disagree with segTEL’s position that federal law provides it with unfettered entitlement to attach to utility poles” and that “such an approach would nullify the property rights of the landowners.” The New Hampshire PUC further stated: “This case is primarily, and fundamentally, a case about the property rights of landowners, and only secondarily, and contingently, a case about telecommunications policy.”

On reconsideration of the April 2010 Order, the New Hampshire PUC granted segTEL a rehearing on the interpretation of the group of easements “for transmitting electric current and/or intelligence.” The New Hampshire PUC stated: “Based upon segTEL’s arguments regarding the use of SCADA and other practices concerning utilities’ supervision and control of the electric distribution and transmission system, however, we have determined to grant rehearing on the interpretation of ‘intelligence’ in the later deeds.” Regardless of the New Hampshire PUC’s decision following rehearing, it is clear (at least in New Hampshire) that state law and the language of easements (not federal law or telecommunications policy) control an attacher’s access to electric utility easements.

### **Frontier Completes Acquisition of Verizon Wireline Operations**

Frontier announced today that its acquisition of Verizon wireline operations in 14 states is complete. In May 2010, the parties received the last state regulatory approval needed to finalize the deal. Shortly thereafter, the FCC granted the pending applications to transfer control of domestic authorizations and licenses, finding (despite objections by a number of parties) that the transaction served “the public interest, convenience, and necessity.” [\[LINK\]](#) The operations acquired by Frontier include all of Verizon’s local wireline operating territories in Arizona, Idaho, Illinois, Indiana, Michigan, Nevada, North Carolina, Ohio, Oregon, South Carolina, Washington, West Virginia and Wisconsin. The transaction also includes a small number of Verizon’s exchanges in California.

### **CenturyLink and Qwest Announce Merger**

While still digesting its merger with Embarq, CenturyLink announced in April 2010 it plans to merge with Qwest. Together, CenturyLink and Qwest serve local markets in 37 states with approximately 5 million broadband customers, 17 million access lines, 1.4 million video subscribers and 850,000 wireless customers. The parties estimate that the deal may take a year to close. The applications for transfer of control of Qwest’s domestic licenses and authorizations are pending at the FCC. [\[LINK\]](#) Comments/Petitions to Deny are due no later than July 12, 2010. Replies/Oppositions are due no later than July 27, 2010.

### **California Wildfire Settlements Emphasize Importance of Compliant Facilities**

The 2007 California wildfires destroyed approximately 1,400 homes, burned more than 200,000 acres, killed 2 people and injured more than 40 firefighters. Victims, including the State of California, filed hundreds of lawsuits. An investigation by the California Public Utilities Commission (“CPUC”) found San Diego Gas & Electric Co. (“SDG&E”) and Cox Communications in violation of CPUC regulations. The CPUC specifically found that lax inspection

programs and faulty facilities sparked three of the fires, one of which was caused by a Cox lashing wire contacting a SDG&E conductor. On April 26, 2010, the CPUC approved settlement agreements resulting in SDG&E paying \$14.35 million and Cox paying \$2 million to the General Fund of California. Although neither SDG&E nor Cox admitted liability, the settlement agreements set forth several hefty remedial measures, including additional training for identification and repair of safety hazards (including clearance violations), as well as enhanced inspection procedures and vegetation management requirements.

### **What to Watch in the Second Half of 2010**

When will the Order and FNPRM be published in the Federal Register? How will stakeholders respond?

Will the FCC act on this FNPRM, or will it die on the vine, be subsumed by a new initiative or be trumped by Congressional action?

Would Congressional action impact the current exclusion of co-ops, munis and railroads? Would it impact investor-owned electric utilities in “certified” states?

How will state regulators respond as the FCC proposes to encroach further into the day-to-day operations of electric distribution systems?

Will there be further realignment and consolidation within the ILEC industry?

What will become of the FCC’s proposal to re-regulate broadband as a telecom service?

Will the FCC’s pro-broadband policies actually yield additional private investment?