

Joint Use & Pole Attachments News Flash

FCC Releases Order and FNPRM

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On May 20, 2010, the FCC released an Order and Further Notice of Proposed Rulemaking (“FNPRM”) on pole attachments. [\[LINK\]](#) The Order and FNPRM is a fulfillment of what was foretold in Chapter 6 of the National Broadband Plan. The Order adopts two new rules and redefines the term “insufficient capacity” used in Section 224(f)(2) of the Pole Attachments (“Act”). The FNPRM proposes several new/revised rules and addresses a number of topics falling into three broad categories: (1) access rules; (2) enforcement process reform; and (3) a new telecom rate. Some of the access-related proposals appear to consider the safety, reliability and engineering concerns raised by electric utilities, but the proposed “reinterpretation” of the telecom rate strains credibility.

THE ORDER

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” (without defining the term “comparable circumstances”); and (2) granting communications attachers a right to “timely” pole access (leaving the details of “timely” access to the FNPRM).

A significant part of the Order is the new definition of the term “insufficient capacity.” Section 224(f)(2) of the Act gives electric utilities the right to deny access for reasons of safety, reliability, insufficient capacity and generally applicable engineering requirements. The FCC in an earlier rulemaking determined that “capacity expansion” (the means of resolving “insufficient capacity”) included steps taken to “rearrange or change out existing facilities.” The Order abandons the notion that capacity is “insufficient” where mere rearrangement of existing facilities (or use of techniques such as

boxing and bracketing) is necessary to accommodate a new attachment. The new definition of “insufficient capacity” is critical to the FNPRM’s proposed access reform rules. The Order does reaffirm that capacity is “insufficient” when a pole must be replaced to accommodate a new attachment.

THE FNPRM

Unlike the 2007 Pole Attachments NPRM, this FNPRM contains several actual proposed rules upon which stakeholders can comment (see Appendix B to Order and FNPRM, pp. 68-72). Because the devil is in the details, there is no way to give full coverage to the proposed rules by way of summary. *We strongly encourage all affected parties to read the FNPRM carefully and in its entirety.* The information below attempts to capture some of the highlights of the FNPRM.

Proposed Access Rules

Make-Ready Timelines: The FNPRM proposes a five-stage access timeline, starting with submittal of a request for attachment and ending with the grant of a final permit. The proposed timeline, which relies heavily on state regulations in New York and Connecticut, would allow 45 days for responding to an application (including completion of any necessary survey and engineering work), 14 days for preparation and tender of make-ready cost estimates, 14 days for the attacher to accept the estimate and render payment, and 45 days for the utility to complete make-ready work. The timeline would not apply where pole replacements are necessary, and would not apply to wireless attachment requests (though the FNPRM seeks comment on appropriate timelines for wireless attachments).

Use of Outside Contractors: The FNPRM proposes a rule that would allow attachers to use utility-approved contractors for: (1)

survey and engineering work where the utility cannot meet the 45-day deadline; and (2) virtually all communications space make-ready work. The FNPRM recognizes that electric utilities must retain control over safety and engineering standards, but proposes a requirement that electric utilities post a list of approved contractors and the standards used to approve contractors. The FNPRM recognizes that attachers and their contractors may be prohibited from entering the electric supply space, except in circumstances where specialized communications knowledge is essential for the work (such as work with wireless pole top antennae). The FNPRM also proposes that, where there are conflicting opinions between the parties' respective engineers, the electric utility "may exercise final authority to make all judgments that relate directly to insufficient capacity or safety, reliability, and sound engineering."

Proposed Enforcement Rules

Expanded Remedies for Attachers: The FNPRM proposes revisions to the complaint proceeding rules designed to broaden the scope of recoverable damages, in terms of both time and type. In essence, the FCC seeks to grant itself powers typically reserved to state or federal courts.

Unauthorized Attachments: The FNPRM recognizes that "dangers presented by unauthorized attachments transcend the theoretical." Despite significant evidence presented by electric utilities regarding the numbers of unauthorized attachments on various systems, the FNPRM states, "[b]ased on the current record, we are unable to gauge with certainty the extent of the problem." The FNPRM takes specific interest in the Oregon PUC penalty regime (which imposes real penalties for unauthorized attachments), and seeks comment on whether a similar model should be implemented by the FCC.

Sign and Sue: The FNPRM proposes a revision to the "sign and sue" rule that would require an attacher, in a complaint challenging the reasonableness of a provision in an executed contract, to submit evidence of a specific objection to the provision during negotiations. The FNPRM also states that where "*quid pro quo* is established, the Commission will not disturb the bargained-for package of provisions." Though the precise parameters and application of the proposed

revisions to this rule are unclear, this appears to be a step in the right direction.

Rental Rates

New Telecom Rate: The proposed new telecom rate is actually lower than the cable rate. Recognizing the statutory problems with imposing a single rate for all attachments, the FCC decided instead to "reinterpret" the telecom rate. Since the 1996 amendments to the Act, the FCC and all stakeholders have recognized that the only difference between the cable rate and the telecom rate is the "space allocation factor." The "cost" being allocated (commonly called "annual pole cost") is the same in each formula. The FNPRM proposes to reformulate the "cost" allocated in the telecom formula by excluding from the carrying charge rate the taxes, depreciation and rate of return components.

ILEC Rates: Though the FNPRM seeks comment on a number of ILEC-related issues, there are no proposed rules specifically relating to the joint use rates charged between electric utilities and ILECs.

What the FNPRM Does Not Address

Despite much discussion in connection with the National Broadband Plan, the FNPRM does not address: (1) the reverse preemption provision that allows states to "opt out" of FCC jurisdiction; (2) the treatment of ILECs as attachers under the Act; (3) the statutory exemptions for municipal and cooperatively utilities; or (4) pole top access for wireless attachments.

CONCLUSION

Initial comments to the FNPRM are due 30 days from the date of publication in the Federal Register (which should occur shortly). Reply comments are due 30 days thereafter. The new rules in the Order are ripe for either: (1) a petition for reconsideration at the FCC; or (2) a petition for review to a federal court of appeals. The rules proposed in the FNPRM, if adopted, will have a significant impact on electric utilities. We strongly encourage active participation in this docket through written comments, submission of data/evidence, *ex parte* meetings with the FCC, and litigation in the federal courts of appeal (if necessary). Please contact us if you have any questions.