

CLIENT ALERT

JOINT USE NEWSLETTER: INAUGURATION EDITION

What to expect from a new administration

Change in the Winds at the Federal Communications Commission

Initial reports following President-elect Donald J. Trump's election indicate that the FCC will re-prioritize a number of issues under the new administration. First, Jeff Eisenach and Mark Jamison, with ties to Verizon and Sprint, respectively, were both named as advisors in Trump's transition team; both have staunchly opposed the Net Neutrality Order and publicly opposed and criticized decisions by former FCC Chairman Tom Wheeler, who announced his resignation in mid-December. Both are expected to recommend that any FCC changes under the new administration work to undue Net Neutrality and change the current FCC agenda. If a change in the Net Neutrality Order results in a reclassification of broadband internet access services from telecommunications services back to information services (the biggest and most controversial portion of the Order as currently written), a number of pole attachments could be stripped of protections under the Pole Attachments Act. Given the ties of Eisenach and Jamison, other changes favoring incumbent local exchange carriers would not be surprising.

Senior Republican FCC Commissioner Ajit Pai, who many have speculated could end up as the new chairman of the FCC, announced his desire to take a "weed whacker" to current FCC regulations. Pai has long been opposed to Net Neutrality and has repeatedly indicated his desire to reform pole attachment regulation with particular focus on (1) reducing pole attachment rates (by excluding capital expenses from the pole attachment formula) and (2) reviewing the reasonableness of charges for make-ready work. Pai has gone so far as to suggest

that Congress should expand the FCC's authority over pole attachments to include jurisdiction over poles owned by state and local government authorities. Notably, Pai worked on the Senate Judiciary Committee for Alabama Senator and Attorney General-nominee Jeff Sessions. Though not as outspoken on pole attachment issues, fellow Republican FCC Commissioner Mike O'Rielly has publicly voiced his opposition to Net Neutrality as well.

Additional changes are not out of the question after reports recently surfaced that Trump has endorsed a proposal from his FCC transition team to restructure various bureaus within the agency. The extent to which these changes would directly impact pole attachment regulations is unknown but a ripple effect on utilities is to be expected and something to watch.

Possible Overhaul to the Telecommunications Act

Beginning in August, and increasing since the election, reports have surfaced that a legislative overhaul to the Telecommunications Act may be a top priority under the Trump administration. The Telecommunications Act, last revised in 1996, is now more than 20 years old and, according to multiple legislators, is no longer in step with increasing technology changes. If a re-write were to take place, many have speculated that Commissioner Pai's positions will weigh heavily. Given his repeatedly voiced displeasure with the current state of pole attachment regulation, a complete revision to Section 224 (the Pole Attachments Act) is certainly a possibility.

New Emphasis on Physical Security of the Electric Grid

In December 2016, President Obama issued a National Electric Grid Security and Resilience Action Plan.

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Though Trump will almost certainly make changes to the Plan, physical security of the electric grid is also likely to be an item on the new administration's agenda. While cyber-security and information sharing are critical aspects of the current plan, infrastructure hardening is also on the list. The plan contemplates the Department of Energy, Department of Defense, Federal Energy Regulatory Commission, and Department of Homeland Security all working with utilities to identify issues and potential action items. Though much of the anticipated action items will focus on safety and security of electric transmission, we expect distribution systems to be impacted. The extent to which this agenda will reach into revised pole attachment rules or policy is unknown. But, given the expected changes at the FCC, a coordinated effort across agencies is something to watch.

Lawsuits Over One-Touch Make-Ready Continue in Federal District Courts

2016 saw a flurry of activity relating to what many are calling "one-touch make-ready." One-touch make-ready, strongly advocated by Google-Fiber, would allow

a licensed and insured contractor to perform make-ready work on all attachments on a pole in a single job. Google Fiber has pushed the concept (mostly at the local level) in an effort to speed up deployment of its gigabit-speed fiber optic internet service. Louisville, Kentucky and Nashville, Tennessee, in efforts to encourage Google Fiber's local investment, passed city ordinances authorizing one-touch make-ready. In response, AT&T and Comcast each filed federal lawsuits seeking to enjoin enforcement of the ordinances. In a slightly unusual move this past October, the Federal Communications Commission filed a Statement of Interest in the Louisville lawsuit. The Statement of Interest supported the rule and argued that local one-touch make-ready is not federally preempted by FCC pole-attachment regulations. Plaintiffs and defendants in both cases filed dispositive motions. To date, neither Court has issued a ruling. Whether a ruling will come before any FCC changes following Trump's inauguration remains to be seen. In October, Google Fiber announced it thereafter would slow its deployment plans and was considering wireless options.

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