

FCC Proposes Changes to its Access to Poles and Conduits Rules

The Federal Communications Commission (FCC) released a combined Order and Notice of Proposed Rulemaking (NPRM) on May 20, 2010, addressing a revised framework for access to utility poles by communications providers. The Order and NPRM implement a part of the FCC's National Broadband Plan, and is intended to make access to utility poles more streamlined and predictable, and to make rental rates more uniform and less expensive. Both the Order and the proposals in the NPRM ultimately may constrain the ability of pole owners to establish rates and conditions for access to their poles. In this context, a "utility pole" includes any pole, duct, conduit or right of way that is owned by a public utility or a local exchange carrier and that is used for any wire communications. Section 224 of the Communications Act gives communications providers a conditional right of access and the Order is intended to assist providers of telecommunications services, cable television service, and other broadband service providers in acquiring and maintaining reasonable access to utility poles in support of their services.

While the FCC has a statutory duty under Section 224 of the Communications Act to ensure that rates, terms and conditions for access to poles are reasonable, this statutory obligation does not preempt state regulation. The statute includes "reverse preemption," – the federal rules do not apply in a state that regulates the rates, terms and conditions for pole attachments. Through the decisions made in the Order and the proposals in NPRM the FCC seeks to delineate further a framework of acceptable and unacceptable practices by utilities in making access to rights of way available.

Use of Non-Discrimination Presumptions

The Order clarifies that communications providers have a statutory right to use space and cost-saving attachment techniques where possible and where consistent with a pole owner's own use and practices. If a pole owner uses space saving techniques, such as boxing (installing communications on both sides of the same pole at the same height) or bracketing (installing extension arms to support communications lines at the same level as those attached to the pole itself), there is a rebuttable presumption that a communications provider also should be able to use these same techniques. The Order requires utilities that choose to allow these types of attachment techniques in some circumstances, but not others, to have clear, objective, non-discriminatory and publicly available

parameters for making distinctions. In the event that a utility refuses to allow a communications provider to use an attachment technique the utility itself has used or allowed to be used in the past, the utility must explain its reasoning in writing.

Proposed Benchmarks for Timeliness of Access

The Order states both that access to utility poles must be timely and that timely access includes preparation of poles for attachment (known as “make-ready” work). Utilities must complete make-ready work promptly and efficiently, and unwarranted delays in pole access due to make-ready or other preparations will be deemed unjust and unreasonable under Section 224 of the Communications Act. To more concretely implement this timeliness requirement, the NPRM seeks comment on proposed specific benchmarks for wired pole attachment requests. The FCC proposes a five-stage process with defined deadlines for each stage, including: (1) 45 days for surveying poles following receipt of a request for access; (2) 14 days for the utility to tender an estimate of charges to perform any make-ready work; (3) 14 days for the access applicant to accept the tendered estimate; (4) 45 days for the completion of make-ready work; and (5) 30 days for multiparty coordination (including coordination and other work required if existing attaches fail to move their facilities as directed by the utility). The NPRM seeks comments on whether this same proposed process should apply for wireless pole attachment requests, noting that some utilities have expressed concern that wireless attachments present different circumstances and issues. For example, attachment of wireless equipment may complicate engineering analyses because, among other things, wireless equipment varies widely, is often placed close to electrical lines, and requires a power source to operate.

Proposed Pricing Regulation

The NPRM also seeks comment on the establishment of rental rates for pole attachments that are “as low and close to uniform as possible.” The FCC expresses concern that a lack of uniformity in applicable rental rates may be deterring service providers, including broadband providers, from extending their networks or adding capabilities, thereby slowing broadband deployment. In particular, the FCC notes that the current distinction between rental rates for telecommunications service providers, as compared with cable service providers, may be a substantial deterrent to expansion. Rental fees are designed to recover a portion of a utility’s operating and capital costs attributable to a given pole. Because the FCC’s rules allocate costs associated with the unusable portion of a pole for cable service providers differently than for telecommunications service providers, the telecommunications rate formula results in higher rental rates. Even though the average annual difference between the two rates is approximately \$3, nationally, differences as to which pole rental rate applies could amount to \$90 million to \$120 million, – or more – given the estimated 30-40 million poles subject to rental rate regulation. In an effort to make rates more uniform, more predictable, and lower, the FCC proposes through the rulemaking process to identify a range of reasonable rates. The FCC’s initial proposal identifies the current telecommunications rate as a reasonable upper limit, with the lower limit based on the same rate, but excluding capital costs and taxes. The FCC proposes that utilities would be free to apply whichever rental rate was higher – the lower limit telecommunications rate or the current cable rate.

The FCC also seeks comment on its proposals for the use of utility-approved outside contractors for survey and make-ready work, as well as how it can improve the availability of information concerning the location and availability of poles, conduits and rights-of-way – including whether the FCC itself should collect data and whether data should be aggregated into a publicly available national database. The NPRM also seeks comment on whether the FCC should modify its existing rules for resolving pole attachment disputes, including whether specialized forums would be better suited to handle pole attachment complaints and disputes.

The Order and NPRM highlight the FCC's interest in creating predictable benchmarks and lower, more uniform rental rates for access to utility resources so as to enhance communications competition and service reach. Utilities' policies on access should certainly be reviewed in light of the Order and the additional changes proposed in the NPRM. Comments on the NPRM will be due 30 days after it is published in the *Federal Register*, with replies due 30 days later.

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