

FCC Launches Major Initiative to Make Pole Attachments Easier and Potentially Cheaper for All Communications Providers

Legal Alert
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The FCC has launched a major rulemaking initiative concerning communications companies' (both cable television and others) use of utility poles that appears poised to reduce both the financial and non-financial burden of pole use. Utility poles owned by third-parties (usually electric power utilities) which communications companies must use to support their plant become an issue in two ways: (1) the initial preparation of the pole for the communications company's new attachment, and (2) the recurring "pole rent" that the communications company pays for the use of the pole thereafter. *See In the Matter of Implementation of Section 224 of the Act; a National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, FCC 10-84, Order and Further Notice of Proposed Rulemaking (rel. May 20, 2010).

The FCC proposes to improve the situation for communications users in three ways: promoting the use of attachment techniques that allow existing poles to hold more attachments, providing for timelines for completion of attachments after they have been requested, and changes in the formula used to calculate pole rents for communications companies (which is different from the one used to calculate rents for cable television companies).

First, the FCC has decided to dictate that any attachment technique that the pole owner uses or allows to be used will be presumed "appropriate" for use by others in similar circumstances, under the non-discriminatory access provision (Section 224(5)(1)) of the Communications Act. The FCC specifically mentions "boxing" and "bracketing" (attaching to the opposite of the pole, and using a bracket to make a standoff attachment, respectively) as techniques that it wishes to encourage, where consistent with safety and reliability. The net effect of this is to increase a pole's capacity for attachments. The FCC was careful to explain that it was not mandating the use of such techniques, but establishing a presumption that they could be used, if the pole owner had used them previously or had allowed them to be used. Left unaddressed is the question of whether the pole owner is obligated to replace a pole that has no spare capacity, regardless of who pays for the replacement. The FCC has promulgated new regulations implementing these concepts and, unlike in the case of the other two initiatives, is not seeking comments on proposed new regulations.

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Second, the FCC has asked for comments on proposed regulations that will accelerate the performance of make-ready work from its current timetable of more than 90 days from the date a request for access is granted, in 31 percent of the cases surveyed. The FCC is proposing adding to its existing regulations that require applications for approval to be acted upon within 45 days by implementing a five-stage timeline that requires that the work be completed within 45 days after the pole owner's estimate for the cost of make-ready has been accepted by the company seeking the new attachment. The intermediate stages are: a 14-day period after the pole owner has responded to the application and completed its survey to provide an estimate of the cost of make-ready, and a 14-day period thereafter for the attaching communications company to accept the estimate. The optional, fifth stage, allows an additional 30 days for the pole owner to coordinate movement of other users' attachments on the pole to allow the make-ready work to be performed. The FCC also proposes regulation to make it easier for communications companies to use utility-approved third-party contractors to make the new attachments after the make-ready has been completed. However, only where the utility fails to make the initial survey or fails to accomplish the make-ready within the times allowed under the proposed new rules would the communications company seeking new attachments be permitted to hire contractors to accomplish these tasks. Finally, the FCC proposes that new attachers be allowed to pay for the make-ready work in stages, allowing them to withhold part of the payment until the work is complete.

Third, the FCC proposes to reduce the difference between pole rates charged cable television companies and those charged telecommunications companies. Now, cable companies pay an average of 7.4 percent of the annual costs of the pole versus the 11.2 percent paid by telecom companies. While the FCC's ability to reduce this disparity is hampered by the fact that the formulas for calculating the respective rates (for cable companies and for telecommunications companies) are set out in the statute, the FCC has seized on the notion that "cost" (used in the statutory telecommunications formula) can be re-defined. Noting that the statutory formula for pole rates paid by telecommunications companies does not specify a "cost formula," the FCC proposes to use the "cost causation" principle to define costs that would be included in the formula. Using this principle, it is likely that a number of significant costs associated with the pole, such as the initial acquisition and installation cost, would not be included, because those costs are not "caused" by the company seeking to attach. The FCC's stated goal is to reduce the disparity between the rate paid by cable companies and the rate paid by telecommunications companies, by lowering the rate paid by telecommunications companies, not by increasing the rate paid by cable companies. Comments are due 30 days after publication of the FCC's *Order and Further Notice* is published in the Federal Register.