

Telecommunications Alert: FCC Adopts Clarifications and Proposes Modifications to its Pole Attachment Rules

5/25/2010

On May 20, 2010, the FCC released an order and further notice of proposed rulemaking (FNPRM)¹ clarifying certain aspects of its pole attachment rules and seeking comment on (1) proposals to establish rental rates for pole attachments that are as low and close to uniform as possible; (2) the imposition of a specific timeline for all wired pole attachment requests and the development of a timeline for the attachment of wireless facilities; (3) proposed rules allowing for the use of contract workers in certain circumstances; and (4) proposed reforms to the FCC's access dispute resolution process. Comments are due 30 days and reply comments are due 60 days after publication of the order and FNPRM in the *Federal Register*, which has not yet occurred.

Order

The FCC clarified two aspects of its pole attachment rules. First, the FCC clarified that the statutory requirement allowing nondiscriminatory access to poles requires a utility to allow communications providers to use the same space- and cost-saving pole attachment techniques, including boxing and bracketing,² that the utility itself uses. If a utility chooses to allow communications providers to use these techniques in some circumstances but not in others, the limiting circumstances must be clear, objective, applied equally to the utility and attaching entity, and disclosed publicly (*e.g.*, on the utility's website). Second, the FCC concluded that the statutory right to just and reasonable access to poles, including for the pole attachment preparation process (*i.e.* "make-ready"), includes the right of timely access. The FCC found that make-ready or other pole access delays not warranted by the circumstances are unjust and unreasonable, and therefore violate statutory requirements.

FNPRM

Rates. The FCC seeks comment on ways to address the current disparity in rates charged for pole attachments used by telecommunications providers and pole attachments used by cable companies. In particular, the Commission seeks comment on (1) certain proposals to establish a uniform rate for all pole attachments used to provide broadband Internet access services; (2) alternatives for reinterpreting the telecommunications rate formula within existing statutory constraints, for example, by changing the FCC's interpretation of the term "cost" within the rate calculations; and (3) any other possible approaches to revise the framework governing pole rental rates. The FCC also seeks comment on a number of rate issues specific to incumbent local exchange carriers (LECs).

Time Frame. The FCC proposed and seeks comment on a comprehensive timeline for the make-ready process. In particular, subject to certain exceptions and limitations, the FCC proposed a five-stage timeline for the make-ready process for wired facilities (including fiber or other wired attachments by wireless carriers):

1. 45 days for a utility to respond to a request for access;
2. 14 days for a utility to tender an estimate of its charges to perform any make-ready work;
3. 14 days for an applicant to accept the tendered estimate;
4. 45 days for the completion of the make-ready work; and
5. an additional 30 days for any coordination and make-ready work required in the event that some existing attachers fail to move their facilities as directed by the utility.

The FCC concluded that imposing such a timeline has the potential to speed pole access more than 50% of the time and cut average make-ready time in half (or better) in approximately 30% of cases. The FCC also seeks comment on the development of a timeline for the attachment of wireless facilities.

Contractors. In addition, the FCC proposed rules regarding the use of independent contractors to do attachment work, including allowing greater utility control over contractors performing survey and make-ready work and more flexibility over contractors actually attaching facilities. The FCC also drew a distinction between electric utilities and incumbent LECs regarding the level of control each may exercise over an attacher's use of independent contractors. The FCC also seeks comment on other options to expedite pole access, including specific recommendations regarding payments and schedules of charges for make-ready work, joint pole ownership, attachment techniques, and the collection of pole-attachment-related data.

Disputes. The FCC also seeks comment on certain proposals designed to refine its pole attachment dispute resolution processes. In particular, the FCC requests comment on whether it should modify its existing procedural rules governing pole attachment complaints; attempt to encourage staff-supervised, informal dispute resolution processes with a set of "best practices" or in other ways; adopt specific proposals relating to the remedies associated with pole attachment disputes; adopt specific penalty systems to deter unauthorized attachment; and make modifications to the current rule that allows an attacher to execute a pole attachment agreement and then later file a complaint challenging the lawfulness of the agreement's provisions (*i.e.*, the "sign and sue" rule).

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Please contact your Mintz Levin telecommunications attorney, or any attorney listed in the right column of this alert, for more information as we continue to follow these developments.

Endnotes

¹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-245 and GN Docket No. 09-51, FCC 10-84 (rel. May 20, 2010).

² “Boxing” refers to the installation of communications on both sides of the same pole at approximately the same height. “Bracketing” refers to the installation of “extension arms,” which extend from the pole to support communications lines at the same level as existing lines attached to the pole.

For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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