

April 15, 2011

## POLE ATTACHMENT REPORT AND ORDER AND ORDER ON RECONSIDERATION

The Commission recently adopted a *Report and Order and Order on Reconsideration* modifying the pole attachment rules and creating new pole rate formulas.<sup>1</sup> The revisions are steps by the Commission to promote competition and increase the availability of telecommunications and advanced services. Highlights of the new rules include significantly limiting the time period available for completion of make-ready for attachments, allowing use of third party contractors when the pole owner does not process make-ready requests in a timely fashion, revising the enforcement process to require “executive-level” negotiations, and establishing lower rates that are more in line with current cable rates.

### Timeline for Section 224 Access

The revised rules establish a timeline for Section 224 access. During Stage 1 of the timeline, the pole owner has 45 days after receipt of a complete application within which to conduct an engineering study to determine feasibility of the attachment, placement of the attachment and the necessity of make-ready.<sup>2</sup> Then, during Stage 2, the pole owner has 14 days to provide an estimate of make-ready charges after receiving the results of the engineering study.<sup>3</sup> In Stage 3, the attacher has 14 days to approve the estimate and provide payment.<sup>4</sup> Finally, for Stage 4, upon receipt of payment from the attacher, the pole owner must notify, in writing, any existing attachers that make-ready for a new attacher needs to be performed within 60 days. The pole owner may take an extra 15 days to complete actual make-ready.<sup>5</sup>

The access timeline applies to both wired and wireless attachments.<sup>6</sup> Utilities have an extra 30 days for wireless attachments.<sup>7</sup> Wireless attachers may file a complaint through the Commission’s complaint procedures for unreasonable delay, if utilities fail to meet the timeline.<sup>8</sup>

The revised rules require each utility to make available a “reasonably sufficient” list of contractors that it authorizes to perform surveys or make-ready work after missing a deadline.<sup>9</sup> If the utility fails to produce the list, the attacher may use a “same qualifications” standard to hire a contractor, meaning that a contractor must have the “same qualifications, in terms of training,

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<sup>1</sup> In the Matter of Implementation of Section 224 of the Act – A National Broadband Plan for Our Future, *Report and Order and Order on Reconsideration*, FCC 11-50 (April 7, 2011).

<sup>2</sup> *Id.* at ¶22. The foregoing timeline applies to orders consisting of less than 0.5% of poles owned within a state or 300 poles within a state during any 30-day period. “Large orders,” defined as the lesser of 5% of the utility’s poles within a state or 3,000 poles within a state receive an extra 15 days. For in-state orders of more than 3,000 poles, the Commission requires the parties to negotiate in good faith. *Id.* at ¶ 63.

<sup>3</sup> *Id.* at ¶ 22.

<sup>4</sup> *Id.* at ¶ 22.

<sup>5</sup> *Id.* at ¶ 22.

<sup>6</sup> *Id.* at ¶ 42.

<sup>7</sup> *Id.* at ¶¶ 42-43.

<sup>8</sup> *Id.* at ¶ 42.

<sup>9</sup> *Id.* at ¶ 54.

as the utility’s own workers.”<sup>10</sup> Final decisions regarding disputes over “capacity, safety, reliability, and generally applicable engineering purposes” are left up to electric utilities, though not in the case of ILECs.<sup>11</sup>

### **Other Access Proposals**

The Commission declined to adopt a schedule of charges for utilities or a staggered payment schedule for make-ready work.<sup>12</sup> It also declined to adopt requirements to collect information regarding the availability and location of poles, ducts, conduits and rights of way.<sup>13</sup>

### **Pole Attachment Dispute Resolution Procedures**

The Commission revised Rule 1.1404(k) to require “executive-level discussions” prior to the filing of a formal complaint with the Commission. Such discussions should now involve “individuals who have sufficient authority to make binding decisions” on behalf of their company.<sup>14</sup> The Commission will consider during enforcement proceedings pole owners’ and attachers’ coordinated efforts from an early stage in the process to determine whether terms and conditions are “just and reasonable.”<sup>15</sup>

### **Unauthorized Attachments**

For new agreements or amendments, the Commission will view as “presumptively reasonable” contract-based penalties for unauthorized attachments so long as they do not exceed those penalties adopted by the Oregon PUC.<sup>16</sup> If an attacher makes unauthorized attachments and then later enters into a pole attachment agreement, the Commission will consider it reasonable to apply the unauthorized attachment provisions in the agreement to the prior unauthorized attachments.<sup>17</sup> If the attacher refuses to sign the pole attachment agreement, the owner may seek other remedies including in state court for trespass.<sup>18</sup>

### **Sign and Sue Rule**

The Commission declined to amend Rule 1.1404(d) to add as a prerequisite for a later complaint a requirement that attachers provide notice to pole owners during negotiation of an agreement that there are issues with the agreement.<sup>19</sup>

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<sup>10</sup> *Id.* at ¶ 54.

<sup>11</sup> *Id.* at ¶ 49.

<sup>12</sup> *Id.* at ¶ 86-87.

<sup>13</sup> *Id.* at ¶ 89.

<sup>14</sup> *Id.* at ¶ 100

<sup>15</sup> *Id.* at ¶ 101

<sup>16</sup> *Id.* at ¶ 115

<sup>17</sup> *Id.* at ¶ 116

<sup>18</sup> *Id.* at ¶ 116

<sup>19</sup> *Id.* at ¶ 125

## **New Telecom Rate**

The Commission established an “upper bound” and “lower bound” telecom rate under Section 224(e).<sup>20</sup> The revised definition of “cost” for the upper boundary price, however is dependant on whether an area is designated “urban” or “non-urban.”<sup>21</sup> In urban areas, “cost” is defined as 66% of the “fully allocated costs” used for the pre-existing telecom rate. In non-urban areas, “cost” is defined as 44% of the “fully allocated costs” used for the pre-existing telecom rate. The new percentage-based system effectively reduces the cost of pole attachment rates.

The “lower bound” rate excludes capital costs from the definition of “cost of providing space.”<sup>22</sup> The Commission noted that capital costs associated with make-ready are already covered by the requirement that the attacher pay for capital costs that arise as a result of the new attachment. For other capital costs associated with pole rental, the Commission found that the attacher is not the “cost causer” of those costs and should therefore not be responsible for them. The definition of “cost of providing space” includes maintenance and administrative expenses.<sup>23</sup>

The Commission clarified that the pole attachment rate formulas also apply to wireless.<sup>24</sup> The Commission also stated that rates for telecom or cable providers that exceed the new telecom rates will not be considered “just and reasonable.”<sup>25</sup>

## **Incumbent LEC Pole Attachments**

Where incumbent LECs have a right of access to utility poles, they are entitled to rates, terms and conditions that are “just and reasonable” and may file a complaint with the Commission.<sup>26</sup> In reviewing an LEC complaint, the Commission will account for whether an LEC is in an inferior bargaining position with the utility.<sup>27</sup>

## **Reconsideration of 2010 Pole Attachment Order**

In reconsidering the 2010 Pole Attachment Order, the Commission reiterated that a utility may not prohibit an attacher from using boxing, bracketing or other attachment techniques, where the utility was using the technique at the time of the attacher’s request. However, a utility may choose to stop using a particular technique and accordingly refuse to allow future requesting attachers to use such a technique.<sup>28</sup> Moreover, where a pole is jointly owned and the owners have different standards regarding which techniques (boxing, bracketing, etc.) are used, the stricter standard may be enforced.<sup>29</sup> The Commission also restated that if rearrangement of facilities on the pole, whether in the electric or communications space, will permit a new

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<sup>20</sup> *Id.* at ¶ 140

<sup>21</sup> *Id.* at ¶ 149

<sup>22</sup> *Id.* at ¶ 144

<sup>23</sup> *Id.* at ¶ 145

<sup>24</sup> *Id.* at ¶ 153

<sup>25</sup> *Id.* at ¶ 154

<sup>26</sup> *Id.* at ¶ 202-203.

<sup>27</sup> *Id.* at ¶ 215

<sup>28</sup> *Id.* at ¶ 227

<sup>29</sup> *Id.* at ¶ 228

attachment, there is not “insufficient capacity” pursuant to Section 224(f)(2). There is also not “insufficient capacity” if a utility can accommodate new facilities by using attachment methods that the utility itself applies.<sup>30</sup>

If you have any questions, please contact [Rebecca Jacobs](#), [Mark Palchick](#) or any of the Womble Carlyle [Telecommunications](#) professionals.

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<sup>30</sup> *Id.* at ¶ 234