

## FCC Takes Further Action to Improve Efficiency of Wireless Deployment

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April 08, 2011

The FCC's actions in two proceedings on Thursday, April 7, 2011 should help pave the way for easier, less costly build-out of wireless infrastructure in the United States.

First, in a broad rulemaking order that impacts both wired and wireless pole attachments that is more fully addressed in a separate DWT Advisory issued today found [here](#), the FCC clarified its pole attachment rules to ensure that companies may expeditiously place antennas and related "wireless" equipment on poles in the "communications space" and above that space at the pole-top at the same low rates applicable to equipment and facilities attached by non-incumbent telecommunication providers.

Second, the FCC launched a Notice of Inquiry (NOI) seeking to improve state and local regulatory processes governing access to rights-of-way and wireless facilities siting by removing some of the more burdensome aspects of those processes, and asking for comments and information in order to develop best practices and/or rules to govern state and local regulatory bodies. The FCC's actions in these proceedings are part of the FCC's ongoing efforts to eliminate impediments to wireless facilities deployment.

### Pole attachment order

The FCC's April 7, 2011 Report and Order and Order on Reconsideration implementing Section 224 of the Act extensively revises the FCC's pole attachment rules in the 30 states where the FCC regulates poles to significantly improve the speed of, and reduce the costs associated with, deployment of wired and wireless facilities on poles. (More information found [here](#).) While addressing many issues for wired attachments, notably, the Order takes significant steps to remove the pole owner bottleneck that currently exists in the process for attaching wireless facilities to poles. Specifically, as to wireless attachments the FCC:

- Reaffirms that wireless carriers are entitled to the benefits and protections of the federal Pole Attachment Act (Section 224 of the Communications Act), including the right to pay attachment rates at no more than the telecom rate formula, which the FCC lowered in the same rulemaking to approximate the current cable pole attachment rate. As expressed by the FCC, "When an attachment requires more than the presumptive one-foot of usable space on the pole," the presumption can be rebutted. However, that simply means that the maximum rental would be a multiple of the regulated rate for one foot of space.
- Clarifies that Section 224 allows pole top attachments of wireless antennas as well as in what has traditionally been referred to as the "communications space" on a pole, which is generally above the minimum ground clearance for wires and attachments and a specific distance below the electric facility space.
- Adopts a four stage timeline for processing wireless pole attachment applications that follow the timeframes for wired attachments, generally, with two exceptions. An extra 30 days is added for make-ready performance for wireless attachments above the communications space, to account for utility concerns about safety and lack of experience with attachments above the communications space. In addition, the remedy for failure to meet the timeline for wireless attachments above the communications space is a complaint remedy rather than the self-effectuating contractor remedy for failure to perform timely survey and make-ready that applies to requests to attach in the communications space. The time frames for wireless attachments are:

Placement	Survey	Estimate	Acceptance	Make-Ready
Comm Space	45 days	14 days	14 days	60-75*
Pole Top	45 days	14 days	14 days	90-105*

\* The 15 day range accounts for a 15 day grace period afforded to a pole owner that timely notifies an attaching entity (prior to the expiration of the makeready timeframe) that it intends to complete any remaining makeready work itself. Failure on the part of the pole owner to timely

notify either shifts the makeready work to the attacher and its contractor (communications space) or triggers the attacher's right to file a complaint (pole top attachments). Pole owners also are given 15 additional days to complete surveys and 45 days to complete make-ready work for larger orders (i.e., up to the lesser of 0.5 percent of the utility's total poles or 300 poles within a state and less than 3,000 poles, at which point time is subject to negotiation). Moreover, pole owners can stop the clock for true emergencies, such as natural disasters.

- Clarifies that a pole owner must complete the 45 day survey process even if the wireless entity has not yet entered into a master agreement with the pole owner. This allows new wireless attachers to engage in contract negotiations at the same time that pole surveys are undertaken, rather than undertake a lengthy contract negotiation before being able to submit applications for specific attachments.
- Adopts a rebuttable presumption in wireless makeready timeframe complaint proceedings that access has not been provided on just and reasonable terms and conditions and shifts the burden to the utility to demonstrate that additional time is warranted.

The remedies available in such a complaint proceeding include mandated access within a specified time frame and in accordance with specified rates, terms, and conditions; substitution of just and reasonable rates, terms, or conditions for unjust and unreasonable ones; refund of an overpayment; and FCC forfeiture (i.e. fines on the utility).
- Requires that any evaluation of new types of equipment, including wireless equipment, be done on commercially reasonable terms, and in a reasonable time, and the FCC commits to monitoring industry practices in this area, including through the complaint process.
- Clarifies that regardless of whether a utility has a master agreement with a wireless carrier, the specificity requirement of section 1.1403(b) applies to all denials of requests for access. Thus, the utility must grant or deny access within 45 days, and if it seeks to deny access, the denial must in writing by the 45th day and must be specific, including all relevant evidence and information supporting the denial of access, and must explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

### Access to public rights-of-way and wireless siting

The NOI adopted by the FCC seeks information about how to improve government policies regarding access to public rights-of-way and wireless facilities deployment. The NOI specifically sets out to investigate ways to reduce the costs and time required for broadband deployment while encouraging private infrastructure investment and increasing broadband adoption.

The wide-ranging NOI seeks comments and data from various stakeholders, including state, local and Tribal governments, federal agencies, consumer advocates and the private sector on numerous rights of way and wireless siting issues and potential solutions. The FCC breaks down the categories of information it seeks as follows:

- Timeliness and ease of the permitting process.* The FCC asks parties to address the application and efficacy of its wireless "Shot Clock" ruling from 2009, in which the FCC set timelines for state and local action on collocation and other tower siting applications. In addition, the FCC seeks information about how current permitting processes work in practice, as well as how they might be improved. Beyond general commentary, the FCC requests that parties provide detailed data concerning specific experiences with permit approval processes.
- Reasonableness of charges.* The FCC solicits comments and data on existing rights-of-way and wireless facility siting charges and practices, including the degree to which current charges are considered reasonable. Along these lines, the NOI asks whether market-based or cost-based rates might be more satisfactory, and inquires how market-based rates are determined. Further, the FCC seeks evidence of specific circumstances in which charges are more likely to be unreasonable, as well as any impact such charges have on rates charged and services provided to broadband subscribers.
- Extent to which ordinances or statutes have been updated to reflect current communications technologies or innovative deployment practices.* The NOI invites comments regarding whether state statutes and local ordinances accurately reflect today's communications industry and recent changes in technologies. In particular, it seeks information on how current requirements affect the deployment of small antennas (such as microcells, picocells, femtocells, and Distributed Antenna Systems (DAS)) on existing facilities. The FCC also asks about how various jurisdictions accommodate the use of existing infrastructure to deploy wireless services.

- *Consistent or discriminatory/different treatment.* The FCC seeks comments on how existing ordinances deal with differences in proposed uses (access to rights of way versus wireless facility siting) and in the equipment to be deployed, and whether current requirements are reasonable and nondiscriminatory.
- *Presence or absence of uniformity due to inconsistent or varying practices and rates in different jurisdictions or areas.* The NOI requests commentary on differing practices and charges between neighboring jurisdictions, among different states and localities, and between different federal agencies. The FCC inquires whether differences in approach at each of these levels are problematic or manageable, and whether efforts at improving uniformity have been successful.
- *Other rights-of-way concerns.* This catch-all category includes an invitation for commentary on any other related issues not already covered as well as issues surrounding private rights-of-way and tower sites, the degree to which concerns about access to rights-of-way and wireless facilities siting are widespread or limited to particular jurisdictions, and the extent to which the FCC should attempt to gather more data relevant to the proceeding.
- *Best practices and compliance.* The NOI also solicits comments on solutions to the challenges surrounding access to rights-of-way and wireless facilities siting, including information about what government entities and other stakeholders have already done to address concerns (i.e., what “best practices” already exist). In addition, the FCC asks whether it should adopt “voluntary” compliance programs (such as best practices, competitions and awards for streamlined and effective processes, FCC-sponsored mediation of disputes) and/or should adopt formal rules or adjudicatory procedures to address problems on a case by case basis.
- *Legal authority.* Finally, the FCC invites comment on its legal authority to engage in educational activities, to adopt policy guidelines and rules, or to adjudicate rights of way cases under Section 253 of the Communications Act.

Comments to this Notice of Inquiry are due to the FCC no later than 60 days after the NOI is published in the Federal Register. Reply comments are due no later than 105 days after publication in the Federal Register. If you are interested in filing comments or have any questions about this proceeding, please contact us.

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