

**POLE ATTACHMENT RULES:  
ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING**

On May 20, 2010, the Commission released an Order and Further Notice of Proposed Rulemaking (“Rulemaking”) to revise the pole attachment rules as recommended in the National Broadband Plan in an effort to lower the costs of telecommunications, cable, and broadband deployment and to promote competition. By instituting these actual and proposed rule changes, the Commission hopes to reduce providers’ costs and provide quicker access to poles, in turn decreasing barriers to broadband deployment and increasing overall availability. To achieve these goals, the Commission revised its rules in the Order to: (1) establish a statutory right of communications providers to use space and cost-saving techniques currently used by the utilities themselves; and (2) establish a statutory right to timely access to poles. Additionally, in the Rulemaking, the Commission seeks comment on proposed changes to its rules that would include imposing timelines to obtain pole attachments, ways to improve the pole attachment process including modifications to current enforcement procedures, changes to the “sign and sue” rule that would favor pole owners, and modifications to the current rate structure. The Commission does not discuss the expansion of companies subject to the pole attachment rules. The specifics of the Order and Rulemaking are as follows:

**The Order**

The National Broadband Plan released on March 16, 2010, identified access to poles as having a significant effect on the deployment of broadband networks. In the Plan, the Commission recommended a number of items that could lower the cost of and improve access to utility poles. By this Order, the Commission adopts some of these recommendations. Specifically, the Commission clarifies its rules to permit attachers to use the same techniques as the utilities would themselves use in similar circumstances, with limited exceptions for issues involving safety, reliability, and engineering. Further, the Commission finds that access to poles, including “make-ready,” must be timely in order to constitute “just and reasonable access.”

**The Rulemaking**

The Rulemaking addresses seven key issues: (1) the institution of a new timeline for the make-ready process; (2) new rules for the use of outside contractors for pole attachment work; (3) new incentives for the quick completion of make-ready work; (4) an updated collection and maintenance method for the Commission to gather and make available information regarding the location and availability of poles, ducts, conduits, and rights-of-way; (5) modification of the Commission’s enforcement procedures, including: the establishment of best practices, modification of the rules for monetary awards and new penalties for unlawful/non-permitted attachments; (6) changes to the “sign and sue” rules that will require attachers to raise issues with pole attachment contracts during negotiations; and (7) changes to the current rate structure to make the rental market more uniform by bringing telecom pole attachment rates lower to meet current cable rates.

First, the Commission proposes a new timeline for the make-ready process. The proposed timeline would cover every step of the pole attachment process and contain five specific stages, including: (1) survey, (2) estimate, (3) attacher acceptance, (4) performance, and, where needed, (5) multiparty coordination. In addition to proposing a timeline for wired pole attachments, the Commission seeks comment on any exceptions or limitations to the timeline that the Commission should consider, including (1) exceptions for requests for access to a large number of poles; (2) timeline adjustments or notice requirements for modifications to the timeline; and (3) any issues that might warrant stopping the clock on the timeline. The Commission also requests comment on developing timelines for Section 224 wireless access and on whether the new timeline provides adequate time for written notification for modifications to a pole.

As recommended in the National Broadband Plan, the Commission also discusses the use of outside contractors for pole attachment work. With respect to surveys and communications make-ready work, the Commission proposes that attachers may use contractors to perform the work if either a utility has failed to perform the work within the timeline or if the utility agrees to use of the contractors. With respect to “post-make-ready attachment of facilities,” the Commission proposes retaining its existing rules – permitting attachers to use contractors who share the “same qualifications, in terms of training, as the utilities’ own workers.” For electric utilities and other non-incumbent LEC pole owners, the Commission proposes that attachers may use contractors to perform surveys or make-ready work that a utility has approved and certified for performing that work. The Commission further proposes that utilities and prospective attachers may jointly oversee contractors for survey and make-ready work. However, for electric utilities and other non-incumbent LEC pole owners, the Commission proposes that attachers that use contractors for surveys and make-ready work should invite representatives of the utility to accompany the contract workers and should agree ahead of time on an amount of notice to the utility. For incumbent LEC-owned poles, the Commission seeks comments on the proposal that attachers performing the work using contractors should invite a representative of the incumbent LEC to accompany the contractor, but that the incumbent LEC should not have any final decision-making power. With respect to work among electrical lines, the Commission proposes that the utilities may deny access by contractors unless the contract has “special communications-equipment related training” that the utility cannot match.

In addition to the timeline, the Commission also proposes additional incentives for performance of make-ready work in a timely manner. Specifically, the Commission proposes: (1) that payment for make-ready work should be made in stages, with the option to withhold payment until completion of work; and (2) requiring utilities to provide a schedule of common make-ready charges. Further, the Commission seeks comment on ways to streamline the relationship between prospective attachers and utilities when there is joint ownership of the pole, so that prospective attachers do not have to contact multiple owners to receive permission to attach. Accordingly, the Commission proposes that when a pole is jointly owned, the owners must determine amongst themselves which one of them will manage the pole. Any prospective attacher will only be required to deal with the owner managing the pole. In light of the Commission’s new rule that attachers may employ the same attachment techniques as utilities, the Commission also seeks comment on the exclusion of certain pole attachment techniques that were previously, but are no longer, used by a utility.

The Commission further seeks comment on how the Commission can improve the collection and availability of information regarding the location and availability of poles, ducts, conduits, and rights-of-way. To assist with this review, the Commission seeks comment on the reasonableness of obtaining and maintaining this information.

As part of the Rulemaking, the Commission also seeks ways to improve the enforcement process for pole attachment disputes. The Commission invites comment on its current process and the recommendations made in the National Broadband Plan to institute changes to its current procedures, including the creation of special forums and processes for attachment disputes and the adaptations of changes that would expedite resolution of pole attachment disputes. The Commission also seeks comment on establishing a set of best practices for resolution of disputes and on modifying the dispute resolution remedies that are to be available when the Commission determines that a utility has wrongfully denied or delayed access to poles. For example, the Commission seeks comment on specifying compensatory damages for unlawful denial or delay of access or where a rate, term, or condition is found to be unjust or unreasonable. Finally, the Commission also proposes modifying its rules for monetary awards. Under the current rules, a monetary award in the form of a “refund or payment” is calculated “from the date that the complaint, as acceptable, was filed, plus interest.” The Commission proposes to remove the phrase “from the date that the complaint, as acceptable, was filed, plus interest” and to replace it with “consistent with the applicable statute of limitations.”

In order to control the unauthorized use of poles, the Commission seeks comment on specifying penalties of \$500 per pole, per year, for attachment of facilities without an agreement and \$100 per pole plus five times the current annual rental per pole for attachments without a permit. Moreover, the Commission would like comment on how these penalties could be enforced and any alternatives to the penalties.

With regard to the “sign and sue” rule, the Commission seeks comment on its current rule permitting attachers to challenge the reasonableness or discriminatory nature of a pole attachment agreement after the agreement is signed, without any restriction on a time limit for such challenge. Specifically, the Commission seeks comment on an amendment to the rule that would require the attacher to raise any issues during contract negotiations. The Commission also seeks comment on when an attacher’s cause of action challenging a rate, term or condition in a pole attachment agreement accrues for purposes of the statute of limitations and whether the Commission should continue to follow common law principles in determining the time of accrual.

The Commission also requests comment on the current state of pole rental rates. Specifically, the Commission would like comment on ways to limit the “distortionary effects” of disparities between current pole rental rates. The National Broadband Plan recommended that the Commission “establish rental rates for pole attachments that are as low and close to uniform as possible.” Following the recommendations of the Plan, the Commission agrees that lowering the telecom rates for pole rentals (which are currently higher than the cable rates) will best promote broadband deployment. Accordingly, the Commission seeks comment on a range of issues addressing current rental rates, including ways to lower telecom rates and establish rate uniformity.

Comments in this proceeding are due 30 days after publication of the Order and Further Notice of Proposed Rulemaking in the Federal Register; with all reply comments due 30 days later. All filings should refer to WC Docket No. 07-245 and GN Docket No. 09-51.

Please contact [Rebecca Jacobs](#) or [Mark Palchick](#) or a member of the [Communications Practice Group](#) if you have any questions regarding this alert.

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