

FCC Law Blog

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National Broadband Plan Recommends Lower, Uniform Pole Attachment Rates

The Federal Communications Commission ("FCC") released its long-awaited National Broadband Plan (the "Plan") on March 16, 2010. The Plan emphasizes that encouraging and facilitating access to infrastructure, such as utility poles, is critical to the continued deployment and enhancement of broadband facilities in America. The Plan states that, "[c]ollectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment." Plan at 109. The Plan notes that "[t]hese costs can be reduced directly by cutting fees" and "can also be lowered indirectly by expediting processes and decreasing the risks and complexities that companies face as they deploy broadband network infrastructure." Plan at 110.

Accordingly, the Plan recommends the following:

(1) Establish pole attachment rental rates that are as low and close to uniform as possible. The Plan notes in particular the fact that incumbent local exchange carriers ("ILECs") are subject to almost three times the rates charged to cable television ("CATV") providers, while using similar amounts of space. The Plan states that "[a]pplying different rates based on whether the attacher is classified as a 'cable' or 'telecommunications' company distorts attachers' deployment decisions." *Id.* The Plan thus recommends that the rate currently charged to CATV providers – a rate that has been held to be just and reasonable and fully compensatory to utilities – should be applied to telecommunications carriers. The Plan leaves the door open for the application of such a rate to ILECs.

(2) Implement rules to lower the cost of pole attachment "make-ready" work. The Plan recognizes that make-ready charges are often the source of significant cost and delay when building broadband networks. The Plan acknowledges that "[r]eform of this inefficient process presents significant opportunities for savings." Plan at 111. To lower the costs of make-ready work and speed up the process, the Plan recommends (among other things): (a) establishing a schedule of charges for the most common types of work; (b) allowing prospective attachers to use independent, utility-approved and certified contractors to perform the make-ready work; (c) mandating that existing attachers take action to accommodate new attachers within a specified timeframe (e.g., 30 days); and (d) linking make-ready payments to the performance of the work, as opposed to requiring that all payments be made up front."

(3) Establish a comprehensive timeline for the attachment process and create a forum for dispute

resolution. Currently, no federal regulations address the duration of the process for obtaining access to poles, ducts, conduit and rights-of-way. As such, prospective attachers can spend months or even years attempting to gain access to necessary infrastructure. The Plan therefore recommends the creation of a federal timeline, applicable to all forms of communications attachments, to cover each step of the Section 224 access process (from application to issuance of the final permit). The Plan also takes issue with the lack of procedures for the timely resolution of pole attachment disputes. Accordingly, the Plan advises the FCC to consider approaches that not only speed up the attachment process, but also provide guidance to the industry. Among the things to be considered are creating specialized fora and processes for attachment disputes, establishing target deadlines for dispute resolution, and awarding compensation based upon the date access was denied as a means of expediting dispute resolution.

(4) Improve the collection and accessibility of information regarding the location and availability of poles, ducts, conduits and rights-of-way. The Plan states that the FCC "should ensure that information about utility poles and conduits is up-to-date, readily accessible and secure, and that the costs and responsibility of collecting and maintaining data are shared equitably by owners and users of these vital resources." Plan at 112. The database should be easily searchable, identify the owner of each pole, and contain up-to-date records of attachments and make-ready work that has been performed. The Plan recognizes that the collection of such information would assist pole owners and attachers by ensuring accurate and efficient application processing and fee collection.

(5) Amend Section 224 to establish a harmonized access policy for all poles, ducts, conduits and rights-of-way. The Plan notes that "without statutory change, the convoluted rate structure for cable and telecommunications providers will persist," and that "due to exemptions written into Section 224 [for poles owned by municipalities, cooperatives and utilities in states that have adopted their own pole attachment regulatory regime], a reformed FCC regime would apply to only 49 million of the nation's 134 million poles." *Id.* The Plan thus recommends amending or replacing Section 224 with a "harmonized and simple policy that establishes minimum standards throughout the nation." *Id.* This new statutory framework would: (a) establish a minimum set of criteria for all poles, ducts, conduits and rights-of-way; (b) provide all broadband providers (whether wholesale or retail) the right to access pole attachments, ducts, conduit, and rights-of-way based on reasonable rates, terms and conditions; (c) mandate that infrastructure access be provided with standard timelines established by the FCC and give the FCC the authority to award damages for non-compliance; and (d) allow the FCC to compile and update a comprehensive database of physical infrastructure assets.

(6) Establish a joint task force with state, Tribal and local policymakers to develop guidelines for rates, terms and conditions for access to public rights-of-way. The Plan requests that the task force make its recommendations within six months of the task force's creation.

Of course, the aforementioned proposals are recommendations, and thus have not been formally adopted or imposed upon industry participants. We expect the FCC to initiate or revive multiple rulemaking proceedings in the coming months to address in greater depth these suggestions, as well as the rest of the recommendations contained in the National Broadband Plan.

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