

## FCC Proposes New Rules for Pole Attachments

May 27, 2010

On May 20, 2010, the Federal Communications Commission (the "FCC" or the "Commission") issued an Order and Further Notice of Proposed Rulemaking (the "NPRM") in WC Docket No. 07-245 and GN Docket No. 09-51.<sup>1</sup> The NPRM proposed modifications to the Commission's "pole attachment" rules issued under Section 224 of the Communications Act, which mandate that electric utilities permit cable and telecommunications providers to place their facilities on or in existing poles, conduits and rights-of-way.

The order portion of the NPRM is not offered for comment. It holds that companies seeking to attach their facilities to poles may use the same "space and cost-saving" attachment techniques, such as "boxing" and "bracketing," that are used by the owners of the poles. However, a utility does not have to permit the use of these techniques under circumstances where the utility itself would not use that method or in circumstances in which safety or the integrity of the pole would be compromised. The order also clarifies that the duty of a utility to proceed with the pole attachment in a timely manner includes "make-ready" work to prepare the poles for attachment.

In the rulemaking portion of the NPRM, the FCC seeks comment on a range of issues relating to pole attachments, many of which had their origins in the FCC's recently published National Broadband Plan, issued March 16, 2010. Although the NPRM covers a wide range of topics such as expediting pole attachment applications and installations and improving the enforcement process at the FCC, the most prominent proposal is to lower the rates that utilities can charge telecom carriers, wireless providers and Internet service providers for the use of utility poles. Energy industry groups, such as the Edison Electric Institute, are already turning to the Senate to seek legislative action to forestall this change, which has the potential to be very costly in terms of diminished revenues.<sup>2</sup> Other specifically proposed changes to FCC regulations include: instituting specific timelines for pole attachment requests, allowing communications providers to use contract workers — including but not limited to the same contractors used by the utilities themselves — for performing attachments under certain circumstances, reforming the regulations relating to pole

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<sup>1</sup> Federal Communications Commission, Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-245 and GN Docket No. 09-51 (May 20, 2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-84A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-84A1.pdf).

<sup>2</sup> "Electricity Groups Turn To Congress In Bid To Defeat FCC Grid Proposal," *Energy Washington Week* (May 19, 2010).

attachment disputes in order to encourage settlements, and the possibility of regulating pole attachment rental rates for Incumbent Local Exchange Carriers (“ILECs”), which are currently subject to a different regulatory regime that results in somewhat higher rates for attachments.

Since the enactment of Section 224 in 1978, pole attachments have been a source of conflict between utilities and communications providers, becoming a critical issue as competitive telecom, cable and Internet services became more widespread in the last two decades. The statute provides for FCC regulation of pole attachment “rates, terms and conditions” in the event that a state does not regulate them, which 20 states now do. The Telecommunications Act of 1996 (“1996 Act”) expanded the FCC’s pole attachment jurisdiction to cover telecom providers and embedded in the statute two separate maximum rates — the “telecom rate” applicable to “telecommunications carriers” and the “cable rate” for attachments “solely to provide cable service.”<sup>3</sup>

The NPRM represents an abrupt change in direction from the Commission’s proposals in its November 20, 2007 Pole Attachment Notice,<sup>4</sup> which proposed that all communications providers should pay the same rate for attachments used to provide broadband Internet service, regardless of whether the provider was a cable system or a telecommunications carrier. As proposed, this rate would have been higher than the cable rate, but not as high as the telecom rate.<sup>5</sup> However, in the NPRM, the FCC is now proposing to reinterpret the maximum rate formulas in Section 224, so that the telecom rate would be lowered to be comparable with the cable rate. Such a change would, the FCC now believes, encourage the rollout of broadband service and remove deployment distortions created by the differences in rates charged to cable systems and telecommunications systems. The desire to harmonize the respective rates arises out of the fact that, over time, technological distinctions between the cable and telecom industries, including their widespread use of Internet technologies, have become increasingly meaningless.

However, such a change collectively could also cost pole owners, mostly electric utilities, hundreds of millions of dollars. The current rates for cable attachments are about \$3 a pole, while those for telecommunications

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<sup>3</sup> In *National Cable & Telecommunications Ass’n v. Gulf Power Co.*, 534 U.S. 327 (2002) (“*Gulf Power*”), the Supreme Court upheld the FCC’s ruling that cable systems offering comingled cable service and broadband service would be charged the cable rate for the purposes of pole attachment.

<sup>4</sup> Federal Communications Commission, Notice of Proposed Rulemaking, WC Docket No. 07-245, Docket Nos. RM-11293 and RM-11303 (Nov. 20, 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-187A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-187A1.pdf).

<sup>5</sup> See *FCC Proposes Changes to Regulation of Pole Attachments*, Dewey & LeBoeuf LLP Client Alert (Nov. 26, 2007), available at <http://www.deweyleboeuf.com/~media/Files/clientalerts/FCCProposesChangestoRegulationofPoleAttachments.ashx>.

providers are approximately \$12 a pole.<sup>6</sup> Moreover, because the rates charged to ILECs are not currently subject to the just and reasonable rates provision of Section 224, the Commission's additional proposal to potentially regulate these rates and lower them to be similar to the cable rate could result in very substantial losses to pole owners.

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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Because the 1996 Act mandates different formulae for telecom and cable rates, bringing the rates together at a single new level that is significantly lower than the telecom rate will require reinterpretation of the statute. The FCC proposal revolves around reinterpreting the term "cost" under Section 224(e), which fixes the formula for telecom rates. The FCC proposes that utilities would calculate the cable rate and the new "cost causation" telecom rate and charge a prospective attacher whichever rate was higher, although it is not clear how this regulatory change will escape the statutory requirement to use one formula for telecommunications carriers and the other for cable systems. Moreover, it remains to be seen whether the courts will accept the Commission's rationalization for the lower rate which is premised on the fact that the courts have found the cable rate to be "just, reasonable and fully compensatory."<sup>7</sup>

There is a further complication. Because of the D.C. Circuit's April 6, 2010 decision to overturn an FCC enforcement action against Comcast for unreasonable and discriminatory broadband network management practices,<sup>8</sup> the FCC is presently considering reclassifying broadband, currently an "information service," as a "telecommunications service." If the Commission were to do so, it would need to address an issue that was not fully settled by the Supreme Court in *Gulf Power*, i.e., whether or not comingled cable service and "telecommunications service" qualifies for the cable rate. A close reading of *Gulf Power* implies that it would, but the scenario has never arisen. Thus, the FCC's attempts to enforce net neutrality could spill over into the seemingly unconnected debate regarding pole attachment rates.

The NPRM has not yet been published in the *Federal Register*; once published, it will be subject to a 30-day comment period and a 60-day reply comment period.

*For more information, please contact David R. Poe at + 1 202 346 8039 or [dpoe@dl.com](mailto:dpoe@dl.com), Brett A. Snyder at + 1 202 346 8008 or [bsnyder@dl.com](mailto:bsnyder@dl.com), Catherine P. McCarthy at + 1 202 346 8753 or [cmccarthy@dl.com](mailto:cmccarthy@dl.com), J. Porter Wiseman at + 1 202 346 8086 or [jwiseman@dl.com](mailto:jwiseman@dl.com), or your Dewey & LeBoeuf relationship attorney.*

<sup>6</sup> "FCC plan raises alarms among utilities," *Megawatt Daily* (May 24, 2010).

<sup>7</sup> *FCC v. Florida Power*, 480 U.S. 245 (1987).

<sup>8</sup> *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. Apr. 6, 2010).