



KEY ISSUES FOR ELECTRIC UTILITIES IN THE FCC's APRIL 7, 2011 POLE ATTACHMENT ORDER

WC Docket No. 07-245

As set forth below, the FCC has adopted new rules regarding access and rates for pole attachments. The following is an overview of these issues, with a brief description of the new rules, reference to relevant portions of the FCC's Order, and citation to the FCC rule.

Issue	Description of FCC Rule	Reference to FCC Order	Rule Section(s)
Scope of Make-Ready Timeline	Make-ready timelines apply to all requests for attachment up to lesser of 300 poles or 0.5% of a utility's poles in a state.	¶¶ 62-67	1.1420(g)(1)
	For attachment requests up to lesser of 3,000 poles or 5% of a utility's poles in a state, utility may add 15 days to survey period and 45 days to make-ready period.	¶¶ 62-67	1.1420(g)(2)-(3)
	Utility must negotiate in good faith the timing of attachment requests larger than lesser of 3,000 poles or 5% of a utility's poles in a state.	¶¶ 62-67	1.1420(g)(4)
	Utility may treat multiple requests from a single cable operator or telecommunications carrier in a single state as one request when requests are filed within 30 days of one another.	¶¶ 62-67	1.1420(g)(5)
	Timelines are not safe harbors, so it may be unjust and unreasonable for utility to take longer than 45 days for make-ready for "medium-sized" requests or 30 days for make-ready for "small requests."	¶ 32	
Stage 1: Survey	Utility must respond to a request for access by a telecommunications carrier or cable operator within 45 days of receipt of a complete application (or 60 days for large requests).	¶ 24	1.1420(c); 1.1420(g)(2)
	Complete application = request that provides utility with information necessary under its procedures to survey poles.	¶ 25	1.1420(c)



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Stage 1: Survey	Completion of an initial master agreement is not a prerequisite to starting the clock on a completed application.	¶¶ 40, 46	
	Pole owner must timely notify attacher of errors in application and may not stop clock to correct errors once application is accepted as complete.	¶ 25	
	If request involves attachment of facilities that are unfamiliar to utility, engineering protocols and technical standards must be established prior to submission of application. If application is submitted for which such specifications have not been established, pole owner must respond within 45 days.	¶ 25, 73	
Stage 2: Estimate	If access request is not denied, utility must present an estimate of make-ready charges within 14 days of completing survey, or if attacher's contractor has performed survey, within 14 days of receipt by utility of survey.	¶ 26-28	1.1420(d)
Stage 3: Acceptance	Attacher must accept the estimate and make payment before estimate is withdrawn, which may be done by utility after 14 days. If estimate is withdrawn, attacher must resubmit application.	¶ 26-28	1.1420(d)(1)-(2)
Stage 4: Make-Ready	Upon receipt of payment of make-ready estimate, utility shall immediately notify, in writing, all known existing attachers that may be affected by make-ready.	¶ 29	1.1420(e)
	Make-ready work must be completed for attachments in communications space within 60 days of receipt of payment (or 105 days for large projects).	¶¶ 29-32	1.1420(e)(1); 1.1420(g)(3)



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Stage 4: Make-Ready	Utility must complete make-ready work for wireless attachments above communications space within 90 days (or 135 days for large projects).	¶ 33	1.1420(e)(2); 1.1420(f)
	If make-ready work is not completed within dates specified above, a utility may assert right to 15-day extension to complete make-ready work.	¶¶ 36-39	1.1420(i)(2)
Stop the Clock	Before a utility offers a make-ready estimate to the attacher in Stage 2, a utility may stop the clock if the parties have no master agreement specifying the rates terms, and conditions of attachment.	¶¶ 46-47	1.1420(h)(1)
	During performance of make-ready, a utility may stop the clock for "good and sufficient cause that renders it infeasible" for the utility to complete the make-ready within the timeline.	¶¶ 68-73	1.1420(h)(2)
	Utility must immediately notify, in writing, the attaching entity and other affected entities with existing attachments of the reason for, and the date and duration of, the stoppage. Stoppage must be no longer than necessary and must end when utility returns to routine operations.	¶¶ 68-73	1.1420(h)(2)
Remedies if Deadlines Missed	If utility does not meet the deadline to complete a survey or make-ready for attachments in communications space, attacher may hire a contractor to conduct survey or complete make-ready work.	¶¶ 49-53	1.1420(i)
	Utility must make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space.	¶¶ 54-57	1.1422(a)



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Remedies if Deadlines Missed	Any requirements that a utility places on listed contractors must be just, reasonable, and nondiscriminatory	¶ 56	
	If attacher hires a contractor for survey or make-ready work in communications space, it must choose from among utility's list of authorized contractors, unless utility fails to develop and keep up-to-date list.	¶¶ 54-57	1.1422(b)
	Attacher must invite a utility representative to accompany and consult with contractor, and electric utility may make final decisions on a nondiscriminatory basis, on issues of safety, reliability, or generally applicable engineering concerns, subject to complaint proceeding.	¶¶ 58-61	1.1422(c)-(d)
	Utility representative may monitor the contractor's work and insist that the work meet utility specifications for safety and reliability, including requirements that may exceed NESC standards	¶ 56	
	If utility does not meet deadline to complete a survey or make-ready for wireless attachments above communications space, attacher may file a complaint case with FCC.	¶ 42	
	In a complaint case for failure to meet the deadlines for wireless attachments above the communications space, a rebuttable presumption applies that access has not been provided on just and reasonable terms and conditions. Utility has the burden of demonstrating that additional time is warranted.	¶ 43	



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Remedies if Deadlines Missed	Remedies in wireless complaint case include mandated access within specified time frame subject to specified rates, terms, and conditions; substitution of existing rates, terms, or conditions; refund of overpayment; and enforcement actions.	¶ 43	
Other Wireless Attachment Issues	Telecommunications providers have a right to pole-top access, subject to utility's right to deny access for insufficient capacity, safety, reliability, and generally applicable engineering concerns.	¶ 77	
	Denials of access must be in writing, reasonable in nature, and specific with regard to particular attachment(s) and particular pole(s) at issue.	¶ 75-76	
Use of Contractors for Attachment	Attacher may use contractor to attach a wireless antenna above the communications space and safety space, but contractor must have proper qualifications and be approved by utility to perform such work.	¶¶ 78-80	
	The right of attachers to use contractors of their own choosing for post make-ready attachment is limited to communications space and associated safety space.	¶ 80	
Management of Jointly Owned Poles	Joint owners must coordinate and cooperate with each other and with requesting attachers. Utility procedures requiring attachers to undergo a duplicative permitting or payment process would be considered unjust and unreasonable.	¶¶ 82-85	
	If joint owners have different standards regarding use of boxing, bracketing, or other attachment techniques, joint owners may apply more restrictive standards.	¶ 228	



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Unauthorized attachments	It is presumptively reasonable for a utility to include provisions in a pole attachment agreement for penalties for unauthorized attachments, so long as they do not exceed penalties implemented by Oregon PUC:	¶¶ 113-118	
	(1) Fee of \$500 per pole for pole occupants without a contract;	¶¶ 115	
	(2) Fee of five times current annual rental fee per pole if pole occupant does not have a permit and violation is self-reported or discovered through joint violation, with additional sanction of \$100 per pole if violation found by pole owner in an inspection in which pole occupant has declined to participate; (3) Pole owner must provide notice of a violation before seeking relief; (4) Attachers must have chance to avoid sanctions by submitting plans of correction within 60 days of receipt of notice of violation or by correcting violation and notifying pole owner within 180 days; (5) Both parties have mutual obligation to correct immediately violations that pose imminent danger to life or property. Party responsible for violation responsible for costs of actual corrections; and (6) Opportunity for resolution of factual disputes via settlement conferences before an alternative dispute resolution forum.		
	Penalties for unauthorized attachments may be included in new agreements, or amendments to existing agreements, executed after effective date of FCC R&O	¶ 114	



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Issue	Description of FCC Rule	Reference to FCC Order	Rule Section(s)
Pole Rates	Maximum just and reasonable rate for attachments to poles by a telecommunications carrier or cable operator providing telecommunications services is higher of the rate yielded by two formulas:	¶¶ 126-198	1.1409(e)
	(1) Rate = Space Factor x Cost Urban areas: Cost = 66% of (Net Cost of Bare Pole x Carrying Charge Rate) Non-urban areas: Cost = 44% of (Net Cost of Bare Pole x Carrying Charge Rate).	¶¶ 146-152	1.1409(e)(2)(i)
	(2) Rate = Space Factor x Net Cost of Bare Pole x (Maintenance and Administrative Carrying Charge Rate).	¶¶ 142-145	1.1409(e)(2)(ii)
	Wireless telecommunications carriers are entitled to the telecom rate formula under Section 224(e)	¶ 153	
	Where a wireless attachment requires more than the presumptive one-foot of usable space on a pole, a utility may rebut the presumption in calculating the appropriate rate for the attachment.	¶ 153	
	Rates for pole attachments by telecommunications carriers or cable operators providing commingled services are not just and reasonable if they exceed telecom rate.	¶ 154	
ILEC Attachments and Rates	ILECs have no right of access under Section 224(f)(1), but are entitled to just and reasonable rates, terms and conditions under Section 224(b)(1) if granted access.	¶¶ 199-212	
	ILECs are not entitled to a benchmark rate, but may file a complaint with the FCC that a rate, term, or condition in a joint use or joint ownership agreement is unjust or unreasonable.	¶¶ 214-220	1.1424



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ILEC Attachments and Rates	In an ILEC complaint case, FCC will take into account following factors: (1) evidence of bargaining power; (2) extent to which an ILEC lacks the ability to terminate an existing agreement and obtain a new agreement; (3) whether provisions in a new ILEC agreement are similarly situated to rates, terms and conditions offered by electric utility to telecommunications carrier or cable operator or whether such terms provide a material advantage to ILEC; (4) rates, terms and conditions ILEC offers to electric utility; and (5) whether a term or condition was included in parties' prior joint use or joint ownership agreement.	¶¶ 215-219	
	If electric utility declines or refuses to provide an ILEC with access to the electric utility's agreements with other telecommunications carriers or cable operators, to provide other information upon reasonable request, ILEC may seek to obtain such access through discovery.	¶ 217	1.1424
Use of Attachment Techniques	A utility may not prohibit an attacher from using boxing, bracketing, or any other attachment technique on a going forward basis where the utility, at the time of an attacher's request, employs such techniques itself.	¶ 227	
	A utility may, however, choose to reduce or eliminate altogether the use of a particular method of attachment used on its poles, including boxing or bracketing, which would alter the range of circumstances in which it is obligated to allow future attachers to use the same techniques.	¶ 227	



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Use of Attachment Techniques	An electric utility's use of a particular attachment technique for facilities in the electric space does not obligate utility to allow the same technique to be used by attachers in the communications space, but may obligate utility to allow use of that technique in the electric space for wireless pole top attachments.	¶¶ 229-230	
	A pole does not have "insufficient capacity" for a new attachment where a utility can rearrange its electric facilities to accommodate a new attacher.	¶¶ 231-234	
Dispute Resolution	Prior to filing a complaint, an attacher or prospective attacher must engage or attempt to engage in executive-level discussions with the pole owners(s) to resolve the dispute. A refusal by the pole owner(s) will be considered an unreasonable practice.	¶¶ 100-101	1.1404(k)
	A refusal to enter into a pole attachment agreement because it contains a dispute resolution procedure would be considered unreasonable.	¶ 105	
	It would be reasonable for parties to agree to a forum other than FCC (e.g., arbitrator or expert panel) to resolve disputes, but cannot insist party waive its right to file complaint with the FCC.	¶ 105	
	In a complaint case, the FCC may order a refund or payment, if appropriate, and the refund or payment will extend as far back in time as "applicable statute of limitations" allows.	¶ 112	1.1410(a)(3)
	A prospective attacher may file a denial of access complaint with the FCC at any time, including later than 30 days after the date of denial.	¶ 106	



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