The Commission Should Impose A Time Limit for Issuance of Pole Attachment Permits to End the Interminable Delays that Greatly Undermine Broadband Deployment and Competition

September 19, 2008

OVERVIEW

1. A Gaping Hole in the Current Rules – The Lack of a Time Requirement for the Issuance of Pole Attachment Permits
2. Pole Owners Have No Incentive to Act Promptly on Attachment Requests, and Many Owners Actually Have an Incentive to Slow-Roll the Process
3. Given these Incentives, Many Pole Owners Take Advantage of the Gaping Hole in the Rules By Causing Tremendous Delays in the Attachment Process
4. Pole Attachment Delays Completely Derail and/or Greatly Delay Broadband Deployment, While Also Harming Competition and Unfairly Tilting the Playing Field
5. The Commission's Recent Cable Franchising Order Greatly Supports Adoption of a Time Limit Here

OVERVIEW

6. Numerous Commenters have Proposed Pole Attachment Time Limits for the Commission to Implement
7. Several States that Regulate Pole Attachments Have Issued Deadlines as well, Further Proving that Pole Attachment Deadlines are Feasible
8. Pole Owner Responses Do Not Undermine, and, if anything, Provide Further Support for, the Imposition of a Time Period
9. Simply Put, the Interminable Delays Must Finally Come to an End, Which Will Only Occur if the Commission Imposes a Time Period On Issuance of Pole Attachment Permits
10. Types of Time Limits the Commission Could Adopt

1. A Gaping Hole in the Current Rules -- The Lack of a Time Requirement for the Issuance of Pole Attachment Permits

- **Pole Attachment Delays are a Fundamental Problem that Must Be Addressed Now** – Attachers need to have timely access to poles to provide broadband services. It is a fundamental issue. Without timely access, the other issues in this proceeding are irrelevant because until access is obtained, broadband services (including both wireline and wireless services) are derailed and customers are without service. As one provider commented, "Perhaps the greatest enemy of an attacher in the make-ready phase is delay."
- **A Gaping Hole in the Current Rules** – Yet, under the current rules, there is no time limit whatsoever under federal law specifying the period within which a pole owner has to issue an attachment permit.

2. Pole Owners Have No Incentive to Act Promptly on Attachment Requests, and Many Owners Actually Have an Incentive to Slow-Roll the Process

- **Many Pole Owners Compete Against Providers** – ILECs, who are also pole owners, compete against other broadband providers all of the time. In addition, the Commission has found that hundreds of public power entities offer some kind of broadband service.
- **Example of Such Competition --** One provider signed a contract with a customer to provide service, with an anticipated delivery date to the customer of nine months. The utility failed to perform the make-ready work necessary to allow the provider to construct its plant on a timely basis, claiming that the utility lacked sufficient resources to meet the requested timetable. When the provider could not meet the customer's delivery date nor provide a reasonable estimate of a later delivery date, because of the utility's refusal to provide timetables or perform the work, the customer contacted the utility directly to attempt to obtain that information. The utility instead contracted directly with the customer and, using the utility's crews, quickly constructed the necessary fiber in the power space and leased it to the customer directly. The utility apparently had no trouble finding the resources to support the customer once it took over the account.

2. Pole Owners Have No Incentive to Act Promptly on Attachment Requests, and Many Owners Actually Have an Incentive to Slow-Roll the Process

- **Benign Indifference at Best** –Even those utilities that do not compete against broadband providers have no incentive to act promptly on pole attachment requests.
- **Commission Finding Supports this Conclusion** -- The Commission has found that a utility's position in a pole attachment negotiation is virtually indistinguishable from that of an incumbent local exchange carrier ("ILEC") in an interconnection negotiation, where an ILEC has "scant, if any, economic incentive to reach agreement."
- **Market Inefficiency** – In addition, there is a clear market inefficiency, with pole owners holding all of the leverage, and providers having none.

3. Given these Incentives, Many Pole Owners Take Advantage of the Gaping Hole in the Rules By Causing Tremendous Delays in the Attachment Process

- **Taking Advantage of the Gaping Hole in the Current Rules** -- Many pole owners take advantage of the gaping hole in the current rules, to the great detriment of providers, their customers, and broadband deployment.
- **Numerous Pole Owners Fail to Even Respond to Attachment Applications for Many Months --** Many providers often do not even receive any response to their application for several months or longer.
- **Many Pole Owners Fail to Complete Make-Ready Work Until a Year or More after Receipt of an Application –** Comments describe delays reaching 12 months, 15 months, 16 months, 3 years and 4 years. Waiting for a utility to issue the permit is often like "Waiting for Godot," you just wait and wait and then wait some more, and sometimes the customer is long gone. The current rules, without a time period to reign in utility dilatoriness, may inadvertently give providers an incentive to engage in unauthorized attachments so as to not lose their customers because of inordinate licensing delays.

3. Given these Incentives, Many Pole Owners Take Advantage of the Gaping Hole in the Rules By Causing Tremendous Delays in the Attachment Process

- **To Make Matters Even Worse, Pole Owners Often Refuse to Provide Any Indication of When the Work will be Completed**

  -- **Customers' Reasonable Expectations**: Potential customers need to know when they should expect to receive the service, and do not want to sign up with a provider not knowing whether the customer will begin receiving the service in months or years.

  -- **Utilities' Non-Responses**: Yet, questions to the pole owner regarding scheduling are frequently met with silence or "we'll get to it, when we get to it."

3. Given these Incentives, Many Pole Owners Take Advantage of the Gaping Hole in the Rules By Causing Tremendous Delays in the Attachment Process

- **Pole Owners Often Refuse to Provide Any Indication of When the Work will be Completed (continued)**

  -- **End Result**: Therefore, it is impossible for broadband providers to manage their customers' expectations, further compounding the untenable delay problem. As one provider commented, "competitive providers must deal with unknown make-ready completion intervals when they request [attachments], making it extremely difficult to introduce services to market or set delivery intervals on potential sales."

4. Pole Attachment Delays Completely Derail and/or Greatly Delay Broadband Deployment, While Also Harming Competition and Unfairly Tilting the Playing Field

- **Derailing Broadband Services** — Some providers are forced to forego or curtail business in certain cities or towns because of pole owners' lengthy delays in connection with pole attachments. As one provider correctly stated, "[i]n order for competitive telecommunications providers to be economically viable in the marketplace, they need access to poles on an expedited schedule."
- **Delaying Broadband Services** — It is axiomatic that significant delays in pole attachments, at the very least, greatly delay the provision of broadband services, which are entirely dependent on such attachments.

4. Pole Attachment Delays Completely Derail and/or Greatly Delay Broadband Deployment, While Also Harming Competition and Unfairly Tilting the Playing Field

- **Harming Competition and Retaining an Unbalanced Playing Field** –- As several providers have commented, "timeframes are necessary to achieve a modicum of competitive neutrality, because ILECs (and electric companies installing facilities for communications purposes) do not need to wait for a license." Existing attachers also have an unfair advantage if new attachers face lengthy delays.
- **Pole Owners Often Act Much More Quickly on Their Own Attachments** – As numerous providers have described, pole owners often act much more quickly when installing their own facilities, thereby gaining a critical advantage over their competitors and undermining broadband competition.
- **Bottom Line** -- When a carrier cannot ensure timely service to a customer because of attachment delays, that carrier is unfairly disadvantaged and may never get a chance to provide service to that customer at all.

4. Pole Attachment Delays Completely Derail and/or Greatly Delay Broadband Deployment, While Also Harming Competition and Unfairly Tilting the Playing Field

- **Revenue Impact from Delays: A Lose/Lose Scenario for Providers**

  -- **One Side of the Revenue Equation**: As one provider correctly commented, "the loss of revenue from being unable to access the market [due to attachment delays] often cripples competitive attachers."

  -- **The Other Side of the Revenue Equation**: Moreover, where delays occur, such providers are further harmed on the other end of the revenue equation, as they have their capital tied up for indeterminate times, having previously paid the pole owner for the make-ready work that still has not been performed. Also, where the poles are jointly owned, one owner may issue a license many months before the other pole owner does, causing a provider to pay rental fees to one pole owner even though it cannot use the pole because of the dilatory conduct of the other owner.

4. Pole Attachment Delays Completely Derail and/or Greatly Delay Broadband Deployment, While Also Harming Competition and Unfairly Tilting the Playing Field

- **The Commission has Recognized the Critical Importance of Timely Access to Poles:**
  - "We agree with attaching entities that time is critical in establishing the rate, terms and conditions for attaching. Prolonged negotiations can deter competition because they can force a new entrant to choose between unfavorable and inefficient terms on the one hand or delayed entry and, thus, a weaker position in the market on the other."
  - Lengthy delays in resolving access issues are "not … conducive to a pro-competitive, deregulatory environment."

5. The Commission's Recent Cable Franchising Order Greatly Supports Adoption of a Time Limit Here

- **Cable Franchising Order** -- The Commission recently imposed a time limit by which local franchising authorities ("LFAs") must respond to cable applications even though (i) there were significant disputes as to the existence of any delays caused by LFAs, (ii) LFAs did not have control over how long the franchising process would take (because franchise agreements are actually negotiated instruments, not "take or leave it" documents); and (iii) local governments want additional providers in their localities to provide their citizens with more options.
- **The Commission's Reasoning in the Cable Franchise Order is Applicable to Pole Attachments** -- In the cable franchising order, the Commission found broadband was being delayed or derailed, that the franchising process sometimes took a year or longer, and that complaints were not adequate remedies since they invariably entailed significant additional delay and expense. All of those findings are applicable here to pole attachment applications and the resulting delays caused by utilities.

5. The Commission's Recent Cable Franchising Order Greatly Supports Adoption of a Time Limit Here

- **In fact, the Case for a Deadline for Pole Attachments is Far Stronger Here than it was in the Cable Franchising Order:**

  -- Here, private entities are causing the delays

  -- The evidence of delays by utilities is overwhelming

  -- Utilities actually do control how long the process takes

  -- Pole owners have no interest in having additional broadband providers in their service territories (in fact, many pole owners even compete with the broadband providers).

6. Numerous Commenters have Proposed Pole Attachment Time Limits for the Commission to Implement

- **Many Proposals for Time Limits** – Numerous commenters have proposed that the Commission adopt a time limit from date of application to date of issuance of a pole attachment permit. Many additional commenters have complained about the untenable delays as well, which unquestionably need to come to an end.

7. Several States that Regulate Pole Attachments Have Issued Deadlines as well, Further Proving that Pole Attachment Deadlines Are Feasible

- **Connecticut Deadline from Date of Attachment to Date of Permit**: **90 days** (except **125 days** if pole replacement is necessary) and **30-50 days** for smaller applications.

- Connecticut DPUC correctly reasoned as follows:

  -- That a longer time period for attachments "is not reflective of today's customer-driven telecommunications market. Connecticut customers … deserve the most efficient delivery of services, and thus the [attachment] process must be streamlined."

  -- "A set time interval also allows the pole administrator to better manage the pole attachment process [and] it provides third party attachers and their customers with some level of certainty and expectation to better conduct their businesses."

7. Several States that Regulate Pole Attachments Have Issued Deadlines as well, Further Proving that Pole Attachment Deadlines Are Feasible

- **New York Deadline from Date of Attachment to Date of Permit**: Effectively **104 Days** if attacher immediately pays invoice (45 days for survey, utility then has 14 days to submit invoice for make-ready, and 45 days once invoice is paid to complete the make-ready work).
- **New York Public Service Commission persuasively reasoned**: "**Since time is the critical factor in allowing Attachers to serve new customers**, it is reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire contractors themselves to do the work, or to allow Attachers to hire approved outside contractors."
- **Logic of Conn. and NY Commissions is Just as Applicable Here** – Thus, Commission should adopt a time limit here.
- **Other State Deadlines** -- Several other states have deadlines, including, but not limited to, Maine and Vermont.

8. Pole Owner Responses Do Not Undermine, and, if anything, Provide Further Support for, the Imposition of a Time Period

- **Utility Silence** – No utility explained why all deadline proposals, regardless of their length, should be rejected. Nor could they.
- **No Response to State Deadlines –** No utility can or did explain why deadlines imposed by a number of states are workable, but a deadline issued by the Commission that would apply to other states is somehow unworkable.

8. Pole Owner Responses Do Not Undermine, and, if anything, Provide Further Support for, the Imposition of a Time Period

- **Utilities' Red Herring Arguments:**

  -- ***Utilities' Argument Against Use of Independent Contractors*** : Some utilities claim that deadlines should not be imposed because independent contractors cannot be used for this type of work. That argument, however, is completely belied by the comments of other utilities, who admit that such contractors can do the work, and by the indisputable fact that many independent contractors actually perform the utilities' work (e.g., Henkels and McCoy; Carr and Duff; Miller Brothers Electric; Pike Contractors; Riggs Distiller; and MJ Electric).

  -- ***Utilities' Complaint Argument***: Some utilities claim that providers should just file complaints where there are lengthy delays. Complaints, however, are exceedingly expensive, and only lead to further delays (which is the problem in the first place). Case-by-case resolution of every pole attachment dispute only stifles competition. Indeed, providers are permitted to file complaints today, and yet the delays continue to occur.

8. Pole Owner Responses Do Not Undermine, and, if anything, Provide Further Support for, the Imposition of a Time Period

- **Utilities' Red Herring Arguments (continued):**

  -- ***Utilities' Safety, Engineering and Reliability Argument***: Utilities claim that safety, engineering and reliability concerns undermine any deadline proposal, no matter the length of the deadline. This claim is false. **Delays of a year or more in the process simply are not safety, engineering or reliability issues – they are harm to broadband deployment and competition issues. Moreover, some utilities already timely respond to pole attachment requests and perform the make-ready work (all within about 90 days or less after application), establishing that such timelines can be met.** As one provider aptly commented, "pole owners routinely complete make-ready work anywhere from several months to several years." As another stated, some utilities provide "access within three months after receiving an application, others take more than five times as long." Further, as discussed earlier, pole owners often perform their own attachments far quicker, once again establishing that attachments can be performed without protracted delays.

8. Pole Owner Responses Do Not Undermine, and, if anything, Provide Further Support for, the Imposition of a Time Period

- **Utility Admissions:**

  -- ***Independent Contractors*:** As mentioned above, some utilities admit that independent contractors can perform the work.

  -- ***Utilities Claim Deadlines May Work with Overtime Pay***: Some utilities admit that a deadline could be acceptable if providers agreed to pay overtime for the work, and therefore these utilities admit that deadlines are feasible. Moreover, no overtime pay should be required since independent contractors can perform the work if utilities lack sufficient employees to complete the work in a reasonable period of time.

  -- *Utilities Claim Deadlines Would Work for Smaller Jobs*: Some utilities admit that a deadline would be acceptable for smaller jobs. Accordingly, if a deadline would work for smaller jobs, then certainly some deadline would work for all jobs.

9. Simply Put, the Interminable Delays Must Finally Come to an End, Which Will Only Occur if the Commission Imposes a Time Period On Issuance of Pole Attachment Permits

- **Interminable Attachment Delays Continue to Undermine Broadband Deployment and Competition** – In sum, the comments in this proceeding are replete with examples of interminable delays in the issuance of pole attachment permits, thereby greatly undermining broadband deployment and competition. As one provider aptly concluded, "Utilities are notoriously slow during the make-ready process…"
- **Interminable Delays Must Come to an End --** Pole attachment delays have continued for far too many years, and must finally come to an end if broadband deployment and competition are to be fully realized.

9. Simply Put, the Interminable Delays Must Finally Come to an End, Which Will Only Occur if the Commission Imposes a Time Period On Issuance of Pole Attachment Permits

- **A Time Limit is Long Overdue and Desperately Needed –** Accordingly, the Commission should impose a time limit for the maximum length of time pole owners can take to issue a pole attachment permit and implement appropriate enforcement mechanisms to ensure compliance with the time limit.
- **Ignoring this Issue Will Lead to More Delays** – Without such a time limit, significant delays will continue to incur to the tremendous detriment of both providers and consumers. The Commission should not refrain from adopting a time period, and thereby continue to permit – and indeed, condone – the dilatory actions of many utilities that greatly undermine and derail broadband deployment and competition.

10. Types of Time Limits the Commission Could Adopt

- **Options for the Commission** -- While it is clear that the Commission should impose a time limit (which will greatly reduce the delays and enhance broadband deployment and competition), the Commission has an option as to which type of time limit to adopt.
- **Types of Time Limits: Commission could impose any of the following types of time limits**

  -- A flat time limit (e.g., New York)

  -- A time limit based on the number of poles involved

  -- A time limit based on whether a pole replacement is necessary (e.g., Connecticut).