

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 224 of the Act)	WC Docket No. 07-245
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
)	

EMERGENCY MOTION FOR STAY

Pursuant to 47 C.F.R. § 1.43, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Florida Public Utilities Company, Oncor Electric Delivery Company, LLC, Progress Energy, Inc., Southern Company, and Tampa Electric Company (collectively “Petitioners”) request that the Commission issue a stay of revised 47 C.F.R. § 1.1409(e) (the reinterpreted telecom rate) pending judicial review.

Revised Rule 1.409(e) was adopted in FCC 11-50, WC Docket No. 07-245 & GN Docket No. 09-51, published at 76 Fed. Reg. 26620 (May 9, 2011) (the “Order”), and has an effective date of June 8, 2011. If the rule is not stayed pending judicial review, and the rule is ultimately held to be unlawful, there will have been a period of time (likely to exceed one year) during which an unlawful rule causes irreparable harm to Petitioners by depriving them of revenue to which they would have been entitled, without a clear opportunity for recovery of such revenue, in the event that the unlawful rule is ultimately overturned by the court. Moreover, effectiveness of the unlawful rule during the pendency of the appeal will further strain relationships that are important not only to electric system safety and reliability but also broadband deployment.

Petitioners filed a Petition for Review of the Order in the Court of Appeals for the District of Columbia on May 18, 2011, and intend to challenge revised Rule 1.1409(e), among other portions of the Order.¹ The relief sought in this motion would merely preserve the *status quo* (and the regulatory paradigm that has been in-place for more than fifteen years) pending judicial review.²

The Commission's Standard For Motions For Stay

1. In reviewing a motion for stay, the Commission evaluates whether:

(1) the movants are likely to succeed on the merits on review; (2) the movants would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest.³

The Commission has recognized that no single factor is dispositive and that “the relative importance of the four criteria will vary depending upon the circumstances of the case.”⁴ Instead, the Commission typically balances all four factors, but does not require a showing as to each factor in every case.⁵ As recently stated, “[i]f there is a particularly overwhelming showing in at

¹ A stamped-filed copy of the Petition for Review was served upon the Secretary (via U.S. Mail) and the Office of General Counsel (via hand-delivery) on May 18, 2011.

² At this time, Petitioners do not seek a stay of Rules 1.1420, 1.1422 or 1.1424 because no effective date has been published. If and when an effective date is published, Petitioners may file a supplemental motion seeking a stay of one or more of these rules pending resolution on appeal.

³ *In the Matter of Review of Part 87 of the Commission's Rules Concerning the Aviation Radio Service*, 26 FCC Rcd. 685, 687 n.16 (2011). See also *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 427 (8th Cir. 1996) (in granting in part the petitioners' motion to stay, the court stated, “we grant the petitioners' motion to stay the FCC's pricing rules and the ‘pick and choose’ rule contained in its First Report and Order pending a final decision on the merits.”); *In the Matter of Wireless E911 Location Accuracy Requirements*, 23 FCC Rcd. 4011 (2008) (granting several motions to stay and staying for six months the initial compliance date of rule); *In the Matter of Telecommunications Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 23 FCC Rcd. 1705 (2008) (granting motion to stay and staying application of rules for at least 90 days, pending further Commission review).

⁴ *Telecommunications Relay Servs.*, 23 FCC Rcd. at 1706-07.

⁵ *In the Matter of Review of Part 87 of the Commission's Rules Concerning the Aviation Radio Service*, 26 FCC Rcd. at 687 n.16.

least one of the factors, the Commission may find that a stay is warranted” even if other factors have not been met.⁶

2. Here, each factor weighs in favor of granting the requested stay. But even if the Commission finds that some of the factors have not been shown, the irreparable injury absent a stay and the public interest overwhelmingly weigh in favor of staying revised Rule 1.1409(e) pending judicial review.

Petitioners Have a Substantial Likelihood of Prevailing on the Merits

3. The Commission’s reinterpretation of the long-settled meaning of the term “cost” as used in 47 U.S.C. § 224(e) is at least “substantially” likely to be reversed upon judicial review. Petitioners’ earlier filings have explained in detail the reasons why success on the merits is a “substantial” likelihood.⁷ The following is a high-level summary of those reasons.

4. First, the Commission lacked statutory authority to alter the telecom rate as it did in revised Rule 1.1409(e). The revised telecom rate is inconsistent with the language and intent of the Pole Attachments Act.⁸ Congress clearly envisioned two different rates, and that the telecom rate would be higher than the cable rate in most instances.⁹ Petitioners are not the first

⁶ *Id.*

⁷ *See, e.g.*, Initial Comments of the Florida IOUs (August 16, 2010) at 57-67; Initial Comments of Oncor Electric Delivery Company, LLC (August 16, 2010) at 58-65; Initial Comments of The Alliance for Fair Pole Attachment Rules (August 16, 2010) at 92-100; Florida IOU November 8, 2010 Ex parte Letter. *See also* Reply Comments of the Florida IOUs (October 4, 2010) at 42-46; Reply Comments of the Oncor Electric Delivery Company, LLC (October 4, 2010) at 45-48; Reply Comments of the Alliance for Fair Pole Attachment Rules (October 4, 2010) at 16-28.

⁸ *See, e.g.*, Florida IOU Initial Comments, 59-64; Oncor Initial Comments, 58-63; Alliance Initial Comments, 80-85. *See also* Florida IOU Reply Comments, 42-46; Oncor Reply Comments, 45-47; Alliance Reply Comments, 8-11.

⁹ *See, e.g.* Alliance Initial Comments, 83-86; Florida IOU Initial Comments, 59-62; Oncor Initial Comments, 59-61; Florida IOU November 8, 2010 Ex parte Letter. *See also* Florida IOU Reply Comments, 43-44; Oncor Reply Comments, 46-48; Alliance Reply Comments, 32-34.

to see it this way. The Commission itself understood, until very recently, that the statute required a higher telecom rate through utilization of fully allocated costs.¹⁰

5. Second, even if the Commission acted within its statutory authority, it exercised that authority in an arbitrary and capricious manner by failing to adequately justify its departure from fifteen years of precedent and by utilizing a results-oriented approach completely lacking in factual record support. These actions do not comport with reasoned agency decision making.¹¹

Petitioners Will Suffer Irreparable Harm

6. The revisions to Rule 1.1409(e) mark a significant departure from long-settled regulatory precedent. This departure from bedrock regulatory precedent will inevitably upset the *status quo* for some or all of the stakeholders at issue. Though it is conceivable that some telecom attachers will continue to pay pole attachment rentals as agreed-upon in existing contracts, it is inconceivable that this will be the case for all (or even most) telecom attachers. In fact, at least one state association in Petitioners' territories already has indicated in writing its expectation that the revised telecom rate will apply to their existing telecom attachments, notwithstanding the terms of their contracts (which frequently include a specific rate or specific formula based on the Commission's legacy telecom formula). This problem is exacerbated by the fact that some Petitioners are preparing to send annual or semi-annual pole attachment rental invoices in June and July 2011. For its part, the National Cable and Telecommunications Association ("NCTA") already has met with Commission staff in the Office of General Counsel

¹⁰ See e.g. Florida IOU November 8, 2010 Ex parte Letter, 2-3; *In re Implementation of Section 703 of the Telecommunications Act of 1996*, FCC 96-327, CS Docket No. 96-166 (Aug. 6, 1996), ¶ 6 ("The new formulas will require that, *in addition to* paying their share of a pole's usable space, these telecommunications service providers also must pay their share of the fully allocated costs associated with the unusable space of the pole, duct, conduit, or right-of-way.") (emphasis added); Florida IOU Initial Comments, 61; *In re Ala. Cable Telecomms. Assoc.*, 16 FCC Rcd 12209, 12231 (2001) ("[t]he end result of the application of the telecommunications pole attachment formula is a rate which reflects the fully allocated costs of the pole-related expenses.").

¹¹ See, e.g., Florida IOU Initial Comments, 64-68; Oncor Initial Comments, 63-65; Alliance Initial Comments, 86-91, 99.

and the Wireline Competition Bureau to express “concern” regarding the clarity of the revised rule, and its implementation by pole owners.¹²

7. This potential for under-recovery also places Petitioners and their electric customers in a precarious position with respect to their state-regulated base electric rates. Depending on the timing and process for cost recovery adjustments, Petitioners could be unable to make timely base rate changes that would reflect the reduced pole attachment revenues they would receive pursuant to revised Rule 1.1409(e) while it is under judicial review.¹³ If revised Rule 1.1409(e) were then overturned on appeal, Petitioners and their shareholders would have irretrievably lost revenues to which they are entitled. Alternatively, Petitioners might be involved in base rate proceedings during the judicial review period, in which new base rates are set that reflect lower future pole attachment revenues under revised Rule 1.1409(e). If revised Rule 1.1409(e) were then overturned on appeal, Petitioners’ electric customers would continue to pay higher base rates reflecting the assumed lower pole attachment revenues even though actual pole attachment revenues would return to the levels that existed prior to the Commission’s rule revision. Under either scenario, there would be “stranded” costs, to be borne by either the electric ratepayers or the utility itself, as a direct result of the Commission enforcing revised Rule 1.1409(e) before the appellate court has spoken on its legality.¹⁴ A stay of revised Rule 1.1409(e) pending final resolution on appeal can minimize the impact of either scenario.

¹² See May 19, 2011 NCTA Ex parte Notice Letter; May 10, 2011 NCTA Ex Parte Notice Letter.

¹³ Petitioners are not suggesting that a change in revenue stream caused by revised Rule 1.1409(e) would be the sole basis for seeking a base rate change, but instead that it would be *part* of any request for a base rate change. In fact, the impact of revised Rule 1.1409(e) is unlikely to motivate a rate change by itself, which increases the likelihood of the “stranded cost” scenario described further into this paragraph.

¹⁴ Some state regulators may actually *require* judicial finality before making the necessary base rate adjustments.

8. In addition to upsetting operational certainty, the conflict between revised Rule 1.1409(e) and existing contractual arrangements is likely to spawn numerous state court collection actions and Commission complaint proceedings, which will cost all stakeholders time and money. The time and expense of litigation in dual forums is not recoverable as an item of damages or “refund” in the normal course. Even in those contractual arrangements that simply incorporate by reference the extant Commission telecom formula, there is no clear procedural mechanism for the Petitioners to recover lost revenue due to unilateral underpayment during the effective period of revised Rule 1.1409(e) in the event it is later found to be unlawful. The result would be irreparable economic harm to the Petitioners.¹⁵

9. Further, even assuming there were means by which Petitioners could be made completely whole (financially speaking), the additional strain placed on the relationships between electric utility pole owners and attachers (which, as acknowledged in the Order, have important consequences to both electric system safety and reliability and to broadband deployment) cannot be ameliorated through the exchange of financial consideration. Bad relationships breed bad practices. The Commission has thrown the industry a curveball; the court of appeals needs to determine whether it is a ball or a strike.

**A Stay Serves the Public Interest and
Will Impose Minimal, if Any, Harm to Other Parties**

10. Assuming that broadband deployment is in the public interest and that pole attachments are crucial to this public interest, maintaining the *status quo* pending judicial review

¹⁵ See *Robertson v. Cartinhour*, 2011 WL 1752189, *3 (D.C. Cir. 2011) (“Although the general rule has it that economic harm does not constitute an irreparable injury, *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009), the rule is based upon the presumption that ‘adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation,’ see *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958)); see also *Iowa Utilities Bd.*, 109 F.3d at 426 (8th Cir. 1996) (“The threat of unrecoverable economic loss, however, does qualify as irreparable harm.”) (citing *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir.1994); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1227 (8th Cir.1987)).

better serves the public interest than visiting turmoil and uncertainty on pole attachment relationships. Where there is a legitimate potential that the basis for the turmoil will be short-lived, as is the case here, the best course of action from a public interest perspective is to maintain the *status quo*. The Commission must concede that revised Rule 1.1409(e) is vulnerable on appeal, especially given that the revision reverses fifteen years of regulatory precedent and rejects the Commission's own two previous proposals.¹⁶

11. Maintaining the *status quo* will not harm the Commission at all, and any harm to attachers is both *de minimis* and outweighed by a balancing of the equities. Those attachers currently paying the telecom rate likely are prepared to do so, from a budget perspective, for the foreseeable future. There is absolutely no evidence in the record to support the notion of any “shovel-ready” broadband projects waiting in the wings for implementation of a revised (and lower) telecom rate. In other words, immediate incremental broadband deployment will not be served by rapid implementation of the lower rate; in fact it is far more likely to result in an illegal windfall to existing attachers (whose deployment decisions already have been made and were not deterred by the current telecom rate in any event).

Emergency Motion

12. Petitioners respectfully request that the Commission stay the effective date of revised Rule 1.1409(e) pending final resolution of the petition for review (and any rehearing or

¹⁶ Notice of Proposed Rulemaking, FCC 07-187, WC Docket No. 07-245, published at 73 Fed. Reg. 6879, 6882 (February 6, 2008) (tentatively concluding “that all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service, ... [and] that the rate should be higher than the current cable rate, yet no greater than the telecommunications rate”); Order and Further Notice of Proposed Rulemaking, FCC 10-84, WC Docket No. 07-245, GN Docket No. 09-51, FNPRM published at 75 Fed. Reg. 41338 (July 15, 2010), *as corrected* 75 Fed. Reg. 45590 (Aug. 3, 2010) (proposing revised Rule 1.1409(e) which stripped taxes, depreciation and rate of return from the carrying charge rate).

petition for certiorari). Revised Rule 1.1409(e) is scheduled to become effective on June 8, 2011. For this reason, **Petitioners respectfully request a ruling on this motion on or before Wednesday, June 1, 2011** so that, in the event the Commission denies the motion, Petitioners have sufficient time to request a stay from the court of appeals prior to the rule's effective date.

Respectfully submitted,

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