

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of
Implementation of Section 224 of the Act
A National Broadband Plan for the Future

WC Docket No. 07-245

GN Docket No. 09-51

**AT&T INC.'S RESPONSE TO
PETITIONS FOR RECONSIDERATION**

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July 5, 2011

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
I. INTRODUCTION AND SUMMARY	iii
II. DISCUSSION	1
A. MAKE-READY DEADLINE ISSUES	1
1. The Commission’s make-ready timeline should take into consideration the impact that non-service provider attachments may have on the pole owner’s ability to comply	1
2. The Commission should clarify that the make-ready deadlines on pole owners do not apply when new poles have to be installed or poles replaced to accommodate additional attachments	2
3. The Commission should consider expanding the types of events or circumstances under which application of the timeline can be postponed; that is, stopping-the-clock events	3
B. SAFETY ISSUES	4
1. The Commission should not adopt the State of Oregon’s rules pertaining to safety violations and unauthorized attachments	4
2. The Commission should not allow electric utilities to impose a total ban on pole-top attachments even if applied in a nondiscriminatory manner	5
C. ATTACHER REARRANGEMENT ISSUES	7
1. The Commission should allow but not require pole owners to use the NJUNS or SPANS electronic notification system	7
2. The Commission should require reimbursement when pole owners are compelled to move the facilities of attachers	7
3. The Commission should make it clear that pole owners are entitled to be free from liability if they are compelled to move the facilities of delinquent attachers	8
D. PROHIBITING REFUNDS EARLIER THAN THE EFFECTIVE DATE OF THE BROADBAND POLE-ATTACHMENT ORDER	8
E. THE COMMISSION SHOULD CLARIFY THE APPLICATION OF THE NEW TELECOM RATE FORMULA IN LIGHT OF ITS STATED GOAL OF MAKING THE TELECOM RATE CLOSER TO THE CABLE RATE	9

III. CONCLUSION 10

I. INTRODUCTION AND SUMMARY

For a period of almost four years, the Commission has been grappling with ways of improving cable provider and telecommunications carrier access to utility poles. And, more recently, the Commission has been examining how to facilitate and encourage the deployment of broadband facilities, especially in rural areas, by reducing the pole attachment rates for telecommunications carriers. This effort culminated in the Commission's April 2011 *Report and Order and Order on Reconsideration (Broadband Pole-Attachment Order)*.¹

With respect to the Commission's efforts in this regard, AT&T supported the Commission's overall goals and most of the Commission's proposals, even though in some cases the Commission's proposed new access rules would impose new and difficult burdens on AT&T as a pole owner. Even while supporting new access proposals, however, AT&T advised that the Commission's access rules had to be subject to *a rule of reasonableness*, because "[t]here is simply no way anyone—the Commission, utilities, and potential attachers—can anticipate the variety of field conditions, local laws, and limitations on performance that can arise naturally and without unlawful intent in the pole-access process."² In the Reconsideration Petitions, petitioners have proposed some reasonable enhancements to the Commission's directives, and AT&T seeks to identify and support those proposals in this filing. They also, unfortunately, have proposed some changes that fly in the face of the Commission's stated goals, and those proposals should be rejected.

Make-Ready Issues: AT&T agrees with the Coalition Petitioners that the Commission should consider the impact that the facilities of non-service provider attachers might have on a pole owner's ability to meet the new timeline standards. What's more, the Commission ought to

¹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240 (2011) (*Broadband Pole-Attachment Order*).

² Comments of AT&T Inc., p. 28 (Aug. 16, 2010) (AT&T's Comments).

be aware that a similar issue arises for ILEC pole owners with respect to electric utility facilities that can also complicate meeting the make-ready timeline goal.

The Commission should clarify that the new make-ready timeline goals do not apply to installation of new poles or pole replacement—as was initially contemplated by the Commission in its FNPRM.

With respect to the new “Force Majeure” standard for stopping the clock—“good and sufficient cause”—AT&T urges the Commission to clarify the standard by allowing other examples of the standard, such as governmental permits, acquisition of private property easements and the like. As for seasonal storms, AT&T believes pole owners ought to be allowed to demonstrate that the occasional seasonal storm, while not an emergency that requires federal disaster relief, was of sufficient magnitude as to fall within the Commission’s standard.

Safety Issues: AT&T disagrees with the Coalition Petitioners and urges the Commission not to adopt the Oregon Public Utility Commission’s automatic penalty rules. AT&T asserts that the Commission has it exactly right in allowing those rules to be the standard by which contract provisions covering alleged violations should be judged. The Commission’s holding should be given a chance to be put into practice.

AT&T also opposes a total ban on pole-top attachments. Any assertion that a pole-top attachment presents a safety or reliability issue ought to be the result of an individualized assessment by the utility and should be subject to review by a disinterested, third-party judge; i.e., the Commission.

Attacher Rearrangement Issues: The Commission should allow pole owners to use electronic notification systems, such as NJUNS, but should not require all pole owners to use the same one. And pole owners should be reimbursed when they are compelled to move the facilities of other attachers. But AT&T agrees with the Commission that this should be covered by the contract for attachment. It would be useful for the Commission to clarify, however, that reimbursement is reasonable.

As with reimbursement, the Commission should clarify that limitations of liability provisions in pole-attachment contracts are reasonable, including those that deny recovery of negligence and consequential damages.

Refunds: Wireless attachers ought to be free to bring complaints challenging the rates charged by pole owner and recover damages based on the applicable Statute of Limitations, and not the date the complaint was filed, when the rate assessed the wireless attacher was not based in any real sense on the prior or new telecom rate.

Telecom Rate: The Commission should clarify the application of the new telecom rate in light of the Commission's stated goal of making it closer to uniform with the cable rate. Clarification of the rate in light of Commission statements and goals might avoid needless litigation and other challenges.

II. DISCUSSION

A. MAKE-READY DEADLINE ISSUES

- 1. The Commission's make-ready timeline should take into consideration the impact that non-service provider attachments may have on the pole owner's ability to comply.*

Coalition Petitioners have asked that the Commission reconsider its make-ready timeline rules in light of the fact that there are non-service provider attachers—*i.e.*, attachers other than cable service providers and telecommunications carriers—over whom the Commission has no regulatory power.³ Specifically, the Coalition Petitioners refer to attachers such as fire departments, highway departments, school districts, police department, and municipalities.⁴ Ideally, when requested to move attachments as part of any make-ready work necessary to accommodate service provider attachers, these entities would comply timely. Unfortunately, things seldom work out ideally. And these sorts of non-service provider attachers have many constraints, not the least of which is money and staffing resources, that prevent them or, at a minimum, do not incent them to act promptly.

The Coalition Petitioners propose that the “Commission reconsider its make ready deadlines to specify that they do not apply to the extent that make-ready work would require any attacher that is not a cable television system or telecommunications service provider (e.g., municipality) to move its facilities.”⁵ AT&T supports a reconsideration of the make-ready deadlines in light of the inability of the pole owner to act unilaterally to move the facilities of other attachers, such as these non-service provider attachers. In this regard, AT&T notes that the ILEC pole owners lack the expertise and the regulatory right to move the facilities of electric

³ Petition for Reconsideration of the Coalition of Concerned Utilities, pp. 7-8 (Coalition Petition).

⁴ *Id.*

⁵ *Id.* at p. 8.

utilities on ILEC owned poles.⁶ Any reconsideration of the make-ready deadlines ought to include any impact that the failure of an attaching electric utility to timely move facilities might have on the ILEC pole owner's timeline obligations.

2. *The Commission should clarify that the make-ready deadlines on pole owners do not apply when new poles have to be installed or poles replaced to accommodate additional attachments.*

In the Commission's *Pole-Attachment Order & FNPRM*, the Commission stated that it did not "propose ... to apply this timeline to make-ready for wireless equipment or pole replacement."⁷ Nevertheless, neither the *Broadband Pole-Attachment Order* nor the applicable rule makes note of this exception. Moreover, in the *Pole-Attachment Order & FNPRM*, as well as in the *Broadband Pole-Attachment Order* itself, the Commission declined to clarify "a utility's obligation to perform pole change-outs," because of the lack of support for Commission action in the record in the proceeding,⁸ which leaves in question the applicability of the timeline to the installation of new poles and pole replacements.

AT&T joins with the Coalition Petitioners asking the Commission to "confirm that the make-ready deadlines do not apply to pole replacements or to the installation of new poles necessary to accommodate additional attachments."⁹

⁶ The ability to complete timely make-ready work on poles can be impacted by the following utility facilities: (1) power lead drip loops for power leads attached to street lights or transformers, (2) vertical conduit risers containing power leads, or (3) guy wires or conductors themselves.

⁷ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Order and Further Notice of Proposed Rulemaking*, 25 FCC Rcd 11864 para. 33 (2010) (*Pole-Attachment Order & FNPRM*).

⁸ *Id.* at 11872 para. 16; and, *Broadband Pole-Attachment Order*, 26 FCC Rcd at 5339 para. 226.

⁹ Coalition Petition, p. 9.

3. *The Commission should consider expanding the types of events or circumstances under which application of the timeline can be postponed; that is, stopping-the-clock events.*

Coalition Petitioners are seeking clarification of the nature of stopping-the-clock events by asking the Commission to acknowledge types of events that the Commission should agree are examples of matters sufficient to stop the application of the pole-attachment access timeline. In the *Broadband Pole-Attachment Order*, the Commission tried to balance the need for some *Force Majeure* relief from the timeline with a concern that a vaguely worded standard, such as “events beyond the utility’s control,” would eviscerate any good that creating a timeline might have done in the first place.¹⁰ Consequently, the Commission adopted a “good and sufficient cause” standard but only identified one example of the new standard: “an emergency that requires federal disaster relief.”¹¹ AT&T supports the Commission’s standard, but believes that this one example is insufficient.

While AT&T is sympathetic with the Commission’s dilemma—wanting to provide a *Force Majeure* exception but not wanting to inadvertently create a loophole by which access is unreasonably delayed or denied—pole owners need clarification of this new standard to avoid unnecessary and costly disputes in the future. The Coalition Petitioners suggest that, in addition to federal-disaster-relief emergencies, the Commission should acknowledge that seasonal storms, governmental permits, acquisition of private property easements, preexisting safety violations, and inadequate route design by the applicant attaché.¹² AT&T can support the inclusion of these events as falling within the Commission’s good and sufficient cause standard, with the exception of seasonal storms.

While seasonal storms can be quite disruptive and, on occasion, be reasonable grounds for stopping the timeline clock, AT&T is reluctant to include *a priori* seasonal storms as being necessarily among the examples of good and sufficient cause. AT&T asserts that pole owners

¹⁰ *Broadband Pole-Attachment Order*, 26 FCC Rcd at 5273 para. 70.

¹¹ *Id.* at 5272-73 para. 68.

¹² Coalition Petition, pp. 12-15.

ought to be free to make the case that a particular seasonal storm was sufficiently disruptive as to fall within the standard, but it does not believe that they usually do. The Commission's blanket exclusion of seasonal storms is too broad; the Coalition Petitioners' inclusion of them is too generous. The Commission should clarify that pole owners are free to make the case that a seasonal storm, or any other event, was sufficiently disruptive that it falls within the good-and-sufficient-cause standard.

B. SAFETY ISSUES

1. The Commission should not adopt the State of Oregon's rules pertaining to safety violations and unauthorized attachments.

The Coalition Petitioners propose that the Commission adopt rules patterned after those enacted by the Oregon Public Utility Commission (OPUC) concerning unauthorized attachments and safety violations. AT&T opposes this request and recommends that the Commission favor negotiated resolutions of such violations.

In brief, the OPUC rules allow pole owners to assess various fines for violations involving unauthorized attachments (no contract), violations of the OPUC's safety rules, and violations of the service drop installation rule (no permit).¹³ In the *Broadband Pole-Attachment Order*, the Commission addressed the issue of unauthorized attachments. Specifically, the Commission found that "the record [wa]s insufficient for us to make specific findings regarding the scope and severity of non-compliance." In spite of this, the Commission took the concerns of electric utility pole owners "seriously" and agreed to abandon the prior *Mile Hi*¹⁴ decision standard for unauthorized attachment penalties, which amounted to little more than payment of back rental. After all, back rent was not deemed much of a deterrent to this sort of behavior.

¹³ OR. ADMIN. R. 860-028-0120, 860-028-0130, 860-028-0140, and 860-028-0150.

¹⁴ *Mile Hi Cable Partners v. Public Service Company of Colorado*, Order, 15 FCC Rcd 11450 (Cable Serv. Bur. 2000), *review denied*, 17 FCC Rcd 6268 (2002), *review denied sub nom. Public Serv. Co. of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

Instead of what the Coalition Petitioners propose, the Commission opted to “favor agreements negotiated between utilities and attaching entities” as the *federal* solution.¹⁵ Briefly, this solution allows the pole owner to contractually bind attachers to penalties on a par with those adopted by the OPUC.¹⁶ AT&T agrees with the Commission’s resolution of the matter and encourages the Commission to reject the Coalition Petitioners’ proposal and to give its own uniquely federal solution time to be put into practice and be tested by experience.

2. *The Commission should not allow electric utilities to impose a total ban on pole-top attachments even if applied in a nondiscriminatory manner.*

Coalition Petitioners argue that, because they are entitled under Section 224 to deny access to their poles on a non-discriminatory basis “for reasons of safety, reliability and generally applicable engineering purposes,”¹⁷ they should be allowed to impose a total ban on pole-top attachments—a ban that would of course impact wireless carriers directly.¹⁸ The Commission should deny this request.

This request amounts to allowing the electric utilities to pre-judge in every case that permitting pole-top access would constitute an unsafe or unreliable attachment. Instead of requiring the electric utilities to make an individualized assessment based on the particular facts of the situation—*e.g.*, the size, age and type pole in question; the nature of pole-top facilities at issue; the number and type of other attachments; *etc.*—by granting the petitioners’ request the Commission would be allowing them to undo by fiat the good the Commission accomplished in the *Broadband Pole-Attachment Order*. A refusal to allow utilities to pre-judge the safety and reliability implications of pole-top attachments would be similar to the Commission’s refusal to

¹⁵ *Broadband Pole Attachment Order*, 26 FCC Rcd at 5292 para. 118.

¹⁶ *Id.* at 5291 para. 115 (“[W]e explicitly abandon the *Mile Hi* limitation on penalties and instead create a safe harbor for more substantial penalties. Specifically, going forward, we will consider contract-based penalties for unauthorized attachments to be presumptively reasonable if they do not exceed those implemented by the Oregon PUC.”).

¹⁷ 47 U.S.C. § 224(f)(2).

¹⁸ Coalition Petition, pp. 18-19.

allow them to ban *a priori* all overlashing.¹⁹ As in the case of overlashing, the Commission acknowledged that electric utilities have the right to deny access because of “safety, reliability and generally applicable engineering purposes,” but in essence required them to do so only after having made an individualized assessment.

If this were not enough, the proposed blanket ban on pole-top attachments would seem to deny the Commission the right to evaluate the propriety of the electric utility’s assessment. The Commission will not be able to fulfill its statutory obligation under Section 224 of the Act to “hear and resolve complaints” concerning the rates, terms, and conditions of pole attachments, which must logically include whether access is being properly denied.²⁰ Electric utilities cannot be left to be the final arbiter of whether they themselves have made a case that an attachment poses a safety or reliability risk. At a minimum, their assessment should be subject to review by a disinterested third party, here the Commission. Otherwise the very purpose of the Act itself would be thwarted.

AT&T notes, as well, that pole-top attachments already exist and, where they do exist, they do not pose any insurmountable issues arising from “safety, reliability and generally applicable engineering purposes.” The request to impose a total ban on pole-top attachments should be denied in favor of requiring electric utilities to make individualized assessments that can be subjected to the scrutiny of the Commission as a disinterested third party.

¹⁹ *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report and Order*, 13 FCC Rcd 6777, 6807-08 para. 64 (1998) (“Overlashing has been in practice for many years. We believe utility pole owners’ concerns are addressed by Section 224’s assurance that pole owners receive a just and reasonable rate and that pole attachments may be denied for reasons of safety, reliability, and generally applicable engineering purposes.”)

²⁰ 47 U.S.C. § 224(b).

C. ATTACHER REARRANGEMENT ISSUES

1. *The Commission should allow but not require pole owners to use the NJUNS or SPANS electronic notification system.*

The Coalition Petitioners propose that the Commission allow pole owners to use the National Joint Use Notification System (NJUNS) or a similar electronic notification tool to facilitate the notification pole owners are now required to provide under newly revised Commission Rule 1.1420(e).²¹ AT&T supports allowing individual pole owners to require attachers to use electronic notification tools, like NJUNS, for any and all pole-attachment notifications, but opposes any proposal that would pre-select the system the pole owner must use. Pole owners should be free to use whatever system they believe works best for them.

2. *The Commission should require reimbursement when pole owners are compelled to move the facilities of attachers.*

In the *Broadband Pole-Attachment Order*, the Commission authorizes pole owners, after notification to all then existing attachers of the need to move facilities to make the pole ready for another attacher, to move the facilities of any existing service provider attacher that fails to complete its make-ready work by the proscribed time.²² The Coalition Petitioners are asking that the Commission make it clear that “pole owners are entitled to be reimbursed by the new attacher for moving existing attachments if the existing attachers do not move their attachments in a timely manner.”²³

In the *Broadband Pole-Attachment Order*, the Commission wrote “we presume that utilities could structure attachment agreements to include provisions for transfer of facilities, or otherwise address liability or other concerns they might have in cases where they elect to perform make-ready themselves.”²⁴ Presumably, the “provisions for transfer of facilities” would

²¹ Coalition Petition, pp. 19-20.

²² *Broadband Pole-Attachment Order*, 26 FCC Rcd at 5256 para. 29 (“Upon receipt of payment from the attacher, we require a utility to notify immediately and in writing all known entities with existing attachments that may be affected by the planned make-ready.”).

²³ Coalition Petition, p. 20

²⁴ *Broadband Pole-Attachment Order*, 26 FCC Rcd at 5261 para. 39.

include cost recovery for the make-ready work caused by delinquent attachers. Still, AT&T agrees that it would help with negotiations for these agreements if the Commission made it clear that under these circumstances the pole owner has a right to be appropriately reimbursed. To this degree, AT&T supports the petitioners' proposal.

3. *The Commission should make it clear that pole owners are entitled to be free from liability if they are compelled to move the facilities of delinquent attachers.*

If pole owners are compelled to move the facilities of other attachers, then they ought not to be exposed to liability for doing so. This is the proposal of the Coalition Petitioners, and AT&T sees merit in it.²⁵ Presumably, like compensation for moving facilities, the Commission contemplated that this liability issue would be covered in pole-attachment agreements.²⁶ Nevertheless, it would be helpful for the Commission that created this obligation to make it clear that it is reasonable for pole owners to insist that such agreements bar any claims for negligence, including consequential damages, for moving an attacher's facilities under these circumstances—even the alleged negligence of the pole owner's independent contractors hired to perform this work. This is on a par with the Commission's decision to articulate what will be acceptable as a reasonable penalty for unauthorized attachments.²⁷

D. PROHIBITING REFUNDS EARLIER THAN THE EFFECTIVE DATE OF THE BROADBAND POLE-ATTACHMENT ORDER

In their petition, the Coalition Petitioners propose that the amendment to Commission Rule 1.1410(c) be prospective only on the grounds that in amending this rule the Commission is “providing new liability for pole owners after the fact.”²⁸ AT&T disagrees with this proposal as it might apply to wireless carriers and asks the Commission to reject this proposal.

²⁵ Coalition Petition, p. 21.

²⁶ *Broadband Pole-Attachment Order*, 26 FCC Rcd at 5261 para. 39.

²⁷ *See id.* at p. 5292 para. 118.

²⁸ Coalition Petition, p. 23.

Petitioners argue that the Commission has provided “a new liability for pole owners,” and that allowing attachers to recover refunds “dating back years before a complaint is filed eliminates any incentive for them to resolve rate issues in a timely manner.”²⁹ Insofar as pole owners relied on the prior telecom rate formula, this shouldn’t be a problem. In the case of wireless attachers, however, many electric utilities ignored the Commission’s instructions on developing a just and reasonable rate.³⁰ This change in the procedural process—allowing recovery based on the applicable statute of limitations—would not negatively impact the incentive to resolve rate issues but help address any wrongs that the utilities imposed on wireless attachers by ignoring the prior telecom rate entirely. Consequently, allowing such claims to be brought “consistent with the applicable statute of limitations”³¹ is appropriate and should be upheld.

E. THE COMMISSION SHOULD CLARIFY THE APPLICATION OF THE NEW TELECOM RATE FORMULA IN LIGHT OF ITS STATED GOAL OF MAKING THE TELECOM RATE CLOSER TO THE CABLE RATE

In The National Broadband Plan (NBP), the Commission set as its goal for broadband pole deployment that “rates for pole attachments should be as low and as close to uniform as possible.”³² Both before and after the NBP was issued, AT&T consistently argued that the Commission ought to set one low, across-the-board, fully compensatory broadband pole-attachment rate for all communications providers—cable television system providers, telecommunications carriers, and incumbent local exchange carriers. In the *Broadband Pole-Attachment Order*, the Commission moved slightly in the direction of a uniform pole-attachment rate by devising a methodology for lowering the rate applicable to the pole attachments of

²⁹ Coalition Petition, p. 23.

³⁰ *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, Report and Order*, 13 FCC Rcd 6777, 6799 para. 42 (1998).

³¹ Commission Rule 1.1410(c).

³² THE NATIONAL BROADBAND PLAN, 6.1 Improving Utilization of Infrastructure, Recommendation 6.1, p. 110 (NBP).

telecommunications carriers (telecom rate). In doing so, the Commission made clear that its intent was to get the telecom rate down around and closer to the cable rate:

Reducing the telecom rate to *make it closer to uniform with the cable rate* will enable more efficient investment decisions in network expansion and upgrades, most notably in the deployment of modern broadband networks. In addition, the change reduces the uncertainty facing third party attachers, and in particular cable companies, as to what charges they are likely to face when they engage in the provision of new advanced services or network upgrades. The new telecom rate also will substantially reduce the incentives for costly disputes by substantially reducing the potential gains that a party can claim by arguing for a favorable attachment definition.³³

In the NCTA Petition, petitioners seek either clarification that the telecom rate formula includes not only instances where there are three and five attaching entities—as is shown in the exemplary formulas set in Commission Rule 1.1409— but also provide corresponding cost adjustments scaled to other entity counts or, in the alternative, that the Commission reconsider its order and now adopt the Commission’s original proposal in the *Pole-Attachment Order and FNPRM*.³⁴ AT&T supports the petitioner’s request to the degree that it seeks to have the Commission clarify the application of the new telecom rate formula, specifically with an eye on how that rate can meet the Commission’s stated goal of “*mak[ing] it closer to uniform with the cable rate.*”

III. CONCLUSION

AT&T respectfully requests that the Commission consider these comments in its deliberations on the Reconsideration Petitions.

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³³ *Broadband Pole-Attachment Order*, 26 FCC Rcd at 5320-21 para. 181 (emphasis supplied).

³⁴ NCTA Petition, pp. 6-7.

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July 5, 2011