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## SELECTED FCC DOCKET SUMMARIES, 2011

***In re* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Second Report and Order*, FCC 11-52, WTB Docket No. 05-265 (Apr. 7, 2011).**

On April 7, 2011, the Federal Communications Commission (“Commission”) adopted a *Second Report and Order* (“*Order*”) requiring providers of commercial mobile data services to offer data roaming arrangements to other providers on commercially reasonable terms and conditions. This data roaming rule applies to all facilities-based providers of commercial mobile data services, even if they also provide commercial mobile radio service. The *Order* defines commercial mobile data service as any mobile data service not interconnected with the public switched network that is provided for profit and available to the public or to such classes of eligible users as to be effectively available to the public.

By implementing this rule, the Commission hopes to further broadband deployment and availability. The *Order* accomplishes this objective in a number of ways. First, it promotes nationwide access to services such as e-mail and wireless broadband Internet by allowing consumers with mobile data plans to use another provider’s network when traveling outside their provider’s network coverage areas. Furthermore, the *Order* encourages investment in mobile broadband networks by a wide range of providers. New market entrants are able to obtain a competitive level of coverage during early periods of investment and build out, and rural providers are provided with assurance that they will be able to offer competitive services to their customers if they invest in their networks. Additionally, host providers maintain incentives to invest in their networks due to the fact that they receive payment for hosting and have the ability to determine the structure and level of such rates. Lastly, the *Order* aims to increase competition in the wireless market, leading to lower prices and increased availability for consumers and greater incentives for edge providers to develop innovative new services.

The Commission received an overwhelming number of comments in favor of the data roaming rule from a wide range of regional, rural, and nationwide service providers, consumer interest organizations, and manufacturers. These commenters asserted that providers must be able to offer data roaming services in order to be competitive, especially given the transition of mobile wireless to

a more data-centric marketplace. However, many providers face difficulties in obtaining data roaming agreements because of increasing consolidation in the industry. Moreover, potential hosts often offer providers unreasonable terms and conditions, or even outright refuse to negotiate agreements. Adopting data roaming rule, these commenters argued, would prevent providers from facing such a competitive disadvantage.

Alternatively, the Commission received pushback on the new rule from two sources – AT&T and Verizon Wireless. Both companies believe that regulation is unnecessary because there is no market failure or consumer harm to justify such intervention, not to mention the fact that providers already have the ability to obtain nationwide coverage through data roaming agreements. The companies also stated that a data roaming obligation would discourage investment by host providers for two reasons. First, the advantage they currently enjoy in scope and quality of network coverage would be rendered obsolete by allowing other providers to roam on their network, eliminating any incentive to invest in their network. Additionally, host providers would be reluctant to make new investments because if they had no control over the terms and conditions under which they would carry other providers' data traffic.

Ultimately, the Commission determined that significant public interest benefits would accrue from adopting a data roaming rule – increased availability of commercially reasonable data roaming arrangements, promotion of significant investment in facilities-based broadband networks, and increased competition. These benefits outweighed the costs of the rule asserted by AT&T and Verizon – a potential decrease or lack of investment in new infrastructure by requesting providers relying on roaming agreements and the possibility of harm occurring to the host provider's network due to congestion or technical problems. The Commission rejected the argument that intervention was unnecessary because data roaming agreements currently occur without regulation. It not pointed to evidence in the record indicating that providers have encountered significant difficulties obtaining agreements on advanced 3G data networks, but also explained that consolidation in the mobile wireless industry had reduced the number of roaming partners for smaller regional and rural providers.

The Commission also noted specific limitations of the rule that rendered AT&T and Verizon's other concerns moot. First, host providers may negotiate commercially reasonable terms and conditions of roaming arrangements on an individualized basis, enabling them to tailor such arrangements so as to avoid serving all requesting providers on the same or standardized terms. This permits providers to reserve their incentive to invest in networks by setting specific terms and conditions, and may force requesting providers to invest in their own networks rather than pay a potentially high rent to a host provider. Additionally, providers may negotiate commercially reasonable measures to safe-

guard quality of service or to prevent harm to their network that may result from roaming traffic. Second, the rule allows host providers to refuse to negotiate data roaming arrangements in situations where requesting providers are not technologically compatible or where it is not technically feasible to provide roaming for the particular service requested and any changes that would be necessary to enable such roaming are not economically reasonable. Finally, the rule authorizes providers to condition the effectiveness of the arrangement on the requesting provider's ability to provide its mobile data service using a comparable generation of wireless technology to the technology on which it seeks to roam. In other words, a carrier cannot build a 2G network, provide its customers with 3G capable handsets, and rely on roaming arrangements to provide nationwide 3G coverage.

The most important part of the *Order*, however, is the explanation of the legal authority the Commission asserts in order to issue the data roaming rule. As discussed, the Commission believes that the rule serves the public interest by promoting connectivity for and nationwide access to mobile broadband, promoting competition and investment in and deployment of mobile broadband services, ensuring the viability of new data network deployments, and promoting the development of competitive service offerings for the benefit of consumers. Title III of the Communications Act provides the Commission with broad authority to manage spectrum, allocate and assign radio spectrum for spectrum based services, and modify spectrum usage conditions in the public interest.

Specifically, Section 301 charges Commission with maintaining control "over all the channels of radio transmission" in the United States. As a result, a licensee does not hold any property interest in the spectrum that can override the exercise of regulatory power over that spectrum. Additionally, Sections 303 and 316 authorize the Commission to establish operational obligations for licensees and adopt new conditions on existing licenses, if it determines that such action will promote the public interest, convenience, and necessity. When read together, these provisions suggest that a data roaming rule is within the Commission's authority to manage spectrum and impose conditions on licensees where necessary to promote the public interest.

The Commission also answered opponents who claimed that it lacked the legal authority to mandate this rule. AT&T and Verizon advanced the argument that data roaming is a private mobile radio service; therefore, requiring providers to offer such a service upon request, on reasonable terms, and free from unreasonable discrimination would treat providers as common carriers and violate Section 332 of the Act. The Commission countered this by asserting that Section 332 did not prevent it from establishing spectrum usage conditions based upon its Title III authority. Imposing a data roaming requirement,

the Commission reasoned, is consistent with its authority to impose operating conditions on any spectrum holders, including private mobile radio licensees, if it serves the public interest. In addition, the new rule complements current voice roaming rules, improves efficiency of spectrum use, and encourages competition. Lastly, the Commission reiterated that the new rule did not treat mobile data providers as common carriers. Instead of having to serve all people indifferently, host providers can negotiate individualized agreements and are not subject to any form of rate regulation or obligation to publicly disclose rates, terms, and conditions of agreements.

Finally, the *Order* outlines the dispute resolution procedure under the new rule and outlines what constitutes commercial reasonableness. The Enforcement Bureau has been tapped to resolve all complaints, while the Wireless Telecommunications Bureau has the authority to resolve all other disputes. However, while accelerated docket procedures are available for data roaming complaints, damages are not. The new rule also allows for “baseball style” arbitration to settle disputes over the commercial reasonableness of terms and conditions. Under this scenario, the Commission may require both parties to provide their best and final offers presented during negotiation. It then has three options: (1) if there has been a violation, resolve the dispute by ordering the parties to agree to the complainant’s terms or determine another appropriate remedy; (2) if there has been no violation, allow the complainant to agree to the host’s terms; or (3) order parties to resume negotiations. In the interest of ensuring that subscribers of requesting providers are not left without coverage while the Commission considers the dispute, the rule also allows requesting providers to obtain data roaming service – on the host provider’s terms and only for an interim basis – if they dispute commercial reasonableness and none of the limitations described above applies.

The determination of commercial reasonableness will be assessed on a case-by-case basis. However, the *Order* contains a non-exhaustive list of relevant factors that the Commission will consider to resolve disputes over whether certain terms are commercially reasonable. These factors include: whether the host provider has responded to the request for negotiation and how long it took to respond; whether the host provider’s terms and conditions are unreasonable to the point that they amount to a refusal to offer a data roaming arrangement; the level of competitive harm in a market and the benefits to consumers; whether the requesting provider is attempted to enter into a data roaming agreement for an area where it already provides facilities-based service; and how the terms and conditions affect either providers’ incentive to invest in facilities, coverage, and services.

*Summarized by Ian Forbes*

***In re Amendment of Parts 1, 2, 22, 24, 27, 90 and 95 of the Commission's Rules to Improve Wireless Coverage Through the Use of Signal Boosters, Notice of Proposed Rulemaking, FCC 11-53, WT Docket No. 10-4 (Apr. 5, 2011).***

In what is a direct follow-up to its 2010 *Public Notices* (25 FCC Rcd 68 and its extension, 25 FCC Rcd 1437) seeking comments relating to the "Use of Signal Boosters" in our expanding wireless society, the Federal Communications Commission ("FCC" or "Commission") has issued this latest *Notice of Proposed Rulemaking* ("*NPRM*"), again seeking comments regarding the expansion of Signal Booster use. For this *NPRM*, the FCC has drafted specific changes to Title 47 of the Code of Federal Regulations ("CFR") based on petitions filed in response to the previous two notices. These petitions from parties, such as Bird Technologies, the DAS Forum, and Wilson Electronics, requested that the FCC hone in on "proper use and regulation of signal boosters." While groups like Jack Daniel sought clarification regarding "operation and technical limits" to certain types of signal boosters. The FCC is now requesting that these stakeholders and others in the general public once again offer comments, but instead of to a public notice, to the proposal of these new amendments.

Signal boosters are devices placed in strategic locations that are used to "amplify and distribute wireless signals" in areas that are plagued by weak or absent signals. The goal of the signal booster is to improve connectivity in our wireless society and fill in the coverage gaps that can create problems for residents trying to communicate via a wireless server. These gaps are found not only in rural areas of the country, but also in other geographic zones where "garages, underground transportation systems, and large buildings" interfere with people's ability to connect. The two main types of signal boosters are fixed signal boosters and mobile signal boosters. Fixed signal boosters are placed in one particular structure, such as a skyscraper, and assist in connectivity within part or all of that structure. Mobile signal boosters consist of antennae placed on the outside of a vehicle, such as car or boat, as well as an internal amplifier connected to the outside antennae. The mobile signal booster thus provides enhanced connectivity wherever the vehicle goes rather than within one fixed location.

On the surface, it seems that no one should oppose something that would only benefit society by enhancing our ability to communicate with each other; however, the truth is that these signal boosters have, in the past, caused dangers due to interference created by some of the poorly manufactured or implemented boosters. One example of interference that is at issue is the noise problems that develop because signal boosters sometimes amplify multiple frequencies within its range, causing adjacent frequencies to interfere with each

other.

Another excessive noise problem that the critics of signal boosters often cite to is known as oscillation. This is the term for the feedback produced when the antennas of poorly manufactured boosters create uncontrollable signals to be generated. The FCC compares the sound that this situation creates to the high pitch sound produced when a microphone is positioned too close to a speaker, but oscillation is more than just a noise problem. In order to avoid oscillation noise, certain cell phones will respond by altering their antennas and boosting power, which results in dropped calls and loss of battery life.

In addition to the threat of dropped calls, emergency systems claim there are concerns with the continued use of system boosters because when their positioning technology systems detect both the original handset signal and boosted signal, but at different strengths, it has led to imprecise location estimates in the past. According to some estimates, this has been known to require certain sheriff's departments to spend hundreds of hours and thousands of dollars in addressing these emergency system interferences to no definitive certainty that the problem will cease to exist.

In issuing this *NPRM*, the FCC hopes to not just "enhance wireless coverage," but also to address these interference issues by creating a much safer network of signal boosters that either completely eliminates interference or allows for a quick response in removing interference if it occurs. Specifically, the Commission has revised Section 90.219 to place a stronger emphasis on the requirements that those authorized to operate signal boosters must adhere to in order to maintain their license. These requirements include the obligation for the operator to mend any instances of interference, as well as the restriction to general use only within areas licensed and not any further beyond the coverage area. This idea of registration is not just a tactic to establish organized distribution, but it is also aimed at creating an efficient means to track down faulty signal boosters to prevent too much harm from occurring before authorities have an opportunity to shut it down.

While seven separate parts of Title 47 are impacted, the bulk of the proposed amendments are aimed at Part 95, in particular Subpart M, which includes language similar to the "operator responsibility" and "authorized locations" issues presented in Section 90.219, and also emphasizes requirements on the manufacturers of the signal boosters to include features that are designed to prevent interference. The *NPRM* addresses this goal of prevention through the following requirements: 1) self-monitoring the signal booster and automatic shut down within 10 seconds if any technical parameters are exceeded; 2) the detection of feedback of oscillation and automatic deactivation of transmitter within 10 seconds of detection; and 3) the automatic power down of mobile signal boosters when "they approach the base station with which they are communi-

cating.”

Although this is clearly not an exhaustive list of the changes being proposed by the Commission, it is a representative sample of the language that is of greatest concern to the stakeholders. Since the *NPRM* is so recent, at the time of this summary, there are no official comments found in the Federal Register, but certain media outlets have collected initial responses from organizations expected to issue a formal response to the proposed language. Despite not having read the *NPRM* at the time of the reporting, CTIA, according to the news source CNET, remains skeptical of the signal booster guidelines, asserting “that poorly manufactured or improperly installed boosters can do much more harm than good for both consumers and public safety officials.”

This new statement from CTIA extends its prior assertion in response to the recent public notices that without carrier consent signal boosters should be banned outright. However, in response, the Commission asserts that the benefit these boosters provide is too great and as long as the signal boosters are properly manufactured and tracked via the licensing/certification process, then CTIA’s objections should not concern the further implementation of signal boosters. Therefore, the FCC seeks comments from organizations like CTIA who through their constructive criticism and comments will allow the Commission to update its regulation in the most efficient and productive manner possible. Since it appears that the Commission is not considering exercising the idea of removing signal boosters from the market, the input derived from this *NPRM* will ideally allow signal boosters to further provide its critical service to society, but without any threat of harming society in the process.

*Summarized by Brian Caron*

***In re Amendment of the Commission’s Rules Related to Retransmission Consent, Notice of Proposed Rulemaking, MB Docket 10-71 (March 3, 2011).***

On March 3, 2011, the Federal Communications Commission (“the Commission” or “FCC”) released a *Notice of Proposed Rulemaking* (“NPRM”) seeking comment on proposed revisions to the current retransmission consent rules. Prompted by a recent increase in retransmission consent negotiation standoffs, the Commission issued the NPRM with the goal of clarifying the rules to improve negotiations and protect consumers from carriage disruption.

The current retransmission consent rules mandate only that broadcast television stations negotiate in good faith with multichannel video programming

distributors (“MVPDs”). The good faith requirement was implemented in 1999, with the adoption of the Satellite Home Viewer Improvement Act (“SHVIA”).

Based on Congressional intent, the Commission interpreted the statute as urging them to refrain from subjecting the negotiations to any substantive regulation or oversight. Drawing from the concepts used in labor law, the Commission developed a two-prong test for evaluating “good faith.” They first look to a list of seven objective standards for good faith. A violation of any of the seven standards is considered a *per se* failure to negotiate in good faith. Next, they look at the “totality of the circumstances” to see whether the party participated in good faith negotiating. If the Commission finds that there was a failure to do so, they can order renegotiation. There have been few complaints regarding violations of the good faith standard, creating little to no precedent for the Commission to follow.

Following a petition from public interest groups and MVPDs criticizing the current negotiation regulations, the Media Bureau invited public comment on the matter. One of the major concerns for the Commission was the recent impact of failed negotiations on consumers, including the October dispute between Cablevision Systems Corp. and News Corp., which resulted in the loss of carriage of three stations for more than two weeks. In the current proceeding, the Commission identified their goal as protecting customers from this sort of disruption by updating the rules and remedies for good faith negotiations. The NPRM addressed five areas: (1) strengthening the good faith negotiation standards, (2) improving specification of the totality of circumstances standard, (3) revising notice requirements, (4) application of the “sweeps” prohibition in disputes, and (5) eliminating network non-duplication and syndicated exclusivity rules.

As an initial matter, in response to comments filed in response to the petition, the Commission clarified that they do not believe they have the statutory authority to impose rules regarding mandatory arbitration or interim carriage agreements. Next, in order to achieve the goal of strengthening the good faith negotiation standards, the Commission looked at seven conditions in particular. They asked whether they should impose these as additional rules of good faith negotiations, which are *per se* breaches when violated.

First, they addressed whether it should be a violation for stations to allow its affiliated network to have the right of approval for retransmission agreements.

The second topic that the Commission sought comment on was a proposal that would essentially prohibit any joint negotiations by stations or station groups that are not commonly owned. Because the entities might have competing interests, allowing non-commonly owned stations to participate has the potential to slow and complicate the process. The Commission expressed its

desire to allow for the benefits of sharing agreements, but still protect the consumers.

Next they ask whether a refusal to present a proposal about an important issue should constitute a *per se* violation, and if so, what should be considered an important issue.

Fourth, the Commission considered non-binding arbitration as a resolution for negotiation standoffs. They look to whether it should be a *per se* violation if a party refuses to take part in arbitration within 30 days of the expiration of their existing agreement. Although they reiterate that they cannot impose binding arbitration, they propose non-binding arbitration as an alternative.

The fifth matter seeks to clarify what qualifies as “unreasonably” delaying negotiations. It had been suggested in the initial comments that parties were deliberately delaying the negotiations as a tactic to gain the upper hand in the situation. The FCC recognizes the damage that this could cause to consumers, as the delay could result in disruption of service.

The next proposed *per se* violation is the request or requirement by the broadcaster that the MVPD not carry specific channels that they might otherwise, specifically out-of-market, significantly viewed stations.

Last, they request suggestions for any other actions that should constitute a *per se* violation.

The next major category they request comment on is the ‘totality of circumstances’ standard that is a part of Section 76.65(b)(2). This standard accounts for actions that do not constitute a *per se* violation, but still negatively impact the negotiations and as a result, the consumers. The Commission does not intend to use this as a way to affect substantive negotiations, but rather to preclude any sort of unreasonable negotiating. The primary question is whether the Commission should clarify the process for assessing the totality of the circumstances, or leave it as an open-ended inquiry. They characterize the existing standard as flexible, but seek comment on whether it should be more specific.

Next, they assess whether they should revise the requirements for notice to consumers of pending negotiation related disruptions. The Commission seeks to achieve a balance between alerting consumers to allow them to make plans for a disruption, and unnecessarily alarming them when a disruption may never actually occur. The current regulations require only that notice be given upon the actual disruption of service. The benefit of notifying consumers so they can assess their options must be weighed against the potential harms of the enhanced notice requirements, which could result in higher costs, public unease, and enflaming ongoing negotiations. The NPRM presents a host of questions about a revised notice requirement, including practical considerations such as the means by which to notify consumers as well as the effect of potentially

frequent notices.

The fourth topic that the Commission requests comment on is the extension of the prohibition of deletion of stations during the “sweeps” period, when ratings services measure the audience size for local stations. The existing law prohibits the deletion of stations by MVPDs, but does not address non-MVPDs or the reciprocal obligations of the broadcasters and whether they may request deletion.

The final matter addressed in the NPRM is the elimination of the non-duplication and syndication exclusivity rules. The Petition argued that these rules create an advantage for broadcasters, who may be able to use exclusivity rules to pressure stations into carriage agreements or prevent the cable system from carrying syndicated programming on another station. The removal of these rules would not affect the private contractual rights of exclusivity but would remove the ability to adjudicate them through the Commission, leaving the courts as the only means of implementing the agreements.

The Commission concludes the NPRM with a request for any other proposals for revising the retransmission consent negotiation rules, and reiterates their desire to protect consumers from the negative effects of carriage disruption.

*Summarized by Kelsey Guyselman*

***In re Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands, Notice of Proposed Rulemaking, 26 F.C.C.R. 2623 (Mar. 3, 2011).***

The Federal Communications Commission (“FCC” or “Commission”) adopted a Notice of Proposed Rulemaking (“Notice”) on March 3, 2011, which sought public comment on methods of increasing the use of spectrum over Tribal lands. The Commission found that overall connectivity for Tribes and the residents of Tribal lands was at a much lower level than the national average despite recently adopted FCC programs aimed at promoting wireless radio and other communications on such land. To combat the low levels of connectivity, the Commission introduced five proposals that provide additional means of advancing access to spectrum over Tribal land.

Three of the five proposals in the Notice focused specifically on new methods for the Tribes to gain access to spectrum. The FCC first requested comments on expanding the current Tribal licensing priority for unassigned Wireless Radio Services licenses, specifically requesting comments on the application process and structure for granting Tribal priority. The Commission also

sought comments on providing Tribes the opportunity to utilize second-market post-licensing opportunities through either license partitioning or through spectrum leasing through good faith negotiations. The Notice indicated Tribes have encountered challenges in initiating and completing negotiations with such licensees in the past, accordingly the FCC aimed to address the prospect of formalizing such negotiations. The Commission further requested comments on a build-or-divest process that would encourage Tribes to build in areas where licensees have met the mandatory construction requirement, but are not yet serving the Tribal lands within their service areas. Through this proposal, the FCC anticipated acceleration of services to such lands.

The remaining two proposals focus on establishing incentives for licensees to provide wireless services on Tribal lands. The Commission proposed the establishment of a Tribal lands construction safe harbor for wireless service providers. Under this proposal, if a licensee provided a requisite level of service to Tribal lands within a geographic area of its license, the licensee would be recognized as having met its construction obligations for the entire service area. While the Commission would attempt to model this safe harbor approach after the present rules regarding licensees in rural areas, the Commission requests comments on implementation of this proposal. Lastly, the FCC sought to explore possible modifications to the current Tribal lands bidding credit rules, including the extension of deadlines, which would in turn promote service to Tribal lands.

*Summarized by Michelle Tucker*

***In re Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 26 F.C.C.R. 2556 (Mar. 3, 2011).***

In this Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, the FCC adopted various guidelines that enhanced opportunities for Tribal entities to receive radio service, and also provide radio broadcast ownership opportunities to such communities.

In the Second Report and Order (Order), Tribes lacking their own “Tribal Lands” are now able to secure the Tribal Priority through seeking waiver. This will assist to include Tribes that share reservations instead of having land of their own.

Secondly, the Commission adopted several proposals under Section 307(b) of the Communications Act that aim to modify the distribution of channels

among urban and rural areas, instead of focusing generally on urban areas higher populations. Accordingly, the Commission issued proposals for new AM facilities, new FM allotments, and changes to community licenses.

The Order also prohibited FM translator “band hopping” applications as they waste resources and preclude the use of those frequencies in future reserved band filing windows for FM translators. The Order further codified the Commission’s decision in *Nelson Enterprises, Inc.* by providing proper standards for determining nighttime mutual exclusivity determinations between applications to provide AM service that are filed in the same window.<sup>1</sup>

In the First Order on Reconsideration, the Commission sought to modify a Tribal Priority adopted in the First Report and Order.<sup>2</sup> The Tribal Priority permitted Native American Tribes and Alaskan Native Villages a Section 307(b) priority for proposing service radio service with several required conditions. However, it had been brought to the Commission’s attention that the Tribal Priority might inadvertently limit the ability of qualifying entities, specifically Tribes with small or irregularly shaped land. Thus, the Commission adopted proposed modifications to the Tribal Priority to encompass Tribes with small or irregularly shaped land, given that they satisfy the other required conditions.

Lastly in the Second Further Notice of Proposed Rulemaking, the Commission sought a more complete record concerning the Tribal bidding credit, and whether to establish a bidding credit for Tribes seeking to provide commercial FM radio service to their Tribal lands. The present record on the topic is not conclusive concerning the effectiveness of the bidding credits. Further, the FCC requests comments about possible alternative approaches or the possibility of modifications to the qualifications to apply for a commercial FM radio channel.

*Summarized by Michelle Tucker*

***In re Implementation of Section 224 of the Act, A National Broadband Plan for Our Future, Report and Order and Order Reconsideration, 26 F.C.C.R. 5240 (Apr. 7, 2011).***

On April 7, 2011 the Federal Communication Commission (“FCC or “the

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<sup>1</sup> Memorandum and Opinion and Order, 18 F.C.C.R. 3414 (2003).

<sup>2</sup> Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, *First Report and Order and Further Notice of Proposed Rulemaking*, 25 F.C.C.R. 1583 (2010).

Commission”) released a Report and Order on the issue of pole attachment rules. The Commission is responding to the Act passed by Congress aimed at improving access to telecommunications and efficiency is installing networks.<sup>3</sup> The FCC identified one of the biggest hurdles to improving network access was the reliable access to the utility poles for installation. Therefore the FCC has developed a new procedure to manage access, rates, and terms for attachment.

Congress initially charged the FCC with this authority under § 224 of the Communications Act of 1934.<sup>4</sup> In 1996, Congress extended the use of pole attachments to telecommunication services but allowed utility companies to reserve the right to deny access poles.<sup>5</sup> At the time the FCC decided to handle pole attachments on a case-by-case basis and not adopt a uniform code. The Commission first streamlined the process in 2010 after the release of the National Broadband Plan. The *Pole Attachment Order and Further Notice* attempted to clarify the existing rules to quicken the process of pole attachments and sought comment on the current procedures. In September 2010 several utility providers filed petitions with the FCC seeking clarifications especially concerning nondiscriminatory use of attachment techniques. The current *Report and Order* addresses the issues raised.

## I. IMPROVED ACCESS TO UTILITY POLES

The first issue raised was the difficulty of timely access to the utility poles by communications providers. The FCC has developed a timeline to prevent excessive delays to the installation process. The timeline will also help attachers make business plans and move broadband projects forward. The process will use four stages taking a total of 148 days to complete. Stage One is a survey period that allows pole owner to evaluate the feasibility of an attachment. In Stage Two, the pole owner will provide an estimate of the make-ready charges for the attachment. Stage Three gives the attacher two weeks to approve and pay for the access. Finally Stage Four requires the pole attacher to complete any necessary make-ready work. The FCC notes that most completions should occur well before the 148-day deadline.

Telecommunication carriers and cable operators seeking attachments in the communication space on utility poles will use the timeline for all requests. It will also apply equally to wireline and wireless attachments. The timeline

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<sup>3</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat 115, § 6001(k)(2) (2009).

<sup>4</sup> 47 U.S.C. § 224(a)(4).

<sup>5</sup> 47 U.S.C. § 224(a)(4), (f)(1)

starts to run when the application is complete. Pole owners are given an extended timeline for especially large attachment requests to provide more time to make the necessary surveys and make-ready plans. There are also extensions allowed for any attachments made above the communications space to improve safety and reliability of installation. Utility providers are also provided exceptions to the timeline if the orders are extremely large order that either exceed 0.5 percent of the utilities total poles in the state or 300 poles, whichever is larger. Emergencies may also allow the utility to “stop the clock” on the timeline if they show good and sufficient cause.

The FCC provides remedies to requesters when the utility companies fail to meet the deadlines of the timeline. An attacher may hire a contractor to complete the necessary work if the utility company fails in either the survey or make-ready stage. Utility companies must be allowed to consult and accompany the contractor performing the work and electric utilities may make final determinations on issues of safety and reliability. The remedy may be used immediately thus limiting any further delays to the process. Attachers are restricted to hiring contractors from a list already approved by the utility. As noted, the utility will still have a right to oversee installation.

## II. ENFORCEMENT PROCESS

In response to comments, the FCC stresses that disputes should first attempt to be settled between the parties before filing a formal complaint with the Commission. To further this, they will require “executive-level discussions” to occur before complaints are filed. These discussions should occur between high-level officials of each party whose decisions will be binding. The FCC also encourages discussions and coordination between the pole owners and attachers to occur as early in the process as possible. Additionally, the FCC pledges to handle formal complaints as quickly as possible.

To continue expediting the process of pole attachments, the Commission recommends that all agreements include dispute resolution procedures. Included in the provision should be the “executive-level discussions.” The 30-day deadline for filing formal complaints is also removed to prevent parties from filing pre-maturely only to meet the deadline. The FCC declined to allow compensatory damages to be awarded for a failure to comply or negotiate. However, the Commission does extend the time period for attachers to seek repayment for overcharges.

Several commenters had raised concerns about unauthorized attachments. The FCC addresses this by adopted a presumption of reasonableness for any penalties contained in the contracts. These penalties are limited by those already put in place by Oregon. If the attacher makes an unauthorized attach-

ment before having an agreement, the penalties provided in a subsequent agreement may be applied to the prior violation. If no subsequent attachment contract is ever made, the utility provider may seek other court remedies.

### III. POLE RENTAL RATES

The FCC has also reevaluated the rate structure so that it will continue to promote the expansion of broadband access and also reasonably compensate pole owners. Overall the rates will be lowered to improve competition and serve the public interest. The new rate will focus on a reasonable balance between the needs of both sides of the agreement. The current telecom rate will be come of the upper range for reasonableness. To establish the lower range, the Commission will rely on cost causation principles whereby if a customer is responsible for causing the cost, the customer will pay the rate for that cost. This will be applied to every category of owner's costs. In defining costs, the FCC divides the costs into urban and non-urban areas, with costs making of a percentage of the fully allocated costs previously used for the telecom rate. The difference in areas reflects the greater requests for pole attachments in urban areas. The FCC notes that these changes in the rates will better reflect Congressional intent and the public policy goals of the National Broadband Plan.

The new rates are expected to improve competition and increase the availability of broadband. By decreasing rates, more cable providers will choose to offer advanced services because they will not longer be required to pay the higher rate. It will also continue to promote expansion because providers will continue to expand into more markets. Despite some complaints from utility companies, the FCC maintains that the new rate structure will still allow the utilities to recover their costs.

*Summarized by Nicole Ruzinski*

