

**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
)	

COMMENTS



I. INTRODUCTION.

The American Cable Association (“ACA”) files these comments in response to the Commission’s Further Notice of Proposed Rulemaking seeking comment on certain pole attachment reforms.¹ ACA commends the Commission for “begin[ning] the process of revising the Commission’s pole attachment rules to lower the costs of telecommunications, cable, and broadband deployment and to promote competition....”² ACA supports many of the reforms proposed in the *FNPRM*, and urges the Commission to:

- Retain the existing cable rate for cable operators providing commingled video and Internet services.
- Consider the impact additional pole attachment related fees have on broadband deployment and consumers.
- Implement a make-ready process timeline.

¹ *In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, FCC 10-84, WC Docket No. 07-245, GN Docket No. 09-51 (rel. May 20, 2010) (“*FNPRM*”).

² *FNPRM* at ¶ 1.

- Allow attachers to use outside contractors to perform surveys and make-ready work if a utility has failed to perform its obligations within the timeline proposed by the Commission.
- Permit applicants to pay make-ready charges in stages.
- Require utilities to make a schedule of make-ready charges available to attaching entities.
- Enumerate in its rules the remedies available to an attacher that proves a utility has unlawfully delayed or denied access to its poles.
- Specify in its rules that compensatory damages may be awarded where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable.
- Retain the current “sign and sue” rule.

American Cable Association. ACA represents nearly 900 independent cable companies that serve more than 7.6 million video subscribers, primarily in smaller markets and rural areas. ACA member systems are located in 49 states and 4 U.S. territories. The companies range from family-run cable businesses serving a single town to multiple system operators with small systems in small markets. More than half of ACA’s members serve fewer than 2,000 subscribers. All ACA members face the challenges of building, operating, and upgrading broadband networks in lower density markets.

II. INCREASING THE POLE ATTACHMENT RATE FOR CABLE OPERATORS WILL HINDER BROADBAND DEPLOYMENT AND HARM CONSUMERS.

ACA supports the Commission’s efforts to ensure that pole attachment rates are as low and close as uniform as possible in order to promote broadband deployment and competition, but strongly opposes any increase in the attachment rate cable operators currently pay for providing commingled video and Internet services. ACA also urges the Commission to consider the impact additional pole attachment related fees have on broadband deployment and consumers.

A. The Commission must not increase the pole attachment rate cable operators currently pay for providing cable and Internet services on a commingled basis.

In the *FNPRM*, the Commission seeks comment on “ways to minimize the distortionary effects arising from the differences in current pole rental rates, consistent with the objectives of the National Broadband Plan and the existing statutory framework.”³ Specifically, the National Broadband Plan recommends that the Commission “establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, as amended, to promote broadband deployment.”⁴

While ACA supports the Commission’s efforts to ensure that pole attachment rates are as low and close to uniform possible in order to promote broadband deployment, ACA strongly opposes any proposal that would **increase** the pole attachment rate cable operators currently pay for providing video and Internet services on a commingled basis. Retention of the existing cable pole attachment rate for cable operators providing commingled services is essential, as it has been instrumental in the ability of smaller cable operators to deploy broadband facilities and offer advanced services in smaller markets and sparsely populated rural areas. Rural and small market providers already face significant hurdles to deploying and upgrading their broadband networks, as they generally must attach their equipment to a greater number of poles than their urban counterparts, yet have fewer subscribers per mile over which to spread the costs.

³ *FNPRM* at ¶ 110.

⁴ *Connecting America: The National Broadband Plan* at 109 (rel. Mar. 16, 2010), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> (last visited Aug. 16, 2010) (“*National Broadband Plan*”).

As the Commission has recognized, in such areas there are fewer homes per mile of plant, so more poles – and correspondingly more attachments – are required to bring advanced broadband technologies to each subscriber’s home.⁵ An increase in the rate charged for these pole attachments is therefore multiplied for each subscriber in smaller markets and rural areas. As a result, increasing cable operators’ existing pole attachment rate – whether to the telecom rate or some other rate higher than the current cable rate – will have a significant, detrimental impact on broadband adoption, especially in the smaller markets and rural areas served by ACA’s members.

The Commission has long acknowledged the detrimental impact applying the higher telecom rate to attachments used for commingled video and Internet services could have on cable operators’ incentive to offer new services:

In specifying [the cable] rate, we intend to encourage cable operators to make Internet services available to their customers. We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the [cable rate] will encourage greater competition in the provision of Internet service and greater benefits to consumers.⁶

In the *FNPRM*, the Commission also recognizes the detrimental impact increasing the pole attachment rate cable operators currently pay for providing commingled video and Internet services would have on both broadband prices and broadband deployment:

⁵ See, e.g., *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd. 6453, ¶ 118 (2000) (“The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers.”); *In the Matter of Caribbean Communications Corp., Petition for Special Relief*, Memorandum Opinion and Order, 17 FCC Rcd. 7092, ¶ 14 (2002) (noting that systems with more than 15,000 subscribers average 68.7 subscribers per mile, while small systems service on average only 35.3 subscribers per mile.). More than half of ACA’s members’ serve fewer than 1,000 subscribers and serve even fewer subscribers per mile).

⁶ *FNPRM* at ¶ 116 (citing *In the Matter of Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-151, 13 FCC Rcd. 6777 6794, ¶ 32 (1998)).

We believe that pursuing uniformity by increasing cable operators' pole rental rates – potentially up to the level yielded by the current telecom formula – would come at the cost of increased broadband prices and reduced incentives for deployment.⁷

To emphasize this point, the Commission notes that “[a] number of cable operators confirm that they have been deterred from offering new, advanced services...based on the possible financial impact if, as a result, they were required to pay the current telecom rate for all their poles.”⁸

In a recent filing, ACA described how some ACA members – many of whom provide broadband service to rural areas that would otherwise not have access to broadband – will face rate increases of 400 percent should the telecom rate be applied to attachments used to provide commingled video and Internet services.⁹ The impact of applying the telecom rate to these operators is manifest, affecting not only operators' plans to expand their services areas to other rural areas, but also potentially impacting current service offerings.¹⁰

Section 706 of the Telecommunications Act directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans....”¹¹ Increasing the pole attachment rate cable operators

⁷ *FNPRM* at ¶ 118.

⁸ *FNPRM* at ¶ 116 (citations omitted).

⁹ See *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010), Reply Comments of the American Cable Association at 15-17 (filed Aug. 12, 2010) (“*ACA Third Way Reply Comments*”) (detailing the detrimental impact applying the telecom pole attachment rate to cable operators providing commingled video and Internet service would have on Wire Tele-View Corporation, SEMO Communications Incorporated, and NewWave Communications).

¹⁰ See *ACA Third Way Reply Comments*, Attachment A, Declaration of Tyrone Garrett at 1 (“The impact of increased pole attachment rates would have a chilling effect on the expansion plans of [SEMO Communications Incorporated].”); *ACA Third Way Reply Comments*, Attachment B, Declaration of James M. Gleason at 1 (“[NewWave Communications] would be forced to evaluate certain current rural areas served to determine if continued service is viable [should the pole attachment rate increase to the telecom rate]...NewWave’s ability to extend its plant into newer, rural areas would be significantly curtailed.”).

¹¹ Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, as amended Pub. L. 107-110, § 1076(gg), Jan. 8, 2002, 115 Stat. 2093, reproduced in notes to 47 U.S.C. § 157(a).

currently pay for attachments providing commingled video and Internet services – particularly if the pole attachment rate increases to the current telecom rate or higher¹² – will have a significant and detrimental impact on both broadband deployment and the current provision of broadband services. This is especially true in smaller markets and rural areas where increases in cost can price broadband out of reach for many consumers. This result is at odds with the Commission’s mandate to encourage the deployment of broadband services to *all* Americans – including those in smaller and rural markets.

While ACA supports the Commission’s efforts to ensure that pole attachment rates are as low and close as uniform as possible in order to promote broadband deployment and competition, ACA strongly opposes any increase in the current cable rate. ACA therefore urges the Commission to retain the existing cable rate for cable operators providing commingled video and Internet services.

B. The Commission must consider the impact additional pole attachment related fees have on broadband deployment and consumers.

In addition to pole attachment rental fees, ACA members report that other pole attachment fees can also have a detrimental impact on broadband deployment and the current provision of broadband services. These include application fees, engineering fees, make-ready fees, and audit fees.

As noted above, there are fewer homes per mile of plant in rural areas, so more poles – and correspondingly more attachments – are required to bring advanced broadband technologies to each subscriber’s home. Moreover, because these fees are typically levied

¹² As the Commission notes in the *FNPRM*, under a proposal offered by USTelecom, “the rates paid by telecom attachers generally would be lower than those rates are today, but the rates paid by cable attachers would be higher.” *FNPRM* at ¶ 121. Moreover, under a proposal offered by AT&T and Verizon, “it appears that both telecommunications carriers and cable operators generally would pay higher pole attachment rental rates than yielded by the current telecom rate formula.” *FNPRM* at ¶ 121.

on a per pole basis, they can be very costly to cable operators providing service in rural areas. With approximately 30 poles per mile, these additional costs can have a considerable impact on broadband deployment in rural areas, where there is a limited number of subscribers in which to spread these costs around. As a result, any increase in cost to provide service in rural areas could potentially lead to the delay of operators' expansion plans and even impact the provision of existing services.

In addition to pole attachment rental rates, ACA urges the Commission to also consider the impact additional pole attachment fees can have on broadband deployment and consumers.

III. ACA SUPPORTS THE COMMISSION'S PROPOSALS TO IMPROVE ACCESS TO POLES.

ACA fully supports the Commission's efforts to improve access to poles, including the proposals to: (i) implement a five-stage timeline to govern the pole attachment process for wired attachments; (ii) allow attachers to use contractors to perform surveys and make-ready work if a utility has failed to perform its obligations within the Commission's proposed timeline; (iii) permit applicants to pay for make-ready work in stages; and (iv) require utilities to make a schedule of make-ready charges available to attaching entities.

Make-ready timeline. In the *FNPRM*, the Commission proposes to implement a five-stage timeline to govern the pole attachment process for wired attachments.¹³ The timeline would include the following stages: (1) survey; (2) estimate; (3) attacher acceptance; (4) performance; and, if needed, (5) multiparty coordination.¹⁴ ACA members

¹³ *FNPRM* at ¶ 31.

¹⁴ *FNPRM* at ¶¶ 31-45.

describe the current make-ready process as flawed, and the proposed make-ready timeline would represent a significant improvement in that process.

ACA members report significant frustration with the current make-ready process. In addition to being time-consuming, operators often encounter changes to estimated pole attachment charges, the inability to obtain a firm completion date for make-ready work, and generally unresponsive pole owners. The delay in make-ready work also places operators at a competitive disadvantage, as they are unable to offer their services to consumers until the attachments are on the poles. ACA is aware of an instance where the make-ready process has still not been completed more than two years after an operator sent an application to a pole owner. Of course, these delays are in addition to the costs associated with application, engineering, and make-ready fees. Based on the foregoing, ACA supports the Commission's proposal to implement a five-stage timeline to govern the pole attachment process for wired attachments.

Use of outside contractors. The Commission also proposes to allow attachers to use contractors to perform surveys and make-ready work if a utility has failed to perform its obligations within the Commission's proposed timeline.¹⁵ As noted above, many ACA members are frustrated with make-ready delays. Allowing attachers to use outside contractors to perform surveys and make-ready work if a utility has failed to perform its obligations within the timeline proposed by the Commission is a welcome proposition, and ACA supports the Commission's proposal.

Other options to expedite pole access. The Commission further proposes to permit applicants to pay for make-ready work in stages, as well as require utilities to make a

¹⁵ *FNPRM* at ¶¶ 58-60.

schedule of make-ready charges available to attaching entities.¹⁶ Again, the make-ready process is time-consuming and costly. In addition to the timeline proposed by the Commission, permitting applicants to pay make-ready charges in stages will presumably encourage and incentivize pole owners to perform make-ready work on schedule and complete that work in a timely manner. Transparency in make-ready charges is also important, and requiring utilities to make a schedule of make-ready charges available to attaching entities will hopefully speed up the make-ready process. ACA supports both of these proposals.

IV. IMPROVING THE POLE ATTACHMENT ENFORCEMENT PROCESS.

ACA supports many of the Commission's proposals to improve the pole attachment enforcement process, including certain changes to the Commission's rules that will provide disincentives to pole owners for denying access to poles. However, ACA opposes any modification to the so-called "sign and sue" rule, as such changes may disproportionately affect smaller operators and lead to unintended consequences.

Improvements to the pole attachment enforcement process. In the *FNPRM*, the Commission proposes several improvements to the pole attachment enforcement process. ACA supports the Commission's proposals to: (i) amend the Commission's pole attachment complaint process to enumerate the remedies available to an attacher that proves a utility has unlawfully delayed or denied access to its poles;¹⁷ (ii) specify in its rules that compensatory damages may be awarded where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable;¹⁸ and (iii)

¹⁶ *FNPRM* at ¶¶ 70-72.

¹⁷ *FNPRM* at ¶ 85.

¹⁸ *FNPRM* at ¶ 86.

amend its rules to provide for an award of compensatory damages where a rate, term, or condition is found to be unjust or unreasonable.¹⁹ ACA supports these proposals, as they provide reasonable and meaningful remedies for attachers that have been wrongfully denied or delayed access to poles, and provide a disincentive for pole owners to deny access to poles.

The “sign and sue” rule. Current Commission rules and precedent allow an attacher to execute a pole attachment agreement with a utility, and then later file a complaint challenging the lawfulness of a provision of that agreement.²⁰ The Commission adopted the “sign and sue” rule in recognition that utilities have monopoly power over pole access.²¹ While the Commission asserts that “there remains a real possibility that utilities may abuse their monopoly power during the negotiating process...[and] propose[s] that the sign and sue rule should be retained in some form,”²² it seeks to modify the existing rule so that attachers are required to provide a pole owner with notice, during negotiations, of the terms it considers unreasonable or discriminatory, as a prerequisite for later bringing a complaint challenging that provision.²³

As the Commission recognizes in the *FNPRM*, cable operators or telecom providers may need to sign an unreasonable pole attachment agreement because they cannot afford to be delayed by protracted negotiations or litigation before the Commission.²⁴ Requiring operators to provide the proposed notice could disproportionately affect smaller operators and lead to unintended consequences. For example, operators that negotiate pole

¹⁹ *FNPRM* at ¶ 87.

²⁰ *FNPRM* at ¶ 99.

²¹ *FNPRM* at ¶ 104.

²² *FNPRM* at ¶ 104.

²³ *FNPRM* at ¶¶ 99, 107.

²⁴ *FNPRM* at ¶ 100.

attachment agreements on their own behalf – and without counsel – may not know that they will waive their right to contest unreasonable or discriminatory provisions in a pole attachment agreement if they fail to provide the pole owner with notice of their objections during negotiations. This is particularly true for small operators, some of whom provide service to as little as 200 subscribers. These operators should not lose their right to challenge an unreasonable or discriminatory provision in a pole attachment agreement merely because they failed to provide notice of their objections to the pole owner during negotiations.

Further, pole owners may pressure operators – particularly smaller operators – to waive any objections to provisions that the operator considers unreasonable or discriminatory by including clauses in the agreement attesting to the reasonableness and non-discriminatory nature of the provisions contained in the agreement. At the very least, the pole owner should be deemed to have constructive notice of the attacher’s objection to a particular provision or provisions of an agreement if they were the subject of contentious negotiations. The “sign and sue” rule serves a useful purpose, and ACA opposes any changes to the rule as it is currently constituted.

V. CONCLUSION.

ACA commends the Commission’s efforts to lower the costs of telecommunications, cable, and broadband deployment and to promote competition, and urges the Commission to promptly implement the proposals supported by ACA in these Comments.

Respectfully submitted,

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