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FCC Mulls Cost Sharing Rules for Pole Replacements

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I. Overview

On February 23, the Federal Communications Commission (FCC) released a draft Second Further Notice of Proposed Rulemaking (Second Further NPRM) concerning pole attachments and pole replacements for poles owned by investor-owned utilities and incumbent local exchange carriers (Utilities or Utility).[1] On March 16, the FCC unanimously adopted the Second Further NPRM[2] to seek comment on ways the FCC could facilitate the resolution of pole replacement and pole attachment rate disputes, with a focus on the following:

- Situations in which a pole replacement is not "necessitated solely" by a new attachment request, whether and to what extent Utilities directly benefit from various types of pole replacements, and if the FCC should establish standards for when Utilities should be required to pay a proportional share of pole replacement costs;
- The costs and benefits of early pole retirements, specifically (1) whether requiring Utilities to pay a portion of the costs of a pole replacement would better align the economic incentives between communications attachers and Utilities, and (2) whether such a requirement would positively or negatively affect negotiations of pole attachment agreements and broadband deployment;
- Measures the FCC could adopt to avoid and expedite the resolution of pole replacement disputes; and
- The scope of refunds ordered by the FCC when it determines that a pole attachment rate, term, or condition is unjust and unreasonable.[3]

The topics covered by this Second Further NPRM indicates the FCC is open to restrictions on areas of pole management that the FCC has not attempted to regulate for many years. This advisory summarizes the FCC's key statements in the Second Further NPRM with a focus on the important context and insight regarding potential next steps.

II. Background

The FCC regulates the rates, terms, and conditions of pole attachments by cable television systems and telecommunications carriers to investor-owned utility and incumbent local exchange carrier poles under Section 224(b) of the Communications Act of 1934, as amended. Since the passage of the 1996 Telecommunications Act, the FCC has undertaken significant regulatory activities in this area, usually to the benefit of attaching entities as

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opposed to pole owners. Generally, courts have upheld the FCC's pole attachment rulemakings. But in one key exception, the Eleventh Circuit in *S. Co. v. F.C.C.,* 293 F.3d 1338 (11th Cir. 2002) overturned, among other regulations, regulations that would require pole owners to replace poles for new attachments.

The FCC let the topic of pole replacements lie for many years. But in January 2021, the Wireline Competition Bureau (Bureau) ruled that Utilities may not impose the entire cost of a pole replacement on a requesting attacher when the attacher is not the sole cause of a pole replacement.[4] Here, the FCC used its power to regulate the "terms and conditions" of pole attachments generally to regulate (although not compel) pole replacement terms and conditions. The Bureau found that it would be contrary to the FCC's rules and policies to require a new attacher to pay the entire cost of a pole replacement when a pole already requires replacement (*e.g.,* because the pole is out of compliance with current safety and utility construction standards) at the time a request for a new or modified attachment is made.[5] Notably, the Bureau concluded that 47 C.F.R. § 1.1408(b) applies to pole replacements. The regulation itself refers to "modification" of a facility; many Utilities maintained that the term "modification" cannot refer to wholesale replacement of a facility.

Now, the FCC's Second Further NPRM seeks comment on further regulation of the cost sharing terms and conditions between pole owners and pole attachers, indicating that it may require pole owners to bear more costs for voluntary pole replacements than ever before.[6]

A. Determining the Applicability of Cost Causation and Cost Sharing

The FCC seeks comment on whether there are other situations in which a pole replacement is not "necessitated solely" by a new attachment request, other than situations where the pole already needs to be replaced as discussed in the Pole Replacement Declaratory Ruling.[7] The FCC indicated that a Utility might have to share the cost of a pole replacement that the Utility planned on replacing at some point in the near future, but not at the time of the request to attach to a pole at full capacity, and seeks comment on when and how that might be appropriate.[8] The FCC may codify a definition of "necessitated solely" for the purposes of Section 1.1408(b) and seeks comment on what should that definition be.[9]

If a pole replacement is necessitated for a reason other than a new attachment request, Section 1.1408(b) requires existing attachers (including the Utility) to pay a proportional share of the replacement costs only if they "directly benefit" from the replacement.[10] The FCC asks whether any benefits that accrue to existing attachers are direct versus incidental (and therefore not requiring cost sharing) and how they define those terms for the purposes of their arguments and cite all economic and legal authorities that support their positions.[11] The FCC also seeks comment on whether a Utility directly benefits from a pole replacement necessary to correct a preexisting violation that the Utility did not cause, and what are the circumstances under which existing attachers, as opposed to Utilities, may be responsible for preexisting violations that require an entire pole to be replaced. In this part of the Second Further NPRM, the FCC suggests that Utilities may be responsible for correcting pre-existing violations of third-party attachers, which we expect Utilities to strenuously dispute. To help answer this question, the FCC asks for more detail from Utilities regarding the economic implications of being required to replace poles before internal processes would otherwise require.[12]

B. Allocating Costs When Utilities Directly Benefit From Pole Replacements

Attachers have represented to the FCC that Utilities often seek to hold them responsible for all costs of replacing a pole needed to make space for a new attachment, even where some costs are not needed to accommodate the new attachment.[13] Utilities contend that while implementing a pole replacement is necessitated solely by the new attachment, they should be able to enhance the pole in some way that is not necessitated by the new attachment without incurring financial responsibility for those enhancements.[14] Attachers have also argued that Utilities receive a windfall when they hold new attachers responsible for all the costs of a pole replacement because it eliminates or reduces the costs they would have otherwise had to pay to replace the pole in the future.[15] Utilities counter that the early retirement of their poles precipitated by a new attachment comes at a cost — the value they lose in a capital asset that has not yet reached the end of its useful life — and are thus entitled to compensation for the unrealized value of the pole.[16]

The Second Further NPRM signals that the FCC is no longer content to leave these matters to private negotiation. The FCC seems especially concerned with the effect pole replacement costs have on the deployment of broadband networks.[17] To evaluate and resolve these competing concerns, the FCC seeks comment on whether it should revise its pole attachment rules to expressly recognize that Utilities directly benefit from pole replacements precipitated by a new attachment request and establish clear standards for when and how Utilities should be required to pay a proportional share of the total pole replacement costs.[18] The FCC also asks whether such standards would help or hinder cost dispute resolutions. The FCC leaves open the possibility that disputes are more likely to be fact-specific and better addressed in adjudicatory proceedings, and requests comments on that point.[19] The FCC lists a series of questions regarding the responsibility of pole upgrades and modifications unrelated to new attachments,[20] as well as the cost and benefits of early pole retirement.[21] Pole owners and attaching entities should review these questions carefully, as we expect responsive data to drive the FCC's ultimate decision on this important new area of potential regulation.

C. Avoiding and Resolving Pole Replacement Disputes

Lastly, the FCC seeks comment on additional measures it could adopt that would enable attachers and Utilities to avoid pole replacement disputes and/or quickly resolve them when they occur.[22] Attachers argue that the FCC should require Utilities to provide potential attachers with information concerning the condition of, and replacement plans for, their poles.[23] The FCC asks whether access to such information would avoid disputes and what specific information and mechanism(s) should be used to provide such information to attachers?[24]

When disputes are unavoidable, the FCC asks commenters whether there are additional procedures the FCC should adopt to expedite the resolution of pole attachment complaints.[25] In 2017, the FCC established a 180-day shot clock for the FCC's Enforcement Bureau to resolve pole access complaints.[26] Communications attachers argue that the FCC should take the additional step of announcing policies favoring the placement of pole attachment complaints arising in unserved areas on the FCC's Accelerated Docket, which must conclude in 60 days.[27] Specifically, the FCC seeks comment on whether such a step is necessary given the 180-day shot clock for pole access complaints and the discretion already afforded to FCC staff to place a complaint on the FCC's Accelerated Docket if they deem it suitable.[28] The FCC also asks commenters how its proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the FCC's relevant legal authority.[29]

III. Analysis

The FCC did not issue this Second Further NPRM in a vacuum. Attachers have been advocating more vigorously for more advantageous pole attachment rules since the pandemic drove workers home in 2020, and many of the suggestions made by attachers have found their way into this Second Further NPRM. The enormous amount of federal funding toward broadband expansion, also instigated by the pandemic, puts pressure on the federal government to remove any barriers and waste that might impede the goal of that funding. These factors have pushed the FCC into another phase of scrutinizing the practices of all owners of infrastructure used by, or useful to, communications networks. Commissioner Carr, in his public statement accompanying the Second Further NPRM, said the FCC should next turn to reducing fees for municipal and cooperative poles and linear public rights of way, and if the Biden administration can fill the open seat on the FCC many expect new net neutrality rules as well, which will give broadband-only provider mandatory pole rights, among other things.

Overall, this Second Further NPRM puts the onus on pole owners to provide data to justify placing costs of pole replacements (especially in cases where poles are scheduled to be replaced in the future) on attaching entities. We expect attaching entities to submit significant data concerning the amount of pole replacement costs they have borne in the past two years, as well as the effect those costs have had on deployment. Pole owners may also be interested in providing data concerning the many issues that have arisen when non-requesting attachers are responsible for some costs associated with make-ready work. The FCC hinted it might make pole owners responsible for certain costs caused by third-party attachers. Pole owners will balk at this proposal, but may suggest additional obligations on those non-requesting attachers. Attaching entities using, or hope to use, public funding for additional deployment goals will likely describe how these costs interact with, and affect the goals of, said funding. Additionally, the subject matter of this Second Further NPRM reaches to the edge of the FCC's powers regarding pole replacements under the *Southern Company* case, and as such we expect that any ruling by the FCC that increases regulation of pole replacements to be challenged by pole owners.

Utilities and communications attachers should strongly consider providing comments to the FCC during the Notice and Comment Period. Utilities and communications attachers should also review their current pole attachment agreements and prepare for a potential ruling from the FCC that will introduce cost sharing for pole replacements. If you have any questions regarding the FCC's Second Further NPRM or would like assistance reviewing and responding, contact Alan Poole with Troutman Pepper's Telecommunications Infrastructure team. If you would like to receive more updates and key insights for telecom and infrastructure, please subscribe to our advisory updates by clicking here and selecting the "Telecom and Infrastructure" box.

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[1] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Second Further Notice of Proposed Rule Making (Second Further NPRM)*, WC Docket No. 17-84, ? 1, Feb. 23, 2022.

[2] "FCC Seeks Input on Resolving Disputes Over Costs for Pole Replacements: Adopts Notice to Provide Regulatory Certainty Around Pole Attachment Rules," FCC News Release, WC Docket No.17-84, https://www.fcc.gov/document/fcc-seeks-input-resolving-disputes-over-costs-pole-replacements, Mar. 16, 2022.

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[3] *Second Further NPRM*, at Fact Sheet page.

[4] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No.

17-84, Declaratory Ruling, 36 FCC Rcd 776, 777, at para. 3 (WCB 2021) (Pole Replacement Declaratory Ruling).

[5] *Id.*

[6] *Id.*, at ? 3.

[7] *Id.*, at ? 9.

[8] *Id.*, at ? 10.

[9] *Id.*

[10] *Id.*, at ? 11.

[11] *Id.,* at ? 11.

[12] *Second Further NPRM*, at ? 15.

[13] *Id.*, at ? 16.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.,* at ? 17.

[18] *Id.*, at ? 18.

[19] *Id.*

[20] *Id.*, at ?? 19–26.

[21] *Id.*, at ?? 27–34.

[22] *Second Further* NPRM, at ? 35.

[23] *Id.*

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[24] *Id.*

[25] *Id.*, at ? 36.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

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