

# Rights of Way & Other Infrastructure Siting Issues

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# Disclaimer

- This presentation is not intended to create an attorney-client relationship
- The information contained in this presentation is general and is not offered as legal advice
- You are strongly encouraged to consult with your attorney(s) if you have specific questions
- Any reliance on the information in this presentation is taken at your own risk



# Pole Attachment Rights

- Section 224 of Communications Act: Rates, terms, and conditions for attachments by cable provider or provider of telecommunications services to a pole, duct, conduit, or right-of-way owned or controlled by a utility must be just and reasonable
  - Does not include broadband-only providers
  - Does not apply to poles owned by cooperatively-owned or municipal utility
- Utility may deny access for insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes
- States can “reverse preempt” FCC rules (24 states incl. DC)



# Pole Attachment Timelines: Application Review and Survey

- 10 business days to review for completeness and 5 business days to review re-submitted application
- 45 days for utility to complete survey of poles and respond to request for access (60 days for “larger orders”)
- Utility must provide estimate of make-ready work charges within 14 days of survey results
- Attacher has 14 days to accept estimate and provide payment



# Pole Attachment Timelines: Make-Ready

- For attachments in communications space: 30 days (or 75 days for larger orders)
- For attachments above communications space: 90 days (or 135 days for larger orders)
  - Utility may assert right to 15 additional days
- Utility provides notice to existing attachers and new attacher is responsible for coordination



# Pole Attachment Timelines: Large Orders

- Large order = More than 300 or 0.5% of the utility's poles in a state, whichever is less, up to 3,000 poles or 5% of the utility's poles in a state (whichever is less)
- More than 3,000 poles or 5% subject to "good faith" negotiation
  - First 3,000 poles in attachment application subject to timelines for large orders
- Utilities can deviate from make-ready timelines for "good and sufficient cause"



# Pole Attachment Timelines: Self-Help

- Surveys: If utility fails to complete survey within 45 (or 60 days)
- Make-ready: If make-ready not complete within 30 (or 75 days) for attachments in communications space or 90 (or 135 days) above communications space
- Must use utility-approved contractors for complex make-ready and work above communications space
- New attacher may choose own qualified contractor for surveys and simple make-ready if utility does not make list available
- New attacher must notify utility and existing attachers within 15 days after completion and they have 90 days to inspect and must notify new attacher within 14 days after inspection of any damage or code violations



# Pole Attachment Timelines: One-Touch Make Ready (OTMR)

- Available for simple make-ready
- Utility has 10 business days to review application and 5 business days for re-submitted application
- Utility must grant or deny within 15 days (or 30 days for larger orders)
- New attacher must provide 15 days notice to utility and existing attachers before proceeding with make-ready
- New attacher must notify utility and existing attachers within 15 days after completion and they have 90 days to inspect and must notify new attacher within 14 days after inspection of any damage or code violations
- Must use utility-approved contractor if list available



# New Pole Attachment Issues at FCC: 4th Report and Order (Dec. 2023)

- Rapid Broadband Assessment Team (RBAT) to provide coordinated review and assessment of pole attachment disputes impeding or delaying deployment of broadband facilities
- FCC adopted specific criteria for cases on Accelerated Docket (60 days)
- Utility pole owners must provide, upon request, information contained in most recent cyclical pole inspection report, incl. whether any poles have been “red tagged” for replacement and scheduled replacement timeframe



# New Pole Attachment Issues at FCC: Red-Tagged Poles and Pole Replacement

- New definition of red-tagged pole: Pole that a utility has identified for replacement for any reason other than the pole's lack of capacity to accommodate a new attachment
- Pole replacement is not necessitated solely by new attachment - (1) pole replacement required by applicable law; (2) current pole fails engineering standards; (3) utility's previous or contemporaneous change to internal construction standards; (4) road expansion or moves, property development, in connection with storm hardening, or similar government-imposed requirements; or (5) pole is already on utility's internal replacement schedule
- Utilities must provide potential attachers with a copy of the utility's easement before a utility can refuse to let attacher share easement or require attacher to obtain its own easement



# New Pole Attachment Issues at FCC: 3rd Further Notice (Dec. 2023)

- Adopt deadline for large orders over 3,000 poles or 5%: Add 90 days to make-ready deadlines
- Whether to adopt limits on # of poles per application?
- Expanded or “early” self-help remedies for surveys, estimates, pole replacements, etc.?



# Railroad Crossings for Fiber Optic Broadband Lines

- New state laws (VA July 2023)
  - Require broadband provider to submit application and 35 day shot clock
  - Caps fees at \$2,000 (or \$1,000 if abandoned) plus up to \$5,000 in costs
  - AAR filed lawsuit
- Other states: Illinois, Iowa, Minnesota, Nebraska, SD, Wisconsin
  - South Dakota and Iowa: \$750, MN and Nebraska: \$1,250, IL: \$1,500, WI: \$500
  - Set timelines between 30-60 days
  - Deemed granted remedy or right to petition state PUC
- Michigan: State appellate court held fiber optic broadband provider did not need permission from Norfolk Southern to install fiber optic cables 15 feet underground - appeal pending



# Access to Public Rights-of-Way

- Regulated by state law and administered by municipal or county agency
- Local agencies usually required to give access to ROWs to certified local exchange carriers or franchised cable operators (who are subject to franchise fee caps)
- Other entities can have access at the local agency's discretion, at non-regulated rates



# State Laws On Access To ROWs for Broadband

- New state laws to streamline permitting process for broadband - lower rates for broadband providers, expand existing easements to include broadband, require batch broadband permitting, expand public-private partnerships, limit liability
- VA (2020): easements for electric and communications facilities may be used to provide or expand broadband, does not interfere with rights of landowner, and limits damages in any trespass claim, but lawsuit forced utility to drop broadband expansion plans



# What Were Your Problems You Dealt with Last Year?

- Field collection speed & detail
- Manual application filing systems
- Owners/Authority distrust of client provided GIS
- Limited access to right-of-way dimensions
- Slow & Slowing Application Processing Windows



# What's New This Year?

- Asset Management Systems becoming more ubiquitous
- Greater transparency of application processing
- Windows are getting longer as more people build and staffs continue to shrink
- Pole Loading Assessment is becoming the exception, not the norm, in many areas



# What Tools/Tactics Are You Finding Helpful This Year?

- Relationships!!!
- Blanket permits in counties/parishes are still attractive, but on the wane as policies and systems become more rigid. Get in while you can.
- Field collection software only getting better and more plentiful.
- Using GIS to communicate status. Don't rely on the authority/owner's tools.



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**THANK YOU**

