Court Upholds Pole Attachment Order

Federal court denies utility challenges to FCC telecommunications pole attachment order

October 21, 2020

​​​​On August 12, 2020, the U.S. Court of Appeals for the 9th Circuit (Court) denied utility challenges to a Federal Communications Commission (Agency) order addressing overlashing, preexisting violations, self-help, and rate reform for pole attachments by telecommunications providers. The order was not arbitrary or capricious, and was supported by the federal pole attachment statute, 47 U.S.C. § 224 (Section 224). **City of Portland v. United States 969 F.3d 1020 (9th Cir. 2020)**.

In 2018, the Agency issued three orders addressing the installation and management of small cell base stations (Small Cells) needed for the fifth generation of cellular wireless technology (5G). Two orders limited local governmental authority to regulate Small Cells (Government Orders). Another order limited utility pole owners from discriminatorily denying or delaying 5G or broadband service providers access to the poles (Utility Order).

The City of Portland, Oregon and numerous local governments, various public and private power utilities (Utilities), and various broadband providers challenged the Government and Utility Orders (collectively, Orders).

Initially, after extensive analysis and explanation, and with two exceptions, the Court held the Government Orders were not arbitrary, capricious, or contrary to law.

Next, the Court explained that, under the Utility Order, a utility may not require an entity attaching additional cables or wires to cables or wires already attached to a utility pole (Overlashers) to conduct pre-overlashing engineering studies or pay a utility's cost for conducting the studies (Overlashing Rule).

The Court also explained that: (1) Under Section 224(d), a utility may recover the additional costs of providing pole attachments to cable television providers; (2)Under Section 224(f)(1), a utility must provide cable television and telecommunications providers with “nondiscriminatory access" to its poles; and (3) Under Section 224(f)(2), an electric utility may deny access to its poles for capacity, safety, reliability, and engineering reasons.

The Overlashing Rule does not prohibit utilities from exercising their access denial rights under Section 224(f)(2). It is “speculative" to suggest that the Agency might interpret the Overlashing Rule to prohibit these rights. Further, the Overlashing Rule permits utilities and Overlashers to negotiate overlashing details.

Under the Overlashing Rule, a utility may require 15-days' advance notice of any overlashing. This notice is sufficient for a utility to address safety and reliability concerns.

Further, Section 224(d) applies to cable television providers. It “does not apply here."

The Overlashing Rule is a “reasonable attempt" by the Agency to prevent unnecessary costs for attachers.

Next, the Court explained that, under the Utility Order, a utility may not deny access to an attacher solely because of a preexisting safety violation created by a third party (Preexisting Violation Rule).

The Preexisting Violation Rule prevents utilities from imposing the costs of fixing a safety violation on entities that did not cause the violation. The rule does not prevent utilities from denying attachments that “increase" safety risks. The rule, therefore, prevents utilities from “relying on preexisting violations pretextually" to deny access to attachments that pose no “greater" safety risk than existing attachments.

The Preexisting Violation Rule reasonably interprets Section 224(f)(2).

Next, the Court explained that, before the Utility Order, an attacher could hire a contractor to perform preattachment work on the lower portion of a pole. Under the Utility Order, an attacher may hire a utility-approved contractor to perform preattachment work on the lower and upper portions of a pole (Self-Help Rule).

To mitigate increased safety risks, the Self-Help Rule: (1) provides the utility 90 days to complete the preattachment work itself; (2) requires attachers to use a utility-approved contractor to perform the preattachment work; and (3) requires attachers to provide the utility advance notice of when the preattachment work will be performed. The Self-Help Rule promotes timely attachments.

The Self-Help Rule is not arbitrary or capricious.

Next, the Court explained that under Section 224(a)(4), a “pole attachment" means an attachment by a cable television or telecommunications provider to a utility pole. It does not include a utility-owned attachment. Section 224(b)(2), however, authorizes the Agency to promulgate regulations “to carry out the provisions" of Section 224. These provisions include the Section 224(f)(1) access requirement.

It was “reasonable" for the Agency to ensure access by permitting preattachment work that repositions utility attachments. Otherwise, a utility could deny access based upon “pretextual reasons of insufficient capacity."

The Agency was authorized to regulate utility-owned pole attachments through the Self-Help Rule.

Next, the Court explained that, under the Utility Order, telecommunications providers who historically owned utility poles (Incumbent Providers) and telecommunications providers who do not own utility poles (Competitive Providers) are presumed to be similarly situated and entitled to the same pole attachment rate (Rate Reform Rule). If a utility rebuts the presumption by showing that an Incumbent Provider retains “net benefits" that other telecommunications providers do not enjoy, then the Rate Reform Rule imposes a maximum rate that the Incumbent Provider and utility may negotiate.

Section 224(a)(5) and (e)(1) authorize the Agency to regulate pole attachment rates for Competitive Providers, but not for Incumbent Providers. Section 224(b)(1), however, requires the Agency to set just and reasonable rates for all pole attachments. These include attachments by Competitive and Incumbent Providers.

Past efforts to decrease rate differences between Competitive and Incumbent Providers were not successful. Further, the historic differences between Competitive and Incumbent Providers that supported different rates in the past “are now disappearing." There was, therefore, adequate justification for the Rate Reform Rule setting the same presumptive rate.

While the Rate Reform Rule imposes a maximum Incumbent Provider rate when a utility rebuts the similar rate presumption, the maximum rate is higher than the Competitive Provider and cable television provider rates. The Agency previously determined that these rates were just and reasonable and allowed full cost recovery.

The Rate Reform Rule, therefore, is an “appropriate exercise" of the Agency's authority under Section 224.

Accordingly, with two exceptions in the Government Orders, the Court denied the challenges to the Orders.

**Editor's Note**:​*Importantly, a “utility" under Section 224 does not include a “cooperatively organized" entity. While Section 224 does not govern electric cooperative pole attachment rates, terms, and conditions, the Utility Order and similar Agency orders may impact, affect, or influence electric cooperative pole attachment contracts and contract negotiations.*

*If you have questions or comments, please contact**Ty Thompson**, NRECA Vice President and Deputy General Counsel for Director and Member Legal Services, Office of General Counsel, at 703-907-5855*​

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