

BALLER STOKES & LIDE

A PROFESSIONAL CORPORATION

2014 P STREET, N.W.

SUITE 200

WASHINGTON, D.C. 20036

(202) 833-5300

FAX: (202) 833-1180

MEMORANDUM

TO: Clients, Colleagues, and Other Interested Parties

FROM: Sean Stokes and Jim Baller

DATE: August 16, 2018

RE: FCC Report and Order on Pole Attachments and Declaratory Ruling on Wireless Siting Moratorium

=====

On August 2, 2018, the Federal Communications Commission (FCC or Commission) adopted a *Third Report and Order (Third R&O) and Declaratory Ruling* in its on-going wireline and wireless infrastructure proceedings aimed at removing barriers to broadband deployment.¹ In the *Third R&O* the Commission significantly revised its rules and regulations governing the pole attachment “make-ready” process, including the establishment of a one-touch make-ready (OTMR) process. The Commission also clarified requirements related to overlashing and indicated that it would preempt express and *de facto* state and local moratoria on the acceptance, processing, or approval of applications or permits for telecommunications services or facilities.

In Part I of this memo we discuss the changes to the Commission’s make-ready pole attachment rules adopted in the *Third R&O*, as well as the implications of these changes for public power utilities. In Part II we discuss the *Declaratory Ruling* and its impact on municipal entities generally.²

I. REVISIONS TO FEDERAL POLE ATTACHMENT RULES

In the *Third R&O*, the Commission expressly acknowledged that its new pole attachment rules do not apply to poles owned by government entities or cooperatives, which are exempt from federal pole attachment regulation by virtue of Sections 224(a)(1) and (a)(3) of the Communications Act.³ Despite this exemption, the newly adopted pole attachment regulations will likely have an impact on public power

¹ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Moratorium*, WC Docket No. 17-84 and WT Docket No. 17-79, released August 3, 2018. <https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf>

² Disclaimer: This memorandum is for general informational purposes only. It is not intended, and should not be interpreted, as legal advice. For case-specific legal advice, please contact us or other qualified legal counsel.

³ *Third R&O* at fn. 10, citing the exemption for public power and cooperatively owned utilities contained in 47 U.S.C. § 224(a)(1).

utilities.⁴ That is so because some states incorporate all or portions of the Commission’s federal pole attachment make-ready rules into state law applicable to public power utilities;⁵ many state public service commissions and courts have looked to the Commission’s rules and interpretations for guidance; and entities seeking new pole attachment agreements or renewals typically invoke the federal rules and Commission interpretations as examples of reasonable rates, terms, and conditions. In addition, the Commission and some members of Congress are actively exploring revisions to federal law or regulations aimed at eliminating or limiting the scope of the current public power exemption under Section 224. For all of these reasons, it is important that public power utilities (and cooperatives) be familiar with the Commission’s pole attachment regulations.

A. One Touch Make Ready Rules

The centerpiece of the Commission’s *Third R&O* is its conclusion that significant savings in time and money can be achieved through the adoption of a one-touch make-ready (OTMR) process that allows the new attaching entity to use a single, qualified contractor to perform all the “simple” make-ready work for wireline attachments in the communications space on the pole. The Commission believes that this approach will eliminate much of the need for the coordination and work of multiple work crews to sequentially perform necessary make-ready work with respect to communications lines owned by various attaching entities. The Commission has concluded that the time and expenses saved using OTMR will serve the public interest through greater broadband deployment and competitive entry.

Over the past two years, OTMR ordinances have been adopted by Louisville, KY, and Nashville, TN, as well as by the State of West Virginia. In its *Third R&O*, the Commission recognized the ability of states to adopt their own OTMR procedures that may differ from those of the Commission. In doing so, the Commission suggested that the authority for states to undertake such actions is pursuant to the provision of Section 224 of the federal Communications Act allowing states to opt out or reverse preempt the Commission’s pole attachment regulations if the state itself certifies that it regulates pole attachments.⁶ It is not clear whether the Commission’s *Third R&O* authorizes local governments rather states to adopt OTMR provisions.⁷

⁴ While our analysis focuses on public power utilities, there may also be implications for some electric cooperatives as well.

⁵ For example, the Indiana Code requires public power utilities to provide small cell wireless providers with access to their utility poles and Section 8-1-32.3-26(d) of the Code states: “For a utility pole used to provide communications service or electric service, the parties to the construction, placement, or use shall comply with the process for make ready work under 47 U.S.C. 224 and any associated implementing regulations.” (*Emphasis added*).

⁶ 47 U.S.C. § 224(c).

⁷ Since Section 224 provides for both the municipal exemption and the right of states to reverse-preempt federal pole attachment regulation, the FCC’s rationale concerning the states would arguably apply as well to municipalities.

1. Application of OTMR Process

The Commission is limiting the use of OTMR to “simple make-ready work” on existing wireline communications facilities located within the communications space on the pole. The Commission defines “simple make-ready work” as make-ready work where “existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.”⁸

In limiting OTMR to simple make-ready work, the Commission concluded that simple make-ready work does not raise the same level of safety concerns as “complex make-ready”⁹ or work above the communications space on a pole.

Thus, OTMR is not available for work that is required to be performed above the communications space -- in the public safety or electric space. The Commission also determined that the OTMR process is not available if the required make-ready work involves the relocation or rearrangement of electric facilities or involves wireless facilities.

An issue that the Commission did not address is whether its determination that OTMR does not apply to wireless facilities includes a prohibition on the use of OTMR for the relocation of wireline attachments that have mid-span wireless installations. Such mid-span installations are becoming increasingly prevalent, particularly on cable company attachments.

2. OTMR Process and Timeline

a. Conducting the survey

Under the OTMR process, the responsibility for conducting a survey of the affected poles to determine the make-ready necessary to accommodate the proposed attachment is on the attaching entity and not the utility pole owner. The rules require new attachers to permit representatives of the utility and any existing attachers potentially affected by the proposed work to be present for the survey. To accomplish this, new attachers are required provide the utility and existing attachers at least three business days advance notice of the date, time, and location of the survey and the name of the contractor performing the survey. The Commission, however, declined to require a new attacher to set a date for the survey that is convenient for the utility and existing attachers.

⁸ *Third R&O*, at ¶ 17.

⁹ The FCC defines “complex” make-ready, as “[t]ransfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments.” *Third R&O*, at ¶ 18.

b. Election to use OTMR

After completion of the survey, the attaching entity will have the option to elect OTMR in its pole attachment application and to identify in its application the simple make-ready work to be performed. The Commission rejected arguments that existing attaching entities should be able to determine whether the proposed work constitutes simple or complex make-ready work. The Commission held, however, that the pole owner utility may object to the attaching entity's determination that the proposed make-ready work is simple. If the utility objects to the new attachers' determination that work is simple, then the work is deemed complex—the utility's objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, and provides a good faith explanation of how such evidence and information relate to a determination that the make-ready is not simple. The utility must, however, make such an objection that the proposed make-ready is not simple during the 15-day application review period discussed below (or within 30 days in the case of larger orders¹⁰).

If, based on the survey, the new attacher determines that the make-ready involves a mix of simple and complex work (or involves work above the communications space), then the Commission will allow the new attacher discretion to determine whether to "bifurcate" the work. If the new attacher prefers to complete the simple make-ready work under the OTMR process while it waits for complex work/work above the communications space to run its course through the longer existing process, then it may do so. A new attacher electing to bifurcate the work must submit separate applications for the simple and complex work and work above the communications space. If the new attacher prefers that its entire project (both simple and complex work and work above the communications space) follow the traditional make-ready process, or if the new attacher does not view bifurcation as feasible, then it may employ the existing process for the entire project.

c. Application complete

Under the OTMR process, a pole attachment application is complete if it provides the utility the information necessary to make an informed decision under the utility's procedures, as specified in a master service agreement or in publicly-available requirements at the time of submission of the application. A utility has 10 business days after receipt of a pole attachment application in which to determine whether the application is complete and to notify the attacher of that decision. If the utility notifies the attacher that the attacher's application is not complete within the 10 business-day review period, then the utility must specify where and how the application is deficient. If there is no response by the utility within 10 business days, or if the utility rejects the application as incomplete but fails to specify any deficiencies in the application, then the application is deemed complete.

If the utility timely notifies the new attacher that the application is incomplete and specifies deficiencies, a resubmitted application need only supplement the previous application by addressing the issues identified by the utility, and the application shall be deemed complete within five business

¹⁰ "Larger" requests are when a pole attachment application request is for greater than 3000 poles or 5 percent of the utility's poles in a state. *See*, 47 CFR § 1.1411(g).

days after its resubmission, unless the utility specifies which deficiencies were not addressed and how the resubmitted application did not sufficiently address the utility's reasons.

d. Application review time period

For OTMR attachments, the Commission has adopted shortened time periods within which a utility must decide whether to grant a complete application. For standard requests, utilities now have 15 days to decide (down from 45 day), and for larger requests, they now have 30 days (down for 60 days). A denial must be in writing and specify that the pole owner does not concur with the simple make-ready determination or that the denial is based on insufficient capacity or for reasons of safety, reliability, or generally applicable engineering purposes. The details of such deficiencies must be specified.

e. OTMR work

The new attacher may proceed with OTMR by giving 15 days' prior written notice to the utility and all affected existing attachers. Moreover, the Commission has held that the new attacher may provide the required 15-day notice any time after the utility deems the pole attachment application complete. Thus, the 15-day notice period may run concurrently with the utility's evaluation of whether to grant the application. If, however, the new attacher cannot start make-ready work on the date specified in its 15-day notice (e.g., because its application has been denied or it is otherwise not ready to commence make-ready), then the new attacher must provide 15 days' advance notice of its revised make-ready date.

In adopting the 15-day notice period, the Commission rejected arguments made by utility poles owners that 15 days does not provide a mechanism by which a new attacher may be made aware if the poles it selected are already subject to a pre-existing pole attachment application and that it does not account for how to address multiple or overlapping pole orders, simply stating that “[i]n the time we give to a utility to review a pole attachment application and also to determine its completeness, we expect that the utility should be able to resolve these processing issues.”¹¹

To keep all affected parties informed about the new attacher's progress, the OTMR rules require the new attacher to provide representatives of the utility and existing attachers the following information in the 15-day advance notice: (1) the date and time of the make-ready work; (2) a description of the make-ready work involved; (3) a reasonable opportunity to be present when the make-ready work is being performed; and (4) the name of the contractor chosen by the new attacher to perform the make-ready work. The Commission concluded that allowing existing attachers and the utility a reasonable opportunity to be present when OTMR work is being done addresses the concerns of existing attachers that third-party contractors may not take proper care when performing simple make-ready work on

¹¹ *Third R&O*, at fn. 234. Indeed, in adopting this 15-day period, the Commission rejected a 25-day period recommended by the FCC's own Broadband Deployment Advisory Committee.

their equipment.¹² Further, the Commission held that the advance notice requirements allow the utility and existing attachers, if they so choose, to alert their customers that work on their equipment is forthcoming.

The new attacher is required to notify an affected entity, including the utility, immediately if the new attacher's contractor damages another company's equipment or causes an outage that is reasonably likely to interrupt the provision of service. Upon receiving notice of damaged equipment or a service outage, the utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or outage, or it can require the new attacher to fix the damage or outage at its expense immediately following notice from the utility or existing attacher.¹³

f. Post-OTMR work

To give existing attachers and the utility an opportunity to correct any errors and to further encourage quality work by the new attacher, the new attacher must provide notice to the utility and affected existing attachers within 15 days after the new attacher has completed OTMR work on a particular pole. In its post-make ready notice, the new attacher must provide the utility and existing attachers at least a 90-day period for the inspection of make-ready work performed by the new attacher's contractors.

Within 14 days after any post-make ready inspection, the utility and the existing attachers must notify the new attacher of any damage or any code (e.g., safety, electrical, engineering, construction) violations caused to their equipment by the new attacher's make-ready work and provide adequate documentation of the damage or the violations.¹⁴ Thereafter, the utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or violations or require the new attacher to fix the damage or violations at its expense within 14 days following notice from the utility or existing attacher.

Finally, as an additional safeguard to prevent substantial service interruptions or danger to the public or workers, the Commission's OTMR rules allow existing attachers and utilities to file a petition with

¹² The Commission emphasized that the 15-day notice period is not an opportunity for existing attachers or the utility to complete make-ready work on their equipment and then bill the new attacher for that work.

¹³ Upon notice from the existing attacher or the utility to fix damages or an outage caused by the new attacher, the new attacher must complete the repair work before it can resume its make-ready work. Where the utility or the existing attacher elects to fix the damage or outage, the new attacher can only continue with make-ready work if it does not interfere with the repair work being conducted by the utility or existing attacher.

¹⁴ As discussed below in Section I.D, the FCC clarified that new attachers are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent such poles or third-party equipment were out of compliance prior to the new attachment.

the Commission, to be considered on an expedited, adjudicatory case-by-case basis, requesting the suspension of a new attacher's OTMR privileges due to a pattern or practice of substandard, careless, or bad faith conduct when performing attachment work.

3. Contractor Selection Under the OTMR Process

Attaching entities seeking to use the OTMR process must use a qualified contractor to perform the make-ready work. To help ensure public and worker safety and the integrity of all parties' equipment, the Commission has concluded that any contractors that perform OTMR work must meet certain minimum safety and reliability standards. Specifically, all qualified contractors must meet the following minimum requirements for performing OTMR work:

- (1) follow published safety and operational guidelines of the utility, if available, but if unavailable, follow the National Electrical Safety Code (NESC) guidelines;
- (2) read and follow licensed-engineered pole designs for make-ready work, if required by the utility;
- (3) follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational Safety and Health Administration (OSHA) rules;
- (4) meet or exceed any uniformly applied and reasonable safety and reliability thresholds set and made available by the utility, e.g., the contractor cannot have a record of significant safety violations or worksite accidents; and
- (5) be adequately insured or be able to establish an adequate performance bond for the make-ready work it will perform, including work it will perform on facilities owned by existing attachers.

The Commission's rules allow a utility to mandate additional commercially reasonable requirements for contractors relating to issues of safety and reliability, but such requirements must clearly communicate the safety or reliability issue, be non-discriminatory, in writing, and publicly available (e.g., on the utility's website).

If the pole owner utility has a list of qualified contractors authorized to perform surveys and simple make-ready work in the communications space, then the attaching entity must use a contractor from the utility's list. While the Commission "strongly encourages" utilities to publicly maintain a list of approved contractors qualified to perform surveys and simple make-ready work as part of the OTMR process, it does not *require* utilities to do so.

If the utility maintains a list, new and existing attachers may request that contractors meeting the qualifications set forth above be added to the utility's list and utilities may not unreasonably withhold consent to add a new contractor to the list.¹⁵ To be reasonable, a utility's decision to withhold consent

¹⁵ The Commission has indicated that the term "contractor" can encompass the attaching entity's employees.

must be prompt, set forth in writing that describes the basis for rejection, be nondiscriminatory, and be based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability

If the pole owning utility does not have a utility-approved list of contractors, the attaching entity must use a contractor that meets key safety and reliability criteria identified above by the Commission. Where there is no utility-approved list of contractors, the utility may veto any contractor chosen by the new attacher. Utilities must base any veto on reasonable safety or reliability concerns related to the contractor's ability to meet one or more of the minimum qualifications described above or on the utility's posted safety standards. The utility also must make its veto within either the three business-day notice period for surveys or the 15-day notice period for make-ready. To avoid an ongoing dispute between the utility and the new attacher, the Commission's rules provide that any veto by the utility that conforms with the above requirements is determinative and final. When vetoing an attacher's chosen contractor, however, the utility must identify at least one qualified contractor available to do the work.

In adopting its rules on contractors, the Commission declined to grant existing attachers the right to veto or object to the inclusion of a contractor on the utility-approved list or a new attacher's contractor selection. Similarly, the Commission rejected a proposal to permit new attachers to use only contractors pre-approved by existing attachers when moving existing attachers' equipment.

Finally, the Commission declined to adopt a requirement that OTMR be performed by union contractors where an existing attacher has entered into a collective bargaining agreement (CBA) that requires the existing attacher to use union workers for pole attachment work. This is a common requirement in pole attachment agreements with incumbent local exchange telephone companies in many areas of the country.

4. Indemnification

While the OTMR rules provide a process for existing attachers to identify damages to their equipment that occurs during the OTMR process and to arrange for its repair, the Commission concluded that a federally-imposed indemnification requirement is not necessary. Instead, the Commission held that if the repair of damaged facilities is not a sufficient remedy, injured parties may seek judicial relief based on commercially negotiated contract terms and state law claims.

B. Revisions to Standard Pole Attachment Process

To further accelerate broadband deployment and reduce the costs for new attachments that are not eligible for the OTMR process, or for new attachers that prefer not to use the OTMR process, the *Third R&O* also made a number of changes to the standard make-ready process.

In its *2011 Pole Attachment Order*¹⁶ the Commission adopted a mandatory comprehensive timeline for utilities to complete pole attachment application, review, and make-ready processes that consisted of a four-stage timeline:

- Stage 1 -- Survey: 45 days;
- Stage 2 -- Estimate: 14 days;
- Stage 3 -- Attacher Acceptance: 14 days;
- Stage 4 -- Make-Ready: 60 days (90 days above the communications space).

In the *Third R&O*, the Commission has substantially revised and shortened the make-ready time frame process adopted in the *2011 Pole Attachment Order*.

1. Complete Application

The Commission adopted the same time period and process for a utility to determine whether a standard pole attachment application is complete as it adopted with respect to applications filed under the OTMR process. Specifically, a utility has 10 business days after receipt of a pole attachment application in which to determine whether the application is complete and to notify the attacher of that decision. An application is complete if it provides the utility the information necessary to make an informed decision under the utility's procedures, as specified in a master service agreement or in publicly-available requirements at the time of submission of the application. If the utility notifies the attacher that the attacher's application is not complete within the 10 business-day review period, then the utility must specify where and how the application is deficient. If there is no response by the utility within 10 business days, or if the utility rejects the application as incomplete but fails to specify any deficiencies in the application, then the application is deemed complete.

2. Application Review and Pole Survey

Unlike the shorter 15-day period for OTMR application reviews, the Commission has elected to retain the existing 45-day review period for non-OTMR applications. The Commission, however, has adopted a requirement that the utility provide the new attacher and any existing attachers potentially affected by the new attachment at least three business-days' notice of any survey to be conducted by the utility, in order to provide such entities an opportunity to be present for any pole surveys. Such notice must include the date, time, and location of the survey, and the name of the entity performing the survey.

In addition, to prevent unnecessary and wasteful duplication of surveys, the Commission will allow a utility to use surveys previously prepared on the poles in question by new attachers. The utility must notify affected attachers of its intent to use the new attacher's survey and provide a copy of the new attacher's survey with its notice. If the utility is relying solely on the new attacher's survey to fulfill

¹⁶ *In the Matter of Implementation of Section 224 of the Act, Report & Order and Order on Reconsideration (2011 Pole Attachment Order)*, WC Docket No. 07-245, FCC 11-50, released April 7, 2011

the survey requirements, the survey and application review period will be shortened from 45 days to 15 days.

3. Standard Make-Ready

a. Time period for make-ready work

To speed broadband deployment, the Commission has amended its rules to reduce the deadlines for both simple and complex make-ready from 60 to 30 days (and from 105 to 75 days for large requests in the communications space). To account for the unique circumstances and safety considerations involved with attachments above the communications space, however, the Commission has elected to maintain the current make-ready deadline of 90 days (and 135 days for large requests) for attachments in the public safety space or electrical space.¹⁷

To further accelerate communications space attachments, the Commission has eliminated the optional 15-day extension period for the utility to complete make-ready work in the communications space. For work above the communications space, the Commission is retaining the existing 15-day extension period for utility to complete make-ready work.

b. Notice of make-ready

When a utility provides the required make-ready notice to existing attachers, it must also provide the new attacher a copy of the notice, plus the contact information of existing attachers to which the notices were sent. Thereafter, the new attacher (rather than the utility) must take responsibility for encouraging and coordinating with existing attachers to ensure completion of make-ready work on a timely basis. In adopting this requirement, the Commission hopes and expects that the new attacher will be in the better position to manage the work of existing attachers, to impose reasonable deadlines, and to negotiate compensation for make-ready work to be performed by existing attaching entities.

4. Self-Help

In its *2011 Pole Attachment Order*, the Commission adopted a rule allowing an attaching entity to use self-help to perform surveys and make-ready using a qualified contractor if the utility or the existing attaching entities did not meet the Commission's established time period for such work.¹⁸ As originally enacted, however, the self-help remedy did not apply to survey or make-ready work above the communications space on the pole.

In the *Third R&O*, the Commission modified its rules to extend the self-help remedy to new attachers for work above the communications space, including the installation of wireless 5G small cells, when

¹⁷ For all attachments, the FCC has adopted a safeguard allowing utilities to deviate from the make-ready timelines for good and sufficient cause when it is infeasible for the utility to complete make-ready work within the prescribed time frame

¹⁸ The Commission clarified that the self-help remedy is not available when pole replacements are required as part of make-ready.

the utility or existing attachers have failed to complete make-ready work within the required time frames. The Commission rejected arguments by electric utilities that this exceeds the Commission's jurisdiction over electric facilities, finding that its new rules are designed to facilitate timely and non-discriminatory access to poles for attachments, and the action therefore falls within the Commission's Section 224 jurisdiction. Given the significant potential public safety implications of this work, electric utilities are likely to challenge this decision.

Further, it is not clear how this decision impacts public power utilities (and coops) that have electric facilities on poles that are owned by telephone utilities that are subject to the Commission's pole attachment regulations. At a minimum, this would appear to suggest the need for public power utilities (and coops) to play a role in approving contractors that perform work above the communications space on poles owned by telephone utilities.

a. Notice for self-help

Similar to the pre- and post-work notice requirements in the new OTMR process, the Commission requires new attachers to give affected utilities and existing attachers: (1) no less than three business days advance notice for self-help surveys and five days' advance notice of when self-help make-ready work will be performed and a reasonable opportunity to be present, and (2) notice no later than 15 days after make-ready is complete on a particular pole so that they have an opportunity to inspect the make-ready work.

Just as in the OTMR context, the advance notice must include the date and time of the work, the nature of the work, and the name of the contractor being used by the new attacher. As in the OTMR context, new attachers must provide immediate notice to the affected utility and existing attachers if the new attacher's contractor damages equipment or causes an outage that is reasonably likely to interrupt the provision of service.

b. Contractors performing work for complex make-ready and above the communications space

In order to use self-help, the new attacher must use a qualified contractor, that is pre-approved by the utility, to do the work. While utilities are not required to maintain a list of qualified contractors to perform OTMR for simple make-ready in the communications space, utilities are required to maintain a list of qualified contractors that are approved to perform complex make-ready work and make-ready work above the communications space.

As in the context of OTMR and simple-self-help, attaching entities seeking to perform complex make-ready, make ready above the communications space, or make ready involving wireless facilities, may request that qualified contractors be added to the utility's list and the utility may not unreasonably withhold its consent for such additions.

5. Make-Ready Estimates and Invoices

To improve the transparency and usefulness of make-ready cost estimates and post-make-ready invoices, the Commission has amended its rules to require that estimates of all make-ready charges

and post-make-ready invoices be detailed and include documentation that is sufficient to determine the basis for all charges. Specifically, the Commission held that as part of the detailed estimate, the utility must disclose to the new attacher its projected material, labor, and other related costs that form the basis of its estimate, including specifications of what costs, if any, the utility is passing through to the new attacher from the utility's use of a third-party contractor. The utility must also provide documentation that is sufficient to determine the basis of all charges in the final invoice, including any material, labor and other related costs

Further, the utility is required to detail all make-ready cost estimates and final invoices on a per-pole basis when requested by the new attacher. At the same time, the Commission recognized that certain fixed costs are not necessarily charged on a per-pole basis (e.g., traffic control, lock-out/tag-out, truck rolls), and therefore such fixed costs may be estimated and submitted on a per-job basis, rather than a pole-by-pole basis, even where a pole-by-pole estimate or invoice is requested.

The Commission also clarified that under its rules, the utility is required to provide estimates for all make-ready work to be completed, including the required make-ready work on existing third-party attachments. The Commission rejected utility arguments that they are poorly positioned to provide estimates for make-ready work other than their own, concluding that utilities are best positioned to compile and submit comprehensive make-ready estimates to new attachers due to the utilities' pre-existing and ongoing relationships with the existing attachers on their poles. The Commission, however, clarified that utilities may comply with this requirement by compiling estimates from third-parties for submission to the new attacher. Further, utilities are not required to compile and submit final invoices of make-ready work performed by third-party existing attachers.¹⁹

C. Overlashing

The Commission codified its longstanding policy that utilities may not require an attacher to obtain its approval for overlashing. The Commission did, however, agree with utilities that it is reasonable to establish reasonable pre-notification requirements including a requirement that attachers provide 15 days (or fewer) advance notice of overlashing work.

The Commission also adopted a requirement that an overlashing party notify the affected utility within 15 days of completion of the overlash on a particular pole. The notice must provide the affected utility at least 90 days from receipt to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage or any code (e.g., safety, electrical, engineering, construction) violations caused by the overlash. If the utility discovers damage or code violations caused by the overlash, then the utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or may require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.

An issue that the Commission did not address is whether its rules on overlashing apply to mid-span wireless facilities that communications carriers, particularly cable operators, are increasingly hanging

¹⁹ The Commission declined to adopt the request of some commenters that utilities be required to provide new attachers with a publicly-available schedule of common make-ready charges.

from their attached wireline cables. In the underlying proceeding electric utilities argued that the term “overlash” has historically applied to the practice of wrapping new communications cables on to existing attached wires and that overlash did not contemplate or encompass the installation of wireless facilities. Utilities therefore argued that the Commission should limit its overlash rules to wireline facilities.

D. Preexisting Violations

The Commission clarified that new attachers are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent such poles or third-party equipment were out of compliance prior to the new attachment.

E. Effective Date

The pole attachment rules adopted by the Commission go into effect on the latter of (1) six months after the adoption of *Third R&O Order* or (2) 30 days after the Commission publishes a notice in the Federal Register announcing approval by the Office of Management and Budget of the rules adopted in the *Third R&O Third R&O*.

II. DECLARATORY RULING ON MORATORIA

In conjunction with the adoption of the *Third R&O*, the Commission also adopted a *Declaratory Ruling* interpreting Section 253(a) of the Communications Act to prohibit express and *de facto* moratoria imposed by state and local governments on applications and permits to deploy wireless or wireline telecommunications services and/or facilities. On its face, the *Declaratory Ruling* appears to apply only to state and local governments acting in their regulatory capacity in granting zoning and permit authority to construct or collocate wireless facilities. It does not address actions of state and local government acting in a proprietary capacity in addressing attachments or installations on publicly-owned facilities or structures.²⁰

Section 253(a) of the Act specifies that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”²¹ In adopting the *Declaratory Ruling*, the Commission concluded that Section 253 prohibits state and local government moratoria on wireless facilities siting.

²⁰ At the same time, governmental entities, including public power utilities, should recognize that this *Declaratory Ruling* is part of a larger pending proceeding in WT Docket No. 17-79, in which the FCC is considering whether to impose regulatory access requirements on publicly-owned poles and other facilities. If the FCC does that, it would not be a large leap of logic for the agency to conclude that delays in acting on applications for attachments to publicly-owned poles or other facilities constitute barriers to entry.

²¹ 47 U.S.C. § 253(a)

The Commission's *Declaratory Ruling* side-stepped, without directly addressing, arguments by state and local governments that Section 332 (c)(7)(A) of the federal Communications Act expressly limits the scope of federal authority over state and local decisions regarding the siting of wireless facilities. The Commission instead simply stated that Section 253 applies to wireless and wireline telecommunications services and Section 253's prohibition on state and local barriers to entry therefore applies to wireless siting decisions. This argument, however, ignores the unequivocal language of Section 332(c)(7)(A) which states that, "nothing in this Act affects or limits" local government authority over "decisions regarding the placement, construction, and modification of personal wireless service facilities."

The Commission defined "express moratoria" as "state or local statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities."²² The Commission held that express moratoria are facially inconsistent with section 253(a) because they explicitly prohibit the provision of telecommunications services by halting the acceptance, processing, or approval of applications or permits for such services or the facilities used to provide such services.

Further, the Commission rejected arguments to allow "temporary" moratoria that are of a limited, defined duration because such moratoria nevertheless have the effect of forcing providers either to delay or cancel their planned deployments

The Commission also found that Section 253(a) also prohibits *de facto* moratoria, which it defined for the purpose of this *Declaratory Ruling* as "state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium."²³ *De facto* moratoria are not formally codified by state or local governments as outright prohibitions but have the same effect as express moratoria since they, by their operation, prohibit or have the effect of prohibiting deployment of telecommunications services and/or telecommunications facilities.

Examples of *de facto* moratoria provided by the Commission included blanket refusals to process applications, refusals to issue permits for a category of structures, frequent and lengthy delays of months or even years in issuing permits and processing applications, and claims that applications cannot be granted until pending local, state, or federal legislation is adopted.

The Commission distinguished *de facto* moratoria, which violate Section 253(a), from state and local actions that simply entail some delay in deployment. Situations cross the line into *de facto* moratoria where the delay continues for an unreasonably long or indefinite amount of time such that providers are discouraged from filing applications, or the action or inaction has the effect of preventing carriers from deploying certain types of facilities or technologies.

The *Declaratory Ruling* does not itself preempt any particular state or local actions, but it does set out the Commission's interpretation of the scope of Section 253(a) as it pertains to state and local moratoria which

²² *Declaratory Ruling*, ¶ 145.

²³ *Declaratory Ruling*, ¶ 149.

the Commission will apply when conducting Section 253 preemption complaints brought against specific state or local governments for the imposition of moratoria. Further, the Commission indicated that the *Declaratory Ruling* will inform judicial resolution of Section 253 preemption claims brought by providers in federal court.²⁴

²⁴ Despite the FCC's assertion that the *Declaratory Ruling* will provide guidance, the commissioners themselves, in the press conference after the *Ruling's* adoption, evidenced disagreement and confusion over the application of their *Declaratory Ruling*. For example, when discussing the *Declaratory Ruling's* reference to the annual moratorium in Myrtle Beach, SC, on construction work within the roadway during hurricane season Commissioner Rosenworcel and Commissioner O'Rielly appeared to disagree as to whether such a moratorium would fall under the scope of the Commission's prohibition.