

Virginia Expands Regulation of Electric Cooperative Pole Attachments

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The Virginia General Assembly, in its 2024 legislative session, passed legislation reforming Virginia's regulation of pole attachments on utility poles owned by Virginia electric cooperatives. Specifically, the General Assembly enacted SB713, which, among other things, incorporates new provisions into Virginia Code § 56-466.1¹ that are taken from the Federal Communication Commission's ("FCC") rules applicable only to poles owned by investor-owned utilities.

Effective July 1, 2024, the new provisions of Virginia Code § 56-466.1 fundamentally change the pole attachment process for new attachments on electric cooperative-owned poles by, among other things, (1) establishing mandatory make-ready practices and procedures, (2) prescribing allocation of pole replacement cost, and (3) broadening Virginia State Corporation Commission ("Commission") authority over attachments on poles owned by Virginia electric cooperatives.

NEW POLE ATTACHMENT MAKE READY PRACTICES AND PROCEDURES

Virginia Code § 56-466.1 now requires electric cooperatives to establish and adhere to "pole attachment practices and procedures" that comply with the new make-ready provisions of SB713, which are outlined below:²

Application Completeness Review

- **Initial Review:** The electric cooperative has **15 business days** to determine whether the application is complete and notify the new attacher.³
 - An application is *deemed complete* if no response is provided within the 15 business day-period.
 - If an application is incomplete, the electric cooperative must specify the reasons for the determination in its notice.
- **Secondary Review:** Incomplete applications that are resubmitted must be reviewed within **7 days** of receipt.⁴
 - The new attacher need only cure the stated deficiencies in the application
 - No limit on the number of times an incomplete application can be resubmitted so long as the new attacher makes a bona fide attempt with each resubmission to cure the deficiencies

¹ Citations to Virginia Code § 56-466.1 and its subsections will be to the amended version.

² Va. Code § 56-466.1 F.

³ *Id.* § 56-466.1 G 1 a (1).

⁴ *Id.* § 56-466.1 G 1 a (2).

- Completeness must be assessed based on either the electric cooperative's (a) master services agreement or (b) requirements made publicly available by the electric cooperative at the time the application is submitted.⁵

Application Review on the Merits

- **Timeframe:** Electric cooperatives must either grant or deny a pole attachment application within **75 days** of receiving a complete application.
 - An electric cooperative's review of the merits of a pole attachment application is *concurrent* with the application completeness review.
 - An application will not be "deemed granted" if no response is provided.

Make-Ready Survey

- **Timeframe:** Within **75 days** of receiving a complete attachment request, an electric cooperative must conduct a survey of its affected poles.⁶
 - The new attacher and any existing attachers to the affected poles may be present for any field inspection conducted as part of the survey.
- **Survey Notice:** The electric cooperative must provide notice of the survey to new and existing attachers at **least 5 business days** before conducting the survey.⁷
 - The notice must include the time, date, and location of the survey and, if applicable, the contractor performing the survey.

Make-Ready Estimate and Acceptance

- **Timeframe:** Electric cooperatives must provide a new attacher with a "detailed itemized estimate" of make-ready costs within **20 days** after the date the application is granted.⁸
 - The estimate must remain open for **30 days** after being presented to the new attacher.⁹
 - The electric cooperative may withdraw the estimate after the 30-day period if not accepted.
 - If not affirmatively withdrawn, the new attacher may accept the estimate after the 30-day period.
- **Scope of Estimate:** The make-ready estimate must cover "all necessary rearrangement" related to an application.¹⁰

⁵ *Id.* § 56-466.1 G 1 a.

⁶ *Id.* § 56-466.1 G 1 c (1).

⁷ *Id.* § 56-466.1 G 1 c (2).

⁸ *Id.* § 56-466.1 G 2.

⁹ *Id.* § 56-466.1 G 2 a

¹⁰ The reciprocal FCC rule has been interpreted to require the utility to compile and submit make-ready cost estimates from existing attachers along with the utility's own make-ready cost estimate. *See* 47 C.F.R. § 1.1411(d); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Development*, Docket No. 17-884, 33 FCC Rcd 7705, 7759, para. 111 (2018).

- Estimate Requirements:
 - The estimate shall be on a pole-by-pole basis upon request unless certain fixed costs are not reasonably calculable as such.¹¹
 - The estimate must include:
 - Details of “projected material, labor, and other related costs that form the basis of such estimate,” and
 - Documentation “sufficient to determine the basis of all estimated charges.”¹²
- True-up: If, after completion of make-ready, the actual cost differs from the estimate, the electric cooperative shall provide the new attacher with a “detailed, itemized final invoice” of the actual make-ready charges incurred.¹³
 - The electric cooperative’s final invoice must include the same detail that is required in the estimate.¹⁴

Make-Ready Notice

- Timeframe: Upon receipt of payment of the make-ready costs in the estimate, the electric cooperative must **immediately** provide written notice to all affected existing attachers.¹⁵
- Notice Requirements:
 - The make-ready notice must be in writing and include:
 - (1) The details and location of make-ready;
 - (2) A completion date for make-ready, which shall be no later than **95 days** from the date of notice;
 - (3) A statement that an existing attacher may modify its attachment prior to the completion date; and
 - (4) The name, telephone number, and email address of the primary contact for the make-ready procedure.¹⁶
 - The electric cooperative must provide to the new attacher:
 - (1) A copy of the make-ready notice;
 - (2) The contact information of any existing attachers; and
 - (3) Any address to which the notice was sent.

¹¹ *Id.* § 56-466.1 G 2.

¹² *Id.*

¹³ *Id.* § 56-466.1 G 2 b.

¹⁴ *Id.*

¹⁵ *Id.* § 56-466.1 G 3.

¹⁶ *Id.* § 56-466.1 G 3 a–d.

Make-Ready Completion:

- **Timeframe:** Make-ready work must be completed within **95 days** from the date of the make-ready notice.
- **Responsibility:**
 - The new attacher is responsible “for coordinating with existing attachers to encourage the completion of [make-ready]” within the 95-day period.¹⁷
 - The electric cooperative is responsible for completing its make-ready by the deadline.¹⁸

Deviation from Make-Ready Time Limits:

- Electric cooperatives may deviate from the make-ready time limits (or “stop the clock”) under two circumstances:
 - (1) Before providing the make-ready estimate when the parties have not yet entered into a pole attachment agreement;¹⁹ or
 - (2) During performance of make-ready when there is “good and sufficient cause, as defined by the Commission, that renders it unfeasible for [the electric cooperative] to complete [make-ready] within such time limits.”²⁰
 - The electric cooperative must provide **immediate** written notice to new and existing attachers containing:²¹
 - a. An identification of each of the affected poles;
 - b. A detailed explanation of the reason for such deviation; and
 - c. A new completion date.
 - Any deviation under this circumstance must be no longer than necessary to complete make-ready.
 - The electric cooperative must resume make-ready “without discrimination upon returning to routine operations.”

¹⁷ *Id.* § 56-466.1 G 3 d.

¹⁸ *Id.* § 56-466.1 G 4. Subsection G 4 provides that the electric cooperative “shall complete any rearrangement by the completion date provided in the notice,” which may be read to mean that the electric cooperative is responsible for completing an existing attacher’s make-ready. *Id.* (emphasis added). However, the reciprocal FCC rule on which Subsection G 4 is based makes clear that the utility is responsible for completing “its” make-ready by the deadline. 47 C.F.R. § 1.1411(f).

¹⁹ Va. Code § 56-466.1 G 5 a.

²⁰ *Id.* § 56-466.1 G 5 b.

²¹ *Id.*

Large Attachment Requests:

- A third-party contractor shall be responsible for make-ready work when a new attacher's pole attachment request would cause the aggregate number of attachments or attachment requests to exceed the lesser of 300 poles or 0.5 percent of the total poles owned by the electric cooperative per month.²²
- Requirements:
 - The electric cooperative must **promptly notify** the new attacher.
 - The electric cooperative shall negotiate in good faith to contract with a mutually agreed upon contractor to perform the electric cooperative's make-ready work.²³
 - As written, this would include the make-ready work in the "electric space" on the pole.
 - The contractor must perform the rearrangement within a "reasonable timeframe"
 - In negotiating a "reasonable timeframe," the new attacher and electric cooperative must use their best efforts to comply with the make-ready timelines in Section 56-466.1.
 - The contractor must perform make-ready in accordance with the cost allocation principles set forth in Section 56-466.1 (e.g., red-tagged poles, pole replacement costs, etc.).
 - The electric cooperative retains oversight of all make-ready work performed by the contractor
 - The electric cooperative may recover "the actual, reasonable costs of such oversight" from the new attacher.

POLE REPLACEMENT COSTS AND ACCESS

Virginia Code § 56-466.1 now contains additional provisions that clarify when electric cooperatives may deny access to their poles and how the electric cooperative recovers pole replacement costs from a new attacher.

Red-Tagged Poles

- The electric cooperative cannot recover the cost of replacing a "red-tagged pole" from the new attacher.²⁴
- A red tagged pole is a pole owned by the electric cooperative that is either:
 - (a) Designated for replacement for any reason unrelated to a lack of capacity to accommodate new attacher's pole attachment request; or
 - (b) Requiring replacement at the time of replacement even if the new attachment was not made.²⁵

²² *Id.* § 56-466.1 G 6.

²³ *Id.*

²⁴ *Id.* § 56-466.1 G 7.

²⁵ *Id.* § 56-466.1 A.

Pole Replacement Costs

- The electric cooperative may recover from a new attacher “the incremental cost of a stronger or taller replacement pole that is *necessitated solely by* the new facilities.”²⁶
- The definition of “rearrangement” (*i.e.*, make-ready) includes pole replacements, necessitated solely by a new attacher, if the existing pole does not contain:
 - (a) Adequate surplus space or excess capacity and cannot be rearranged so as to create the adequate surplus space, or
 - (b) Excess capacity required for a pole attachment.²⁷

Pole Access

- Electric cooperatives may deny a new attacher access to poles if such denial is made on a nondiscriminatory basis on either of the following grounds:
 - (a) Insufficient capacity, or
 - (b) For reasons of safety, reliability, or generally applicable engineering principles.²⁸
- Section 56-466.1 now clarifies that the term “insufficient capacity,” when used as the grounds for denying access, “shall not exist if a rearrangement can be accomplished consistent with prevailing electric safety and utility standards *as determined by the Commission*.”²⁹
 - The Commission, in determining the “prevailing electric safety and utility standards,” must “consider national electrical safety standards, the public interest relating to expanding broadband access in the Commonwealth, the impact to ratepayers, and other relevant considerations as determined by the Commission.”³⁰

EXPANSION OF COMMISSION AUTHORITY

SB713 significantly expands the Commission’s authority over attachments on electric cooperative-owned poles. The Commission now has express authorization to “enforce the requirements” of Section 56-466.1, including the new make-ready and pole replacement provisions.³¹

- Dispute Resolution Timeframe: The Commission shall resolve pole attachment disputes:
 - (a) Involving pole access, including the allocation of rearrangement costs, within **90 days**, and

²⁶ *Id.* § 56-466.1 G 7 (emphasis added).

²⁷ *Id.* § 56-466.1 A.

²⁸ *Id.* § 56-466.1 D.

²⁹ *Id.* (emphasis added). The new definition of “insufficient capacity” loosely follows the FCC’s guidance as to the meaning of the term. *See, e.g., Gulf Power Co. v. FCC*, 669 F.3d 320, 324 (D.C. Cir. 2012) (quoting 26 FCC Rcd. 6452, 6462 para. 24 (2011)) (upholding the FCC’s interpretation that capacity is not insufficient “[w]hen a new attacher could be accommodated by rearranging existing attachments or with conventional attachment techniques to the same extent that the utility uses them,” where facility rearrangement in the existing space using traditional methods of attachment can accommodate the request); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Docket No. 07-245, 26 FCC Rcd 5240, 5341, paras. 231–32 (2011) (clarifying that “where rearrangement of a pole’s facilities—whether in the communications space or the electric space—can accommodate an attachment, there is not ‘insufficient capacity’ under section 224(f)(2)”).

³⁰ Va. Code § 56-466.1 D.

³¹ *Id.* § 56-466.1 H. Section 56-466.1 previously authorized the Commission to only determine just and reasonable rates, terms, and conditions.

- (b) Concerning all other matters arising under Section 56-466.1 (e.g., pole attachment rates) within **120 days**.

The Commission may issue an order extending either period by 60 days.



This Utilities and Telecommunications Update is intended to keep readers current on developments regarding Virginia electric cooperatives pole attachments. It is not intended to be legal advice. If you have any questions, please contact authors [Cody Murphey](#) at 804.788.7765 or cmurphey@eckertseamans.com, or [Eric Page](#) at 804.788.7740 or epage@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.