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Highlights

Broadband Infrastructure Issues: The National Broadband Plan and the FCC Pole Attachment Proceeding

By Christopher S. Huther, Megan H. Troy & Timothy J. Tardiff

While the FCC made significant steps towards rationalizing the pole attachment rate regime over the past few years, its May 2010 *Order and Further Notice of Proposed Rulemaking* in the pole attachment docket (WC Docket No. 07-245), in which the agency deferred a ruling on whether to mitigate the disparities between rates charged to ILECs and the rates charged to competitive local exchange carriers and cable television providers, leaves the playing field in a less than level state. **Page 3**

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Pole Attachments

The National Broadband Plan and the FCC Pole Attachment Proceeding

By Christopher S. Huther, Megan H. Troy & Timothy J. Tardiff*

While the FCC made significant steps towards rationalizing the pole attachment rate regime over the past few years, the May 2010 *Order and Further Notice of Proposed Rulemaking* (“Order and FNPRM”) in the Commission’s pole attachment docket (WC Docket No. 07-245), in which the agency deferred a ruling on whether to mitigate the disparities between rates charged to ILECs and the rates charged to competitive local exchange carriers (“CLECs”) and cable television providers (“CATVs”), leaves the playing field in a less than level state. In particular, as long as artificially higher attachment rates are charged to incumbent local exchange carriers (“ILECs”), competition among broadband and other telecommunications service providers remains seriously distorted. It is essential that the FCC complete the remedial work begun in the Order and FNPRM by adopting rules and processes for establishing uniform rates applicable to *all* pole attachers as soon as practicable.

I. Background

On November 20, 2007, the Federal Communications Commission (“FCC”) initiated a rulemaking proceeding to determine whether it should establish a uniform rate for all pole attachments used to provide broadband Internet service.¹ The FCC sought comment on its tentative conclusions that: (1) all attachments should be subject to a single rate; and (2) the uniform rate should be somewhere between the current rate charged to CATVs (the “cable rate”) and the rate charged to CLECs (the “telecom rate”). Interested parties filed formal comments and reply comments, and made numerous *ex parte* presentations.

The parties generally agreed with the FCC that rate uniformity for broadband attachments was desirable. However, specific proposals differed in predictable ways on issues such as how to calculate the uniform rate and whether the uniform rate should apply to ILEC attachments.² ILECs argued that a uniform broadband rate should be set and proposed a number of different methodologies to set the rate. In addition, ILECs argued that, under the plain language of Sec-

tion 224—which entitles any “provider of telecommunications service” (a term that unquestionably includes ILECs) to just and reasonable rates—they are statutorily entitled to the uniform rate. The cable television industry proposed setting the uniform rate at the lower cable rate and allowing ILECs to take advantage of that lower rate provided they agreed to “opt in” to the terms and conditions of existing agreements between CATVs and electric companies. Finally, the electric companies—which own a substantial majority of utility poles—proposed that the rate be set higher than the prevailing telecom rate and challenged the ILECs’ right to such a rate.

Last year, we evaluated the competing proposals, with particular emphasis on their potential to: (1) facilitate competition in the provision of broadband services; (2) provide pole owners with a reasonable opportunity to recover the costs of providing space for other providers and their own attachments; (3) promote administrative feasibility; and (4) avoid rate shock.³ We also noted that, to the extent a uniform rate produces less revenue than the current rates and ILECs are allowed to access that rate, the electric companies could experience a considerable reduction in revenues from pole attachment fees. To offset that decrease, electric companies are likely to seek alternative sources of revenue, including increased “make-ready” charges, more vigorous enforcement and collection of fees for unauthorized attachments, and the sale of poles to ILECs.

II. The National Broadband Plan

On March 16, 2010, the FCC released its long-awaited National Broadband Plan (“NBP”), which included a series of recommendations to promote the continued deployment and enhancement of broadband Internet service in the United States.⁴ To this end, the NBP recognized the importance of ensuring that broadband providers have reliable, cost-effective access to necessary infrastructure, such as utility poles. The NBP states that, “[c]ollectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20 percent of the cost of fiber optic deployment.”⁵ The NBP notes that “[t]hese costs can be reduced directly by cutting fees,” and indirectly “by expediting processes and decreasing the risks and complexities that companies face as they deploy broadband network infrastructure.”⁶

The following were among the recommendations made by the NBP:

- *Establish pole attachment rental rates that are as low and close to uniform as possible.* The NBP recognizes that “[a]pplying different rates based on whether the attacher is classified as a ‘cable’ or ‘telecommunications’ company distorts attachers’ deployment decisions.”⁷ The NBP thus recommends that the rate currently charged to CATVs—a rate that has been held to be just and reasonable and fully compensatory to utilities—should be applied to telecommunications carriers. The NBP leaves the door open for the application of such a rate to ILECs.
- *Implement rules to lower the cost of pole attachment “make-ready” work.* The NBP recognizes that make-ready charges are often the source of significant cost and delay when building broadband networks. The NBP acknowledges that “[r]eform of this inefficient process presents significant opportunities for savings.”⁸ To lower the costs of make-ready work and speed up the attachment process, the NBP recommends: (a) establishing a schedule of charges for the most common types of work; (b) allowing prospective attachers to use independent, utility-approved and certified contractors to perform the make-ready work; (c) mandating that existing attachers accommodate new attachers within a specified timeframe (e.g., 30 days); and (d) linking make-ready payments to the performance of the work, as opposed to requiring that all payments be made up front. If adopted, these changes would limit or otherwise restrict the electric companies’ ability to impose other charges to offset revenues lost as a result of a lower uniform rate.
- *Establish a comprehensive timeline for the attachment process and create a forum for dispute resolution.* The NBP recognizes that, in the absence of federal regulations addressing the time within which decisions must be made, prospective attachers can spend months (or even years) attempting to gain access to necessary infrastructure. The NBP therefore recommends the creation of a federal timeline, applicable to all forms of communications attachments, to cover each step of the Section 224 access process (from application to issuance of the final

permit). The NBP also takes issue with the lack of procedures for the timely resolution of pole attachment disputes, and recommends examining such things as specialized fora and processes for attachment disputes, establishing target deadlines for dispute resolution, and awarding compensation based upon the date access was denied as a means of expediting dispute resolution.

III. The FCC Pole Attachment Proceeding

Not surprisingly, the NBP’s pole attachment recommendations prompted a flurry of activity at the FCC, with the electric companies mounting an aggressive, coordinated attack against the NBP’s proposals. Just a few months later (on May 20, 2010), the FCC released its Order and FNPRM in the pole attachment docket,⁹ which contained few final rules (primarily to clarify the parameters of the statutory nondiscriminatory access requirement and the right to timely access to poles),¹⁰ despite the fact that many more were ripe for decision. Rather, the majority of the Order and FNPRM sought additional comment on the following issues:

- *ILEC Rate Issues.* Despite having already sought (and received) extensive comment regarding whether and under what conditions ILECs should be entitled to a uniform rate, the FCC sought additional comment on a host of issues related to the regulation of ILEC pole attachment rates.¹¹ The FCC asked about the relationship between ILEC rates, ILEC deployment decisions, and the affordability of broadband services—questions that appeared to be driving at whether inflated pole attachment rates impede broadband deployment. In doing so, the FCC questioned whether ILECs needed the rate protections of Section 224, or whether they already enjoyed more favorable terms and conditions than their competitors by virtue of their existing joint use relationships. If ILECs are entitled to just and reasonable rates under Section 224, the FCC asked how “just and reasonable” should be determined. The FCC also asked whether ILECs be able to “opt in” to existing pole attachment agreements, as the cable television industry association proposed. Finally, the FCC sought comment on whether ILECs should be able to file pole attachment complaints before the FCC.

- *Pole Attachment Rates Generally.* The FCC also sought comment on how to minimize distortions in the marketplace caused by differences in the current pole attachment rental rates. The FCC declined to follow the approach proposed by the previous pole attachment NPRM of establishing a uniform rate that is higher than the current cable rate, but no greater than the telecom rate, arguing that increasing CATVs' pole attachment rates would likely increase broadband prices and decrease incentives for broadband deployment.¹² Rather, the FCC questioned whether a uniform rate could be established by: (a) adopting either the USTelecom or AT&T/Verizon rate proposals;¹³ (b) reinterpreting the telecom rate formula (for example, by establishing an upper and lower bound);¹⁴ or (c) adopting an alternative approach (such as one of the formulas adopted by state regulators).¹⁵
- *Make-Ready Timeline.* The FCC sought comment on how to improve access to essential infrastructure and expedite the build-out of affordable broadband, telecommunications, and cable services. The FCC proposed a comprehensive timeline for all wired pole attachment requests, including fiber or other wired attachments by wireless carriers. The FCC asked: (a) whether such a timeline was necessary and should it apply to wireless attachments,¹⁶ (b) was there anything to be learned from the experience of the states in this area,¹⁷ (c) was the length of each of the five stages in the timeline appropriate,¹⁸ and (d) are any adjustments, exceptions or limitations warranted (e.g., exceptions for requests to attach to large numbers of poles).¹⁹
- *Outside Contractors.* The FCC sought comment on a host of proposed rules regarding an attacher's ability to use outside contractors for: (a) survey and make-ready work, and (b) the actual attachment of facilities.²⁰ As a general matter, the FCC believes that utilities should have greater control over the former, but favors a less restrictive approach for the latter. The FCC distinguishes, however, between electric companies and ILECs regarding the control that each may exercise over an attacher's use of contractors.
- *Expediting Pole Access.* The FCC sought comment on alternative approaches to expediting

the deployment of broadband, such as withholding payment for make-ready until after the work is complete, making available a schedule of common make-ready charges, simplifying the relationship between utilities and prospective attachers when there is joint ownership, and improving the collection and availability of data regarding the location and availability of poles, ducts, conduits, and rights-of-way.²¹

- *Dispute Resolution.* Finally, the FCC proposed specific reforms to its dispute resolution procedures, such as modifying the procedural rules applicable to pole attachment disputes, modifying the "sign and sue" rule, establishing specialized forums to handle pole attachment disputes, and specifying the remedies available to attachers.²² The FCC also asked whether it should try to encourage parties to resolve disputes themselves or through local dispute resolution processes, and whether a set of best practices should be established to facilitate such informal discussions.²³ In addition, the FCC questioned the sufficiency of the current unauthorized attachment penalties and asked, if the penalties are deemed inadequate, whether the Oregon system of penalties presents a viable alternative.²⁴

Whether the aforementioned proposals—perhaps adjusted based on comments to the Order and FN-PRM—advance the NBP's recommendation that the FCC reduce the costs of make-ready and expedite access to poles and other critical infrastructure will depend on the extent to which they facilitate, rather than frustrate, the provision of nondiscriminatory access to poles and other infrastructure. Moreover, the FCC appears to have taken a few steps backward on the issue of rate uniformity and, specifically, affording ILECs the rate protections of Section 224. The rationale underlying the NBP—that "applying different rates based on whether the attacher is classified as a 'cable' or 'telecommunications' company distorts attachers' deployment decisions"—strongly suggests that ILEC attachments should be assessed at the uniform rate. However, instead of deciding the issue (despite having a complete and sufficient record upon which to do so), the FCC postponed for another day a ruling on whether ILECs should be entitled to a uniform rate.

IV. Conclusion

The NBP and the FCC's subsequent Order and

FNPRM are designed to produce changes in pole attachment rates and other terms and conditions that are conducive to facilitating widespread broadband deployment and use. In evaluating specific outcomes from any decisions that follow, we believe that the criteria we proposed for evaluating the proposals that resulted from the earlier investigation of a uniform rate for broadband attachments remain valid today. The key question remains: do specific changes in rates and other terms and conditions (1) facilitate competition in the provision of broadband services; (2) provide pole owners with a reasonable opportunity to recover the costs of providing space for other attachers, as well as their own attachments; (3) promote administrative feasibility; and (4) avoid rate shock?

With regard to facilitating competition in the provision of broadband services, failure to mitigate the disparities between the rates charged for to ILECs and rates charged to CLECs and CATVs distorts the ability of all broadband providers to compete on the merits and, as a result, impedes efficient competition among all providers of broadband services. In particular, retaining the mechanisms that have produced much higher attachment rates for major providers of broadband services in both rural and urban areas—the ILECs—is not conducive to a competitive process that benefits broadband consumers. Accordingly, it is essential that the FCC reverse the backward steps it took in the Order and FNPRM and adopt rules and processes for establishing uniform rates applicable to *all* pole attachers as soon as practicable.

With regard to other terms and conditions, the fundamental rationale for uniform rates—to facilitate broadband competition on the merits—applies with equal force. New rules that prevent unreasonable discrimination between pole owners and attachers are clearly conducive to efficient competition. In designing such rules, however, it is important to not impose unnecessary costs on pole owners that could arise from adopting “one-size-fits-all” national rules (e.g., timetables) that take insufficient account of conditions that vary among pole owners. The imposition of such unnecessary costs could frustrate the objective of providing pole owners with a reasonable opportunity to recover the cost of providing pole attachment space.

Finally, changes in pole attachment rules that fail to provide rate uniformity among all providers and/or impose unnecessary costs when attempting to design non-discriminatory terms and conditions are likely to be especially deleterious to ILECs, both in the provision of pole attachment space and in competing for

broadband customers. Not only would the irrational disparity in the rates charged to competing broadband providers remain in place (or even increase if the rates charged to other telecommunications carriers were reduced to the rates currently charged to CATVs), but the ILECs as pole owners could also realize lower revenues from rates charged to other telecommunications providers and higher costs from any new rules that impose unnecessary costs.

Endnotes

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1. *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2001) at ¶1 (“Pole Attachment NPRM”).
2. Currently, the pole attachment rates that electric companies charge ILECs (and vice versa) are set by joint use agreements. Unlike the rates charged to CATVs and CLECs, Section 224 (and the rate formulas prescribed therein) has not yet been interpreted to apply to ILECs.
3. Christopher S. Huther, Megan H. Troy & Timothy J. Tardiff, *A Legal and Economic Justification for a Uniform Pole Attachment Rate* (pts. I, II & III), Communications Environmental & Land Use Law Report, Nov. 2008; Communications Environmental & Land Use Law Report, Dec. 2008; Communications Environmental & Land Use Law Report, Jan. 2009.
4. *Connecting America: The National Broadband Plan* (“NBP”).
5. *Id.* at 109.
6. *Id.* at 110.
7. *Id.*
8. *Id.* at 111.
9. *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking (rel. May 20, 2010) at ¶¶ 7-18 (“Order and FNPRM”).
10. *Id.* at ¶¶ 8-18.
11. *Id.* at ¶¶ 144-48.
12. *Id.* at ¶ 118.
13. *Id.* at ¶¶ 119-21.
14. *Id.* at ¶¶ 122-41.
15. *Id.* at ¶ 142.
16. *Id.* at ¶¶ 25-33, 52-53.

17. *Id.* at ¶¶ 27-28.
 18. *Id.* at ¶¶ 31-45.
 19. *Id.* at ¶¶ 45-51.
 20. *Id.* at ¶¶ 58-69.

21. *Id.* at ¶¶ 70-74.
 22. *Id.* at ¶¶ 78-80, 83-88.
 23. *Id.* at ¶¶ 81-82.
 24. *Id.* at ¶¶ 89-98.

Rural Services

Commerce Announces Final BTOP Awards

The Commerce Department's National Telecommunications and Information Administration has announced the final recipients of the \$4 billion in stimulus grants it is charged with distributing to expand broadband Internet infrastructure.

Commerce Secretary Gary Locke on September 27 announced the final round of 14 grants, which total \$207 million. They include:

- a \$154.6 million grant to fund deployment of an interoperable wireless public safety broadband network across Los Angeles County, providing more than 80 public safety agencies and up to 34,000 first responders with such features as computer-aided dispatch, rapid law enforcement queries, real-time video streaming, medical telemetry and patient tracking;
- a \$12.1 million grant to fund deployment of an interoperable wireless public safety broadband network in an area that includes Colorado's Adams County and the Denver International Airport to serve more than 20 public safety agencies and up to 2,000 first responders;
- a \$7.1 million grant to fund a California project designed to place unemployed residents in IT-industry jobs by training approximately 37,000 people and providing computers to qualified low-income residents who graduate from a broadband training curriculum;
- a \$7.9 million grant that fund a project to provide broadband-related training to approximately 8,400 seniors, low-income individuals, and others in economically and socially vulnerable groups in the city and county of San Francisco;
- a \$5.2 million grant to fund a Michigan State University project to provide broadband-related

training to approximately 3,200 residents, focusing on high school students, displaced workers, and small businesses in 11 cities across the state; and

- a \$3.6 million grant that will fund approximately three new and 26 upgraded public computer centers, and 500 new or upgraded workstations, in Monterey County, California.

Other grant funds were awarded to projects in Arkansas, California, Colorado, Delaware, Florida, Louisiana, Minnesota, Nevada, New York state, Oregon, Texas and Washington state.

Over the last year and a half, NTIA has awarded funds to 233 projects in every state under the Broadband Technology Opportunities Program (BTOP). These include "middle-mile" fiber-optic loops. NTIA's initiative is part of a total of \$7 billion in stimulus monies being targeted to broadband deployment. The Department of Agriculture's Rural Utilities Service is also administering grants, all of which fall under the American Recovery and Reinvestment Act passed in 2009.

In a news release, Commerce said overall Recovery Act investments in broadband are expected to create tens of thousands of jobs in the near term and expand economic development and job opportunities in unserved and underserved communities.

"NTIA's work is far from over," NTIA Administrator Lawrence Strickling said. "We will be overseeing these projects to ensure they are completed on schedule and within budget, and deliver the promised benefits to the communities they serve."

FCC Urged to Make Rural Broadband as Flexible as Possible for Health Care Users

The Federal Communications Commission is being urged to allow for as much flexibility as possible in a newly proposed program aimed at connecting ru-