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Pole Attachments
Are Cities asleep at the wheel on the information super highway?

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Are Cities asleep at the wheel on the information super highway?

Brian T. Grogan

INTRODUCTION

Under the Communications Act of 1934¹, as amended by the Telecommunications Act of 1996² ("1996 Act") municipalities (including their electric utilities) have enjoyed an exemption from federal law governing pole attachments.³ As a result, the myriad of FCC regulations governing pole attachments and the permissible rates to be charged are not presently binding upon municipalities.⁴ But that may be changing as providers are calling for an end to the municipal exemption and modifications to the pole attachment rules.

The federal pole attachment regulations have been aggressively debated over the last two decades as private utilities, telephone companies and cable operators have argued over access to the poles and the appropriate level of compensation. These same issues are now coming before municipalities as agreements come up for renewal and operators seek to add more equipment to the poles to accommodate broadband services. Many municipalities find that the pole attachment agreements currently in place are antiquated and allow for unfettered access to the poles with little or no compensation to the municipality. These municipalities are looking for answers to basic questions: 1) what rates to charge for telephone, cable and broadband attachments; 2) what reasonable terms should be imposed on those seeking to attach to municipal poles; and 3) is there a growing movement towards eliminating the federal exemption for municipalities regarding pole attachment fees.

Municipalities have historically spent very little effort negotiating pole attachment agreements. Often municipalities would simply accept generic agreements offered by telephone and cable operators which offered little compensation and abrogated control of the poles in many respects. Municipalities have recently begun to take a closer look at pole attachments focusing on the key issues of cost recovery, safety and the prospect of regulation at the federal level.

This paper will provide a brief history of pole attachment regulation at the federal and state levels and will outline ways in which municipalities can improve their pole attachment agreements. The focus will be on improved cost recovery and

¹ Communications Act of 1934 ("Communications Act") 47 U.S.C. §§ 151, et seq.

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), codified at 47 U.S.C. §§ 151, et seq.

³ Section 224(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 224(a).

⁴ By statute, municipal electric cooperatives are specifically exempt from FCC pole attachment regulation but may be subject to state regulation if a state asserts jurisdiction. Thus, cooperatives are not guaranteed exemption from some form of pole attachment regulation.

compensation models as well as an outline of the FCC's proposed changes to the pole attachment process which could become applicable for municipalities if certain industry players continue to apply pressure.

NO BROADBAND WITHOUT POLE ATTACHMENTS

The FCC pole attachment regulations⁵ attempt to establish a program for nondiscriminatory access to utilities' poles, ducts, conduits and rights-of-way. These regulations attempt to institute a fair, efficient and expeditious regulatory regime for determining just and reasonable pole attachment rates with a minimum of administrative costs.⁶ The bottom line, however, is that few are satisfied with the current FCC regulations. Telephone and cable operators argue that their access to the poles is limited as they seek to extend their communications systems and provide new services. These providers argue that utility poles are a monopoly and attachers are forced to pay ever increasing rates for access that only serve to drive up the cost of voice video and broadband services. Private (investor-owned) utilities argue that the current FCC regulations do not allow enough control over the poles for essential utility services. Utilities further maintain that telephone and cable operators are not paying their fair share of the cost of maintaining the poles given the added equipment and services they are now providing over their systems (voice, video and broadband).

The arguments surrounding pole attachments have gained further scrutiny in 2010 as a result of the FCC's National Broadband Plan.⁷ As part of the National Broadband Plan, on May 20, 2010, the FCC released an Order and Further Notice of Proposed Rulemaking to revise the FCC's pole attachment rules in an effort to lower the costs of telecommunications, cable, and broadband deployment and to promote competition.⁸ According to the FCC, the purpose of this rulemaking is to reduce telephone and cable providers' costs and provide quicker access to poles, in turn decreasing barriers to broadband deployment and increasing overall availability. Not surprisingly, not all parties agree that the FCC's proposed changes to the pole attachment regulations will accomplish the FCC's desired goals.

⁵ FCC rules governing pole attachments, 47 C.F.R. §§ 1.1401-1.1418.

⁶ *Local Competition Order*, 11 FCC Rcd at 16058-59. See 47 U.S.C. § 224(b)(1) and (2).

⁷ Connecting America: The National Broadband Plan (rel. Mar. 16, 2010), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> ("National Broadband Plan").

⁸ In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for Our Future, Order and Further Notice of Proposed Rulemaking, FCC 10-84, WC Docket No. 07-245, GN Docket No. 09-51 (rel. May 20, 2010).

CURRENT FEDERAL LAW⁹

In 1978, Congress first addressed pole attachments by adding Section 224 to the Communications Act.¹⁰ Section 224 directed the FCC to ensure that the rates, terms, and conditions for pole attachments by cable television systems were just and reasonable. It was at this time that Congress withheld from the FCC jurisdiction to consider attachment complaints where the utility is a railroad, cooperatively organized, or owned by a government entity.¹¹

The 1996 Act expanded the definition of pole attachments to include attachments by providers of telecommunications service¹², and granted both cable systems and telecommunications carriers¹³ an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility.¹⁴ However, the 1996 Act permits utilities to deny access where there is insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes.¹⁵ Besides establishing a right of access, the 1996 Act mandates a rate formula for telecommunications carriers that differs from the rate formula for attachments used solely to provide cable service.¹⁶

In 1996 the FCC implemented the Section 224 access requirements in the Local Competition Order.¹⁷ At that time, the FCC concluded that it would determine the reasonableness of a particular condition of access on a case-by-case basis. Finding that no single set of rules could take into account all attachment issues, the FCC specifically declined to adopt the National Electric Safety Code (NESC) in lieu of access rules.¹⁸ The Commission also recognized that utilities typically

⁹ The below summary regarding the history of FCC regulations is derived in part from information contained in: In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for Our Future, Order and Further Notice of Proposed Rulemaking, FCC 10-84, WC Docket No. 07-245, GN Docket No. 09-51 (rel. May 20, 2010).

¹⁰ Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978). Section 224 provides that the Commission will regulate pole attachments except where such matters are regulated by a state. 47 U.S.C. § 224(c). See also States That Have Certified That They Regulate Pole Attachments, WC Docket No. 10-101, Public Notice, DA 10893 (rel. May 19, 2010).

¹¹ 47 U.S.C. § 224(a)(1)

¹² 47 U.S.C. § 224(a)(4).

¹³ For purposes of Section 224, Congress excluded incumbent LECs from the definition of "telecommunications carriers." 47 U.S.C. § 224(a)(5).

¹⁴ 47 U.S.C. § 224(f)(1). As a general matter, all references to poles refer to the infrastructure covered by the statutory definition of "pole attachments," including poles, ducts, conduit, and rights-of-way, unless otherwise indicated. 47 U.S.C. § 224(a)(4).

¹⁵ 47 U.S.C. § 224(f)(2); see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, Report and Order, 11 FCC Rcd 15499, 16080-81, paras. 1175-77 (1996) (Local Competition Order) (extending the provisions of Section 224(t)(2) to other utilities).

¹⁶ See 47 U.S.C. § 224(d) (describing the "cable rate formula"), (e) (describing the "telecom rate formula").

¹⁷ Local Competition Order, 11 FCC Rcd at 15499.

¹⁸ Local Competition Order, 11 FCC Rcd at 16068-69, paras. 1145-46 (finding that the NESC's depth of detail--64 pages of rules dictating minimum clearances alone--and allowance for variables make it unworkable for setting access standards).

develop individual standards and incorporate them into pole attachment agreements, and that, in some cases, federal, state, or local laws also impose relevant restrictions.

The Local Competition Order acknowledged concerns that utilities might deny access unreasonably, but rather than adopt a set of substantive engineering standards, the FCC decided that procedures for requiring utilities to justify the conditions they placed on access would best safeguard attachers' rights. The FCC adopted five rules of general applicability and several broad policy guidelines in the Local Competition Order.¹⁹ The five specific rules are:

- (1) a utility may rely on industry codes, such as the NESC, to prescribe standards with respect to capacity, safety, reliability and general engineering principles;
- (2) a utility will still be subject to any federal requirements, such as those imposed by FERC or OSHA, which might affect pole attachments;
- (3) state and local requirements will be given deference if not in direct conflict with FCC rules;
- (4) rates, terms and conditions of access must be uniformly applied to all attachers on a nondiscriminatory basis; and
- (5) a utility may not favor itself over other parties with respect to the provision of telecommunications or video services.

In the 1998 Implementation Order, the FCC adopted rules implementing the 1996 Act's new pole attachment rate formula for telecommunications carriers.²⁰ The FCC also concluded that cable television systems offering both cable and Internet access service should continue to pay the cable rate.²¹ The FCC further held that the statutory right of nondiscriminatory access includes attachments by wireless carriers.²² The latter two determinations were challenged but ultimately upheld by the Supreme Court in the Gulf Power case.²³

¹⁹ Local Competition Order, 11 FCC Rcd at 16071-74, paras. 1151-58.

²⁰ Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777 (1998) (1998 Implementation Order), aff'd in part, rev'd in part, Gulf Power v. FCC, 208 F.3d 1263 (11th Cir. 2000) (Gulf Power v. FCC), rev'd, Nat'l Cable & Telecommunications Ass'n v. Gulf Power, 534 U.S. 327 (2002) (Gulf Power).

²¹ See 1998 Implementation Order, 13 FCC Rcd at 6796, para. 34.

²² See 1998 Implementation Order, 13 FCC Rcd at 6797-99, paras. 36-42 (applying the definitions of "telecommunications carriers," "telecommunications services," and relevant provisions of Section 224 to wireless carriers).

²³ See Gulf Power v. FCC, 208 F.3d at 1273-75 (wireless), 1275-78 (cable rate) (finding that the term "any telecommunications carrier" in Section 224 excluded attachment of wireless carriers' equipment, and that the term "solely cable service" rendered provision of Internet access service

On November 20, 2007, the FCC issued the Pole Attachment Notice²⁴ in recognition of the importance of pole attachments to the deployment of communications networks. Some providers had argued that that incumbent LECs, as providers of telecommunications service, are entitled to just and reasonable pole attachment rates, terms, and conditions of attachment even though, under Section 224, they do not count as "telecommunications carriers" and have no statutory right of access. Others argued that the FCC should initiate a rulemaking to set access standards for pole attachments, including standards for timely performance of make-ready work, use of boxing and extension arms, and use of qualified third party contract workers, among other concerns.

The Pole Attachment Notice focused on the effect of disparate pole-attachment rates on broadband competition and arrived at two tentative conclusions. First, all attachers should pay the same pole attachment rate for all attachments used to provide broadband Internet access service.²⁵ Second, the rate charged for such attachment should be higher than the current cable rate, yet not greater than the telecommunications rate. The Pole Attachment Notice also inquired about application of the telecommunications rate to wireless pole attachments and other pole access concerns.

In 2009 Congress adopted the American Recovery and Reinvestment Act of 2009 which included a requirement that the FCC develop a national broadband plan to ensure that every American has access to broadband capability.²⁶ In particular, the National Broadband Plan included recommendations to improve the pole attachment process and compensation methodology. The recommendations were as follows:

- (1) The FCC establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 to promote broadband deployment;
- (2) The FCC implement rules that will lower the cost of the pole attachment "make-ready" process. For example, the FCC should authorize attachers to use space and cost-saving techniques, such as boxing or extension arms, where practical and in a way that is consistent with pole owners' use of those techniques;

by cable systems ineligible for cable rate); Gulf Power, 534 U.S. at 333-39 (cable rate), 339-342 (wireless) (finding that cable rate did not limit agency discretion to determine rates, and holding that any service provided "by" a cable system is, by definition, a "cable" service; also finding inclusion of wireless equipment within "any attachment" reasonable and entitled to deference).

²⁴ Pole Attachment Notice, 22 FCC Rcd at 20195.

²⁵ Pole Attachment Notice, 22 FCC Rcd at 20206, para. 26.

²⁶ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(2) (2009).

- (3) The FCC establish a comprehensive timeline for each step of the Section 224 access process and reform the process for resolving disputes regarding infrastructure access; and
- (4) The FCC improve the collection and availability of information regarding the location and availability of poles, ducts, conduits and rights-of-way.²⁷

As part of the National Broadband Plan, on May 20, 2010, the FCC released an Order and Further Notice of Proposed Rulemaking²⁸ to revise the FCC's pole attachment rules in an effort to lower the costs of telecommunications, cable, and broadband deployment and to promote competition. The Rulemaking addresses seven key issues:

- (1) the institution of a new timeline for the make-ready process;
- (2) new rules for the use of outside contractors for pole attachment work;
- (3) new incentives for the quick completion of make-ready work;
- (4) an updated collection and maintenance method for the FCC to gather and make available information regarding the location and availability of poles, ducts, conduits, and rights-of-way;
- (5) modification of the FCC's enforcement procedures, including: the establishment of best practices, modification of the rules for monetary awards and new penalties for unlawful/non-permitted attachments;
- (6) changes to the "sign and sue" rules that will require attachers to raise issues with pole attachment contracts during negotiations; and
- (7) changes to the current rate structure to make the rental market more uniform by bringing telecom pole attachment rates lower to meet current cable rates.

Comments in the Rulemaking were submitted in August of 2010 and judging from the list of entities submitting comments and the disparate proposals for regulation, the FCC will have challenges keeping all parties satisfied. What appears clear from reviewing the comments is that telephone and cable providers maintain that the poles are a monopoly in need of regulation. They base their

²⁷ National Broadband Plan at 110-12.

²⁸ In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for Our Future, Order and Further Notice of Proposed Rulemaking, FCC 10-84, WC Docket No. 07-245, GN Docket No. 09-51 (rel. May 20, 2010) ("Rulemaking").

comments in large part on the concept that voice, video and broadband services are “essential” services no less than electric service. They further argue that unreasonable terms for access to the poles will only raise the cost of service and harm consumers. Not surprisingly the utilities view the issue differently but many utilities seem to recognize the inconsistencies present in the current FCC pole attachment rate formulas.

At least one trade organization, the American Cable Association (“ACA”), has submitted a letter to the FCC²⁹ arguing that all utilities should calculate attachment rates consistent with the FCC’s formula. The letter supports the comments of 13 state cable associations that have argued to the FCC that municipal utilities are now starting to increase attachment rates. the ACA states in its letter that “[t]he ability of some pole owners – such as electric cooperatives and municipalities – to charge pole attachment rates without regard to the FCC’s pole attachment rate calculation impedes the delivery of broadband in sparsely populated rural areas.” Neither the ACA nor the state cable associations mentioned that many municipalities have been charging extraordinarily low attachment rates of \$2-\$6 dollars per pole per year for decades. Thus even an increase to \$10 -\$15 per attachment may represent a significant increase in the pole attachment rate but may also remain well below the maximum rate permitted under the existing FCC formula. Simply because municipalities executed agreements in the 1980s that were particularly favorable to the attachers, should not limit the ability of municipalities to assess reasonable attachment fees to providers today.

STATE REGULATION

Given the complexity of the legal and regulatory issues impacting pole attachments, it is not surprising that many municipal electric cooperatives have struggled with how best to manage the pole attachment activities of telecommunications companies, cable operators and others. The complexity may be even greater in states that have certified to regulate pole attachments. The FCC regulates pole attachments to private utility poles unless a state certifies to the FCC that it will regulate. The following states have certified to the FCC that they regulate pole attachments:

- (1) Alaska
- (2) Arkansas
- (3) California
- (4) Connecticut
- (5) Delaware
- (6) District of Columbia
- (7) Idaho
- (8) Illinois

²⁹ See April 5, 2010 letter from Mathew M. Polka, ACA President to Ms. Marlene Dortch, FCC Secretary (copy attached).

- (9) Kentucky
- (10) Louisiana
- (11) Maine
- (12) Massachusetts
- (13) Michigan
- (14) New Hampshire
- (15) New Jersey
- (16) New York
- (17) Ohio
- (18) Oregon
- (19) Utah
- (20) Vermont
- (21) Washington³⁰

Most of these states that have certified follow the FCC's rate regulations but a careful review of each state's regulations is required before executing a pole attachment agreement. Under Section 224 municipal electric cooperatives are specifically exempt from FCC pole attachment regulation but they may be subject to state regulation if a state asserts jurisdiction. Thus, municipalities are not guaranteed exemption from some form of pole attachment regulation.

COST RECOVERY IN POLE ATTACHMENT AGREEMENTS

Regulated utilities argue that the FCC's pole attachment formula establishes rates at levels too low to recover most pole attachment-related costs and far lower than the actual value of access to the utility distribution system. Under the current FCC formula, cable companies pay a lower rate than telecommunications companies.³¹ Competitive local exchange carriers (CLECs) pay a lower rate than independent local exchange carriers (i.e. telephone companies other than Verizon, AT&T and Qwest). The FCC formula does not currently apply to internet service providers (ISPs) or broadband providers. The only option for ISPs and broadband providers to mandate access to the poles is to become a CLEC.

Utilities argue that the FCC formulas do not allow for the minimum recovery of reasonable and prudent expenses incurred by utilities installing and maintaining their poles. As a result, many utilities contend they are unfairly subsidizing attachers. Moreover, utilities argue that attachers have high levels of unauthorized attachments and numerous violations of the National Electric Safety Code (NESC) or other relevant safety regulations that utilities have included in executed pole attachment agreements. These violations, they allege, have an

³⁰ See States That Have Certified That They Regulate Pole Attachments, WC Docket No. 10-101, Public Notice, DA 10893 (rel. May 19, 2010).

³¹ The rationale for the more favorable formula is based on the time period when cable operators were in the early developmental days of the industry, many argue that such a policy is less sensible today when cable and telephone companies compete head to head for voice, video and broadband subscribers.

adverse impact on the electric distribution system and may render the system less safe and reliable.

The FCC applies the following formula³² to determine the maximum allowable annual pole attachment rate for cable television systems that do not also provide telecommunications services:

$$\text{Maximum Rate} = \text{Space Factor} \times \frac{\text{Net Cost of a Bare Pole}}{\text{Total Usable Space}} \times \text{Carrying Charge Rate}$$

$$\text{Where Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

Where Space Occupied is presumed to be one foot, Usable Space is presumed to be 13.5 feet and Pole Height is presumed to be 37.5 feet. The carrying charge rate is calculated by determining the percentage of a pole owner's depreciation expense, administrative and general expenses, maintenance expenses, taxes, rate of return, pro-rated annualized costs for pole audits or other expenses that are attributable to the pole owner's investment and management of poles.

The FCC applies the following formula³³ to determine the maximum allowable rate for pole attachments that provide telecommunications services:

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\begin{array}{c} \text{Carrying} \\ \text{Charge} \\ \text{Rate} \end{array} \right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space Occupied}}{\text{Pole Height}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

Where Space Occupied is presumed to be one foot, Unusable Space is presumed to be 24 feet and Pole Height is presumed to be 37.5 feet.

While municipalities are not required to utilize the FCC formulas when calculating applicable pole attachment rates, many use the formula as a guide. The first step is to obtain an accurate pole count and accurate number of attachments to each municipally owned pole. There are companies that specialize in handling pole counts and can provide documented support for the number reported. It is often a good idea to provide written notice to all attachers before conducting a pole count so each attacher has an opportunity to be present, if

³² See 47 C.F.R. §§ 1.1401-1.1408.

³³ Id.

desired. The next step is to determine the number of attachers on each pole. This information is then added to the municipal utilities own data regarding net pole cost and carrying charges.

With this data the utility can derive a maximum pole attachment rate. While there is no legal prohibition on a municipal utility from charging in excess of the maximum permitted rate, most use the maximum permitted rate as a guide but generally implement a lower rate - particularly when compared to investor owned utility poles in the same region. It is not uncommon for the existing pole municipal pole attachment rate to be well below the maximum rate, to have been in place for 15 or more years and in some cases there may be free access to municipal poles. Thus, any increase in the pole attachment rate is viewed as excessive even though it may be well below the maximum permitted under the FCC formula.

Since the formula is only used as a guide by municipalities (unless state regulation dictates otherwise) and is not binding, the only argument raised by attachers seeking to avoid a rate increase is that any cost increase in the attachment rate will be passed along to subscribers. Knowing this is a politically sensitive issue, particularly in rural communities, the attachers often have success with this argument before local city councils. The issue to focus on for the municipal utility is to charge a fair and reasonable rate to recoup the costs associated with the pole attachment - including any ancillary equipment installed by the attacher. This equipment may include back up generators or batteries that can have a negative impact on the reliability of the electric distribution system. If the pole attachment rate is set below this reasonable level, the result will be that electric rate payer or city taxpayers will carry a disproportionate burden of the cost of a pole and indirectly subsidize the communications services offered by the attachers.

CHANGES PROPOSED BY THE FCC

Timeline for Negotiations

In the FCC's May 20, 2010 Rulemaking,³⁴ the FCC proposes a new timeline for the make-ready process. The proposed timeline would cover every step of the pole attachment process and include the following five stages: 1) survey; 2) estimate; 3) attacher acceptance; 4) performance; and, if necessary, 5) multiparty coordination.

In addition to proposing a timeline for pole attachments, the FCC seeks comment on any exceptions or limitations to the timeline that the FCC should consider, including (1) exceptions for requests for access to a large number of poles; (2)

³⁴ In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for Our Future, Order and Further Notice of Proposed Rulemaking, FCC 10-84, WC Docket No. 07-245, GN Docket No. 09-51 (rel. May 20, 2010).

timeline adjustments or notice requirements for modifications to the timeline; and (3) any issues that might warrant stopping the clock on the timeline. The FCC also requests comment on developing timelines for Section 224 wireless access and on whether the new timeline provides adequate time for written notification for modifications to a pole.

Use of Third Party Contractors

As recommended in the National Broadband Plan, the FCC also considers the use of outside contractors for pole attachment work. With respect to surveys and communications make-ready work, the FCC proposes that attachers may use contractors to perform the work if either a utility has failed to perform the work within the timeline or if the utility agrees to use of the contractors. With respect to “post-make-ready attachment of facilities,” the FCC proposes retaining its existing rules – permitting attachers to use contractors who share the “same qualifications, in terms of training, as the utilities’ own workers.” For electric utilities and other non-incumbent LEC pole owners, the FCC proposes that attachers may use contractors to perform surveys or make-ready work that a utility has approved and certified for performing that work.

The FCC further proposes that utilities and prospective attachers may jointly oversee contractors for survey and make-ready work. However, for electric utilities and other non-incumbent LEC pole owners, the FCC proposes that attachers that use contractors for surveys and make-ready work should invite representatives of the utility to accompany the contract workers and should agree ahead of time on an amount of notice to the utility. For incumbent LEC-owned poles, the FCC seeks comments on the proposal that attachers performing the work using contractors should invite a representative of the incumbent LEC to accompany the contractor, but that the incumbent LEC should not have any final decision-making power. With respect to work among electrical lines, the FCC proposes that the utilities may deny access by contractors unless the contract has “special communications-equipment related training” that the utility cannot match.

Joint Pole Ownership

In addition to the timeline, the FCC also proposes additional incentives for performance of make-ready work in a timely manner. Further, the FCC seeks comment on ways to streamline the relationship between prospective attachers and utilities when there is joint ownership of the pole, so that prospective attachers do not have to contact multiple owners to receive permission to attach. Accordingly, the FCC proposes that when a pole is jointly owned, the owners must determine amongst themselves which one of them will manage the pole. Any prospective attacher will only be required to deal with the owner managing the pole. In light of the FCC’s new rule that attachers may employ the same attachment techniques as utilities, the FCC also seeks comment on the exclusion

of certain pole attachment techniques that were previously, but are no longer, used by a utility.

Enforcement of Pole Attachment Agreements

As part of the Rulemaking, the FCC also seeks ways to improve the enforcement process for pole attachment disputes. The FCC invites comment on its current process and the recommendations made in the National Broadband Plan to institute changes to its current procedures, including the creation of special forums and processes for attachment disputes and the adaptations of changes that would expedite resolution of pole attachment disputes. In order to control the unauthorized use of poles, the FCC seeks comment on specifying penalties of \$500 per pole, per year, for attachment of facilities without an agreement and \$100 per pole plus five times the current annual rental per pole for attachments without a permit. Moreover, the FCC would like comment on how these penalties could be enforced and any alternatives to the penalties.

Sign and Sue Rule

With regard to the “sign and sue” rule, the FCC seeks comment on its current rule permitting attachers to challenge the reasonableness or discriminatory nature of a pole attachment agreement after the agreement is signed, without any restriction on a time limit for such challenge. Specifically, the FCC seeks comment on an amendment to the rule that would require the attacher to raise any issues during contract negotiations. The FCC also seeks comment on when an attacher’s cause of action challenging a rate, term or condition in a pole attachment agreement accrues for purposes of the statute of limitations and whether the FCC should continue to follow common law principles in determining the time of accrual.

Pole Attachment Rates

The FCC also requests comment on the current state of pole rental rates. Specifically, the FCC would like comment on ways to limit the “distortionary effects” of disparities between current pole rental rates for cable, telephone and broadband providers. The National Broadband Plan recommended that the FCC “establish rental rates for pole attachments that are as low and close to uniform as possible.” Following the recommendations of the Plan, the FCC agrees that lowering the telecom rates for pole rentals (which are currently higher than the cable rates) will best promote broadband deployment. Accordingly, the FCC seeks comment on a range of issues addressing current rental rates, including ways to lower telecom rates and establish rate uniformity. Not surprisingly the utilities are not in favor of this proposal as it will bring rates down to the lowest common denominator and may not cover the proportionate pole costs incurred by the utility.

CONCLUSION

The Internet is continuing to reshape the World we know. Entire industries have disappeared (music industry) and new ones have been created (social media) in a virtual blink of the eye. For more than a decade now broadband capacity has been considered the new superhighway of the 21st Century. Municipalities have gone to great lengths to ensure that their communities are well positioned to take advantage of the new opportunities that broadband now provides. So it is particularly ironic that with all this new technology, it is the plain old utility poles that have emerged to become the key lynchpin in the entire process. If a company cannot gain access to the poles, they have no business. Perhaps that is why so much attention is now being focused on the FCC's pole attachment Rulemaking under the new National Broadband Plan.

While municipalities currently enjoy an exemption from both Section 224 and the FCC's regulations, the winds of change may be blowing and municipalities should start to focus on their existing pole attachment agreements and the pending FCC's proceedings. There is not only an opportunity for increased revenue to the municipality in the form of higher per pole attachment rates, but also continued control over the infrastructure which delivers these critical services to the municipalities' constituents.

Brian T. Grogan is a shareholder with the Minneapolis law firm of Moss & Barnett practicing in the firm's communications, business and infrastructure law departments. Since 1988 Brian has worked with governmental entities throughout the country on a variety of cable, telecom, wireless and broadband communications issues. He has also been actively negotiating cable and telecommunications franchises for cities across the country. In his business law practice Brian focuses on fiber lease agreements, mergers and acquisitions and contract matters in the communications and technology industries. Brian is a member of IMLA, NATOA, ACM and is the 2009-10 Chair of the Communications Law Section of the Minnesota State Bar Association.



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April 5, 2010

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

via ECFS

Re: American Cable Association Notice of Ex Parte Presentation Supporting State Cable Associations' March 18, 2010 Ex Parte Letter; GN Docket Nos. 09-47, 09-51, and 09-137; WC Docket No. 07-245

Dear Ms. Dortch:

On behalf of the American Cable Association ("ACA"), I write to strongly support the State Cable Associations' March 18, 2010 Ex Parte Letter ("Cable Associations' Letter") filed in the above-referenced proceedings. For the reasons herein, ACA strongly supports the State Cable Associations' response to the March 8, 2010 presentation made by the National Rural Electric Cooperative Association ("NRECA").

In numerous filings with the Commission, ACA has shown the need for Commission action to ensure that all pole owners calculate rates consistent with the FCC's regulations.¹ The ability of some pole owners – such as electric cooperatives and municipalities – to charge pole attachment rates without regard to the FCC's pole attachment rate calculation impedes the delivery of broadband in sparsely populated rural areas. As the Commission has recognized, there are fewer homes per mile of plant in these areas.² More poles — and, consequently, more attachments — are required to

¹ See, e.g., *In the Matter of A National Broadband Plan For Our Future*, GN Docket No. 09-51, Comments of the American Cable Association (filed June 8, 2009); *In the Matter of Petition for Declaratory Ruling of American Electric Power Service Corporation et al. Regarding the Rate for Cable System Pole Attachments Used to Provide Voice Over Internet Protocol Service*, WC Docket No. 09-154, Opposition of the American Cable Association (filed Sept. 24, 2009); *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Reply Comments of the American Cable Association (filed Apr. 17, 2008).

² See, e.g., *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd. 6453, ¶ 118 (2000) ("The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural

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bring broadband to each subscriber's home. Excessive rates have a disproportionately negative impact on the subscribers in rural areas, and increase the cost of broadband deployment in small markets and rural areas – areas served by ACA's member companies. In short, high pole attachment rates impede the delivery of broadband in sparsely populated rural areas.

The Cable Associations' Letter details the significant problems with electric cooperatives' and municipalities' exemption from pole attachment regulation. These include the enormous disparity in pole attachment rates cooperatives and municipalities charge compared to those entities not subject to the exemption from pole attachment regulation,³ as well as the impact unregulated rates have on broadband deployment.⁴ The State Cable Associations also correctly note that many cooperative and municipal pole owners compete against cable operators in providing broadband service.⁵

Permitting electric cooperatives and municipal utilities to charge pole attachment rates without regard to the FCC's pole attachment rate calculation has a disproportionately negative impact on the subscribers served by ACA's members. This is because ACA's members serve mainly lower-density markets. No economic theory supports the dramatically higher pole attachment rates cooperatives and municipal utilities seek. As the courts have routinely held, pole owners are fully compensated for cable attachments under the cable formula.⁶

ACA strongly supports the Cable Associations' Letter, and continues to advocate ending the pole attachment regulation exemption for cooperative and municipally owned utilities. The Commission must ensure that all pole owners provide access to poles, ducts, conduits, or rights-of-way on a non-discriminatory basis.

Sincerely,



Matthew M. Polka
President and CEO
American Cable Association

operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers."); *in the Matter of Caribbean Communications Corp., Petition for Special Relief*, Memorandum Opinion and Order, 17 FCC Rcd. 7092, ¶ 14 (2002) (noting that systems with more than 15,000 subscribers average 68.7 subscribers per mile, while small systems service on average only 35.3 subscribers per mile).

³ Cable Associations' Letter at 2-4 (providing examples of rate disparities in Arkansas, Tennessee, Texas, Virginia, and California).

⁴ *Id.* at 4 ("high pole costs extinguish broadband deployment....").

⁵ *Id.* at 5.

⁶ See generally *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002).