

Joint Use & Pole Attachments Newsletter

“Year In Review”

December 2008

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This has been an interesting and active year in joint use and pole attachments. The year began with a new state certification of pole attachment regulation (the first in 16 years) and the publication of a comprehensive Notice of Proposed Rulemaking (“NPRM”) at the FCC (the first pole attachment rulemaking initiated in more than a decade). As the year comes to a close, two major ILECs are merging, and the FCC has yet to release a final rule in the NPRM. This “Year in Review” newsletter captures a few of 2008’s highlights.

FCC Releases Comprehensive Pole Attachment NPRM

In response to rulemaking petitions filed in late 2006 (and likely other influences as well), the FCC released a comprehensive pole attachment NPRM on November 20, 2007. [\[LINK TO NPRM\]](#) The NPRM was “published” (the event, under the FCC’s rules, which initiated the comment period) on February 6, 2008. The main focus of the NPRM was unification of pole attachment rates paid by different types of broadband providers (including ILECs) as a means of promoting competitive neutrality in broadband deployment. The NPRM reached only one tentative conclusion: “that all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service” and that “the rate should be higher than the current cable rate, yet no greater than the telecommunications rate.” (NPRM, ¶ 36).

The FCC expressed caution about its jurisdictional constraints, and specifically sought comment on whether the federal Pole Attachments Act permits FCC regulation of pole attachment rates paid by ILECs to electric utilities. (NPRM, ¶ 25). Electric utilities responded to this question with a resounding “no.” The comments filed by electric utility interests uniformly noted: the Act treats ILECs as pole owners – not attachers; the FCC has always treated ILECs as pole owners; and ILECs never made this argument until late in 2006 – more than 10 years after the very

amendments to the Act upon which they now base their jurisdictional argument. As proof that “politics makes strange bedfellows,” the cable television and electric utility industries are allies on this jurisdictional issue.

The NPRM also sought comment on a broad range of access-related issues, including make-ready timelines, the use of third-party contractors, and the use of boxing and standoff brackets. (NPRM, ¶¶ 37-38). The comments filed by electric utilities urged the FCC to reject “one-size-fits-all” access regulations due to the disruption it would cause to an electric utility’s core mission – the provision of safe and reliable electricity to customers.

Numerous electric utilities and groups of electric utilities (along with other impacted industries) filed comments and evidence addressing the issues raised in the NPRM. The comment period closed in April 2008, after which there was a flurry of *ex parte* activity at the FCC by all interested industries. As of the end of November 2008, electric utility interests had made a total of 54 separate *ex parte* contacts at the FCC in connection with the NPRM (compared to 22 for ILECs, 15 for CATVs, and 35 for CLECs and wireless interests combined). Whether these efforts yield results remains to be seen. But there is no doubt the electric industry voiced its concerns.

Conventional wisdom held that a final rule would be released, if at all, prior to FCC Chairman Kevin Martin’s departure. With Martin’s chairmanship (and perhaps his tenure at the FCC) ending early next year, there is uncertainty as to whether a final rule will ever be released. While the possibility exists that a final rule might appear on the FCC’s January meeting agenda, it appears highly unlikely at this point. Even if a final rule is released in January, it would be subject to review before a newly constituted FCC (which may have two or more new Commissioners in 2009). The NPRM is by no means dead, but it does appear to have lost steam for now.

NARUC Takes Interest in Pole Attachments

At its Winter Meetings in February 2008, the National Association of Regulatory Utility Commissioners (“NARUC”) Committee on Telecommunications hosted a panel discussion on pole attachments: *“Pole Attachments: Who Pays What And Who Has Access?”* The panel, which featured spirited debate among the major stakeholders, was moderated by the Honorable Maureen Harris of the New York Public Service Commission. The panelists were Jonathan Banks of US Telecom representing the ILEC point-of-view, Paul Glist of Davis Wright Tremaine LLP representing the cable television point-of-view, Wayne Leuck of T-Mobile and Jacqueline McCarthy of CTIA representing the wireless point-of-view, and Eric Langley of Balch & Bingham LLP representing the electric utility point-of-view.

At its Summer Meetings in July 2008, NARUC adopted a resolution strongly supporting implementation of state and federal telecom policies which facilitate deployment of advanced communications products while protecting the safety and reliability of the nation’s electric infrastructure. [\[LINK TO RESOLUTION\]](#) The resolution directed NARUC’s General Counsel to complete a “report on the status of pole attachment regulation across the United States including a comprehensive list of appropriate best practices, which could be employed by other states in an effort to advance policies which would further facilitate the deployment of advanced services.” It is expected that this report will be completed in early 2009, and perhaps presented at the NARUC Winter Meetings in February 2009.

New Hampshire Certifies Regulation of Pole Attachments

On January 23, 2008, New Hampshire became the 19th state (plus the District of Columbia) to “certify” that it regulates the rates, terms and conditions for pole attachments. [\[LINK TO LETTER & INTERIM RULES\]](#) State “certification” (a process explicitly set forth in the federal Pole Attachments Act) divests the FCC of jurisdiction over pole attachments. The New Hampshire Public Utilities Commission adopted “interim” rules and regulations effective for up to a two-year period while it promulgates “regular” rules.

After an initial comment period on the “interim” rules, the New Hampshire PUC issued proposed final rules on June 16, 2008.

[\[LINK TO PROPOSED FINAL RULES\]](#) The proposed final rules would apply to electric cooperatives (FCC regulation does not); extend access rights to virtually *any* entity which seeks to attach *anything* to a pole (though the enabling act appears to limit the PUC’s regulatory authority to the “types of attachments” regulated under the federal Act); require installation and maintenance of attachments in accordance with the NESC; require pole owners to install and maintain flower pots on every fifth pole located in the public right-of-way (this is not a joke); and borrow the FCC’s rate formulas as the maximum just and reasonable rates through July 15, 2009 (after which the PUC shall “consider” these formulas in determining just and reasonable rates). The New Hampshire PUC rulemaking is ongoing.

Arkansas Certifies Regulation of Pole Attachments

On October 20, 2008, Arkansas became the 20th state (plus the District of Columbia) to certify regulation of pole attachments. [\[LINK TO LETTER & RULES\]](#) The certification followed a rulemaking proceeding at the Arkansas Public Service Commission, which culminated with a contested hearing in June 2008. Arkansas PSC Staff had proposed comprehensive rules, addressing permit requests, make-ready estimates, safety responsibilities, audit procedures, and rate formulas. The rate formulas proposed by PSC Staff would have yielded cable television and telecom rates equal to 18.9% and 21.5% of annual pole cost, respectively. The pole audit rules proposed by PSC Staff would have required participation by attaching entities, and allocated the cost of the audit pro rata to the attaching entities (defined in the proposed rules to exclude the pole owner).

But on July 30, 2008, an Administrative Law Judge (“ALJ”) of the Arkansas PSC entered an order adopting a much leaner version of the rules than proposed by PSC Staff. [\[LINK TO ORDER\]](#) The order accepted the uncontested rules, but largely deferred on the more controversial issues, leaving them for case-by-case resolution under the complaint procedures. Specifically, the ALJ declined to adopt Staff’s proposed rate formula, saying: “Given the significant differences in the positions of the parties and the very hypothetical and speculative nature of the testimony and evidence, the Presiding Officer finds that the public interest suggests erring on the side of caution by allowing the Commission as much flexibility in determining pole attachment rates as is permitted by the statute.” (Order, p. 10) The only contested issue resolved by the ALJ was whether negotiated agreements could be



challenged in a complaint proceeding. The ALJ rejected the “sign and sue” rule urged by the cable television companies, finding that the enabling statute did not grant the PSC “authority to abrogate either currently existing contracts or those which will be executed once the [pole attachment rules] are in place.” (Order, p. 16). The rejection of “sign and sue” (a practice currently allowed by the FCC) is a significant win for electric utilities.

CenturyTel and Embarq to Merge

CenturyTel and Embarq – two of the nation’s largest telephone companies – entered into a merger agreement in late October 2008. Under the agreement, Embarq Corp. (the holding company which owns the Embarq operating company subsidiaries) will become a wholly-owned subsidiary of CenturyTel, Inc. through a stock-for-stock transaction. CenturyTel operates in 25 states; Embarq currently operates in 18 states. Even though Embarq does business in fewer states, it has significantly more telephone and broadband customers than CenturyTel. The combined company would provide local exchange services to nearly 8 million telephone lines and broadband service to more than 2 million subscribers.

CenturyTel and Embarq filed their Application For Consent To Transfer Control of Embarq’s domestic Section 214 authorizations (the certificates from the FCC allowing construction and operation of telephone lines) on November 26, 2008. [LINK TO APPLICATION & EXHIBITS](#) According to the application, CenturyTel operates CLEC subsidiaries in three Embarq ILEC markets: Chaska, Minnesota; Fayetteville, North Carolina; and Rocky Mount, North Carolina. The extent to which the merger will impact pole attachment and joint use adjustment rates in those markets is unclear. All electric utilities which have joint use agreements with Embarq should review those agreements to consider the impact of the merger (notice provisions, assignment clauses, etc.). The CenturyTel/Embarq merger, which follows the AT&T/Bellsouth merger by less than two years, may signal a trend of re-consolidation in the telephone industry. The CenturyTel/Embarq merger is still subject to approval by various state and federal regulators.

What to Watch in 2009

Will the FCC act on the pending NPRM? Will one or more of the impacted industries take their issues to Congress?

Will the FCC resolve the Voice Over Internet Protocol (“VOIP”) classification debate? How will it impact pole attachment rates?

Are the two new state certifications in 2008 (New Hampshire and Arkansas) the start of a new trend? Are other states soon to follow?

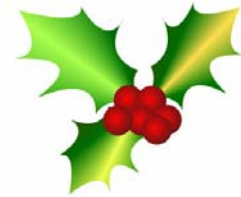
With the economy tightening, will there be further consolidation within the communications industry? What impact will it have on pole attachment and joint use agreements?

Will wireless carriers and Distributed Antenna Systems (“DAS”) continue their build-out? If so, what access, safety/reliability, and rate issues will it raise?

Practice Pointer

Insurance and bonds (or letters of credit) are two of the most important protections in your pole attachment agreement. Make sure your attachers are providing current (and compliant) certificates of insurance and bonds. In the event a pole attachment agreement is assigned to another entity, you should review your insurance and bond to ensure the protections remain intact.

Happy Holidays!



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