

JOINT USE NEWSLETTER

Northeast Cable and CLEC Associations Push for Favorable Treatment from State Commissions

In May, CTIA – The Wireless Association filed a petition with the New York Public Service Commission seeking to “clarify” that the PSC’s protections for wired communications by attaching entities apply equally and consistently to the attachment of wireless communications facilities to utility poles. Among the requested protections are (1) non-discriminatory access; (2) permit and make-ready timelines; (3) expedited resolution of disputes over rates, terms and conditions; and (4) rate principles consistent with the formulas promulgated by the FCC and other state commissions. At the end of June, the New York PSC issued a notice seeking comment on the petition. Initial Comments were due August 1, with Reply Comments due August 15.

In July, the Vermont Public Service Board opened a rulemaking proceeding to consider revising space presumptions in its pole attachment rate formula. The Competitive Local Exchange Carriers Association of Northern New England filed the petition requesting the proceeding but was joined and supported by a host of other entities including Comcast, Level 3 Communications and Charter. The proposal would amend the existing rule and adopt a single, rebuttable presumption that the 1-foot rate applies to all attaching entities. A workshop on the proceeding was held on August 9.

Ohio PUC Rules in Favor of Pole Owners

In a May 18, 2016 decision, the Public Utilities Commission of Ohio considered various provisions of CenturyLink’s pole attachment tariff and entered a favorable order for pole owners on a number of issues including bonds, timelines and audit costs, among other things. Most notably, the Commission went against FCC precedent and held that overloading rules were subject to private negotiation and that overloading was not permitted without approval from the pole owner unless so stipulated in a negotiated agreement. The Commission also upheld provisions in the tariff that allow the pole-owner to demand that an attachers perform necessary modifications within sixty days. The Commission approved this language after recognizing that the pole-owner must have some control over the work on its poles and noting that nothing in the tariff prevented attaching entities from disputing the need for the work.

Google Advocates for One-Touch-Make-Ready Mandates

With plans to expand to more than a dozen new cities (Chicago, Jacksonville, Tampa, Dallas, San Antonio, Oklahoma City, Phoenix, San Diego, Los Angeles, Irvine, Raleigh-Durham, San Francisco, San Jose, and Portland), Google continues its focused effort to obtain quick and easy access to utility poles. Last month Google representatives met with various administrators at the

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FCC to discuss “one-touch make ready” policies that would allow any communications provider to perform all make-ready work, without pole owner knowledge or pre-approval; if the attacher uses engineering designs and contractors approved by the pole owner and the work does not require service interruption. Google claimed growing support from a handful of various associations and entities in its *ex parte* meeting. Google’s *ex parte* meeting is just the latest in a number of efforts to push the “one-touch make-ready” agenda. The City of Louisville already enacted an ordinance permitting one-touch make-ready and AT&T and Frontier are in the midst of challenging it due to the competition Google poses to their existing customer bases. (This dispute is likely the first of many, the City of Nashville recently began considering a similar “one-touch make ready” ordinances and AT&T and others have already voiced opposition.) We can expect continued push from Google and perhaps new developments at the FCC or in Congress in response.

Major Decisions from the FCC and D.C. and Sixth Circuits

The FCC’s continued effort to lower pole attachment rates in general and to harmonize the rates charged to all attaching entities was supported by (1) the FCC’s 2016 Order addressing cost allocators in the pole attachment rate formula and (2) the D.C. Circuit’s decision affirming the FCC’s 2015 Open Internet Order reclassifying broadband services. In February, the FCC formally entered the Order that was forecast at the end of 2015. Per the FCC’s February Order, there are new cost allocators in the pole attachment rate formula depending on the average number of attaching entities: for 5 attachers: 66.1%; for 4 attachers: 55.6%; for 3

attachers: 43.9%; and for 2 attachers: 30.9%. The deadline to appeal the order passed earlier this spring and pole owners did not file an appeal. In June, the D.C. Circuit affirmed the so-called *Open Internet Order*. The Court upheld the FCC’s reclassification of broadband internet service as a telecommunications service subject to heightened regulation. Previous challengers to the *Open Internet Order* have indicated they will appeal to the United States Supreme Court.

More recently, last week the Sixth Circuit rebuffed the FCC’s effort to preempt state laws limiting municipal broadband expansion. Tennessee and North Carolina both enacted state laws limiting municipal broadband providers’ ability to expand their service beyond municipal borders. Two providers from municipalities in Tennessee and North Carolina petitioned the FCC for an Order preempting the state laws and thereby allowing them to expand their services to unserved or underserved areas outside city limits. The FCC granted the request but Tennessee and North Carolina challenged the Order at the Sixth Circuit. The Court reversed the FCC’s Order, upheld the validity of the state laws and held that the FCC did not have authority under the Telecommunications Act to “essentially re-allocate decision-making power between the states and their municipalities.” We expect the FCC to challenge the ruling.

Recent Action in the U.S. Congress

There is continued push for further federal legislative and regulatory action governing pole attachments. Back in March of this year, FCC Commissioner Pai spoke to the House of Representatives Energy and Commerce Committee about broadband deployment and supporting FCC efforts. Commissioner Pai focused on concerns

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about make-ready and a push for an incremental cost option. He further suggested that the FCC can and should do more to foster further broadband deployment by “finding ways to streamline the process of deploying wireline infrastructure.” Commissioner Pai also urged the FCC to hasten resolution of pole attachment complaints “to send a message to pole owners that the FCC is serious about facilitating deployment.” Commissioner Pai is not an outlier. It believed that, if elected, Hillary Clinton will push for faster broadband deployment. She has repeatedly advocated “wi-fi for everyone” and her published platform seeks to connect every household in America to high-speed internet by 2020 and contemplates free public wi-fi. (Donald Trump has not yet staked out a broadband deployment position.) Given the current political agenda on broadband, we continue to keep an eye on these and other developments in the U.S. Congress.

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