DETERMINING JOINT USE UTILITY POLE RATES: WHAT’S FAIR?

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The joint use of utility poles has created partnerships between electric utilities and telecommunication providers for almost a century. But in 2011, new Federal Communications Commission (FCC) regulations redefined important aspects of these long-standing relationships and spurred the need for these providers to further cooperate — or in other cases to stand their ground — in order to successfully and efficiently serve their customers.

“Joint use” means that utilities must manage more than just issues surrounding pole ownership, maintenance and attachment. They also must also consider factors such as risk management, regulatory, safety, environmental compliance, public right of way and emergency response.

In the following discussion over pole attachment rates, Christopher S. Huther, partner at Wiley Rein LLP, and Thomas B. Magee, partner at Keller and Heckman LLP weigh in on recent joint use utility pole court rulings, regulations and rate negotiations, and common areas of disagreement between the different stakeholders.

REGULATION OF ILEC ATTACHMENTS

Over the strong objections of the electric utility industry, the FCC in 2011 asserted jurisdiction over joint use attachments by incumbent local exchange carrier (ILEC) pole owners to electric utility poles. Earlier this year, that controversial decision was upheld by the U.S. Court of Appeals for the District of Columbia Circuit, and the Supreme Court just denied certiorari, which means it will not review the case any further. Are you seeing any increase in activity by attaching ILECs for adjustments in pole attachment rates?

Magee: The FCC’s Order was a head scratcher. The legal appeals have been exhausted for now, but that does not mean we all stopped wondering what the FCC Order really says.
However, only one major ILEC in the country seems to have taken the offensive. Just a few months after the Order became effective in 2011, the ILEC sent dozens of letters to its electric utility joint use partners in its service territories demanding lower attachment rates — immediately. Never mind that the FCC believes longstanding joint use agreements between pole owners should be respected, or that the ILEC made no showing that it may be entitled to a lower rate. There was no evidence the ILEC is “comparably situated” to a third-party cable company or a competitive local exchange carrier (CLEC), and that the ILEC is receiving considerable advantages over cable company and CLEC attachers. And it ignores the fact that the joint use relationship between pole owners is completely different from the licensee arrangement that pole owners have with cable companies and CLECs.

To date, electric utilities have interpreted the FCC Order one way, and the ILECs seem to have interpreted it another: No matter how it’s interpreted, however, you have to admit that there are just too many variables to know how the FCC might rule in any particular complaint proceeding. One thing we know for certain is that the FCC does not want to provide ILECs with an unfair competitive advantage over their cable and CLEC competitors.

The FCC has never analyzed this joint use relationship between pole owners (as it has until recently disclaimed any statutory authority to do so), and it needs more experience to understand the relationship before it can do what’s fair in any particular FCC complaint proceeding for either party.

At this point, most of the parties seem to be assessing the situation. There has been no FCC ruling in any complaint case, and none is pending.

However, we have seen litigation in the courts. One ILEC has been aggressively seeking lower rates and took it upon itself to “short-pay” joint use rental invoices sent by a large number of its electric utility joint use partners, based upon what it believes the FCC might decide if a complaint case were filed. Not surprisingly, the utility industry has been duly concerned with this sharp practice, which seems to invite breach of contract actions in state or federal court to recover unpaid amounts, due under existing joint use agreements.

One other major ILEC now appears interested in selling poles in some instances in an effort to make itself “comparable” to cable and CLEC attachers. But most have sought to find a constructive way to partner with others, and have hesitated disrupting their relationship pending an uncertain outcome in the courts or at the FCC.

**Huther:** The FCC’s decision to recognize the federal rights of ILECs to just and reasonable rates was not a bolt from the blue. The statute affords rights to “providers of telecommunication services” and ILECs fall within that definition. The FCC’s decision to recognize the statute’s plain meaning was entirely reasonable, as the U.S. Court of Appeals for the D.C. Circuit has since recognized in a decision that the U.S. Supreme Court declined to review.

For good reason then, ILECs have sought the just and reasonable rates to which they are entitled under the law since the effective date of the Pole Attachment Order. In many cases, the power companies have dragged their feet and have refused to provide the rate relief required by the Pole Attachment Order, insisting that the Order would be overturned on appeal. The appeals have now been exhausted, and ILECs are beginning to see, in some cases, a greater willingness by power companies to reduce rental rates in conformance with federal law and the Order. It is not unreasonable to think that additional complaints will be brought against power companies that continue to deny the Order’s applicability or that otherwise stall negotiations.

**Magee:** Of course there are. In fact, there are a lot of reasons to treat ILECs differently. Consider make-ready expenses: Our coalition of utilities filed evidence at the FCC showing that CLECs pay more than 100 times the make-ready expense per existing pole than do ILECs, primarily because ILECs have the advantage of being there when the pole is installed and are essentially guaranteed space on the poles.

Consider how easy it is for ILECs to install their attachments. Unlike cable companies and CLECs, ILECs do not need to seek approval from utility pole owners before attaching new facilities, and they do not incur post-attachment inspection costs like cable companies and CLECs.

Because ILECs are pole owners and are expected to act responsibly and have virtually no oversight, Verizon’s FiOS and AT&T’s U-Verse rollouts have been pretty easy, relative to rollouts of upgraded facilities by cable companies and CLECs.

Next, there’s the issue of pole location and the amount of space allocated to ILECs. Unlike their competitors, ILECs often are guaranteed space on the poles and they attach almost always at the lowest (and best) location in the communications space.

ILECs also often avoid other charges that cable companies and CLEC’s pay, such as relocation and rearrangement costs. They also can obtain easements and rights-of-way and can “super depreciate” pole plant in order to obtain income tax advantages. None of these advantages are available to CLECs or cable companies.

ILECs are different. They own poles just like electric utilities, and they entered into unregulated “joint use” relationships with electric utilities many decades ago. These joint use relationships contain rights and responsibilities that are completely different from the rights and responsibilities of third-party licensee attachment agreements.

**With cable and telephone companies all offering basically the same types of services, are there still justifications for treating ILECs and other pole attachers differently from a regulatory standpoint?**
**Huther:** The purported advantages that ILECs enjoy relative to other attachers are based on the flawed assumption that ILECs are currently engaged in large-scale build-outs. In many cases, they are not and haven’t been for many years. ILECs that built out their networks decades ago have been paying an extraordinary premium for so-called advantages that they haven’t needed or enjoyed. As a result, many ILECs have sought to attach, under the terms of a standard license agreement, at a rate charged a comparable CLEC attacher. Almost universally, power companies have refused these ILEC requests, seeking instead to perpetuate pre-existing, joint use agreements and unreasonably high rental rates that they have extracted over the years.

Even where ILECs seek to retain the terms and conditions in pre-existing, joint use agreements, any net advantages do not justly pay a rate that is three, four or five times the rate charged CATVs and CLECs. Moreover, ILECs have numerous obligations (such a carrier-of-last-resort) that their CATV and CLEC competitors do not, which must also be factored into the equation. Accordingly, the FCC benchmarked the just and reasonable rate for ILECs as one that is no higher than the pre-existing telecom rate.

**RATE NEGOTIATIONS IN FCC JURISDICTIONS**

When negotiating just and reasonable pole attachment rates for ILECs pursuant to the FCC’s Pole Attachment Order, which traditional sticking points do you think the electric utility industry should move beyond, and why?

**Huther:** First, the electric industry has to get past the notion that it is entitled to the annual revenue stream that it extracted from ILECs before the FCC’s Pole Attachment Order. Federal law mandates that ILECs be afforded a just and reasonable pole rental rate — which means that utilities are no longer going to collect all of the pole rental revenue that they enjoyed in the past. Electric utilities should accept the new federal legal landscape and stop looking backwards in all their rate negotiations.

Second, the industry needs to accept the fact that a just and reasonable rate is a rate that is charged comparable cable and CLEC attachers. The Pole Attachment Order finally put the lie to rate negotiations that seek significantly more from ILECs than could be charged to other comparable attachers. Competitive neutrality now must be the hallmark of all rate negotiations, with ILECs treated fairly and equally with cable and CLEC attachers.

Third, the electric industry needs to accept the reality that ILECs do not require, and should not pay for, three or four feet of useable space on a utility pole. This space allocation is an antiquated remnant of joint use history, back when there were only two pole occupants and 60 percent of the annual pole costs were typically allocated to the electric company, and 40 percent to the telephone company. Since then, the marketplace has fundamentally changed. The number of attachers has significantly increased and the amount of space occupied by ILEC attachment has significantly decreased. It’s time for electric utilities to recognize the unfairness of these obsolete space allocations that result in ILECs paying for space they don’t need or use, which is often occupied by third party attachers who also pay rent to the electric company.
**Magee:** Federal law says ILECs should be charged a just and reasonable rate, but the FCC indicated the rate in many, if not most, cases will be the rate from the existing joint use agreement, which the FCC does not want to change. ILECs and electric utilities are two large utilities that negotiated an agreement at arm’s length to share each other’s poles. It reached not only mutually beneficial rates, but also other mutually beneficial terms and conditions of joint use. The rate in existing agreements is already fair. In any event, the rates cannot be analyzed in isolation without considering all the related rights and responsibilities of both parties.

Electric utilities are all for competitive neutrality, but what the ILECs appear to want is a competitive advantage over their cable and CLEC competitors. ILECs pretend that the advantages they have in joint use contracts (and the significant head start the joint use contracts provided) do not count for anything. But they count for a lot.

As for pole space, ILECs still occupy significantly more space than cable companies and CLECs. If they occupy two or three times the space, the starting point for any analysis of a fair rate should be two to three times what cable companies and CLECs pay.

**What guidance has the FCC provided with respect to establishing just and reasonable pole attachment rates for ILECs?**

**Huther:** A central theme throughout the Pole Attachment Order is that ILECs must be given the same rate as other comparable attachers.

The FCC did not adopt one uniform and comprehensive rate methodology to govern the calculation of the appropriate rate for ILEC, as it did for cable and CLEC attachers. Instead, it urged the industry to adhere to the principle of competitive neutrality in their rate negotiations to level the playing field between ILECs and their cable and CLEC competitors.

The need to add balance to the marketplace became evident after the FCC investigated the effect of pole attachment rates on the deployment of broadband and other advanced services. The FCC learned that, although ILECs compete for customers with cable companies and CLECs, the rates that they have typically been charged have far exceeded the rates charged to cable companies and CLECs. This disparity, if left unaddressed, could undermine the public’s access to advanced services and broadband by distorting infrastructure investment decisions.

**Magee:** With the advantages of a joint use relationship, ILECs are nowhere near comparable to third-party licensee attachers, such as cable companies or CLECs, so granting them the same annual attachment rate as these entities makes no sense. The joint use relationship contains a completely different set of terms and conditions than exist in a third party attachment agreement, so ILECs are no more comparable to cable companies and CLECs than apples to oranges.

As for the deployment of broadband, pole attachment rental rates have little if anything to do with deployment decisions. Instead, the cost to ILECs of upgrading equipment and the likelihood of providing service to enough high-paying customers to recover that investment have a lot more influence. That’s why affluent urban and suburban areas will continue to receive better broadband services than rural American and low-income communities.

**IN CONCLUSION**

Regulatory changes and technology developments have significantly affected the legal and business relationships between electric utilities and communications companies. As the number of attaching parties continues to increase and technologies continue to evolve, utilities can expect to see increased requests for rate adjustments and contract revisions, as well as legal challenges.

Mr. Huther and Mr. Magee participate in the legal panel at WEI’s annual Joint Use conference each September.

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