Access to Utility Poles For FTTH Providers

To encourage the buildout of fiber to the home by nontraditional, innovative providers, legal changes are needed.

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One avoidable barrier to the rapid deployment of fiber optic networks in the United States is the cost associated with the lack of reliable, efficient and affordable access to physical infrastructure, particularly utility poles.

There are several reasons for access-related barriers to deployment: First, the processes and time schedules for negotiating access to utility poles vary depending on the type of utility company that owns the poles. The lack of a fixed, uniform protocol creates uncertainty, which in turn deters investment.

Second, although the FCC has promulgated rules governing the rates that may be charged for attachment rights, enforcing the rules is costly and time-consuming and risks undermining providers' long-term business relationships with owners of essential infrastructure. As a result, these rules are often ignored in practice.

Third, disparities in pole attachment rates may distort a service provider's decisions about which advanced services to provide. For example, uncertainty surrounding attachment rights and costs may deter a provider of cable television service from offering other, noncable services over the same wire.

GOOGLE IN KANSAS CITY

The effects of regulatory uncertainty on fiber deployment are illustrated by the bureaucratic flak Google Fiber encountered early last year. Google first announced the project to deliver symmetrical 1 Gbps Internet connections to residential homes in February 2010. In March 2011, Google announced it had selected Kansas City, Kan., as the first buildout site for the new network. A few months later, it expanded the project to Kansas City, Mo., and several other neighboring towns.

The new fiber network promises to bring huge benefits to these communities, including a boost in property values and new jobs, as businesses find ways to take advantage of increased connectivity. Compared with costs in other areas of the country, the cost of a Google connection is a bargain – $70 a month for Internet service or $120 a month for Internet and television service. If deployed nationally, Google Fiber's all-IP fiber network has the potential to revolutionize ISP and cable television business models.

The key factor in Google's selection of Kansas City for initial deployment was the city's promise to minimize bureaucratic red tape by providing ready access to rights-of-way, expedited permitting and free space in city facilities, as well as assistance with public relations and marketing. Despite this promise of cooperation, Google's deployment efforts were hampered by controversy over fiber pole attachment rates and the physical placement of lines, causing the company to delay its much-anticipated service activation for several months.

Google's disputes over access to utility poles, though eventually resolved, illustrate why smaller-scale fiber-to-the-home projects have been so difficult to realize.

OLD CATEGORIES, NEW TECHNOLOGY

The FCC is cognizant of the deployment obstacles created by cumbersome pole attachment processes and has moved to streamline the process. In its 2010 National Broadband Plan, the commission wrote that "the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20 percent of the cost of fiber deployment. These costs can be reduced directly by cutting fees. The costs can also be lowered indirectly by expediting processes." Regarding processes, the plan noted that make-ready work "can be a significant

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source of cost and delay in building broadband networks."

However, the FCC must work within the constraints set by multiple laws and court decisions. In 1978, Congress passed the Federal Pole Attachments Act, giving the FCC authority to regulate the rates that utilities could charge for access to utility poles "by a cable television system."[1] In particular, the rates, terms and conditions of attachment must be "just and reasonable," ensuring the utility the recovery of "not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of usable space, or a percentage of total duct or conduit capacity, which is occupied by the pole attachment, by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit or right-of-way."

The Telecommunications Act of 1996 broadened the scope of the pole attachment requirement to include "any attachment by a … provider [other than an ILEC] of telecommunications service" and required that those with attachment rights be given "nondiscriminatory access" to poles, ducts, conduits or rights-of-way controlled by the utility.[2] Congress also directed the FCC to establish a rate cap applicable to attachments for the provision of telecommunications services (the "telecommunications rate"). The telecommunications rate initially established by the FCC was significantly higher than the cable rate.[3]

Because federal law limits pole attachment rights to two kinds of entities – "cable systems" and providers of "telecommunications service" – the law as written is vague concerning pole attachments by providers of high-speed Internet access service, which, for regulatory purposes, is neither a cable service nor a telecommunications service but rather an unregulated information service. Does a pure Internet service provider (ISP) have a federal statutory right to attach data transmission lines to utility poles, and if so, which rate cap (the cable rate or the higher telecommunications rate) applies to such attachments? Or, in order to qualify for pole attachment rights, must the ISP first offer traditional cable or telecommunications service and sell Internet connectivity as a secondary offering?

Increasingly in the 21st century, voice and multichannel video services are moving toward Internet-based delivery platforms, undermining the pertinence of traditional cable and telecommunications regulatory silos to emerging technologies. Google Fiber – which uses an innovative data-centric business model under which multiple broadband services are delivered to customers over a single wire by means of a super-fast Internet connection – illustrates the difficulty of applying yesterday's regulatory classifications to tomorrow's technology.

When it initially announced the fiber project, Google focused only on Internet connectivity and had no public plans to provide video services at all. Although Google later applied for and was awarded statewide video franchises for Kansas and Missouri, its fiber networks in those states do not clearly satisfy the federal definition of a cable system, and it's safe to say that Google does not think of itself as a cable operator.[4]

COURT CASES AND RULE CHANGES

In 2000, the Court of Appeals for the 11th Circuit ruled that the Federal Pole Attachment Act as amended by the Telecommunications Act of 1996 did not authorize the FCC to regulate pole attachments by providers of Internet access services (including cable operators).[5] Two years later, the Supreme Court overruled the 11th Circuit, ruling that the 1996 Act gives the commission jurisdiction over pole attachments used for commingled cable and Internet services.[6]

The court noted that the act governs attachments "*by* cable systems" and "*by* a provider of telecommunications service" even if the attached wire is used to provide a service that is neither cable nor telecommunications.[7] The court also affirmed the FCC's application of the cable rate to broadband attachments instead of the higher telecommunications rate.

In 2007, the FCC issued a Notice of Proposed Rulemaking[8] to reform its pole attachment rules. To encourage broadband deployment, the commission tentatively proposed a uniform attachment rate for all categories of broadband Internet access services, higher than the standard cable television rate but lower than the telecommunications rate. However, the commission abandoned that approach in the 2010 National Broadband Plan, which recommended broadband rates "as low and close to uniform as possible."

In April 2011, the FCC adopted a Report and Order in the rule-making proceeding.[9] The 2011 order announces a sweeping overhaul of the pole attachment rules, all intended to streamline the process and reduce uncertainty. Highlights of the 2011 order:

Improving attachers' access to poles. Adoption of a make-ready time frame for utilities to allow pole attachments, with a maximum of 148 days for attachments in the communications space, 178 days for wireless attachments on pole tops and an extra 60 days for large requests.

Use of utility-approved contractors. Authorization for attachers to use contractors approved by the utility to perform surveys and make-ready work in the communications space if the utility fails to perform its obligations within the applicable time frames. For wireless attachments on pole tops, an attacher may file a complaint with the FCC if the deadlines are not met.

Enforcement. Clarification that if a utility denies access, it must explain the specific capacity, safety, reliability or engineering objection to the proposed attachment. The order also adopts a good-faith "executive level negotiation" requirement as a prerequisite for filing a pole attachment complaint with the commission, eliminates the current rule that requires an attacher to file a complaint within 30 days after a utility's denial of access and removes the cap on penalties for unauthorized attachments.

ILEC attachment rights. Previously, incumbent local exchange carriers (ILECs) were excluded from the class of telecommunications carriers entitled to pole attachment rights on the grounds that their ownership of poles protected ILECs from electric utility abuses. The 2011 order extends certain pole attachment rights to

Providers that offer only broadband service may not have any federal right to pole attachment.

ILECs (excluding the right of access to poles) and allows ILECs to petition the FCC to obtain "just and reasonable" rates, terms and conditions.

Uniform rates. The commission found that charging different rates to different attachers based on legacy regulatory classifications removes incentives to provide converged video, data and telephone services over shared networks. Accordingly, the 2011 order lowers the telecommunications rate approximately to the cable rate in most cases.[10]

In addition, the 2011 order provides that the rate charged for commingled services provided by a cable or telecom attacher cannot exceed the new telecommunications rate. Cable operators that offer a triple play of cable, telecommunications and Internet access will pay the new telecom rate. Cable operators that offer broadband but not telecommunications will continue to pay the cable rate.

GAPS IN THE NEW RULE

However, the FCC has yet to declare that service providers that offer *only* broadband connectivity are entitled to the new telecommunications rate or, for that matter, whether such providers have any pole attachment rights at all under federal law. This question is likely to come to the forefront as communications services converge on the broadband platform.

On the one hand, the commission's refusal to clarify this area of residual vagueness is understandable because the federal statute as written extends pole attachment rights only to "cable systems" and "telecommunications providers." If the FCC were to interpret the statute to vest pole attachment rights to pure ISPs, that interpretation would by implication classify Internet access service as either telecommunications or cable service, a classification that the commission has studiously and prudently avoided.

On the other hand, lack of clarity surrounding the pole attachment rights of data providers burdens innovative companies such as Google vis-à-vis their traditional cable and telco competitors. Milo Medin, Google vice president, addressed this burden in his testimony before a congressional committee shortly after the FCC's 2011 order was released. According to Medin, the 2011 order "doesn't appear to help those of us who want to offer pure broadband Internet access service. Because broadband Internet access services don't fit into the right regulatory box in the Communications Act, we do not have automatic attachment rights. Pure broadband providers are exactly the group you wouldn't want to leave out, so the existing requirements need to be clarified or changed if we want to get more dollars, jobs and broadband into our communities and enable competition from nontraditional operators."[11]

Regulators, as well as the general public, must pay attention to ensure that infrastructure access issues, including utility pole attachments and access to right-of-of-way generally, do not undermine innovation, investment and initiative in broadband deployment. ❖

ENDNOTES

1 47 U.S.C. § 224(d)(3). The Pole Attachment Act authorizes states to preempt federal regulation by electing to regulate pole attachments themselves, and 19 states have chosen this option. As of this writing, the following states have elected to regulate pole attachments: Alaska, Arkansas, California, Connecticut, Delaware, the District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Utah, Vermont and Washington.

2 47 U.S.C. § 224(f)(1).

3 The cable and telecommunications rates differ in their respective methodologies for determining the proportion of unusable space on a pole that is attributable to the attachment. The cable formula attributes the unusable space to an attachment based on the portion of usable space occupied by the attachment, and the telecom formula attributes the unusable space to a telecommunications attachment based on the total number of attaching entities.

4 The Communications Act defines the term "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include: (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility system." 47 U.S.C. § 522(7).

5 Gulf Power Co. v. FCC, 208 F.3d 1263, 1276 (11th Cir. 2000), *rev'd* 534 U.S. 327, 122 S.Ct. 782, 151 L.Ed.2d 794 (2002) ("The 1996 Act allows the Commission to regulate the rates for cable service and telecommunications service; Internet service is neither").

6 National Cable and Telecommunications Ass'n v. Gulf Power Co., 534 U.S. 327, 332, 122 S.Ct. 782, 151 L.Ed.2d 794 (2002) (the Act covers "any attachment by a cable television system or provider of telecommunications services to a [utility's] pole, conduit or right-of-way").

7 Cable television and telecommunications services are "simply subsets of – but not limitations upon" the Act's broader coverage. 534 U.S. at 336.

8 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, *Notice of Proposed Rulemaking*, 22 F.C.C. 21095 (2007).

9 In the Matter of Implementation of Section 224 of the Act, WC Docket No. 07-245, *Report and Order and Order on Reconsideration*, 26 F.C.C. 5240 (2011) (the "2011 Order").

10 Specifically, different interpretations of the term "cost" in the Pole Attachment Act yield a range of rates, from the existing fully allocated cost approach at the high end to a rate closer to the incremental cost of attachment at the low end. Balancing its broadband deployment goals against the interest in continued utility pole investment, the FCC adopted a definition of "cost" that produces a new "just and reasonable" telecommunications rate that allows the utility to recover the same portion of pole costs as the cable rate. The specific formula is provided in Appendix A of the 2011 Order, rule section 1.1409(e)(i).

11 http://oversight.house.gov/wp-content/uploads/2012/01/TestimonyofMiloMedin_1.pdf.