

New Broadband-Friendly Laws In Ohio, Louisiana

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In recent separate actions, the Public Utility Commission of Ohio (PUCO) and the Louisiana Public Service Commission (LPSC) adopted comprehensive pole attachment regulatory regimes intended to facilitate the deployment of broadband communications infrastructure and level the competitive playing field for broadband providers. Each stressed the need for reasonable and nondiscriminatory access, clear access processes and timelines, a single unified pole attachment rate, and efficient dispute resolution procedures. And each made clear that its rules apply to “wireless” attachments as well as traditional wire-based attachments.

Ohio

On July 30, 2014, PUCO adopted a finding and order (F&O) substantially revising the regulations applicable to the rates, terms and conditions of pole attachments made by communications companies to utility poles. The revised rules go a long way toward achieving a fundamental PUCO objective “to make explicit ... that the nondiscriminatory access required under the proposed rule be made pursuant to rates, terms and conditions that are just and reasonable.” The F&O follows similar revisions made by the FCC in 2011, affecting pole rates, access timelines and use of third-party contractors and wireless attachments.

The Ohio Commission also clarified that all attachments by cable operators and CLECs would be governed by the FCC’s “cable” rate formula, rejecting arguments made by some pole owners that there should be a two-rate structure in Ohio. PUCO found that “a single-rate formula for all pole attachments is appropriate and should be adopted. In coming to this conclusion, the Commission agrees that the costs incurred by the pole owner to provide attachment space is not affected by the servicing being provided by the attaching entity.” PUCO also confirmed that it would continue to follow, and now codify, its long-standing practice of using presumptions for various elements and factors in the pole-rate formula.

With respect to nonrate issues, the Ohio Commission adopted structure-access timelines that closely track those adopted by the FCC in 2011. The F&O also contains significant provisions for the attachment of wireless facilities to utility poles, both in the traditional communications space — as the FCC likewise mandated in 2011 — and at the top of the pole.



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PUCO also specified that pole attachment rates, terms and conditions are to be implemented through tariffs, although parties are also permitted to enter into “voluntarily negotiated agreements.” PUCO will determine whether rates, terms and conditions of attachment are reasonable in either tariff or complaint proceedings. PUCO also expressed a preference for access-facilitating measures, such as the adoption of electronic workflow tracking, permitting and make-ready coordination, and assignment of remediation of safety violation costs to the party responsible for the violation.

PUCO explicitly rejected an electric utility proposal to toll the access periods upon the discovery of a safety violation on a pole that is part of an attachment application. It also rejected a utility-sponsored rule that would have automatically required the owner of an unpermitted (unauthorized) attachment to pay for a pole replacement if a safety violation was detected on that pole.

Louisiana

The LPSC’s rulemaking yielded a similarly favorable result for broadband and broadband providers in Louisiana.

After a 15-year freeze on rates, and a multiyear rulemaking proceeding, the LPSC on Aug. 6, 2014, adopted comprehensive pole attachment rules lifting the 1999 rate freeze and implementing certain measures intended to check dramatic rate increases, and clarifying the inputs to and application of the existing rental-rate formula (which is identical to the Federal Communications Commission’s cable formula but allocates 2 feet instead of 1 foot of usable space to the communications attacher).

The Louisiana rules also contain a number of measures intended to expedite pole access (including timelines) and to address controversial, and in some cases divisive, practices advanced by electric cooperatives with respect to rental rates, penalties, inventories and safety audits. Like Ohio (and the FCC before that), the Louisiana rules recognize that “wireless” attachments to utility poles are subject to regulatory protection.

In addition to ending the 1999 rate freeze, the LPSC’s order establishes clear rules of the road to govern the relationships between communications attachers and pole owners, where contracts and individual practices and field relationships fail to produce just and reasonable terms and conditions of attachment. Integral to this are clear and specific standards and expectations of reasonable conduct and detailed dispute resolution procedures.

During the last several years that this docket has been pending, relationships between some communications companies (cable operators, competitive local exchange carriers (CLECs) and incumbent local exchange carriers (ILECs) alike) and some pole owners (particularly electrical cooperatives) deteriorated into litigation at both the LPSC, as well as state and federal courts in Louisiana. Virtually all such litigation was the result of certain cooperatives’ highly orchestrated efforts to raise pole rental rates in violation of the LPSC’s 1999 rate freeze, and to break sharply with prior agreements and working practices.

The commission’s rules reflect an awareness of the problems afflicting some attacher and pole-owner relationships in Louisiana. The rules also are premised on the notion that, absent regulatory scrutiny, clear standards and a robust dispute resolution mechanism, pole attachments can be a corrosive impediment to broadband deployment and realization, rather than an essential and efficient means to it.

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