

Pole Attachments

A Legal and Economic Justification for a Uniform Pole Attachment Rate, Part II: The Industry Players React

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[Note: This is the second part of a three-part article on the rationale for establishing a pole attachment rate that is independent of the type of entity attaching its equipment to the pole. The uniform pole attachment rate is one alternative under consideration in the Federal Communications Commission's ongoing Pole Attachment rulemaking proceeding [Docket 07-245].

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As discussed in Part I of this series, the FCC has tentatively concluded that a uniform pole attachment rate is warranted for all broadband service providers.¹ In reaching this conclusion, the FCC recognized the need to ensure that its “regulatory framework would remain current and faithful to the pro-competitive, market-opening provisions of the Act in light of the industry experience over the last decade, advances in technology, and developments in the markets for telecommunications and video services.”²

The FCC's proposal and the questions posed in its Notice of Proposed Rulemaking (NPRM) triggered an intense debate by a variety of industry players po-

tentially affected by any Commission action on the subject. In Part II of this series, we analyze the critical elements of the prominent stakeholders' proposals to resolve the central question posed by the FCC:³ Should a uniform pole attachment rate be adopted and, if so, who is entitled to the uniform rate and how should the rate be set?

The Current FCC Rate Methodologies

To understand the proposals under consideration, it is helpful to review the methods by which the FCC currently sets pole attachment rates for CATVs and CLECs. There are three basic components to pole attachment rate methodologies: (1) the amount of pole space allocated to each attaching entity (the “Space Factor”); (2) the average pole investment (the “Pole Cost”); and (3) the annual costs associated with the average pole investment (the “Pole Cost” times the “Carrying Charge Rate”).⁴ Both the CATV and CLEC formulae calculate a pole owner's annual pole cost—that is, the Pole Cost multiplied by the annual Carrying Charge Rate associated with that investment—in the same manner.⁵ However, the methodologies contain different assumptions regarding the amount of space allocated to each attaching entity, and thus result in different rates for CATV and CLEC attachers.

Both methodologies have a rebuttable presumption that a joint use pole is 37.5 feet tall and that, of that total, there are 13.5 feet of usable space and 24 feet of unusable space. The **FCC CATV formula** assumes that the CATV attacher occupies 1 foot of usable space on a pole and allocates the unusable space in direct proportion to the usable space. That is, the CATV formula assumes that each CATV attacher occupies 7.4% of the total usable space (1 foot /13.5 feet of usable space), and likewise allocates 7.4% of the unusable space to the CATV attacher as well.

The **FCC CLEC formula**, on the other hand, (1) allocates the pole's usable space in direct proportion to the 1 foot of space presumed to be occupied by the CLEC and (2) assigns *two-thirds* of the pole's unusable space equally among all attaching entities, including the pole owner (presumed to be 3 in rural

populations or 5 in urban populations). As a result, rates established by the CATV formula (in which the attaching entity pays directly in proportion to the space used) can be significantly lower than those established by the CLEC formula (in which the attaching entity pays for the space occupied and also for a larger portion of the unusable space). Both the CATV and CLEC formulae consider the 40-inch space needed to provide safe clearance between electric and other cables as usable space assignable to the ELCO.

ILEC Proposals

The incumbent local exchange carriers (ILECs) greeted the FCC's preliminary conclusion with much enthusiasm. The ILECs uniformly agree that a uniform pole attachment rate should be set and that they, as well as cable television providers (CATVs) and competitive local exchange carriers (CLECs), should be entitled to the uniform rate. AT&T, for example, states that "[b]y treating competitors providing the same or similar services differently, the current pole attachment regime distorts competition and undermines the broader goals of the Communications Act, including promoting the deployment of broadband services."⁶

The ILECs and their industry association have offered several proposals for setting a uniform rate. AT&T and Verizon recently proposed a rate formula that allocates 18.7% of the pole costs to ILECs, CATVs, and CLECs alike.⁷ Under the rebuttable presumptions in the AT&T/Verizon Proposal, the electric company (ELCO) pole owner would be responsible for 43.9% of the pole costs. To arrive at these percentages, AT&T and Verizon employ a modified version of the FCC CLEC formula. They assume that (1) there are 4 attaching entities (including the pole owner) (2) each broadband attacher occupies 1 foot of usable space;⁸ and (3) all attaching entities (including the pole owner) share the unusable space equally.⁹ In doing so, AT&T and Verizon (1) eliminate the CLEC formula's distinction between the numbers of rural versus urban attaching entities; (2) extend the CLEC formula's allocation of one foot of usable space to cover all broadband attachers; and (3) increase the amount of unusable space, and costs thereof, allocated to each attacher. AT&T and Verizon state that "this proposal results in a just and reasonable uniform rate for all pole attachments capable of supporting broadband Internet access service, thereby eliminating the

regulatory disparities that currently distort competition for broadband services."¹⁰

An alternative to the AT&T/Verizon Proposal is the United States Telecom Association (USTA) proposal, under which each attaching entity pays a rate equal to 11% of the pole costs, regardless of how much space they use or how many attachers are on the pole.¹¹ To derive this figure, USTA assumes that (1) the average pole height is 37.5 feet; (2) there are 13.5 feet of usable space; and (3) ELCOs use an average of 10.5 feet on the pole (including the 40-inch safety space)—assumptions that result in ELCOs being allocated 78% of the pole costs (10.5/13.5).¹² USTA proposes a non-rebuttable presumption that there will be two attaching entities (in addition to the pole owner), and allocates the remaining 22% equally between the two—resulting in each attaching entity being responsible for 11% of the pole costs.¹³ If the pole owner identifies additional attaching entities (beyond the two presumptive attachers), it can collect the same 11% from those attachers. Thus, unlike the FCC formulae, the rate charged to existing attachers does not decrease when additional attaching entities share the pole.¹⁴ USTA states that its proposal "seeks to balance rate parity for broadband pole attachments and fairness to pole owners, while also trying to achieve administrative simplicity to the extent reasonably possible."¹⁵

CATV Proposal

The CATVs' trade association (National Cable & Telecommunications Association, or NCTA) takes issue with the ILECs' proposals for failing "to serve the Commission's stated interest in competitive neutrality" because they do not recognize the differences between the joint use agreements between ILECs and ELCOs, and the licensing arrangements between CATVs/CLECs and ELCOs.¹⁶ NCTA would maintain the current CATV formula (which allocates 7.4% of the pole costs to each CATV attacher) and apply it to both CATVs and CLECs.¹⁷ NCTA would allow ILECs to take advantage of the CATV rate, but only if they "opt in" to existing agreements between CATVs and ELCOs.¹⁸ ILECs are thus given the option of attaching to poles under the same rates, terms and conditions of CATVs *or* maintaining their existing agreements with ELCOs if they prefer.¹⁹ NCTA claims that its proposal, which would result in the low-

est rates for all attachers, best promotes broadband investment and deployment and would most likely result in regulatory parity.²⁰

ELCO Proposal

The ELCOs seek to preserve the status quo and oppose granting ILECs the right to a uniform broadband pole attachment rate. The ELCOs claim that the FCC “lacks any statutory authority” to establish a pole attachment rate for ILECs and that ILECs “have no legitimate claim to an equivalent rate because they already have negotiated huge advantages over [CATVs and CLECs] that are contained in their longstanding joint use and joint ownership agreements.”²¹ The ELCOs do not object to a uniform rate for CATVs and CLECs, *provided* the rate is greater than the rates produced by either of the existing formulae. The starting point for the ELCOs’ uniform rate is the FCC CLEC formula, adjusted as follows: (1) the 40 inch safety space should be added to the

amount of unusable space on the pole, thereby increasing the unusable space to 27.33 feet; (2) the presumed number of attachers should be 3; (3) all attaching entities should share equally the unusable space.²² As noted in the chart below, the ELCO Proposal would increase significantly the amount of pole costs allocated to CATV and CLEC attachers.

As we will discuss in the third and final installment of this series, any rate methodology ultimately adopted by the FCC must reflect the realities of joint use today and allocate the costs of owning and maintaining poles accordingly. The rate methodology adopted should facilitate competitive parity among *all* competitors, while ensuring that pole owners are appropriately compensated for their pole costs. Regardless of the rate methodology chosen, however, the FCC’s decision will have a significant impact on the joint use industry players. Our final installment thus will also offer insights into what may be expected from the industry participants in a post-uniform rate world.

Attaching Entity	Allocation of Annual Pole Costs (ELCO-Owned Poles)				
	Current FCC Formulae	AT&T/Verizon Proposal	USTA Proposal	CATV Proposal	ELCO Proposal
CATV	7.4%	18.7%	11.1%	7.4%	27.0%
CLEC non-urban	16.9%	18.7%	11.1%	7.4%	27.0%
CLEC urban	11.2%	18.7%	11.1%	7.4%	27.0%
ILEC	N/A	18.7%	11.1%	N/A ²³	N/A

(Endnotes)

¹ *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007) at ¶ 36 (“Pole Attachment NPRM”).

² Pole Attachment NPRM at ¶ 1.

³ Part II of this series is not intended to be an exhaustive summary of the proposals put forth by all commenting parties, but rather is designed to present an overview of the key similarities and differences

among what appear to be the leading proposals under consideration by the Commission.

⁴ The annual costs are analogous to the rent a building owner charges tenants in order to earn a return on the investment in the building and cover the costs of operating and maintaining the building space.

⁵ There is some ambiguity as to whether the reductions in pole costs to eliminate investments in cross arms and other non-pole related items (15% for ELCO-owned poles and 5% for ILEC-owned poles) are to be used in calculating rates with the CLEC formula. Because the rationale for excluding such costs does

not depend on the type of attaching entity, we assume that the excluded costs should apply in both formulae.

⁶ *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Comments of AT&T Inc. (filed Mar. 7, 2008) at 1.

⁷ Letter from Robert W. Quinn, Jr. (AT&T) and Susanne A. Guyer (Verizon) to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 (filed Oct. 21, 2008) ("AT&T/Verizon Proposal").

⁸ As we discussed in Part I of this series, the ELCO's attachments require more space than do the attachments of cables providing broadband services.

⁹ AT&T/Verizon Proposal at 2-3.

¹⁰ AT&T/Verizon Proposal at 2.

¹¹ Letter from Jonathan Banks (USTA) to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 (filed Oct. 27, 2008) ("USTA Proposal").

¹² USTA Proposal at 3. Like the FCC's CATV formula, the USTA Proposal allocates the unusable space on the pole based on the percentage of usable space allocated to each attacher.

¹³ USTA Proposal at 4.

¹⁴ USTA also advocates heightened enforcement of unauthorized attachments. *See* USTA Proposal at 7.

¹⁵ USTA Proposal at 2.

¹⁶ Letter from Daniel L. Brenner (NCTA) to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 (filed Nov. 14, 2008) at 1 ("CATV Proposal").

¹⁷ CATV Proposal at 2; *see also* Reply Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245 (filed Apr. 22, 2008) at 18-23 ("NCTA Reply Comments").

¹⁸ CATV Proposal at 2; *see also* NCTA Reply Comments at 21-23.

¹⁹ *See* CATV Proposal at 2.

²⁰ CATV Proposal at 5-8.

²¹ Letter from Jack Richards and Tom Magee (Counsel to the Coalition of Concerned Utilities) to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 (filed Nov. 13, 2008) ("ELCO Proposal").

²² ELCO Proposal at 5-7.

²³ The NCTA Proposal would only permit ILECs to take advantage of the 7.4% uniform rate if they "opt in" to existing agreements between CATVs and ELCOs.