

BEFORE

THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Rulemaking to)
Consider Adoption of Rules to)
Implement RCW ch. 80.54 Relating) Docket No. UT-140621
to Attachments to Transmission)
Facilities.)

COMMENTS OF FRONTIER COMMUNICATIONS NORTHWEST INC.

I. Introduction

Frontier Communications Northwest Inc. (“Frontier”) applauds the Commission’s efforts to adopt pole attachment regulations that fully implement Rev. Code Wash, Chapter 80.54. The current pole attachment regulations disadvantage incumbent local exchange carriers (“ILECs”). ILECs pay significantly higher rates for attachments on poles owned by investor-owned electric companies (“ELCOs”) compared to what cable television systems (“CATVs”) and competitive local exchange carriers (“CLECs”) pay while ILECs, CATVs, and CLECs directly compete by providing triple-play packages for video, internet, and telecommunications services. To remedy this situation and ensure competitive neutrality, the Commission should adopt a uniform rate formula for pole attachments by all attaching service providers, including ILECs, CLECs, CATVs, and ELCOs.

This uniform pole attachment rate formula should be limited to reasonable cost recovery. To that end, the Commission should presume that the average jointly-used pole is a standard 40-foot Class 5 wood pole, require that the owner’s pole costs be allocated among all users in direct proportion to their allocated share of a pole’s total usable space, and treat the required 40-inch safety space between electrical and communications facilities as part of the usable space

allocated to an attaching ELCO. The Commission has the authority to adopt such a uniform pole attachment rate formula under Rev. Code Wash., Chap. 80.54.

II. Background Information

The use of utility poles has fundamentally evolved since the 1920s when ILECs and ELCOs were the only parties on a pole, and the rates, terms, and conditions for pole attachments were established under so-called “joint use” agreements. In the decades since, ELCOs have required considerably more space on utility poles while ILECs have needed less, and ELCOs’ relative pole ownership has increased dramatically while ILECs’ pole ownership has declined. Additionally, the number of attaching parties on utility poles has grown as have the types of services pole attachments are being used to provide. Consequently, joint use agreements are no longer an effective mechanism for establishing just and reasonable pole attachment rates.

“Joint use” agreements traditionally involved the shared use of poles by ILECs and ELCOs in their common operating areas for their respective aerial facilities and related equipment. The underlying objective was to minimize costs and maximize savings by using one pole jointly for the two parties’ facilities instead of two separate poles. Joint use allowed both the ILEC and ELCO to avoid unnecessary investment while minimizing the proliferation of utility poles across the country. The principle underlying joint pole use was straightforward: fair and reasonable allocation of the costs and benefits associated with shared use among users of a “standard” utility pole, typically identified in early joint use agreements as a 35-foot Class 5 pole made of wood.

The allocation of space and cost responsibility between the ILEC and ELCO in early joint use agreements typically ranged between 40 percent/60 percent to 50 percent/50 percent. Originally, each entity owned or expected to own a proportion of utility poles that was roughly

comparable to the ratio of the rates in its joint use agreements. However, several changes in how utilities and other entities use poles have undercut the historic assumptions underlying pole attachment rates in existing joint use agreements.

First, the space requirements for the electric and telephone industries on poles has fundamentally changed. In the 1920s and 1930s when joint use agreements were first introduced, ILECs and ELCOs had nearly the same space requirements of around 3 feet to 4 feet because both groups used open (un-insulated) copper wire. Today, ELCOs effectively utilize between 8 feet to 12 feet in order to accommodate the equipment necessary to provide the increasingly higher voltages required to serve their customers. At the same time, ILECs, such as Frontier, have increasingly switched from open copper wire to insulated fiber optic cable with infinitely greater pair capacity to service their customers and, in doing so, have seen their space usage contract to only one to two feet of space on utility poles.

Second, the number of parties occupying joint use poles has increased dramatically. Historically, only the ILEC and the ELCO occupied a utility pole, but, now, CATV, wireless carriers, and CLECs also occupy the space on utility poles traditionally reserved for the ILEC. Moreover, local municipalities increasingly use utility poles for the placement of street lights, and non-telecommunications carriers utilize them to carry privately-owned facilities.

In renegotiating joint use agreements, ELCOs insist on preserving the myth that only two parties – the ELCO and the ILEC – use a pole and that their usage and pole ownership remain relatively similar. That scenario bears no resemblance to the reality of today. The addition of other attachments on an ELCO-owned, joint use pole results in the ELCO receiving additional compensation for “renting” the ILEC space on the pole to CATVs and CLECs. But at the same time, the ILEC receives no corresponding benefit or reduction in the amount it has to pay even

though the additional CATV and CLEC attachments reduce the ILEC's proportional usage of that pole and at the same time increase the ELCO's revenues. Consequently, even though a traditional joint use agreement may provide that the ILEC and the ELCO are each responsible for 50 percent of the annual pole costs for ELCO-owned poles, the revenue from the additional attachments significantly reduces the ELCO's effective contribution toward its annual carrying costs. By contrast, the ILEC is left to defray 40 to 50 percent of the pole's annual costs, even though it now uses approximately the same amount of space as its competitors.

In addition, it is no longer possible to accommodate the growing number of pole users on the 35-foot standard pole of early two-party joint use. Consequently, ILECs are being asked to help pay for both the initial construction and the recurring annual carrying costs of stronger and taller poles that have become necessary to accommodate additional attachers even though ILECs derive no benefit from such poles.

Third, the relative ownership of joint use poles has shifted dramatically. Although ILECs traditionally owned a significant portion of joint use poles, that is no longer the case. The relative pole ownership distribution across the country is now approximately 25 to 30 percent ILEC ownership as compared with 65 to 70 percent ELCO ownership.¹ And, as of March 2011, the Frontier-affiliated ILECs that were formerly owned by Verizon Communications were attached to approximately 643,000 poles owned by investor-owned ELCOs in their 20 largest joint use agreements, and those same ELCOs were attached to approximately 138,000 Frontier-owned poles.²

This imbalance in ownership of joint use poles stems from the differing nature of the telecommunications and electric industries. For example, when a new subdivision is under

¹ *In the Matter of Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, FCC 11-50, ¶ 206 (FCC 2011) (the "2011 FCC Order").

² 2011 FCC Order, ¶ 206, n. 617.

construction, the developer usually contacts the electric company early in the process (and typically before contacting the telephone company) in order to ensure the delivery of electric service. As a result, electric companies are often first to make preparations to serve a new development, which entails the installation of electric company-owned poles to the site. This same phenomenon occurs when a utility pole is damaged and needs to be replaced - because of the real or perceived primacy of electric service, the ELCO typically is the first utility on the scene, giving the electric company the first opportunity to install its own poles. In addition, following natural disasters involving significant number of poles that require replacement, ELCOs are the first to clear an area to ensure the safety of citizens and utility workers, and, as a result, install their own poles in place of any poles owned by ILECs.

The imbalance in pole ownership in favor of the ELCOs also has been exacerbated by: (1) overbuilding, which is a practice by ELCOs to set taller poles beside existing ILEC poles, resulting in the ILEC's having to transfer its facilities to the new ELOC poles and thereby losing ownership of (and revenue stream from) its own poles; (2) the desire on the part of ELCOs to maintain control and ownership of joint use poles in order to minimize their potential exposure to liability due to their highly energized facilities; and (3) the ELCOs' expanded need for pole space to accommodate their facilities, which has resulted in ELCOs conducting expensive pole change outs to obtain additional space on taller poles. These trends make the traditional allocation to the ILEC of 40 percent to 50 percent of the cost of a pole under most joint use agreements unwarranted and unsupportable.

Yet, when called upon to renegotiate pole rental rates under joint use agreements, ELCOs have little incentive to do so. ELCOs typically refuse to discuss, let alone update, the obsolete space and cost allocation percentages to reflect more accurately actual pole usage. ELCOs also

typically decline to discuss, much less incorporate, any offset in their pole costs generated by the income they receive from the proliferating number of users seeking to attach to utility poles today. Instead, ELCOs simply demand that ILECs continue to defray 40 percent to 50 percent of their annual pole carrying cost, based on the demonstrably outdated premise that joint use poles still carry attachments of only two parties occupying 3 to 4 feet of space each.

ILECs have relatively little bargaining power in re-negotiating pole attachment rates downward under existing joint use agreements. Because ILECs own relatively few joint use poles and have limited options to relocate their facilities from ELCO poles, ILECs often find themselves at the mercy of ELCOs during any renegotiation process. As a consequence, ILECs pay significantly higher pole attachment rates than do CLECs or CATVs. Indeed, the FCC has specifically recognized that “the rental rates paid by communications companies to attach to a utility pole vary widely – from approximately \$7 per foot per year for [CATVs] to \$10 per foot per year for [CLECs] to more than \$20 per foot per year for some [ILECs].”³ This cost differential places ILECs, such as Frontier, at a significant competitive disadvantage.

³ *Connecting America: The National Broadband Plan*, available at <http://download.broadband.gov/plan/national-broadband-plan.pdf>, at 110 (FCC 2010) (the “National Broadband Plan”).

III. Discussion

A. *A Uniform Rate Formula for Pole Attachments Would Facilitate Competition in the Provision of Communications Services*

Under the FCC's current regulations, CLECs, CATVs, and ILECs utilize different formulae when calculating their pole attachment rates based solely upon their provider status despite the fact that these entities now all compete in the same communications marketplace.⁴ For example, in Everett, Comcast, a CATV, retails its "Xfinity Triple Play" service that provides high definition television, high-speed internet, and digital voice to businesses and consumers;⁵ Level 3 Communications, a CLEC, sells voice, data, and video packages to businesses;⁶ and Frontier provides businesses and consumers with FiOS packages for high definition video, high-speed internet, and digital voice services.⁷ Thus, in just this one market, adoption of the FCC's pole attachment regulations would result in Comcast paying a utility pole owner a rate for pole attachments based on the FCC's cable rate formula, Level 3 paying pole attachment rate calculated under the telecom rate formula the FCC adopted in 2011, and Frontier potentially paying a rate under the telecom rate formula that existed prior to 2011.⁸

As the FCC has recognized, "in a market where carriers are offering the same services and competing for the same customers, disparate treatment of different types of carriers or types of traffic has significant competitive implications" and could give one carrier "a competitive advantage over another type of carrier."⁹ To avoid such a result, the Commission should establish a uniform pole attachment rate formula that applies to any entity that seeks to attach to poles owned by a public utility similar to the FCC's cable rate formula and the rate formula that

⁴ 47 C.F.R. §§ 1.1409(e)(1) and (2) and 1.1424; 2011 FCC Order at ¶¶ 214-20.

⁵ <http://www.comcast.com/locations/washington/everett.html>.

⁶ <http://local.level3.com/en/or-wa/>.

⁷ <http://west.frontier.com/fios/wa/everett>.

⁸ 47 C.F.R. §§ 1.1409(e)(1) and (2) and 1.1424; 2011 FCC Order at ¶¶ 214-20.

⁹ *Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4685, 4696, ¶ 121 (2005).

Oregon has implemented. In today's communications market, cable operators and providers of telecommunications services (whether CLECs or ILECs) offer the same or similar video, broadband, and voice services and compete for the same customers. Under these circumstances, they should pay the same rate for pole attachments.

Regulation that constrains incentives to invest in and deploy the infrastructure needed to deliver modern communications services is also not in the public interest. Such is the case today, and would be the case if the Commission adopts the FCC's pole attachment regulations, because ILECs, such as Frontier, are subject to, and would continue to be subject to, significantly higher pole attachment rates that artificially inflate the cost of all services that they provide. Indeed, as previously noted, an individual ILEC often pays an ELCO an annual attachment rate that is up to \$13.00 per pole higher than what the ELCO charges to CATVs and CLECs that offer the same or similar communications services. Such a large cost difference acts as a deterrent to ILEC infrastructure investment that the Commission should seek to remedy.

The establishment of a uniform pole attachment rate that would apply to all attachments on poles owned by public utilities would alleviate these problems. It would remove distortions in the communications market by ensuring consistent regulatory treatment of competing platforms.¹⁰ It also would remove disincentives to invest in and deploy broadband infrastructure by eliminating the use of pole attachment as a revenue stream that artificially inflates the cost of communications services.¹¹ Thus, by establishing a uniform pole attachment rate formula, the Commission would help secure lower prices and higher quality services for Washington telecommunications consumers and encourage increased deployment of new telecommunications technologies.

¹⁰ National Broadband Plan, at 110-11.

¹¹ Id.

B. *The Commission Should Establish a Pole Attachment Rate that Equitably Shares Costs Among All Pole Owners and Attachers*

The adoption of the FCC's current pole attachment rate regime would require the application of different rate formulae and calculations depending upon the regulatory status of the attacher. CLECs would be subject to one rate formula, CATVs to another formula, and ILECs and other public utilities to a third rate calculation. The Commission should, instead, adopt a single pole attachment rate methodology and cost allocation assumptions that apply to all attachers on utility-owned poles, regardless of their regulatory status.

In doing so, the Commission should adopt a rebuttable presumption that the average height of a jointly-used pole is 40 feet. Moreover, each pole user's space and associated cost allocation factor for both the usable space and the non-usable space should be calculated by expressing its allocated space as a percentage of the pole's total usable space. The amount of space required on a pole varies by attacher, and the Commission should recognize this disparity in usage on the pole by making each pole user responsible for a percentage of the cost of the entire pole that reflects its specific allocation of the usable space. As a part of the space allocation, the Commission should apportion the 40 inches of safety space separating electric and communications facilities to ELCOs because, as the FCC has recognized time and again, that space is "usable and used [only] by the electric utility."¹²

Such a formula would be consistent with the FCC's cable rate formula¹³ and the rate formula developed by Oregon's Public Utility Service.¹⁴ Critically, as the FCC and United States Supreme Court have both recognized, "[t]he rate formula for cable providers ... has been

¹² Report and Order, *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, ¶ 51 (1998); Report and Order, *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453, ¶¶ 21-22 (2000).

¹³ 47 U.S.C. § 224(d); 47 C.F.R. § 1.1409(e)(1).

¹⁴ Ore. Admin. Rule 860-028-0110(2).

in place for [over] 31 years and is ‘just and reasonable’ and fully compensatory for utilities.”¹⁵

Moreover, adopting this formula would streamline the rate calculation process by allowing a pole owner to develop a per foot pole attachment rate that it could then apply consistently to different types of attachers depending upon their actual space usage.

C. The Commission Has Authority to Establish a Single Rate Formula

The Commission’s authority to regulate pole attachment rates is set forth in Rev. Code Wash, Chapter 80.54. Critically, this chapter establishes a single standard for the calculation of a just and reasonable rate that applies to both utility and non-utility attachers on utility-owned poles.

Rev. Code Wash. § 80.54.020 grants the Commission “the authority to regulate in the public interest the rates, terms, and conditions for attachments by licensees or utilities” and states that the rates, terms, and conditions “received by any utility for any attachment by a licensee or by a utility must be just, fair, reasonable, and sufficient.” Rev. Code Wash. § 80.54.040 then sets forth a single set of criteria for what constitutes a just and reasonable rate:

A just and reasonable rate shall assure the utility the recovery of not less than all the additional costs of procuring and maintaining pole attachments, nor more than the actual capital and operating expenses, including just compensation, of the utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities, and uses which remain available to the owner or owners of the subject facilities.

Thus, Washington’s pole attachment statute differs from the federal Pole Attachment Act, which contains specific, separate rate formulae for CATVs¹⁶ and CLECs¹⁷ and a generalized

¹⁵ National Broadband Plan, at 110 (citing *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987)).

¹⁶ 47 U.S.C. § 224(d)(3).

¹⁷ 47 U.S.C. § 224(e)(1).

provision requiring just and reasonable rates for all other pole attachments.¹⁸ Critically, the FCC has specifically stated that it only applies different rate formulae to the various regulatory classes of attachers because of the Pole Attachment Act’s constraints and that having differing rate structures increases the likelihood of costly and needless disputes:

Different rates for virtually the same resource (space on a pole), based solely on the regulatory classification of the attaching provider, largely result from the rate formulas established by Congress ... under Section 224 of the Communications Act of 1934, as amended (“the Act”). The rate structure is so arcane that, since the 1996 amendments to Section 224, there has been near-constant litigation about the applicability of “cable” or “telecommunications” rates to broadband, voice over Internet protocol and wireless services.¹⁹

Indeed, the FCC has recommended that Congress revise the federal Pole Attachment Act because “without statutory change, the convoluted rate structure for cable and telecommunications providers will persist.”²⁰

Because Washington’s pole attachment statute does not contain the same constraints as the federal Pole Attachment Act, the Commission should develop a single, unified rate formula that applies to all attachments placed on utility poles, regardless of the attacher’s regulatory classification.

IV. Conclusion

This proceeding represents an important opportunity for the Commission to promote the deployment of advanced telecommunications services by bringing rationality to the current pole attachment regime. The Commission can do so by establishing a uniform pole attachment rate that applies to all entities that seek to attach to utility-owned poles regardless of the attacher’s regulatory classification.

¹⁸ 47 U.S.C. § 224(b)(1).

¹⁹ The National Broadband Plan, at 111 (internal citations omitted).

²⁰ *Id.*, at 112.