



STATE TRENDS

High wire acts: Negotiating pole attachment agreements under the 1996 Telecom Act

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Obtaining pole attachment access requires upfront planning, anticipation of potential problems, and a thorough knowledge of a CLEC's rights and remedies under FCC rules.

The Pole Attachment Problem

You're a startup, facilities-based, local telecom competitor (a/k/a CLEC). You have already secured fiber transmission facilities; your switches are up and running. You have been granted state certification and municipal franchises. Your interconnection agreement with the incumbent local carrier (ILEC) has been executed, filed with, and approved by the state commission. Your tariffs have been filed with federal and state authorities. The ILEC has agreed to collocate your switches on its premises. At long last, you soon will be ready to serve local customers.

Think again. Missing from this checklist, and often overlooked in the business plan, is perhaps the most difficult hurdle facing many CLEC entrants—that of securing space on (or in) utility poles, ducts, conduits and rights-of-way or, stated simply, finding a place to hang the CLEC's fiber. Failure or delay in obtaining this necessary element may well turn into a showstopper. The CLEC will almost certainly fail to meet its implementation schedule and, thus, its market entry and revenue projections. In extreme cases, failure to secure pole attachments can stymie market entry. In a word, the importance of pole attachments should not be underestimated, nor, as explained below, should the right of access to poles be taken for granted.

To understand the importance of pole attachment, it is necessary to examine the statutory background governing pole attachment agreements, their negotiation, and, when all else fails, remedies when these negotiations prove unsuccessful.

Statutory Background

The time-honored practice of utilities' leasing space on their poles, ducts, conduits and rights-of-way (collectively, poles) to one another was not regu-

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lated by the federal government until 1978. Responding to cable television industry demand, Congress then enacted Section 224 of the Communications Act of 1934 to ensure "just and reasonable" pole attachment practices by utilities for the benefit of cable television service providers. The Telecommunications Act of 1996 (1996 Act) extended the protections of Section 224 to telecommunications carriers (and to cable companies providing telecommunications services).¹

Briefly, the 1996 Act amendments to Section 224 created a mandatory right of access to utility poles for both cable system providers and telecommunications carriers, and the Federal Communications Commission (FCC or Commission) was charged with ensuring that the rates charged for pole attachments² were both fair and reasonable. The 1996 Act amendments to Section 224 also (i) expanded the definition of "utility" to include local exchange carriers who owned their own poles and (ii) specifically excluded ILECs from the definition of "telecommunication carriers" entitled to pole attachment rights.³ Consequently, under amended Section 224, an ILEC must grant access to its poles, but has no right to seek access to the poles of other utilities.⁴

The 1996 Act also directed the FCC to ensure that third party attaching entities seeking access to utility poles are dealt with on a just, reasonable and nondiscriminatory basis.⁵ The Commission responded by revising its existing pole attachment rules.⁶ These modified FCC rules provide CLECs with codified complaint procedures for dealing with a recalcitrant utility that refuses to permit access to its poles.

Negotiating Pole Attachments under the 1996 Act

When negotiating pole attachment with utilities (e.g., electric or other non-telephonic utilities), a CLEC should consider specific requirements. First, the FCC expects the CLEC (or any other attaching entity) and the utility to negotiate in good faith the rates, terms and conditions of nondiscriminatory access to the utility's poles at just and reasonable rates and to attempt resolution of any disputes through negotiation.⁷ However, recognizing their unequal bargaining power, the FCC considers non-telephone utilities to be akin to ILECs when negotiating interconnection agreements with new entrants under Sections 251 and 252 of the 1996 Act. Accordingly, the Commission has concluded that any pole attachment agreement requiring

the attaching entity to waive federal, state, or regulatory relief is *per se* unreasonable.⁸ The CLEC should, therefore, insist that the pole attachment agreement expressly provide the right to seek relief in addition to, and not in lieu of, other remedies.

Second, the Commission has suggested that negotiated pole attachment agreements address: (i) the time frame within which and the notification methods by which the attaching entity is to access a utility's poles; (ii) the make-ready work to be performed, including the cost of the work and by whom it will be performed; (iii) the costs of pre-construction surveys; and (iv) any change-out costs incurred in readying the pole for the desired attachment.⁹ A utility's refusal to negotiate on these points may thus be actionable under the FCC's complaint procedures discussed *infra*.

Third, the CLEC should negotiate for an express treatment of *third-party* attachments to the poles. In particular, the parties should agree on the utility's obligations either to order third parties to perform make-ready work to accommodate the CLEC as the "new kid" on the pole or to perform the work itself. Typically, pole attachment agreements grant the utility the right to require an attaching entity to rearrange its facilities to make room for other attachments. The CLEC should, thus, insist that the utility exercise this right if existing third parties refuse or delay in doing so.

When negotiating pole attachments with an ILEC, a CLEC, in addition to addressing the foregoing points, should address the rates, terms and conditions of the attachment in its interconnection agreement, which is entered into with an ILEC pursuant to Sections 251 and 252 of the 1996 Act. Thus, in addition to FCC pole attachment complaint proce-

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dures, a CLEC may have the benefit of seeking arbitration or other Section 252 remedies if it is denied pole attachment.

When All Else Fails

In the final analysis, however, a CLEC should not lose sight of the fact that, no matter how well negotiated or drafted, pole attachment agreements are just that—agreements—not guarantees of access. There are many ways that a utility can effectively deny pole access to requests made by an attaching entity. For example, the utility may simply fail to respond (positively or negatively) to the access request. Similarly, from a CLEC's point of view, protracted negotiations can turn into an effective denial of access.¹⁰ In addition, a utility's failure to timely discharge its obligations—for example, by failing to timely perform make-ready work—can also be tantamount to a denial of access.

FCC complaint procedures

Recognizing these difficulties, the Commission has provided attaching entities with recourse when they are unable to resolve a pole attachment dispute with a utility pole owner.¹¹ The FCC's revised pole attachment rules include complaint procedures that may be invoked when a utility fails to provide nondiscriminatory access to any pole that it owns or controls.¹²

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As a first step, the CLEC must request access to a utility's poles in writing. If access is not granted within 45 days, the utility must confirm the denial of access in writing by the 45th day. A utility may deny access to its poles only when there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes. A written denial of access by a utility, moreover, must be specific, must include all relevant evidence and information supporting the denial, and must explain how the information meets the FCC's criteria.¹³ Red herrings

(e.g., manpower shortages, administrative delays) do not suffice.

Within 30 days of a denial by a pole owner of the attaching entity's written request for access (such denial being written or effective), the attaching entity must file its complaint with the FCC. The complaint must set forth a *prima facie* case that the denial was unlawful in violation of 47 U.S.C. §224(f).¹⁴ The utility then has 30 days in which to respond to the complaint filed against it for denial of access. Upon the utility's filing of a response with the FCC, the attaching entity has 20 days to file a reply to the utility's response.¹⁵ All factual allegations by either party must be supported by affidavits, and all exhibits must be verified by the exhibit preparer. Except as provided in FCC Rule 1.1403, which addresses removal notice and temporary stay procedures, no other filings or motions, except for an extension of time, will be considered by the Commission in reviewing the denial of access by a utility.

Unfortunately, however, as with any other administrative remedy, there are shortcomings. The complaint procedures, for instance, do not set forth any deadline by which the FCC must act on a request. Furthermore, the complaint procedures appear more suited to an "actual" rather than an "effective" denial of access by a utility, and they do not impose a legal obligation on third parties to rearrange their facilities to accommodate a new entrant. Finally, as with any regulatory proceeding, these procedures will cause a CLEC time, expense, and aggravation. In short, helpful as they may be, the FCC's complaint procedures are not a panacea.

Conclusion

In the long run, to deal with pole attachment issues, a CLEC should recognize the complexities and the difficulties early in the local entry process. These, in turn, should be addressed, to the extent possible, in the negotiating process. Arbitration, state commission review, "bad faith" remedies, and 1996 Act protections all may come into play when attempting to obtain pole access from an ILEC. Awareness of all these potential problems is critical. Forewarned is forearmed. ▲



¹ See 47 U.S.C. §224 (1978) (Section 224).

² Under Section 224, "pole attachment" means "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility." 47 U.S.C. §224 (a)(4) (1996).

³ A "utility" is defined in Section 224 as "any person who is a local exchange carrier, an electric, gas, water, steam or other public utility, and who owns or controls poles, ducts, conduits, rights-of-way used, in whole or in part, for any wire communication." 47 U.S.C. §224 (a)(1) (1996).

Section 224(a)(5) provides that "the term 'telecommunications carrier' (as defined in section 3 of this Act) does not include any incumbent local exchange carrier as defined in Section 251 (h)." 47 U.S.C. §224 (a)(5) (1996).

⁴ See *In Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order* ¶ 1119 (August 1996); *In the Matter of Implementation of Section 703 of the Telecommunications Act of 1996, Amendments and Additions to the Commission's Rules Governing Pole Attachments*, CS Docket No. 97-151, *Report and Order*, ¶ 5 (February 6, 1998) (*February Order*).

⁵ See 47 U.S.C. §224 (b).

⁶ See 47 U.S.C. §§224 (a)(1), (a)(4), (a)(5), (b), (c)(2)(B), (d)(3), (g) and (i) (1996); *In the Matter of Implementation of Section 703 of the Telecommunications Act of 1996, Amendments and Additions to the Commission's Rules Governing Pole Attachments*, CS Docket No. 96-166, *Order*, (August 6, 1996). See also *First Report and Order* at ¶ 1119-1225.

⁷ *In the Matter of Implementation of Section 703 of the Telecommunications*

Act of 1996, Amendments and Additions to the Commission's Rules Governing Pole Attachments, CS Docket No 97-151, *Notice of Proposed Rule Making*, ¶ 12, (August 12, 1997) (*August Order*).

⁸ *February Order* at ¶ 21.

⁹ See *August Order* at ¶ 15 and note 15. "Make-ready work" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. A "change out" is the replacement of a pole to accommodate additional users.

¹⁰ See *February Order* at ¶ 17. The Commission found that time is critical in establishing the rates, terms and conditions for pole attachment.

¹¹ *Id.* at ¶ 10.

¹² See 47 C.F.R. § 1.1403(a).

¹³ 47 C.F.R. § 1.1403(a) and (b).

¹⁴ 47 C.F.R. § 1.1403. FCC Rule 1.1403 (a) states that a utility may deny access to its poles where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes. 47 U.S.C. § 1.1403 (a). In addition to other things, the complaint must state the reasons given by the utility for its denial of access. FCC Rule 1.1401 (a) - (n) delineates all the documentation and exhibits that must accompany the complaint when it is filed by the attaching entity. By setting forth in its complaint the information evidencing that access was not denied for these reasons, the attaching party may well establish its *prima facie* case, thereby shifting the burden of proof to the utility.

¹⁵ See 47 C.F.R. § 1.1407.