

Pennsylvania
Telephone Association

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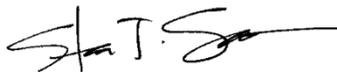
Membership
Bulletin

#20-21

December 16, 2020

TO: PTA Active Member Companies

FROM: Steve Samara



RE: Update on Pole Attachments

In an effort to keep members up to date on pole attachments, PTA's legal counsel sent the attached legal memo to be shared with the membership.

Please feel free to contact us with questions.

Norman J. Kennard
nkennard@eckertseamans.com

To: Steve Samara
From: Norm Kennard
Date: December 15, 2020
Re: The Incumbent Local Exchange Carriers Can Now Attach at the Same Rate as All Other Telecommunications Companies – FCC and PA PUC Update

This memo addresses the legal changes recently made to the ILEC right to pole attachments, including those under joint use agreements (JUA). As you will recall, the 1996 Telecommunications Act created a two-tier rate system, by establishing a separate formula of cost allocation for: “telecommunication attachers”; and for attachments used “solely to provide cable service.” The fact that the cable rate was lower, because joint and common costs were excluded, was a disparity that has plagued pole owners and attachers ever since.

Incumbent telephone companies were excluded from the class of telecommunications attachers. They were neither fish nor fowl -- obliged to provide pole access at discounted rates to its competitor cable company when the pole owner, but unable to receive equal treatment when the attacher. As the telecommunications industry continued to evolve and morph, the 1996 era distinctions based upon product silos became more obviously unfair and increasingly difficult to manage.

On April 7, 2011, the Federal Communications Commission (FCC) unanimously adopted a comprehensive overhaul of its pole attachment rules, implementing many of the recommendations contained in the National Broadband Plan.¹ Notably, the rate formula was reduced to levels approximately equal to the cable rate (now known as the “new telecom rate”) and, thus, equalized for everyone in the telecommunications space *except* the incumbent phone companies. The ILECs, however, made substantial inroads when they were allowed to petition

¹ *In the Matter of Implementation of Section 224 of the Act and National Broadband Plan for Our Future*, WC Docket No. 07-245 and GN Docket No. 09-51, Report and Order and Order on Reconsideration, Released: April 7, 2011 (2011 FCC Pole Attachment Order).

the FCC to obtain "just and reasonable" rates, terms and conditions under an FCC wink and nod that "competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider (whether the telecommunications carrier or cable operator)."

The FCC stepped forward to provide more definitive relief to the ILECs seven years later. In an Order released on August 3, 2018,² the FCC adopted a *rebuttable presumption* "that the incumbent LEC should be charged no higher than the pole attachment rate calculated for the rest of the telecommunications attachers." The pole owner can rebut that presumptive entitlement to the lower, new telecom rate "by demonstrating that the incumbent LEC receives net benefits that materially advantage the incumbent LEC over other telecommunications attachers." If the presumption is rebutted, the old telecom rate (i.e., pre-2011 *Pole Attachment Order*) is the maximum.

The FCC recently decided its first complaint proceeding under the new rules,³ concluding that a JUA with Potomac Edison provides Verizon "with material advantages over competitive LEC and cable attachers on the same poles" and, therefore, the new telecom rate would not apply in that situation.

As one would expect, the parties' annual rate calculation widely ranged from approximately \$9.00 per pole (Verizon's new telecom rate) to \$16.00 (Potomac Edison's old telecom rate). After deciding the input issues, the FCC concluded that the applicable old telecom rate should be no more than \$12.12 per year going forward. A refund was ordered for the three-year period preceding the date of complaint filing. The reduction is not one sided. The FCC found that Potomac Edison is entitled to "a proportional reduction" in the rate charged under the JUA by Verizon.

² *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket Nos. 17-84 and WT Docket No. 17-79, Third Report and Order and Declaratory Ruling Released August 3, 2018 (2018 *FCC Pole Attachment Order*).

³ *In the Matter of Verizon Maryland LLC v. The Potomac Edison Company*, Docket No. EB-19-MD-009, Memorandum Opinion and Order released November 23, 2020.

In another development closer to home, the Pennsylvania Public Utility Commission (PA PUC) recently assumed jurisdiction over pole attachments and then took up the companion case involving the two Verizon ILECs and three FirstEnergy (FE) companies in Pennsylvania employing the FCC rules.⁴ The PA PUC found that FirstEnergy failed to show that Verizon receives benefits under the JUAs that materially advantage it over other entities also providing telecommunications services on the same poles. In other words, in the record of this case, the electric company did not rebut the presumption.

Therefore, the PA PUC applied the “new telecom rate.” Again, the range of rates was material. FE, using the old telecom rate method, argued that rates among the three electric companies involved were between \$19.85 and \$30.22 per pole (2019 figures).⁵ The new telecom rate, as found by the PUC, ranges from \$9.07 to \$13.83 per pole (again 2019), which are lower than the existing rates.⁶ Rather than go back three years as did the FCC, the PA PUC Commissioners held that the refund should be prorated from the complaint date of November 20, 2019.

The conclusions reached in this memo involving Pennsylvania are based upon the Joint Motion and not a Final Order. Reconsideration and appeals will likely ensue, so the gains are not yet solidified. We will keep you updated on the status of the PUC Order when it is entered.

In meantime, the Pennsylvania ILECs should consider the risks and rewards of updating the rates used in their historic joint use agreements with the electric distribution companies.⁷ The FirstEnergy calculations are a good place to start, since the results shouldn’t be different from the Verizon case. For all electric companies, the cost input information is publicly available (FERC Form 1) and can be run through the formulas.

⁴ *Verizon Pennsylvania LLC and Verizon North LLC v. Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company*, Docket No. C-2020-3019347, Joint Motion of Chairman Dutrieuille and Commissioner Coleman, Public Meeting held December 3, 2020 (“Joint Motion”).

⁵ ALJ RD at 53-54. The fully allocated rates were calculated by FE to be materially higher, in the range of \$27.89 to \$42.25. *Id.*

⁶ Marked confidential in the proceeding.

⁷ The rural electric cooperatives are not affected by the ruling and their attachment rates and terms remain unregulated.