Issues Facing Pole Attachers in the Wake of 
American Electric Power Service Corporation v. FCC

Chip Yorkgitis

April 25, 2013
Agenda

- Jurisdiction Basics under Section 224
- February 26 Opinion of US Court of Appeals for DC Circuit: *American Electric Power Service Corporation v. FCC*
  - Decision
  - What Comes Next?
- What’s in Front of the FCC Now?
- Additional Issues Facing Attachers
- Closing Thoughts
FCC’s Jurisdiction Is Limited

- Section 224 of the Communications Act gave FCC authority to regulate rates, terms, and conditions for attachments by cable service operators and telecommunications carriers to the poles, ducts, conduits, and other rights of way owned or controlled by a utility.

- Exceptions and Exclusions
  - “Telecommunications carrier” does not include ILECs.
  - ISPs and private carriers not covered by Section 224.
  - Attachments to transmission-only facilities not included.
  - States may preempt the applicability of the statute and the jurisdiction of the FCC.
<table>
<thead>
<tr>
<th>States That Have Reverse Preempted</th>
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<tr>
<td>Alaska</td>
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<td>Arkansas</td>
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Jursdictionally-related State Activities

- Reverse-preemption under consideration (Iowa)
- Municipally-owned utilities (Tennessee)
- Cooperatives (Missouri and Kentucky)
- Non-telecommunications carrier attachers (New Mexico)
Overview of the April 2011 Order

- Application, Survey, and Make Ready Timelines
- Wireless Telecommunications Carriers
- Use of Contractors
- Major Changes to Telecom Rate Formulas (appeal issue)
- New ILEC Complaint Rights (appeal issue)
- Other Complaint and Enforcement Matters (appeal issue)
- Unauthorized Attachments
- Clarifications of FCC’s 2010 Order on Make Ready
Timelines

Access Timeline for Pole Attachment in the Communications Space (*days*)

<table>
<thead>
<tr>
<th>Stage</th>
<th>Small Orders 300/0.5% poles</th>
<th>Large Orders 3000/5.0% poles</th>
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<tbody>
<tr>
<td>Survey</td>
<td>45</td>
<td>60</td>
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<tr>
<td>Estimate</td>
<td>14</td>
<td>14</td>
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<tr>
<td>Acceptance &amp; Payment</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>Make-Ready</td>
<td>60 -75</td>
<td>105 - 120</td>
</tr>
<tr>
<td>TOTAL</td>
<td>133-148</td>
<td>193-208</td>
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## Timelines

### Access Timeline for Wireless Pole Attachment Above the Communications Space (days)

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<tr>
<td>Make-Ready</td>
<td>90 - 105</td>
<td>135 - 150</td>
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<tr>
<td><strong>TOTAL</strong></td>
<td><strong>163-178</strong></td>
<td><strong>223 - 238</strong></td>
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Judicial Review of the April 2011 Order

- **American Electric Power Service Corp. et al. v FCC**, Case No. 11-1146 (filed May 18, 2011, D.C. Cir.)
- Oral argument held on January 23, 2013
- Decision issued on February 26, 2013
- Three aspects of the 2011 Order were at issue
  - New telecom rate
  - Rights of ILECs under Section 224(b) and ability to bring complaints before FCC
  - Refund period extending back to statute of limitations
American Electric Power Service Corp. v FCC: Rates

- Lawfulness of the New Telecom Rates Challenged

  - Major issue for utilities and telecom carrier attachers
  
  - The Court affirmed the FCC’s decision to bring telecom carrier attachment rates substantially in line with cable operator rates in certain circumstances
    
    - Before the 2011 Order cable rates based on percentage of usable space occupied applied to entire pole cost whereas telecom rates differed by allocating unusable space based on the average number of attachers
    
    - 2011 Order inserted a “cost factor” (either 44% or 66%) into the telecom formula to eliminate the difference when FCC’s presumed number of attachers used; alternatively, capital cost components were removed
  
  - The Court concluded that the operative term “cost” was undefined and ambiguous, conferring discretion on the FCC to interpret, taking into account policy objectives of removing non-cost-based distortions
Pole Attachment Rate Formula for Telecom Carriers (excluding ILECs)

2001 Telecom Rate Formula

Maximum Rate = Space Factor \times \text{Net Cost of a Bare Pole} \times \left[\frac{\text{Carrying Charge Rate}}{}\right]

Where Space Factor = \left[\frac{(\text{Space Occupied}) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]
Pole Attachment Rate Formula for Telecom Carriers (excluding ILECs) (cont’d)

2011 Telecom Rate Formula No. 1

\[ \text{Rate} = \text{Space Factor} \times \text{Cost} \]

Where Cost in Urbanized Service Areas = 
\[ 0.66 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}) \]

Where Cost in Non-Urbanized Service Areas = 
\[ 0.44 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}) \]

Where Space Factor = 
\[ \left( \frac{(\text{Space Occupied}) + \left( \frac{2/3 \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}}{\text{Pole Height}} \right)}{\text{Pole Height}} \right) \]
Pole Attachment Rate Formula for Telecom Carriers (excluding ILECs) (cont’d)

2011 Telecom Rate Formula No. 2

Rate = Space Factor × Net Cost of a Bare Pole × \[ \text{Maintenance and Administrative Carrying Charge Rate} \]

Where Space Factor = \[ \left( \frac{\text{Space Occupied}}{\text{Pole Height}} + \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right) \]
American Electric Power Service Corp. v FCC: Rates (cont’d)

- Post-Decision Telecom Rate Issues
  - Telecom rates may still exceed cable rates despite outcome
    - Presumed number of attachers may not be used
  - Pending reconsideration petition of NCTA, COMPTEL, and tw telecom seeks to address this “loophole”
    - Clarification or amendment of rules sought: the cost factor will be modified based upon the actual average number of attaching entities
    - Method to achieve the objective of rate parity in a greater variety of scenarios
American Electric Power Service Corp. v FCC: ILECs

- Limited ILEC Rights as Attachers under Section 224 Challenged
  - 2011 Order found ILECs are “providers of telecommunications service” entitled to bring claims that pole attachment rates, terms, and conditions are unjust and unreasonable.
  - Court disagreed with petitioners that the exclusion of ILECs from definition of “telecommunications carrier” for purposes of Section 224 commensurately narrowed the term “provider of telecommunications services” as used in that section as well
    - The FCC’s interpretation is entitled to deference
What Comes Next for ILECs in Wake of Decision?

- Renegotiation of joint use agreements
- Will there be a “flood” of ILEC complaints?
- Pending FCC complaint: **Frontier West Virginia v. Appalachian Power Co., et al.**, EB-12-MD-004, June 22, 2012
  - Raises issue of under what circumstances Frontier, as an ILEC, is entitled to the rates at or near rates of its competitors
  - Raises issue of whether the West Virginia PSC has jurisdiction despite never certifying to FCC its regulation of telecom carrier access and rates
  - Held in abeyance pending resolution of complaint at the WV PSC; petition for reconsideration has been filed by Frontier
What Comes Next for ILECs in Wake of Decision? (cont’d)

Factors affecting analysis of ILEC complaints

- Case-by-case analysis based on totality of circumstances
- Prospective effect only
- Existing ILEC Utility agreements presumed reasonable
- FCC articulated rough upper and lower bounds of what is just and reasonable rate for ILECs
American Electric Power Service Corp. v FCC: Refunds

- FCC’s Extension of the Refund Period Based on “Applicable Period of Statute of Limitations” Survived Challenge
  - The old rule was that attachers, if overcharged by pole owners under Section 224, are entitled to refunds only beginning with the date of a filed complaint.
  - The 2011 Order changed the rules to allow refunds going back from the date of the complaint based on the applicable statute of limitations.
  - The Court found the Petitioners’ challenge had “no serious statutory basis” and that the Commission adequately explained its reasons for the change.
The Court’s ruling regarding the refund period opens the door to potential new complaints regarding rates by changing the calculus about initiating litigation:

- Promotes settlement rather than a rush to court
- But also opportunity for attachers to review rates and get more bang for the litigation buck by theoretically expanding the potential damages recovered to a multi-year period

Petition before FCC seeks to limit pre-complaint refunds to effective date of 2011 Order (filed by the Coalition of Concerned Utilities)
What Pole Issues Are Pending before the FCC?

- Petitions for reconsideration
- Complaint proceedings
- A new request for comments or information?
Petitions for Reconsideration

- Further adjustments to the telecom rate formula – NCTA *et al.*
- Refinement of the *2011 Order* – CCU
  - Make ready deadlines
  - Safe harbor for penalty provisions for safety violations
  - Automatic unauthorized attachment provisions
  - Prospective adoption of policies concerning boxing and extension arms
  - Pole top attachments and safety
  - Electronic attachment notification systems
  - Reimbursement for relocation
  - Joint pole owner coordination
Pending FCC Complaint Proceedings

- **Charter Communications v. Georgia Power Company**, EB-12-MD-002, Feb. 15, 2012
  - Is Charter, by providing certain services, acting as a telecom carrier and subject to the telecom carrier rate?
    - Including Business VoIP, Virtual Private Line, and Fixed-Lease Line
    - Pole-by-pole analysis
  - Average number of attachers -- calculation of telecom carrier rate

- **Frontier West Virginia v. Appalachian Power Co., et al.**, EB-12-MD-004, June 22, 2012
Pending FCC Complaint Proceedings (cont’d)


- Focus of complaint is on alleged unreasonable and discriminatory make-ready delays by the pole owner respondents

- Mooted by the 2011 Order?
  - The complaint raises a number of secondary issues of interest
    - Pole-owner specific deadlines
    - Scope of permissible evidence to establish pattern of unlawful behavior
    - Are applicants entitled to use temporary attachment methods and under what circumstances?
Some Current Issues

- Application and make ready charges
- Make ready delays and use of contractors
- Boxing and bracketing
- Municipal and municipal utility rates
Other Things to Consider

- Sign and sue rule
- Up-to-date agreements
- Admin and maintenance costs – double recovery
Closing Observations

- Opportunities to Inject Increased Certainty
- Use of FCC’s Rebuttable Presumptions
- Closer Look at Make Ready Costs and Delays Possible
- Possible Increased ILEC Complaint Activity
- Other Proceedings Testing the FCC Order
- Broadband Networks
- State Activity – Preemption, Regulation of Munis, Other Attachers
Questions?
Contact Us

Chip Yorkgitis
PARTNER
Telecommunications & Litigation
Phone: (202) 342-8540
cyorkgitis@kelleydrye.com
www.kelleydrye.com
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