

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

IMPLEMENTATION OF SECTION 224)	
OF THE ACT)	WC Docket No. 07-245
)	
A NATIONAL BROADBAND PLAN)	GN Docket No. 09-51
FOR OUR FUTURE)	

COMMENTS OF THE
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

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SUMMARY

The National Broadband Plan (NBP) recognizes that just and reasonable pole attachment rates, terms, and conditions are a crucial element in the drive to deploy advanced services further. The Commission's interest in furthering National goals to deploy broadband will be promoted by pole attachment policies that ensure just and reasonable rates, terms, and conditions. In many rural areas served by ITTA members, trenching for underground fiber is uneconomical. Aerial cable continues to be the most cost-effective and efficient solution to furthering deployment of standard and advanced services. Therefore, refined policies regarding access to poles, dispute resolution, and pole attachment rates will enhance end-users' ability to access new broadband services throughout the Nation.

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INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

To the Commission:

I. INTRODUCTION

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits comments in the above-captioned proceedings.¹ ITTA is an alliance of mid-size telephone companies which collectively serve approximately 23 million access lines in 44 states, offering subscribers a broad range of high-quality wireline and wireless voice, broadband, and video services.

ITTA members serve primarily rural areas of the Nation. In many of those areas, trenching for underground fiber is uneconomical. Aerial cable continues to be the most cost-effective and efficient solution to furthering deployment of standard and advanced services. The National Broadband Plan (NBP) recognizes that just and reasonable pole attachment rates, terms, and conditions are a crucial element in the drive to deploy

¹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future: Order and Further Notice of Proposed Rulemaking*, WC Docket No. 07-245, GN Docket No. 09-51, FCC 10-84 (rel. May 20, 2010) (NPRM).

advanced services further.² The Commission's interest in furthering National goals to deploy broadband will be promoted by pole attachment policies that ensure just and reasonable rates, terms, and conditions.

II. **DISCUSSION**

The NBP recommends actions intended to “lower the cost and improve the speed of access to utility poles.”³ In the NPRM, the Commission addresses policies relating to access, enforcement, and rates. ITTA members include companies that are primarily pole owners, and companies that are primarily “attachers.” Accordingly, ITTA's comments consider the needs of both owners and attaching entities.

A. **IMPROVING ACCESS TO POLE ATTACHMENTS**

Wireless Attachments

The Commission seeks comments on whether wireless attachments place different demands on pole owners.⁴ Although ITTA members, collectively, did not document frequent requests from wireless providers, they did note characteristics of wireless attachments that warrant different treatment. For example, wireless attachments frequently require a power source, and are accordingly placed near power lines. This aspect demands specialized attention and additional safety precautions beyond those taken when attaching non-power-sourced facilities. For these reasons, additional factors

² Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan, at 109 (*available at* <http://download.broadband.gov/plan/national-broadband-plan.pdf> (National Broadband Plan)).

³ NPRM at para. 7.

⁴ NPRM at paras. 52, 53.

relating to contractor expertise and make-ready provisions may be implicated.

Therefore, although ITTA does not at this time propose specific standards for wireless attachments, ITTA urges the Commission to recognize the specialized demands occasioned by wireless attachments, and to contemplate flexible standards to enable proper treatment when approaching wireless attachments.

Use of Outside Contractors

The Commission seeks comment on whether outside contractors are used for survey and make-ready work; whether outside contractors are used for actual attachment of facilities; and, concerns that may arise regarding such.⁵ ITTA members contract regularly with third-party contractors. Pole owners should retain the right to select contractors and confirm that they are properly trained and appropriately certified consistent with all current standards and codes. An attaching entity's right to select a contractor *carte blanche*, however, should be rejected, even where surveys and make-ready work have not been completed within prescribed deadlines.⁶ Rather, the Commission should consider the model of a "pre-approved" list of contractors that pole owners might compile, and from which an attaching entity may select.⁷ Pole owners should retain the right to perform inspections during the work period, as well as post-construction inspections. These inspections are critical, especially when work is completed in conduits. Owners and attaching entities have significant interest in ensuring

⁵ NPRM at para. 55.

⁶ NPRM at para. 59.

⁷ *See, e.g.*, NPRM at para. 62.

that all work is done in accordance with current standards, practices, and codes.

Notably, also, the pole attachment agreement must be in place before any work can commence.

The Commission proposes that, “with respect to incumbent LECs . . . to perform surveys or make-ready work, attachers may use any contractor that has the ‘same qualifications, in terms of training, as the utilities own workers.’”⁸ The Commission proposes this approach because it believes that ILECs have anti-competitive incentives to obstruct competitors from completing pole attachment work, whereas other utilities are disinterested from that perspective. ITTA objects to this characterization. The implementation of objective standards for outside contractors should result in equivalent opportunities and obligations for all parties. Presuppositions that ILECs would obstruct the pole attachment process for anti-competitive reasons should be rejected. The use of a “pre-approved” list, as proposed above, would enable attaching entities to obtain comparative and competitive bidding from contractors whose credentials conform to the pole owner’s certification. A broad requirement that an attaching entity can engage contractors who are required only to have the “same qualifications, in terms of training, as the utilities’ own workers”⁹ eliminates the opportunity for pole owners to make subjective judgments as to the quality of a particular contractor’s work, experience or violation history. When implicating matters involving significant potential costs, liabilities, interests of other attaching entities, and the pole owner’s investment, the Commission’s reliance on minimal “same training” standards only should be rejected.

⁸ NPRM at para. 65.

⁹ NPRM at para. 65.

Payment for Make-Ready Work

The Commission seeks comment on whether payment schedules for make-ready work should be formalized, *e.g.*, installment schedules.¹⁰ ITTA submits that a fundamental principle of this inquiry should be affirmation of the right of pole owners to manage their assets. ITTA members generally demand payment up-front. ITTA members have occasionally deviated from this internal requirement, but have often incurred uncompensated costs when doing so. Pole owners may forecast budgets that contemplate pole replacements necessitated by pole attachment needs. In those instances, the expenses caused by pole attachments must be recouped before the pole owner incurs that expense in order to ensure that the pole owner does not bear the burden of expense occasioned and caused by another entity.

Schedule of (Common) Charges

The Commission seeks comment on whether pole owners should provide a schedule of common make-ready charges.¹¹ In response, ITTA submits that there are few “common” fees. Expenses may arise out of many conditions encountered in the normal and ordinary course of business, such as permitting or raw labor costs. Additionally, there may be discrepancies in rural and urban areas. For example, in rural areas, poles may be relatively easy to replace, while in urban areas, poles may be more often sunk in concrete, rather than soil. In rural areas, work might take place during regular business hours, while in urban areas, work may be limited to “off hours” during which crews must be paid overtime wages. In all areas, costs fluctuate depending on the number and type

¹⁰ NPRM at para. 70.

¹¹ NPRM at para. 71.

of other attachments, which may include those supporting electric power lines.

Therefore, a schedule of per-item charges may be an unwieldy undertaking. A standard hourly charge may be an achievable goal, but that too must be geared to reflect the particular task and skill-set involved; by way of example, crews with specialized training to handle power lines may be designated at a higher rate than personnel assigned solely to remove or install poles. An hourly charge must reflect the true engineering and work costs associated with make-ready work.

Joint Ownership

The Commission seeks comment on whether joint owners should determine which owner will serve as primary point of contact for prospective attachers.¹² ITTA notes that each joint ownership agreement may include unique distribution of responsibilities. In many circumstances, it may be inefficient for joint owners who have devised an equitable distribution of duties to impose upon a single owner sole responsibility for administering the totality of a pole attachment process. The matter of communications between prospective attachers and owners, and the performance of pole owners' duties, should instead be governed overall by the pole owners' general legal obligations vis-à-vis attachments.

Responsibility to Manage Pole During Make-Ready Process, Including Management of Existing Attachers

The Commission proposes that pole owners obtain from other attachers statements of costs attributable to rearrangement of existing attachments, to bill the new

¹² NPRM at paras. 72.

attaching entity for those costs, and to distribute payments to other attachers.¹³ ITTA submits that this proposal contemplates an unnecessary and burdensome use of the pole owner's resources. The pole owner is required to take steps toward making the pole ready, but is not required to become a billing agent on behalf of the new attaching entity. The proposal should be rejected.

Pole Attachment Techniques

The Commission has clarified that utilities are required to permit other attachers to use the same techniques that it uses, *e.g.*, boxing and bracketing. Utilities, however, may change their practices over time, and the Commission seeks comment on how non-discrimination rules would play a role as utilities may continue to use practices that they now deny to others.¹⁴ In this regard, ITTA submits that, consistent with the proposition that pole owners must be permitted to manage their assets, a pole owner must not be constrained from updating its internal engineering practices by requiring it to offer to others outdated or inefficient processes previously used, but now rejected. Therefore, pole owners must be permitted to ensure that attaching entities subscribe to practices currently mandated by the pole owner, and that pole attachers are not conferred a right to invoke historic practices whose safety or effectiveness have been superseded by more refined processes.

In specific regard to boxing and bracketing, those practices cause concerns in the field, complicating pole replacements and emergency responses, which in turn can cause public safety concerns due to dual poles. This type of construction also often introduces

¹³ NPRM at para. 73.

¹⁴ NPRM at para. 74.

mid-span separation issues. If the pole owner only uses boxing and bracketing in last resort situations, then third-party attachers should only be able to use boxing and bracketing in “last resort” situations. Boxing and bracketing should not be used as avoidance of make ready work simply because it is easier or cheaper for the third-party attacher. By way of example, a pole owner may use bracketing in a last resort situation if it is not able to obtain authorization to trim. Or, boxing and bracketing may be used when a company was not involved with pole site selection. Overall, however, boxing should not be the alternative to increasing pole height (or moving cables to create capacity if that has not already been done) when there is insufficient capacity.

Improving the Availability of Data

The Commission seeks comment on whether common collection of pole location, ownership, attachments, and other data would be useful for the efficient and timely deployment of advanced and competitive communications networks.¹⁵ ITTA submits that the collection of pole data would be an inefficient and costly exercise of questionable, if any, value. Pole and conduit ownership and rights of way information can often be obtained from public records. Information that is not available in the public domain is confidential and proprietary network information that is not ordinarily made available to third-parties in the normal course of business, and should similarly be unavailable for these purposes. The proposed mandate to collect detailed information regarding actual attachments would yield no beneficial value. In the first instance, a vast database of pole-related information would create an enormous administrative burden for owners required to load and update the data. Second, the perpetually changing nature of

¹⁵ NPRM at paras. 75-77.

pole attachments, including attaching entities and type of attachments used, would result in a Sisyphean exercise yielding results of little benefit, since any prospective attacher would in all events need to confirm that data with the pole owner before commencing the request process. Companies already have regimented processes in place to confirm factors necessary to respond to pole attachment requests. Finally, the presence of unauthorized attachments, a widespread problem noticed in the instant NRPM, throws into question the reliability of any database that, by definition, can rely only upon known data.

B. IMPROVING THE ENFORCEMENT PROCESS

Forum for Resolving Complaints

The Commission seeks comment on whether the FCC should revise its procedures for resolving pole attachment complaints, including whether the FCC should “establish specialized forums to handle pole attachment disputes.”¹⁶ ITTA submits that while its members have experienced difficulties when negotiating pole attachment agreements, most issues have been resolved through standard local dispute resolution processes that are addressed by language in the attachment agreement. Although the Commission may be an appropriate forum in certain instances, ITTA members support commencement of dispute resolution at the local level.

Unauthorized Attachments

The Commission seeks comment on the prevalence of unauthorized attachments, and proposes various approaches toward implementing meaningful penalties that would

¹⁶ NPRM at paras. 78, 80.

more effectively discourage unauthorized attachments.¹⁷ As pole owners, ITTA members are familiar with instances in which unauthorized attachments have been affixed to their facilities; at the same time, ITTA members have been characterized as unauthorized attachers when pole owners have not maintained accurate records. Overall, ITTA notes that record keeping is imperfect, and reasonable errors among owners and attaching entities can and do occur. Therefore, “cookie cutter” penalties should not be implemented. Rather, penalties should be sufficiently significant to discourage intentional “bad behavior,” but unauthorized attachers should have a recognized opportunity to demonstrate whether an error was made in “good faith.” The rules must recognize the difference between “good faith” errors, and, in contrast, unauthorized attachments that are affixed with an intent to avoid payment or other requirements.

“Sign and Sue” Rule

Under current Commission rules, an attacher may execute a pole attachment agreement and subsequently file a complaint regarding that agreement. ITTA has previously supported the “sign and sue” rule. The Commission now asks whether modifications to the rule should be implemented, including specifying the provisions the attacher plans to dispute.¹⁸ The proposal that the attacher indicate which provisions are to be the subject of a complaint has merit, but any such rule should not limit the attacher’s rights to dispute provisions not identified previously. The notion that the rule “engender[s] distrust”¹⁹ should be set aside; it is a sensible rule that enables attachers to

¹⁷ NPRM at para. 95.

¹⁸ NPRM at para. 99.

¹⁹ NPRM at para. 102.

deploy services in a reasonably timely manner, while preserving their rights to obtain relief subsequently. The provision nullifies pole owners' ability to impose a "take it or leave it" construct to the negotiating process.

Cost Causations of Poles

The Commission asks whether pole owners incur capital costs outside the standard "make ready" costs in order to accommodate third-party attachers.²⁰ ITTA members include the probability of attachers when replacing poles, and routinely install poles that are taller than necessary in order to accommodate third party attachers. These are costs that must be recovered among the capital costs of pole attachment agreements. The proposal to develop average per pole maintenance expense rates based on FERM or ARMIS data²¹ is not supported by ITTA; it is not clear that those rates would enable owners to recover costs adequately.

Opt-In Agreements

The Commission seeks comment on whether attachers should be able to "opt in" to existing agreements.²² This inquiry raises several issues, including, but limited to the role of state jurisdiction. This proposal also implicates issues related to the age of an agreement into which an attacher could opt-in: an agreement that has been in place for many years may be outdated; how provisions would be grandfathered into the new agreement. Some guidance may be obtained from evaluating the model used for

²⁰ NPRM at para. 135.

²¹ NPRM at para. 138.

²² NRPM at para. 147.

interconnection agreements, including protocols and how rates, terms, and conditions might be modified and updated.

C. POLE RENTAL RATES

The Commission seeks comment on “ways to minimize the distortionary effects arising from differences in current pole rental rates.”²³ Consistency in rate regulation is needed to increase regulatory parity, diminish disruptive market signals, and preempt inappropriate regulatory advantages. Currently, cable owners pay attachment fees at a rate that is generally lower than that which is charged to competitive providers of telecommunications services. This discrepancy is exacerbated in the broadband arena because the Commission has not yet reconciled its rules to reflect the statute that guarantees incumbent local exchange carriers (ILECs) just and reasonable rates, terms and conditions for their pole attachments.²⁴ The regulatory chasm frustrates broadband deployment by enabling utility pole owners to levy exorbitant rates on ILECs.

The Commission has stated its intent to “promote the pro-competitive and deregulatory goals of the Act . . .”²⁵ This goal can be realized by removing regulatory mechanisms that impose upon providers varying obligations that are not substantially

²³ NPRM at para. 110.

²⁴ *See Implementation of Section 224 of the Act: Amendment of the Commission’s Rules and Policies Governing Pole Attachments: Comments of the Independent Telephone & Telecommunications Alliance*, WC Docket No. 07-245, RM-11293, RM-11303 (Mar. 7, 2008). *See, also, Reply Comments of the Independent Telephone & Telecommunications Alliance* (Apr. 22, 2008).

²⁵ *Implementation of Section 224 of the Act: Amendment of the Commission’s Rules and Policies Governing Pole Attachments: Notice of Proposed Rulemaking*, WC Docket No. 07-245, RM-11293, RM-11303, FCC 07-187, at para. 36 (2007) (Pole Attachments NPRM) at para. 2.

related to actual costs. The Commission's current pole attachment regulatory regime, which enables different rate formulae for identical attachments, is no longer appropriate as intermodal competition increases:

[T]he Commission has recognized that once-clear distinction between 'cable television systems' and 'telecommunications carriers' has blurred as each type of company enters markets for the delivery of services historically associated with the other. The Commission has identified cable operators as market participants in both the enterprise and mass market for telecommunications services. The Wireline Competition Bureau has recently clarified that wholesale telecommunications carriers that provide services to other service providers, including cable operators providing Voice over Internet Protocol (VoIP) services, are indeed 'telecommunications carriers' for the purpose of Section 251 of the Act, and are thus entitled to interconnect with incumbent LECs.²⁶

Accordingly, the Commission should pursue a uniform rate structure that is unrelated to the classification of the attaching entity.

²⁶ Pole Attachments NPRM at para. 14 (internal citation omitted).

III. CONCLUSION

The Commission's interest in furthering National goals to deploy broadband will be promoted by pole attachment policies that ensure just and reasonable rates, terms, and conditions. Equitable solutions to address access to poles, dispute resolution, and pole attachment rates consistent with the balanced positions set-forth above will facilitate greater deployment of advanced services throughout the Nation.

Respectfully submitted,

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