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A HIDDEN ISSUE POTENTIALLY IMPACTING BEAD IMPLEMENTATION: POLE ATTACHMENTS

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The heat that arose over the course of 2022 on the topic of pole attachments shows no signs of abating. Indeed, the rollout of the broadband infrastructure program under the bipartisan infrastructure law may be heightening tensions over the topic.

Now, some experts are claiming that concerns about access to poles could delay fiber builds funded by the $42.5 billion Broadband Equity, Access and Deployment program of the U.S. Department of Commerce.

In order to deploy broadband networks, fiber and cable companies must run wires either underground or above ground. Utility poles, the poles that support public utility services such as electricity, are an attractive option to minimize deployment costs and reach every address in a provider's jurisdiction.

The specific controversy generally centers around the rates that broadband companies seeking to put fiber on utility poles need to pay the owners of the poles, often utilities. Internet companies claim that utility companies place an undue financial burden on attachers, which can hinder builds through the federal grant programs coming down the pipeline.

Utilities often require that new attachers pay the price of pole replacement or else the cost to make the poles ready for new attachments. This financial burden is felt particularly heavily by new entrants that do not have the necessary capital to invest in these poles. In fact, Google Fiber faced these hurdles in Nashville in 2016 when pole attachment permits became hard to acquire and financially burdensome.

Pole attachments differ from pure conduits

Pole attachments differ from conduits, which are structures containing one or more ducts — a single enclosed path for conductors, cables or wire — usually placed in the ground, in which cables or wires may be installed. Service providers may rent conduit, often owned by utilities or other providers, for their broadband networks.

Pole attachment disputes are further complicated by safety practices that must be upheld by the owner of the pole, typically utilities. Different lines must be placed certain distances from other lines and communication lines must be a specified distance from all other lines.

Pole owners include incumbent local exchange carriers or telephone companies, electric cooperatives or nonprofit private companies that deliver electricity to its jurisdiction and municipalities or cities. Incumbent users of the poles differ in perspective. Often, municipalities and electric cooperatives have a common goal to provide internet access to its residents. However, new users of the poles are often at odds with incumbent users for things like pricing, competition and maintenance.

More than a dozen communications companies urged the Federal Communications Commission in April to hasten its decision on an existing file addressing the pole replacement issue, claiming that it is unfair for them to bear the full cost of replacing wood poles

when they want to attach their equipment on it. New poles are often needed when the pole cannot bear additional equipment or if the existing pole would be out of compliance with the new attachments.

The FCC voted more than a year ago to seek comment on what to do with the cost of pole replacements and how to align economic incentives between attachers and owners. Since then, third parties have pressed the commission to force the sharing of the costs as the utilities pushed back on the idea on the basis that it takes resources away from other critical work. An April 2022 Broadband Breakfast Live Online debate also covered the topic.

The legal framework put in place by the Telecom Act

Section 224 of the Communications Act, as modified by the Telecom Act of 1996, governs the dispute. The section defines a "utility" as any person who is a local exchange carrier or an electric, gas, water, stream or other public utility. Such terms do not include railroads, co-ops or any entity owned by federal or state governments, like municipalities.

The section gives the FCC authority to regulate the rates, terms and conditions for pole attachments to provide that they are "just and reasonable." It defines a reasonable rate as a rate that "assures a utility the recovery of not less than the additional costs of providing pole attachments," nor more than the amount determined by multiplying the percentage of total usable space by the sum of operating expenses attributable to the entire pole.

The FCC is also given authority to adopt procedures "necessary and appropriate" to hear and resolve complaints about the rates, terms and conditions. Section 224 specifies that a utility shall provide any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way that the utility owns. However, that utility may deny access on a non-discriminatory basis "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."

It also says that an entity that obtains an attachment to a pole or conduit shall not be required to bear costs of rearranging or replacing the attachment.

Pole attachments are governed by a 'reverse-preemption' process

The section does not, however, give the FCC jurisdiction to rates and terms that are regulated by a state. 26 states do not have laws governing pole attachments. Each of these states are involved in a conflict of their own to ensure that their individual laws and regulations meet the needs of their incumbent and new users on utility poles. This presents a two-theater conflict in which providers must fight pole attachment concerns.

For those 24 states that do have attachment provisions — a number that has been rising — each is required to certify to the FCC that it regulates those rates, terms and conditions. The states must also certify that it has the authority to — and does — consider the interests of the subscribers of the services offered by the pole attachments as well as the interests of the consumers of the utility services. In June 2022, Florida became the 24th jurisdiction to reverse-preempt the FCC, or to certify to the agency that it regulates pole attachments as a state.

In August of 2018, the FCC instituted regulations, called "one-touch-make-ready," which outlined that each new attacher may opt to perform all work to prepare a pole for a new attachment. The rule "will accelerate broadband deployment and reduce costs by allowing the party with the strongest incentive to prepare the pole to efficiently perform the work itself," read the FCC release. But those rules apply only in those states that do not themselves assert authority to govern pole attachments.

Before an internet service provider can add a new attachment or line to a utility pole, the existing attachments may need to be moved around so that the pole can be made ready to handle a new attachment, called make ready work. According to federal guidelines, make-ready work must occur sequentially, meaning that attachments can only be moved in the order in which they were placed on the line.

One-touch-make-ready allows a single contactor to be authorized to make all the pole attachment changes at once and decreases the cost and time investment into pole attachments.

The conflict: Pole attachments are not simply a matter before the FCC

The debate regarding which entity should bear pole replacement costs revolves around which company benefits most from the replacement. The FCC should presume that pole owners benefit from replacements, industry trade group INCOMPAS said in a November letter to the agency. Even in the case of make-ready costs, utility pole owners benefit from pole replacements as much as attachers, added T-Mobile.

Commenter Schools, Health and Libraries Coalition added that under the current model, pole owners are not required to share information regarding the age of the pole, tagged status, replacement, and maintenance schedules. "Without such transparency, the attacher maintains little recourse to contest these costs, aside from blindly questioning them," SHLB said.

The Utilities Technology Council criticized this argument, saying in its comments that the benefits of pole replacements are "insignificant" for utilities in comparison to the great benefit it provides attachers.

Kristian Stout, director of innovation policy at the International Center for Law and Economics, said in comments to Broadband Breakfast that the biggest problem concerning pole attachments is that it is not a single problem.

"Because of how Section 224 operates, there are many areas of the country not subject to FCC oversight on access to poles," Stout explained. "So on the one hand, there are issues before the FCC with access to some of the poles under its jurisdiction. In that case, the FCC needs to look at expediting disputes and developing a rate that doesn't favor one party or the other."

The problem is then multiplied across the states not subject to FCC oversight and the municipal and co-op pole owners, he said. "This creates a very complicated puzzle for any deployer to solve, and the incremental costs from each pole can quickly add up."

Utilities and cooperatives weigh in

However, utilizes do not agree. "Although some are claiming that pole attachments are a barrier to broadband deployment, those claims simply do not stand up to scrutiny," said the Utilities Technology Council in comments.

"Not only are [utilities] providing pole attachments on rates, terms and conditions that are just and reasonable, they are also providing ISPs with access to middle mile fiber so they can provide last mile broadband services. Utilities are the ones proposing solutions to promote more efficient use of space on the poles, including one-touch-make-ready," the group continued.

According to UTC, utilities are primarily concerned with ensuring that pole attachments comply with safety standards and permitting processes. Utilities follow standards, like the National Electrical Safety Code, and often, third-party attachers make attachments that do not comply with those standards and are unsafe or unauthorized. "That poses a safety and a reliability issue," it said.

UTC called utilities the success story because they promote broadband access in unserved areas by providing middle mile fiber optic capacity, last-mile broadband services in unserved areas or by sugging ways to use space on pole more efficient.

"The biggest move we've ever had to get broadband to everyone is starting right now with all this infrastructure funding," said **Brian O'Hara**, senior director of regulator issues at utilities trade association NRECA. He said that this issue will continue to prevail throughout the program.

NRECA released its pole attachment toolkit in 2020 to help co-ops respond to attachment requests and necessitating taller and stronger poles. "Some co-ops have not updated their pole attachment fees for decades because it is a costly and burdensome task. Many have erred on low rates that fail to keep up with inflation," said O'Hara. "This toolkit gives co-ops the information backed by federal and state rate authorities to determine pole attachment fee formulas that best serve their needs."

O'Hara claimed in comments to the FCC that pole owners "make no profit and receive no benefit from prematurely replacing poles."

NRECA said it is "highly skeptical of suggestions made by for-profit broadband providers, many with financial wherewithal far superior to much smaller electric cooperatives, that they cannot profitably deploy broadband unless electric utilities and their ratepayers add to the government grants they already receive by financing their pole replacement costs."

The importance of the issue

The issue of pole attachments is likely to be of critical importance as BEAD rolls out. "As the nation prepares to invest historic levels of capital in broadband, the success of these funding programs to deliver internet for all will depend on streamlined regulations and reasonable deployment costs," said **Van Bloys**, senior counsel of utility relations for provider Crown Castle.

Access to utility poles is a crucial factor in broadband deployment, and that the high costs of pole attachment make-ready — including, in some cases, the cost to replace an entire pole — can set that back, he said. Crown Castle released an analysis to the FCC demonstrating how allowing pole owners to shift the entire cost to attachers does not make economic sense.

"The concern in because access to poles is critical for deployment," stated Stout. "Unnecessary time delays and costs function as a hidden tax on broadband because they appear relatively small for any given pole but quickly explode when you multiply them by the hundreds or thousands of poles a particular deployment needs to cross. So even when a relatively small amount of pole owners play games, those costs are very significant."

Stout added that he would be shocked if there were not delays and cost overruns from pole attachments issues in projects funded by the BEAD program. "It's what we've seen in the past and nothing much has changed, so I expect to see it again in the future."

Closing the digital divide will require pole attachments, said **Edward Lopez**, a professor of Economics at Western Carolina University, in comments to Broadband Breakfast. "For third-party providers seeking to achieve full broadband expansion, no real cost-effective alternative exists other than to attach onto existing networks of utility poles."

Lopez referred to pole attachments are intermediate goods, inputs that are vital to the production of the final good, in this case, connecting unserved and rural locations.

Additional concerns about rights-of-way and railroads

INCOMPAS CEO **Chip Pickering** also raised concerns about what he called the significant delays that railroads play as a "dividing line and barrier" between communities. Railroads continue to be a barrier to deployment and represent a real, tangible digital divide, he said.

A lawsuit filed in a Virginia court in July challenges a law seeking to limit the timeframe and expense for broadband companies to cross wires over or under railroad tracks.

The Association of American Railroads claims that the law removes the railroad's constitutional right to "just compensation" for use of the rail and it hampers the railroad company's ability to maintain safe operating environment. AAR's lawsuit claims that the state took authority of railroads and handed the power unduly to broadband companies to use as they see fit.

According to a local electric cooperative, some railroad crossings were held up for six months to a year. Some crossings, like underground wires, are more expensive to evaluate and install.

Solutions to the conflict over poles

Stout suggested that FCC sets its rates correctly and ensures that disputes under its jurisdiction are expedited. He added that Congress needs to amend Section 224 to rationalize the landscape, saying that there is no reason why municipalities and co-ops should not be subject to either FCC or state regulation.

Congress should use its oversight power to push the FCC to prioritize this issue, he claimed, and make sure the agency is resolving disputes quickly with a reasonable compensation formula.

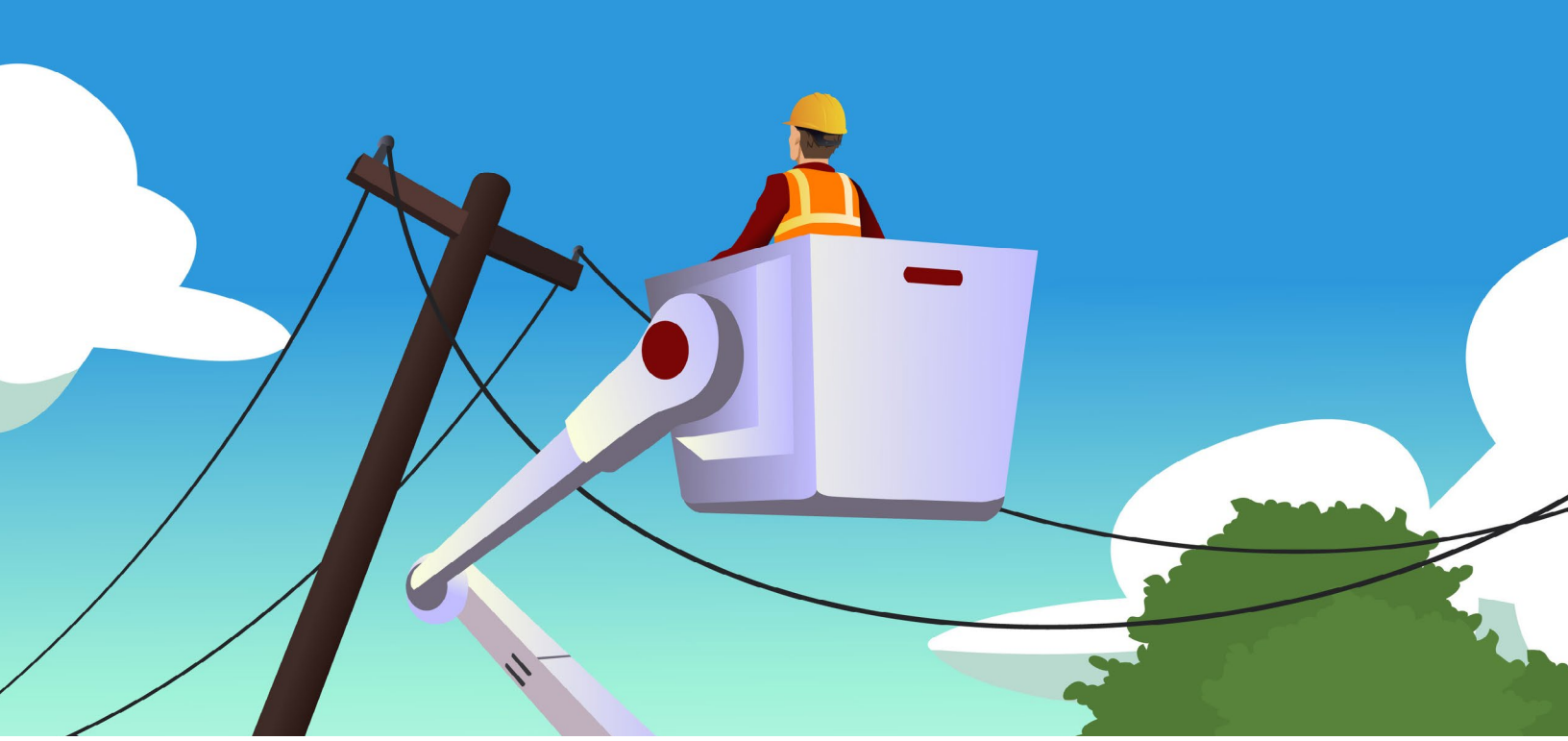
However, Stout added that by and large, most problems can work themselves out because they are simply business negotiations in which each side wants to resolve the matter and move on. "It's really when some pole owners create hold out problems on negotiations — and where some owners like municipalities and co-ops have no incentive to bargain at all — that very expensive problems can arise."

INCOMPAS's Pickering highlighted the need for more transparency so that pole attachers can understand what is being replaced at what cost and why. There is a lack of real information between different broadband providers that are trying to deploy their networks, he said.

Others are pushing for the Fair Access to Internet Ready Poles Act, a proposed legislation that would standardize permitting timelines and accelerate the resolution of pole attachment disputes to speed broadband deployment and focus government funding on building broadband networks. Defenders of the proposal highlight Texas as an example of effective policy for implementing a pole fund that takes advantage of federal resources to replace aging, wooden utility pole infrastructure unable to accommodate modern broadband equipment.

For its part, UTC suggested that states should continue to remove restrictions and encourage utilities to deploy broadband infrastructure. They want states to pass legislation clarifying the ability of utilities to use their existing easements and rights of way for broadband purposes.

More speculatively, another solution might mirror structural changes in the cellular tower industry. Decades ago, different cellular providers owned their own cell towers. But over time, neutral hosting companies emerged to offer any provider the ability to locate radio-frequency transmission equipment. Could the same "neutral host" model emerge when it comes to pole attachments?



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