



## **UTC Briefing Paper: A History of U.S. Pole-Attachment Policy**

### **Utility Poles**

Utility distribution poles are an economic superhighway fueling our nation's modern lifestyles. These poles not only carry electricity to nearly every home and business in the U.S., they also are used to deploy telecommunications and broadband services throughout the country.

While often taken for granted, distribution poles and the services they support are essential to our country's safety and economic wellbeing. That's why it is so important that the poles, and the devices attached to them, are properly maintained.

Because they are almost everywhere, utility distribution poles can be an effective way of providing other essential services like voice and broadband. Presently, most utility distribution poles are owned by electric utilities. This wasn't always the case, however, as for much of the 20<sup>th</sup> Century, pole ownership was split between electric utilities and traditional telephone companies. During this time, utilities and phone companies worked out arrangements between themselves on whether, when, and how to attach their equipment to each other's poles. These industries at the time were both heavily regulated and depended on each other's infrastructure to provide their services.

However, as the telecommunications industry deregulated, many telephone companies got out of the pole-owning business, leaving most poles in the hands of the still heavily regulated electric utility industry. Starting in the late 1970s, U.S. policies on pole attachments shifted as well. The purpose of this paper is to outline U.S. pole-attachment policies, which shifted in the 1970s to reduce costs and risks to attaching industries such as cable and, over time, wireless and traditional telecommunications services.

### **Pre-1978**

Prior to the 1978 Pole Attachments Act, the process for attaching third-party equipment to utility distribution poles was done through so-called "joint-use agreements." Distribution poles are the wooden or sometimes steel or concrete poles found along many streets and neighborhoods, delivering electricity and voice services to homes and businesses across the country. Throughout the last century, electric utilities and telecommunications companies owned most of the poles in the U.S.

Rather than installing two or more poles to deliver these services in a single area/location, electric utilities and telecommunications companies agreed to jointly host their services on a single pole. Until 1978, pole owners—typically either the electric utility or telecommunications company—would negotiate "joint-use agreements" with the other service provider to allow access to their poles. Every new piece of equipment

added to a pole has an impact on that pole, so it is critical to ensure that new devices first and foremost can be added safely. These agreements included cost and timing of when and how new services are “attached” to a pole to ensure the structural integrity of the pole and the safety of personnel

These “joint-use agreements” covered everything, from cost to determining how long it would take to add a new device to the pole itself, as well as the construction of new poles if necessary<sup>1</sup>. For decades, this arrangement worked well.

### **Pole Attachment Act of 1978**

In the mid- to late-1970s, cable television was an emerging industry. In order to make cable more competitive in the video business, Congress passed the Pole Attachment Act of 1978, which provided cable companies a regulated rate to attach their devices—usually a coaxial cable—to a utility pole<sup>2</sup>. The law set up a process requiring the Federal Communications Commission (FCC) to establish low, regulated rates to support and lower the cost of business for new entrants in the cable industry. The law was intended to boost the nascent cable sector and make it more competitive with other video service options. States could “reverse preempt” the FCC’s authority by enacting rules of their own, and certifying to the FCC that pole attachments are regulated on a state level. As of this writing, 23 states and the District of Columbia regulate pole attachments.<sup>3</sup>

Importantly, the Pole Attachment Act of 1978 only applied to poles owned by investor-owned electric utilities (IOUs) and the Incumbent Local Exchange Carriers (ILECs), which refers to the incumbent local or regional telephone company which provides landline telephone services. At the time of the Act, both IOUs and ILECs were heavily regulated by the state PUCs because the industries were considered monopolies. Regulation ensured that the rates charged by these industries to consumers were not exorbitant and in fact were considered “just and reasonable.”

The Pole Attachment Act of 1978 imposed, for the first time, a regulatory regime directing investor-owned utilities and ILECs to allow cheaper, subsidized access to their poles. Since it only applied to the cable industry, the Act did not impact the fees, terms, and conditions negotiated jointly between utilities and ILECs. And because the Act exempted public power and cooperative utilities, the electric industry has typically not coalesced around a single, industry wide position or response to these rules.

### **Telecommunications Act of 1996**

The intention of the Pole Attachment Act of 1978 was a good one—to boost a developing industry and bring competition to the video services marketplace. During the late 70s and early 80s, Congress and the federal government began deregulating numerous industries, including trucking, freight rail, and, eventually, the telecommunications industry. The theory behind deregulation was that competition between companies providing similar services would ultimately lower costs for

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<sup>1</sup> <https://www.sec.gov/Archives/edgar/data/1096788/000119312508057619/dex1029.htm>

<sup>2</sup> <https://pubs.naruc.org/pub/635DF852-FCB3-B3A2-D381-9A307381F48F>

<sup>3</sup> <https://docs.fcc.gov/public/attachments/DA-20-302A1.pdf>

consumers<sup>4</sup>. The Pole Attachment Act of 1978 was an effort to support the cable industry throughout this period.

As the telecommunications industry deregulated—marked by the 1984 breakup of the Bell Operating System—and new companies emerged<sup>5</sup>, Congress determined that the new, competitive telephone companies also needed assistance similar to what the cable industry received in 1978. The result was the Telecommunications Act of 1996<sup>6</sup> which, among other things, mandated that the new Competitive LECs (CLECs) that formed in the wake of the breakup of the Bells would receive access to utility poles with similar rates and terms as the cable companies.<sup>7</sup> The mandate requiring access to utility poles was a step beyond what was required in the 1978 Act, which only set forth regulatory rates for pole attachments<sup>8</sup>.

Throughout this period, the number of ILECs owning poles diminished, meaning that most utility poles in the U.S. are now owned by electric utilities.

The 1996 Act was considered the most significant regulatory change to the telecommunications industry since the 1930s<sup>9</sup>. It was intended to reduce barriers for new entrants to get into the industry, one of those barriers perceived to be pole-attachment fees, terms, and conditions. Using the same logic as applied to the 1978 Act and the cable industry, policymakers determined that lowering pole attachment rates would help the new competitive telecom providers compete against incumbent companies in the marketplace. The law also established pole regulatory rates specific to CLECs, along with certain timeframes for pole owners (now mostly electric utilities) to process and approve applications to attach new devices to their infrastructure at rates below the negotiated joint-use agreements.

*"...Congress did three things: (1) it prescribed a new full-cost based 'telecommunications rate formula' for providers of telecommunications service; (2) it limited the protection of the cable rate formula to cable systems that 'provide solely cable service,' and (3) it required cable systems to use the telecommunications rate formula when they became providers of telecommunications services. Congress also reaffirmed and extended the exemption from federal pole attachment regulation for state and local governments, cooperatives, and railroads."<sup>10</sup>*

Once again, the 1996 Act only applied to investor-owned utilities and ILECs, not public power or cooperative utilities. As a result, the industry as a whole remained split on pole-attachment issues, as these new regulations only impacted one third of the industry.

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<https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1006&context=caselrev>

<sup>5</sup> <https://www.businessinsider.com/att-breakup-1982-directv-bell-system-2018-02>

<sup>6</sup> <https://www.fcc.gov/general/telecommunications-act-1996>

<sup>7</sup> <https://pubs.naruc.org/pub/635DF852-FCB3-B3A2-D381-9A307381F48F>

<sup>8</sup> <http://www.baller.com/wp-content/uploads/BallerHerbstPracticalPrimerPoleAttachments.pdf>

<sup>9</sup> <https://www.fcc.gov/general/telecommunications-act-1996>

<sup>10</sup> <http://www.baller.com/wp-content/uploads/BallerHerbstPracticalPrimerPoleAttachments.pdf>, page 6

## **Federal Communications Commission Actions on Pole Attachments**

The 1996 Act required the Federal Communications Commission (FCC, the Commission) to initiate a rulemaking to implement its amendments to Section 224 of the Communications Act. Importantly, those amendments directed the FCC to establish a specifically higher rate for telecommunications-related attachments. The Act maintained the lower cable rate only for cable companies that provide exclusively cable television services; however, if they also offered telecommunications services, those entities would be required to pay the higher telecommunications pole-attachment rate, according to a House of Representatives conference report that accompanied the new law. The conference report also stated that new pole rates must "allow for reasonable terms and conditions relating to health, safety, and the provision of reliable utility service"<sup>11</sup>. In other words, House lawmakers intended that the new law should not impact the reliability or structural integrity of the distribution poles themselves.

Unfortunately, as the FCC began implementing the law, it did not follow the contours of this report language. Instead, it began adopting a series of rules starting in 1998 through 2018 that ignored Congress's mandate that new pole-attachment rules not impact utility service<sup>12</sup>. In 1998, the Commission issued rules which determined that cable companies could continue receiving their lower pole rates if they also offered internet services, in spite of the 1996 Act's limitation that cable companies would lose their lower rates if they offered telecommunications services. In doing so, the Commission paved the way for other telecommunications companies to receive lower rates as well<sup>13</sup>.

Over the next 10-plus years, starting in 2007, the FCC initiated more rulemakings aimed at further reducing the difference between the lower cable rate and the higher telecommunications rate. This trend continued after Congress passed the American Recovery and Reinvestment Act of 2009, which mandated that the FCC develop a National Broadband Plan to accelerate the deployment of broadband services throughout the U.S.<sup>14</sup> Among the many items in its report, the FCC determined that the rates for pole attachments "should be as low and as close to uniform as possible" to promote broadband deployment<sup>15</sup>. When the report was released, the FCC stated that the average pole-attachment rate for cable companies was \$7 per foot, while the average rate for competitive telecommunications providers was \$10, and the average rate for traditional incumbent telecommunications companies was \$20. These different rates, the FCC found, "distorts attachers' deployment decisions," which, the agency said, could be seen as a risk in companies deploying services, particularly in lower density and rural areas.<sup>16</sup>

From there, the FCC issued rules in 2011 based on the recommendations of the National Broadband Plan. The 2011 rule amendments attempted to erase the difference between the cable and telecommunications rates, effectively granting competitive

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<sup>11</sup> [http://www.baller.com/wp-content/uploads/BallerHerbstPracticalPrimerPoleAttachments.pdf\\_page\\_7](http://www.baller.com/wp-content/uploads/BallerHerbstPracticalPrimerPoleAttachments.pdf_page_7)

<sup>12</sup> Ibid., page 8

<sup>13</sup> Ibid.

<sup>14</sup> [https://www.everycrsreport.com/reports/R40436.html#\\_Toc282011678](https://www.everycrsreport.com/reports/R40436.html#_Toc282011678)

<sup>15</sup> <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>

<sup>16</sup> <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>

telecommunications services companies the same rates as cable. The rules also created timelines “to govern virtually every step” of the pole-attachment make-ready process. [Make Ready is the term used to describe the process of physically attaching the new devices to a pole.] Additionally, the FCC’s 2011 Pole Attachment Order prohibited utility construction standards that restrict the use of pole tops by wireless attachers, and provided a process whereby incumbent telecommunications companies could petition for lower attachment rates on a case-by-case basis.<sup>17</sup>

### **2018 Rules on Wireline, Small Cell Attachments**

Nearly 10 years later, the FCC took additional action on pole-attachment policies. In 2018, the Commission issued two orders that continued these trends and even asserted questionable jurisdiction over infrastructure owned by localities and municipalities.

The first order, issued in August 2018, further reduced both the fees attaching entities could pay for using pole infrastructure and the timelines in which pole owners—again, mostly electric utilities—have to perform the necessary “make ready” work for the new attachments. This order dealt mainly with wireline attachments. For the first time, the order granted traditional incumbent telecommunications providers (ILECs) the lower pole-attachment rates on a carte-blanche basis, instead of a case-by-case basis as it did in 2011. This now put the burden fully on the pole owner—again the electric utility, for the most part—to demonstrate why the traditional carrier should not be granted this rate.

Additionally, the FCC required IOU pole owners to permit “self-help” make-ready in the supply space, if make-ready cannot be completed by the pole owner within 90 days. As many entities told the FCC during its deliberative process, electrical equipment is inherently dangerous and sloppy or rushed work to add new devices or wires to poles, if not done carefully, endangers not only the safety of the workers performing the task but also the nearby public should the pole itself be less stable.<sup>18</sup>

The next month, the FCC applied much of the same reasoning from all of these combined policies to the deployment of the so-called “small cellular devices” necessary for the latest 4G and 5G wireless networks. In a September 2018 ruling, the Commission asserted jurisdiction over towns and localities, which it had not done before, by imposing blanket timelines and fees for processing small-cell applications. Specifically, the rules limit the amount of time cities, counties, and localities have to review such applications to 60 days for small-cell installations on existing infrastructure, and 90 days for applications to site new poles to hold such infrastructure. Additionally, the rules cap the fees municipalities can charge for processing such applications at \$500 for an initial application for five small cells and \$270 annual right-of-way access per device<sup>19</sup>.

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<sup>17</sup> <https://www.dwt.com/insights/2011/04/fcc-amends-pole-attachment-rules-to-promote-broadb>

<sup>18</sup> <https://www.bluetoad.com/publication/?m=62269&i=648829&p=16>

Although this order is not directly related to the wireline pole attachments described in this document, it is relevant in that the FCC's stated intention is the same—to reduce fees and regulatory review of these attachments in order to accelerate the deployment of small-cell devices.

### **Bridging the Broadband Divide?**

Meanwhile, closing the rural broadband gap—often cited by the FCC and the industry as a reason for their pole-attachment decisions—remains a national priority<sup>20</sup>. The FCC and other federal agencies have created new grant-funding programs aimed at disbursing millions in federal dollars to subsidize broadband programs in rural areas. Even the telecommunications industry has indicated that the biggest challenge to solving the rural broadband gap is through federal subsidies<sup>21</sup>. In a 2018 report, the telecommunication's industry trade association USTelecom pointed to rural electrification as an example where the federal government determined that subsidies were necessary to bring electricity to hard-to-serve areas of the country.

*"In establishing sound public policy (and rules implementing that policy) regarding broadband deployment in high cost and rural areas, it is useful to first consider the economics of investments. In particular, the economics of network investment in rural areas is germane. Networks in general exhibit economies of density; that is, costs per user (or usage unit) are lower in high density areas. As one moves to more rural areas, with any network, the costs per user become increasingly high, eventually leading to unsustainable business models to provide network services.*

*"In this respect, there are similarities between networks in communications, electric power, roads, natural gas distribution, water distribution, and sewer networks. By the very nature of network economics, each industry exhibits economies of density and each reaches a point at which un-subsidized provision of service in low-density areas is not viable. The causes of higher costs in low-density areas are discussed in this paper using communications examples. In addition, the scope of low-density areas in the United States are considered."*

Indeed, the rural electrification programs of the 1930s and 40s were essential to electrifying the entire country, and this model is appropriate for rural broadband as well.

### **Conclusion**

Clearly pole-attachments policies have benefited the voice and cable industries, as was the intention. Questions remain, though, as to their impact and benefit to consumers themselves, and the infrastructure owners themselves. While the supposed objectives behind these policies --spurring innovation, improving connectivity, and supposedly bridging the rural digital divide--these policies do not adequately account for the importance of ensuring the structural integrity of utility infrastructure or the costs

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<sup>20</sup> <https://www.fcc.gov/health/maps>

<sup>21</sup> <https://ustelecom.org/wp-content/uploads/documents/Rural%20Broadband%20Economics-A%20Review%20of%20Rural%20Subsidies%20%5B1%5D.pdf>

associated with the attachments. In doing so, these policies have shifted much of the risks and costs associated with maintaining these new devices on the pole owners themselves, namely the electric utility companies and their customers across the U.S.

To correct this imbalance, policymakers should instead consider alternative approaches that would not only increase the deployment of these services but also ensure the continued safe use of utility infrastructure. A number of utilities have worked in partnership with telecommunications firms and municipalities to successfully deploy new streetlight infrastructure that results in newer, safer, and more resilient electric streetlighting combined with the deployment of new small-cellular devices<sup>2223</sup>. This is a true win-win that brings innovation, connectivity, and more resilient electric supply. Policymakers should look to these kinds of agreements of examples as to how cooperative, market-based approaches can truly benefit society as a whole.

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<sup>22</sup> [https://ecfsapi.fcc.gov/file/12182106018178/Xcel%20Energy%20-%20Southern%20Co%20Notice%20of%20Ex%20Parte%20\(Davenport\)\(12-18-19\).pdf](https://ecfsapi.fcc.gov/file/12182106018178/Xcel%20Energy%20-%20Southern%20Co%20Notice%20of%20Ex%20Parte%20(Davenport)(12-18-19).pdf)

<sup>23</sup> [https://ecfsapi.fcc.gov/file/10113706307001/Duke%20Energy%20Ex%20Parte%20Notice\\_01132020.pdf](https://ecfsapi.fcc.gov/file/10113706307001/Duke%20Energy%20Ex%20Parte%20Notice_01132020.pdf)