

Understanding Current FCC Regulations and Industry Trends in Pole Attachments

Sean Knowles

Picture a time in the not-too-distant future when you are riding in the driver's seat of your Tesla. Because the car drives itself, you're watching a streaming movie on Netflix. Your car pulls off the road to power up at an EV charging station, and you don't even look up.

Sound like science fiction? Consider the following: hundreds of companies and partnerships, including Google, Apple, GM, Daimler, Volvo, and of course Tesla, have already committed billions of dollars to the pursuit of autonomous vehicles. Audi's new A8 has achieved Level 3 autonomy (on a scale that counts Level 5 as full automation). Self-driving cars are expected to be on the road in significant numbers within the next five to 10 years, depending upon the prediction of your favorite expert.

Mobile traffic in North America will grow at a compound annual growth rate of 33 percent between 2016 and 2022.

This all sounds like fun, but what does it have to do with the obscure topic of pole attachment regulation? The answer is that self-driving cars, Netflix, and your teenager are all expected to continue the massive increase in demand for

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Internet connectivity and data throughput that has been underway in the United States for so long that it can no longer be called a trend. According to the 2017 Ericsson Mobility Report, total mobile traffic in North America will grow at a compound annual growth rate of 33 percent between 2016 and 2022.¹ All that traffic is enabled by wires and wireless antennas attached to poles and towers. At present, mobile data relies largely on cell towers with fiber backhauls, but to facilitate the densification of 4G networks and the rollout of 5G, which is a moving target but expected by 2020, wireless providers are going to need to get their antennas closer to their customers. Every building, every light pole, and certainly every traditional utility pole is a candidate for attachments of the wired and wireless variety.

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Of course, telecom companies, with the encouragement of policy makers, have trended over time to divesting expensive-to-build-and-maintain poles, instead preferring to attach to the poles of the nearest available electric utility. There is no need to build two pole lines when someone else has already gone to the trouble of building one. To this point, cable companies never owned poles in significant numbers, realizing from the start that it is cheaper and faster to pay rent to phone and power companies. This makes getting access to poles an occasional challenge.

The Federal Communications Commission (FCC), under new Chairman Ajit Pai, has stated publicly over and over again that his objective is to “make sure every American who wants Internet access can get it.”² He has not backed away from adjusting the FCC’s pole attachment policy to support that goal, even hinting at a willingness to consider preempting state and local authority on pole attachments in the interest of broadband deployment.

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These trends all spell one thing: it will be increasingly difficult for utilities to keep their heads in the sand regarding pole attachments.

POLE ATTACHMENT REGULATION HAS EVOLVED

Pole Attachment Act of 1978

Let’s begin with a little historical primer on pole attachment regulation. For many years in the early and mid-twentieth century, the phone company and the power company coexisted on the same pole through the use of contractual joint-use agreements. Both of these industries were growing, and cooperation and mutual capital investment supported the objectives of organizations in both industries. The joint-use contract provided the perfect framework for this “grow-along-and-get-along” approach.

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In 1978, Congress wanted to help the nascent cable industry take hold, and the cable industry needed access to poles. The Pole Attachment Act of 1978 (Section 224 of the Communications Act of 1934) marked the beginning of the modern era of pole attachment relationships driven by contracts and regulation rather than local cooperation. The Pole Attachment Act marked

the occasion when the FCC first gained practical jurisdiction over the pole attachment process.

The act also provided pole attachment rental rate protection for the cable industry. And, importantly to many stakeholders in the electric utility industry, the act established an exemption from pole attachment regulations for municipally owned electric utilities and electric cooperatives on the basis that they are governed either by a local government or a local board elected by its membership. Finally, the act provided an exemption from regulation to any state that certified to the FCC that it would regulate pole attachments independently.³

Telecom Act of 1996

Fast forward to 1996. The cable industry was no longer a fledgling. It had thrived very nicely.

Of course, the Internet had been invented (Al Gore jokes aside), and Bill Clinton and Congress were starting to see its potential to transform not only the cable and telecom industries, but also our entire economy. In addition to many other things, the Telecom Act of 1996 provided further protection for cable companies from excessive annual pole attachment rental rates, and for the first time, extended similar rental rate protection to telecom companies.

The act also established for the first time a right to access utility poles for attachers and established the first telecom and cable rental rate formulas for pole attachments.

FCC Orders, 1998–2015

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Its orders in 1998, 2000, and 2001 allowed cable providers to provide Internet service as telecoms did and started to give shape to what we now know as the FCC Maximum Allowable Rate Formula for pole attachments. In 2011, Order 11-50 changed the Maximum Allowable

Rate Formula with the intention of bringing the telecom rate down toward the cable rate and made clear that the FCC expects utilities will be recovering costs from attachers via make-ready engineering and construction reimbursements rather than just through the rental rate. In 2015, FCC Order 15-151 completed a decades-long process by reducing the telecom rate to eliminate the disparity between the Maximum Allowable Rate formula for telecom and cable companies.

Who Is Regulated and How

As mentioned previously, the Pole Attachment Act exempted municipally and cooperatively owned electric utilities from pole attachment regulations, as well as entities in states that have certified they regulate pole attachments.

Twenty states and the District of Columbia (**Exhibit 1**) have certified to the FCC that they regulate pole attachments within their borders. However, several states, often acting through their public service or public utility commissions, have regulated their municipal utilities. This has created a patchwork of regulation that, more often than not, refers back to the FCC for thought leadership on the topic.

CURRENT FCC ADMINISTRATION

As previously noted, Chairman Pai, appointed to the FCC in January 2017 by President Donald J. Trump, believes strongly that all Americans, particularly those in rural areas, should have access to broadband Internet. Pai's policy agenda aimed at "bridging the digital divide" between urban and rural areas is well-documented. In fact, he recently took a road trip to rural locations to highlight the need for broadband deployment, and has designated August 2017 as "Rural Broadband Month" at the FCC.

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The roots of this policy emphasis may lie in Chairman Pai's upbringing in the small town of Parsons, Kansas, or in the political importance of rural voters to President Trump's electoral vic-

Exhibit 1. States That Have Certified They Regulate Pole Attachments

Alaska	Massachusetts
Arkansas	Michigan
California	New Hampshire
Connecticut	New Jersey
Delaware	New York
District of Columbia	Ohio
Idaho	Oregon
Illinois	Utah
Kentucky	Vermont
Louisiana	Washington
Maine	

tory, or, more likely, both. Pai was also formerly a staff attorney for Verizon and believes philosophically that the way to unleash investment is to remove regulatory barriers and costs imposed on those who might make investments.

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The broadband deployment policy agenda is clear and is coming to bear on pole attachment policy in several specific ways. First, Pai has appointed a Broadband Deployment Advisory Committee (BDAC)⁴ that will be developing model codes for municipalities and states as templates for how to effectively encourage broadband deployment. These model codes are expected to be published as soon as October or November 2017 and address, among other things, pole attachment and right-of-way access timelines.

Second, the FCC has published a Notice of Proposed Rulemaking, Notice of Inquiry (NPRM/NOI) focused on "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment," which concentrates on allowing access for wireless carries

into public rights-of-way to facilitate the deployment of “small cells” and other wireless infrastructure. Third, the FCC has published a NPRM/NOI and Request for Comment focused on “Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,” which speaks to pole attachment policy specifically.

CURRENT NOTICE OF PROPOSED RULEMAKING/NOTICE OF INQUIRY

On April 20, the FCC adopted FCC 17-37, Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment regarding Docket 17-84, “Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment.”⁵

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The NPRM/NOI discusses and invites comments on a wide range of questions related to pole attachment policy that the FCC is considering. The discussion contemplates a range of controversial moves, including using separate authority to overturn its long-standing Pole Attachment Act prohibition against preempting state and local authorities on pole attachment matters, instituting some form of One-Touch Make-Ready policy, and establishing “shot

Exhibit 2. States That Have Passed Small Cell Legislation

Kansas	Ohio
Virginia	Indiana
Iowa	Arizona
Florida	Colorado

Source: Smith, J. (2017, May 15). Iowa joins 7 states passing small cell bills. *AGL's E-Digest*. Retrieved from <http://www.aglmediagroup.com/iowa-passes-small-cell-legislation/>.

clocks” for pole attachment access requests and complaint responses.

However, discussions within the BDAC have made it clear that the FCC, at least at the staff level, does not intend to preempt state and local policy-makers, a move that surely would have touched off a series of legal challenges.⁶ Digging deeper into the *Federal Register* notes a more limited list of actual proposed changes to existing FCC rules, as contained in Title 47 of the Code of Federal Regulations, related to the NPRM,⁷ as highlighted in the **Appendix**.

The preemption of state and local governments seems unlikely at this point.

While the comment period has ended, a timeline has not yet been set for the publication of a final rule on wireless or wire-line regulation. Though the preemption of state and local governments seems unlikely at this point, shortened timelines for the pole attachment permitting process and at least some improved access to poles and rights-of-way for attachers seems much more probable.

STATE-LEVEL “SMALL CELL” LEGISLATION

The impending need for 4G network densification and 5G network deployment has prompted wireless companies to lobby state legislatures, in addition to the FCC, for regulatory certainty on their ability to deploy small-cell wireless facilities.

The result has been mixed, with roughly 20 states considering wireless legislation, and eight states, included in **Exhibit 2**, passing some type of legislation to clear the way and establish timelines for wireless facilities to access public rights-of-way, and in some cases, utility poles owned by public entities. This emphasis further contributes to the complex patchwork of regulation and oversight in place on pole attachments.

WHAT WE KNOW AND WHAT A UTILITY SHOULD DO

What does all this mean for electric utilities? The FCC’s currently proposed regulation will compound the recent industry trends and court

rulings placing downward pressure on rental rates, permitting timelines, and make-ready reimbursement. However, despite all the demands for access, the utility remains ultimately responsible for the safety, code compliance, and engineering soundness of its assets. This responsibility vests the utility with certain inalienable rights that it must exercise.

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Streamline Your Process

The permitting process provides the utility control of its poles and allows for the utility to collect the cost of its time to review the proposed attachment. When a utility fails to adhere to a sound permitting process, it is impossible to correctly enforce an agreement or ensure the safety of its asset. It is important that this process work well, recover costs, and provide responsive service to attachers, preferably through a geographic information system (GIS)-enabled interface.

When a utility fails to adhere to a sound permitting process, it is impossible to correctly enforce an agreement or ensure the safety of its asset.

When the permitting process reveals that changes must be made to a pole to accommodate an attacher, in most cases, it is the attacher's responsibility to cover those costs—from crew and equipment time to engineering to new pole purchase and installation if necessary. This winds up being several thousand dollars each year of uncollected revenue for many utilities. Often, the make-ready cost for a pole is more than the rental revenue for the life of the pole.

It is the attachers' responsibility to ensure that they comply with the National Electric Safety Code in attaching to your pole, but it is the utility's responsibility to verify this is the case and attachers are not creating unsafe conditions on your system. Again, the utility should inspect

and the attacher should bear the reasonable cost of this inspection.

Update Agreements and Actually Administer Them

Now more than ever, it is important to ensure that a utility's pole attachment agreements with existing attachers are up to date, and for the utility to know and understand the provisions of those agreements.

Trying to recover all pole attachment costs through annual rental rates is impossible to justify and will strain relations with your attachers. It is far better to administer existing agreements effectively and resolve conflicts on the local level. If you're going to share space on the same pole, you should be able to sit down and have a conversation in the same room. At the end of the day, all parties are trying to get service to their customers.

Even if you have never enforced your pole attachment agreements before, now it is essential to do so.

Even if you have never enforced your pole attachment agreements before, now it is essential to do so. A rock-solid permitting process is the foundation of accountable attachment provisioning. If you don't have the staff or the time to enforce or administer the agreements, consider hiring a professional permitting firm to help you work in good faith with your attachers so they can accomplish their business objectives and you can recover the costs incurred by the attachers using your utility's assets.

Communicate! (With Attachers, Crews, and Regulators)

Communication is essential to successfully administering any workflow process, and pole attachments are no exception.

One way to do this is the old-fashioned way, by sitting down on a regular basis with your attachers to discuss current issues, review procedures, and preview upcoming plans—maybe once a quarter or every six months. It is also imperative to communicate to your utility's operations team what your pole attachment agree-

ments say and what this means for them. Many agreements get signed, filed, and never again see the light of day. There is little point in negotiating an effective agreement if your crews don't know how to handle and report a transfer or an emergency pole replacement in accordance with that agreement.

Another way to improve communication is to invest in a detailed GIS: poles, size, class, age, attachments per pole, and other data. GIS is an important tool to track attachments per pole and pole characteristics. With available cloud platforms, good GIS records are much more affordable and useful than they used to be. Once GIS data has been reconciled to attachment data, use the National Joint Use Notification System or asset management software such as Alden Systems' Notify to facilitate regular, location-enabled communication with your attachers.

Perform a pole attachment inventory on a regular basis (typically every five years) to ensure the utility is collecting revenue on the correct attachments. Additionally, attachment inventories often pay for themselves, and the project setting creates an opportunity to communicate with attachers about a range of issues in addition to the logistics of the inspection process.

Finally, don't forget to communicate with industry trade groups, statewide organizations, your governing body, and your regulators about the progress you have made in administering an effective pole attachment process that will enable future broadband deployment. This may help keep future FCC regulations at bay.

Plus, your future self-driving car is depending on it. 

NOTES

1. Ericsson. (2017). *Ericsson mobility report*. Stockholm, Sweden: Author. Retrieved from <https://www.ericsson.com/assets/local/mobility-report/documents/2017/ericsson-mobility-report-june-2017-north-america.pdf>.
2. See, for example, Pai, A. (2017, July 13). Bridging the digital divide. Washington, DC: FCC. Retrieved from <https://www.fcc.gov/news-events/blog/2017/07/13/bridging-digital-divide>.
3. 47 U.S.C. § 224.
4. For more information, see <https://www.fcc.gov/broadband-deployment-advisory-committee>.
5. https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-37A1.pdf.
6. Sibley, M. (2017, July 17). On broadband, FCC talks carrots, not sticks. *Lightreading*. Retrieved from [http://www.](http://www.lightreading.com/services/broadband-services/on-broadband-fcc-talks-carrots-not-sticks-/d/d-id/734777)

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7. <https://www.gpo.gov/fdsys/pkg/FR-2017-05-16/pdf/2017-09689.pdf>.

Appendix.

§ 1.1403—Request for Access response time shortened from 45 to 15 days.

§ 1.104 and § 1.1409—Changes regarding the pole attachment complaint process, including the exclusion from rate calculation of any actual capital costs received by utilities from cable operators and telecom carriers.

§ 1.1416—Requires that attachers are only responsible for make-ready costs directly attributable to their attachments and that if the utility or other attachers benefit from the make-ready process by adding or modifying their existing facilities, they should participate proportionately in the make-ready expense. Also requires that utilities provide attachers a schedule of their common make-ready charges.

§ 1.1420—Shortens pole access response timelines significantly for every stage in the permitting process, including Survey, Estimate, and Make-Ready stages.

§ 1.1422—Requires utilities to keep and make available two lists of authorized contractors: one list to perform surveys and make-ready in the communications space, and another list to perform surveys and make-ready above the communications space.

§ 1.1424—Changes regarding the pole attachment complaint process for incumbent local exchange carriers (ILECs).

§ 1.1425—Change in the review period for pole access complaints.