

## Dealing with difficult pole occupants

One of the issues that pole owners frequently face with respect to pole occupants is a general lack of responsiveness to pole owner communications and concerns. This can range from the failure to either pay or dispute invoices in a timely manner; the failure or refusal to correct safety violations; the failure to apply for permits when required; and, in the extreme cases, the failure or refusal to communicate at all. In my experience, pole owners encounter this type of behavior from all types of pole occupants — including sophisticated cable and telecommunications providers all the way down to local, community telephone or Internet providers.

With most types of contracts or business relationships, the pole owner's primary remedy with respect to a non-responsive counterparty would be to terminate the agreement and bring legal action to recover monetary damages. In this context, therefore, many pole owners' first instinct is to terminate the pole attachment agreement or joint use agreement, remove the occupant's facilities from the owner's poles, and file a lawsuit to recover damages. As explained below, however, these normal contract remedies are either ineffective or unavailable with respect to a pole owner's relationship with its pole occupant.

Given the strong public policy in favor of allowing cable and telecommunications companies access to utility poles, pole owners simply do not have the option of "walking away" from non-responsive pole occupants. In Oregon, for example, a pole owner cannot simply "terminate" an agreement with a pole occupant because the terminated agreement remains in effect by operation of state law until a new agreement is reached. Further, a pole owner in Oregon may not remove an occupant's attachments without first obtaining an order from the Oregon PUC allowing it to do so. Finally, the pole occupant would likely raise jurisdiction arguments in an attempt to frustrate any legal action by the pole owner in a court of law to enforce or recover damages under the parties' agreement.

Because the pole occupants know that normal contract remedies are largely ineffective when applied to the pole attachment context, threats of terminating agreements and removing attachments often fall on deaf ears. Instead, we have found a number of other tools available to the pole owners that seem to be more effective at eliciting the desired outcome. Below is a high-level summary of some recommended strategies:

- **Try communicating with someone else.** It sounds obvious, but sometimes the communication barrier lies only with a particular individual with the pole occupant's company. In the simplest cases, the contact information is incorrect or the person being contacted is no longer with the company. Thus, the pole occupant may not even know that the pole owner is trying to communicate with him or her in the first place. In other cases, the individual being contacted may simply not know how to respond or may be involved

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in a personal dispute with the pole occupant or someone in the pole occupant's organization. In order to test whether this is the issue, it is quite easy to attempt to contact someone else in the organization — particularly some one higher in the corporate management structure. If that does not illicit a response, then it is also possible to have legal counsel contact the pole occupant's legal counsel, or provide notice of a possible legal claim to the pole occupant's registered agent. There are instances in which the pole occupant's legal counsel is better able to address the pole owner's concerns than the operations personnel.

- **Suspend permit processing.** Assuming that the pole owner has exhausted all reasonable means of communicating with the pole occupant without receiving an appropriate response, the pole owner can inform the pole occupant that it will not process any more attachment permits until corrective action is taken. In my experience, this tactic is particularly effective with the larger telecommunications and cable companies. The telecommunications industry is highly competitive and the lifeblood of any successful provider is attracting and retaining subscribers; they are unable to do this when they cannot reach their customers. Thus, the threat of suspending permit processing is tantamount to prohibiting providers from reaching new customers.
- **Impose sanctions.** If the action that the pole occupant has failed or refused to take rises to the level of a breach of contract or violation of law, then most states permit pole owners to impose sanctions against the pole occupant. Pole occupants universally dislike sanctions, thus this step

is almost certain to result in at least some response. Because sanctions are usually treated as a legal matter rather than a day-to-day operational issue, they can be effective for stimulating involvement by higher level managers within the pole occupant's organization. The caveat with this strategy is that imposing sanctions can sometimes overshadow the underlying problem. Further, a pole owner that finds that it needs to impose sanctions must follow the letter of law precisely in order for the notice of sanctions to be effective and enforceable.

- **Charge non-compliant rental rate.** As part of a longer-term compliance strategy, the pole owner should also consider whether it is appropriate to charge the pole occupant the non-compliant rental rate. In most jurisdictions, the pole owner is allowed to charge a higher rate to a pole occupant that has shown a pattern of non-compliance with applicable contract provisions or administrative rules. As with the decision to impose sanctions, however, the pole owner must take care to follow the law precisely when charging the non-compliant rental rate. Typically this includes providing the pole occupant advance written notice of the decision to charge the non-compliant rate, along with an explanation of the grounds for charging the non-compliant rate.
- **Exercise self-help where available.** In some instances, it may be possible for the pole owner to take corrective action and recover the costs from the pole occupant. For example, Oregon law expressly permits pole owners to correct safety violations caused by a pole occupant, at the pole occupant's sole cost and expense, who has not timely

responded to a notice of violations. The downside to this strategy is, of course, the risk of non-payment. If the pole occupant is unwilling to address the safety violation in the first place, then there is a good chance that he or she is also unwilling to pay for the pole owner to address the safety violation. Thus, this remedy is best used when the pole owner is entitled to seek (and has received) pre-payment for the corrective work, or there is a performance bond or other form of financial security in place to cover the pole occupant's payment obligation.

- **Enlist third-party help.** If the problem is that the pole occupant and the pole owner disagree as to the obligations of the pole occupant, then it may be helpful to enlist the assistance of a neutral third-party to help resolve the dispute. In Oregon, the Oregon Joint Use Association (OJUA) provides non-binding dispute resolution services to help pole owners and occupant's resolve differences. While other states may not currently have an analogue to the OJUA, I think it is likely that they will eventually adopt the OJUA model. In the meantime, pole owners outside of Oregon can turn to the staff of their respective state utility commissions to fill this role. Commission staff can share with the parties, in an informal and non-binding way, how they interpret the applicable rules and laws. Both parties are more likely to respond to the input of commission staff, even when they are acting solely in an advisory capacity. **NWPPA**

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