Legal

by Richard Lorenz

Is your current pole attachment rate too high? Probably not.

One issue that all consumer-owned utilities have in common is managing pole attachments. In the world of pole attachers, some are good partners. They pay their bills on time. Their field work is competent and consistent with applicable standards. Other pole attachers seem to be following a different business model. They might do sloppy installation work, fail to correct NESC violations in a timely manner, or just generally refuse to pay their bills when due.

Recently, one or more such pole attachers has been sending letters to consumer-owned utilities in the region alleging that their current pole attachment rates are unlawful and demanding a rate reduction. The argument set forth in these letters is that state law requires "strict application" of the pole attachment rate calculation methodology established by the FCC. In many cases, the pole attacher actually seeks a retroactive rate decrease for unpaid invoices from prior billing cycles to the extent that such invoices deviate from the FCC rate-setting methodology. These letters sound plausible, and they can be somewhat intimidating. But are they accurate?

Under Washington law

For "locally regulated utilities" in Washington, the news is almost all good. Under Washington law, RCW 54.04.045 authorizes public utility districts to set and approve their own rental rates for pole attachments. Specifically, RCW 54.04.045(2) provides that rates must be "just, reasonable, nondiscriminatory, and sufficient." In broad terms, RCW 54.04.045(3) states that the just and reasonable rate may recover the actual expenses attributable to that portion of the pole, including a proportionate share of support and clearance space, used for the pole attachment. Under RCW 54.04.045(4), the utility may choose to set rates according to the state statute or according to the FCC cable rate formula. Thus, there is no requirement that Washington utilities must strictly adhere to the FCC rate-setting methodology. Furthermore, the rates set by the utility under this statute are not otherwise subject to review or approval by either the FCC or the WUTC.

A Washington state court has recently interpreted and applied these statutory provisions in a manner that was very favorable to pole owners. On March 15, 2011, the Superior Court in Pacific County Washington issued a decision affirming the rates set by the Public Utility District No. 2 of Pacific County (Pacific PUD). The Court found that Pacific PUD's actions were done in good faith and were "reasonable, fair, and not arbitrary or capricious." The Court further found that Pacific PUD's pole attachment rate was fair, reasonable, and sufficient. The Court awarded damages to Pacific PUD in excess of $600,000, and issued an order for the defendants to either start paying Pacific PUD's adopted rates or remove their attachments from Pacific PUD's poles. In short, it was a total victory for Pacific PUD — which was well represented in that case by Don Cohen and others of the Gordon Thomas Honeywell law firm.

Under Oregon law

For pole owners in Oregon, there is both good news and bad news. The good news is that there is no legal basis for any pole attacher to demand a retroactive rate decrease. Oregon law is clear that the agreed-upon rate formula set forth in an existing contract is lawful. ORS 759.670 states that "[a]greements regarding rates, terms, and conditions of attachments shall be deemed to be just, fair and reasonable unless the Public Utility Commission finds upon complaint by a telecommu-

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nications utility party to such agreement and after hearing, that such rates, terms, and conditions are adverse to the public interest and fail to comply with the provisions hereof." In other words, the rate set forth in an existing contract shall be payable by the pole attacher unless and until both parties agree to a new rate or the Public Utility Commission of Oregon (OPUC) makes a determination pursuant to ORS 759.670 that such rate is "adverse to the public interest." Even if this were to happen, however, the better legal position is that any adjustment to the rates may be prospective only such that it does not violate the rule against retroactive ratemaking.

The bad news is that Oregon consumer-owned utilities probably have less discretion in how they fashion their rental rates going forward than do Washington public utility districts. Unlike general rate-setting matters for electric service, the OPUC does have jurisdiction to regulate pole attachment rates set by consumer-owned utilities. The OPUC has adopted regulations that make it relatively easy for the pole attacher to demand that the pole owner negotiate a new contract. If the parties cannot agree on the terms of the new contract, then the matter may be submitted to the OPUC for resolution. (*See generally* OAR 860-028-0070.) The OPUC has adopted a "modified" version of the FCC Cable Rate as the benchmark for what is just and reasonable. (*See* OPUC Order 07-137, p. 9 (April 10, 2007).) Thus, Oregon law does not require "strict compliance" with the FCC cable rate, and pole owners do have the opportunity to prove that a higher rate is just and reasonable. That being said, the reality is that the OPUC is probably not likely to approve pole attachment rates that deviate very far from the FCC cable rates.

Conclusion

Neither Washington nor Oregon law requires "strict" application of any federal pole-attachment rate-setting methodology. Although Washington courts and the OPUC may certainly look to the FCC cable and telecom formulas for guidance, the touchstone in both states is whether the rates are "just and reasonable" in terms of recovering the utility's costs. While considerations of space and time do not permit a discussion of the laws of other states, I would be surprised to learn that the outcome is any different. Thus, there is no reason for any utility to be cowed by aggressive letters demanding a change in rental rates — particularly where such change would have retroactive application. NWPPA

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