

Oklahoma Passes FCC-Like Maximum Pole Attachment Rate for Rural Electric Coops

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On April 28, the governor of Oklahoma approved HB3835,^[1] setting a maximum pole attachment rate for rural electric cooperatives (Rural Coops) in the event of a dispute with a “communications services provider”^[2] regarding pole attachment rates.

Overall, the bill appears to balance the significant political demand for rural broadband expansion and the strong coalition of Rural Coops, which have typically succeeded in keeping higher (and unregulated) pole attachment rates compared to investor-owned utilities (IOUs). The Oklahoma legislature settled on a rate similar to the FCC’s pole attachment rate with a few tweaks that may allow Rural Coops to charge higher rates and an often used “One Dollar Deal” for pole attachments used by retail broadband providers to provide high-speed broadband in unserved areas. The use of an FCC-based formula is somewhat surprising given past attempts to set a cap of \$20 per attachment and given that neighboring Arkansas allows pole attachment rates significantly higher than the FCC rate. If not for the recent political focus on rural broadband expansion, the ultimate pole rate formula for Rural Coops may have turned out higher or (as in many states) left completely unregulated.

The Details

The rate is based on the FCC’s pole attachment rate, which takes the average cost of a bare pole, reduces that amount by 15% for non-pole appurtenances included in said cost, and then multiplies said amount by (1) a space factor meant to compensate utilities for one foot of attachment space and (2) a carrying charge rate consisting of administrative, maintenance, depreciation, tax, and rate of return elements. The key differences are:

- The tax component of the formula is somewhat different, using only Account 408.1 (Gross Receipts Tax) as the numerator (the FCC formula adds several other accounts);
- Rate-of-return component is set at 8% (FCC requires actual rate of return established by public utilities commissions, or 11.25% as a default);
- Unusable space is 25 feet, one more foot than the FCC standard (this increases the space factor from 7.4% to 8%);

- No cap on unauthorized attachment rates (the FCC's cap per attachment is five years back rent plus \$100 unless the attachment is self-reported or discovered during a joint audit); and
- The "One Dollar Deal" allows a communications services provider to enjoy a rate of \$1.00 per attachment for four years so long as the provider is serving an unserved area (per the Oklahoma broadband maps); only has one attachment on the pole; and provides at least 100/20 Mbps service (the download speed may increase if the FCC increases its broadband definition). One Dollar Deal recipients must provide certified information showing compliance to the pole owner within 60 days of the end of each calendar year, and intentionally submitting false or incomplete data will subject the provider to daily penalties.

The bill also sets some non-rate rules that differ from the FCC's rules.

- The FCC's requires pole owners to submit data justifying its pole rates within 60 days of request. HB3835 does the same, but also requires an NDA and letter of intent from the requesting attacher and subjects the pole owner to penalties for failure to comply.
- Whereas FCC pole attachment disputes typically go to the FCC, Oklahoma law will give its district court system the authority to hear disputes.
- The FCC's rules contemplate that the information to calculate pole rates is publicly available (although in practice this is often not completely true). This HB3835, however, presumes that the relevant information is sensitive and proprietary in nature, and gives Rural Coops explicit protection from the public disclosure of its pole plant information.
- The new pole attachment rates do not apply to attachments properly authorized under an existing pole agreement prior to the effective date of the bill.

In sum, the communications industry and the Rural Coops appear to have reached a deal that makes sense in the current political landscape. Historically, Rural Coops have resisted regulation of pole attachment rates (especially rates as low as the FCC's rates). Today, Rural Coops are taking a newly active role in broadband expansion, from case-by-case deals with broadband providers to the provision of service by Rural Coops themselves, and this bill fits squarely within this new trend. All parties affected by Rural Coop pole attachment rates should expect to see more state-level movement on Rural Coops pole attachment rates in the near future.

If you have any questions regarding this latest bill, contact [Alan Poole](#) with Troutman Pepper's Telecommunications Infrastructure team. If you would like to receive more updates and key insights on telecom and infrastructure, please subscribe to our advisory updates by clicking [here](#) and selecting the "Telecom and Infrastructure" box.

[1] See [https://webserver1.lsb.state.ok.us/cf_pdf/2021-22 ENR/hB/HB3835 ENR.PDF](https://webserver1.lsb.state.ok.us/cf_pdf/2021-22_ENR/hB/HB3835_ENR.PDF).

[2] This term does not appear to be defined in any relevant Oklahoma statutes. However, the Oklahoma Small Wireless Facilities Deployment Act defines “communications service provider” as “a cable operator as defined in 47 U.S.C., Section 522(5), a provider of information service as defined in 47 U.S.C., Section 153(24), a telecommunications carrier as defined in 47 U.S.C., Chapter 153(51), or a wireless provider[.]” See Okla. Stat. tit. 11 § 36-502(8), which is a common definition for the term and may define the scope of these pole attachment rights.

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