

Date of Hearing: April 25, 2011

ASSEMBLY COMMITTEE ON UTILITIES AND COMMERCE

Steven Bradford, Chair

AB 1027 (Buchanan) – As Amended: April 25, 2011

SUBJECT: Energy: Local Publicly Owned Electric Utilities: utility pole and support structures.

SUMMARY: Requires local publicly owned electric utilities, including irrigation districts to make appropriate space and capacity on and in their utility poles and support structures available for use by cable television corporations, video service providers, and telephone corporations. Specifically, this bill:

- 1) Requires local publicly owned electric utilities (POU) and irrigation districts (ID) to make appropriate space and capacity on and in a utility pole and support structure owned or controlled by the local publicly owned electric utility available for use by a cable television corporation, video service provider, or telephone corporation (Proponents).
- 2) Excludes existing contracts prior to the enactment of this part, which shall remain valid until the contract, rate, term or condition expires or is terminated according to its terms, or until the local POU/ID proposes a change in the rate, term or condition in the contract. Annual rates unspecified in an existing contract are subject to the provisions in this bill.
- 3) Requires a POU or ID to respond to Proponents' request for use of a utility pole or support structure owned or controlled by the local publicly owned electric utility within 45 days of the request, or 60 days for requests to attach to over 300 poles. If the request is denied, the local publicly owned electric utility shall provide the reason for the denial and the remedy to gain access to the utility pole or support structure.
- 4) Clarifies that no additional authority is granted herein to a local publicly owned electric utility to impose a fee that is not otherwise authorized by law.
- 5) States that a local POU/ID may require an additional one-time charge equal to three years of the annual fee for attachments reasonably shown to have been made after January 1, 2012, without authorization.
- 6) Limits the annual fee charged by a POU/ID for the use of a utility pole by a Proponent is not to exceed an amount determined by multiplying the percentage of the total usable space which is occupied by the pole attachment by the annual costs of ownership of the pole and its supporting anchor. It shall be presumed, subject to factual rebuttal, that a single attachment to a pole by a Proponent occupies one foot of usable space and that an average utility pole contains 13.5 feet of usable space.
- 7) Mandates that the annual fee charged by a local publicly owned electric utility for use of a support structure by a Proponent shall not exceed the local publicly owned electric utility's

annual costs of ownership of the percentage of the volume of the capacity of the structure rendered unusable by the equipment of the Proponent.

8) Specifies procedures for setting or increasing a fee charged by the local publicly owned electric utility to a Proponent for a pole attachment.

9) Excludes jointly-owned poles from certain provisions in the bill.

10) States that the use of a utility pole or support structure by a cable television corporation, video service provider, or telephone corporation shall comply with PUC General Order 95 and all other applicable provisions of law.

EXISTING LAW:

1) Defines "Public Utilities" as private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers.

2) Specifies that public utilities are subject to control by the Legislature.

3) Exempts locally owned electric utilities from federal regulations of pole attachment rental rates.

4) Mandates that pole rental rates must be just, reasonable, nondiscriminatory and sufficient.

5) Defines "Surplus Space" as that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the California Public Utilities Commission (PUC), to allow its use by a cable television corporation for a pole attachment.

6) Defines "Usable Space" as the total distance between the top of the utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance.

7) Defines "Annual Cost of Ownership" as the sum of the annual capital costs and annual operation costs of the support structure which shall be the average costs of all similar support structures owned by the public utility.

8) States the "basis for computation of annual capital costs" shall be historical capital costs less depreciation. The accounts upon which the historical capital costs are determined shall include a credit for all reimbursed capital costs of the public utility. It shall not include costs for any property not necessary for a pole attachment.

9) States "Depreciation" shall be based upon the average service life of the support structure.

10) Mandates that a utility provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

FISCAL EFFECT: Unknown.

COMMENTS: According to the author, this bill creates a public and transparent process for local publicly owned utilities and irrigation districts to establish fair and reasonable pole attachment rates. Under the current process, cable and telephone companies are often charged very different pole attachment rates, for poles in similar locations, based solely on whether or not the pole is owned by a local publicly owned utility or investor owned utility.

The sponsors of the bill, the California Cable and Telecommunications Association (CCTA) claim that "California local publicly owned electric utility pole attachment rates are unilaterally set by the local governing bodies, allowing them to act in a monopolistic manner without any redress if the rate is clearly excessive. CCTA believes this bill is aimed at developing an open and transparent process for the establishment of fees that comply with state requirements is essential for good government."

1) Background: On April 7, 2011, the Federal Communications Commission (FCC) reformed its pole attachment rules to "streamline access and reduce costs for attaching broadband lines and wireless antennas to utility poles."

The Commission recognized that "[r]ather than insisting upon a single regulatory method for determining whether rates are just and reasonable, courts and other federal agencies with rate authority similar to its own evaluated whether an established regulatory scheme produces rates that fall within a 'zone of reasonableness.' For rates that fall within the zone of reasonableness, the agency rate must undertake a 'reasonable balancing' of the 'investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates."

The FCC also opened an inquiry into how the Commission could work with other government entities and the private sector to improve policies for access to other physical spaces where wires and wireless broadband can be deployed, including rights-of-way on other locations for wireless facilities.

The Commission's Order included: 1) setting a maximum timeframe of 148 days for utility companies to allow pole attachments in communications space, with a maximum of 178 days allowed for attachments of wireless antennas on pole tops, and an extra 60 days for large orders. (Large orders would be 300 poles or 0.5 percent of a utility's total poles within a state, whichever is less.); 2) set the rate for attachments by telecommunications companies at or near the rate paid by cable companies; 3) confirmed that wireless providers are entitled to the same rates as other telecommunications carriers, and 4) clarified that the denial by a utility of a request for an attachment must explain the specific capacity, safety, reliability or engineering concern.

Pole Attachments: 47 U.S.C. Section 224: Section (e)(2) provides the formula used prior to April 7, 2011. It states that a utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

In Section (e)(3) a utility requires apportioning the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

The law also included the following safeguards: Section (f)(1) stated that a utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. However, a utility providing electric service could deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there was insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

The American Recovery and Reinvestment Act of 2009 (ARRA) included a requirement that the FCC develop a national broadband plan to ensure that every American had access to broadband capability. On March 16, 2010, the Plan was released, and identified access to rights-of-way—including access to poles—as having a significant impact on the deployment of broadband networks. In the National Broadband Plan, the FCC estimated that pole attachments amount to 20 percent of the total cost of deploying fiber-optic cable. Generally large telecom companies paid about \$20 per foot of pole annually while smaller competitors paid about half of that. Cable companies paid about \$7 per foot per pole.

2) One size fits all: Currently, local publicly owned electric utilities have the sole discretion over the rates they charge communications providers for pole attachments. This bill would create a process for local publicly owned electric utilities to determine pole attachment rates by multiplying the percentage of the total usable space which is occupied by the pole attachment by the annual costs of ownership of the pole and its supporting anchor. In other words, this basis for calculating the fee is equal to 7.45 percent (1 feet divided by 13.5 feet = 7.45). However, it is unclear if this assumption would allow the local publicly owned electric utilities full cost recovery for pole attachment agreements since the bill places a cap on the costs that can be recovered.

CCTA and AT&T claim that the basis for this calculation would establish fair and reasonable pole attachment rates. Furthermore, CCTA notes that other states, such as West Virginia, Colorado, Kentucky, North Carolina, Oregon, Washington, Texas and Virginia, have enacted state laws to regulate local publicly owned electric utilities pole attachment rates, terms and conditions to mitigate escalated pole rates.

The Northern California Power Authority and the California Municipal Utilities Association claim this cap provision would not give them flexibility to determine actual costs. For instance, the POU/IOU costs exceed the cap; they would essentially be subsidizing the cable or

telecommunication equipment provider. According to the Sacramento Municipal Utility District (SMUD), this bill would prohibit POUs from recovering the costs associated with the specialized attachments for cell phone antennas that are placed on top of the utility poles resulting in higher costs to SMUD ratepayers.

In the case of irrigation districts, which typically have smaller service territories (or a proportionately small number of ratepayers and a large geographic territory), this proposed calculation may not permit recovery of the actual costs of providing access to the pole. According to the Modesto Irrigation District (MID), electric ratepayers of the state would be required to bear the unrecovered costs, and will receive no benefit in return. MID further claims that the cost of pole attachments is a very small percentage of the overall cost of providing broadband service so reducing the cost of the pole attachments will not reduce the costs charged to consumers for such services. MID ratepayers would essentially be paying for the benefits of the private telecommunications companies. MID states the difference in costs to its ratepayers could exceed \$725,000 annually.

The author and this committee may wish to add a provision in the findings and declarations section of the bill that would preclude the subsidizing of communications companies by ratepayers for pole attachments.

3) What happens with the IOUs: Current California law pertaining to IOUs states in Public Utilities Code Section 767.5 that whenever a public utility (IOU) and a single or association of cable television corporations are unable to agree on pole attachment terms, the PUC shall establish and enforce the rates, terms, and conditions for pole attachments and rearrangements so as to assure an IOU the recovery of both of the following: 1) a one-time reimbursement for actual costs incurred by the IOU for rearrangements performed at the request of the cable television corporation and; 2) an annual recurring fee computed as follows:

a) for each pole and supporting anchor actually used by the cable television corporation, the annual fee shall be \$2.50 or 7.4 percent of the IOUs annual cost of ownership for the pole and supporting anchor, whichever is greater. If an IOU applies for a fee greater than \$2.50, the annual fee shall be 7.4 percent of the IOUs annual cost of ownership for the pole and supporting anchor, and

b) for support structures used by the cable television corporation, other than poles or anchors, a percentage of the annual cost of ownership for the support structure, computed by dividing the volume or capacity rendered unusable by the cable television corporation's equipment by the total usable volume or capacity. Here "total usable volume or capacity" means all volume or capacity in which the public utility's line, plant, or system could legally be located, including the volume or capacity rendered unusable by the cable television corporation's equipment.

As seen in California's existing IOU formula, the annual fee is capped but contains sufficient flexibility to ensure true recovery. It states that an annual fee shall be \$2.50 or 7.4 percent of the annual cost of ownership, whichever is greater.

According to CCTA, the pole attachment rates for regulated investor owned electric utilities in California are significantly less than those charged by local publicly owned utilities and irrigation districts, depending on the regulated utility and its costs.

4) Makes Accessibility Mandatory Without Safeguards: As noted above, Congress and the FCC has a long history of ensuring that electric utilities could deny access to a cable corporation if it determined there was insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

As proposed in this bill, a local publicly owned electric utility shall make appropriate space and capacity on and in a utility pole and support structure owned or controlled by the local publicly owned electric utility available for use by a cable television corporation, video service provider, or telephone corporation. The author and this committee may wish to make an amendment that adds the long standing safeguards of insufficient capacity, safety, reliability and engineering as valid reasons for denying an application for a pole attachment. Utilities claim that not all poles are created equal. Houses, population, traffic, soil conditions and wind all factor into the safety and reliability of a pole.

5) Timelines for Approval: As noted above, on April 7, 2011, the FCC in its Pole Attachment Order provided two new timetables for approving pole attachments. The order would allow a maximum timeframe of 148 days for utility companies to allow pole attachments in communications space, with a maximum of 178 days allowed for attachments of wireless antennas on pole tops, and an extra 60 days for large orders as adopted on April 7, 2011.

As proposed in the bill, a local publicly owned electric utility must respond to a request for use by a Proponent within 45 days of the request or 60 days for requests to attach to over 300 poles. This is very similar to the recent FCC ruling. This bill states that when a request is denied, the local publicly owned electric utility shall provide in writing the response the reason for the denial and the remedy to gain access to the utility pole or support structure. This too is similar to what the FCC recently ordered.

If a request to attach is accepted, the local publicly owned electric utility will have 14 days to provide a cost estimate based on the actual cost for the work necessary to accommodate the attachment. In turn, the Proponent will have 14 days to accept the cost estimate. After the acceptance, the publicly owned electric utility will have 60 days, or 105 days in the case of requests to attach to over 300 poles, to notify any existing attachers that make ready work for a new attacher needs to be performed.

According to CMUA, the acceptance or denial of a pole attachment request may take more than 45 or 60 days depending on the municipal utility staff size, the size of the request, and the specific engineering of the pole in question as some pole have more complex engineering than others and attachment engineering reviews take longer for those poles.

The MID sees the value in setting forth a standard time frame for responding to pole attachment requests, MID also believes that there should be a provision for an extension of the standard time frame when circumstances warrant and upon agreement of the parties. The author and this

committee may wish to allow an extension of the standard time frame for special circumstances upon agreement of the parties.

REGISTERED SUPPORT / OPPOSITION:

Support:

AT&T

California Association of Competitive Telecommunications Companies (CALTEL)

California Cable & Telecommunications Association (CCTA) (Sponsor)

Verizon

Opposition:

California Municipal Utilities Association (CMUA)

Modesto Irrigation District (MID)

Northern California Power Agency (NCPA) (unless amended)

Sacramento Municipal Utility District (SMUD)

Southern California Public Power Authority (SCPPA)

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