



**Broadband Over Power Line:
Pole Attachment, Antitrust And Access Issues**

**Jack Richards
Thomas Magee
©Keller and Heckman LLP
1001 G Street, NW
Washington, D.C. 20001**

richards@khlaw.com

(202) 434-4210

magee@khlaw.com

(202) 434-4128

September 23, 2004

Many electric utilities interested in deploying Broadband over Power Line (“BPL”) technology are considering a variety of issues, including whether BPL attachments may be subject to regulation by the Federal Communications Commission or state agencies as pole attachments. Utilities also are investigating whether the electric space on their poles may be open to claims for access by unaffiliated BPL providers and other would-be attachers. Antitrust and common carrier nondiscriminatory access requirements also raise concerns.

This White Paper outlines these regulatory and antitrust issues. It is not intended to be an exhaustive review but provides a broad overview and framework for further analysis. Utilities interested in deploying BPL systems are encouraged to explore these issues in greater detail.

A. Background On Pole Attachment Regulation

Attachments to investor-owned utility (“IOU”) poles are subject to regulation by the FCC unless a state decides to regulate, in which case state regulation becomes exclusive in this area.¹ Eighteen states and the District of Columbia have certified that they regulate pole attachments, and many of these states follow the FCC’s rules. By statute, Rural Electric Cooperatives (“REC’s”)

¹ 47 C.F.R. § 224(c)(1).

are specifically exempt from FCC pole attachment regulation, but may be subject to state regulation (which often follows FCC rules) if a state asserts jurisdiction.²

The federal rules apply only to attachments by two types of entities: “cable television systems” and “providers of telecommunications services.”³ Under the rules, an IOU (or REC operating in states applying FCC rules) must provide these types of entities with “nondiscriminatory access” to any “pole, duct, conduit or right-of-way” that the utility owns or controls.⁴ Generally speaking, the FCC interprets this requirement to mean that access similar to what a utility grants to one cable or telecommunications company must be granted to all other cable and telecommunications companies.

B. BPL Providers Currently Do Not Appear To Qualify As Cable Systems Or Telecommunications Providers Eligible to Assert Pole Attachment Rights

As mentioned, only cable systems and telecommunications service providers are entitled to assert attachment rights under the Pole Attachment Act. A threshold question, therefore, is whether a BPL provider qualifies as either a cable system or a telecommunications service provider.

Among other things, to qualify as a “cable system,” a BPL provider would need to offer “video programming,” which is defined as “programming provided by, or generally considered comparable to programming provided by, a television

² 47 U.S.C. § 224(a)(1).

³ 47 U.S.C. § 224(a)(4).

⁴ 47 U.S.C. § 224(f)(1).

broadcast station.”⁵ While this is a factual question to be resolved on a case-by-case basis, current BPL technology does not appear to provide programming comparable to television broadcast programming. Nevertheless, BPL technology may soon evolve to the point where BPL providers can offer comparable video services. At that point, the BPL provider may be deemed to be the functional equivalent of a cable company if all other “cable system” requirements are met.⁶

As a general matter, “telecommunications services” is the unmodified transmission of information selected by the user between points specified by the user, that is made available for a fee to the general public.⁷ If BPL is limited to internal utility uses only (demand side management, automated meter reading, outage notifications, and the like), the service does not appear to qualify as a telecommunications service because it is not offered for a fee to the general public.

If BPL is used only to provide Internet access service, it likewise would not qualify as a telecommunications service because the FCC currently classifies Internet access as an “information” service, not a telecommunications service.⁸ In its recent *Brand X* decision, the Ninth Circuit vacated the FCC's determination and

⁵ 47 U.S.C. §§ 522(7), (20)

⁶ 47 U.S.C. §§ 522(7), (12), (20).

⁷ 47 U.S.C. §§ 153(43), (46).

⁸ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) (Cable Modem Declaratory Ruling & NPRM), aff'd in part, vacated in part, and remanded, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), stay granted pending cert. (April 9, 2004); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (Wireline Broadband NPRM).

ruled that cable modem service includes components of both information and telecommunications services.⁹ That decision, however, has been stayed pending Supreme Court review. If the Ninth Circuit decision stands, and the FCC is required to treat cable modem service as having a telecommunications service component, then Internet access service offered over BPL also could be found to have a telecommunications service component.

BPL also may be used to provide Voice over Internet Protocol (“VoIP”) service. Whether VoIP service will be regulated as a telecommunications service is currently the subject of the FCC’s *IP-Enabled Services*¹⁰ proceeding. That proceeding is designed to establish the regulatory framework for Internet Protocol (“IP”)-enabled services with respect to various underlying transport technologies, including BPL. But that proceeding may raise more questions than it answers. The Commission may very well end up determining on a case-by-case basis whether particular VoIP offerings by individual providers constitute telecommunications services.¹¹

So while BPL providers currently do not appear to qualify as “cable systems” or “telecommunications service providers” that might subject the utility

⁹ See *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. Oct. 6, 2003).

¹⁰ See *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (Mar. 10, 2004).

¹¹ The Commission already has made these particularized decisions in two cases. See *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd. 7457 (Apr. 21, 2004); *In the Matter of Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd. 3307 (Feb. 19, 2004).

to pole attachment-type regulations, that situation could change quickly in the future as the technology evolves to encompass new and expanded service offerings. Even if BPL providers were to qualify as “cable systems” or “telecommunications service providers,” however, the Pole Attachment Act still may not apply to BPL.

C. The Pole Attachment Act May Not Apply To Electric Distribution Wires

Some utilities may argue that Congress intended the Pole Attachment Act to apply only to attachments in the communications space, not to attachments in the electric space. Under this view, Congress did not contemplate mandatory BPL attachments in the electric space -- even if BPL service were deemed to be a cable or telecommunications service.

But this construction may be difficult to sustain in light of the literal wording of the Pole Attachment Act. A “pole attachment” is defined in the Act as “any attachment” to the utility’s “poles, ducts, conduits and rights-of-way.”¹² The plain meaning of the phrase “any attachment,” appears to make attachments to any portion of the pole -- whether inside or outside of the electric space -- subject to the requirements of the Pole Attachment Act. Applying the plain meaning of the statute, BPL on its face seems literally to include pole attachments within the electric space.

¹² 47 U.S.C. § 224(a)(4).

Importantly, however, BPL involves more than just attachments to utility poles. BPL also requires a utility to provide access to its electric distribution wires and to permit electrical impulses to be carried via those wires.

Electric distribution wires do not appear to qualify as either “poles, ducts, conduits or rights-of-way” covered by the Act. They are, instead, the vital arteries by which utilities provide electric services to their customers. As a result, although a BPL provider requesting access to a utility’s distribution plant may be seeking a “pole attachment,” it is also asking for something more near and dear to utilities: access to and use of the core electric distribution wires.

In our opinion, the current pole attachment rules do not require utilities to open access to their electric distribution wires to third parties for the provision of BPL service. We believe that a utility may not be compelled to allow an unaffiliated provider to access the electric space -- and electric wires -- for BPL, even if the BPL provider somehow were to qualify as a cable system or telecommunications service provider.

D. Requests For Access To The Electric Space By Non-BPL Providers Are Unlikely

As mentioned, the Pole Attachment Act requires utilities to provide the same level of access to all cable and telecommunications service providers.¹³ If a utility were to allow a BPL provider into its electric space, and if the BPL provider were

¹³ 47 U.S.C. § 224(f)(1).

to qualify as a cable system or telecommunications service provider, then non-BPL cable and telecommunications companies might seek similar access to the utility's electric space under this nondiscrimination requirement.

Having granted access to its electric space for BPL, it is unclear whether the utility would be entitled to deny access to that space by other, non-BPL cable and telecommunications attachers. Federal rules permit utilities to deny access to poles for safety reasons. Safety reasons, however, may be difficult to rely on as a basis for exclusion if a BPL provider (even a utility subsidiary) were already allowed to make attachments in the electric space.

Utilities also may deny access if insufficient capacity exists, but as a technical matter sufficient capacity for an additional wire may be available in the electric space. If the National Electrical Safety Code and other safety regulations prohibit communications wires in close proximity to electric wires, utilities should be prepared to explain why BPL attachments by utility subsidiaries are permissible in the electric space while attachments by other communications companies (*e.g.*, telecommunications and cable) are not.

Even if safety, reliability or capacity considerations do not justify excluding non-BPL cable and telecommunications companies from the electric space, it is still unclear whether the FCC would mandate access. Considering the potentially dire consequences -- and the FCC's lack of expertise with respect to the safe and efficient operation of electric distribution facilities -- the Commission may well be

reluctant to mandate open access to the electric space. If the Commission were so inclined, it is conceivable that FERC, RUS and other agencies with relevant expertise would become involved in the decision-making process.

In any event, the cost to a non-BPL cable or telecommunications company of attaching to the electric space may be prohibitive. In light of the expense of complying with stringent OSHA, NESC and other requirements, a non-BPL cable or telecommunications company lacking adequate communications space for its attachments likely would request that a utility change out to a taller pole before seeking access to a utility's electric space.¹⁴

E. An Unaffiliated BPL Provider May Attempt To Use Antitrust Principles To Demand Access To A Utility's Distribution System

Regardless of the language of the Pole Attachment Act, some unaffiliated BPL providers may argue that antitrust principles require utilities to open access to their electric distribution systems for the provision of BPL. As a general matter, the antitrust laws are designed to ensure equality of opportunity among business competitors. Section 2 of the Sherman Act prohibits any entity from monopolizing or attempting to monopolize trade or commerce.¹⁵

Pole attachment claims under the Sherman Act typically have been analyzed using the "Essential Facilities Doctrine." The Essential Facilities Doctrine applies

¹⁴ See, e.g., 29 C.F.R. § 1910.269.

¹⁵ 15 U.S.C. § 2.

when: (1) there is monopoly control of facilities; (2) the facilities cannot be duplicated; (3) it is feasible to provide access to the facilities; and (4) access is denied to a competitor. If all elements of the four-part Essential Facilities test are satisfied, a utility must provide equal access to all competitors at fair prices.¹⁶

Regarding the first criterion (monopoly control), would-be BPL attachers may have alternative means of delivering Internet access, VoIP, video-on-demand and other BPL-type services. For example, these types of services may be deliverable using the local exchange carrier's telephone wires, Wi-Max, Ka-Band Satellite or other technologies. Without monopoly control of the facilities, there can be no Essential Facilities violation.

With respect to the second part of the test (inability to duplicate), it has been widely argued that there are political and economic obstacles preventing pole attachers from installing their own, duplicate distribution systems, whether above ground or below. If true, that particular element of the Essential Facilities test would be satisfied.

The third part of the test (the feasibility of providing access to the BPL provider) is more problematic. BPL access may be considered "infeasible" because of safety, reliability and engineering concerns. State public service commission regulations also may prohibit access by non-affiliated entities. If a utility already has provided access over a portion of its system to a BPL provider

¹⁶ *MCI Communications Corp. v. American Telephone and Telegraph Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

(even a utility subsidiary), however, it may be challenging for the utility to argue that safety, reliability or engineering concerns preclude it from providing access to another, unaffiliated BPL provider (especially over a portion of the utility's service area that is unserved by BPL).

Part four of the Essential Facilities test requires that access be denied to a "competitor." At a minimum, to satisfy this test a utility must provide (or potentially provide) a service similar to the services to be offered by the BPL provider.¹⁷ In the case of a utility providing BPL in part but not all of its service territory, it could be argued that a BPL provider seeking access to the unserved portion does not compete with the utility for any of the same BPL customers and therefore is not a "competitor." With today's BPL technology, it also may be difficult as a practical matter for two incompatible BPL technologies to compete for customers on the same portion of the system.

In short, it is possible but in our view unlikely that antitrust principles would entitle an unaffiliated BPL provider to demand access to a utility's distribution system. Antitrust claims always have been difficult to establish, and many factors appear to rebut an antitrust claim with respect to BPL service.

¹⁷ Compare *Continental Cablevision of Ohio, Inc. v. Amer. Elec. Power Co.*, 715 F.2d 1115 (6th Cir. 1983) (no evidence of any existing or potential competition between utilities and cable companies) with *TV Signal Co. of Aberdeen v. AT&T*, 617 F.2d 1302 (8th Cir. 1980) (cable company and telco pole owner were actual competitors in the construction of cable distribution facilities and cable signals, and potential competitors in "broadband" services such as meter reading, at-home shopping, data services, etc.).

F. If BPL Qualifies As A Telecommunications Service, A Nondiscriminatory Access Requirement May Apply

In addition to issues regarding BPL access to utility poles and non-BPL access to the electric space, questions also may arise regarding access to the BPL-based service itself. If a BPL service provider (as opposed to the utility pole owner) is deemed to be a telecommunication service provider, the BPL service may be subject to nondiscriminatory common carrier access requirements. In other words, if a utility providing BPL service were deemed to be a telecommunications service provider (through application of *Brand X*, *IP-Enabled Services* or otherwise), federal statutes could require the utility to make its BPL service available to other service providers on a nondiscriminatory basis.

This open access requirement is derived from the common carrier obligations contained in Sections 201 and 202 of the Communications Act, which require that all common carriers, such as telecommunications companies, provide nondiscriminatory access to any parties seeking service to the extent that capacity is available.¹⁸

As a result, if BPL providers were found to be telecommunications service providers, they may face requests for access from competing ISPs or VoIP providers. Assuming there were no safety, compatibility or capacity issues preventing access, this nondiscrimination requirement could force the BPL

¹⁸ 47 U.S.C. §§ 201, 202.

provider to open access to its service to third party providers -- unless the FCC were to affirmatively decide to “forbear” from imposing open access requirements.

This FCC “forbearance authority” stems from Section 10 of the Communications Act, which authorizes the Commission to forbear from applying any regulation or statutory provision to a telecommunications service provider if the regulation is unnecessary and forbearance is in the public interest.¹⁹ At this early stage, it is unclear whether the Commission would assert its forbearance authority to foreclose access to BPL service by competing ISPs and telecommunications providers.

G. Conclusion

Due in part to the fact that BPL is a nascent technology, a certain degree of legal and regulatory uncertainty exists with respect to pole attachment, antitrust and access issues. Any utility interested in pursuing BPL opportunities should fully consider these issues and their impact.

In our view, even if BPL were to qualify one day as a cable system or telecommunications service, application of the Pole Attachment Act is inappropriate in light of the BPL provider’s need to access electric distribution wires in addition to poles. Non-BPL cable and telecommunications companies conceivably could request access to the electric space if a BPL cable or

¹⁹ 47 U.S.C. § 160(a).

telecommunications company were already granted access, but it is unclear whether the FCC would mandate such access and likely that those companies would be happier with a change out to a taller pole. We believe that any antitrust claim for access to the electric distribution system would be difficult for a third party BPL provider to establish under any circumstances. Finally, if BPL service were deemed to be a telecommunications service, a nondiscriminatory access requirement may apply to the BPL service itself -- but only to the extent that (i) capacity on the system is available, (ii) there are no safety, reliability or compatibility issues, and (iii) the FCC refrains from asserting its forbearance authority.

Jack Richards
Thomas Magee
©Keller and Heckman LLP
1001 G Street, NW
Washington, D.C. 20001

richards@khlaw.com
(202) 434-4210
magee@khlaw.com
(202) 434-4128

* * *

Mr. Richards is a Partner in the Washington, D.C. law firm of Keller and Heckman LLP (www.khlaw.com). Since joining the firm in 1986, he has represented electric utilities, commercial wireless service providers, mobile radio and microwave operators and others before the Federal Communications Commission and in various telecommunications business ventures. His clients include the National Rural Telecommunications Cooperative and the National Rural Electric Cooperative Association. Before joining Keller and Heckman LLP, Mr. Richards served for 10 years as an attorney with the FCC, where he held senior policy and management positions.

Mr. Magee represents investor-owned utilities, electric cooperatives, municipal utilities and other infrastructure companies before the Federal Communications Commission, federal and state courts, and state public service commissions. He advises these clients with respect to pole attachments and related matters, private wireless issues, broadband over power line, and other utility telecommunications issues. Mr. Magee also represents commercial wireless companies, telecommunications end users, tower owners and equipment manufacturers on communications matters. Before joining Keller and Heckman LLP in 2000, Mr. Magee represented natural gas producers in pipeline proceedings before the Federal Energy Regulatory Commission and later cable television companies before the FCC and state and local regulatory authorities.

The opinions expressed in this article do not necessarily represent the views of Keller and Heckman LLP or its clients.

This article is intended to provide a general overview of pole attachment, antitrust and access issues regarding the provision of Broadband over Power Line service. It should not be considered legal advice applicable to any particular factual or legal question.

* * *