

HOUSE BILL 1111

By Matlock

AN ACT to amend Tennessee Code Annotated, Title 65, Chapter 21, relative to pole attachment arrangements between utilities and attaching parties.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. As of the effective date of this act, most Tennesseans receive electric power from municipally owned utilities operated pursuant to § 7-52-103, other public or private act, or from rural cooperatively owned utilities doing business pursuant to the authority of title 65, chapter 25, or title 48, chapter 53. Because these entities are not governed by federal law in the same manner that investor-owned electric utilities are governed, this act is intended to provide a Tennessee-specific framework to promote efficient, fair, and reasonable attachment to poles owned by such non-investor-owned electric utilities pursuant to license agreements between such utilities and certain pole users. As of the effective date of this act, these utilities typically operate under long-standing joint use arrangements or other similar reciprocal agreements with other types of pole users, such as telephone companies that also own poles, and parents, subsidiaries, or other affiliated entities in their respective corporate families, within the utilities' respective service areas, and nothing in this act is intended to apply to such current or future arrangements.

SECTION 2. Tennessee Code Annotated, Title 65, Chapter 21, Part 1, is amended by adding the following language as a new section:

(a) Except where expressly stated otherwise, nothing in this section shall apply to, or impose obligations upon, any telecommunications carrier that, on the effective date of this act, owns more than three hundred thousand (300,000) poles in Tennessee or another state, or to such carrier's parents, subsidiaries, or other affiliated entities in such

carrier's corporate family, or to any joint use agreement or other similar reciprocal agreement between a utility and a telecommunications carrier that owns poles in the applicable utility's service area.

(b) As used in this section:

(1) "Attaching party" means the pole user or party entering into a pole attachment agreement with a utility for the purpose of making and maintaining wireline attachments;

(2) "Exempt attaching party" means a telecommunications carrier that, on the effective date of this act, owns more than three hundred thousand (300,000) poles in Tennessee or another state, and any parents, subsidiaries, or other affiliated entities in such carrier's corporate family, and also includes any other telecommunications carrier that owns poles in the applicable utility's service area and that, on or after the effective date of this act, has entered into or enters into a joint use agreement or other similar reciprocal agreement with the utility;

(3) "Governing board" means the board of directors or other governing body having responsibility for the operations of a utility;

(4) "National Joint Utilities Notification System" or "NJUNS" means the national organization of member utilities formed for the purpose of improving the coordination of joint ventures; and

(5) "Shared cost rate for licensees" means a rental rate applicable to an attaching party calculated by first establishing the total annual cost of pole ownership; including, without limitation, administration, depreciation, maintenance, taxes, and payments in lieu of taxes, cost of capital and a rate of return, and then allocating that total cost among pole users based on the system average number of pole users, providing for an equal allocation of support space on the pole among the pole users, an equal allocation of safety space on the pole among pole users other than the electric system, and an allocation of usable space to each pole user. The costs compiled in determining the total annual cost

of pole ownership shall be drawn, where possible, from the utility's last annual report to the Tennessee Valley authority or from guidance provided to the utility by the Tennessee Valley authority. The shared cost rate for licensees is not applicable to exempt attaching parties or to telephone companies that also own poles within the utilities' respective service areas and does not provide a benchmark or reference in the negotiation of joint use or other reciprocal arrangements with such companies or exempt attaching parties or their parents, subsidiaries or other affiliated entities in their respective corporate families. The shared cost rate for licensees is intended to provide the maximum appropriate rate for an attaching party;

(6) "Utility" means a municipally owned or other governmentally owned utility operated pursuant to § 7-52-103, any public or private act, or a rural cooperatively owned utility doing business pursuant to the authority of chapter 25 of this title, or title 48, chapter 53.

(c)

(1) Written consent from a utility shall be obtained before an attaching party may attach to, or otherwise use, a utility's poles. In addition, the attaching party shall report that attachment according to the processes provided in the applicable pole attachment agreement, which may include the use of the National Joint Utilities Notification System, within ten (10) days from the date of attachment. An existing pole attachment agreement between a utility and an exempt attaching party shall serve as consent for the exempt attaching party to attach non-guyed service drops to the utility's pole in accordance with subdivision (c)(2), unless such agreement provides otherwise. Notification, if any, for such

attachments by exempt attaching parties shall be governed by the pole attachment agreement or other arrangement between the parties.

(2) All attachments shall be made in accordance with the applicable provisions of the current American National Standard Electrical Safety Code, as described in § 68-101-104, to ensure the safety of the public and of employees of utilities.

(3) In the absence of contractual provisions between a utility and an attaching party addressing unauthorized attachment penalties, an attaching party that fails to obtain written consent before attaching its lines to, or otherwise using, the poles of a utility in violation of § 65-21-105 and subdivision (c)(1), or fails to report an attachment in violation of subdivision (c)(1), or violates subdivision (c)(2), shall, upon written demand, pay the utility a penalty not to exceed five hundred dollars (\$500) per violation per pole. The penalty assessed pursuant to this subdivision shall be paid within thirty (30) days of receipt of the written demand. Any undisputed penalty unpaid shall be subject to interest at the highest rate allowed by Tennessee law. All costs of collecting the penalty, including reasonable attorney fees, shall be paid by the attaching party. The penalty assessed pursuant to this subdivision (c)(3) does not apply to:

(A) An attaching party that is a government entity other than a publicly owned utility and that is making an attachment that it is otherwise expressly empowered by state statute to make;

(B) An attaching party operating under an expired or terminated contract and participating in good faith efforts to negotiate a contract or engage in formal dispute resolution, arbitration, or mediation regarding the contract; or

(C) An attaching party operating under a contract that is expired if both pole owner and attaching party are unaware that the contract expired and both carry on business relations as if the contract terms are mutually-agreeable and still applicable; or

(D) An exempt attaching party.

(4) A penalty imposed pursuant to subdivision (c)(3) shall be imposed no more than once per year, per attachment for a violation of each of subdivision (c)(1) or subdivision (c)(2); accordingly, the maximum penalty that may be assessed pursuant to subsection (c) shall be five hundred dollars (\$500) per year, per pole.

(d)

(1)

(A) To facilitate better working relationships between utilities, attaching parties, and exempt attaching parties on an operational level, there is hereby created a statewide operational working group to be comprised of twelve (12) individuals: six (6) of whom shall represent municipal electric systems and rural electric cooperatives; and six (6) of whom shall represent cable television, incumbent local exchange carriers, wireless telecommunications carriers, competitive local exchange carriers, or rural telephone cooperatives.

(B) No later than July 1, 2013, the speakers of the house of representatives and the senate shall each appoint an equal number of the six (6) representatives of electric systems and an equal number of the six (6) representatives of cable and telecommunications systems identified in subdivision (d)(1)(A). Each appointee shall have technical and

professional knowledge related to operation of the utility's, exempt attaching party's or attaching party's system.

(C) The Tennessee Municipal Electric Power Association and the Tennessee Electric Cooperative Association may provide the names of knowledgeable persons to be appointed to the working group to represent the interests of municipal electric systems and rural electric cooperatives. The Tennessee Cable Telecommunications Association, the Tennessee Telecommunications Association, and other telephone providers certificated by the Tennessee Regulatory Authority or wireless telecommunications carrier doing business in Tennessee may provide the names of knowledgeable persons to be appointed to the working group to represent the interests of cable television companies, incumbent local exchange carriers, wireless telecommunications carriers, competitive local exchange carriers, or rural telephone cooperatives.

(D) Subject to subdivision (d)(3), such representatives shall be appointed annually by the speakers. Representatives may be reappointed to serve on the working group. Representatives serving on the working group shall receive no state reimbursement for attending meetings of the group. If a vacancy occurs, the speaker making the initial appointment shall, after conferring with the appropriate trade associations listed in subdivision (c)(1), make the appointment to fill the vacancy.

(2) The working group shall meet periodically to address operational issues on a coordinated basis and to develop operational "best practices" that would be advisory recommendations to the utilities, exempt attaching parties, and attaching parties.

(3) No later than July 1, 2014 and annually thereafter through and including July 1, 2018, at which time the working group shall cease to exist, the working group shall file an annual report with the speaker of the senate, the speaker of the house of representatives, the house of representatives business and utilities committee, and the senate commerce and labor committee, summarizing the work of the working group together with any proposed legislative changes.

(e) To facilitate productive, community-focused contract negotiations between utilities and attaching parties, the following best practice standards shall apply to pole attachment contract negotiations between utilities and attaching parties:

(1) The utility that owns the pole shall provide sufficient time for meaningful negotiations between the parties. Such contract negotiations shall involve discussions among both parties, and allow for at least a ninety-day negotiating period for any substantial contract changes;

(2) The utility that owns the pole shall give appropriate consideration to any adverse impacts on broadband deployment and to providing additional predictability in future pole attachment rates. If a pole user demonstrates that rate increases will have a material adverse impact on broadband deployment, the parties shall explore mechanisms to mitigate that impact; and

(3) The parties shall explore whether rate increases are justified and can be coordinated with the attaching party's fiscal year end, to mitigate midyear budget impacts, and further explore the length of contracts generally entered into to determine whether longer contracts could be developed to provide more predictability for future rate changes.

(f) To provide a dispute resolution mechanism governing pole attachment rates between a utility and an attaching party, in the event an attaching party and a utility are unable to agree upon the rate for making pole attachments on the utility's poles in connection with negotiations to renew an existing pole attachment contract or, where no contract exists, negotiations to enter into a pole attachment contract, either party may file a petition with the governing board for a hearing and decision in accordance with this subsection.

(1) Petitions for hearings received by the governing board shall be forwarded immediately to the administrative division of the secretary of state's office for assignment to an administrative law judge. The hearing provided for by this subdivision shall be conducted as a contested case in the county in which the utility's principal office is located and in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, except as otherwise provided in this subsection. Contested cases initiated pursuant to this subdivision shall be heard by an administrative law judge sitting alone. The costs of the administrative law judge shall be divided equally between the utility and the attaching party.

(2) The administrative law judge to whom a case has been assigned shall convene the parties for a scheduling conference within fifteen (15) days of the date the petition for contested case is filed. The scheduling order for the contested case adopted by the administrative law judge shall establish a schedule that results in a hearing completed within ninety (90) days of the date on which the petition for contested case was received by the utility. Extensions of time or variances from the scheduling order shall be granted sparingly, and

only because of unforeseen developments that would cause substantial prejudice to a party.

(3) Following the conclusion of the hearing, the administrative law judge shall calculate a pole attachment rate that equals the shared cost rate for licensees. The order recommending the shared cost rate for licensees shall be entered within thirty (30) days of the date the hearing is completed. The administrative law judge shall furnish a copy of the record of the proceeding to the governing board along with its order, and the governing board shall consider the shared cost rate for licensees in its deliberations pursuant to subdivision (f)(4).

(4) Within thirty (30) days of the governing board's receipt of the order of the administrative law judge, the governing board shall either accept the calculation of the shared cost rate for licensees by the administrative law judge and establish a rate that is equal to or less than the shared cost rate for licensees or, upon making a written finding that the administrative law judge's calculation is not supported by substantial and material evidence, the board may reject the administrative law judge's calculation and establish a rate that it deems to be equal to or less than the correct shared cost rate for licensees. The rate shall become effective as of the date of the renewed or new contract.

(5) An attaching party aggrieved by the final decision of the governing board may within sixty (60) days file a petition for judicial review pursuant to the provisions for judicial review of contested cases in the Uniform Administrative Procedures Act in title 4, chapter 5, part 3, asserting that the governing board has established a rate in excess of the shared cost rate for licensees. In the case of a decision of the governing board of a municipally owned utility located in

a county having a population of greater than three hundred thousand (300,000) according to the 2010 federal census or any subsequent federal census, the petition for review shall be filed in the chancery court located in that county. In all other cases, the petition for review shall be filed in the chancery court of Davidson County. Consistent with the Uniform Administrative Procedures Act, the review shall be confined to the record established before the administrative law judge and the written finding, if any, of the governing board.

SECTION 3. This act shall take effect July 1, 2013, the public welfare requiring it.