

# Multichannel NEWSWIRE

## Cable's Big Worry: Getting Poleaxed

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Tom Steindler will argue his first case at the U.S. Supreme Court this fall — and he couldn't be happier. "This is going to be fun," he beamed.

The jovial Steindler, a lawyer with McDermott, Will & Emory, could become the cable industry's worst nightmare: He represents Gulf Power Co. in a lawsuit that could significantly change how cable operators are regulated, even though that change revolves around the Byzantine world of pole-attachment rates.

Many cable operators take for granted the regulated rates paid for pole attachments — often less than \$10 per pole per year.

But electric utilities think they're getting ripped off. They want those cable operators that offer advanced services to pay more — and not just a little more. Steindler foresees "market rates" that could climb as high as \$50 to \$60 per pole per year in some areas.

Last year, the U.S. Appeals Court for the 11th Circuit ruled that rate regulation shouldn't apply to cable operators that use their facilities to deliver Internet access or other nonvideo services. And in January, the Supreme Court agreed to review the decision.

"This case gives the court the opportunity to settle this question about how or whether cable-modem service should be regulated," Steindler said.

The case — *FCC and National Cable Television Association vs. Gulf Power Co.* — has tentacles that could change the way regulators treat cable operators that sell Internet service. The key question: When offered over cable plant, is high-speed Internet service a "cable service," a "telecommunications service," or something else entirely?

Right now, it's basically treated as a cable service. But a decision that classifies cable-modem service as a "telecommunications" product could force the FCC to apply common-carrier regulations to MSOs, and compel many operators to open their networks to competitors.

Under that scenario, cable operators would still be protected by a pole-attachment rate formula that applies to "telecommunications" carriers.

### 'OPEN SEASON' FEARED

The formula wouldn't apply if the high court agrees with Gulf Power's contention that Internet access over cable plant is neither a cable service nor a telecommunications product.

Were that to happen, it would be open season on the rates that pole owners could charge cable operators that also offer Internet services — within reason.

"We don't believe that there's a real market in the pole business," admitted Steindler in addressing cable's argument that there can't be a market rate when utilities have a monopoly on poles. "But it's easy to construct a market rate even where there's no free market."

Steindler said pole owners would rely on condemnation law, which defines the just rates of compensation that entities must pay for property as mandated by the Fifth Amendment.

"What do you do when there is no free market? You use traditional tools that appraisers use

to construct a market rate," Steindler said. "Let's look at what pole owners are providing: It's ready-made infrastructure.

"The question is, 'What is the value of that? What would it have cost cable companies to build that network themselves?'"

These arguments rankle Paul Glist, a lawyer at Cole, Raywid and Braverman, who represents the NCTA (now the National Cable & Telecommunications Association). Because no free market exists, it's impossible to arrive at "market rates" under any formula, he said.

Indeed, most appraised property has some value based on comparables (such as real estate in the surrounding area). That doesn't apply to poles, which were built over the course of almost a century under a major federal subsidy program.

Glist suspects that pole owners don't really expect to extract huge attachment fees from operators. Rather, operators would be forced to offer revenue splits or other incentives in lieu of the levies, he said.

"If the utilities could threaten you with these rates, then suddenly they would be partners in your business," he said. "It's either that or worse."

### **CLASSIFY A HERRING**

Of course, the cable industry has argued that the debate over the regulatory classification of cable-provided Internet service is immaterial to the Gulf Power case itself.

"That issue is a red herring," argued Glist, pointing to case law which suggests that data transmissions by cable operators are still defined as cable services. One such example is *Heritage Cablevision Associates vs. Texas Utilities Electric Co.*, a 1991 case in which the pole owner attempted to create a surcharge for nonvideo services.

A federal appeals court eventually ruled that pole-price protections apply to all attachments, "regardless of the type of service provided over the equipment attached to the poles."

But with the emergence of the World Wide Web, regulators and courts aren't giving as much deference to such precedents. Instead, they are grappling mightily with how to classify cable's broadband services in a new era of convergence.

Glist said he has learned to live with it.

"You get to a point in which a court or a regulator balks, and says, 'I don't care what the law said. It just doesn't feel right,'" said Glist. "At some point, a technology develops to the point in which a regulator said, 'I've got to find another bucket for this.'"

### **IT GETS COMPLICATED**

Said Robert Rini, a lawyer at Rini, Coran & Lancellotta: "We're all wrestling with convergence. If it's a cable service, maybe we need these rate protections. If it's not, maybe we don't."

One thing is certain: New regulatory buckets usually create complications, including questions as to how to classify different types of service, or whether to draw distinctions between different devices.

For example, a cable modem that sits inside a set-top box may transmit two-way data, some of which touches the Internet and some of which stays within the "walled garden" of the cable system. Should both products be treated the same way? And what about data that interacts with other devices in a home or business?

"If you try to put the Internet into one particular bucket, then the world is your oyster," Glist noted. Despite arguments to the contrary, he added, the government has always applied different rules to two entities providing the same content — for example, a movie that plays on television, rather than in a theater.

"We do that all the time," he said. "The same stuff is treated differently based on the means of delivery. It might be different if it comes through my cable or my refrigerator."

Cable operators' fears with respect to out-of-control pole owners stem from a history of mistrust, not to mention prior experiences with rural electric cooperatives that are exempt from the pole-attachment rate rules.

"It's the rural co-ops that are the problem," said Time Warner Cable spokesman Mike Luftman. "They can just set whatever rate the traffic will bear. And if you agree to pay these kinds of inflated rates, it's like a domino effect. Every co-op in the surrounding area wants to charge the same."

Operators are understandably anxious to avoid a nationwide free-for-all that would make what they've experienced in rural areas a more widespread phenomenon. In one recent dispute, Time Warner Cable decided to bypass poles altogether when the pole owner demanded a sharp increase.

"We just decided to go underground," Luftman said.

To that point, electric utilities argue that operators can exercise other options to build out their networks and don't need a subsidy from the government.

"It is largely rubbish to say that cable operators don't have alternatives," said Steindler. "They could do street cuts or dig trenches. The reason they don't is that they get this deep rate cut to get on poles. Cable is one of the most subsidized industries in America."

If such words sound ironic coming from someone who represents an industry that has lived on subsidies for a century, he said, then get over it.

"My response is, 'Sorry, but that was a decision made by the federal government,' " he said.

### **NCTA'S WEB TIRADE**

Of course, that creates a political dynamic. Even the consumer section of the NCTA's Web site includes a tirade about pole-attachment rates: Visitors are warned that pole owners are trying to raise rates by up to 600 percent.

"That could increase a subscriber's bill by up to \$2 per month, not for service improvement, but because utility and phone companies want to make it more expensive for cable to compete with telephone companies and utilities," the site contends.

But the electric utilities aren't political novices either. Said Steindler: "Whatever increases in revenue that result from higher pole-attachment revenues will ultimately be passed on to electric-utility consumers. And unlike cable, everyone in America uses electricity. That's our political counterpoint."

Translation: It's a wash.

Telcos — which, as common carriers, must allow competing ISPs to use their networks — have long argued that allowing cable operators to block such access puts them at a competitive disadvantage.

"Cable-modem access service is not a cable service," insists United States Telecom Association vice president of regulatory affairs and general counsel Lawrence Sarjeant. "When you state that you need protection on these poles, you have stated that you're a telecommunications service. It's no different than a telecommunications transport service."

The USTA has filed briefs in the *Gulf Power* case in which it argues that cable-provided Internet access should be classified as a telecommunications service.

To that point, section 224 of the 1996 Telecommunications Act appears to draw distinctions between rates charged "for any pole attachment used by a cable television system solely to provide cable service" and those used for "telecommunications" services offered by cable operators.

"It's very hard to read [section 224] and not conclude it's not a cable service," Sarjeant said. "But [the *Gulf Power* case] should help crystallize the issue."

Still, he said, no one can predict how far the Supreme Court's ultimate ruling will reach. Added Glist: "There's no doubt that reasonable minds can disagree. There are three cases out there, all with three different decisions."

In addition to the *Gulf Power* decision, the Appeals Court for the 9th Circuit ruled in *AT&T vs. City of Portland* that cable-modem service is a telecommunications service (even though AT&T and Cox argue that's simply court "dicta").

In *MediaOne Group Inc. and AT&T Corp. vs. Henrico County*, however, a U.S. District Court

ruled that data provision is a cable service. (That case was appealed to the U.S. Court of Appeals for the 4th Circuit, which had not ruled by press time).

Then there's a 1999 case in which South Florida U.S. District Court Judge Donald Middlebrooks ruled that Broward County, Fla.'s open-access ordinance violated the operator's First Amendment rights.

"We just have a lot of conflicting decisions right now," notes Rebecca Duke, senior counsel at the Washington law firm of Holland & Knight. "And the FCC is arguing that when a statute is ambiguous, the agency has deference."

Of course, it's questionable if the FCC would step into the fold unless the Supreme Court ordered it to do so. The agency has so far declined to make any move that would be interpreted as regulating the Internet.

That includes the creation of any new regulations for Internet services or the opening of a rulemaking on open access, although that question is now the subject of a "notice of inquiry."

The agency is also under the direction of a Republican administration, and new chairman Michael Powell has made no secret of his reluctance to regulate. He will soon have a Republican majority on the FCC, assuming Congress approves President Bush's nominees for commissioner.

Pole owners shouldn't look to local governments for support, either. Municipalities stand to benefit if data service is classified as a "cable service," because they can then argue that it falls under their franchising jurisdiction.

"Local governments say, 'Great, we can regulate this and get 5 percent of the revenue,' " noted Duke, a former government attorney. If the Supreme Court puts its stamp of approval on the "cable service" classification, she said, cities could be even more emboldened to apply other franchising powers to cable-modem service.

"Any authorization they have to regulate cable service could potentially apply," she said.

## **LIABILITY CONCERNS**

But despite the Gulf Power case's knack for raising larger issues, it's still primarily a case about the rates pole owners are allowed to charge those who would attach to their poles. The Supreme Court could decide to address those issues narrowly, inserting language that would minimize the ruling's impact on other areas of telecom policy.

Even a narrow ruling that doesn't touch on the "cable service" question raises another issue that could be at least as daunting for operators across the U.S. — liability.

"Cable could be looking at millions in back payments for all of those casual attachments over the years," said Jonathan Kramer, president of municipal consultancy Kramer. Firm.

According to Kramer, cable installers have hammered "P-hook" nails into poles during installations for years, typically when running a cable line from the curb to the home. Though such attachments are usually unauthorized, he said, sending someone out to find them is generally not worth a utility's expense.

But if utilities were to win the Gulf Power case, he said, finding those attachments could prove very lucrative — and might even yield back payments.

"Every one of those P-hooks is a pin on a grenade, waiting for a utility to pull it," he said. "That extra hook actually becomes a pole attachment, and it's seldom just one on each pole.

"It's pretty easy to tell when the attachment was made," Kramer added. "All you have to do is check when the person's cable was installed."

And there's another problem: Kramer said such hookups often violate the National Electrical Safety Code (NESC), which governs the spacing that's required between pole attachments. In that case, it becomes an issue for the local government responsible for ensuring NESC compliance.

"It is consistent," he said. "It is widespread. It's a ticking time bomb."

In most cases, Kramer said, cities would give cable operators time to correct the problem rather than levy fines, but either scenario would involve huge expenses for cable operators.

"This can run into serious money," he said.

Of course, not everyone agrees that liabilities are hanging over the industry. And Glist said any attempt by pole owners to act as if they were unaware of existing attachments would be a stretch.

"Investor-owned utilities not only can, but do audit those poles already," he said.

Even Steindler demurred when asked if cable operators would be liable for unauthorized attachments. But pole owners would be more likely to check if the rate structure were higher, he agreed.

"With the rates being so low, there's less attention paid to them than there would be if they were getting market rates," he said.

At the very least, pole owners could demand payments from here on out. Said Duke: "If it goes to \$35 or \$40 per pole, then it may get to be worth their while to check them."

With oral arguments in the Gulf Power case likely for October or November, a final decision won't likely be made before next year. Until then, cable operators will have to wait to find out whether the once-arcane issue of pole attachments changes the dynamics of the entire industry. It may be best not to think about that.

Said Glist: "Things are so subtle with all of these different paths the court could choose, it's just too much of a nightmare to contemplate."

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