

March 5, 2013

The Honorable Art Swann
Chairman, House Business and Industry Subcommittee
Tennessee Legislature
Nashville, Tennessee

Chairman Swann,

We understand that soon you will be undertaking a review of legislation, SB1222 and HB1111, which would allow Tennessee's electric cooperatives and government-owned utilities to increase the amount they charge for telecommunications companies, including cable, to attach fiber lines to the utility's poles. In other words, to consider legislation that would allow for a radical increase in the "pole attachment fee" in Tennessee.

The Institute for Policy Innovation (IPI) is a 25 year-old free market policy organization. IPI's focus is on approaches to governing that harness the strengths of individual liberty, limited government, and free markets. IPI does not lobby and does not engage in political activity. We are, however, free to analyze legislation and share our input with you, which we hope you will consider.

We have long had an interest in communications policy across the country, our interest driven by our commitment to advancing ideas to grow our economy, and our understanding that technology is a key part of that formula. We have worked with the federal government and in a variety of states to help craft successful communications policy. This interest is what led us to discover the proposals on pole attachments advancing in Tennessee. We are concerned that the proposal to allow government owned utilities to raise prices against their broadband competitors leads to discriminatory treatment of competitors, hampers broadband deployment across Tennessee, and expands the power of government via increased taxes.

Municipal Utilities and Broadband Providers Raise Costs of Private Sector Competitors

The proposed new system in HB 1111 and SB 1222 is fervently supported by the electric cooperatives and the government owned utilities for good reason – they are merely seeking a way to use the force of government against their private sector competitors. The proposal would allow them to radically raise their rates for pole attachments to multiples of the national average.

Currently, while the national average payment to attach to a pole is near \$7, in Tennessee the average rate is \$17, already 143% higher than the national average. The “shared cost” proposal to come before you would allow for these government

www.ipi.org

Tom Giovanetti
President
tomg@ipi.org

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Zyrex*

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*Professor of Politics
Hillsdale College*

1660 South Stemmons,
Suite 245
Lewisville, TX 75067
(972) 874-5139 voice
(972) 874-5144 fax

email ipi@ipi.org

entities to charge their competition more than \$33 per attachment or more than 371% of the national average, and double the current Tennessee rate. Justification for such stunning increases are scant as the electric company's costs do not increase because of the pole attachments especially as any actual, new costs are paid immediately by the attaching company.

To be clear, this is not an issue of the free market failing. The issue is there is no free market for attaching to electric poles. The poles are owned by the government, the rents set by the government without any sort of market analysis, and the fees collected are not applied based on real costs. Rather, these charges essentially function as a broadband tax, and worse, one that is imposed on private sector broadband providers who are, in some cases, the government's competition since some of these same entities are government owned providers of broadband.

Objections by providers to this anticompetitive tax often cause the pole owning government entity or co-op to balk at granting access to the pole or even to flat out deny any new attachments. The results of such biased action result in the obvious – customers denied the opportunity to receive service, hence slowing the continued roll out of national broadband.

Like Not Being Treated As Like

Nearly ten years ago we first drafted principles for state communications policy. One of the key principles is that communications and tax policy should be technologically neutral. Why should one method for accessing the Internet be highly taxed and regulated, while others are not? Why are communications companies more highly taxed and regulated than other industries? One would think they should be taxed at lesser rates given our reliance on communications to improve so many facets of life.

Why should co-ops or municipal electric systems be in the position to arbitrarily raise costs on broadband providers? And why would a state ever allow a municipal competitor to be in the position to extract payments of their choosing from their private sector competitors? Certainly this is an example of the worst of government.

Moreover, some competitors have already cut separate contractual deals further undermining a truly competitive market where like products and services compete on a level playing field to bring their best to the customer for the lowest price.

A policymaker's goal should be neutrality, so that technologies and companies succeed or fail in the marketplace, and not because of extra charges applied only on certain competitors in a market.

Slowing the Broadband Rollout

To meet the ever-increasing demand for new technology and faster speeds, broadband companies must constantly invest to increase capacity for their existing lines and add lines which require pole attachments to poles. Attaching to a pole is really the only practical way to expand service as the costs for burying lines underground are largely prohibitive.

The already high costs imposed in Tennessee have caused some broadband providers to question the reasonableness of the rates, which in turn has led some of the utilities to stop allowing attachments at all. Questioning the exorbitant rates will only increase if this proposal were enacted, resulting in a rate increase of approximately \$20 million per year—the largest tax or fee increase ever imposed on the broadband industry in Tennessee.

Rather, government should be asking what it can do to enhance broadband availability and penetration. Requests to affix new fiber lines to an existing pole should be welcomed, even encouraged, with rates that are reasonable and designed to encourage greater broadband roll out, not rates designed to benefit the local co-op, municipal electricity company, or government broadband provider.

This slowing down of the broadband rollout stands in absolute opposition to the national policy of greater broadband deployment across the country.

Cable and telecom providers certainly should be charged a reasonable rate for attaching their facilities to the utilities' poles. But absent a true economic case to the contrary, rates in Tennessee are already more than sufficient, and likely should be reduced not raised, particularly as broadband Internet services being provided over the cable attachments does not impact the costs incurred by utilities allowing pole access. Adoption of a lower pole attachment rate will promote continued expansion of broadband deployment in Tennessee, in line with national policy.

But in the meantime, current delays because of high costs, and the future longer delays brought on by yet even higher costs, result in limited coverage for consumers and in some cases no service at all. These high fees deny the digital opportunity to many, and particularly limit innovation at the edge of the networks.

Decreasing Investment in Tennessee

As the cost of making an investment increases the amount invested will decrease, or said another way, the higher the price, the less you get.

As already mentioned, the current proposal will increase the cost of broadband investment in Tennessee by the private sector by \$20 million thereby making

investment less likely, or certainly decreasing the amount invested. In addition, there will simply be less to invest as the increased tax burden decreases capital available for investment. And it is precisely capital investment that results in the building of plant and purchase of equipment that leads to new job creation.

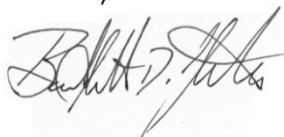
Fortunately a Better Alternative Is Available

Other bills (HB 567 and SB 1049) have been introduced that do take into account the concerns that have been raised here. These proposals aim to create a just, fair and non-discriminatory system through the establishment of reasonable rates and the use of a neutral third party to hear disputes over pole attachment rates, terms, and conditions. These alternatives are the better way for Tennessee. In fact, some of Tennessee's neighbors, such as Virginia and North Carolina, have come down on the side of these just, fair and reasonable proposals.

In this case pursuing fairness does not just return an academic sense of doing the right thing, but also returns greater investment in Tennessee. In return, that investment in broadband infrastructure leads more jobs for those in the state.

We sincerely hope that the elected leaders of Tennessee will stand for just treatment and fairness, and turn their backs on discriminatory treatment of some to favor others—that those leaders will indeed show Tennessee as “America At Its Best!”

Sincerely,

A handwritten signature in black ink, appearing to read "Bartlett D. Cleland". The signature is fluid and cursive, with the first name being the most prominent.

Bartlett D. Cleland
Policy Counsel