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Round Two: Joint Use After the D.C. Circuit's Pole Attachment Decision



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On February 26, 2013, the U.S. Court of Appeals for the D.C. Circuit rejected a challenge mounted by electric utilities against the Federal Communications Commission's 2011 Order regarding pole attachments. The unanimous decision in *American Electric Power Service Corp. v. FCC*, D.C. Cir., No. 11-1146, 02/26/13, sets the stage for incumbent local exchange carriers ("ILECs") to obtain significantly reduced rates that approximate the rates paid by their competitors for attachment to electric utility poles. Securing these rates from electric companies ("ELCOs"), however, will likely require ILECs to overcome fact-based arguments regarding the Order's proper application, an increased effort to transfer pole attachment regulation to State authorities, and negotiations intended to recoup lost rate revenue through added fees. In this article, we will summarize the FCC findings that were challenged before the D.C. Circuit, the D.C. Circuit's affirmance of the findings, and the basis for our conclusion that, although the judicial decision should accelerate resolution of

longstanding rate disputes, it is more likely to serve as just the next step in a continuing quest for the just and reasonable attachment rates, terms, and conditions that federal law promises ILECs.

The Challenged FCC Findings. The D.C. Circuit's decision follows years of debate regarding the need for FCC oversight of the rates, terms and conditions for the attachment by ILECs to utility poles.¹ With its April 2011 Report and Order and Order on Reconsideration, the FCC recognized that comprehensive reform of its pole attachment rules was needed in order to "promote competition" and "reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks, in order to accelerate broadband buildout."² In so doing, the Commission made three findings that were unsuccessfully challenged by ELCOs before the D.C. Circuit.³

First, the Commission concluded that the pole attachment statute guarantees to ILECs just and reasonable rates, terms and conditions, and provides a mechanism for enforcing that right before the Commission. "In particular, section 224(b)(1) provides that the Commission 'shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.'"⁴ A "pole attachment" under the statute is "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or

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¹ See Christopher S. Huther, Megan H. Troy & Timothy J. Tardiff, *A Legal and Economic Justification for a Uniform Pole Attachment Rate* (parts I, II, III, and IV), Communications Environmental & Land Use Law Report, Nov. 2008, Dec. 2008, Jan. 2009, and Oct. 2010.

² See Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan For Our Future*, 26 FCC Rcd 5240, 5241 (¶ 1) (Apr. 7, 2011) ("Pole Attachment Order").

³ The scope of this article is limited. We do not address every aspect of the FCC's Order or their possible effect on the joint use environment.

⁴ *Pole Attachment Order*, 26 FCC Rcd 5240 at 5331 (¶ 209) (quoting 47 C.F.R. § 224(b)(1)).

right-of-way owned or controlled by a utility.”⁵ The Commission, accordingly, concluded that the pole attachments of ILECs are statutorily entitled to rate regulation because they are the attachments of “providers of telecommunications service.”⁶ In reaching this conclusion, the Commission rejected the argument that the statutory definition of “telecommunications carrier,” which explicitly excludes ILECs and is used in Section 224(e) and (f), controls the meaning of the different statutory term “provider of telecommunications service” that is used in Section 224(b).⁷

The Commission’s recognition of the statutory right was a departure from its prior practice, but one that was required by the plain text of the statute. Moreover, the Commission compiled substantial record evidence that oversight of ILEC rates, terms and conditions is needed to eliminate the “widely disparate pole rental rates” that ELCOs extracted from ILECs in private negotiations, as compared to the regulated rates obtained from cable television companies (“CATVs”) and competitive local exchange carriers (“CLECs”).⁸ The record showed that in many cases ELCOs had exercised near monopoly bargaining power over ILECs based on their significantly greater percentage of pole ownership and obtained pole attachment rates from ILECs each year in amounts \$320 million to \$350 million greater than it could obtain from CLECs and CATVs for their attachments to the same poles.⁹

Because “actions to reduce input costs, such as pole rental rates, can expand opportunities for investment,” and thus can encourage “deployment decisions for all telecommunications carriers, including incumbent ILECs,”¹⁰ the Commission instituted a principle of competitive neutrality for ILEC attachment rates to govern future FCC complaint proceedings.¹¹ In other words, where an ILEC attaches to an ELCO pole, the ILEC should receive the same rate as a comparable CLEC or CATV attacher or, in any event, a rate no higher than that calculated using the FCC’s preexisting telecom rate formula.¹² The Commission thus endeavored to ensure that the access to poles provided to ILECs, like that provided to their competitors, is not “more burdensome or expensive than necessary.”¹³

Second, the Commission extended its principle of competitive neutrality to the CLEC context in order to reduce the rates paid by CLECs to a level that approximates the rate paid by their CATV competitors.¹⁴ The FCC did so by retaining its preexisting telecom formula (Rate = Space Factor x Cost), but reinterpreted the Cost

element to reduce the percentage recovery of the fully allocated cost of a pole in urban areas from about 11.2 to 7.4 percent, and in non-urban areas from about 16.9 to 7.4 percent, thereby approximating the recovery of about 7.4 percent under the cable formula.¹⁵ The new rate thus also helps “remove the market distortions that affect attachers’ deployment decisions,”¹⁶ including those distortions that have resulted in the wide disparity of rates between ILECs and their competitors.

Third, the FCC extended the period for which refunds may be obtained in an FCC complaint proceeding alleging unreasonable attachment rates. Rather than restricting refunds to the period starting when the FCC complaint was filed, the Commission decided to determine the refund period “consistent with the applicable statute of limitations.”¹⁷ The new rule is intended to ensure full recovery and encourage “pre-complaint negotiations between the parties to resolve disputes about rates, terms, and conditions of attachment.”¹⁸

The D.C. Circuit Decision. On appeal, Senior Judge Stephen F. Williams, writing for a panel of the Court including Judge David S. Tatel and now-Senior Judge David B. Sentelle, rejected every argument pressed by the ELCOs in opposition to the FCC’s Pole Attachment Order.

First, the Court upheld the FCC’s decision that the pole attachment statute confers upon ILECs the right to just and reasonable rates, terms and conditions when they attach to utility poles, and to Commission oversight to ensure their reasonableness.¹⁹ The Court agreed with the Commission that Section 224(b), by extending these rights to “pole attachments,” defined in Section 224(a)(4) to include the attachments of “provider[s] of telecommunications services,” extended the right to ILECs.²⁰ It further held that “Congress’s uses of the two terms (telecommunications carrier, provider of telecommunications services) conform readily to th[is] understanding” because it “suggests an entirely intentional character in § 224(a)(4)’s use of the broader term” that sweeps in ILECs.²¹

Doubting that the Commission’s “prior interpretation was reasonable” given the plain language of the statute, the Court nonetheless assessed the reasons given by the Commission for the change in its interpretation of Section 224 for reasonableness.²² Considering the record, and the ELCOs arguments, the Court found “every reason to believe the new view satisfies” the legal standard on review.²³ The record included data showing “that equality [in pole ownership] had . . . eroded, leaving the

⁵ See *id.* (quoting 47 C.F.R. § 224(a)(4)).

⁶ *Id.* at 5332 (¶ 211).

⁷ *Id.* at 5331 (¶ 210).

⁸ *Id.* at 5243 (¶ 6), 5327 (¶ 199).

⁹ *Id.* at 5330-31 (¶ 208).

¹⁰ *Id.*

¹¹ *Id.* at 5336 (¶¶ 217-18).

¹² *Id.*

¹³ *Id.* at 5243 (¶ 6).

¹⁴ *Id.* at 5303 (¶ 147).

¹⁵ See *id.* at 5304 (¶¶ 149-150).

¹⁶ *Id.* at 5295 (¶ 126).

¹⁷ *Id.* at 5289 (¶ 110).

¹⁸ *Id.* (¶ 111).

¹⁹ Slip op. at 6-9.

²⁰ *Id.* at 8.

²¹ *Id.*

²² *Id.* at 9.

²³ *Id.*

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power companies with a far higher proportion of poles and a lesser incentive to share” and the ELCOs had not presented “conflicting data on the current situation, nor any actual reason to suppose that the Commission’s numbers are materially unrepresentative.”²⁴ Accordingly, the Court upheld the Commission’s view that ILECs are “providers of telecommunications services” for purposes of Section 224.

Second, the D.C. Circuit affirmed the FCC’s decision to interpret its rate formula to result in competitively neutral rates for CLECs and CATVs. Recognizing that “[t]he Commission expressly justifies its current policy in terms of eliminating the differences between the cable and telecom rates,” the Court held that the Commission had authority to change its interpretation of “cost,” and that the ELCOs offered “neither theory nor fact to contradict the Commission’s fundamental proposition that artificial, non-cost-based differences in the prices of inputs among competitors are bound to distort competition, handicapping the disfavored competitors and at the margin causing market share and capital to flow to less efficient firms.”²⁵ The Court, accordingly, held that the change was reasonable and entitled to judicial deference.²⁶

Third, the D.C. Circuit held that the ELCOs’ challenge to the FCC’s decision to expand the period for pole attachment rate refunds had “no serious statutory basis.”²⁷ As the Commission had authority to “regulate the rates, terms, and conditions for pole attachments,” to “adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions,” and to “take such action” following a complaint determination “as it deems appropriate and necessary,” the Court found it “hard to see any legal objection to the Commission’s selection of any reasonable period for accrual of compensation for overcharges or other violations of the statute or rules.”²⁸ The Court further found that the ELCOs failed to point to any “material flaw” in the Commission’s reason for the change—that the new refund period would ensure full recovery and encourage pre-complaint negotiation—or to “any powerful countervailing consideration.”²⁹

The Decision’s Impact on Joint Use. The decision of the D.C. Circuit marks the end (assuming certiorari review is not successfully sought) of a long and contentious debate over the meaning of Section 224(b). In no uncertain terms, the D.C. Circuit solidified the right of ILECs to just and reasonable rates, terms, and conditions of attachment, and approved the FCC’s policy decision to reduce pole attachment rates by incorporating principles of competitive neutrality into the rate analysis for ILECs and CLECs. The decision thus affords protection to ILECs unable to negotiate reasonable rental rates with ELCOs and to those who are otherwise unable to renegotiate rates established by agreements entered long ago. It also provides a solid basis for ILECs to reduce or eliminate the rate disparity that has existed for several years with respect to their CLEC and CATV competitors.

²⁴ *Id.*

²⁵ *Id.* at 9-13.

²⁶ *Id.* at 13.

²⁷ *Id.*

²⁸ *Id.* (quoting 47 U.S.C. § 224(b)(1)).

²⁹ *Id.* at 14.

At the same time, the decision resolves one of many issues that ILECs face in negotiations with ELCOs. As the legal adage goes, “if you have the law on your side, pound the law; if you have the facts, pound the facts; if you have neither, pound the table.” ELCOs may no longer have the law on their side, but they can be expected to argue the facts to try to avoid rate reductions going forward. The decision can thus be expected to change the nature of the debate, but not to eliminate it. Based on recent developments in the industry, we expect that the ELCOs will focus their fact-based arguments on three areas: (1) distinguishing the facts from the record considered by the FCC, (2) seeking State, rather than federal, oversight of pole attachments, and (3) recapturing lost rate revenue through added fees.

First, ELCOs can be expected to argue during negotiations, litigation, and FCC enforcement proceedings that facts pertinent to a particular relationship with an ILEC do not justify rate relief under the FCC’s Order. For example, ELCOs have already seized on specific words in the FCC’s Order to try to deny it widespread applicability. The public documents in one ILEC Complaint proceeding at the FCC, for example, show that ELCOs have defended their rate demands by pointing to the FCC’s discussion of “new agreements” to argue that the Order does not apply to any poles for which attachment was made under a prior agreement. Under this view, the Order would fail to offer relief to the vast majority of the joint use network that has already been deployed, directly contrary to the Commission’s intent. In negotiations, ELCOs have also seized on this language to attempt to deny rate relief absent full and complete termination of all terms and conditions of an existing joint use agreement. Given the prevalence of “ever-green clauses” and the longstanding recognition that neither ILECs nor ELCOs need to remove their attachments during negotiations for a replacement agreement, this argument is designed to leverage the real-world implications of termination for ILECs in order to retain existing, exorbitant rates. The FCC has noted, however, that ILECs would be entitled to relief under the “sign and sue” rule should they be required to agree to unreasonable rates, terms, and conditions “simply to maintain pole access.”³⁰

Another argument pressed by ELCOs has focused on the Commission’s recognition that, in general, ILECs “own fewer poles now than in the past, and this relative change in pole ownership may have left incumbent ILECs in an inferior bargaining position to other utilities.” ELCOs have argued that the FCC’s observation about an overall shift in pole ownership limits the Order’s applicability to joint use relationships that have, in fact, experienced a significant change in the pole ownership disparity. In so arguing, ELCOs seek to deny relief where it is especially needed—where ILECs have historically and consistently owned far fewer poles. The ELCOs’ argument would irrationally limit the FCC’s decision by denying relief in cases where market inequality or other factors have always precluded competitive negotiations or just and reasonable rates.

Second, ELCOs can be expected to press in favor of State, rather than federal, oversight of pole attachments based on their perception of a friendlier audience at State utility commissions. To date, 20 states and the District of Columbia have certified that they regulate

³⁰ See *id.* at 5335 (¶ 216 & n.655).

pole attachments pursuant to Section 224(c), thereby denying the Commission jurisdiction to adjudicate an ILEC rate dispute. Given the rate reductions now affirmed by the D.C. Circuit, ELCOs can be expected to launch an effort to convince additional States that their need for additional revenue to maintain their plant and facilities counsels in favor of State regulation and certification under Section 224(c). Indeed, in at least one proceeding before a State public utility commission, an ELCO has sought State regulation of an ILEC dispute irrespective of statutory certification.

ELCO State efforts will also focus on codifying regulations that favor higher rates for ELCOs. In Tennessee, for example, where certain ELCOs (cooperatives and municipalities) already receive rates nearly two and a half times the national average (\$17/pole), ELCOs are lobbying in favor of a bill that would increase attachment rates to more than five times the average (\$33/pole). The result of State regulation, however, is not a foregone conclusion. In some States, such as Texas, legislatures have recognized the same rate disparity identified by the FCC and have tied the rates available to those calculated under FCC methodology. Industry participants, accordingly, will be well served by actively engaging in the State legislative process.

Third, the future of joint use relationships will inevitably involve ELCO efforts to recoup lost rate payments through additional fees and charges. Under existing

agreements, ELCOs are likely to seek more revenue by trying to count additional attachments during pole audits and by increasing pole inspections for contract violations that may not have been pursued in the past. In negotiations for new joint use agreements, ELCOs will increasingly focus on including language that sets ILECs apart from their CLEC and CATV competitors to establish a basis for a higher rate under the FCC's Order, and contractual provisions for new fees and charges associated with topics like make-ready work, unauthorized attachments, and safety violations. ILECs, accordingly, will need to approach pole audits and negotiations carefully in order to protect the statutory right to just and reasonable rates, terms, and conditions that has now been recognized by the FCC and the D.C. Circuit.

Conclusion. The D.C. Circuit's recent decision establishes the statutory right of ILECs to just and reasonable attachment rates comparable to those paid by CLECs and CATVs to attach to the same ELCO poles. The recognition of that right, however, is merely the prologue to the next set of arguments that ELCOs will press in an attempt to maintain the status quo. However, with good arguments of their own and the law now firmly on their side, ILECs should seize the opportunity presented by the decision to obtain the just and reasonable rates to which they are entitled.