

D.C. Circuit Upholds FCC Pole Attachment Rate Order

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Wiley Rein, with Helgi C. Walker as lead counsel for a coalition of incumbent local exchange carrier (ILEC) intervenors, helped persuade a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit to reject a challenge mounted by electric utilities against the Federal Communications Commission's (FCC) 2011 order regarding pole attachments. Ms. Walker is chair of the firm's Communications Appellate Practice and co-chair of the Appellate Group.

Senior Judge Stephen F. Williams, writing for a panel of the Court including Judge David S. Tatel and then-Chief Judge David B. Sentelle, upheld the FCC's decision that the pole attachment statute, 47 U.S.C. § 224, confers upon ILECs the right to just and reasonable rates when they attach to utility poles.

Stating that the FCC's current position was a departure from its prior interpretation excluding ILECs from the protections of Section 224, the Court expressed "doubt [that] the prior interpretation was reasonable" and concluded that, even assuming it was, the FCC had presented a valid basis for the change. Accordingly, the Court "uph[e]ld the Commission's view that ILECs are 'providers of telecommunications services' for purposes of § 224(a)(4)," thereby entitling them to just and reasonable pole attachment rates, terms and conditions.

The D.C. Circuit also affirmed the FCC's decision to adopt rates for telecom attachers that are substantially equivalent to rates previously set for attachments by cable companies. The Court recognized as valid the FCC's basis for revising the telecom rate, which will "significantly reduce the marketplace distortions and barriers to the

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availability of new broadband facilities and services that arose from disparate rates.” The Court rejected the petitioners’ challenge to this justification, finding that “they offer[ed] 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.”

Finally, the D.C. Circuit held that petitioners’ challenge to the FCC’s decision to expand the period for which pole attachment rate refunds are available had “no serious statutory basis.” It further agreed that the FCC’s new position was reasonable and that petitioners had offered no “material flaw in [its] reasoning nor any powerful countervailing consideration.”