



REGULATORY ADVISORY: FEDERAL APPEALS COURT UPHOLDS THE FEDERAL COMMUNICATIONS COMMISSION 2011 REVISIONS TO POLE RATES

Today, a three judge panel of the Circuit Court for the District of Columbia upheld the FCC's 2011 Pole Attachment Report and Order and Order on Reconsideration (the "Order"). In a unanimous [opinion](#), the Court held that the FCC met the "modest demands" required "for changing its policy" and rejected American Electricity Power Services Corporation and other power companies' challenge to the FCC's revised interpretation. Although the power companies could seek Supreme Court review, it is highly unlikely that the Supreme Court would take the case. Thus, appellate challenges to the 2011 Order appear to be over.

Most notably, the 2011 Order revised the FCC's interpretation of Section 224 of the Communications Act of 1934, 47 U.S.C. § 224 and, for the first time, included incumbent local exchange carriers (ILECs) in the definition of "utility." By upholding the Order, the Circuit Court paved the way for ILECs to receive the advantages of rate regulation, including increased leverage in negotiating pole attachment terms and for ILECs and CLECs to pay rates more uniform to those paid by cable providers. However, the FCC does expect any cost savings from new rates to be passed through to consumers. Moreover, all providers, and specifically those deploying new broadband service, can also expect to benefit from a longer timeline to complete the attachment process and a more equitable enforcement process.

The terms of the Order are summarized below.

Timeline: The Order establishes a four-stage timeline for attachment to poles, with a maximum timeframe of 148 days for completion of all four stages: survey (45 days), estimate (14 days), attacher acceptance (14 days), and make-ready (60-75 days). The timeline applies to both wireline and wireless requests for attachment in the communications space on a pole. Wireless attachments above the communications space are subject to a modified, 178-day timeline. In addition, the Order adopts longer timelines for requests to attach to a large number of poles.

Self-Effectuating Remedy: The Order provides attachers with the right to use utility approved contractors to perform survey and make-ready work if the pole owner does not complete survey or make-ready work on time.

Reasons for Rejection: The Order concludes that if an electric utility rejects a request for attachment, it must explain the reasons for such rejection and how those reasons relate to capacity, safety, reliability, or engineering concerns.

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Pole Tops: The Order clarifies that wireless attachers enjoy the same right to attach to pole tops as to any other communications space on a pole.

ILEC Attachments: The Order allows ILECs to file pole attachment complaints if they believe a particular rate, term or condition is unjust or unreasonable.

Rates: The Order reinterprets the telecommunications rate formula for pole attachments and adopts definitions yielding a new telecommunications rate that will, as a general matter, recover the same portion of pole costs as the current cable rate. The Order confirms, as well, that wireless providers are entitled to the same attachment rate as other telecommunications carriers.

Enforcement: The Order adopts reforms to the enforcement process, including a requirement that the complainant attempt to engage the other party in executive level discussions before filing a complaint, provisions encouraging pre-planning and coordination among parties, and removal of a cap on penalties for unauthorized attachments. Notably, the Commission declined to adopt changes to the “sign and sue” rule, which permits attachers to challenge the lawfulness of terms in an executed pole attachment agreement and declined to adopt compensatory damage rules.

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