

FCC Commissioners Affirm Chief ALJ Ruling in Favor of Cable Industry in Gulf Power Pole Attachment “Just Compensation” Case

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On April 12, 2011, the Federal Communications Commission (FCC) released a 17-page [Decision](#) affirming the FCC Chief Administrative Law Judge (ALJ)'s 2007 decision in *Florida Cable Telecommunications Association, et al. v. Gulf Power Company*. The ruling is the latest win for the cable industry defending the constitutionality of the 1996 amendments to the Pole Attachment Act and related FCC rules as well as recent pole reforms. For the complete history of this particular litigation and full explanation of Gulf Power's claims and how the ALJ ruled, see DWT's [Feb. 1, 2007 advisory](#). For details on last week's far-reaching FCC Order on pole attachment rates and reforms, see DWT's [April 8, 2011 advisory](#).

This dispute began when Gulf Power sought a “just compensation” pole attachment rate more than five times the maximum rate allowed under the FCC formula for cable attachments. Gulf Power claimed its poles were at “full capacity” and that it had buyers “waiting in the wings” willing to pay a higher rate, the two circumstances the 11th Circuit held were both necessary before a pole owner could collect pole rents above marginal cost (the 11th Circuit as well as the FCC and other commissions have held that the cable formula already produces rates above marginal cost).

The ALJ first found Gulf Power had not met its burden of proving full capacity because routine make-ready could have been and was used to accommodate additional attachments. The ALJ also found that Gulf Power failed to prove there were any other attachers precluded from attaching, or that Gulf Power was foreclosed from putting the space to a higher valued use for its own operations. If poles are not at full capacity, and even with full poles, without a new attacher precluded from attaching, Gulf Power could only charge the rate mandated by the FCC's cable formula. The ALJ thus rejected all of Gulf Power's proposed rate increase.

In upholding the decision below, the FCC affirmed the ALJ's key legal holding, namely that poles are not at “full capacity” if make-ready can accommodate new attachments. The FCC also affirmed the ALJ's evidentiary findings that Gulf Power had failed in its burden of proving “full capacity” and the presence of buyers “waiting in the wings.” Lastly, the FCC affirmed other aspects of the ALJ's decision and rejected Gulf Power's challenge to certain evidentiary rulings.

Davis Wright Tremaine lawyers have represented the Florida Cable Telecommunications Association and the cable operators throughout the ALJ and Commission proceedings, and have also represented state and national cable associations and cable operators throughout the various related FCC pole proceedings and 11th Circuit appeals. Please contact us if you would like any further information or updates.

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