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FCC REJECTS JUSTIFICATION FOR CHARGING POLE ATTACHMENT RATES ABOVE ITS CABLE RATE FORMULA

In its recent decision in *Florida Cable Telecommunications Association, Inc. v. Gulf Power*, the FCC affirmed the decision of one of its Administrative Law Judges, who had held that the following claims are not sufficient under the test laid out by the Eleventh Circuit in *Alabama Power v. FCC* to justify charging above regulated pole attachment rates: (1) the claim that a pole is at full capacity simply because make-ready work must be performed in order to make room for a new attachment, or (2) the claim that buyers are competing for available space on the pole based on hypothetical buyers “waiting in the wings.”

Background

The recent decision involved two cable operators that entered into a pole attachment agreement with Gulf Power Company for pole attachments throughout Florida. Pursuant to the Cable Rate formula for pole attachments, the cable operators initially paid rates of approximately \$6.00 per pole. The contracts also required them to pay any associated make-ready costs, which were then excluded from the Cable Rate formula calculations so as to avoid paying twice for the make-ready work. In 2000, Gulf Power informed the cable operators that the rental rate would increase to \$38.06 – a rate that significantly exceeded the Cable Rate formula. The cable operators filed a complaint with the Commission claiming a violation of Section 224 of the Communications Act.

The FCC’s Enforcement Bureau found in favor of the cable operators and upon petition for reconsideration and a request for an evidentiary hearing by Gulf Power designated a hearing before the ALJ to determine whether the facts offered by Gulf Power satisfied the test in *Alabama Power v. FCC* for justifying rates over and above the Cable Rate formula. After an evidentiary hearing, the ALJ found in favor of the Cable Operators and determined that Gulf Power had not submitted sufficient evidence to satisfy the *Alabama Power* test. Specifically, the ALJ found that Gulf Power “failed to show that any pole is at full capacity and that (1) the Cable Formula has cost it an opportunity to rent space to someone else at a higher rate or that (2) it is prevented from putting the space to a higher valued use within its own operations.” Gulf Power filed exceptions to the ALJ’s decision contending that “[t]he most critical error in the Initial Decision is the determination that there is no such thing as a ‘full capacity’ pole so long as capacity can be expanded to accommodate a new attacher – including actually taking a pole out of the ground and replacing it with a new pole.”

Decision

After a review of the ALJ’s decision and specifically the question of whether Gulf Power made the evidentiary showing required by the *Alabama Power* case to seek costs above those found to be just and reasonable through the Cable Rate formula, the Commission held that Gulf Power had not fulfilled the elements of the *Alabama Power* test. First, the Commission found that Gulf Power had failed to show that its poles were at full capacity. The Commission rejected the assumption asserted by Gulf Power that “a pole is full if, in its current state, without any

make-ready work, adding a new attachment would result in a code violation.” Rather, the Commission found that when “an electric utility can accommodate a new attachment, in compliance with safety codes, by using conventional techniques that the utility uses in its own operations, the pole cannot reasonably be described as having ‘insufficient capacity’ within the meaning of section 224(f)(2), or described as at ‘full capacity’ within the meaning of the *Alabama Power* decision.” Second, the Commission found that Gulf Power failed to show that other attachers were waiting to rent space on the pole or that the company itself could use the communications space for a higher-value purpose. To meet the burden of proof for the second prong of the *Alabama Power* test, Gulf Power had to produce evidence that buyers were competing with the Cable Operators for space on the pole or that the utility itself was competing for the space. Without such evidence, Gulf Power could not claim that it had lost an opportunity to sell additional space by selling the space to the cable operators. The Commission rejected Gulf Power’s contention that a hypothetical buyer, rather than an actual buyer qualifies as “a buyer waiting in the wings.” Accordingly, the Commission held that Gulf Power had not produced sufficient evidence to show that it had lost an opportunity to sell the space to parties other than the cable attachers.

If you have any questions, please contact [Mark Palchick](#) or one of our other Womble Carlyle [Telecommunications](#) professionals.

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