

U.S. Court of Appeals for the D.C. Circuit Affirms FCC Pole Attachment Ruling in Favor of Cable Industry

Court Rejects Gulf Power's Constitutional "Just Compensation" Challenge to Pole Attachment Rental Rates

02.23.12

By John D. Seiver and Ronald G. London

On Feb. 21, 2012, the United States Court of Appeals for the D.C. Circuit issued its opinion in [Gulf Power Co. v. FCC](#) summarily denying the electric utility's challenge that the federal statutory rental rate for cable company attachments to utility poles fails to provide "just compensation" in violation of the Fifth Amendment's Takings Clause. The court's opinion thus affirms the Federal Communications Commission's (FCC) 2011 [Decision](#) in favor of Florida Cable Telecommunications Association, Comcast, Cox, Brighthouse and Mediacom.

The court's ruling is the latest win for the cable industry defending the constitutionality of the Pole Attachment Act and related FCC rules as well as recent pole reforms. This dispute began when Gulf Power sought a pole attachment rate more than five times the maximum allowed under the FCC formula for cable attachments. Gulf Power claimed its poles were at "full capacity" and that other buyers were willing to pay a higher rate, the two circumstances the 11th Circuit had held in a related case (*Alabama Power v. FCC*) were necessary before a pole owner could collect higher pole rents on a "just compensation" theory.

In the agency proceedings, an FCC Administrative Law Judge (ALJ), and then the full Commission, 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 FCC and ALJ also found 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.

On petition for review to the D.C. Circuit, Gulf Power challenged these administrative holdings, but also sought to challenge the denial of higher pole rental rates under Fifth Amendment constitutional takings principles. However, because Gulf Power participated in the *Alabama Power* case and had sufficient control over it through its common parent, the D.C. Circuit rejected Gulf's argument. Specifically, it held Gulf was estopped under the doctrine of "issue preclusion," which generally bars a party from re-litigating an issue resolved in a prior court determination.

The court also upheld the FCC's application of the 11th Circuit test and the FCC's rejection of Gulf Power's far-reaching claims and found it unnecessary to reach any other arguments Gulf Power made regarding the FCC's adjudication of the dispute.

Davis Wright Tremaine lawyers have represented the Florida Cable Telecommunications Association and the cable operator Intervenors throughout the FCC and court proceedings, and have also represented state and national cable associations and cable operators throughout the various related FCC pole proceedings and state and federal trial and appellate court proceedings.

For the complete history of this particular litigation and full explanation of Gulf Power's claims and how the FCC and ALJ ruled, see respectively DWT's [April 13, 2011 advisory](#), and [Feb. 1, 2007 advisory](#). For details on the far-reaching FCC Order on pole attachment rates and reforms issued just before the FCC's *FCTA v. Gulf Power* ruling, see DWT's [April 8, 2011 advisory](#).

Please contact us if you would like any further information or updates.

Disclaimer

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.