

UTILITIES AND TELECOMMUNICATIONS ALERT

D.C. CIRCUIT MOVES FORWARD ON APPEAL OF FCC'S POLE ATTACHMENT ORDER

As you are likely aware, a coalition of investor-owned utilities ("IOUs") has challenged the FCC's 2011 Pole Attachment Order and modified rules, implementing, among other things, sharp reductions in the maximum allowable pole attachment fees charged to telecommunications carriers, firm deadlines for the processing of pole access requests, and new access rights for incumbent LECs and providers of wireless services. The judicial appeal, now pending before the D.C. Circuit for just over six months, presents the following specific issues for review:

- (1) Whether the FCC is authorized under Section 224 to address complaints by incumbent LECs;
- (2) Whether the FCC was authorized to adopt a new rate formula for attachment fees charged to telecommunications carriers, and if so, whether the new Telecom Rate formula is arbitrary and capricious; and
- (3) Whether the FCC is authorized to award damages in complaint cases for the entire time period permitted under the applicable statute of limitations, even if such period pre-dates the filing of the complaint.

Other issues have been raised in petitions for reconsideration at the FCC, including several operational issues, and further adjustments to the new Telecom Rate formula, supported by the competitive telecommunications and cable industries, designed to further reduce *all* pole attachments fees to the levels now paid by cable service providers. The D.C. Circuit, rejecting the FCC's request to postpone its consideration of the judicial appeal until the FCC's reconsideration issues are decided, has ordered briefing in the early 2012 time frame. Oral arguments will follow briefing, on a date to be decided by the Court.

Given the briefing schedule, which concludes on April 9, we do not expect any resolution of appeal issues by either the D.C. Circuit or the FCC until late Summer 2012. EEI will be participating, *amicus curiae*, on behalf of the IOUs in the judicial appeal, and we intend to coordinate with EEI in preparing its brief.

Please do not hesitate to contact us if you have questions about the Pole Attachment Order, or if your company wishes to become more fully involved as the appeal process moves forward.

This Utilities and Telecommunications Alert is intended to keep readers current on matters affecting businesses and is not intended to be legal advice. If you have any questions please contact Charles Zdebski at 202.659.6605, Eric Schwalb at 202.659.6608, Brett Heather Freedson at 202.659.6669, or contact any one of our other Utilities and Telecommunications Group attorneys at Eckert Seamans.

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