

## FCC Rules Against Texas Utilities in Favor of Marcus Cable in Pole Attachment Case

On July 29, 2003, almost six years after the original complaint was filed, the Federal Communications Commission (“FCC”) released its final decision in *Marcus Cable Assoc., LP v. Texas Util. Elec. Co.*, File No. PA 96-002. The only victory for the utility is that the FCC held that it will limit the scope of its decision to the pole attachment agreement at issue in the complaint proceeding, and would not apply the decision to all of Texas Utilities’ pole attachment agreements unless otherwise asked to do so by Texas Utilities’ other attaching entities.

Because Marcus Cable filed the complaint just after the 1996 amendments to the Pole Attachments Act, some of the issues raised in the complaint had been resolved or addressed in other proceedings. For example, the utility argued that the cable company violated its pole attachment agreement by subleasing space on its network to third-parties. In the *Consolidated Partial Order on Reconsideration*,<sup>1</sup> issued well after the complaint was filed, the FCC held that the practice of subleasing is acceptable and that a term prohibiting such a practice is unreasonable. As part of its holding on the sublicensing issue, the FCC also rejected Texas Utility’s argument that the FCC did not have jurisdiction over this matter because there was a negotiated and executed pole attachment agreement that addressed sublicensing. According to the utility, the disagreement amounted to a breach of contract that belonged before a state court. Once again, the FCC relied on its jurisdiction to regulate pole attachments to justify rewriting the governing agreement in favor of the attaching entity.

Also noteworthy is Texas Utilities’ challenge to how the FCC reached the factual conclusion that Marcus Cable was not allowing third-parties to overlash on its facilities. Specifically, the utility argued that the FCC “impermissibly shifted the burden of proof on the overlash and other issues to” Texas Utilities. The FCC responded by stating that “[o]nce a complainant in a pole attachment proceeding meets its burden of establishing a *prima facie* case, the respondent bears a burden to explain or defend its actions.” A “*prima facie* case” is one where the complainant will prevail on the evidence presented unless contradicted by evidence to the contrary. This lenient application of the *prima facie* case standard is just one more way the FCC makes it easy for attaching entities to file successful pole attachment complaints with the agency.

Finally, the FCC declared unreasonable provisions in the pole attachment agreement entitling Texas Utilities to know the identity of and be indemnified by third-parties leasing space on Marcus Cable’s facilities. In addition, the FCC held that Texas Utilities can not require attaching entities to identify the services provided over its attachments other than notice of service changes from cable to telecommunications service, thereby warranting application of the higher telecommunications rate calculated according to 47 U.S.C. § 224(e).

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<sup>1</sup> *In re Amendment of Commission’s Rules and Policies Governing Pole Attachments*, 16 FCCR 12103 (rel. May 25, 2001).