

# FCC Modified Pole Attachment Formulas to Bring Telecom Rates Down to Parity with Cable Rates

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On November 24, 2015, the FCC issued an Order on Reconsideration (“Reconsideration Order”) updating the telecommunications carrier pole attachment formula in its rules. The Reconsideration Order granted a four-year old Petition for Reconsideration and adopted modified cost allocators to bring parity in theoretically all instances to the pole attachment rates for telecommunications carrier attachers and cable company attachers. The Reconsideration Order addresses concerns among cable operators offering broadband Internet access service (“BIAS”) that, as a result of the FCC’s *Open Internet Order*, they would be forced to pay the oftentimes higher telecommunications attachment rate, as well as the concerns of competitive telecommunications carriers.

The Reconsideration Order built on a partial fix adopted by the Commission in 2011 to move toward parity. The changes adopted in the Reconsideration Order apply to rates charged by regulated pole owners in the thirty states that have not reverse-preempted regulation of access to poles and rates for attachments. States that have elected to regulate rates and certified to the FCC that they do so will not be directly impacted.

The rule changes adopted by the Reconsideration Order have not yet taken effect. They will do so thirty (30) days after publication of the Reconsideration Order in the Federal Register.

## The 2011 Pole Attachment Order Left Gaps in the Commission’s Efforts to Reform Attachment Rates

In its 2011 *Pole Attachment Order*, the FCC revised its Part 1 rules governing pole attachment rates by reinterpreting the ambiguous “cost” term found in Section 224 of the Communications Act, as amended (the “Act”). In 2011, the FCC adopted cost allocators for the telecommunications pole attachment rate formula “that closely approximate the treatment of cost in the cable rate formula,” inserting factors of 0.66, or 66 percent, and 0.44, or 44 percent, in the formulas for urbanized and non-urbanized areas, respectively. With these new cost allocators, the pole attachment rates for telecommunications carriers and cable service operators were brought into parity *but only when the pole owners used the FCC presumed average number of attachers of three and five attachers in non-urban and urban areas, respectively.*

Following the 2011 *Pole Attachment Order*, several parties sought reconsideration because the FCC’s decision, while welcome, still created the potential for substantial disparity between rates when pole owners rebutted the FCC’s presumptions by using the actual average number of attachers. The

petition asked that the FCC “either to clarify that 66 percent and 44 percent are ‘illustrations’ of the new rule, or to revise the rules to ‘provide corresponding cost adjustments to other entity counts.’” Based on the actual averages when utilities rebut the presumptions with actual average attacher numbers, the Petition noted that the telecommunications rate could be “as much as 70 percent higher than the cable rate.”

## The Commission’s Solution Eliminates All or Most of the Remaining Disparity

The Reconsideration Order took several actions to address the residual disparity between the telecommunications rates and cable rates. First, the Reconsideration Order removed the distinction between the cost factors for urbanized and non-urbanized areas, including the cost factors adopted in 2011. Second, the FCC adopted new cost allocators for poles with exactly two, three, four, and five attaching entities. Third, when the average number of attaching entities is a fraction – such as the 2.6 average referenced in the example above – utilities must “interpolate” the percentage cost allocator based on the nearest whole number cost allocators. Unfortunately, the Reconsideration Order does not clarify precisely *how* parties are to interpolate the cost factor when the number of attaching entities is not a whole number, but the Reconsideration Order, as a whole, suggests that the interpolated cost factor, like the factor when the average attachers is a whole number, will lead to a rate in parity with that paid by cable operators for access to the same poles.

Finally, the FCC believes the additional reforms will promote state-by-state uniformity in rates. For the twenty states and the District of Columbia that have certified that they regulate pole attachment rates, the Reconsideration Order will not directly affect rates. However, most states that have elected to regulate pole attachments have established uniform rates for telecom and cable services and generally apply a rate substantially identical to the FCC’s current cable rate. The current reforms address the artificial disparities in cost of aerial deployment in states that follow the FCC’s rates versus the states with their own rates.

The FCC expects through the Reconsideration Order to incentivize further nationwide investment by creating consistent and predictable rates for telecommunications carriers, which now includes cable operator providing broadband Internet access service as a result of the Commission’s March 2015 *Open Internet Order*. The Reconsideration Order reflects that the Commission’s shared the concerns of the Petitioners, the American Cable Association, and several cable companies that the decision to reclassify BIAS as a telecom service would improperly incentivize utilities to rebut the FCC’s presumed attacher numbers in areas in which they hadn’t previously in order to secure higher telecom rates from cable companies. The Reconsideration Order eliminates any “unintended consequences” of imposing higher rates for cable providers following the 2015 *Open Internet Order*.

## Commissioner Pai Identified Possible Concerns about the Legality of the FCC’s Reconsideration Order

In a concurring statement, Commissioner Ajit Pai, while agreeing with the outcome of the Reconsideration Order, offered concerns that “the Order may be vulnerable in court because the legal rationale for this new, lower rate is rather odd.” Commissioner Pai noted that in order to achieve the desired parity between the telecommunications and cable rates, the FCC was forced to develop what he termed an “inconsistent” interpretation of the word “cost” in the telecom rate language of Section 224. He noted that, under the new rules, since a difference percentage of capital and operating expenses must be applied based on the number of attachers in order to achieve parity

with the cable rate. For example, if there are five pole attachments, the Reconsideration Order interprets “cost” in the telecom rate to mean 66% of capital and operating expenses, but if there are only two pole attachments, “cost” now means 31% of those expenses. He added that “[t]he Order’s interpretation of the same word (‘cost’) in the same provision (the telecom rate) to mean different things in different circumstances appears to violate the canon of consistency.”

The majority rejected concerns that its attempt to interpret “cost” in such a way that creates parity is at odds with Congress’ intent for Section 224, asserting that the statute doesn’t require that the rates for telecommunications carriers and cable operators be different and that the ambiguity of “cost” in the telecom rate permits the current reforms. Moreover, in affirming the FCC’s 2011 *Pole Attachment Order*, the federal appellate court, the U.S. Court of Appeals for the District of Columbia, apparently gave the Commission wide berth in interpreting the ambiguous term “cost” in the statute. See *CommLawMonitor Blog “Appellate Court Upholds 2011 Pole Attachment Order Lowering the Telecom Pole Attachment Rate and Paving the Way for ILEC Complaints Against Electric Utility Pole Owners”*, Feb. 26, 2013.

## Timing for Effective Date of New Telecom Rates

The new Part 1 rules will be effective 30 days after publication in the Federal Register, which has not yet occurred. No part of the FCC’s Order is subject to review or approval by the Office of Management and Budget so the Order will take effect in its entirety.

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Any companies providing telecommunications services and cable operators that currently have or are in the process of negotiating pole attachment agreements, as well as any attachers reviewing their bills for pole attachments, would be advised to make sure that they understand the changes to the telecommunications rate calculations and how they may be impacted by the FCC’s recent decision. The attorneys in the [Communications practice](#) at Kelley Drye have extensive experience with FCC regulations and addressing pole attachment rate negotiations and disputes. For more information regarding the FCC’s recent Order on Reconsideration or this client advisory, please contact [Chip Yorkgitis](#) at (202) 342-8540.