GRANTED

No. 00-832

IN THE

Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether 47 U.S.C. § 224 applies to attachments by cable television systems that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eleventh Circuit are listed in Appendix A and Appendix G of NCTA's Petition for Certiorari at 1a-4a, 104a.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it has no parent corporations and it has issued no publicly held stock.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is published at 208 F.3d 1263 (11th Cir. 2000) and is reproduced in the Appendix to National Cable Television Association, Inc.'s ("NCTA's") Petition for Certiorari ("NCTA Pet. App.") at 1a-37a. The *Report and Order* of the Federal Communications Commission ("FCC" or "Commission") is published at *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998). Relevant portions of the *Report and Order* are reproduced at NCTA Pet. App. 38a-68a. The court of appeals' orders denying the petitions for rehearing are unpublished, and its order denying the petitions for rehearing *en banc* is published at 226 F.3d 1220 (11th Cir. 2000) (per curiam). Those orders are reproduced at NCTA Pet. App. 77a-96a. The court of appeals' order staying the mandate

pending the filing and resolution of a petition for certiorari is unpublished and is reproduced at NCTA Pet. App. 69a-76a.

JURISDICTION

The court of appeals entered judgment on April 11, 2000, and denied timely petitions for rehearing and rehearing en banc on September 12, 2000. NCTA's petition for a writ of certiorari was filed on November 22, 2000, and was granted on January 22, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The statutes relevant to this case are: 47 U.S.C. § 224 ("Section 224"), as amended by Section 703 of the Telecommunications Act of 1996 ("1996 Act"); Section 706 of the 1996 Act, which is codified at 47 U.S.C. § 157, statutory note; and Section 509 of the 1996 Act, which is codified, in pertinent part, at 47 U.S.C. § 230(b). The text of these provisions is included in the appendix to this brief.

STATEMENT OF THE CASE

This case presents the issue whether cable television systems that choose to provide high-speed Internet access services, using the same lines they simultaneously use to provide traditional video programming, thereby forfeit the regulatory oversight that Congress provided in Section 224 to ensure their nondiscriminatory access to essential bottleneck facilities owned or controlled by utilities at "just and reasonable" "rates, terms, and conditions."

The clear answer is no. First, and foremost, the plain language of Section 224 provides that these regulatory protections extend to "any attachment" by a cable television system. Further, the background of settled administrative and judicial decisions (against which Congress amended Section 224) also establishes that these regulatory protections extend

to attachments by cable operators used for "commingled" video and data services. Finally, the purposes underlying Section 224 and the 1996 Act – *i.e.*, to provide access to bottleneck facilities and to speed deployment of new and advanced services – further confirm that the FCC is required to ensure that the "rates, terms, and conditions" of pole attachments used by cable television systems to provide high-speed Internet access (as well as traditional video programming) are "just and reasonable" and "nondiscriminatory."

The court of appeals' contrary conclusion that Congress sought to limit the scope of the Commission's existing authority is inconsistent with the language of Section 224, ignores that implied repeals are disfavored, and is predicated on a misreading of the 1996 amendments to Section 224. But even if Congress' amendments to Section 224 were ambiguous on this point, the law is clear that Congress intends that such ambiguities be resolved by the administrative agency charged with implementing Section 224. Here, the FCC concluded that cable television systems do not forfeit Section 224 rights to nondiscriminatory access and regulatory oversight of the "rates, terms, and conditions" of their pole attachments by choosing to use those attachments to provide high-speed Internet access as well as traditional video programming. That conclusion is eminently reasonable and therefore is entitled to deference.

A. The Cable Television Industry.

As this Court has noted, the "role of cable television in the Nation's communications system has undergone dramatic change over the past" half century. *Turner Broad. Sys., Inc.* v. *FCC*, 521 U.S. 623, 627 (1994). Nevertheless, throughout this period of explosive growth and change, one technological fact has remained constant: cable systems "rely upon a physical, point-to-point connection" to provide services to their individual subscribers. *Id.* at 627-28.

1. Cable television has its roots in "community antenna television" or "CATV," which first was established more than fifty years ago. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 162 n.12 (1968); see also H.R. Rep. No. 89-1635, at 5 (1966). Initially, CATV operated as nothing more than a powerful and sophisticated television antenna. "CATV systems receive[d] the signals of television broadcasting stations, amplif[ied] them, transmit[ted] them by cable or microwave, and ultimately distribute[d] them by wire to the receivers of their subscribers." *Southwestern Cable*, 392 U.S. at 161. Thus, CATV systems originally performed only two functions: they (i) "supplement[ed] broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible," and (ii) "transmit[ed] to subscribers the signals of distant stations entirely beyond the range of local antennae." *Id.* at 163.[1]

To carry out these functions, CATV systems typically consisted of "antennas located on hills . . . with connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers." *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 392 (1968). In addition, CATV systems "contain[ed] equipment to amplify and modulate the signals received, and to convert them to different frequencies, in order to transmit the signals efficiently while maintaining and improving their strength." *Id.* As this Court has explained, the purpose of these earliest

[1] *See also Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 399 (1968) ("[A] CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set."); J. Goodale, *All About Cable* § 1.02, at 1-6 (2000) ("Goodale, *Cable*") (describing functions of earliest CATV systems); 1 D. Brenner, *et al.*, *Cable Television and Other Nonbroadcast Media* § 1.02[1], at 1-2 (14th rel. 2000) ("Brenner, *Cable Television*") (same).

CATV systems "was not to replace broadcast television but to enhance it." *Turner*, 512 U.S. at 627.

Although early "CATV systems characteristically d[id] not produce their own programming," there was "no technical reason why they [could] not." *Southwestern Cable*, 392 U.S. at 161-62 & n.9. By the late 1960's, engineers developed ways of providing additional channel capacity through "coaxial cable." Brenner, *Cable Television*, § 1.02[2], at 1-3. CATV filled that "additional channel capacity" with its own programming, which "initially consisted of simple arrangements . . . using automated cameras providing time, weather, news ticker, or stock ticker information, and aural systems with music or news announcements." *Teleprompter Corp.* v. *Columbia Broad. Sys., Inc.*, 415 U.S. 394, 404 n.8 (1974).

By the early 1970's, "program origination" by CATV was "expanded to include coverage of sports and other live events, news services, moving picture films, and specially created dramatic and non-dramatic programs." *Id.* at 404 n.8. Because CATV no longer operated as solely a community antenna service, the FCC "adopted the 'more inclusive term cable television systems.'" *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 702 n.7 (1984). That change in nomenclature reflected the FCC's recognition that "cable's multichannel or broadband capacity" could provide a broad array of services to its subscribers. *Heritage Cablevision Assocs.* v. *Texas Utils. Elec. Co.*, 6 FCC Rcd 7099, 7102 (¶ 17) (1991), *aff'd*, 997 F.2d 925 (D.C. Cir. 1993).

Specifically, in addition to "program origination," the FCC recognized, as early as 1972, that cable television's "broadband or multichannel capacity" could be used to provide:

> [F]acsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary

> customers or suppliers; access to computers; e.g., man to computer communications in the nature of inquiry and response (credit checks, airline reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and *computer to computer communications* . . . .

Cable Television Report & Order, 36 FCC2d 143, 144 n.10 (¶ 1) (1972) (alteration in original) (emphasis added).[2] By the 1980s, the cable television industry was, in fact, providing its subscribers "nonvideo communications services, such as data transmission." *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993).

More recently, technological advances have allowed cable operators, who collectively have invested billions of dollars in the effort, to upgrade their existing coaxial cables and other equipment so that they can simultaneously carry both traditional video programming services and high-speed or "broadband" access to the Internet at data transmission speeds hundreds of times faster than the "narrowband" services available through traditional telephone lines. See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, slip op. ¶ 8 & n.12 (FCC Sept. 28, 2000) (explaining that this Internet service is offered by "incumbent cable operators and new entrants" that "can be part of either small, independent companies or large

[2] In 1970, the FCC explained that "CATV service represents the initial practical application of broadband cable technology" and that "there is a substantial expectation that broadband cables, in addition to CATV services, will make economically and technically possible a wide variety of new and different services involving the distribution of data, information storage and retrieval, and visual, facsimile and telemetry transmission of all kinds." Final Report & Order, *Section 214 Certificates*, 21 FCC2d 307, 324-25 (¶ 47) (1970), *aff'd*, 449 F.2d 846 (5th Cir. 1971) ("*Section 214 Certificates*").

nationwide companies").[3] Such facilities have made cable an ideal medium for transmitting large amounts of digital information – data, graphics, and video – at high speeds.

Not surprisingly, the cable industry actively competes against numerous segments of the communications industry to provide high-speed Internet services to consumers nationwide. See Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996*, 14 FCC Rcd 2398, 2404 (¶ 12) (1999) ("*Section 706 Report*"). Provision of such high-speed Internet services is important because, as the FCC has noted, "[w]idespread access" to high-speed or broadband Internet services "can increase our nation's productivity and create jobs" as well as "meaningfully improve our educational, social, and health care services." *Id.* at 2401 (¶ 2). Indeed, the FCC has concluded that development of such services will provide consumers with "the ability to download feature-length movies in a matter of minutes," "change web pages as fast as changing the channel on a television" and create "new possibilities . . . for electronic commerce." *Id.* (¶ 3).

The cable television industry has been instrumental in the development of high-speed Internet service. See *id.* at 2415-16 (¶ 37) (describing multi-billion dollar investments by cable operators to develop high-speed Internet access). For

[3] As this Court recently explained, "[t]he Internet is an international network of interconnected computers," *Reno* v. *ACLU*, 521 U.S. 844, 849, 850 (1997), and "[a]nyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods." *Id.* at 851. For example, "[t]he best known category of communication over the Internet is the World Wide Web," which "consists of a vast number of documents stored in different computers all over the world," and "which allows users to search for and retrieve information stored in remote computers" and "to communicate back to designated sites." *Id.* at 852.

example, in August 2000, the Commission reported that 1.4 million of the 1.8 million high-speed lines to residential homes and small businesses were provided through cable technology. Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, slip op. ¶ 71 & Fig. 5 (FCC Aug. 21, 2000). More recently, the Commission reported that there were 4.3 million broadband or high-speed lines connecting homes and small businesses to the Internet and that the cable industry provided about 2.2 million such lines.[4] The development of these services by the cable industry is likewise spurring development and deployment of competing high-speed services (known as "DSL") by telephone companies. See *Section 706 Report*, 14 FCC Rcd at 2419 & n.84 (¶ 42).

These changes in the scope of services offered by the cable television industry over the past fifty years have been matched by the equally "explosive" growth of the cable industry. *Southwestern Cable*, 392 U.S. at 163. As noted above, the first commercial CATV system was established in 1950. *Id.* at 162. By 1959, "there were 550 'nationally known and identified' systems serving a total audience of 1,500,000 to 2,000,000 persons." *Id.* By 1977, there were 3,000 cable systems with 11 million subscribers. By the mid 1980's, nearly 53 million households subscribed to cable services. Today, almost seven of ten television households (more than 65 million) subscribe to cable television.

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[4] *See* Press Release, FCC, Federal Communications Commission Releases Data on High-Speed Services for Internet Access 1 (Oct. 31, 2000), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2000/nrcc0054.doc ("FCC, *Data on High-Speed Services for Internet Access*").

2. Although the cable industry has undergone a remarkable transformation over the past 50 years, it remains equally true today that "to deliver television signals to their subscribers," cable operators "must have a physical carrier for the cable." *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 247 (1987). Cable systems still "make this connection much like telephone companies, using cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers." *Turner*, 512 U.S. at 628. In fact, "virtually the only practical physical medium for installation of television cables" has been poles, ducts, and rights-of-way owned or controlled by local utilities. *Florida Power*, 480 U.S. at 247. Accordingly, a cable system's "right to secure the use of those facilities on reasonable terms may be crucial to its very existence." Goodale, *Cable* § 6.01, at 6-3.

The vast majority of cable lines are strung aboveground and are attached to utility poles that "are 35 and 40 feet high." *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 FCC 2d 59, 69 (¶ 21) (1979), *aff'd*, 655 F.2d 1254 (D.C. Cir. 1981). The entire length of the pole, however, cannot be used for attachments. Thus, for example, a 35-foot utility pole generally "has 6 feet of its height underground and 18 feet reserved for ground clearance," leaving 11 feet of usable space. *Id.* at 68 n.21 (¶ 20). For safety reasons, electric "power lines generally are located on the upper-most portion of utility poles," and require "a 40 inch safety space between electric lines . . . and communications cables on the same pole." *Id.* at 69-70 (¶ 22). Telephone lines typically are located "at the minimum ground clearance of 18 feet." *Id.* at 69 (¶ 22).

Cable attachments are located in between, "1 foot above telephone cables," *id.*, and "are usually strung along metal lashing strands which make them less likely to sag." Brenner, *Cable Television* § 5.02[2][b], at 5-7. According to the FCC, the actual space occupied by cable attachments is "approximately 1 inch." *Adoption of Rules for the Regulation*

of Cable Television Pole Attachments, 77 FCC2d 187, 190 (¶ 8) (1980), *aff'd*, 655 F.2d 1254 (D.C. Cir. 1981). Cable operators also rely on "'overlashing,'" whereby "a new cable is wrapped around an existing wire, rather then being strung separately." *Implementation of the Local Competition Provisions in the Telecomm. Act of 1996*, 11 FCC Rcd 15499, 16075 (¶ 1161) (1996).

High-speed Internet access services offered by cable operators are "commingled" with traditional cable video services "on one transmission facility." NCTA Pet. App. 63a (¶ 30). Accordingly, cable operators that provide high-speed Internet access services and traditional cable video services must rely on utilities for reasonable and affordable access to the same "poles, ducts, conduits, or rights-of-way" necessary to deliver traditional cable services to their subscribers. Moreover, provision of commingled video and Internet access services places no additional burden on the utility facilities necessary to provide these commingled services. As a result of the pro-competitive provisions of the 1996 Act, however, pole-owning utilities have a greater incentive to deny such access on reasonable "rates, terms, and conditions" because the 1996 Act lifts restrictions that prohibited some utilities from diversifying into telecommunications and other services so that now they too can compete directly against cable entities and other communications providers. See Pub. L. No. 104-104, § 103, 110 Stat. 56, 81-86 (1996) (codified at 15 U.S.C. § 79z-5c).

Today, as much as ever before, the cable industry still must rely upon its actual and potential competitors for reasonable access to facilities that are necessary to provide its services to individual subscribers.

B. Statutory And Regulatory Background.

Congress has acted to ensure that cable operators have access to these bottleneck facilities on reasonable and nondiscriminatory "rates, terms, and conditions." In doing so,

Congress has recognized that federal regulatory oversight is necessary to ensure that utilities that own and control these facilities do not engage in anti-competitive conduct that would deny such access and thereby hinder the further development of the cable industry.

1. In 1978, in response to mounting evidence that utility companies were exploiting their monopoly power over bottleneck facilities needed by cable television systems to deliver their services to consumers, Congress enacted the Pole Attachment Act ("1978 Act"). See *Florida Power Corp.*, 480 U.S. at 247. At the time, approximately 95 percent of cable's lines to their subscribers were installed on utility poles. S. Rep. No. 95-580, at 12 (1977). "In many communities," "because of the lack of available rights-of-way, environmental restrictions, or zoning laws," cable operators were "unable to construct [their] own pole plant for the attachment of [their] coaxial cable" and instead were required "to use existing utility company poles." H.R. Rep. No. 94-1630, at 5 (1976). Specifically, the cable industry used "existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional, duplicate set of poles to be placed." H.R. Rep. No. 95-721, at 2 (1977).[5] Thus, just before the 1978 Act was passed, "the number of poles owned or controlled by cable companies [was] insignificant, estimated to be less than 10,000, as compared to the over 10 million utility-owned or controlled poles to which CATV lines are attached." S. Rep. No. 95-580, at 13.

As a result, "public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably

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[5] *Accord* S. Rep. No. 95-580, at 13 (1977) ("Owing to a variety of factors, including environmental or zoning restrictions and the cost of erecting separate CATV poles or entrenching CATV poles underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles.").

in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates." S. Rep. No. 95-580, at 13. Moreover, the danger of anti-competitive conduct was heightened because "the introduction of broadband cable services may pose a competitive threat to telephone companies" that owned or controlled these facilities. *Id.* In particular, then-FCC Chairman Richard E. Wiley informed Congress of the basis for that competitive threat:

> Cable operators foresee systems developing into two-way home communications centers through which subscribers may shop for merchandise, order facsimile newspapers, conduct banking business, and have utility meters read. Many of these services are now technically feasible, and already a few systems are offering burglar alarms and fire alarm, facsimile, and preference polling services.

Cable Television: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Sci., and Transp., 95th Cong. 3 (1977).[6]

In light of this evidence, Congress passed the 1978 Act "[t]o establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 95-580, at 14. The 1978 Act defined the

[6] *See Section 214 Certificates*, 21 FCC2d at 324-25 (¶¶ 46-47) (explaining that Commission adopted restrictions on telephone common carriers' ownership and operation of "CATV" facilities to "prevent" abuses of pole attachment agreements that would (i) "preempt" development of CATV and (ii) extend telephone monopoly "to broadband cable facilities and the new and different services such facilities are expected to be providing in the future"); *see also Better T.V., Inc.* v. *New York Tel. Co.*, 31 FCC2d 939, 966 (¶ 68) (1971) (concluding that telephone company used its ownership and control over "utility poles" to "eliminat[e] the requesting CATV operator as a competitor").

term "pole attachment" as "*any attachment* by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." Pub. L. No. 95-234, sec. 6, § 224(a)(4), 92 Stat. 33, 35 (1978) (codified, as amended, at 47 U.S.C. § 224(a)(4)) (emphasis added). Congress further provided in subsection (b)(1) that the FCC "shall regulate" not only the "rates" but also the "terms, and conditions" for pole attachments "to provide that such rates, terms, and conditions are just and reasonable." *Id.* sec. 6, § 224(b)(1), 92 Stat. at 35 (codified, as amended, at 47 U.S.C. § 224(b)(1)).

As to the requirement of a "just and reasonable" rate, Congress directed that, as an initial matter, a "rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole . . . ." *Id.* sec. 6, § 224(d)(1), 92 Stat. at 36 (codified, as amended, at 47 U.S.C. § 224(d)(1)). It was thus the Commission's responsibility "to ensure that the pole attachment rates charged cable operators do not fall below the statutory minimum – incremental costs – or above the statutory maximum – fully allocated costs." *Alabama Power Co.* v. *FCC*, 773 F.2d 362, 364 (D.C. Cir. 1985).

Similarly, the Commission was authorized and obligated to ensure that the "terms, and conditions" of pole attachment agreements also were "just and reasonable." As the Commission subsequently explained, if "a term or condition of a pole attachment agreement is found to be unjust or unreasonable, it is unlawful." *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 4 FCC Rcd 468, 471 (¶ 25) (1989). If the FCC makes that determination, "a cable company may be entitled to a rate adjustment or the term or condition may be invalidated." *Id.* (¶ 26).

The Commission's rules implementing the 1978 Act and, in particular, its "procedure for determining whether rates" for attachments by cable television systems "are just and reasonable," were affirmed by the D.C. Circuit. *Monongahela Power Co.* v. *FCC*, 655 F.2d 1254, 1256 (D.C. Cir. 1981) (per curiam). The *Monongahela* Court explained that "[t]he statute itself is all-encompassing in its wording: the FCC is to 'regulate the rates, terms, and conditions for pole attachments to provide that [they] are just and reasonable.'" *Id.*

2. The scope of the FCC's authority to regulate "rates, terms, and conditions" subsequently became an issue because of the cable television industry's entry into "the growing market for nonvideo communications services, such as data transmission." *Texas Utils.*, 997 F.2d at 927. In 1989, TCI Cablevision ("TCI") filed a complaint with the FCC under Section 224, alleging that a utility pole owner unjustly and unreasonably had imposed a separate charge for the attachment of facilities employed to provide both video and nonvideo broadband communications services (e.g., data transmission services) that was greater than the regulated rate assessed "to attach equipment used to provide more conventional cable television services to subscribers." *Heritage*, 6 FCC Rcd at 7099 (¶ 1). The utility pole owner had charged TCI an "annual rental for 'standard' cable television pole attachments (approximately $5.00 per pole)" plus a "surcharge for providing nonvideo services over the facilities (approximately $50-$100 per pole . . .)." *Id.* at 7101 (¶ 9).

TCI's complaint presented the FCC with the issue whether Section 224 provided the Commission with "jurisdiction to regulate pole attachments supporting facilities to provide nontraditional cable television services." *Id.* (¶ 10). The Commission looked first to the language of Section 224. Because Section 224 (i) "applies to 'any' pole attachment by a cable television system," and (ii) "includes no language

limiting the nature of the services of a cable operator to which it applies," the Commission concluded that "Section 224 is most reasonably read to provide that a cable operator may seek Commission-regulated rates for all pole attachments within its system, regardless of the type of service provided over the equipment attached to the poles." *Id.* (¶ 12) (footnote omitted).

The Commission next examined Section 224's legislative history, holding that it did not "support[] a conclusion that protecting traditional cable television service was Congress' *exclusive* concern." *Id.* at 7102 (¶ 16). To the contrary, the Commission noted that the legislative history referenced testimony "'that the introduction of *broadband cable services* may pose a competitive threat to telephone companies,'" *id.*, and that "the term 'broadband cable services' to which Congress was referring has commonly been understood throughout the years to include nonvideo services," *id.* (¶ 17). Accordingly, the Commission concluded that "Congress was aware of the Commission's longstanding view of cable as a provider of video *and* nonvideo services" and that "cable might not evolve beyond its traditional video offerings if utilities were able to employ overly restrictive pole attachment agreements to frustrate these potential competitors in the provision of nonvideo services." *Id.* at 7103 (¶ 18).[7] In short, the FCC ruled that the legislative history did "not indicate any congressional intent to draw a distinction or create a dichotomy between traditional and nonvideo broadband services over cable systems for purposes of [Section 224]." *Id.*

Finally, the Commission determined, as a matter of policy, that its interpretation of Section 224 was "more pro-

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[7] The Commission also concluded that the Cable Act of 1984, to the extent it was relevant, supported its conclusion that Section 224 applied to the data transmission services provided by TCI. *Heritage*, 6 FCC Rcd at 7104 (¶¶ 22-24).

competitive than the current situation where utilities . . . can forestall competition by cable operators in the data market by charging pole attachment rates that bear no relation to costs." *Id.* at 7105 (¶ 26). Although the FCC acknowledged that its conclusion "w[ould] afford cable television system operators an advantage over other competitors who are not entitled to pole attachment rates under Section 224," "Congress, in enacting Section 224, expressly limited its applicability to cable television systems." *Id.* at 7104, 7105 (¶ 26).[8]

The Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision. *Texas Utils.*, 997 F.2d at 927. The D.C. Circuit held that the FCC's conclusion that Section 224 applies to all pole attachments by a cable operator "'regardless of the type of service provided over the equipment attached to the poles'" was "a permissible construction, rational and consistent with the congressional purpose in enacting the [1978 Act]." *Id.*

3. Against this background of administrative and judicial decisions, Congress enacted the 1996 Telecommunications Act ("1996 Act"). By its terms, the 1996 Act was designed to foster increased competition in the markets for the provision of communications services. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act accomplishes

[8] Subsequently, the FCC resolved similar complaints by ruling that "Section 224 protects . . . pole attachments which support equipment used to provide nonvideo services in addition to video and other traditional cable television services." *WB Cable Assocs.* v. *Florida Power & Light Co.*, 8 FCC Rcd 383, 386 (¶ 21) (1993) (cable company providing security alarm services); *see also Selkirk Communications, Inc.* v. *Florida Power & Light Co.*, 8 FCC Rcd 387, 390 (¶ 21) (1993) (traditional and non-traditional cable services "[s]ometimes . . . provided in one cable, while at other times . . . provided by a separate cable"). In doing so, the Commission delegated its authority to resolve these cases to the Common Carrier Bureau because these cases "fail[ed] to raise either 'novel or unusual issues.'" *WB Cable*, 8 FCC Rcd at 383 n.3 (¶ 1); *Selkirk*, 8 FCC Rcd at 387 n.3 (¶ 1).

this goal, at least in part, by doing away with the economic and legal barriers put in place by government-granted incumbent monopolies, see, *e.g.*, 47 U.S.C. § 253, by allowing all competitors to compete in all markets, see, *e.g.*, 15 U.S.C. § 79z-5c; 47 U.S.C. § 541(b)(3)(B), and by requiring firms that control bottleneck facilities to share those facilities on regulated terms with firms that would use them to offer services to the public, see, *e.g.*, *id.* § 251(c)(3).

The 1996 Act also directs the FCC to encourage the development and deployment of high-speed Internet services. Specifically, Section 706 of the 1996 Act directs the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by . . . regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157, statutory note (a). In turn, "'advanced telecommunications capability'" is defined as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications." *Id.* statutory note (c).[9]

Consistent with the overarching purposes of this statutory regime, the 1996 Act also amended Section 224 to further these same pro-competitive goals. The protections provided by Section 224 were expanded to require that a utility "shall provide . . . nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). Further, while the protections of Section 224 previously applied only to "attachments by a cable television system," the 1996 Act modified Section 224 to

[9] In addressing this directive, the FCC has focused on the development and availability of high-speed Internet service. *See, e.g.*, FCC, *Data on High-Speed Services for Internet Access* at 1. Indeed, in the 1996 Act, Congress announced that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b).

extend its protections to "provider[s] of telecommunications service." Pub. L. No. 104-104, sec. 703(2), § 224(a)(4), 110 Stat. at 150 (codified at 47 U.S.C. § 224(a)(4)). These protections, however, were not extended to incumbent local exchange carriers, 47 U.S.C. § 224(a)(5), since they already own or control the poles, ducts, and conduits for which others require access.

Correspondingly, the structure of the Commission's rate mechanisms was modified in two ways. First, a new rate methodology – which the Senate report described as a "fully allocated cost formula," S. Conf. Rep. No. 104-230, at 206 (1996) – was added in subsection (e) that, when implemented by FCC regulations, would "govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(1). Second, the pre-existing rate methodology in subsection (d) was expressly "grandfathered" "for any pole attachment used . . . solely to provide cable service." *Id.* § 224(d)(3).

Congress also was aware, however, of the "increasing convergence between cable and other electronic media." *Turner*, 512 U.S. at 627. In fact, Congress expressly acknowledged that both cable systems and telecommunications carriers would be protected by FCC-regulated rates for pole attachments used to provide "any telecommunications service." 47 U.S.C. § 224(d)(3). Thus, the Senate report explained that, under the amended Section 224, "to the extent that a company seeks pole attachment for a wire used solely to provide cable television services . . . , that cable company will continue to pay the rate authorized under current law." S. Conf. Rep. No. 104-230, at 206. "If, however, a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the Commission pursuant to the fully allocated cost formula." *Id.*

Other aspects of Section 224 remained unchanged. Specifically, the 1996 amendments did not alter the language

of subsection (b), which grants the Commission general authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). Further, Congress left untouched the specific language – *i.e.*, "any attachment by a cable television system," *id.* § 224(a)(4) – that the FCC had concluded was "most reasonably read to provide that a cable operator may seek Commission-regulated rates for all pole attachments within its system, regardless of the type of service provided over the equipment attached to the poles." *Heritage*, 6 FCC Rcd at 7101 (¶ 12) (footnote omitted).

C. The Commission's Report And Order.

Pursuant to its obligation to implement the amendments to Section 224, see 47 U.S.C. § 224(b)(2), the Commission considered whether the 1996 Act restricted the services that cable operators could provide over pole attachments while still being covered by Section 224. At the outset, the Commission explained that it did not write on a blank slate because prior to the 1996 Act, Section 224 unquestionably applied to "the provision by a cable operator of both traditional cable services and nontraditional services on a commingled basis over a single network" and "that a cable system providing both video and nonvideo broadband services is not excluded from the benefits of Section 224." NCTA Pet. App. 60a & n.111 (¶ 27) (citing *Texas Utils.*, 997 F.2d at 936).

The Commission concluded that its prior analysis regarding the scope of Section 224 had not been "'overruled' by the passage of the 1996 Act insofar as it held that a cable system is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled data and video." NCTA Pet. App. 62a-63a (¶ 30). The Commission reasoned that under Section 224, as amended, the "definition of 'pole attachment' does not turn on what type of service the attachment is used to provide" but instead

"include[s] any attachment by a 'cable television system.'" *Id.* at 63a (¶ 30). Thus, the Commission explained that "the rates, terms and conditions for all pole attachments by a cable television system are subject to the Pole Attachment Act." *Id.* And, applying Section 224(b)(1), the Commission ruled that it "ha[d] a duty to ensure that such rates, terms, and conditions are just and reasonable." *Id.*

The Commission saw "nothing on the face of Section 224 to support the contention that pole owners may charge any fee they wish for Internet and traditional cable services commingled on one transmission facility." NCTA Pet. App. 63a (¶ 30). Specifically, the Commission highlighted that the "purpose of the amendments to Section 224 made by the 1996 Act," was "to remedy the inequitable position between pole owners and those seeking pole attachments," *id.* (¶ 31), and that the nature of that relationship "is not altered when the cable operator seeks to provide additional service," *id.* The Commission reasoned that if it were to interpret Section 224 to exclude cable operators that also provide Internet services, then Section 224 "would penalize cable entities that choose to expand their services in a way that will contribute 'to promot[ing] competition in every sector of the communications industry,' as Congress intended in the 1996 Act." *Id.* at 63a-64a (¶ 31) (alteration in original).

Thereafter, the FCC, pursuant to its authority under Section 224(b)(1), concluded that the "just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate." NCTA Pet. App. 64a (¶ 32). The Commission explained that it "intend[ed] to encourage cable operators to make Internet services available to their customers," and that adoption of "a higher rate might deter an operator from providing non-traditional services." *Id.* Specifically, the Commission ruled that adoption of the Section 224(d)(3) rate would "encourage greater competition in the provision of Internet service and greater benefits to consumers." *Id.* In reaching these conclusions, the

Commission expressly refrained from deciding "the precise category into which Internet services fit." NCTA Pet. App. 66a (¶ 34).

D. The Court Of Appeals' Decision.

The court of appeals rejected the FCC's interpretation of Section 224. The panel majority largely ignored the Commission's statutory analysis of Section 224(b)(1) and (a)(4). Instead, the panel ruled that because subsections (d) and (e) of Section 224 provided specific rules governing the rate mechanism for "'solely cable services'" and "telecommunications service," the Commission could only regulate the "'rates, terms, and conditions'" of pole attachments for those specific purposes. NCTA Pet. App. 25a, 26a. That is, the panel majority believed that "[f]or the FCC to be able to regulate the rent for an attachment that provides Internet service then, Internet service must qualify as either a cable service or a telecommunications service." *Id.* at 26a. Applying that framework, the court of appeals went beyond the questions that the FCC had addressed and decided that Internet service was not a "cable service," *id.* at 26a-29a, and that "there is no statutory basis for the FCC to regulate the Internet as a telecommunications service," *id.* at 29a. As a result, the court of appeals held that "the 1996 Act does not authorize the FCC to regulate pole attachments for Internet service." *Id.*

In reaching that conclusion, the panel majority expressly "decline[d]" "to adopt the D.C. Circuit's reasoning in *Texas Utilities.*" NCTA Pet. App. 27a-28a n.32. The majority acknowledged that the D.C. Circuit had "deferred to the FCC's interpretation that co-mingled services were covered by section 224," but stated that it felt "no need to follow the reasoning of *Texas Utilities*" because the D.C. Circuit's decision was issued "before the 1996 amendments [to Section 224] were enacted." *Id.* at 28a n.32. According to the panel majority, the 1996 amendments to Section 224 "eliminate[d] the ambiguity" regarding the Commission's authority

confronted by the D.C. Circuit in *Texas Utilities* by adding a "new section 224(d)(3)" which "states that 'solely cable services' receive regulated rents." *Id.* Therefore, the panel below concluded that it was presented "with an entirely different situation from that faced by the D.C. Circuit in *Texas Utilities*." *Id.*[10]

In dissent, Judge Carnes explained that the "plain language" of Section 224 refuted the panel's conclusion regarding the Commission's authority to regulate attachments by cable operators that provide Internet service. NCTA Pet. App. 33a. Judge Carnes noted that "Section 224(b)(1) provides that the FCC 'shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.'" *Id.* at 34a. Further, he explained that "[t]he term 'pole attachment' is defined . . . as '*any* attachment by a cable television system,'" *id.*, and that the word "'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" *id.* Judge Carnes employed that commonsense statutory analysis to conclude that "the FCC has the authority to regulate "*all* attachments, i.e., attachments 'of whatever kind.'" *Id.*

In his subsequent statement dissenting from the denial of rehearing en banc, Judge Carnes explained that the issues presented in this case "may affect every person who uses . . . Internet service in this country." NCTA Pet. App. 96a. According to Judge Carnes, "[a] more national case could hardly be imagined." *Id.* Thereafter, the court of appeals granted the motions to stay the mandate pending the filing and resolution of a petition for certiorari. *Id.* at 69a-76a.

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[10] The court of appeals also ruled, based on its prior decision in *Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1338 (11th Cir. 1999), that respondents' facial challenge, under the Fifth Amendment, to the formula adopted by the FCC to provide "just compensation" under Section 224 was "unripe," and therefore the court of appeals did "not address it." NCTA Pet. App. 18a-19a.

SUMMARY OF ARGUMENT

1.A. The plain language of 47 U.S.C. § 224, the background of administrative and judicial decisions against which Congress amended Section 224, and the purposes underlying the 1996 Act, all confirm that a cable system does not forfeit regulatory oversight by the FCC that ensures its nondiscriminatory access to essential bottleneck facilities at "just and reasonable" "rates, terms, and conditions" by providing high-speed Internet access to its customers along the same lines it uses to provide traditional video programming services.

First, Section 224, by its terms, mandates that the Commission ensure "just and reasonable" "rates, terms, and conditions" for "pole attachment[s]," which are defined as "any attachment by a cable television system . . . to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4), (b)(1). This broad language clearly encompasses "pole attachments" used by a cable television system to provide high-speed Internet access as well as traditional video cable programming to its subscribers.

Second, the administrative and judicial interpretations of the language of Section 224(b)(1) and (a)(4) further confirm that conclusion. Congress is presumed to be aware of administrative and judicial interpretation of language in a statute, and to adopt that interpretation when it amends the statute without any relevant change to that language. *E.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978). Prior to the 1996 amendments, the law was settled that the FCC had authority under Section 224(b)(1) and (a)(4) to regulate the "rates, terms, and conditions" of pole attachments by cable television systems "'regardless of the type of service provided over the equipment attached to the poles.'" *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993) (quoting *Heritage Cablevision Assocs.* v. *Texas Utils. Elec. Co.*, 6 FCC Rcd 7099, 7101 (¶ 12) (1991)). In 1996, when it amended

Section 224, Congress adopted those prior interpretations because it left the relevant language of Section 224(b)(1) and (a)(4) entirely unchanged.

Finally, the FCC's interpretation of Section 224 is consistent with and promotes the statutory purposes underlying the 1996 Act. As to Section 224, the 1996 amendments quite clearly were intended to expand, rather than limit, the Commission's authority over the "rates, terms, and conditions" of "pole attachments." Thus, the Commission's general authority was expanded to encompass attachments by "provider[s] of telecommunications service" as well as "cable television system[s]," 47 U.S.C. § 224(a)(4), and the Commission was given the added responsibility to ensure that the "rates, terms, and conditions" of such access were "nondiscriminatory" as well as "just and reasonable." *Id.* § 224(f)(1). More generally, the clear intent of the 1996 Act was to break down artificial barriers to competition put in place by government-granted monopolies, to encourage the development of advanced services such as high-speed Internet access and to promote the Internet and other interactive media. The Commission's interpretation of Section 224 is thus consistent with and compelled by these overarching statutory purposes.

B. The court of appeals' contrary conclusion does not withstand scrutiny. First, its determination that the language of subsections (d) and (e) divested the Commission of its authority under Section 224(b)(1) ignores that these subsections simply ensure that the pre-existing rate structure would continue to apply to cable systems using attachments "solely" to provide cable services, but that cable systems and telecommunications carriers both would be subject to a separate rate structure when they competed for the provision of telecommunications service. Subsections (d) and (e) therefore do not divest the Commission of authority under subsection (b)(1), but instead identify how the Commission is to implement that authority over pole attachment rates in two

specific circumstances. For all other circumstances, the FCC retains authority to regulate pole attachment rates under Section 224(b)(1). In contrast, the court of appeals' reading that the rate structures in (d) and (e) are exclusive renders subsection (b)'s references to "just and reasonable" "rates" entirely superfluous.

Moreover, in holding that the 1996 amendments implicitly repealed pre-1996 law on commingled services, the court of appeals ran afoul of the "cardinal" rule that repeals by implication are disfavored. See *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). Indeed, Congress would not have repealed the Commission's established authority over the "rates, terms, *and* conditions" of these pole attachments by merely modifying one provision (subsection (d)) and adding another (subsection (e)) that address "rates" only and say nothing about the "terms" or "conditions" of any pole attachments. Finally, the court of appeals' determination that prior administrative and judicial decisions interpreting the scope of the FCC's pole attachment authority were not controlling was itself based upon a misreading of the 1996 amendments to Section 224.

C. But even if there were any ambiguity over whether the FCC could regulate under Section 224 pole attachments used by a cable television system to provide high-speed Internet access services along with traditional video programming services – and there is none – the FCC's conclusion is, at a minimum, a reasonable one. Indeed, the FCC's conclusion that it has such authority is consistent with the plain language of Section 224, respects the prior administrative and judicial interpretations of identical statutory language, and promotes the purposes underlying the 1996 Act. Accordingly, settled law requires deference to the FCC's reasonable conclusion that pole attachments used by cable television systems to provide high-speed Internet access fall within Section 224's protections.

2. Alternatively, even if the Court were to conclude that Section 224 authorized regulation of rates, terms, and conditions of attachments only for "cable service" and "telecommunications service," the decision below should be reversed to allow the Commission to assemble the record necessary to determine, in the first instance, whether Internet access provided by a cable television system is, in fact, a "cable service." That approach properly recognizes that reviewing courts are required to defer to reasonable interpretations of statutes by agencies and that agency decisions should be based upon an adequate factual administrative record. Here, the FCC expressly declined to determine whether Internet service provided by a cable system qualified as cable service. The Commission thus should be permitted to gather the evidence necessary to analyze and determine whether Internet access provided by cable television systems qualifies as "cable service." Indeed, that issue is squarely presented in a separate proceeding currently before the FCC.

ARGUMENT

I. CONGRESS DID NOT INTEND THAT CABLE SYSTEMS WOULD FORFEIT REGULATORY OVERSIGHT THAT ENSURES NONDISCRIMINATORY ACCESS TO POLES AT "JUST AND REASONABLE" "RATES, TERMS, AND CONDITIONS" BY PROVIDING HIGH-SPEED INTERNET ACCESS IN ADDITION TO TRADITIONAL VIDEO PROGRAMMING.

A. The Plain Language Of Section 224, Its Statutory History, And The Purposes Underlying Section 224 And The 1996 Act Confirm That The FCC Has Authority To Regulate The Rates, Terms, And Conditions For Pole Attachments Used By Cable Television Systems To Provide Internet Access Service.

1. This Court explained long ago that "[w]hen there is no ambiguity in the words, there is no room for construction." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.). "The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 409 (1993) (quoting *Chevron, U.S.A, Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). Put another way, "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there," for "[w]hen the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)).

The language of Section 224 is clear. It provides that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1).

Subsection (a)(4), in turn, defines "pole attachment," as "*any* attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." *Id.* § 224(a)(4) (emphasis added). As this Court has explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New Int'l Dictionary* 97 (1976)). Indeed, in *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), the Court relied upon Congress' use of word "'any'" in 47 U.S.C. § 251(c)(3) to reject a claim that the statutory "duty to provide, to *any* requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis," 47 U.S.C. § 251(c)(3) (emphasis added), should be limited to a subset of requesting carriers that satisfied a separate "facilities-ownership requirement." 525 U.S. at 392.

Based on the plain language of Section 224, the Commission properly declined to limit its authority over "any attachment by a cable television system" to a subset of such attachments used solely to provide video programming, and not Internet access services. Instead, it properly concluded that the "the definition of 'pole attachment' does not turn on what type of service the attachment is used to provide," and therefore "the rates, terms, and conditions for *all* pole attachments by a cable television system are subject to [Section 224]." NCTA Pet. App. 63a (¶ 30) (emphasis added). In short, the plain language of Section 224 is clear, and it fully supports the FCC's conclusion.

2. Further, when it amended Section 224, Congress did not write on a clean slate. That fact is important because "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation of a statute when it reenacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978).

See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-82 (1982).[11] This rule of construction "is based upon the theory that the legislature is familiar with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing that statute," and, therefore, the legislature "impliedly adopts the interpretation upon reenactment." 2B N. Singer, *Sutherland Statutory Construction* § 49.09, at 108 & n.6 (6th ed. 2000) (citing cases). For example, in *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768 (1985), the Court ruled that when Congress "amended" 5 U.S.C. § 8347 "without explicitly repealing" an established legal interpretation of § 8347, that fact "itself g[ave] rise to a presumption that Congress intended to embody [the prior legal interpretation] in the amended version of [the statute]." *Id.* at 782.

These principles apply equally in this case. Prior to Congress' 1996 amendments to Section 224, the law was settled that the "any attachment by a cable television system" language in Section 224(a)(4), "provide[d] that a cable operator may seek Commission-regulated rates for all pole attachments within its system, regardless of the type of service provided over the equipment attached to the poles." *Heritage Cablevision Assocs.* v. *Texas Utils. Elec. Co.*, 6 FCC Rcd 7099, 7101 (¶ 12) (1991) (footnote omitted). Specifically, the FCC, the agency authorized by Congress to implement Section 224, ruled that Section 224(a)(4) and (b)(1) required it to regulate attachments by cable television systems used "to provide nonvideo broadband communications services . . . , including data transmission services." *Id.* at 7100 (¶ 8); see also *WB Cable Assocs.* v. *Florida Power & Light Co.*, 8 FCC Rcd 383, 386 (¶ 21) (1993) (reaffirming FCC's

[11] *See also Holder* v. *Hall*, 512 U.S. 874, 920 (1994) (Thomas, J., joined by Scalia, J., concurring in judgment) ("[Court] generally will assume that reenactment of specific statutory language is intended to include a 'settled judicial interpretation' of that language").

decision in *Heritage*); *Selkirk Communications, Inc.* v. *Florida Power & Light Co.*, 8 FCC Rcd 387, 390 (¶ 21) (1993) (same). The FCC's interpretation of this language, in turn, was affirmed on appeal by the D.C. Circuit. *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993).

In 1996, in the face of this settled administrative and judicial precedent interpreting the "any attachment by a cable television system" language in Section 224, Congress re-adopted precisely the same language when it amended Section 224. First, Congress left Section 224(b)(1) entirely unchanged. Moreover, Congress amended Section 224(a)(4) to provide: "The term 'pole attachment' means *any attachment by a cable television system* or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4) (emphasis added). Both the pre- and post-1996 amendment language are identical in all relevant respects. Settled principles of statutory construction thus dictate that Congress intended to adopt the administrative and judicial construction of Section 224 when it amended that section but reenacted precisely the same language that had been conclusively interpreted by the FCC and affirmed by the D.C. Circuit.

To be sure, Congress modified the definition of "pole attachment" to add attachments by a "provider of telecommunications service," as well as "cable television system[s]" which already were covered. *Id.* But that amendment reflects an *expansion* of the scope of Section 224 to encompass yet another category of attachments. It would make no sense to conclude that Congress narrowed the regulatory authority that the FCC admittedly possessed over pole attachments by cable television systems "'regardless of the type of service provided over the equipment attached to the poles,'" *Texas Utils.*, 997 F.2d at 927, by "expand[ing] the scope of the coverage of section 224." H.R. Conf. Rep. No. 104-458, at 206 (1996).

3. Moreover, when construing a statute, this Court looks to "the provisions of the whole law," including "its object and policy." *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990). The meaning of a statute "is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

Here, Congress' amendments to Section 224 contained in the 1996 Act were intended to expand the scope of Section 224. In addition to expanding the definition of "pole attachment" to encompass "provider[s] of telecommunications service" as well as "cable television system[s]," Congress also expanded the obligations imposed by Section 224 on utilities, requiring that they "provide . . . nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by [them]." 47 U.S.C. § 224(f)(1). The purpose of these amendments plainly is to expand the protections of Section 224 and thus to broaden access to bottleneck facilities necessary for greater competition in the provision of communications services by cable television systems and telecommunications carriers.

As the Commission explained, "[t]he purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it first was enacted in 1978, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments." NCTA Pet. App. 63a (¶ 31). The nature of that relationship, and the potential for anti-competitive conduct by pole owners "is not altered when the cable operator seeks to provide additional service." *Id.* In fact, the potential for such abuse has increased because, under the 1996 Act, utilities that are required to provide access to poles under Section 224 now may be authorized to compete against cable operators for the provision of Internet service. 15 U.S.C. § 79z-5c. As the FCC has explained, "[a] growing number of public utilities"

are competing directly with cable operators in the market for Internet services. *Section 706 Report*, 14 FCC Rcd at 2427 (¶ 55).

More generally, the 1996 Act, of which the amendments to Section 224 were but a part, was designed to foster competition among communications service providers by reducing the restraints imposed by government-granted incumbent monopolies. Under the 1996 Act, monopoly state telephone franchises were preempted, 47 U.S.C. § 253, incumbent local exchange carriers ("LECs") were required to share their networks with competitors, *id.* § 251(c)(3), local franchising authorities were limited in their ability to restrict local competition, *id.* § 541(b)(3)(B), and public utilities were freed of legal restrictions that prevented diversification into telecommunications, 15 U.S.C. § 79z-5c. As a result of the 1996 Act, "States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry." *Iowa Utils. Bd.*, 525 U.S. at 371.

Apart from promoting competition by lowering legal and economic barriers to market entry and ensuring access to bottleneck monopoly facilities, the 1996 Act also expressed a national policy "to promote the continued development of the Internet." 47 U.S.C. § 230(b)(1). In Section 706 of the 1996 Act, Congress authorized the Commission, if it concludes that advanced telecommunications capability is not being deployed in a reasonable and timely manner, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.* § 157, statutory note (b).

In light of these provisions, it strains credulity to suggest that Congress simultaneously intended to limit the Commission's authority under Section 224 and thereby penalize "cable entities that choose to expand their services in a way that w[ould] contribute 'to promot[ing] competition in

every sector of the communications industry,' as Congress intended in the 1996 Act." NCTA Pet. App. 63a-64a (¶ 31) (second alteration in original). This is particularly true because the bottleneck control over essential facilities possessed by utilities is in no way altered "when the cable operator seeks to provide additional service." *Id.* at 63a (¶ 31).

B. The Court Of Appeals' Ruling Is Based On A Misreading Of Section 224 That Violates Settled Canons Of Statutory Construction.

The court of appeals' decision largely ignores these principles. Instead, it focuses solely on subsections (d) and (e), and concludes that the "language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized." NCTA Pet. App. 25a n.29. That conclusion does not withstand scrutiny.

1. As described previously, the plain language of Section 224 refutes the court of appeals' conclusion that Section 224 authorizes only "[i] one [rate] for cable television systems providing solely cable service and [ii] one for telecommunications carriers providing telecommunications service." NCTA Pet. App. 25a n.29. Subsection (b) of Section 224 provides, as it did prior to the 1996 amendments, that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). Subsections (d) and (e) merely define "just and reasonable" rates in two specific circumstances: (i) when a cable television system uses an attachment "solely to provide cable service," *id.* § 224(d)(3), and (ii) when a telecommunications carrier uses an attachment "to provide telecommunications services." *id.* § (e)(1).

Subsections (d) and (e) do not reveal any congressional intent to remove attachments that cable operators use to provide Internet access service from the purview of Section 224(b), even if Internet access is neither a cable service nor a telecommunications service. Rather, taken together, they establish a level playing field for the provision of "telecommunications service" by cable systems and telecommunications providers. Thus, "to the extent that a company seeks pole attachment for a wire used solely to provide cable television services . . . , that cable company will continue to pay the rate authorized under current law . . . . If, however, a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the Commission pursuant to the fully allocated cost formula." S. Conf. Rep. No. 104-230, at 206.

Simply put, when Congress dictated the mechanism that the Commission should employ when setting rates under two specific circumstances, Congress did not, by negative implication, divest the Commission of its established authority to ensure "just and reasonable" "rates, terms, and conditions" for pole attachments by cable operators that provide both traditional cable video service and Internet service. Indeed, the court of appeals never suggests any plausible reason that Congress would have intended to dissuade cable entities from expanding their services to include high-speed Internet access services. But that is precisely the effect of the court of appeals' decision that cable operators forfeit valuable regulatory protections under Section 224 if they provide Internet service to their subscribers.

Moreover, the court of appeals' conclusion that the specific provisions of subsections (d) and (e) divested the Commission of general authority under subsection (b)(1) is virtually identical to an argument rejected by this Court in *Iowa Utils. Bd.*, 525 U.S. at 380-83 & nn.8, 9. There, the Court held that the scope of the FCC's existing general rulemaking authority

under 47 U.S.C. § 201(b) was not limited by the 1996 Act, which added further provisions in 47 U.S.C. § 251 that "refer[red] to the exercise of [rulemaking] authority conferred elsewhere" or established additional constraints on the FCC's exercise of that general rulemaking authority. *Iowa Utilities Bd.*, 525 U.S. at 383 nn.8, 9. The Court explained that the specific provisions in newly enacted Section 251 did not limit the FCC's established rulemaking authority under Section 201(b), especially since the specific grants of authority were "not redundant of § 201(b)." *Id.*[12] Here too, the Commission's general authority under subsection (b)(1) has not been repealed by Congress' provisions addressing how the Commission should exercise that authority over pole attachment rates in two specific circumstances.

Further, the court of appeals' analysis is entirely backwards because it presumes that the 1996 Act sought to *limit* the scope of the regulatory protections provided by Section 224. According to the panel majority, when Congress dictated the rate mechanism that the Commission should apply for a "cable television system solely to provide cable service," 47 U.S.C. § 224(d)(3), and "telecommunications carriers to provide telecommunications service," *id.* § 224(e)(1), Congress thereby stripped the Commission of all authority to regulate the "rates, terms, and conditions" for pole attachments under any other circumstances. NCTA Pet. App. 26a, 29a.

In fact, the 1996 Act *expanded* the reach of Section 224 by extending the protections previously accorded only to "cable television system[s]" to "provider[s] of telecommunications

[12] Although the principal dissent disagreed on this point, it relied primarily on its conclusion that Section 201(b) was not, contrary to the majority holding, a general grant of rulemaking authority, but rather was limited to authorizing rules relating to interstate service only. *See* 525 U.S. at 404, 407-09 (Thomas, J., dissenting). Here, by contrast, there can be no dispute regarding the breadth of the language in Section 224(b)(1) and (a)(4).

service" as well. 47 U.S.C. § 224(a)(4). Indeed, even apart from the language of the 1996 amendments, the court of appeals' conclusion also cannot be reconciled with the 1996 Act, whose manifest goal is to eliminate the ability of entities to exercise monopoly control over essential bottleneck facilities that create barriers to competition for communications services. Of course, when construing a statute, this Court considers "the provisions of the whole law" including "its object and policy." *Dole*, 494 U.S. at 35. The object and policy of the 1996 Act refute the notion that Congress sought to limit the FCC's authority over pole attachments by cable television systems.

Finally, the court of appeals' insistence that, apart from the two rates identified in subsections (d) and (e), "no other rates are authorized," NCTA Pet. App. 25a n.29, also should be rejected because it renders a portion of subsection (b)(1) redundant. That is, if the only allowable pole attachment rates are set forth in subsections (d) and (e), then it adds nothing to provide in subsection (b) that pole attachment "rates" must be "just and reasonable." See *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997) (noting that interpretation should "'give effect, if possible, to every clause and word of a statute"). In contrast, the FCC's construction of Section 224 gives meaning both to the specific commands in subsections (d) and (e) as well as the general command to ensure that all attachment rates are "just and reasonable."

2. The court of appeals' interpretation also is mistaken because it fails to consider the presumption against implied repeals. Specifically, the court of appeals recognized that, prior to the 1996 amendments, Section 224 (as interpreted by the FCC and affirmed by the D.C. Circuit) authorized the regulation of pole attachments used by cable systems regardless of the service being provided. NCTA Pet. App. 27a-28a n.32. The court of appeals, however, failed to consider the effect that settled practice had on its conclusion that Congress had implicitly repealed existing practice and

had limited the Commission's authority to only the specific circumstances identified in subsections (d) and (e).

The law is clear that "repeals by implication are not favored," *Rodriguez* v. *United States*, 480 U.S. 522, 524 (1987) (per curiam), and a party advocating such a repeal "bears a heavy burden of persuasion." *Amell* v. *United States*, 384 U.S. 158, 165 (1966); 1A N. Singer, *Sutherland Statutory Construction* § 23.10, at 353 (5th ed. 1991) ("Courts have created a presumption against the repeal of prior laws by implication"); *accord Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). The purpose of this rule of construction "is to give harmonious effect to all acts on a subject where reasonably possible." 1A N. Singer, *Sutherland Statutory Construction* § 23.10, at 353.

The Court's analysis in *Posadas* v. *National City Bank* is instructive. There, the Court considered the legality of taxes imposed by the Philippine Government on bank branches established by National City Bank in the Philippine Islands under Section 25 of the Federal Reserve Act of 1913 ("Section 25"). 296 U.S. at 498-99. Section 25 authorized the establishment of branches "in foreign countries or dependencies of the United States." *Id.* at 500. The Court explained that "without regard to later legislation," the taxes "imposed by the Philippine Government [were] invalid" under Section 25 of the 1913 Act. *Id.* Posadas, however, argued that "subsequent legislation ha[d] the effect of repealing and abrogating Section 25 of the 1913 act." *Id.* at 501. Specifically, Posadas insisted that a 1916 Act of Congress that amended Section 25 by adding "the words 'or insular possessions' after the word 'dependencies'" effected an implied repeal of Section 25's established legal meaning. *Id.*

In rejecting the argument that the settled meaning of Section 25 had been implicitly repealed by a 1916 amendment to Section 25, the *Posadas* Court relied upon the "cardinal rule . . . that repeals by implication are not favored."

Id. at 503. Under that rule, "'[w]here the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed.'" *Id.* at 504. Accordingly, implied repeals must be "clear and manifest," and the "implication" of repeal "must be a necessary implication." *Id.* Applying those standards, the Court held that "nothing" "justifies the conclusion that by the amendment of 1916[,] Congress intended to repeal the old § 25 of the Federal Reserve Act." *Id.* at 505.

Here too, nothing in the 1996 amendments to Section 224 justifies the conclusion that Congress sought to repudiate or limit established practice. In 1978, Congress enacted the Pole Attachment Act to provide the FCC, in Section 224(b)(1), with authority to regulate "the rates, terms, and conditions for pole attachments to provide that [they] are just and reasonable." 47 U.S.C. § 224(b)(1). In turn, the 1978 Act defined "pole attachment" in subsection (a)(4) to mean "any attachment by a cable television system." *Id.* § 224(a)(4). Through rulemaking and adjudication, these provisions acquired a settled legal meaning wherein the Commission was authorized to regulate pole attachments by a cable operator "'regardless of the type of service provided over the equipment attached to the poles.'" *Texas Utils.*, 997 F.2d at 927 (quoting *Heritage*, 6 FCC Rcd at 7101 (¶ 12)).

Subsequently, Congress passed the 1996 Act, which amended portions of Section 224. In the 1996 Act, Congress included no language expressly repealing the subsections of Section 224 that defined the Commission's authority over pole attachments in subsection (b)(1) or the term "pole attachment" in subsection (a)(4). Moreover, the only change that Congress made to either of these provisions is that it expanded the definition of "pole attachment" so that it would include "providers of telecommunications service" as well as the "cable television systems" previously covered under the 1978 Act. As in *Posadas*, there quite simply is no "clear and manifest" intent or "necessary implication" that Congress

intended to repeal the prior understanding of the scope of the Commission's authority to regulate the "rates, terms, and conditions" of pole attachments under Section 224(b)(1).

In addition, the manner in which Congress amended Section 224 makes it especially unlikely that Congress intended to repeal and limit the Commission's existing regulatory authority over pole attachments by cable television systems. The FCC's authority under Section 224(b)(1) is not limited to "rates," but also extends to the "terms, and conditions" of pole attachments. According to the court of appeals, however, Congress implicitly repealed the Commission's authority over the "rates, terms, and conditions" of these pole attachments by modifying subsection (d) and adding subsection (e), two provisions that relate solely to pole attachment *rates* and say nothing about "terms" or "conditions." If Congress had intended to repeal the FCC's established authority over the "rates, terms, and conditions" of pole attachments, it would not have done so by merely adding language that has nothing to do with the "terms" or "conditions" of pole attachments.

3. Finally, the court of appeals' conclusion that the 1996 amendments to Section 224 repudiated settled practice as reflected in the D.C. Circuit's *Texas Utilities* ruling was based upon a misreading of the 1996 amendments to Section 224. According to the court of appeals, "new section 224(d)(3) states that 'solely cable services' receive regulated rents." NCTA Pet. App. 28a n.32. Based on that reading, the court of appeals insisted that "Congress, in 1996, amended [Section 224] to eliminate the ambiguity" confronted by the D.C. Circuit in *Texas Utilities*, and therefore it was "faced with an entirely different situation from that faced by the D.C. Circuit." NCTA Pet. App. 28a n.32.

Contrary to the court of appeals' decision, however, the "new section 224(d)(3)" does *not* state that "solely cable services" will receive regulated rents. Rather, Section 224(d)(3) provides that "any pole attachment used by a cable

television system solely to provide cable service" will be governed by the rate structure set forth in Section 224(d). 47 U.S.C. § 224(d)(3). Similarly, Section 224(e)(1) provides that pole attachments "used by telecommunications carriers to provide telecommunications services" are governed by the rate formula set forth in subsection (e). *Id.* § 224(e)(1). As demonstrated above, these new provisions do not divest the FCC of regulatory authority over "rates, terms, and conditions" of pole attachments in all other circumstances. *Id.* § 224(b)(1). Congress' use of the word "solely" in subsection (d) simply distinguishes the rates applicable to attachments by cable systems used to provide "solely" cable service from the rates in subsection (e) for attachments used to provide "telecommunications" service.

Nothing in the 1996 amendments either expressly or implicitly limits the prior scope of Section 224, which grants the FCC authority under subsection (b)(1) to ensure "just and reasonable" "rates, terms, and conditions" of "pole attachment[s]," and which still defines "pole attachment" in subsection (a)(4) to mean "any attachment by a cable television system . . . to a pole . . . owned or controlled by a utility." 47 U.S.C. § 224(a)(4), (b)(1). The relevant language of Section 224, as amended by the 1996 Act, is exactly the same language interpreted by the FCC in *Heritage* and affirmed by the D.C. Circuit in *Texas Utilities*. It should have been interpreted in the same way by the court of appeals.

C. Even If The Scope Of The Commission's Authority Under Section 224 Were Ambiguous, Then The Commission's Reasonable Interpretation Must Prevail.

Although the 1996 Act "profoundly affects a crucial segment of the economy worth tens of billions of dollars," *Iowa Utils. Bd.*, 525 U.S. at 371, it is "in many important respects" "a model of ambiguity," *id.* at 397. In such cases, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing

agency." *Id.*; see also *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). As demonstrated in Parts I.A. and I.B., *supra*, in the 1996 amendments to Section 224, Congress intended to *expand* the scope of the FCC's existing authority to regulate the "rates, terms, and conditions" of pole attachments. But even if the effect of the 1996 amendments on Section 224 rendered the scope of the Commission's authority ambiguous on this point, then under *Chevron*, the FCC's reasonable interpretation must still prevail.

Chevron provides that if "Congress has not addressed the precise question at issue, the Court does not simply impose its own construction." 467 U.S. at 843. Rather, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*; see also 1 K. Davis & R. Pierce, Jr., *Administrative Law Treatise* § 3.3, at 113 (3d ed. 1994) ("[P]olicy disputes within the scope of authority Congress has delegated an agency are to be resolved by agencies rather than by courts").

In Section 224, Congress provided that "[t]he Commission shall prescribe by rule regulations to carry out the provisions of this section." 47 U.S.C. § 224(b)(2). In carrying out that obligation, the Commission concluded that pole attachments used by a cable television system to provide high-speed Internet access fall within the scope of the Commission's authority to regulate the "rates, terms, and conditions" of "any attachment by a cable television system." The FCC's conclusion (i) is faithful to the statutory language of Section 224(b)(1) and 224(a)(4); (ii) properly incorporates the settled legal meaning of Section 224; and (iii) is consistent with Congress' express goals of expanding the scope of Section 224, promoting competition in the communications industry generally, and ensuring the availability of advanced services such as high-speed Internet access. At the very minimum, the Commission has reached a reasonable interpretation of the

scope of Section 224 that is entitled to deference under *Chevron*.

II. EVEN IF THE COURT CONCLUDES THAT ONLY ATTACHMENTS USED EXCLUSIVELY TO PROVIDE CABLE SERVICES AND TELECOMMUNICATIONS SERVICES ARE PROTECTED BY SECTION 224, IT NEVERTHELESS SHOULD REVERSE THE DECISION BELOW TO ALLOW THE FCC TO DETERMINE WHETHER INTERNET ACCESS PROVIDED BY A CABLE TELEVISION SYSTEM IS A CABLE SERVICE.

As demonstrated above, Section 224 is properly read to provide the FCC with jurisdiction over pole attachments by cable television systems used to provide high-speed Internet access services. If this Court should determine, however, that the court of appeals was correct in concluding that Section 224 authorizes regulation of pole attachments by cable television systems only when such attachments are used to provide "cable service" or "telecommunications service," its judgment nevertheless should be reversed so that the FCC may make the determination – that it expressly declined to make previously, NCTA Pet. App. 66a (¶ 34) – of whether high-speed Internet access service provided by a cable system is a "cable service."

Where Congress has entrusted the implementation and construction of federal law to an administrative agency, federal courts are precluded from substituting their own judgment for that of the expert agency. *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Of course, an agency's implementation and construction of a statute must be informed by an adequate administrative record. Indeed, this Court has "consistently expressed the view that ordinarily review of administrative decisions is to be confined to 'consideration of the decision . . . and of the evidence on which it was based.'" *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (quoting

Camp v. *Pitts*, 411 U.S. 138, 142 (1973)). As a result, "[i]f the decision of the agency is not sustainable on the administrative record made, then the decision must be vacated and the matter remanded . . . for further consideration." *Id.* (omission in original).

These principles apply equally to this case. In its Order, the Commission made clear its view that it "need not decide . . . the precise category into which Internet services fit," because "[s]uch a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems using pole attachments to provide traditional cable services and Internet services." NCTA Pet. App. 66a (¶ 34). As a result, the FCC did not assemble the necessary evidentiary record to determine precisely the nature of Internet services provided by cable television systems. Nor did the agency address and resolve arguments regarding the proper characterization of Internet service provided by a cable television system. *Id.*

Unfortunately, the absence of a complete record describing the contours of Internet access services provided by cable systems did not dissuade the court of appeals from resolving this issue on its own. See NCTA Pet. App. 26a-28a. Indeed, the court of appeals concluded that Internet access services were neither cable service nor telecommunications service. *Id.* at 29a. In doing so, the court of appeals, in the absence of any factual record on the point, improperly substituted its own judgment for that of the agency chosen by Congress to implement Section 224. *Id.* The proper course for the court of appeals should have been to remand the case back to the FCC for further proceedings to resolve this separate issue. See, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 121 S. Ct. 903, 919 (2001) (rejecting EPA implementation of policy as unreasonable but leaving "it to the EPA to develop a reasonable interpretation").

To the extent that the Court concludes that the FCC's construction of Section 224 is unreasonable, the decision

below nevertheless should be reversed to allow the Commission to assemble an adequate record and consider the arguments that are necessary for it to properly exercise its expert judgment in resolving whether Internet access services provided by a cable television system qualify as "cable service." Simply put, if the question is relevant to this case, the Commission should be permitted to resolve the proper regulatory category for high-speed Internet access services provided by cable television systems in the first instance.[13]

[13] That process currently is underway in a separate proceeding in which the Commission has sought factual input that may affect policy concerns relating to high-speed Internet access using cable modem technology. *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, slip op. ¶¶ 14-24 (FCC Sept. 28, 2000). Indeed, respondents noted previously that "the proper regulatory classification of Internet service 'is central to a separate debate concerning whether a cable operator can be compelled to provide unaffiliated Internet service providers with "open access" to its cable facilities.'" Opposition Br. at 13 (quoting Gov't Pet. at 15 n.4).

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

47 U.S.C. § 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this

subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

(June 19, 1934, c. 652, Title II, § 224, as added Feb. 21, 1978, Pub.L. 95-234, § 6, 92 Stat. 35 and amended Sept. 13, 1982, Pub. L. 97-259, Title I, § 106, 96 Stat. 1091; Oct. 30, 1984, Pub.L. 98-549, § 4, 98 Stat. 2801; Oct. 25, 1994, Pub.L. 103-414, Title III, § 304(a)(7), 108 Stat. 4297; Feb. 8, 1996, Pub.L. 104-104, Title VII, § 703, 110 Stat. 149.)

47 U.S.C. § 157. New technologies and services

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HISTORICAL AND STATUTORY NOTES

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Advanced Telecommunications Incentives

Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, provided that:

"(a) In general.—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

"(b) Inquiry.—The Commission shall, within 30 months after the date of enactment of this Act [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

"(c) Definitions.—For purposes of this subsection:

"(1) Advanced telecommunications capability.—The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

"(2) Elementary and secondary schools.—The term 'elementary and secondary schools' means elementary and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801) [section 8801(14) and (25) of Title 20, Education]."

47 U.S.C. § 230. Protection for private blocking and screening of offensive material

* * * *

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

* * * *

(June 19, 1934, c. 652, Title II, § 230, as added Pub.L. 104-104, Title V, § 509, Feb. 8, 1996, 110 Stat. 137; Pub.L. 105-277, Div. C, Title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681-739.)