No. 00-843

IN THE SUPREME COURT OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, et al,
Petitioners

v.

GULF POWER COMPANY, et al.
Respondents

BRIEF FOR THE RESPONDENT'S

Filed June 5th, 2001

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

COUNTERQUESTIONS PRESENTED

1. Whether Congress granted the Federal Communications Commission jurisdiction in 47 U.S.C. § 224 to regulate pole attachments that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

2. Whether Congress granted the Federal Communications Commission jurisdiction in 47 U.S.C. § 224 to regulate attachments of wireless telecommunications equipment.

RULE 29.6 STATEMENT

Florida Power & Light Company is a wholly-owned subsidiary of FPL Group, Inc.

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STATUTE INVOLVED

The Pole Attachments Act, 47 U.S.C. § 224 (amended 1996), is set forth at Gov. App. 205a-211a.[1]

COUNTERSTATEMENT OF THE CASE[2]

This case involves implementation by the Federal Communications Commission ("FCC") of amendments to the Pole Attachments Act, 47 U.S.C. § 224 enacted by Congress as part of the Telecommunications Act of 1996:[3] *In re Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole*

1. "Gov. App." references in this brief are to the Federal Petitioners' Appendix To The Petition For A Writ Of Certiorari, Case No. 00-843. "Gov. Brf." references are to the Brief For The Federal Petitioners. "Wireless *Amici*" refers to the Wireless Industry as *Amici Curiae* in Support of Petitioners. All citations to the Pole Attachments Act, 47 U.S.C. § 224, Section 224 and Section 224 subsections are to 47 U.S.C. § 224, as amended in 1996, as reproduced in Gov. App. Appendix E, 205a-211a, unless expressly indicated otherwise.

2. This Counterstatement reflects the fact that Respondent Florida Power & Light Company ("FPL") is not separately briefing the issue of whether a cable system which is providing commingled cable and Internet service is entitled to the "solely cable" pole attachment rate of 47 U.S.C. § 224(d)(3).

3. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), hereafter cited as the "1996 Act" or "Telecommunications Act."

Attachments, 13 F.C.C.R. 6777 (1998) (hereafter referred to as *"FCC Order"*).[4] Gov. App. Appendix D, 56a.

Congress made many changes in the 1996 Act, expanding the FCC's jurisdiction to regulate commerce in radio and wire communications, including substantial additions to 47 U.S.C. § 251 (interconnection duties of local exchange carriers) and 47 U.S.C. § 332(c) (National Wireless Telecommunications Siting Policy).[5] Congress also added significant new provisions to the Pole Attachments Act, 47 U.S.C. § 224, but left unchanged several key provisions either by expressly not amending the prior text or by making minor "clarifying" amendments. (App. A.)

The first significant change to the Pole Attachments Act in 1996 was the amendment to 47 U.S.C. § 224(a)(4). Congress amended this section to provide within the definition of the term "pole attachment" that the regulated attachment now could be made not only by a cable system but also by a "provider of telecommunications service." Gov. App. 205a. Congress left unchanged the remainder of the definition "pole attachment." Local exchange carriers remained subject to the burdens, but not the benefits, of Section 224. 47 U.S.C. § 224(a)(5).

4. A *Petition for Reconsideration* was filed on April 13, 1998 by The Edison Electric Institute and UTC. On May 25, 2001, the FCC released its *Consolidated Partial Order on Reconsideration*. *See* http://hraunfoss.fcc.gov:8835/edocs_public/attachmatch/FCC-01-170A1.doc>. The FCC expressly declined to address the Internet and wireless issues pending issuance of final court mandate on those issues. *Id.*, ¶ 3.

5. Pub. L. No. 104-104, § 251, 110 Stat. 61 (1996) and Pub. L. No. 104-104, § 704(a), 110 Stat. 61, 151, 153 (1996).

The second significant amendment was the addition of Section 224(e) directing the FCC to prescribe a new telecommunications pole attachment formula to be applied when the parties failed to agree on pole attachment charges and requiring that one element of the new telecommunications formula be that of usable and other than usable space. 47 U.S.C. §§ 224(e)(1), (2), (3). Congress retained the prior definition of "usable space" which is based on attachment of wirelines.

The third significant amendment was the addition of Section 224(f). Section 224(f)(1) places the duty on the utility to "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." 47 U.S.C. § 224(f). Gov. App. 209a.[6] Congress also amended the Pole Attachments Act by adding Section 224(g):

> 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.

6. The Eleventh Circuit previously held that the Section 224(f)(1) obligation to provide nondiscriminatory access for pole attachment is a physical invasion and, therefore, a taking. The Court did not decide the question of whether the compensation afforded by the FCC's pole attachment formula achieves the required just compensation. *Gulf Power Company v. United States*, 187 F.3d 1324 (11th Cir. 1999).

Congress added other sections which are not relevant to this case. (App. A at 6a, 7a.)

In implementing the amended and the new sections of Section 224, and as pertinent here, the FCC determined that a cable system which provides Internet service along with cable service was entitled to the "solely cable" rate under Section 224(d)(3). Gov. App. 90a-91a. The FCC further determined that wireless carriers are entitled to the benefits and protection of Section 224 without distinction as to whether the pole attachment made by the wireless carrier is an attachment of wirelines or an attachment of wireless equipment. Gov. App. 94a. The FCC adopted a new pole attachment formula in response to Congress' mandate under Section 224(e)(1) that it prescribe regulations for charges for providers of telecommunications services. This formula applies to wirelines only. Gov. App. 79a-91a; 97a-107a; 123a-133a; 137a-154a. The FCC expressly declined to adopt a telecommunications pole attachment rate for attachments of wireless equipment. Gov. App. 95a-96a.

Several electric utility companies filed petitions for review of the *FCC Order* in the Third, Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits. The cases were consolidated in the Eleventh Circuit. The Eleventh Circuit held that the Pole Attachments Act does not authorize the FCC to regulate pole attachments for Internet service. *Gulf Power Company v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *petition for rehearing en banc denied* 226 F.3d 1220 (hereafter "*Gulf Power v. FCC*"). Gov. App. Appendixes A and B. The Eleventh Circuit also determined that the Pole Attachments Act had always addressed only wire attachments,[7] that poles were not

7. *Gulf Power v. FCC*. Gov. App. 22a.

bottleneck facilities for the wireless equipment of the wireless carriers,[8] and that Congress had addressed the siting of wireless equipment with specificity in another section of the Telecommunications Act.[9] The Eleventh Circuit, therefore, held that the FCC has no statutory authority to regulate wireless carriers under the 1996 [Pole Attachments] Act. *Id.* Gov. App. 20a.[10]

8. *Id.*, Gov. App. 25a.

9. *Id.*, Gov. App. 26a.

10. Cases challenging the FCC rate formula as failing to provide just compensation are pending in the Eleventh Circuit. *Alabama Power Company v. Federal Communications Commission*, No. 00-14753 and consolidated cases (11th Cir. filed September 13, 2000). Also pending before the Eleventh Circuit are cases challenging several access rules adopted by the FCC under Section 224 in *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 F.C.C.R. 15,499 (1996). *Southern Company v. Federal Communications Commission*, No. 99-15160-GG and consolidated cases (11th Cir.), Petition for Review filed December 16, 1999. One such challenge is to the FCC's assumption that Congress gave it jurisdiction under Section 224 and Sections 224(f)(1) and (2) to adopt, and through complaint proceedings, to enforce regulations as to the sufficient capacity, reliability, safety and sound engineering requirements of the physical plant of the electric utility (or of the gas, water, steam, or other burdened utility), areas wholly outside the FCC's expertise and experience.

In addition, pending before the FCC are various rulemakings requested by wireless companies seeking mandatory nondiscriminatory access rights under Section 224(f)(1) to rooftops and inside buildings in multi-tenant environments for antenna and wireline facilities through use of the word "right-of-way" in 47 U.S.C. § 224(a)(4). *See In re Promotion of Competitive Networks in Local*

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SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eleventh Circuit correctly determined that commingled cable and Internet service does not receive the benefit of the "solely cable" pole attachment rate. 47 U.S.C. § 224(d)(3).

The Eleventh Circuit also correctly determined that Section 224, as amended in the 1996 Act, deals only with wire and cable attachments to bottleneck facilities and that utility poles are not bottleneck facilities for wireless systems and that Section 224 does not provide the FCC with pole attachment jurisdiction over the wireless equipment of the wireless communications providers.

The plain face of the statute shows that the wireless equipment of the wireless communications providers is not included within the FCC's pole attachment jurisdiction under Section 224 and that wireless equipment is not within the definition of "pole attachment" as defined in 47 U.S.C. § 224(a)(4). The dispute is not over attachments of wirelines of the wireless providers of telecommunications services, as Petitioners argue. The dispute is whether the antennas and other wireless equipment of a provider of telecommunications services are within Section 224 and within the definition of the term "pole attachment" in Section 224(a)(4). If the wireless equipment is within Section 224,

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Telecommunications Markets, First Report and Order and Further Notice Of Proposed Rulemaking in WT Docket No. 99-217, 15 F.C.C.R. 22,983 (2000). This *First Report and Order* is pending on motions for reconsideration. The FCC has not yet issued an order on its *Further Notice of Proposed Rulemaking. Id.*

such equipment can obtain the dual benefits afforded the wirelines: A regulated pole attachment rate under Section 224(e) and mandatory access rights under Section 224(f)(1).

Section 224(a)(4) provides in its entirety:

> 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.[11]

(Emphasis added to show extent of 1996 Amendment.) Petitioners ignore the long established meaning of the term "pole attachment" as "a wireline" or "of wireline." Petitioners' interpretation also renders superfluous the word "wire" in Section 224(a)(1) and the word "wires" used in Section 224(d)(2) in defining the term "usable space" and as incorporated through definition of "usable space" into Sections 224(e)(2) and (3) as a necessary element of the new telecommunications pole attachment rate. Congress expressly directed the FCC to prescribe regulations in accordance with the requirements in Section 224(e) to govern charges for pole attachments for the telecommunications carriers. The FCC adopted a telecommunications pole attachments rate formula that is applicable to wireline attachments only. The FCC

11. An attachment to a right-of-way is made by direct burying of the wireline in trenches dug in the land which constitutes the right-of-way. *See* S. Rep. No. 95-580 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109: "Approximately 95 percent of all CATV cables are strung above ground on utility poles, the remainder being placed underground in ducts, conduits, or trenches. These poles, ducts, and conduits are usually owned by telephone and electric power companies. . . ." (App. B, Excerpts, 10a.)

expressly declined to adopt a pole attachments rate for wireless equipment. The FCC had "difficulty" in applying the statutorily required "usable space" element, which is defined in terms of "wires," to attachments of wireless equipment. By adopting a telecommunications rate for attachments of wirelines only, the FCC shows that the plain statutory language of Section 224 applies to attachments of wirelines only.

By adding the phrase "or provider of telecommunications service" to the definition of "pole attachment" in Section 224(a)(4), Congress merely extended those who have the ability to make a regulated pole attachment to include the providers of telecommunications services. The defined term "pole attachment" was not changed in 1996. The word "pole" continues to subsume and to represent the class of "pole, duct, conduit or right-of-way" to which an attachment must be able to be made to be within FCC pole attachment jurisdiction. The prepositional phrase "to a pole, duct, conduit or right-of-way" was not modified and continues to modify the word "attachment." Only wirelines can attach to each of these individual class members. Wireless equipment cannot be installed in ducts, or conduits which are underground or in walls. Nor can it be direct buried in trenches in right-of-way. "Poles, ducts, conduits and rights-of-way" are not bottleneck facilities for wireless equipment. Wire communication requires transport by a continuous physical medium from the point of origin to the point of termination. The radio communication does not. The word "attachment," not the word "any" is the determinative word. "Any attachment" refers to the dictionary meaning of any in its quantitative sense, the number of attachment, one or the

maximum of the class. This is the only interpretation of "any attachment" which reconciles the different sections of Section 224. The only way that Section 224(a)(4) can be interpreted to be consistent with the remainder of Section 224 and the 1996 Act is if the definition of "pole attachment" in Section 224(a)(4) means attachment of wirelines of a cable system or, provider of telecommunications services.

Congress was well aware of the distinction between "wire communications" and "radio communications." Both are defined terms in the Communications Act of 1934. In the 1996 Act, Congress addressed the siting of wireless equipment in a separate section creating a new "National Wireless Telecommunications Siting Policy." Pub. L. No. 104-104, § 704(a), 110 Stat. 61, 151, 153 (1996) (codified at 47 U.S.C. § 332(c)). Congress was completely silent as to wireless facilities in Section 224. The Telecommunications Act of 1996 is Congress' resolution of the competing interests among the various providers of telecommunications services. It is not for the FCC or this Court to reach a different resolution as to how those competing industry interests are best resolved.

The opinion of the Eleventh Circuit should be affirmed.

ARGUMENT

I. COMMINGLED CABLE AND INTERNET SERVICE DOES NOT RECEIVE THE BENEFIT OF THE "SOLELY CABLE" RATE.

The United States Court of Appeals for the Eleventh Circuit correctly determined that commingled cable and Internet service does not receive the benefit of the "solely cable" pole attachment rate under 47 U.S.C. § 224(d)(3) and

that "the 1996 [Pole Attachments] Act does not authorize the FCC to regulate pole attachments for Internet service." *Gulf Power v. FCC.* Gov. App. 32a.[12]

II. UNDER THE PLAIN LANGUAGE OF SECTION 224, THE FCC HAS NO JURISDICTION OVER THE WIRELESS EQUIPMENT OF THE WIRELESS CARRIERS AND WIRELESS EQUIPMENT IS OUTSIDE THE MEANING OF POLE ATTACHMENT AS DEFINED IN 47 U.S.C. § 224(a)(4).

A. This Case Is Not About Wireline Attachments.

Petitioners' statement of the question confuses the specific issue before this Court by its over inclusiveness. The specific issue is not whether wireline attachments of the wireless companies are within the definition of "pole attachment" and therefore, subject to FCC pole attachment regulation. The issue is whether the attachments of the wireless equipment of the wireless carriers are subject to the pole attachment jurisdiction of the FCC. This was the issue raised and argued before the Eleventh Circuit. As Respondents stated in their *Brief In Opposition To Petition for Writ of Certiorari*, at page 20, n.11: "To the extent a wireless carrier seeks to attach a wireline facility to a utility pole, this wireline attachment is covered by Section 224. This was the position taken by the electric companies in the court of appeals, and we believe it to be the holding of the court's opinion." *See also FPL Brief* below (11th Cir., Case No. 98-6222) at page 13: "If a wireless carrier wished to

12. Respondent FPL adopts the briefs filed for the other Respondents on this Question I.

attach a wireline along a pole line, duct, conduit or right-of-way burdened by the statute, then that wireline attachment would be subject to the protections of the Pole Attachments Act."

B. In Amending Section 224, Congress Retained "Pole Attachment" As The Defined Term In Section 224(a)(4) And Retained Its Meaning Of Wireline Attachment.

1. The Meaning Of "Pole Attachment" In Section 224(a)(4) Has Always Been And Continues To Be Attachment of Linear Wirelines.

Section 224(a)(4) provides: "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). Gov. App. 205a. (Emphasis added to show extent of 1996 amendment.) (App. A at 1a.)

The plain language of the Pole Attachments Act when viewed as a whole shows that the meaning of "pole attachment" in Section 224(a)(4) has always been and continues to be any or all attachment of wireline facilities to a pole, duct, conduit or right-of-way.[13] *See United States v.*

13. *Gulf Power v. FCC.* Gov. App. 21a-24a. *See also* n.11, *supra, citing* S. Rep. No. 95-580 (1977), (stringing of CATV cables on poles and attachment to underground ducts, conduits and direct burying in trenches). *See id.*, S. Rep.: "Due to the local monopoly in ownership or control of poles [in the representational sense] to which cable system operators, out of necessity or business convenience,

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Cleveland Indians Baseball Company, 121 S.Ct. 1433, 1443 (2001), *citing, United Savings Association of Texas v. Timbers of Inwood Forest Associates, LTD.*, 484 U.S. 365, 371 (1988) (statutory construction is a holistic endeavor). Moreover, Congress is presumed to be aware of an administrative or judicial interpretation when it reenacts a statute without change or incorporates sections of a prior law. *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

Congress, in 1996, did not amend the phrase "any attachment." Nor did Congress amend the phrase "to a pole, duct, conduit or right-of-way." Nor did Congress amend "pole attachment" as the term to be defined. The only change that Congress made to the definition of "pole attachment" in 1996 was to include the phrase "or provider of telecommunications service."

Congress' definition of the term "pole attachment" as "any attachment" within Section 224(a)(4) contains two express limitations. The first is that "any attachment" must be "by a cable television system or provider of telecommunications service." This limits those who may make a regulated pole attachment but says nothing about the nature or category of attachment. The second limitation is that "any attachment" must be made "to a pole, duct, conduit or right-of-way owned or controlled by a utility."[14] The phrase

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must attach their distribution facilities, it is contended that the utilities enjoy a superior bargaining position over CATV systems in negotiating the rates, terms and conditions for pole attachments." (App. B at 11a.)

14. *See* n.11, *supra*. The term "right-of-way" as used in Section 224 means the land attached to by direct burying the wireline in trenches. (App. B at 10a.)

"to a pole, duct, conduit or right-of-way" is a prepositional phrase modifying the word "attachment." This phrase defines the word attachment by establishing that only those types of attachments which are able, in fact, to attach — not just to a pole — but to a pole, duct, conduit or right-of-way are within the category of "attachment". Since the defined term is not "attachment" but "pole attachment," this phrase also makes clear that the word "pole" subsumes and is as of the same kind as or sharing a common principle with the limited category of "ducts, conduits or rights-of-way," each with the same relation to "attachment." It is a category or class used to define "pole attachment." 47 U.S.C. § 224(a)(4). Gov. App. 205a.

The word "any" in "any attachment" is not the determinative word in defining "pole attachment." The determining words are "pole, duct, conduit or right-of-way" and, as Respondents argue, the word "attachment" in the phrase "any attachment." Whether the word "any" is used in its expansive sense (as an adjective) or in its sense of specifying the amount of a certain class or category of objects or activity (as a pronoun) cannot be determined by looking at the word "any" as a single stand-alone word as do Petitioners and Judge Carnes. When viewed in context of "any attachment" within the entire Section 224(a)(4) definition of "pole attachment," the text shows that the word "any" in "any attachment" is used as a pronoun in its numerical sense of one or the maximum of those of the category or kind; "any part, quantity, or number." *See Webster's Third New International Dictionary of the English Language*, p. 97 (unabridged, 1986), (the word "any" at 2). *Compare The American Heritage Dictionary of the English Language*, p. 59 (1969), ("any," "adj. 1. One, no matter which, from three or more; a, an, or some. 2. Some,

regardless of quantity or number. 3. The smallest quantity or number of; even one. 4. Every. *-pron.* 1. Any one or ones among three or more. 2. Any quantity or part" [as common usage closer in time to enactment of Pole Attachments Act]) *with The American Heritage Dictionary of the English Language*, p. 81 (4th ed. 2000), ("any" under 2. "*pron.* (used with a sing. or pl. verb) Any one or more persons, things, or quantities"). *See also The Oxford English Dictionary*, (Oxford University Press, on-line version through University of Michigan Library, 1989 updated through 1996, http://www.ets.umdl.umich.edu/01/oed [access restricted]); ("any," "2a. With a specially quantitative force = A quantity or number however great or small . . . . b. A large or considerable (number, quantity, etc.). . .").

The word "any" describes the "amount" of attachment, not the nature of the attachment. The word "any" is a recognition that an attaching entity will be making numerous attachments (of the same kind) as to any one wireline and as to numerous wirelines over a long period to a pole, duct, conduit or right-of-way. This is the only interpretation of Section 224(a)(4) that is consistent with the entire Section 224, the history and purpose of Section 224, and Section 224's relative position in the 1996 Act.

As used in Section 224, a pole, duct, conduit or right-of-way each has something in common with the other as each relates to "attachment." The phrase "pole, duct, conduit or right-of-way" appears as a phrase, in singular or plural form, eleven times in the relatively short Section 224.[15] The defined

15. 47 U.S.C. §§ 224(a)(1), (a)(4), (c)(1), (d)(1), (e)(2), (f)(1), (f)(2), (h) (three times), and (i).

term "pole attachment," in singular or plural form excluding the definitional Section 224(a)(4) and section headings, appears in the text of Section 224 fourteen times.[16] *See, e.g., King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . ." citations omitted).

That commonality is that each is necessary in meeting the unique need of the wireline to be strung from pole to pole, or to run through duct or conduit, or to be direct buried in trenches in the right-of-way. A pole, duct, conduit or right-of-way must be installed or laid or trenched or acquired in a line to form an assembled and continuous linear corridor — a physical pathway — from point of origin of a communication to the point of reception of such communication. The pole line, duct, conduit or right-of-way runs through different neighborhoods and often through different governmental jurisdictions. In this sense, a telecommunications wireline is like the electric lines of the burdened electric utility. *Cf. Nerbonne v. Florida Power Corporation*, 692 So.2d 928, 929-930 (Fla. 5th DCA 1997) (power line transports electric energy in the same sense that vehicles transport people). Wireless equipment does not share this unique need for a linear and continuous need of attachment within an assembled corridor. Wireless equipment does not run continuously through different neighborhoods or governmental jurisdictions. It sits. The wireless equipment is installed in discrete and physically unconnected "points."[17]

16. 47 U.S.C. §§ 224(b)(1), (c)(1), (c)(2), (c)(3), (c)(3)(A), (d)(1) (twice), (d)(3) (three times), (e)(1) (twice), (e)(4), and (g).

17. "Wireline networks transmit through linear networks (Cont'd)

The Eleventh Circuit was correct in finding significant the definition of "wire communication." *Gulf Power v. FCC.* Gov. App. 21a-22a, n.23:

> "[W]ire communications" is defined [in 47 U.S.C. § 153(52)] as "the transmission of writing, signs, signals, pictures, and sounds of all kinds *by aid of wire, cable, or other like connection* between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission."

When this definition is compared with the definition of "radio communication," 47 U.S.C. § 153(33), the distinction between the needs of a "wireline" telecommunications system and those of a "wireless" radio based telecommunications system is clear. "Radio communication" is defined as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." *Id.* This definition does not contain the phrase "**by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.**" There is no continuous physical connection from point of origin to point of termination in a wireless communications system.[18]

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of cables strung between poles. Wireless networks, on the other hand, transmit through a series of concentric circle emissions that allow the network to continue working if one antenna malfunctions." *Gulf Power v. FCC.* Gov. App. 25a.

18. *See, e.g.,* Wireless *Amici*, 14: "In other cases, using our fixed wireless spectrum, we will deploy a high-bandwidth wireless connection between an antenna on the roof of the customer's premises and an antenna attached to our fiber rings."

Wireless equipment may be relatively small and simple or very large and complex. The wireless equipment is carrier specific. *See* Wireless *Amici*, 18, ("individual carriers may typically depend at any given time more heavily on one form of technology than another . . ."). The Eleventh Circuit recognized that the wireless attachments of the wireless carriers may include "antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service."[19]

2. That Congress Retained The Word "Wire" In Section 224(a)(1) Shows That Only The Linear Wireline Attachments Are Within FCC Pole Attachment Jurisdiction.

The plain language of Section 224(a)(1) shows that it is the attachment of "wire communications" facilities and not the attachment of any or no communications equipment which initiates FCC jurisdiction over the utility. Section 224(a)(1) provides: "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,

19. *Gulf Power v. FCC.* Gov. App. 24a-25a, *citing*, 13 F.C.C.R. at 6799, ¶ 41. Gov. App. 96a. *See, also*, Jonathan Marshall, *Where's The Antenna*, The San Francisco Chronicle, December 6, 1996 (Final Edition, available in LEXIS, News Library, Allnws file)("[n]ew sites typically require anywhere from two to six antennas, each about six inches wide, six inches deep and six feet high.") In determining what attachments should be regulated under the Pole Attachments Act, Congress distinguished between the linear wireline attachments and the insular discrete wireless attachments. It did not distinguish among the various sizes of the wireless attachments.

ducts, conduits or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1). Gov. App. 205a.

Petitioners argue that "[o]nce it is determined . . . that certain poles are subject to the Act because they are used for wire communications, the Act makes no further distinction based on whether the attachments to those poles are used to provide wireless or wireline telecommunications service." Gov. Brf. 14. Petitioners' interpretation renders meaningless the word "wire" used in Section 224(a)(1), and the word "wires" used in Section 224(d)(2) and incorporated through definition into Sections 224(e)(2) and (3).

Congress made minor amendments to Section 224(a)(1) in 1996, but left unchanged the requirement that the poles, ducts, conduits or rights-of-way of the burdened utilities be used in whole or in part for wire communications. 47 U.S.C. § 224(a)(1). (App. A at 1a.) *See, e.g., Lorillard v. Pons, supra* at 580-581, (Congress presumed to have been aware of prior interpretations when it reenacts statute without change or incorporates into new law sections of prior law). If Congress intended that FCC jurisdiction over pole attachments apply to both wireline and wireless equipment used in communications, Congress could have omitted the word "wire" and provided "poles, ducts, conduits or rights-of-way used for communications."

Even more directly, Congress could have, but did not, omit both "wire" and "communications" and define the term "utility" as any electric, gas, water, steam or other public utility, which owns or controls poles, ducts, conduits or rights-of-way which can be attached to [by a cable system or any provider of wire or radio communications]. *See Kungys*

v. United States, 485 U.S. 759, 778 (1988) (words within a statute should not be rendered meaningless). Congress knew the difference between "wire communications" and "radio communications" and chose to retain that distinction.[20]

3. The Word "Wires" In The Definition Of "Usable Space" Which Is A Necessary Element Of Pole Attachment Rate Shows That Section 224 Jurisdiction Extends Only To Attachments of Wirelines.

Congress added an entire new rates Section 224(e) to provide for the parameters for charges for attachments by the providers of telecommunications services. Congress directed the FCC to prescribe regulations for these charges. 47 U.S.C. § 224(e)(1). Gov. App. 208a-209a. Congress did not leave the FCC free to devise the methodology by which to determine "just, reasonable, and nondiscriminatory rates for pole attachments." *See* § 224(e)(1). Gov. App. 208a-209a. Congress expressly provided in Sections 224(e)(2) and (3) that the rate formula developed by the FCC was to be based on "usable space": "A utility shall apportion the cost . . . [based on] usable space required for each entity." Congress defined the term "usable space" as "the space above the minimum grade level which can be used **for the attachment of wires, cables, and associated equipment**." § 224(d)(2). (Emphasis added.) Gov. App. 208a. For purposes

20. Congress readopted the definitions of each, but placed the definitions in renumbered sections in the 1996 Act. *Compare* 47 U.S.C. §§ 153(a) and (b) (main volume, 1995) *with* 47 U.S.C. §§ 153(33) and (52) (Cum. Supp. 2000). *See also*, n.11 *supra* (Senate recognition that Pole Attachments Act was originally adopted to extend FCC jurisdiction over poles, ducts, conduits, and rights-of-way needed for attachment of cable).

of FCC pole attachment rate regulation, the "shall" is mandatory. *See Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 432, n.9 (1995) ("shall" generally means "must"). The *FCC Order* shows that the FCC followed the statutory directive that "usable space" as defined in the context of wireline attachments and that "usable space" is a necessary element in the pole attachment rate formula. The FCC states under *Part IV, Charges for Attaching; Poles; Formula Presumptions*, that: "In determining a just and reasonable rate, two elements of the pole are examined: usable space and other than usable space." *Id.* Gov. App. 79a. The formula that the FCC adopted for attachments of the telecommunications carriers shows on its face that "usable space" for wire attachments is a necessary and enduring element of FCC pole attachment rate regulation. *Id.* Gov. App. 97a, 123a, 125a, 143a.

The FCC expressly declined to adopt a telecommunications rate for attachments of wireless equipment. The FCC stated: "There are potential difficulties in applying the [FCC's] rules to wireless pole attachments, as opponents of attachment rights have argued. They note that previous and proposed rate formulas do not account for the unusual requirements of wireless attachments." FCC *Order*, ¶ 41. Gov. App. 95a-96a. The FCC's solution to this fact is to first remove the wireless attachment rate from FCC rate regulation, as preferred by Congress, by stating that the wireless company and pole owner should negotiate an attachment fee. *FCC Order*, ¶ 11. Gov. App. 68a-69a. And second, to ignore the Section 224(e)(1) directive that the FCC, in fact, "prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers." Instead the FCC relies on individual, fact specific, time consuming *ad hoc*

determinations as to each and every instance where the parties fail to agree.[21] Parties are almost certain to fail to agree.[22]

Moreover, reliance on *ad hoc* determinations with respect to attachments of wireless equipment directly contradicts FCC's own insistence and consistent practice since enactment of the Pole Attachments Act in 1978 that a formula of general applicability is required. The FCC states:[23]

> When Congress enacted Section 224 in 1978, it directed the [FCC] to institute an expeditious program for determining just and reasonable pole attachment rates. Legislative history indicates that Congress was concerned with regulatory complexity, opting for a simple plan requiring a minimum of staff, paperwork and procedures and the avoidance of a large-scale ratemaking

21. *FCC Order*, ¶ 42 ("If parties cannot modify or adjust the formula to deal with unique attachments, and the parties are unable to reach agreement through good faith negotiations, the Commission will examine the issues on a case-by-case basis"). Gov. App. 96a.

22. The wireless industry has freely negotiated lease or license charges for attachment of wireless equipment on alternative structures such as radio towers not subject to FCC pole attachment regulation for amounts up to $1,500 or more a month. The FCC's pole attachment rates for attachments of wireline result in a typical pole attachment charge per pole of $6 to $8 a year. This also suggests that the real interest of the Wireless *Amici* may not be so much in a regulated rate, but in the mandatory nondiscriminatory access provisions of Section 224(a)(1).

23. *In re Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, CS Docket No. 97-98, *Report and Order*, 15 F.C.C.R. 6453 (2000), ¶ 7.

> proceeding. Congress did not believe that special accounting measures or studies would be necessary because most cost and expense items attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies, for example forms submitted to the [FCC] by local exchange carriers ("LECs") and to the Federal Energy Regulatory Commission ("FERC") for electric utilities. Congress also did not expect the [FCC] to re-examine the reasonableness of the cost methodologies that various regulatory agencies had sanctioned.

The FCC repeated this necessity for a clear formula in the *FCC Order*: "An uncomplicated complaint process **and a clear formula for rate determination are essential to promote the use of negotiations** for pole attachment rates, terms, and conditions." (Emphasis added.) *FCC Order*, ¶ 16. Gov. App. 74a. By instead adopting an *ad hoc* time consuming approach to charges for attachments of the wireless equipment, the FCC fails the purpose of Section 224(e) and the express direction in Section 224(e)(1). By not adopting a pole attachment rate for wireless attachments because wireless equipment is "unique," the FCC has shown that that attachment of wireless equipment is not within either Section 224(e) rate parameters or the Section 224(a)(4) definition of "pole attachment."

C. Congress Addressed Wireless Equipment In Another Section Of The 1996 Act.

Congress did not address wireless equipment as part of the Pole Attachments Act. Congress did address the siting of wireless communications equipment in a separate section of

the 1996 Act. That section immediately follows the amendments to the Pole Attachments Act in the Public Law No. 104-104. *See* §§ 704(a)(A), (B)(i)(I), (II), 110 Stat. 61, 151, 153 (1996) (codified at 47 U.S.C. §§ 332(c)(7)(A), (B), (C). *See Gulf Power v. FCC.* Gov. App. 25a-26a. In Section 704(a) of the 1996 Act, Congress sets forth the "National Wireless Telecommunications Siting Policy." Pub. L. No. 104-104. A key provision in Section 704 is the retention of local zoning authority over the siting of antenna facilities. *Id.* § 704(a)(7)(A), (B), (C). Congress provided: "Except as provided in this paragraph, nothing in this Act [47 USCS §§ 151 et seq.] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7).

That the FCC's interpretation of Section 224 to include the wireless facilities was directly related to Congress' retention of local government powers provision in 47 U.S.C. § 332(c)(7) is clear on the face of the *FCC Order*. The FCC states: "Wireless providers contend they do not have easy alternatives for placing their equipment because they have had difficulty getting permits to erect antennas."[24] *FCC Order*, *supra*, at ¶ 37. Gov. App. 93a.

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24. A potential and highly adverse consequence of the FCC's interpretation of including wireless equipment within the FCC's pole attachment jurisdiction is that local governments may attempt to use their zoning and siting powers over antenna support structures to obtain zoning and siting control over the electric utility poles and lines themselves — something which many local governments in Florida have long desired but do not have. Local governments in Florida have issued code violations against the electric *pole* itself for attachment of wireless equipment of the wireless providers to electric poles.

The Eleventh Circuit correctly determined that the "specificity with which Congress addressed the siting of wireless equipment in Section 332 indicates that it did not intend that Section 224 provide the FCC authority to regulate the placement of wireless carriers' equipment." *Gulf Power v. FCC.* Gov. App. 26a. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (Congress presumed to have acted intentionally when it includes language in one section but omits it from another section). *Accord Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 934-935 (11th Cir. 2000), *cert. denied*, 121 S.Ct. 1609 (2001) (each provision should be read with reference to the whole act; court should avoid reading statutory language to address an issue not specifically covered in text when Congress has addressed the issue in more specific language elsewhere).

D. Poles, Ducts, Conduits and Rights-Of-Way Are Not Bottleneck Facilities For Wireless Equipment.

The Eleventh Circuit correctly determined that the poles, ducts, conduits and rights-of-way are not bottleneck facilities for wireless equipment[25] and that the antenna of the radio

25. *See, e.g., Gulf Power v. FCC* (poles are not bottleneck facilities for wireless equipment). Gov. App. 25a. That the Eleventh Circuit correctly understood one interest of the FCC in expanding its jurisdiction under Section 224 over attachments of wireless equipment was to achieve the benefit of Section 224(f)(1) mandatory access for the wireless industry is plain from its opinion: "Petitioners challenge the FCC's decision to include wireless carriers within the 'nondiscriminatory access' provision of Section 224(f), claiming that the FCC has no statutory authority to regulate wireless carriers under the 1996 [Pole Attachments] Act". *Gulf Power v. FCC.* Gov. App. 20a. The wireless industry did not participate in the case below. Only after the Eleventh Circuit issued its opinion and during the pendency of the FCC rulemaking on whether telecommunications (Cont'd)

based communications systems (the wireless carriers) have numerous alternatives to installation on an electric pole.[26] *Gulf Power v. FCC.* Gov. App. 24a-25a.

The Wireless *Amici* state that the word "bottleneck" does not appear in Section 224 and that "[n]othing in the plain language of the statute suggests that wireless telecommunications carriers, as distinct from wireline telecommunications carriers, must demonstrate that a utility's facility operates as a bottleneck before availing themselves of Section 224's provision of access."[27] There is nothing in the record or history of the Pole Attachments Act, however, that shows that Congress ever considered the poles, ducts, conduits or rights-of-way of the utility as bottleneck facilities for attachment of wireless equipment. Congress' intent to extend Section 224 benefits to wireless equipment must be clear on the face of the statute. That a cable system or a provider of telecommunications services does not need to prove necessity or even desirability of attachment under Section 224, works against, not for Petitioners. Because Section 224(f)(1) imposes on utilities not otherwise regulated by the FCC a burden of mandatory nondiscriminatory access, Section 224 requires strict, not expansive interpretation of Section 224(a)(4). *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (physical occupation

(Cont'd)
providers had mandatory access to rooftops in the multi-tenant environments for antenna installations by means of the word "right-of-way" in Section 224 did the wireless industry decide to participate in this litigation. *See In re Promotion of Competitive Networks in Local Telecommunications Markets*, n.10, *supra.*

26. *See* n.30, *infra.*

27. Wireless *Amici*, 10-11.

of property of another is a taking without regard to size of encroachment or the public interests that physical use may serve); *Gulf Power Company v. United States*, 187 F.3d 1324, *supra* at 1328. Nor does citation to *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366 (1999) help Petitioners.[28] That a telecommunications company might be less delayed or incur less expense if it had mandatory access to the facility of another is not in itself enough to achieve a statutory right of access. *See, e.g., id.* at 387-390:("necessary standard" is not met "regardless of whether 'requesting carriers can obtain the requested proprietary element from a source other than the incumbent'" and whether delay or higher construction costs result from non-access).[29] A right of physical occupation of the property of another must be strictly construed and clearly granted. Section 224 shows on its face that Congress made no determination that the "poles, ducts, conduits or rights-of-way" were bottleneck facilities for wireless equipment or that the wireless equipment was granted the right to nondiscriminatory access under Section 224(f)(1). The Eleventh Circuit correctly concluded that utility poles are not bottleneck facilities for the wireless carriers and that there are many alternatives for attachment of wireless facilities. *Gulf Power v. FCC.* Gov. App. 25a.[30]

28. Gov. Brf., 28.

29. Nor, as Petitioners argue, does the FCC have the same broad jurisdiction over pole attachments that it does over wire and radio communications. Gov. Brf., 28. The FCC has no Pole Attachment jurisdiction at all in nineteen states. *See* 47 U.S.C. § 224(c)(1). Gov. Brf., 17. Unlike the wire and radio communications industries, the FCC has no direct regulatory authority over the electric utility, gas, water or steam industries.

30. A LEXIS-NEXIS search, www.nexis.com/research/pnews, produces several articles identifying alternative sites for wireless (Cont'd)

Only Congress can legislate a remedy — even if one were needed. There is no clear indication on the face of Section 224 that Congress intended the FCC to legislate mandatory access rights or rate regulation for wireless equipment to the poles, ducts, conduits or rights-of-way of the electric utility or any other burdened utility. *See, e.g., Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 683 (2001) (Congress must have clearly conveyed requirement where administrative interpretation invokes outer limits of Congress' power). Because there is no such clear indication in the language of Section 224 — and because the wireless equipment cannot be installed in underground or in wall duct or conduit or buried in trenches in the rights-of-way — it is more reasonable to assume the primary and original purpose of the statute to provide FCC regulation over wirelines attachments was not changed. *See Gustafson v. Alloyd Company, Inc.*, 513 U.S. 561, 572 (1995).

(Cont'd)
equipment, including radio towers, water towers, streetlights, church steeples, buildings and rooftops, stealth towers (often camouflaged as trees or flagpoles), actual flagpoles, clock towers, billboards, walls, silos, even scoreboards. *See, e.g.*, Jonathan Marshall, *Where's The Antenna, supra*, n.20; Andrew C. Revkin, *It's a Tree! It's a Cactus!; Phone Companies Try to Soften a Suburban Antenna Invasion*, The New York Times Company, January 11, 1998 (Sunday, Late Edition – Final) (available in LEXIS, News Library, Allnws file). Pole Attachment revenues accrue to the benefit of the utility customers in the setting of the rate for electric service — they are accounted for "above the line." Utility pole owners have no superior bargaining position over the private or public owners of radio towers, steeples, clock towers, silos, high walls, rooftops, etc. for attachment of wireless equipment.

E. The 1996 Telecommunications Act Is The Culmination Of Congress' Resolution Of Conflicting Industry Interests.

The Telecommunications Act, including Section 224, is the culmination of Congress' resolution of conflicting industry interests. Adoption of the 1996 Act involved long and often intense debate and compromise. Interested industries lobbied hard for and against proposals. *See generally*, Max D. Paglin, Editor, Joel Rosenbloom, James R. Hobson, Co-editors, *The Communications Act, A Legislative History of the Major Amendments 1934-1996*, 327-370 (1999). Once the 1996 Act was adopted, however, it is not for the FCC or the Court to rewrite the statute to better achieve the goals of a particular industry. *See Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302, 1311-1312 (2001) (court ought not attribute to Congress an official purpose based on motives of a particular group that lobbied for or against a certain proposal).

There is no basis in the record to suppose that the procompetitive goals of the 1996 Act cannot be met unless wireless equipment has the same rate protection and mandatory access benefits of Section 224 as attachments of wirelines. Only Congress and not the FCC or this Court can determine whether that is so and, if so, legislate a remedy. Given the great difference between attachments of wirelines and attachments of wireless equipment, the fact that Congress had long distinguished between wire communications and radio communications in its statutory provisions and, given the mandatory access rights involved, if Congress had intended to include wireless radio equipment within Section 224 benefits, it would have done so directly and plainly. Congress did not. The purpose of a statute includes not only

what Congress sets out to change, but what Congress also resolves to leave alone. *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) *citing Rodriguez v. United States*, *supra*, at 525-526.

CONCLUSION

The decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A — 47 U.S.C.S. § 224 (REDLINE SHOWING 1996 CHANGES)

§ 224. Pole attachments

(a) Definitions. As used in this section:

(1) ~~The term "utility" means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or rights of way used, in whole or in part, for wire communication.~~ **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 3 of this Act [47 USCS § 153(49)] does not include any incumbent local exchange carrier as defined in section 251(h) [47 USCS § 251(h)].

(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 title III of the Communications Act of 1934 [47 USCS § 312(b)], as amended.

(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), 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,** ~~cable television services,~~ 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; definition of "usable space". (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), 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) (1) The Commission shall, no later than 2 years after the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 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 the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 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.

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(f) (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) 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) 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.

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(i) 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). (As amended Feb. 8, 1996, P.L. 104-104, Title VII, § 703, 110 Stat. 149.)

APPENDIX B — EXCERPTS FROM SENATE REPORT NO. 95-580

CALENDAR NO. 534

SENATE

95TH CONGRESS
1st Session

Report
No. 95-580

COMMUNICATIONS ACT AMENDMENTS — PENALTIES AND FORFEITURES AUTHORITY AND REGULATION OF CABLE TELEVISION POLE ATTACHMENTS BY THE FEDERAL COMMUNICATIONS COMMISSION

NOVEMBER 2 (Legislative day, NOVEMBER 1), 1977. — Ordered to be printed

MR. HOLLINGS, from the Committee on Commerce, Science, and Transportation submitted the following

REPORT

[To accompany S. 1547]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1547) to amend the Communications Act of 1934, as amended, with respect to penalties and forfeitures, and to authorize the Federal Communications Commission to regulate pole

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attachments, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

SUMMARY AND PURPOSE

The bill (S. 1547) serves two purposes:

(1) To unify, simplify, and enlarge the scope of the forfeiture provisions of the Communications Act of 1934; and

(2) To establish jurisdiction within the Federal Communications Commission (FCC) to regulate the provision by utilities to cable television systems of space on utility poles, ducts, conduits, or other rights-of-way owned or controlled by those utilities.

PENALTIES AND FORFEITURES

S. 1547, as reported, would unify and simplify the forfeiture provisions in the Communications Act of 1934, enlarge their scope to cover all persons subject to the act, provide more practical limitations periods and more effective deterrent levels of forfeiture authority, and would generally afford the Federal Communications Commission greater flexibility in the enforcement of the Communications Act and rules and regulations promulgated thereunder.

* * *

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[12] * * *

POLE ATTACHMENT REGULATION

It is the general practice of the cable television (CATV) industry in the construction and maintenance of a cable system to lease space on existing utility poles for the attachment of cable distribution facilities (coaxial cable and associated equipment). These leasing agreements typically involve the rental of a portion of the communications space on a pole for an annual or other periodic fee as well as reimbursement to the utility for all costs associated with preparing the pole for the CATV attachment. The FCC estimates that there are currently over 7,800 CATV pole attachment agreements in effect. Approximately 95 percent of all CATV cables are strung above ground on utility poles, the remainder being placed underground in ducts, conduits, or trenches. These poles, ducts, and conduits are usually owned by telephone and electric power utility companies, which often have entered into joint use or joint ownership agreements for the use of each other's poles. It is estimated that approximately 70 percent of all utility poles owned by either telephone or electric utilities are actually jointly used. These joint utility agreements commonly reserve a portion of each pole for the use of communications services (telephone, telegraph, CATV, traffic signaling, municipal fire and police alarm systems, et cetera). This communications pole space is usually under the control of the telephone company.

[13] Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to

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a CATV system operator except to utilize available space on existing poles. The number of poles owned or controlled by cable companies is 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.

Sharing arrangements minimize unnecessary and costly duplication of plant for all pole users, utilities as well as cable companies. Nevertheless, pole attachment agreements between utilities which own and maintain pole lines, and cable television systems which lease available space have generated considerable debate. Conflict arises, understandably, from efforts by each type of firm to minimize its share of the total fixed costs of jointly used facilities. Of the more than 10 million poles on which cable operators lease space, fewer than half are controlled by telephone companies, while 53 percent are controlled by power utilities, public and private. Most CATV systems lease space from more than one utility. An estimated 72 percent of all cable systems lease pole space from Bell Telephone operating companies, approximately 65 percent have agreements with investor-owned power companies, an additional 21 percent lease space from independent telephone companies, while 10 percent attach to poles owned by REA cooperatives and 14 percent acquire space from utilities owned by municipalities.

Due to the local monopoly in ownership or control of poles to which cable system operators, out of necessity or business convenience, must attach their distribution facilities, it is contended that the utilities enjoy a superior bargaining position over CATV systems in negotiating the rates, terms and conditions for pole attachments. It has been alleged by

representatives of the cable television industry that some utilities have abused their superior bargaining position by demanding exorbitant rental fees and other unfair terms in return for the right to lease pole space. Cable operators, it is claimed, are compelled to concede to these demands under duress. The Commission's Office of Plans and Policy, in a staff report released in August 1977, concluded that, "[a]lthough the reasonableness of current pole attachment rates remains open to question, public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates" (page 34).

The committee received testimony that the introduction of broadband cable services may pose a competitive threat to telephone companies, and that the pole attachment practices of telephone companies could, if unchecked, present realistic dangers of competitive restraint in the future. The Commission has investigated the competitive interrelationships of telephone and cable companies in various proceedings and contexts, and has taken action to curtail potential anticompetitive practices in several instances. (See for example, *Common Carrier Tariffs for CATV Systems*, 4 FCC 2d 257 (1966); *General Telephone Co. of California*, 13 FCC 2d 448, *aff'd*, 413 F. 2d 390 D.C. Cir. *cert. denied*, 396 U.S. 888 (1969). See also, *General Telephone Co. of the Southwest v. United States*, 449 F. 2d 846, 857 (5th cir. 1971).)

[14] The pole attachment policies and practices of utilities owning or controlling poles are generally unregulated

at the present time. Currently only one State — Connecticut — actually regulates pole attachment arrangements, while in another eight States, regulatory authority apparently exists but has not been exercised — California, Hawaii, Nevada, Alaska, Rhode Island, Vermont, New Jersey, and New York. According to a recent survey conducted by the Commission's Cable Television Bureau, entitled "Cable Television Pole Attachment — State Law and Court Cases," very few States have specific statutory provisions governing attachments to utility poles. Only 15 States, including the District of Columbia, appear to have enacted statutory authority which may be of sufficient breadth to permit regulation by an appropriate State body.

JURISDICTIONAL BASIS FOR FCC REGULATION

Moreover, the Federal Communications Commission has recently decided that it has no jurisdiction under the Communications Act of 1934, as amended, to regulate pole attachment and conduit rental arrangements between CATV systems and nontelephone or telephone utilities. (*California Water and Telephone Co., et al.*, 40 R.R. 2d 419 (1977).) This decision was the result of over 10 years of proceedings in which the Commission examined the extent and nature of its jurisdiction over CATV pole attachments. The Commission's decision noted that, while the Communications Act conferred upon it expansive powers to regulate all forms of electrical communication, whether by telephone, telegraph, cable or radio, CATV pole attachment arrangements do not constitute "communication by wire or radio," and are thus beyond the scope of FCC authority. The Commission reasoned:

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> The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites.

In addition the Commission concluded that there was no reason to separate resolution of the purely legal question of jurisdiction on the basis of whether the party owning or controlling the pole was a telephone or nontelephone company.

The committee believes that S. 1547, as reported, will resolve this jurisdictional impasse, by creating within the FCC an administrative forum for the resolution of CATV pole attachments disputes and by prompting the several States, should they wish to involve themselves in these matters, to develop their own plans free of Federal prescriptions.

The committee believes that Federal involvement in pole attachment arrangements should serve two specific, interrelated purposes: To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public.

[15] The basic design of S. 1547, as reported, is to empower the Federal Communications Commission to

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exercise regulatory oversight over the arrangements between utilities and CATV systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement and where a State or more local regulatory forum is unavailable for resolution of disputes between these parties. S. 1547, as reported, accomplishes this design in the most direct and least intrusive manner. Federal involvement in pole attachments matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable. Thus, regardless of whether the owner or controller of the pole is an entity engaging in the provision of communications service by wire, if provision has been made for attachment of wire communications a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission. The underlying concept of S. 1547, as reported, is to assure that the communications space on utility poles, created as a result of private agreement between nontelephone companies and telephone companies, or between nontelephone companies and cable television companies, be made available, at just and reasonable rates, and under just and reasonable terms and conditions, to CATV systems.

S. 1547, as reported, stops short of declaring the provision of pole space to CATV "wire or radio communications" per se, or that poles constitute "instrumentalities, facilities, apparatus," et cetera incidental to wire communications (as used in section 3(a) of the Communications Act, 47 U.S.C. § 153(a)). However, S. 1547, as reported, does expand the Commission's authority over entities not otherwise subject to FCC jurisdiction (such

as electric power companies) and over practices of communications common carriers not otherwise subject to FCC regulation (principally the intrastate practices of interstate or intrastate telephone companies). This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems. Even in this instance S. 1547, as reported, does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment arrangements. FCC regulation will occur only when a utility or CATV system invokes the powers conferred by S. 1547, as reported, to hear and resolve complaints relating to the rates, terms, and conditions of pole attachments. The Commission is not empowered to prescribe rates, terms, and conditions for CATV pole attachments generally. It may, however, issue guidelines to be used in determining whether the rates, terms, and conditions for CATV pole attachments are just and reasonable in any particular case.

Moreover, the Commission's jurisdictional reach extends only to those entities which participate in the provision of communications space on utility poles. Thus, an electric power company which owns or controls a utility pole would be subject to FCC jurisdiction only if two preconditions are met: (1) the power company shares its pole with a telephone company, or other communications entity; and (2) a cable television system shares the communications space on the pole with the telephone utility or other communications entity, or occupies the communications space alone. An electric power company

owning or [16] controlling a pole on which no communications space has been designated would not be subject to FCC jurisdiction. S. 1547, as reported, does not vest within a CATV system operator a right to access to a utility pole, nor does the bill, as reported, require a power company to dedicate a portion of its pole plant to communications use.

It has been made clear in testimony by CATV industry representatives to this committee that access to utility poles does not in itself constitute a problem, among other reasons because CATV offers an income-producing use of an otherwise unproductive and often surplus portion of plant. CATV industry representatives estimate that about 15 percent of all utility poles owned or controlled by electric power companies are not occupied by telephone companies as well, and that CATV systems are already attached to a high percentage of these power poles in communities served by cable television.

While S. 1547, as reported, does not legislate a guarantee of access by CATV systems to utility poles, the committee recognizes that it is conceivable that a nontelephone utility which currently provides CATV pole attachment space might discontinue such provision simply in order to avoid FCC regulation. The committee believes that under S. 1547, as reported, the Commission could determine that such conduct would constitute an unjust or unreasonable practice and take appropriate action upon a finding that CATV pole attachment rights were discontinued solely to avoid jurisdiction.

Furthermore, S. 1547, as reported, would not require the Commission, as it stated in its *California Water and*

Telephone Co. decision, noted above, "to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire, or even access and rents for antenna sites." The communications space must already have been established, meaning that FCC jurisdiction arises only where a pole, duct, conduit, or right-of-way has already been devoted to communications use, and the communications space must already be occupied by a cable television system. Hence any problems pertaining to restrictive easements of utility poles and wires over private property, exercise of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC CATV pole attachment jurisdiction. Any acquisition of any right-of-way needed by a cable company is the direct responsibility of that company, in accordance with local laws. S. 1547, as reported, is not intended to disturb such matters in any way.

STATE OR LOCAL CATV POLE ATTACHMENT REGULATION

S. 1547, as reported, permits any State which regulates the rates, terms, and conditions for CATV pole attachments to preempt the Federal Communications Commission's regulation of pole attachments in that State. The committee considers the matter of CATV pole attachments to be essentially local in nature, and that the various State and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate CATV pole attachments. Regulation should be vested with those persons or agencies most familiar with the local environment within which utilities and cable television systems operate. It is only because such State . . . .

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