Nos. 00-832 and 00-843

In the Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
PETITIONER

v.

GULF POWER COMPANY, ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, PETITIONERS

v.

GULF POWER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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I. SECTION 224 APPLIES TO ATTACHMENTS USED FOR DELIVERY OF COMMINGLED CABLE TELEVISION AND INTERNET SERVICE

A. The Plain Terms Of The Act Protect Wires Used To Provide Commingled Cable Television Service And Internet Access

1. The plain terms of the Pole Attachments Act authorize the FCC 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) (1994). The Act also defines "pole attachment" to mean "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).[1] Therefore, under the precise and unambiguous terms of the Act, if a wire is an "attachment by a cable television system," the FCC has authority "to provide" that the rates for the attachment are "just and reasonable." An item attached to a utility pole to provide commingled cable television programming and Internet access is an "attachment by a cable television system." Accordingly, the FCC has construed the Act to provide that it has authority to ensure that rates for such attachments are just and reasonable. The court of appeals' conclusion to the contrary is inconsistent with the most basic canons of statutory interpretation and with core principles of deference in administrative law.

2. Respondents do not dispute that a wire used to provide commingled cable television service and Internet access is an "attachment." Some respondents, however, assert that such attachments are not "by a cable television system." *E.g.*, Amer. Elec. Power. Br. 18-22; Atlantic City Elec. Co. Br. 23. They refer to the definition of the term "cable system" found at 47 U.S.C. 522(7). In 1996, Congress applied that definition, which originally applied only to Title VI of the Communications Act (which governs cable television), to the Communications Act as a whole, including the Pole Attachments Act. See 47 U.S.C. 153(7). The definition states that the term "cable system"

> does not include * * * a facility of a common carrier which is subject, in whole or in part, to the provisions of [Title II of the Communications Act], except that such facility shall be considered a cable system * * * to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services.

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[1] All references to 47 U.S.C. in this brief refer to Supp. V 1999, unless otherwise indicated.

47 U.S.C. 522(7). Respondents argue that "most major cable companies are now common carriers subject, in part, to the provisions of Title II, through the delivery of residential and/or commercial telephone service over the cable company's fiber optic network." Amer. Elec. Power Br. 20. They conclude that cable television systems receive the protections of the Pole Attachments Act only "to the extent" that their facilities are "used in the transmission of video programming directly to subscribers" —and not insofar as their facilities are used to provide Internet access. *Id.* at 21.

Respondents' argument is not properly before this Court, because respondents did not advance it before the FCC (or, for that matter, in the court of appeals). In *Sims* v. *Apfel*, 530 U.S. 103, 107-108 (2000), this Court discussed the doctrine of "administrative issue exhaustion." Although finding the doctrine inapplicable in that case, the Court cited as an example of a scheme that does require such exhaustion a decision of the D.C. Circuit interpreting Section 405 of the Communications Act, 47 U.S.C. 405, "to require complainants, before coming to court, to give the FCC a 'fair opportunity' to pass on a legal or factual argument." *Washington Ass'n for Television & Children* v. *FCC*, 712 F.2d 677, 681-682 & n.6 (1983); accord *Cellular Phone Taskforce* v. *FCC*, 205 F.3d 82, 88-89 (2d Cir. 2000), cert. denied, 121 S. Ct. 758 (2001). Respondents did not give the FCC a "fair opportunity" to address their "legal or factual argument." Accordingly, respondents' argument is not properly before this Court.

Requiring respondents to make their argument to the FCC in the first instance is particularly important in this case. Respondents' argument depends on a number of issues of statutory construction, such as the meaning of the proviso in Subsection 522(7) that a cable company remains such "to the extent [it] is used in the transmission of video programming directly to subscribers." Moreover, it is inconsistent on its face with the provision of the Pole Attachments Act that

protects "any" attachment not only "by a cable television system," but also "by a * * * provider of telecommunications service"—which presumably describes a cable company when it acts as a common carrier. 47 U.S.C. 224(a)(4). The FCC should have the opportunity to address those issues in the first instance.

Furthermore, respondents' argument rests on the factual premise that "most"—but apparently not all—"major cable companies are now common carriers subject, in part, to the provisions of Title II [of the Communications Act]." The sole support advanced for that proposition (Amer. Elec. Power Br. 20) is a publication of petitioner National Cable and Telecommunications Association stating that "[a]t least nine of the nation's largest multiple system operators (MSOs) now offer residential and/or commercial phone service in more than 45 markets overall." See *ibid.* By its terms, that untested statement does not purport to specify the number or percentage of individual "cable television systems" operated by those or other firms that act as telecommunications carriers.[2] In short, the untested factual premise of respondents' argument could not possibly support the court of appeals' conclusion that *all* attachments used to provide commingled cable television and Internet access are outside the protections of the Pole Attachments Act.

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[2] On page 1-C-1, the same document states that "the cable industry now comprises 10,466 separate systems." NCTA, *Cable Television Handbook* (2001), <*available at:* http://www.ncta.com/pdf_files/Handbook-Total.pdf>.

B. Subsections (d) And (e), Which Provide Parameters For Certain Pole Attachment Rates, Do Not Purport To—And Have Been Reasonably Construed By The FCC Not To—Limit The Types Of Attachments Protected By The Act

1. As we explain in our opening brief (at 22-25), Subsections (d) and (e) do not limit the types of attachments protected by the Act, but instead specify limits on rates applicable to certain classes of attachments: Subsection (d) addresses rates "for any pole attachment used by a cable television system solely to provide cable service," 47 U.S.C. 224(d)(3), and Subsection (e) addresses rates "for pole attachments used by telecommunications carriers to provide telecommunications services," 47 U.S.C. 224(e)(1). Respondents argue that those provisions impliedly limit the general authority to ensure just and reasonable rates for "any" pole attachment granted in Subsections (a) and (b) to the particular attachments specified in Subsections (d) and (e).

Respondents' reading gives no effect to the general ratemaking authority granted in Subsections (a) and (b). Indeed, the coverage of the Act would remain unchanged under respondents' theory if Congress had simply eliminated the general terms of Subsections (a) and (b) granting that authority. But Congress wrote the Act to give the FCC a broader authority, and respondents' attempt to read Subsections (a) and (b) out of the Act should be rejected. "[T]he more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight." *United Food & Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544, 550 (1996).

2. Respondents argue that the "more specific language in Sections 224(d)(3) and (e)(1) * * * expressly limits the FCC's ratemaking powers to attachments used solely to pro-

vide cable and telecommunications services." Atlantic City Elec. Br. 15-16. Nothing in those subsections, however, "expressly" or even impliedly limits Subsections (a) and (b) to any specific types of attachments. As our opening brief points out (at 17-18), Congress knew how to withdraw parts of the FCC's general ratemaking authority when it wanted to do so, as it did in Subsection (c), which governs cases in which a State has regulated pole attachments, and Subsection (a)(5), which governs attachments by incumbent local exchange carriers (ILECs).[3] Nothing in Subsections (d) and (e), however, can reasonably be read to withdraw the authority over "any" pole attachment granted in Subsections (a) and (b).

3. Respondents argue that "Congress cannot reasonably be assumed to have provided * * * highly detailed standards for * * * rates for cable and telecommunications attachments [in Section 224(d) and (e)], yet to have provided an entirely *unbounded* power to the Commission to set just and reasonable rates for *other* services (including Internet services)." Amer. Elec. Power Br. 14. There are two errors in respondent's argument. First, the FCC's power to set "just and reasonable" rates for "other services" is not at all "unbounded"; an important factor in determining whether a rate is "just and reasonable" under the Act (as the FCC clearly recognized in this case by adopting the Subsection (d) rate for commingled cable and Internet services) is the

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[3] We explain in our opening brief (at 18) that Congress excluded attachments by ILECs from the Act's protections in part because it found that ILECs frequently owned or controlled poles themselves. Respondents state (Amer. Elec. Power Br. 4 n.3) without citation that "[t]he implication that [ILECs] own or control all of the poles they use to string their wires is untrue." What is significant, however, is that Congress itself, as shown by the committee report cited in our opening brief (at 18), has long shaped the Pole Attachments Act on the premise that ILECs frequently (not always) own or control the poles they use, and Congress had no reason to disrupt the longstanding arrangements by which electric utilities and ILECs each shared access to poles owned by the other.

relationship between it and the specific rates in Subsections (d) and (e). Second, what is at issue here is not pole attachments used exclusively for "other services," but pole attachments that are indisputably used at least in part "by a cable television system," 47 U.S.C. 224(a)(4), to provide cable television services. The FCC has not broadened the Act to include attachments for Internet access; it has reasonably construed the Act in accordance with its terms so as not to exclude the intended rate protection for attachments by cable television systems simply because they additionally provide commingled Internet access.

4. Respondents argue extensively that Internet access is neither a "cable service" nor a "telecommunications service" under the Communications Act and that the FCC erred in failing to rule on that question. See, *e.g.*, Amer. Elec. Power Br. 16-18, 22-28; Atlantic City Elec. Br. 24-30; TXU Elec. Br. 15-18. The question on which this Court granted certiorari, however, is whether the provisions of the Pole Attachments Act "apply to attachments by cable television systems that [are] simultaneously used to provide high-speed Internet access and conventional cable television programming." 121 S. Ct. 879. Because that question turns on the general terms of Subsections (a) and (b), it does not turn on the characterization of Internet access as "cable" or "telecommunications" service. If Internet access is either cable television service or telecommunications service, all parties apparently agree that it comes within the protection of the Act. If Internet access is neither cable television service nor telecommunications service, it still comes within the Act if it is provided over "any attachment by a cable television system or provider of telecommunications service." 47 U.S.C. 224(a)(4). Accordingly, for the reasons given in our opening brief (at 29-30), the characterization issue need not—and should not—be resolved to answer the question presented here. See also Amer. Elec. Power Br. 12 (characterization issue has "ramifications far beyond the world of pole attachments").

The FCC should be left to resolve that issue in the first instance as and when such resolution becomes necessary.

C. Respondents' Policy Arguments Are Contrary To The Policies Of The Act

1. Respondents argue that the FCC's decision to apply the Subsection (d)(3) rate to wires used to provide commingled cable television programming and Internet access has untoward policy implications. Even if that were true, it is for Congress—not the courts—to make any corrections it deems desirable in the Pole Attachments Act. In any event, respondents' policy arguments are not sound.

a. Respondents argue that the FCC's construction of the Act is wrong because "it is not reasonable to assume that Congress intended *sub silentio* to 'subsidize' the cable industry's provision of high-speed Internet service, while simultaneously excluding this 'subsidy' for their principal competitors," which are said to consist of telecommunications firms that provide high-speed Internet access by means of digital subscriber lines. Amer. Elec. Power. Br. 29-30.

Insofar as respondents' complaint arises from the FCC's choice of the Subsection (d) rate—rather than the Subsection (e) rate or some other rate—it is not properly before this Court. The court of appeals did not address the question whether the FCC's choice of a rate was valid; it held that the FCC had no jurisdiction over attachments used to provide commingled service at all. If this Court reverses the court of appeals, that court on remand could address any issues that respondents have preserved about the FCC's choice of rate.

In any event, respondents' argument is not well-taken. It is undisputed that the Act provides a potentially lower rate for attachments by cable television systems used to provide cable television service. It provides a potentially somewhat higher rate based on the number of attachers for attachments by competitive local exchange carriers (CLECs),

which are essentially new entrants into the local telephone market. See 47 U.S.C. 224(e). And it does not provide rate protection at all for incumbent local exchange carriers (ILECs). See 47 U.S.C. 224(a)(5). As written and as construed by the FCC, the Act provides that all three categories of providers—cable television systems, CLECs, and ILECs—continue to pay the same rates as before for pole attachments if and when they provide commingled Internet access. Thus, all three groups are on an equal competitive footing in providing Internet access. Under respondents' theory, however, cable systems—but not CLECs or ILECs—would face a potentially large increase in their pole attachment rates if they initiate Internet access. Accordingly, while the Act as written and construed by the FCC preserves competitive equality, respondents' argument would result in imposing a substantial competitive disadvantage on cable systems in comparison to other competitors in the market for Internet access. Or, to put the matter another way, respondents' theory would destroy competitive equality by increasing—perhaps forbiddingly—cable systems' marginal costs of providing commingled Internet access.

b. On a related point, we explain in our opening brief (at 20-21) that Congress's express statutory declarations of a federal policy to "encourage the deployment" of broadband capability "that remove barriers to infrastructure investment," 47 U.S.C. 157 note, and "to promote the continued development of the Internet," 47 U.S.C. 230(b)(1), support the FCC's construction of the Pole Attachments Act not to impose a penalty on cable television systems that provide commingled Internet access. Respondents argue (*e.g.*, Amer. Elec. Power. Br. 29) that another federal policy—"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," 47 U.S.C. 230(b)(2)—is also implicated in this case.

The provision cited by respondents addresses the market "for the Internet," and it therefore is most naturally read to address the market for provision of Internet services to consumers, not the market for products (such as pole attachments or, for that matter, telephone switching equipment or rights-of-way used by ILECs and CLECs) used by providers of Internet services to make their businesses viable.[4] Furthermore, the Act as written and construed by the FCC does preserve a "vibrant and competitive free market" for Internet services by protecting cable television systems that provide such services from the monopoly power that utilities would otherwise exercise over pole attachments. Finally, Section 230(b)(2) is a statement of policy that could not in any event override the unambiguous terms of specific laws, such as those of the Pole Attachments Act at issue here.

2. Respondents argue (*e.g.*, Atlantic City Elec. Br. 20) that there is a "requirement that the Act be construed narrowly" because it "effects a taking." In *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), this Court held that the

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[4] Respondents cite (see, *e.g.*, Atlantic City Elec. Br. 32-33) three provisions of the Communications Act that impose restrictions on communication over the Internet in an effort to protect children—Sections 230, 231, and 271 of Title 47—and then claim that "Congress did not * * * subtly hide regulation of the Internet in historical definitions of other services." Congress of course directly addressed the Internet in those provisions because, unlike the Pole Attachments Act, they regulate communication over the Internet, regardless of how the Internet is accessed. Moreover, there is nothing "subtle" or "hid[den]" in the Pole Attachments Act's provisions protecting rates for "any" pole attachment "by a cable television system or provider of telecommunications service." 47 U.S.C. 224(a)(4). Indeed, it is respondents whose position presumes that Congress "subtly hid[]" partial *de*regulation (*i.e.*, deregulation as soon as the provider adds commingled Internet access) of rates for attachments by cable television systems in provisions of the Pole Attachments Act (Subsections (d) and (e)) that on their face do not withdraw any of the Act's protections.

pre-1996 Act did not effect a taking. The Eleventh Circuit has held that the Act now does effect a taking, see Pet. App. 17a-18a, but that court has not yet addressed the question whether its rate formulas provide for just compensation, *id.* at 19a. So long as just compensation is provided, the Act is not subject to constitutional objection. And if it ultimately were to turn out that just compensation is not provided, constitutional questions would arise about the validity of the Act's rate protections for all attachments by cable television systems and telecommunications providers—not just the subset of attachments at issue here that are used to provide commingled cable television programming and Internet access. In short, the Act in our view is not unconstitutional, no court has held it to be unconstitutional, and, in any event, the doctrine of constitutional doubt could not suffice to require interpreting it in contradiction to its plain language and the views of the agency entrusted with its implementation. See *National R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 503 U.S. 407, 421-422 (1992) (following "the rule of judicial deference to an agency's statutory interpretation, even when the statute is one authorizing condemnation of private property").

II. SECTION 224 APPLIES TO ATTACHMENTS USED TO PROVIDE WIRELESS COMMUNICATIONS

A. All Parties Agree That The Act Protects At Least Some Attachments By Wireless Providers

We explain in our opening brief (at 34-35 & n.12) that wireless carriers frequently use wires to attach and connect their wireless facilities. Respondents now repudiate (American Elec. Power Br. 31) as "imprecise language" the court of appeals' statement that the Pole Attachments Act does not protect any attachments by wireless telecommunications providers—even wireline attachments used to connect to wireless facilities. See, *e.g.*, Pet. App. 25a ("[T]he act does not provide the FCC with authority to regulate

wireless carriers."). Respondents now uniformly agree that the court of appeals' statements cannot be taken at face value, and that "to the extent a wireless carrier seeks to attach a wireline facility to a utility pole, * * * the wireline attachment is subject to Section 224." Amer. Elec. Power Br. 31; Atlantic City Elec. Br. 40; TXU Elec. Br. 18; Florida Power & Light Br. 10-11. All parties therefore now agree that, insofar as the court of appeals excluded wireline facilities used by wireless telecommunications providers from the Act's protections, it erred.

B. The Act's Definition Of "Usable Space" Does Not Limit Its Protection For Attachments By Providers Of Wireless Telecommunications Services

Respondents argue that the rate formula in Subsection (e) for attachments by telecommunications providers requires the conclusion that "wireless *equipment* is not covered." Amer. Elec. Power Br. 31; see *id.* at 35. The Subsection (e) rate formula defines the rate for attachments by telecommunications providers partly in terms of the "usable space" on a pole. 47 U.S.C. 224(e)(2) and (3). The term "usable space" is not defined for purposes of Subsection (e). But the prior subsection—Subsection (d), which governs the rates for attachments by cable television systems and telecommunications providers until the FCC has promulgated new regulations (as it now has done)—provides that "[a]s 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." 47 U.S.C. 224(d)(2) (1994). Respondents argue that, at least under the Section 224(d) definition of usable space, telecommunications providers "are entitled to a regulated rate for attachments of *wires, cables and associated equipment*," and they assert that it follows that "[w]ireless facilities are not covered." Amer. Elec. Power. Br. 35.

1. Section 224(d)(2) does not purport to limit the terms of Subsections (a) and (b) that unambiguously provide that wireless attachments are covered. Moreover, respondents' argument fails on its own terms, because the "usable space" definition on which respondents rely refers not merely to "wires," but also to "associated equipment." As the FCC explained, "associated equipment," even in the case of traditional wireline telecommunications providers, often includes "*a traditional box-like device* and cable wires strung between poles." Pet. App. 96a (emphasis added).[5] Thus, even under respondent's view, attachments of both "wires" and "associated equipment" consisting of "box-like device[s]" are protected by the Act—regardless of whether the purpose of the attachment is ultimately to provide wireline or wireless telecommunications.

2. If the Act protects wires and associated "box-like device[s]" of all telecommunications providers, then its protections extend well into the full range of attachments by wireless telecommunications providers. But respondents would require courts to distinguish other kinds of wireless equipment—presumably those that are not "box-like device[s]" or otherwise sufficiently similar to the attachments made by wireless telecommunications providers—whose attachment to poles would not be protected by the Act. Respondents nowhere offer any principled way to distinguish between wires and "box-like device[s]" that are protected by the Act and what they term "wireless equipment" that

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[5] The record before the FCC includes pictures and descriptions of various box-like devices typically attached to utility poles by cable and wireline telecommunications providers. See, *e.g.*, Exhibits to Joint Comments of the Electric Utilities Coalition, CS Dkt. No. 97-98 (filed June 27, 1997); Exhibits to Reply Comments of the Electric Utilities Coalition, CS Dkt. No. 97-98 (filed Aug. 11, 1997). See also Pet. App. 59a n. 5 (noting that FCC "considered the comments and reply comments filed in * * * CS Docket No. 97-98" in this proceeding). We have lodged copies of the cited comments and exhibits with the Court.

respondents claim to be unprotected. See, *e.g.*, American Elec. Power Br. 31. Indeed, while some wireless equipment of some providers may require "the Commission [to] examine the issues on a case-by-case basis," Pet. App. 96a, other modern wireless equipment may be very similar in size and shape to the equipment used to provide purely wireline cable and telecommunications service. The fact that attachment of some wireless equipment could present novel issues that the Commission will have to address is an insufficient basis for concluding that the Act excludes attachments for "wireless equipment."[6]

3. The Commission's straightforward interpretation of the Act avoids the fruitless task of attempting categorically to distinguish wires and "box-like device[s]" that are protected by the Act from those that are not. The general jurisdiction-granting provisions of the Act do not make any distinction between wireline and wireless equipment. See U.S. Br. 31. To be sure, difficulties may arise in applying the FCC's rules to some wireless pole attachments, just as they may arise in applying the rules to some wireline pole attachments. See Pet. App. 95a. Such difficulties, however, can be resolved in an orderly way under the Act. As the FCC explained, "[t]he statute, legislative policy, administrative authority, and current industry practices all make private negotiation the preferred means by which pole attachment arrangements are agreed upon between a utility pole owner and an attaching entity." *Id.* at 67a-68a (footnotes omitted). Although respondents contend that the FCC's rules are inadequate to deal with the regulation of wireless attachments, the Commission has stated that "[t]here is no clear indication that [the Commission's] rules cannot accommodate

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[6] The Act does expressly permit pole owners to deny attachment rights "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. 224(f)(2).

wireless attachers' use of poles when negotiations fail." *Id.* at 96a. The Commission's determination that its rules and presumptions are sufficient to accommodate most attachments to provide wireless service is entitled to respect. As the FCC has stated in a recent order reconsidering the rate formula for wireless and other attachments, "[w]e continue to believe it prudent to gain experience through case by case adjudication to determine whether additional guiding principles or presumptions are necessary or appropriate." *Consolidated Partial Order on Reconsideration*, FCC 01-170, para. 45 (May 25, 2001); see also Pet. App. 96a.

4. On a related point, respondents argue that "[t]he FCC's own interpretations of the Act focus exclusively on wire attachments." Atlantic City Elec. Br. 44 (capitalization altered). To facilitate private negotiations, the FCC has indeed adopted a series of presumptions that govern pole attachment rates, and those presumptions include "a *rebuttable* presumption of one foot as the amount of space a cable television attachment occupies." Pet. App. 80a (emphasis added).[7] Utilities certainly may challenge that presumption in cases where they can show that an attachment takes up more than one foot of usable space. The FCC's adoption of a one-foot presumption, especially in the face of the fact that a cable wire typically occupies less than an inch of space, see note 7, *supra*, suggests that the FCC was allowing for the attachment not only of a cable wire, but also for clearance

[7] Respondents incorrectly state that the FCC's rules "presume that a wire attachment will be made in about one *inch* of the pole's communications space." Atlantic City Elec. Br. 45 (emphasis added). While the FCC initially recognized that cable wires may have a diameter of less than one inch, it nonetheless presumptively assigned them a space of one foot. See *In re Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, 69-70 & n.26 (1979); see also 47 C.F.R. 1.1418(b) ("The *presumptive* one foot of space occupied by attachment is applicable to both cable operators and telecommunications carriers.") (emphasis added).

around that wire and some "associated equipment."[8] In any event, the FCC's adoption of only a rebuttable—rather than conclusive—presumption that attachments take up one foot of usable space suggests that the FCC took account of the fact that some attachments protected by the Act may take up more space.

C. Respondents' Other Arguments Should Be Rejected

1. Respondents argue (*e.g.*, Amer. Elec. Power Br. 30 n.21) that Section 224 does not "mandate access for cable or telecommunications companies to hang anything at all, from advertising banners to clothes lines, on utility poles." See also Atlantic City Elec. Br. 41 ("a cable video monitor, advertising signage or lighting"). The FCC has not been asked to consider whether the Act protects attachments that are not directly used to provide cable television or telecommunications services. If that issue were to arise, however, the FCC surely could find that the Act does not apply to attachments that are not used directly to provide cable television or telecommunications service. Alternatively, the FCC could conclude that the "just and reasonable" rate for a clothesline or advertising banner, in light of the Act's purposes and structure, is the market rate for that item. The plain terms of the Act protecting attachments used to provide wireless and wireline telecommunications services

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[8] Respondents argue that prior to 1996, "equipment 'associated' with cable wires, such as the power boosters or amplifiers that cable operators routinely use to maintain cable signals over longer distances, was routinely attached to poles but was never the subject of regulated rates." Atlantic City Elec. Br. 44 (footnote omitted). That is mistaken, as the case they cite for that proposition demonstrates. See *Capital Cities Cable, Inc.* v. *Mountain States Tel. & Tel. Co.*, 56 Rad. Reg. 2d (P&F) 393, at 403 para. 23 (1984) ("[T]he space deemed occupied by [a cable television system] includes not only the cable itself, *but also any other equipment normally required by the presence of [the cable television system]*.") (emphasis added).

should not artificially be limited to address respondents' far-fetched examples.

2. Respondents argue (*e.g.*, Atlantic City Elec. Br. 46) that permitting pole attachment rights for facilities used for wireless telecommunications services could make utility poles subject to "regulation as antenna structures" and could subject their owners to certain registration requirements. Registration is required, however, only for antennas that are more than 200 feet high, 47 C.F.R. 17.7(a), or would intrude into the airspace in or near an airport in accordance with certain formulas, 47 C.F.R. 17.7(b), (c) and (d). Typical utility poles subject to the Pole Attachments Act are 37.5 feet high, see note 9, *infra*, and are unlikely to intrude into the airspace of an airport, regardless of whether they have wireless attachments. Accordingly, respondents' concerns are misplaced. In any event the Commission can certainly address any problems that arise from particular attachments if and when such problems develop.

3. Respondents make much of an asserted congressional desire to limit the FCC's jurisdiction when the Pole Attachments Act was first enacted in 1977. See, *e.g.*, Amer. Elec. Power Br. 32, 34-35. To a great extent, the cited statements of concern had to do with whether the FCC or state regulatory bodies should be regulating pole attachments. For example, although respondents (see *id.* at 32) rely on concerns expressed by the White House Office of Telecommunications Policy, that office ultimately concluded that the Act's provision that "FCC jurisdiction would not exist if the state regulatory authorities adopt any plan to regulate pole and conduit space * * * accommodates our concerns." H.R. Rep. No. 721, 95th Cong., 1st Sess. Pt. 2, at 12 (1977), *reprinted in* Amer. Elec. Power Br. App. 85a-86a.

In any event, it is certainly true that Congress originally limited the Act's protection to pole attachments by cable television systems, excluding all other attachments (including those by all telecommunications providers). See, *e.g.*,

Atlantic City Elec. Br. 40. It is equally true, however, that Congress extended the Act's protection in 1996 to "any attachment by a * * * provider of telecommunications service," 47 U.S.C. 224(a)(4), and at the same time added a definition of "telecommunications service" that—by using the phrase "regardless of the facilities used," 47 U.S.C. 153(46)—precluded any distinction between wireline and wireless services. In 1996, Congress was therefore clearly aware that it was protecting attachments used to provide wireless, as well as wireline, telecommunications services. Respondents do not adduce a scrap of legislative history to suggest that Congress at that time was concerned with "strictly circumscrib[ing]," Amer. Elec. Power Br. 1, the FCC's jurisdiction or otherwise limiting the Act's protection for "any" pole attachment, 47 U.S.C. 224(a)(4).

4. Respondents argue that Congress "deal[t] extensively with the siting of wireless equipment in [47 U.S.C. 332(c)(7)]," which was also part of the 1996 Telecommunications Act, and that the specificity of that provision indicates that Congress "did not intend that Section 224 provide the FCC authority to regulate the siting of wireless equipment." Amer. Elec. Power Br. 36, 38; see also Florida Power & Light Br. 22-24; Pet. App. 26a. Section 332 addresses "the authority of a State or local government * * * over decisions regarding the placement, construction, and modification of" wireless telephone facilities. 47 U.S.C. 332(c)(7)(A). It requires zoning boards and other instrumentalities of state and local government, *inter alia*, to act within a reasonable time on siting requests, to support any denial of a request with substantial evidence, and not to base siting decisions on environmental effects of radio frequency emissions.

Contrary to the inference that respondents seek to draw, Section 332(c)(7)(A) demonstrates that Congress knew how to distinguish between wireless and wireline facilities when it wanted to do so. In that provision, Congress addressed

local zoning problems that affected wireless (not wireline) service, and it accordingly limited the provision solely to wireless services. The terms of the Pole Attachments Act, however, have nothing to do with zoning problems and preclude any such distinction. To the contrary, they apply to "any" attachment by a telecommunications service provider, "regardless of the facilities used." 47 U.S.C. 153(46).

5. Finally, respondents state, without citation, that "[a] vibrant free market exists for wireless sites" and that the "market rate * * * varies widely, but typically is $1,500 to $2,000 per month." Amer. Elec. Power. Br. 41. Regardless of whether respondents' figures are accurate, they appear to apply at most to the market for that part of the wireless architecture that requires line-of-sight capability, substantial height, and precise geographical location. It is unclear whether or to what extent any substantial part of that market would be affected by the Pole Attachments Act, since utility poles may not be high enough or located appropriately for telecommunications providers' antennas.[9] What is clear is that much of the wireless architecture may well be dependent on pole attachments, and Congress intended to cover such attachments when it amended the Act in 1996.

In any event, Congress has determined in the Pole Attachments Act that telecommunications providers—whether wireless or wireline—are entitled to rate protection for pole attachments. Whether Congress's determination does or does not affect what respondents call a "vibrant" free market is beside the point. If respondents are dissatisfied with Congress's determinations, their remedy is not to seek a judicial revision of the plain terms of the Act but to return

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[9] Amici Site Owners and Managers Alliance state (at 22 n.13) that "[t]owers used for wireless attachments vary considerably in height, with the tallest exceeding 2000 feet above ground and the average tower reaching 200-250 feet above ground." By contrast, the FCC has determined that typical utility poles are 37.5 feet high. Pet. App. 80a; 47 C.F.R. 1.1418(b).

to Congress to seek new legislation. Moreover, respondents have not disputed the proposition (see U.S. Br. 27-31, 36) that this case should be resolved under *Chevron* standards. See, *e.g.*, Atlantic City Elec. Br. 38-39. The FCC has construed the Act in accordance with its terms to apply to "any" attachment—whether used to provide wireless or wireline services. In order to prevail, respondents must show that the FCC's interpretation is either "arbitrary or capricious in substance" or "manifestly contrary to the statute." *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). Their policy arguments that regulation may be unnecessary for some class of wireless attachments cannot satisfy that burden.

For the reasons given above and those in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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