No. 00-843

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

GULF POWER COMPANY, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

CHRISTOPHER J. WRIGHT
General Counsel
Federal Communications Commission
Washington, D.C. 20554

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

In the Supreme Court of the United States

No. 00-843

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

GULF POWER COMPANY, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

The two issues presented in the petition for certiorari share a common feature. Both involve interpretation by the FCC of unqualified statutory language in the Pole Attachments Act, 47 U.S.C. 224, in accordance with its plain and unambiguous meaning. In both rulings challenged in the petition, the court of appeals not only contradicted the plain meaning of the Act, but also rejected the interpretation of the Act adopted by the agency charged with implementing it. The court of appeals' decision thereby interfered with the achievement of national communications policy objectives that Congress embodied in the Telecommunications Act of 1996, Pub. L. No. 104-104, Tit. VII, 110 Stat. 56. Respondents do not dispute that the decision of the court of appeals in this consolidated proceeding will have nationwide significance, and that there will likely be no opportunity for any other court of appeals to consider

the validity of the FCC rules at issue. See Pet. 17-18. Further review is therefore warranted.

I. The Pole Attachments Act Applies To Cable Television Systems That Provide Commingled Cable Television Services And Internet Access

Section 224(b) of the Pole Attachments Act provides that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. 224(b)(1). In turn, the Act provides that "[t]he 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) (Supp. IV 1998). Those provisions unambiguously authorize the FCC to provide for "just and reasonable" rates for pole attachments "by a cable television system." The court of appeals' conclusion that the FCC loses its authority to regulate the rate for a pole attachment if the cable television system uses the pole attachment for the provision of other services —such as Internet access—in addition to conventional video programming cannot be squared with the plain language of Section 224(a)(4) and (b)(1).

1. Respondents' core argument is that in other provisions of the Act, Congress "authorize[d] the FCC to establish rates for pole attachments in two specific cases, one where the attachment is for 'solely cable service' under Section 224(d), the other where the attachment is for 'telecommunications service' under Section 224(e)," and that "*[n]o other rates are authorized.*" Br. in Opp. 6-7. The terms of Section 224(a)(4) and (b)(1), however, plainly *do* authorize other rates: as stated above, they authorize "just and reasonable" rates for "any" pole attachment "by a cable television system."

There is no provision of the Pole Attachments Act or of any other federal statute that revokes the authorization granted in Section 224(a) and (b). Accordingly, that authorization is a valid source of authority for the FCC to regulate pole attachments by cable television systems, regardless of whether other commingled services (*i.e.*, Internet access) in addition to conventional video programming are provided through those attachments.

Respondents argue that "the FCC's general grant of power in Section 224(b)(1) to regulate pole attachments is *defined and limited* by the specific standards set out in subsections (d) and (e) for attachments used for cable service and telecommunications service." Br. in Opp. 9. Those provisions, however, "define" the FCC's general grant of power only in the sense that they provide specific formulas for determining a just and reasonable rate for the particular pole attachments to which they apply. In the case of subsection (d), that means "the rate for any pole attachment used by a cable television system solely to provide cable service," 47 U.S.C. 224(d)(3) (Supp. IV 1998), and in the case of subsection (e), that means "the charges for pole attachments used by telecommunications carriers to provide telecommunications services" after an interim period, 47 U.S.C. 224(e)(1) (Supp. IV 1998). Nothing in either subsection purports to "define," much less to "limit," the FCC's authority to set a "just and reasonable" rate in any other context. Thus, if (as respondents contend) cable modem service should be classified neither as a "cable service" nor as a "telecommunications service," that conclusion would simply leave undisturbed the FCC's broad discretion to set a "just and reasonable" rate for attachments used to provide cable modem service. It would certainly not mean that cable companies would lose *all* protection from monopolistic rate practices whenever they use their wires, even in part, to provide

the broadband Internet services that Congress sought to promote.

2. Respondents argue that "Congress can not reasonably be assumed to have provided * * * highly detailed standards for cable and telecommunications attachments [in subsections (d) and (e)], yet to have provided *no* standards for attachments for *other* services (including Internet services)." Br. in Opp. 9. It is commonplace, however, for legislatures to delegate ratemaking and similar authority to an agency on comparably broad terms. See, *e.g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-603 (1944) (delegation to Federal Power Commission to determine "just and reasonable" rates); *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 577 (1939) (delegation to Secretary of Agriculture to "fix[]" prices to a level that was "in the public interest"); *Yakus* v. *United States*, 321 U.S. 414, 427 (1944) (delegation to Price Administrator to fix commodity prices that would be "fair" and "equitable"); *National Broad. Co.* v. *United States*, 319 U.S. 190, 225 (1943) (delegation to FCC to regulate broadcast licensing as "public interest, convenience, or necessity" require). There is no need in this case to "assume[]," as respondents put it, that Congress made a broad delegation of ratemaking authority in the Pole Attachments Act; rather, the terms of the Act quite explicitly state that that was Congress's approach, and it was a reasonable one that Congress has frequently used in ratemaking and similar contexts.

3. Respondents argue that granting further review in this case "would require this Court to rule on whether Internet service is a 'cable service' or a 'telecommunications service.'" Br. in Opp. 13. That issue —which has ramifications that extend far beyond this case—is currently under consideration by the FCC and should be addressed in the first instance by the FCC.

See Pet. 15 n.4. It is not a question presented in this case, since this case presents only the question whether the FCC has any authority to regulate the rates for pole attachments by cable television systems that provide commingled Internet access under Section 224(a) and (b). That question can easily be answered without reference to whether Internet access is a "cable service," a "telecommunications service," or some other form of service. Section 224(a) and (b) authorize the FCC to ensure just and reasonable rates for "*any* attachment by a cable television system" (emphasis added); those provisions do not require further classification of the services for which the attachment is used.

Even if that were not the case, there would still be no need for this Court in the first instance to determine the proper statutory characterization of Internet access. If the Court concluded that FCC authority over pole attachments by cable television systems that provide commingled Internet access depended on whether such Internet access is a "cable service," a "telecommunications service," or some other kind of service, the appropriate course for this Court would be to remand the case to the FCC—the step the court of appeals should itself have taken when it ruled (mistakenly) that the characterization of Internet access was determinative. Because implementation of the federal communications law is entrusted to the FCC, it is that agency—not this Court and certainly not the court of appeals—that should address the characterization issue in the first instance See *IRS* v. *FLRA*, 494 U.S. 922, 933 (1990) (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943)).

4. Section 224(a)(5) of the Act provides that "the term 'telecommunications carrier' * * * does not include any incumbent local exchange carrier," 47 U.S.C.

224(a)(5) (Supp. IV 1998), and it thereby excludes such incumbent local exchange carriers (ILECs) from the rate protections of the Act.[1] Respondents argue that Congress would not have wanted, as a matter of policy, to provide rate protection for pole attachments by cable television systems that provide commingled video programming and Internet access, while excluding ILECs, which may also be providing Internet access, from those same protections. Br. in Opp. 12. The short answer to that contention is that the best guide to the policy Congress intended is the terms of the statute that it enacted. The terms of the Pole Attachments Act unambiguously provide rate protection for cable television systems, even if they furnish commingled internet access, but not for ILECs, even if they also provide Internet access. The wisdom of that policy is a question for Congress to consider in formulating further legislation, not the courts.

In any event, the policy choices that Congress embodied in the Pole Attachments Act were sound. Respondents themselves note that Congress originally enacted the Pole Attachments Act to address problems brought to its attention when "[c]able companies * * * complained [that] there were no practical alternatives to stringing their cables on utility poles, and that some utilities (*principally telephone companies*) had exploited their 'monopoly' position over these 'bottleneck facilities' by charging excessive rates for pole attachments." Br. in Opp. 1 (emphasis added). Congress had

---

[1] An "incumbent local exchange carrier" is elsewhere specified to be the carrier that provided local telephone service in a given area, typically on a monopoly basis, as of February 8, 1996. 47 U.S.C. 251(h) (Supp. IV 1998). A firm newly attempting to compete in providing telephone service in a local area is generally not an ILEC.

long ago found when it first enacted the Pole Attachments Act that "poles, ducts, and conduits are usually owned by *telephone* and electric power utility companies, which often have entered into joint use or ownership agreements." S. Rep. No. 580, 95th Cong., 1st Sess. 12 (1977) (emphasis added); see also *ibid.* (noting that agreements between telephone and electric utilities usually provide that "communications pole space is * * * under the control of the telephone company"). On that basis, Congress concluded that there was no need to provide rate protection for pole attachments to incumbent telephone carriers, *i.e.*, ILECs. It is significant, however, that Congress chose only to except *incumbent* local exchange carriers from the rate protections of the Act. Congress granted rate protection to non-incumbent carriers, which, unlike incumbent carriers but like cable television systems, would not have had their own poles to which to attach the necessary wires. See also NCTA Reply Br. 7 n.2.

5. Finally, respondents argue that review is unnecessary because the Takings Clause in any event requires that they be permitted to charge whatever the market will bear for pole attachments, Br. in Opp. 15-16, and because "[c]able companies almost always have alternatives for the deployment of facilities to provide high-speed Internet access," *id.* at 16-17. The premise of both of those arguments is that the court of appeals' misconstruction of the Pole Attachments Act is of no consequence, because, respondents suggest, the Act serves little or no purpose in any event. This Court ought not accept a premise that is so at odds with Congress's determination in 1996 that the Act should be amended substantially to provide broader protections.

In any event, respondents' Takings Clause contention is wrong because, even if the Pole Attachments Act as amended constitutes a taking, that would surely not

entitle respondents, as a matter of just compensation, to charge monopoly rents—rather than "just and reasonable" rates—for pole attachments. See *FCC* v. *Florida Power Co.*, 480 U.S. 245, 253-254 (1987). Respondents are also wrong in claiming that cable television systems always have economically feasible alternatives to attaching their wires to "a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. 224(a)(1)(4) (Supp. IV 1998).[2] Obviously, the least expensive way for cable television systems to provide Internet access to their existing customers is likely to be to provide such access through the same wires attached to the same pole that they use for conventional video programming services. Requiring cable companies to provide Internet service through other, more expensive, means to avoid the monopoly prices that utilities would charge for pole attachments would often be impracticable and would in any event drive up the price of the Internet access that cable television systems can provide. That in turn would directly defeat Congress's declared purpose to "encourage the deployment" of broadband (*e.g.*, cable modem) capability. 47 U.S.C. 157 note.

---

[2] Even if true, respondents' contention (Br. in Opp. 17) that cable companies are likely in any event to place new wires underground is irrelevant. The Pole Attachments Act provides rate protection for "any attachment," not merely to a "pole," which would be above-ground, but also to a "duct, conduit, or right-of-way," which may be above-ground or underground. 47 U.S.C. 224(a)(4) (Supp. IV 1998). Moreover, the Pole Attachments Act provides rate protections not only for new pole attachments, but also for the vast number of existing above-ground pole attachments used by cable companies to provide their services.

II. The Pole Attachments Act Fully Applies To Providers Of Wireless Telecommunications Services

The plain language of the Act makes clear that it extends to wireless, as well as wireline, telecommunications providers. As we have noted, see p. 2, *supra*, Section 224(b)(1) authorizes the FCC to require that just and reasonable rates be charged for "pole attachments," and Section 224(a)(4) defines a "pole attachment" to "mean 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) (Supp. IV 1998) (emphasis added). Wireless carriers provide telecommunications service no less than wireline carriers, and pole attachments used for wireless telecommunications services are accordingly protected by the plain terms of the Act. The applicable definitional provision eliminates any possible doubt on that point, since it defines "[t]elecommunications service" as the offering of telecommunications for a fee directly to the public "*regardless of the facilities used*." 47 U.S.C. 153(46) (Supp. IV 1998) (emphasis added). Although respondent (Br. in Opp. 19-20) and the court of appeals (Pet. App. 21a-22a) correctly note that there are provisions of the Act that *do* refer to wires, see Br. in Opp. 19-20, none of them purports to—or can reasonably be read to—exclude wireless telecommunications services from the Act's protections. There is no logical basis in the provisions of the Act for the court of appeals' conclusion that it provides less protection to providers of wireless telecommunications services than to providers of wireline telecommunications services.

Respondents argue that the Act "is designed to deal with the potential exercise of monopoly power over bottleneck facilities" and that "[u]tility poles are not,

even potentially, bottleneck facilities for wireless equipment." Br. in Opp. 18. That argument, like the court of appeals' reasoning that it mirrors, see Pet. App. 24a-26a, begins from a mistaken factual premise. As amici AT&T Wireless Services et al., demonstrate (Amici Br. 14-15), a "pole, duct, conduit, or right-of-way" may in fact be a bottleneck facility for a wireless carrier in a wide variety of circumstances.[3]

In any event, Congress did not choose to limit the Act by requiring a showing that a "pole, conduit, duct, or right-of-way" is a "bottleneck facility" before rates for attachments to it receive the protection of the Act. Indeed, neither the term "bottleneck facility" nor any synonym for it appears in the Act. To the contrary, the Act was designed to protect entities that utilize pole attachments "out of necessity *or business convenience*." S. Rep. No. 580, *supra*, at 13 (emphasis added).

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

CHRISTOPHER J. WRIGHT
General Counsel
Federal Communications Commission

JANUARY 2001

---

[3] The fact that wireless carriers themselves did or did not directly participate in this case would not be a basis for granting or denying the petition for certiorari. We note, however, that respondent's claim that wireless carriers are uninterested in the question presented, see Br. in Opp. 18 ("[N]or has any wireless company supported the Government's petition."), is demonstrably false. See Br. of Amici AT&T Wireless Services, Inc. et al., in Support of Petitioners (filed Dec. 27, 2000).