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Case at a Glance

This case presents the question of whether the Federal Communications Commission has the authority to regulate either the pole attachments used by cable television systems that provide high-speed Internet access services over the same lines on which they provide traditional cable TV programming or the pole attachments used by wireless telecommunications services.

Can the FCC Regulate the Placement of Wireless Equipment and Internet Service Attachments on Utility Poles?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 12–16. © 2001 American Bar Association.

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ISSUES

Does the Pole Attachments Act of 1996 apply to utility pole attachments used by cable systems that simultaneously provide high-speed Internet access and conventional cable TV? Does it apply to the attachments used by providers of wireless telecommunications services?

FACTS

The 1996 Pole Attachment Act (47 U.S.C. § 224) gives providers of cable and telecommunications services the right to attach wires to the poles of power and telephone companies. If the power and telephone companies will not accept the rent the providers offer to pay, the Federal Communications Commission (FCC) sets the rent. The FCC has adopted regulations containing a formula for computing the rent.

The FCC has ruled that the 1996 Act precludes power and telephone utilities from receiving rent for wires that were "overlashed" (overlashing occurs when an attacher physically ties additional cables to cables already attached to the pole). According to the FCC, the 1996 Act gives it the authority to regulate the placement of wireless communications equipment and attachments for Internet service on utility poles. In addition, the FCC has also ruled that the 1996 Act precluded utilities from receiving rent for unused wires within fiber optic cables (so-called "dark fiber") that are attached to the poles. (Dark fiber is "bare capacity" and does not involve any of the electronics necessary to transmit or receive signals over that capacity.)

Gulf Power Co. and a number of other utility companies (Respondents) petitioned the courts

NATIONAL CABLE AND TELECOMMUNICATIONS ASSOCIATION ET AL. V. GULF POWER COMPANY ET AL.
and
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES ET AL. V. GULF POWER COMPANY ET AL.
DOCKET NOS. 00-832 AND 00-843

ARGUMENT DATE:
OCTOBER 2, 2001
FROM: THE ELEVENTH CIRCUIT

of appeals for review of the FCC's ruling. The cases were consolidated in the Eleventh Circuit.

A divided panel of the Eleventh Circuit held that the FCC lacks the authority to regulate the placement of wireless equipment on utility poles and attachments for Internet service. The court explained that the 1996 Act gives the FCC authority to regulate pole attachments that are used, at least in part, for wire communications, and by negative implication does not give the FCC authority over pole attachments that are used for wireless communications. *Gulf Power Co. v. FCC,* 208 F.3d 1263 (11th Cir.2000). Noting that the original purpose behind regulating utility poles was to prevent utility companies from charging monopoly rents to connect to their "bottleneck facilities," the court of appeals stated that the poles are not bottleneck facilities for wireless systems, since their attachments could be placed on any tall building and wireless networks may continue working even if one antenna malfunctions.

The court of appeals also rejected the FCC's conclusion that Internet services provided by a cable television system are subject to regulation under the 1996 act. In the court's view, for "the FCC to be able to regulate the rent for an attachment that provides Internet service ... Internet service must qualify as either a cable service or a telecommunications service." The court concluded that such Internet access is neither cable service nor telecommunications service and that the FCC therefore has no authority to regulate rates for pole attachments by cable operators that carry cable television and Internet access through the same wires.

The Eleventh Circuit determined, however, that the FCC's decision regarding dark fiber constitutes a reasonable interpretation of the 1996 Act. The court of appeals declined to address a takings claim and the overlashing claim on the ground that those claims were not ripe for adjudication.

The Supreme Court thereafter granted the petitions of the FCC and the National Cable Television Association, Inc. (Petitioners), and agreed to review the Eleventh Circuit's decision. 121 S.Ct. 879 (2001).

Case Analysis

From the beginning, cable television companies have attached their cables to the utility poles owned by power and telephone companies. Factors such as zoning restrictions, environmental regulations, and start-up costs made other options infeasible. The attachment agreements between the cable television companies and utilities have generally been voluntary. However, the lack of alternatives has given the power and telephone companies an advantage in negotiating attachment agreements. In response to this problem, in 1978 Congress enacted the Pole Attachment Act (47 U.S. § 224).

The 1978 act specified a range of rents that telephone and power companies could charge the cable television companies for attaching cables to their poles. Under the act, however, the cable television companies had no right to attach their cables; the utilities could reject a cable television company's request to attach to their poles.

The FCC then promulgated rules under the 1978 act, providing complaint and enforcement procedures to ensure that the rates, terms, and conditions for cable television pole attachments were just and reasonable. Under the FCC's formula, the maximum rent the utility could charge was the attacher's proportionate share of the bare costs of maintaining the pole and the "carrying charges" associated with the pole.

After the FCC promulgated these rules, several cable television companies in Florida filed complaints with the FCC contending that a power company was charging them unreasonable rents to attach. The FCC agreed that the rates were unreasonable and set a lower rent. The utility appealed from this ruling, claiming that the FCC's action amounted to a taking of the utility's property without just compensation. The Supreme Court held that no "taking" occurred because the utility had voluntarily agreed to the cable companies' attachments. *FCC v. Florida Power Corp.,* 480 U.S. 245 (1987). The Court suggested that, had Congress in the 1978 act required utilities to allow the attachments, a taking may have occurred.

In 1984, Congress enacted the Cable Communications Policy Act of 1984 (47 U.S.C. §§ 521-559). Before the 1984 act, cable television companies operated under exclusive franchises granted by a local government. Because these franchises effectively gave the companies monopolies in the franchise territory, the local governments regulated the rates they could charge subscribers. In order to encourage competition, Congress eliminated the power of local governments to set rates for "basic" cable service. Although prices might increase in the short run, Congress believed that prices would decrease in the long run as local governments granted additional franchises for a given territory. New cable companies would be able to enter the market and compete with the incumbent

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cable company—but only if they could obtain utility attachments on the same terms as those given to the incumbent cable company.

In *Texas Utilities Electric Co. v. FCC,* 997 F.2d 925 (D.C. Cir. 1993), the D.C. Circuit considered whether the pre-1996 version of the act permitted cable systems to pay the regulated rate when they provided cable services commingled with noncable services. The D.C. Circuit deferred to the FCC's interpretation that commingled services were covered by the act because, prior to 1996, the act did not specify the particular services of a cable television system that were entitled to a regulated rent.

In addition to making new demands for pole space, a number of new telecommunications carriers (such as new long-distance telephone carriers and wide-area telephone service providers) that used wires to carry their signals began seeking to rent space on poles. Because the 1978 act only regulated the rents utilities could charge cable television companies, many utilities demanded monopoly rents from these telecommunications carriers.

In order to fix this problem, in 1996 Congress amended the 1978 act to give entities providing telecommunications and cable-television service the right to "nondiscriminatory access" to utility poles. Should the parties be unable to agree to the terms of the attachments, including the rent, the 1996 act authorized the FCC to set "just and reasonable" terms. The 1996 act also (1) redefined "utility" to encompass "any person who is a local exchange carrier, or an electric, gas, water, steam, or other public utility;" (2) redefined "pole attachment" to include attachments by providers of telecommunications service; (3) directed the FCC to create a formula for determining the attachment rent that a utility could charge a telecommunications service provider; and (4) instructed utilities on how to apportion the costs of "unusable" and "usable" space on their poles among telecommunications service providers.

In 1998, the FCC issued regulations implementing its authority under the 1996 act. The FCC interpreted the 1996 act to require that utility companies give Internet providers access to their poles because the Internet was a cable service. It also interpreted the 1996 act to mean that telephone and power companies would have to accept pole attachments for wireless telephone equipment. The FCC determined that the 1996 act precludes utilities from receiving rent for overlashed wires unless those wires significantly increase the burden on the pole. Finally, the FCC interpreted the act to prohibit utilities from receiving rent for dark fiber. The FCC then articulated formulas for determining the attachment rents utilities may charge telecommunications service providers.

The petitioners in this case now argue that the Pole Attachments Act of 1996 protects pole attachments by cable television systems that provide commingled cable television service as well as attachments by providers of wireless telecommunications services. The petitioners argue that the act's phrase "any attachment by a cable television system or provider of telecommunications service" includes an attachment by a cable television system that is used to provide commingled cable television.

The respondents counter that the 1996 act does not apply to attachments used for delivery of commingled cable and Internet service. Declaring that a "cable television system" is not synonymous with a cable "company," respondents argue that a cable modem service is neither a cable service nor a telecommunications service.

The petitioners claim that Congress had sound policy reasons not to accept the rule adopted by the Eleventh Circuit, a rule that it claims would penalize cable television systems for providing commingled Internet access by removing their attachments from the Act's protections as soon as such Internet access is provided. Contending that Congress delegated to the FCC the authority to implement the 1996 act, the petitioners declare that the courts must defer to the FCC's reasonable construction of the Act.

Respondents, on the other hand, contend that the Eleventh Circuit's decision is fully consistent with Congress' policy of promoting deployment of high-speed services. Respondents say that the FCC has avoided the question posed by attachments that provide high-speed Internet access and conventional cable television simultaneously and, thus, that its interpretation of the act is not entitled to deference with respect to this issue.

The respondents point out that Congress has declared that it is the policy of the United States "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." Because cable Internet service was left out of the 1996 act, the respondents argue that cable companies and their chief competitors in the Internet business must pay the same unregulated rates for Internet attachments.

With respect to the Eleventh Circuit's conclusion that the 1996

act provides limited or no protection for wireless—as opposed to wireline—telecommunications services, the FCC argues that the definition of a "covered" pole attachment in the act makes no distinction between providers of wireless telecommunications service and providers of wireline telecommunications service. Once it is determined that certain poles are subject to the act because they are used for wire communications, the petitioners say, the Act calls for no further distinctions to be made on the basis of whether the attachments to those poles are used to provide wireless or wireline telecommunications service. Once an attachment is made by a provider of telecommunications service, it is protected by the act, whether the attaching entity uses wireless, wireline, or some hybrid type of facility to provide the telecommunications service.

The FCC states that it is the unqualified term "provider of telecommunications service," not a court's conception of what constitutes a "bottleneck facility," that defines the scope of the act's protections. The FCC suggests that the Eleventh Circuit was wrong in suggesting that utility poles are not "bottleneck facilities for wireless systems." It says that wireless systems are typically "wireless" only between the subscriber's wireless telephone (or, in the case of "fixed wireless" systems, between a central location in the subscriber's building) and the nearest receiving antenna. "Wireless" providers often depend on actual wires attached to poles to get their signals from such antennas back to a central location, where they are connected to a network that may itself include pole-to-pole wireline facilities. It concludes that, as a practical matter, a wireless telecommunications service may well depend on poles owned or controlled by utilities.

Respondents assert that the act does not cover attachments of wireless telecommunications equipment. Acknowledging that the act applies to attachments by wireless carriers, respondents assert that the dispute pertains to the type of facilities a wireless carrier can attach; the question is whether the act extends to wireless equipment, not to wireless carriers. Stating that they have never taken the position that the wireline segments of a wireless carrier's network are outside the act, the respondents contend that wireless equipment is not covered. Thus, respondents state that a wireline attachment is subject to the act to the extent a wireless carrier seeks to attach a wireline facility to a utility pole, whether for "traffic backhaul, redundancy, intermodal operations," or other purposes.

SIGNIFICANCE

The regulation of cable-based platforms for high-speed access to the Internet has become one of the most controversial subjects in communications law. See Jim Chen, "The Authority to Regulate Broadband Internet Access Over Cable," 16 *Berkeley Tech. L.J.* 677 (2001). At one time, cable systems were regarded merely as a means of delivering television signals to rural areas. Now, however, these systems can supply high-speed Internet access throughout the United States. A recent study has indicated that, within three years, cable modems will occupy 86 percent of the American wireline broadband market. Christopher Duffy, Note, "The Statutory Classification of Cable-Delivered Internet Service," 100 *Colum. L. Rev.* 1251 (2000), citing a Forrester Research study. This suggests that in the broadband market, cable will be a dominant player, if not the primary one. *Id.*

This case presents difficult and complex technical and statutory issues that may resolve important questions of regulatory authority over open access in cable broadband. Although the 1996 act was hailed as the regulatory reform needed for the digital age, the act's definitions contain technological and marketplace anachronisms that may be inconsistent with the direction of the telecommunications industry then and now. Steve Kelley, "Liberating Our Digital Future: How the 1996 Telecommunications Act Definitions Are Hobbling Change," 27 *Wm. Mitchell L. Rev.* 2137 (2001). These definitions create internal conceptual problems, interpretive difficulties for the FCC and the courts, policy-making problems for states, and implementation challenges at multiple levels of government and industry. *Id.*

The difficulties in this case are illustrated by the courts of appeals' attempts to determine the nature of cable broadband Internet access. In *AT&T Corp. v. City of Portland,* 216 F.3d 871 (9th Cir. 2000), the Ninth Circuit held that cable broadband Internet access service was not a "cable service" as defined in the communications act because the essence of cable service is one-way transmission of programming to subscribers generally. The Ninth Circuit held that where a provider's service consisted of a "pipeline" with cable broadband and Internet service both transmitted through that pipeline, the provider was providing "telecommunications services" as defined in the communications act.

The Fourth Circuit has observed that the issue of the proper regulatory classification of cable modem service is complex and subject to considerable debate. *MediaOne Group, Inc. v. County of Henrico,* 257 F.3d 356 (4th Cir. 2001). It concluded that a cable modem service

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was a telecommunications facility regulated by federal law.

The Eleventh Circuit in *Gulf Power Co.* held that a cable modem service was neither a cable service nor a telecommunications service under the communications act. See also Christopher Duffy, Note, "The Statutory Classification of Cable-Delivered Internet Service," 100 *Colum. L. Rev.* 1251 (2000) (cable-delivered Internet service is an information service, not a cable or telecommunications service).

Respondents suggest that a decision upholding the Eleventh Circuit would allow utilities to charge cable television companies that also provide Internet service prices for using their utility poles that are determined by market forces. This would undoubtedly result in increased income for the utilities. Because the 1996 act applies to telecommunications carriers providing Internet service using DSL technology over the same wires transmitting traditional telecommunications services such as telephone service, the rent charged to the telecommunications carrier for both telephone service and high-speed Internet access could be controlled by the FCC. However, if the FCC cannot restrain the rent for cable-provided Internet access, the cable competitor would be at a severe competitive disadvantage. Steve Kelley, "Liberating Our Digital Future: How the 1996 Telecommunications Act Definitions Are Hobbling Change," 27 *Wm. Mitchell L. Rev.* 2137 (2001).

Petitioners reason that a decision reversing the Eleventh Circuit would restrict what utilities could charge for attachments to their poles, and they suggest that such a decision would actually enhance competition. Such a ruling would undoubtedly reduce the costs of cable companies and increase their profits. However, if cable broadband Internet services can be regulated as "telecommunications service," but a conventional Internet service provider (ISP) cannot be regulated because there is no state or FCC regulatory power over information services, there is a potential for regulatory discrimination between entities that are in competition with each other. Steve Kelley, "Liberating Our Digital Future: How the 1996 Telecommunications Act Definitions Are Hobbling Change," 27 *Wm. Mitchell L. Rev.* 2137 (2001).

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