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Pole Position: National Cable & Telecommunications Ass'n v. Gulf Power Co. and the Implications of the FCC's Pole Attachments Act

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POLE POSITION: NATIONAL CABLE & TELECOMMUNICATIONS ASS’N v. GULF POWER CO. AND THE IMPLICATIONS OF THE FCC’S POLE ATTACHMENTS ACT REACHING HIGHER GROUND

“What’s in a name? That which we call a rose by any other name would smell as sweet.”

I. INTRODUCTION

The Pole Attachments Act authorizes the Federal Communications Commission (FCC) to regulate the rates, terms, and conditions of attachments to poles owned by utility companies.1 The scope of this Act, specifically what type of pole attachments are covered, has been the subject of recent debate in the telecommunications and information technology industries.2 The Act originally applied only to pole attachments by cable television companies offering cable television


2. Compare Nat’l Cable & Telecomms. Ass’n, Overview: The Cable Industry and Pole Attachment Regulation (September 2001) at http://www.ncta.com (last visited Feb. 6, 2003) [hereinafter Overview] (explaining that the FCC’s regulatory protections should govern all information service provider pole attachments, regardless of the type), with Press Release, United Telecom Council, UTC Files in Supreme Court Telecom Battle (June 14, 2001) at http://www.utc.org (last visited Feb. 6, 2003) (Press Release Archive) (arguing that Congress intended to provide the FCC with only limited jurisdiction over utility infrastructure, namely wire-based communications providers and cable service providers that offer solely traditional cable television).
services. A 1996 Amendment to the Act expanded the FCC’s jurisdiction to include coverage of attachments by wire-based telecommunications services. Additionally, in 1998, the FCC issued a rule that interpreted the Act to cover rate regulations of attachments providing commingled high-speed Internet access and traditional cable television (commingled services) and rate regulations of attachments by

3. 47 U.S.C. § 224(d)(3) (2000). Section 224(d)(3) states “[t]his subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service.” It is this subsection, and specifically Congress’ use of the word “any,” that has sparked much of the debate over the FCC’s regulation of pole attachments for high-speed Internet access via cable modems. See Steve Kelley, Liberating Our Digital Future: How the 1996 Telecommunications Act Definitions are Hobbling Change, 27 WM. MITCHELL L. REV. 2137, 2156 (2001) (stating that in the Gulf Power decision at the lower court, the Eleventh Circuit expressly concluded that Congress’ definition was “not significant enough to sweep Internet services into the cable service ambit”). See also infra notes 65, 66 and accompanying text for a discussion on the interpretation of the word “any.”


5. 47 U.S.C. § 224(e)(1) (2000). Section 224(e)(1) states “the Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.” Id.

6. See Nat’l Petroleum Refiners Ass’n v. FTC, 482 F.2d 672 (D.C. Cir. 1973) (establishing the power of an agency to promulgate legislative rules when Congress constitutionally delegated that power to the agency). See also American Hospital Ass’n v. NLRB, 499 U.S. 606 (1991) (holding that the general grant of rulemaking power to the NLRB was not limited by the requirement that the agency make certain determinations in each case). Section 551(4) of the Federal Administrative Procedure Act (APA), Pub. L. 79-404, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 551-59, 801-08 (2000)), defines a rule as:

– the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4) (2000). Agency regulations, often referred to as legislative rules, have virtually the identical legal effect to that of a statute. Richard J. Pierce, Jr., Sidney A. Shapiro & Paul R. Verkuil, ADMINISTRATIVE LAW AND PROCESS § 6.4.4 (3d ed. 1999). When adopting a rule or regulation, an agency must follow the procedures set forth in either the APA § 553, or the agency’s internal enabling act. Id. The APA, which sets the floor level requirements for agency rulemaking, adopted the “notice and comment” approach to rulemaking. Id. at § 6.4.6a. Section 553(b) of the APA states that “notice of the proposed rulemaking shall be published in the Federal Register” and the notice shall include, inter alia, “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3) (2000). Section 553(c) of the APA indicates that after the required notice, “the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.” § 553(c).

wireless telecommunications service providers.\(^8\)

Pole-owning utility companies challenged this FCC rule, asserting that commingled cable services and wireless telecommunications services are not covered by either of the Act’s two specific rate regulation formulas.\(^9\) The Court of Appeals for the Eleventh Circuit reversed the FCC’s orders, holding that the plain meaning rule of statutory construction led to a narrow interpretation of both rate formulas.\(^10\) The court reasoned that by negative implication, commingled services and wireless telecommunications were precluded from the Act’s coverage.\(^11\) The Supreme Court granted certiorari and

\(^8\) Implementation, supra note 7, at ¶ 36. The FCC stated that, although wireless carriers have not historically affixed their equipment to utility poles, the 1996 Act gives them the right to do so, and entitles them to rates consistent with the regulation scheme set forth in § 224. \(\text{Id.}\) Section 224 does not describe the specific type of telecommunications equipment a carrier may attach, and to establish an exhaustive list would not be advisable or even possible. \(\text{Id.}\)

\(^9\) Gulf Power Co. v. FCC, 208 F.3d 1263, 1271 (11th Cir. 2000). Pole-owning utility companies petitioned for review of an FCC order regulating rent to be paid by cable and telecommunication service providers for attaching equipment to the utility companies’ poles. \(\text{Id.}\) at 1266. The FCC argued that on the issue of commingled cable Internet service, the attachments were covered either by § 224(d)(1) as a cable service, or in the alternative, that the rates were just and reasonable under § 224(b)(1). \(\text{Id.}\) at 1276-77. The Court of Appeals for the Eleventh Circuit agreed with the utility companies and held, \(\text{inter alia}\), that (1) the FCC lacked authority to regulate pole attachments used for wireless communications, and (2) the FCC could not regulate pole attachments for Internet service provided by cable companies. \(\text{Id.}\) at 1274, \(\text{rev’d}\), 534 U.S. 327 (2002). See also infra note 33 and accompanying text for an explanation of § 224(b)(1)’s just and reasonable rates.

\(^10\) Gulf Power, 208 F.3d at 1274. The court reasoned that the language of § 224 plainly covers attachments for wire communications, and this supports a narrow reading of the FCC’s authority. \(\text{Id.}\) (emphasis added). \(\text{See also}\) 47 U.S.C. § 153(52) (2000) (defining “wire communications” as “the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connections between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission”).

\(^11\) Gulf Power, 208 F.3d at 1276. The court concluded that Internet service is neither a cable service nor a telecommunications service; therefore the FCC has no authority under the 1996 Telecommunications Act to regulate Internet service providers. \(\text{Id.}\) Judge Carnes’ dissent criticized
reversed the circuit court, upholding the application of the FCC’s original rate regulation orders.12

Both high-speed Internet access via commingled cables and wireless communications are complex and cutting edge topics in today’s world of ever changing information technology.13 This Note examines how these issues were addressed recently in Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co. (Gulf Power).14 Part II of this Note provides a review of the Pole Attachments Act, focusing particularly on using the purpose behind the Act to establish the minimum and maximum limitations of its coverage.15 Part III discusses the factual and procedural history of the Gulf Power case, first addressing the Court of Appeals for the Eleventh Circuit’s opinion,16 and then detailing the U.S. Supreme Court’s reasoning.17 Part IV analyzes the antitrust implications of the FCC’s competitive approach to regulating the telecommunications and information service technology industries.18 Additionally, Part IV analyzes the Supreme Court’s decision to uphold FCC regulation of pole attachments providing highly technical services that the commission itself cannot even define.19 Finally, Part V concludes the Note by arguing that in terms of policy considerations and practical applications, the Supreme Court’s ruling in Gulf Power was not only correct, but it may foreshadow the FCC’s taking a more hands-on approach to regulating the wild, wild west of the information superhighway.20

II. BACKGROUND

In 1978, Congress adopted the Pole Attachments Act in response to

the court’s opinion, stating that the majority read too closely into the definitions put forth in the statute, and that the Pole Attachments Act should extend regulated rates to all pole attachments. Id. at 1280-81 (Carnes, J. dissenting). Judge Carnes’ dissent based the reasoning behind his view of broad regulation by the FCC on the plain language of the statute. Id. This is similar to the reasoning the Supreme Court used in their Gulf Power decision. See infra notes 73 – 85 and accompanying text for a thorough discussion of the Supreme Court’s Gulf Power decision.

13. See, e.g., Bill Scanlon, Bridging the Gap – Carriers Seek Better, More Profitable Ways to Connect Customers to the Backbone (August 13, 2001) at http://www.eweek.com (last visited March 5, 2003) (explaining that innovations in technology are running rampant in the race to get the general public online with faster, more advanced equipment).
14. See infra Parts II-IV.
15. See infra notes 21 - 39 and accompanying text.
16. See infra notes 40 - 72 and accompanying text.
17. See infra notes 73 - 98 and accompanying text.
18. See infra notes 99 - 171 and accompanying text.
19. Id.
20. See infra notes 168-85 and accompanying text.
the widespread consumer popularity of cable television. Congress designed the Act to protect emerging cable companies from monopoly pricing by the incumbent pole-owning utility companies. Cable television systems rely on a physical, point to point connection to provide their services to cable television subscribers. The most practical means for this connection is to string cables above ground using poles controlled by the local utilities. In turn, the utility

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21. John P. Morrissey, Equal Access to Pole Attachment Agreements: Implications of Telephone Company Participation in the Cable Television Market, 18 U. BALT. L. REV. 165, 165-66 (1988). Cable television was invented in the 1950’s. Id. at 165. By the mid 1970’s almost sixty-five percent of the nation’s homes were able to receive cable television. Id. at 166 n.10. By 1977, pole attachment disputes existed in twenty-seven states, and this prompted the intervention of government regulation in 1978. Id. at 167 n.14. See also Jim Chen, The Authority to Regulate Broadband Internet Access Over Cable, 16 BERKELEY TECH. L.J. 677, 679 n.5 (2001) (citing In re Annual Assessment of Competition for the Delivery of Video Programming, 15 F.C.C.R. 978, 988-89 (2000)) (noting that in year 2000, cable reached more than ninety-six percent of all homes with at least one television set). An offspring of cable television’s magnetism is the popularity of cable modems as the consumer’s choice for high-speed Internet access. Id. at 679. In June 2000, almost seventy percent of broadband subscribers in the United States reached the Internet through cable modems. Id. (citing FCC, Fed. Communications Comm’n Releases Data on High-Speed Services for Internet Access 8, tbl. 3, at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1000.pdf (Oct. 31, 2000)). Its closest competition is digital subscriber lines (DSL), which is a wire-based telephone line modem equivalent to a high-speed cable line modem. Id. Chen noted that as of June 2000, DSL had twenty-eight percent of the market share. Id. These statistics have almost inevitably changed since June 2000, as Chen himself notes, “three years is an eternity in Internet time.” Id.

22. Implementation, supra note 7, at ¶ 2. (stating that the purpose of § 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers). See also Kelley, supra note 3, at 2158 (noting that it is curious that the Court of Appeals for the Eleventh Circuit did not wonder whether its interpretation of the congressional intent behind § 224 was at odds with the congressional goals of increasing competition and ensuring non-discrimination, both of which the court recognized in its opinion).

23. See Overview, supra note 2. An example of this physical, point to point connection is “antennas located on hills . . . with connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers.” Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 392 (1968).


25. FCC v. Fla. Power Corp., 480 U.S. 245, 254 (1987) (holding that the Pole Attachments Act does not amount to a Fifth Amendment taking because it authorizes regulation of a voluntary economic relationship). In 1978, approximately ninety-five percent of cable system providers’ cable lines were installed on utility companies’ poles. Brief of Petitioner at 11, Gulf Power (No. 00-832). Cable operators were required to use existing poles, rather than construct a duplicate set of
companies charge a rent to the cable and telecommunications companies for attaching assorted devices to the utility owned poles. 26 The FCC’s regulation of this rent is designed to prevent utility company monopolies and must comport with Congress’ general instructions to the FCC to encourage the deployment of Internet and wireless telecommunications. 27 Originally, the 1978 Act defined a pole attachment as “any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” 28 In 1996, Congress reformed telecommunications law by amending the original 1934 Communications Act, and expanded this definition of pole attachments to include “any attachment by a . . . provider of telecommunications service.” 29

The Pole Attachments Act sets out two specific rate methodologies, which the FCC must use to regulate rates when a cable or telecommunications service provider cannot reach a mutual agreement with the utility company charging rent for the pole attachment. 30 One poles, due to economic, environmental and zoning restrictions. Id. (citing H.R. REP. NO. 94-1640, at 5 (1976) and H.R. REP. NO. 95-721, at 2 (1977)). In the twenty-four years since enactment of the Pole Attachments Act, the situation remains relatively the same. Id. at 3. The most practical way for cable companies to disseminate information and services to their customers is to attach their equipment to utility company owned poles. Id. at 9.

26. Brief of Petitioner at 10-11, Gulf Power (No. 00-832). Typically, a pole-owning utility company charges the company desiring to attach to the pole a flat rate per year for each pole the company accesses. Overview, supra note 2. Rates range from $3.50 per pole per year to $38.00 per pole per year. Id. at 5, 6.

27. 47 U.S.C. § 157(a) (2000) (stating that “[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public”). See also 3 WEST’S FED. ADMIN. PRAC. § 3536 (3d ed. 2001) (explaining that Congress designed the Telecommunications Act of 1996 to promote competition and reduce regulation, and to encourage the rapid deployment of new telecommunications technologies).


30. Morrissey, supra note 21, at 175. See Implementation, supra note 2, at ¶ 9 (stating that § 224 applies when the parties fail to resolve a dispute over rate charges). The FCC “encourage[s] parties to negotiate the rates, terms, and conditions of pole attachment agreements.” Id. See also
section of the Act covers rate calculation guidelines for cable television pole attachments,31 and another section provides a different set of guidelines for telecommunications pole attachments.32 In addition, § 224(b)(1) of the Act, commonly referred to as the fallback provision, grants general authority to the FCC to regulate rates for pole attachments not covered by the Act’s aforementioned two specific provisions.33

Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, in 16TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY & REGULATION, at 289, 389 (PLI PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY, Course Handbook Series No. G4-4040, Dec. 1998) available at WL 544 PLI/PAT 289 (noting that the pole attachment rental rates under § 224(d)(3) for cable services are lower than the pole attachment rental rates under § 224(e)(1) for telecommunications services). In response to the changes made to the 1996 Act, cable companies argued that they were entitled to the lower § (d)(3) rates because that regulation rate was designed to apply to cable services. *Id.* The cable industry further argued that treating their attachments otherwise would erect a barrier, in the form of higher pole attachment rental rates, to the deployment of enhanced telecommunications and cable services. *Id.* at 389-90. The utility companies disagreed, arguing that broadband Internet services over commingled cables are neither telecommunications services, nor cable services, but rather are information services not entitled to regulated pole attachment rates under § 224. *Id.* at 390.


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.

*Id.*

This range is more commonly referred to as the “not less than the incremental cost of adding a particular attachment, nor more than the fully allocated costs of the pole” rate regulation. Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co., 208 F.3d 1263, 1267 n.5 (11th Cir. 2000).


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.

*Id.*

33. 47 U.S.C. § 224(b)(1) (2000) (stating 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). The actual scope of this “fall back provision” is one issue that is disputed in the *Gulf Power* case. Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327, 337-39 (2002). The FCC, as well as the Supreme Court, concluded that §224(b)(1) is broad in scope, and that it acts as a general authority to regulate pole attachment rates. *Id.* at 336 (holding that nothing about the structure of the Act suggests that §§ 224(d) and (e) are the exclusive rates allowed). See also Brief of Petitioner at 24-25, Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002) (No. 00-832) (stating that §§ 224 (d) and (e) simply ensure that the pre-existing rate structure of § 224(b)(1) would continue to apply to cable systems and telecommunications, by identifying how the Commission is to implement their authority in two specific circumstances). But see Brief for Respondent Fla. Power & Light Co. at 10, Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002) (No. 00-832) (concluding that the use of the word “solely” in § 224(d)(3) indicated Congress’ intent to limit the rate regulation to attachments by cable systems...
The nature of the pole attachment agreement is voluntary.\footnote{34} Cable television companies and telecommunications providers have no right to attach to existing poles.\footnote{35} However, if utility companies authorize an attachment, the FCC can monitor the rates charged.\footnote{36}

The Pole Attachments Act itself has been fairly uncontroversial, from its inception in 1978 until now.\footnote{37} However, the importance of the U.S. Supreme Court’s decision in \textit{Gulf Power} lies in the implications the holding will have in areas far beyond mere pole attachments.\footnote{38} This is the first of the regulatory classification of information technology services cases to go before the Supreme Court.\footnote{39} used solely to provide cable services). The utility companies argued that § 224(b)(1) is limited only to “reasonable” rates for the attachments falling into one of the two specific provisions, § (d)(3) for commingled cable attachments and § 224(e)(2) for telecommunications attachments. \textit{Id.} See also \textit{Gulf Power}, 208 F.3d at 1278 (holding that Congress authorized the FCC to regulate the rent of attachments providing cable and telecommunications services, and because Internet service does not meet either of those definitions, the 1996 Act does not authorize the FCC to regulate pole attachments for Internet services).

\footnote{34} Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co., 208 F.3d 1263, 1267 (11th Cir. 2000).
\footnote{35} \textit{Id.}
\footnote{36} See \textit{supra} notes 31-34 and accompanying text for a discussion of how the FCC monitors pole attachment rental rates.
\footnote{37} Chen, \textit{supra} note 21, at 692. Chen notes that, “[a] strange twist in statutory interpretation has now thrust this formerly obscure controversy into the debate over cable broadband.” \textit{Id.}
\footnote{38} Kelley, \textit{supra} note 3, at 2157 (criticizing the Eleventh Circuit’s failure to consider the competitive consequences of its \textit{Gulf Power} holding). Kelley argues that the court was so sure of the plain meaning of the statute that it did not address the possible ramifications of its decision. \textit{Id.} “If the FCC could not restrain the rent for cable provided Internet access, the cable competitor would be at a severe competitive disadvantage.” \textit{Id.} Kelley argues that a telecommunications carrier using pole attachments to provide Internet access is entitled to rates regulated by the FCC. \textit{Id.} However, the FCC could not restrain the rent charged to a cable company using similar pole attachments to provide competing Internet access. \textit{Id.} This stands in stark contrast to the policies behind the Act. \textit{Implementation, supra} note 7, at ¶ 2. See also \textit{supra} notes 21-22 accompanying text (discussing the policies behind the 1996 Act).
\footnote{39} Harold, \textit{supra} note 29, at 764-65 (stating that the definitions and classifications of “cable service,” “telecommunications service,” “Internet service,” and “information service” are vague and ambiguous). This vagueness is reflected by the federal regulatory agencies avoiding direct confrontation of the issue. \textit{Id.} at 763. In addition, the courts that have addressed this issue have handed down inconsistent decisions. \textit{Compare} MediaOne Group, Inc. v. County of Henrico, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000), \textit{aff’d} on other grounds, 257 F.3d 256 (4th Cir. 2001) (concluding that commingled cables offering both cable services and high-speed Internet access is a cable service), \textit{with} AT&T Corp. v. Portland, 216 F.3d 871, 878 (9th Cir. 2000) (concluding that commingled cables offering both cable services and high-speed Internet access is a telecommunications service). It may have been only by luck of the draw that the Supreme Court granted certiorari to \textit{Gulf Power}, to hopefully shed some light on this dark and murky area. \textit{But see} Chen, \textit{supra} note 20, at 700 (arguing that the Supreme Court will probably reverse the Eleventh Circuit’s “gross misinterpretation” of the Pole Attachments Act, without even deciding whether commingled cable services are cable services, telecommunications services or neither). Chen urges that the proper statutory classification for broadband Internet access over cable is an “information
III. STATEMENT OF THE CASE

A. Statement of Facts

In 1998, several utility companies challenged the FCC’s authority to regulate certain pole attachments that were not covered in the literal reading of the two specific rate provisions of § 224. The utility companies claimed that the Act itself prohibited the FCC from regulating wireless telecommunications systems (as opposed to wire-based systems) and commingled cable and high-speed Internet access systems (as opposed to cables that provide cable television only). In short, the utility companies argued that the FCC has no statutory authority to regulate wireless telecommunication carriers or Internet service providers under the Pole Attachments Act because of the literal,
plain meaning of the statute. The Court of Appeals for the Eleventh Circuit agreed with the utility companies’ position. The court reviewed this challenge to the FCC’s interpretation of its own statute under the two-step Chevron analysis. In Chevron v. Natural Res. Def. Council, the Supreme Court ruled that courts should use this two-pronged analysis when reviewing agency interpretations of their own statutes. Under step one of the

43. See also Brief of the Site Owners and Managers Alliance of the Personal Communications Indus. Ass’n as Amicus Curiae in Support of Respondents at 7-9, Nat’l Cable & Telecommns. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002) (Nos. 00-832, 00843).

Despite the breadth of the phrase “any attachment,” it is apparent that Congress, the cable industry, the FCC and utility companies universally understood that “any attachment” by a cable system meant any “wire” attachment. Congress is presumed to be aware of “existing law pertinent to the legislation it enacts.” Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988). Pursuant to this venerable principle, this Court may presume that Congress was cognizant of the industry’s construction of the term “attachment” in 1978, and that it did not intend to apply the term “any attachment” to wireless equipment . . . .

Id. at 8.

44. Gulf Power, 208 F.3d at 1278.

45. Id. at 1271. In Chevron, the Court held that Environmental Protection Agency regulations allowing states to treat all pollution-emitting devices within the same industrial grouping was based on a reasonable construction of the term “stationary source” in the Clean Air Act Amendments. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-845 (1984). See also Philip J. Weiser, Chevron, Cooperative Federalism, and Telecommunications Reform, 52 VAND. L. REV. 1, 7-8 (1999) (stating that Chevron directs federal courts to “abstain from second-guessing a federal agency’s reasonable interpretation of ambiguous statutory terms where the statutory scheme assigned the implementation of its provisions to an expert agency”). Weiser refers to Chevron’s holding as “one of the cornerstone principles of modern administrative law.” Id. Contra Christensen v. Harris, 529 U.S. 576, 596 (2000) (Breyer, J. dissenting) (opining that Chevron made “no relevant change” in administrative law). Justice Breyer stated that Chevron “simply focused upon an additional, separate legal reason for deferring to certain agency determinations, namely that Congress had delegated to the agency the legal authority to make those determinations.” Id. In Gulf Power, the Court of Appeals for the Eleventh Circuit stressed that in first deciding whether an ambiguity exists, normal rules of statutory construction are used without affording agency interpretations any deference. Gulf Power, 208 F.3d at 1272.

46. Chevron, 467 U.S. at 844-45. See also Auer v. Robbins, 519 U.S. 452 (1997) (holding that agency deference is given to interpretations of agency regulations in addition to the statutes governing the agency). In Auer, St. Louis police sergeants sued the City of St. Louis Board of Police Commissioners under the Fair Labor Standards Act (FLSA) for overtime wage benefits. Id. at 454. Under § 7(a)(1) of the FLSA, employers must pay overtime to employees who work more than forty hours in a given week. 29 U.S.C. § 207(a)(1) (2000). However, under § 213(a)(1), employees are not entitled to overtime compensation if they are exempted from the statute as a “bona fide executive, administrative or professional.” 29 U.S.C. § 213(a)(1). The Secretary of Labor promulgated regulations to determine the requirements for exempt status under the statute. Auer, 519 U.S. at 454. One regulation states that exempt status requires that the employee be paid on a salary basis, and that his compensation not be subject to deductions based on disciplinary actions taken by the employer. Id. at 456 (citing 29 C.F.R. § 514.118(a) (1996)). The police sergeants contended that the “no disciplinary deductions” element of the regulation was invalid as it applied to them because it reflected an unreasonable interpretation of the salary-basis exemption...
analysis, a determination must be made as to whether Congress has spoken unambiguously to the question at hand.\textsuperscript{47} This is commonly referred to as the plain meaning rule, and if this applies, the inquiry ends here and courts give effect to Congress’ intent.\textsuperscript{48}

Step two of the \textit{Chevron} analysis is used only if a court determines that the statute is silent on the issue at hand, or that Congress’ intent is ambiguous.\textsuperscript{49} If so, courts give deference to the agency interpretation, unless it is unreasonable, arbitrary or capricious.\textsuperscript{50} The Court of Appeals for the Eleventh Circuit reasoned that the FCC’s regulations were unambiguous in this situation, and therefore stopped at step one of the \textit{Chevron} analysis.\textsuperscript{51} The court concluded that no deference was owed to the FCC’s statutory interpretation, and because the plain meaning of the statute was clearly on the side of the utility companies, the FCC’s interpretation of the statute was struck down.\textsuperscript{52}

\textsuperscript{47} \textit{Chevron}, 467 U.S. at 842-43.
\textsuperscript{48} \textit{Id}.
\textsuperscript{49} \textit{Id}. at 843.
\textsuperscript{50} \textit{Id}. at 843-44. The Court stated that “if the statute is silent or ambiguous . . . the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” \textit{Id}. at 843. Footnote 11 in Justice Stevens’ opinion accompanies this notion, stating that “[t]he court need not conclude that the agency construction was the only one it permitably could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” \textit{Id}. This deference doctrine affords agencies a considerable amount of latitude in interpreting their own statutes. \textit{Id}. at 844. “Deference means that a court must be persuaded on the correctness of the agency’s interpretation of law in order for it to accept the agency’s views.” Charles H. Koch, Jr., \textit{Administrative Law: Cases and Materials} 369 (4th ed. 2001). \textit{See also} Richard Fallon, \textit{Of Legislative Courts, Administrative Agencies, and Article III}, 101 Harv. L. Rev. 915, 983-85 (1988) (explaining that although courts have the ultimate responsibility of deciding questions of law, “no article III value forbids acknowledgment that, concerning questions to which administrative expertise is relevant, the agency’s interpretation furnishes a presumptively reliable indicator of how the question ought to be resolved”).

\textsuperscript{51} Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co., 208 F.3d 1263, 1273 (11th Cir. 2000).

\textsuperscript{52} \textit{Id}. (holding that the FCC’s regulatory power over utility companies is limited to pole attachments, therefore interpreting §§ 224(d) and (e) broadly is contrary to the Commission’s narrow authority in this area). However, Judge Carnes’ dissent takes issue with the majority’s reasoning. \textit{Id}. at 1281 (Carnes, J. dissenting). The dissent argues that although the majority claimed to have relied on the unambiguous statutory language, thus stopping at step one of the \textit{Chevron} analysis, the opinion went on to discuss legislative history under step two of the \textit{Chevron} analysis to justify its conclusion. \textit{Id}. This is contradictory to the Supreme Court’s well-recognized
According to the Eleventh Circuit, the FCC had no statutory authority to regulate pole attachments by Internet service providers through commingled cables or attachments by wireless communications providers.53

B. Procedural History

Procedurally, these two claims were asserted in one case, but substantively, they are best looked at separately.54 The utility companies’ arguments have two distinct flavors: one for wireless telecommunications and one for commingled cable and Internet systems.55

1. Wireless Telecommunications

The utility companies argued, and the Eleventh Circuit agreed, that attachments for wireless communications are excluded from the Act by negative implication.56 The court found that the 1934 Communications Act originally covered only wire and radio communications.57 The court concluded that the statutory definition of “utility”58 restricted the Act’s


53. Gulf Power, 208 F.3d at 1273.
54. Id.
55. Id.
56. Id. at 1273-4. See also F. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 9-10 (1975) (defining a negative implication as an implication that “denies outside the area of express coverage what is expressly asserted within it”). The negative implication doctrine is asserted in the Latin maxim expressio unius est exclusio alterius. Id. However, the Supreme Court has repeatedly held that the negative implication doctrine does not apply to every statute. “[T]he canon expressio unius est exclusio alterius . . . has force only when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (citing U.S. v. Vonn, 535 U.S. 55, 65 (2002)); see also Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81 (2002) (stating that “exclusion demonstration” is the extrastatutory ingredient requiring a series of terms within a statute that can be understood to go hand in hand); Barnhart, 537 U.S. at 168 (holding that the courts should not find an exclusion “unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it”); Bingler v. Johnson, 394 U.S. 741, 749 (1969) (holding that certain tax exempt organizations were exceptions only because they were expressly set out in the statute, and that no additional restrictions may be put on these basic exclusions).

57. Gulf Power, 208 F.3d at 1273.
regulatory power to attachments used for wire-based communications.\textsuperscript{59} In 1978, Congress explicitly extended the FCC’s authority to regulate utility companies’ charges to cable system providers, by enacting the Pole Attachments Act.\textsuperscript{60} When Congress amended the Act in 1996, it once again expanded the FCC’s jurisdiction, this time to cover attachments by telecommunications providers.\textsuperscript{61} However, in \textit{Gulf Power} the Eleventh Circuit found that wireless systems are not akin to wireline systems,\textsuperscript{62} relying on an FCC Administrative Report that stated, “[t]here are potential difficulties in applying the Commission’s rules to

\textsuperscript{59} \textit{Gulf Power}, 208 F.3d at 1274 (reasoning that the language of § 224 plainly states that attachments may be made to poles used for wire communications). See also 47 U.S.C. § 153 (51) (2000) (defining wire communications 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 (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission). The Court of Appeals for the Eleventh Circuit commented that before the 1978 Pole Attachments Act, the fact that a cable service provider found it convenient to attach equipment to a utility company owned pole, as opposed to a telephone company owned pole, was not a sufficient basis for the authority to regulate. \textit{Gulf Power}, 208 F.3d at 1274. It was not until 1978, when Congress expanded the FCC’s jurisdiction to include regulation of attachment rental rates charged by pole owning utility companies, that cable companies were entitled to regulated rates for attaching to utility company owned poles. \textit{Id}. The court attempts to analogize the cable situation in 1978 to the wireless situation today, by saying that while it may be convenient for wireless carriers to attach to utility poles, it is not necessary. \textit{Id}. at 1275.

\textsuperscript{60} 47 U.S.C. § 224 (b) (2000). See also supra notes 1, 33 and accompanying text (discussing § 224(b)).


\textsuperscript{62} \textit{Gulf Power}, 208 F.3d at 1275. The court reasoned that the purpose behind the Pole Attachments Act was to prevent a monopoly by pole owning utility companies, when the poles are \textit{bottleneck facilities} (emphasis added). \textit{Id}. A “bottleneck” is an essential facility which enables an entity to exploit market power in one market, thus illegitimately promoting monopoly power in a related or distinct market in violation of antitrust law. Steven Ferrey, \textit{Deregulation of Power v. Anticompetitive Practices} 1 L. OF INDEPENDENT POWER 10:56 (2002). See also AT&T Corp. \textit{v. Iowa Utility Board}, 525 U.S. 366, 388 (1999) (defining a “bottleneck facility” as synonymous with the essential facilities doctrine of antitrust law); MCI Communication \textit{v. A.T.T.}, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (identifying the four elements required to meet the test of the essential facilities doctrine as: (1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility). The Eleventh Circuit went on to say that utility owned poles are not bottleneck facilities for wireless carriers, in that the poles are not essential. \textit{Gulf Power}, 208 F.3d at 1275. Most wireless equipment can be placed on top of tall buildings or towers. \textit{Id}. The court also reasoned that in § 332 of the 1996 Telecommunications Act, the placement of wireless equipment may be regulated by state and local governments. \textit{Id}. See 47 U.S.C. § 332(7)(B)(i)(I) and (II) (2000) (requiring state and local governments to be non-discriminatory when acting on requests to site wireless equipment, and limiting the reasons a state can put forth for determining where wireless carriers can locate their equipment). Therefore, the Eleventh Circuit interpreted § 332 to mean that Congress did not intend § 224 to authorize federal regulation of the placement of wireless equipment, in addition to regulation by the state and local governments. \textit{Gulf Power}, 208 F.3d at 1275.
wireless pole attachments.\textsuperscript{63} Therefore, the Eleventh Circuit concluded that the FCC lacked authority to regulate wireless carriers.\textsuperscript{64}

2. Commingled Cable Services

The Eleventh Circuit found that neither of the specific rate formulas identified in the Act covered commingled cable and Internet services.\textsuperscript{65} The court first classified commingled services as an Internet service, and then determined that an Internet service does not qualify as a cable service or as a telecommunications service.\textsuperscript{66}

However, the FCC contended that Congress’ use of the word “any”\textsuperscript{67} in the Pole Attachments Act was evidence of intent for the FCC to broadly regulate pole attachments.\textsuperscript{68} The FCC argued that, regardless

\textsuperscript{63} Implementation, supra note 7, at ¶ 41. See infra notes 66 - 68 and accompanying text (explaining how the Court of Appeals for the Eleventh Circuit took this FCC statement out of context). See also Implementation, supra note 7, at ¶ 39 (stating that “wireless carriers are entitled to the benefits and protection of § 224”).

\textsuperscript{64} Gulf Power, 208 F.3d at 1279.

\textsuperscript{65} Id. at 1276.

\textsuperscript{66} Id. at 1276-77. The first rate regulation formula in the Act applies to “any attachment used by a cable television system solely to provide cable service.” 47 U.S.C. § 224(d)(3) (2000) (emphasis added). Commingled services provide both cable television services and high-speed Internet access. Gulf Power, 208 F.3d at 1276. The court determined that these two functions were not solely cable services. Id. Therefore, the word “solely” in § 224(d)(3) narrowed the general definition of pole attachments. Id. The second rate formula applies to “pole attachments used by telecommunications carriers to provide telecommunications services.” 47 U.S.C. § 224(e)(1) (2000). The majority concluded that commingled services are not telecommunications services, relying on the FCC’s own conclusion that Internet service is not the provision of a telecommunications service under the 1996 Act. Gulf Power, 208 F.3d at 1277-78. See Implementation, supra note 7, at ¶ 33 (concluding that Internet service is not a telecommunications service); see also In re Fed.-State Joint Bd. on Universal Serv., 12 F.C.C.R. 8776, 1997 WL 236383, § XIII(B)(2)(a)(780) (1997) (listing examples of telecommunications services as, \textit{inter alia}, cellular telephone and paging services; mobile radio services; wide area telephone services (WATS); toll-free services; 900 services; and telex and telegraph services).

\textsuperscript{67} See supra notes 1 - 3 (defining 47 U.S.C. §§224(a)(4), (d)(3) (2000)). In his dissent in \textit{Gulf Power}, Judge Carnes cited Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997), and argued that the word “any” is not ambiguous and has a well established, expansive meaning. \textit{Gulf Power} 208 F.3d at 1280 (Carnes, J., dissenting). Applying this to the sections of 224 at hand, the FCC has the authority to regulate all attachments, “by a cable television system or provider of telecommunication service to a pole, duct, conduit or right-of-way owned or controlled by a utility”. Id. “Obviously, ‘all attachments’ includes those attachments used to provide wireless and Internet services.” Id. As discussed in \textit{Gulf Power} the Supreme Court followed, among other things, Judge Carnes’ sole dissent on this point. Supra note 10 and accompanying text.

\textsuperscript{68} Gulf Power, 208 F.3d at 1274). The FCC argued that any attachment made by either a cable television provider or a telecommunications service provider may be regulated by § 224, no matter what kind of attachment it is. Brief for the Federal Petitioners at 13-15, Nat’l Cable & Telecomm. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002) (No. 00-832, 00-843) (arguing that once it is determined that a utility pole is subject to the Act because it is used for telecommunications or cable services, the Act makes no further distinction based on the type of
of the definition, commingled cable services are subject to regulation under the fall back provision of § 224(b)(1), which authorizes the FCC to “ensure that the rates, terms, and conditions [for pole attachments] are just and reasonable.”69 The Eleventh Circuit disagreed with the FCC, and ruled that § 224(b)(1) did not apply to Internet services.70

Finally, the FCC urged the Eleventh Circuit to follow the District of Columbia Circuit’s ruling in Texas Utilities Electric Co.71, where the Pole Attachments Act was found to be ambiguous, and under step two of the *Chevron* analysis, deference was given to the agency’s interpretation.72 Once again, the Eleventh Circuit declined to side with the FCC, holding that the statute was unambiguous under *Chevron*.73

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69. *Gulf Power*, 208 F.3d at 1276. See supra note 33 (defining § 224(b)(1) (2002)). See also 74 AM. JUR. 2D Telecommunications § 174 (May 2002) (stating that “in setting the charge for attachment of cable television lines to utility company poles, the Commission’s action is to be judged on the basis of reasonableness of method used to compute the pole attachment rate, not merely by whether the ultimate result fell within the range allowed by statute”).

70. *Gulf Power*, 208 F.3d at 1276. The court reasoned that for § 224(b)(1) to apply to a pole attachment, that attachment must first fall under § 224(d)(3) (cable services), or under § 224(e)(1) (telecommunications services). *Id.* at 1277. In opposition to the FCC’s assertion that § 224(b)(1) is a broad provision designed to mandate the agency’s authority over pole attachments, the court concluded that §§ 224(d) and (e) have the effect of narrowing § 224(b)(1)’s general mandate to only setting just and reasonable rates. *Id.* “The straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized.” *Id.* at 1277 n.29.


72. *Gulf Power*, 208 F.3d at 1277 n.32. In *Texas Utilities*, the court deferred to the FCC’s interpretation that commingled services were within the ambit of § 224, using step two of the *Chevron* analysis, discussed supra note 45. *Texas Utilities*, 997 F.2d at 932. The D.C. Circuit court reasoned that the 1978 Act was ambiguous because it did not differentiate between the type of service the attachment provided, and the type of entity doing the attaching. *Id.* at 930-32. The Eleventh Circuit, in *Gulf Power*, distinguished *Texas Utilities*, since *Texas Utilities* was decided before the 1996 amendments to the Telecommunications Act. *Gulf Power*, 208 F.3d at 1277 n.32.

73. *Gulf Power*, 208 F.3d at 1277. See supra note 45 (describing the *Chevron* case). The *Gulf Power* court relied on the 1996 amendment to § 224(d)(3), which states that “solely cable services” receive rent regulations, to determine that the statute was unambiguous. *Gulf Power*, 208 F.3d at 1277. The court determined that Congress intended the “type of service provided” to be emphasized for regulation, over the “type of entity acquiring the attachment,” and that by changing the language Congress intended to narrow the scope of application. *Id.* at n.32. The court also applied the plain language argument to another 1996 amendment to the Act. *Id.* at 1277. In § 522, cable service is defined as “the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” 47 U.S.C. § 522(6)(A), (B) (2000) (emphasis added). The only part of the definition that changed from the 1978 Act to the 1996 Act was the addition of the phrase “or use.” *Gulf Power*, 208 F.3d at 1277. The court pointed...
The court concluded that the FCC lacked the authority to regulate Internet services under the 1996 Telecommunications Act.\textsuperscript{74}

C. U.S. Supreme Court Decision

1. Majority

The Supreme Court first addressed the question of whether the Pole Attachments Act applied to attachments that provide commingled cable and Internet services.\textsuperscript{75} Using step one of the\textit{Chevron} analysis, Justice Kennedy, writing for the majority, found the Pole Attachments Act unambiguous as applied to commingled cable services.\textsuperscript{76} However, the Supreme Court reached the opposite conclusion as the Eleventh Circuit and held that attachments by commingled cable service providers do fall within the FCC’s authority to regulate.\textsuperscript{77} The Court then expanded the\textit{Chevron} analysis, and stated in the alternative that, if the statute is found to be ambiguous, the utility companies cannot prove that the FCC’s interpretation is unreasonable, arbitrary or capricious.\textsuperscript{78}

The Supreme Court rejected the Eleventh Circuit’s restrictive reading of the Pole Attachments Act, stating that the two narrow subsections, §§ 224(d)(3) and (e)(1), are “simply subsets of, but not limitations upon” the broader §§ 224(a)(4) and (b)(1).\textsuperscript{79} The Court went out that this change was minor, and nothing in the legislative history of the Act indicated that Congress intended to broaden the scope of a cable service. \textit{Id}. at 1276. In finding that a minor change in language does not lead to a major statutory shift, the \textit{Gulf Power} court relied on the Supreme Court’s decision in Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305 (1985). \textit{Gulf Power}, 208 F.3d at 1276-77. \textit{See} Walters, 473 U.S. at 318 (stating that without substantive comment, “it is generally held that a change during codification is not intended to alter the statute’s scope”) (citing Muniz v. Hoffman, 422 U.S. 454, 467-74 (1975)).

\textsuperscript{74}\textit{Id}. at 1279.

\textsuperscript{75}\textit{Gulf Power}, 208 F.3d at 1279.

\textsuperscript{76}\textit{Id}. at 331.

\textsuperscript{77}\textit{Id}. In deciding that the statute was unambiguous, the Court turned to §§ 224(b) and (a)(4), and concluded that what matters under the statute is the entity the attachment is “by.” \textit{Id}. In other words, a pole attachment attached by a cable television company is an attachment by a cable television system, for the purposes of § 224. \textit{Id}. This situation does not change if that cable one day provides high-speed Internet access. \textit{Id}. The Supreme Court’s ruling on this point is in direct opposition to the Eleventh Circuit’s holding on the same issue. \textit{See} supra note 73.

\textsuperscript{78}\textit{Gulf Power}, 534 U.S. at 334. \textit{See also} supra note 60 and accompanying text (discussing the circuit court’s holding).

\textsuperscript{79}\textit{Id}. at 336. The Court stated that the Eleventh Circuit had no foundation for their narrow interpretation of the sections at issue. \textit{Id}. at 336-37. The plain language of §§ 224(a)(4) and (b)(1) leads to a broad reading. \textit{Id}. Nothing about the Act suggests that the two specific rate categories, one for attachments used by a cable television system solely to provide cable services (§ 224(d)(3)) and one for attachments used by telecommunications carriers to provide telecommunications
on to explain that the trend has been for Congress to expand the FCC’s jurisdiction, starting with the 1996 reformation of the Telecommunications Act.80 The Supreme Court granted certiorari only to determine the scope of §§ 224(a) and (b), and not to define the limitations of the more specific §§ 224(d)(3) and (e)(1).81 The Court specifically declined to categorize Internet services as either cable services or telecommunications service, because regardless, what was at issue was a pole attachment, and thus it is within the FCC’s reach.82

Next, the Court addressed the question of whether pole attachments by wireless telecommunications providers, consisting distinctively of wireless rather than wire-based equipment, are within the reach of FCC regulation.83 The Court used concise reasoning to answer in the services (§ 224(e)(1)), are the exclusive rates allowed. Id. “The sum of the transactions addressed by the rate formulas . . . is less than the theoretical coverage of the Act as a whole.” Id. at 336. The Court reasoned that if cable television systems that also provide Internet services are now outside the scope of § 224(d)(3) because they may provide more than “solely” cable services, the result of the analysis still does not change. Id. at 335. Pole attachments for cable television systems that also provide Internet services are still covered by §§ 224(a)(4) and (b). Id. 81

Id. at 337.

Id. The FCC, on the other hand, went a step further and decided that Internet services were not telecommunications services. Id. See Implementation, supra note 7, at ¶ 33 (stating that “a cable television system providing Internet service over a commingled facility is not a telecommunications carrier subject to the revised rate mandated by § 224(e) by virtue of providing Internet service”). However, the FCC found it did not need to decide whether Internet services were cable service. Regardless of whether such commingled services constitute “solely cable services” under § 224(d)(3), we believe that the subsection (d) rate should apply. If the provision of such services over a cable television system is a “cable service” under § 224(d)(3), then the rate encompassed by that section would clearly apply. Even if the provision of Internet service over a cable television system is deemed to be neither ‘cable service’ nor ‘telecommunications service’ under the existing definitions, the Commission is still obligated under § 224(b)(1) to ensure that the ‘rates, terms and conditions are just and reasonable,’ and we would, in our discretion, apply the subsection (d) rate as a ‘just and reasonable rate.’

Id.

The Court did not fault the FCC for taking this approach, commenting that, “decision makers sometimes dodge hard questions when easier ones are dispositive.” Gulf Power, 534 U.S. at 338. See discussion infra notes 88 - 100 and accompanying text (explaining how Justice Thomas’ dissent shows why this may have negative implications in the vast area of information services in the future).

83 Gulf Power, 534 U.S. at 339. This question is a bit narrower than the question presented to the lower court. Id. at 340. The original question was whether any equipment attached by wireless carriers was subject to FCC regulation of pole attachments. Id. at 332. The Eleventh Circuit held that “the act does not provide the FCC with authority to regulate wireless carriers.” Nat’l Cable & Telecommms. Ass’n, Inc. v. Gulf Power 208 F.3d 1263, 1275 (11th Cir. 2000). Because it is obvious that if a wireless provider attaches a wire-based facility to a utility pole, that attachment falls within § 224, the Supreme Court stated that all parties now agree that the court of
affirmative. First, the Court stated that, similar to commingled cables, wireless attachments are subject to regulation under §§ 224(a)(4) and (b), even if they don’t fall squarely within the definition of § 224(e)(1). It is apparent from the amount of time the Court spent on the commingled cable issue, as opposed to the wireless telecommunications issue, that broadband Internet access over commingled cables is the more controversial subject. This conclusion is also reflected in the concurrence and dissent.

2. Concurrence and Dissent

Justice Thomas, joined by Justice Souter, concurred in part and dissented in part in the _Gulf Power_ decision. Justice Thomas concurred with the majority’s decision that the Pole Attachments Act grants the FCC jurisdiction to regulate attachments by wireless telecommunications providers. However, he dissented on the issue of whether the Act gives the FCC authority to regulate attachments providing commingled cable television service and high-speed Internet access. The dissent recommended vacating and remanding this issue to the FCC to explain clearly the statutory basis for regulation of commingled cable attachment rates, and to statutorily categorize commingled cable services.

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84. _Id_. The Court held “we address only whether pole attachments that carry commingled services are subject to FCC regulation at all. The question is answered by §§ 224(a)(4) and (b), and the answer is yes.” _Id_. at 338.

85. Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327, 334-35 (2002). The utility companies, as well as the Eleventh Circuit, relied on the argument that poles are not bottleneck facilities for wireless attachments. _Id_. at 335. See supra note 61 (defining “bottleneck facilities”). The Court rejected that argument, holding that the FCC was not unreasonable in its regulation. _Id_. at 338. In any event, even if the text were ambiguous, under _Chevron_ the Court would defer to the FCC’s interpretation on this technical and complex question. _Id_. at 339.

86. _Id_. at 331-35. The Supreme Court’s reasoning as to the utility companies’ proposed distinction between wire-based attachments and wireless attachments consists of five short paragraphs. _Id_. at 334-35. The Court dismissed the distinction as having no statutory support, being difficult to draw and being overly burdensome on the FCC. _Id_. On the other hand, the Court’s discussion of commingled Internet access cables spans twenty-one paragraphs. _Id_. at 331-34.

87. See infra notes 88 - 100 and accompanying text for a discussion of Justice Thomas’ dissent.


89. _Gulf Power_, 534 U.S. at 347 (Thomas, J., concurring).

90. _Id_. In his dissent, Justice Thomas acknowledged that the majority’s conclusion “may be correct,” but that he was not satisfied with their reasoning. _Id_.

Justice Thomas reasoned that unless commingled cable services are defined, so that a court can conclude whether or not they fall within the ambit of either two specific rate provisions, the issue of the more general §§ 224(a)(4) and (b)(1)’s scope is, “nothing more than a tempest in a teapot.”92 Because the two specific rate provisions provide mandatory methodologies if applicable, it is necessary to first decide whether an attachment falls into one of the two categories.93 If, and only if, this determination is made in the negative can the Court logically review whether the fall back provisions of §§ 224(a)(4) and (b)(1) apply.94 The dissent concluded that remanding the case to the FCC for further classification of the terms at issue is the proper course of action.95

The dissent’s reasoning for remanding the decision on the issue of defining cable modem services is two-fold. First, the dissent disagreed

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92. Gulf Power, 534 U.S. at 348 (Thomas, J., dissenting). “Tempest in a teapot” (or teacup) traces its origin to the Latin saying excitare fluctus in simpulo, meaning “to stir up a tempest in a small ladle;” hence, to storm about over trifles, to make much ado about nothing. CHARLES EARLE FUNK, CURIOUS WORD ORIGINS, SAYINGS & EXPRESSIONS, 528 (Galahad Books 1993).

93. Id. at 348. See supra note 27 (explaining the ninth and fourth Circuits’ inconsistent definitions of commingled cable services as telecommunications services and cable services, respectively). But see Implementation, supra note 7, at ¶ 34 (ordering that § 224(d)(3) rates apply to commingled cable services, regardless of whether they constitute solely cable services). The commission stated that the lower § 224(d)(3) rate “will encourage greater competition in the provision of Internet service and greater benefits to consumers.” Id. at ¶ 32.

94. Gulf Power, 534 U.S. at 349 (Thomas, J., dissenting). See Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968) (holding that “[j]udicial review of [an agency’s] orders will . . . function accurately and efficaciously only if the [agency] indicates fully and carefully the methods by which . . . it has chosen to act”).


To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

Id. This proposition seems to reach a similar conclusion as step two of the Chevron analysis, used when a statute is found to be ambiguous. See supra note 45 (discussing the Chevron analysis). However, the dissent fails to cite Chevron in its opinion. See Gulf Power, 534 U.S. at 347-61 (Thomas, J. concurring in part and dissenting in part).
with the majority’s finding that the FCC had already decided high-speed Internet access via cable modems is not a telecommunications service.\textsuperscript{96} Second, it is unknown if a theoretical attachment exists that is covered under the Pole Attachments Act’s §§ 224(a)(4) and (b)(1), but is not covered by either of the Act’s specific rate methodologies.\textsuperscript{97} Interestingly, the dissent concluded that, nonetheless, it is likely that the FCC has authority to regulate commingled cable and Internet service attachments.\textsuperscript{98} The legislative history and policy behind the 1996 Telecommunications Act, to encourage the dissemination of information technology, point in that direction.\textsuperscript{99} However, according to Justice Thomas, legislative history and policy do not excuse the FCC’s “failure to engage in reasoned decision making.”\textsuperscript{100}

IV. ANALYSIS

The \textit{Gulf Power} decision is a step toward bringing high-speed

\textsuperscript{96} \textit{Gulf Power}, 534 U.S. at 352 (Thomas, J., dissenting). The FCC stated “we have not yet established the regulatory classification of Internet services provided over cable television facilities.” \textit{In re Federal-State Joint Board on Universal Service}, 13 F.C.C.R. 11501, 11534, 1998 WL 166178, ¶ 69 n.140 (1998). \textit{See also} Brief for the Federal Petitioners at 29-30, Nat’l Cable & Telecommns. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002) (No. 00-832, 00-843) (stating that to date, the FCC has taken no position on the issue of whether an Internet service is a “cable service,” a “telecommunications service,” or “some other kind of service”).

\textsuperscript{97} \textit{Gulf Power}, 534 U.S. at 356-57 (Thomas, J. dissenting). The Court’s opinion notes that the literal reading of “any attachment” is “absurd.” \textit{Id}. at 341. The respondents argue that any attachment surely cannot mean a billboard or a clothesline, therefore “any” should be a limiting word. \textit{Id}. The Court rejects this theory, saying “attachments of other sorts may be examined by the [FCC] in the first instance.” \textit{Id}. The dissent criticized the majority’s conclusion that “the sum of the transactions addressed by the rate formulas . . . is less than the \textit{theoretical} coverage of the Act as a whole.” \textit{Id}. at 357. \textit{See also supra} note 79 (discussing the Court’s broad theoretical coverage of the statute). The dissent argued that it is not conducive to proper judicial review to consider the scope of a statutory provision in the abstract. \textit{Gulf Power}, 534 U.S. at 359 (Thomas, J., dissenting). “Knowing the size and composition of the universe of attachments not addressed by the Act’s two specific rate methodologies, however, would be extremely useful in evaluating the reasonableness of the FCC’s position that it may regulate rates for those attachments.” \textit{Id}.

\textsuperscript{98} \textit{Id}. at 359-60.

\textsuperscript{99} \textit{Id}. at 360. \textit{See supra} notes 21 - 22 and accompanying text for a discussion of the policy behind the 1996 Act.

\textsuperscript{100} \textit{Id}. at 360 (Thomas, J., dissenting). The importance of classification lies in the difference between the two categories’ rate methodologies. \textit{Id}. at 361. Rates calculated pursuant to § 224(e) (telecommunications services) are generally higher than rates calculated under § 224(d) (commingled cable services). \textit{Id}. at 361 n.12. What category high-speed Internet access using cable modem technology falls into may determine whether or not the applicable rate is “just and reasonable.” \textit{Id}. \textit{See also} Esbin, \textit{supra} note 30, at 389 (explaining that under § 224, cable operators providing cable services will pay lower pole attachment rates than cable operators providing telecommunications services). Esbin notes that if cable service providers that offer commingled Internet access are seen as anything but “cable providers” this will result in higher pole rents and undermine the purpose of the 1996 Act to encourage the deployment of information services. \textit{Id}.
Internet access and other information technology services to consumers at a lower price, through pro-competitive FCC regulation.\textsuperscript{101} After \textit{Gulf Power}, the FCC can now regulate rental rates for pole attachments that provide more than just traditional telephone and cable services.\textsuperscript{102} This regulatory expansion is consistent with the congressional policies behind the enactment of the 1978 Pole Attachments Act.\textsuperscript{103} The Court’s decision to allow FCC regulation of pole attachments for wireless telecommunications, as an extension of wire-based telecommunications, was a natural, and not particularly controversial, progression.\textsuperscript{104} Wireless telecommunications, such as cellular telephones, obviously come within the reach of FCC regulation.\textsuperscript{105} On the other hand, the question of how pole attachments for broadband Internet access via commingled cables should be regulated by the FCC is not so easily answered.\textsuperscript{106}

This Note will now analyze the impact of the Court’s decision to allow FCC regulation of pole attachments for commingled cable and high-speed Internet service providers.\textsuperscript{107} It will consider why broad

\begin{itemize}
  \item \textsuperscript{101} See \textit{Gulf Power}, 534 U.S. at 339 (holding that if the FCC did not have jurisdiction to regulate commingled cable services “a cable company [that] attempts to innovate at all and provide anything other than pure television . . . loses the protection of the Pole Attachments Act and subjects itself to monopoly pricing”). The Court supports its holding by referring to the congressional policy behind the 1996 amendments to the Act “to accelerate deployment of such capability by removing barriers to infrastructure investment.” \textit{Id.} See also Michael I. Meyerson, \textit{Ideas of the Marketplace: A Guide to the 1996 Telecomms. Act}, 49 FED. COMM. L.J. 251, 287 (1997) (noting that the 1996 Act is complex in that it is simultaneously detailed and incomplete). “The Act contemplates the creation of competition across the full telecommunications field, even in areas such as local telephone service and cable television service that had previously been monopoly controlled.” \textit{Id.} The Act needs to ensure that if the information service providing industry becomes a battlefield for large diversified companies, there will still be a place for the small player. \textit{Id. at 288}.
  \item \textsuperscript{102} \textit{Gulf Power}, 534 U.S. at 342. “The attachments at issue in this suit – ones which provide commingled cable and Internet service and ones which provide wireless telecommunications – fall within the heartland of the Act.” \textit{Id.}
  \item \textsuperscript{103} See \textit{supra} notes 21 - 22 and accompanying text for a discussion of the policy behind the Act.
  \item \textsuperscript{104} See \textit{Gulf Power}, 534 U.S. at 339-40. In the majority opinion, Justice Kennedy discussed the Eleventh Circuit’s holding that the Act does not provide the FCC with authority to regulate wireless carriers, and stated that “[a]ll parties now agree this holding was overstated.” \textit{Id.} at 349. The dissent agreed with the Court’s holding that the FCC does have jurisdiction to regulate wireless providers’ pole attachment rates. \textit{Id.} at 347 (Thomas, J. dissenting). The petitioner’s brief to the Supreme Court further supports this view, by arguing that any attachment by a provider of telecommunications services is covered by the Act. \textit{Brief of Petitioner at 14, Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power. Co., 534 U.S. 327 (2002) (No. 00-832)}. \textit{Id.}
  \item \textsuperscript{105} See \textit{Gulf Power}, 534 U.S. at 334-38.
  \item \textsuperscript{106} Brief of Petitioner at 14-15, \textit{Gulf Power}, (No. 00-832).
  \item \textsuperscript{107} Historically, FCC cable rate regulation has always been a controversial topic. Meyerson, \textit{supra} note 101, at 270 (discussing the 1992 – 1999 battle in the cable industry over regulation of “basic” service and regulation of “cable programming” service). “Basic” cable offered broadcast
regulation and liberal deference should be afforded to agency interpretation of statutes governing, not just pole attachments, but also high technology industries in their entirety.\textsuperscript{108} Additionally, it will examine the anti-monopoly approach, expanding far beyond the Pole Attachments Act, that the Court used in reaching the \textit{Gulf Power} decision.\textsuperscript{109} Finally, it will analyze the economic and policy considerations of \textit{Gulf Power} from both the cable companies’ point of view and the pole owning utility companies’ perspective.\textsuperscript{110}

\textbf{A. Broad Regulation for Information Technology}

The \textit{Chevron} analysis has generally been applied more liberally to FCC interpretations of statutes governing high technology.\textsuperscript{111} For channels and public, educational and government access programming. \textit{Id.} “Basic” cable was subject to local regulation, which in turn was subject to strict FCC guidelines. \textit{Id.} “Cable programming” service provided all other tiers of cable programming except pay-per-view service. \textit{Id.} The 1996 Telecommunications Act deregulated rates for cable operators providing “cable programming” services, effective after March 31, 1999. \textit{Id.} at 271. The cable industry fought for this deregulation, in order to have cable providers offering “cable programming” services free from FCC reasonable rate regulations. \textit{Id.} However, it is ironic that in \textit{Gulf Power}, the cable industry switched sides and fought for FCC regulation. \textit{Overview, supra} note 2. “While the cable industry generally favors marketplace solutions over regulatory solutions, it believes that in the case of pole attachments, utilities control essential facilities that cannot practically be replicated.” \textit{Id.} at 7.

\textsuperscript{108} See \textit{infra} notes 111 - 122 and accompanying text (discussing broad regulation for information technology services). \textit{See also} Nancy J. Whitmore, \textit{The Evolution of the Intermediate Scrutiny Standard and the Rise of the Bottleneck “Rule” in the Turner Decisions}, 8 COMM. L. & POLICY, 25, 44 (2003) (explaining that the \textit{Gulf Power} case was not the first occasion where the FCC asked the Court to define cable services). In \textit{Turner}, the FCC urged the Court to constitutionally classify cable television under the same First Amendment standard that applied to broadcast television. \textit{Id.} The Court declined to define cable television, but nonetheless, held that program content on cable systems was afforded less First Amendment protection than traditional broadcast medium, due to the monopolist characteristics of cable systems providers. \textit{Id.} at 28. \textit{See also} Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994); \textit{supra} note 24.

\textsuperscript{109} See \textit{infra} notes 123 - 150 and accompanying text.

\textsuperscript{110} See \textit{infra} notes 151 - 174 and accompanying text.

\textsuperscript{111} Weiser, \textit{supra} note 45, at 11 (arguing that the classic \textit{Chevron} analysis should be extended to federal courts deferring to state agencies’ interpretations of federal law, especially in the FCC interconnection and local access area). In the 1996 Act, Congress invited state agencies to implement federal regulatory schemes for municipal local owned exchange carriers. \textit{Id.} at 13-14. However, the Act does not set forth the appropriate standard of review. \textit{Id.} at 14. Weiser suggests three reasons why the \textit{Chevron} standard should apply to the state agencies as well: (1) the fact that Congress delegated the rulemaking responsibility to the state agency in the first place; (2) the institutional competence of agencies over courts in making certain types of decisions; and (3) the superior ability of agencies to fill the gaps in complex regulatory schemes. \textit{Id.} at 24-26. The notion that state agencies’ interpretations of their own statutes, with the FCC’s guidelines as parameters, should be given deference under \textit{Chevron} is consistent with the policy behind the Court’s decision. \textit{Id.} “[A]gencies . . . are the bodies charged with developing statutory policies left implicit in a regulatory scheme.” \textit{Id.} at 25.
example, the FCC regulates rates for pole attachments carrying services other than the transmission of traditional telephone and cable television, such as network attachments under 47 U.S.C. § 251.\footnote{112} A “network attachment” is the gateway to the facilities and services an information technology company owns.\footnote{113} Allowing liberal deference to complex agency statutes is a result-oriented approach, permitting the agency to regulate from the bottom up, rather than from the top down.\footnote{114} This is a practical attitude toward statutory interpretation, permitting common sense and life experience to factor into the analysis.\footnote{115} This pragmatic
approach means, for example, that the FCC can intend to regulate rates for high-speed Internet access via coaxial cables without literally labeling what commingled cable services actually are.\textsuperscript{116} Justice Kennedy noted this approach in \textit{Gulf Power} when he said that commingled cable lines and wireless telecommunications services are “within the heartland” of the FCC’s jurisdiction, regardless of exactly how the agency defines those terms.\textsuperscript{117}

This approach is apropos to highly complex and technical statutes in areas such as information technology, commingled cable services and wireless telecommunications.\textsuperscript{118} The technology behind electronic

\textsuperscript{116} See also infra notes 116 - 119 and accompanying text for an analysis of statutory interpretation theories.

\textsuperscript{117} Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327, 342 (2002). See also William N. Eskridge, Jr., \textit{Statutory Interpretation as Practical Reasoning}, 42 STAN. L. REV. 321, 323 (1990) (arguing that the most effective rules of statutory interpretation stem from ancient Aristotelian philosophy). Eskridge cites two interpretation theories that were inspired by Aristotle’s line of thinking. \textit{Id}. The first, modern hermeneutics, is based on the notion that a subject retrieves meaning from an object. \textit{Id}. The goal is to find common ground between interpreter and text. \textit{Id}. The second theory is traditional American pragmatism, which focuses on practical reasoning. \textit{Id}. Eskridge notes that both theories “emphasize . . . the concrete situatedness of the interpretive enterprise, which militates against overarching theories; the complexity of interpretation and argument, which recognizes that different values will pull the interpreter in different directions; and the importance of workable resolutions to complex questions.” \textit{Id}. at 323-24.

\textsuperscript{118} See Transmission Access Policy Study Group v. F.E.R.C., 225 F.3d 667, 714 (D.C. Cir. 2000) (stating that when the issue requires a high level of expertise, courts “must defer to the informed discretion of the responsible federal agency”). In \textit{Transmission Access}, the D.C. Circuit held that the enormously technical and difficult task F.E.R.C. faced in deregulating the utility companies was well recognized. \textit{Id}. at 724. The court held that F.E.R.C. produced a “comprehensive, evenhanded record . . . carefully considering all commenters’ claims,” it accomplished its stated objectives, conforming to case law and reasonably accommodated all competing interests. \textit{Id}. The court stated that given the extremely technical nature of these issues, as well as the highly deferential standard of review, “FERC has done an admirable job.” \textit{Id}. See
information devices changes rapidly, and Congress must be broad in defining high-tech terms or proposed bills will be outdated before they are passed into law.\textsuperscript{119} The general consuming public cannot even keep up with purchasing the newest and fastest electronic devices, therefore it is unreasonable to think that Congress or the federal agencies could keep up with regulating them.\textsuperscript{120} Although Justice Thomas’ dissent makes

\textsuperscript{119} See Kate Marquess, \textit{Technical Difficulties: Litigating Computer-Related Cases Means Bringing the Judge and Jury up to Speed on the Complexities of a Fast-Paced Industry. Find Out How to Avoid Being Left in the Dot.com Dust}, 87 \textit{J.A.B.A. J.} 54, 57 (2001) (explaining that keeping up with changes in both technology and pertinent areas of the law can be exhausting, as evidenced by the recent Napster copyright case and Microsoft antitrust case). “That means judges and lawyers need to keep up with minute-by-minute changes. They also need to think about applying old rules to a new game.” \textit{Id.} See also Jason H. Marcus, \textit{Don’t Stop That Funky Beat: The Essentiality of Digital Sampling to Rap Music}, 13 \textit{HASTINGS COMM. & ENT. L. J.} 767, 778 (1991) (noting the inability of the legislature to predict future advancements in The Copyright Act, and how this leads to disputes and questions about the applicability of the Act to novel situations). Marcus explained that strict construction is inappropriate when analyzing statutes governing areas with potential technological advancements. \textit{Id.} at 779. Going back to 1968, the Supreme Court recognized this concept in \textit{Fortnightly Corp. v. United Artists Television}, a case involving transmitting cable television to rural West Virginia. \textit{Fortnightly Corp. v. United Artists Television}, 392 U.S. 390, 395-96 (1968).

\textit{Our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in light of drastic technological change.} \textit{Id.} Marc Andreessen, \textit{The New IT crisis}, \textit{SPECIAL TO ZDNET FROM ZDWIRE, available at 2002 WL 7064728} (Dec. 11, 2002) (stating that the most “thankless, cumbersome function faced by Fortune 2000 companies” today is keeping up with the state of information technology). The average large business spends seven to eight percent of its revenue on information technology, with approximately seventy percent of this budget going toward the management of new devices. \textit{Id.} “After spending the past decade helping everyone else inside the company hop aboard the technology bandwagon, it is time for IT to jump on as well.” \textit{Id.; Sonya A. Donaldson, Cyberwise: Keeping Up, BLACK ENTERPRISE, Oct. 1, 2002}, at 68, \textit{available at LEXIS, Nexis Library, BLKENT file} (stating that when it comes to technology, it does not make sense to purchase the “latest” just because it is new; “[d]oing so is a surefire way of quickly . . . going broke”).

\textit{Id.} Donaldson, \textit{supra} note 119, at 68. \textit{See also} Lara J. Glasgow & Alicia N. Vaz, \textit{Symposium Beyond Microsoft: Antitrust, Technology, and Intellectual Property}, 16 \textit{BERKELEY TECH. L. J.} 525 (2001) (stating that there are potential complications that arise when applying long established law to the rapidly changing universe of technology). Glasgow & Vaz explain that the dynamic nature of high technology makes it difficult for any one company or any one product to dominate a particular market share. \textit{Id.} at 527. This unpredictability affects areas of the law such as antitrust, intellectual property and communications law, because it is hard to determine whether government bodies are equipped to handle the changing economic demands. \textit{Id.} Glasgow and Vaz specifically reference the administrative concerns regarding the speed of the Federal Trade Commission’s review process in comparison to the speed of the fast-paced world of high technology. \textit{Id.} “[T]he harm to consumers might be irreversible by the time a sufficient factual inquiry can even begin.” \textit{Id.} at 528.
logical sense point by point, it will not work to accomplish the legislative goals behind the 1996 Act in the most effective and efficient way.

B. Anti-Monopoly Considerations

The purpose behind the 1978 Pole Attachments Act is to protect emerging cable companies from unreasonably high rental rates by pole-owning utility companies. At the time the statute was enacted, cable companies and utility companies were not direct competitors because they each provided their own unique services. However, less than twenty years later the information technology revolution had arrived and the regulatory landscape needed change. The 1996 Amendments to the Act lifted some restrictions placed on utility companies that prohibited them from diversifying into telecommunications services.

121. See Gulf Power, 534 U.S. at 347-61 (Thomas, J. dissenting). Justice Thomas’ dissent focuses on the traditional “plain meaning rule” of statutory interpretation. According to Eskridge, supra note 117, at 340, the plain meaning rule is that “[t]he beginning, and usually the end, of statutory interpretation should be the apparent meaning of the statutory language.” This theory is also referred to as “textualism,” and is supported by the rule-of-law, in that one should be able to read a statute and therefore know their rights and duties. Id. at 340. Oliver Wendell Holmes wrote, somewhat sarcastically, “[w]e do not inquire what the legislature meant; we ask only what the statute means.” (citing Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 HARV. L. REV. 417, 419 (1899)); see also Farber & Frickey, supra note 116, who argue that:

several prominent judges appointed by President Reagan . . . most notably Justice Antonin Scalia, have advocated a radical reassessment of the concept of legislative intent. They would reject, or at least sharply limit, reliance on legislative history, and they would abandon any consideration of congressional actions or statements after a statute was passed. Justice Scalia . . . would go further and jettison the whole idea of legislative intent as a guide to interpretation.

Id. at 423.

122. The Telecommunications Act of 1996 was designed “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.” S. Rep. No. 104-230, at 1.

123. See supra notes 21 - 22 and accompanying text for a discussion of the policy behind the 1996 Act.

124. See Frank W. Lloyd, Telephone Company Entry Into Video Programming, in CABLE TELEVISION LAW 1992: CABLE FACES CONGRESS, THE COURTS, AND COMPETITION, at 757, 802 (PLI PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY, Course Handbook Series No. G4-3877, Feb.-Apr. 1992) available at WL 330 PLI/PAT 757 (explaining that Congress enacted the 1978 Pole Attachment Act because the utility companies had a superior bargaining position over the cable operators, who needed the right to lease pole space). Lloyd notes that Congress was aware that cable and utility companies may be potential competitors in the future provision of nonvideo services, but in 1978, this idea was only speculative. Id. at 804.

125. Id.

126. Brief of Petitioner at 10, Nat’l Cable & Telecommns. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002) (No. 00-832). Petitioners argue that the 1996 Telecommunications Act was a pro-
Today, utility companies can compete directly against cable companies and other telecommunications providers for the same information technology market share.\(^{127}\)

The 1996 Amendments also expanded the protection of § 224,\(^{128}\) and broadened the access to bottleneck facilities\(^ {129}\) necessary for greater competition in the arena of communications and information technology services.\(^ {130}\) Under Gulf Power, less emphasis is placed on what type of service is being provided, and more emphasis is placed on what type of company is doing the providing.\(^ {131}\) If the Gulf Power Court had determined that the FCC was acting outside their jurisdiction by including additional attachments within the ambit of § 224, the result would have had a huge economic impact on the information technology industry.\(^ {132}\) Companies that provided services other than “solely cable”

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\(^{127}\) Brief of Petitioner at 10-11, Gulf Power, (No. 00-832). See also Kathryn A. Tongue, Municipal Entry into the Broadband Cable Market: Recognizing the Inequities in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers, 95 N.W. U. L. REV. 1099, 1115-16 (2001) (arguing that privately owned cable companies are at a disadvantage against municipal utility companies that are trying to break into the cable market). “[M]unicipal cable systems use monopoly rates from one service, such as water or gas, to subsidize broadband cable services in competition against private cable companies.” Id. at 1116. Tongue also notes that a second unfair advantage the municipal utility companies enjoy over private cable companies is that tax laws often exempt municipals from their coverage. Id. Tax laws favor municipally owned companies in other ways as well. Id. at 1116. The recent deregulation of the electric industry is one example that is analogous to the cable service provider situation at issue in Gulf Power. Id. Although private companies are free to provide electric service to consumers, they may not be able to compete with the municipally owned electric companies, who are exempt from certain taxes. Id. at 1117. “This debate stems from the fear that tax preferences for municipal electric utilities will distort competition and create a lopsided playing field in the newly competitive electric industry.” Id.

\(^{128}\) See Barbara S. Eshin & Gary S. Lutzker, Poles, Holes and Cable Open Access: Where the Global Information Superhighway Meets the Local Right-of-Way, 10 COMM. LAW CONSPECTUS 23, 24 (2001) (explaining that expanding the regulatory scheme was not an easy task, because the new capabilities rarely fit nicely into existing regulatory categories). “[I]t presents daunting challenges to those charged with administering a regulatory framework premised upon distinct networks, services and service providers.” Id.

\(^{129}\) See supra note 62 for an explanation of a bottleneck facility.

\(^{130}\) Eshin & Lutzker, supra note 128, at 31.

\(^{131}\) Id. at 29.

\(^{132}\) Overview, supra note 2 (noting that the cable industry is “concerned that an adverse decision would seriously undermine the 1996 Telecommunications Act’s twin goals of creating a competitive communications environment, free of bottlenecks, and promoting the continued deployment and availability of affordable high-speed Internet service to all Americans”).
would not be able to secure protection under the FCC’s regulatory umbrella. Utility companies, who have a monopoly on utility poles, would have been able to charge unreasonable rates for the dissemination of technically innovative services to the consuming public.

National Cable and Telecommunications Association predicted that without regulation, the utility companies’ average rate increase would raise the cable companies’ cost of providing “traditional cable, digital video services, and high-speed Internet access from a few pennies a month to over $1.00 per month for each cable customer” in several North Dakota towns. Id. at 6. See cf. 73B C.J.S. Public Utilities § 34 (explaining that regulating agencies have the responsibility of balancing the right of the utility’s investors against the right of the public that it pay no more than a reasonable value for the utility’s service). If the two rights cannot be compatibly balanced, it is the consuming public that must prevail. Id.

133. This would clearly go against congressional intent to delegate to the FCC broad authority. See Michael A. DiSabatino, Annotation, Who is a “Common Carrier” of “Carrier” Within the Meaning of § 3(H) of the Communications Act of 1934 (47 U.S.C.A. §153(H)), 46 A.L.R. Fed. 626, § 2b (1980) (noting that, going back to 1968, the Supreme Court has repeatedly stated that nothing in the Telecommunications Act’s history or purpose limited the FCC’s jurisdiction to forms of communications specifically described elsewhere in the Act) (citing United States v. Southwestern Cable Co., 392 U.S. 157 (1968)). “Rather, the [C]ourt said, the Act confers regulatory authority over all interstate communication by wire or radio.” Id.

134. See United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956) (defining monopolization as “the power to control prices or exclude competition” in a relevant market, plus a general willful intent to acquire, use, or preserve that power). But see TV Signal Co. of Aberdeen v. AT&T, 462 F.2d 1256, 1259 (8th Cir. 1972) (holding that a pole attachment agreement between a telephone company and a cable television company was not subject to the Robinson-Patman Act, 15 U.S.C. § 13(a) (2000), which forbids price discrimination “between different purchasers of commodities of like grade and quality”). The court held that “space on a telephone pole was not a commodity within the purview of the Act.” Id. The court explained that a pole attachment was more akin to a real estate transaction. Id. This 1972 case was decided well before the 1978 Pole Attachments Act, and before the courts knew what the face of the cable and information technology industries would look like today. Id. The Eighth Circuit has since changed their view on whether pole attachments could be the subject of a monopoly. See TV Signal Co. of Aberdeen v. AT&T, 617 F.2d 1302, 1307-09 (8th Cir. 1980) (holding that cable companies and telephone utility companies are actual competitors in the construction of cable systems, and potential competitors in broadband telecommunications services). In the 1980 case, the Eighth Circuit held that the utility company’s policy of one attachment per pole illegally abused the utility’s monopoly and involved an illegal conspiracy to raise the cable service provider’s entry cost in violation of the Sherman Antitrust Act §§ 1 & 2. Id.

135. Gulf Power Co. v. FCC, 208 F.3d 1263, 1271 (11th Cir. 2000). The utility companies involved in the Gulf Power case put forth another argument against FCC regulation of pole attachment rates for services other than “solely cable.” Id. The utilities argued that the implementation of the FCC’s formula for computing attachment rents amounted to a taking without just compensation under the Fifth Amendment. Id. The Supreme Court ruled on a similar issue in a 1987 case that dealt with attachments only for cable television, before high-speed Internet access via commingled coaxial cables was an issue. FCC v. Florida Power Corp., 480 U.S. 245, 248-49 (1987). In that case, the Court held that no taking occurred because Florida Power Corp. had voluntarily agreed to the cable companies’ attachments. Id. Nonetheless, the Gulf Power respondents put forth the same takings clause argument again, in the hopes that the court of appeals would rule differently for attachment rates for services other than “solely cable.” Gulf Power, 208 F.3d at 1271. The district court granted summary judgment to the FCC, citing the Supreme Court’s Florida Power decision. Gulf Power Co. v. United States, 998 F.Supp. 1386, 1395 (N.D. Fla.
Today’s Internet users are concerned with the end product, primarily desiring faster and more advanced Internet access and web technologies.\textsuperscript{136} It is highly unlikely that Internet users care whether or not their Internet service provider is a cable company, a telecommunications company or an independent provider.\textsuperscript{137} Allowing a monopoly clearly goes against the underlying goals and policies of Congress’ delegation of power in authorizing FCC regulation of pole attachments.\textsuperscript{138}

There are other examples of the FCC fostering competition by reducing the restraints imposed through government granted monopolies.\textsuperscript{139} One such example is that, under the 1996 Act,
incumbent local exchange carriers (LECs) were required to share their network elements with competitors, and local franchising authorities were limited in their ability to restrict local competition. A glaring from antitrust laws, resulting in “government-sponsored cartels.” In *Parker v. Brown*, 317 U.S. 341, 362 (1943), which concerned state enforced pricing of California raisins, the Supreme Court held that state sponsorship of cartels immunizes cartel members from the antitrust laws if the cartel pricing policy is clearly articulated by state law and active state supervision is found to exist. Conant, supra, at 362 (citing *Parker*).

140. A local exchange carrier is “any person that is engaged in the provision of telephone exchange service or exchange access.” 47 U.S.C. § 153 (26) (2000).

141. See 47 U.S.C. § 153(29) (2000), which defines a network element as: a facility or equipment used in the provision of a telecommunications service. Such terms also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

Id. See also 47 U.S.C. § 251(c)(2)-(4) (2000) (imposing three specific requirements on the incumbent LECs to foster competition). Section 251(c)(2) requires the LECs to allow local competitors to interconnect with the existing local exchange networks at fair, nondiscriminatory rates. Id. Section 251(c)(3) requires the LECs to allow local competitors to lease parts of existing local exchange networks at fair, nondiscriminatory rates. Id. Finally, section 251(c)(4) requires the LECs to allow local competitors to purchase telephone services at wholesale rates for resale to the competitors’ customers. Id. Section 251(c)(3), requiring nondiscriminatory leasing of “parts” of existing networks, refers to “unbundled” network elements. See 47 U.S.C. § 153(29) (2002) (defining an unbundled network element as “a single network element that a competitor may lease on its own, or if the competitor wishes, in combination with other elements”). This FCC-mandated deterioration of local telephone companies’ monopolies sparked a surge of litigation in the late 1990’s, as LECs across the nation challenged both the FCC’s rulemaking authority, and, in the alternative, the reasonableness of the FCC’s newly proposed rules. See, e.g., *Melcher v. F.C.C.*, 134 F.3d 1143, 1164 (D.C. Cir. 1998) (upholding FCC regulations to prohibit LECs from holding local multipoint distribution service licenses in the same geographic areas which they provided telephone service as “not only rational, but highly sound”); *City of Dallas, Tex. v. F.C.C.*, 165 F.3d 341, 352 (5th Cir. 1999) (holding that the FCC did not exceed its authority in adopting regulations permitting non-LECs to be certified as open video system operators); *AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc.*, 197 F.3d 663, 670 (4th Cir. 1999) (holding that the FCC regulations plainly required Bell Atlantic to allow AT&T and MCI to use their network equipment for switching and routing); *MCI Telecomms. Corp. v. Michigan Bell Telephone Co.*, 79 F. Supp.2d 768, 792 (6th Cir. 1999) (holding that LECs shall provide access to directory listings to competing providers, and that the competing providers must be able to read the information in the LECs directory assistance databases).

142. See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999) (explaining that the 1996 Telecommunications Act fundamentally restructured local telephone markets by ending the state granted LEC monopolies). In that case, the LECs argued that primary authority to implement the local competition provisions of the Act belonged to the states rather than the FCC. *Id. at 374*. The Eighth Circuit agreed with the telephone companies, and vacated the FCC’s pricing rules as reaching beyond the Commission’s jurisdiction. *Id.* (citing *Iowa Utilities Board v. FCC*, 120 F.3d 753, 805-06 (1997)). The court of appeals reasoned that nothing in the 1996 Act overcame the presumption in the 1934 Act of preserving state authority over intrastate communications. *Iowa Utilities*, 120 F.3d at 796. According to the court of appeals, this presumption is a fence that is “hog tight, horse high, and bull strong, preventing the FCC from intruding on the states’ intrastate turf.” *Id.* at 800. The Supreme Court reversed the decision and upheld the FCC regulations. *AT&T Corp.*,
exception to the anti-monopoly approach was that monopoly state and municipally owned telephone franchises were exempted from federal regulation.143 Congress left the locally owned telephone companies under state regulation, and this meant that in many communities, consumers had no choice of carriers for their local telephone service.144

525 U.S. at 397. Justice Scalia used his signature style of interpreting statutes according to their plain meaning, by stating “[w]e think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions’ of this Act” Id. at 378. See supra note 121 and accompanying text for a discussion of Justice Scalia and the plain meaning rule. See also Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002) (holding that the FCC is authorized to “require state utility commissions to set the rates charged by the incumbents for leased elements on a forward-looking basis untied to the incumbents’ investment”).

143. See Paul Glist, Wesley R. Heppler & T. Scott Thompson, Telecommunications “Franchising,” in CABLE TELEVISION LAW 2001: COMPETITION IN VIDEO, INTERNET & TELEPHONY at 349, 381-382 (PLI PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY, Course Handbook Series No. G0-00LY, Mar.-Apr. 2001), available at WL 642 PLI/PAT 349 (explaining that local telephone service is of a “state concern,” and the state has retained the broader police power of granting the franchises). However, this leaves the power to grant franchises to the state or municipal governments. See 47 U.S.C. § 253 (2000) (stating that local telecommunications franchising issues have been preserved to local authority). Thus, although competitive local exchange carriers (CLECs) are now allowed to enter the market, the CLECs must lease the network equipment from, and pay reasonable compensation for, use of rights-of-way to, the incumbent LECs. Nicholas P. Miller, Joseph Van Eaton, William L. Lowery, Mitsuko R. Herrera & James R. Hobson, Municipalities and Communications Networks: Some Key Issues, in CABLE TELEVISION LAW 2001: COMPETITION IN VIDEO, INTERNET & TELEPHONY at 279, 289-90 (PLI PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY, Course Handbook Series No. G0-00LY, Mar.-Apr. 2001), available at WL 642 PLI/PAT 279. The incumbent LECs argue that the preservation of their rights under state law allows them to use what they already own without paying compensation. Id. at 289. On the other hand, the CLECs are arguing that they are entitled to the same treatment as the incumbent providers. Id. “The claims of newcomers in turn often depend on whether a court believes that it is necessary to extend to others whatever benefits may have been granted a century ago to the incumbent.” Id. See, e.g., TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785, 795-97 (E.D. Mich. 1998) (holding that, under state law, TCG (a CLEC) could be required to obtain a franchise and pay a four percent fee, even though Ameritech Michigan had a grandfathered franchise under Michigan state law to provide telephone service). In that case, both state and federal claims were put forth by TCG. Id. The federal claim focused on 47 U.S.C. § 251(c) that allows municipalities to charge franchise fees, as long as the compensation is just and reasonable. Id. at 790. The four percent franchise fee was upheld under the 1996 Act. Id. at 791.

144. See Miller, supra note 142, at 285 for a discussion of the incumbent LEC’s arguments. See also Jeffrey Walker, Missed Connections: One Failed Attempt to Ease Restrictions on Bell Operating Companies, 47 FED. COMM. L.J. 439, 442 (1994) (explaining that the federal deregulation of the long distance telephone companies actually granted a monopoly over the local service areas to the LECs, provided they have equal access to all telephone service carriers); Michael T. Osborne, The Unfinished Business of Breaking up “Ma Bell:” Implementing Local Telephone Corporation in the Twenty-first Century, 7 RICH. J. L. & TECH. 4 (2000), available at http://www.richmond.edu/jolt/v7i7/note1.html (last visited March 15, 2003) (arguing that the FCC’s most important role after enacting the 1996 Telecommunications Act was to facilitate “a swift transition form the ‘bad old days’ of monopoly provision of local telephone service to a new era of fully competitive and deregulated local telecommunications markets”). Osborne argued that the
It is possible that the *Gulf Power* decision is a precursor to allowing the FCC to regulate, and possibly dissect, the local access telephone monopolies.145 By dismantling state granted local telephone franchise monopolies, the FCC would finally be able to “offer regulatory certainty for communications providers at the federal, state, and local levels.”146 Today, “communications providers” is a general term for companies that provide information services, such as traditional telephone companies, cable companies and Internet service providers.147 In *Gulf Power* the

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145. Meyerson, *supra* note 101, at 255-56. Under federal law, states are limited to telecommunications rate regulations that are just and reasonable, and states and municipalities retain their ability to manage the public rights-of-way. *Id*. See also 86 C.J.S. Telecommunications § 205 Pole Attachments (August 2002) (explaining that under the Federal Communications Act, the rates, terms and conditions of pole attachments, meaning attachments by a cable television system or provider of telecommunications services to a utility’s pole, duct, conduit, or right-of-way, are regulated by the FCC, unless a state meets certain requirements). *Cf.* Esbin & Lutzker, *supra* note 128, at 69 (suggesting that the *Gulf Power* decision may have direct legal bearing on the authority of municipalities to impose open access as a cable franchising requirement). Esbin & Lutzker critique the Court of Appeals for the Eleventh Circuit’s holding, and predict that the Supreme Court will reverse. *Id.* at 70. “The Eleventh Circuit’s *Gulf Power II* decision exemplifies how courts can be led astray by a combination of silence from the expert agency charged with interpreting federal law and an analysis that reads the relevant statute in a vacuum divorced from its underlying policies.” *Id.*

146. Arthur H. Harding & Paul W. Jamieson, *Dismantling the Final Regulatory Entry Barriers: A Call for the FCC to Assert its Preemptive Authority*, 12 HARV. J. L. & TECH. 533, 535 (2000). The FCC has authority to preempt state and local regulations that conflict with the 1996 Telecommunications Act’s provisions and policies. *Id.* Even when localities’ regulations violate the letter and intent of the 1996 Act by deterring CLECs from entering the local telephone market, the FCC has responded timidly and slowly. *Id.* at 540. This is “evidenced by the lack of vibrant competition in areas such as local residential telephony.” *Id.* at 537. The major obstacle to achieving Congress’ goal of speedy deployment of information technology is the patchwork of local telephone regulations. *Id* at 556-57.

147. See *infra* note 148 and accompanying text for examples of the convergence of information services technologies. The theory behind regulation of converging technologies is that if technology “A” offers the same service as technology “B,” the two technologies should be regulated as competitors even though they may be technically different. Benjamin Lipschitz, *Regulatory Treatment of Network Convergence: Opportunities and Challenges in the Digital Era*, 7 MEDIA L. & POL’Y 14, 16 (1998).

Factors such as technological innovation, changes in the market, and developments in regulatory reform are all serving to create an entirely new, overlapping marketplace for basic services such as telecommunications, electric, gas, etc. These factors have further propelled companies to enter into strategic alliances, joint ventures, and in some cases, mergers, which enables them to offer a menu of product options to consumers and to operate their systems more efficiently. This is commonly referred to as ‘convergence.’ *Id.* (quoting Consumer Energy Council of America Research Foundation Convergence Forum, *Case Study: Regulatory Convergence*, available at http://www.cecarf.org/projects/convergence/cs-regulatory.html). See also Senator Ted Stevens, *The Internet and the Telecommunications Act of*
Court acknowledged that these traditionally separate industries will continue to merge into one entity, generally referred to as information technology service providers.¹⁴⁸

In light of this envisioned merger, the Court decided to read the Pole Attachments Act broadly and allow FCC regulation of wireless telecommunication, and commingled cable and high-speed Internet access attachments, two terms that are not literally defined in the Act.¹⁴⁹ It is this type of practical, aggressive enforcement that the FCC needs to assert, and the courts need to uphold, in order to foster competition in this highly technical arena.¹⁵⁰

¹⁴⁸ Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327, 333 (2002) (holding that “if one day [a cable television company’s] cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment ‘by a cable television system’”). See also John F. Gibbs & Todd G. Hartman, Telecommunications in the 21st Century: The Regulation of Convergence Technologies: An Argument for Technologically Sensitive Regulation, 27 WM. MITCHELL L. REV. 2193, 2193 (2001) (stating that “[a]t nearly every level of telecommunications regulation, heated battles are being conducted over the question of how to regulate convergence technologies”). In every court case considering the issue of convergence technology, an analysis of the service provided by the cable or Internet company, and whether that function was a cable service, a telecommunications service or an information service, has been held relevant. Id. at 2196.

¹⁴⁹ Gulf Power, 534 U.S. at 339. See also Whitmore, supra note 108, at 25 (stating that “the law is a function of the analogies used, definitions applied and assumptions employed by those who have participated and prevailed in the adjudication process”).

¹⁵⁰ Harding & Jamieson, supra note 146, at 557 (concluding that the FCC should promulgate a clear statement of principles regarding regulatory parameters, with no variation in the regulations applied to services offered via different technologies, in order to allow free competition); see also Henry E. Crawford, Internet Calling: FCC Jurisdiction Over Internet Telephony, 5 COMMLAW CONSPECTUS 43, 43 (1997) (arguing that despite the fact that Internet and telephone service differ significantly in their technology, architecture and quality, the FCC should regulate the two industries as one). But see Andrew Kowalewski, “Placing a Ban On Police Radar Jammers,” Rocky Mountain Radar v. FCC, 158 F.3d 1118 (10th Cir. 1998), 19 TEMP. ENVTL. L. & TECH. J. 137, 137 (2000) (arguing that the FCC went too far when it issued an order banning the sale and marketing of the Spirit II, a device designed to cause police radar guns to malfunction). The Spirit II is an active device that “emits a radio signal designed to counter and confuse the signal coming from the police radar gun.” Id. at 137-38. Due to Spirit II’s active nature, the FCC read its regulations to bring the device within the agency’s jurisdiction. Id. at 138. Rocky Mountain Radar, the company that manufactures the Spirit II, challenged the FCC’s jurisdiction in Rocky Mountain Radar, Inc. v. FCC, 158 F.3d 1118 (10th Cir. 1998). Kowalewski, supra, at 134. The Court of Appeals for the Tenth Circuit found that the Spirit II was a radio communication under the 1996 Act, and upheld the
C. Cable Companies Test the Waters

As society becomes ever more dependent on new technology, cable companies will inevitably increase their entry into the telecommunications and information services markets. However, entering this market requires a large capital investment. From an economic standpoint, the cable companies may have used the decision in Gulf Power for more than just enforcing their right to regulated rates for pole attachments. Because the utility companies’ poles are bottleneck facilities, it made sense for the cable companies to “test the waters” to

FCC’s order to ban the device. Id. at 139.

151. Lloyd, supra note 7, at 233 (explaining that as industry and technology develop, the division between cable television and telephone services will disappear). See also Heather T. Hendrickson, Cable Open Access: The FCC Should Establish a National Policy of Staying Out of the Way of Broadband Competition, 8 GEO. MASON L. REV. 749, 750 (2000) (explaining that due to the high demand for advanced, high-speed telecommunications capability, various types of communications companies are investing large dollars in competing technologies, including cable, digital subscriber lines (DSL), wireless and satellite access). But see James B. Speta, Symposium Overview: Part II: Unbundling and Open Access Policies: The Vertical Dimension of Cable Open Access, 71 U. COLO. L. REV. 975, 975 (2000) (arguing that open access advocates contend that cable companies entry into the Internet market is actually anti-competitive because customers have to pay an ISP for Internet services and a cable company for online access). Internet access over commingled cable wires will soon be a substitute for traditional cable programming. Id. at 977. Given that, there is a fear that cable companies will provide “less than true open access in order to protect their traditional programming revenues.” Id.

152. Hendrickson, supra note 151, at 755.

153. Id. at 751 (arguing that how heavy handed the FCC will be in regulating the Internet access market is still unknown). Hendrickson published her Comment before the Supreme Court handed down the Gulf Power decision. She concluded that the FCC should affirmatively choose not to regulate the high-speed Internet access market “in its infancy,” thereby allowing the market to regulate itself. Id. The FCC would step in if and when they saw a problem with potential monopolies. Id. The FCC’s regulation of pole attachments for commingled cable high-speed Internet access in Gulf Power may have been just the entry the federal agency was looking for. Pole attachments are just one small part of the debate over how the FCC should regulate information technology services. Now that the FCC has authority to regulate pole attachments for commingled cable high-speed Internet access, market competitors could use the Gulf Power decision to predict that the FCC will also impose regulations for things such as franchise fees and public rights-of-way for incumbent wire owners. See id. at 784. “The FCC’s historical ‘unregulation’ of data services has allowed the Internet to flourish at an amazing rate and so [the FCC] should continue the deregulatory approach.” Id. To support her conclusion that it is too early for the FCC to regulate Internet services, Hendrickson notes that as of spring of 2000 when her Comment was published, the FCC had not yet statutorily classified cable broadband services as either “telecommunications services” or “cable services” Id. at 762. When Gulf Power was handed down in January 2002, the FCC had still not defined “an attachment by a cable television service provider.” Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327, 337-39 (2002). However, the Court based the FCC’s jurisdiction to regulate these attachments on § 224(b)(1) of the Pole Attachments Act, authorizing the FCC to regulate any attachments, as long as the rates are “just and reasonable.” Id. See supra note 33 and accompanying text for a thorough discussion of § 224(b)(1).

154. See supra note 62 and accompanying text for a discussion of “bottleneck facilities.”
find out if they were also entitled to regulated rates for providing Internet services.  

It is infeasible for cable companies to run their own lines in duplication of the essential facilities infrastructure of the utility companies’ poles and wires, due to high costs and physical space limitations.  However, if the cable companies did decide to duplicate,

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155. See Nicole M. Payne, Note, AT&T v. City of Portland – A Decision Without a Resolution: The Ongoing Debate Over Open Access to Broadband Internet Technology, 37 WILLAMETTE L. REV. 717, 717-22 (2001) (arguing that the “open access” debate is the most important issue facing cable companies today). In addition to the cable companies’ entitlement to regulated rates for pole attachments for Internet service, FCC regulation of another area of concern in information technology services may be looming over the cable industry. Id. The open access debate concerns conventional Internet Service Providers (ISPs), such as America Online (AOL), wanting the right to access cable company facilities. Id. at 719. A cable company has the necessary resources to facilitate high-speed Internet access, but currently they can pick and choose which ISPs will have access to their cable modem platforms. Id. at 719-20. Proponents of open access say that because this area is currently unregulated, consumers are denied the right to a competitive market. Id. If consumers choose to use cable modem to access the Internet, they must pay for the cable company’s ISP. Id. Whether the FCC will require open access, or even regulate competitive conduct in a constantly changing, highly technical arena such as high-speed Internet access, is of the utmost importance to both the cable industry and cable modem consumers. See John E. Lopatka & William H. Page, Internet Regulation and Consumer Welfare: Innovation, Speculation, and Cable Bundling, 52 HASTINGS L. J. 891, 894 (2001). The courts have just recently begun to address this issue. In AT&T Corp. v. Portland, the Ninth Circuit concluded that cable modem service is not a cable service under the 1996 Act, but a telecommunications service. AT&T Corp. v. Portland, 216 F.3d 871, 877-78 (9th Cir. 2000). This decision allowed FCC regulation of cable modem services to fall under the telecommunications regulatory scheme, rather than the cable industry regulatory scheme, and the court held that the 1996 Telecommunications Act prohibited the open access provision in question. Id. However, in Gulf Power, the Supreme Court declined to follow the Ninth Circuit’s lead, and ruled that it was unclear whether the FCC defined cable modem service as a telecommunications server or as a cable service. See supra notes 79 – 82 (discussing the Court’s reasoning). In Gulf Power, the issue of open access was not before the Court. See also MediaOne Group, Inc. v. County of Henrico, 97 F. Supp.2d 712, 716-17 (E.D. Va. 2000) (holding the open access ordinance invalid under the 1996 Act); Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp.2d 685, 698 (S.D. Fla. 2000) (holding the open access ordinance invalid under the First Amendment).

156. See Lloyd, supra note 7, at 255. The antitrust essential facilities doctrine requires that a company with monopoly power over an essential facility, such as utility poles, must make that facility available, notwithstanding a legitimate business reason for refusal. Id. See also supra note 62 for a thorough discussion of the essential facilities doctrine. A cable company trying to attach to a utility company’s pole would most likely benefit from application of the four part test of the essential facilities doctrine. Lloyd, supra note 7, at 255. First, utility companies can be natural monopolies when they control the only poles in the area. Id. Second, duplication of the pole infrastructure would be impracticable. Id. Third, denial of access to a facility because the company seeking access is a competitor is not a legitimate business reason. Id. Fourth, it is not infeasible to allow a competing service provider access to the utility company poles since such pole attachment is already common. Id.

157. Just after the turn of the century, state regulatory bodies established regulated public utility monopolies to deal with the problem of unnecessary investments in duplicating the essential facilities, such as poles and wires. See Tim Rupp, The Effect of the Telecommunications Act of
this would only further the problem of monopoly ownership, by in a sense, creating two monopolies. 158 When two different “players” simultaneously control the same market, this is referred to as a duopoly, and from an antitrust standpoint, it has similar regulatory concerns as a traditional monopoly. 159 The cable industry wanted to know if it was entitled to regulated rates before making a large monetary investment in duplicating the existing pole infrastructures. 160 Now that cable companies are comfortable with the Court’s decision, they will instead spend that money entering into the utility and telephone companies’

1996 on the Local Exchange: A Significant Step in the Right Direction, 70 S. CAL. L REV. 1085, 1090 (1997) (reasoning that a duplication of each carrier’s infrastructure would result in inflated costs for consumers and non-uniformity in the construction, operation, and maintenance of telephone services). Duplication of facilities would also impede competition because many smaller companies trying to enter the market do not have the economic resources to fund such a project. Id. at 1099. Antitrust law is implicated if a monopolist, such as the utility companies in Gulf Power, control the essential facility. Id. “[H] competitors are not reasonably and practically able to duplicate that facility, the monopolist’s denial of the use of that facility by the competitor when it is feasible to allow such use violates antitrust principles.” Id. Under the 1996 Act, the FCC for the first time mandated cable companies’ access to the essential utility owned poles on a nondiscriminatory basis. Overview, supra note 2, at 3-4. Utility companies can only deny access to their poles for reasons of safety, reliability, and generally applicable engineering concerns. Id. at 4; see also Thomas A. Piraino, Jr., The Antitrust Analysis of Network Joint Ventures, 47 HASTINGS L. J. 5, 22-23 (1995) (noting that the large economies involved in telephone, utility, or cable networks usually make it impractical for a competitive service provider to duplicate the necessary infrastructure); Elena Maria Rodriguez, FCC v. Florida Power Corp.: Limiting the Utility of the Loretto Rule, 41 U. MIAMI L. REV. 1149, 1149 (1987) (explaining that the cable industry’s use of preexisting poles is the most feasible way of establishing their service due to financial, aesthetic and franchise considerations).

158. See supra notes 139 - 141 and accompanying text for a discussion of monopoly ownership.

159. See BLACK’S LAW DICTIONARY 519 (Bryan A. Garner ed., 7th ed., West 1999), defining a duopoly as a market in which there are only two sellers of a product or service. Id. See also Jerome A. Barron, Viacom-CBS Merger: Structural Regulation of the Media and the Diversity Rationale, 52 FED. COMM. L. J. 555, 555-57 (2000) (noting that duopolies are common in areas of FCC jurisdiction such as radio and television stations). For example, the FCC permits common ownership of two television stations in the same market if eight independently owned and operated television stations remain in the same area. Id. at 555. There are three diversity rationales for multiple ownership rules. Id. at 557. The first is to encourage gender, ethnic and racial diversity in the ownership of broadcast radio or television stations. Id. The second is to maximize diversity of viewpoint in programming. Id. The final rationale is that “media deconcentration rules will prevent undue concentration of economic power contrary to the public interest.” Id.

160. Daniel F. Spulber, Deregulating Telecommunications, 12 YALE J. ON REG. 25, 53-54 (1995). Some theorists argue that an entrant into a market will pay higher costs to duplicate an infrastructure than the incumbent paid to construct the original system. Id. at 53. If the costs of attaching are too high due to lack of FCC regulation, then cable companies may find it economically feasible to build their own duplicate facilities instead. Id. Cf. Rupp, supra note 157, at 1107 (discussing the options that CLECs have in the local telephone service market when LECs access fees are left unregulated).
D. Where the Cable Companies Stand

Another economic benefit to cable companies that attach to existing utility owned poles is that they will avoid the troubles of owning the poles, such as franchise fees, rights-of-ways, and pole maintenance and upkeep. Traditionally, municipal governments were authorized to charge utility companies for the public space they used to house their poles, in the forms of franchise and rights-of-way fees. In recent years, the municipalities have relied on increasing these fees as an additional source of government income. However, under Gulf

161. Esbin & Lutzker, supra note 128, at 410 (noting that computer, broadcast, cable, telephone, satellite, and media entertainment industries will find themselves part of a much larger marketplace). Esbin argues that these industries must learn to compete with each other in a broad market, rather than remain sheltered from competition within their own narrow market segment. Id. “[T]he convergence of telecommunications, computing and broadcasting industries as opening the way for seamless access to multimedia information and entertainment any time, any place, anywhere” is becoming commonplace in today’s society. Id. at 417.

162. Municipalities charge pole-owning utility and wireline telecommunications companies fees, taxes, and rents for occupying municipal rights-of-ways. Leonard M. Baynes, How Much is the Toll to Access the Information Superhighway? An Analysis of the Appropriate Measure of Compensation for The Partial Taking of Public Utility Property, 62 TENN. L. REV. 141, 177 (1994) (discussing that the most common computation for these charges is a franchise fee based on a percentage of the companies’ gross revenues).

163. The municipalities’ authority to charge the utilities rent for poles is longstanding. See Mackay Tel. & Cable Co. v. City of Little Rock, 250 U.S. 94 (1919) (holding that a $0.50 per pole tax was reasonable); W. Union Tel. Co. v. City of Richmond, 224 U.S. 160 (1912) (finding that a $2.00 per pole charge was reasonable); Atl. & Pac. Tel. Co. v. City of Philadelphia, 190 U.S. 160 (1903) (upholding a $1.00 per pole charge as prima facie reasonable); City of St. Louis v. W. Union Tel. Co., 166 U.S. 388 (1897) (ruling that the lower court’s finding of reasonableness regarding a $5.00 per pole fee was justified). In 1996, the Telecommunications Act codified the municipalities’ authority to charge for rights-of-way in § 253(c), which granted the municipalities new affirmative rights to manage the rights-of-ways, and the authority to require payment of fees and compensation. See Christopher R. Day, The Concrete Barrier at the End of the Information Superhighway: Why Lack of Local Rights-of-Way Access is Killing Competitive Local Exchange Carriers, 54 FED. COMM. L. J. 461, 469 (2002) (arguing that the municipal requirements and franchise proceedings often make it more difficult for many new telecommunications providers to enter certain markets). However, because the pole-owning companies are restricted to charging reasonable rates for attachments, this may mean that companies that just attach, and do not own the poles, may be able to offer the same services at lower prices. See id. at 463-64 (stating that an attaching company “attempts to make a profit on the provision of this resold service by reselling it at a rate that is generally equal to or lower than the rates charged by the incumbent carrier in the market”).

164. Day, supra note 163, at 469. See also Kent D. Wakeford, Municipal Cable Franchising: An Unwarranted Intrusion into Competitive Markets, 69 S. CAL. L. REV. 233, 246-47 (1995) (explaining that due to the monopoly nature of the cable industry, local municipalities demanded higher franchise fees from cable companies, directly benefiting the local politicians in office and transferring wealth from consumers to municipalities). Many municipalities required cable companies seeking a franchise arrangement to “follow a rigorous application process delineating the
Power, the utility companies are limited to charging “just and reasonable” rates to competitors for renting space on their poles.\textsuperscript{165} Non-pole owning cable companies may have an economic advantage over other types of service providers competing in the same information technology market.\textsuperscript{166} Once a cable company attaches, it is free to diversify its services; however, the rent the cable company pays for attaching must still remain within the limitations set by § 224 of the Act.\textsuperscript{167}

E. Where the Pole Owning Utility Companies Stand

The gas and electric companies that own poles are now in a unique position as well.\textsuperscript{168} Market competition theories do not come into play features of the proposed cable system and all the additional services required by the city.” Id. at 247. The cable companies spent large amounts of money conforming to this process, reimbursed the cities for administrative costs, and lobbied the politicians. Id. The municipalities put forth three justifications for charging franchise fees: (1) the franchises’ essentially permanent use of public ways; (2) the disruptive nature of constructing and maintaining a cable system and; (3) the inherent characterization of the cable franchise as a natural monopoly. Id. at 249.

\textsuperscript{165} Nat’l Cable & Telecommns. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327, 331-32 (2002). See also Lawrence G. Acker, Rebecca L. Fowler & Elizabeth B. Dickerson, Effect of the Telecommunications Act of 1996 on Access to Electric and Gas Utilities Rights-of-Way, 22 ENERGY L. J. 361, 362 (2001) (stating that when Congress passed the 1996 Act, they made certain that pole owning companies charging just and reasonable rates under § 224(b)(1) would recover the actual costs of making their poles available to competitors, including a reasonable profit); Baynes, supra note 162, at 148-49 (arguing that, pursuant to antitrust law, the just and reasonable rate is the proper standard under which to determine the cost utility companies may charge competitors wanting to attach to the utility company owned poles). An alternative rate methodology is the fair market value, which is inappropriate for a monopoly company to charge because it would be difficult, if not impossible, to determine. Id. at 149-50. “Applying the ‘just and reasonable’ rate standard in this situation replicates the methodology, rationale, and result used in the regulation of other products and services that a public utility provides.” Id. at 149; Gardner F. Gillespie, Rights-of-Way Redus: Municipal Fees on Telecommunications Companies and Cable Operators, 107 DICK. L. REV. 209, 236 (2002) (stating that the term “fair and reasonable compensation” found in § 253 of the 1996 Act, which limits the ability of state and municipal governments to interfere with national regulation of telecommunications, should be given the same meaning as the term “just and reasonable” rates under the Pole Attachments Act).

\textsuperscript{166} See Chen, supra note 21, at 696 (opining that the Gulf Power decision may carry the greatest weight in the issue of open access for cable broadband, because it is the first case related to this debate that the Supreme Court decided). See also, Barbara Esbin, Internet Over Cable: Defining the Future in Terms of the Past, 7 COMMLAW CONSPECTUS 37, 88 (1999) (discussing that in addition to providing traditional cable services, cable companies will also provide “enhanced services” including “meter reading, stock market quotations, burglar and fire alarm services, at-home shopping services, data service, and two-way television”). The FCC recognized the potential importance of the cable industry in terms of the information services market when it amended the 1996 Act. Id.

\textsuperscript{167} Chen, supra note 21, at 696.

\textsuperscript{168} The 1996 Telecommunications Act substantially expanded the authority of the FCC over local utility companies by establishing broad access to utility poles. See Acker, supra note 165, at
unless these utility companies, for example, offer telecommunications or cable services as well as electricity. The utility companies have less competitive resistance, as these information service attachments just serve as an extra source of revenue, and the burden of housing such attachments is rather small. The pole-owning utilities may also serve

361 (explaining that the FCC concluded that the use of any utility pole for communications, regardless of what type of utility company owned the pole, subjected the company to § 224 pole attachment regulations). Section 224(a)(1) defines utility as “any person that 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.” 47 U.S.C. § 224(a)(1) (2000). In Gulf Power, the Supreme Court upheld the FCC’s interpretation that the Pole Attachments Act also included regulation of attachments by cable companies providing Internet services, and wireless telecommunications carriers. Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327, 335 (2002).

169. See Acker, supra note 165, at 378 (concluding that the utility companies are likely to give preferential access to attaching companies that are affiliated with the utility). The Pole Attachments Act does not provide the right to attach, as attaching agreements are entered into on a voluntary basis. Overview, supra note 2, at 2. However, the Act does require that when agreements are entered into, the rates charged by the utility company to the attaching company be “non-discriminatory,” and “just and reasonable.” Id. at 2-3.

170. Richard E. Wiley, Competition, Consolidation, Convergence and Challenge: Developments in Communications Law, in COMMUNICATIONS LAW 1999 at 79, 90 (PLI PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY, Course Handbook Series No. G0-0087, Nov. 1999), available at WL 582 PLI/PAT 79. The framework of the 1996 Act was to eventually permit local telephone companies and long distance carriers to enter into each other’s markets, as well as provide other communications services. Id. Utility companies were seen to come into the picture only in respect to the unique position of their poles in relation to attaching devices. Id. Congress may not have properly anticipated that these myriad companies, including telephone, utility, cable and Internet, would also be competing with each other as information service providers. Id. An information service provider offers “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing.” 47 U.S.C. § 153(20) (2000).

171. Overview, supra note 2. The actual physical space occupied by a cable attachment is approximately one inch. Id. at 2. Cable companies maintain their own lines, which are lashed to steel strands that make them less likely to sag. Id. The clearance to the next communications user is one foot. Id. However, the biggest burden to the utility company is not the physical space used, but the limited supply of space available for the companies to rent. See Baynes, supra note 162, at 177 (explaining that pole attachment rates must be regulated because due to limited space, if a fair market value is used to determine attachment rates, the cable companies would most likely be charged a monopoly rent). Most utility company poles that house cable attachments are thirty-five to forty feet high. Overview, supra note 2, at 2. Typically, these poles have six feet of their height underground, and eighteen feet reserved for ground clearance. Id. This leaves approximately eleven to sixteen feet of usable space. Id. For safety reasons, electric power lines are usually located on the upper portion of the utility poles, and they require a forty-inch clearance from communications cables on the same pole. Id. Telephone lines are typically strung at the minimum ground clearance of eighteen feet. Id. Cable attachments are typically located one foot above the telephone cables. Id. When the Gulf Power case reached the Court of Appeals for the Eleventh Circuit, one claim brought forth by the pole owning utility companies was that the implementation of the FCC’s formula for computing attachment rents amounted to a taking without just compensation under the Fifth Amendment. Gulf Power Co. v. FCC, 208 F.3d 1263, 1271 (2000).
as a “check” on how much money the pole owning telephone companies can charge for attachments, by offering rental space for the same attachments at a lower price. Telephone companies may be hesitant to charge only the minimum rates provided for in § 224, because, in essence, they are renting space to their direct competitors. However, as noted before, it is not unforeseeable that traditional utility companies,

The court held that the attachments were a taking, but that because this was a facial challenge of the FCC order in general, petitioners had to prove that the formula would deny just compensation in every case, and this they did not do. See Acker, supra note 165, at 378-79 (establishing a minimum and a maximum rate that pole owning companies can charge, and still be within the “just and reasonable” boundaries set by § 224). See also Thomas A. Hart, Jr., The Evolution of Telco-Constructed Broadband Services for CATV Operators, 34 CATH. U. L. REV. 697, 699 (1985) (stating that as the cable industry evolved, cable companies turned to utility companies’ preexisting pole and conduit networks, as an alternative to telephone companies’ poles, as a means of attaching their cables); Mark Sievers, And Now For Something Completely Different, 4 KAN. J. L. & PUB. POL’Y 109 (1995) (discussing that a new entry into the telecommunications market, such as a power company or a cable television company, may be able to provide local telephone service at lower costs, so that the incumbent telephone company would be forced to reduce its costs to match its new competitor). Cf., Arthur Bresnahan, The (Unconstitutional) Telco-Cable Cross-Ownership Ban: It Seemed Like a Good Idea at the Time, 1 MICH. TELECOMM. TECH. L. REV. 79, 82 (1996) (explaining that the 1984 Cable Communications Policy Act expressed similar concerns in a related area when it banned a telephone company’s provision of all video programming over its own facilities). Congress and the FCC feared that telephone companies would begin to provide cable service at a lower rate than independent cable operators because they had an artificial cost advantage by owning the necessary poles. See, e.g., Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994); US West, Inc. v. United States, 855 F. Supp. 1184 (W.D. Wash. 1994).

173. Acker, supra note 165, at 378-79. Compare William P. Rogerson, New Economic Perspectives on Telecommunications Regulation: Competition in Telecommunications: Jean-Jacques Laffont and Jean Tirole, MIT, 2000. Pp xvii, 315, 67 U. CHI. L. REV. 1489, 1499-1500 (2000) (explaining that the “optimal price cap” theory of government regulation of telecommunications industry charges is used to ensure that an incumbent telephone company will have no artificial incentive to attempt to degrade access to its competitors). The optimal price cap theory is based on an absolute or global pricing structure that regulates all the services a company offers, rather than regulating the margin between the access price and the specific services, such as long distance service, local telephone service, cable service and Internet service. See Lloyd, supra note 7, at 254 (noting that federal regulation aids in assuring that monopoly companies do not engage in predatory pricing, which is illegal under § 2 of the Sherman Act). Predatory pricing occurs when a company reduces prices below cost in order to force competitors out of the market. Id.
such as a local electric company, may enter the information superhighway and start providing high-speed Internet access.\footnote{174}

V. CONCLUSION

In the not too distant future it will be almost impossible for consumers to tell the difference between a cable company, a telecommunications company and an Internet service provider. A single provider will offer all three types of services, and possibly more, in a digital format over primarily fiber optic broadband plant.\footnote{175} It seems futile then for Congress to attempt to individually categorize these merging technologies, just for the purpose of establishing federal agency authority to regulate.\footnote{176} Statutes such as § 224(b)(1), which allow broad regulation as long as the regulation is “just and reasonable,” are the best way to deal with emerging technologies that defy definition at every

\footnote{174} See supra note 161 and accompanying text (discussing converging technologies). See also Steve Bickerstaff, Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet, 78 Tex. L. Rev. 1, 2-3 (explaining that companies that either did not exist, or were relatively unknown, twenty years ago have become the source of very substantial wealth for their founders and stockholders, due to the explosive growth of the Internet). In addition to adding to our economy, the increased use of the Internet has “altered in a virtually unprecedented fashion the way in which many Americans conduct their businesses, run their households, raise their children, search for or obtain information, conduct their political campaigns, and entertain themselves. Possibly the greatest effect has been and will increasingly be on how and what people communicate.” Id. at 3. See also Steven C. Carlson, A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway, 25 Rutgers Computer & Tech. L. J. 1, 4 (1999) (suggesting that publicly owned utilities offer the lowest possible Internet access rates, and therefore are the best providers of Internet services).

\footnote{175} Esbin, supra note 166, at 118 (explaining that in just using a cable line there are three potential ways to deliver a single, world-wide web page to a subscriber). These three ways are (1) through the cable system over a cable modem, (2) via a broadcaster’s digital signal carried as a channel of television programming over cable systems, and (3) on a dial up basis from a cable operator’s competitive local exchange carrier. Id. This does not include other Internet access options such as, traditional dial up through a wire-based telephone line, high-speed telephone access via DSL, and remote wireless Ethernet systems. See Joseph Kattan, Broadband and Mandatory Access, in E-COMMERCE ANTITRUST & TRADE PRACTICES: PRACTICAL STRATEGIES FOR DOING BUSINESS ON THE WEB at 269, 271-73 (PLI CORPORATE LAW AND PRACTICE, Course Handbook Series No. B0-0116, Mar. 2001), available at WL 1236 PLI/CORP 269 (analyzing the pros and cons of the competition between broadband Internet access and traditional dial-up Internet access). See also Kenneth N. Gilpin, Cable Industry Plays Catch-Up, N.Y. Times, May 19, 2002, at section 3, page 7 (stating that the cable industry must start marketing its Internet services to stay at the forefront technologically).

\footnote{176} See Esbin & Lutzker, supra note 128, at 73 (noting that the FCC recognizes its own “widespread confusion regarding the regulatory status of Internet services provided over cable”). The need to establish a national policy of information services regulation is evident in the “Pandora’s Box” of regulatory consequences regarding the pole attachment, open access and local exchange carrier monopoly debates. Id. This national policy can be accomplished through broad regulation, rather than taking a divide and conquer approach. Id.
turn. The *Chevron* analysis supports this view by directing the courts to defer to an agency’s interpretation of its own statutes, even when the statute itself may be ambiguous.178

The purpose behind the 1996 Telecommunications Act is to prevent monopolies and to encourage the development of, and public access to, information technology and services.179 FCC rate regulation is an essential means to effectuate this end, and now under *Gulf Power*, the rate restraints apply to any type of provider wishing to attach to poles and enter the information technology market.180 It is both too cumbersome and too speculative for Congress to predict and categorize what type of companies will want to attach what type of devices in the future.181

The FCC has the authority to regulate interstate telecommunications.182 With the convergence of present technology, this means that even local, or traditionally intrastate, telephone companies are joining the global communications market, thus falling within the...

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177. See *supra* notes 111 - 122 and accompanying text for a discussion of broad regulation of information services.

178. See *supra* note 45 and accompanying text for a thorough analysis of the *Chevron* doctrine.

179. See *supra* notes 21 - 22 and accompanying text for a discussion of the purpose behind the 1996 Telecommunications Act.

180. Morrissey, *supra* note 101, at 167 (explaining that before the Pole Attachments Act of 1978, the cable industry lacked the bargaining power necessary to prevent arbitrary pole attachment rates by utility pole owners). In addition to being subject to unregulated rates, the cable industry also lacked a forum for review. *Id.* Thus, the Pole Attachments Act was put into place, with a comprehensive plan to address the problems at the time. *Id.* See also 31 FED. PROC., L. ED. §72:364 (May 2002) (explaining that the FCC has the right to hear claims over rates charged to cable television systems for pole attachments that support equipment used to provide non-video services in addition to traditional cable services, as well as claims concerning pole attachments which are used to provide solely intra-state, non-video cable services). Today’s problems concerning the cable industry, and the information service industries in general focus on high technology definitions that Congress was not contemplating in 1978. See *supra* notes 111 - 122 and accompanying text for an explanation. However, the goal behind the Pole Attachments Act should still be the same; to provide uniform regulation and prevent monopolies, regardless of what categorical business the attaching companies are in. See *supra* notes 111 - 122.

181. As Oscar Wilde so aptly put it in 1894, “[*t*here is a fatality about all good resolutions. They are invariably made too soon.” OSCAR WILDE, THE COMPLETE OSCAR WILDE: PHRASES AND PHILOSOPHIES FOR THE USE OF THE YOUNG 855 (Quality Paperback Book Club, 1996).

182. 47 U.S.C. § 151 (2000), which states that the FCC was created for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide, wire and radio communication service with adequate facilities at reasonable charges.

*Id.*
FCC’s jurisdiction. The FCC should equally regulate all companies that want to become players in the “universal service market, and effectively break up the local monopolies that own existing infrastructures, regardless of what category the service providing company falls within. Although the immediate issue in *Gulf Power* is a small, obscure, one-inch technology attachment that sits high in the air atop a pole, the implications of this decision may position the FCC to continue even-handed regulation of the converging information technology industries. After all, what’s in a name?

*Darci Deltorto*

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184. See Mark P. Trincher & Holly Rachel Smith, *Federal Preemption of State Universal Service Regulations Under the Telecommunications Act*, 51 FED. COMM. L.J. 303, 305 (1999) (defining the notion of universal services as extending telecommunications services “to as many members of society as possible” while providing the necessary funding to support this policy).

185. *Brief of Petitioner at 12, Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co.,* 534 U.S. 327 (2002) (No. 00-832) (stating that Congress’ intent to encourage the development of broadband access and to promote the continued development of the Internet is consistent with a broad regulatory regime). This supports the notion that cable television systems can provide commingled Internet access without suffering a financial penalty from the pole owning companies’ unreasonable attachment rates. *Id.* Without broad regulation, “cable television systems are in effect penalized as soon as they invest in providing broadband Internet access as well as cable television service to their subscribers.” *Id.*

186. I would like to thank Professor Jay Dratler, Jr. for his thoughtful insight and guidance in helping me piece together this article.