IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, INC., : Petitioner : v. : No. 00-832 GULF POWER COMPANY, ET AL.; and FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, : Petitioners : v. : No. 00-843 GULF POWER COMPANY, ET AL. :

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Washington, D.C.

Tuesday, October 2, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

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PETER D. KEISLER, ESQ., Washington, D.C.; on behalf of the

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Petitioner in No. 00-832.

THOMAS P. STEINDLER, ESQ., Washington, D.C., on behalf of the Respondents.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-832, National Cable & Telecommunications Association v. Gulf Power Company.

Mr. Feldman.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE PETITIONERS IN NO. 00-843

MR. FELDMAN: Mr. Chief Justice, and may it please the Court:

Under the Pole Attachments Act, the FCC is required to regulate pole attachments to ensure the rates, terms, and conditions for those attachments be just and reasonable.

The question presented in this case is whether two particular types of attachments are covered by the act.

The first is an attachment to provide cable television service and commingled Internet access. That means that over that particular wire at the particular time is traveling both cable television service and Internet access at different frequencies.

The second type of attachment at issue is an attachment used to provide wireless telecommunications services.

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The FCC determined and the most natural reading of the act requires that both types of attachments are covered. The operative provision, the basic coverage provision, defines a pole attachment as any attachment by a cable television system or provider of telecommunications service.

QUESTION: Where do we find the text of the act?

MR. FELDMAN: In the appendix to our petition for certiorari, right at the end. The language that I'm talking about now is on page 205a.

QUESTION: Is it in your brief?

MR. FELDMAN: I'm sure it's in our brief also, but it's not -- it's not separately set forth in an appendix there.

QUESTION: Go ahead.

MR. FELDMAN: But the -- and the section I'm referring to now is section 224(a)(4). It says, the term pole attachment means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

QUESTION: And don't you think it's implicit in that definition that it mean not just an attachment by, but also an attachment for the purpose of the business of?

MR. FELDMAN: I think it's -- what is --

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QUESTION: They couldn't put up a billboard, you know -- you know.

MR. FELDMAN: Right. I think that the use of the term, in particular, cable television system, it has to be part of the cable television system, which could be reasonably construed to mean the -- the network of -- of devices that are used to provide cable television system service to people. I think that's correct, and I think probably the same thing is true with the telecommunications --

QUESTION: Telecommunications.

MR. FELDMAN: -- provider of telecommunications services.

But I -- what I would contrast -- what's at issue here is these attachments are used to provide commingled cable television and Internet access.

QUESTION: Now, is -- is Internet access part of a cable television system?

MR. FELDMAN: The FCC hasn't reached a conclusion on that yet because what the FCC concluded -- and I think what the most natural reading of the statute leads to the conclusion as well -- that if an attachment is an attachment that's used to provide cable television system service, the fact -- or it's used by a cable television system, the fact that it's also used for

something else doesn't exclude that attachment from the act.

QUESTION: Oh, that's fair enough.

But what if -- what if it not only is added to the cable television system, but it also in itself consists of telecommunications?

MR. FELDMAN: If it still is -- well, it would still be. Then it would be covered under -- under either provision of the act.

QUESTION: Well, it would be covered under (e), under -- under the telecommunications rate. Right?

MR. FELDMAN: Well, I wouldn't quite say that. The rate would have to be determined under (e), and I would agree with you on that. But the act -- it concerns rates, terms, and conditions and also mandatory access. And in terms of the basic coverage of the act, what particular rate --

QUESTION: Okay. But we're talking about the rates here. I mean, that's -- that's the fighting issue.

And -- and why -- how could the -- the thing I really do not understand about this case is how the commission could possibly resolve it without ever purporting to decide whether Internet is telecommunications. It has -- it has purported to reserve that question, hasn't it?

MR. FELDMAN: I -- I wouldn't quite put it that way. I think what the commission did, if you look at paragraph 33 and 34 of its order in this case, is what they said is --

QUESTION: Where do we find that?

MR. FELDMAN: That is on page 80 -- the best place to start with is 87a at paragraph 33. That's of our appendix.

What they say is, several commentators suggested that cable operators providing Internet service should be required to pay the section 224(e) telecommunications rate. We disagree.

And then they cite a prior order, the Universal Service Order, where the -- in which the FCC concluded that based on the statutory definition of telecommunications, cable service is not telecommunications. And they concluded that based on the proposition that -- that -- under the statutory definition, telecommunications requires no change in the material transmitted back and forth.

QUESTION: Okay. But you think that -- that issue is up in this case, then, whether -- whether --

MR. FELDMAN: No.

QUESTION: -- indeed, Internet service is telecommunications?

MR. FELDMAN: No, I don't think so for this reason.

QUESTION: Well, you're saying that the -- that the decision here rests upon that.

MR. FELDMAN: No. Excuse me. I don't -- I wouldn't say that's up in this case for this reason. The -- these -- what the court of appeals held is that these wires are not covered by the act at all. They're simply not covered, not under the (d) rate, not under the (e) rate. A utility can charge a -- an attach -- or a cable television system whatever rate it wants, $50, $100, or $1,000. It doesn't matter. The FCC has no jurisdiction.

QUESTION: Well, but the issue is here not whether the court of appeals was right; it's whether the commission was wrong.

MR. FELDMAN: Right, but the rate issue was -- the -- the court of appeals did not -- did not address -- and I don't even think was presented to the court of appeals -- what the proper rate is to apply.

The question is whether the FCC has jurisdiction over these attachments at all, and these are attachments by a cable television system or provider of telecommunications service. And if you look at the -- the -- that coverage provision in (a)(4) that I was referring to before, if it turns out that Internet access is

telecommunications service, if it were to turn out that way, then the act would then -- the attachment would be -- would be protected under both halves of that. It would both be an attachment by a cable television system; it would also be an attachment by a provider of telecommunications service.

QUESTION: Yes, but theoretically it could be -- theoretically it could be neither.

MR. FELDMAN: It theoretically could be neither.

QUESTION: All right. And don't you think, as a result of that, we don't know? We cannot tell. We cannot infer from -- from what the agency did what its view was on this, which is -- at least is consistent with the fact that it's got another proceeding going on to -- to get into the definitional matter.

MR. FELDMAN: I don't think that that's correct.

QUESTION: Doesn't it make sense for us to say to the agency, you've got to explain to us what you at least believe your jurisdictional basis is for this because, depending on whether your jurisdictional basis is the general provision or (d) or (e) may affect that -- that may -- the result in this case could be dependent on that. And we should know.

MR. FELDMAN: I think the agency was very clear that its basis for jurisdiction is (a)(4), which is the

basic coverage provision of the act, and --

QUESTION: All right. Then that -- then that forces -- in other words, you're saying the agency made it clear that it was neither (d) nor (e).

MR. FELDMAN: No.

QUESTION: All right, and I agree.

MR. FELDMAN: No. That's not quite right.

QUESTION: You can infer -- you're right. You can infer that --

MR. FELDMAN: I don't know -- I'll tell you what the agency said. What they said was it's not (e) based on this past precedent, which Congress has now asked us to look into and we're now looking into it once again. We may change our mind, but as of now, it's not (e).

QUESTION: But it could be (d).

MR. FELDMAN: And they said it could be (d) because we're not -- we don't have to decide whether it is a -- whether the Internet access part of it is a provision -- is a cable service because if it's a cable service, it's covered under the terms of (d). If it's not a cable service, we're going to apply the just and reasonable rate as being the same thing --

QUESTION: Okay, but if it's -- if it's under (d), we review it strictly within (d) terms. But if we don't know whether they're acting under (d) or whether

they're acting under the general just and reasonable power, then we've got to decide another issue. We've got to decide whether, in fact, there's anything left under the general power, and if we decide that and say the answer is no, only then do we get to the question whether this -- whether this is a proper jurisdictional exercise under (d).

And we should not have to go, it seems to me, through that sort of byzantine reverse decisional tree when the agency itself could tell us up front what it was acting under. And, therefore, I'm suggesting that maybe on this part of the case, the wise thing to do would be to vacate, send the thing back, and say, tell us -- you know, come to grips with us and tell us what you believe you're operating under and we'll review that.

MR. FELDMAN: But I -- I think the agency was quite clear, and they pinned their decision --

QUESTION: They were quite clear that it wasn't (e), but they're not quite clear on anything else.

MR. FELDMAN: Right, but the question of then whether it's (d) or not is -- just has to do with the question of what the right rate is. What the agency was 100 percent clear on was this is an attachment by a cable television system, and therefore, the FCC has authority to provide for just and reasonable rates. I would add --

QUESTION: Mr. Feldman, are you saying that it's an academic question what the precise rate is when we're dealing with a court of appeals decision that says that's irrelevant because there is no authority at all in the FCC?

MR. FELDMAN: And I'd like to address that. I think that the point is that is not a -- even almost not a -- probably not a possible reading of the statute, and certainly not the one that the FCC -- once the FCC adopted a contrary one --

QUESTION: So, you're asking us to say that the FCC does have authority. Which particular rate category it falls under is for another day.

MR. FELDMAN: That's right.

QUESTION: But the basic question is does it have any authority to come up with a just and reasonable rate at all.

MR. FELDMAN: That's correct. And I would --

QUESTION: But it's also the case that we are being forced to decide an issue which, if the agency were clear and came out and said it's (d), we wouldn't have to decide.

MR. FELDMAN: I -- I don't think that that's right because whether the agency says it's (d) or not, the fact is that (a)(4) covers this. And let me -- let me

give this as an illustration.

QUESTION: Well, yes, but that's the -- that's one of the issues.

MR. FELDMAN: I realize that, but that -- that issue, it seems to me, is not a difficult one. If you look at (d), for example, (d) -- Congress knew quite well, when it was dealing with rates, not when it was dealing with terms, conditions, or mandatory access, which are also at issue in the statute -- when it was dealing with rates, it was quite clear this subsection -- that's (d)(3) -- shall apply to the rate for any pole attachment used by a cable television system solely to provide a cable service.

Now, if Congress wanted to limit the -- the coverage -- the general coverage of the act, it could have used exactly that same language, and in (a)(4), it could have said, the term pole attachment means any attachment by a cable television system used solely to provide cable service. But Congress actually made a distinct choice. For purposes of the rate, it did want that to govern, and it had a reason for doing that, which I can go into.

QUESTION: I can give you -- I can give you another -- another plausible explanation. Indeed, I think it's -- it's to my mind the most plausible explanation. I think Congress divides the world -- the world -- of what

can go on poles into cable and telecommunications. There are these two categories. That's the only reason people are going to string wires: cable or telecommunications.

Then when it got to prescribing the rates, what are you going to do with something that overlaps between the two? You can provide one rate for cable, another rate for telecommunications. What about one that is both? You solve that question by, in the first rate section, saying if it's cable only, it has this rate, and if it's telecommunications, which is everything else, including the mingling of telecommunications with cable, it's another rate. That would be a perfectly plausible explanation of why Congress put cable only in the later section and in the earlier section just talked about cable because it thought anything else that cable does will be telecommunications.

MR. FELDMAN: Well, if Congress thought that -- again, the result of -- of if that were true could be that the (e) rate might apply to this thing, but it would still be that the (e) rate applied. It would not be that this -- that these attachments are not protected at all.

And I would add that in 1996, when Congress passed this statute, the FCC had already determined in several cases that a cable attachment that's also used to provide data transmission services was still an attachment

by a cable television system and still entitled to the protection of the Pole Attachment Act. That -- that decision was affirmed by the D.C. Circuit in the Texas Utilities case in 1993, and the FCC had applied it in several cases after that.

So, by the time Congress -- and Congress did not change any of the relevant language that was important for that decision. It still left it the pole attachment means any attachment by a cable television system.

I mean, I would add if the -- whatever the FCC is to -- is going to determine about what the Internet access is, whatever they would determine about that, the attachment would still be an attachment by a cable television system. I don't see how you can construe it to mean it's not any longer an attachment by a cable television system. It may be something else as well.

QUESTION: But let's assume that the FCC determines that this is not telecommunications --

MR. FELDMAN: And I think they have determined --

QUESTION: -- and it's not -- and it's not cable, and you have a hybrid cable. Would the commission be within its authority to charge the cable company more for the hybrid cable than it does for the regular cable?

MR. FELDMAN: If it turned out that this

additional -- the addition of Internet access meant that it was neither cable nor telecommunications service -- that that additional service was neither -- neither of those, then the FCC would have to figure out what the just and reasonable rate would be for that. And they would have a range of choices, and they'd have to justify what --

QUESTION: So, it could charge more for a hybrid than for a pure cable.

MR. FELDMAN: It's possible the FCC could do that. And I'll tell you why the FCC didn't and why the statute --

QUESTION: But I'm -- I'm wondering why that can be because it has no jurisdiction over pure Internet.

MR. FELDMAN: No. But this is the point, and I think -- I think this is crucial and this is the mistake the court of appeals made. The court of appeals started by saying the question in this case is whether the FCC has jurisdiction over Internet access. The FCC doesn't purport to have jurisdiction over Internet access. And if you were dealing with a wire that only provided Internet access, that would be a completely different question.

QUESTION: I agree, but then my question is why can it possibly charge more for the hybrid cable.

MR. FELDMAN: Well, you know, I don't want to

justify that decision because what the FCC decided is that that wouldn't be what it would want to do. If -- it decided that if it's a hybrid like that --

QUESTION: Well, but --

QUESTION: It's even worse. They're -- they're saying even though the section says you charge this rate when it's cable only, we're going to say you can charge this rate when it's cable plus Internet. You think that's better.

MR. FELDMAN: Yes, because I think that what Congress wanted to specify when it said when it's cable only is it wanted to ensure that -- and this is actually fairly clear -- is when the cable companies went into -- into the business of providing telephone service to people, that they would be charged the same rate as the telecommunications providers who were newly added to the act.

But that was not their intent. With -- with respect to Internet access, they didn't have a specific intent like that. They had an intent that Internet access should be characterized however it should be characterized.

What you do know is that if, at one and the same time over that same wire, are proceeding -- is a -- a cable television service and Internet access, it is an

attachment by a cable television system. And the fact that the cable television system is providing something else through that wire doesn't preclude the application of -- of -- doesn't preclude the FCC's jurisdiction.

QUESTION: If you ignore the doctrine inclusio unius, exclusio alterius, and you say these are the rates when it's cable only.

MR. FELDMAN: But that's --

QUESTION: And the FCC has come and said, these are also the rates when it's cable plus.

MR. FELDMAN: But that's again -- that could lead --

QUESTION: It seems to me a little strange.

MR. FELDMAN: If that were true, that could lead to the conclusion that the FCC's choice of rate here was wrong and maybe it should have chosen the (e) rate or some other rate. But that couldn't lead to the conclusion that an attachment by a cable television system is outside the act. And in fact, if it were outside the act, it's -- it's not -- it's very difficult to understand why Congress didn't take that solely by a cable -- solely to provide cable television services and put it right here in (a)(4) in the basic coverage provision.

QUESTION: Mr. Feldman, do I understand your argument that if we should reverse the Eleventh Circuit

and say there is FCC jurisdiction, then it would go -- then it would have to await your ongoing rule making to determine which category this is, or would there be something for the Eleventh Amendment to do on remand once we say you have jurisdiction to do something?

MR. FELDMAN: I think that -- that if the issue was preserved before the Eleventh Circuit, they would have jurisdiction to determine what the right rate is, and look at what the FCC's reasoning was and whether -- you know, the various conclusions the FCC reached in coming to the (d) rate.

I'd like to reserve -- well, maybe I should address the other issue just for a minute. The other issue seems -- is -- really rests on the same basic premise, which is an attachment by a wireless telecommunications provider is an attachment by a telecommunications provider. The statute defines the provision of telecommunications service as the offering of telecommunications to the public regardless of the facilities used, and it therefore precludes making a distinction between wireless and wireline telecommunications providers.

I'd like to reserve the balance of my time.

QUESTION: Thank you, Mr. Feldman.

Mr. Keisler, we'll hear from you.

ORAL ARGUMENT OF PETER D. KEISLER

ON BEHALF OF THE PETITIONER IN NO. 00-832

MR. KEISLER: Mr. Chief Justice, and may it please the Court:

The central feature of the provisions of this act that define its scope, sections 224(a)(4) and (b)(1), is that the threshold question of whether an attachment is covered by the act turns on the nature of the facility not on what service is provided over that facility. Section (a)(4) defines pole attachment as any attachment by a cable television system. And, Justice Scalia, cable system is a defined term in the act. Section 522, subsection 7 defines a cable system as the physical equipment that constitutes the cable network. It's on --

QUESTION: You say the attachment of a cable system. It says an attachment by a cable system. You make a big deal of that in -- in the brief, and I don't see that it makes any difference whether it says cable company or cable system. It is still an attachment by a cable either company or system. It doesn't say the attachment of a cable system.

MR. KEISLER: Well, it's an attachment by a cable television system to the pole, and the system itself is defined as a set of closed transmission paths and associated signal and generation/reception control

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equipment that is designed to provide cable services which include video programming. These wires which are attached to the poles are one of those closed transmission paths that constitute the cable system under that definition.

Now, it's -- it's not the case I think, Justice Scalia, that Congress could have divided the world solely into cable services and telecommunications services because there are lots of services that don't fit either definition. Telecommunications service is the offering of telecommunications, which is defined in section 153 of the act as the transmission of information of the user's choosing without change in the form or content.

Internet access, the commission has found, changes the form of the information. An Internet service provider engages in something called protocol conversion so that the message that goes out from your computer can actually talk to the service and computers that comprise the worldwide web. So, it is not a telecommunications service. The commission correctly found that.

And applying telecommunications service regulation to everything that's not a cable service would mean applying a whole host of legacy telecommunications statutes and rules to a whole sector of the economy that has always been unregulated, information service providers.

And, Justice Souter, I don't think a remand to the FCC would be appropriate. Essentially -- unless you conclude that they're wrong on the theory of the case on which they resolved it.

But you suggested, Your Honor, that the commission could have reached the same result through an alternative path. It could have said, well, this is a cable service, therefore the (e) rate applies.

But I think the question for this appeal is was it arbitrary or capricious or contrary to law for the commission to resolve the case the way it did. If the commission's legal interpretation of section (a)(4) is correct, that it applies to any attachment by a cable television system, and a cable system includes wires that commingle Internet access and video programming, then it's not arbitrary or capricious or contrary to law for the commission to resolve the case the way it did. And I think beyond that, it was perfectly reasonable.

The question of whether this is a cable service is a very big question with immense regulatory consequences that determines again whether a whole host of regulations that go well beyond the Pole Attachment Act will be applied to this service. The commission said we don't need to decide that here since we would choose to apply the (d) rate anyway. We'll postpone that to a later

proceeding where we can gather a record. That proceeding is going on now, and that's going to be resolved in that proceeding.

QUESTION: But -- but that means that they can get away with it only if they are correct that -- in choosing to apply the (d) rate.

MR. KEISLER: It means --

QUESTION: If that selection of the (d) rate is wrong, then their assumption that they don't have to get into that question is also wrong.

MR. KEISLER: It could only be wrong in two circumstances. It could be wrong if this were a telecommunications service, and no one has sought cert on the ground that the commission erred in finding this wasn't a telecommunications service. Or it could be wrong because it was arbitrary and capricious for them to exercise their authority under subsection (b) to choose this particular rate rather than another rate. But again, nobody has sought review on that question before the court of appeals or before this Court.

The sole claim that respondents made in their petition for review is that we are out of the statute entirely, completely unregulated, that we get kicked off the system the instant we provide any service other than cable only or telecommunications. And that's just not a

plausible reading of the statute. They have not been able to posit a single plausible purpose for that result. In fact, their brief actually refers to it as an unanticipated consequence of the way the statute is written.

But we know the Congress wanted to promote Internet access. It said so in the statute itself, section 230. We know that Congress believed that cable television systems needed continued rights to access poles. It said so in 224. The only way to serve both objectives is to cover commingled attachments.

QUESTION: You say they haven't sought cert on it, but -- but they're -- they're the respondents here. I mean, they --

MR. KEISLER: Oh, I'm sorry. They didn't petition for review before the Eleventh Circuit. There's no claim ever in this case that the utilities have made that the commission chose the wrong rate.

QUESTION: Well, but it seems to me they're -- they're entitled to defend the -- the outcome below on any -- on any ground.

MR. KEISLER: But they haven't defended on that ground, Justice Scalia. They've said, we're out of the statute entirely. They haven't said, choose a different rate. They said the commission has no authority to set

any rate at all.

And that can't have been Congress' purpose. Congress has always understood that the cable wire into the home is potentially capable of carrying many, many services other than simply television programs. That's why they were so careful to define cable system as a facility designed to provide cable services which include video programming, not which are exclusively video programming, but which include video programming. There was testimony before Congress, findings of the FCC that the cable wire had potential of becoming a broadband communications gateway. And the packing of multiple services into this wire was considered a good thing, good for consumers and good for competition.

QUESTION: Can we talk for a minute about the attachment of wireless --

MR. KEISLER: No. The National Cable & --

QUESTION: You don't care about it.

MR. KEISLER: We don't have a position.

QUESTION: You don't care about it.

(Laughter.)

MR. KEISLER: But the packing of multiple services into this wire -- that was considered a good thing. And every one of those services is equally dependent on access to poles. That's why the coverage in

the statute turns on the nature of the facility and not what service is provided over that facility because whatever the service is, if it's provided over a wired facility, the poles are going to be an essential communications pathway to reach the home. And Congress could not have wanted us to be kicked off the system simply because we ventured beyond the two specific services that they enumerated in subsections (d) or (e). That doesn't make sense.

And, in addition, I think it has --

QUESTION: As far as Internet is concerned, you wouldn't be kicked off. If -- if Internet were telecommunications, you wouldn't be kicked off.

MR. KEISLER: No. That's right. But if Internet were neither telecommunications nor a cable service or if we came up with another service in the future that was neither telecommunications nor a cable service, then we'd be kicked off. And Internet access is not a telecommunications service because the form of the signal is changed by the Internet service provider. So, the consequence of this really would be that we would be kicked off.

If the Court has no further questions.

QUESTION: Thank you, Mr. Keisler.

Mr. Steindler, we'll hear from you.

ORAL ARGUMENT OF THOMAS P. STEINDLER

ON BEHALF OF THE RESPONDENTS

MR. STEINDLER: Mr. Chief Justice, and may it please the Court:

I'd like to, with the Court's permission, just say a few words about the wireless issue first so it doesn't get lost here. It's a very important issue to the industry.

I'd like to turn again straight to -- to the text of the statute, which is reprinted at the back of the appendix to the petition, turn first to section 224(b)(1), which provides that the commission --

QUESTION: On page what?

MR. STEINDLER: I'm sorry. It's at page 206a of the appendix to the petition.

QUESTION: What is --

MR. STEINDLER: It's 47 U.S.C., section 224(b)(1).

QUESTION: Thank you.

QUESTION: And the page reference again? Excuse me.

MR. STEINDLER: It's 206a of the appendix to the petition.

(B)(1) says, in pertinent part, that the commission shall regulate the rates, terms, and conditions

for pole attachments. That's the general grant of authority.

Pole attachments is then defined on the previous page in section 224(a)(4) as any attachment by a cable television system or, in this case the pertinent -- of pertinence, a provider of telecommunications service, which is elsewhere defined to include wireless companies.

Now, the Government asks you to stop reading the statute right here and say that any attachment means literally any attachment and that that would include wireless equipment.

QUESTION: It's even funnier than that. They acknowledge that it doesn't include billboards. It doesn't include billboards.

MR. STEINDLER: Indeed.

QUESTION: But it includes nailing up a wireless thing.

MR. STEINDLER: Well, the Government, on this issue and also on the Internet issue, they've -- they've ignored some of the basic rules of reading a statute, and what they've ignored here is the basic rule that you have to read the whole statute and the meaning that any of the phrases, like any attachment here, is informed by context. If you keep reading this statute, it tells you what any attachment means, and it tells you that, if you turn to

section 224(d) and (e), which are the rate sections --

QUESTION: But before you turn to the next section, staying with (a)(4) for a minute --

MR. STEINDLER: Sure.

QUESTION: -- it's any attachment to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

MR. STEINDLER: Correct.

QUESTION: Does that language apply to what we're talking about?

MR. STEINDLER: Of course.

QUESTION: Oh, okay.

MR. STEINDLER: Of course. The utility -- there's a jurisdictional predicate here in (a)(1), which is a utility -- this is a -- I'm here representing the utility companies, and they own and control poles, ducts, conduits, or rights-of-way.

QUESTION: So that literally the definition does apply regardless of the purpose of the attachment.

MR. STEINDLER: If -- if you stop reading -- if you stop reading the statute there, you could come to that conclusion, but you need to read the whole statute, and if you do, sir, with respect, in (d) and (e) are the two rate formulas. (D) is the rate formula for cable only, and it provides for a rate that says --

QUESTION: May I just -- may I just cut you short because I want to get one thought out of my mind.

MR. STEINDLER: Sure.

QUESTION: Do you read it as saying provided that the attachment is used either for a (d) or an (e) purpose?

MR. STEINDLER: Correct.

QUESTION: So, those are exclusive uses.

MR. STEINDLER: Correct.

QUESTION: Okay.

MR. STEINDLER: And it's under the -- we'll get to there in a second, but it's under the --

QUESTION: And -- and no other uses.

MR. STEINDLER: And no other. Correct. Under the exclusio unius principle, (d) and (e) are the only purposes that are authorized here, and others are intended to be excluded. You have to ignore that fundamental canon of reading a statute --

QUESTION: I just wonder why.

MR. STEINDLER: Say that again?

QUESTION: I just wonder why. I mean, as far as I read (d) and (e), they address a typical, but not most important, regulatory problem. How do you divide fixed costs among several different uses? It's the same problem with oil wells that produce natural gas. It's the same

problem with chickens under price control. And (d) and (e) provide two ways. Nothing there purports to be the exclusive way. Indeed, I think an economist would say that neither (d) nor (e) is the economically correct way. They're approximations.

So, why don't we have simply here two ways among -- I could give you 50, frankly. So, could you. So, what is it that says if you happen to have this, you use this way; if you happen to have that, you use that way? If you happen to have something we're not too interested in because it's not that common, but if you should have it, you can try yet a third, a fourth, or a fifth way. That would make this statute consistent with every other regulatory statute I know, and moreover, it would make sense.

MR. STEINDLER: I think there are several answers to that question. The first is that, indeed, you know, you have the expressio unius doctrine, and in this case, you've got Congress -- and now we're off to the Internet issue.

QUESTION: We're off on the other issue.

MR. STEINDLER: We've gotten off to the issue, but let me just answer the question quickly, if I could.

You've got Congress providing very detailed formulas for two specific kinds of services that go

through a wire: cable service and wire service. You have to ignore the expressio unius doctrine to conclude that they also have authority for another type of service.

QUESTION: Well, you -- you don't if -- if you characterize (b) the right way. You began by -- by saying, before we started questioning, that (d) provides the exclusive -- I think you used the word formula. But that's different from the exclusive authorization to set rates, and the authorization is in (b). (D), as Justice Breyer pointed out, are two specific formulae that the commission must use. But that's -- that's not necessarily to cover the whole universe of rate setting. So, I don't see why the exclusio unius even applies.

MR. STEINDLER: You'd have to -- in order to come to that reading, you'd have to separate this -- this very detailed set of rate formulas from their general jurisdiction to regulate. In other words, you'd have to assume that -- that Congress intended to give jurisdiction that was undefined, that was under a bare just and reasonable power for anything other than cable and wire service. But --

QUESTION: More than that. As one of the briefs points out, you'd have to assume that for services that are beyond the ordinary regulatory bailiwick of the FCC, the FCC has been given unrestricted powers to set rates --

MR. STEINDLER: Right.

QUESTION: -- whereas for those areas that are within its special expertise, cable and telecommunications, Congress has specified the rates. But if it's beyond that in areas that you don't know squat about, you can -- you can pick whatever rate you like.

QUESTION: I'm glad you agree with that. I just wonder what's so odd about Congress giving regulatory authority to set just and reasonable rates to a regulatory agency and then taking out two areas, it happens to be, that the industry is particularly interested in and negotiating a specific formula, while leaving others -- I've seen it a thousand times in regulatory statutes -- leaving others for the agency to proceed under normal, ordinary, just, and reasonable rate setting authority.

MR. STEINDLER: I think another answer -- and again, I do want to return to the wireless issue because it does tend to get lost in the shuffle here.

Another answer is this. This is not an ordinary agency case. This is not a case where an agency is regulating an industry under its organic statute. This is not Iowa Utilities. This is a case where the electric industry here, which is principally regulated by other agencies, is now being regulated also by the FCC.

Congress -- people were very concerned about

giving the -- the communications agency jurisdiction over the electric industry. The White House's Office of Telecommunications Policy wrote two letters to Congress expressing that concern when the act was being considered, and Congress said, in the legislative history, quite clearly we're giving the FCC a very narrow grant of jurisdiction. And one of the ways that you give an agency a narrow grant of jurisdiction is you constrain their discretion. They've given them very detailed formulas to -- to govern the exercise of their discretion in these two particular circumstances.

QUESTION: Yes, but it's very narrow because they're only talking about attachments to utility poles. They aren't talking about much else in the -- in the utilities business. It's a very narrow aspect of the utilities' overall operations.

MR. STEINDLER: Not only are they talking about attachments to utility poles, but they're only talking about attachments to utility poles for two kinds of services.

And remember this. Not everybody that has an attachment --

QUESTION: Well, that's an assumption. The statute doesn't really say that. It doesn't say that only these two kinds of services --

MR. STEINDLER: Well, that's -- that's --

QUESTION: It says if you have two kinds of rates, these are the formulas for those two. But I don't see where it totally forecloses attachments for other purposes.

MR. STEINDLER: If -- well, certainly if you read this canon -- if you read the statute with the canon of expressio unius, you -- there needs to be some --

QUESTION: Well, the expressio unius relates to rates. It doesn't relate to regulatory authority. Justice Kennedy pointed out.

MR. STEINDLER: Well, again, you would end up --

QUESTION: And it not only fixes rates, it requires access. There are two things that the commission can do. It can say you've got to let these people hook up to the pole and you can only charge them so much. There are two different things.

MR. STEINDLER: Indeed. The statute provides a mandatory access provision and a rate provision. But again, you have to come to the conclusion that for these specific types of services that are enumerated in the statute, there's a very detailed set of formulas that come to it. But for unenumerated services which --

QUESTION: It's only detailed on rates. It's not detailed on the access provision.

MR. STEINDLER: Indeed, indeed.

If I could just return quickly back to the wireless issue, the -- the -- (d) and (e) provide, in a sense, formulas for these two types of rates. In (d), the attacher pays either somewhere between an incremental cost and a proportionate share of the useable space. In (e), it's a higher rate. It's a proportionate share of the usable space on the pole and the unusable space on the pole. And that's reflected on page 209 of the -- of the appendix in -- in 224(e)(3), which reads, a utility shall apportion the cost of providing usable space, and then the immediately preceding section, 224(e)(2) talks about the portion of the cost of providing the space other than usable space.

Now, the operative term in both (d) and (e) is usable space, and the statute defines usable space. Usable space is where attachments go. If you look at 224(d)(2), on the -- on page 208a, the statute defines usable space as the space above the minimum grade level, which can be used for the attachment of wires, cables, and associated equipment. That's what this statute is about: wires, cables, and associated equipment.

QUESTION: Now, what you mean by associated equipment, I suppose, is -- I don't know -- joint boxes, lightening arresters, things of that sort.

MR. STEINDLER: Associated equipment is equipment that is used to make the wires and the cables work.

QUESTION: Why couldn't associated equipment mean for the -- for a wireless company -- I guess very few of these wireless companies are entirely wireless. Some -- some portions of their system go over wire.

MR. STEINDLER: Correct.

QUESTION: So, why couldn't the wireless boxes that they nail on these -- on these poles as pole attachment be deemed associated equipment of these wires that they use elsewhere?

MR. STEINDLER: Well, again, it's wires, cables, and associated equipment, and not equipment and -- and associated wires and cables.

The FCC has never until its -- the Government's reply brief --

QUESTION: You think it has to be associated with the very wires and cables that -- that are attached?

MR. STEINDLER: Of course. Under just familiar ejusdem generis principles, in that phrase, wires, cables, and associated equipment, the associated equipment is subordinate to the words that precede it and is delimited by those two words.

The Government argues for the first time, in its

reply brief, that -- that wires and cable -- or that -- that wireless equipment ought to be able to come within the scope of associated equipment here. And they argue, well, much like Justice Scalia just -- just mentioned, they could be the -- the same shape. You might have a piece of wireless equipment that's the same shape as the kinds of things like mounting brackets or splice boxes that are used as associated equipment.

But leaving aside the fact that this just occurred to the Government here in its reply brief, a toaster is the same shape. It has a box-like shape, but no one would really argue that it is associated equipment within the meaning of the phrase.

This -- this issue with the wireless issue really boils down to the question here of whether associated equipment is wireless. We submit to you that it can't be. That conclusion is buttressed by the definition of utility in this act. The definition of utility --

QUESTION: I'm lost. Can you just tell me, where does the term, associated equipment -- what section was that in?

MR. STEINDLER: It's in section 224(d)(2) on page 208a of the --

QUESTION: I've got you.

MR. STEINDLER: You've got it? Okay.

If you turn to the definition of utility, which is in -- at the beginning of the statute, 224(a)(1) on page 205a, it reads in pertinent part that a utility is a person who owns poles, ducts, conduits, and rights-of-way used, in whole or in part, for wire communications. It doesn't say wireless communications. It doesn't say communications. It says wire communications. And that certainly supports the negative inference that the court below drew from this language that we're talking about wire communications in this statute, not wireless equipment.

QUESTION: Yes, but when -- given -- given the fact, as somebody pointed out -- I guess Justice Scalia pointed out earlier -- the wireless companies always have some wires. Why isn't the existence of -- of that wire portion of their equipment sufficient to fit within the statute?

MR. STEINDLER: Two things. First of all, again we're talking about wires, cables, and equipment that's associated with that. And the -- the -- the particular wires that are associated with a wireless antenna, which run down the pole --

QUESTION: You mean it's going to be a wire on the pole or -- or associated --

MR. STEINDLER: Correct. It's got to be a --

QUESTION: Yes.

MR. STEINDLER: Right. That's our argument.

And I think also one last quick point on -- on wireless. What the Government is doing here -- the FCC is making a revolutionary expansion in its jurisdiction. Wireless antennas are ubiquitous, and what the FCC has said is that we're going to regulate a very narrow portion of the wireless siting market, i.e., just those wireless sites that are owned by utility companies. So that a wireless antenna that goes up on a -- on a rooftop --

QUESTION: Non-wireless sites that are used by a utility.

MR. STEINDLER: Say that again?

QUESTION: Non-wireless sites that are owned by utility companies. If a utility company only -- only has permitted the stringing of wire, it has opened itself up, has it not, under this rule --

MR. STEINDLER: Yes.

QUESTION: -- to mandatory carriage of -- of wireless?

MR. STEINDLER: Correct. That's the -- that's the Government's argument.

This -- under this FCC's -- under the FCC's reading of this statute, which is impermissible if you

read the whole statute, they have -- they have decided to take this revolutionary expansion of their jurisdiction to regulate this tiny piece of the wireless siting market. But if Congress had intended the FCC to regulate the wireless siting market in this peculiar kind of way, just utility sites, clearly they would have said something about it. And they didn't here, which is another part of the context here of the statute which informs the reading of the phrase, any attachment, in the statute.

QUESTION: Mr. Steindler, could I ask you a question that gets you to the other -- to the other issue? Is it -- is the Government correct that you lose if the -- even if the rate applied by the FCC is wrong, that the only thing you're asking us is to say that the FCC has no jurisdiction? It wouldn't even matter if the FCC should have been treating this under (e) as telecommunications. That isn't what you're asking for.

MR. STEINDLER: Well, no, it's not. If the FCC had gone through the exercise that you had suggested and classified cable modem surface -- service, as either a cable service or a telecommunication service or neither, as an information service, if it had gone through that exercise and that exercise had survived a challenge, then this -- the game would be over. It would be if it's a cable service or a telecommunications service, it would

fall within (d) or (e).

What the FCC has done here -- and the reason that we're in this awkward posture -- is they've refused to make that classification, but they've decided that, nonetheless, cable modem service, even though we don't know what it is, is going to be treated under (d), which Congress has said will be applied solely to cable service. The statute --

QUESTION: Well, they -- they didn't say it would be treated under (d). They said under (a) we're going to proceed the same way -- or under -- under whatever it is --

MR. STEINDLER: (A) and (b), correct.

QUESTION: Under (a) and (b), we're going to -- we're going to use the same rate that Congress specifies in -- in (d). They don't say it's under (d).

MR. STEINDLER: That's correct. That's correct. A distinction I think without a difference from our perspective.

QUESTION: From your perspective.

MR. STEINDLER: But that's indeed what they -- what they've done.

A couple of points to make here quickly. One is that -- that indeed what Congress was doing here, as the petitioners have pointed out, was dealing with the fact

that cable companies were going to be getting into the telephone business. And this Texas Utilities case, which the Government mentions in its brief, stands for the proposition in the pre-'96 era -- in the pre-'96 statute -- that if you're a cable company in the telephone business, you get a regulated rate for your attachment, and -- and therefore can compete against the ILEC's, which is what the larger purpose of much of the '96 act was about.

But if you're -- if you're a CLEC, if you're a telephone company, a communications company, that's in the same business and providing the same service, you don't get a regulated rate. That was a regulatory anomaly, as the legislative history calls it, and Congress dealt with that head on in the statute. And it provided in section (d) and section (e) -- it -- that -- that where you have -- it added telecommunications carriers to the statute, although it exempted the ILEC's.

Remember this. The cable companies' biggest competitors in high-speed services business, the DSL lines, or the local phone companies, don't have regulated pole attachments. And that's what, in many respects, is driving the cable companies.

QUESTION: Say it again. The local phone companies --

MR. STEINDLER: The local phone company is exempted from the statute. Let me show you where. If you turn to the definition of a telecommunications carrier on page 205a, in section 224(a)(5), for purposes of this section, the term telecommunications carrier does not include any incumbent local exchange carrier as defined in section 251.

QUESTION: Is that because they have their own poles?

MR. STEINDLER: They have very few of their own poles. I think largely -- Congress didn't say exactly why they were -- why they were doing this.

But remember what the larger purposes of the '96 act were. The '96 act was designed to create competition to the local telephone companies.

QUESTION: I thought the purpose of this -- and I'm really asking this question because I want to hear what your argument is on the main point in this case, if it's different from what you've already said. I mean, you've been talking about wireless for a long time, and now maybe you're back to the main point.

MR. STEINDLER: Indeed.

QUESTION: All right. And if you're going to be right on the main point, my main question on the main point is I thought that the purpose of this act basically

is that Congress discovered that the utilities have poles everywhere. There are new competitors coming along that could use those poles to transmit their networks at lower cost, but the utilities have a monopoly. And we want to make sure that a monopoly, a monopoly into -- a monopoly does not charge a monopoly price and, therefore, we want them regulated. And, therefore, they wrote very broad language to throw into what is going to be regulated virtually everything related to communications that will meet that kind of problem. Now, that's my -- I'm -- I'm saying this to get you started on what I consider the main point.

MR. STEINDLER: Right, and I understand that. I think the answer is that this statute is not written in very broad language. This statute is written very narrowly. Congress said it was to be construed narrowly, and it provides, with great specificity, what services are regulated and how they're to be regulated. And -- and I think that really addresses the fundamental question here.

QUESTION: Yes, except the jurisdictional language is broad.

MR. STEINDLER: Well, let's talk about the jurisdictional language --

QUESTION: And the language that you point to as narrowing is language that picks out two categories of

rate setting.

MR. STEINDLER: The jurisdictional language is not as broad as it may appear to be. The --

QUESTION: It doesn't include toasters and it doesn't include billboards, I agree.

MR. STEINDLER: Yes, but it also doesn't include commingled cable and Internet service. And the reason that it doesn't include that is that Congress specifically -- as Mr. Keisler pointed out, Congress specifically defined a cable system in the statute. It's -- it's reprinted. The definition is reprinted at page 19 of the brief of the respondents, American Electric Power Service Corporation.

But remember -- remember what we're talking about. We're talking about a pole attachment definition which is any attachment by a cable television system. Congress has defined this term.

Now, Justice Scalia remarked earlier that it was -- it's an attachment by a cable -- a cable system, not of a cable system. And, indeed, there is awkwardness in this language, but I would submit to you that the express definition of cable system will trump any awkwardness in grammar.

QUESTION: Well, there's an awkwardness that I don't understand. The '96 act was extending the benefit

of attachment a group that hadn't had that benefit before. What is there that makes sense of saying, cable company, if you dare to go into the Internet business, you are going to be, in the words that were used before, kicked off the pole. That's it. If Congress was trying to encourage development of Internet service, it also wanted the cable system to get onto that pole at a rent that was not a monopoly rent. What sense would it make to say, cable company, you dare to go into the Internet access business, you are off the pole entirely?

MR. STEINDLER: Well, Congress has talked sort of out of both sides of its mouth about the Internet. It wants to promote it on the one hand, indeed. But it also wants to be sure that it keeps its hands off the Internet and has -- has said -- announced its policy that it's going to -- the Internet ought to develop unfettered by Federal and State regulation.

Remember this, that -- that the pole attachment statute was designed originally to help cable companies in their infancy, when they were mom and pop cable shops.

QUESTION: It doesn't fetter the Internet. This fetters the utility companies.

(Laughter.)

MR. STEINDLER: Indeed. Indeed. But -- but you've got the -- you've got a statute that says the

following very clearly. We're going to give you -- it makes it clear now that we're going to give you one rate if you're providing cable only, and we're going to give you another rate, a much higher rate, if you add a service to that wire, which is the telecommunications service.

It's not incomprehensible or unclear that if -- if the cable company makes a decision to step into the Internet business, that it -- that it simply opts out of the statute. These cable companies --

QUESTION: Well, that's your position. That's how you read the statute.

MR. STEINDLER: Correct.

But these cable companies are -- are not mom and pop shops anymore. They're some of the biggest companies in the United States.

QUESTION: But is there anything in the legislative history, anything that indicates that Congress wanted to take this benefit away from the cable systems if they were also offering Internet access?

MR. STEINDLER: Let me -- the answer is yes, and it comes in the definition of a cable system. A cable system is a set of facilities, but where you're a common carrier -- that is to say if you're in the phone business and you're regulated as a common carrier -- the definition says you are a cable system only to the extent that you

provide traditional video service. That dovetails here with what Congress has done with respect to cable service in 224(d). It gives this lower rate only if you're providing cable service.

The cable system definition -- let me say that again. You're --

QUESTION: You're not arguing about the lower rate anymore. I mean, you --

MR. STEINDLER: Well, what I'm arguing here --

QUESTION: You're arguing --

MR. STEINDLER: -- is -- is about --

QUESTION: You're arguing that you're off the pole entirely.

MR. STEINDLER: Well, you're -- you're unregulated. That doesn't make you off the pole. The -- the phone company is unregulated --

QUESTION: You can charge anything you want. That's -- you take the cable company that is getting this low rent because the FCC has specified that rent. If it gets into -- into the Internet business, then it's subject to whatever the utility wants to charge.

MR. STEINDLER: If -- if the -- if it gets into the Internet business, it gets put on the same footing as if you're a local phone company charging DSL service --

QUESTION: Whatever -- whatever the --

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MR. STEINDLER: -- which is the market rate.

QUESTION: -- utility wants to charge.

MR. STEINDLER: Correct.

QUESTION: Right. And that's the price of getting into the Internet for a cable system. It has to give up --

MR. STEINDLER: For a cable company.

QUESTION: -- the tremendous advantage that it has.

MR. STEINDLER: It gives up -- it gives up rate regulations here.

QUESTION: Is its main competitor the local phone system?

MR. STEINDLER: Yes, yes.

QUESTION: So --

MR. STEINDLER: But there are two -- there are two big competitors in this business: the local phone company which is unregulated, and the cable company which is seeking this regulation.

QUESTION: How many -- how many poles do the local phone companies own in relation to the utilities that you're representing?

MR. STEINDLER: About 80 or 85 percent of poles are owned by the utility companies; 15-20 percent are owned by the telephone companies.

QUESTION: So, the effect of what Justice Ginsburg is talking about is going to be significantly different in relation to the utilities from what it is in relation to local phone companies. You say, well, it just puts them in the same relationship to the utility as they are to the phone company, but in economic terms, there's a tremendous difference because you've got most of the poles.

MR. STEINDLER: Indeed, but the -- the -- I think the relevant comparison of that would be how many the phone company -- it's putting -- it's putting the --

QUESTION: You can charge --

MR. STEINDLER: -- cable company and the phone company on, more or less, the same footing.

QUESTION: You're -- you're the ones holding -- holding the market position.

MR. STEINDLER: Yes.

QUESTION: You -- you can charge the -- the phone companies whatever you want for their use of your --

MR. STEINDLER: Correct. And remember this. If there is -- these attachers have, if they're unregulated, a remedy if they feel they're being overcharged under the essential facilities doctrine. They go into court and bring an antitrust case.

QUESTION: Mr. Steindler, am I wrong in

thinking --

(Laughter.)

QUESTION: May I just ask one question? Am I wrong in thinking that a local phone company can be a utility within the meaning of the statute?

MR. STEINDLER: Indeed.

QUESTION: Indeed, that I'm wrong, or indeed, it is?

MR. STEINDLER: They're both. Indeed, it is. They are both.

QUESTION: Thank you, Mr. Steindler.

MR. STEINDLER: Thank you.

QUESTION: Mr. Feldman, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE PETITIONERS IN NO. 00-843

MR. FELDMAN: I think it might be worthwhile to point out that the -- the FCC's construction of the act is entitled to deference and is at least a reasonable construction of the act.

But let -- let me go to the -- the point that Mr. Steindler was just making. Congress, in 1978 as a premise of this act, decided that the telephone companies and the utilities had a lot of -- and we cite the -- the committee report that makes this point -- had -- had

interconnection agreements. Some owned -- the utilities owned some poles; the telephone companies owned other poles. They had a longstanding agreements by which everybody used everybody else's poles because everybody had to get a complete network to all the houses.

Now, under -- so, therefore, that is why Congress did not include the so-called ILEC's, the old-fashioned telephone companies, in this act. They already had access to poles. They either owned them or had agreements with longstanding arrangements with -- with the utility -- electric utilities.

On the other hand, there were CLEC's, which are new entrants in the telecommunications business. Those were protected by the (e) rate regardless of whether they do or don't provide Internet access.

Similarly, cable companies, the FCC decided, should be protected by the (d) rate similarly so that if they provide Internet access, they're not penalized thereby and kicked off the pole. Under Mr. Steindler's rule and under the Eleventh Circuit's decision, if a cable company provides Internet access, it's off the pole.

QUESTION: I guess that isn't quite -- I mean, in fairness to what he was arguing, I mean, a person, were this statute not to apply, could still go either to the local telephone company regulators, which I imagine they

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would do in the case of the local phone company, could go to the local public utilities commission, or could go to the Federal Power Commission and ask them for the same kind of protection that the FCC might give them if this act does apply.

MR. FELDMAN: Well, I guess --

QUESTION: Is that right?

MR. FELDMAN: I'm not -- I'm not aware of what the basis of the Federal Power Commission's ability to order --

QUESTION: Well, if it were some kind of high tension wire that was used in transmitting interstate commerce.

But the fact is these areas are all regulated by somebody, and this is really a question of who has what jurisdiction.

MR. FELDMAN: Right, but what -- what Congress wanted was --

QUESTION: Am I right about that?

MR. FELDMAN: I'm not -- I'm not sure about what the -- what the authority of local utility agencies is over the poles as opposed to the rates --

QUESTION: Could they not --

MR. FELDMAN: -- for the service. I just don't know.

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QUESTION: I'm imagining they could -- well, I -- sorry.

MR. FELDMAN: Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Feldman.

The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)

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