X.

Resale Service

This contract is made and electricity is sold and delivered upon the express condition that the Customer shall not directly or indirectly sell or resell, assign, or otherwise dispose of the electricity or any part thereof, to any person, firm or corporation, except where service is supplied under a contract specifically providing for resale.

Under no circumstances will the Company supply electricity for resale in competition with the Company.

Foreign Electricity

The Customer shall not use the Company's electric service in parallel with other electric service, nor shall other electric service be introduced on the premises of the Customer for use in conjunction with or as a supplement to the Company's electric service, without the written consent of the Company.

XI.

Service Interruptions

The Company does not guarantee continuous service. It shall use reasonable diligence at all times to provide uninterrupted service, and to remove the cause or causes in the event of failure, interruption, reduction or suspension of service, but the Company shall not be liable for any loss or damage to a customer or customers resulting from such failure, interruption, single-phase condition, reduction or suspension of service which is due to any accident or other cause beyond its control, or to any of the following:

1. An emergency action due to an adverse condition or disturbance on the system of the Company, or on any other system directly or indirectly interconnected with it, which requires automatic or manual interruption of the supply of electricity to some customers or areas in order to limit the extent or damage of the adverse condition or disturbance, or to prevent damage to generating or transmission facilities, or to expedite restoration of service, or to effect a reduction in service to compensate for an emergency condition on an interconnected system.
2. An Act of God, or the public enemy, or insurrection, riot, civil disorder, fire, or earthquake, or an order from Federal, State, Municipal, County or other public authority.
3. Making necessary adjustments to, changes in, or repairs on its lines, substations, and facilities, and in cases where, in its opinion, the continuance of service to Customers' premises would endanger persons or property.
4. It is expressly understood and agreed that the Company does not contract to furnish power for pumping water for extinguishing fires. In the event that the Consumer shall use said electric power, or any part thereof, for pumping water to be used for extinguishing fires, the Consumer shall, at all times, keep on hand, or otherwise provide for, an adequate reserve supply of water so that it shall not be necessary to pump water by means of said electric power during a fire. It is expressly understood and agreed that the Company shall not, in any event, be liable to the Consumer, nor to any of the inhabitants of any municipal consumer nor to any person, firm or corporation for any loss or injury of or to property or person by fire or fires occasioned by, or resulting directly or indirectly from the failure of any pump, pumping apparatus or appliances to operate, whether said failure shall be due to the act or omission of the Company or otherwise. It is the intention of the parties hereto that the Company shall not, in any event, be liable for any loss or damage occasioned by fire or fires which may be caused by, or result from the failure of the Company to supply electric power to operate such or any pump or pumping apparatus or appliances.

XII.

Denial or Discontinuance of Service

The Company, subject to the rules of the Commission, shall have the right to suspend its service for repairs or other necessary work on its lines, or system. In addition, the Company shall have the right to deny, suspend, or discontinue its service for any of the following reasons:

1. For any misrepresentation as to the identity of the Customer entering the contract for service.
2. For violation by the Customer of any terms or conditions of the agreement between the Company and the Customer, or violation of any of these service regulations which are a part of the agreement.
3. For the reason that the Customer's use of the Company's service is detrimental to the service of other Customers.
4. For the reason that the Customer's use of the Company's service conflicts with, or violates orders, ordinances or laws of the state or any subdivision thereof, or of the Commission having regulatory powers.
5. For the reason that wiring, equipment, appliance or device is installed or in use on the Customer's premises which permits the electricity to be used without passing through the Company's meter, or which prevents or interferes with the measuring of electricity by the Company's meter.
6. For the nonpayment of any bill, when due, for service rendered either at the existing location of the Customer or at any former location.
7. Upon failure or refusal of the Customer to make, restore or increase his deposit as required.
8. For the reason that at the time of application, a member of the household or business at the premises for which the application is being made is indebted to the Company for service previously rendered in any area served by the Company, except that an applicant for residential service shall not be denied service for failure to pay outstanding bills for nonresidential service.

Removal of Equipment

In the event of discontinuance of service or expiration of contract, then it shall be lawful for the Company to remove its meters, apparatus, appliances, fixtures, or other property.

Waiver of Default

Any delay or omission on the part of the Company to exercise its right to discontinue or suspend service, or the acceptance of any part of any amount due, shall not be deemed a waiver by the Company of such right so long as any default in whole or in part or breach of contract on the part of the Customer shall continue, and whenever and as often as any default or breach of contract shall occur.

Reconnect Fee

In case of discontinuance of service for any reason except repairs or other necessary work by the Company, the Customer shall pay the Company a reconnect charge before service will be restored as follows:

If payment is received, or other arrangements made for reconnection, during normal business hours (8:00 a.m. and 5:00 p.m., Monday through Friday), the fee shall be $25.00

If reconnection is requested and/or payment is received after normal business hours (8:00 a.m. and 5:00 p.m., Monday through Friday), the fee shall be $75.00.

Returned Check Charge

When a check or bank draft, tendered for payment of a Customer's account, is subsequently returned by the bank due to a failure of the issuer's bank to honor the check/draft for good and sufficient reason, a $20.00 fee will be charged the Customer for each such returned check/draft. The Company, at its option for good cause, may refuse to accept a check tendered as payment on a Customer's account.

XIII.

Unavoidable Cessation of Consumption

In the event the Customer's premises is destroyed by fire, natural disaster; or other casualty, or the operation of its plant is shut down because of strike, fire, natural disaster, or other cause beyond the Customer's control, making a complete cessation of service, then upon written notice by the Customer to the Company within thirty (30) days thereafter, advising that the Customer intends to resume service as soon as possible, any minimum charge, or guarantee for which the Customer may be liable will be waived during the period of such cessation, and the contract shall be extended for a corresponding period. Otherwise, the agreement for service shall immediately terminate. When service has ceased under the described conditions, the Company shall have the right to (1) waive the collection of a deposit to reestablish service, (2) waive temporary service charges for temporary facilities or for reestablishment of service when such charges do not exceed a reasonable amount, (3) waive the collection of area lighting charges due to early termination of contract, and (4) waive the collection of a reconnection fee.

XIV.

Copies

Forms of application, service agreement, or contract, schedules of rates, riders, and copies of service regulations are available at the various offices of the Company and will be furnished to the Customer on request.

XV.

Changes

All agreements and contracts for service between the Company and its customers, including the rate schedules and these Service Regulations, are subject to such changes and modifications from time to time as approved by the Commission or otherwise imposed by lawful authority.

XVI.

Types of Service

The types of service supplied and the schedules applicable thereto are as follows:

1. Residential Service

   The residential rate schedules are applicable to an individual residence, condominium, mobile home, or individually-metered apartment. The residential rate schedules shall be applicable to only one meter serving an individual residence.

   The residential rate schedules are available for a single unit providing permanent and independent living facilities complete for living, sleeping, eating, cooking and sanitation. If the structure does not meet the requirements of a dwelling unit, service will be provided on one of the general service rate schedules.

   Outbuildings, garages, swimming pools, water pumps, and other uses which form a part of the general living establishment on the same property with a residence may be connected to the residential service meter, or they may be separately metered; such separately metered services shall be served on one of the general service rate schedules.

   Individual meters shall be installed by the Company for each individual residence, condominium, mobile home, housekeeping apartment, or housekeeping unit for which a permit was issued or construction started after September 1, 1977 in accordance with North Carolina General Statute 143-151.42 which prohibits master metering. Exceptions must be approved by the Commission.

   Residential service to two or more residences on the same property or to a residence or residences sub-divided into two or more individual housekeeping units may not be supplied through one meter on a residential rate schedule except as provided below:

   Block Billing Under Residential Rate Schedules

   a. If, for any reason, the wiring is so arranged by the Customer that rewiring for individual meters is not feasible, but a single meter must be used for two or more residences or units, then for billing purposes through this single meter, the Basic Facilities Charge and each kwh block of the rate schedule shall be multiplied by the number of residence units served.

   b. Condominium units which were served as apartments through a single meter on a general service rate schedule before December 1, 1979, may continue to be served through one meter on a residential schedule; however, the Basic Facilities Charge and each kwh block of the rate schedule shall be multiplied by the number of residence units served.

2. Service to Mobile Home Parks, Recreational Parks, Portable Structures.
   a. Mobile Home Parks

      Each space designated for the parking of mobile homes will be served through a separate meter and billing will be in accordance with the applicable residential or general service rate schedule.

      The Company will extend its conductors to groups of two or more spaces designated for the parking of mobile homes, and will provide and install at each delivery location a service structure on which its conductors are terminated and on which may be mounted the switch panels and wiring to accommodate a separate meter for each mobile home space. Otherwise, service connections will be the same as set forth in these Service Regulations VI, 1.

      Energy used by the mobile home park in its office, service buildings, area lighting, water pumps, and other purposes connected with the operation of the park, including spaces designated for the overnight parking of mobile homes in transit or awaiting assignment to separately metered spaces available within the park, may be served through a single meter, and will be billed in accordance with the applicable general service rate schedule.

   b. Recreational Parks and Campgrounds

      Service to recreational parks and campgrounds may be supplied to each establishment at one delivery point, and energy used in its offices, service buildings, area lights, water pumps, individual service outlets at campsites, and other purposes connected with its operation, will be billed through one meter in accordance with the applicable general service rate schedule.

      Where a portable structure (travel trailer, camper, motor home, etc.) occupies and remains at an individual campsite in a recreation park or campground under a lease arrangement for twelve (12) months or longer, the Company may, at its option, provide an individual delivery and meter the service to the structure on the individual campsite as provided for under 2. a. above. Energy used will be billed on a residential or general service rate schedule, whichever is applicable.

   c. Locations other than Mobile Home Parks, Recreational Parks or Campgrounds

      Service will be provided as set forth in these Service Regulations, XVI (10) Temporary Service, except that if the Customer presents satisfactory evidence of intent to remain at said location twelve (12) months or longer, service will be provided as for any structure having a permanent foundation. Energy used will be billed on a residential or general service rate schedule, whichever is applicable.

3. Residential Service to Group Facilities

   Facilities designed to provide residential care or a group home in a residential structure for up to and including nine adults or children (excluding houseparent or caregiver) may be served on a residential rate schedule provided the facility is a single housekeeping unit and energy is used only by equipment which would normally be found in a residence. If the facility has a separate housekeeping unit for the caregiver, commercial cooking or laundry equipment, vending machines, or other equipment not normally found in a residence the facility will be served on a general service rate schedule.

4. Professional Offices or Business Activities in Residences

   For residences involving some business, professional, or other gainful activity, a residential rate schedule will be permitted only where:

   a. the electric energy used in connection with such activity is less than 15% of the total energy use; and

   b. the electric energy is used only by equipment which would normally be used in a residence.

   If both of the foregoing conditions cannot be met, the entire premises shall be classified as nonresidential and an appropriate nonresidential rate schedule shall be applied.

   The Customer may, at his option, provide separate circuits so that the residential uses can be metered separately and billed under a residential schedule and the other uses under a general service schedule.

   For residences in which a Day Nursery is operated, a residential rate schedule will be permitted provided:

   a. The operator and the operator's family, if any, live there.

   b. The nursery requires no extra electrical equipment or space in addition to that normally required for the operator's family.

   c. There are no conspicuous business soliciting devices about the premises.

If all of the foregoing conditions cannot be met, then the facility will be served on a general service rate schedule.

5. Farm and Rural Service

The residential rate schedules are available for service through one meter to the Customer's personal farm residence, and for the usual farm uses outside the dwelling unit, but not for commercial operations selling at retail, or for non-farming operations, or for the processing, preparing, or distributing of products not indigenous to that farm.

The residential farm service customer may, at his option, elect to take the entire service under one of the general service rate schedules, or he may provide separate circuits so that the residential dwelling unit, together with the usual farm uses outside the dwelling unit, can be metered and served under a residential rate schedule, and the other uses under a general service rate schedule.

6. General Service

General service rate schedules are available to the individual customer for any purpose other than those excluded by the availability paragraph of the schedules, and they shall apply to the following:

a. Customers engaging in retail trade or personal service directly with the public such as hotels, motels, boarding houses; ("Boarding House" is defined as an establishment making a business of providing rooms and/or meals to the public in much the same manner as hotels and restaurants; or which has a license for operating such an establishment. This does not include homes taking in a small number of roomers and/or boarders, where the home owner does not depend on the revenue therefrom as a principal source of income.)

b. Hospitals, nursing homes, institutional care facilities;

c. Office buildings, stores, shops, restaurants, service stations, and other commercial establishments;

d. Schools, dormitories, churches, and other nonresidential customers, and other nonindustrial customers;

e. Energy used in a multi-family residential structure (other than the individual housekeeping units), such as hall lighting, laundry facilities, recreational facilities, etc.

f. Miscellaneous services with individual meters serving well pumps, signs, customer-owned lighting, garages, etc.

General service rate schedules continue to be available for master-metered apartments constructed prior to September 1, 1977, (or after September 1, 1977 with Commission approval) where the establishment consists of:

a. one or more buildings, each three (3) or less stories in height, of three (3) or more individual apartment living units per building, located on contiguous premises and under single ownership, or

b. a single building, under single ownership, four (4) or more stories in height, containing three (3) or more individual housekeeping units,

provided there is no submetering, resale, conjunctional, or sub-billing, or separate charge to tenants for electricity by the landlord, nor any form of variable rental charge based upon the electric usage by any tenant.

Notwithstanding a. above, 10% or less of the total number of living units being served through the single meter may be of two units per building, but no single-family units which may be among the buildings in the establishment can be served through the single meter. The number of buildings and apartment units to be served through a single meter may not be greater than the number for which the developer has secured a construction loan or permanent mortgage as of the date of the contract, and proof of such commitment may be required. Additional units to be built on the original premises or on an adjoining premises, must be contracted for separately and served through a separate meter and served on the applicable general service rate schedule.

Upon mutual agreement by the Customer and the Company, service will be rendered through a single meter to multiple delivery points, with the Company owning the distribution facilities between the meter and the several delivery points as set forth under the Extra Facilities section of these Service Regulations.

Service through a single meter billed on a general service schedule is available only for general building use and residential use. Any tenant who could otherwise qualify for any of the Company's rate schedules other than residential, must be served separately by the Company.

The landlord must enter into a contract with the Company for each establishment qualifying for the single meter general service rate schedule in a. or b. above, and the contract shall specify the number of buildings and the number of stories and apartment units within each building in the establishment, the total contract demand of the establishment, and the names of streets, roads, or other boundaries of the contiguous premises within which each establishment is located.

Service will be supplied separately to each establishment. The Company shall make the final determination as to what constitutes a single establishment entitled to a service through a single meter at a single delivery point and shall notify the Customer before making a contract with the Customer.

7. Industrial Service

   The industrial service rate schedule is available to customers classified as "Manufacturing Industries" by the Standard Industrial Classification Manual published by the United States Government, and where more than 50% of the electric usage of such establishment is for its manufacturing processes.

8. Water Heating Service

   Residential water heating service is available through the same meter as other residential service on Schedule RS, RE, or RT. Residential controlled submetered water heating service is available on Schedule WC.

   Customers on Schedule G or I can obtain separately metered water heating service on Schedule W.

   Water heaters which do not meet the requirements of Schedule W will be served on the other schedule on which the customer is receiving service. Schedule W is not available to residential customers.

9. Outdoor Lighting Service

   Customer-owned outdoor lighting service may be connected to the residential, general service, or industrial service meter or it may be separately metered. Such separately metered services shall be served on the general service schedule.

   Where the Company owns and operates the lighting equipment, service will be provided under Schedule OL or FL.

10. Seasonal Service

    Where the Customer's use of energy is seasonal, generally it will be to his advantage to keep his premises connected to the Company's lines throughout the year. Under certain rate schedules, the Customer may elect to contract for an annual minimum charge, rather than a monthly minimum charge, as outlined in the applicable schedules. The Company will disconnect the service for a period of inactivity upon request, but will make a disconnect charge of $15.00 if the service has been connected less than 6 months.

11. Government and Municipal Service

    The regular general service rate schedules are available for government and municipal service to facilities such as offices and schools. Schedule PL is available to governmental entities for street and public area lighting. Schedule TS is available to governmental entities for traffic and safety signals.

12. Time of Day Service

    Time of Day rates are optional and are available to residential and nonresidential customers.

13. Load Control and Interruptible Service

    Optional Riders for residential load control, interruptible service and standby generator service offer credits for contracting customers who provide a source of capacity to the Company.

14. Breakdown and Standby Service

    The Company does not supply breakdown or standby service, and service under its rate schedules may not be used for resale or exchange or in parallel with other electric power, or as a substitute for power contracted for or which may be contracted for, except at the option of the Company, under special terms and conditions expressed in writing in the contract with the Customer.

15. Temporary Service

Temporary service for construction of buildings or other establishments which will receive permanent electric service from the Company's lines when completed will be provided under Schedule BC if single-phase service is supplied, or under Schedule G if three-phase service is supplied.

Temporary service for construction projects which will not result in permanent electric service, and for rock crushers, asphalt plants, carnivals, fairs, and other nonpermanent installations will be provided on the General Service Schedule where the Customer agrees to pay the actual cost of connection and disconnection. The cost shall include payroll, transportation, and miscellaneous expense for both erection and dismantling of the temporary facilities, plus the cost of material used, less the salvage value of the material removed. A deposit may be required equal to the estimated cost of connection and disconnection plus the estimated billing on the General Service Schedule for the period involved, said deposit to be returned if the contract period is fulfilled.

16. Special Provisions

a. Service to x-ray, welding and other equipment of this type may be operated by the Customer through his regular service meter when such operation will not adversely affect the quality of service to neighboring customers. For purposes of establishing the contract demand, such equipment will be rated at one KW for each 4 KVA of rated capacity.

If, however, the use of such equipment causes voltage fluctuations detrimental to the service of the Customer or other customers, the Company may set a separate transformer for the exclusive use of the Customer, and extend a separate service to the Customer's premises. This service shall be metered, and shall be billed on the applicable rate schedule. In addition, the Customer shall be billed 30 cents per month per KVA of the separate transformer. In lieu of setting the separate transformer, the Company may require the Customer to either discontinue the operation of the equipment or install the necessary motor-generator set or other apparatus to eliminate the disturbance to other customers.

b. Fluorescent lamps: Installation of neon, fluorescent, and/or mercury vapor lamps or tubes, or other types or combinations of gaseous discharge lamps having lower power factor characteristics, made, replaced, relocated, or rearranged after December 31, 1940, should be so equipped that the power factor of each unit or group of units shall not be less than approximately 90% lagging. When an installation has a power factor less than approximately 90% lagging, there shall be added to each monthly bill covering such installation an additional fixed charge of 35 cents for each 100 volt-amperes by which the volt-ampere rating of such installation numerically exceeds the watt rating, as obtained by test or from the manufacturers' nameplates.

c. Optional Schedules: For certain classes of service, optional schedules are available which result in lower average prices to customers because of their usage characteristics. Since this use is under the control of the Customer, the amount of saving, if any, is also under his control and the choice of schedules, therefore, lies with him.

Upon request, investigation will be made and assistance will be given to the Customer in selecting the rate which is most favorable to his condition and to determine whether the rate under which he is being billed is the most advantageous. The Company does not guarantee that each customer will be served under the most favorable rate at all times, and will not be responsible for notifying the Customer of the most advantageous rate. Not more than one change from one optional rate to another will be made within any twelve (12) month period for any customer. When a change is made from an optional rate to another, no refund will be made of the difference in charges under different rates applicable to the same class of service.

d. Extra Facilities. At the request of the Customer, the Company will furnish, install, own and maintain facilities which are in addition to those necessary for delivery of service at one point, through one meter, at one voltage, in accordance with the applicable rate schedule, such additional facilities to be furnished under an "Extra Facilities Clause" added to and made a part of the Company's standard form of contract and containing the following provisions:

1) Service shall be used solely by the contracting Customer in a single enterprise located entirely on a single, contiguous premises, and there shall be no exemption from any of the other provisions of these Service Regulations.

2) "Extra Facilities" shall consist of such of the following as may be required: voltage regulators, circuit breakers, duplicate service, transformers, substations, connecting lines, or other equipment installed for the exclusive use of the contracting Customer, other than facilities which the Company would furnish to the Customer without cost under its standard form of contract.

3) The facility to be supplied shall be Company standard overhead transmission or distribution, or transmission and distribution, equipment to be installed only on the Company side of the point of delivery.

4) A monthly "Extra Facilities Charge" equal to 1.7% of the installed cost of the facilities, but not less than $25, shall be billed to the Customer in addition to the billing for energy, or for demand plus energy, in accordance with the applicable rate schedule.

5) The "installed cost of extra facilities" shall be the original cost of material used, including spare equipment, if any, plus applicable labor, transportation, stores, tax, engineering and general expenses, all estimated if not known. The original cost of materials used is the current market price of the equipment at the time the equipment is installed, whether said equipment is new or out of inventory.

6) "Extra Facilities" shall include the installed cost of extra meters and associated equipment necessary to record demand and energy at the voltage delivered to the Customer. Upon mutual agreement between the Customer and the Company, demand and energy may be metered at primary voltage, without compensation for transformer loss, and without inclusion of any part of the metering cost as an extra facility. When extra facilities furnished include a voltage regulator, metering equipment shall be installed on the Company side of the regulator, or if this is not feasible, the meter shall be compensated so as to include registration of the regulator losses.

7) When the extra facilities requested by the Customer consist of those required to furnish service at either more than one delivery point on the premises or at more than one voltage, or both, the installed cost of the extra facilities to be used in the computation of the Extra Facilities Charge shall be the difference between the installed cost of the facilities made necessary by the Customer's request, and the installed cost of the facilities which the Company would furnish without cost to the Customer under its standard form of contract.

8) The Company shall have the option of refusing requests for extra facilities if, on its own determination, the requested facilities are not feasible, or may adversely affect the Company's service to other customers.

9) Contracts containing the Extra Facilities clause shall have a minimum original term of 5 years to continue from year to year thereafter, but the Company may require the payment of removal costs in contracts with original terms of 10 years or less, and may require advance payment of the Extra Facilities Charge for a period equal to one-half the original term of the contract.

10) Customers from whom the Company may be furnishing extra facilities under contracts made prior to September 1, 1962 shall be exempted from all provisions of this Extra Facilities Clause except 1) until such time as their contracts may expire, or are terminated by the Customer, or are terminated by the Company for reasons not related to the furnishing of extra facilities.

11) In the event that an existing extra facility must be modified or replaced, whether or not such modification or replacement is requested by the affected extra facility Customer, then the installed cost of extra facilities on which the monthly Extra Facilities Charge is based shall be the installed cost of existing equipment, plus the installed cost of new additions, less the installed cost of equipment removed. The installed cost of existing equipment shall be the same installed cost used for said equipment immediately prior to the modification or replacement. The installed cost of new additions shall be the current market price of said new additions at the time the new additions are installed. The installed cost of equipment removed shall be the same installed cost used for said equipment immediately prior to removal.

Exhibit B

Excerpts from the Brief and Reply Brief

of American Electric Power Services Corp., *et al.*

Gulf Power v. FCC, Case No. 98-6222

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 98-6222,
Consolidated with 98-2589, 98-4675, 98-6477, 98-6486, 98-6485, 98-6478, 98-6476, 98-6458, 98-6442, 98-6431, 98-6430, 98-6414

GULF POWER COMPANY, *ET AL.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents,

AMERITECH CORPORATION, *ET AL.*,
Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF PETITIONERS AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION AND UNION ELECTRIC COMPANY

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Dated: November 2, 1998

or a combination of both. Since Dark Fiber is neither, the FCC interpretation is contrary to the statute.

4. Rate Formula. The 1996 Act created a mandatory right of access for service providers to utility poles. This effects a *per se* takings under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and its progeny. In addition, the rate formula established in the *Order* does not establish market-based compensation and thus does not provide just compensation in violation of the Fifth Amendment's Just Compensation Clause.

ARGUMENT

I. The Commission's Interpretation That Wireless Equipment Is Covered By The Pole Attachments Act Is Contrary To The Statute.

A. The FCC Interpretation

In its *Notice of Proposed Rulemaking*, 12 F.C.C.R. 11725, ¶ 61 (1997), the FCC advanced the proposition that, although wireless carriers had not historically affixed their equipment to utility poles, the 1996 Act gives them the right to do so at a regulated rate. In the *Order*, the FCC confirmed that "wireless carriers are entitled to the benefits and protection of Section 224." *Order* ¶ 39.

The FCC's reading of the statute to reach this conclusion starts with the language of Section 224(e)(1), which states: "The Commission shall . . . prescribe regulations . . . to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." This language, according to the FCC, "encompasses wireless attachments." *Order* ¶ 39.

The FCC notes that Congress intended in the 1996 Act to "expand the pole attachment provisions beyond their 1978 origins." *Id.* ¶ 40. Specifically, the definition of "pole attachment" in Section 224(a)(4) was expanded to cover "any attachment by a . . . provider of telecommunications service" in addition to attachments by cable television systems. *Id.* (emphasis added). The Commission then turns to Section 224(d)(3), in which Congress made the current pole attachment rules applicable on an interim basis for "any telecommunications carrier . . . to provide any telecommunications service." The Commission concludes that the use of the term "any" in both Section 224(a)(4) (a pole attachment is "any attachment by a . . . provider of telecommunications service) and in Section 224(d)(3) (pole rules applicable on interim basis to "any telecommunications carrier . . . to provide any telecommunications service") "precludes a position that Congress intended to distinguish between wire and wireless attachments." *Id.*

The Commission supports its analysis with the statutory definitions of three terms: (1) "telecommunications carrier," (2) "telecommunications services," and (3) "telecommunications." *Id.* The Commission states that each of these terms is defined by statute in a manner that includes wireless carriers and/or wireless services. *Id.* The Commission notes that it "has already recognized that cellular telephone, mobile radio, and PCS are telecommunications services." *Id.*

B. Standard of Review

The FCC's interpretation of Section 224 is reviewed under the two step framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first step in the *Chevron* framework requires that the court ascertain whether Congress clearly expressed its intent in the statute. *Legal Envtl. Assistance Found. v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997); *Jaramillo v. INS*, 1 F.3d 1149 (11th Cir. 1993) (en banc). "In a statutory construction case, the beginning point must be the language of the statute . . . ." *Legal Envtl.,* 118 F.3d at 1473 (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Id.* (quoting *KMart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). "In expounding a statute, [a court] must not be guided by a single

sentence or member of a sentence, but look to the provisions of the whole law, and to its policy." *In re Colortex Indus., Inc. v. Varsity Carpet Servs., Inc.*, 19 F.3d 1371, 1375 (11th Cir. 1994) (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986), in turn quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956), in turn quoting *United States v. Heirs of Boisdore*, 49 U.S. 113 (1849)); *see also In re City of Mobile*, 75 F.3d 605, 610 (11th Cir. 1996) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."). In applying *Chevron's* first step, a court does not defer to the agency's interpretation, as the court is dealing with a "pure question of statutory construction." *National Mining Ass'n v. Secretary of Labor*, 153 F.3d 1264, 1267 (11th Cir. 1998) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)).

Where the intent of Congress is not clear, a second level of review comes into play, and the court must determine "whether the agency's answer to the question Congress left open reflects a permissible construction of the statute." *Jaramillo v. INS*, 1 F.3d 1149, 1152 (11th Cir. 1993). The court "need not conclude that the agency construction was the only one it permissibly 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." *Id.* at 1153.

Instead, the court's review "is confined to whether the agency's construction is a reasonable one. . . ." *Id.* Agency interpretation is reasonable and controlling unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Rodriguez v. Lamer*, 60 F.3d 745 (11th Cir. 1995) (citing *Chevron*, 467 U.S. at 844, and *Alabama Power Co. v. FERC*, 22 F.3d 270, 272 (11th Cir. 1994)).

C. Construction of the Statute

At its core, the FCC's argument is that the 1996 Act expanded Section 224's coverage to include telecommunications carriers (including wireless), and that "pole attachment" is now defined to include "<u>any</u> attachment by a . . . provider of telecommunications service." 47 U.S.C. § 224 (a)(4) (Add. Tab 7 at 55). Given its literal reading, "any" attachment is not limited, and since, according to the FCC, "telecommunication carriers" includes wireless companies, a pole attachment could include wireless equipment attached by a wireless carrier. This interpretation is supported, says the FCC, by Congress' additional use of the term "any" in Section 224(d)(3), where it prescribes that the existing rate formula shall be applicable on an interim basis to "<u>any</u> telecommunications carrier" providing "<u>any</u> telecommunications service." Again, given an expansive reading, "any" telecommunications carrier includes wireless carriers, and "any" telecommunications service includes wireless service.

The FCC's argument that Congress' use of the word "any" precludes an interpretation that Congress intended to limit coverage under Section 224 to wireline equipment confuses "plain meaning" with literalism. The meaning of the term "any" is determined by its use in the statutory context as a whole. *E.g.*, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"), *quoted in In re Colortex Indus.*, 19 F.3d 1371, 1375 (11th Cir. 1994)); *see also Bell Atl. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997). If the "'literal application of a statute will produce a result demonstrably at odds with the intention of the drafters, . . . the intention of the drafters rather than the strict language controls." *United States v. Ron Pair Enter.*, 489 U.S. 235, 242 (1989) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1529 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 482 (1996) ("If a literal construction of the words of a statute would lead to an absurd, unjust, or unintended result, the statute must be construed so as to avoid that result. . . . Even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed the purpose of the act, rather than the literal words.") (citations omitted); *see also*

Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C. Cir. 1998). Here, the FCC's expansive reading of the term "any" is demonstrably at odds with the language, structure and purpose of the statute, all of which clearly demonstrate Congress' intent to limit the statute to attachments of wireline facilities.[7]

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[7] Wireless attachments are vastly different from wireline attachments. Unlike wireline attachments, wireless attachments have no need to be installed through the linear corridors of the "poles, ducts, conduits and rights-of-way" of a utility's distribution system. Wireless antennas are a discrete single point installation, typically emitting their signals in a circular or fan pattern radiating out from the antenna. Wireless networks consist of an overlapping series of concentric circles of each antenna's emission pattern. Physically, wireline and wireless attachments are fundamentally different. Wireline attachments typically consist of a box-like device and cable wires strung between poles. *Order* ¶ 41. Wireless attachments, on the other hand, typically include "an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service." *Id.*

It is beyond peradventure that the original 1978 Act was limited to wireline facilities, for several reasons. First, Congress' grant of jurisdiction to the FCC is defined in terms of "wire communications." 47 U.S.C. § 224(a)(1) (Add. Tab 7 at 55) ("utility" means "any person . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications") (emphasis added). Congress explained that the FCC's jurisdiction is triggered only where a communications space for wire communications has been established:

> Federal involvement in pole attachment matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable.

S. Rep. No. 95-580, at 15 (emphasis added) (Add. Tab 1 at 5). Congress admonished that the "expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems." *Id.* (emphasis added).

Second, an earlier draft of the legislation expressly called for regulation for "any attachment for wire communication." As noted *supra*, this was changed to "any attachment by a cable television system" in the final version of the legislation at the behest of the FCC. The FCC's letter requesting the

change, *see* H.R. Rep. No. 94-1630, at 30-31, *quoted in Texas Utilities*, 997 F.2d at 930, and the fact that CATV companies are in a *wireline* business make clear that the change was intended to limit coverage of Section 224 to a subset of attachments for wire communication.

To be sure, pole attachment was defined as "any attachment by a cable television system." Given the FCC's expansive reading of the statute, it is theoretically possible that the statute could be read to provide a covered rate for banners or other advertising that a cable company might want to hang on utility poles. This would be an absurd result, of course, given that a cable company could hang its banners anywhere and utility poles thus are not a bottleneck facility for cable company advertising. And in the two decades of operation of the 1978 Act, no one ever sought to read the "any attachment" language expansively, as the FCC does now, to provide coverage to anything other than a wireline facility.

Third, the statutory language regarding the rate formula to be applied to pole attachments was confined to wireline attachments. The rate formula is set forth in Section 224(d)(1). It provides that a utility is entitled to recover certain costs, up to a maximum of actual costs, associated with a percentage of the "total usable space" on the utility's poles. The term "usable space" is defined in

Section 224(d)(2) in terms that are unmistakably confined to wireline facilities, to wit: "the space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment" (emphasis added).[8]

Congress' clear and unambiguous intent to limit Section 224 to wireline facilities in the original statute was not changed by the amendments of the 1996 Act.[9] To be sure, the 1996 Act added telecommunications carriers to the existing statutory framework. Congress' purpose in adding telecommunications carriers was to address the regulatory anomaly created by the fact that cable companies who were also providing telecommunications services over their wireline facilities were entitled to a regulated rate, while telecommunications carriers who wished to provide the same service over wireline facilities were not entitled to a regulated rate. S. Rep. No. 103-367, at 65 (1994) (Add. Tab 5 at 42); H.R.Conf. Rep. No. 104-458, at 206 (Add. Tab 6 at 53). Though telecommunications carriers were added, their addition did not change the basic structure or purpose of the Act.

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[8] Even the notion of "space above the minimum grade" has no meaning in the case of a wireless attachment. *See supra* note 7.

[9] A redline version of Section 224 showing the changes made by the 1996 Act is attached in the Addendum hereto at Tab 8.

There is not a single mention of wireless telecommunications in Section 703 of the 1996 Act, which amended Section 224, or in the legislative history. However, Congress did deal with the placement of wireless equipment in the 1996 Act, in the very next section, Section 704. P.L. 104-104, Title VII, at § 704(c), 110 Stat. 152 (Add. Tab 9 at 63). Section 704 deals with "Facilities Siting" for wireless telecommunications service. Section 704(a) is entitled "National Wireless Telecommunications Siting Policy." It addresses local zoning authority to regulate the placement, construction, and modification of personal wireless service facilities. Section 704(c) establishes a national policy of making Federal government property available for the placement of wireless telecommunications equipment. It does not direct the FCC to impose a regulated rate for placement of wireless equipment on federal property. Congress addressed wireless matters in Section 704; if it intended to address wireless attachments in Section 703, it would have done so explicitly.

Further, Congress' grant of jurisdiction contained in Section 224(a)(1) remained unchanged in the 1996 Act, and is still defined in terms of "wire communications." The 1996 Act thus did not change Congress' clear and unambiguous intent that the Commission's jurisdiction be "strictly

circumscribed" and limited to arrangements affecting the wireline "communications space" on utility poles.

In addition, the definition of "usable space" as set forth in Section 224(d)(2) (the space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment) also was left entirely unchanged in the 1996 Act. Further, Section 224(d)(3), added by the 1996 Act and the very section relied upon by the FCC, makes this existing rate formula and its definition of usable space – with its limitation to wires, cables and associated equipment – applicable on an interim basis to attachments by "any telecommunications carrier . . . to provide any telecommunications service." This language, which the FCC would read expansively to include coverage of wireless equipment, is thus expressly limited to "wires, cables and associated equipment" by the definition of usable space in Section 224(d)(2). The FCC's expansive reading thus would render meaningless Section 224(d)(2)'s express limitation to "wires, cables and associated equipment." It is axiomatic, however, that an interpretation of statutory language that causes other language within the statute to be meaningless contravenes the "'elementary cannon of construction that a statute should be interpreted so as not to render one part inoperative.'" *In re City of Mobile*, 75 F.3d 605, 611 (11th Cir. 1996)

(quoting *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)).

It is true that the definition of "pole attachment" was expanded to include "any attachment by a cable television system <u>or provider of telecommunications service</u>." The "any attachment" language, upon which the FCC relies, was part of the original definition of pole attachments in the 1978 Act, and is unchanged in the 1996 Act. In the two decades of the operation of the 1978 Act, "any attachment" was confined, without exception, to wireline facilities. If Congress meant to expand the scope of the statute to include wireless equipment, it would have done so in a clear and explicit manner.

Finally, and of most fundamental importance, the 1996 Act did not change the basic purpose of the statute, which is to address the alleged exercise of monopoly power by the utilities over their poles. Utilities do not have, <u>even in theory</u>, monopoly power in siting of wireless equipment. Wireless equipment can be sited on hills or virtually any tall building or structure, such as water towers, standard communications towers, monopoles, billboards, highway light structures, church steeples, etc. An entire

commercial industry has grown up that is dedicated to siting wireless equipment.[10] In addition, Section 704 of the 1996 Act and the President's

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[10] *See, e.g.*, *Hicks, Muse to Invest $1 Billion in Communications Tower Business*, Comm. Daily, Sept. 10, 1997 ("We intend to be the leading owner and operator of transmission towers in the country within a short period of time"); *Another Player in U.S. Tower Market Prepares for IPO*, Comm. Today, July 20, 1998; *Tower Firms Climbing Up in Market*, PCS Week, July 1, 1998; *Pinnacle, Westower Active in White-Hot Tower Site Market*, Comm. Today, June 15, 1998; *Building Managers See New Dollars in Telecommunications*, Comm. Today, Apr. 27, 1998; *see also* Prospectus of Crown Castle International Corp., Form 424(B)(1), filed Apr. 17, 1998 (raising capital for company specializing in "the provision, ownership and management of communications sites, the leasing of antennae space on such sites and the provision of related network infrastructure and support services, such as the design of wireless and broadcast sites and networks, the selection and acquisition of tower and rooftop sites (including the resolution of zoning and permitting issues), the construction of towers and the installation of antennae.").

Executive Memorandum of August 10, 1995,[11] have mandated that federal government buildings, facilities and public lands be made available for the siting of wireless equipment. The General Services Administration has established guidelines to implement this mandate.[12] Utility infrastructure, therefore, is simply not a bottleneck facility in any sense for wireless equipment. Wireless companies have a multitude of options of where to site their antennas. Indeed, utility poles are typically not tall enough to be an optimal choice for the placement of most wireless equipment. As such, utility companies cannot even theoretically exercise monopoly power with respect to the siting of wireless equipment, since utilities have no monopoly over the sites that can be used by wireless companies to mount their antennas. The

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[11] *Facilitating Access to Federal Property for the Siting of Mobile Services*, President's Memorandum on Mobile Services Antennas, 31 Weekly Comp. Pres. Doc. 1424 (Aug. 10, 1995).

[12] Placement of Commercial Antennas on Federal Property, 61 Fed. Reg. 14100 (Mar. 29, 1996); Placement of Commercial Antennas on Federal Property, 62 Fed. Reg. 32611 (June 16, 1997); Public Buildings and Space, 63 Fed. Reg. 10631 (Mar. 4, 1998).

purpose of the statute thus does not even come into play with respect to wireless equipment.

In short, therefore, the FCC's argument that the statutory term "any" should be read expansively to include wireless equipment is a literal construction at odds with the demonstrable intentions of Congress in drafting the Act and its amendments. The Act was intended to protect cable companies against the alleged exercise of monopoly power by utility companies with respect to attachments of wireline facilities on utility poles. The Commission was given a narrow and "strictly circumscribed" grant of jurisdiction to effect this purpose, and the scope of its jurisdiction was limited to regulation of arrangements affecting the provision of wireline communications space on utility poles. The rate formula to be applied to such attachments was expressly defined in terms limited to "wires, cables and associated equipment." The 1996 Act did not change any of this. The 1996 Act added telecommunications carriers to the class of entities that were entitled to a regulated rate for "pole attachments." But it did not change the fact that the clear and unambiguous intent of Congress is and remains that "pole attachments" subject to coverage under Section 224 are expressly limited by the statutory language and the statutory purpose to wireline attachments.

This case is similar to a recent case in the D.C. Circuit, where the Bell Operating Companies attempted to give an expansive reading to the word "any" in another part of the 1996 Act. *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997). The case involved the interpretation of a statutory provision that stated that a Bell Operating Company ("BOC") "may provide any interLATA . . . facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rate." *Id.* at 1045. In this case, the FCC read a limitation into the word "any" based on the context of the statute, while the BOCs argued that the plain meaning of the term "any" precluded any such definition. After chiding the BOCs for their wooden approach to the statute, the Court found that the limitation of the term "any" was appropriate:

> The first traditional tool of statutory construction focuses on the language of the statute . . . . However, the textual analysis is a language game played out on a field known as "context." The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use. In short, "the meaning of statutory language, plain or not, depends on context." [citation omitted]. Although Petitioners rely on the expansive character of the word "any," the Supreme Court has specifically held that in context the word "any" may be construed in a non-expansive fashion. See *O'Connor v. U.S.*, 479 U.S. 27, 31 93 L. Ed. 2d 206, 107 S. Ct. 347 (1986) (Scalia, J.) (statutory context showed that unmodified phrase "any taxes" included only taxes of Republic of Panama).

Id. at 1047.

Petitioners are not unmindful of cases that stand for the proposition that the term "any" is to be construed broadly. *See, e.g.*, *Merritt v. Dillard Paper Company*, 120 F.3d 1181 (11th Cir. 1997); *Lopez v. First Union Nat'l Bank*, 129 F.3d 1186 (11th Cir. 1997). However, in the context of the instant case, the line of cases, including the Supreme Court's decision in *O'Connor v. U.S.*, 479 U.S. 27 (1986), requiring that the term be understood in the context of the entire statute and its purpose, is controlling.

The FCC's expansive interpretation of the statute is contrary to the clearly expressed intent of Congress, as determined using the traditional tools of statutory construction, and thus should be rejected under *Chevron*'s first step. In the alternative, the FCC's interpretation clearly is to be rejected under *Chevron* step two, as "arbitrary, capricious, or manifestly contrary to the statute." *Rodriguez v. Lamer*, 60 F.3d 745, 747 (11th Cir. 1995).

In addition to the statutory construction analysis set forth above that demonstrates the FCC's interpretation is "manifestly contrary to the statute," the FCC's interpretation is arbitrary and capricious in that it creates bizarre results. As noted above, there is a flourishing industry for the siting of wireless equipment, which includes both private companies and federal, state and local governments. Every one in this industry, except utilities, is able to charge an

unregulated market rate for wireless sites. Only utilities are subject to an FCC-imposed rate. In effect, utilities are the only landlords of potential wireless sites that are subject to a form of "rent control," while every other site owner is entitled to charge a market rate. And the disparity is non-trivial: market rates for wireless equipment sites typically run in the range of $1000 to $2000 per month, while regulated pole attachments typically are $6 to $10 per year. There is no conceivable basis for such disparate treatment.

II. The Commission's Interpretation That Service Providers Can Overlash A Host Attachment Without Any Additional Compensation To The Pole Owner Constitutes A Taking Without Just Compensation In Violation Of The Fifth Amendment.

A. The FCC Determination

As discussed *supra*, overlashing can take place in one of two ways: (1) where an existing attacher overlashes its own pole attachment; or (2) where a third party overlashes an existing attachment. The Commission determined in both instances that a service provider who wishes to overlash an existing attachment has a mandatory right to do so without any compensation to the pole

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Case No. 98-6222,
Consolidated with 98-2589, 98-4675, 98-6477, 98-6486, 98-6485, 98-6478, 98-6476, 98-6458, 98-6442, 98-6431, 98-6430, 98-6414

GULF POWER COMPANY, *ET AL.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents,

MCI TELECOMMUNICATIONS CORPORATION, *ET AL.*,
Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF OF PETITIONERS AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION AND UNION ELECTRIC COMPANY

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Dated: January 28, 1999

ARGUMENT

I. THE FCC'S ARGUMENTS THAT THE POLE ATTACHMENTS ACT EXTENDS TO WIRELESS TELECOMMUNICATIONS EQUIPMENT ARE MERITLESS

A. The FCC's Argument Ignores The Fact That Utility Poles Are Not A Bottleneck Facility For Siting Wireless Equipment

The first and most fundamental flaw in the FCC's argument that Section 224 extends to wireless equipment[1] is that the FCC ignores the purpose of the Pole Attachments Act. There is no dispute that the purpose of the Act is to address the perceived danger of the exercise of monopoly power by utilities over "bottleneck facilities," to wit, the utilities' distribution poles. *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). The FCC and the Intervenors acknowledge this purpose. *See, e.g.*, FCC Br. at 4; MCI Br. at 3-4; NCTA Br. at 6-7. Indeed, the briefs of the FCC and its supporting Intervenors are littered with allegations regarding abuse of monopoly power by the utilities over their so-called "bottleneck facilities." When it comes to the wireless argument, however, the FCC simply chooses to ignore this fundamental purpose. The FCC does so because acknowledgement of the Act's purpose is fatal to the FCC's claim that the Act extends to wireless equipment. Utility distribution poles are not bottleneck

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[1] The FCC is the only party advancing this argument.

facilities for siting wireless equipment. The FCC does not, because it cannot, dispute this obvious fact. Wireless equipment can be sited on hills or virtually any tall building or structure. Indeed, as Petitioners note in their opening brief, an entire commercial industry has grown up that is dedicated to siting wireless equipment. Pet. Br. at 33-36. Utility infrastructure is not necessary, or even particularly important, for siting wireless equipment. Utility companies do not have monopoly power, *even in theory*, over the siting of wireless equipment. The FCC ignores this in its brief.[2] In doing so, the FCC asks this Court to ignore the obvious, to wit, that the Pole Attachments Act is not intended by Congress to address wireless siting.

B. The FCC Invents A New Legislative History For The 1996 Amendments To The Pole Attachments Act

In keeping with its effort to ignore Congressional intent with regard to the Pole Attachments Act, the FCC invents a brand new, post-hoc legislative history

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[2] Instead, without citation to Petitioners' brief, the FCC mischaracterizes Petitioners' argument as holding that wireless attachments are "inappropriate for siting on poles and thus may impose additional burdens on pole owners." FCC Br. at 47. While this is true in certain circumstances, it is not Petitioners' argument. Petitioners' argument is that wireless companies have a multitude of options of where to site their wireless equipment. Utility infrastructure is one choice among many. It is not a bottleneck facility. The FCC does not address this fundamental point anywhere in its brief.

for the 1996 amendments, one that flies in the face of the actual legislative history. The FCC argues that, at the time of the 1996 legislation, the "nation faced a crisis in the siting of wireless facilities," FCC Br. at 45-46, and Congress addressed this concern in Section 703 of the 1996 Act. *Id.* at 46-47. The FCC concedes that Congress addressed these concerns in a separate section of the Act, Section 704, but argues this "national crisis" also motivated the amendments to the Pole Attachments Act in Section 703. *Id.*

The FCC's argument is a pure exercise in creative writing. There is, indeed, concern expressed in the legislative history regarding wireless siting. It is contained in the legislative history of Section 704 of the Act. The House Report states the following in its discussion of Section 704:

> The Committee finds that current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible.

H.R. Rep. No. 104-204, at 2 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61.

To that end, Congress enacted Section 704, which deals with "Facilities Siting" for wireless telecommunications service. Section 704(a) establishes a

National Telecommunications Siting Policy, which addresses the concerns expressed in the House Report regarding local zoning authority to regulate the placement, construction, and modification of wireless service facilities. Section 704(c) establishes a national policy of making Federal government property available for the placement of wireless equipment. *See* Addendum to Pet. Br. ("Add.") Tab 9 at 63.

Local community opposition to wireless siting was expressly considered and explicitly addressed by Congress in Section 704 and the House Report accompanying that section. *There is not one word about wireless siting, local community opposition, or anything else pertaining to wireless equipment in Section 703.* The word "wireless" is not contained anywhere in Section 703 or any part of its legislative history. Nonetheless, the FCC would have this Court import, wholesale, the legislative history of Section 704 into the legislative history of Section 703 to establish that Section 703 was informed by a Congressional desire to address local opposition to wireless siting in their communities. This is nonsense, at best. If Congress intended to address local community opposition to

wireless siting in Section 703, it would have said so – just as it did in Section 704.[3]

C. The FCC Mischaracterizes Petitioners' Jurisdictional Argument

The FCC characterizes Petitioners as arguing that Section 224(a)(1)'s jurisdictional limitation to utilities that use their infrastructure for "wire communications" demonstrates that pole attachments are limited to wire communications. FCC Br. at 41. Though this is patently untrue, the FCC triumphantly knocks down this straw man by arguing that "[d]efining who must *provide* access by reference to wire communications says nothing about who may obtain access or what equipment may be used for such access." FCC Br. at 41-42 (emphasis in original).

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[3] The FCC's interpretation of Section 703 also creates a conflict with the plain language of Section 704. Section 704 establishes exclusive state and local jurisdiction over wireless siting issues:

> Except as provided in this paragraph, nothing in [the Communications Act of 1934, as amended] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

Pub. L. No. 104-104, § 704(a), 110 Stat. 152 (1996) (Add. Tab. 9 at 63). Interpreting Section 703 as creating *Federal* regulation for the siting of wireless equipment on utility poles is inconsistent with the exclusive grant of jurisdiction over wireless siting given to states and local government in Section 704.

The FCC ignores Petitioners' actual point, which is the following: In 1978, Congress specifically stated that it was limiting its grant of the FCC's jurisdiction to wireline equipment:

> This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems.

S. Rep. No. 95-580, at 15 (1977) (Add. Tab 1 at 5). The FCC *admits* that its grant of jurisdiction was not changed in the 1996 Act, since, according to the FCC, the "Commission's jurisdiction over the utilities was not at issue." FCC Br. at 43. Nonetheless, the FCC asks this Court to ignore the clear and express limitation by Congress on that grant of jurisdiction to regulate the communications space used for wires and cables, and nothing more. Such a request is unwarranted.

D. The FCC's Argument Regarding "Usable Space" Is Meritless

The FCC's argument regarding "usable space" is also unavailing. Petitioners argued in their opening brief that "usable space" is defined in terms of "wires, cables and associated equipment," and that the FCC's interpretation of the Act as covering wireless equipment would read this definition out of the Act. Pet. Br. at 19. The FCC responds that the definition is only used to identify specific physical space on the pole, and that once this space is identified, nothing in the Act prohibits putting wireless equipment in this space. FCC Br. at 44. Here too,

the FCC's argument highlights the FCC's effort to shoehorn wireless equipment into this statute. The fact of the matter is that wireless equipment does not fit, physically, in the "usable space" on a pole. Wireless equipment typically includes, *inter alia*, an antenna or antenna cluster mounted at the top of the pole, coaxial cables running down the entire length of the pole to a communications cabinet located at the base of the pole, which itself is set on a concrete pad on the ground. *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket No. 97-151, *Report and Order*, 13 F.C.C.R. 6777, ¶ 41 (1998). Most of this equipment is located outside the physical space that is defined as "usable space" by the statute. No matter how hard the FCC tries, it cannot cut this statute to fit wireless equipment without rendering major aspects of the statutory language – including the definition of usable space – meaningless.

E. The FCC's Wooden Statutory Construction Is Unavailing

The FCC argues there are five separate provisions of the Act that support its interpretation. FCC Br. at 38. Each of them focuses on the fact that the 1996 amendments added telecommunications carriers to the class of attaching entities. The FCC's position as to each of these five provisions boils down to the argument

that this new class of telecommunications carriers includes wireless carriers; *ergo*, the statute must now cover wireless equipment.

The FCC's "plain language" argument fails to appreciate that the Act's coverage is limited to *pole attachments*, whatever the nature of the attaching entity. The phrase "pole attachment" was defined in the 1978 Act as being limited to wireline equipment. The Senate Report accompanying the 1978 Act spells this out clearly:

> A pole attachment, for purposes of this bill, is the occupation of space on a utility pole by the distribution facilities of a cable television system – coaxial cable and associated equipment – under contractual arrangements whereby a CATV system rents available space for an annual or other periodic fee from the owner or controller of the pole – usually a telephone or electric power company.

S. Rep. No. 95-580, *reprinted in* 1978 U.S.C.C.A.N. 109, 110. Despite its broad "*any* attachment" language, Congress clearly meant to limit pole attachments to wireline facilities. A cable company that sought to put up something other than wireline equipment – say, advertising banners, or indeed, wireless antennas – clearly would not fall under the scope of the Act.

The FCC argues that the scope of covered "pole attachments" is defined by the specific entities to be protected, FCC Br. at 42, and this was expanded in 1996 to include telecommunications carriers, including wireless. This argument entails that Congress intended in 1996 to erase its intention to "strictly circumscribe" the

FCC's jurisdiction, despite not saying a word to this effect in the statute or legislative history. The argument also necessarily entails that Congress intended, again without a single word, to change the fundamental purpose of the Act – protecting against the alleged exercise of monopoly power by utilities – since utility infrastructure is not a bottleneck facility for wireless equipment.

This is make-believe on the part of the FCC because Congress clearly expressed its intentions with respect to the 1996 amendments. The legislative history makes clear that the purpose of adding telecommunications carriers in 1996 was to address the regulatory anomaly that cable systems providing telecommunications services over coaxial or fiber optic cables were entitled to regulated rates, whereas other providers of telecommunications services were not. S. Rep. No. 103-367, at 65 (1994) (Add. Tab 5 at 42); H.R. Conf. Rep. No. 104-458, at 206 (1996) (Add. Tab 6 at 53).[4] In other words, telecommunications carriers were added to the statute to put them on the same regulatory footing as cable companies. Intervenor NCTA, the cable industry association, freely

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[4] The regulatory inequity addressed in the 1996 amendments was not, as Intervenor MCI falsely suggests in its brief, MCI Br. at 5, occasioned by *power companies* getting into the telecommunications business, but by cable companies that already were in the telecommunications business, which were entitled to a regulated rate for wireline attachments while other telecommunications providers were not.

acknowledges this is the case. *See* NCTA Br. at 12, 17 ("all that Section 703 did was to extend the protection of the existing formula to telecommunications carriers for competitive parity").

By adding telecommunications carriers to the Act in 1996, Congress' intent was to put telecommunications companies on an equal footing with cable companies. That's all. Congress did *not* change the Act's fundamental purpose, nor did it eliminate the strict circumscription of FCC jurisdiction to the wireline communication space. Nor indeed did it change the definition of usable space, which continues to be stated in terms of "wires, cables and associated equipment." The FCC's tortured effort to invent a new legislative history to justify its reading of the statute, and to ignore Congress' expressed purpose in enacting this legislation and the plain language of the statute, demonstrates that its interpretation is contrary to Congress' intent and must be rejected.

F. The FCC's Interpretation Creates Bizarre Results

The bizarre results that derive from ordering regulated pole attachment rates for wireless equipment buttress the conclusion that the FCC's reading is contrary to the intent of Congress. As noted *supra*, an entire industry has grown up that is dedicated to siting wireless equipment, which includes both private companies and federal, state and local governments. *See* Pet. Br. at 34, 38. Everyone in this

industry, except utilities, is able to charge an unregulated market rate for wireless sites. Under the FCC's reading of the statute, only utilities are subject to "rent control" for their sites. The anomaly is further underscored by the fact that wireless carriers themselves are part of the communications siting industry, using their own towers to lease antenna sites to other wireless carriers. For example, a company called 360° Communications leases space on over 1,700 towers that it owns or operates throughout the United States.[5] Similarly, PrimeCo has announced plans to make 1000 of its cell sites available to wireless carriers[6] and GTE Wireless is allowing wireless carrier access to 950 of its own sites.[7] Under the FCC's Order, these and other wireless companies that lease tower space to other wireless carriers will be able to collect market rates of $1,000-2,000 per month for their sites from third parties, while at the same time be able place their own wireless equipment on utility pole sites for regulated rates of $6 to $10 per year. Petitioners doubt that Congress intended this kind of arbitrary and capricious result when it passed the 1996 amendments.

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[5] *360 Degree Communications Will Lease Out Antenna Tower Space*, Wireless Today, Dec. 16, 1997.
[6] *PrimeCo Sets Two-Pronged Collocation Strategy*, Comm. Today, June 10, 1998.
[7] *Telephony Section*, Comm. Daily, Feb. 18, 1997.