

[US] Supreme Court Rules that Federal Regulators Can Limit Rates for Utility Pole Use

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On 16 January 2002, the U.S. Supreme Court handed the cable industry a clear victory in *NCTA v. Gulf Power Company*. The Court upheld the FCC's authority to regulate rates for utility--power, telephone--pole use, regardless of the type of service offered. Under the Pole Attachments Act of 1978, the FCC is required to regulate just and reasonable rates for pole attachments.

The 1978 Act's definition of a pole attachment is "any attachment by a cable television system ... owned or controlled by a utility." The Telecommunications Act of 1996 expanded the definition of pole attachment to include "any attachment by a ... provider of telecommunications service." The pole attachments at issue in this case were ones providing commingled cable and Internet (broadband) service, and ones providing wireless communications service.

First, the Court examined commingled cable and Internet service. The Court's analysis focused on the definitions of pole attachment in both the 1978 and the 1996 Acts. The majority concluded that the word "by" limits the regulation of pole attachments by who is doing the attaching, not by what is attached. Using this interpretation, an attachment of commingled services is still an attachment "by" a cable company even if it includes services in addition to cable.

The Court's dissent argued that the FCC must first classify broadband as a "cable service," a "telecommunications service," or some other form of service before it can have authority to regulate rates and to determine a just and reasonable rate.

Second, the Court examined the issue of wireless communications service and came to a similar conclusion. The Court read the 1996 Act to include any "attachment" of telecommunications equipment "by" a telecommunications service provider, regardless of whether attachments were of wireline facilities or of distinctively wireless equipment.

Respondents argued that there is a distinction between wire-based and wireless equipment because for wire-based equipment utility poles constitute a bottleneck facility. Yet most distinctively wireless equipment can be located anywhere sufficiently high. The statute does not make a distinction, however, and defines telecommunications service as the offering of telecommunications service to the

public for a fee, "regardless of the facilities used."

The Court stated that the FCC has the authority to fill gaps where the statute is silent because agencies, as a general rule, have that authority when the subject matter is technical and complex.

The Supreme Court's decision overruled the Eleventh Circuit Court of Appeals (Florida) ruling that because the Internet has not been defined as a cable service, the FCC could not regulate prices. The Court of Appeals also ruled that the FCC lacked the authority to regulate the placement of wireless equipment on utility poles.

National Cable and Telecommunications Association, Inc. v. Gulf Power Co., Nos. 00-832, 00-843, 16 January 2002

