No. 17-819

In the Supreme Court of the United States

AMEREN CORPORATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 224 of Title 47 of the United States Code authorizes the Federal Communications Commission (FCC) to require "just and reasonable" rates, terms, and conditions for "pole attachments"—*i.e.*, wires and other equipment that cable companies and telecommunications carriers attach to a utility's poles. 47 U.S.C. 224(b)(1), (d)(1), and (e)(2)-(3). Historically, FCC regulations implementing Section 224 allowed pole owners to charge telecommunications carriers a higher rate for pole attachments than they charged cable companies. After finding that this discrepancy deterred the deployment of new services and network investment, the FCC amended its regulations so that cable companies and telecommunications carriers would pay equivalent rates. The question presented is as follows:

Whether the FCC lawfully exercised its authority under Section 224 to establish just and reasonable rates for pole attachments by modifying a formula for determining the "cost" of providing space on a utility pole to align the rates paid by telecommunications carriers and cable companies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 865 F.3d 1009. The order of the Federal Communications Commission (Pet. App. 12-85) is reported at 30 FCC Rcd 13,731.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2017. On October 20, 2017, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including November 28, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Cable companies have long found it "convenient, and often essential, to lease space for their cables on telephone and electric utility poles." *National Cable &*

Telecomms. Ass'n v. *Gulf Power Co.*, 534 U.S. 327, 330 (2002). In 1978, to prevent utility-pole owners from "charg[ing] monopoly rents" when leasing such space, *ibid.*, Congress enacted what is known as the Pole Attachment Act. See Act of Feb. 21, 1978, Pub. L. No. 95-234, § 6, 92 Stat. 35; see also 47 U.S.C. 224. In States that do not regulate pole attachments, that statute requires the Federal Communications Commission (FCC or Commission) to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. 224(b)(1).

As originally enacted, Section 224 applied only to attachments by cable companies. Section 224(d)(1) establishes upper and lower bounds for a "just and reasonable" rate for cable company attachments (the cable rate). At the upper bound, the cable rate cannot be greater than "the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole," multiplied by "the percentage of the total usable space" occupied by the attachment. 47 U.S.C. 224(d)(1). At the lower bound, the rate cannot be "less than the additional costs of providing pole attachments." *Ibid.* To set the upper-bound rate for cable company attachments, the FCC uses a formula that multiplies three values: the space factor (the space occupied by an attachment divided by the total usable space on the pole), the net cost of a bare pole, and a carrying charge. 47 C.F.R. 1.1409(e)(1).

2. In 1996, Congress expanded Section 224's coverage to encompass "providers of telecommunications service[s]." 47 U.S.C. 224(a)(4). See Telecommunications Act of 1996, Pub. L. No. 104-104, § 703(2), 110 Stat. 150. A new provision, Section 224(e), established a formula

for determining the "just and reasonable" rate for pole attachments used by telecommunications carriers (the telecom rate). Unlike the cable rate formula in Section 224(d)(1), which delimits the "cost" used to determine the upper- and lower-bound rates, the telecom rate formula in Section 224(e) does not define "cost." Instead, it specifies only how cost should be allocated between the pole owner and telecommunications company attachers. In addition to apportioning the cost of the usable space on a pole among attachers based on the amount of space "required" for each attachment, the telecom rate apportions to each attacher two-thirds of the *pro rata* cost of the unusable space on a pole, *i.e.*, the space on the pole, including the portion underground, that cannot be used for attachments. See 47 U.S.C. 224(e)(2)-(3).

Until 2011, the FCC calculated the telecom rate based on the "cost" used to calculate the upper-bound cable rate. That approach resulted in telecom rates that generally exceeded cable rates. *In re Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240 ¶ 131 & n.399 (2011 Order). The discrepancy stemmed from the way that the two statutory formulas allocate the cost of the unusable space on the pole. The cable rate formula allocates that cost based on the fraction of the usable space that an attachment occupies. *Id.* ¶ 131 n.397. The telecom rate formula, by contrast, requires all entities with attachments on the pole to share, on a proportionate basis, two-thirds of the cost of the unusable space. *Ibid.*

3. In 2011, the FCC adopted new rules to implement Section 224. See 2011 Order. The FCC found that the discrepancy between the cable rate and the telecom rate

had deterred cable operators' investment in new, advanced services because of the "financial impact" that could result from application of the higher telecom rate. *Id.* at 5317 (¶ 174). The FCC further found that unifying the cable and telecom rates would "eliminate competitive disadvantages" that arise when providers of similar services pay different rates for functionally identical pole attachments. *Id.* at 5318 (¶ 176).

Accordingly, the Commission determined that the telecom rate formula would no longer incorporate the "cost" used to determine the upper-bound cable rate. Instead, the agency adopted an approach that defined the cost of telecommunications carrier attachments "in terms of a percentage of the fully allocated costs" of the pole—specifically, 66% of fully allocated costs in urban areas and 44% of costs in non-urban areas. 2011 Order at 5304 (¶ 149); see 47 C.F.R. 1.1409(e)(2)(i). The FCC intended for this new measure of cost to produce a telecom rate that "will, in general, approximate the cable rate," 2011 Order at 5304 (¶ 149), thereby allowing cable and telecommunication companies that provide service using attachments placed on utility poles "to compete on a level playing field," *id.* at 5303 (¶ 147).

4. Utilities (including one of the petitioners here) sought review of the 2011 Order in the United States Court of Appeals for the D.C. Circuit. The court rejected petitioners' argument that "cost" in Section 224(e)(2) and (3) "must necessarily refer to the pole's fully allocated cost"—essentially, the same "cost" used in the Section 224(d)(1) formula for calculating cable rates. *American Elec. Power Serv. Corp.* v. *FCC*, 708 F.3d 183, 188-190 (D.C. Cir.), cert. denied, 134 S. Ct. 118 (2013). The court explained that Section 224(e) "is in important respects less specific than [Section] 224(d)"

because, "while [Section] 224(e) prescribe[d] the apportionment criteria rather specifically, it nowhere defines the term 'cost.'" *Id.* at 188-189. The court concluded that "the term 'cost,' without more, is open to a wide range of reasonable interpretations," providing the FCC significant discretion to define that term in Section 224(e). *Id.* at 189. The court held that the FCC had reasonably exercised that discretion in defining the "cost" used in the telecom rate formula as percentages of the fully allocated cost of a utility pole. In the court's view, reducing the disparity between cable and telecom rates in order to "eliminate [market] distortion" was a reasonable "policy justification" for the FCC's "chosen methodology." *Id.* at 190.

5. In *Gulf Power*, *supra*, this Court held that the FCC has authority to regulate attachments that cable companies use to offer "commingled" video and broadband Internet access services, and to set the "just and reasonable" rate for those attachments at the Section 224(d) cable rate. 534 U.S. at 333-339. At the time, the FCC classified broadband Internet access service provided by a cable company as an "information service" under the Communications Act of 1934, 47 U.S.C. 151 *et seq.* See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 975 (2005).

On February 26, 2015, the Commission adopted an order that classified "retail broadband Internet access service" as "an offering of a 'telecommunications service.'" *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, 5734 (¶ 308) (2015) (Open Internet Order), aff'd, *United States Telecom Ass'n* v. *FCC*, 825 F.3d 674 (D.C. Cir. 2016), petition for cert. pending, No. 17-498 (filed Sept. 27, 2017). The FCC recognized

that the Open Internet Order gave pole owners an incentive to demand that cable companies providing broadband Internet access service pay the telecom rate for pole attachments—which, despite the Commission's adoption of different formulas for urban and non-urban areas, was still generally higher than the cable rate. *Id.* at 5833 (¶ 484). Expressing concern that the Open Internet Order could inadvertently lead to increases in pole attachment rates that would stifle future investment in broadband infrastructure, the FCC stated that it would "promptly take further action" regarding pole attachment rates "if warranted." *Id.* at 5833 (¶ 483).

6. While litigation over the 2011 Order was pending, the National Cable and Telecommunications Association (NCTA), a trade association representing cable companies, filed a petition with the FCC seeking administrative reconsideration or clarification of that order. The NCTA petition asserted that the 66% and 44% cost allocators adopted in the 2011 Order produce telecom rates that replicate cable rates when applied in tandem with the presumption in the FCC's rules that there are, on average, five attachers on a pole in an urban area and three attachers on a pole in a non-urban area. Pet. App. 26-28; see 47 C.F.R. 1.1417(c). The NCTA petition further asserted, however, that urban poles typically have fewer attachments (2.6 on average) than the Commission's rules presume, and that the mismatch between the presumptive number of attachers and the actual number of attachers had resulted in telecom rates that frequently exceeded cable rates. Pet. App. 26-27. NCTA therefore asked the FCC either to clarify that the 66% and 44% allocators "are mere illustrations of the new rule," or to add cost allocators for poles with

two or four attachers, to ensure that cable and telecom pole attachment rates are comparable. *Id.* at 27.

7. On November 24, 2015, the FCC released the order that is the subject of the petition for a writ of certiorari in this case. In response to the NCTA petition, the FCC "broaden[ed] the use of cost allocators in the telecom rate formula" by introducing cost allocators for poles with two attachers (31% of fully allocated cost) or four attachers (56% of fully allocated cost), based on the average number of attachers in a service area. *In re Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 30 FCC Rcd 13,731, 13,738 ¶¶ 2, 16 (2015) (2015 Order) (Pet. App. 29-30).* The FCC found that this "multiple cost-allocator approach" would "fulfill[] [the agency's] intent * * * to bring cable and telecom rates for pole attachments into parity at the cable-rate level," Pet. App. 30, consistent with the Commission's finding in the 2011 Order that "[l]ower pole rental rates serve to encourage broadband investment," *id.* at 36.

Three considerations motivated the agency's decision. First, the FCC found "widespread agreement" in the record before it "that the real average number of attaching entities" on a pole "is regularly far lower than" the presumptive number of attachers contemplated by the FCC's rules —a disparity that the record showed "causes rates calculated with the telecom rate formula to be around 70 percent higher than rates calculated with the cable rate formula." Pet. App. 31.

Second, the FCC predicted that the flawed presumptions underlying the cost definition in the 2011 Order,

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* The 2015 Order also provided for "interpolated [cost] allocators" where the average number of attachers on a utility pole is not a whole number (*e.g.*, 2.6). Pet. App. 33; 47 C.F.R. 1.1409.

in combination with the Open Internet Order, could have the "unintended consequence" of increasing pole attachment rates for cable companies that also offer broadband Internet access services. Pet. App. 37-39, 52-53. The Commission observed that cable companies "are responsible for the substantial majority of pole attachments," and that subjecting them to the telecom rate would give utilities "increased incentives" to rebut the FCC's presumptions. *Id*. at 38 & n.83.

Third, the FCC found that perpetuating the unintended disparity between cable and telecom rates could "deter[] investment" in some States relative to others. Pet. App. 39. The record showed that many States that had elected to regulate pole attachments under Section 224(c) had set the telecom rate at the cable-rate level. The FCC was concerned that broadband Internet access service providers would be more likely to invest in those States than in States subject to higher FCC-established pole attachment rates. *Id.* at 39-40.

Utilities opposed the FCC's further refinement of the telecom rate formula, arguing that it would "unfairly reduce their revenue from pole attachments." Pet. App. 46. The FCC found that argument "unpersuasive," noting that before the Open Internet Order, only about ten percent of all pole attachments had been used by telecommunications carriers. *Ibid.* The FCC concluded that, because most existing pole attachments were subject to the cable rate when the order at issue here was entered, reducing the telecom rate to the cable rate would "disrupt[] settled expectations far less" than raising the cable rate to the telecom rate. *Ibid.*

8. Petitioners filed a petition for review in the United States Court of Appeals for the Eighth Circuit, which upheld the agency's order. Pet. App. 1-11.

The court of appeals rejected petitioners' argument that Section 224 requires cable companies and telecommunications carriers to pay different pole attachment rates. Pet. App. 8-10. The court "conclude[d] that the term 'cost' in [Section] 224 is ambiguous." *Id.* at 7. It observed that, "while the Cable Rate under [Section] 224(d) must fall within a range defined by two different, specified types of 'cost,' [Section] 224(e) does not specify what type of 'cost' must be used to determine the Telecom Rate." *Id.* at 8. The court found that, because the term "cost" in Section 224(e) is undefined, "the same 'cost' definition need not be used" to calculate rates under Section 224(d)(1) and Section 224(e). *Ibid.* "Accordingly," the court held, "the statute permits, but does not require, the Cable Rate and the Telecom Rate to diverge." *Ibid.*

The court of appeals also rejected petitioners' argument that the FCC's interpretation of the statute renders Section 224(e) superfluous. Pet. App. 9-10. The court explained that, "[w]hether or not the rates diverge, * * * the Telecom Rate must be calculated according to the formula set forth in [Section] 224(e)." *Id.* at 9.

The court of appeals further held that the FCC's refined definition of "cost" reflected "a reasonable interpretation" of Section 224(e). Pet. App. 9. The court recognized that, by relying on flawed presumptions about the number of attachers on a pole, the FCC's 2011 cost definition had inadvertently perpetuated the disparity between cable and telecom rates. *Id.* at 10. The court therefore concluded that the Commission had made a "'reasonable policy' choice" when, to "avoid subjecting cable providers offering broadband service to the higher Telecom Rate," and to "avoid rate disparity be-

tween [S]tates," it had adopted additional cost allocation percentages for poles with two and four attachers. *Id.* at 9-10 (citation omitted).

Finally, the court of appeals found "the D.C. Circuit's decision in *American Electric Power* to be persuasive" and petitioners' attempt to distinguish it unavailing. Pet. App. 10. The court acknowledged that the 2011 Order and the 2015 Order differed in some respects. See *ibid.* The court noted in particular that, under the 2011 Order, "the Telecom Rate did not vary based on the number of attachers"; that there were "only two definitions of the term 'cost'"; and that "it was at least possible for the Cable and Telecom Rates to diverge." *Ibid.* The court concluded, however, that "those distinctions are of no significance." *Ibid.* The court explained that the D.C. Circuit in *American Electric Power* had concluded both that "the term 'cost' was ambiguous" and that "the FCC's choice to define 'cost' so as to equalize the Cable and Telecom Rates was reasonable." *Id.* at 10-11. The court found that the D.C. Circuit's "reasoning applie[d] with equal force" in the case before it. *Id.* at 11.

9. On January 4, 2018, the FCC released the Restoring Internet Freedom Order. When that order takes effect, it will "reverse" the Open Internet Order by "restor[ing] broadband Internet access service to its Title I information service classification." *In re Restoring Internet Freedom*, No. 17-108, 2018 WL 305638, ¶ 2 (Jan. 14, 2018).

ARGUMENT

Petitioners contend (Pet. 18-31) that the 2015 Order is not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S.

837 (1984), because it reflects an unreasonable interpretation of the term "cost" in Section 224. The court below correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. In addition, the dispute in this case is of diminishing ongoing significance because the Restoring Internet Freedom Order, when it takes effect, will require cable providers to pay the cable rate for attachments used to provide commingled video and broadband Internet access services, which will significantly reduce the percentage of pole attachments that are subject to the telecom rate. For all of those reasons, further review is not warranted.

1. a. Under the familiar two-part framework set forth in *Chevron*, a court must first determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If it has, the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If the statute is silent or ambiguous with respect to the specific issue that is the subject of the parties' dispute, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Ibid.* The agency's view will "govern[] if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

b. The court of appeals correctly applied the established *Chevron* framework to the facts of this case. Consistent with this Court's recognition that the term "cost" standing alone "is 'a chameleon,' a 'virtually meaningless term,'" *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 500 (2002) (citations omitted), the court of

appeals concluded that "the term 'cost' in [Section] 224(e) is ambiguous," Pet. App. 7. The court explained that, even within Section 224(d), the term "cost" is used in two different ways. *Ibid.* Section 224(d) identifies as the lower bound for the cable rate the "additional costs" of providing pole attachments, and it identifies as the upper bound a rate equal to the percentage of the pole's usable space occupied by the attachment multiplied by operating expenses and "actual capital costs" of the utility attributable to the entire pole. 47 U.S.C. 224(d)(1). In contrast, Section 224(e) "does not specify what type of 'cost' must be used to determine the Telecom Rate." Pet. App. 8. The court correctly held that the same definition of "cost" "need not be used to determine the upper bound for cable rates under [Section] 224(d) and the rate for telecommunications providers under [Section] 224(e)." *Ibid.* The statute thus "permits, but does not require, the Cable Rate and the Telecom Rate to diverge." *Ibid.*

The court of appeals also correctly upheld the FCC's resolution of the ambiguity in Section 224(e). Pet. App. 9. The court recognized that the agency had "sought to eliminate" the cable-telecom rate "disparity" in order "to avoid subjecting cable providers offering broadband service to the higher Telecom Rate," and "to avoid rate disparity between [S]tates whose pole attachment rates are regulated by the FCC and those [S]tates that * * * us[e] the Cable Rate even for telecommunications providers." *Id.* at 9-10. The court correctly held that the agency's 2015 Order on telecom rates reflected "a 'reasonable policy' choice." *Id.* at 10 (quoting *Verizon*, 535 U.S. at 523).

2. Petitioners contend (Pet. 18-31) that the 2015 Order is not entitled to *Chevron* deference because it reflects an unreasonable interpretation of Section 224(e). Petitioners acknowledge that, "to the extent there is ambiguity in the term 'cost'" in Section 224(e), "the FCC has discretion to interpret that term." Pet. 18. They contend, however, that the agency "went well beyond the bounds of that discretion" in the 2015 Order. *Ibid.* That argument lacks merit.

a. Petitioners contend that the court of appeals permitted the FCC "to rewrite [Section] 224 * * * to accomplish [its policy] objectives." Pet. 19; see Pet. 18-21. But under *Chevron*, an agency may rely on policy rationales to choose among otherwise permissible interpretations of an ambiguous statutory term. See *Verizon*, 535 U.S. at 523; *American Elec. Power Serv. Corp.* v. *FCC*, 708 F.3d 183, 188-190 (D.C. Cir.), cert. denied, 134 S. Ct. 118 (2013). In *National Cable & Telecommunications Ass'n* v. *Gulf Power Co.*, 534 U.S. 327 (2002), this Court held that the Commission may interpret Section 224 in light of "Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability." *Id.* at 339 (quoting 47 U.S.C. 1302(a)).

b. Petitioners further contend (Pet. 20-21) that the FCC's interpretation of "cost" in Section 224(e) should have been accorded less deference because it was inconsistent with the agency's earlier interpretation of that statutory term. This Court has made clear, however, that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); see *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996) ("[C]hange is not invalidating, since the

whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."). Indeed, *Chevron* itself involved a change in an agency's interpretation of a statute. 467 U.S. at 857-858. A change in agency interpretation can be reasonable if the agency adequately explains the reasons for its policy shift, *Smiley*, 517 U.S. at 742, which the FCC did here.

c. Finally, petitioners repeat (Pet. 18-19, 24-31) the statutory-construction arguments they made in the court of appeals. They contend (Pet. 18-19) that, after the court of appeals concluded that the term "cost" was ambiguous, it "rubberstamped approval of the FCC's interpretation of that term" without conducting the analysis required under *Chevron*. Pet. 18. The court of appeals' opinion does not support that characterization. The court examined the language of Section 224(d) and (e) and applied accepted tools of statutory construction to conclude that the FCC's interpretation of Section 224 is reasonable. The court correctly rejected petitioners' assertion, repeated here (Pet. 19, 24-25), that the 2015 Order renders Section 224(e) superfluous by interpreting the Section 224(e) formula for telecom rates so that it approximates the cable rate under Section 224(d). The court explained that, however the term "cost" is defined, Section 224(e) performs an independent function by prescribing how costs are apportioned among the pole owner and the attaching entities. Pet. App. 9.

Petitioners further contend (Pet. 19, 25-27) that Congress must have intended that the rates for cable and telecom attachments would be different because it provided different formulas for determining the rate. But different rate formulas can produce the same rate where, as here, one subsection of the statute defines the

"cost" used in the rate formula, 47 U.S.C. 224(d)(1), and other subsections do not, 47 U.S.C. 224(e)(2)-(3). Because Section 224(e) does not contain its own definition of the term "cost" for purposes of that provision, "the statute permits, but does not require," the cable and telecom rates to diverge. Pet. App. 8.

Petitioners argue (Pet. 25) that, if Congress had intended for cable and telecommunications companies to pay the same pole attachment rate, it could have achieved that result by simply adopting the Section 224(d) rate for telecommunications carriers. That approach, however, would have *required* the FCC to ensure that the two rates are the same in all circumstances. By including two distinct rate formulas in Section 224, Congress *allowed* the FCC to establish different cable and telecom rates, but it did not *obligate* the agency to do so.

Petitioners further contend that the FCC's interpretation of the term "cost" in Section 224(e) is unreasonable because, "[r]ather than 'cost' being *allocated* based upon the number of attaching entities * * *, the FCC *defined* the term 'cost' based upon the number of attaching entities." Pet. 28; see Pet. 27-31. To be sure, under the 2015 Order, the cost of an attachment on a particular pole can depend on the number of entities that have contracted for attachments on that pole. But the agency reasonably preferred that approach to the prior regime, which had forced competitors with the same attachments on the same pole to pay different rates. That prior outcome, the FCC explained, had distorted end-user choices between broadband technologies, erected a barrier to the deployment of new services, and discouraged network investment. 2011 Order at 5303 (¶ 147); *American Elec. Power*, 708 F.3d at 190.

The FCC made a "'reasonable policy' choice" when it interpreted "cost" in Section 224(e) to eliminate that rate disparity. Pet. App. 10 (quoting *Verizon*, 535 U.S. at 523).

Under well-settled principles, when Congress leaves a gap in a statute that is administered by an agency, it vests the agency with the authority to fill in the gap by means of reasonable interpretation. *Chevron*, 467 U.S. at 843-844; accord *Brand X*, 545 U.S. at 980; *Gulf Power*, 534 U.S. at 339. The court of appeals correctly held that the FCC's interpretation of the undefined term "cost" in Section 224(e) was consistent with the statutory text and would reasonably advance important policy objectives. Pet. App. 9-11.

3. Petitioner contends (Pet. 14-17) that the decision below conflicts with the Eleventh Circuit's decisions in *Alabama Power Co.* v. *FCC*, 311 F.3d 1357 (2002), and *Georgia Power Co.* v. *Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033 (2003). Petitioner's reliance on those decisions is misplaced. The Eleventh Circuit did not hold in either of those cases that Section 224 bars the FCC from requiring cable companies and telecommunications carriers to pay equivalent pole-attachment rates.

In *Alabama Power Co.*, a utility company argued that the FCC's cable-rate methodology violated the Just Compensation Clause of the Fifth Amendment. 311 F.3d at 1367-1371. The Eleventh Circuit held that, unless a utility's poles are at full capacity, the utility receives just compensation if the cable rate is above the marginal cost of the pole attachment. *Id.* at 1370-1371. Because the FCC-imposed rate was well above the marginal cost and the utility company had not shown that its poles were full, the court held that no Fifth Amendment violation had occurred. *Id.* at 1370. In *Georgia*

Power Co., the Eleventh Circuit similarly rejected a Just Compensation Clause challenge to an FCC-imposed telecom rate. 346 F.3d at 1038. The court explained that, "[i]f the cable rate provided more than just compensation in *Alabama Power*, then the higher [telecom] rate set by FCC in this case provides just compensation." *Id.* at 1047.

Although the Eleventh Circuit in *Georgia Power Co.* observed that the telecom rate was higher than the cable rate under the then-existing regulatory scheme, it did not decide whether Section 224 mandated that disparity. Similarly in *Alabama Power Co.*, the court noted the existence of the rate differential without determining whether the statute required it. In holding that payment of the cable rate provided the utility in that case with just compensation, the court in *Alabama Power Co.* explained that, "[s]ince marginal cost provides just compensation * * * , it is irrelevant that the Telecom Rate provided in [Section] 224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments." 311 F.3d at 1371 n.23. The court attributed the difference between the two rates to the FCC's then-current interpretation of Section 224. *Ibid.* (citing *Alabama Cable Telecomms. Assoc.* v. *Alabama Power Co.*, 16 FCC Rcd 12,209 (¶ 49) (2001)); see *Georgia Power Co.*, 346 F.3d at 1047 (observing that, at the time of the court's decision in *Alabama Power Co.*, the FCC had set the telecom rate above the cable rate).

In both *Alabama Power Co.* and *Georgia Power Co.*, the court briefly discussed whether and in what way the *existence* of the cable-telecom rate differential was relevant to the court's Just Compensation Clause analysis.

For purposes of that Fifth Amendment inquiry, however, it was irrelevant whether that disparity was mandated by statute or instead resulted from the FCC's exercise of regulatory discretion. In neither case did the Eleventh Circuit have occasion to address whether the FCC could change its interpretation of Section 224.

The only other court of appeals that has examined the FCC's interpretation of "cost" in Section 224(e) reached the same conclusion as the court below. In *American Electric Power*, the D.C. Circuit upheld the FCC's authority to define "cost" in Section 224(e) to eliminate disparity between the cable and telecom rates. 708 F.3d at 188-190. The court emphasized that "the term 'cost,' without more, is open to a wide range of reasonable interpretation," *id.* at 189, and that "artificial, non-cost-based differences in the prices of inputs among competitors are bound to distort competition," *id.* at 190. The court held that, "[b]ecause the Commission's methodology is consistent with the unspecified cost terms contained in [Section] 224(e), and the Commission's justifications are reasonable," the agency's efforts in 2011 to align the cable and telecom rates were lawful. *Ibid.*

4. Petitioners contend (Pet. 31-38) that this is a case of exceptional importance because "the FCC's approach on pole attachment rents is effecting a wealth transfer of hundreds of millions of dollars annually from electric utility ratepayers to communications company shareholders." Pet. 35. That argument lacks merit. The 2015 Order largely maintained the status quo, under which cable companies—which "are responsible for the substantial majority of pole attachments"—will continue to pay the same rate for the same pole attachments that they paid before the order. Pet. App. 32 n.65; see *id.* at

46-47. This Court concluded more than three decades ago that the cable rate is just, reasonable, and not confiscatory. *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 254 (1987). The only thing petitioners "lost" was the opportunity to take advantage of the flawed presumptions underlying the FCC's 2011 rules, and the reclassification of broadband Internet access service in the Open Internet Order, to raise the rates for millions of existing pole attachments. The FCC reasonably denied petitioners that "windfall," which would have come at the expense of broadband deployment. Pet. App. 57-58.

Petitioners further contend (Pet. 36) that the 2015 Order raises "federalism issues regarding the ability of the FCC * * * to impact the rates set by state regulators for electric service." But Section 224 allows States to regulate pole attachment rates, and it authorizes the Commission to require just and reasonable rates for pole attachments only in States that decline to exercise that authority. 47 U.S.C. 224(c). The 2015 Order therefore creates no meaningful federalism concern.

5. Finally, the significance of the 2015 Order has been diminished by subsequent regulatory developments. As explained above (see p. 10, *supra*), when the FCC's recent Restoring Internet Freedom Order takes effect, broadband Internet access service will be reclassified as an "information service" rather than as a "telecommunications service." *In re Restoring Internet Freedom*, No. 17-108, 2018 WL 305638, ¶ 2 (Jan. 14, 2018). When that occurs, there will no longer be a basis for contending that pole attachments used by cable providers to offer broadband Internet access are subject to the telecom rate. Instead, consistent with this Court's decision in *Gulf Power*, 534 U.S. at 337-339, cable providers will pay the cable rate for attachments used to

provide commingled video and broadband Internet access services. Only about ten percent of all pole attachments are used by telecommunications carriers. Pet. App. 46. The FCC's interpretation of Section 224(e), and the telecom rate in the 2015 Order, therefore will affect considerably fewer pole attachments in the future than it did when the court below issued its decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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