SUPREME COURT OF THE UNITED STATES

Nos. 00–832 and 00–843

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, INC., PETITIONER
00–832 *v.*
GULF POWER COMPANY ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, PETITIONERS
00–843 *v.*
GULF POWER COMPANY ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January 16, 2002]

JUSTICE THOMAS, with whom JUSTICE SOUTER joins, concurring in part and dissenting in part.

I join Parts I and III of the Court's opinion because I agree that the Pole Attachments Act, 47 U. S. C. §224 (1994 ed. and Supp. V), grants the Federal Communications Commission (FCC or Commission) jurisdiction to regulate attachments by wireless telecommunications providers. The Court's conclusion in Part II of its opinion that the Act gives the FCC the authority to regulate rates for attachments providing commingled cable television service and high-speed Internet access may be correct as well.

Nevertheless, because the FCC failed to engage in reasoned decisionmaking before asserting jurisdiction over attachments transmitting these commingled services, I cannot agree with the Court that the judgment below should be reversed and the FCC's decision on this point allowed to stand. Instead, I would vacate the Court of

Appeals' judgment and remand the cases to the FCC with instructions that the Commission clearly explain the specific statutory basis on which it is regulating rates for attachments that provide commingled cable television service and high-speed Internet access. Such a determination would require the Commission to decide at long last whether high-speed Internet access provided through cable wires constitutes cable service or telecommunications service or falls into neither category.

I

As these cases have been presented to this Court, the dispute over the FCC's authority to regulate rates for attachments providing commingled cable television service and high-speed Internet access turns on one central question: whether 47 U. S. C. §224(b)(1)'s general grant of authority empowers the FCC to regulate rates for "pole attachments," §224(a)(4), that are not covered by either of the Act's two specific rate methodologies, §224(d) and §224(e). Petitioners, including the FCC, contend that §224(b)(1) authorizes the Commission to regulate rates for all "pole attachments" as that term is defined in §224(a)(4). Respondents, on the other hand, argue that the FCC may only regulate rates for attachments covered by one of the two specific rate methodologies set forth in the Act, the position adopted by the Court of Appeals below.

It is not at all clear, however, that the disputed attachments at issue here—those providing both cable television programming and high-speed Internet access—are attachments for which neither of the Act's two specific rate methodologies applies. The FCC has made no determination with respect to this issue that this Court (or any other court) can review. Indeed, there is nothing in the record indicating whether *any* pole attachments currently exist that fall within the terms of §224(a)(4) yet are not covered

by either of the Act's specific rate methodologies. Consequently, the specific legal issue the Court chooses to address is, at this time, nothing more than a tempest in a teapot.

The disputed attachments here provide two distinct services: conventional cable television programming and high-speed Internet access. No party disputes the FCC's conclusion that conventional cable television programming constitutes cable service. See *ante*, at 4. Crucially, however, the FCC has made no determination as to the proper statutory classification of high-speed Internet access using cable modem technology. In fact, in asserting its authority to regulate rates for attachments providing commingled cable television service and high-speed Internet access, the Commission explicitly declined to address the issue: "We need not decide at this time . . . the precise category into which Internet services fit." *In re Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. 6777, 6795 (1998). In their petition for certiorari, the Government and the FCC (hereinafter FCC) explained that the FCC proceeded in this manner "because the classification of cable Internet access as 'cable service,' 'telecommunications service,' or some other form of service is the subject of ongoing proceedings before the Commission concerning issues outside the Pole Attachments Act," and it "'d[id] not intend . . . to foreclose any aspect of the Commission's ongoing examination of those issues.'" Pet. for Cert. in No. 00–843, p. 5, n. 2 (quoting 13 FCC Rcd., at 6795).

The statutory scheme, however, does not permit the FCC to avoid this question. None of the parties disputes that the two specific rate methodologies set forth in the Act are mandatory if applicable. If an attachment by a cable television system is used solely to provide cable service, the rate for that attachment *must* be set pursuant

to the methodology contained in §224(d). See 47 U. S. C. §224(d)(3). And, if an attachment is used to provide telecommunications service, the rate for that attachment *must* be set pursuant to the methodology contained in §224(e). As a result, before the FCC may regulate rates for a category of attachments, the statute requires the FCC to make at least two determinations: whether the attachments are used "solely to provide cable service" and whether the attachments are used to provide "telecommunications service."

Here, however, the FCC has failed to take either necessary step. For if high-speed Internet access using cable modem technology is a cable service,[1] then attachments providing commingled cable television programming and high-speed Internet access are used solely to provide cable service, and the rates for these attachments *must* be regulated pursuant to §224(d)'s methodology. Or if, on the other hand, such Internet access constitutes a telecommunications service,[2] then these attachments are used to provide telecommunications service and *must* be regulated pursuant to §224(e)'s rate methodology.[3]

Only after determining whether either of the Act's mandatory rate methodologies applies to particular attachments and answering that question in the negative does the statute allow the FCC to examine whether it may define a "just and reasonable" rate for those attachments pursuant to §224(b)(1). Had the FCC engaged in such

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[1] See, *e.g.*, *MediaOne Group, Inc.* v. *County of Henrico*, 97 F. Supp. 2d 712, 715 (ED Va. 2000), aff'd on other grounds, 257 F. 3d 356 (CA4 2001) (concluding that cable modem service is a cable service).

[2] See, *e.g.*, *AT&T Corp.* v. *Portland*, 216 F. 3d 871, 878 (CA9 2000) (concluding that cable modem service is a telecommunications service).

[3] Rates set pursuant to §224(e)'s methodology are generally higher than those set pursuant to §224(d)'s methodology. See Brief for Petitioners in No. 00–843, p. 24; Brief for Respondents Atlantic City Elec. Co. et al. 10, n. 2.

reasoned decisionmaking below and concluded that it had the authority to regulate rates for attachments used to provide commingled cable television service and high-speed Internet access *even though* high-speed Internet access using cable modem technology constitutes neither cable service nor telecommunications service, then this Court would have been able to review the Commission's order in a logical manner. We first would have asked whether the Commission had permissibly classified the services provided by these attachments. And, if we answered that question in the affirmative, we would then (and only then) have asked whether the FCC has the authority under §224(b)(1) to regulate rates for attachments where Congress has not provided an applicable rate methodology.

Instead, the FCC asks this Court to sustain its authority to regulate rates for attachments providing commingled cable television programming and high-speed Internet access, even though it has yet to articulate the specific statutory basis for its authority to regulate these attachments. Yet, as Justice Harlan noted some years ago: "Judicial review of [an agency's] orders will . . . function accurately and efficaciously only if the [agency] indicates fully and carefully the methods by which . . . it has chosen to act." *Permian Basin Area Rate Cases*, 390 U. S. 747, 792 (1968). Here, the FCC obviously has fallen far short of this standard.

The FCC seems to hold open the following options: (a) Rates for attachments providing commingled cable television programming and high-speed Internet access may be regulated pursuant to §224(d)'s rate methodology; (b) rates for these attachments may be regulated pursuant to §224(e)'s rate methodology; or (c) rates for these attachments may be regulated under the FCC's general authority to define "just and reasonable" rates pursuant to §224(b)(1). To be sure, the Commission has rejected a

fourth possible option advanced by respondents: that it lacks any authority to regulate rates for attachments providing commingled cable television programming and high-speed Internet access. But if the FCC wishes to regulate rates for these attachments, the statute requires the Commission to do more. Eliminating only one of four possible answers in this instance does not constitute reasoned decisionmaking.

For these reasons, the FCC's attempt to regulate rates for attachments providing commingled cable television service and high-speed Internet access while refusing to classify the services provided by these attachments is "arbitrary, capricious," and "not in accordance with law." 5 U. S. C. §706(2)(A). I would therefore remand these cases to the FCC for the Commission to identify the specific statutory basis for its authority to regulate rates for attachments providing commingled cable television programming and high-speed Internet access: 47 U. S. C. §224(d), §224(e), or §224(b)(1) (1994 ed. and Supp. V).

II

Notwithstanding the FCC's failure to classify the services provided by the attachments at issue in these cases, the Court nonetheless concludes that the FCC's analysis below was adequate. Proceeding from the premise that the Commission in fact *has determined* that high-speed Internet access using cable modem technology is not a telecommunications service, see *ante*, at 8, the Court finds that the Commission, after reaching this conclusion, was not required to determine whether the attachments here are used solely to provide cable service. Even if the FCC had concluded that these attachments are not used solely to provide cable service, the Court notes that the FCC indicated it would have used its power under §224(b)(1) to apply §224(d)'s rate methodology regardless. See *ante*, at 8–9. Under the Court's reasoning, this is therefore a case

of six of one, a half dozen of another. Either the FCC must apply §224(d)'s methodology to attachments providing commingled cable television programming and high-speed Internet access because such attachments are used solely to provide cable service, see §224(d)(3), or the FCC has exercised its power under §224(b)(1) to regulate the rates for these attachments and has chosen to "apply the [§224(d)] rate as a 'just and reasonable' rate." 13 FCC Rcd., at 6796. The problem with this position is twofold.

A

First, the FCC has not conclusively determined that high-speed Internet access using cable modem technology is *not* a telecommunications service. Admittedly, the FCC's discussion of the topic in its order below was opaque.[4] The Commission, however, has since made its

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[4] Residential high-speed Internet access typically requires two separate steps. The first is transmission from a customer's home to an Internet service provider's (ISP's) point of presence. This service is generally provided by a cable or phone company over wires attached to poles, ducts, conduits, and rights of way. The second is a service delivered by an ISP to provide the connection between its point of presence and the Internet. See Brief for United States Telecom Assn. et al. as *Amici Curiae* 6. The Commission has classified the second step of this process, the service provided by an ISP, as an "information service." See, *e.g.*, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385, 401 (1999). To date, however, the FCC has not classified the first step of this process in the cable context. Notably, when high-speed Internet access is provided over phone lines, in what is generally known as DSL service, the FCC has classified the first step of this process as involving the provision of a telecommunications service. See *id.*, at 402–403.

The FCC's order below reflected the Commission's position. In its order, the Commission never specifically addressed whether transmission over cable wires from a customer's residence to an ISP's point of presence constitutes a telecommunications service. Instead, the FCC merely referred to its earlier decision that ISPs do not provide a telecommunications service under the 1996 Telecommunications Act. It

lack of a position on the issue unambiguous.

The FCC has not represented to this Court that high-speed Internet access provided through cable wires is *not* a telecommunications service. To the contrary, it has made its agnosticism on the topic quite clear. In its petition for certiorari, for instance, the FCC complained that the Court of Appeals "mistakenly felt compelled to address whether a cable company's provision of Internet access is properly characterized as a 'cable service,' a 'telecommunications service,' or an 'information service.'" Pet. for Cert. in No. 00–843, p. 15, n. 4. It then clearly stated, "To date, the FCC *has taken no position* on that issue." *Ibid.* (emphasis added). The FCC not only repeated this contention in its merits brief, see Brief for Petitioners in No. 00–843,

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then reasoned that "[u]nder this precedent, a cable television system providing Internet service over a commingled facility is not a telecommunications carrier subject to the revised rate mandated by Section 224(e) by virtue of providing Internet service." *In re Implementation of Section 703(e) of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. 6777, 6794–6795 (1998). To be sure, to the extent that a cable television system actually provides Internet service like any other ISP it is undoubtedly providing an "information service" under the Commission's precedents. The Commission's analysis, however, failed to address the crucial question: What type of service is provided when cable wires are used to transmit information between a customer's home and an ISP's point of presence?

It is for this reason perhaps that the Commission explained in its order below that it was reviewing the extent to which its "definition[s] of 'telecommunications' and 'telecommunications service' . . . [were] consistent with the Act" and did "not intend, in this proceeding, to foreclose any aspect of the Commission's ongoing examination of those issues." *Id.,* at 6795. Crucially, when the FCC released that "review," it expressly stated "no view . . . on the applicability of [its prior] analysis to cable operators providing Internet access service," and noted that "we have not yet established the regulatory classification of Internet services provided over cable television facilities." *In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, 11535, n. 140 (1998).

p. 30, but also explicitly asked this Court *not* to evaluate whether high-speed Internet access using cable modem technology is "a 'cable service,' a 'telecommunications service,' or some other kind of service," *ibid.*, *even if* we concluded such an inquiry was necessary to determine whether the FCC could regulate rates for attachments providing commingled cable television programming and high-speed Internet access. The reason it gave for this request was simple: The FCC should be allowed to "address the characterization issue in *the first instance*." *Id.,* at 31 (emphasis added).

Outside of this litigation, the FCC has also unambiguously indicated that it holds "no position" as to whether high-speed Internet access using cable modem technology constitutes a telecommunications service. For example, in an *amicus curiae* brief submitted to the United States Court of Appeals for the Ninth Circuit, the FCC stated: "To date, the Commission has not decided whether broadband capability offered over cable facilities is a 'cable service' under the Communications Act, or instead should be classified as 'telecommunications' or as an 'information service.' The answer to this question is far from clear." Brief for FCC as *Amicus Curiae* in *AT&T Corp.* v. *Portland*, No. 99–35609, p. 19.[5] Just last year, in fact, the

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[5]The FCC's *amicus curiae* brief in *AT&T Corp.* v. *Portland* is completely inconsistent with the Court's position that the FCC has not decided whether high-speed Internet access using cable modem technology constitutes cable service but has concluded that such Internet access is not a telecommunications service. The FCC's brief questions whether the provision of Internet access through a cable modem is a "cable service" without taking a definitive position on the question. Brief for FCC as *Amicus Curiae* in No. 99–35609, at 19–26. The FCC then observes, "[O]n a conceptual level, an argument can be made that Internet access is more appropriately characterized as an information or telecommunications service rather than a cable service." *Id*., at 26.

Commission issued a Notice of Inquiry seeking comment on the proper statutory classification of high-speed Internet access using cable modem technology. See *In re Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, 15 FCC Rcd. 19287 (2000). In this Notice of Inquiry, the FCC specifically sought comment on, among other issues, whether such Internet access "is a telecommunications service," see *id.*, at 19294, at no point indicating that the FCC had ever taken any position on the issue.

The Court's conclusion that the FCC has already decided that high-speed Internet access using cable modem technology is not a telecommunications service thus stands in stark contrast to the FCC's own view of the matter. "[T]he Commission has not determined whether Internet access via cable system facilities should be classified as a 'cable service' subject to Title VI of the Act, or as a 'telecommunications' or 'information service' subject to Title II. There may well come a time when it will be necessary and useful from a policy perspective to make these legal determinations." *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., to AT&T Corp.,* 15 FCC Rcd. 9816, 9872 (2000) (footnote omitted).

The Court, however, does not dispute that reasoned decisionmaking required the FCC to make the "legal determination" whether high-speed Internet access using cable modem technology constitutes a telecommunications service nearly four years ago when the Commission asserted its authority to regulate rates for attachments providing commingled cable television programming and high-speed Internet access. Instead, the Court mistakenly

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The Commission then notes, however, that it "has not yet conclusively resolved the issue." *Ibid.*

concludes that the Commission has reached a decision on the issue. In the Court's view, the FCC's repeated statements that it has not determined whether high-speed Internet access using cable modem technology constitutes a telecommunications service only reflect the "Commission's willingness to reconsider its conclusion that Internet services are not telecommunications." *Ante*, at 9. The relevant issue here, however, is not whether *Internet service* is a telecommunications service. Rather, it is whether *high-speed Internet access* provided through cable wires constitutes a telecommunications service. The two questions are entirely distinct, see n. 4, *supra*, and, as shown above, the FCC has never answered the latter question and has indicated as much no less than six times in recent years.[6] These cases therefore should be remanded to the FCC on this basis alone.

B

Second, even if the FCC had determined that high-speed Internet access provided through cable wires does not constitute a telecommunications service, these cases still would need to be remanded to the FCC. In order to endorse the FCC's primary argument that §224(b)(1) provides the Commission with the authority to regulate rates for attachments not covered by either of the Act's specific rate methodologies, §§224(d) and 224(e), it seems necessary, as a matter of logic, for such attachments to exist. But as both the FCC and the Court admit, the attach-

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[6] See Pet. for Cert. in No. 00–843, p. 15, n. 4; Brief for Petitioners in No. 00–843, p. 30; Brief for FCC as *Amicus Curiae* in No. 99–35609 (CA9), pp. 19–26; *In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, 11535, n. 140 (1998); *In re Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, 15 FCC Rcd. 19287, 19294 (2000); *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., to AT&T Corp.,* 15 FCC Rcd. 9816, 9872 (2000).

ments here very well may be addressed by one of the Act's rate formulas. Moreover, neither the FCC nor the Court advances a single example of any attachment that is a covered "pole attachment" under the definition provided in §224(a)(4) but is not covered by either of the Act's specific rate methodologies.

This obviously suggests a dilemma: If all attachments covered by the Act are in fact addressed by the Act's specific rate methodologies, then the coverage of §224(a)(4) is not greater than the sum of §§224(d) and (e), and the FCC has no residual power to define "just and reasonable" rates for attachments pursuant to §224(b)(1). Yet the Court affirms that the FCC indeed possesses just such authority.

Unable to provide a single example of an attachment not addressed by either of the Act's specific rate methodologies, the most the Court can argue is that "[t]he sum of the transactions addressed by the rate formulas . . . is less than the *theoretical* coverage of the Act as a whole." *Ante*, at 7 (emphasis added). The Court, though, offers no reasoning whatsoever in support of this observation, nor does it have any basis in the record.

Leaving aside that which may or may not be theoretically possible, I do not have a view at the present time as to whether any attachments exist that are covered "pole attachments" under the Act, see §224(a)(4), but do not fall within the ambit of §224(d) or §224(e).[7] I do question,

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[7]Two types of attachments are covered by §224(a)(4): those "by a cable television system" and those by a "provider of telecommunications service." Rates for attachments used to provide telecommunications service are covered by §224(e)'s rate methodology regardless of whether these attachments are also used to provide cable service and/or other types of service as well. This is because §224(e), unlike §224(d)(3), does not contain the restriction that attachments must be used "solely" to provide a particular type of service for its methodology to apply. And rates for attachments used solely to provide cable service are regulated pursuant to §224(d)'s methodology. See §224(d)(3). As a result, the

however, whether Congress contemplated the existence of such attachments. Before 1996, the parties agree that the FCC did not possess any general authority to define "just and reasonable" rates for attachments pursuant to §224(b)(1); rates for all attachments were set pursuant to the formula contained in §224(d).[8] And if Congress in 1996 intended to transform §224(b)(1) into a provision empowering the FCC to define "just and reasonable" rates for attachments, it did so in an odd manner: The 1996 amendments to the Act did not change a single word in the relevant statutory provision, and the legislative history contains nary a word indicating that Congress intended to take this step.[9]

Congress may have believed that attachments were *always* used to provide cable service and/or telecommunications service and then taken great care to ensure that specified rate methodologies covered all attachments providing each of these services and both of these services.[10] In this vein, Congress in 1996 provided a new rate

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only "pole attachments," as that term is defined in the Act, that would appear to fall outside of the Act's two specified rate methodologies would be any attachments used to provide only cable service and an additional type of service other than telecommunications service.

[8] For this reason, the Court's reference to "the FCC's *customary discretion* in calculating a 'just and reasonable' rate for commingled services" is rather misleading. *Ante*, at 10 (emphasis added). Prior to 1996, the FCC clearly did not enjoy "discretion" in calculating "just and reasonable" rates for any regulated attachments.

[9] See H. R. Rep. No. 104–204, pp. 220–221 (1996).

[10] While no reference is made in either the text of the Act or the legislative history to attachments providing any services beyond cable service and telecommunications service, the broader Telecommunications Act of 1996 does define such a third category of services: "information services." The statute defines "information service" as "the offering of a capability for generating, acquiring . . . , or making available information *via telecommunications*." 110 Stat. 59, 47 U. S. C. §153(20) (1994 ed., Supp. V) (emphasis added). Given this definition, *amicus*

methodology for the new category of attachments added to the Act,[11] see §224(e), and required that the old rate methodology be applied to the new category of attachments until regulations implementing the new rate methodology for these attachments could be promulgated, see §224(d)(3).

It is certainly possible that Congress, in fact, has not provided an applicable rate methodology for all attachments covered by §224(a)(4). Knowing the size and composition of the universe of attachments not addressed by the Act's two specific rate methodologies, however, would be extremely useful in evaluating the reasonableness of the FCC's position that it may regulate rates for those attachments. So in the complete absence of evidence concerning whether any pole attachments actually exist that are not covered by either of the Act's two specific rate methodologies, my position is simple: It is not conducive to "accurate" or "efficacious" judicial review to consider in the abstract whether the FCC has been given the authority to regulate rates for these "theoretical" attachments. See *Permian Basin Area Rate Cases*, 390 U. S., at 792. This is especially true given that the unusual posture of these

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curiae Earthlink, Inc., argues that "it is logically, technically, and legally impossible for an information service that is offered to the public for a fee to exist without an underlying telecommunications service. Quite simply, the only way that an information service can reach the public is over a telecommunications service." Brief for Earthlink, Inc., as *Amicus Curiae* 24. If Earthlink's position is correct, then this suggests that attachments used to provide an information service may always also provide a telecommunications service and would thus be regulated pursuant to §224(e)'s methodology.

[11] Prior to 1996, the Act only granted the FCC jurisdiction to regulate one category of attachments, those by a cable television system. See 47 U. S. C. §224(a)(4) (1994 ed.). In 1996, however, Congress expanded the scope of the Act to cover attachments by providers of telecommunication service as well. See Telecommunications Act of 1996, 47 U. S. C. §224 (1994 ed., Supp. V).

cases is entirely the result of the FCC's failure to engage in reasoned decisionmaking below. See Part I, *supra*.

III

For many of the same reasons given by the Court, I believe it is likely that the FCC, at the end of the day, has the authority to regulate rates for attachments providing commingled cable television programming and high-speed Internet access. Prior to 1996, the Act was interpreted to grant the FCC such broad authority, see *Texas Util. Elec. Co.* v. *FCC*, 997 F. 2d 925, 929 (CADC 1993), and there is no clear indication in either the text of the 1996 amendments to the Act or the relevant legislative history that Congress intended to take this power away from the FCC.

Moreover, such an interpretation of the 1996 amendments to the Act would be in substantial tension with two congressional policies underlying the Telecommunications Act of 1996. First, Congress directed the FCC to "encourage the deployment" of high-speed Internet capability and, if necessary, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment." See §§706(a), (b), and (c)(1), 110 Stat. 153, note following 47 U. S. C. §157 (1994 ed., Supp. V). And second, Congress declared that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media." §509, 47 U. S. C. §230(b)(1). Needless to say, withdrawing the Act's rate protection for the attachments of those cable operators providing high-speed Internet access through their wires and instead subjecting their attachments to monopoly pricing would appear to be fundamentally inconsistent with encouraging the deployment of cable modem service and promoting the development of the Internet.

That the FCC may have reached a permissible conclusion below, however, does not excuse its failure to engage in reasoned decisionmaking and does not justify the Court's decision to allow the Commission's order to stand.[12] If the FCC is to regulate rates for attachments providing commingled cable television programming and high-speed Internet access, it is required to determine whether high-speed Internet access provided through cable wires is a cable service or telecommunications service or falls into neither category. See Part I, *supra*. The Commission does not claim to have taken this step. As a result, the judgment of the Court of Appeals should be vacated, and the cases should be remanded to the FCC with instructions that the Commission identify the specific statutory basis on which it believes it is authorized to regulate rates for attachments used to provide commingled cable television programming and high-speed Internet access: §224(d), §224(e), or §224(b)(1).

For all of these reasons, I respectfully dissent from Parts II and IV of the Court's opinion.

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[12] Indeed, to the extent that the FCC holds open the possibility that high-speed Internet access using cable modem technology is a telecommunications service, its decision to regulate rates for the disputed attachments pursuant to §224(d)'s rate methodology may result in utilities receiving a rate that is not "just and reasonable." This is because rates calculated pursuant to §224(e)'s methodology are generally higher than those calculated pursuant to §224(d)'s methodology. See n. 3, *supra.*