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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1658 & 85-1660

TITLE FEDERAL COMMUNICATIONS COMMISSION, ET AL., Appellants V. FLORIDA POWER CORPORATION, ET AL.; and GROUP W. CABLE, INC., ET AL., Appellants V. FLORIDA POWER CORPORATION, ET AL.

PLACE Washington, D. C.

DATE December 3, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Appellants

V.

FLORIDA POWER CORPORATION, ET AL.;

and

GROUP W. CABLE, INC., ET AL.,

Appellants

V.

FLORIDA POWER CORPORATION, ET AL.

No. 85-1658

No. 85-1660

Washington, D.C.

Wednesday, December 3, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the appellants.

JAY E. RICKS., ESQ., Washington, D.C.; on behalf of the appellants.

ALLAN J. TOPOL, ESQ., Washington, D.C.; on behalf of the appellees.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in two consolidated cases, Federal Communications Commission against Florida Power Corporation; and Group W. Cable against Florida Power Corporation.

Mr. Wallace, you may proceed whenever you're ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

The Pole Attachments Act of 1978, which the Court of Appeals held unconstitutional in this case, was enacted in response to a particular concern expressed in the Congressional committee reports and hearings, and in a staff report of the Federal Communications Commission that was submitted to Congress.

That concern is properly understood against the familiar backdrop of State public utility regulation, under which electric and telephone companies are granted monopoly power through franchising, and are allowed to use public rights of way for their poles, or to acquire easements across private property for that purpose, sometimes by use of power of eminent domain.

And in return for these monopoly privileges, State public utilities commissions regulate the rates that the utilities can charge their customers to assure that they are just and reasonable, and provide a fair rate of return.

The particular concern that was the focus of Congressional attention was that a new class of customers of these utilies, cablecasters, whc were renting excess space on the utility poles, were very frequently being omitted from the protection of rate regulation by the State public utilities commission while being subjected to the superior bargaining position of the utilities companies that resulted from their government-conferred monopoly power.

And the committee reports on the bill, in describing the testimony before Congress, are replete with references to such phrases as "superior bargaining position," "exorbitant rental fees," "extract monopoly rents," "virtual contracts of adhesion;" and at one point pointing out that once the cablecaster has strung his wires on the pole, then he could be subjected to substantial increases in rates without explanation or an opportunity for negotiation.

So Congress' solution to this problem that had been brought to it was to give the Federal

Communications Commission authorty, unless and until the State commissions asserted jurisdiction over these rates, authority to resolve disputes between the contracting parties for these rentals regarding the fairness of the fees.

The act applies only if the utility has voluntarily agreed to permit an attachment by cablecasters to its poles.

QUESTION: Voluntarily? What if the State requires it tc agree? Don't scme States require the utilities to provide pole attachments?

MR. WALLACE: I don't know the answer to that question, Mr. Justice.

QUESTION: I'd be very surprised if they didn't.

QUESTION: Is there a Federal act that now requires it?

MR. WALLACE: The recent amendments require sharing of the rights of way, but doesn't refer to a requirement that an attachment be made to the poles. The Commission has not yet ccnstrued the new amendments. They're not at issue in this case. But the most --

QUESTION: Do we know that all the contracts at issue here were not entered into under compulsion of

State law?

MR. WALLACE: There is no indication in the record that there was any compulsion. So far as we know --

QUESTION: Nor that there wasn't?

MR. WALLACE: The appellees voluntarily wished to rent the excess space on their poles. They did not submit any evidence to the contrary. And that would have been their burden, Mr. Justice.

So the Act applies only when there has been an agreement by the utility company to rent excess space on its poles.

QUESTION: Mr. Wallace, does the act and does the FCC permit a utility company to terminate a pole attachment lease?

MR. WALLACE: There is no doubt that if the contracts, as they typically do and as these do, give the utility company the right to reclaim the space for its own purposes, that it can do that.

If there is no such term in the contract, then it is an open question whether the utility company could, under the act, terminate.

There has been no attempt to terminate.

QUESTION: Do you take the position that under the act the utility company may make a termination for

some reason other than a pretextual one to avoid the act, can terminate?

MR. WALLACE: The Commission has not yet taken a position on that. It's really a double question in the Commission's mind.

There's no doubt that the utility company, if it needed the space itself, could reclaim the space even without a contractual provision reserving the right to do so.

The open question is whether if the cablecaster then offered to build a taller pole, or to bear the expense of whatever is needed in order that its cable could still be accommodated, whether the utility company would have to accede to that request or not.

QUESTION: Well, do you think the answer to that may be a factor in knowing whether there's been a taking?

MR. WALLACE: It may in a case that raises that. But that's not -- there's been no effort by the appellees in this case to terminate their contracts.

QUESTION: Well, let's talk about termination for what your brief and the FCC calls a pretextual reason, that is, terminating simply because the utility just doesn't believe the amount of money it's getting from this thing is worth its trouble.

MR. WALLACE: That's what this case --

QUESTION: That's right.

MR. WALLACE: -- resembles.

QUESTION: Is there any doubt that that would be prohibited by the FCC?

MR. WALLACE: There's -- there's no doubt that it would be prohibited. But the appellees here have never said that they would prefer not to have the cables at all, rather than to get the lower rates.

QUESTION: But is that a condition to their asserting that this is not a voluntary arrangement, as you're maintaining it is?

What is the regulations had said the same thing? The FCC has done this by adjudication, but could as well have said in the regulation, anybody who's in a contract shall not be able to get out simply because we're requiring a lower rate?

If it said that in the regulation, I don't think we would require the utility to try to get out of the contract before it could come before us and say -- and say, this is not a voluntary agreement that we're in. We're in an involuntary agreement.

MR. WALLACE: We're not saying that they volunteered to rent it at this price. We're saying that they volunteered to rent the space for this purpose.

QUESTION: Oh, well, I see.

MR. WALLACE: And that this is a compatible purpose with the use of their poles.

QUESTION: Don't you think it's important that they volunteered to do it for a price?

MR. WALLACE: Well, this is precisely the distinction that this case turns on. Because in this case appellees wish, and still wish, for all that appears, to rent this excess space on their poles to cablecasters at the contractually specified rates.

And it is only the rate regulation to which they are objecting.

QUESTION: (Inaudible) the purpose for which they rented it was to make money on it. I mean, to say that that's a minor detail of the voluntariness seems to me absurd.

MR. WALLACE: That is the only purpose for which they are selling electricity to their other customers.

QUESTION: Of course.

MR. WALLACE: But the rates are still regulated. And the question is whether they have a different Constitutional privilege with respect to these sales.

That is the question.

QUESTION: Mr. Wallace, before you go on, if the State undertook to regulate the rate itself, would the Federal commission then not regulate the rate of return?

MR. WALLACE: That is correct. The commission has authority only to fill a regulatory gap unless and until the State commission asserts jurisdiction over these rates.

Now --

QUESTION: Mr. Wallace, in the rates that the FCC -- the statute sets forth what the rates that the FCC -- the range that the FCC can impose, right? And the bottom level of that range, as I understand it, is essentially marginal cost.

MR. WALLACE: Incremental costs, we call it, yes.

QUESTION: Right. And that's essentially what the FCC has been using, right?

MR. WALLACE: No, Your Honor, they have taken the position that if they are reducing the rate from the contract rate, they can only reduce it to the maximum allowable under the statute, which is the so-called fully allocated cost.

And that includes a component for the so-called cost of capital, and namely, a component for a

fair rate of return on the investment, which they calculate by reference to what the State public utility commission uses.

QUESTION: It does include fully distributed cost, then?

MR. WALLACE: It does. It does.

Because the complaint is solely about the rates, and not being allowed to adhere to the contractual rates, rather than about the attachment itself, what we have here is an objection to the statute which, while it's in the form of a takings complaint, the objection is at bottom a complaint of loss of a business opportunity or of interference with contractual freedom.

And of course entirely valid regulation of commerce characteristically restricts business or contractual opportunities that would otherwise exist.

Obvious illustrations would be the Fair Labor Standards Act; the securities laws; the food and drug laws; the oil price controls of a few years ago. This is the commonest element of regulation of commerce.

And to bring the examples closer to home here, under this Court's jurisprudence upholding public utility rate regulation, appellees would clearly be precluded from making any claim that the State has taken

their property rights in their inventory of electric energy by restricting the price at which it may be sold to just and reasonable rates, even though a property owner's bundle of rights includes a right to alienate.

Now, in this case, the owner has chosen to alienate only a leasehold interest, rather than title to the property. But that is no reason for a different result with respect to rate regulation.

In the factual context we have, the statutory rate regulation is a form of rent control. It regulates the rental rate. And like other instances of rate regulation, rent control, if nonconfiscatory, is constitutionally permissible, and does not constitute a taking of property.

That is what this Court's opinion strongly indicated in Loretto v. Teleprompter, and that is what eight Justices squarely held in dismissing for want of a substantial Federal question a Constitutional challenge to the Cambridge, Massachusetts rent control ordinance in Fresh Pond Shopping Center against Callahan, even though the present Chief Justice in dissent correcly pointed out that a takings question under the Fifth and Fourteenth Amendments was presented, and that the questions might be postponed or avoided, if I may quote, if the case were here on certiorari. But the case is in

an appeal. We act on the merits, whatever we do, unquote.

So our primary submission, relying on the rent control jurisprudence of this Court, is that the Federal act does not effect a taking of appellees' property.

Our brief also -- also shows that the statutory scheme, in any event, provides the appellees with just compensation. They claim that the statutory formula falls short of awarding them market value.

But in the factual context we have here, their use of the term, market value, is a mere euphemism for monopoly profits to which there is no Constitutional entitlement.

And contrary to appellees' further contention, the reviewing court is fully able in these cases to hear Constitutional as well as statutory claims.

QUESTION: So you would -- I take it you would suggest, then, that if the -- if the utilities said to the commission, we don't like the rates you're allowing, we're going to get out of the business of renting to these people, and the FCC said, sorry, no, you can't do that, even if it were a taking, there would be just compensation in their price formula?

MR. WALLACE: That is our position, Mr. Justice. There has been litigation about the details of

the formula, but if you look at the statute at the very end of the appendix to our --

QUESTION: And the same thing would go for the company -- for a utility that had never been in the business, and didn't want to get into the business, and the FCC ordered it to get into the business?

MR. WALLACE: That would follow under that approach to it, that that would amount to a taking for a public use for which just compensation was provided.

The statutory formula is quite malleable, and can be expanded in application to include elements that a reviewing court would believe required in order to afford just compensation.

QUESTION: Do we have to approve the entire statutory formula in order to agree if you here? If the FCC were giving -- were giving compensation only at marginal cost, I'd have -- wouldn't there be some problem with that?

MR. WALLACE: There would be a problem if there were a taking. But our primary submission is that there is no taking, so you don't have to reach of whether there --

QUESTION: (Inaudible.)

MR. WALLACE: That is correct. But --

QUESTION: In Hope Natural Gas could the

utility commission have allowed the gas company to charge only marginal cost for all of its products? Certainly not. When you charge marginal cost for some, you're going to have to charge well above average cost for others.

So the Federal Government is, in effect, relying upon the State commissions to provide the difference where it's not allowing fully distributed costs, isn't it?

MR. WALLACE: The two questions are intertwined. The jurisprudence says that nonconfiscatory rate regulation is not a taking.

QUESTION: And not it not be confiscatory to allow only marginal costs where you yourself are not assuring the obtaining of more than average costs somewhere else?

MR. WALLACE: In the Permian Basin cases the Court did say that the statutory inquiry in what is a just and reasonable rate basically coincides with the Constitutional standard of just compensation.

QUESTION: You're sure that's not here, though? You're sure that question is not here in this case?

MR. WALLACE: Well, I think it's here in the sense that we submit that the statute does provide a

nonconfiscatory system of rate regulation.

I would like to reserve the balance of my time, if I may.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wallace.

We'll hear now from you, Mr. Ricks.

ORAL ARGUMENT OF JAY E. RICKS, ESQ.,

ON BEHALF OF THE APPELLANTS

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

I'm appearing on behalf of the cable company and cable association parties that participated in the proceeding below.

In regard to the questions that were propounded to Mr. Wallace, let me just add that only the State of California requires access to utility poles for purposes of cable television.

No other State has such a statute, although a number of States do regulate this acitivity. And when they regulate this activity, under the Federal statute, there is an automatic preemption by the States.

There is no Federal requirement of access.

In this case, there was no local compulsion of access. The utility voluntarily licensed -- in fact, has licensed cable systems for over 20 years, to use

excess space on its poles.

I would to just make this observation, that the very purpose of the Pole Attachment Act was to prevent utilities such as Florida Power from charging a rate for the cable attachment that was based on the scarcity value or the hold-up value of the pole.

As Mr. Wallace noted, Congress found that utilities controlled a critical gateway to the provision of an important interstate communication service; that the utilities were seeking to exact a monopoly profit for the use of the gateway; and that the regulation of the gateway was required in the public interest.

The statute, we believe, is thus similar to the regulation of a grain elevator in Munn v. Illinois, or other efforts by government or States to regulate an essential -- the use of an essential gateway in the public interest.

The Eleventh Circuit, we believe, pushed the Loretto analogy far beyond the facts of this case.

In Loretto, as distinguished from this case, the New York statute mandated that the cable come on the premises of an unwilling property owner.

Here, the FCC -- neither the FCC nor the statute vests in th cable company any right to have access to utility property.

In its takings analysis in the Loretto case, this Court noted a number of characteristics of the ownership of property that, when disturbed by a government-regulated occupation, will -- will rise to a taking of that property.

The Court noted that the property is taken, or that a third party takes possession of the property, against the wishes of the owner.

The Court noted that the owner cannot repossess the property that has been occupied; and that the owner cannot control the use of the possession of the property after it's been occupied.

Here, for over 20 years, as I noted, Florida Power has voluntarily licensed its poles. The contract that it employs for that purpose is in the Joint Appendix, and that orders the relationship between the parties.

And the contract provides that at any time Florida Power wishes, it can deny space to a cable operator if it has a need for the space; it can repossess any space that it requires for its own needs; and it can continue to control the pole, irrespective of the occupation.

The Eleventh Circuit engaged in a great deal of speculation about the permanency of the occupation,

but it had only to look to the contract between the parties to see that the use was conditional upon the utility getting the pole back at any time that it needed it.

QUESTION: Mr. Ricks, did the contract give the utility the right to simply go out of the business of renting to cable TV people?

MR. RICKS: Mr. Chief Justice, the contract has a term in it for, I believe, five years, and then renewable, six months or year increments after that; at which time, presumably, it could, if it wished to, go out of that business.

The Congress observed, in not creating a right of access, that it didn't think that would ever be a problem, because under the statutory provision of compensation, the utility was getting a positive benefit for an otherwise unproductive use of its property; and therefore, it would strain credulity to say, why would a utility not wish to lower the revenue requirement for its public subscribers and go out of the use of --

QUESTION: They wouldn't make it a matter of principle, so to speak?

MR. RICKS: Well, that seemed to be the observation. In connection with questions that were asked of Mr. Wallace, yes, I believe the FCC would

prevent a retaliatory eviction. But the FCC has never been faced with a prospect of a utility that for good and sufficient reasons says, I don't want you to use poles.

Now, interestingly, this contract --

QUESTION: Excuse me, what about a failure -- a failure to renew, because of the fact that the company is just not satisfied with the amount that it's getting? Would the FCC stop that?

MR. RICKS: The -- Justice Scalia, the utility has the right to obtain fully allocated costs. And fully allocated costs, as we know in the utility lexicon, include a return on capital.

Here the utility asked for and received 14.6 return on its capital stock. Now, why would a utility say, I don't want to get 14.6 return on my capital stock?

QUESTION: I don't know, maybe because they say, you know, we're rate regulated anyway. It's not as though -- it's not as though it's going to be money in our pockets.

To the extent we get it from the cable people, we get a little less from our electric and telephone subscribers. The State will make up the difference, and actually, we may do better, because there's less regulatory lag there.

MR. RICKS: Well, that is absolutely correct that the utility is not going to be enriched by exacting more money from the cable operator, but it's merely a --

QUESTION: Suppose they do that and the State lets them get away with it? Would the FCC stop that?

MR. RICKS: The FCC is not presented with that case. And under the act, it would have, in my judgment, questionable jurisdiction to stop that.

That's a -- perhaps it's a hole in the act, a loophole in the act, but it's one that commonsense said you don't need, because it's inconceivable that the State would allow a utility to forego a positive contribution to its revenue.

QUESTION: In Munn v. Illinois, could the railroads have simply said, we're going to get -- or the grain storage warehousemen simply said, we're going to get out of this business? We don't think that the rate that the State has provided is enough. We're out.

MR. RICKS: This Court has dealt with that in rent control cases, and has said that a property owner can not get out of the ambit of regulation simply by saying, I'm going to cease renting my property.

That was the situation Mr. Wallace referred to in the Clearwater Shopping Center Case. The entity was not allowed by the statute to get out of rent regulation

by wanted to go out of the business. In fact, that's exactly what they wanted to do there. And the State said, no, you may not get out of that business. You have to stay in it.

Now, I would like to just mention that in the contract that Florida Power has employed for the relationship with cable systems, which is, as I said, in the Joint Appendix, it has precluded an entire class of poles that cannot be used by cable. And they are concrete poles.

Florida Power, I assume because of the environment in the State of Florida, has elected to use some poles that are made out of concrete.

And I believe -- because I'm not sure -- but I believe because they do not have those poles weakened by having a hole drilled through them, for -- historically, they have refused to allow cable systems to use them.

And there has never been a case that I'm aware of, at least, in which a cable operator successfully has argued that I should have access to those poles because they're there.

They made a rational decision to exclude cable, and the FCC and States have not interfered with that decision.

Turning to the issue of compensation, we agree with Mr. Wallace that there's no taking here under the decisions of this Court.

But we also believe that even if you accept a taking under the Loretto model, this statute provides for just compensation.

Interestingly, Florida Power did not claim that this statute was unconstitutional before the Eleventh Circuit, but that the order of the FCC constituted a taking of its property without just compensation, because, Florida Power argued, the FCC set the compensation on the basis of fully allocated cost, rather than on the value to the cable system, which is what Florida Power wanted.

The Eleventh Circuit, on a point that was not briefed by any party, held that the statute was facially unconstitutional because it prevented the FCC from determining just compensation.

But in Alabama Power v. FCC, in a case before the D.C. Circuit, the panel that included Justice -- then Judge Scalia -- the D.C. Circuit held that the FCC is not bound -- is not bound to set compensation at any particular level by the Pole Attachment Act; but indeed, that the FCC is obligated to set the element of -- the rate of return at whatever level would be required to

avoid a confiscation of the utility's property.

We believe, Your Honor -- Honors, that the statute is Constitutional.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ricks.

We'll hear now from you, Mr. Topol.

ORAL ARGUMENT OF ALLAN J. TOPOL, ESQ.,

ON BEHALF OF THE APPELLEES

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

At the outset, I'd like to be clear as to what it is that this case is about, and what the defect is that we see in the statute.

Congress prescribed a binding formula for the determination of the rates that utilities could charge cable companies. And this is an important point, because Mr. Wallace indicated that the statute is mushy; that it could expand -- the scheme was "malleable," his term -- it could expand to provide just compensation.

With all due respect, I believe that's incorrect. The statute, at pages -- page 51A of the Government's appendix, indicates Congress set a formula.

It said, you may not require the payment of less than X dollars, X being incremental costs; but you may not permit the payment of more than Y dollars, Y

being the term that's tossed around in the briefs as allocated costs.

And in our view, herein lies the defect in this statutory situation. Congress, which has taken the property, Congress which has authorized the taking, is the same body which has fixed the compensation.

It has done so by means of a formula: not less than X and not more than Y. And in our system of jurisprudence, or the authorities I'm going to discuss, Congress can't both take the property and determine the compensation.

The Congress can take the property. It can get into the fray between utilities and CATV companies if it wants to.

It can say, as between two monopolists, the cable people who have a monopoly in their area, and the utilities who have a monopoly for utility service, it can address the problem.

But having decided to take, having decided to have utility customers subsidize, in essence, CATV customers by taking utility property, it can't then fix the rate of compensation.

And that's our difficulty with this statute.

QUESTION: Perhaps not finally. But can't it come up with a figure? And if that figure turns out in

the judgment of Article III courts to be compensatory, it's all right.

MR. TOPOL: I don't think it can, Your Honor. Because I think the question of just compensation is a case-by-case determination.

And as this Court said in the Monongahela Navigation case is, once the Congress takes, the court has to determine.

Now the question is, how in each case is the court going to determine what's just compensation? The cases of this Court, for example, the 564 Acres case, says, the standard for just compensation is what will put the party in the same pecuniary situation as he would have been had there been no taking.

That's $6 for us in this situation.

The Olson case says, the standard of just compensation is fair market value. It explicitly says in Olson, which we quote in our brief, that it's not enough to look at costs and to look at investment. The inquiry as to just compensation has to be broader. And --

QUESTION: But why can't the Court of Appeals, reviewing a decision of the FCC, make just that sort of inquiry?

MR. TOPOL: Well, I think, Your Honor, the

difficulty with that is because the FCC is not having a proceeding before it with a wide open record in which it's permitting evidence to come in that would be relevant to the inquiry of just compensation; for example, evidence as to market price; evidence as to what we charge other customers. Economic testimony.

QUESTION: Well, couldn't the Court of Appeals so indicate in an opinion reviewing the compensation award in a particular case that there was not enough evidence allowed in to really decide what just compensation was?

MR. TOPOL: Well, what the Eleventh Circuit was saying in this case, Your Honor, is that the statutory scheme is such that that kind of evidence can never end up being presented before the FCC.

In order to have the FCC make that kind of broad inquiry, this Court would have to rewrite the statute.

QUESTION: Well, but we don't really have to deal with every conceivable configuration of facts that might come up. It's just a question, really, of whether your client was awarded just compensation, or nonconfiscatory regulation in this case.

MR. TOPOL: Your Honor, I think that's correct. And I think from the record evidence, given

the fact that the FCC was operating with such a very, very narrow inquiry and a narrow record, in this statutory scheme, that is simply impossible for a reviewing court to make a determination on.

And that's what bothered the Eleventh Circuit. We didn't have an opportunity for a -- had this statutory scheme said, very broadly, the FCC should make a determination of just compensation in a Constitutional sense, and that decision would be reviewed by an appellate court, then we would have no difficulty with that scheme.

But our difficulty is the fact that the FCC isn't given the broad latitude to make a determination, and indeed, to make a record, even, with respect to just compensation in a Constitutional sense.

QUESTION: Then your position here is somewhat different than that taken by the Eleventh Circuit, isn't it?

MR. TOPOL: I don't believe so, Your Honor. I mean, I believe that what the Eleventh Circuit said the defect in this statute was, and they quoted specifically from the Monongahela Navigation case, if I may, to read just two sentences, because I think that's the essence. It's the key quote in the Eleventh Circuit and it's the essence of our argument, is the court -- this Court, in

the navigation case, said:

It does not rest with the public taking the property through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Now, we've heard a lot of discussion, after all, these are monopoly profits and this is ridiculous. And you have a monopoly in the area. And it shouldn't be $6 a pole; it should be $1.79.

On this issue of whether or not there was just compensation, there's only one court decision -- court decision outside of the rubric of this statute. And it's interesting.

It's the Continental Cable television, a 1983 Sixth Circuit opinion which is discussed on page 36 of our brief. It came up from the District Court. It involved Section 2 charges, the charges that the utility were monopolizing, and there was also a counter-claim in quasi-contract or unjust enrichment for pole space that was occupied that wasn't subject to contract.

And in that case, the issue was -- factual issue -- what's a reasonable rate for a pole

attachment? And a District Court -- which incidentally, didn't -- it could have followed the statute and come out with something like $1.79, but it didn't.

The District Court decision in that case came up with a conclusion of $5.60 per pole was, quote, reasonable. That decision was affirmed by the Sixth Circuit, by the Court of Appeals.

Now, I'm not asking this Court to endorse $5.60, or any other number. But what I'm saying is, this is the only District Court decision, the only court decision, judicial inquiry.

This really puts us on --

QUESTION: Well, I take it -- I take it you would say that no court could ever define that fully distributed costs would afford reasonable compensation?

MR. TOPOL: Justice White, what I'm saying is that --

QUESTION: Well, is that what you're saying or not?

MR. TOPOL: What I'm saying is that the court can't say that allocated costs will constitute just compensation in all cases.

QUESTION: Well, but could it ever?

MR. TOPOL: It's conceivable in a case,

perhaps -- perhaps --

QUESTION: Well, what about this case?

MR. TOPOL: I don't think it can, because in this case the FCC was operating with a very, very narrow standard and very narrow --

QUESTION: Well, that may be so. But what if the Court of Appeals had said that the only question before us is whether this is a confiscatory -- these rates are confiscatory? And we don't think they are; we think fully distributed costs or allocated costs with a profit is just compensation.

MR. TOPOL: Well, Your Honor, the court couldn't --

QUESTION: Could the court have said that?

MR. TOPOL: I don't think so.

QUESTION: Because you haven't had a -- you weren't allowed to make a record, is that it?

MR. TOPOL: That's precisely correct. Because the FCC didn't have that kind of broad mandate. I mean, we could rewrite the statute, and we could take out the section I read that says, you apply -- you determine just compensation not less than X --

QUESTION: Well, the Court of Appeals said this was a judicial task, not an administrative task to -- that's what they said, isn't it?

MR. TOPOL: That's correct.

QUESTION: Classically a judicial task? Now, we're going to perform. We think that allocated are perfectly adequate.

MR. TOPOL: I don't believe, Your Honor, that a court can perform --

QUESTION: Then what would be your objection? That they just made an error in determining it, or -- a procedural error?

MR. TOPOL: No, Your Honor, my objection would be that the statutory scheme doesn't permit the FCC to make the kind of broad-ranging inquiry; it doesn't permit that kind of factual determination before the FCC to permit that kind of record.

I mean, we would have to rewrite the statute. If we rewrote the statute and we said, the FCC may make a finding, may consider evidence and make a finding as to just compensation in a Constitutional Fifth Amendment sense, and that should be reviewed by the Court of Appeals, then I would have no difficulty. But that, Your Honor, is a different statute.

QUESTION: So you're saying that we can't -- we can't decide whether these rates are compensatory or not?

MR. TOPOL: In the same sense, Your Honor, if

Congress passed a law that said homeowners -- somebody purchased a piece of property for $50,000; put $10,000 in it in terms of costs and improvements. And Congress passed a law that said, in taking a highway, no person shall get more than the cost that he paid plus the amount that he put in.

If I had evidence, and the evidence showed that the fair market value of that house was $300,000, surely we wouldn't let Congress pass a law that says the most I could get for that property is $60,000.

QUESTION: But would we simply throw out the statute as a whole, or would we say, it may well be bad as applied to some cases, but we're going to decide on a case-by-case basis?

MR. TOPOL: Your Honor -- and I recognize, of course, it's only as a last resort that we throw out a statute, but I think that we couldn't make the inquiry in a case-by-case interpretation without rewriting the statute.

QUESTION: Why wouldn't you be -- why wouldn't you be satisfied with a -- if you won, in the sense that -- that we would say that just compensation is not measured -- necessarily measured by allocating costs, and that the record is insufficient, and send it back to the FCC or send it back to some court to determine?

MR. TOPOL: Well, the difficulty with that is -- I mean, I'd obviously be happy with the victory. But the difficulty, Your Honor, is that it would be inconsistent with the statute. And this Court would then be rewriting the statute. And that would be my difficulty.

QUESTION: Well, Mr. Topol, all of this argument, it seems to me, presupposes there's been a taking. And I'm not certain we've gotten over that hurdle yet.

And I'm curious to know whether there's a taking at all. And in knowing whether there's a taking, part of the inquiry, in determining whether a rate regulation requirement, which this is, is a taking, is to know whether it's confiscatory.

Now, that's a different question from determining whether there's just compensation, once you've determined there's a taking.

Now, maybe the FCC and the courts are able, on this record, to make that inquiry, to determine whether it's confiscatory and whether there's been a taking.

MR. TOPOL: Your Honor, let me address that taking issue and respond to your question, because in a sense, you're absolutely correct. The first issue: Is there a taking? And if there is, we go to just

compensation.

With respect to whether or not there is a taking, we believe that the Loretto case decided by this Court in 1983 is dispositive on that issue. In Loretto --

QUESTION: Well, but it is different because the utilities and the cable companies willingly entered into leases originally. There was a willingness here to have some space rental.

MR. TOPOL: Your Honor, I have two responses to that. The first is that in Loretto, there was a willingness to enter into, because Loretto's predecessor, from whom she bought the buiding, willing let the cable people on in Loretto; so there was voluntary.

But secondly, I would say here, as the Eleventh Circuit did, what Florida Power did was to voluntarily let the cable people on at $6 a pole. They didn't voluntarily let the cable --

QUESTION: How does that differ from rent control?

MR. TOPOL: Well, Your Honor, I think it differs under the distinction that this Court made in the Loretto case.

What this Court said is that we will accord

permanent physical occupations a greater standard of Constitutional protection.

Where there is a permanent physical occupation, we will decide, we will conclude, that there is a per se taking.

And in other regulatory situations -- we've heard about grain elevators and other kind of regulation -- this Court, I think, made that distinction.

QUESTION: I think you have a real hurdle to get over on the compulsory aspects of Loretto which aren't present here.

MR. TOPOL: Well, Your Honor, with respect to the compulsory aspects of Loretto, as to whether we put them on, there was a dialogue on the opening colloquy on the question of, can we take them off? And I really think that's the key inquiry.

And Judge Scalia asked the question, he indicated, well, that the FCC had moved by adjudication. Suppose they'd moved by regulation?

And indeed, and we quote on page 16 and 17 of our brief, an FCC regulation which says that the Commission will have jurisdiction under these rules, where the utility has discontinued cable TV attachments in order to avoid Commission jurisdiction.

And then we have three cases. We have the

ones that we cite at 17 and 18. Contrary to the position taken by the appellant, in those cases, on pages 17 and 18, the Whitney, Tele-Communications and Bailey, people tried to discontinue their contracts.

They said in a couple of these cases, in two of the cases, they said safety factors; we want to throw the people off. And back came the response from the FCC: If the real reason you're throwing them off is because you don't like the rates we're setting, then you can't do it on the statutory scheme.

Now, to me, that seems more permanent than --

QUESTION: Well, how does that differ from typical restrictions against retaliatory evictions under rent control laws?

MR. TOPOL: Well, it's not retaliatory evictions. It's the fact that -- as the question was put -- if we didn't like the $1.79. Suppose we wanted to throw them off, and then leave the poles idle and wait for a better offer to come.

I mean, after all, this Court has seen in the Los Angeles case, there may come a time when there's competition in the cable business; more than one company may want to service an area.

Suppose we wanted to say, we won't take $1.79. We'll sit with empty poles. That's not

retaliatory. It's certainly avoiding the FCC's jurisdiction.

We can't do it. We'd be stuck. In Loretto, Loretto was better off than we were. She could have converted her building to a condominium at any time. She could have gotten out of the residential rental business at any time; avoided the New York statute.

We can't do that. Our poles are there, and our utility system is there.

QUESTION: Mr. Topol, a lot of utilities can't do that. The problem I have is whether this should be analogized to -- to a typical taking case, or rather, to a utility regulation case; to Hope Natural Gas, for which purpose it's absolutely clear, it seems to me, that there has been no taking or -- and I'm not sure which way you want to put it -- the taking has been adequately compensated, so long as a utility is allowed to get fully distributed costs.

You wouldn't dispute that point, would you, that for purposes of Hope Natural Gas, fully distributed cost is fine?

MR. TOPOL: No, Your Honor. But what I would say is where I think this case should be treated as a taking is because of the amazing similarity between this case and the Loretto case.

I mean, Loretto was a CATV case. It involved precisely the same type of hookups: plates, wires, screws, bolts.

QUESTION: But a landlord is, for all of that, not a public utility.

MR. TOPOL: Well, it's not, Your Honor, but --

QUESTION: Well, why should this utility get any more -- why should its rates for renting on poles be established by any different formula than is used for selling gas or electricity?

MR. TOPOL: Well, I think, Your Honor, that comes back to the question of whether or not there's been a taking, I mean which I think is the initial question.

If there's been a taking under Loretto, then we're entitled to the Fifth Amendment just compensation test.

QUESTION: And -- why would that measure of just compensation be any different for pole rental than for setting the rates for gas?

MR. TOPOL: Because this Court has spoken in a number of cases, Your Honor, as to what just compensation means in a Constitutional sense.

I mean, it said, for example, in the 564 Acres, it's what it takes to put the party back in the

same position it would have been pecuniarily had the property not been taken.

QUESTION: But we've said something different in utility cases, for some reason. I mean, you know, don't ask me why; but we have. We've said that so long as you -- you don't have to assure the most the market will bear. Where you have a utility that's been given a monopoly, it's enough if you assure them, in essence, fully distributed cost, enough to make a go of the business.

QUESTION: And these utilities have these poles only because they are a utility.

MR. TOPOL: But Your Honor, let me respond to the two points.

On the first point, the question of whether or not this is subject to the regulation, what I submit is that under the Loretto case, the distinction the Court made, we have the type of permanent physical occupation.

This Court created a dichotomy between permanent physical occupation and regulation. Here we have precisely the same type of occupation as in Loretto.

It would really do violence to the distinction made to say, here, no taking.

But in addition, I would submit that the

distinction this Court in Loretto made sense. We live in a highly regulated society. We're subject to all types of regulations, as Loretto was, as my utility clients are.

We always wrestle in this Court with the question of, how much is too far? How far can the government go?

This Court in Loretto said, when we get to the point of permanent physical occupations, that's too far.

QUESTION: I suppose, then, that the States would be acting unconstitutionally if they only allowed the utilities to get fully distributed for the stringing of -- for allowing telephone companies to string their wires on their poles? That's just as much of a physical taking.

Do you mean that the States have to allow the electric utilities to hold up the telephone companies for whatever the market will bear in order to string the telephone wires?

MR. TOPOL: No, but there is a different situation in that the telephone companies are subject to a State regulation across the board, I mean, which is a difference; whereas the CATV companies aren't.

And with respect to the question of whether this is just another aspect of the utility business is

-- we have a number of cases that we refer to in our briefs in which State and Federal courts have expressly concluded that space on utility poles constitutes private property that cannot be taken by means of physical attachments without just compensation.

QUESTION: Mr. Topol, does this statute require your client to make any new attachments?

MR. TOPOL: It doesn't require them to make any new attachments, no, the statute --

QUESTION: Did the statute in Loretto require landlords who did not previously have cables affixed to them --

MR. TOPOL: I believe it did.

QUESTION: So isn't that a rather important difference?

MR. TOPOL: Well, with this statute -- I don't think so, Your Honor. Because in both cases, we have the attachment situation.

The question is: What should be the compensation?

QUESTION: But one is a statute that only applies that have been accepted voluntarily, and the other is a statute that compels the landlord to accept those he didn't want.

MR. TOPOL: Well, I guess there are two

distinctions, Your Honor.

The first is that in Loretto, Loretto's predecessor voluntarily agreed --

QUESTION: I understand on the particular facts of that particular landlord. But the statute generally covered landlords who had not previously agreed to the attachment?

MR. TOPOL: Yes, but in this situation, Your Honor, what is it Florida Power agreed to do? It agreed --

QUESTION: A different price.

MR. TOPOL: Yes, it agreed to put them on at $7.

QUESTION: And you say that you're compelled to stay in business. But you're compelled to stay in the electric business, too.

MR. TOPOL: That's correct.

QUESTION: And why isn't the State statute a taking by an equal -- by the same argument?

MR. TOPOL: Well, Your Honor -- well, I guess because the courts have provided in a number of cases, most importantly, from Florida as well, that the business of renting space on poles is not part of our public utility business.

And we've got the reference on page 24 and 25

of our brief to the Florida case. We've a number of cases from other States which have held that when you rent space on your poles, that's not part of your public utility operation.

QUESTION: If a State said to the contrary, would it be unconstitutional?

MR. TOPOL: I think if there was a State -- yes. Well, if there was a taking of property, as this is --

QUESTION: Well, they just said, we're going to treat your pole rentals just like we do everything else, as part of your utility operation.

MR. TOPOL: Yes --

QUESTION: And we're going to fix the rates on the same formula.

MR. TOPOL: Yes, Your Honor, if they said that, then we would argue, because this is not part of our utility business, that there would be a taking, and we would have a right to just compensation in a Fifth Amendment sense.

QUESTION: Well, is the question of whether it's part of your utility business a question of Federal Constitutional law? I mean, can't the State say, well, we're going to define the regulated business to encompass this particular activity?

MR. TOPOL: I suppose it could, Your Honor, but no courts to my knowledge have done that. The position taken is that this is not part of your public utility business.

That's certainly the case in Florida, and it's the case in a number of other -- in a number of other situations.

QUESTION: I know, but it's unconstitutional, I take, under your view, for Congress to treat this part of your utility business?

MR. TOPOL: That's correct. I would -- I would -- I guess --

QUESTION: Maybe no court has treated it that way, but Congress seems to have.

MR. TOPOL: Congress has. Well, that's correct, Your Honor. And we basically hold -- the analysis is twofold.

One, we argue that there is a taking in the Loretto sense. When one looks at Loretto, it's CATV, it's hookups, it's screws, it's bolts, it's precisely the same kind of hardware.

The voluntary nature, given what the FCC has said in its regulations and in its cases, it's not voluntary as to Florida Power.

So given the fact that the hookup's the same;

given the fact that there's no voluntariness; the first part of our argument is that we have a taking. And it seems to me it would distort, as the Eleventh Circuit found, the meaning of Loretto to say, we're going to carve out an exception here.

And I would really --

QUESTION: But Mr. Topol, here you have a situation where the utility company with the power poles and the easements has the only access possible for cable television to use. I mean, it is a natural monopoly.

And you're trying to have us say that the Federal Government can't recognize that as regulate it as such.

MR. TOPOL: No, Your Honor, I'm not. What I'm saying is, indeed, the Federal Government can even authorize the taking. But once it does so, it has to provide for a judicial vehicle for determination of just compensation.

QUESTION: Well, that depends on whether it's a taking rather than a monopoly regulation.

MR. TOPOL: That's correct, Your Honor. And I guess my situation is -- my feeling is that the Loretto situation involved, again, monopoly aspects in the same sense. I mean, Loretto was the owner of that particular apartment building. One had to go through that

apartment building.

I have difficulty finding any distinction between this factual situation and Loretto. And I'm persuaded that the distinction the Court made in Loretto between permanent physical occupations and other regulation for purposes of the taking argument, made very good sense.

So I would urge you to continue the Loretto analysis and find no distinction.

Having made that conclusion, hopefully first, then I would say, if there's a taking, we really are up against Monongahela Navigation, and should the Congress really be permitted to determine in a taking case, it's going to be not less than X and not more than Y.

And under the jurisprudence of this Court, I have a lot of difficulty with that conclusion; any more than the Department of Highways should be able to take someone's property and say to that person, you will receive only your costs, or your costs plus any improvements to the property.

That's not our legal standard. Our legal standard is, you have a judicial determination of just compensation.

And it seems to me what this Court could say to the Congress is, you didn't provide that mechanism in

this statute. You boxed in the determination of just compensation.

Rewrite it, and say in broad terms -- leave the FCC in the act. The FCC makes a recommendation first as to whether or not there's just compensation in a Fifth Amendment sense, hearing all the evidence in a full proceeding directed to that issue.

If the statute were rewritten in this form, if the Court said to the Congress, it has to be rewritten in that form to survive the Constitutional challenge, then Congress could do it and we could deal with the issue.

But there's a terribly, terribly important principle. And it's the question -- back to Monongahela Navigation -- should we let the Congress, which is doing the taking, if we find there's a taking, should we let the body, the Congress, that's doing the taking, be the one to make the determination as to just compensation?

And we really feel, it shouldn't. So I guess at bottom line we've got, our two basic issues are, one, we feel that under this Court's decision in Loretto -- and we talk about the utility cases on poles and pole space -- we believe under Loretta there is a taking. And to create an artificial distinction --

QUESTION: If it's not a Loretto taking,

though, if it's a Hope Natural Gas taking, if it's that kind of a taking, in that area, it's always the legislature or a State agency that makes the determination of what's just compensation, isn't it?

MR. TOPOL: That's correct.

QUESTION: Which a court simply reviews?

MR. TOPOL: That's correct, Your Honor. But here we have a -- we're back to the Loretto distinction. And this Court carved out and said, permanent physical occupations should be accorded a higher standard --

QUESTION: But there's clearly nothing inherent in takings that requires the Court to have the first cut at it. It's only one class of takings. I mean, there's a whole broad class of takings in utility regulation that -- where that isn't the case.

MR. TOPOL: Well, the agency can have the first cut at it if the agency's standard is just compensation in a Constitutional sense.

I'd have no problem with the agency having the first cut at it, if --

QUESTION: It's not the agency's standard. The agency's standard is usually fully distributed cost on the totality of your business.

MR. TOPOL: Well, here the Agency's operating

under the standard that Congress set. And that, we submit, is not a constitutional standard.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wallace, you have three minutes.

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF THE APPELLANTS

QUESTION: Mr. Wallace, I hate to cut in on your time, but it would help me if you could tell me what standard should be applied on judicial review in determining whether the rate is just and reasonable?

MR. WALLACE: The same standard that's applied in Permian Basic and Hope Natural Gas.

QUESTION: Same basis as is applied in Hope Natural Gas?

MR. WALLACE: Exactly the same standard.

QUESTION: What effect would the formula have on the application of that standard?

MR. WALLACE: It provides guidance for the commission that the court should review the adequacy of to meet that standard.

Now, the record that was before the commission by appellees is precisely the record that they chose to make. The commission did not reject anything that they submitted.

And the commission's consistent practices in

these cases has been to accept evidence in the form of affidavits or documentary evidence of any nature that the companies wish to submit, even if the commission thinks the evidence is irrelevant for their purposes. They simply have been putting it in the file, and it becomes part of the agency record.

There's no inability of a company to establish a record for purposes of judicial review. On page 21 of our brief we cite the statute -- or 27 of cur brief, we cite the statutory authority for the reviewing court to decide the Constitutional as well as statutory claims.

And the D.C. Circuit it held it had that authority in an opinion by Judge Bork for a unanimous panel that include then-Judge Scalia.

Thank you, Mr. Wallace.

The case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#85-1658 - FEDERAL COMMUNICATIONS COMMISSION, ET AL., Appellants V. FLORIDA POWER CORPORATION, ET AL.; and

#85-1660 - GROUP W. CABLE, INC., ET AL., Appellants V. FLORIDA POWER CONSTRUCTION, E

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BY Paul A. Richardson

(REPORTER)