No. 02-1474

In the Supreme Court of the United States

ALABAMA POWER COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Pole Attachments Act, 47 U.S.C. 224, requires utilities to allow nondiscriminatory access by cable television systems to utility poles. The Act establishes a maximum rental rate that a utility may charge cable television systems for access. As applied by the FCC, that rate assures the utility not less than the additional costs caused by the cable television pole attachments plus a share of the full costs of the pole proportional to the usable space on the pole taken up by the cable television pole attachments. The question presented is whether that rate satisfies the Fifth Amendment requirement for just compensation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 311 F.3d 1357. The order of the Federal Communications Commission (Pet. App. 25a-86a) is reported at 16 F.C.C.R. 12,209.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2002. A petition for rehearing was denied on January 8, 2003 (Pet. App. 98a-99a). The petition for a writ of certiorari was filed on April 4, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents." *National Cable & Telecommunications Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 330 (2002). To address that problem, Congress in 1978 enacted the Pole Attachments Act, Pub. L. No. 95-234, § 6, 92 Stat. 35 (47 U.S.C. 224). See generally *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987); S. Rep. No. 580, 95th Cong., 1st Sess. (1977).

The 1978 Act did not compel utilities to allow cable attachments by cable television systems. The Act did, however, authorize the FCC to regulate the rates, terms, and conditions for such attachments to ensure that they are "just and reasonable." 47 U.S.C. 224(b)(1). Then, as now, the Act provided that

> a rate [for an attachment by a cable television system] is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. 224(d)(1). Thus, the minimum rate the FCC could allow is the utility's incremental or avoidable costs—i.e., reimbursement for expenses the utility

would not have incurred but for the cable attachment. The maximum rate is the fully allocated cost of the attachment—i.e., a share of the capital and operating costs of the utility pole, conduit, or right-of-way proportionate to the amount of useable space occupied by the cable attachment. See S. Rep. No. 95-580, *supra*, at 19, 27. See also *Florida Power*, 480 U.S. at 254; Pet. App. 6a ("[T]he FCC promulgated regulations that focused on the *upper end* of this range.") (emphasis added). "A utility must charge a pole attachment rate that does not exceed the maximum amount permitted by the Cable Formula." Pet. App. 27a.

In *Florida Power* in 1987, this Court held that the Pole Attachments Act as originally enacted does not effect an unconstitutional taking of property without just compensation. The Court held that there was no taking because the Act "authorizes the FCC * * * to review the rents charged by public utility landlords who have *voluntarily* entered into leases with cable company tenants renting space on utility poles." 480 U.S. at 251-252 (emphasis added). The Court also held that the rates set under the Act are not confiscatory, and they therefore satisfy the constitutional standards for rate regulation. *Id.* at 253-254.

2. The Pole Attachments Act was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, which comprehensively revised the structure of regulation for the entire communications industry. Among the changes made by the Telecommunications Act was the addition of a new "non-discriminatory access" provision. That provision requires any utility that chooses to use its poles, ducts, conduits, or rights-of-way at least in part for wire communications to "provide a cable television system or any telecommunications carrier with non-discriminatory

access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. 224(f)(1). Utilities that do not choose to use their poles for wire communications are thus not obligated by the Act to provide access, although they may voluntarily decide to do so. The amendment also authorizes an additional exception; a utility may deny access "on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. 224(f)(2).

The 1996 amendments also expanded the FCC's rate jurisdiction to include attachments to poles and conduits by "providers of telecommunications service," as well as cable television systems. See 47 U.S.C. 224(a)(4). The regulated rate for pole attachments by telecommunications providers is somewhat different from the rate applicable to attachments by cable television systems. 47 U.S.C. 224(e). The rate for telecommunications attachments "is similar to the cable attachment rate with the sole exception being" that "the telecommunications pole attachment rate allocates the cost of the unusable portion of the pole to an attacher based on the total number of attaching entities rather than on the portion of usable space occupied by the attachment." Pet. App. 64a. The telecommunications rate is ordinarily higher than the cable rate, although the telecommunications rate is lower than the cable rate if there are a large number of attachers to a given pole.

3. Petitioner Alabama Power Company and several other utilities brought suit against the United States and the Federal Communications Commission seeking a declaration that the nondiscriminatory access provision of the 1996 amendments, 47 U.S.C. 224(f), is facially

unconstitutional.[1] They argued that the Act as amended effects a taking of their property without just compensation and without an adequate process for securing just compensation. The district court agreed that the Act effected a taking of property, but the court granted summary judgment in favor of the federal defendants after concluding that the amendment did not necessarily deny the utilities just compensation. See *Gulf Power Co.* v. *United States*, 998 F. Supp.1386 (N.D. Fla. 1998). The court held, moreover, that the procedure for determining compensation—starting with a proceeding before the FCC—did not violate the separation of powers doctrine because the Commission's decision was subject to judicial review. See *id.* at 1397-1398.

The court of appeals affirmed. See *Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1328-1331 (11th Cir. 1999). The court of appeals declined to reach the utilities' argument that the statutory formula is constitutionally inadequate. The court held that it "d[id] not believe this issue is ripe for decision" becuase "it would require sheer speculation for us to conclude that the actual rates ordered by the FCC will fail to provide just compensation." *Id.* at 1338. With respect to the utilities' procedural argument, the court agreed with the district court that, although the 1996 Act authorizes a taking of the utilities' property, the Act provides an effective procedure for awarding just compensation that does not violate the Separation of Powers doctrine. The court explained: "Had the Act eliminated all possibility of judicial review and made the FCC the final arbiter of a

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[1] The other utilities were Duke Power Company, Florida Power Corporation, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Ohio Edison Company.

utility's compensation, we would be faced with a different situation, but the Act does not do that. Instead, as we have explained, the Act merely provides that the FCC has the first cut at fashioning the compensation a utility receives for the taking of its property." *Id.* at 1337.

4. For some 20 years, petitioner rented excess space on its poles to cable television companies at a negotiated rental rate calculated under the statutory formula applicable to attachments by cable television systems. See 47 U.S.C. 224(d)(1). Just before the instant proceedings commenced, petitioner was charging $7.47 per pole per year, which was in line with the statutory maximum. Then, in June 2000, petitioner announced that it was unilaterally rescinding all existing agreements with the cable companies, and it told the companies that if they wished to maintain their existing attachments they would have to begin paying an annual rate of $38.81 instead of $7.47. The cable companies filed a complaint with the FCC. Pet. App. 87a-96a.

Petitioner did not attempt to justify the new rate under the statutory formula. Pet. App. 91a. Instead, petitioner asserted that the rate for cable attachments had been rendered constitutionally deficient by the mandatory access provisions of the 1996 amendments to the Pole Attachments Act. Petitioner's relationship with the cable companies was now an involuntary one, petitioner argued, which in petitioner's view entitled it to a much higher level of compensation than would be permitted under the statutory formula. *Id.* at 92a-93a.

The FCC granted the cable companies' complaint and ordered petitioner to renegotiate a rate that complies with the statutory formula. Pet. App. 83a, 96a. With respect to petitioner's just compensation claim, the Commission first observed that the statutory rate,

which provides for the recovery of the incremental costs caused by the cable attachment plus a proportionate share of the fully allocated cost including the actual cost of capital, is not confiscatory. *Id.* at 62a (citing *Florida Power*, 480 U.S. at 253-254).[2] The Commission found that "th[e] measure of [just] compensation is not changed simply because the regulation restricting the use of the property amounts to a physical occupation under *Loretto* [v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)]." *Id.* at 66a.

The Commission also examined whether, if the mandatory access required by the 1996 Act did require application of a different standard for just compensation, that standard would be satisfied as well. The Commission applied the general principle that "[j]ust compensation is generally determined by the loss to the person whose property is taken." Pet. App. 68a (citing *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 124 (1950)). The Commission noted that "the nature of cable television pole attachment rights and interests, and the monopoly inherent in the poles owned by [petitioner] and other utilities, affect the measure of compensation." *Id.* at 69a. The Commission explained that "[i]n any specific area, there is only one provider of pole space and there is usually surplus space on those poles." *Ibid.* Because there is "no viable alternative" to

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[2] The Commission explained that "[t]he Commission's pole attachment formula ensures that a utility receives full compensation for any loss incurred as a result of an attachment. The attacher directly compensates the utility through make-ready and change-out charges for the cost of any modifications to utility poles necessitated by the attachments, including pole rearrangements, inspections, pole replacements, and other direct incremental costs of making space available to the cable operator." Pet. App. 63a-64a.

use of the existing poles for cable attachments, the utilities' poles have "bottleneck monopoly status"—a conclusion as to which "no credible evidence" to the contrary "has ever been presented to the Commission." *Ibid.* In those circumstances, and in light of the fact that "there is no non-monopoly market in pole attachments," *ibid.*, the Commission found that each of the alternative valuation methods proffered by petitioner was inadequate.

Because "other industries, technologies and property rights * * * are too different to draw any meaningful conclusions," petitioner "was unable to show that there is any reasonable way to evaluate a pole attachment value using a comparable sales approach" that would draw on other industries and technologies. Pet. App. 69a-70a. Because "the income generated by a cable television system is the product of many tangible and intangible assets and cannot be attributable to its pole attachment," petitioner also "failed to meet its burden to show that" an income capitalization method based on the income the pole attachment could generate for a cable television system "is required or even appropriate." *Id.* at 70a. Finally, the Commission found that "requiring the use of replacement costs as a measure of just compensation is inappropriate," because of the "limited property interest" occupied by a pole attachment, the fact that the "pole attachment does not displace the utility from its own use of the pole or from the right to license additional users on the pole," the fact that "the utility's interest in the property is not completely destroyed," and the fact that "it is not feasible to reproduce existing utility poles." *Id.* at 71a. The Commission concluded that petitioner "has not provided any credible evidence that shows that [it] is not compensated fully under the [statutory] formula and

placed in the same position monetarily as it would be but for the attachments." *Id.* at 72a.

5. The Eleventh Circuit affirmed. The court of appeals agreed with petitioner that "[w]hen a physical taking is at issue, * * * a different analytical hat must be worn" than when a mere rate regulation is examined under the Just Compensation Clause. Pet. App. 15a. Nevertheless, the court held that the rate for cable attachments satisfies the constitutional standards for just compensation.

The court began by recognizing the "rigid rule for determining just compensation" that "[i]n physical takings cases, the property owner generally must receive the 'full monetary equivalent of the property taken.'" Pet. App. 16a (quoting *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970)). Although "[t]ypically, fair market value is used," an "alternative to fair market value must be used" in this case because "[t]here is not an active, unregulated market for the use of 'elevated communications corridors.'" *Ibid.* The court noted that the guiding principle in determining an alternative to fair market value is that "just compensation is determined by the loss to the person whose property is taken," not the special value of the property for the governmental use to which it is put. *Id.* at 17a-18a.

The court held that the statutory rate was satisfactory in this case, based on two considerations. First, the court noted that the statutory rate requires the attaching company to pay "much more than marginal cost," because it requires the attacher to pay *both* all of the marginal costs of the attachment, including "the opportunity cost of capital devoted to make-ready and maintenance costs," *and* "some portion of the fully embedded cost." Pet. App. 17a. Second, the court explained that the "use [of a pole] by one entity does not

necessarily diminish the use and enjoyment of others," because there is ordinarily ample space on the pole for all attachments and a cable company's attachments "do[] not foreclose any other use" of the pole by the power company. *Id.* at 18a, 19a. Relying on the Second Circuit's decision in an analogous circumstance in *Metropolitan Transportation Authority* v. *ICC*, 792 F.2d 287 (1986), the court found that, based on those facts, "marginal cost will be sufficient to compensate the pole owner" and the statutory formula—which allows for a much higher rate—provides just compensation. Pet. App. 19a.

The court of appeals noted the limits of its holding. The court's reasoning depended on the proposition that the utility had no lost opportunity cost, because it had no other use for the pole space occupied by the cable attachment. That proposition, the court noted, was reasonable on this record, because "nowhere in the record did [petitioner] allege that [petitioner's] network of poles is currently crowded." Pet. App. 20a. The court held, however, that a utility could advance a claim that the statutory rate does not provide just compensation if it could show "with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations." *Id.* at 21a. The court held that, "[w]ithout such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Assuming that the non-discrimination provisions added to the Pole Attachments Act in 1996 effect a taking, the court of appeals correctly held that the statutory rate for cable attachments, which provides for a payment to petitioner that is "much more than the marginal cost" caused by the attachments, Pet. App. 17a, provides just compensation for the value of the property interest taken.[3] In reaching that holding, the

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[3] The court of appeals in this case adhered to its holding in its prior *Gulf Power* decision that the amended Pole Attachments Act effects a taking. See Pet. App. 9a. That holding was based on the court's belief that the taking issue was controlled by *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which held that a law that required a landlord to permit the physical occupation of his property by cable television fixtures constituted a physical taking. See *Gulf Power*, 187 F.3d at 1328-1331. The court rejected the contention that the taking issue is instead controlled by *Florida Power*, which held that the pre-1996 version of the Pole Attachments Act does not contain that element of "required acquiescence" and therefore does not effect a taking. See *Florida Power*, 480 U.S. at 252. The amended Act, however, continues to define a utility as an entity that, inter alia, "owns or controls poles * * * *used, in whole or in part, for any wire communications*." 47 U.S.C. 224(a)(1) (emphasis added). Accordingly, so long as a power company remains outside the wire communications business, it is not a "utility" under the Act and is under no obligation to permit cable television attachments. It is only when a utility chooses to use its poles to enter the "wire communications" business, and thereby to enter a field of pervasive regulation, that it becomes subject to the Section 224(f)(1) nondiscrimination requirement and, consequently, to the requirement that it permit cable attachments to those poles. Moreover, in the context of a heavily regulated industry, a nondiscrimination or equal access provision closely re-

court relied on the fact that "the cable company's use does not foreclose any other use." Pet. App. 19a. Accordingly, there is ample available space on the utility poles that will not be used for any other purpose, and the attachment of cable television wires to petitioner's utility poles will not cost the utility anything in terms of "lost opportunity or any other burden." *Ibid.* Indeed, if a utility company has "insufficient capacity" on its pole or if there are "reasons of safety, reliability, and generally applicable engineering purposes" that preclude attachment of a cable television wire, then the utility may refuse to permit the attachment. See 47 U.S.C. 224(f)(2); see also *Southern Co.* v. *FCC*, 293 F.3d 1338, 1346-1347 (11th Cir. 2002) (setting aside, as inconsistent with Section 224(f)(2), FCC regulation requiring utilities to expand capacity to accommodate an attachment). The court therefore correctly discerned that this case involves an unusual form of "nonrivalrous" property interest, in which "use by one entity does not necessarily diminish the use and enjoyment of others." Pet. App. 18a. The court of appeals correctly held that, in light of the nature of the property interest at issue and the limited intrusion on that interest by a cable television wire, the statutory compensation formula provides just compensation.

2. a. The decision of the court of appeals is consistent with the only other federal appellate decision addressing the appropriate measure of compensation in a comparable situation. In *Metropolitan Transporta-*

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lated to rate regulations is properly analyzed as a regulatory measure, rather than a physical taking. For those reasons, the question whether there is a taking in this case is controlled by *Florida Power*, not *Loretto*, and the court of appeals erred in finding that the amended Act effects a taking.

tion Authority v. *ICC*, 792 F.2d 287 (2d Cir. 1986), the Interstate Commerce Commission, acting pursuant to statutory authority, ordered the MTA, a commuter railroad, to permit AMTRAK to use 74 miles of its track for AMTRAK's intercity trains. AMTRAK's use of the trackage did not interfere with the MTA's use of the same trackage for its own trains. The court of appeals held that, assuming that there was a taking, "compensation is adequate since the MTA, *in obtaining avoidable costs*, will receive what it would have had but for the taking." *Id.* at 297 (emphasis added). As the court explained, "the owner * * * will be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation." *Ibid.* The court concluded that "there is no support for [the MTA's] claim that [the] adoption of the avoidable cost methodology is constitutionally infirm" under those circumstances. *Id.* at 298.

Petitioner argues (Pet. 15) that "'[m]arginal cost' has never been a recognized proxy for market value" and that *Metropolitan Transportation Authority* is inapposite because it "is not a takings case; it is a rate regulation case." That is incorrect. The Second Circuit in *Metropolitan Transportation Authority* based the pertinent part of its decision on the assumption that there had been a taking, see 792 F.2d at 297 ("assuming arguendo that there has been a taking"), and it held, based on that assumption, that "compensation is adequate." *Ibid.* Indeed, the Second Circuit specifically agreed with the Eleventh Circuit in this case on the subsidiary principle that "[t]he model of negotiation between a willing buyer and a willing seller is inappropriate to the instant case," *id.* at 298, for the same reason that that model is inapplicable here. In both

cases, the absence of any genuine fair market for the property interest at issue would make it impossible to determine directly the "market value" of the property to the seller.

b. The decision of the court of appeals is also consistent with the remand proceedings that followed this Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). After this Court held that the installation of cable television equipment on the rooftop of an apartment house was a physical taking, the state court on remand noted that "there is little reason to believe that landlords will receive any greater amount in * * * 'just compensation'" than allowed by the state law at issue—which was "in most cases $1.00." *Loretto* v. *Group W. Cable*, 522 N.Y.S.2d 543, 546 (App. Div. 1987), appeal denied, 71 N.Y.2d 802 (Table), cert. denied, 488 U.S. 827 (1988). If a nominal sum was sufficient in *Loretto* to provide just compensation, the statutory formula for cable attachments in this case—which permits recovery of marginal costs *plus* a proportional percentage of the total costs of the pole—must be adequate as well.

3. Petitioner argues (Pet. 9) that "this case presents the Court with an opportunity to clarify the constitutional issue that divided this Court in *Brown* [v. *Legal Foundation of Washington*] * * *, *i.e.*, the continued viability of the black-letter rule that fair market value is the measure of compensation in physical takings cases." The Court in *Brown*, however, was not divided about "the continued viability" of the "fair market value" measure in takings cases, and this case would not clarify any issue left open by *Brown*.

Brown involved the calculation of just compensation for interest earned on certain pooled escrow accounts, where each individual sum invested in the pooled

accounts could not, on its own, have earned any net interest for its owner. The Court held that "just compensation is measured by the net value of the interest that was actually earned" by the owners of the money, which the Court found to be zero. *Brown* v. *Legal Foundation of Washington*, 123 S. Ct. 1406, 1420-1421 n.10 (2003). The dissent argued that the Court should have instead focused on the total—rather than the net—amount of the interest earned, and the dissent argued as well that the Court's conclusion that the net value was zero was mistaken. *Id.* at 1426-1427. Because *Brown* involved the interest earned on money, *Brown* did not require the Court to address any question related to the crucial issue in this case, which concerns how to place a monetary value on a particular property interest that has no market value outside the context of government-regulated rates.

Moreover, both the Court in *Brown* and the dissent accepted a key principle underlying the court of appeals' decision in this case. The court of appeals here relied on the principle that "just compensation is determined by the loss to the person whose property is taken," rather than the special value to the government of the condemned property. Pet. App. 17a-18a. The Court in *Brown* calculated just compensation in the same way, relying on the principle that "compensation is measured by the owner's pecuniary loss," rather than the gain to the government. 123 S. Ct. at 1421. The dissent in *Brown* did not disagree that "just compensation consists of the value the owner has lost rather than the value the government has gained," although it argued that the two were the same on the facts of *Brown*. *Id.* at 1426 (Scalia, J., dissenting). In short, this case does not present any question left unanswered by *Brown*.

4. Petitioner contends (Pet. 13) that "the court of appeals inappropriately applied rate regulation principles to a physical takings case." The court of appeals, however, clearly decided this case on the premise that it involved a physical taking and that the just compensation analysis applicable in such cases is different from the analysis applicable to a rate regulation case not involving a physical taking. The court stated that "[t]he FCC inappropriately focused on ratemaking cases" and explained that "[w]hen a physical taking is at issue, * * * a different analytical hat must be worn." Pet. App. 15a.[4]

Petitioner also argues (Pet. 15-16) that "[t]he most glaring example of the court of appeals' own ratemaking analysis is its * * * conclusion that the disparate rates for the taking of identical pole space (i.e., the Cable Rate vs. the Telecom Rate) is 'irrelevant' due to Congress' 'legislative discretion.'" Petitioner's argument rests upon a misunderstanding of the

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[4] For that reason, petitioner's complaint that the court of appeals approved a "historical cost measure" in this case is mistaken. The statutory formula compensates petitioner at actual, present value for the incremental costs associated with cable attachments. See, *e.g.*, *In re Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 F.C.C.R. 12103, 12119 n.120 (2001) (utilities may recover "up front," i.e., in advance, "the full amount of make-ready or pole change out costs"). The statutory formula does use historical costs to measure the additional amount, over incremental costs, that petitioner receives for its proportionate share of the pole space used by the cable attachment. But the court of appeals did not rely on that use of historical costs. Instead, the court held that the statutory rate provides just compensation because it undoubtedly yields "much more than marginal cost," Pet. App. 21a, thus making it of no significance whether the "much more than marginal cost" amount is derived using historical costs, present value, or some other methodology.

Just Compensation Clause. The Clause sets a minimum —not a maximum—amount that the government must pay when it effects a taking of a property right. Because the rate for cable television attachments satisfies the constitutional minimum of "just compensation," Congress's determination that other pole attachers should pay a higher rate is indeed irrelevant. See Pet. App. 21a n.23.[5] The court's observation that it is irrelevant that different attachers pay different rates demonstrates that the court was focused on the proper just compensation analysis.

4. a. Petitioner contends (Pet. 17) that the court of appeals erred because it "abandoned the *hypothetical* willing buyer/willing seller standard, instead requiring that [petitioner] prove the existence of an *actual* buyer 'waiting in the wings' before it can claim that its property has any value." *Ibid.* That contention, too, is mistaken.

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[5] Petitioner argues (Pet. 16) that the higher Telecom Rate demonstrates "immediate, identifiable and rivalrous 'lost opportunity.'" See Pet. 25 ("Once a cable company attaches * * *, [petitioner's] limited communications space is lost (on average)."). That would be true only if petitioner were forced to permit a cable television system to use up pole space that could otherwise have been provided to another entity, such as a telecommunications service provider, at a higher price. Although petitioner now argues (Pet. 24-25) that its poles are crowded, its calculations are inconsistent with the FCC's presumptions regarding pole height and usable space, see Pet. App. 73a-74a; as the Commission noted, although those presumptions are rebuttable, *id.* at 73a, petitioner did "not provide[] data that would overcome" them. *Id.* at 73a, 74a. Indeed, petitioner did not make the showing that *any* of its poles is crowded. See Pet. App. 20a ("[N]owhere in the record did [petitioner] allege that [its] network of poles is currently crowded."). Accordingly, it is too late for petitioner to make arguments in this Court based on an alleged lost opportunity cost.

Initially, the court of appeals did not hold that a plaintiff in a takings case must always show the existence of an actual buyer "waiting in the wings" before it can claim that its property had value. The court simply held that, in the context of this case, petitioner cannot claim that its compensation can be determined by the value of its lost opportunities unless it can show that there are other valuable uses for the pole space occupied by the cable attachments. See Pet. App. 21a ("[T]here is no 'lost opportunity' foreclosed by the government" unless petitioner can show that its poles are "at full capacity" and there is an alternative "higher-valued use."). Petitioner did not make that showing, and it accordingly was not entitled to compensation for lost opportunity costs.

The court of appeals recognized that the fair-market-value measure of just compensation is applicable in the vast run of cases. See Pet. App. 16a ("Typically, fair market value is used" as the measure of just compensation, and "[f]air market value is established by determining what a willing buyer would pay in cash to a willing seller.") (internal quotation marks omitted). In this case, however, the court of appeals followed long-settled precedent in disagreeing with petitioner's attempt to construct a fair market value for cable pole attachments. It has long been clear that, although market value is ordinarily the appropriate measure for just compensation, "[o]ther measures of 'just compensation' are employed * * * when market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public." *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1, 10 n.14 (1984); see *United States* v. *50 Acres of Land*, 469 U.S. 24, 29 (1984); *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950); *United States* v. *Miller*,

317 U.S. 369, 374 & n.16 (1943) (citing cases). Indeed, although petitioner repeatedly invokes (see Pet. 9-10, 12, 28) the dissenting opinion in *Brown* v. *Legal Foundation of Washington*, 123 S. Ct. at 1422 (Scalia, J., dissenting), that opinion did not state that a direct determination of fair market value is the only measure that may ever be used to determine just compensation. To the contrary, that opinion noted that this Court's cases have "recognized * * * two situations in which [the fair market value] standard is not to be used: when market value is too difficult to ascertain, and when payment of market value would result in 'manifest injustice' to the owner or the public." *Id.* at 1423 (Scalia, J., dissenting).

The court below correctly determined that this was a case in which a direct determination of fair market value did not provide the right measure of just compensation. "[A]n alternative to fair market value must be used" here because "[t]here is not an active, unregulated market for the use of 'elevated communications corridors.'" Pet. App. 16a. Fair market value is impossible to ascertain in this case because, as the FCC found, "[t]here are no arm's length transactions reflecting the prices paid by willing buyers and sellers for comparable pole attachments." *Id.* at 69a.[6] Moreover,

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[6] It is instructive, however, that under the Pole Attachments Act before attachment rights became mandatory, petitioner was willing to sell attachments at $7.47 per year and the cable companies were willing to pay that rate. Although there were regulatory constraints on the rate, petitioner had the option of not selling under that pre-1996 regime if it were not receiving an adequate return. Indeed, petitioner is subject to the nondiscrimination provision of Section 224(f)(1)—and the consequent obligation to permit cable attachments where possible—only because it has become a participant in the heavily regulated wire communications business.

calculation of market value as petitioner sought would result in "manifest injustice" because there is a "monopoly inherent in the poles owned by [petitioner]." *Ibid.* As this Court recently noted, "[t]he very reason for the [Pole Attachments] Act is that—as to wires—utility poles constitute a bottleneck facility, for which utilities could otherwise charge monopoly rents." *National Cable & Telecommunications Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 340 (2002). This Court has long recognized that just compensation does not include compensation for the monopoly power that a particular owner may exert. See *United States* v. *Cors*, 337 U.S. 325, 334 (1949) (government cannot be compelled to pay "hold-up value" for property taken); *United States* v. *Miller*, 317 U.S. 369, 375 (1943) ("special value to the condemnor * * * must be excluded"); see also *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 125-127 (1950). The court of appeals' determination to utilize an alternative valuation was therefore dictated by settled principles of the law of just compensation.[7]

5. Petitioner contends (Pet. 18-20) that the court of appeals' decision is inconsistent with the principle of

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See note 3, *supra*. The calculation of just compensation in this case may reasonably take that fact into account. See *United States* v. *Commodities Trading Corp.*, 339 U.S. 121 (1950) (government-set ceiling price provides just compensation for taking of property subject to that price).

[7] Petitioner contends (Pet. 21-22) that the prices paid for leasing a right-of-way from the federal government provides a measure of the fair market value. The fact that owners of real property demand certain rates for rental of their property in arm's-length transactions does not, however, establish a fair market value for the different interest at issue here—attachment space on a non-crowded utility pole for which there is no free market.

Monongahela Navigation Co. v. *United States*, 148 U.S. 312, 327 (1893), that "the right to determine what shall be the measure of compensation" is "a judicial, and not a legislative, question." Petitioner is mistaken. *Monongahela* rests on the principle that the judicial branch is entrusted under the Constitution with the ultimate responsibility of ensuring just compensation. That principle is consistent with permitting the other branches of government to determine, in the first instance and subject to judicial review, the amount that should be paid for property taken. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 151 n.39 (1974); see also *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) ("[A]ll that is required is that a reasonable, certain, and adequate provision for obtaining compensation exist at the time of the taking."); *Wisconsin Central Ltd.* v. *Public Service Comm'n*, 95 F.3d 1359, 1367-1369 (7th Cir. 1996). As the court of appeals explained, there are numerous means by which a court of appeals could "gather the information needed to determine just compensation" and thus exercise its constitutional responsibility. See Pet. App. 9a n.9; *Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1333-1334 (11th Cir. 1999). In this case, the court of appeals carefully reviewed the statutory formula and the FCC's administration of that formula. Although petitioner complains (Pet. 20) that the court of appeals "turned a blind eye toward [petitioner's] evidence," the court's disagreement with petitioner over the correct measure of just compensation on the particular facts of this case made it unnecessary for the court to examine the factual validity of petitioner's evidentiary submission.[8]

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[8] The utility trade associations that filed a brief as amici curiae

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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in support of petitioner are primarily concerned with the future application of the rate for cable attachments to attachments to non-distribution utility property, such as transmission facilities and rights-of-way, and to attachments by wireless communication facilities. Amici Br. 4-5 & n.6. They claim that the issues raised by such attachments "should not be re-argued before the [FCC] and re-litigated before the courts if they can be addressed fully and settled in this case." Amici Br. 6. Rate regulation for such attachments, however, was not at issue below. The trade associations' concerns can and should be addressed in the first instance by the FCC, not by this Court.