No. 12-1396

In the Supreme Court of the United States

AMERICAN ELECTRIC POWER SERVICE CORP., et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONERS

Mark W. Menezes
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue NW
Washington, DC 20037
(202) 955-1500
mmenezes@hunton.com

Eric B. Langley
Counsel of Record
J. Russ Campbell
Jason B. Tompkins
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Birmingham, AL 35203
(205) 521-8000
elangley@balch.com

Counsel for Petitioners

August 9, 2013

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REPLY BRIEF OF PETITIONERS

"*Chevron* is rooted in a background presumption of congressional intent,"[1] and the text, structure, and history of the Pole Attachments Act (and even the FCC's contemporaneous understanding of the statute) all indicate that Congress intended to exclude ILECs entirely from the Act's protections. Yet the FCC finds the only support for its "re-interpretation" of the Act in what it believes the statute "suggests."[2]

And while the FCC maintains that "Petitioners offer no alternative explanation for Congress's decision to use two different terms in adjacent subsections,"[3] it is the FCC that "has given us no sound reason in the statutory text or context to disregard"[4] Congress's intent to entirely exclude ILECs from the protections of the Pole Attachments Act. If its "re-interpretation" of the Act to mean the opposite of what Congress intended does not fail at step one of the *Chevron* inquiry, then judicial deference to an agency's interpretation will have essentially become judicial acquiescence to administrative legislation.

---

[1] *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

[2] Br. for the Federal Resp'ts in Opp'n ("Br. in Opp'n") 6, 9.

[3] Br. in Opp'n 10.

[4] *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1184 (2011).

I. The FCC's recent "re-interpretation" of the Pole Attachments Act is based on a newly-discovered ambiguity within the Act and begs the question of Congress's intent under *Chevron*.

A. The FCC has offered no explanation for its sudden discovery of an ambiguity that leads it to conclude Congress intended precisely the opposite of what it previously "assumed" was unambiguous.

"No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington*, 133 S. Ct. at 1868 (emphasis in original). The Communications Act is "an example of a statute under which an agency's 'authority is clear because the statute gives an agency broad power to enforce *all* provisions of the statute."[5] But this Court has advised that "[e]ven for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."[6]

---

[5] *City of Arlington*, 133 S. Ct. at 1871 n.3 (quoting *Gonzales v. Oregon*, 546 U. S. 243, 258–59 (2006)).

[6] *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).

The FCC offers no explanation for how its recent "re-interpretation" of the Pole Attachments Act—to mean the opposite of what it "assumed" for fifteen years that Congress had unambiguously intended—is within the statutory bounds drawn by Congress.[7] In fact, the FCC's solitary reference to the congressionally intended bounds of the Pole Attachments Act is the candid acknowledgment that its *previous* position—that ILECs were excluded entirely from the protections of § 224—was "'consistent with Congress' intent [to] promote competition by ensuring the availability of access to *new* telecommunications entrants.'" (Br. in Opp'n 3) (quoting *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777, ¶5 (1998) (emphasis added)).

There could be no serious dispute that the FCC's previous and contemporaneous "interpretation"—in reality a straightforward application of the statute's unambiguous text—accurately reflected Congress's intent for the Act to *burden* ILECs at the expense of new telecommunications entrants, not *benefit* ILECs at the expense of other utilities. Indeed, it was universally acknowledged, including by the Solicitor General on behalf of the FCC, that "there was no need to provide rate protection to entities that usually owned or controlled the poles themselves." Br. for the Federal Pet'rs, *Nat'l Cable Television Ass'n v. Gulf Power Co.*,

---

[7] Br. in Opp'n 3 ("When it first implemented the 1996 amendments, the FCC assumed that, because ILECs were excluded from Section 224's definition of 'telecommunications carrier,' they were also excluded from that provision's grant of authority to the FCC to regulate pole attachment rates charged to 'provider[s] of telecommunications service.'").

534 U.S. 327 (2002) (Nos. 00-832, 00-843), 2001 WL 345195, at *18. As the FCC notes in its brief, all utilities—including both ILECs and electric companies—potentially could "charg[e] monopoly rents" for pole attachments prior to the passage of the Act. (Br. in Opp'n 2.) Thus, Congress intended to subject ILECs and electric companies to the burdens placed on pole-owning "utilities," not to provide them with the benefits of rate regulation.

B. The FCC presumes the very statutory distinction it seeks to prove in order to ascribe its 2011 policy goals to Congress's 1996 intent, rather than vice versa.

Without evidence that Congress intended to give the FCC interpretive leeway to contradict the text of the statute by doing what the FCC previously conceded only Congress could do,[8] the FCC understandably prefers to ignore the text, context, and structure of the

---

[8] *See* Nat'l Broadband Plan at 112 ("[W]ithout *statutory* change, the convoluted rate structure for cable and telecommunications providers will persist . . ."). The FCC insists that the above-quoted portion of its National Broadband Plan referred only to the different statutory rates for cable and telecommunications providers. (Br. in Opp'n 11 n.4). But just prior to its call for "statutory change," the FCC indicated that it would, "**[t]hrough a rulemaking**," alter the "telecommunications carrier rate formula to yield rates as close as possible to the cable rate." Nat'l Broadband Plan, at 110 (emphasis added). Therefore, the FCC surely could not have meant that "statutory change" was necessary in order to achieve the very same result it planned to effect "[t]hrough a rulemaking." This nips the FCC's post-hoc rationalization in the bud.

Act. But in doing so, the FCC presumes the truth of the very statutory distinction it seeks to prove.

In the first paragraph of its Brief in Opposition—the Question Presented—the FCC begs the question of whether Congress intended to exclude ILECs from both terms. According to the FCC, because the Act "provides additional benefits to 'telecommunications carrier[s],' which are defined to exclude 'incumbent local exchange carrier[s],'" the Act draws a distinction between "telecommunications carriers" and "providers of telecommunications services." (Br. in Opp'n I.)

But the FCC puts the cart before the horse by arguing that the import of the Act's definitions is determined by the Act's substantive contents. To the contrary, the Act's definitions must guide its substantive provisions. "It is commonly understood that such *definitions establish meaning* where the terms appear in that same act," not the other way around. 2A Norman J. Singer & J.D. Shamble Singer, Sutherland Statutes and Statutory Construction § 47:7 (7th ed. 2007) (emphasis added).

The FCC has now found daylight between two terms that the definitional provisions of the statute provide are "interchangeable equivalents."[9] But as logic

---

[9] *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 n.1 (1934); *see also* 2A Norman J. Singer & J.D. Shamble Singer, Sutherland Statutes and Statutory Construction § 47:7 (7th ed. 2007) ("A term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning by construction than where the definition

dictates, and as the statute provides, because ILECs are excluded from one term, they must also be excluded from that term's statutory equivalent. And to ignore the equivalency established by Congress is to subvert this Court's *Chevron* inquiry from one focused on effectuating congressional intent to one that elevates deference to an unjustifiable level. If the FCC's "re-interpretation" of the Pole Attachments Act is entitled to deference, then any other agency is likewise free to implement its own policy judgment at the expense of Congress's intent.

II. Both the plain language of the statute and its legislative history demonstrate that Congress intended to exclude ILECs entirely from the protections of the Pole Attachments Act.

Contrary to what the FCC suggests,[10] Petitioners have in fact offered an alternative explanation for the use of two different terms in § 224: by excluding ILECs from the definition of "telecommunications carrier" for purposes of § 224, Congress unambiguously intended to also exclude ILECs from the "providers of telecommunications services" entitled to the protections of the Act, as shown by the text of the Act, and confirmed by its legislative history.

---

declares what a term 'means.' . . . A definition which declares what a term 'means,' excludes any meaning that is not stated.").

[10] Br. in Opp'n 10.

A. The text of the statute unambiguously indicates that "telecommunications carrier" means "provider of telecommunications services," and that the exclusion of ILECs from one "means" that ILECs are excluded from both.

Even though the D.C. Circuit acknowledged that "'telecommunications carrier' equals 'provider of telecommunications services,' and thus vice versa," it nonetheless concluded that the use of two different terms, "cheek by jowl," "suggests" that the terms mean two different things. Pet'r. App. 8–9. But the text of § 224 and section 3 of the Communications Act demonstrate that Congress unambiguously intended for the two terms to be construed identically.

In fact, Congress removed any doubt about whether the general definition of "telecommunications carrier" is applicable to the entire statute, including § 224, by expressly stating that, "[e]xcept as otherwise provided in this Act, the terms used in this Act have the meanings provided in section 3 of the Communications Act of 1934."[11] According to the definition of the term in section 3, "'telecommunications carrier' means any provider of telecommunications services."[12] And "[f]or purposes of [§ 224]," Congress "otherwise provided"

---

[11] Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 56, 47 U.S.C.A. § 153 NOTE (Feb. 8, 1996).

[12] 47 U.S.C. § 153(51).

that "the term 'telecommunications carrier' does not include any incumbent local exchange carrier."[13]

Thus, the equivalence of the two terms—and consequently the exclusion of ILECs from both—is apparent on the face of the Act, which may as well read:

> (5) For purposes of this section, the term ["provider of telecommunications services"] does not include any incumbent local exchange carrier . . . .

47 U.S.C. § 224(a)(5).

Despite the inference drawn by the FCC that the use of two different terms suggests that Congress intended for the terms to mean two different things, "[i]t can hardly have been Congress's intention to include this cross-reference and thereby incorporate the otherwise inapplicable definition, only to have the [FCC] disregard the definition. . . ."[14]

---

[13] 47 U.S.C. § 224(a)(5).

[14] *Port Auth. v. Dep't of Transp.*, 479 F.3d 21, 32–33 (D.C. Cir. 2007) (citing *Chevron*, 467 U.S. at 842–43).

B. The evolution of the relevant amendments to the Act confirms that Congress never intended for ILECs to benefit from the Act's protections.

Legislative history also confirms Petitioners' plain-language reading of the statute. Specifically, the evolution of the 1996 amendments to the Act reveals that the anomalous reference in § 224(a)(4) to "a provider of telecommunications services," whereas the Act elsewhere speaks only to the regulation of "telecommunications carriers," is likely a relic of the legislative process.

Consistent with the FCC's interpretation of § 224 from the time it appeared in amended form until its April 2011 about-face, the Senate proposed to amend the Act by extending its protections to all "telecommunications carriers," except ILECs, and elsewhere provided that the term "'[t]elecommunications carrier' means any provider of telecommunications services."[15] The House, on the other hand, rejected the Senate's approach and proposed to do precisely what the FCC accomplished only recently with its "re-interpretation" of § 224—to extend the protections of the Act to "pole attachments provided to all providers of telecommunications services,"[16] potentially, if not presumably, including ILECs.

---

[15] S. 652, 104th Cong. § 2(b) (1995).

[16] S. 652, 104th Cong. § 106(4) (as amended by House, Oct. 12, 1995).

But as explained in the Conference Report, Congress clearly rejected the House's proposal (and, by extension, the FCC's "re-interpretation"). Instead, Congress "adopt[ed] the Senate provision,"[17] which clearly envisioned extending the protections of the Act only to "carriers" of telecommunications services. The Senate bill, however, also inadvertently failed to revise the Act's definition of "pole attachment" to include "telecommunications carriers."

The Conference Report indicates that Congress rectified this drafting error by including "a provider of telecommunications service" under the definition of "pole attachment," while retaining the Senate bill's consistent reference to "telecommunications carrier," and its concomitant exclusion of ILECs from the definition of that term "[f]or purposes of this section." Knowing that "the terms used in this Act have the meanings provided in section 3 of the Communications Act of 1934,"[18] and fully aware that the bill elsewhere ordained in section 3 that the terms "telecommunications carrier" and "provider of telecommunications services" were "interchangeable

---

[17] *See* S. Conf. Rep. No. 104-230, 207, § 703 (Feb. 1, 1996). The Conference Report also stated that the final bill adopted three specific modifications from the House, namely what would become §§ 224(g), (h), and (i), none of which is related or indicates in any way an intent to extend the Act to any "provider of telecommunications service" with no exclusion of ILECs. *Id.* This likely explains why the FCC never saw the need (until recently) to "interpret" this particular section of the Act at all—because the FCC knew *exactly* what Congress intended.

[18] Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 56, 47 U.S.C.A. § 153 NOTE (February 8, 1996).

equivalents,"[19] the conferees detected no anomaly in the use of two different terms that they had concurrently defined within the same Act to mean the same thing. And in any event, nothing in the legislative history even hints that Congress intended to "adopt[] the Senate provision," while simultaneously effecting a complete shift in the treatment of ILECs under the Act from pole-owning "utilities" to protected "entrants."

In fact, the version of the Act that emerged from the conference also amended the definition of "utility" to include "any person who is a local exchange carrier."[20] Congress structured the Act in a way that unambiguously indicates its "intent [to] promote competition by ensuring the availability of access to *new* telecommunications entrants," not to provide benefits to *incumbent* local exchange carriers. *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd. 6777, ¶5 (1998)) (emphasis added).

With this history and context in mind, the Act's most recent amendments "suggest[] an entirely intentional character" to Congress's use of two different terms—that Congress never intended to include ILECs within the ambit of § 224 in one breath, then carve them out "[f]or purposes of [§ 224]" with the next.

---

[19] *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 n.1 (1934).

[20] Telecommunications Act of 1996, Pub. L 104–104, § 703(1) (Feb. 8, 1996).

CONCLUSION

The legislative history of § 224 confirms what the text makes clear—that by excluding ILECs from the definition of "telecommunications carrier," Congress also intended to exclude ILECs from the term's interchangeable equivalent, a "provider of telecommunications services." Indeed, prior to its "re-interpretation" of the Act to mean the opposite, the FCC's position (shared by the Solicitor General and, for all that appears, everyone else) was that § 224 required no interpretation at all because Congress's intent to entirely exclude ILECs was unambiguously clear.[21]

Regardless of what Congress's use of two different terms within § 224 might "suggest" to the FCC, it is not at liberty to disregard the clear articulation of congressional intent for those two terms to be construed identically. Because the text of the statute provides that "'telecommunications carrier' equals 'provider of telecommunications services,' and thus vice versa,"[22] when Congress "*specifically excluded incumbent LECs* from the definition of telecommunications carriers with rights as pole

---

[21] *See* Pet. 22–23.

[22] Pet'r. App. 8–9.

attachers,"[23] it intended for "ILECs [to] have no rights with respect to the poles of other utilities."[24]

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Eric B. Langley
Counsel of Record
J. Russ Campbell
Jason B. Tompkins
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Birmingham, AL 35203
(205) 521-8000
elangley@balch.com

Mark W. Menezes
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue NW
Washington, DC 20037
(202) 955-1500
mmenezes@hunton.com

Counsel for Petitioners

---

[23] *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order, 15 FCC Rcd. 22983, ¶ 72 (2000).

[24] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd. 6777, ¶ 5 (1998).