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

BRIEF OF DTE ELECTRIC COMPANY, MINNESOTA POWER, NATIONAL GRID, AND SOUTH CAROLINA ELECTRIC & GAS COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE* [1]

The four electric utilities filing this *Amicus* Brief – DTE Electric Company ("DTE Electric"), Minnesota Power, National Grid and South Carolina Electric & Gas Company ("SCE&G) (collectively "*Utility Amici*") – agree with Petitioners that the Federal Communications Commission's ("FCC's" or "Commission's") assertion of jurisdiction over attachments by telephone company pole owners (incumbent local exchange carriers, or "ILECs") to electric utility poles is an impermissible expansion of its statutory authority. Such a radical and unjustified departure from Congressional intent and past precedent will undermine joint pole arrangements between telephone company and electric utility pole owners spanning the last one hundred years or so and could be disastrous for the *Utility Amici* and electric utilities across the country.

The FCC's one-sided regulation of the century-old "joint use" or "joint ownership" relationship will upset well established private contractual relationships to the unfair benefit of ILECs and the enormous detriment of the electric utility industry.[2] FCC jurisdic-

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. The parties have been given at least 10 days' notice of the intention of *amici* to file. The documents granting that permission are filed herewith.

[2] Under a "joint use" arrangement, electric utility and ILEC pole owners share the use of each other's poles. Under a "joint ownership" arrangement, each of the poles shared by the electric utility and ILEC is owned by both companies.

tion will cause the transfer of hundreds of millions of dollars annually from electric utilities and their ratepayers to telephone companies via reduced attachment rentals.[3] Even more significantly, it could cause telephone companies to exit joint pole ownership altogether, since the FCC's attachment rules are so favorable as compared to joint use.

Future FCC precedent, which the Commission intends to establish on a case-by-case basis, could make the attachment rules for ILECs even more favorable. For example, if the FCC's jurisdiction over joint use were upheld, the Commission eventually could force the transfer of billions of dollars in pole ownership and maintenance costs from ILECs to electric utilities.

The FCC's efforts to regulate joint use arrangements as if they were simple "pole attachments" by cable companies or competitive local exchange carriers ("CLECs") is misplaced. ILECs, which own and control tens of millions of distribution poles across the country, attach to electric utility poles with much different rights and responsibilities than cable company and CLEC attachers, which do not own distribution poles. Cable companies, CLECs, and electric utilities themselves rely on access to ILEC-owned poles in order to distribute their respective services to consumers. As a result, ILECs are in a superior bargaining position compared to cable companies and CLECs when negotiating attachment arrangements with electric utilities.

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[3] The ILECs themselves estimate the FCC's jurisdiction over joint use potentially shifts about $350 million in annual costs from electric utilities and their ratepayers to the ILECs. Pet. App. 68.

Like electric utilities nationwide, DTE Electric, Minnesota Power, National Grid and SCE&G all have joint use or joint ownership contracts with many different ILEC pole owning partners that specify the rights and responsibilities of each pole owner with respect to its own and the other party's poles (or to poles jointly-owned by both). This mutual dependency explains why joint use/joint ownership agreements have been used for decades and have enabled the successful deployment of extensive aerial distribution systems for telephone and electric services across the entire country.

These types of joint use arrangements negotiated by telephone companies and electric companies at arm's length typically contain vastly different terms and conditions than third party pole attachment "licensee" agreements between cable/CLEC attachers and ILEC/electric utility pole owners. Pursuant to most joint use agreements, each pole-owning party (*i.e.*, the ILEC and the utility) is required to set an equal number (or a defined percentage) of new poles, inspect and replace the poles when they become defective, and expend the necessary resources to maintain those poles. Joint use contracts also often specify which pole owner will pay for stronger or taller poles that may be required by one of the parties or by a government entity. Because of this mutual dependency between joint pole owners, joint use agreements, unlike pole attachment agreements, often require that the agreement stay in effect for all existing attachments, even after the term of the agreement has expired.

These types of comprehensive pole-owning rights and responsibilities are absent from vastly different third party attacher contracts between cable company/

CLEC attachers and electric utility/ILEC pole owners. Based on these mutual rights and responsibilities, the *Utility Amici*, like utilities nationwide, successfully worked for many decades with their ILEC pole owning partners to construct pole distribution systems that both pole owners share.

The FCC's assertion of jurisdiction over joint use arrangements between electric utilities and ILECs (predicated on pole ownership) as if they were the same as pole attachment contracts with cable companies and CLECs (simple licensee arrangements) is an unjustified and unfair distortion of the Pole Attachment Act[4] and violates years of specific FCC precedent to the contrary.

DTE Electric Company is an electric utility providing service to approximately 2.1 million customers in southeastern Michigan.[5] DTE Electric currently has joint use agreements in place with AT&T (d/b/a Michigan Bell Telephone Company), CenturyTel Midwest of Michigan and Frontier Communications. There are approximately 658,000 joint use poles that DTE Electric shares with these ILECs. Approximately 137,000 of them are owned by the ILECs and 521,000 of them are owned by DTE Electric. If DTE Electric were required to reduce the amount DTE Electric charges these ILEC joint use partners to attach to DTE Electric's poles to the level of the FCC rate charged cable companies, DTE Electric would lose approximately $16 million annually, which

[4] Pole Attachment Act, 47 U.S.C. §224. The Pole Attachment Act is part of the Communications Act of 1934 (47 U.S.C. § 151 *et seq*.).

[5] Michigan is a state that regulates pole attachments, and DTE Electric is concerned that the Michigan Public Service Commission may adopt the FCC's new rules.

would go directly to the ILECs. If DTE Electric were forced to purchase the 137,000 poles owned by the ILECs at a cost, for example, of $100, $250 or $500 per pole, it would cost DTE Electric $13,700,000, $34,250,000, or $68,500,000 in capital expenditures, and perhaps another $3.6 million to $18.1 million annually in operating expenses to maintain those additional poles.

Minnesota Power is an electric utility providing electricity service to 144,000 customers in northeastern Minnesota. Minnesota Power currently has joint use agreements in place with Frontier and CenturyLink. There are approximately 40,000 joint use poles that Minnesota Power shares with these ILECs. Approximately 10,400 of them are owned by the ILECs and 29,600 of them are owned by Minnesota Power. If Minnesota Power were required to reduce the amount it charges these ILEC joint use partners to attach to Minnesota Power's poles to the level of the FCC rate charged cable companies, Minnesota Power would lose approximately $161,000 annually, which would go directly to the ILECs. If Minnesota Power were forced to purchase the 10,400 poles owned by the ILECs at, for example, $100, $250 or $500 per pole, it would cost Minnesota Power $1,040,000, $2,600,000, or $5,200,000 in capital expenditures, as well as ongoing operating and maintenance expenses associated with these additional poles and future capital expenditures for pole replacements.

National Grid is an electric utility providing service to approximately 3.3 million customers in New York,

Massachusetts, and Rhode Island.[6] National Grid shares joint ownership with its ILEC joint use partners on approximately 1,672,000 jointly-owned poles. Its joint ownership partner on 90% of those jointly-owned poles is Verizon, and more than two dozen other, much smaller ILECs are National Grid's joint ownership partners in New York state. Rental fees are not charged by either National Grid or the ILECs on these jointly-owned poles. If National Grid were forced to purchase the ILECs' share of these 1,672,000 jointly-owned poles at, for example, $100, $250 or $500 per pole, it would cost National Grid $167,200,000, $418,000,000 or $836,000,000 in capital expenditures, as well as ongoing operating and maintenance expenses for these additional poles and future capital expenditures for pole replacements.

South Carolina Electric & Gas Company is an electric utility providing service to approximately 668,000 customers throughout South Carolina. SCE&G currently has joint use agreements in place with AT&T, Frontier, CenturyLink, Windstream and six small rural ILECs. There are approximately 120,000 joint use poles that SCE&G shares with these ILECs. Approximately 34,000 of them are owned by the ILECs and 86,000 of them are owned by SCE&G. If SCE&G were required to reduce the amount SCE&G charges these ILEC joint use partners to attach to SCE&G's poles to the level of the FCC rate charged cable companies, SCE&G would lose approximately $3.5 million annually, which would go directly to the ILECs. If SCE&G were

[6] New York and Massachusetts are states that regulate pole attachments, and National Grid is concerned that these states may adopt the FCC's new rules.

forced to purchase the 34,000 poles owned by the ILECs at, for example, $100, $250 or $500 per pole, it would cost SCE&G $3,400,000, $8,500,000, or $17,000,000 in capital expenditures, and perhaps another $848,000 to $4.2 million annually in operating expenses to maintain those additional poles.

SUMMARY OF ARGUMENT

After more than 100 years of successful private "joint use" arrangements between electric utility and incumbent telephone company pole owners – and after more than 10 years of repeatedly stating that it had no statutory authority to do so – the Federal Communications Commission has asserted jurisdiction over this "joint use" arrangement despite a clear statutory directive to the contrary. Unfortunately, it does so at the considerable expense of electric utilities and on the backs of their rate payers.

This is a fundamental dispute between two core American industries: electric utilities on the one hand, and telephone companies on the other. Hundreds of millions of dollars per year (and potentially much more) is at stake. Utility customers and telephone company subscribers across the country will be affected by the outcome.

The FCC, an expert regulatory agency in communications matters, reached a decision favoring telephone companies. Electric utilities are now petitioning this court to hear their arguments that the FCC reached its decision by stretching, distorting, and blatantly evading the applicable statute (the "Pole Attachment Act").

This statute created a detailed, specific regulatory scheme between pole owners (*i.e.*, electric utilities

and telephone companies) and attachers to poles (*i.e.*, cable companies and competitive local exchange companies). Nothing in the statute or the accompanying legislative history indicated any intention by Congress to confer upon the FCC broad authority to go beyond these types of pole attachment arrangements, upset decades of privately negotiated joint use agreements, and replace them with a government-mandated regime favoring one industry (telecommunications) over another (electric utilities).

Only one year before its decision, the Commission recognized in its National Broadband Plan that it lacked statutory authority to regulate the joint use relationship between electric utilities and telephone companies. The FCC's new interpretation to the contrary defies the language of the statute and makes little sense, which may explain why neither the FCC nor any telephone company or other interested party previously raised it.

The FCC's re-interpretation of the Pole Attachment Act, no matter how well-intentioned, is a disaster in waiting for the *Utility Amici* and the rest of the electric utility industry, as well as the consumers they serve. Putting the FCC "fox" in charge of the electric utility "henhouse" is not what Congress intended and is exactly the type of overreaching that the Court earlier this year was careful to guard against. *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013).

The *Utility Amici* respectfully urge the Court to hear this important case.

ARGUMENT

I. CONGRESS DID NOT AUTHORIZE THE FCC TO REGULATE THE ELECTRIC UTILITY/ILEC JOINT USE AND JOINT OWNERSHIP RELATIONSHIP

For more than 10 years prior to its 2011 Pole Attachment Order, the FCC acknowledged beyond any doubt that Section 224(b) excluded ILECs from the group of entities entitled to receive FCC-regulated pole attachment rates, terms and conditions.[7] This statutory exclusion made perfect sense (and still does), since Congress recognized that ILECs and electric utilities both owned poles and thus differed from other attaching entities. In the Pole Attachment Act, Congress actually defined the term "utility" to include both electric and ILEC pole owners. 47 U.S.C. § 224(a)(1). Consistent with their status as pole owners, the Telecommunications Act of 1996 excluded ILECs from the definition of a "telecommunications carrier" subject to the protections afforded non-pole owning entities such as cable companies and CLECs. 47 U.S.C. § 224(a)(5).

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[7] *See, e.g., In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*; Amendment of the Commission's Rules and Policies Governing Pole Attachments, 13 FCC Rcd. 6777, ¶5 (1998) ("1998 Report and Order"). Only one year prior to the FCC's April 7, 2011 Pole Attachment Order, the FCC's own National Broadband Plan recognized that ILECs are not entitled to government-mandated pole attachment rates, terms and conditions under the Communications Act: "without statutory change, the convoluted rate structure for cable and telecommunications providers will persist." Connecting America: The National Broadband Plan, 2010 WL 972375 at p. 130 (FCC) (Mar. 16, 2010), available at http://www.broadband.gov ("National Broadband Plan").

The FCC's new claim to jurisdiction over the joint use relationship ignores the historic distinction between pole owners (ILECs and electric utilities) and attachers (cable companies and CLECs) and grants unprecedented and unjustified rights to ILECs as if they were attachers and not joint pole owners.

As mentioned above, FCC jurisdiction is predicted to cause the transfer of hundreds of millions of dollars annually from electric utilities and their ratepayers to ILEC telephone companies in the form of reduced attachment rental payments.[8] ILECs may well opt out of the pole ownership business altogether, since the FCC's attachment rate offers a preferable, lower-cost alternative.

Broad FCC jurisdiction over the rates, terms and conditions of joint use also could move beyond just lower attachment rates. As the FCC makes its rulings in pole attachment complaint proceedings on a case-by-case basis, it could determine that to "level the playing field" between cable and CLEC attachers and ILEC pole owners, ILECs should have fewer and fewer pole ownership responsibilities. The entire balance of pole owning rights and responsibilities could be shifted to favor the ILECs over electric utilities and their ratepayers.

FCC jurisdiction over ILEC joint use is one-sided and confers no parallel rights on electric utilities with respect to their much needed access to ILEC-owned poles. Instead, electric utilities will be left to fend for themselves in attempting to gain access to ILEC-owned poles. Under such ILEC-friendly regulation, ILECs would naturally question why they should own

[8] The ILECs estimate that figure to be about $350 million per year. Pet. App. 68.

poles at all when under the FCC's new rules the electric company must make space available at a small fraction of the cost of ownership. ILECs may naturally be expected to make every effort to abandon joint ownership of poles in favor of attachments under the FCC's new utility ratepayer-subsidized rates.

Had Congress intended such a radical disruption of the country's remarkably successful joint use system, one would expect at least some indication to that effect in the statute or legislative history. Yet there is nothing in the Pole Attachment Act, the Telecommunications Act of 1996, or the legislative history of either that even hints at such a fundamental change in historic joint ownership relationships.[9]

Quite the contrary, by defining ILECs as "utilities" and recognizing them as pole owners, Congress sought instead to protect cable companies and CLECs from ILEC (and electric utility) pole owners, not to place ILECs on the same regulatory footing as non-pole-owning cable companies and CLECs. As the Utility Petitioners point out, "it was simply inconceivable that Congress would allow ILECs to *benefit* from the Act when a principal purpose of the Act was to place *burdens* on pole owners." Pet. Br. 4 (emphasis in original).

The fact that the FCC's new interpretation of ILEC pole attachment rights and joint use defies the language of the statute and makes little sense may

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[9] A major change in existing rules "would not likely have been made without specific provision in the text of the statute," and it is "most improbable that it would have been made without even any mention in the legislative history." *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 380 (1988).

explain why no ILEC or other interested party raised this far-fetched theory for more than 10 years after adoption of the Telecommunications Act of 1996.[10] The Commission's recent epiphany that it actually *does* have statutory authority over the rates, terms and conditions of ILEC attachments to electric utility poles – after more than 10 years of decisions to the contrary – was not the result of a fair and objective analysis of the law or the record. It was not a reasoned legal review. It was a convoluted and willful misreading of the statute driven by one-sided and misguided policy considerations.

II. BY FAILING TO ANALYZE THE POLE ATTACHMENT ACT IN CONTEXT AND MISAPPLYING *CHEVRON*, THE D.C. CIRCUIT ALLOWED THE FCC TO REWRITE THE STATUTE

The FCC's claim to jurisdiction over the rates, terms and conditions of the joint use/joint ownership relationship rests on the mistaken notion that Congress, at the time it enacted the Telecommunications Act of 1996, intended to draw some previously undiscovered distinction between the terms "telecommunications carrier" and "provider of telecommunications service." Although the FCC acknowledged that Congress excluded ILECs from the definition of "telecommunications carrier," the Commission argued that it did not also exclude them from the definition of "provider of telecommunications service." Based on this miniscule distinction in an otherwise crystal clear statute articulating the many differences between pole owners and attachers, the FCC concluded

[10] *See, e.g.*, 1998 Report and Order at ¶ 5; National Broadband Plan, 2010 WL 972375 at p. 130, available at http://www.broadband.gov.

that ILECs are entitled to benefit from any provision in the Pole Attachment Act that uses the term "provider of telecommunications service."[11]

There are several problems with this analysis, but the D.C. Circuit unfortunately failed to address them. First, the court did not read the Pole Attachment Act in context. Rather, the court parsed a single phrase in a vacuum without first ascertaining the unambiguous overriding intent of Congress in enacting the Pole Attachment Act, as amended. Failing to ascertain the overall intent of Congress, the court summarily passed over the first prong of the *Chevron* test designed to honor Congressional intent: "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, quoted by *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013).

Here, Congress unambiguously intended to exclude ILECs from the protections of the Act, but the circuit court never considered it. Instead, the court assumed that the Pole Attachment Act's one-time use of two different terms, "telecommunications carrier" and "provider of telecommunications service," created an ambiguity and therefore skipped the first step of

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[11] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, at ¶¶ 207-208 (2011).

Chevron and asked only whether the FCC's interpretation was "reasonable."[12]

This unparalleled deference to the FCC was misplaced. "Even 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.*" *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (emphasis added).

When the Pole Attachment Act is analyzed in context, and not by a piecemeal analysis of two different, individual phrases, the intent of Congress is abundantly clear. The FCC is granted jurisdiction only over the rates, terms and conditions of attachments by cable companies and CLECs to ILEC and electric utility poles—not over ILEC attachments to those poles. There is no indication at all in the legislation itself or the accompanying legislative history that Congress intended such a massive grant of authority to the FCC to regulate the joint use relationship between ILEC and electric utility pole owners.

The FCC itself recognized this obvious limitation in its jurisdictional authority for more than 10 years,[13] yet the circuit court focused on a single, minor phrase

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[12] Pet. App. 9-10. *See also* Pet. App. 6 ("We review the Commission's interpretation of § 224 for reasonableness under the familiar standard of *Chevron, USA, Inc. v. NRDC, Inc.*, 469 U.S. 837 (1984), 'which . . . means (within its domain) that a "reasonable agency interpretation prevails."'") (citations omitted).

[13] *See, e.g.*, 1998 Report and Order at ¶ 5; National Broadband Plan, 2010 WL 972375 at p. 130, available at http://www.broadband.gov.

that was inconsistent with the remainder of the statute and found an "ambiguity." But "[a] reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 121. Rather, "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.* at 133. *See also Brown v. Gardner*, 513 U.S. 115,118 (1994) ("the meaning of statutory language, plain or not, depends on context.").[14]

Placed in context, there is no ambiguity here. The Pole Attachment Act[15] is part of the Communications Act of 1934.[16] Under the Communications Act, the terms "telecommunications carrier" and "provider of telecommunications service" are synonyms. The phrases mean the same thing. As Congress made clear in the Communications Act, the term "telecommunications carrier" "*means any provider of telecommunications services.*" 47 U.S.C. § 153(44) (emphasis added). Where the word "means" is used, the terms are "interchangeable equivalents." *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 n.1 (1934).[17]

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[14] A "statute's text, its context, the structure of the statutory scheme, and canons of textual construction are relevant in determining whether the statute is ambiguous and can be equally helpful in determining whether such ambiguity comes accompanied with agency authority to fill a gap with an interpretation that carries the force of law." *City of Arlington*, 133 S. Ct. at 1876 (Breyer, J., concurring).

[15] 47 U.S.C. §224.

[16] 47 U.S.C. §§ 151, *et seq.*

[17] The D.C. Circuit for argument's sake agreed that "for purpose of [its] analysis . . . the word 'means' is equivalent to 'equals'" and consequently "it is true that under § 153(51),

As a result, viewed in context, when Congress excluded ILECs from the term "telecommunications carrier" in the Pole Attachment Act, it automatically excluded ILECs from the equivalent term "provider of telecommunications services." The grant of FCC jurisdiction to regulate attachments by "providers of telecommunications services" therefore does *not* include attachments by ILECs, since ILECs were excluded from the definition of "providers of telecommunications services" in the same statute.

The FCC's opposite conclusion that the term "provider of telecommunications services" actually includes ILECs in the Pole Attachment Act makes no sense. It is without support in the statute or the legislative history and is at odds with a decade of previous FCC decisions.[18] If Congress intended the FCC to regulate ILEC attachments and to grant to the FCC wide jurisdiction over joint use, Congress would have been expected at least to mention it somewhere. Such an enormous grant of regulatory authority "would not likely have been made without specific provision in the text of the statute," and it is "most improbable that it would have been made without even any mention in the legislative history." *United Savings*, 484 U.S. 365, 380. In stark contrast to the FCC's new jurisdictional claim, however, no such specific provision in the statute or legislative history exists.

Read in the context of the Communications Act as a whole, and considering the significant impact of

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telecommunications carrier equals provider of telecommunications services, and thus vice versa." App. 8.

[18] *See, e.g.*, 1998 Report and Order at ¶ 5; National Broadband Plan, 2010 WL 972375 at p. 130, available at http://www.broadband.gov.

joint use regulation, it is readily apparent that Congress had no intention of granting and did not grant to the FCC authority to regulate the joint use/joint ownership relationship. Since "Congress has directly spoken to the precise question at issue," both in Section 224 and in Section 3 (44) (47 U.S.C. § 153(44), defining "telecommunications carrier") of the Communications Act, the D.C. Circuit should have rejected the FCC's radical interpretation under the first part of the *Chevron* analysis so as to "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. 837, 842-43.

The D.C. Circuit's failure to apply step one of the *Chevron* analysis and to conclude that Congress did not intend the FCC to regulate joint use was erroneous. Rather than restrain the FCC from asserting unwarranted jurisdiction over ILEC attachments and joint use, the court allowed the FCC to rewrite the Pole Attachment Act to better suit its predetermined policy goals. As explained in another FCC-related case, "What we have here, in reality, is a fundamental revision of the statute." *MCI Telecommc'ns Corp. v. AT&T*, 512 U.S. 218, 231 (1994).

Allowing the FCC to promote communications-oriented policy goals by requiring electric utilities to alter carefully-balanced joint use relationships that utilities depend upon to provide safe and reliable electric service across the country is not what Congress intended. The FCC's re-interpretation of the Pole Attachment Act, no matter how well-intentioned, is a disaster in waiting for the *Utility Amici* and the rest of the electric utility industry. Putting the FCC "fox" in charge of the utility "henhouse" is exactly what the Court earlier this year was careful to guard against. "The fox-in-the-henhouse syndrome

is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *City of Arlington*, 133 S. Ct. at 1874.

CONCLUSION

Viewed in context, the FCC's radical interpretation of its jurisdiction to regulate the joint use relationship under the Pole Attachment Act does not withstand scrutiny. The D.C. Circuit's failure to consider common rules of statutory interpretation and to apply the first prong of the *Chevron* analysis was erroneous. On its face, the Pole Attachment Act does not grant the FCC jurisdiction over the joint use relationship between electric utility and ILEC pole owners, and the FCC and circuit court's decision to the contrary should be reviewed and reversed.

The Petition for a writ of certiorari should be granted.

Respectfully Submitted,

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