No. 12-1396

In the Supreme Court of the United States

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

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

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

BRIEF FOR *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE* [1]

Amicus Edison Electric Institute (EEI) is the trade association of U.S. shareholder-owned electric utility companies, international affiliates, and industry associates worldwide. Its U.S. utility members comprise approximately 70 percent of the Nation's electric power industry and serve almost 95 percent of all customers in the shareholder-owned segment of the industry.

EEI's members generate, purchase, sell, and deliver electricity and related services throughout the country. In delivering electricity to customers, they rely on tens of millions of utility poles that will be affected by the Federal Communications Commission (FCC) pole attachment rules at issue in this case.

In 2011, the FCC reinterpreted the plain language of the statute governing the regulation of pole attachments to adopt new rules that address the use of electric utility poles by incumbent local telephone companies throughout all regions of the country, without providing reciprocity or any equivalent form of protection for the use of the telephone company poles by electric utilities. As a result, these new rules upset a careful balance established by Congress in the Federal Communications Act as amend-

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[1] Counsel for the parties received timely notice of the intent to file this brief and have consented in writing to the filing of this brief. Their letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, no counsel for either party had any role in authoring this brief in whole or in part, and no party other than the named *Amicus* has made any monetary contribution toward the preparation and submission of this brief.

ed, with substantial, negative implications for electric utilities and their customers across the country.

The questions presented to the Court are therefore of significant national importance.

SUMMARY OF THE ARGUMENT

In its ruling below, the United States Court of Appeals for the District of Columbia Circuit upheld the FCC's decision to assert regulatory authority over attachments to electric utility poles by incumbent local telephone companies, known as incumbent local exchange carriers (ILECs).[2] The FCC reached this decision by reinterpreting the Pole Attachments Act, 47 U.S.C. § 224, and reversing the agency's long-standing prior interpretation of the Act. In upholding this decision, the D.C. Circuit has endorsed an expansion of authority by the FCC that contradicts the clear intent of Congress as expressed in the plain language of the Pole Attachments Act and imposes a regulatory scheme disruptive of long-standing and beneficial joint use agreements between ILECs and other utilities.

Just last month, this Court held that "[w]here 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, Tex. v. FCC*, 569 U.S. ___ at 16 (2013). In extending the protections of the Pole Attachments

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[2] "Incumbent local exchange carrier" – or "ILEC" – is the term adopted by Congress in the Telecommunications Act of 1996 to refer to incumbent local telephone companies. *See* 47 U.S.C. § 251(h).

Act to ILECs, the FCC has gone beyond the clear line established by Congress through the plain language of the statute and well beyond what any possible "ambiguity" will allow.

The petition for writ of certiorari in this case extensively addresses the legal questions raised by the D.C. Circuit's affirmation of the FCC's expansion of its authority to encompass ILEC attachments. The purpose of this brief is: (i) to describe for the Court the nature of the relationship between ILECs and other utilities with respect to pole attachments and the Nation's utility pole infrastructure, which guided Congress in its consideration and enactment of the Pole Attachments Act and subsequent amendments; and (ii) to explain to the Court the ramifications of this expansion of the FCC's regulatory authority and the broad, nationwide impact the D.C. Circuit's decision will have on electric utilities and the electric distribution infrastructure.

ARGUMENT

I. THE RELATIONSHIP BETWEEN ELECTRIC UTILITIES AND ILECS WAS LONG-ESTABLISHED AND WELL-UNDERSTOOD BY CONGRESS WHEN IT ADOPTED THE POLE ATTACHMENTS ACT

The relationship between electric utilities and ILECs with respect to pole infrastructure dates back to the beginning of the last century. For both economic and aesthetic reasons, electric utilities and telephone companies historically found it to be in their best interests, as well as the public's interest, to use the same poles for their respective networks.

This led to the establishment of "joint use" and "joint ownership" agreements between electric utilities and telephone companies.

Under a joint use agreement, ownership and control of the poles is split between the electric utility and the ILEC, and each party depends on the other for access to each other's poles. Under a joint ownership agreement, each pole is jointly owned by both the electric utility and the ILEC, giving both parties an ownership interest in every pole in the network covered by the agreement. These types of arrangements have been in use for decades and are still in widespread use today.

Joint use and joint ownership agreements are based on mutual benefits and responsibilities negotiated between the parties subject to oversight by state public utility commissions. These agreements have provided a viable framework for establishing the amount of compensation exchanged between electric utilities and ILECs along with the related rights and responsibilities of each party, thus enabling the nationwide deployment of millions of miles of infrastructure delivering essential electric and communications services to the public.

In 1978, Congress enacted the Pole Attachments Act, codified as Section 224 of the Communications Act of 1934, 47 U.S.C. § 224. As originally enacted, Section 224 directed the FCC to ensure that the rates, terms, and conditions for pole attachments by cable television operators were just and reasonable. *See* Pole Attachments Act of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978). At the time this legislation was adopted, the joint use framework between elec-

tric utilities and telephone companies (*i.e.*, ILECs) was well-established, and such arrangements were generally considered standard practice. Congress expressly recognized the prevalence of this joint use framework, noting in the Act's legislative history that "poles, ducts, and conduits are usually owned by telephone and electric power utility companies, which often have entered into joint use or joint ownership agreements." S. Rep. No. 95-580, at 12 (1977). Accordingly, Section 224 did not make any distinction between electric utilities and telephone companies, treating both as pole owners rather than as attachers.

This joint use framework between electric utilities and telephone companies was virtually unchanged over fifteen years later when Congress enacted the Telecommunications Act of 1996, which amended Section 224 to extend the right to nondiscriminatory access to utility poles at just and reasonable rates to competitive telecommunications carriers as well as to cable television operators.

With the Telecommunications Act, Congress sought to facilitate market entry by new, competitive telecommunications carriers by requiring incumbent telephone companies to provide competitive carriers with access to their networks and infrastructure. Thus, in order to ensure that ILECs would not be able to use their pole ownership and joint use arrangements as barriers to competitive entry into the telecommunications market, Congress maintained the dichotomy originally established in 1978 between pole owners ("utilities") and attachers (competitive carriers and cable operators) by expressly excluding ILECs from the definition of "telecommunications

carrier" and instead including ILECs in the definition of "utility" for the purpose of regulating pole attachments. 47 U.S.C. §§ 224(a)(1) and (5) (defining "utility" and "telecommunications carrier" for purposes of Section 224).

Since the enactment of the 1996 amendments to the Pole Attachments Act, electric utilities and ILECs have continued to rely on negotiated, mutually beneficial joint use and joint ownership agreements as the basis for the rates, terms, and conditions of access to each other's pole infrastructure. Although there have been some changes in recent years in the relative levels of pole ownership between the parties, with ILECs now generally owning fewer poles than before, these changes have not resulted in any loss of bargaining power for the ILECs. The number of poles currently owned by ILECs is still significant, and electric utilities still require access to these poles for the deployment of their electric distribution facilities. Joint use and joint ownership therefore remain the foundation of the electric utility/ILEC relationship, just as they were when Congress first began considering the regulation of pole attachments over 35 years ago.

As discussed below, however, this decades-long relationship – which, as noted above, has resulted in the safe and economically efficient nationwide deployment of millions of miles of electric and communications infrastructure serving the needs of the public – will be significantly and irreparably disrupted if the decision by the D.C. Circuit to allow the FCC to extend its authority to regulate the rates paid by ILECs for attachment to electric utility poles is allowed to stand.

II. ALLOWING THE FCC TO ASSERT AUTHORITY OVER ILEC ATTACHMENT RATES WOULD DISRUPT AND UNDERMINE THE LONG-STANDING ELECTRIC UTILITY/ILEC RELATIONSHIP

Allowing the FCC to assert regulatory authority over the rates for ILEC attachments would seriously undermine the economic foundation of the joint use and joint ownership agreements that have effectively governed the electric utility/ILEC relationship for decades.

As discussed above, these agreements are based on mutual benefits and responsibilities freely negotiated with oversight by state public utility commissions. Although each agreement is different, having been developed and tailored over time to address specific local issues and the parties' specific needs and interests, these agreements generally contemplate the sharing of pole costs and of administration and maintenance responsibilities between the parties.

Extending the protection of FCC-regulated rates to ILECs would significantly disrupt the long-established contractual positions of electric utilities and ILECs by providing ILECs with a subsidized regulated rate for their attachment on electric utility-owned poles while leaving electric utility attachments on ILEC-owned poles subject to previously negotiated rates and with no regulatory safeguards. The elimination of reciprocity or parity in the rates paid by the parties will in turn undermine the balance negotiated between the parties with respect to

the multitude of other issues covered by the joint use and joint ownership agreements, such as responsibility for pole maintenance and repair.

The D.C. Circuit's affirmance of the FCC's decision to reinterpret the plain statutory language of the Pole Attachments Act in order to expand its regulatory authority to ILEC pole attachment rates exceeds the bounds established by this Court in *City of Arlington*:

> 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, 569 U.S. ___ at 16.

As the petition for certiorari makes clear, the plain language of the Act demonstrates that Congress used different terminology to assure that ILECs are not entitled to rates established under the pole attachment provisions. There is no ambiguity for the FCC to have interpreted.

To the extent that the FCC believes that a change in this allocation of regulatory authority and public policy is warranted, this change can and should be made only by Congress and not through an administrative agency's reinterpretation of the plain language of the statute. This case provides an excellent opportunity for this Court to reaffirm that the *City of Arlington* decision did not eviscerate the continued applicability of the plain language doctrine.

CONCLUSION

For the foregoing reasons, *Amicus* Edison Electric Institute supports the Petitioners and urges this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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