No. _______

In The Supreme Court of the United States

AMEREN CORPORATION, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") improperly applied *Chevron* deference[1] to a Federal Communications Commission ("FCC") order under the Pole Attachments Act concluding that 47 U.S.C. § 224(d) and § 224(e), which unambiguously set forth two separate and different attachment rate formulas, can provide for identical rates where the FCC accorded the word "cost" in § 224(e) an infinite number of meanings unrelated to the surrounding statutory language?

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[1] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

PARTIES TO THE PROCEEDING

Petitioners in the proceeding below were Ameren Corporation, American Electric Power Service Corporation, CenterPoint Energy Houston Electric, LLC, and Virginia Electric and Power Company d/b/a Dominion Energy Virginia and d/b/a Dominion Energy North Carolina, (collectively referred to herein as "Petitioners").

Respondents in the below proceeding were the Federal Communications Commission ("FCC" or "Commission") and the United States of America (collectively referred to herein as "Respondents").

Intervenors in the below proceeding were COMPTEL, doing business as INCOMPAS, Level 3 Communications, LLC, National Cable & Telecommunications Association and United States Telecom Association.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, the undersigned counsel for Petitioners disclose the following:

1. Ameren Corporation ("Ameren") is an electric utility holding company that, through its subsidiaries, owns electric distribution infrastructure, including a substantial number of utility poles, in Illinois and Missouri, many of which are impacted either directly or indirectly by the FCC pole attachment rules and authority. Ameren is a publicly traded company on the New York Stock Exchange under the ticker symbol "AEE." Ameren has no parent company and there are no publicly-held companies that have a 10% or greater ownership interest in Ameren.

2. American Electric Power Service Corporation ("AEP Service Corp.") is a wholly-owned subsidiary of American Electric Power Company, Inc. ("AEP"). AEP is a publicly traded company on the New York Stock Exchange under the ticker symbol "AEP." AEP Service Corp. supplies administrative and technical support services to AEP and its subsidiaries. AEP, through its operating company subsidiaries, owns electric distribution infrastructure, including a substantial number of utility poles, in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia, many of which are impacted either directly or indirectly by the FCC's pole attachment rules and authority.

3. CenterPoint Energy Houston Electric, LLC ("CenterPoint Houston") is a wholly-owned

subsidiary of CenterPoint Energy Inc. ("CenterPoint Inc."). CenterPoint Inc. is a publicly traded company on the New York Stock Exchange under the ticker symbol "CNP." CenterPoint Houston provides electric transmission and distribution services in the Texas Gulf Coast area, which includes the city of Houston, and owns electric transmission and distribution infrastructure, including a substantial number of utility poles, in the state of Texas, all of which are impacted directly or indirectly by the FCC's pole attachment rules and authority.

4. Virginia Electric and Power Company ("VEPCO") d/b/a Dominion Energy Virginia and d/b/a Dominion Energy North Carolina is a wholly-owned subsidiary of Dominion Energy, Inc. ("Dominion Energy"), which is publicly traded on the New York Stock Exchange under the symbol "D." VEPCO operates as an electric distribution company in the states of Virginia and North Carolina. Through its operating company subsidiaries, VEPCO owns electric distribution infrastructure, including a substantial number of utility poles, in North Carolina and Virginia, all of which are impacted directly or indirectly by the FCC's pole attachment rules and authority.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Ameren Corporation, American Electric Power Service Corporation, CenterPoint Energy Houston Electric, LLC, and VEPCO (collectively referred to herein as "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, which denied a petition for review of an FCC order.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 865 F.3d 1009. The FCC order on review at the court of appeals (App. 12) is reported at 30 FCC Rcd. 13731.

JURISDICTION

The court of appeals filed its judgment on July 31, 2017. App. 1. On October 20, 2017, Justice Gorsuch extended the time for filing a petition for a writ of certiorari until November 28, 2017. No.17A439. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

47 U.S.C.A. § 224

…

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate 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.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

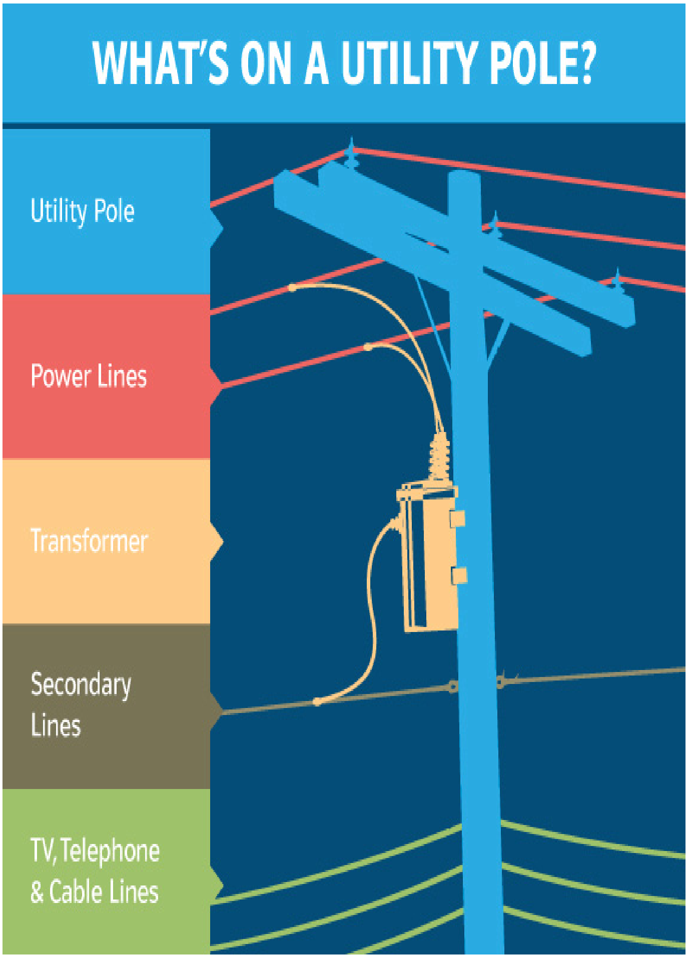
(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

Additional pertinent constitutional, statutory, and regulatory provisions are reproduced in the Petition Appendix at 79-85, 134-140.

STATEMENT OF THE CASE

Different types of communications companies attach their facilities to utility poles owned by electric utilities, such as the Petitioners here.



Congress passed the Pole Attachments Act in 1978 (Pub. L. 95–234, 92 Stat. 33 (1978)("1978 Act")), giving the FCC authority "to regulate the rates, terms and conditions for pole attachments to provide that such rates, terms and conditions are "just and reasonable." 47 U.S.C. § 224(b)(1). App. 80. The 1978 Act prescribed a single pole attachment rental rate formula applicable to cable television attachments, which were the only type of attachments covered by the 1978 Act. The original formula allocated pole costs based on the amount of usable space occupied by the attachment. The formula provides that a "rate is just and reasonable if it assures a utility the recovery of not less than the additional cost of providing pole attachments, nor more than an amount determined by multiplying the percentage of total usable space…occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole…." 47 U.S.C. §224(d)(1). App. 81-82.

The original formula was intentionally designed by Congress to spur the then-nascent cable television industry. *See* H. Rpt. 104-204, 91 ("The beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy."). Through various rulemakings, the FCC implemented these statutory parameters using specific regulatory capital and expense accounts. The "sum of the operating expenses and capital costs" referenced in § 224(d)(1) are known as "fully allocated costs." *See, e.g.*, Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act*, 30 FCC Rcd. 13731 n. 17 (2015)("Telecom Rate Order"). App. 18.

Against this backdrop, Congress amended the Pole Attachments Act as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996)("1996 Act"). The 1996 Act added a new category of covered attachments (telecommunications carriers) and a new statutory formula applicable to such attachments. *See* 47 U.S.C. §224(e)(1). App. 82-83. The new statutory formula, expressed in §224(e)(2) & (3), allocates the cost of "other than usable space" (*i.e.* the portion of the pole in the ground and below minimum ground clearance) and "usable space" (*i.e.* attachment space) differently. App. 83. Immediately following the effective date of the 1996 Act, the FCC concluded that the § 224(e) formula required allocation of the same "fully allocated costs" allocated through the § 224(d) formula:

> The 1996 Act also created a distinction between pole attachments used by cable operators solely to provide cable service and pole attachments used by cable operators or by any telecommunications carrier to provide any telecommunications service. The Act prescribed a methodology for determining pole attachment rates for the latter group. The new formulas will require that, in addition to paying their share of a pole's usable space, these telecommunications service providers also must pay their share of the fully allocated costs associated with the unusable space of the pole…. In order to implement these

> new formulas, Congress directed the Commission to issue new pole attachment formulas within two years of the effective date of the 1996 Act.

Order, *In the Matter of Implementation of Section 703 of the Telecommunications Act of 1996*, 11 F.C.C. Rcd. 9541, 9543-44, ¶ 6 (1996)("1996 Order").

Two years later, the FCC acknowledged that Congress intended—and that the statute requires—a different and higher rate under §224(e): "We note that in the one case **where Congress affirmatively wanted a higher rate** for a particular service offered by a cable system, **it provided for one in section 224(e)**." *See* Report and Order, *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, 6794-96, ¶ 34 (1998)(also noting that the FCC is "statutorily required to apply the higher Section 224(e) rate")(emphasis added)("1998 Order"). Shortly thereafter, in a case addressing the constitutionality of the § 224(d) formula, the FCC stated:

> Congress' decision to choose a slightly different rate methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula…because both formulas provide just compensation under the Fifth Amendment…. **Congress used**

its legislative discretion in determining that cable and telecommunications attachers should pay different rates.

Order, *In the Matter of Ala. Cable Telecomm. Ass'n*, 16 FCC Rcd. 12,209, ¶ 49 (2001) (emphasis added).

The FCC's original understanding of the statute's requirements and Congressional intent was shared by the courts. *See, e.g., Alabama Power Co. v. F.C.C.*, 311 F.3d 1357, 1371 n. 23 (11th Cir. 2002)("[T]he Telecom Rate provided in 47 U.S.C. § 224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments."); *Georgia Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033, 1047 (11th Cir. 2003)("Recall that the 1996 Telecommunications Act mandates two different formulas for calculating pole attachment rates: the cable rate for cable company attachments and the new telecom rate for telecommunications attachments.... As *Alabama Power* recognized, however, the telecom rate yields a higher pole attachment rate for telecommunications attachments than the cable rate yields for cable attachments.").

Even in 2010, as the FCC was actively considering ways to "establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224," the FCC observed: "[a]s previously discussed, without statutory change, the convoluted rate structure for cable and telecommunications providers will persist." *Connecting America: The Nat'l Broadband*

Plan, 2010 WL 972375, at *101 (2010)("FCC Broadband Plan").

In 2011, however, the FCC began undertaking results-oriented re-interpretation of these provisions designed to decrease costs for broadband providers. The agency declared that the term "cost" in § 224(e) was ambiguous, after all, and meant something different than the term "cost" in § 224(d). It then revised its implementation of the § 224(e) formula in a way intended to reduce the disparity between the § 224(d) and (e) rates. Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act; A Nat'l Broadband Plan for Our Future*, 26 F.C.C. Rcd. 5240, 5308, ¶ 156 (2011)("April 2011 Order"). App. 111-113. However, in doing so, the FCC acknowledged that the rates yielded by § 224(d) and (e) would continue to diverge under certain circumstances. April 2011 Order ¶ 168. App. 127-128.[1]

In March 2015, the FCC released its Open Internet Order. Report and Order on Remand, Declaratory Ruling, and Order, *In the Matter of Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, ¶ 49 (2015) ("Open Internet Order"). The Open Internet Order, among other things, reclassified broadband Internet access service as a "telecommunications service." This had the effect of subjecting virtually all pole attachments under the

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[1] A group of electric utilities sought judicial review of several aspects of the April 2011 Order, including the FCC's new telecom rate formula. The United States Court of Appeals for the District of Columbia Circuit ("DC Circuit") denied their petition. *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

FCC's jurisdiction to the potentially higher Section 224(e) rate formula. (*See* Telecom Rate Order ¶ 15) ("[C]able systems that also provide broadband Internet access service and previously were subject to the cable rate formula are now subject to the telecom rate formula.")). App. 28-29. The FCC used this reclassification as a primary justification for the additional changes that it implemented to the Telecom Rate. Telecom Rate Order ¶ 15. App. 28-29.

In November 2015, the FCC abandoned its approach in the April 2011 Order (which had left open the possibility of divergent results under the separate § 224(d) and (e) rate formulas), and instead defined "cost" as used in § 224(e) to mean, in the words of Commissioner (now Chairman) Ajit Pai, "whatever percentage of capital and operating expenses is needed to equate the telecom and cable rates." App. 76. The FCC specifically defined "cost" as follows:

> • in Service Areas where the number of Attaching Entities is 5 = 0.66 x (Net Cost of a Bare Pole x Carrying Charge Rate)
>
> • in Service Areas where the number of Attaching Entities is 4 = 0.56 x (Net Cost of a Bare Pole x Carrying Charge Rate)
>
> • in Service Areas where the number of Attaching Entities is 3 = 0.44 x (Net Cost of a Bare Pole x Carrying Charge Rate)

- in Service Areas where the number of Attaching Entities is 2 = 0.31 x (Net Cost of a Bare Pole x Carrying Charge Rate)

- in Service Areas where the number of Attaching Entities is not a whole number = N x (Net Cost of a Bare Pole x Carrying Charge Rate), where N is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.

Telecom Rate Order ¶ 36-37. App. 53-57. The FCC further identified the allocators as "66.1% in service areas with an average of 5 attaching entities; 55.6% in service areas with an average of 4 attaching entities; 43.9% in service areas with an average of 3 attaching entities; and 30.9% in service areas with an average of 2 attaching entities." Telecom Rate Order, ¶ 36 n. 138. App. 53-54. The purpose of these more specific iterations of the cost allocators was to ensure that the Telecom Rate *perfectly* aligned with the Cable Rate, removing any technical (albeit *de minimis*) distinction. In his concurring statement, Commissioner (now Chairman) Ajit Pai further noted:

> [T]he Order may be vulnerable in court because the legal rationale for this new, lower rate is rather odd. To achieve its result, the Order interprets the word "cost" in the telecom rate to mean whatever percentage of capital

> and operating expenses is needed to equate the telecom and cable rates for any number of pole attachments.... The Order's interpretation of the same word ("cost") in the same provision (the telecom rate) to mean different things in different circumstances appears to violate the canon of consistency. And the result that the two statutory formulas always arrive at the same rate appears to violate the canon against surplusage.

Telecom Rate Order, Concurring Statement of Commissioner Pai. (internal citations and footnotes omitted). App. 76-77. Despite his concerns regarding the FCC's construction of the statute, Commissioner Pai voted in favor of the Telecom Rate Order because he approved of the policy behind the Order. *Id.*

Petitioners filed a petition for review with the Eighth Circuit in March 2016. The Eighth Circuit heard arguments in this matter on January 11, 2017. On July 31, 2017, the Eighth Circuit issued an Opinion denying the petition. App. 1. The Eighth Circuit determined that the term "cost" as used in 224(e) was ambiguous, and that the FCC had broad discretion to define the term as it saw fit. App 7-8. The Eighth Circuit, contrary to the Eleventh Circuit and the FCC's own earlier understanding, determined that the different formulas in 224(d) and (e) permit, "but [do] not require, the Cable Rate and the Telecom Rate to diverge." App. 8.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for at least three independent reasons. First, the FCC's Telecom Rate Order and the Eighth Circuit's affirmation of that order are premised on two alleged ambiguities within the Pole Attachments Act: (1) an ambiguity with respect to the meaning of "cost" as used in § 224(e); and (2) an ambiguity with respect to whether the different formulas in §§ 224(d) and (e) commanded different results. Not only do the Telecom Rate Order and the Eighth Circuit decision conflict with the FCC's own prior understanding of the statute, but they also conflict with the Eleventh Circuit's independent conclusion that the statute reflects Congress' intent for the § 224(e) rate to be different and higher than the § 224(d) rate. This conflict, even if not a circuit split in the traditional sense, warrants clarity that only this Court can provide on an important matter of statutory construction.

Second, the Eighth Circuit erred in deferring to the FCC's unreasonable interpretation of the statute. Though an agency has discretion to interpret ambiguous terms within a statute it is charged with implementing, it does not have authority to rewrite the statute in order to meet its policy choices. Here, the FCC itself previously recognized that, "without statutory change, the convoluted rate structure for cable and telecommunications providers will persist." FCC Broadband Plan, 2010 WL 972375, at *101. Rather than taking its case to Congress for a "statutory change," the FCC instead adopted an interpretation that not only relied on ambiguity where it had previously seen none, but also violated the canon against surplusage—a problem that even Commissioner (now Chairman) Pai noted in his concurring statement. Further, in deferring so generously to the FCC, the Eighth Circuit did not even scrutinize the reasonableness of attributing an infinite number of meanings to the same term within the same subsection of the same statute.

Third, this issue of statutory construction is one of exceptional national importance because it lies at the intersection of electric and broadband infrastructure. The FCC's Telecom Rate Order is a massive transfer of wealth (hundreds of millions of dollars annually) from electric ratepayers to the shareholders of communications giants like Comcast, Charter, AT&T and Verizon. If the statute permits such a transfer of wealth to suit an agency's policy goals, so be it. But given the amount of money at stake and the concomitant statutory construction issues, it should be this Court decides what the statute permits.

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH TWO PRIOR ELEVENTH CIRCUIT DECISIONS ACKNOWLEDGING THAT § 224(e) REQUIRES A DIFFERENT AND HIGHER RATE THAN SECTION 224(d).

The Eighth Circuit held, in essence, that the § 224(e) rate need not be higher or even different that the § 224(d) rate:

> Petitioners argue that the November 2015 Order defies Congress's intent to establish two different rates in § 224(d)(1) and § 224(e). We disagree that the statute evinces such an intent.... Because the term "cost" in § 224(e) is ambiguous, the same "cost" definition need not be used to determine the upper bound for cable rates under § 224(d) and the rate for telecommunications providers under § 224(e). Accordingly, the statute permits, but does not require, the Cable Rate and the Telecom Rate to diverge.

App. 8. The United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"), however, reached exactly the opposite conclusion in two separate cases in 2002 and 2003.

In *Alabama Power Co. v. FCC*, which was a petition for review of a FCC order addressing the constitutional sufficiency of the § 224(d) formula, the Eleventh Circuit stated:

> Since marginal cost provides just compensation so long as these factors are absent, it is irrelevant that **the Telecom Rate provided in 47 U.S.C. § 224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments**. The FCC reached a perfectly logical conclusion when it observed:

> Congress' decision to choose a slightly different rate methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula…because both formulas provide just compensation under the Fifth Amendment…. **Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates.**

Alabama Power Co., 311 F.3d at 1371 (quoting Order, *In the Matter of Ala. Cable Telecomm. Ass'n,* 16 FCC Rcd. 12,209, 12,231, ¶ 49) (2001))(emphasis added). The Eleventh Circuit's decision was completely in line with the FCC's position at the time, which was that the statute required it to implement two formulas for the two different types of attachers. *See, e.g.*, 1996 Order ¶ 6 ("In order to implement these new **formulas**, Congress directed the Commission to issue new pole attachment **formulas** within two years of the effective date of the 1996 Act.")(emphasis added).

The next year, in *Georgia Power Co. v. Teleport Communications Atlanta, Inc.*—a case similar to *Alabama Power* addressing § 224(e)—the Eleventh Circuit stated:

> Recall that the 1996 Telecommunications Act mandates two different formulas for calculating pole attachment rates: the cable rate for

> cable company attachments and the new telecom rate for telecommunications attachments…. As *Alabama Power* recognized, however, the telecom rate yields a higher pole attachment rate for telecommunications attachments than the cable rate yields for cable attachments.

Georgia Power Co., 346 F.3d at 1047. In other words, the Eleventh Circuit, in two separate cases, interpreted § 224(e) itself as requiring a different (if not higher) rate than yielded by § 224(d). The Eighth Circuit concluded just the opposite.

Though this admittedly is not a traditional circuit split, it is nonetheless conflicting authority on an important issue of statutory construction. In *Alabama Power* and *Georgia Power*, the Eleventh Circuit was not deferring to the FCC's interpretation of a supposedly ambiguous statutory provision. Instead, the Eleventh Circuit was making observations about the import of the plain language of the statute. Of course, as set forth above in the statement of the case, even the FCC at that time understood the § 224(e) formula as unambiguously requiring a different (and higher) rate that the § 224(d) formula. *See* supra, pp. 5-6 ("Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates.") (citing *In the Matter of Ala. Cable Telecomm. Ass'n,* 16 FCC Rcd. at 12,231, ¶ 49). This is all the more reason why the Court should resolve this important issue of statutory construction.

II. THE EIGHTH CIRCUIT'S DECISION IMPROPERLY DEFERS TO THE FCC.

A. The Eighth Circuit accorded *Chevron* deference to the FCC without ever probing the reasonableness of its statutory interpretation.

The Eighth Circuit overruled Petitioners' objection to the reasonableness of the FCC's interpretation of the statute, simply stating that the FCC's "approach represents a 'reasonable policy'" and then deferring to the FCC's interpretation with only a cursory analysis. App. 10. Petitioners' objections to the Telecom Rate Order, though, focus almost exclusively on the conflict between the FCC's revised regulations and the text, structure, and purpose of the statute that authorizes the FCC to make those regulations. A focus on the merits of the FCC's policy choices not only fails to address Petitioners' actual arguments, it also completely ignores the relevant case law.

The Eighth Circuit found the term "cost" in § 224(e) to be ambiguous and then rubberstamped approval of the FCC's interpretation of that term. App. 7-10. Petitioners concede (and conceded below) that, to the extent there is ambiguity in the term "cost," the FCC has discretion to interpret that term. But Petitioners also argued that the FCC went well beyond the bounds of that discretion when it interpreted "cost" in a manner explicitly designed to alter the structure of the statute, and to override the unambiguous portions of the statute's text.

The Eighth Circuit failed to conduct the analysis that this Court has repeatedly stated is required of a Court reviewing the actions of an agency. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)("The question whether Congress intended [] two standards to be identical is a pure question of statutory construction for the courts to decide."). Instead of examining the overall language of § 224(d) and § 224(e) and applying the traditional tools of statutory construction, or reviewing the legislative history of the 1978 Act and the 1996 Act, the Eighth Circuit's analysis began and ended with the word "cost." A delegation of authority to an agency to implement a particular standard or rate is not limitless, though. When Congress provides an agency with two different standards to implement, it intends those standards to be treated differently. *See id* at 448-49.

Thus, even assuming the validity of the FCC's policy objectives, it lacks authority to rewrite § 224 in order to accomplish those objectives. *See Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 462 (2002) ("We will not alter the text in order to satisfy the policy preferences of the [agency]."); *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2445 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.").

As recently as 2010, the FCC recognized that unification of the § 224(d) and (e) rates would require statutory change. In its National Broadband Plan, the FCC stated:

> **Recommendation 6.5: Congress should consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights-of-way.**
>
> Even if the FCC implemented all of the recommendations related to its Section 224 authority, additional steps would be needed to establish a comprehensive national broadband infrastructure policy. **As previously discussed, without statutory change, the convoluted rate structure for cable and telecommunications providers will persist.**

FCC Broadband Plan, 2010 WL 972375, at *101 (emphasis added).

If the FCC now believes that § 224(e) is detrimental to its policy goals, the proper recourse is to seek statutory change from Congress. Further, the FCC's discretion to interpret an ambiguous term in the statute is bounded by the unambiguous expression of different rate formulas in § 224(d) and (e). The FCC cannot use an ambiguous term in one provision of a statute to negate the otherwise unambiguous intentions of Congress, and the Eighth Circuit should not have deferred to the FCC on this interpretation. Moreover, the Eighth Circuit failed to acknowledge the fact that the FCC's interpretation should be afforded a much lower level of deference given its inconsistency in positions. *See*

Cardoza-Fonseca, 480 U.S. at 446 n. 30 ("An additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt v. Alaska,* 451 U.S. 259, 273 (1981)).

B. The Telecom Rate Order Does Not Merit Deference

The Telecom Rate Order's explicit purpose in redefining the "cost" allocated through the § 224(e) formula was to ensure perfect alignment of the § 224(d) and (e) rates. *See* Telecom Rate Order ¶ 3. App. 15-16. This Court has previously rejected similar attempts by the FCC to step beyond the authority delegated to it by Congress. In *MCI v. AT&T*, the FCC asserted that because it had statutory discretion to "modify any requirement" imposed under the statute, it could waive an otherwise mandatory requirement that long-distance carriers file their rates with the FCC. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994). In rejecting that argument, this Court held that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *Id.* at 229; *see also Util. Air Regulatory Grp.*, 134 S. Ct. at 2446 ("The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.") (internal citations omitted).

When analyzing an agency's interpretation of a statute, courts often apply the familiar two-step framework announced in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984).[2] However, this Court has held that invocation of the *Chevron* doctrine is not necessary in the face of a clear statutory directive. *See, e.g., F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767-68 (2016), *as revised* (Jan. 28, 2016). Similarly, *Chevron* deference is not required when an agency's statutory interpretation touches on a matter of "deep 'economic and political significance.'" *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)(internal citations omitted). As noted below, given the importance of both electricity and broadband, and the manner in which the cost of delivering those services should be shared, this Petition presents just such a case.

Indeed, this matter presents many of the concerns that the Justices of this Court have raised in the past regarding *Chevron* deference. Instead of making a case to Congress that the statutory distinction between the § 224(d) and (e) rate

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[2] At the first step, a court must determine whether Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, "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." *Id.* at 842–843. If not, then at the second step the court must defer to the agency's interpretation if it is "reasonable." *Id.* at 844.

formulas should be eliminated, the FCC took it upon itself to eliminate the impact of the statutory language it now finds objectionable. The FCC's arrogation of legislative authority to itself represents a significant blurring of the separation of powers between the legislative and executive branches of the federal government. *See Michigan v. E.P.A.*, 135 S. Ct. 2699, 2712–13 (2015) (Thomas, J., concurring); *see also Gutierrez-Brizuela v. Lynch,* 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring)("For whatever the *agency* may be doing under *Chevron*, the problem remains that *courts* are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them.").

Moreover, the Eighth Circuit's perfunctory analysis with respect to the FCC's actions raises similar questions regarding the judiciary's role in checking the power of the executive. *See Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring)("Transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions.").

The FCC's Telecom Rate Order and the Eighth Circuit's ratification of that order have completely divorced the FCC's actions from any constraint imposed by the language of the statute. As such, the instant proceeding provides ample justification for the proposition that further revision and reevaluation of the judiciary's deference with respect to agency statutory interpretation is needed. In other words, if the FCC's Telecom Rate Order comports with *Chevron*, then *Chevron* itself is in need of repair.

III. THE EIGHTH CIRCUIT ERRED IN AFFIRMING THE FCC's CLEARLY UNREASONABLE INTERPRETATION OF THE WORD COST.

A. The Eighth Circuit erred in its determination that the FCC's varying definition of "cost" under § 224 does not violate the cannon against surplusage.

An agency cannot construe a statute to render any part of it superfluous. *See Marx v. Gen. Revenue Corp.,* 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); *Corley v. U.S.*, 556 U.S. 303, 314 (2009) ("'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant....' ") (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *see also Dunn v. Commodities Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) ("Our reading of the exemption is therefore also consonant with the doctrine that legislative enactments should not be construed to render their provisions mere surplusage.").

By intentionally manipulating the § 224(e) formula so that it equals the § 224(d) formula in *all* circumstances, the Telecom Rate Order renders § 224(e) superfluous. Congress created two separate formulas for two different types of attachments. And until 2011, the FCC not only recognized that Congress created two separate formulas, but also recognized that Congress intended for the Telecom Rate to be higher. (*See* Telecom Rate Order ¶ 1. App. 13-14. ("The [Act] contains two formulas for calculating pole attachment rates. . . ."); *see also* 1998 Order ¶ 34 (noting that the FCC is "statutorily required to apply the higher Section 224(e) rate").

The Eighth Circuit concluded that the FCC's formula for "calculating the Telecom Rate under § 224(e) is not superfluous," reasoning that "the statute allows the Cable Rate and the Telecom Rate to diverge, but does not require them to do so." App. 9. The flaw with this justification is that, as the Eighth Circuit concedes, although the statute allows rates to diverge, the FCC's rules do not.

B. The Eighth Circuit erred in its determination that § 224(d) and (e) do not evidence an intent by Congress to create different telecom and cable rates.

The Telecom Rate Order completely circumvents the statutory distinction between rates for telecommunications carriers and cable television companies. Had Congress intended that cable television companies and telecommunications companies pay the same rate, it could have done so by simply adopting the § 224(d) rate for telecommunications carriers in 1996. Instead, Congress created a new rate formula for telecommunications carriers. The Eighth Circuit's response to this argument was that:

> Section 224(d) requires that pole attachment rates for cable providers fall within a certain range. Section 224(e) requires that pole attachment rates for telecommunications providers be calculated according to a certain formula. Because the term "cost" in § 224(e) is ambiguous, the same "cost" definition need not be used to determine the upper bound for cable rates under § 224(d) and the rate for telecommunications providers under § 224(e). Accordingly, the statute permits, but does not require, the Cable Rate and the Telecom Rate to diverge.

App. 8; *see also* Telecom Rate Order ¶ 41. App. 62-64. (stating that, while the two-formula structure of the Act *permits* different rates, "we also conclude that Congress did not *require* such an outcome as mandatory.") (emphasis added).

The problem with this analysis is two-fold. First, it defies common sense to believe that Congress intended anything other than different outcomes under its different formulas. Why would Congress explicitly adopt a separate rate formula for attachments by telecommunications carriers if it did not intend for the result of that formula to be any different than the cable rate formula? Second, § 224(e)(2) indicates that the outcome of the application of the statutory formula would vary depending on the number of attaching entities. And under the FCC's new rule, it does not. "That congressional election settles this case. [The Agency's] preference for symmetry cannot trump an asymmetrical statute." *Michigan v. EPA,* 135 S. Ct. 2699 (2015)(citing *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 562 U.S. 277, 296 (2011)).

C. The Eighth Circuit erred in determining that the Telecom Rate Order constitutes a reasonable interpretation of the term "cost" in the telecom rate formula.

As noted above, the Eighth Circuit determined that the term "cost" as used in § 224(e) is ambiguous, and that "the November 2015 Order constitutes a reasonable interpretation of the ambiguity in § 224(e)." App. 8-10. The Eighth Circuit reasoned:

> We conclude that the November 2015 Order constitutes a reasonable interpretation of the ambiguity in § 224(e). The FCC sought to eliminate the disparity between the Cable and Telecom Rates in order to avoid subjecting cable providers offering broadband service to the higher Telecom Rate, and to avoid rate disparity between states whose pole attachment rates are regulated by the FCC and those states that had elected to regulate pole attachment rates using the Cable Rate even for telecommunications providers.... This approach represents a "reasonable policy" choice, and thus we defer to the FCC's interpretation. *See Verizon*, 535 U.S. at 523.

App. 9-10. However, given the overall structure and language of § 224, the FCC's actions are outside of the authority delegated to it by Congress. *See Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374–75 (1986)("… we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress.").

1. **The FCC provided no rational and reasoned basis for defining the term "cost" based on the average number of Attaching Entities.**

An agency must provide a reasoned explanation of its decision making. *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (stating that federal administrative agencies are required to engage in "reasoned decisionmaking"); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) ("agency must examine the relevant data and articulate a satisfactory explanation for its action"). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Allentown*, 522 U.S. at 374.

Rather than "cost" being *allocated* based upon the number of attaching entities (as required by § 224(e)(2)), the FCC *defined* the term "cost" based upon the number of attaching entities. There is no basis to suggest that the "cost" of a pole and the number of attachers on a pole are in any manner related. In fact, the FCC admits there is no connection at all:

> Moreover, we adopt a definition of cost recoverable through regulated pole rental rates that varies with the number of attachers based on the policy considerations explained in the preceding section, and **not based on an assumption that the fully allocated cost of a pole necessarily varies with the number of attachers** . . . .

(Telecom Rate Order ¶ 39 n.152) (emphasis added). App. 59-60. This is the very sort of irrational and illogical interpretation of a statute to which this Court should not defer. *See United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n. 1 (2012) (Scalia, J. concurring)("It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'").

2. An infinite number of definitions for the term "cost" in the same statutory provision is not reasonable.

Four different stated meanings for a single word ("cost")—as well as an infinite number of "interpolations" for that single word—is *per se* unreasonable.[3] Telecom Rate Order ¶ 19. App. 33-35. In his Concurring Statement to the Telecom Rate Order, Commissioner (now Chairman) Pai recognized:

> *For one*, the *Order* may be vulnerable in court because the legal rationale for this new, lower rate is rather odd. To achieve its result, the *Order* interprets the word "cost" in the telecom rate to mean whatever percentage of capital and operating expenses is needed to equate the telecom and cable rates for any number of pole attachments. . . . **The *Order*'s interpretation of the same word ("cost") in the same provision (the telecom rate) to mean different things in different circumstances appears to violate the canon of consistency.** And the result that the two statutory formulas always arrive at the same rate appears to violate the canon against surplusage.

(Telecom Rate Order, Concurring Statement of Commissioner Pai) (footnotes omitted) (emphasis added) (citing *Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one.")). *See also*

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[3] The April 2011 Order's 66% and 44% cost allocators were at least arguably supported by a theoretical connection between the location of the pole (urbanized v. non-urbanized) and "cost."

Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.").

IV. THIS CASE PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE REGARDING PAYMENT FOR BROADBAND INFRASTRUCTURE AND APPLICATION OF THE *CHEVRON* DOCTRINE TO THE POLE ATTACHMENTS ACT

A. This Case Will Directly Determine Whether and to What Extent Electric Ratepayers Should Subsidize the Cost of Broadband Infrastructure for Broadband Shareholders

The investor owned electric utility and broadband industries are two of this country's critical infrastructure industries and this case lies at the intersection of those industries. There are approximately 115 investor owned electric utilities in the United States, which operate in all 50 states and the District of Columbia and provide electricity for about 220 million Americans.[4] Pole attachments

[4] *See U.S. Investor-Owned Electric Companies*, EDISON ELECTRIC INSTITUTE, *http://www.eei.org/about/members/uselectriccompanies/Pages/default.aspx* (last visited November 27, 2017); *Members List*, EDISON ELECTRIC INSTITUTE (May 2017), *http://www.eei.org/about/members/uselectriccompanies/Documents/memberlist_print*

are directly regulated by the FCC in 30 out of the 50 states.[5] The four Petitioners here provide electric service to over 12 million customers across 13 states. They own approximately 6,000,000 poles which are available and used for pole attachments subject to the FCC's rate regulation.

While both electricity and broadband are vital to the nation's economy, they are also vital to its health, welfare and security. Virtually all governmental functions, businesses and individuals necessarily require reliable and affordable electric service simply to function, and most use and/or desire reliable and affordable broadband service to function at their best. Consider the impact of Hurricanes Harvey and Irma on Florida, Texas, Puerto Rico and the U.S. Virgin Islands. The restoration of electric power and communications capability were of paramount and overarching importance.

The construction and deployment of electric and broadband infrastructure requires vast sums of money, labor and expertise. Pole attachments are where the financial and operational interests of electric utilities and broadband providers both converge and collide. They converge because broadband providers need (or at least prefer) access to electric utility pole networks to distribute their services and because it is sensible public policy for electric utilities to share their pole networks with

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.pdf (last visited November 27, 2017).

[5] In 20 states and the District of Columbia, state regulatory commissions regulate pole attachments pursuant to the so-called "reverse preemption" provisions of 47 U.S.C. § 224(c). *See* Public Notice, *States That Have Certified that They Regulate Pole Attachments,* 25 FCCR 5541, 5541–42 (2010).

broadband providers. In addition, electric utilities have a long and proven ability to capably construct and manage safe and reliable pole networks for the benefit of the public. *See, e.g.*, *Gulf Power Co. v. Fed. Commc'ns Comm'n*, 226 F.3d 1220, 1225 (11th Cir. 2000)("…this is an important case that may affect every person who uses wireless communication or Internet service in this country. The case comes to us on consolidated petitions for review filed by power companies from around the country and involves the competing interests of those companies, telephone companies, cable television companies, wireless communication companies, Internet service providers, and of course, consumers. A more national case could hardly be imagined.").

To be sure, the financial dynamics of pole attachments are very different for the electric utility industry than for the broadband industry. The core business of electric utilities is to provide safe and reliable electric service to consumers. In general, they are compensated for this by the rates paid by consumers, which rates are regulated by each state public utility commission. Electric utilities' respective state regulatory commissions engage in a cost-based ratemaking approach and include an allowed rate of return to prospectively set the rates paid by ratepayers. Payments received by electric utilities from broadband providers for pole attachments are not profits and are not kept by the electric utilities or their shareholders. Instead, they are factored into the rate-making process as part of revenue requirements of the electric utility. Simply put, pole attachment revenues have an inverse relationship to electric rates. When more monies are recovered by the electric utilities for pole attachments, electric rates go down. When fewer monies are recovered by electric utilities for pole attachments, electric rates go up.[6]

Broadband companies have a very different perspective on pole attachment rates than do electric utilities. Congress passed the Pole Attachments Act in 1978, which included the § 224(d) cable rate, to protect the then-fledgling cable television industry. *See* H. Rpt. 104-204, 91 ("The beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy."). Today, the CATV, CLEC and ILEC industries are all part of the broadband industry which comprises some of the largest telecommunications carriers in the world, including Verizon, AT&T, Comcast and Charter. The cable industry no longer principally comprises the local mom and pop cable companies the original § 224(d) rate was intended to benefit, but rather multi-media giants. Almost all cable television companies are now classified as "telecommunications carriers" for purposes of pole attachments rates because they provide various types of services constituting "telecommunications services," including broadband Internet access service.

Critically important here is that the multi-media giants providing broadband service are not subject to rate regulation for that service.[7] Wireless

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[6] The above is by necessity a brief and generalized summary of the rate-making process and the impact of pole attachment revenue. There are, of course nuances and exceptions, but the general proposition remains that pole attachment revenues have an inverse relationship to electric rates.

[7] Open Internet Order ¶ 5.

telecommunications service, cable television service, and long distance telecommunications service also are generally not subject to rate regulation.[8] Thus, any monies broadband, wireless, cable and long distance telephone providers save on the payment of pole attachment rents go not to the benefit of consumers or "ratepayers" of these communications companies, but to the benefit of their shareholders.

Simply put, the FCC's approach on pole attachment rents is effecting a wealth transfer of hundreds of millions of dollars annually from electric utility ratepayers to communications company shareholders. And it is doing so for a rationale that has long since disappeared. As recently as 2007, the Commission appeared to recognize that the "beneficial" cable rate might have outlived its originally intended purpose:

> We seek comment on the extent to which the current cable rate formula, whose space factor does not include unusable space, results in a subsidized rate, and, if so, whether cable operators should continue to receive such subsidized pole attachment rate at the expense of electric consumers. More importantly, we seek comment on whether cable operators should continue to qualify for the cable rate where they offer multiple services in addition to cable service.

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[8] *See, e.g.*, Memorandum Opinion and Order, *In Re Wireless Consumers All., Inc.*, 15 F.C.C. Rcd. 17021, 17031, ¶ 18 (2000).

Notice of Proposed Rulemaking, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules & Policies Governing Pole Attachments*, 22 F.C.C. Rcd. 20195, 20203, ¶ 19 (2007). Nevertheless, in 2011, and again in 2015, the Commission took steps to ensure that not only cable operators, but also telecommunications carriers and other broadband providers, received the equivalent of the cable rate.

The Telecom Rate Order also raises important federalism issues regarding the ability of the FCC as a federal agency to impact the rates set by state regulators for electric service, without the FCC being accountable to the state ratepayer base. As explained by the Texas Office of Public Utility Counsel ("OPUC") in its Motion to File Amicus Curie Letter in the Eighth Circuit:

> The increased costs to Petitioners that would result from the FCC's order will ultimately be passed on to ratepayers, primarily residential and small commercial ratepayers because these classes of customers are served through the electric distribution system.

Motion for Leave to File Amicus Curiae Letter of the Texas Office of Public Utility Counsel Supporting Petitioners at 2, *Ameren Corporation, et al v. FCC, et al.*, Docket No. 16-1683 (8th Cir. May 24, 2016). The OPUC went on to explain in its amicus curiae letter:

Because electric rates are regulated, electric utilities are compensated by ratepayers for reasonable and necessary expenses in utility operations. Pole attachment costs are considered distribution costs, and are born predominantly by residential customers. Thus, any pole attachment rates that do not fully compensate the utility for its costs are allocated to its ratepayers and primarily to residential customers. …The FCC's order at issue in this petition for review increases the revenue deficiency and consequently, the costs to Texas ratepayers.

Moreover, the benefits of any savings on the telecommunications side are not guaranteed to offset any additional costs to ratepayers on the electric side. Setting aside the fact that not all electric ratepayers take service from wireline telecommunication providers, in Texas, most telephone exchanges have been deregulated and are open to competition. It is unknown whether or to what extent the [reduction to] pole attachment costs for telecommunication companies will be flowed through to telecommunication customers. OPUC is concerned that Texas electric customers are being asked to subsidize the cost of pole attachment, resulting in higher electric

> rates, without any firm commitment that cost savings on the telecommunications side will be passed on to telecommunications customers.

Amicus Curiae Letter of the Texas Office of Public Utility Counsel Supporting Petitioners at 2-3, *Ameren Corporation, et al v. FCC, et al.*, Docket No. 16-1683 (8th Cir. May 24, 2016).

B. This Case Presents the Last Word on the Interpretation of Section 224(d) Cable Attachment Rates and Section 224(e) Telecommunications Attachment Rates as Illuminated by a Well-Developed Canon of Agency Law and Distinct Aspects of *Chevron*

This Petition asks the Court to examine crucial aspects of the *Chevron* doctrine intertwined with important aspects of the Pole Attachments Act. It provides the right opportunity at the right moment in time for the Court to conduct such an examination because the tenets of the *Chevron* doctrine at issue are brought into sharp focus by the mature state of the law under the Pole Attachments Act. The Court has a rare chance to settle certain elements and boundaries of the *Chevron* doctrine as illuminated by nearly 40 years of agency and judicial interpretation of a discrete body of regulatory law.

The Court has examined the Pole Attachments Act twice in the nearly 40 years since its original enactment, a time period in which many FCC and Courts of Appeal decisions have illuminated the Act. *See National Cable and Telecommunications Assoc v.*

Gulf Power Co., 534 U.S. 327 (2002); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). Nine years after the Act took effect, in 1987, the *Florida Power Corp.* case explained and defined the parameters of the one specific rate provision then in effect under the Act, the § 224(d) rate for pole attachments by cable television operators used solely to provide cable service:

> The Act provides that the minimum reasonable rate is equal to "the additional costs of providing pole attachments," while the maximum reasonable rate is to be calculated "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). The minimum measure is thus equivalent to the marginal cost of attachments, while the statutory maximum measure is determined by the fully allocated cost of the construction and operation of the pole to which cable is attached.

480 U.S. at 253. As of 1987, the Court had left no doubt as to the specific rate mandate of § 224(d). Meanwhile, the Court had announced the *Chevron* doctrine in 1984. *Chevron USA, Inc.*, 467 U.S. at 837.

Nine years after *Florida Power Corp.*, Congress passed the 1996 Act which brought telecommunications carriers under the 1978 Act's umbrella and provided a new and specific directive in § 224(e) for the rate that would apply to telecommunications carriers. When it passed the 1996 Act, Congress must be presumed to have known of both the *Florida Power Corp.* decision and the FCC's prior interpretations of the Pole Attachments Act. *See Lorillard v. Pons,* 434 U.S. 575, 581 (1978) ("[W]here ... Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").[9]

The Court decided *Gulf Power* in 2002, six years after the 1996 Act. *Gulf Power Co.,* 534 U.S. at 327. There, the Court examined the FCC's jurisdiction under § 224(b) to set a just and reasonable rate for attachments used by cable television providers to provide "commingled services" despite the existence of specific rate provisions in §§ 224(d) and (e). Of importance here, the Court observed: "Congress did indeed prescribe two formulas for 'just and reasonable' rates in two specific categories . . . ." *Id.* at 335.

With the Court having analyzed the parameters of both the § 224(d) cable rate and the § 224(e) telecommunications rate, with multiple Courts of

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[9] Congress did not provide, nor would it have rationally been expected to provide, in Section 224(e): "The FCC shall implement a rate and formula for attachments by telecommunications carriers under this subsection 224(e) such that telecommunications carriers pay the same rate as do cable providers under subsection 224(d)."

Appeal decisions analyzing the Pole Attachments Act, including the Eleventh Circuit, the United States Court of Appeals for the D.C. Circuit, and the Eighth Circuit, and with approximately half a dozen major FCC rulemakings interpreting and applying the Act, this Petition brings the Court to a particular moment in time. The applicable aspects of the *Chevron* doctrine are crystallized for review in the light of nearly 40 years of regulatory law built around the FCC's application of the Pole Attachments Act during the maturation of the *Chevron* doctrine. And those several crystallized aspects are now clearly presented for the Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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