No. 17-819

In The
Supreme Court of the United States

AMEREN CORPORATION, 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 Eighth Circuit

REPLY BRIEF OF PETITIONERS

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The Federal Communications Commission's ("FCC" or "Commission") Brief in Opposition only serves to underscore the fundamental concerns with *Chevron* that make the Court's intervention imperative here. The FCC's Telecom Rate Order (App. 12–78) was not an act of interpretation. It was a policy choice that even the FCC's current Chair conceded was incompatible with principles of statutory construction. The FCC cannot paper over the reality of the inconsistencies between that policy choice and the understandings of 47 U.S.C. § 224 set out in prior Court of Appeals precedent. Nor can the FCC fixate on the ambiguity in a single word in the statute—"cost"—to justify a choice that cannot be squared within any reasonable reading of the statute's structure as a whole. And far from alleviating the need for review, the fact that the FCC has reversed one of the prior orders on which it premised the Telecom Rate Order only guts the agency's proffered justification for the Telecom Rate Order and the United States Court of Appeals for the Eighth Circuit's ("Eighth Circuit") basis for upholding it. Agencies cannot take *Chevron* this far, and these considerations create an urgent need for review.

I. The FCC Understates and Mischaracterizes the Eleventh Circuit's *Alabama Power* and *Georgia Power* Decisions.

The FCC asserts that Petitioners' reliance on *Alabama Power* and *Georgia Power* for the proposition that the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") twice interpreted Section 224(e) as requiring a different and higher telecom rate than the rate yielded by Section 224(d) is "misplaced." (Resp'ts' Br. in Opp'n. 16). Though this case does not present a traditional circuit split (*see* Pet. 17), the *Alabama Power* and *Georgia Power* decisions nonetheless have resulted in conflicting precedent regarding whether Congress intended the unambiguously distinct rate formulas in Sections 224(d) and (e) to yield different rates (which it did). Further, even assuming the Eleventh Circuit's interpretation of Sections 224(d) and (e) was not central to the *Alabama Power* and *Georgia Power* holdings, the FCC's myopic focus on the holdings incorrectly presumes there is nothing relevant in judicial opinions other than the holding itself.

In any event, the FCC's characterization of the *Alabama Power* and *Georgia Power* decisions suggests that the Eleventh Circuit merely acknowledged the manner in which the FCC interpreted Section 224(e) at that time:

> Although the Eleventh Circuit in *Georgia Power Co.* observed that the telecom rate was higher than the cable rate under the then-existing regulatory scheme, it did not decide whether Section 224 mandated that disparity. Similarly in *Alabama Power Co.*, the court noted the existence of the rate differential without determining whether the statute required it. . . . The court attributed the difference between the two rates to the FCC's then-current interpretation of Section 224.

(Resp'ts' Br. in Opp'n. 17) (internal citations omitted). Not so. The Eleventh Circuit specifically tied the higher telecom rate to the statutory requirements. In *Alabama Power* (the first of the two decisions), the Eleventh Circuit stated: "**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**." *Alabama Power Co.*, 311 F.3d 1357, 1371 (11th Cir. 2002) (emphasis added).

In *Georgia Power*, the Eleventh Circuit reaffirmed its understanding of Section 224, as expressed in *Alabama Power*:

> **[T]he 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. v. Teleport Communications Atlanta, Inc., 346 F.3d 1033, 1047 (11th Cir. 2003) (emphasis added). In short, *Alabama Power* and *Georgia Power* unmistakably express the Eleventh Circuit's independent understanding of what the text of Section 224 requires, even if those clear expressions were not part of the actual holdings.

The Eleventh Circuit's statements were not, as the FCC suggests in its Brief, merely a recitation of the FCC's "then-existing regulatory scheme." (Resp'ts' Br. in Opp'n. 17). Moreover, had the Eleventh Circuit thought that a "higher" telecom rate was merely the product of the FCC's then-existing regulatory scheme, the Eleventh Circuit would have made that point in response to the petitioners' arguments in *Alabama Power* that the higher Section 224(e) rate undermined the constitutionality of the lower Section 224(d) rate. Instead, the Eleventh Circuit addressed petitioners' arguments by saying, as the FCC itself notes in its Brief, that because both statutory formulas yield in excess of marginal costs, it was "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." *Alabama Power Co.*, 311 F.3d at 1371 n. 23. At all times, the Eleventh Circuit found that Section 224 yielded two different rates as Congress intended.

II. Courts Should Not Defer to FCC Policy Objectives That Are Completely Untethered From The Statutory Text.

The FCC repeatedly stresses the reasonableness of its policy preferences as a basis for the statutory interpretation at issue here. (Resp'ts' Br. in Opp'n. 9-10, 15-16). The FCC lacks authority, though, to rewrite Section 224 in order to accomplish policy objectives, whether such objectives are reasonable or unreasonable. *See, e.g., 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].”). While the FCC may have some discretion to interpret any ambiguity inherent in Congress’s use of the word “cost” in Section 224, that discretion is not unlimited. It is confined by the surrounding unambiguous language and overall structure of the statute.

The FCC argues that its new interpretation of the word “cost” does not render Section 224(e) superfluous because Congress intended it to have the discretion to fashion either two different rates, or one identical rate, depending on the FCC’s policy preferences. (Resp’ts’ Br. in Opp’n. 15). But, as set forth in the Petition (Pet. 25-27), had Congress intended to give the FCC discretion to harmonize Sections 224(e) and (d), there would have been much easier ways to do so. For example, Section 224(d) explicitly allows the FCC to implement a permissible range of rates in which the FCC could craft a rate it believed would best suit its policy goals. Congress could have crafted Section 224(e) with a similar range of rates that overlapped with the range provided in Section 224(d). Congress did not do that. Neither the FCC nor the Eighth Circuit provided an explanation of why Congress did not simply follow the very obvious example of Section 224(d) when it was supposedly crafting Section 224(e) to vest the FCC with the same level of discretion as the discretion provided by the immediately preceding statutory subsection.

The FCC also asserts that its most recent construction of Section 224(e) should not be treated to a more stringent standard of review despite the FCC’s clear shift in statutory interpretation. (Resp’ts’ Br. in Opp’n. 13-14). In support of this contention, the FCC cites *National Cable &*

Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005). *Brand X*, though, dealt with an agency shifting from one possible interpretation of an ambiguous statutory term to another. *Id.* Here, in contrast, the FCC shifted from acknowledging that Section 224 **required** two separate attachment rates, to claiming discretion to merge the two rates. *Compare Alabama Cable Telecommunications Ass'n*, 16 F.C.C. Rcd. 12209, 12231 (2001)("Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates.") *with* Telecom Rate Order ¶ 31, App. 49 ("Congress granted the Commission substantial discretion to implement section 224(e) based on the agency's policy expertise by leaving the definition of the relevant costs ambiguous."). In other words, in the case at bar, the FCC shifted its interpretation from *Chevron* step one to *Chevron* step two. In *Brand X*, the FCC was merely changing positions within *Chevron* step two. *See Brand X Internet Servs.*, 545 U.S. 967, 984-85.

The FCC's actions here represent a danger inherent in the *Chevron* doctrine recognized by numerous commentators:

> From my more than five years of experience at the White House, I can confidently say that *Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016). Even the current FCC Chairman acknowledged that the FCC's statutory interpretation at issue in this case is in a precarious legal position. *See* Concurring Statement of Ajit Pai, App. 76, 78 ("…the *Order* may be vulnerable in court because the legal rationale for this new, lower rate is rather odd…I can only concur, holding out hope that the courts will allow us to mitigate the higher pole attachment rates that the reclassification order made possible."). This Court should take this opportunity to make clear that too much judicial deference afforded to agencies, such as that afforded by the Eighth Circuit here, poses just as great a risk to the rule of law as does too little deference.

III. The FCC's Reversal of the Open Internet Order Elevates, Rather than Diminishes, the Need for Certiorari Review.

A. The Reversal of the Open Internet Order Guts the Policy Basis for the Telecom Rate Order.

The FCC seeks to downplay the exceptional importance of this case—which will determine the extent to which electric ratepayers must subsidize the cost of the nation's broadband infrastructure—by arguing:

> …the dispute in this case is of diminishing ongoing significance because the Restoring Internet Freedom Order, when it takes effect,

> will require cable providers to pay the cable rate for attachments used to provide commingled video and broadband Internet access services, which will significantly reduce the percentage of pole attachments that are subject to the telecom rate.

(Resp'ts' Br. in Opp'n. 11). To the contrary, the Restoring Internet Freedom Order, which reverses the Open Internet Order (including the Open Internet Order's classification of broadband as a "telecommunications service"), undercuts the very basis for the Telecom Rate Order. Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, WC Docket No. 17-108, 2018 FCC LEXIS 44, ¶ 2 (Jan. 4, 2018).

The impetus for the FCC adopting the Telecom Rate Order was the adoption of the Open Internet Order. Telecom Rate Order, ¶¶ 15, 21 App. 28-29, 37-39. Moreover, the Eighth Circuit relied on the Open Internet Order as the primary policy basis for justifying the Telecom Rate Order:

> 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.**

App. 9-10 (emphasis added) (internal citations omitted).[1] The above-quoted portion of the Eighth Circuit's decision makes clear that the primary basis for upholding the reasonableness of the FCC's policy choice was, in fact, the Open Internet Order's classification of broadband as a "telecommunications service" (thus subjecting more cable television attachments to the higher telecom rate).[2]

Even if the Court is not inclined to grant a writ of certiorari here, Petitioners respectfully request that the Court remand this case to the Eighth Circuit for further proceedings to consider the legal impact of the FCC's reversal of the Open Internet Order and, specifically, whether the Telecom Rate Order remains a "reasonable policy choice" given that its primary policy basis has been gutted.[3]

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[1] The 8th Circuit's decision below has now been published at *Ameren Corp. v. FCC*, 865 F. 3d 1009 (8th Cir. 2017).

[2] The Open Internet Order was reversed by the Restoring Internet Freedom Order on January 4, 2018 (after the Eighth Circuit's decision and after the Petition was filed in this case).

[3] The secondary policy basis for upholding the Telecom Rate Order, as expressed by the Eighth Circuit, was "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

B. The Telecom Rate Order Remains Important Despite the Reversal of the Open Internet Order Because the Telecom Rate is Still Applicable to Many Attachments by Legacy Cable Service Providers.

The Restoring Internet Freedom Order will not mean, as the Government implies, that the cable rate will now apply to all attachments by cable service providers. (Resp'ts' Br. in Opp'n. 19-20). As Section 224(d)(3) makes clear, the telecom rate applies not only to attachments by

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Rate even for telecommunications providers." *Ameren Corp.*, 865 F.3d at 1013. This is not a legally sufficient policy basis for upholding the Telecom Rate Order for two main reasons. First, it was not the actual policy basis for the Telecom Rate Order. The alleged rate disparity existed long before the Open Internet Order, yet it was the Open Internet Order that actually motivated the Telecom Rate Order. Second, the Telecom Rate Order did not eliminate the rate disparity with states that regulate pole attachments given two undisputed facts: (a) several states that regulate pole attachments actually set the rate for all attachments **higher** than the cable rate (*see, e.g.,* Louisiana Public Service Commission, General Order, *Review of the General Order dated March 12, 1999 (Pole Attachments)*, Docket No. R-26968, 2014 La. PUC LEXIS 263, *67-68 (Rule 12(f)), *69-75 (Attachment A) (Sept. 4, 2014); Arkansas Public Service Commission Pole Attachment Rules, 126-03 Ark. Code R. § 028, Rule 4.01 (2017); and (b) even in states where the FCC regulates pole attachments, the FCC only regulates rates on investor-owned utility poles—it does not (and cannot under Section 224) regulate rates on poles owned by municipalities and cooperatives, which cover vast swaths of the states. 47 U.S.C. §§ 224(a)(1), 224(a)(3).

telecommunications carriers, but also to "any pole attachment used by a cable system…to provide any telecommunications service." 47 U.S.C. § 224(d)(3). Long before the Open Internet Order, many cable companies provided telecommunications services such as private line services, dark fiber leases, transport services and Ethernet. And the provision of telecommunications services subjected these cable companies (or at least some portion of their attachments) to the Telecom Rate. *See*, e.g. *Salsgiver Telecom, Inc. v. N. Pittsburgh Tel. Co.,* 22 FCC Rcd 9285, ¶¶ 14-18 (2007); *Amendment of Comm'n's Rules and Policies Governing Pole Attachments,* 16 FCC Rcd 12103, ¶ 86 (2001); *Fiber Technologies Networks, L.L.C. v. North Pittsburgh Tel. Co.*, 22 FCC Rcd 3392, ¶ 21 (2007); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 9 (2005). The reversal of the Open Internet Order means only that the stakeholders are restored to their posture prior to the Open Internet Order.

Aside from its continuing applicability to some portion of cable television attachments and all telecom carrier attachments, the Section 224(e) rate is also important for another reason: the telecom rate's use as a reference point in certain pole attachment disputes between electric utilities and incumbent local exchange carriers ("ILECs"). The pole network cost sharing relationships between electric utilities and ILECs (called "joint use agreements") are of even greater financial consequence than the network contributions paid by cable television and other telecom carriers pursuant to the Section 224(d) and (e) rates. Though ILECs are excluded from the definition of "telecommunications carriers" for purposes of Section 224 (and, thus, not expressly subject to the Section 224(e) rate), the FCC nonetheless treats ILECs as "providers of telecommunications service" subject to the FCC's general pole attachment regulation under 224(b)(1). Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act; A Nat'l Broadband Plan for Our Future,* 26 FCC Rcd 5240, ¶¶ 205-208 (2011). And the FCC has identified the Section 224(e) rate as a reference point for resolving certain types of pole attachment disputes between electric utilities and ILECs. *Id.* at ¶ 218. Perhaps even more importantly, the FCC is currently considering a proposed rule that aims to subject all attachments by ILECs to the Telecom Rate, which would dramatically increase the extent to which electric ratepayers subsidize broadband deployment. Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket. No. 17-84, 32 FCC Rcd 3266, *3312, Proposed 47 C.F.R. § 1.1424 (2017). In short, even after the Restoring Internet Freedom Order, this case continues to present "questions of exceptional importance regarding payment for broadband infrastructure." (Pet. 31).

REQUEST FOR RELIEF

For those reasons set forth in the Petition and this reply brief, Petitioners respectfully request that the Court grant the Petition and issue a writ of certiorari. In the alternative, if the Court is not inclined to grant a writ of certiorari at this time, then Petitioners respectfully request that the Court remand this case to the Eighth Circuit for further proceedings to consider the legal impact of the FCC's reversal of the Open Internet Order.

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