No. 12-1396

In the Supreme Court of the United States

AMERICAN ELECTRIC POWER SERVICE CORPORATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 224 of the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, authorizes the Federal Communications Commission (Commission) to regulate the rates, terms, and conditions for "pole attachments" by any "provider of telecommunications service." 47 U.S.C. 224(a)(4) and (b). The statute also provides additional benefits to "telecommunications carrier[s]," which are defined to exclude "incumbent local exchange carrier[s]." 47 U.S.C. 224(a)(5). The question presented is as follows:

Whether the Commission reasonably interpreted the term "provider of telecommunications service" as used in Section 224 to include "incumbent local exchange carrier[s]."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 708 F.3d 183. The order of the Federal Communications Commission (Pet. App. 24-165) is reported at 26 F.C.C.R. 5240.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 2013. The petition for a writ of certiorari was filed on May 24, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Cable companies have long found it "convenient, and often essential, to lease space for their cables on telephone and electric utility poles." *National Cable &*

Telecomms. Ass'n v. *Gulf Power Co.*, 534 U.S. 327, 330 (2002). To prevent utilities from "charg[ing] monopoly rents" when leasing such space, *ibid.*, Congress in 1978 passed what is known as the Pole Attachment Act. Act of Feb. 21, 1978, Pub. L. No. 95-234, § 6, 92 Stat. 35; see 47 U.S.C. 224. That statute requires the Federal Communications Commission (FCC or Commission) to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable" in States that do not themselves regulate pole attachments. 47 U.S.C. 224(b).

The Pole Attachment Act originally defined a "pole attachment" as an attachment by "a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. 224(a)(4) (1982). Congress later "expanded the definition," *Gulf Power*, 534 U.S. at 331, so that it now covers any such attachment by a "cable television system *or provider of telecommunications service*." 47 U.S.C. 224(a)(4) (emphasis added). See Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, § 703(2), 110 Stat. 150. Accordingly, as amended, the statute gives the FCC authority to "regulate the rates, terms, and conditions" to ensure "just and reasonable" rates for pole attachments by both cable operators and "providers of telecommunications service." 47 U.S.C. 224(a)(4) and (b).

In the 1996 amendments, Congress provided additional benefits to "telecommunications carriers," including a right of nondiscriminatory access to utilities' poles and a statutory rate scheme. 47 U.S.C. 224(e)-(f); see 1996 Act § 703(7), 110 Stat. 150. Specifically excluded from the definition of "telecommunications carrier" is "any incumbent local exchange carrier" (or ILEC)—the descendants of the Bell System local telephone compa-

nies that resulted from the 1984 divestiture of AT&T. 47 U.S.C. 224(a)(5); see 47 U.S.C. 251(h); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 549 (2007).

2. When it first implemented the 1996 amendments, the FCC assumed that, because ILECs were excluded from Section 224's definition of "telecommunications carrier," they were also excluded from that provision's grant of authority to the FCC to regulate pole attachment rates charged to "provider[s] of telecommunications service." See *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777, para. 5 (1998) (*Implementation of Section 703(e)*); 47 U.S.C. 224(a) and (b). Although the Commission did not explicitly consider other possible interpretations, it deemed this reading "consistent with Congress' intent" to "promote competition by ensuring the availability of access to new telecommunications entrants." *Implementation of Section 703(e)*, para. 5.

In 2007, however, the FCC began a re-examination of its prior interpretation of Section 224 "in light of [the Commission's] experience over the last decade, advances in technology, and developments in the markets for telecommunications and video services." *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 22 F.C.C.R. 20195, para. 1 (2007). The Commission sought comment on a number of issues, including whether ILECs are entitled under the statute to regulation of their pole attachment rates. *Id.*, para. 3. At Congress's direction,[1] the Commission subsequently released a report containing a "National Broadband Plan," which found that the "cost of deploying a broadband

[1] See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 128.

network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way." FCC, *Connecting America: The National Broadband Plan* 109, http://download.broadband.gov/plan/national-broadband-plan.pdf (last visited July 26, 2013) (*National Broadband Plan*). The plan also stated that ILECs' average cost per-pole-foot was twice that of other phone companies and almost three times that of cable companies, a disparity that threatened to "distort attachers' deployment decisions." *Id.* at 110. Soon after the plan was released, the FCC sought renewed comment in light of these findings on whether it had authority to regulate pole attachment rates paid by ILECs. *Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, 25 F.C.C.R. 11864, paras. 143-148 (2010).

In 2011, the FCC "comprehensively revise[d]" its rules to "improve the efficiency and reduce the * * * costs" of pole attachments "in order to accelerate broadband buildout." Pet. App. 27. *Inter alia*, the Commission concluded that it had authority under 47 U.S.C. 224(b) to ensure that the rates and terms for ILECs' pole attachments are just and reasonable. Pet. App. 67. The agency did not set a specific rate, but instead instituted a procedure to review complaints on a "case-by-case basis." *Id.* at 76-77.

The FCC noted that Congress had used two distinct terms in different provisions of Section 224: "provider of telecommunications service" in Section 224(a)(4)'s generally-applicable definition of "pole attachment," and "telecommunications carrier" in different, specialized rate and access provisions. Pet. App. 61-62, 71. Although Congress had enacted a special definitional provision "excluding" ILECs from the scope of "telecommu-

nications carrier[s]" for purposes of Section 224, the statute contains no such carve-out for the term "provider of telecommunications service." *Id.* at 70-71. The FCC's general "authority to regulate the rates, terms and conditions of pole attachments" comes from Section 224(b), which extends to all "pole attachments," including those by "provider[s] of telecommunications service," not just "telecommunications carrier[s]." *Id.* at 70, 72. "Because incumbent LECs are 'providers of telecommunications service,'" the Commission stated, "'pole attachment' as defined in [S]ection 224(a)(4) includes attachments of incumbent LECs." *Id.* at 72.

The FCC acknowledged that it was "chang[ing] the Commission's prior interpretation of [S]ection 224(b) with respect to [ILECs]." Pet. App. 63. It found that this change was justified "given the evidence in the record regarding current market realities." *Ibid.* The FCC explained that, while ILECs formerly had "owned roughly as many poles as electric utilities," ILECs are now in an "inferior bargaining position," and "market forces" are not necessarily "sufficient to ensure just and reasonable rates." *Id.* at 58; see *id.* at 63-64.

The Commission also found on further analysis that, contrary to the FCC's previous position, Congress's goal of promoting competition under the Act would be well served by ensuring just rates for ILECs, especially given that ILECs may not have market power with respect to new video and other services they have offered in recent years. Pet. App. 64-65. Noting that reducing pole rental rates could spur investment in broadband, the Commission emphasized that it would continue to monitor the outcomes of the market and the FCC's regulatory regime to assure that the new rule created the expected consumer benefits. *Id.* at 68-69.

3. The court of appeals denied a petition for review of the Commission's order. Pet. App. 1-16.

The court of appeals recognized that Section 224(a)(5) contains a definition of "telecommunications carrier" that is "tailored to [Section] 224" by excluding ILECs. Pet App. 9. The court observed, however, that this "restricted definition" appears "cheek by jowl" with Section 224(a)(4), which uses the "broader term," "provider of telecommunications service." *Ibid.* The court found that the use of two distinct terms "suggests an entirely intentional character." *Ibid.* It therefore concluded that, in line with the "undisputed proposition" that ILECs are generally "providers of telecommunications services," *id.* at 8, Section 224's reference to any "'provider of telecommunications services' embraces ILECs rather than excludes them." *Id.* at 9.[2]

The court of appeals discerned no anomaly in the fact that the Commission's reading gave ILECs a right to regulation of rates and terms without the concomitant right of access that is provided to cable companies and (non-ILEC) "telecommunications carrier[s]." Pet. App. 9 (citing 47 U.S.C. 224(f)(1)). The court pointed out that, under the 1978 Pole Attachment Act, cable companies

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[2] The court of appeals illustrated this point with symbolic equations. Pet. App. 8-9. The court first defined the term TC as "telecommunications carrier," the term TC_{224} as "telecommunications carrier for the purposes of [Section] 224," and the term PTS as "provider of telecommunications service." *Id.* at 8. It then explained that, because TC_{224} = TC – ILEC, it follows through substitution of PTS for TC (which petitioners contended are "synonyms" (Pet. 29)), that TC_{224} = PTS – ILEC. *Ibid.* Or, put equivalently, PTS = TC_{224} + ILEC. *Id.* at 9. The court therefore concluded that, even "on petitioners' own rather mathematized reading" of Section 224, the term "provider of telecommunications services" includes ILECs. *Ibid.*

likewise enjoyed the benefits of rate regulation but were not entitled to any statutory right of access until the 1996 Act gave them an access right. *Id.* at 9-10. The effect of the Commission's current reading thus is to give ILECs the same (limited) rights that cable companies possessed before 1996. *Ibid.*

"Given [its] analysis of the relevant language," the court of appeals expressed "doubt" that the Commission's previous interpretation, which had excluded ILECs from the category of "providers of telecommunications services" for purposes of Section 224, was a permissible reading of the statutory text. Pet. App. 10. The court found it unnecessary to decide that question, however, because it concluded that, at a minimum, the agency's explanation for its abandonment of that interpretation was entirely reasonable. *Ibid.* (citing *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). In particular, the court of appeals noted the Commission's explanation that, "whereas in 1978 the power companies and the historic phone companies had, by virtue of the roughly equal scale of their pole systems, roughly equal incentives for sharing, that equality ha[s] since eroded, leaving the power companies with a far higher proportion of poles and a lesser incentive to share." *Ibid.* The court rejected petitioner's challenge to the factual underpinning of the agency's analysis because petitioners had "offered neither conflicting data on the current situation, nor any actual reason to suppose that the Commission's numbers are materially unrepresentative." *Ibid.*

ARGUMENT

The court of appeals correctly held that the FCC's current interpretation of Section 224 is consistent with the statutory language, and that the Commission had

provided a reasonable explanation of its decision to adopt that interpretation. The court's case-specific decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Section 224(b) requires the Commission to regulate the rates and terms of "pole attachments," which Section 224(a)(4) defines to include attachments by a "provider of telecommunications service." 47 U.S.C. 224(a)(4) and (b). There is no dispute that ILECs provide telecommunications services. See Pet. App. 8-9. It was therefore entirely reasonable for the Commission to revise its prior interpretation of Section 224 and conclude that it has authority to regulate the terms and rates of ILECs' pole attachments.

As the FCC recognized (Pet. App. 61-62, 71), Section 224(a)(5) excludes ILECs from the definition of "telecommunications carrier[s]" for purposes of Section 224. 47 U.S.C. 224(a)(5). The statute contains no such exclusion, however, from the definition of "provider[s] of telecommunications service[s]." The Commission found that distinction "critical," Pet. App. 62, because the FCC's general authority to regulate rates extends to all "pole attachments," a term that includes attachments not simply by "telecommunications carrier[s]," but by "provider[s] of telecommunications service[s]." *Id.* at 71-72.

The Commission's interpretation is reasonable. This Court "generally seek[s] to respect Congress' decision to use different terms to describe different categories of people or things." *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012); see *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 825 (2013); *Sosa* v. *Alvarez–Machain*, 542 U.S. 692, 711 n.9 (2004). In this case,

the use of different terms "cheek by jowl" "suggests an entirely intentional character." Pet. App. 9. The Commission therefore reasonably concluded that the statute does not exclude ILECs from the term "provider[s] of telecommunications service."

2. Petitioners acknowledge that, "[r]ead literally," Section 224's grant of authority to the FCC to regulate pole attachments "encompasses attachments by a 'provider of telecommunications service.'" Pet. 26. Petitioners contend, however, that "provider of telecommunications service" is a "synonym" for "telecommunications carrier," Pet. 14, 29, because the term "telecommunications carrier" is generally defined under the Communications Act to mean "any provider of telecommunications service." Pet. 19 (citing 47 U.S.C. 153(51)).[3] It necessarily follows, petitioners argue, that because "ILECs were excluded" from the definition of "telecommunications carrier" in Section 224, "they are likewise excluded from its synonym," "provider of telecommunications service." Pet. 29. Petitioners are incorrect.

As the court below explained, Pet. App. 9, the flaw in petitioners' argument lies in its assumption that these distinct terms are synonyms for purposes of Section 224. That assumption is incorrect. Section 224 contains a

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[3] The statute states:

> The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

47 U.S.C. 153(51) (Supp. V 2011).

specific carve-out for one of the terms—"telecommunications carrier"—but not for the other—"provider of telecommunications service." 47 U.S.C. 224(a)(5). Congress's decision to modify the term "telecommunications carrier" to exclude ILECs "for purposes of [Section 224]," but not to modify the term "provider of telecommunications service" at all, suggests that the meaning of the latter phrase remained unchanged. *Ibid.*

Petitioners offer no alternative explanation for Congress's decision to use two different terms in adjacent subsections. If Congress had intended to exclude ILECs from both the right-of-access and reasonable-rate provisions of Section 224, it could simply have used the term "telecommunications carrier" throughout that section. Petitioners therefore have failed to refute the court of appeals' conclusion that Congress's use of the two terms to convey different meanings was "entirely intentional," Pet. App. 9, much less to show that the Commission's reading is unreasonable.

In any event, the court of appeals' determination that the FCC's interpretation of the Pole Attachment Act was reasonable does not conflict with any decision of this Court or of another court of appeals. It is a case-specific application of settled rules of statutory interpretation that does not warrant this Court's review.

Petitioners' further contention that the FCC was not granted interpretive authority over Section 224, see Pet. 16-17, is foreclosed by *City of Arlington* v. *FCC*, 133 S. Ct. 1863 (2013), in which this Court affirmed that "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication." *Id.* at 1874; see 47 U.S.C. 201(b).

3. The Commission adequately explained its change of position. Pet. App. 10. Under the Administrative Procedure Act, an agency that changes policy must "display awareness that it *is* changing position," but it "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Instead, it need only show "that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Ibid.*

The *Order* easily satisfies those requirements. The Commission acknowledged that it had previously interpreted Section 224 to exclude jurisdiction over ILECs. See Pet. App. 62, 67. In addition to its textual analysis, the FCC offered a two-fold policy rationale for adopting a new interpretation.[4]

First, record evidence of "current market realities" showed that "aggregate incumbent LEC pole ownership has diminished relative to that of electric utilities." Pet. App. 63. As a result of that change in circumstances, "incumbent LECs often may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations," *id.* at 63-64, and "market forces"

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[4] The language petitioners quote (Pet. 22) from the government's brief to this Court in *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327 (2002) (Nos. 00-832, 00-845), simply reflected the Commission's prior (and now reasonably revised) interpretation of the statute. Petitioners also imply that the FCC took the position in the 2010 *National Broadband Plan* that the text of Section 224(a)(4) excludes ILECs. Pet. 5-6 & n.11. But the language quoted from the plan makes no reference to jurisdiction over ILECs. Instead, it refers to the need for statutory change to remedy "the convoluted rate structure for cable and telecommunications providers." See *National Broadband Plan* 110, 112.

therefore may not be "sufficient to ensure just and reasonable rates." *Id.* at 58. Petitioners complain (Pet. 31) that the Commission supported its position with a reference to a baseline set of data contained in a 1977 Senate Report rather than examining data from 1996. Petitioners do not dispute the trend of declining ILEC pole ownership, however, nor do they otherwise cast doubt on the Commission's conclusions about the current market or its effect on rate negotiations. See Pet. App. 10.[5]

Second, the Commission questioned the assumption that the pro-competitive goals of the 1996 Act should benefit only new telephone company entrants. Pet. App. 64-65; cf. Pet. 22-24. Especially given that ILECs are still relatively "nascent" competitors in video and other markets in which they offer new services, the Commission concluded that they too can benefit from the oversight of pole attachment rates in the interests of robust competition. Pet. App. 65 & n.620. The *National Broadband Plan* had stated that, compared to their competitors, ILECs pay two- and three-times the average attachment rate per-pole-foot, a situation that "distort[s]" marketplace competition. See p. 4, *supra*. The Commission reasonably concluded that reduced ILEC attachment rates "can expand opportunities for [broadband] investment," thereby furthering the Commission's statutory obligation to encourage broadband deployment. Pet. App. 68 (citing 47 U.S.C. 1302(a) (Supp. V 2011)). In any event, the court of appeals' case-specific

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[5] Contrary to petitioners' contention (Pet. 32), there is no contradiction between the Commission's finding of unequal bargaining power and its prediction that electric utilities are unlikely to deny ILECs access altogether. See Pet. App. 81 n.655. Unequal bargaining power may lead to unfair attachment rates even if it does not lead to an outright refusal to bargain. See *id.* at 64 n.618.

application of the settled standard of review for an agency change in position does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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