No. 14-901

In the
Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

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

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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The 10th Circuit's decision[1] attracted four petitions for certiorari. The *Brief for the Federal Respondents in Opposition (*FCC Br./FCC) and the *Brief for Respondents AT&T, Sprint, T-mobile, Verizon, Verizon Wireless and Vonage in Opposition* (AT&T Br./AT&T) claim all lack merit.

Although there are *four* petitions, the FCC elected to spend *over half* their "argument" attacking NARUC's petition. AT&T spent its *entire* word allotment on NARUC's request.

There is a reason for those choices.

Both oppositions highlight the need for review by what they choose to present as arguments and by what they fail completely to address.

Neither provides any substantive response to Petitioner's critique of the 10th Circuit's failure to provide the rigorous statutory analysis required by *City of Arlington, Texas v. F.C.C.,*[2] to determine

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[1] *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014)..

[2] *City of Arlington, Tex. v. F.C.C.,* 133 S. Ct. 1863, 1874 (2013)(*Arlington*)

> The fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously . . . statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.

when *Chevron*[3] deference is appropriate. The oppositions' repetition of the gaps and flawed logic of the 10th Circuit's decision merely highlight the need for review.

I. Both Oppositions Reinforce the Need to Grant Review to Examine the 10th Circuit's Mis-Application of *Chevron*.

Both oppositions either do not attempt to address or provide only partial response to the flaws in the 10th Circuit's decision identified by NARUC. For example, there is *no* response by either to the fact that:

(1) the FCC's new interpretation renders surplus the mandated State role to *specifically assure the reciprocal compensation rate complies with the §252(d)(2) cost standard*;

(2) the FCC's elimination of the State responsibility under §252(d)(2) renders surplus §252(e)(5), which permits the FCC to act *only* if the State fails to act; and

(3) the zero bill-and-keep rate the FCC has mandated for all (even non-reciprocal) traffic bears *no* resemblance to the "bill-and-keep" arrangements the statute "does not preclude." *See,* NARUC Petition at 30-31.

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

Instead, the FCC proffers a naked claim that §252(d)(2)(B)(i) proves the agency has authority to establish that the reciprocal compensation for the additional costs of transporting or terminating calls is zero. FCC Br. at 28.

However, that section, on its face, *only* permits States to approve bill-and-keep arrangements, and *only* under the listed conditions.

Moreover, the FCC's claim is directly undermined by the §252(d)(2)(B)(ii) prohibition against either the "Commission, or any State commission" engaging "in any rate regulation proceeding to establish with particularity the additional costs" - *whether zero or not* – "of transporting or terminating calls." It defies logic to suggest that the FCC's has not set both interim and final rates - which this Court has found it lacks authority to do.

NARUC's petition raises crucial issues about the 10th Circuit's application of *Chevron* and *Arlington*'s standard to "apply[] rigorously, in all cases, statutory limits on agencies' authority" to the FCC's strained interpretations of the Telecommunications Act of 1996.[4]

NARUC's petition starts with a list of suspect interpretations that radically diverge from the Act as well as 16 years of FCC/court precedent.

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[4] *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996) (Act)

All those changes, Petitioner asserts, should not have passed the required review.[5] NARUC's petition cites *Chevron* 16 times focusing on how the 10th Circuit's decisions cannot be squared with the statute or cannons of construction under *Arlington*'s rigorous analysis standard.

Yet, the FCC Br. only mentions *Chevron* twice, at 23 and 24, noting simply that - the facially flawed "interpretation" that §251(b)(5) allows it to adopt the oxymoronic *bill-and-keep-methodology* - is "entitled to the full measure of deference under *Chevron*."

AT&T does not even mention *Chevron* in its argument. Rather AT&T concludes, with little elaboration, that NARUC's "petition turns on idiosyncratic issues of statutory interpretation that are specific to the order and unlikely to reoccur." AT&T Br. at 12.

To buttress its claim that no review is warranted, AT&T posits that "notably no telephone companies – the payors and recipients of intercarrier compensation the Order affects most directly – support the NARUC petition." AT&T Br. at 12-13.

However, the same day AT&T's opposition was filed, the National Telecommunications Cooperative Association (NTCA) *representing 900 small telephone companies across the country*

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[5] *NARUC's issue statements, Petition at i, were drafted to permit this Court to review the issues listed on pages 3-7 of the petition and vacate/remand the entire decision.*

"affected the most directly" by the FCC's action *did* file as respondents supporting NARUC's petition.

AT&T thus concedes that NTCA's 900 member's support of NARUC is both "notable" and persuasive evidence in favor of *granting* review. It is also "notable" that the National Association of State Utility Advocates, representing more than 40 states and the District of Columbia, also filed strongly endorsing NARUC's petition.

For AT&T claim's to have merit, there can be no likely reoccurrence of the interplay of *Chevron/Arlington* to the 1996 Act's framework at issue here.

The frailty of that claim is obvious.

The 10th Circuit decision cites both *Chevron* and *City of Arlington*. Its misapplication of both – across a broad range of issues[6] - is apparent from a cursory review of the decision with a copy of the relevant statutory provisions in hand.

There can be little doubt the decision that sanctioned the FCC's self-described *"transformational order" will* be a landmark case. It will be cited by the FCC and other agencies often, as a guide for application of *Chevron* and principles of statutory construction.

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[6] Including those listed at the very beginning of *NARUC's Petition for Certiorari*. *See* footnote 5, *supra*.

There is also little doubt it has *already* had a significant impact both on NTCA's 900 members and NARUC's member commissions from all fifty States, U.S. territories, and the District of Columbia.

AT&T's claim does not dispel the need for clarification of both the proper application of *Chevron* and the interplay of *Chevron* and specific rules of construction mandated by Congress in the Act. Review is warranted.

II. The Oppositions Highlight the 10th Circuit's Conflict With this Court's Decision In *Iowa Utilities Board* and the fractured Logic of the FCC's construction of the Act's Provisions.

The rest of both opposition responses, with few exceptions, consist of repeating arguments made below and then citing the 10th Circuit's confirmation of them as evidence they are correct.[7]

Mere repetition of the decision's findings is not evidence that *Chevron* was properly applied – nor can it purport to be an actual response to NARUC's petition. No real justification is provided by either opposition on the clear conflict between the FCC's specifying interim and final rates and

(1) this Court's ruling in *AT&T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366 (1999)(*IUB*);

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[7] *See, e.g.*, FCC Br. at 27 ("As the court of appeals explained…") and 28 ("The court of appeals correctly rejected NARUC's argument.").

(2) a "reasonable" reading of the clear statutory text; and

(3) compliance with the *Chevron/Arlington* standard for the breadth of deference that can lawfully be applied.

Rather than taking on these conflicts directly, AT&T suggests that "NARUC's petition presents fact-bound issues of error correction," (AT&T Br. at 7) but then immediately devolves into a discussion of *exclusively legal* issues, selectively quoting both statutory text and court precedent, as well as offering carefully phrased arguments NARUC has not disputed. For example, it is true, as AT&T Br. at 7 states, that "no court has held that [§]252 forecloses the FCC from adopting a default *methodology* for reciprocal compensation." (emphasis added) No Court has so held.

But that AT&T strawman is irrelevant to the issues raised by NARUC petition. It fails to engage NARUC's actual argument that the 10th Circuit sanction of FCC authority to set rates, conflicts with this Court's instructions in *IUB,* and the 8th Circuit's decision[8] on remand, which found Congress designated States to set actual rates in arbitrations.

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[8] *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part, and remanded sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467, 257 (2002). ("Setting specific prices goes beyond the FCC's authority to design a pricing methodology and intrudes on the States' right to set the actual rates pursuant to §252(c)(2).")

Both the AT&T Br., at 9, and the FCC say that this Court's *IUB* decision applies because, as AT&T describes it, the FCC Order

> represents the "FCC's prescription…of a requisite pricing methodology" that lets States determine "the concrete result in particular circumstances."

Exhibiting the same flawed reasoning, the FCC Br. at 29-30 explains its order conformed to *IUB* by prescribing:

> a methodology that . . . eliminates the need for intercarrier rates, while preserving State commissions' authority to arbitrate the "terms and conditions" of reciprocal compensation . . . The FCC thus did not usurp any authority granted to State commissions under a §252(c) and (d).

The fractured logic of this FCC rationale is evident.

The FCC says that by "eliminating the need for rates" they have *preserved the role Congress assigned States under §252(c)(2)* – a section which specifies that *the States*, *not the FCC*, "shall…establish any rates for interconnection, services, or network elements according to subsection [252] (d) of this section."

It makes no sense to uphold an argument that setting both the interim[10] and final rates is not actually setting the rate. Indeed, the "terms and conditions" in the FCC argument is from §252(d)(2)(A), which is captioned "*Charges* for transportation and termination of traffic. Those "terms" apply *only* to analysis of the "reciprocal compensation" *rate*.

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[10] The FCC Br. at 28 n.9 references the 10th Circuit finding that Petitioners waived challenges to the FCC-set interim rates by not raising the argument in our initial brief. But the July 17, 2013 initial *Joint Intercarrier Compensation Principal Brief of Petitioners*, at 29-30, certainly does argue:

> "In 1996, the Commission adopted both a pricing methodology for States to apply… and "default proxies" (actual rates) for transport and termination...The Eighth Circuit on remand vacated the default prices, relying upon the Supreme Court…As the Order concedes, the Eighth Circuit found that "'[s]etting specific prices goes beyond the [Commission's] authority to design a pricing methodology,'" and "'intrudes on the States' right to set the actual rates...The FCC does the same thing here."

But even if we had not said this in our initial brief, the other text based arguments there - that the statute does not admit of a construction that allows the FCC to set a rate, logically, also apply to interim rates. *IUB* specifies the FCC cannot set rates. Any FCC-set rates, even if "interim", cannot be sustained. If certiorari is granted, this 10th Circuit determination re: the FCC's interim rates should be vacated.

Neither the FCC nor the 10th Circuit explain how a State can *ever* respond to Congress's mandate in §252(d)(2)(A), to "consider the terms for reciprocal compensation to be just and reasonable." If the rate is pre-ordained, it is impossible for a State to make the required determination that such "terms and conditions" "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carriers network facilities of calls that original on the network facilities of the other carrier." 47 U.S.C. §252(d)(2)(A).

AT&T Br. at 9 posits that NARUC is "not seriously contending that the decision below conflicts with" *IUB*. Actually, that is exactly what we contend. The FCC 10th Circuit-approved construction of the Act diverges from both the letter of the law, and this Court's construction of it in *IUB*.

The 10th Circuit deferred to the FCC claim that actually setting interim and final rates is *not* actually supplanting the rate-setting task assigned States by Congress. In *IUB*, this Court notes:

> The FCC's prescription, through rulemaking, of a requisite pricing *methodology* no more *prevents the States from establishing rates* than do the statutory "Pricing standards" set forth in § 252(d).
>
> *It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances*.

> That is enough to constitute the establishment of *rates*. *IUB*, 525 U.S. 366, 384 {emphasis added}

It is difficult to comprehend how, as the 10th Circuit confirms,[11] the States' ability arising under §§252(b)/251(c)(2)(B) to grant a carrier's requested point of interconnection can be construed as "determining the concrete result in particular circumstances" or fulfilling the role Congress assigned States in §§252(c)(2)&(d) to establish rates.

It is even more difficult to comprehend how the FCC's proscription of a zero rate can be construed as *not*, in the words of this Court in *IUB* "*prevent(ing) the States from establishing rates*." 525 U.S. 284 {emphasis added}

And it is impossible to understand how setting specific interim and final rates can possibly be construed as the "methodology" this Court described in *IUB*.

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[11] *See* FCC Br. at 29 n.10 ("That state authority includes the important ability to define the "edge" of a carrier's network.'" Pet. App. 199a, 203a.) Leaving States the option, pursuant to another section of §252 – to confirm or reject a carrier's requested point of interconnection may impact some costs, but it has zero to do with setting a rate that conforms to 252(d) standards. *See*, March 27, 2015 filed *Brief of Respondent in Support of Petition for Certiorari*, 14-901, filed by NTCA, at 7-8. Allowing the States to determine the "network edge" at which FCC-mandated rates apply, does not validate this clear departure from the Congressional scheme.

Both oppositions acknowledge that *IUB* is relevant – but provide the same tortured construction adopted by the 10th Circuit to contend that decision supports the FCC's actions and does not undermine the Congressionally-assigned State role.

These "arguments" are reasons to grant certiorari, not deny it.

AT&T next paradoxically argues that, although *IUB* supports the FCC's action, it is not *really* applicable – at least as interpreted by the 8th Circuit. AT&T claims the 8th Circuit didn't address state authority to set reciprocal compensation rates, and is not relevant because that case only "addressed [§]252(c)(2)." AT&T Brief at 10.

However, if you actually read [§]252(c)(2), it is relevant, as it specifies States must establish rates using §252(d) standards (which includes the §252(d)(2) "reciprocal compensation" standards).

AT&T continues, at 10, claiming the FCC order on review "by contrast" "

> addresses reciprocal compensation under [§]251(b)(5). State authority over reciprocal compensation is not found in Section §252(c)(2) or (d)(1) but instead in [§]252(d)(2), *which confers no rate setting authority*. (emphasis added.)

Read in context, with the U.S. Code in hand, the flaws in this last "argument" are clear. The Act not only confers, it imposes an exclusive federal *mandate* on States to "establish rates" in §252(c)(2)

using reciprocal compensation standards in §252(d)(2).

Certiorari is warranted to address the 10th Circuit's deviation from *IUB* and the clear text of the Act.

III. Certiorari should be granted to Settle the Recurring Question of Proper Application of §152(b) and §601(c)(1).

NARUC's petition points out that both §§ 152(b) of the 1934 Act and §601(c)(1) of the 1996 Act, by their express terms, are rules of statutory construction that *require* the FCC to "construe" preemptive portions of the Act *narrowly* and reservations of State authority *broadly*.

In *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 373, (1986), this Court acknowledged §152(b) "…contains not only a substantive jurisdictional limitation on the FCC's power, *but also a rule of statutory construction*." {emphasis added}

In practice, the FCC does not consider either provision, except to claim the deference it is due makes them inapplicable. This case was no different. App.187a

The FCC Br., at 26-27, claims a review of whether the 10th Circuit properly considered those provisions is foreclosed by this Court's decision in *IUB*.

However, even a cursory examination of NARUC's petition demonstrates the frailty of the FCC argument.

Below the FCC asserted that §251(b)(5) reciprocal compensation includes *intra*state access charges.

The *IUB* Court was not faced with *anything* resembling the tortured statutory analysis accepted by the 10th Circuit that (1) reciprocal compensation includes *intra*state access charges and (2) the FCC has final rate-setting authority for reciprocal compensation.

The *IUB* court did not, therefore, have to consider the impact of §152(b) and §601(c) to express reservations of State authority over, *inter alia*, intrastate access charges/intrastate retail rate design. Intrastate access service is not expressly included in the scope of §251(b)(5) and even the Supreme Court has recognized that the text of §252(c)(2) requires States to set the final rate. In such cases, the unambiguous text of §601(c)(1) and §152(b) precludes preemption of State authority over intrastate access service as well as the FCC supplanting the State rate-setting function.

In any case, one question remains outstanding. Where do these two express rules of statutory construction apply, if they do not apply to how the FCC (or Courts) construes purportedly "ambiguous" statutory text directly undermining tasks assigned by Congress to States.

The FCC's arguments and the 10th Circuits treatment of these two sections amply support the need for review. Again the FCC opposition highlights exactly why the Court should grant certiorari.

This Court should clarify how the express and mandatory instructions in §152(b) and §601(c)(1) are to be applied to tasks Congress either positively assigned (reciprocal compensation rates) or proactively reserved (intrastate access charges) to States.

The 10th Circuit's decision provides all the elements.

Here a Court approved preemption in the face of these two Congressional requirements based on alleged *ambiguities* in the statutory text – statutory text the same agency found 16 years earlier *unambiguously* required a contrary result.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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