No. 04-460

In the Supreme Court of the United States

NATIONAL LEAGUE OF CITIES, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission permissibly determined not to regulate cable modem service as a "cable service" under the Communications Act of 1934, 47 U.S.C. 151 *et seq*.

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OPINIONS BELOW

The opinion of the court of appeals (04-281 Pet. App. 1a-39a) is reported at 345 F.3d 1120. The declaratory ruling and notice of proposed rulemaking of the Federal Communications Commission (04-281 Pet. App. 40a-203a) is reported at 17 F.C.C.R. 4798.

JURISDICTION

The petitions for a writ of certiorari in No. 04-281 and No. 04-277 were filed on August 27 and 30, 2004, respectively. The conditional cross-petition was filed on September 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Cable modem service consists of the provision of high-speed (or "broadband") Internet access to subscribers through cable television facilities that have been modified to provide that additional service. On March 15, 2002, the Federal Communications Commission issued a Declaratory Ruling in which the agency determined that cable modem service is an information service under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, with no separately regulated telecommunications service component. In the course of its decision, the FCC also determined that cable modem service is not a cable service subject to regulation under Title VI of the Act, 47 U.S.C. 521-573. In reviewing the FCC's decision, the court of appeals relied on one of its own prior decisions, reached before the FCC had acted, to vacate the FCC's classification of cable modem service as purely an information service and to hold that cable modem service does have a separately regulated telecommunications service component. Also relying on its own prior decision, the court of appeals affirmed the FCC's determination that cable modem service is not a "cable service" under the Act.

The petitions for a writ of certiorari in Nos. 04-277 and 04-281 seek review of the court of appeals' determination that cable modem service has a separate component that is a telecommunications service under the Act. The instant cross-petition seeks review of the court of appeals' determination that cable modem service is not a "cable service" under the Act.

1. The Communications Act defines a "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service,

and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. 522(6). Video programming is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. 522(20), whereas "other programming service" is "information that a cable operator makes available to all subscribers generally," 47 U.S.C. 522(14).

a. The FCC concluded that cable modem service is not a cable service under 47 U.S.C. 522(6) for two broad reasons. First, the FCC explained that cable modem service does not satisfy the requirement of section 522(6)(A) that cable service involve a "one-way transmission to subscribers." 04-281 Pet. App. 120a. When Congress enacted 47 U.S.C. 522(6)(A) in 1984, cable operators had begun developing the capability to provide various types of "two-way" communications services (including common carrier services) over their cable systems, in addition to the "one-way" delivery of video programming that has traditionally characterized cable television service. Pub. L. No. 98-549, § 2, 98 Stat. 2780. Congress intended to subject only the latter one-way services to regulation under Title VI. Congress accordingly specified in 47 U.S.C. 522(6)(A) that cable service involves a "one-way transmission to subscribers," in order to distinguish between traditional cable services involving the "same package or packages of video programming transmitted from the cable operator * * * to all subscribers," 04-281 Pet. App. 120a, and other types of communications services that could be offered using a cable network. In subsequent decisions applying the statutory definition of cable service, the FCC interpreted the requirement of a "one-way transmission" as

requiring the cable operator to participate actively in the selection and distribution of video programming, *id.* at 121a, an interpretation of the Act that the D.C. Circuit has upheld as reasonable. See *National Cable Television Ass'n* v. *FCC*, 33 F.3d 66, 73 (1994) (*NCTA*).

Based on the record evidence before it, the FCC concluded in the declaratory ruling at issue in this case that cable operators offering cable modem service are not "in control of selecting and distributing content to subscribers." 04-281 Pet. App. 127a. The FCC explained that cable modem service allows subscribers "to define searches for information throughout the World Wide Web, query web sites for information, engage in transactions, receive individually tailored responses to their requests, generate their own information, and exchange e-mail," among other things. *Id.* at 127a-128a. Thus, the FCC concluded, "ultimate control of the [Internet] experience lies with the subscriber" and "the information received by the subscriber is tailored to that subscriber's interests." *Id.* at 129a. Although the FCC observed that some cable operators provide subscribers "proprietary information or packages of pre-selected web site links," *id.* at 130a, the Commission concluded that the fact that "discrete parts of cable modem service have characteristics of cable service * * * does not require classification of the service as a cable service when it is predominantly Internet access." *Ibid.* Under the "one-way transmission to subscribers" requirement, the fact that "the majority of the information accessed over the Internet is chosen individually by the Internet user without the involvement of the cable operator" is sufficient to support the FCC's conclusion that cable modem service is not a "cable service" under the Act. *Id.* at 129a.

The FCC also concluded that cable modem service is not a cable service because it does not satisfy the requirement of 47 U.S.C. 522(6)(A)(ii) for an "other programming service," which is defined as "information that a cable operator makes available to all subscribers generally." See 47 U.S.C. 522(14).[1] Under that definition, the FCC found that "other programming service" includes "non-video information having the characteristics of traditional video programming." 04-281 Pet. App. 123a (citing H.R. Rep. No. 934, 98th Cong., 2d Sess. 41-42 (1984)) (internal quotation marks omitted). In contrast, the FCC stated, information that is "subscriber specific," such as the information that a cable modem subscriber might choose to retrieve from the Internet, does not satisfy the condition in the definition of "other programming service" that the information must be made available "to all subscribers generally." *Ibid*.

b. The FCC rejected arguments that 47 U.S.C. 522(6)(B)—and particularly Congress's addition in 1996 of the term "or use" in Section 522(6)(B)—compels classification of cable modem service as a cable service. The FCC explained (04-281 Pet. App. 123a-125a) that cable modem service (had it existed at the time) clearly would have fallen outside of the pre-1996 definition of cable service, and that neither the text of the 1996 amendment nor its legislative history establishes that Congress intended the amendment to bring a service like cable modem service within the reach of the statute. *Id.* at 125a. As the FCC noted, "subscriber interaction is not a necessary component of cable service," as demon-

[1] The FCC noted that there was general agreement among commenters —not challenged by cross-petitioners here—that cable modem service is not "video programming" under 47 U.S.C. 522(6)(A)(i). 04-281 Pet. App. 122a-123a.

strated by the term "if any" in 47 U.S.C. 522(6)(B). Pet. App. 126a (quoting *NCTA*, 33 F.3d at 72) (internal punctuation omitted). Thus, the FCC explained, if a service offered by a cable operator does not satisfy the "one-way transmission" requirement in 47 U.S.C. 522(6)(A), it cannot become a cable service merely because "subscriber interaction [is] required" for the "use" of that service under 47 U.S.C. 522(6)(B). Pet. App. 125a-126a ("The [1996] amendment itself addresses only the use of content *otherwise qualifying as cable service*.") (emphasis added).

Finally, the FCC rejected arguments that the Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Tit. XI, §§ 1100-1104, 112 Stat. 2681-719 to 2681-726, reveals any congressional intent regarding the classification of cable modem service as a cable service under the Communications Act. 04-281 Pet. App. 131a. The Internet Tax Freedom Act prohibits certain state and local taxes on Internet access services, § 1101(a), 112 Stat. 2681-719, but specifically exempts franchise fees for cable services from the definition of taxes, § 1104(8)(B), 112 Stat. 2681-726. Noting at the outset that the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," 04-281 Pet. App. 132a (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)), the FCC concluded that, in any event, the 1998 exception for cable franchise fees did not indicate a congressional intent to address the scope of the definition of "cable service" in the Communications Act, but only clarified that franchise fees are outside the reach of the Internet Tax Freedom Act, *ibid*.

2. Petitions for review of the FCC's declaratory ruling classifying cable modem service were filed in the Third, Ninth, and D.C. Circuits. A judicial lottery

conducted under 28 U.S.C. 2112(a)(3) selected the Ninth Circuit to review the agency's decision. In responding to cross-petitioners' argument that cable modem service is a cable service under the Communications Act, the court of appeals explained that, in *AT&T Corp.* v. *City of Portland*, 216 F.3d 871 (9th Cir. 2000), it had rejected that argument on the basis that "[t]he essence of cable service * * * is one-way transmission of programming to subscribers generally," while the "salient characteristics" of cable modem service "are not one-way and general, but interactive and individual." 04-281 Pet. App. 13a (internal quotation marks omitted) (quoting *Portland*, 216 F.3d at 876). Concluding that *Portland* was binding circuit precedent, the court of appeals in this case affirmed the FCC's determination not to regulate cable modem service as a cable service under Title VI of the Act. 04-281 Pet. App. 21a-22a.

ARGUMENT

Unlike the petitions in Nos. 04-277 and 04-281, this cross-petition does not involve a reviewing court's rejection of the expert federal agency's reasonable interpretation of its governing statute. Instead, the court of appeals *upheld* the FCC's determination that cable modem service is not a "cable service" under the Communications Act. The Ninth Circuit's decision concerning the definition of cable service does not conflict with any decision of any other court of appeals or of this Court, and the question whether the Ninth Circuit erred in refusing to conduct *Chevron* analysis—which is squarely presented in Nos. 04-277 and 04-281—is not well framed here. Nor would grant of the cross-petition aid the Court's resolution of the issues presented in those other petitions. The cross-petition for a writ of certiorari should therefore be denied.

1. The government and the cable interests have filed petitions for writs of certiorari in Nos. 04-277 and 04-281 seeking review of the court of appeals' decision that cable modem service is partly an information service and partly a telecommunications service under the Communications Act. Cross-petitioners elected not to file a stand-alone petition to challenge the court of appeals' decision that cable modem service is not a cable service, and they do not contend that their cross-petition would have been worthy of a grant of certiorari had it been filed on a stand-alone basis. They nonetheless suggest (Cross-Pet. 4, 13) that, if the Court grants the petitions in Nos. 04-277 and 04-281, it should also evaluate the merits of cross-petitioners' arguments in favor of the cable service classification. That suggestion is unfounded for several reasons.

First, the court of appeals affirmed the FCC's decision that cable modem service is not a cable service, and there is no conflict of authority within the circuits on that point. The Eleventh Circuit is the only court of appeals other than the Ninth Circuit to have considered whether the cable service definition applies to cable modem service, and, in agreement with the FCC and the Ninth Circuit, the Eleventh Circuit concluded that cable modem service is not a cable service. *Gulf Power Co.* v. *FCC*, 208 F.3d 1263, 1276-1277 (11th Cir. 2000), rev'd on other grounds, 534 U.S. 327 (2002). Only one district court has adopted cross-petitioners' view that cable modem service is a cable service. See *MediaOne Group, Inc.* v. *County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000).[2] On review of that district court decision, the

[2] At least one other district court has followed the FCC's decision that cable modem service is not a cable service under the Act. See *Parish of Jefferson* v. *Cox Communications La., LLC*, No. Civ. A 02-

Fourth Circuit declined to adopt the district court's classification of cable modem service and affirmed on different grounds. *MediaOne Group, Inc.* v. *County of Henrico*, 257 F.3d 356 (4th Cir. 2001). Moreover, because the court of appeals' decision upholds the FCC's implementation of the Communications Act with respect to the reach of Title VI requirements, the cross-petition does not present a situation in which important federal policies established by the political Branches have been thwarted by non-deferential judicial review.

Second, cross-petitioners argue (Cross-Pet. 14) that the relationship between *Chevron* analysis and circuit precedent is a question that this Court should resolve. The Court can fully address that question, however, by granting the petitions for certiorari in Nos. 04-277 and 04-281. Grant of the cross-petition would not substantially aid the Court's resolution of the *Chevron* question. Indeed, cross-petitioners' principal argument is that *Chevron* deference is *not* appropriate because, in their view, "Congress spoke so comprehensively on the 'cable service' definition." Cross-Pet. 16. Cross-petitioners, therefore, are poorly positioned to defend the principle that a court of appeals should apply *Chevron* in reviewing a responsible agency's interpretation of ambiguous statutory provisions, notwithstanding the existence of circuit precedent addressing the same language.[3]

3344, 2003 WL 21634440, at *6 (E.D. La. July 3, 2003).

[3] It is also unpersuasive for cross-petitioners to argue (Cross-Pet. 24) that the court of appeals' decision to affirm the FCC's conclusion that cable modem service is not a cable service contravenes *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), by affirming the agency on grounds different from those the agency itself adopted. First, the FCC's reasons for concluding that cable modem service is not a cable service

Third, the Court can resolve the question raised in Nos. 04-277 and 04-281—whether the FCC permissibly determined that cable modem service does not include a separate telecommunications service component—without undertaking the entirely separate analysis that would be required to address cross-petitioners' arguments relating to the cable service definition. The permissibility of the FCC's classification of cable modem service as purely an information service, rather than partly an information service and partly a telecommunications service, turns on the definitions of "information service" and "telecommunications service" contained in 47 U.S.C. 153 and the FCC's decisions concerning the relationship between those two categories of service. In contrast, cross-petitioners' arguments regarding the definition of cable service are grounded in Title VI of the Communications Act and an entirely different set of FCC decisions and background materials relating to the definitions in 47 U.S.C. 522. See Cross-Pet. 16-20. Moreover, cross-petitioners do not argue that classifying cable modem service as a cable service would prevent the FCC from classifying it as an

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are consistent with the court of appeals' reasoning in *Portland*, which the Ninth Circuit applied here. Compare 04-281 Pet. App. 122a (emphasizing the statutory requirement of a one-way transmission) with *Portland*, 216 F.3d at 876-877 (same). Furthermore, cross-petitioners' suggestion (Cross-Pet. 23) that the court of appeals in this case could have followed *Chenery* after concluding that it was bound by *Portland* makes no sense. The Ninth Circuit's decision to follow its circuit precedent meant that it was not engaging in the sort of review of the agency's reasoning under the Administrative Procedure Act that would trigger *Chenery*. Lastly, cross-petitioners' *Chenery* argument involves no more than applying the settled law stated in *Chenery* (which the Ninth Circuit did not even consider because of its reliance on circuit precedent) to particular facts.

information service as well (see Cross-Pet. 6, 12), and nothing in the Act indicates that those two regulatory categories are inherently inconsistent. Therefore, upholding the FCC's conclusion that cable modem service does not contain a separate telecommunications service component would not require this Court to consider the correctness of the agency's decision that cable modem service is not a cable service.

2. In any event, cross-petitioners' argument (Cross-Pet. 16-20) that the definition of cable service unambiguously encompasses cable modem service is untenable. It is settled law that, when a cable operator offers "video programming" under 47 U.S.C. 522(6)(A)(i), the requirement of a "one-way transmission to subscribers" in the definition of cable service requires the cable operator to participate actively in the selection and distribution of that programming. See *NCTA*, 33 F.3d at 73. Cross-petitioners do not challenge the FCC's determination that the requirement of active participation applies equally to "other programming services" under 47 U.S.C. 522(6)(A)(ii). They also do not allege that the cable operator actively participates in the selection of content that cable modem subscribers receive from the Internet, or challenge the FCC's undisputed determination that "the majority of the information accessed over the Internet is chosen individually by the Internet user." 04-281 Pet. App. 129a. Yet cross-petitioners contend that cable modem services are "other programming services" because Internet access service constitutes "information that a cable operator makes available to all subscribers generally." Cross-Pet. 18 (citing 47 U.S.C. 522(14)). The FCC reasonably rejected that argument, concluding that information is not made available generally to subscribers when the particular information

that subscribers receive depends on their individual Internet queries and on-line activities. 04-281 Pet. App. 127a-128a.

Cross-petitioners respond (Cross-Pet. 18) that cable modem service provides all subscribers with access to the same information on the Internet. That is incorrect. Internet information to which one cable modem subscriber obtains access (*e.g.*, on-line banking information and personal e-mails) may be unavailable to other subscribers of the same cable modem service. It is ultimately the subscriber, not the cable operator, who selects the information to be retrieved. Moreover, contrary to cross-petitioners' suggestion (Cross-Pet. 21-22), neither a cable operator's provision of certain content to its cable modem subscribers, nor any technical ability to block subscribers' access to certain content on the Internet, requires that cable modem service as a whole be classified as a cable service. As the FCC concluded, cable modem service is "built around Internet access," 04-281 Pet. App. 127a, and the fact that the cable operator may take steps to make Internet access "easier, faster, and more convenient" does not remove "ultimate control" of the Internet experience from the subscriber. *Id. at* 129a.[4]

[4] Cross-petitioners likewise are incorrect in their suggestion (Cross-Pet. 22) that cable modem service must be a telecommunications service unless the cable operator exercises editorial control over the information that subscribers receive. Cable modem service, like all Internet access services, permits a subscriber to "retriev[e] * * * information via telecommunications." 47 U.S.C. 153(20) (defining information services). As explained in the government's petition in No. 04-281 (at 16-19), subscribers can access the cable operator's information services through "telecommunications" without acquiring a "telecommunications service" from the cable operator.

The FCC also reasonably concluded that Congress's addition in 1996 of the term "or use" to part (B) of the definition of cable service (47 U.S.C. 522(6)(B)) was not intended, as cross-petitioners suggest (Cross-Pet. 12, 17), to sweep all information services provided by cable operators into Title VI of the Communications Act. Cross-petitioners rely heavily on a statement in the conference report on the 1996 amendment that the amendment "reflect[ed] the evolution of cable to include interactive services" such as "information services" and "enhanced services." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 169 (1996). But as the FCC explained in its declaratory ruling (04-281 Pet. App. 127a), the language of the 1996 amendment itself, while contemplating the provision of "interactivity associated with both video and other programming services," did not reflect an intent to expand the definition of cable service to encompass *all* information services provided by cable operators. Rather, Congress left intact, as an independent element of the "cable service" definition, the long-standing requirement of a "one-way transmission to subscribers" that cable modem service fails to satisfy. *Ibid.*

Finally, cross-petitioners' reliance (Cross-Pet. 19) on the Internet Tax Freedom Act's exception for "franchise fees" is misplaced. As the FCC observed, nothing in this 1998 statute purports to speak to the Communications Act's definition of cable service or the proper interpretation of the 1996 amendment to that definition. 04-281 Pet. App. 132a. Nor is the franchise fees exception "meaningless surplusage" (Cross-Pet. 19); because the Internet Tax Freedom Act was enacted before the FCC had classified cable modem service under the Communications Act, Congress may well have decided to

include the exception out of an abundance of caution. See, e.g., *Fort Stewart Schs.* v. *FLRA*, 495 U.S. 641, 646 (1990) ("It might reasonably be argued, of course, that these two exceptions are indeed technically unnecessary, and were inserted out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti cautela*)."). In short, the Internet Tax Freedom Act does not support cross-petitioners' challenge to the reasonableness of the FCC's resolution of the ambiguity in the Communications Act's definition of cable service.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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