No. 99-2038

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISERS, 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 SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JOEL I. KLEIN
Assistant Attorney General

ROBERT J. WIGGERS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

CHRISTOPHER J. WRIGHT
General Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether Entertainment Connections, Inc., which provides satellite master antenna television service to subscribers in 12 apartment buildings in Michigan, is required to obtain a local franchise under Title VI of the Communications Act, 47 U.S.C. 541(b)(1).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page

Constitution, statutes and regulations:

In the Supreme Court of the United States

No. 99-2038

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISERS, 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 SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A24) is reported at 199 F.3d 424. The opinion and order of the Federal Communications Commission (Pet. App. A27-A107) is reported at 13 F.C.C. Rcd 14277.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1999. Petitions for rehearing were denied on March 22, 2000 (Pet. App. A109-A110). The petition for a writ of certiorari was filed on June 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For many years, no federal statute governed the regulation of cable television. During that time, the Federal Communications Commission began to regulate cable television in conjunction with its statutory duty to regulate broadcasting. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). As federal regulation of cable television evolved, the FCC preempted many forms of local cable regulation, including leased channel regulations and technical standards. *Amendment of Part 76 of the Commission's Rules*, 54 F.C.C.2d 855, 863 (¶ 25) (1975). But the Commission declined to preempt local franchising of cable systems that transmit video programming through coaxial cables buried in public rights-of-way. *Ibid.* (¶ 24).

At the same time, the Commission concluded that distributors of multichannel video programming should not be subject to local franchising if they do not use public rights-of-way to deliver programming. For instance, the Commission preempted local franchising of systems that use multipoint distribution service (MDS), a service that transmits microwave radio frequencies to rooftop antennas for distribution to subscribers in apartment buildings. *Orth-O-Vision, Inc.*, 69 F.C.C.2d 657 (1978), on recons., 82 F.C.C.2d 178 (1980), aff'd *sub nom. New York State Comm'n on Cable Television* v. *FCC*, 669 F.2d 58 (2d Cir. 1982). Similarly, the Commission preempted local franchising of satellite master antenna television (SMATV) systems, which transmit television signals from satellites directly to satellite receiving stations atop apartment buildings. *Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1224 n.3 (1983), aff'd *sub nom. New York State*

Comm'n on Cable Television v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984).

2. In 1984, Congress passed the Cable Communications Policy Act, Pub. L. No. 98-549, 98 Stat. 2779 (1984 Cable Act), the first comprehensive federal legislation concerning cable television. The 1984 Cable Act created Title VI of the Communications Act. Among other things, Title VI codified the well-established practice of local cable television franchising. It provided that, with limited exceptions, "a cable operator may not provide cable service without a franchise." 47 U.S.C. 541(b)(1). The statute defined a "cable operator" as any person or group "(A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. 522(5). The statute defined a "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. 522(7) (1994 & Supp. III 1997).

The 1984 Cable Act expressly excluded certain types of facilities from the definition of "cable system." In particular, the statute made clear that the term "cable system" did not include private cable facilities that serve "only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities us[e] any public right-of-way." 47 U.S.C. 522(6)(B) (1988). Thus, under the statute's plain terms, operators of private

cable facilities are exempt from the franchise requirement.[1]

Originally, the private cable exemption applied only to systems serving "multiple unit dwellings under common ownership, control, or management." 47 U.S.C. 522(6)(B) (1988). Congress eliminated that restriction when it amended the Communications Act in 1996. As amended, the statute provides that any "facility that serves subscribers without using any public right-of-way" is exempt from local franchising, even if the facility serves buildings that are not commonly owned, controlled, or managed. 47 U.S.C. 522(7)(B) (Supp. III 1997).

3. Private cable systems were not the only facilities exempted from local cable franchising. In the early 1990s, the FCC determined that the Title VI franchise requirement did not apply to "video dialtone," a new format proposed by the Commission for delivering multichannel video programming. Under the proposed framework for video dialtone, a telephone company would provide unaffiliated video programmers with nondiscriminatory access to a "platform" that they would use to deliver their video services to their respective subscribers. The Commission concluded that neither the telephone company supplying the video dialtone platform nor any programmer using the platform qualified as a "cable operator" subject to local franchise obligations. *Telephone Co.-Cable Television Cross-Ownership Rules*, First Report and Order, 7 F.C.C.R. 300, 324-328 (¶¶ 47-52) (1991), on recons., 7 F.C.C.R. 5069 (1992), aff'd *sub nom. National Cable*

---

[1] This Court rejected a claim that the private cable exemption from local franchising violated the Constitution's Equal Protection Clause. *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307 (1993).

Television Ass'n, Inc. v. *FCC*, 33 F.3d 66 (D.C. Cir. 1994) (*NCTA*).

The Commission reasoned that a telephone company providing a video dialtone platform would not be a "cable operator" providing "cable service" because it would not transmit programming of its own choosing, but would merely serve as a conduit for programming selected by unaffiliated programmers. As for those programmers, the Commission found that they would not be "cable operators" because they would not own, control, or manage the video dialtone platform. On review, the D.C. Circuit affirmed the Commission's determination that none of the participants in providing video dialtone service was required to obtain a local franchise. *NCTA*, 33 F.3d at 70-75.[2]

4. The issue in this case is whether the Title VI franchise requirement applies to Entertainment Connections, Inc. (ECI), a SMATV provider that serves approximately 1600 subscribers in twelve apartment buildings in Michigan. Originally, ECI operated a conventional SMATV system. It transmitted its video signal to a separate master antenna television facility, or "headend," at each building it served; and each headend then distributed ECI's video signal to subscribers within that building. As long as ECI provided

---

[2] At the time the FCC adopted its video dialtone rules, the Communications Act generally banned cable-telephone company cross-ownership. See 47 U.S.C. 533(b) (1988). The Commission envisioned video dialtone as a method for telephone companies to participate in the provision of cable service without violating the cross-ownership ban, but very few telephone companies ever took advantage of that method. In 1996, Congress rescinded both the cross-ownership ban and the FCC's video dialtone regulations. Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(1) and (3), 110 Stat. 124.

service this way, its video signal never crossed public rights-of-way, and no local franchising authority asked ECI to obtain a cable franchise. Pet. App. A3.

In 1996, ECI reconfigured its SMATV system to transmit video signals through a single headend. In order to link that headend with the various apartment buildings it serves, ECI entered into a contract to purchase "Supertrunking Video Transport Service" from Ameritech, the incumbent local exchange carrier in Michigan. Ameritech offers this service to video programming providers on a common carrier basis. Under its service contract with ECI, Ameritech conveys ECI's video signal from ECI's headend to the various apartment buildings through fiber optic facilities that traverse public rights-of-way. Ameritech constructed, owns, and manages these transmission facilities. At each building, Ameritech's lines connect to junction boxes, which connect with ECI's interior building drop lines, which in turn connect to the television sets of individual subscribers. Pet. App. A3, A30. The headend and reception facilities that ECI owns or controls are located entirely on private property; they do not encroach on public rights-of-way (*id.* at A31).

After ECI began using Ameritech's video transport service in East Lansing and Meridian Township, Michigan, officials in those two communities informed ECI that it needed to obtain local franchises for its reconfigured SMATV system (Pet. App. A3). In response, ECI filed a motion with the FCC requesting a declaratory ruling that ECI was not a "cable operator" subject to the franchise requirement of Title VI (*id.* at A4).

5. After receiving and reviewing extensive comments on the subject from interested parties (summarized at Pet. App. A36-A50), the FCC issued a declaratory ruling that ECI need not obtain a cable

franchise under Title VI. The Commission relied on its previous determination in the video dialtone context that "the term 'cable operator' does not encompass an entity that maintains reception and transmission equipment wholly on private property and that transmits its video signals through the public rights-of-way solely by means of a local exchange carrier's facilities that are made available on a common carrier basis." *Id.* at A71. The Commission noted that in ECI's case, as in video dialtone, two separate entities control the headend and transmission facilities, and the owner of the transmission facilities makes them available to multiple video programming providers. Under those circumstances, where "the concepts of a single, integrated system and unified control are not present," the Commission reasoned that ECI, like a programmer using a video dialtone platform, lacks sufficient ownership or control of a cable system to qualify as a "cable operator" under Title VI. *Id.* at A73-A75 (quoting *NCTA*, 33 F.3d at 74).

As an alternative basis for its declaratory ruling, the Commission determined that ECI qualified for the "private cable" exemption from local franchising because ECI's facilities did not use any public rights-of-way to serve subscribers (Pet. App. A81-A82). While the Commission acknowledged that "ECI's signal moves across public rights-of-way to reach its subscribers," it observed that "Ameritech, not ECI, * * * uses the rights-of-way" to transport ECI's programming. *Id.* at A81. The Commission concluded that ECI did not "use" rights-of-way merely by hiring Ameritech to transport ECI's signal, since ECI's own facilities did not use any rights-of-way. *Id.* at A82.

In ruling that ECI is not subject to local franchising requirements, the FCC emphasized that its decision is

"expressly limited to the facts before the Commission as presented by ECI." Pet. App. A91. Specifically, the Commission identified seven factors on which it based its conclusion:

> (i) there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them; (ii) ECI's facilities are located entirely on private property; (iii) Ameritech provides service to ECI pursuant to a tariffed common carrier service; (iv) Ameritech has no editorial control over the content of ECI's programming; (v) the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI's request; (vi) there is capacity to serve several other programming providers; and (vii) ECI has committed to make its drops available to other programming providers.

Ibid.

6. Various parties filed petitions for judicial review of the FCC's decision. Those petitions were consolidated in the Seventh Circuit. A divided panel of that court denied the petitions for review. Pet. App. A1-A24. The court, noting the ambiguous statutory definition of "cable operator" and the specific characteristics of the system used to transmit ECI's programming, held that the FCC had reasonably concluded that "there is no entity which owns a significant interest in the system or who controls, manages, or operates the system as a whole." *Id*. at A14. Consequently, the court upheld the FCC's determination that ECI is not a "cable operator" under Title VI. The court also found ambiguity in statute's definition of "cable system", which excluded private cable facilities that provide

service "without using any public right-of-way." 47 U.S.C. 522(7)(B) (Supp. III 1997). The court concluded that it is unclear "what is meant by 'using' the public right-of-way." Pet. App. A13. Because that term could reasonably be construed to entail construction of cable facilities on public rights-of-way, "it is reasonable to conclude that ECI has not 'used' the public right-of-way." *Id.* at A16. On that basis, the court upheld the Commission's finding that ECI qualifies for the private cable exemption from local franchising.[3]

The dissenting judge disagreed with the majority's conclusion that the Title VI provisions governing local franchising are ambiguous. In her view, the plain language of those provisions compels the conclusion that ECI must obtain a franchise to provide its video service. Pet. App. A18-A24 (Rovner, J., dissenting).

On March 22, 2000, the Seventh Circuit denied several petitions for rehearing and rehearing en banc. Three judges voted for rehearing en banc.

ARGUMENT

1. Petitioners assert that the FCC's decision in this case produced a "radical restructuring of Title VI." Pet. 11. But there was nothing radical about the Commission's declaratory ruling on ECI's franchise obligations. By expressly confining that ruling to the specific facts presented by ECI, the Commission merely concluded that the novel facts presented properly fit within a very narrow extension of franchising

[3] The panel majority made clear that it would have reached the same result in this case even if it were not required to defer to the FCC's statutory interpretation: "[W]hile the agency interpretation is, of course, not the only possible one, it is one which we are now convinced we would arrive at ourselves, were we the ones making the original determination." Pet. App. A8.

exemptions that have been in place for many years. Given the limited effect of the FCC's ruling, this case does not warrant this Court's review.

Contrary to petitioners' suggestion, exemptions from local cable franchising are nothing new. In the 1980s, the courts affirmed the FCC's exemption of MDS and SMATV systems from local franchising obligations. See *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984) (affirming SMATV exemption); *New York State Comm'n on Cable Television* v. *FCC*, 669 F.2d 58 (2d Cir. 1982) (affirming MDS exemption). Then, in the 1990s, the D.C. Circuit upheld the FCC's ruling that Title VI franchise requirements did not apply to video dialtone. *NCTA*, 33 F.3d at 70-75. Thus, as the court below rightly recognized, "the exemption from local franchise requirements of some technology which does, in fact, provide cable programming is not a novel nor a static one. Nor does the ever-evolving technology allow the boundaries which are drawn to always be clear and distinct." Pet. App. A12.

The Commission's exemption of ECI from local franchising represented a minor extension of existing franchise exemptions in response to a newly created system for video programming distribution. As the court below observed, ECI's system shares several attributes of SMATV and video dialtone systems, which "have a history of exemption from the [franchise] requirement." Pet. App. A10-A11. The Commission identified a number of specific ways in which ECI's system resembles a video dialtone arrangement:

> (i) there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between

> them; (ii) ECI's facilities are located entirely on private property; (iii) Ameritech provides service to ECI pursuant to a tariffed common carrier service; (iv) Ameritech has no editorial control over the content of ECI's programming; (v) the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI's request; (vi) there is capacity to serve several other programming providers.

Pet. App. A91. In light of these factors, and in view of ECI's commitment to make its drop lines available to other programming providers, the Commission decided that ECI's system, like video dialtone, is not subject to the local franchising requirement of Title VI.

Petitioners incorrectly claim that the fact-specific declaratory ruling in this case will "exempt a large subclass of wireline cable operators" from local franchising. Pet. 8. By its own terms, the FCC's ruling here is "expressly limited to the facts before the Commission as presented by ECI." Pet. App. A91. Petitioners do not identify any other provider whose video programming distribution facilities share the distinctive characteristics of ECI's system. They suggest instead that cable operators may try to evade local franchising by reconfiguring their systems to mirror ECI's operations. It is, however, implausible to speculate that cable operators that own and control their own transmission lines will abandon those facilities in favor of a video transport service offered by a telephone company, particularly when that service is made available on a common carrier basis to multiple video programming providers. At bottom, this case involves a fact-bound declaratory ruling about a video programming provider whose system appears to be

quite unusual. Because that ruling is unlikely to have far-reaching consequences, further review is not warranted.

2. Petitioners also incorrectly assert that the decision below conflicts with *City of Austin* v. *Southwestern Bell Video Services, Inc.*, 193 F.3d 309 (5th Cir. 1999), cert. denied, 120 S. Ct. 1708 (2000). In *City of Austin*, as in this case, the court affirmed a ruling that the local franchising requirements of Title VI do not apply to a video programming distribution system when: (1) the headend and transmission facilities are controlled by two different entities; and (2) the transmission facilities are controlled by a common carrier that offers its video transport service to multiple video programming providers. The only apparent difference between the systems in these two cases is that, in *City of Austin*, the two entities that owned parts of the system were affiliates of the same parent company. Acknowledging that affiliation, the Fifth Circuit nonetheless found that, because the two companies maintained separate and independent operation of their respective facilities, no single entity in that case controlled, managed, or owned a significant interest in a "cable system." *City of Austin*, 193 F.3d at 311-312. The Fifth Circuit's reasoning in *City of Austin* would not dictate a different outcome here. If anything, the franchising exemption affirmed by the Fifth Circuit in *City of Austin* is broader than the declaratory ruling at issue here; and this Court saw no need for further review of the Fifth Circuit's decision. 120 S. Ct. 1708 (2000). There is even less reason to review the more circumscribed ruling in this case.

3. In any event, the court below correctly decided this case. The scope of the Title VI franchising requirement is not entirely clear, because the defini-

tions of "cable operator" and "cable system" are ambiguous in respects that are relevant here. The court accordingly deferred to the FCC's reasonable interpretation of these statutory terms. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U. S. 366, 396-398 (1999) (deferring to FCC on interpretation of Communications Act); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

Contrary to petitioners' assertion (Pet. 12), neither the Commission nor the court below found that ECI is exempt from franchising simply "because it does not have complete ownership" of all the components of its cable system. Pet. App. A14. As the court correctly found, Ameritech's separate ownership of the system's transmission facilities is "an element, but not the sole basis, of the FCC decision." *Ibid.* That decision rests on a number of factors. Among other things, the Commission found that the facilities Ameritech uses to transport ECI's signal can also be used to serve other video programming providers. The Commission further noted that Ameritech offers its video transport service on a common carrier basis. These and other factors, in combination with Ameritech's separate ownership and control of the transmission facilities, persuaded the Commission and the court below that "there is no entity which owns a significant interest in the system or who controls, manages, or operates the system as a whole." *Ibid.*

These additional factors distinguish ECI's operations from channel service. Under a channel service arrangement, a telephone company builds a transmission facility to a cable operator's specifications and dedicates that facility exclusively to transmission of the cable operator's programming. See Pet. App. A76-A77; *New York Tele. Co.*, 10 F.C.C.R. 11548, 11552 n.18 (1995).

The Commission had previously indicated that a cable operator using channel service must hold a local cable franchise pursuant to Title VI. See *Telephone Co.-Cable Television Cross-Ownership Rules*, Second Report and Order, 7 F.C.C.R. 5781, 5787 n.21 (1992). ECI's system, however, differs from channel service in critical respects. As the court below observed, the facilities used by Ameritech to provide service to ECI were, "for the most part, not constructed at ECI's request." Pet. App A15. The "large majority" of those facilities "were constructed by Ameritech prior to marketing its Supertrunking video service" (*id.* at A77). Even the few facilities that Ameritech constructed in response to ECI's request for service are not dedicated to ECI's exclusive use. In marked contrast to a channel service arrangement, Ameritech is offering to provide video transport service to other video programming providers over the same facilities that it currently uses to serve ECI. *Id.* at A77-A78. These fundamental differences between ECI's system and channel service justified different regulatory treatment of ECI under Title VI. Cf. *NCTA*, 33 F.3d at 74-75 (differentiating between video dialtone and channel service). Indeed, the closest parallel to ECI's system is not channel service, but video dialtone. When that service was in existence, it was not subject to Title VI franchise requirements, as the D.C. Circuit concluded in *NCTA*, 33 F.3d at 70-75. That decision reflects a reasonable analysis of the uncertain boundaries of the local franchising requirement under Title VI, an analysis that the court below essentially tracked in this case. Further review is not warranted.

Although petitioners concede that ECI's system is "similar" to video dialtone, they assert that "Congress explicitly rejected" video dialtone "in favor of a less

radical open video system" when it amended the Communications Act in 1996. Pet. 24. But petitioners offer no evidence that the 1996 amendment reflected congressional disapproval of the D.C. Circuit's ruling in *NCTA*. Presumably, if Congress had disagreed with the court's statutory interpretation in *NCTA*, it would have amended the definitions of "cable operator" and "cable system" to make clear that Title VI franchising requirements would apply to systems resembling video dialtone. Instead, the 1996 amendments *reduced* the scope of local franchising by expanding the private cable exception to the definition of "cable system."[4]

Finally, there is no merit to petitioners' claim (Pet. 24-28) that the court below should not have deferred to the FCC's statutory interpretation. Petitioners point out that judicial deference is inappropriate when an agency interprets a statute that it does not administer. Pet. 25 (citing *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990)). In this case, however, the FCC construed provisions that define terms used throughout Title VI of the Communications Act. Various provisions of Title VI direct the Commission to regulate "cable operators" and "cable systems." See, *e.g.*, 47 U.S.C. 533(f)(1)(B) (directing the FCC "to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest"). To discharge these regulatory re-

[4] Moreover, contrary to petitioners' suggestion, it is unlikely that Congress viewed video dialtone as a "radical" concept. At the time Congress eliminated the FCC's video dialtone regulations in 1996, virtually no video dialtone systems existed. In all likelihood, Congress created a new regulatory framework to replace video dialtone simply because so few entities had shown any interest in the concept.

sponsibilities, the Commission necessarily must construe the statutory definitions of the terms "cable operator" and "cable system." Therefore, the Commission's interpretation of these statutory definitions is entitled to judicial deference.

In any event, the court below made clear that it would have reached the same conclusion even without deference to the FCC's statutory construction: "[W]hile the agency interpretation is, of course, not the only possible one, it is one which we are now convinced we would arrive at ourselves, were we the ones making the original determination." Pet. App. A8. The court's analysis of the Title VI franchising requirement in this case is fully consistent with decisions rendered by other courts on this subject. See *City of Austin*, 193 F.3d at 311-312; *NCTA*, 33 F.3d at 70-75. Most importantly, the court's reading of the relevant statutory provisions is reasonable. The statute's definition of "cable system" refers to "a set of closed transmission paths and associated signal generation, reception, and control equipment." 47 U.S.C. 522(7) (1994 & Supp. III 1997). Because Ameritech's "closed transmission paths" can be used by multiple entities to distribute video programming, it was reasonable for the Commission and the court to conclude that Ameritech's "closed transmission paths" could not really be "associated" with the signal generation and reception equipment of any single video programming provider.

In sum, the decision below affirms an agency's reasonable interpretation of ambiguous statutory language in a very limited factual context. There is no conflict of appellate decisions or other reason for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

SETH P. WAXMAN
Solicitor General

JOEL I. KLEIN
Assistant Attorney General

ROBERT J. WIGGERS
Attorney

CHRISTOPHER J. WRIGHT
General Counsel
Federal Communications Commission

AUGUST 2000