IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-1479 (consolidated with 00-1004)

BELL ATLANTIC TELEPHONE COMPANIES and
QWEST COMMUNICATIONS INTERNATIONAL INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Review of Orders of the
Federal Communications Commission

BRIEF FOR PETITIONERS

Under the Telecommunications Act of 1996 and Federal Communications Commission precedent interpreting that Act, "information services," which include many Internet services, by definition offer the user "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(21). In contrast to the information-changing character of an information service, the "term 'telecommunications' means the transmission . . . of information of the user's choosing, *without change in the form or content of the information* as sent and received." *Id.* § 153(43) (emphasis added).

As these definitions demonstrate, and as the FCC squarely held (after issuing the order under review), "'telecommunications' and 'information service' are *mutually exclusive categories*." *Report to Congress*[1] ¶ 69 n.138 (emphasis added). Therefore, although an information service is by definition provided "via telecommunications," 47 U.S.C. § 153(21), an information service provider "does not [thereby] *provide* telecommunications"; rather, "it is *using* telecommunications" to provide its information service. *Report to Congress* ¶ 41 (emphases added).

This case turns on these vital distinctions, mandated by the language of the 1996 Act and confirmed by the Commission's own reading. Section 271(a) of the 1996 Act states that neither a Bell operating company nor its affiliate may "provide interLATA [*i.e.*, long-distance] services" except under the terms set forth in the remainder of section 271. 47 U.S.C. § 271(a).[2] The section 271(a) prohibition cannot extend to information services unless the term "interLATA services" includes both telecommunications and information services. But Congress expressly restricted the term "interLATA services" by defining it to mean "telecommunications" between LATAs. *Id.* § 153(21). Accordingly, when a Bell operating company or its affiliate provides an information service (such as an Internet

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[1] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998).

[2] LATAs, or local access and transport areas, are the local calling areas that were first established when AT&T divested the Bell operating companies under a consent decree. *See United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). "[A]ll Bell territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest." *United States v. Western Elec. Co.*, 569 F. Supp. 990, 993-94 (D.D.C. 1983). The 1996 Act defines "LATA" as a geographically contiguous local calling area established by a Bell operating company before the date of enactment or thereafter modified with the FCC's approval. *See* 47 U.S.C. § 153(25).

service) between LATAs "*via* telecommunications," it does not "provide" an "interLATA service" under section 271(a).

In spite of these clear definitions in the 1996 Act, the Commission unlawfully concluded in the *Non-Accounting Safeguards Order*[3] that the "interLATA services" prohibited by section 271(a) include both "telecommunications" and "information services," because an information service is provided "via telecommunications" — the very reasoning foreclosed by the statute and subsequently rejected by the Commission itself in its *Report to Congress*. *Non-Accounting Safeguards Order* ¶ 56 (JA __).

JURISDICTION

The FCC released its *Non-Accounting Safeguards Order* on December 24, 1996. Numerous parties, including petitioner Qwest Communications International Inc., thereafter filed timely petitions for reconsideration. The Commission took final action on those petitions on October 1, 1999, when it released its *Third Reconsideration Order*.[4] Now that the FCC has disposed of the petitions for reconsideration, the *Non-Accounting Safeguards Order* itself is subject to judicial review. The Commission gave public notice of the *Third Reconsideration Order* (*see* 47 C.F.R. § 1.4(b)(1)) on November 12, 1999, by publishing a summary in the Federal Register. 64 Fed. Reg. 61,527.

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[3] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905 (1996) (JA __-__).

[4] Third Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 14 FCC Rcd 16299 (1999) (JA __-__). Although the Commission issued two earlier orders on reconsideration, neither addressed the petitions for reconsideration disposed of in the *Third Reconsideration Order*.

Petitioners filed their petitions for review in this Court on November 22, 1999, and January 10, 2000, within the 60-day period prescribed by 28 U.S.C. § 2344. This Court has jurisdiction under 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). Venue is proper in this Court under 28 U.S.C. § 2343.

ISSUE PRESENTED FOR REVIEW

The question in this case is whether the FCC acted unlawfully when it ruled in the *Non-Accounting Safeguards Order* that the term "interLATA services," as used in section 271 — and as defined in section 153(21) to mean "telecommunications" — includes "information services," notwithstanding that the statute establishes (as the Commission itself has ruled repeatedly) that "telecommunications" and "information services" are mutually exclusive categories and that a provider of "information services" does not *provide* "telecommunications" but rather *uses* "telecommunications."

STATUTES AND REGULATIONS

The relevant provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq*., are set forth in the Addendum.

STATEMENT OF THE CASE

A. Statutory Background

The Telecommunications Act of 1996 became law in February 1996. Pub. L. No. 104-104, 110 Stat. 56. The Act's intent was "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Joint Statement of Managers, S. Conf. Rep. No. 104-230, at 1 (1996), *quoted in*

Non-Accounting Safeguards Order ¶ 1 (JA __). The Act provides explicit definitions for its key terms. *See* 47 U.S.C. § 153. Relevant to this case are the following:

> "The term **'telecommunications'** means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43).
>
> "The term **'telecommunications service'** means the offering of telecommunications for a fee directly to the public . . . ." *Id.* § 153(46).
>
> "The term **'information service'** means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ." *Id.* § 153(20).

These defined terms are incorporated into the substantive provisions of the 1996 Act, including the "Special Provisions Concerning Bell Operating Companies," *id.* §§ 271-276. Of particular relevance here, section 271(a) restricts a Bell company (or its affiliate) from providing certain kinds of "interLATA services" (commonly referred to as long-distance services, *see AT&T Corp. v. FCC*, Nos. 99-1538 & 99-1540, 2000 WL 964030, at *2 (D.C. Cir. Aug. 1, 2000)). Specifically, section 271(a) states that a Bell company (or its affiliate) may not "provide interLATA services except as provided in this section." 47 U.S.C. § 271(a). Section 271(b), in subsections (1)-(3), then states three exceptions: (1) a Bell company may provide "interLATA services originating in any of its in-region States"[5] if the FCC grants its approval under section 271(d)(3); (2) a Bell company may immediately provide "interLATA services originating outside its in-region States"; and (3) a Bell company may

[5] An "in-region State" is a state in which a Bell company was authorized to provide wireline services under the AT&T consent decree, as in effect on the day the 1996 Act was enacted. 47 U.S.C. § 271(i).

immediately provide "incidental interLATA services (as defined in subsection (g)) originating in any State." *Id.* § 271(b).

The critical term, "interLATA services," which describes what a Bell company generally may not do in its in-region states without FCC approval, is also expressly defined by the 1996 Act:

> "The term '**interLATA service**' means *telecommunications* between a point located in a local access and transport area and a point located outside such area." *Id.* § 153(21) (emphasis added).

B. Proceedings Below

The question presented in this case is whether the "interLATA services" covered by section 271, which the statute defines as "telecommunications" between LATAs, also include the discrete category of interLATA "information services," *i.e.*, information services provided via telecommunications crossing LATA boundaries, of which many Internet services are a principal example. In its Notice of Proposed Rulemaking that led to the order under review, the Commission (we believe correctly) answered that question in the negative:

> [T]he 1996 Act defines "interLATA service" as referring to telecommunications service. *See* 47 U.S.C. §153(21). Thus, where the 1996 Act draws distinctions between in-region and out-of-region "interLATA services," as it does in section 271(b), these distinctions do not apply to information services.

Non-Accounting Safeguards NPRM [6] ¶ 41 n.80 (JA __). The Commission rendered this interpretation in the context of examining the requirement in section 272 that certain Bell company

[6] Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 18877 (1996) (JA __-__).

activities, including the provision of information services, be conducted through a separate affiliate rather than by the Bell company itself. *Non-Accounting Safeguards NPRM* ¶ 41 (JA __).

In its final order, however, the Commission reversed itself, in response to unsolicited comments. *Non-Accounting Safeguards Order* ¶ 52 (JA __) ("Although we did not specifically seek comment on this analysis, several parties disagree with our interpretation of the scope of the term 'interLATA services.'"). The Commission concluded — in just two short paragraphs containing little in the way of explanation — that "interLATA information services are provided via interLATA telecommunications transmissions and, accordingly, fall within the definition of interLATA service." *Id.* ¶ 56; *see also id.* ¶ 57 (JA __).

Because the statute defines "interLATA service" to mean "telecommunications," the Commission's conclusion necessarily requires that "information services" qualify as "telecommunications." In orders issued after the *Non-Accounting Safeguards Order*, however, the Commission announced a directly contradictory interpretation, expressly *rejecting* the notion that "information services are inherently telecommunications services because information services are offered via 'telecommunications.'" *Universal Service Order*[7] ¶ 789. The Commission explained that, "while the statutory definition of telecommunications only includes transmissions that do not alter the form or content of the information sent," information service providers "alter the format of information

[7] Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997). The issue arose in the universal-service proceeding because section 254(d) requires providers of "telecommunications" to contribute to universal-service mechanisms. 47 U.S.C. § 254(d). The universal-service system is designed to ensure the widespread availability of telephone service at reasonable rates. *Universal Service Order* ¶ 1.

through computer processing applications such as protocol conversion and interaction with stored data." *Universal Service Order* ¶ 789.

In other words, as the Commission declared in its most comprehensive analysis of the issue, "'telecommunications' and 'information service' are *mutually exclusive categories*." *Report to Congress* ¶ 69 n.138 (emphasis added); *see also id.* ¶ 13. The Commission explained:

> [A]n entity should be deemed to provide telecommunications . . . only when the entity provides a transparent transmission path, and does not "change . . . the form and content" of the information. When an entity offers subscribers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications," it does not *provide* telecommunications; it is *using* telecommunications.

Id. ¶ 41 (emphasis added). The Commission considered and expressly rejected an argument that "Congress . . . intended that a service qualify as both 'telecommunications' and an 'information service.'" *Id*. ¶ 41 n.79. The Commission concluded that "[o]ur examination of the legislative history . . . convinces us that Congress intended the two categories to be mutually exclusive, and *did not contemplate any such overlap*." *Id.* (emphasis added).

SUMMARY OF ARGUMENT

Although the 1996 Act plainly declares that "the term 'interLATA service' *means telecommunications*" between points in two different LATAs, the FCC interpreted that term in the *Non-Accounting Safeguards Order* to subsume "information services." But under the 1996 Act, as the Commission correctly determined in its 1997 *Universal Service Order* and its 1998 *Report to Congress*, "telecommunications" and "information services" are mutually exclusive categories. "Telecommunications" is limited by definition to the transmission of information without change in form

or content. In contrast, an "information service," provided "via telecommunications," necessarily alters the format of the transmitted information. There is no hint in the 1996 Act that Congress expected the categories of telecommunications and information services to be anything other than mutually exclusive. Consequently, as the Commission made clear in its *Report to Congress*, information service providers do not *provide* telecommunications; they *use* telecommunications. Because an "information service" cannot qualify as "telecommunications," neither can it qualify as an "interLATA service."

The Commission believed in 1996 that its interpretation of "interLATA service" to include "information services" produced "a more natural, common-sense reading" of the term. *Non-Accounting Safeguards Order* ¶ 56 (JA __). But the Commission's reading of "interLATA service," a statutory term of art, is no more natural than what Congress expressly defined the term to mean. And it is Congress's express definition — not the Commission's own say-so — that controls. An agency has no license to ignore express statutory definitions: "When a statute includes an explicit definition, [a court or agency] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 120 S. Ct. 2597, 2615 (2000). Moreover, the Commission subsequently rejected the theory of its own interpretation, when it held — correctly — that a provider of "information services" by definition does not provide "telecommunications" but rather *uses* "telecommunications," and that "Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'" *Report to Congress* ¶¶ 13, 41.

The Commission also based its reading on language that appears not in section 271 but in section 272 — a provision that imposes "separate-affiliate" requirements and other "safeguards" for

certain Bell company activities. In particular, the Commission pointed to Congress's use in section 272(a)(2)(B) of the term "interLATA telecommunications services," rather than simply "interLATA services," and reasoned that Congress thereby demonstrated that it limited the term "interLATA service" to transmission when it wished to. The Commission inferred that all non-transmission services, including information services, must therefore be covered by the term "interLATA services" where it is not so limited. *Non-Accounting Safeguards Order* ¶ 56 (JA __). That reasoning is at least doubly wrong as a basis for inferring that Congress intended to assign the term "interLATA services" a meaning different from that stated in the express statutory definition, which limits the term to "telecommunications."

First, even if section 272(a)(2)(B)'s language is read as a narrower subset of a broader class, the Commission simply ignored the statutory definitions when it inferred that the broader class itself extends beyond "telecommunications." Section 272(a)(2)(B) refers not to "telecommunications," but to the more narrowly defined "telecommunications services." That term reaches only the provision of "telecommunications *for a fee directly to the public*" (47 U.S.C. § 153(46) (emphasis added)), which the Commission has restricted to "telecommunications provided on a common carrier basis" (*i.e.*, to the general public, as distinguished from private-line services serving the needs of, for example, a large corporation). *See Universal Service Order* ¶ 785; *see also Report to Congress* ¶ 124. At most, therefore, section 272(a)(2)(B) implies only that "interLATA services," standing alone, reaches more than *common-carrier* transmission services — which it undoubtedly does, for it reaches all interLATA "telecommunications," including non-common-carrier transmission. Section 272(a)(2)(B) cannot be

read to imply that the term "interLATA services," contrary to its express definition, reaches more than "telecommunications."

Second, and in any case, rather than supporting an override of the statute's definition of "interLATA services," section 272(a)(2)(B)'s use of "interLATA telecommunications services" is better understood as an effort, through use of a parallel expression, to underscore the contrast with the next paragraph, section 272(a)(2)(C), which concerns "interLATA information services."

ARGUMENT

A. When a Bell Operating Company Provides Information Services, It Is Not Providing "InterLATA Services" Within the Meaning of Section 271

1. Section 271(a) states that neither a Bell operating company nor its affiliate may "provide interLATA services" except under the terms set forth in the remainder of section 271. The scope of that prohibition is delineated by the Act's express definition of "interLATA service": "[t]he term 'interLATA service' *means telecommunications*" between points in two different LATAs. 47 U.S.C. § 153(21) (emphasis added). To fall within the compass of section 271(a), therefore, a Bell company or its affiliate must "provide" "telecommunications."

Under the 1996 Act, "[t]he term 'telecommunications' means the *transmission*, between or among points specified by the user, of information of the user's choosing, *without change in the form or content* of the information as sent and received." *Id.* § 153(43) (emphases added). The defining characteristic of "telecommunications" — transmission with *no* change in form or content — finds its mirror image in the definition of the mutually exclusive set of services that *do* involve a change in the form or content: "[t]he term 'information service' means the offering of a capability for generating,

acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications.*" *Id.* § 153(20) (emphasis added). Because an information service entails an alteration of the form or content of the transmitted information, it simply cannot constitute telecommunications.

Based on these express definitions, the Commission, in orders issued *after* the *Non-Accounting Safeguards Order*, has repeatedly and comprehensively confirmed that this is the proper reading of the statute. In its *Report to Congress*, submitted in response to Congress's direction to review the definitions of (among other things) "telecommunications," "telecommunications service," and "information service," the Commission correctly concluded that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive." *Report to Congress* ¶ 13; *see also Universal Service Order* ¶ 789 (explaining that "telecommunications" by definition requires transmission of information without change to its form or content, whereas a provider of "information services" by definition does "alter the format of information").

As the Commission explained, "Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'" *Report to Congress* ¶ 13. The Commission elaborated in terms that could not have been clearer or more correct:

> Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers "telecommunications." *By contrast, when an entity offers transmission incorporating the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," it does not offer telecommunications.* Rather, it offers an "information service" even though it *uses* telecommunications to do so. We

> believe that this reading of the statute is most consistent with the 1996 Act's text, its legislative history, and its procompetitive, deregulatory goals.

Id. ¶ 39 (emphases added); *see also id.* ¶ 58 ("An offering that constitutes a single service from the end user's standpoint is not subject to common carrier regulation simply by virtue of the fact that it involves telecommunications components."). In other words, the statutory definitions make clear that "an entity is *not* deemed to be providing 'telecommunications,' *notwithstanding its transmission of user information*, in cases in which the entity is altering the form or content of that information." *Id.* ¶ 40 (second emphasis added).

In these circumstances, an information service provider *uses* telecommunications but does not *provide* telecommunications:

> The statutory text suggests to us that an entity should be deemed to provide telecommunications . . . only when the entity provides a transparent transmission path, and does not "change . . . the form and content" of the information. When an entity offers subscribers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications," it does not *provide* telecommunications; it is *using* telecommunications.

Id. ¶ 41 (emphases added); *see also id.* ¶ 43 ("The Senate Report stated in unambiguous terms that its definition of telecommunications 'excludes those services . . . that are defined as information services.' Information service providers, the Report explained, "'do not "provide" telecommunications services; they are *users* of telecommunications services.'") (quoting S. Rep. No. 104-23, at 18, 28 (1995) (footnote omitted; emphasis added)).[8]

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[8] The Commission has suggested that it might be possible to draw a distinction between information services transmitted over that provider's own telecommunications facilities, and information services transmitted over facilities obtained from other carriers: "In those cases where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order

The Commission's reading thus emphatically confirms what the statute itself plainly says: "information services" are not "telecommunications," and do not become so merely because they incorporate transmission. And when Congress enacted section 271, which declares that a Bell company or its affiliate may not "provide interLATA services" (except in certain prescribed circumstances), 47 U.S.C. § 271(a), it unambiguously restricted that prohibition to interLATA "telecommunications": "[t]he term 'interLATA service' *means telecommunications*" between LATAs, *id.* § 153(21) (emphasis added). Under the express definition of "interLATA services," then, providers of information services do *not* "provide" "interLATA services" covered by section 271. *Id.* § 271(a).

2. The limitation of section 271 to "telecommunications," to the exclusion of "information services," is reinforced in multiple ways by section 272, which requires a Bell operating company to provide certain services through a separate affiliate. Section 272 consistently affords separate treatment to "telecommunications services" and "information services," both in the provisions that impose a separate affiliate requirement, and in the provisions that establish different "sunset" dates for those services.

First, section 272(a)(2) sets out three subdivisions covering the types of services for which a separate affiliate is sometimes required. Subparagraph (A) covers "[m]anufacturing activities"; subparagraph (B) covers origination of "interLATA telecommunications services"; and subparagraph

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to provide an information service, . . . [o]ne could argue that . . . the Internet service provider is furnishing raw transmission capacity to itself," *i.e.*, providing telecommunications to itself. *Report to Congress* ¶ 69. The Commission has not yet embraced such a theory, however, and nothing in the statutory definition of "information service" makes any distinction based on who might own the underlying transmission facilities. 47 U.S.C. § 153(21).

(C) covers "[i]nterLATA information services." *Id.* § 272(a)(2)(A)-(C). That breakdown itself confirms Congress's distinction between telecommunications and information services. Section 272(a)(2), moreover, places every one of its references to section 271 (the section that restricts a Bell company's ability to provide "interLATA services") under subparagraph (B)'s category of "interLATA telecommunications services"; in contrast, subparagraph (C)'s category of "interLATA information services" makes no reference to section 271. *Id.* § 272(a)(2)(B)-(C). And only subparagraph (B) speaks of "origination," a distinction that is critical under section 271. *See id.* § 271(b)(1)-(3).

Second, section 272(f), which establishes the "sunset" dates of the various separate-affiliate requirements, further confirms that section 271 is limited to telecommunications and does not include information services. *Id.* § 272(f). Paragraph (1) sets the sunset date for "manufacturing" and "interLATA telecommunications services" at three years after the date a Bell company or its affiliate "is authorized to provide interLATA telecommunications services under section 271(d)" (unless extended by the Commission). *Id.* § 272(f)(1) (entitled "Manufacturing and long distance"). Paragraph (2) separately establishes a different sunset date for "interLATA information services": four years after enactment of the 1996 Act (unless extended by the Commission). *Id.* § 272(f)(2) (entitled "InterLATA information services"). By tying the sunset of the separate-affiliate requirement for interLATA telecommunications services to approval of a Bell company's section 271 application, while tying the sunset of the separate-affiliate requirement for interLATA information services to enactment of the 1996 Act, Congress underscored its understanding that section 271 has no application to "interLATA information services."

In sum, both the language and the structure of the statute confirm that the expressly defined term "interLATA service" cannot be interpreted in section 271 to include interLATA information services. Yet the Commission inexplicably did just that.

B. The Commission's Rationale Does Not Justify Its Disregard of the Expressly Defined Meaning of "InterLATA Service"

In its Notice of Proposed Rulemaking leading to the order under review, the Commission correctly concluded that the term "interLATA service" excludes interLATA information services:

> [T]he 1996 Act defines "interLATA service" as referring to telecommunications service. *See* 47 U.S.C. §153(21). Thus, where the 1996 Act draws distinctions between in-region and out-of-region "interLATA services," as it does in section 271(b), these distinctions do not apply to information services.

Non-Accounting Safeguards NPRM ¶ 41 n.80 (JA __). In reversing this determination in the *Non-Accounting Safeguards Order*, the Commission relied on three grounds, none of which can justify the Commission's departure from the congressionally defined, and structurally confirmed, limitation of section 271 to "telecommunications" (to the necessary exclusion of "information services").

1. The Commission reasoned that, because "interLATA information services are provided via interLATA telecommunications transmissions," they "fall within the definition of 'interLATA service.'" *Non-Accounting Safeguards Order* ¶ 56 (JA __). As explained above, that holding is contrary both to the plain meaning of the statute and to the Commission's own subsequent (and correct) interpretation in the *Report to Congress* and the *Universal Service Order*. Quite simply, "interLATA service" means "telecommunications" between LATAs, 47 U.S.C. § 153(21), and, as the Commission itself clearly recognizes, "telecommunications" does not include "information service."

The Commission's reading, moreover, leads to the textually illogical result that an information service must simultaneously *be* "telecommunications" and perform its function "*via* telecommunications." *Id.* § 153(20). But a service that supplies the ability to gather, transform, and process information "via telecommunications" cannot itself *be* "telecommunications." Land's End may deliver clothing via truck, but that does not make Land's End either a motor carrier or a provider of trucking service. And a florist that fills orders with its own vans is still acting only as a flower retailer. There is no reason to impute to Congress an intention fraught with such semantic incoherence, when a straightforward reading of the definitions produces an entirely logical result that squares fully with the statute's text and structure.

2. The Commission believed that "it is a more natural, common-sense reading of 'interLATA services' to interpret it to include both telecommunications services and information services." *Non-Accounting Safeguards Order* ¶ 56 (JA __). But the Commission's reading of the technical term "interLATA service" (for which it gave no analysis but only its conclusion) is no more natural and embodies no more common sense than the meaning that Congress specifically ascribed to that term in the express definition set forth in the statute. Indeed, unlike many common terms that Congress uses in statutes, *see, e.g.*, *MCI Telecomms. Corp. v. AT&T Corp.*, 512 U.S. 218, 225-26 (1994) ("modify"), "interLATA service" is a term of art that has no ordinary meaning outside the statute.

Congress declared that "[t]he term 'interLATA service' means telecommunications" between LATAs, 47 U.S.C. § 153(21), and it is Congress's express definition — not the Commission's own say-so — that controls. As the Supreme Court has stated time and again, "[w]hen a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."

Stenberg, 120 S. Ct. at 2615; *see also Meese v. Keene*, 481 U.S. 465, 484-85 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term."); *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) ("As a rule, '[a] definition which declares what a term "means" . . . excludes any meaning that is not stated.'") (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978)), *overruled in part on other grounds, Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989). And as the Commission itself recognized in the *Report to Congress*, "[a]ll of the specific mandates of the 1996 Act depend on application of the statutory categories established in the definitions section." *Report to Congress* ¶ 21; *see also* Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, ¶ 33 (1998) ("The specific obligations of the 1996 Act depend on application of the statutory categories established in the Act's definitions section.").

Thus, the law is settled that such definitions — when they are phrased, as these are, to state what a term "means" rather than what it includes — control even over what might otherwise seem a natural or ordinary meaning. That is all the more true when the defined term is contained in a detailed definitional section (here, 47 U.S.C. § 153) containing 52 defined terms. "This is definitional specificity of the first order." *American Mining Congress v. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987) (interpreting Resource Conservation and Recovery Act, "containing thirty-nine separate, defined terms"). Still less can an express definition be ignored when it is in no sense an anomaly in the statute, but rather accords comfortably with other provisions. The Commission thus violates a cardinal rule of statutory interpretation: "Never paraphrase a statute." *First Nat'l Bank & Trust v. NCUA*, 90 F.3d

525, 530 (D.C. Cir. 1996) (quoting Mary Ann Glendon, *A Nation Under Lawyers* 197 (1994) (quoting, in turn, Karl Llewellyn)), *aff'd*, 522 U.S. 479 (1998).

3. Concluding a fruitless search, the Commission sought support for its reading by pointing to section 272(a)(2)(B)-(C), where "Congress uses and distinguishes between 'interLATA telecommunications services' and 'interLATA information services,'" thereby supposedly "demonstrating that it limited the term 'interLATA services' to transmission services when it wished to." *Non-Accounting Safeguards Order* ¶ 56 (JA __). According to the Commission, "if Congress had intended the term 'interLATA services' to include only interLATA telecommunications services, its use of the term 'interLATA telecommunications services' in section 272(a)(2) would have been unnecessary and redundant." *Id.* This attempt to draw the extraordinary inference from section 272(a)(2)(B) that Congress could not have meant what it said in the statute's express definition of "interLATA services" is fatally flawed.

Congress's use of the phrase "interLATA telecommunications services" in section 272(a)(2)(B) does not imply that "interLATA services," standing alone, extends not only beyond "telecommunications services" but also beyond "telecommunications" (and thus reaches "information services"). In concluding otherwise, the Commission seems to have overlooked the fact that "telecommunications" and "telecommunications service" are discrete, separately defined terms. "Telecommunications" means "the transmission . . . of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). "Telecommunications service" has a more limited definition: "the offering of telecommunications for a fee *directly to the public*, or to such classes of users as to be effectively available to the public,

regardless of the facilities used." *Id.* § 153(46) (emphasis added). As the Commission has explained, the "inclusion of the term 'directly to the public' is intended to encompass only telecommunications provided on a common carrier basis." *Report to Congress* ¶ 124; *see also id.* ¶ 131; *Universal Service Order* ¶ 785 (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976)). Thus, "[c]ommon carriers can be distinguished from private network operators, which serve the internal telecommunications needs of, for example, a large corporation, rather than selling telecommunications to the general public." *Report to Congress* ¶ 124.

Congress used the narrower term "interLATA telecommunications services" in section 272(a)(2)(B). It thus distinguished common-carrier transmission services from non-common-carrier transmission services and applied the separate-affiliate and other safeguards of section 272 only to the former, allowing a Bell company itself to provide *private-line* interLATA telecommunications (when such services may be provided at all under section 271). In other words, the language of section 272(a)(2)(B) requires a separate affiliate only for common-carrier activities, which constitute by far the bulk of the industry. *See* FCC, Common Carrier Bureau, Industry Analysis Div., *Statistics of Communications Common Carriers*, Table 5.12 (Aug. 2000) (long-distance private line revenues constituted 11% of total long-distance revenues in 1995).

The statutory definitions thus do suggest, as the Commission reasoned, that "interLATA services" is broader than "interLATA telecommunications services." But that is the most that can be inferred. In view of the express, broader definition of "telecommunications," the Commission was quite wrong to infer that "interLATA services" extends, contrary to its express definition, not just beyond

"telecommunications services" but also beyond "telecommunications." *See Non-Accounting Safeguards Order* ¶ 56 (JA __).

Congress therefore had no need at all to "limit[] the term 'interLATA services' to transmission" in section 272(a)(2)(B) or anywhere else, because the very definition of the term limits it in precisely that way. Contrary to the FCC's analysis, section 272(a)(2)(B), read in light of the statute's definition of "telecommunications services," neither creates redundancy nor contradicts the "interLATA services" definition limited to transmission. It simply articulates narrower coverage *within* the broader class of transmission.

In any event, even if one were to ignore the 1996 Act's separate definition of "telecommunications service" in terms narrower than that of "telecommunications," it would still be improper to ignore the statute's express definition of "interLATA services." There is a readily available, natural explanation for Congress's use of the phrase "interLATA telecommunications services" in section 272(a)(2)(B) even aside from the intent to focus only on common-carrier (rather than, say, private-line) transmission services. Within the structure of section 272(a)(2), Congress used parallel formulations in subparagraphs (B) and (C): to highlight the *contrast* with "interLATA information services" in subparagraph (C), it used "interLATA telecommunications services" in subparagraph (B). There is no basis for inferring that, by using the term "interLATA telecommunications services," Congress intended to contradict its own definitional limitation, under which "interLATA services," and therefore the reach of section 271, extends only to telecommunications, *not* to information services.

* * * * *

The 1996 Act's unambiguous terms thus unavoidably preclude the treatment of "information services" as either "telecommunications" or (therefore) "interLATA services." Because "Congress has directly spoken to the precise question at issue," this Court may — indeed, must — dispose of this case at step one of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). The Commission's interpretation is "not entitled to *Chevron* deference because it is outside the plain meaning of [section 271], given the statutory definitions associated with that provision." *Bower v. Federal Express Corp.*, 96 F.3d 200, 208 (6th Cir. 1996). Even if the Court were to find some ambiguity warranting inquiry under step two of *Chevron*, the same analysis would demonstrate that the Commission's reading of "interLATA services" to reach "information services" cannot be sustained because it is not a reasonable interpretation of the statute's text and structure. *See Farmington River Power Co. v. FERC*, 103 F.3d 1002, 1005 (D.C. Cir. 1997) (concluding that even if there were some statutory ambiguity, the Court "would not defer to the Commission" because its interpretation of the specific statutory provision at issue was "unreasonable"); *Abbott Lab. v. Young*, 920 F.2d 984, 989 (D.C. Cir. 1990) (agency must demonstrate that its conclusion has a sufficient "'fit' with the statutory language").

In the end, this is a case of clear statutory meaning. Both the agency and a reviewing court must "assume that in drafting this legislation, Congress said what it meant," and meant what it said. *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Because the Commission's interpretation cannot be squared with what "Congress said," it must be set aside.

CONCLUSION

The petitions for review should be granted, the FCC's orders should be vacated in relevant part, and the matter should be remanded for further proceedings.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This Court's Order dated April 13, 2000, permits Petitioners-Intervenors 14,000 words for their brief. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a)(3), the undersigned certifies that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), this brief contains 5,854 words. This certificate was prepared in reliance on the word count of the word-processing system (WordPerfect 7.0) used to prepare this brief.

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