



# THE FREE STATE FOUNDATION

A Free Market Think Tank for Maryland.....Because Ideas Matter

***Perspectives from FSF Scholars***  
***November 26, 2012***  
***Vol. 7, No. 33***

**City of Arlington v. FCC:  
Questioning an Agency's Authority to Determine Its Own Jurisdiction**

by

**Jonathan H. Adler \***

A dispute between the Federal Communications Commission and local governments over the Commission's authority over local zoning applications could produce the most significant administrative law decision in a decade. In January, the Supreme Court will hear oral arguments in *City of Arlington v. FCC*, in which the Court will decide whether courts should defer to an agency's determination of its own jurisdiction. Although the need for courts to defer to agency interpretations of ambiguous statutory provisions under *Chevron v. NRDC* is well-established, the Supreme Court has never decided whether so-called *Chevron* deference should apply to statutory provisions delineating the scope of agency jurisdiction.

Section 332(c)(7) of the Communications Act seeks to balance the need for regulatory uniformity to promote mobile telecommunications services with state and local control over zoning decisions. Section 332(c)(7)(a) of the Act contains a savings clause providing that state and local authority to regulate "placement, construction, and modification of personal wireless service facilities" is only limited to the extent the Act expressly provides.<sup>1</sup> Section 332(c)(7)(b) goes on to place limits on state and local authority to deny permits for the placement or modification of personal wireless service

facilities and requires state and local authorities to respond to permitting requests and the like within a “reasonable” period of time, among other things.<sup>2</sup>

In a 2009 Declaratory Ruling the FCC interpreted Section 332(c)(7)(b) to limit the grounds upon which local permitting authorities could deny permits for wireless facilities and require state and local governments to act upon siting permits within a set period of time.<sup>3</sup> Several local governments sued to challenge the FCC’s interpretation, arguing the Commission had acted beyond the scope of its power in construing Section 332(c)(7)(b). Specifically, they argued the relevant provisions were enacted to limit the FCC’s jurisdiction, and could not be interpreted by the FCC to preempt local regulation.

The U.S. Court of Appeals for the Fifth Circuit upheld the FCC’s interpretation.<sup>4</sup> Finding the relevant provisions in the Communications Act ambiguous, the Fifth Circuit deferred to the FCC’s interpretation. This was not an ordinary application of the *Chevron* doctrine, however. As the Fifth Circuit noted, at issue was the scope of the FCC’s regulatory jurisdiction – specifically whether the FCC had the authority to administer Section 332(c)(7) and define the limits this provision places on state and local governments.

Whether *Chevron* applies in such circumstances remains an open question the Supreme Court has yet to address directly, let alone resolve.<sup>5</sup> Prior Fifth Circuit decisions suggested such deference was appropriate, however.<sup>6</sup> So the court deferred to the FCC’s conclusion Section 332(c)(7) conferred the Commission with regulatory authority to define the limitations imposed on state and local government authority. As the court explained, because the statute did not “unambiguously preclude” the FCC from exercising such authority, the law was sufficiently ambiguous for the FCC to have its way.

The Supreme Court’s grant of certiorari in *City of Arlington v. FCC* is limited to the question of whether a court should apply *Chevron* deference to review an agency’s determination of its own jurisdiction. This is an important question that has divided the circuit courts of appeals for many years. It is also one that should yield a decision that *Chevron* deference should not apply. Whatever the substantive or policy merits of the FCC’s 2009 Declaratory Order, there are several reasons to conclude the Fifth Circuit’s grant of deference to the FCC’s determination of its own jurisdiction was inappropriate. Questions regarding an agency’s jurisdiction are not properly part of *Chevron*’s domain.<sup>7</sup>

*Chevron U.S.A. v. Natural Resources Defense Council* set forth a now-familiar two-step inquiry for courts to undertake when evaluating agency interpretations of federal statutes.<sup>8</sup> First, the reviewing court considers the statutory text to determine “whether Congress has directly spoken to the precise question at issue.”<sup>9</sup> If so, the statute controls, “for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>10</sup> On the other hand, if the reviewing court concludes that the statute is “silent or ambiguous,” the court must defer to the agency’s statutory interpretation, so long as it “is based on a permissible construction of the statute.”<sup>11</sup> At

this second step, the agency's interpretation is given "controlling weight" unless it is "arbitrary, capricious, or manifestly contrary to the statute."<sup>12</sup> This is so even if the agency adopts a different interpretation than that which would have been favored by the court.

*Chevron* deference does not apply in all situations in which a court is presented with a federal agency's interpretation of a potentially ambiguous federal statute, however. The statute in question must be one the agency is entrusted to administer. So, for example, the Environmental Protection Agency will receive deference when interpreting ambiguous provisions of the Clean Water Act and Clean Air Act, but the Department of Defense will not, even when these laws are applied to military activities.

While ambiguity is necessary to trigger the deference *Chevron* prescribes in step-two, it is not sufficient.<sup>13</sup> As the Supreme Court has made clear in subsequent cases, *Chevron* deference is based upon a delegation of interpretive authority from Congress to federal agencies.<sup>14</sup> Absent such delegation, there is no basis to defer. Thus, the Court has explained, *Chevron* deference is due only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."<sup>15</sup>

*Chevron* and its progeny have made clear that the reason for deference is not that federal agencies have inherent authority to fill gaps and resolve ambiguities in federal statutes, but rather that Congress often delegates to agencies such authority. This only makes sense for, as the Court has emphasized time and again, federal agencies have no inherent authority to prescribe rules or standards governing private activity.<sup>16</sup> This applies to executive agencies and independent agencies alike.

The primary reason courts should not confer *Chevron* deference to agency interpretations of statutes that define or limit an agency's jurisdiction is implicit in the *Chevron* doctrine itself. The conferral of *Chevron* deference is premised upon the existence of agency jurisdiction. If there is no jurisdiction, there is no deference. So before a court can even consider whether an agency should receive deference for its statutory interpretation, it must first assure itself that agency jurisdiction exists. Put another way, the question of whether Congress has delegated authority to a federal agency – authority that may include the power to construe ambiguous statutory provisions – is prior to the question of whether a given agency interpretation may be due *Chevron* deference.

One reason Congress delegates agencies the authority to interpret ambiguous statutory provisions is because federal agencies often have a degree of field-specific knowledge and expertise that Congress lacks. Officials at the Federal Communications Commission, for example, presumably know more about the details of communications policy than does the average member of Congress. The FCC employs economic and technical experts who specialize in the sorts of questions the FCC is tasked to address.

Whatever comparative advantage federal agencies may have in addressing technical or policy questions within their bailiwick of expertise, agencies have no such comparative advantage on matters of jurisdiction. Courts, by contrast, are called upon to address jurisdictional questions all the time. Courts, not agencies, have the comparative advantage in resolving matters of jurisdiction.

Whether Congress conferred jurisdiction to a given agency to address a particular concern is a matter of statutory interpretation of the sort courts are regularly required to address. Indeed, the Administrative Procedure Act itself tasks federal courts with the responsibility to decide “all relevant questions of law” and set aside those agency actions courts find to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”<sup>17</sup>

Granting *Chevron* deference to agency interpretations of their own jurisdiction also creates the risk of agency self-aggrandizement. As Cass Sunstein has observed, “In Anglo-American law, those limited by law are generally not empowered to decide on the meaning of the limitation.”<sup>18</sup> The concern is that if an agency is entrusted with the authority to determine the scope of its own jurisdiction it may extend its authority beyond the limits Congress envisioned.<sup>19</sup> Not only is it unlikely that Congress will delegate authority to an agency to determine the scope of its own authority without making such an intention clear, the grant of such authority poses distinct risks given that agencies only exercise that authority which they have been delegated in the first place.

Whether local land-use and zoning regulations unduly inhibit the placement of mobile service facilities may well be a question about which the FCC has substantial expertise. Yet whether Congress delegated the FCC authority to address this question is not. Questions of agency jurisdiction are legally and analytically antecedent to the question of whether a given agency interpretation is one to which *Chevron* deference is due. In *City of Arlington* the Supreme Court has the opportunity to clarify this point. There are good reasons for it to make clear that agencies should only receive *Chevron* deference when they are exercising that authority Congress has delegated, and they should not receive deference when facing the question of whether the agency has authority at all.

\* Jonathan H. Adler is a member of the Free State Foundation’s Board of Academic Advisors and the Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law.

The Free State Foundation is a nonpartisan, Section 501(c)(3) free market-oriented think tank located in Rockville, Maryland.

---

<sup>17</sup> Jonathan H. Adler joined an *amicus curiae* brief in support of the petitioners in *City of Arlington v. FCC*. Portions of this essay are based upon Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497 (2009).

---

<sup>1</sup> 47 U.S.C. §332(c)(7)(a).

<sup>2</sup> 47 U.S.C. §332(c)(7)(b).

<sup>3</sup> 24 FCC Rcd. 13994 (Nov. 18, 2009), *reconsideration denied*, 25 FCC Rcd. 11157 (Aug. 3, 2010)

<sup>4</sup> *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012).

<sup>5</sup> *Id.* at \_\_ (“The Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency’s determination of its own statutory jurisdiction”); *see also* *Pruidze v. Holder*, 632 F.3d 234, 237 (6th Cir. 2011).

<sup>6</sup> *See, e.g.*, *Texas v. United States*, 497 F.3d 491, 501 (5th Cir. 2007); *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 901 (5th Cir. 1995).

<sup>7</sup> *See generally* Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001).

<sup>8</sup> 467 U.S. 837 (1984).

<sup>9</sup> *Chevron*, 467 U.S. at 842.

<sup>10</sup> *Id.* at 842-43.

<sup>11</sup> *Id.* at 843.

<sup>12</sup> *Id.* at 844.

<sup>13</sup> *See Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C.Cir.2001) (“Mere ambiguity in a statute is not evidence of congressional delegation of authority.”) (citations omitted).

<sup>14</sup> *See, e.g.*, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (“A precondition of deference under *Chevron* is a congressional delegation of authority.”).

<sup>15</sup> *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). *See also* Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 348 (2003) (“Unless the reviewing court affirmatively finds that Congress intended to delegate interpretive authority to the particular agency at hand, in the particular statutory scheme at hand, *Chevron* deference is not due and the *Chevron* two-step is not to be invoked.”).

<sup>16</sup> *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”).

<sup>17</sup> 5 U.S.C. § 706.

<sup>18</sup> Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2097 (1990); *see also Addison v. Holly Hill Fruit Prods. Inc.*, 322 U.S. 607, 616 (1944) (“[D]etermination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested.”).

<sup>19</sup> *See generally* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL’Y 203 (2004).