Chevron Step One-and-a-Half: Appendix

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DC CIRCUIT *CHEVRON* STEP ONE-AND-A-HALF CASES

The following are cases in which the DC Circuit has applied the *Chevron* Step One-and-a-Half doctrine from 1985 through April 2017. Although we have attempted to identify the relevant cases, we do not claim that this list is exhaustive.

NextEra Desert Center Blythe, LLC v Federal Energy Regulatory Commission	2017 WL 1228577 (DC Cir)
Initial agency decision: June 3, 2015	DC Circuit decision: April 4, 2017
Agency decision on remand: ---	Later DC Circuit decision: ---

Language at issue	"NextEra may elect to 'receive Congestion Revenue Rights as defined in and as available under the CAISO Tariff, in lieu of a refund of the cost of Network Upgrades.'" *NextEra*, 2017 WL 1228577 at *3 (ellipsis and emphasis omitted) (quoting Article 11.4 of the agreement governing the interconnection of two solar power plants and a power grid controlled by a state regulatory agency).[1]
Agency view	"As FERC sees it, the critical language is 'in lieu of a refund of the cost of Network Upgrades,' which it takes to mean that NextEra may receive CRRs *only* if it is eligible for a refund for a Network Upgrade." Id.
DC Circuit reasoning	"[T]he only thing Article 11.4 clearly forecloses is the receipt of both CRRs and a refund for Network Upgrades. The clause beginning with 'in lieu of' does not unambiguously mean that the lone avenue for receipt of CRRs is by way of a Network Upgrade." Id (emphasis omitted).

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[1] While the language here comes from a tariff agreement rather than a statute, the DC Circuit explained that the deference analysis is identical: "Where, as here, we confront a challenge to FERC's reading of a tariff and related contracts, we review the '[Commission]'s interpretation under the Administrative Procedure Act's arbitrary and capricious standard of review, using a two-step, *Chevron*-like analysis,'" and "if FERC's decision rests on 'an erroneous assertion that the plain language of the relevant wording is unambiguous[,] we must remand' to the Commission so that it may 'consider the question afresh in light of the ambiguity we see.'" *NextEra*, 2017 WL 1228577 at *2 (brackets in original).

Vacate or remand?	Remanded. Id at *4.
Post-remand history	None as of April 2017.

United States v Ross	2017 WL 728040 (DC Cir)
Initial agency decision: July 2, 2008	DC Circuit decision: February 24, 2017
Agency decision on remand: ---	Later DC Circuit decision: ---

Language at issue	"The Attorney General shall have the authority to specify the applicability of the requirements of [the Sex Offender Registration and Notification Act (SORNA)]." 42 USC § 16913(d).
Agency view	The attorney general's decision "explain[s] that the [agency's SORNA] guidelines 'require the application by a jurisdiction of SORNA's requirements to sex offenders convicted prior to the enactment of SORNA.'" *Ross*, 2017 WL 728040 at *4, quoting Department of Justice, Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed Reg 38030, 38035 (2008).
DC Circuit reasoning	The court concluded that the attorney general's argument for retroactive application of the SORNA guidelines had "a fatal flaw: the Attorney General disclaimed any authority to decide for himself whether SORNA applied to pre-enactment offenders." *Ross*, 2017 WL 728040 at *4. The court added: "Where a statute grants an agency discretion but the agency erroneously believes it is bound to a specific decision, we can't uphold the result as an exercise of the discretion that the agency disavows." Id.
Vacate or remand?	Vacated. Id at *7.
Partial dissent	"Unlike the majority opinion, I would join every other circuit that has addressed the question and hold that the Attorney General's Final Guidelines adequately specified how and when SORNA would apply to pre-Act offenders." Id (Millett concurring in part, dissenting in part, and dissenting from the judgment). "[T]he Attorney General was certainly correct that Congress itself had decided that SORNA should be retroactively applicable to pre-enactment offenders to the extent feasible." Id at *11 (Millett concurring in part, dissenting in part, and dissenting from the judgment).
Post-remand history	None as of April 2017.

Noble Energy, Inc v Salazar	671 F3d 1241 (DC Cir 2012)
Initial agency decision: September 1, 2009	DC Circuit decision: March 2, 2012
Agency decision on remand: April 9, 2014	Later DC Circuit decision: April 29, 2016

Language at	"Interior's regulations require that lessees 'promptly and permanently

issue	plug' their temporarily-abandoned oil wells if the government so orders." *Noble Energy*, 671 F3d at 1244 (brackets omitted), quoting 30 CFR § 250.1723. "Lessees must in any event 'permanently plug all wells on a lease within 1 year after the lease terminates.'" *Noble Energy*, 671 F3d at 1244, quoting 30 CFR § 250.1710.[2]
Agency view	The "plugging" obligations apply even though the federal government materially breached its lease agreement with Noble Energy. See *Noble Energy*, 671 F3d at 1243–44.
DC Circuit reasoning	The agency's letter to Noble Energy does not expressly indicate that it considered the common-law doctrine of discharge, nor does it include any "hint of the agency's reasoning or the factors that it took into account. We therefore cannot be sure whether [the agency's] letter embodied an interpretation of the regulations' applicability after breach." Id at 1245.
Vacate or remand?	Vacated. Id at 1246.
Concurrence	"I concur in the court's opinion and judgment but write separately to express doubt whether the Interior Department, on remand, will be able to offer an interpretation that is both reasonable and supportive of its action here." Id (Williams concurring).
Post-remand history	On remand, the agency "interpreted the regulations in question and determined that [the 'plugging' duties] were independent of the obligations of the lease and were, therefore, not discharged by the government's material breach of the lease." *Noble Energy, Inc v Jewell*, 110 F Supp 3d 5, 9 (DDC 2015). Based on this interpretation, and applying *Chevron* deference, the district court granted the government's motion for summary judgment. See id at 10–13, 16. The DC Circuit affirmed. See generally *Noble Energy, Inc v Jewell*, 650 Fed Appx 9 (DC Cir 2016).

PSEG Energy Resources & Trade LLC v Federal Energy Regulatory Commission	665 F3d 203 (DC Cir 2011)
Initial agency decision: June 20, 2008	DC Circuit decision: December 23, 2011
Agency decision on remand: June 2, 2015	Later DC Circuit decision: ---
Language at issue	"Any proration shall be subject to reliability review." *PSEG Energy Resources*, 665 F3d at 206 (quoting a tariff that implemented an "auction mechanism" to set utility prices).[3]

[2] Because this case involves an agency's interpretation of its own regulation rather than a statute that it administers, the relevant deference regime is *Auer* rather than that of *Chevron U.S.A. Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984). See *Auer v Robbins*, 519 US 452, 461 (1997) (stating that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation") (quotation marks omitted). However, the DC Circuit in *Noble Energy* made clear that it believed the *Prill* line of cases applied in the *Auer* context as well. See *Noble Energy*, 671 F3d at 1246 & n 5.

[3] As in *NextEra*, this case involved an interpretation of a tariff filed with the Federal Energy Regulatory Commission rather than a statute. See note 1.

Agency view	"FERC held that when reliability review precludes quantity proration, the tariff still requires [the administrator of New England energy markets] to impose price proration to avoid violating the total payment cap." Id at 207.
DC Circuit reasoning	"In rejecting PSEG's arguments, FERC spoke the language of textual clarity." Id at 208. "On appeal, however, FERC's counsel conceded that the relevant provision of the Proration Rule is ambiguous. . . . We agree." Id.
Vacate or remand?	Remanded. Id at 210–11.
Post-remand history	"We have revisited our analysis of the Proration Rule in light of the court's opinion, particularly its view that the Proration Rule is ambiguous, and on remand, we reverse our earlier determination. We now find that where resources needed for reliability were prohibited from prorating quantity under the Proration Rule, they should have received the full market clearing price for each megawatt offered." *ISO New England Inc*, 151 FERC ¶ 61,196, ¶ 14 (2015) (available on Westlaw at 2015 WL 3477041).

United States Postal Service v Postal Regulatory Commission	640 F3d 1263 (DC Cir 2011)
Initial agency decision: September 30, 2010	DC Circuit decision: May 24, 2011
Agency decision on remand: September 20, 2011	Later DC Circuit decision: June 5, 2015

Language at issue	The agency shall "establish procedures whereby rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances." 39 USC § 3622(d)(1)(E).
Agency view	"[T]he plain meaning of ['due to'] requires the proposed rate adjustments to be 'tailored to offset the specific effects of the claimed exigency.'" *Postal Service*, 640 F3d at 1264.
DC Circuit reasoning	The statutory language "due to" does not necessarily mean that the proposed rate adjustment may offset only those specific costs caused by the extraordinary or exceptional circumstances identified. Saying that the proposed increase is "due to" extraordinary circumstances does not necessarily mean that there could not be other motivations as well. See id at 1267–68.
Vacate or remand?	Remanded. Id at 1268.
Post-remand history	After notice-and-comment proceedings, the agency maintained the same interpretation. See Postal Regulatory Commission, Order Resolving Issues on Remand: Rate Adjustment due to Extraordinary or Exceptional Circumstances, Docket No R2010-4R, Order No 864, *30–46 (Sept 20, 2011), archived at http://perma.cc/N9LZ-LWFN. "No party challenged Order 864 when it came out." *Alliance of Nonprofit Mailers v Postal Regulatory Commission*, 790 F3d 186, 191 (DC Cir 2015).

Prime Time International Co v Vilsack	599 F3d 678 (DC Cir 2010)
Initial agency decision: February 8, 2006	DC Circuit decision: March 26, 2010
Agency decision on remand: November 6, 2011	Later DC Circuit decision: June 10, 2014

Language at issue	The Fair and Equitable Tobacco Reform Act of 2004 requires tobacco companies to pay assessments, which are "allocated on a pro rata basis . . . based on each manufacturer's or importer's share of gross domestic volume." 7 USC § 518d(e)(1).
Agency view	7 USC § 518d(g)(3)(A) requires the agency to measure the volume of cigars by mere number of cigars, with no differentiation based on the size of the cigars. See *Prime Time*, 599 F3d at 681.
DC Circuit reasoning	"The plain text . . . does not self-evidently vindicate [the agency's] . . . assessment method [for determining volume]." Id at 683. There are multiple possible meanings based on the interplay between sections, and the secretary must ensure that "each manufacturer and importer pays only its correct pro rata share of total gross domestic volume." Id at 681–82, quoting 7 USC § 518d(i)(4)(B).
Vacate or remand?	Remanded. *Prime Time*, 599 F3d at 683.
Post-remand history	The agency "commenced notice and comment rulemaking on its . . . calculation method. The [agency] received five sets of comments in response to its notice, and issued a final determination on November 6, 2011 concluding that the existing . . . method will remain in place." *Prime Time International Co v Vilsack*, 930 F Supp 2d 240, 246 (DDC 2013) (citation omitted). The agency brought a cross-claim for unpaid assessments, and the district court granted summary judgment for the agency on *Chevron* grounds. Id at 261. The DC Circuit affirmed. See generally *Prime Time International Co v United States Department of Agriculture*, 753 F3d 1339 (DC Cir 2014).

Labor, Mine Safety and Health Administration v National Cement Co of California	494 F3d 1066 (DC Cir 2007)
Initial agency decision: February 9, 2004	DC Circuit decision: July 20, 2007
Agency decision on remand: August 26, 2008	Later DC Circuit decision: July 21, 2009

Language at issue	Facilities subject to the Mine Safety and Health Act include "coal or other mine[s]" and "private ways and roads appurtenant to such area[s]." 30 USC §§ 802(h)(1), 803.
Agency view	The statutory language must cover a road owned by a third party, over which a cement company has been granted a nonexclusive easement. See *National Cement*, 494 F3d at 1072–73.
DC Circuit reasoning	The dictionary defines "private" as "not freely available to the public," but also defines "private" as "belonging to or concerning an individual person, company, or interest." Id at 1074. Similarly, the dictionary

	defines "appurtenant to" as "annexed or belonging legally to some more important thing" or as "incident to . . . [or] used . . . [by] easements." Id.
Vacate or remand?	Vacated. Id at 1077.
Dissent	"The court improperly relies upon policy considerations to find ambiguity where there is none," even though the agency officials determined that the statute was unambiguous. Id (Rogers dissenting). The purpose of the Mine Act and the legislative history both indicate that the common legal meanings of both "private" and "appurtenant" were obviously used. See id at 1077–80 (Rogers dissenting).
Post-remand history	The agency interpreted the statute such that the road in question fell within the classification "private ways and roads appurtenant to such area." *Labor v National Cement Co of California*, 573 F3d 788, 789, 791–92 (DC Cir 2009). An independent commission "again found the Secretary's interpretation unreasonable and vacated the citation." Id at 792. "The Secretary [ ] again petitioned for review, arguing that her interpretation . . . is reasonable." Id. The DC Circuit held that "[h]er interpretation is reasonable," vacated the commission's decision, and remanded. Id at 797.

Menkes v Department of Homeland Security	486 F3d 1307 (DC Cir 2007)
Initial agency decision: 2003–2004	DC Circuit decision: May 15, 2007
Agency decision on remand: June 2, 2008	Later DC Circuit decision: March 8, 2011

Language at issue	"The Secretary may authorize the formation of a pool by a voluntary association of United States registered pilots to provide for efficient dispatching of vessels and rendering of pilotage services." 46 USC § 9304(a). Furthermore, "[w]hen pilotage service is not provided by the association authorized under 46 U.S.C. 9304 because of a physical or economic inability to do so, . . . the Director may order any U.S. registered pilot to provide pilotage service." 46 CFR § 401.720(b).
Agency view	The statute and regulations allow the agency to require pilots to be part of a pilotage association. See *Menkes*, 486 F3d at 1310.
DC Circuit reasoning	The agency has not offered reasons for its determination that it may prefer associations over independent pilots, and the statute does not speak clearly to the question at issue. See id at 1313–14.
Vacate or remand?	Vacated. Id at 315.
Post-remand history	On remand, the agency maintained the same interpretation. *Menkes v United States Department of Homeland Agency*, 637 F3d 319, 339–42 (DC Cir 2011) (reprinting the agency decision from June 2, 2008). The district court granted summary judgment for the agency. The DC Circuit affirmed. See generally id.

Peter Pan Bus Lines, Inc v Federal Motor Carrier Safety Administration	471 F3d 1350 (DC Cir 2006)
Initial agency decision: October 26, 2005	DC Circuit decision: December 19, 2006
Agency decision on remand: December 21, 2006; December 16, 2008	Later DC Circuit decision: August 26, 2008

Language at issue	The secretary of Transportation "shall register a person to provide transportation subject to jurisdiction under . . . this title as a motor carrier if the Secretary finds that the person is willing and able to comply with [ ] this part and the applicable regulations of the Secretary [of Transportation] and the [Surface Transportation] Board" and other specified laws and regulations. *Peter Pan*, 471 F3d at 1352, quoting 49 USC § 13902(a)(1) (brackets in original and paragraph break omitted).
Agency view	The agency may not reject an application for failure or unwillingness to comply with the Americans with Disabilities Act (ADA), because the statute specifically identifies the regulations upon which the agency may predicate approval. To interpret the statute to allow ADA considerations would render part of the statute superfluous. See *Peter Pan*, 471 F3d at 1353.
DC Circuit reasoning	Interpreting "the applicable regulations" to include the ADA makes 49 USC § 13902(a)(1)(B) and (C) superfluous. However, interpreting "the applicable regulations" to not include the ADA makes a portion of 49 USC § 13902(a)(1)(C) superfluous. "Thus, section 13902 contains surplusage under either reading and, as a result, we cannot say that either proffered construction reflects the Congress's unambiguously expressed intent." Id at 1353–54.
Vacate or remand?	Vacated. Id at 1354–55.
Concurrence	The concurrence expressed doubt that the agency's interpretation, if it maintains the same interpretation, "could survive *Chevron* step two" analysis. Id at 1355 (Tatel concurring).
Post-remand history	Just two days after the DC Circuit decision, the agency issued a notice of proposed rulemaking that effectively reversed course and required ADA compliance for new entrants. See generally Department of Transportation, Federal Motor Carrier Safety Administration, New Entrant Safety Assurance Process, 71 Fed Reg 76730 (2006). Peter Pan moved for dismissal (ostensibly because of the proposed rule) and the DC Circuit dismissed the case. See generally *Peter Pan Bus Lines, Inc v Federal Motor Carrier Safety Administration*, 2008 WL 4356826 (DC Cir). The final agency rule implemented the proposed rule. See generally Department of Transportation, Federal Motor Carrier Safety Administration, New Entrant Safety Assurance Process, 73 Fed Reg 76472 (2008).

Teva Pharmaceuticals USA, Inc v Food & Drug Administration	441 F3d 1 (DC Cir 2006)
Initial agency decision: June 28, 2005	DC Circuit decision: March 16, 2006

Agency decision on remand: April 11, 2006	Later DC Circuit decision: None
Language at issue	At the relevant time, the statute gave a marketing exclusivity period to a generic drug manufacturer that began on the date of the "first commercial marketing of the [generic] drug" or "the date of a decision of a court . . . holding the patent . . . to be invalid or not infringed, whichever is earlier." 21 USC § 355(j)(5)(B)(iv) (2000). This provision was further interpreted in *Teva Pharmaceuticals, USA, Inc v United States Food and Drug Administration*, 182 F3d 1003 (DC Cir 1999) ("Teva I"), and *Teva Pharmaceuticals, USA, Inc v United States Food & Drug Administration*, 2000 WL 1838303 (DC Cir) (per curiam) ("Teva II").
Agency view	The *Teva I* and *Teva II* decisions establish binding precedent that a district court's "stipulation and [dismissal] order" constitutes a "decision of a court." *Teva*, 441 F3d at 3–4.
DC Circuit reasoning	The agency misunderstood the precedent, which held only that the agency in those cases had insufficiently explained its determinations regarding which orders were and were not "decision[s] of a court" under the statute. See id at 4–5.
Vacate or remand?	Vacated. Id at 5.
Post-remand history	In an April 11, 2006 letter, the agency "reversed itself." *Apotex, Inc v Food & Drug Administration*, 449 F3d 1249, 1251 (DC Cir 2006) (per curiam), citing Gary Buehler, Director, Office of Generic Drugs, Center for Drug Evaluation and Research, Letter to Pravastatin ANDA Applicant *15 (Apr 11, 2006), archived at http://perma.cc/L8CV-G2LB.

PDK Laboratories Inc v United States Drug Enforcement Administration	362 F3d 786 (DC Cir 2004)
Initial agency decision: December 19, 2002	DC Circuit decision: March 26, 2004
Agency decision on remand: November 22, 2004	Later DC Circuit decision: February 24, 2006
Language at issue	The statute grants to the agency the authority to block the importation of a chemical if "the chemical may be diverted to the clandestine manufacture of a controlled substance." 21 USC § 971(c)(1).
Agency view	The statutory language plainly means that "the chemical" may refer to the raw chemical itself or to products made from that chemical. See *PDK Laboratories*, 362 F3d at 790–91.
DC Circuit reasoning	The agency's regulations "distinguish between a 'drug containing ephedrine' [in other words, a finished product] and 'a listed chemical' [the raw chemical]." Id at 795 (brackets omitted). Furthermore, the timeline of the legislative history makes the argument that "chemical" refers to both the raw material and finished products tentative. See id at 794–95.
Vacate or remand?	Vacated. Id at 799.
Concurrence	The court should vacate and remand only on the ground that the agency did not follow its own regulations (which the agency effectively

	conceded), and should not address the broader *Chevron* question. If addressing the *Chevron* question, the agency should win on *Chevron* Step One grounds because the statute is not ambiguous (that is, it does not explicitly limit its application only to raw chemicals). The court should not remand because the agency believes not that the statute mandated a certain result, but rather that it granted discretion to the agency. Id at 799–810 (Roberts concurring in part and concurring in the judgment). And even if the statute were ambiguous, there is "no reasonable and genuine doubt" what the agency would do on remand, and "[i]n the absence of such doubt, a *Prill* remand outstrips its rationale." Id at 809 (Roberts concurring in part and concurring in the judgment).
Post-remand history	On remand, the agency maintained its broad interpretation. See *PDK Laboratories Inc v United States Drug Enforcement Administration*, 438 F3d 1184, 1188 (DC Cir 2006), citing Department of Justice, Drug Enforcement Administration, Indace, Inc., c/o Seegott, Inc.; Malladi, Inc.; Suspension of Shipments, 69 Fed Reg 67951, 67954–57 (2004). The DC Circuit affirmed on *Chevron* grounds. *PDK Laboratories*, 438 F3d at 1189–93, 1197–98.

Arizona v Thompson 281 F3d 248 (DC Cir 2002)

Initial agency decision: September 30, 1998	DC Circuit decision: March 5, 2002
Agency decision on remand: September 27, 2006; July 23, 2008	Later DC Circuit decision: None

Language at issue	Earlier welfare legislation did not prohibit "primary program" cost allocation (wherein all common administrative costs for multiple welfare programs are assigned to a single primary program). The new 1996 welfare reforms likewise did not explicitly prohibit "primary program" cost allocation. *Thompson*, 281 F3d at 251–52.
Agency view	States may not allocate all administrative costs for Temporary Assistance for Needy Families, Medicaid, and Food Stamps to a single program for accounting and reimbursement purposes (a "primary program" designation). See id at 252.
DC Circuit reasoning	There is no statutory provision that prohibits primary program allocation, and there was no such statutory provision in the previous welfare regime either. It is incorrect to interpret the silence as a mandatory prohibition, and the agency must exercise discretion. See id at 254–59.
Vacate or remand?	Remanded. Id at 259–60.
Post-remand history	The agency filed a notice of proposed rulemaking maintaining the same interpretation. See generally Department of Health and Human Services, Administration for Children and Families, Cost Allocation Methodology Applicable to the Temporary Assistance for Needy Families Program, 71 Fed Reg 56440 (2006). The final rule was promulgated on July 23, 2008. Department of Health and Human Services, Administration for Children and Families, Cost Allocation Methodology Applicable to the Temporary Assistance for Needy Families Program, 73 Fed Reg 42718 (2008), amending 45 CFR Part 263. It appears this rule was not challenged.

ITT Industries, Inc v National Labor Relations Board	251 F3d 995 (DC Cir 2001)
Initial agency decision: May 10, 2000	DC Circuit decision: June 5, 2001
Agency decision on remand: May 13, 2004	Later DC Circuit decision: June 28, 2005
Language at issue	"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities." 29 USC § 157.
Agency view	The term "employee" includes employees of the same company who work at different plants than the one in question, and therefore such employees have access rights for union activities on any company property, even if a specific employee does not work at the facility in question. See *ITT*, 251 F3d at 996–97.
DC Circuit reasoning	Prior federal court cases have not resolved this question, and the agency did not acknowledge the ambiguity in whether "employee" access rights extend only to the facility at which the employees work or to all employer properties. See id at 1000–05.
Vacate or remand?	Vacated. Id at 1006–07.
Post-remand history	In a separate, subsequent case, the agency interpreted the statute to give employees of the same company who work at different plants nonderivative, freestanding access rights to all the employer's plants for union activities. See *Hillhaven Highland House*, 336 NLRB 646, 648 (2001). Applying *Hillhaven Highland House*'s interpretation to the ITT case, the NLRB "reaffirm[ed] the Board's original [2000] order." *ITT Industries, Inc*, 341 NLRB 937, 941 (2004). The DC Circuit affirmed. See *ITT Industries, Inc v National Labor Relations Board*, 413 F3d 64, 76–77 (DC Cir 2005).

Jacoby v National Labor Relations Board	233 F3d 611 (DC Cir 2000)
Initial agency decision: September 30, 1999	DC Circuit decision: December 12, 2000
Agency decision on remand: September 28, 2001	Later DC Circuit decision: April 11, 2003
Language at issue	Labor unions owe employees "the duty of fair representation," as used in *United Steelworkers of America, AFL–CIO–CLC v Rawson*, 495 US 362, 372 (1990), and *Air Line Pilots Association, International v O'Neill*, 499 US 65, 76–77 (1991).[4]
Agency view	*Rawson* and *O'Neill*, "read together, mandate that merely negligent conduct can never breach the duty of representation in any context, including that of the hiring hall." *Jacoby*, 233 F3d at 616.

[4] The duty of fair representation follows only indirectly from the relevant statute. See *Jacoby*, 233 F3d at 614 (noting that the duty of fair representation is "judicially inferred"). Nonetheless, NLRB decisions interpreting the duty of fair representation are eligible for *Chevron* deference, as if the duty were an explicitly statutory one. See id at 614–15.

DC Circuit reasoning	The DC Circuit's holding in *Plumbers and Pipe Fitters Local Union No 32 v National Labor Relations Board*, 50 F3d 29, 33–34 (DC Cir 1995), contradicts the agency's view that the agency must be deferential to the union's hiring hall procedures. *Rawson* and *O'Neill* did not deal with hiring hall procedures. See *Jacoby*, 233 F3d at 616.
Vacate or remand?	Remanded. Id at 619.
Post-remand history	The agency "reaffirm[ed] the Board's earlier [1999] holding" and explained its interpretation. *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549, 550 (2001). The DC Circuit affirmed on *Chevron* grounds. See *Jacoby v National Labor Relations Board*, 325 F3d 301, 308–09 (DC Cir 2003).

GTE Service Corp v Federal Communications Commission 224 F3d 768 (DC Cir 2000)

Initial agency decision:	DC Circuit decision:
July 30, 1997; December 31, 1998	July 14, 2000
Agency decision on remand: None	Later DC Circuit decision: None

Language at issue	The statute required that all "provider[s] of interstate interexchange telecommunications services" charge the same rates to customers in all states. 47 USC § 254(g).
Agency view	"The language of section 254(g) . . . on its face unambiguously applies to all providers of interstate, interexchange services. Thus, section 254(g) applies to the interstate, interexchange services offered by [wireless] providers. If Congress had intended to exempt [wireless] providers, it presumably would have done so expressly as it did in other sections of the Act." *In the Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace*, 14 FCC Rec 391, 396 (1998). See also *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rec 11812, 11821 (1997).
DC Circuit reasoning	"[W]e cannot agree with either the [agency] or the petitioners that the Congress spoke unambiguously on the precise issue that divides them." *GTE*, 224 F3d at 774. Because the statute was meant to incorporate pre-1996 telecommunications policy (which did not serve to bring wireless providers within the category), it is not reasonable to require an explicit exemption—such an exemption could certainly have been presumed. See id. On the other hand, the broad definition of "exchange service" does bring in wireless providers, so "it is not clear that the Congress was referring only to wireline service when it used the word 'interexchange.'" Id at 775.
Vacate or remand?	Vacated. Id at 776.
Post-remand history	The agency dismissed as moot the wireless providers' petitions for enforcement forbearance, because (by virtue of the DC Circuit's decision) "there is currently no rate integration rule to apply to [wireless] carriers and no rule to forbear from applying." *In the Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace*, 15 FCC Rec 21066, 21068 (2000). The agency also stated that "[p]ursuant to the Court's order, we will further consider the matter of whether [wireless] carriers are covered under section 254(g)." Id. The agency on September 8, 2000, stated that it was in the process

	of considering the issues. See *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, 15 FCC Rec 17414, 17420–21 (2000). It is unclear whether there was additional litigation.

Transitional Hospitals Corp of Louisiana, Inc v Shalala	222 F3d 1019 (DC Cir 2000)
Initial agency decision: September 1, 1992; December 24, 1992	DC Circuit decision: August 22, 2000
Agency decision on remand: August 1, 2001	Later DC Circuit decision: None
Language at issue	For Medicare reimbursement purposes, a hospital can receive higher payments if the hospital is classified as a "long-term care hospital," which is defined as "a hospital which has an average inpatient length of stay (as determined by the Secretary) of greater than 25 days." 42 USC § 1395ww(d)(1)(B)(iv).
Agency view	"[A]n initial data-collection period is statutorily required" before classifying any hospitals as "long-term care hospitals." *Transitional Hospitals*, 222 F3d at 1020.
DC Circuit reasoning	"Although it does establish a criterion based on average length of stay, the statute is silent as to how and when that length should be calculated." Id at 1024. "Nor does the statute's use of the present tense verb 'has' definitively resolve the question." Id.
Vacate or remand?	Remanded. Id at 1029.
Post-remand history	On May 4, 2001, the agency initiated notice-and-comment proceedings on a proposed rule that would maintain its interpretation. See generally Department of Health and Human Services, Health Care Financing Administration, Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2002 Rates, 66 Fed Reg 22646 (2001). The agency promulgated that final rule on August 1, 2001. See Department of Health and Human Services, Centers for Medicare & Medicaid Services, Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Rates and Costs of Graduate Medical Education: Fiscal Year 2002 Rates; Provisions of the Balanced Budget Refinement Act of 1999; and Provisions of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, 66 Fed Reg 39828, 39917–19 (2001), amending various Parts of CFR Title 42. Apparently, the plaintiff in this case did not pursue further litigation. In a separate case, the district court upheld the agency's regulation on *Chevron* grounds. See *Select Specialty Hospital of Atlanta v Thompson*, 292 F Supp 2d 57, 65–66 (DDC 2003).

PanAmSat Corp v Federal Communications Commission	198 F3d 890 (DC Cir 1999)
Initial agency decision: June 16, 1998	DC Circuit decision: December 21, 1999
Agency decision on remand: July 10, 2000	Later DC Circuit decision: March 22, 2002

Language at issue	The statute grants agency authority to "assess and collect regulatory fees to recover the costs of . . . regulatory activities," 47 USC § 159(a)(1), including $65,000.00 or $90,000.00 annually per "Space Station," depending on the type. 47 USC § 159(g).
Agency view	The statutory language's "plain legislative history" compels the agency to exempt Comsat, a competitor to PanAmSat, from "space station fees" under the statute, because Comsat does not own its own telecommunications satellite but rather is the US user of internationally owned satellites. *PanAmSat*, 198 F3d at 892–94. "[T]he Conference Report for the 1993 amendments [ ] explicitly incorporated by reference, to the extent applicable, the appropriate provisions of" an earlier House report connected to "a virtually identical bill that passed the House in 1991 but failed to be enacted." Id at 895 (quotation marks and brackets omitted). The House report for the earlier failed bill stated that "[f]ees will not be applied to space stations operated by international organizations." Id at 896.
DC Circuit reasoning	There is no explicit exemption in the statute, nor even any "obvious hook in the language on which to hang an exemption." Id at 895. "Given the ambiguity of the legislative history, and more importantly the absence of any clear exemption in the statute, the [agency] was mistaken in its conclusion that the statute compelled an exemption for Comsat." Id at 896.
Vacate or remand?	Remanded. Id at 898.
Post-remand history	The agency ultimately reversed itself and stated that "[i]t would unreasonably frustrate the intent of Congress to suppose that it framed the fee schedule in a way that made a category of costs [ ] unrecoverable . . . without creating an express exemption." *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2000*, 15 FCC Rec 14478, 14488 (2000). The DC Circuit affirmed on *Chevron* grounds. *Comsat Corp v Federal Communications Commission*, 283 F3d 344, 349 (DC Cir 2002).

Sea–Land Service, Inc v Department of Transportation 137 F3d 640 (DC Cir 1998)

Initial agency decision: December 10, 1996	DC Circuit decision: March 13, 1998
Agency decision on remand: None	Later DC Circuit decision: None

Language at issue	Maritime shippers are prohibited from entering into certain shipping arrangements "except as otherwise required by the law of the United States." *Sea–Land*, 137 F3d at 643 (emphasis omitted), quoting 46 USC Appx § 1709(c)(6).
Agency view	"[W]ithout specific authorization," the agency does not have authority to exempt carriers from the statute by issuing orders allowing the prohibited shipping arrangements. *Sea–Land*, 137 F3d at 646. Such orders are not "the law of the United States" under the statute. Id at 645.
DC Circuit reasoning	Administrative orders may certainly be considered "law" in other contexts, and therefore the text does not per se restrict the agency's authority to issue orders exempting carriers. And the "erroneous belief [that the agency did not have the authority] was the sole basis for the modification of the orders." Id at 644–46.

Vacate or remand?	Vacated (thus reinstating the original agency orders). Id at 650.
Post-remand history	No further litigation.

Alarm Industry Communications Committee v Federal Communications Commission	131 F3d 1066 (DC Cir 1997)
Initial agency decision: March 25, 1997	DC Circuit decision: December 30, 1997
Agency decision on remand: September 25, 1998	Later DC Circuit decision: None

Language at issue	The statute prohibited Ameritech Corporation from "acquir[ing] any equity interest in, or obtain[ing] financial control of, any unaffiliated alarm monitoring service entity" for a certain period of time. 47 USC § 275(a)(2).
Agency view	The agency "thought the word 'entity' in this clause had a clear and precise meaning—it included only an object with a separate legal existence such as a corporation." *Alarm Industry*, 131 F3d at 1067. "Ameritech therefore could . . . purchase alarm monitoring assets organized and operated in an unincorporated division of Circuit City Stores, Inc." Id.
DC Circuit reasoning	The agency based its "plain meaning" argument on the *Black's Law Dictionary* definition of "entity," but "[w]hen the purported 'plain meaning' of a statute's word or phrase happens to render the statute senseless, we are encountering ambiguity rather than clarity." Id at 1068. Interpreting the statute as the agency did "render[s] the statute senseless" because it would allow regulated companies to purchase alarm services divisions of larger companies, but not the larger companies themselves. Other dictionaries indicate definitions that "lead to different or uncertain outcomes." Id at 1068–69. The statute "presents a puzzle, and [ ] the wooden use of a dictionary cannot solve it." Id at 1070.
Vacate or remand?	Vacated. Id at 1072.
Post-remand history	On remand, the agency interpreted the statute broadly to "include[ ] any organizational unit such as Circuit City's Home Security Division," because that interpretation was "more consistent with the Congressional purpose underlying section 275(a)(2)." *In the Matter of Enforcement of Section 275(a)(2) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, against Ameritech Corp*, 13 FCC Rec 19046, 19052 (1998). The agency therefore "f[ou]nd that Ameritech's transaction with Circuit City violated section 275(a)(2)." Id at 19061.

City of Los Angeles Department of Airports v United States Department of Transportation	103 F3d 1027 (DC Cir 1997)

Initial agency decision: June 30, 1995	DC Circuit decision: January 17, 1997
Agency decision on remand: December 23, 1997	Later DC Circuit decision: February 5, 1999
Language at issue	A state may charge "reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision." 49 USC § 40116(e)(2).
Agency view	The statute "mandates the use of historic cost valuation to the exclusion of every other method of valuing land that is to be included in the landing fee rate base." *City of Los Angeles Department of Airports*, 103 F3d at 1032.
DC Circuit reasoning	The Supreme Court has never "held that historic cost represents the only true measure of cost." Id. "Nothing in the [statute] . . . prescribes an accounting rather than an economic conception of cost in airport ratemaking." Id.
Vacate or remand?	Remanded. Id at 1039.
Post-remand history	"As before, the [agency] held that the 1993 and 1995 fees should be set aside because it was unreasonable for the City to recover its claimed 'opportunity cost.' . . . But this time the [agency] rested its decision explicitly on policy grounds." *City of Los Angeles v United States Department of Transportation*, 165 F3d 972, 975 (DC Cir 1999), citing generally Department of Transportation, *Los Angeles International Airport Rates Proceeding and Second Los Angeles International Airport Rates Proceeding*, Order No 97-12-31 (Dec 23, 1997) (available on Westlaw at 1997 WL 784476). The DC Circuit denied the City of Los Angeles's petition for review, see *City of Los Angeles*, 165 F3d at 980, and denied the petition for rehearing en banc. See *City of Los Angeles v United States Department of Transportation*, 179 F3d 937, 938 (DC Cir 1999) (per curiam). The Supreme Court denied the City's petition for certiorari. See generally *City of Los Angeles v Department of Transportation*, 528 US 1074 (2000).

Cajun Electric Power Cooperative, Inc v Federal Energy Regulatory Commission	924 F2d 1132 (DC Cir 1991)

Initial agency decision: October 26, 1989	DC Circuit decision: February 8, 1991
Agency decision on remand: June 24, 1992	Later DC Circuit decision: October 6, 1995
Language at issue	One section of a contract filed with the Federal Energy Regulatory Commission provided that Gulf States Utilities Company's obligation to supply transmission services to Cajun Electric Power Cooperative was "limited to delivery points on an integrated part of the system of a rural electric cooperative." *Cajun Electric*, 924 F2d

	at 1134. A second section of the contract "appear[ed] to give Cajun a right to insist on interconnection without Gulf States' agreement whether or not the interconnection is on a rural coop's integrated system." Id.
Agency view	The agency held that "the contract is unambiguous" and that Cajun lacked the right to insist on interconnection outside the integrated system of a rural cooperative. Id at 1135.
DC Circuit reasoning	The court held that the agency's decision "based on the notion that this contract unambiguously favors Gulf States seems at least high-handed and perhaps driven by regulatory policy considerations not apparent on this record." Id at 1137.
Vacate or remand?	Remanded. Id.
Post-remand history	An administrative law judge held an evidentiary hearing and "concluded that Cajun failed to meet its burden that the parties had intended Cajun's interpretation." See *Cajun Electric Power Cooperative, Inc v Federal Energy Regulatory Commission*, 66 F3d 364, 367 (DC Cir 1995). The agency upheld the ALJ's determination, as did the DC Circuit. See id at 367–68.

American Petroleum Institute v United States Environmental Protection Agency	906 F2d 729 (DC Cir 1990) (per curiam)
Initial agency decision: August 17, 1988	DC Circuit decision: June 26, 1990
Agency decision on remand: August 19, 1991	Later DC Circuit decision: July 8, 1994
Language at issue	The statute gives the agency the authority to establish treatment standards for "solid waste," which is "any garbage, refuse, sludge from a waste treatment plant, . . . and other discarded material." 42 USC § 6903(27).
Agency view	K061, which is "a zinc-bearing listed hazardous waste that emanates from the primary production of steel in electric furnaces," *American Petroleum*, 906 F2d at 734, "ceases to be a 'solid waste' when it arrives at a metal reclamation facility because at that point it is no longer 'discarded material.'" Id at 740. Therefore, the agency "determined that it lacked authority to establish any treatment standards for the [ ] residue that results from the metals reclamation process." Id at 734. See also id at 741 (explaining that the agency's interpretation relied primarily on *American Mining Congress v United States Environmental Protection Agency*, 824 F2d 1177 (DC Cir 1987)).
DC Circuit reasoning	The agency "mistakenly concluded that our case law left it no discretion to interpret the relevant statutory provisions." Id at 741.
Vacate or remand?	Vacated. Id at 742.
Post-remand history	The agency interpreted the statute so as to "bring K061 slag within the regulatory scope" of the statute. *Steel Manufacturers Association v Environmental Protection Agency*, 27 F3d 642, 643 (DC Cir 1994) (per curiam), citing generally Environmental Protection Agency, Land Disposal Restrictions for Electric Arc Furnace Dust (K061), 56 Fed Reg

	41164 (1991), amending 40 CFR Parts 261, 268, and 271. The DC Circuit upheld the agency's interpretation. *Steel Manufacturers Association*, 27 F3d at 649.

Baltimore and Ohio Railroad Co v Interstate Commerce Commission — 826 F2d 1125 (DC Cir 1987)

Initial agency decision: June 26, 1986	DC Circuit decision: August 25, 1987
Agency decision on remand: October 23, 1989; February 6, 1990	Later DC Circuit decision: None
Language at issue	To approve a railroad abandonment, the agency must "find[ ] that the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 USC § 10903(d).
Agency view	The agency was not allowed to consider, in making the required abandonment findings, whether there were potential buyers or subsidizers who could continue operation of the track. See *Baltimore and Ohio Railroad*, 826 F2d at 1127.
DC Circuit reasoning	There is "broad delegation language" in the statute, and "[n]othing in the legislative history . . . suggests a congressional intent so to restrict the Commission's abandonment decision." Id at 1128. The agency also misinterpreted an agency precedent. See id at 1129.
Vacate or remand?	Vacated. Id at 1126.
Post-remand history	The agency initiated notice-and-comment proceedings on these questions. The specific abandonment proceeding was eventually dismissed—as to the specific party at issue—because "the line involved in this abandonment was sold to a new entity for continued rail operations." *Buffalo, Rochester and Pittsburgh Railway Co and the Baltimore and Ohio Railroad Co—Abandonment and Discontinuance of Service in Indiana County, Pa*, 1989 WL 239582, *1 (Interstate Commerce Commission). Thereafter, the agency determined to articulate its policy through adjudication. See generally *Rail Abandonments—Consideration of Possible Sale or Subsidy of Rail Line in Analysis of an Abandonment Application under 49 U.S.C. 10903*, 1990 WL 287322 (Interstate Commerce Commission).

Phillips Petroleum Co v Federal Energy Regulatory Commission — 792 F2d 1165 (DC Cir 1986)

Initial agency decision: August 27, 1984	DC Circuit decision: June 13, 1986
Agency decision on remand: August 10, 1987	Later DC Circuit decision: February 24, 1989
Language at issue	The statute establishes the natural gas price ceiling as "the just and reasonable rate . . . established by the Commission which was (or would have been) applicable to . . . such natural gas on April 20, 1977." 15 USC § 3314(b)(1)(A)(i) (1982).
Agency view	The holding in *Public Service Commission of New York v Mid-Louisiana Gas Co*, 463 US 319 (1983), bound the agency to apply national rates to

	both pipeline-produced and independently produced natural gas. See *Phillips Petroleum*, 792 F2d at 1166.
DC Circuit reasoning	The *Mid-Louisiana* passage on which the agency relied was dicta, and mandates neither rate parity nor Phillips's preferred interpretation. Id at 1171.
Vacate or remand?	Remanded. Id at 1172.
Post-remand history	On remand, the agency issued an order interpreting the statute and "reaffirm[ing] the [agency]'s [1985] conclusion that pipeline production previously priced on a cost-of-service basis is now subject to the same ceiling price as gas sold by independent producers." *First Sales of Pipeline Production under Section 2(21) of the Natural Gas Policy Act of 1978; First Sales by Affiliates*, 40 FERC ¶ 61174, p 61543 (1987) (available on Westlaw at 1987 WL 117821). The agency denied the petition for rehearing. See generally *First Sales of Pipeline Production under Section 2(21) of the Natural Gas Policy Act of 1978; First Sales by Affiliates*, 42 FERC ¶ 61145 (1988) (available on Westlaw at 1988 WL 243722). The DC Circuit affirmed on *Chevron* grounds. See *Midwest Energy, Inc v Federal Energy Regulatory Commission*, 870 F2d 660, 661 (DC Cir 1989) (per curiam).

Prill v National Labor Relations Board	755 F2d 941 (DC Cir 1985)
Initial agency decision: January 6, 1984	DC Circuit decision: February 26, 1985
Agency decision on remand: September 30, 1986	Later DC Circuit decision: December 31, 1987
Language at issue	The statute gives employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively[,] . . . and to engage in other concerted activities." 29 USC § 157.
Agency view	The statutory language mandates that "concerted activities" be those "engaged in with or on the authority of other employees, and not solely by or on behalf of the employee himself." *Prill*, 755 F2d at 946.
DC Circuit reasoning	The agency had discretion to interpret "concerted activities" broadly. Id at 949–50.
Vacate or remand?	Remanded. Id at 957.
Dissent	The agency's interpretation is compelled by the plain meaning of "concerted," and even if not textually required, the agency's "interpretation of the provision is reasonable and should be upheld without hesitation." Id at 958–66 (Bork dissenting).
Post-remand history	The Supreme Court denied Meyers Industries, Inc's petition for certiorari. See generally *Meyers Industries, Inc v Prill*, 474 US 948 (1985). On remand, the agency interpreted the statute narrowly, so as to have the same effect as the original 1984 decision. See *Meyers Industries*, 281 NLRB 882, 883–84 (1986). Applying *Chevron* deference, the DC Circuit affirmed the agency's interpretation. *Prill v National Labor Relations Board*, 835 F2d 1481, 1482 (DC Cir 1987). The US Supreme Court again denied the petition for certiorari. See generally *Meyers Industries, Inc v National Labor Relations Board*, 487 US 1205 (1988).