

Nos. 10-313, 10-329

In the Supreme Court of the United States

TALK AMERICA, INC., PETITIONER,
V.
MICHIGAN BELL TELEPHONE COMPANY, D/B/A AT&T
MICHIGAN, RESPONDENT.

ORJIAKOR ISIOGU, *ET AL.*, PETITIONERS,
V.
MICHIGAN BELL TELEPHONE COMPANY, D/B/A AT&T
MICHIGAN, RESPONDENT.

*ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

**BRIEF FOR *AMICUS CURIAE* COMPTTEL IN
SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

COMPTEL is the leading national trade association representing communications service providers and their supplier partners. COMPTEL's members provide local exchange telecommunications services in competition with incumbent local exchange carriers ("ILECs") including Respondent Michigan Bell Telephone Company. COMPTEL's members must interconnect their networks with the networks of the ILECs in order for their customers to be able to make calls to and receive calls from customers of the ILECs. COMPTEL's members purchase entrance facilities – *e.g.*, transmission links -- from the ILECs in order to interconnect their networks with the ILECs' networks for the purpose of exchanging traffic. As a result, COMPTEL and its members have a significant interest in the question presented in this case which concerns the obligation of the ILECs under 47 U.S.C. § 251(c)(2) to make entrance facilities available to requesting carriers for interconnection purposes at cost-based rates.

¹ Pursuant to Rule 37.6, COMPTEL hereby certifies that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* COMPTEL has made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Rule 37.3, COMPTEL certifies that counsel of record for all parties have consented to its filing in letters on file with the Clerk's office submitted herewith.

SUMMARY OF ARGUMENT

Sections 251(c)(2) and 251(c)(3) of the Communications Act (the “Act”), 47 U.S.C. §§ 251(c)(2), 251(c)(3), impose two different and discrete obligations on ILECs. Pursuant to Section 251(c)(2), ILECs are required to provide requesting carriers interconnection to their networks for the transmission and routing of telephone exchange (local) and exchange access (toll) services. Pursuant to Section 251(c)(3), ILECs are required to provide requesting carriers access to their network elements on an unbundled basis for the provision of telecommunications services to the carriers’ customers if the failure to provide such access would impair the carriers’ ability to provide a service. ILECs are required to charge cost-based rates both for interconnection facilities and for unbundled network elements. 47 U.S.C. §252(d)(1).

Entrance facilities are the physical transmission links connecting ILEC networks with the networks of competitive local exchange carriers (“CLECs”). The Sixth Circuit read the Federal Communications Commission’s (“FCC”) rule² limiting requesting carriers’ rights to access entrance facilities on an unbundled basis pursuant to Section 251(c)(3) of the Act to eliminate their rights to obtain entrance facilities for the transmission and routing of

² 47 C.F.R. § 319(e)(2)(i).

telephone exchange and exchange access service pursuant to Section 251(c)(2) of the Act. This reading cannot be reconciled with the plain language of the statute. It is also at odds with the FCC's rules implementing the statute and the agency's interpretation of those rules, to which the Sixth Circuit accorded no deference in contravention of the precedent of this Court. Confronted with the same issue, the Seventh, Eighth and Ninth Circuits all properly deferred to the FCC's interpretation of the rights and obligations of telecommunications carriers under the Act and the rules. The Court should reverse the Sixth Circuit's decision and correct its clear misconstruction of the statute and the FCC's rules.

ARGUMENT

The Michigan Public Service Commission correctly determined that Respondent Michigan Bell is obligated under Section 251(c)(2) of the Act, 47 U.S.C. § 251(c)(2), to make entrance facilities used for interconnection purposes available to competitive local exchange carriers ("CLECs") at total element long run incremental cost ("TELRIC") calculated in accordance with Section 252(d)(1) of the Act, 47 U.S.C. §252(d)(1). The Public Service Commission's ruling is consistent with the FCC's rules and precedent interpreting the Act as well as with the decisions of the three other circuit courts that have

addressed the issue. The decision should have been upheld. In reaching the opposite conclusion – *i.e.*, that ILECs may charge their competitors whatever they want for entrance facilities used for interconnection purposes -- the Sixth Circuit improperly conflated the obligations imposed on ILECs by Section 251(c)(2) of the Act and with those imposed by Section 251(c)(3) of the Act. In failing to distinguish between the rights of CLECs to obtain TELRIC-priced access to entrance facilities used to exchange traffic with ILECs and the restrictions on their rights to obtain unbundled access to TELRIC-priced entrance facilities used for other purposes, the Sixth Circuit significantly pared back the interconnection duties Congress deemed necessary for ILECs to fulfill in an effort to ensure that telephone subscribers are able to call one another regardless of the identity of their service provider. The Sixth Circuit's decision, *Michigan Bell Telephone Co. v. Covad Communications Co.*, 597 F.3d 370 (6th Cir. 2010), must be reversed.

I. The ILEC's Duties Under Section 251(c)(2) And Section 251(c)(3) Are Not The Same

Congress enacted the Telecommunications Act of 1996³ to open local telephone markets to competition. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 476 (2002). Prior to the passage of the Telecommunications Act, ILECs had the exclusive right to provide local telephone service in their territories and their ubiquitous networks were the only source of connections to customers. *Id.* at 490-491. To open the markets to competition and to facilitate competitive entry, Congress imposed certain obligations on the ILECs and granted certain rights to new entrants. Two of those rights and obligations are at the center of this dispute. Section 251(c)(2) of the Act imposes on ILECs the duty to provide requesting telecommunications carriers interconnection to their networks for the transmission and routing of telephone exchange service and exchange access at TELRIC rates. 47 U.S.C. §§251(c)(2), 252(d)(1). ILEC and CLEC networks must be interconnected in order for ILEC customers to be able to make calls to and receive calls from CLEC customers and for CLEC customers

³ Pub.L. 104-104, 110 Stat. 56. The Telecommunications Act of 1996 was codified in various provisions of the Communications Act of 1934, as amended, 47 U.S.C §§151, *et seq.*, including Sections 251 and 252.

to be able to make calls to and receive calls from ILEC customers.

Section 251(c)(3) of the Act imposes on ILECs the duty to provide requesting telecommunications carriers, also at TELRIC rates, access to their network elements on an unbundled basis for the provision of telecommunications service. 47 U.S.C. §§251(c)(3), 252(d)(1). CLECs may combine the unbundled network elements they purchase from the ILECs with their own network facilities to provision service to their customers.

In determining which network elements ILECs are required to make available at TELRIC rates, Congress directed the FCC to consider whether the failure to provide unbundled access to a particular network element would impair the ability of a requesting carrier to provide service. 47 U.S.C. §251(d)(2). Although the FCC had originally determined that CLECs were entitled to purchase access to unbundled entrance facilities under Section 251(c)(3), it changed that assessment in 2005 when it found that CLECs were not impaired in providing telecommunications service without access to unbundled entrance facilities at TELRIC rates. At the same time, the FCC explained that its non-impairment determination under Section 251(c)(3) did not adversely affect the rights of CLECs to obtain TELRIC-priced entrance facilities for the

transmission and routing of telephone traffic pursuant to Section 251(c)(2). *Unbundled Access To Network Elements And Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533 at 2611, ¶140 (2005) (“*TRRO*”), *petitions for review den.*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). Unlike Section 251(c)(3), Section 251(c)(2) does not call for an impairment determination.

In ruling that CLECs are not entitled to TELRIC-priced entrance facilities for the purpose of interconnection, the Sixth Circuit failed to recognize that an ILEC’s interconnection duty pursuant to Section 251(c)(2) is independent of its duty to provide access to unbundled network elements. The plain language of Section 251 makes clear that subsection (c)(2) (interconnection) and subsection (c)(3) (access to unbundled network elements) impose separate and distinct obligations on ILECs. The FCC’s implementing regulations eliminate any doubt about the independence of the obligations. Section 51.307(b) of the FCC’s rules states that the duty to provide access to unbundled network elements pursuant to Section 251(c)(3) “includes a duty to provide a connection to an unbundled network element *independent* of any duty to provide interconnection” pursuant to Section 251(c)(2) of the Act. 47 C.F.R. §51.307(b) (emphasis added). *See*

also, Pacific Bell Telephone Co. v. California Public Utilities Comm'n, 621 F.3d 836, 845 (9th Cir. 2010) (duties of ILECs under Section 251(c)(2) are independent of duties under Section 251(c)(3)).

Despite the plain language of the statute and the rule as well as the FCC's reaffirmation in the *TRRO* that CLECs continue to have access to TELRIC-priced entrance facilities used for interconnection purposes, the Sixth Circuit applied the FCC's finding that CLECs are not *impaired* in providing telecommunications service without access to unbundled entrance facilities pursuant to Section 251(c)(3) to foreclose the independent right of CLECs to obtain access to entrance facilities for the transmission and routing of telephone traffic pursuant to Section 251(c)(2). In so doing, the Sixth Circuit impermissibly expanded the reach of §51.319(e)(2)(i) of the FCC's rules, 47 C.F.R. § 51.319(e)(2)(i). Section 51.319 is entitled "Specific Unbundling Requirements" and subsection (e)(2)(i) states that ILECs are not obligated to provide CLECs *unbundled access* to entrance facilities that do not connect a pair of ILEC wire centers. Section 51.319(e)(2)(i) was adopted to reflect the FCC's finding that CLECs are not impaired without access to unbundled entrance facilities in provisioning service to their customers. It was *not* intended to curtail CLECs' rights to obtain access to entrance facilities used to interconnect with the ILEC's

network for the transmission and routing of telephone exchange and exchange access service. The Sixth Circuit's reading conflicts with the plain language of the rule which by its terms is limited to unbundling requirements.

II. The Sixth Circuit Substituted Its Judgment For That Of The Expert Agency

The Sixth Circuit's analysis of the rights and obligations of ILECs and CLECs under Section 251(c) does not withstand scrutiny. In addition to running counter to the decisions of the three other circuit courts that have considered the issue,⁴ the Sixth Circuit reached its decision by substituting its own judgment for that of the expert agency not only with respect to the manner in which telephone networks are designed and operate but also with respect to the meaning of the expert agency's own regulations.

As this Court has recognized, ascertaining the meaning of the Telecommunications Act of 1996 often presents challenges. Congress has delegated to the FCC the authority to resolve any ambiguities.

⁴ *Pacific Bell Telephone Co. supra*; *Southwestern Bell Telephone, L.P. v. Missouri Public Service Comm'n.*, 530 F. 3d 676 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 971 (2009); *Illinois Bell Telephone Co. v. Box*, 526 F. 3d 1069 (7th Cir. 2008).

The FCC's interpretations of the rights and duties of carriers under the Act are entitled to deference so long as they are reasonable:

It would be a gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. This is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars. The 1996 Act can be read to grant (borrowing a phrase from incumbent GTE) "most promiscuous rights" to the FCC vis-à-vis the state commissions and to competing carriers vis-à-vis the incumbents – and the Commission has chosen in some instances to read it that way. But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency. We can only enforce the clear limits that the 1996 Act contains. . . .

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 397 (1999). See also, *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (ambiguities in a statute within an agency's jurisdiction to administer are delegations of authority to fill the statutory gap

and courts should accept the agency's construction so long as it is reasonable).

Fifteen years ago, the FCC wisely concluded that national rules for interconnection pursuant to Section 251(c)(2) are necessary to promote Congress' goal of "creating conditions that will facilitate the development of competition in the local exchange market." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15591-92 at ¶179 (1996), *reversed in part on other grounds, AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999) ("*Local Competition Order*"). The term "interconnection" is not defined in the Act. The FCC's interpretation of the term is therefore entitled to considerable weight and the deference of the reviewing court so long as it is reasonable. *Competitive Telecommunications Ass'n. v. FCC*, 117 F. 3d 1068, 1071 (8th Cir. 1997).

Section 51.5 of the FCC's rules, 47 C.F.R. §51.5, defines interconnection as the "linking of two networks for the mutual exchange of traffic" and defines "equipment necessary for interconnection" for purposes of Section 251(c)(2) as the equipment used to interconnect with the ILEC's network for the transmission and routing of telephone exchange service, exchange access service or both. The FCC has found that Section 251(c)(2) expressly requires

ILECs to provide access to the transmission facilities CLECs need in order to interconnect with the ILEC network. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17203 at ¶ 366 (2003) (“TRO”), *vacated in part and remanded in part on other grounds, United States Telecom Ass’n. v. FCC*, 359 F.3d 554 (D.C. Cir 2004).

Interconnection of networks for the purpose of exchanging traffic is an arrangement that benefits both the ILEC and the CLEC equally by allowing each of their respective customers to make calls to and receive calls from the customers of the other. *Local Competition Order*, 11 FCC Rcd at 15781, ¶553; *Pacific Bell Telephone Co.*, 621 F. 3d at 847. In the *Local Competition Order*, the FCC explained that the Section 251(c)(2) interconnection duty requires ILECs “to design interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within their own networks.” 11 FCC Rcd. at 15614-15615, ¶ 224.

There is no dispute that entrance facilities are the physical transmission facilities -- usually fiber optic links with tremendous capacity -- that connect ILEC networks and CLEC networks. *Michigan Bell*

Telephone Co., 597 F. 3d at 372. What the Sixth Circuit failed to appreciate is that various types and jurisdictional classifications of communications traffic can and do ride a single entrance facility (on different virtual channels) and that what distinguishes the different types and jurisdictions of traffic is the regulatory treatment that each is accorded, not the physical facilities they traverse.

There is also no dispute that the FCC has determined pursuant to Section 251(c)(3) that CLECs are not impaired in providing telecommunications services to their customers without access to unbundled entrance facilities at TELRIC rates. This finding of non-impairment, however, does not eliminate the right of CLECs to obtain TELRIC-priced entrance facilities used for interconnection purposes pursuant to Section 251(c)(2). The FCC has explained the distinction between interconnection and access to unbundled network elements:

[I]nterconnection is different from “access” to unbundled elements. . . . Section 251(c)(2) requires that interconnection be provided for the “transmission and routing of telephone exchange service and exchange access.” Section 251(c)(3), in contrast, requires the provision of access to unbundled elements to allow requesting carriers to provide a “telecommunications service.” The

term “telecommunications service” by definition includes a broader range of services than subsection (c)(2) allows for interconnection. Subsection (c)(3), therefore, allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection. If we were to conclude that “access to unbundled network elements” pursuant to subsection (c)(3) could only be achieved by means of interconnection under subsection (c)(2), we would be limiting, in effect, the uses to which unbundled elements may be put, contrary to the plain language of Section 251(c)(3) and standard canons of statutory construction.

Local Competition Order, 11 FCC Rcd at 15636-37, ¶270.⁵ Despite this explication of the differences in the services provided over Section 251(c)(2) facilities and Section 251(c)(3) facilities, the Sixth Circuit misconstrued the language of Section 251(c)(3) and the FCC’s entrance facility unbundling rule to limit

⁵ The Act defines “telecommunications service” as 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. “Telecommunications” in turn is defined as 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. 47 U.S.C. §§153(43), (46).

the interconnection rights of CLECs under Section 251(c)(2).

There is no basis for the Sixth Circuit's conclusion that entrance facilities -- that is, the physical transmission facilities connecting networks -- cannot be interconnection facilities even when they are used to interconnect an ILEC network and a CLEC network for the mutual exchange of traffic because "neither the FCC nor any court has ever defined interconnection" or "entrance facility" by the use that is made of the transmission facility. *Michigan Bell Telephone Co.*, 597 F.3d at 383-384. The Sixth Circuit is mistaken. The FCC does in fact define the regulatory treatment of transmission facilities and whether they are priced at TELRIC rates or unregulated rates by the use that is made of those facilities. See e.g., 47 C.F.R. §51.305(b) (carrier that requests interconnection *for a purpose other than providing telephone exchange service and/or exchange access service* to others not entitled to TELRIC priced interconnection pursuant to Section 251(c)(2)); 47 C.F.R. §307(a) (ILEC shall provide unbundled access to network elements *for the provision of a telecommunications service*); 47 C.F.R. §51.309(b) (a requesting carrier may not access an unbundled network element *for the exclusive provision of mobile wireless service or interexchange*

service).⁶ See also, *Competitive Telecommunications Ass'n. v. FCC*, 117 F. 3d at 1071-1072. (“Congress intended for ‘the transmission and routing of telephone exchange and exchange access’ only to describe what the interconnection, the physical link, would be *used* for.”)⁷

Consistent with industry practice, the FCC has long recognized that CLECs use the “transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic” and that Section 251(c)(2) applies only to the former use. *TRO*, 18 FCC Rcd at 17203, ¶365. If the physical transmission link is used for the transmission and routing of telephone exchange or exchange access traffic between the ILEC and the CLEC, the CLEC is entitled to TELRIC pricing. If the CLEC uses the physical transmission link to reach its collocation space in the ILEC’s wire center and access unbundled network elements or to transport calls between its own customers, the CLEC is not entitled to TELRIC pricing.

The FCC acted well within its authority in interpreting Section 251(c)(2) to require ILECs to make entrance facilities available for

⁶ Emphasis added.

⁷ Emphasis added.

interconnection purposes at TELRIC rates regardless of whether Section 251(c)(3) requires ILECs to provide CLECs unbundled access to entrance facilities for the purpose of backhauling traffic or providing any other telecommunications service. *TRO*, 18 FCC Rcd. at 17203-05 ¶¶365-367 and nn. 1113 and 1117. In order to justify its conclusion that entrance facilities are not interconnection facilities subject to TELRIC rates even when they are used to connect an ILEC network and a CLEC network for the *transmission and routing of telephone exchange service*, the Sixth Circuit had to reject the expert agency's analysis with respect to the different uses telecommunications carriers make of entrance facilities and the different statutory rights and obligations that attach to those different uses of the facilities. *Michigan Bell Telephone Co.*, 597 F. 3d at 382-383.

The Sixth Circuit found the FCC's interpretation of CLECs' interconnection rights under Section 251(c)(2) to be "so plainly erroneous or inconsistent with the regulation" as to warrant no deference. *Michigan Bell Telephone*, 597 F.3d at 375. But the FCC's interpretation is neither erroneous nor inconsistent with any regulation. The purported inconsistency the court found was with 47 C.F.R. §51.319(e)(2)(i) of the FCC's rules, the *unbundling* regulation that very clearly states that ILECs are

not required pursuant to Section 251(c)(3) to provide unbundled access to entrance facilities that do not connect a pair of ILEC wire centers. *Michigan Bell Telephone Co.*, 570 F. 3d at 382. As noted, when the FCC adopted this regulation in 2005, it contemporaneously clarified that its finding pursuant to Section 251(c)(3) that CLECs were not impaired without access to unbundled entrance facilities used to provide telecommunications services does not affect the right of CLECs pursuant to Section 251(c)(2) to obtain TELRIC-priced entrance facilities to the extent that they use them to interconnect with the ILEC's network for the mutual exchange of traffic. *TRRO*, 20 FCC Rcd 2533 at 2609-2612, ¶¶ 136-140.

The FCC's reaffirmation of CLECs' rights to entrance facilities used for interconnection purposes at TELRIC rates under Section 251(c)(2) of the Act is not plainly erroneous or inconsistent either with the statute or with its finding that CLECs may not obtain unbundled access to entrance facilities at TELRIC rates when they use them for other purposes, including backhauling their own traffic. The FCC's interpretation of the scope of §51.319(e)(2)(i) and its impact on the interconnection rights of CLECs under Section 251(c)(2), therefore, is entitled to deference. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009). By declining to defer to the FCC's

interpretation, the Sixth Circuit improperly substituted its construction of the statute and the FCC's implementing regulation for that of the FCC in a very technical area. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

In an effort to reconcile its reading of §51.319(e)(2)(i) of the FCC's regulations with the explanatory language in the *TRRO*, the court rephrased the pertinent provisions of the rule and the *TRRO* to say that ILECs are not required to provide entrance facilities at TELRIC rates under any circumstances. *Michigan Bell Telephone*, 597 F.3d at 379. The Sixth Circuit erroneously turned a blind eye to the fact that the regulation does not speak to the ILECs' obligation to provide entrance facilities for interconnection purposes pursuant to Section 251(c)(2) of the Act, much less relieve ILECs of that obligation. The three other circuit courts that have addressed the issue of the interplay between §51.319(e)(2)(i) of the regulations and Section 251(c)(2) of the Act have properly sustained the FCC's interpretation of the statute and its own regulations. *Pacific Bell Telephone Co.*, 621 F. 3d at 846-47 (FCC's interpretation that Section 251(c)(2) requires ILECs to lease entrance facilities at TELRIC rates to CLECs for interconnection purposes is reasonable and entitled to deference); *Southwestern Bell Telephone, L.P. v. Missouri Public*

Service Commission, 530 F.3d 676 683-84 (8th Cir. 2008) (state commission properly read FCC rules to mean that ILECs must provide CLECs access to entrance facilities at TELRIC rates if necessary for interconnection); *Illinois Bell Telephone Co. v. Box*, 526 F. 3d 1069, 1072 (7th Cir. 2008) (federal law requires that entrance facilities used for interconnection must be priced at TELRIC). The Sixth Circuit should have done the same.

CONCLUSION

For the foregoing reasons and those set forth in the Petitioners' briefs, COMPTTEL respectfully requests that the Court reverse the Sixth Circuit's decision.

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