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No. 10-313

IN THE

Supreme Court of the United States

TALK AMERICA INC.,
Petitioner,

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 PETITIONER

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January 27, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Was the Michigan Public Service Commission barred from requiring incumbent local exchange carriers ("ILECs") to offer their competitors telecommunications facilities known as "entrance facilities" at cost-based rates under § 251(c)(2) of the Telecommunications Act of 1996 as a result of a Federal Communications Commission rule eliminating ILECs' obligation to provide similar facilities under § 251(c)(3) when they are used by competitors for a different statutory purpose?

PARTIES TO THE PROCEEDING

In addition to Talk America Inc., Covad Communications Company and XO Communications were Intervenors-Defendants-Appellants in the court of appeals. Michigan Bell Telephone Company d/b/a AT&T Michigan was Plaintiff-Appellee in the court of appeals. The following parties, or their predecessors in office, were Defendants-Appellants in the court of appeals: Michigan Public Service Commission; J. Peter Lark, Laura Chappelle, and Monica Martinez, in their official capacities as Commissioners of the Michigan Public Service Commission. Commissioners currently appointed to the Michigan Public Service Commission are Orjiakor N. Isiogu, Monica Martinez, and Greg R. White. In addition, McLeodUSA Telecommunications Services, Inc. and TDS Metrocom, LLC were Intervenors in the court of appeals.

AMENDMENT TO RULE 29.6 CORPORATE DISCLOSURE STATEMENT

As of December 6, 2010, through intermediate wholly-owned subsidiaries, Petitioner Talk America Inc. is a wholly-owned indirect subsidiary of PAETEC Holding Corp., a publicly held company (NASDAQ: PAET). No publicly-held company owns 10% or more of the stock of PAETEC Holding Corp.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 597 F.3d 370. The court's order denying rehearing and rehearing en banc (Pet. App. 90a-91a) is unreported. The district court's opinion (Pet. App. 143a-169a) is not reported in the *Federal Supplement* but is available at 2007 WL 2868633.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2010 (Pet. App. 1a), and it denied petitioner's timely filed petition for rehearing en banc on June 2, 2010 (Pet. App. 90a). The petition for a

writ of certiorari was filed on August 31, 2010, and granted on December 10, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The full text of the most pertinent provisions of the Telecommunications Act of 1996, 47 U.S.C. §§ 251-252, are reproduced at Pet. App. 92a-111a. In addition, 47 U.S.C. § 201 is reproduced below.

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the

> different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

STATEMENT

Statutory and Regulatory Background

The Telecommunications Act of 1996 ("1996 Act" or "Act") was intended to eliminate the incumbent local telephone companies' monopolies and fundamentally restructure the telecommunications industry by imposing upon the incumbent local monopolists a host of duties whose purpose was to facilitate entry into the local market. As this Court stated: "[f]oremost among these duties is the [incumbent's] obligation under [251(c) of the Act] to share its

network with competitors." *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 371 (1999).[1]

That obligation to share is set out in § 251 of the Act, which imposes several different and independent duties. Two of those duties are at issue here. First, every incumbent local exchange carrier ("ILEC") has the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." 47 U.S.C. § 251(c)(2). Interconnection is to be provided "at any technically feasible point within the carrier's network" and must be provided on a non-discriminatory basis and at rates that are just and reasonable. *Id*. Second, every ILEC must provide requesting carriers access to network elements on an "unbundled basis," i.e., as unbundled network elements ("UNEs"), at any technically feasible point, on a nondiscriminatory basis and at rates that are just and reasonable. 47 U.S.C. § 251(c)(3).

Promptly after the Act became law, the Federal Communications Commission ("FCC") initiated a rulemaking proceeding to implement the Act, including the network sharing requirements of § 251,[2] and

[1] In describing the monopolistic status of local telephone services that existed before the 1996 Act this Court said: "AT & T and its satellites . . . [were] known as the 'Bell system,' which by the mid-20th century had come to possess overwhelming monopoly power in all telephone markets nationwide, supplying local-exchange and long-distance services as well as equipment." *Verizon Communications v. FCC,* 535 U.S. 467, 480 (2002), citing R. Vietor, CONTRIVED COMPETITION: REGULATION AND DEREGULATION IN AMERICA 171, 174-175 (1994).

[2] Section 251(c) also requires ILECs to make their retail services available at wholesale rates so that competing carriers can resell them (§ 251(c)(4)) and permit competitors to collocate

specifically §§ 251(c)(2) and 251(c)(3). With respect to the ILECs' interconnection obligation set forth in § 251(c)(2), the FCC sought comments on how interconnection and the concept of "technical feasibility" should be interpreted. In its resulting order, the FCC interpreted the term "interconnection" to mean "the physical linking of two networks for the mutual exchange of traffic." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15590 ¶ 176 (1996) ("*Local Competition Order*"). Accordingly, the FCC's implementing regulations define "interconnection" as "the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. Furthermore, the FCC's regulations provide that ILECs must provide their competitors "any technically feasible method of obtaining interconnection." *Id.* § 51.321(a). The FCC's regulations require "an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network." 47 C.F.R. § 51.305(a)(3). The FCC's regulations also require that "[i]f technically feasible, an incumbent LEC shall provide two-way trunking upon request." *Id.* § 51.305(f). These rulings have remained unchanged.

The FCC has not enjoyed such permanence with respect to its decisions implementing the ILECs' unbundling obligations under § 251(c)(3). The FCC's identification of network elements, its determination of which network elements must be made available

at the ILECs' premises equipment used by competitors necessary for interconnection or for access to UNEs (§ 251(c)(6)).

as UNEs, and its decisions regarding the ILECs' role in combining UNEs for their competitors have all been challenged in the courts. Since the FCC's initial unbundling conclusions were set forth in the *Local Competition Order*, the FCC has repeatedly reexamined its unbundling rules in response to courts' rejection of some of those rules and in response to technological developments and expanding competition. The result has been that, in the decade between the date the Act became law and the FCC's last reexamination of the ILECs' unbundling obligations, the list of network elements that the ILECs must make available as UNEs has at times expanded and contracted.

The FCC's last, most recent, effort to address the network elements that must be provided as UNEs began with its Triennial Review Proceeding begun in December, 2001. Once again, the FCC looked at the elements that make up the ILECs' local networks: loops, central office and tandem switches, transport, packet switching, signaling networks, call-related databases and operational support system functions.[3]

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[3] This Court explained how certain elements of the local exchange related to each other and to the provision of local service in *Verizon*:

> The physical incarnation of such a market, a "local exchange," is a network connecting terminals like telephones, faxes, and modems to other terminals within a geographical area like a city. From terminal network interface devices, feeder wires collectively called the "local loop," are run to local switches that aggregate traffic into common "trunks." The local loop was traditionally, and is still largely, made of copper wire, though fiber-optic cable is also used, albeit to a far lesser extent than in long-haul markets. Just as the loop runs from terminals to local switches, the trunks run from the local switches to centra-

Once again, the FCC applied the standard Congress established for UNEs under § 251(c)(3), namely that at a minimum it determine whether access to the network element is "necessary" and whether "the failure to provide access to such network elements would impair the ability of" the competing carrier to offer its services. 47 U.S.C. § 251(d)(2). This is the "necessary and impair" standard that delineates the limits of the ILECs' obligations to offer to competing carriers access to UNEs. *AT&T v. Iowa Utils. Bd.,* 525 U.S. at 391-392. The FCC issued its order in 2003. *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order*" or "*TRO*").

> lized, or tandem, switches, originally worked by hand but now by computer, which operate much like railway switches, directing traffic into other trunks. A signal is sent toward its destination terminal on these common ways so far as necessary, then routed back down another hierarchy of switches to the intended telephone or other equipment. A local exchange is thus a transportation network for communications signals, radiating like a root system from a "central office" (or several offices for larger areas) to individual telephones, faxes, and the like.

Verizon, 535 U.S. at 489-490 (footnotes omitted.) The elements of a local exchange market in their broadest sense are largely unchanged; the technology used in the industry has changed over time.

Among the network elements that the FCC determined need no longer be made available as a UNE under § 251(c)(3) was an element called an "entrance facility." The FCC analyzed entrance facilities as a form of dedicated transport, noting first, that its prior unbundling decision[4] had used a definition of dedicated transport that "applied to all technically feasible capacity levels between incumbent LEC wire centers, or between switches owned by incumbent LECs or requesting telecommunications carriers." *TRO*, 18 FCC Rcd at 17201, ¶ 362. It then noted that reviewing courts had criticized its broad unbundling determinations regarding dedicated transport, and in response to that criticism revised its definition so that dedicated transport would be limited to transmission facilities between an incumbent LEC's switches and wire centers, thus excluding entrance facilities from the definition. *Id.*, 18 FCC Rcd at 17202-203, ¶¶ 363-366.

The FCC analyzed the use to which competing carriers put these entrance facilities, noting that competitors use entrance facilities for two distinct purposes: (1) interconnection and (2) to carry their own traffic, for their end users, which the industry calls "backhaul." *Id.*, 18 FCC Rcd at 17203, ¶ 365. The FCC said that its conclusion that entrance facilities should not be provided as a UNE under § 251(c)(3) was "buttressed" by the economics of facilities used for "backhaul" between networks; competing carriers had access to alternative providers' facilities for the "backhaul" use and "some

[4] *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999), *corrected by Errata*, 16 FCC Rcd 1724 (1999).

control" over the location of their own facilities. *Id.*, 18 FCC Rcd at 17204, ¶ 367.

Notably, the FCC wrapped up its discussion and its rulings with the following statement applicable to all competing carriers, including CMRS (cellular) providers:

> We find that no requesting carrier shall have access to unbundled inter-network transmission facilities under section 251(c)(3). Thus, assuming *arguendo*, that a CMRS carrier's base station is a type of requesting carrier switch, CMRS carriers are ineligible for dedicated transport from their base station to the incumbent LEC network. However, all telecommunications carriers, including CMRS carriers, will have the ability to access transport facilities *within* the incumbent LEC's network, pursuant to section 251(c)(3), and to interconnect for the transmission and routing of telephone exchange service and exchange access, *pursuant to section 251(c)(2)*.

Id., 18 FCC Rcd at 17206, ¶ 368 (second emphasis added) (footnotes omitted).

A number of ILECs, competitive local exchange carriers ("CLECs") and other parties challenged aspects of the *TRO*; on appeal, the D.C. Circuit affirmed some portions of the order and rejected others, remanding to the FCC those determinations the court rejected. The FCC's decision not to conduct an "impairment" test for entrance facilities, as required by § 251(c)(3) for all network elements, was one of the rejected FCC determinations. *United States Telecom Ass'n v. FCC,* 359 F.3d 554, 586 (D.C. Cir. 2004) ("*USTA II"*), *cert. denied sub nom., Nat'l*

Ass'n of Regulatory Utility Comm'rs v. United States Telecom Ass'n, 543 U.S. 925 (2004).

On remand, the FCC conducted the required impairment test with respect to the unbundling of entrance facilities under § 251(c)(3), as required by *USTA II,* and ultimately restated its conclusion (which the D.C. Circuit had not overturned) that entrance facilities need not be unbundled pursuant to § 251(c)(3). *In re Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, 20 FCC Rcd 2533, 2610 ¶ 137 (2005) (*"Triennial Review Remand Order" or "TRRO").* It did not stop there, however. The FCC went on to state that:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

Id., 20 FCC Rcd at 2611, ¶ 140 (footnotes omitted). The FCC recognized that the ILECs' obligations regarding interconnection under § 251(c)(2) are separate and distinct from their obligations regarding unbundling under § 251(c)(3) and stressed its understanding of this distinction by repeating the point it previously had made in the *TRO*.

While the unbundling debates were raging at the federal level, ILECs and CLECs were negotiating revisions to their interconnection agreements to

implement the *TRO*, and then the *TRRO*.[5] In Michigan, this process was undertaken through negotiations facilitated by the Michigan Public Service Commission's (MPSC) staff and culminated in an arbitration conducted by the MPSC under § 252 of the Act. *In the Matter, on the Commission's Own Motion, To Commence A Collaborative Proceeding To Monitor and Facilitate Implementation of Accessible Letters Issued By SBC Michigan and Verizon,* Michigan Public Service Commission, Case No. U-14447. It is the validity of the MPSC's decision regarding the extent of the ILECs' obligations under the *TRRO* to provide entrance facilities that is the crux of the parties' dispute.

Specifically, the MPSC concluded in its Arbitration Order that the FCC's unbundling ruling in the *TRRO* eliminated the ILECs' duty to provide entrance facilities as a UNE under § 251(c)(3) of the 1996 Act, but left intact the ILECs' separate obligation to provide entrance facilities used for purposes of interconnection under § 251(c)(2). Pet. App. 185a.

Interconnection

The requirement that the ILECs interconnect their networks with other carriers' networks is critically important to opening the local telecommunications market to competition, but is not new. Soon after the invention of the telephone it became obvious that the competing telephone companies would have to interconnect their lines so that one company's customers could talk to another's and vice versa. That fundamental need has never changed. As one court

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[5] The D.C. Circuit rejected challenges to the FCC's rulings in the *TRRO* in *Covad Communications Co. v. FCC,* 450 F.3d 528 (D.C. Cir. 2006).

recently observed, "[a] local telephone service is of little use if it cannot connect to other local telephone users." *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836, 840 (9th Cir. 2010).

The FCC has interpreted the interconnection obligation established in § 251(c)(2) to be a requirement that the ILECs provide to their competitors a range of physical facilities that competitors can use to interconnect their networks to those of the ILECs. In its first rulemaking proceeding implementing the requirements of § 251, the FCC ordered ILECs to provide various "methods of technically feasible interconnection or access" to their networks, including the provision of existing or newly built transmission facilities. *See Local Competition Order*, 11 FCC Rcd at 15780-81, ¶ 553; 47 C.F.R. § 51.321 (requiring ILECs to provide "any technically feasible method of obtaining interconnection").

The FCC's regulations establish a structure in which the competitor, not the ILEC, selects the form of interconnection it wants to use; the ILEC must provide what is requested unless the ILEC demonstrates that it is not technically feasible. 47 C.F.R. § 51.321(d). In implementing the statutory standard that interconnection be made available "at any technically feasible point" (47 U.S.C. § 251(c)(2)), the FCC has ordered ILECs to provide various "methods of technically feasible interconnection or access to [their] networks," including the provision of existing or newly built transmission facilities; "meet point arrangements" are one form of interconnection that may require an ILEC to build out its facilities to meet those of a competitor. *Local Competition Order*, 11 FCC Rcd at 15780-81, ¶ 553. ILECs also are required to provide interconnection by allowing

their competitors to place their network equipment in the ILECs' central offices; this is known as virtual and physical collocation. *Id.*

Several courts have affirmed the FCC's statutory interpretation of what interconnection means under the 1996 Act. The Eighth Circuit has explained that, under § 251(c)(2), an ILEC's "duty is to provide interconnection for the facilities and equipment of the requesting carrier with the LEC's network. By its own terms, this reference is to the physical link, between the equipment of the carrier seeking interconnection and the LEC's network." *Competitive Telecom. Ass'n v. FCC*, 117 F.3d 1068, 1072 (8th Cir. 1997). The D.C. Circuit similarly has concluded that the term "interconnect" refers to "facilities and equipment, not to the provision of any service . . . ." *AT&T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003). And, the D.C. Circuit also has ruled that § 251(c)(2) "obliges an [sic] LEC to provide interconnection facilities with any other carrier at a single 'technically feasible' POI [point of interconnection]." *Mountain Communications, Inc. v. FCC*, 355 F.3d 644, 649 (D.C. Cir. 2004). The ILECs' obligation to provide interconnection extends to building additional transmission facilities to meet a competitor's needs if such facilities do not already exist. *US West Communications, Inc. v. Minn. Pub. Utils. Comm'n*, 55 F. Supp. 2d 968, 982-83 (D. Minn. 1999) (ILEC must provide existing transmission facilities or build new ones to comply with regulations implementing § 251(c)(2)).

That interconnection encompasses a physical transmission facility that is provided by the incumbent is apparent from the FCC's regulations identifying two-way trunking as a form of interconnection

that the ILEC must provide. 47 C.F.R. § 51.305(f). It also is consistent with the manner in which interconnection was provided by the Bell System to other common carriers. For example, not long after new market entrants, such as MCI, began providing point-to-point long distance service using microwave technology, the FCC was called upon to address the extent to which AT&T (Bell System) was or should be required to interconnect its telephone company facilities with those of the non-Bell, non-telephone company communications common carriers. At the conclusion of the proceeding, the FCC ordered AT&T to make physical interconnection available to other common carriers under tariffs to be filed at the FCC. *In re Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers; and Letter of Chief, Common Carrier Bureau, Dated October 19, 1973, to Laurence H. Harris, Vice President, MCI Telecommunications Corp.,* Decision, 46 FCC 2d 413 (1974) ("*Bell System Tariff Offerings*"), *aff'd sub nom., Bell Telephone Co. of Pa. v. FCC,* 503 F.2d 1250 (3rd Cir. 1974), *cert. denied sub nom., AT&T v. FCC,* 422 U.S. 1026 (1975). Although AT&T filed tariffs as required, it ultimately submitted revised tariffs as part of a settlement with a number of common carriers that had raised objections to AT&T's initial tariff filing. *In re American Telephone & Telegraph Co., et al. Offer of Facilities for Use by Other Common Carriers,* Memorandum Opinion and Order, 52 FCC 2d 727 (1975) (*"OCC Facilities Tariffs")*. Those tariffs (*id.* at Appendix A) provided for interconnection facilities that include as methods of interconnection "Voice grade central office connecting facilities between an OCC terminal location and a point of connection with the Telephone Company . . . ."

Id. at 749. The voice grade connecting facilities are stated to be "wire" facilities. *Id.* at 748-749.

Thus, before the passage of the 1996 Act, the incumbent monopoly telephone company provided physical facilities to its competitors as a means of fulfilling its interconnection obligations. The 1996 Act and the FCC's rulings in the *Local Competition Order* implementing § 251(c)(2) continued that obligation.

Entrance Facilities

The network element that is the subject of this case is known in the industry as an "entrance facility." There is no definition of "entrance facilities" in the 1996 Act; the term appears once in the FCC's regulations governing unbundling under § 251(c)(3). Section 51.319(e)(2)(i) of the FCC's unbundling regulations states as follows: "2 *Availability*. *Entrance facilities.* An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers." 47 C.F.R. § 51.319(e)(2)(i). To the extent this statement is a definition of the term, it does no more than define the entrance facilities to which competitors will not have access as a UNE under § 251(c)(3).

The term entrance facilities is by no means new; rather it has long been used by the FCC in its orders addressing interconnection between AT&T (as the Bell System) and its various customers and competitors under the Communications Act of 1934, prior to its amendment by the 1996 Act. At one time in the history of telecommunications, AT&T's control over its network extended to prohibiting customers from attaching, i.e., using, a telephone or a PBX that was not provided by the telephone company. The

competition that is taken for granted today essentially began in 1968 when the FCC determined that customers would be permitted to use their own equipment, e.g., their own telephone handsets, rather than be restricted to using only the handsets the local telephone companies provided.[6] Following the *Carterfone* decision AT&T submitted new tariffs eliminating the prohibition against "foreign attachments" to its network. In the same tariff submission, AT&T submitted a tariff that permitted a customer that operated its own point-to-point voice channels to interconnect those channels with the AT&T network. In its order allowing those tariffs to go into effect, the FCC described AT&T's tariff for this new service (A.T.&T. Tariff FCC No. 260) as follows:

> This tariff applies to private-line service. This is a separate service that does not use the switched telephone network. . . . the private-line-service tariff is being revised, effective January 1, 1969, to make a new private-line offering whereby customers may obtain private lines of not more than 25 airline miles to connect their own voice-grade private channels to the telephone company message toll telephone network. *These private-line facilities are called entrance facilities.* They may not be used to connect a customer terminal or system to private-line facilities of the telephone company.

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[6] *See In re Use of the Carterfone Device in Message Toll Telephone Service, in re Thomas F. Carter and Carter Electronics Corp., Dallas, Tex. (Complainants) v. American Telephone and Telegraph Co., Associated Bell System Companies, Southwestern Bell Telephone Co., and General Telephone Co. of the Southwest (Defendants),* Decision, 13 FCC 2d 420 (1968) ("*Carterfone*").

In re American Telephone and Telegraph Co. (A.T.&T.) 'Foreign Attachment' Tariff Revisions in A.T.&T. Tariff FCC Nos. 263, 260, and 259, Memorandum Opinion and Order, 15 FCC 2d 605, 1968 WL 13557, *4, ¶ 17 (1968) (*"Foreign Attachment Tariff")* (emphasis added). Before long distance competition began to blossom, the FCC had used the term entrance facilities to denote a physical means of connecting to AT&T's network.

Later, in a series of orders issued in the mid-1970s, the FCC examined AT&T's (the Bell System's) interconnection arrangements with international record carriers (IRCs) that were provided under contracts, and compared them to the AT&T tariffs that governed its interconnection arrangements with satellite common carriers and specialized common carriers. The FCC determined that the interconnection facilities in question were "like facilities" and the differences in the rates charged under contract and under tariff were discriminatory. In describing the nature of the prior proceedings, and the settlement reached by the parties, the FCC described AT&T's interconnection responsibilities with respect to these common carriers as including the provision of entrance facilities.

> Our Docket No. 20452 proceeding, designated for hearing at 52 FCC 2d 1014 (1975), was initiated against the background of the proceeding in Docket No. 20099, *AT&T Offer of Facilities For Use by Other Common Carriers*, 52 FCC 2d 727 (1975). At issue in Docket No. 20099, to which the International Record Carriers (IRCs) were parties, were the Bell System's interconnection responsibilities (provision of various kinds of interconnection facilities) to non-telephone company common carriers such as the Domestic

> Satellite Common Carriers (DSCCs), the Specialized Common Carriers (SCCs) and the IRCs. One result of the Docket No. 20099 proceeding was a negotiated settlement, signed by all parties including the IRCs, under which the Bell System companies were obligated to provide DSCCs, SCCs, and IRCs, under certain Other Common Carrier (OCC) facility tariffs, facilities to be used within cities and interconnected with interstate services. Another provision in the settlement provided that the Bell System companies would provide to the DSCCs and SCCs under other OCC facility tariffs entrance facilities (*e.g.*, between earth stations operating offices) and intercity facilities (*e.g.*, between and among operating offices in different cities).

In re Interconnection Facilities Provided to the International Record Carriers Bell System Operating Companies Proposed Tariff FCC No. 4, Overseas Connecting Facilities for Other Common Carriers, American Telephone and Telegraph Company, Long Lines Department Proposed Revision to Tariff FCC No. 266, Facilities for Other Common Carriers, Memorandum Opinion and Order, 66 FCC 2d 517, 1977 WL 38374, *1, ¶ 2 (1977).

Thus, the term "entrance facilities" and the use of entrance facilities as a physical means to connect the incumbent provider's network to a private network and to the network of other providers, including the incumbent's competitors, existed before the 1996 Act was passed. The FCC's examination of entrance facilities under the Act not only is consistent with the distinct statutory obligation to provide interconnection under § 251(c)(2), but is consistent with prior FCC decisions and statements.

Proceedings Below

The MPSC initiated a proceeding to address the parties' disputes over implementation of the *TRRO*. *In the Matter, on the Commission's Own Motion, To Commence A Collaborative Proceeding To Monitor and Facilitate Implementation of Accessible Letters Issued By SBC Michigan and Verizon,* Michigan Public Service Commission, Case No. U-14447. Among the numerous disputed issues was the question of whether Michigan Bell Telephone Company d/b/a AT&T Michigan ("AT&T")[7] had the right to price entrance facilities used for interconnection above the TELRIC rate, i.e., above the cost-based rate required pursuant to § 251(c)(2). AT&T argued that the *TRRO*, when it eliminated the ILECs' obligation to provide entrance facilities as UNEs, also eliminated any obligation to provide entrance facilities at TELRIC rates for any purpose, including interconnection. Pet. App. 183a-184a.

The MPSC rejected AT&T's arguments, and concluded that the FCC's decision eliminating the ILECs' duty to provide entrance facilities as UNEs under § 251(c)(3) left intact the ILECs' separate obligation to provide entrance facilities used for purposes of interconnection under § 251(c)(2). Pet. App. 185a.

On April 28, 2006, AT&T appealed portions of the MPSC Arbitration Order to the United States District Court for the Eastern District of Michigan. Among the portions of the MPSC Arbitration Order AT&T appealed was the MPSC's ruling requiring AT&T to continue to provide CLECs with entrance facilities at a cost-based rate when those entrance

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[7] At the time of the initial proceeding, AT&T was known as SBC Michigan.

facilities are used for purposes of interconnection under § 251(c)(2). In an unpublished opinion dated September 26, 2007, the District Court issued its Order, including its ruling that the MPSC Arbitration Order did not comply with the rules regarding entrance facilities adopted by the FCC in its *TRRO*, and that, therefore, the MPSC's ruling on that issue must be set aside. Pet. App. 158a. The District Court entered its final judgment on October 23, 2007, granting, in part, AT&T's motion for summary judgment and enjoining the MPSC from enforcing those portions of its Arbitration Order which the district court ruled to be unlawful. Pet. App. 168a-169a.

The district court's decision on entrance facilities was timely appealed to the Sixth Circuit by the MPSC, and by a group of CLECs, including petitioner Talk America Inc. A three-judge panel of the Sixth Circuit heard oral argument in this case on December 10, 2008. At oral argument, panel members queried counsel whether it would be productive to seek input from the FCC, since the meaning of the *TRRO*, as well as other FCC orders and rules, was at issue in the case. On the same day as oral argument, the Clerk of the Sixth Circuit sent a letter to the General Counsel of the FCC inviting the FCC to file a brief as *amicus curiae*, stating its position on the issue on appeal.

The FCC filed its invited *amicus* brief on April 3, 2009. *See* Pet. App. 112a-142a. The FCC urged the Sixth Circuit to reverse the district court, stating its position in no uncertain terms:

> The FCC in paragraph 140 of the *TRRO* declared explicitly that its rule relieving incumbent LECs of the duty to unbundle entrance facilities and its non-impairment finding "do[] not alter the right

> of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)." The FCC went on to state categorically that "competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." The MPSC was correct in accepting the agency's authoritative interpretation of the scope of the unbundling rule and its specification of the incumbent LECs' section 251(c)(2) obligations.

Pet. App. 128a-129a (footnotes omitted). The FCC urged that "the district court (in contrast to two circuit courts previously confronting the same issue) improperly disregarded the FCC's authoritative construction of its own rules and authorizing statute," and that there was no question that the Sixth Circuit should reverse the district court's erroneous decision. Pet. App. 120a.

The case remained pending in the Sixth Circuit until February 23, 2010, when the panel issued its 2-1 decision. The panel majority's opinion rejected the reasoning of the prior on-point decisions of the Seventh and Eighth Circuits in *Illinois Bell Tel. Co. v. Box,* 526 F.3d 1069 (7th Cir. 2008) and *Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n,* 530 F.3d 676 (8th Cir. 2008), *cert. denied sub nom., Missouri Pub. Serv. Comm'n v. Southwestern Bell Tel. L.P.,* ____ U.S. ____, 129 S.Ct. 971 (2009). Likewise, the panel majority rejected the FCC's view of the meaning of its own orders and rules, which had been detailed in the FCC's *amicus* brief.

The MPSC and the CLEC intervenors filed timely motions for panel rehearing or rehearing en banc. The motions were denied on June 2, 2010, with Judge

Sutton stating that he would have granted rehearing en banc for the same reasons he dissented from the panel majority's opinion.

Talk America Inc. filed its petition for writ of certiorari on August 31, 2010, which was granted on December 10, 2010.

SUMMARY OF ARGUMENT

I. The Telecommunications Act of 1996 imposes on the ILECs certain network sharing requirements, two of which are at issue here: the obligations to provide to any requesting telecommunications carrier (i) interconnection to the ILECs' networks (§ 251(c)(2)) and (ii) access to the ILECs' network elements on an "unbundled basis," i.e., as UNEs (§ 251(c)(3)). These obligations are separate and distinct under the Act. Interconnection facilities and UNEs are each required by the Act to be provided at cost-based rates, a requirement that the FCC has implemented by establishing a costing methodology known as TELRIC, which is applicable to both.

The FCC has consistently interpreted § 251(c)(2) to require the ILECs to provide to their competitors a range of physical facilities that CLECs can use to interconnect their networks to those of the ILECs. The only constraint is that a CLEC's request for a particular form of interconnection must be "technically feasible." 47 U.S.C. § 251(c)(2). An entrance facility can be a type of physical interconnection facility.

In the *TRO*, the FCC observed that CLECs use entrance facilities in two different ways: (1) as a transport transmission link where the CLEC carries its own customers' traffic from an ILEC's central office to the CLEC's switch, and is known as "backhaul" in the

industry, and (2) as interconnection facilities used to exchange traffic between an ILEC's switch and the CLEC's switch and thus between customers on the two carrier's networks. In the first situation, a CLEC is not using entrance facilities for interconnection purposes, but rather to carry traffic to and from its end users. In the second situation, a CLEC uses entrance facilities to interconnect with the ILEC's network; that is, to provide a transmission path between the ILEC's switch and the CLEC's switch for the exchange of traffic between the two networks and the ILEC's and CLEC's customers. The FCC concluded that "[u]nlike the facilities that incumbent LECs explicitly must make available for Section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic." *Id.* ¶ 365 (footnote omitted).

In the *TRRO*, the FCC reiterated its focus on *the use* being made of the entrance facility. Thus, while the FCC found that the entrance facilities no longer would be among the UNEs ILECs must provide under § 251(c)(3), it also said this decision had no effect upon the ILECs' separate statutory *interconnection* obligations under § 251(c)(2). In ¶ 140 of the *TRRO*, the FCC said,

> our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to § 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities

> at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

CLECs' right to obtain facilities necessary for interconnection under § 251(c)(2) is absolute and does not depend upon a finding of impairment. When it removed entrance facilities from the list of UNEs, the FCC did not eliminate CLECs' ability to obtain entrance facilities for purposes of interconnection at cost-based rates. The Sixth Circuit's decision is contrary to federal law and must be reversed.

II. The Communications Act of 1934, as amended, provides the FCC with broad authority to implement the provisions of the statute. Because Congress has not directly spoken to the precise question at issue here – the continued availability of entrance facilities for interconnection – the courts must sustain the FCC's approach so long as it is based on a permissible construction of the statute. In an *amicus* brief filed at the Sixth Circuit's request, the FCC explained the substance of its prior order on the subject, the *TRRO*, and urged the court to reinstate the MPSC's ruling. The panel majority erred when it failed to accord the FCC's opinion deference under *Auer v. Robbins*.

Contrary to the panel majority's opinion, the FCC's order is not an interpretive rule, but was enacted in the notice-and-comment rulemaking process. Its pronouncements are legislative in character. Further, the order is consistent with prior FCC action on the same subject. The FCC's interpretation of the *TRRO*, under this Court's jurisprudence, is controlling unless plainly erroneous or inconsistent with the order and resulting regulation. Because the FCC's construction of this highly technical topic meets this

standard, deference requires a reversal of the Sixth Circuit's opinion.

ARGUMENT

I. THE SIXTH CIRCUIT MISAPPLIED OR MISAPPREHENDED FEDERAL LAW AND WRONGLY DECIDED THE QUESTION OF THE ILECS' OBLIGATIONS REGARDING THE PROVISION OF ENTRANCE FACILITIES TO CLECS.

A. The FCC's decision in the *TRRO* that entrance facilities need not be made available as UNEs did not and could not alter the availability of entrance facilities for purposes of interconnection at cost-based rates.

In the *TRRO*, the FCC applied the impairment standard of § 251(c)(3) and held that CLECs are not impaired without access to entrance facilities, and therefore not entitled to entrance facilities as UNEs under § 251(c)(3). *See* 20 FCC Rcd at 2609-12, ¶¶ 136-41. In making this determination, however, the FCC also explicitly stated that,

> our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to § 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

Id. at 2611, ¶ 140.

It is obvious that the FCC recognized that entrance facilities can be used by CLECs for different purposes and that only their use as UNEs was being affected by the FCC's unbundling determinations in the *TRRO*. The FCC did not attempt to alter and, indeed, could not have altered the separate duty that the Act imposes on ILECs to provide access to transmission facilities for interconnection purposes under § 251(c)(2). The plain language of the *TRRO*, quoted above, makes clear that the FCC's unbundling determination did not eliminate CLECs' access to entrance facilities at cost-based rates for purposes of interconnection.

The FCC has recognized that CLECs use entrance facilities in at least two distinct ways, one of which is "interconnection" under § 251(c)(2) of the Act. In the *TRO*, the FCC observed that CLECs use entrance facilities: (1) as a transport transmission link where the CLEC carries its own customer's traffic from an ILEC's central office to the CLEC switch, and (2) as interconnection facilities used to exchange traffic between ILEC and CLEC switches. In the first situation, a CLEC does not use entrance facilities for interconnection purposes, but rather to carry traffic to and from its end users, a process known as "backhauling." In the second situation, a CLEC uses entrance facilities to interconnect with the ILEC's network, to provide a transmission path between the ILEC's switch and the CLEC's switch for the exchange of traffic between the two networks. *See TRO*, 18 FCC Rcd at 17202-03, ¶¶ 365-66.

In the *TRRO*, the FCC determined that when a CLEC uses entrance facilities to carry traffic to and from its own end users (situation (1) above), it is not entitled to obtain entrance facilities from ILECs as

UNEs. *See TRRO*, 20 FCC Rcd at 2610-12, ¶¶ 136-41. The FCC also reaffirmed in the *TRRO*, however, its earlier determination that if a CLEC needs entrance facilities to interconnect with an ILEC's network (situation (2) above), the CLEC has the right to obtain such facilities from the ILEC, at cost-based rates, under § 251(c)(2) of the Act. *Id.*

The FCC thus unquestionably understood that the 1996 Act imposes different obligations in different portions of the Act. In particular, the FCC understands the distinction between its authority to determine what portions of the network will be made available as UNEs under § 251(c)(3) and the separate statutory obligations the Congress imposed on ILECs under other portions of the Act. Furthermore, not only did the FCC in the *TRO* and *TRRO* recognize that Congress created separate obligations for the ILECs under § 251(c)(2) and § 251(c)(3), it also recognized that the Act contains a set of obligations that apply only to some ILECs; that is, § 271 establishes obligations that apply solely to the ILECs that are also former Bell Operating Companies (BOCs). In both the *TRO* and the *TRRO*, the FCC acknowledged the statutory obligations set out in § 271 that require the BOCs to provide certain network elements and certain services to competitors.[8]

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[8] *See TRO,* 18 FCC Rcd at 17389, ¶ 655 (recognizing that an independent obligation applicable to the BOCs under section 271 is not inconsistent with the structure of the Act: "Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.").

That interconnection is to be provided at cost-based rates, rates that are determined using the TELRIC methodology, is well established. The Act requires ILECs to provide interconnection facilities on "rates, terms and conditions" that comply with the requirements of § 252. 47 U.S.C. § 251(c)(2)(D). In turn, the "just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251" shall be cost-based. 47 U.S.C. § 252(d)(1)(A)(i). In implementing these portions of the Act, the FCC concluded that Congress intended to apply the same pricing rules to interconnection and to UNEs, based on the plain language of §§ 251(c)(2), 251(c)(3), and 252(d)(1):

> Sections 251(c)(2) and (c)(3) impose an identical duty on incumbent LECs to provide interconnection and access to network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." In addition, both interconnection and unbundled network elements are made subject to the same pricing standard in section 252(d)(1). Based on the plain language of sections 251(c)(2), (c)(3), and section 252(d)(1), we conclude that Congress intended to apply the same pricing rules to interconnection and unbundled network elements. The pricing rules we adopt [i.e., TELRIC] shall, therefore apply to both.

Local Competition Order, 11 FCC Rcd at 15816, ¶ 628 (footnotes omitted). Use of the TELRIC methodology was upheld by this Court in *Verizon,* 535 U.S. at 497.

The Sixth Circuit panel majority appears to have reached the mistaken conclusion that, because UNEs and interconnection facilities are both required to be priced at TELRIC, a change in pricing because UNE

status is removed means a change in pricing for interconnection. The panel majority overlooked the fact that unbundling and interconnection obligations each present a separate and independent basis for applying TELRIC pricing to ILEC facilities used by CLECs. Furthermore, because the "necessary and impair" standard must be applied and satisfied under § 251(c)(3), but does not apply under § 251(c)(2), the FCC's finding that competitive alternatives exist for the ways CLECs use entrance facilities to gather and haul their end user's traffic that is not going to and from the ILEC's customers has no bearing on CLECs' right to obtain these facilities for interconnection. The right of CLECs to obtain facilities for interconnection under § 251(c)(2), and to have them priced at TELRIC, is absolute.

A concept not uncommon in this industry is the application of different prices to the same telecommunications facility when it is used for different functions or purposes.[9] For example, when it implemented the interconnection provisions of § 251(c)(2), the question arose whether interexchange carriers (long distance carriers) could obtain interconnection facilities under § 251(c)(2), rather than continue to use higher priced alternative facilities. The FCC looked at the language of the statute and distinguished between interconnection established for purposes of a carrier "terminating its interexchange traffic" (*i.e.,* long distance calls) and for purposes of "providing to others telephone exchange service or exchange access" (*i.e.,* local calls or network access).

[9] As every user of telecommunications services is aware, different pricing historically has applied to business and residential customers, to local and to long distance services, and to data, such as text messages, and voice calls.

Local Competition Order, 11 FCC Rcd at 15598-15999. Although the same "interconnection" – using the same "facilities and equipment," or the same "wire" – could be used for both purposes, the FCC's rule prohibits the use of the wire at TELRIC rates for terminating long distance traffic, but permits the use of the wire at TELRIC rates for offering local services in competition with the ILEC.

The Eighth Circuit upheld this aspect of the FCC's rule, i.e., 47 C.F.R. § 51.305(a)(1). The Eighth Circuit said that:

> CompTel also challenges the FCC's interpretation of interconnection as having a discriminatory impact, by permitting LECs to charge different rates for the same service based on whether the carrier who is seeking interconnection . . . is a long-distance service provider or a local service provider. But the two kinds of carriers are not, in fact, seeking the same services. The IXC is seeking to use the incumbent LEC's network to route long-distance calls and the newcomer LEC seeks use of the incumbent LEC's network in order to offer a competing local service. Obviously the services sought, while they might be technologically identical (a question beyond our expertise), are distinct.

Competitive Telecom. Ass'n v. FCC, 117 F.3d at 1073. Thus, the different services provided over the same wire, the distinct functions to which the facilities would be put, was found by the court to justify different regulatory treatment under the interconnection rules.[10]

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[10] The Sixth Circuit panel majority rejects what it calls the "separate-use theory" embodied in paragraph 140, stating that

The same is true here. Examining the use of entrance facilities under each of the statutory obligations, under § 251(c)(2) and under § 251(c)(3), is appropriate when the FCC issues its rules interpreting the 1996 Act. This is precisely the analysis performed by the FCC in the *TRO* and the *TRRO*.

B. The ILECs' obligation to provide interconnection under Section 251(c)(2) includes providing physical facilities, such as the wires known as entrance facilities, to CLECs.

The FCC has consistently interpreted the obligation of interconnection in § 251(c)(2) to be a require-

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it requires assuming that the FCC used the term entrance facility to refer to a use by CLECs (backhauling) that is not part of FCC's definition of the term. Pet. App. 25a-27a. The problem with the majority's argument, however, is twofold. First, the two definitions define the *end points* of the facility, not the *type of traffic* carried on the facility. That is, *TRRO* ¶ 136 (20 FCC Rcd at 2609) states that entrance facilities are transmission facilities that connect CLEC network with ILEC networks; 47 C.F.R. § 51.319(e)(2)(i) states that entrance facilities are dedicated transport that does not connect a pair of ILEC wire centers. Second, each of these definitions encompasses both the use of entrance facilities for the exchange of traffic and the use of entrance facilities to access UNEs, which the FCC determined is the purpose of interconnection. *See Local Competition Order,* 11 FCC Rcd at 15606, ¶ 204. Thus, neither definition precludes a CLEC's use of entrance facilities for interconnection. Since the FCC clearly distinguished in *TRRO* ¶ 140 between entrance facilities subject to the impairment standard to be applied under § 251(c)(3) and entrance facilities obtained under § 251(c)(2) "for the transmission and routing of telephone exchange service and exchange access service," the FCC necessarily contemplated that different types of traffic could be carried—different uses could occur—under the two sections of the Act, otherwise it would not have articulated different rules under the two sections.

ment that the ILECs provide to their competitors a range of physical facilities that CLECs can use to interconnect their networks to those of the ILECs. In its first rulemaking proceeding implementing the requirements of § 251, the FCC ordered ILECs to provide various "methods of technically feasible interconnection or access" to their networks, including the provision of existing or newly built transmission facilities. *See Local Competition Order*, 11 FCC Rcd at 15780-81, ¶ 553; 47 C.F.R. § 51.321 (requiring ILECs to provide "any technically feasible method of obtaining interconnection"). The FCC further concluded that "the term 'technically feasible' refers solely to technical or operational concerns, rather than economic, space, or site considerations" and that technically feasible as that term applied to "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." *Local Competition Order,* 11 FCC Rcd at 15602, ¶ 198.

Interconnection can take different forms and it is the CLEC, not the ILEC, that determines where and in what form interconnection will be for the exchange of traffic. *Id.* at 15608, ¶ 209 (concluding that § 251(c)(2) gives competing carriers the right to select the interconnection point). The only constraint is that a CLECs' request for a particular form of interconnection must be "technically feasible." 47 U.S.C. § 251(c)(2).[11] No argument has been made that the

[11] The Sixth Circuit panel majority dismisses the well-established principles embodied in the FCC rules for determining whether interconnection methods are "technically feasible." It opines that, "at least in our view, entrance facilities are not actually a 'technically feasible means of obtaining

entrance facilities at issue in this case fail to meet the "technically feasible method of obtaining interconnection" standard that is set forth in the FCC's interconnection regulations.

Among the means of interconnection that the FCC identified as the minimum to be made available to CLECs, is trunking. *Local Competition Order,* 11 FCC Rcd at 15612-15613, ¶ 219; 47 C.F.R. § 51.305(f) (requiring ILECs to provide if technically feasible "two-way trunking upon request"). Addressing the non-discrimination requirement set out in § 251(c)2(D), the FCC determined that "this duty requires incumbent LECs 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." *Id.* at 15614-15615, ¶ 224.

Thus, the concept of "interconnection" is not and has never been confined to simply allowing a competitor to "plug in" to an ILEC's network the way one plugs a toaster into an electrical outlet, nor is it limited to allowing a competitor's optical fiber to meet the ILEC's optical fiber in an underground vault. Rather, the FCC has ruled that the right to interconnection includes a competitor's right to obtain a physical facility from the ILEC for use in

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interconnection' because they do not connect the CLEC with the ILEC network directly; entrance facilities, when used, connect the CLEC with the interconnection facility." Pet. App. 24a. The majority provides no citation to the record, nor to statute or rule, supporting its conclusion that entrance facilities are not a technically feasible means of interconnection.

transmitting, i.e., exchanging, traffic between the two networks.[12]

This interpretation is perfectly consistent with the manner in which interconnection was provided by AT&T (Bell System) to enable those of its customers who had their own point-to-point facilities to connect to AT&T's network, and with AT&T's provision of interconnection to a variety of other carriers, including competitors in the long distance arena before the 1996 Act. As noted *supra*, AT&T proposed a private line tariff which the FCC described as a "new private-line offering whereby customers may obtain private lines of not more than 25 airline miles to connect their own voice-grade private channels to the telephone company message toll telephone network. These private-line facilities are called 'entrance facilities.'" *Foreign Attachment Tariff* 1968 WL 13557, at *4, ¶ 17. Also, as noted *supra,* AT&T proposed tariffs to effect interconnection with a variety of other common carriers as part of a

[12] Dicta in the D.C. Circuit's opinion in *USTA II* regarding the use of entrance facilities, seems to have misled the Sixth Circuit panel majority. Twice in the majority's opinion there is reference to the D.C. Circuit's statement that "[i]f (as appears) [entrance facilities] exist exclusively for the convenience of the CLECs, it seems anomalous that CLECs do not themselves provide them …." Pet. App. 6a, n.3; 13a. The D.C. Circuit was, of course, reviewing the FCC's unbundling determinations under § 251(c)(3); the matter of entrance facilities used for purposes of interconnection under § 251(c)(2) was not addressed. In any event, no interconnection facility is provisioned purely for the benefit of one party; the purpose of interconnection is to enable the exchange of traffic between carriers, in this instance between ILEC and CLEC. These facilities enable the ILEC's customers to call the customers of the CLEC; the ILEC benefits when its customers can communicate with customers of the CLEC.

settlement of interconnection issues. *See OCC Facilities Tariffs*, 52 FCC 2d at Appendix A. In both instances physical wire facilities were being provided as a means of interconnection.

Moreover, interconnection through physical facilities is not limited to what the incumbent telephone company decided it would offer. The FCC's authority under § 201(a) of the Communications Act explicitly grants the FCC the power to order interconnection among carriers that are subject to its jurisdiction. 47 U.S.C.A. 201(a). *See, e.g. Bell System Tariff Offerings*, 46 FCC 2d at 413.

The FCC acted under its § 201(a) authority to initiate a rulemaking proceeding to consider the request of three other common carriers that it order AT&T to interconnect with them at the group and supergroup level and provide them with group and supergroup facilities. *In re American Telephone and Telegraph Company and Associated Bell System Companies, Offer of Facilities for Use by Other Carriers*, 84 FCC 2d 1, 1981 WL 158405, Notice of Inquiry and Proposed Rulemaking (1981). In its discussion of facilities – i.e. groups, supergroups,[13] and mastergroups available for entrance facilities—the Commission concluded that "there is no apparent reason why these so-called 'entrance facilities' could not be provided on a nationwide basis . . . ." *Id.* at *7, ¶ 25. The FCC ordered AT&T to file tariffs making these interconnection facilities available to other common carriers and to the public. *In re American Telephone and Telegraph Company Offer of Facilities to Other Common Carriers,* Memorandum Opinion and Order

[13] The group and the supergroup facilities have bandwidths of 48 kHz and 240 kHz respectively. *Id.*, 1981 WL 158405, *1, ¶ 1.

and Further Notice of Proposed Rulemaking, 92 FCC 2d 46 (1983).[14]

More recently, under the 1996 Act, the FCC Common Carrier Bureau arbitrated disputes between Verizon and various CLECs in Virginia regarding interconnection obligations to be set forth in the parties' interconnection agreements, acting in lieu of the Virginia Corporation Commission which declined to perform the arbitration obligation assigned to states under Section 252 of the 1996 Act. In one of those disputes, Verizon and the CLECs disagreed about the terms under which CLECs would provide "entrance facilities" to Verizon. In its order, the FCC Common Carrier Bureau noted: "These *'entrance facilities' are interconnection facilities* [CLECs] provide to Verizon that are used to transport Verizon-originated traffic to the [CLECs'] networks." *In re Petition of WorldCom, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum and Order, 17 FCC Rcd 27039, 27069, ¶ 58 (2002) (emphasis added).

Thus, prior to the 1996 Act and prior to the issuance of the *TRO* and the *TRRO,* the FCC undoubtedly viewed entrance facilities as a subset of

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[14] Notably Executive Agencies including the Departments of State and Defense, NASA, the CIA, and others who were the largest single end user of telecommunications in the U.S. at that time asserted that an important national security telecommunications principle is to ensure that interconnection take place between all interstate common carrier telecommunications networks so as to facilitate interoperation in case of any national emergency. *Id.*, 1983 WL 182810, at *15.

"interconnection facilities."[15] What is apparent from these and other proceedings conducted by the FCC before and after the passage of the 1996 Act is that interconnection facilities, including entrance facilities, are physical facilities that can be wires over which the incumbent exchanges traffic with other common carriers. It is also apparent that interconnection facilities, including entrance facilities, exist for the benefit of both of the interconnecting carriers and for their customers.

II. THE PANEL MAJORITY ERRED IN FAILING TO ACCORD *AUER* DEFERENCE TO THE FCC'S INTERPRETATION OF ITS OWN ORDERS AND RULES.[16]

A. Under well-settled law, broad deference to the FCC is appropriate here.

As this Court has noted: "It would be 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." *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 397. Where, as

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[15] An erroneous premise that appears to underlie the panel majority's opinion is that "interconnection facilities and entrance facilities are different things." Pet. App. 27a. The majority also erroneously concludes that the term "interconnection facilities" does not appear in the FCC's *TRO*, but instead "is a phrase new to the *TRRO*." Pet. App. 26a. As demonstrated *supra*, both the underlying premise and the conclusion are simply not correct.

[16] Petitioner Talk America Inc. did not include *Auer* deference as a separate question in its Petition for a Writ of Certiorari, but instead addressed it as additional grounds for overturning the Sixth Circuit's opinion. *See* Petition at 30-31. Hence, Talk America includes this argument for the same purpose here.

here, Congress has not "directly spoken" to the "precise question" at issue in a case, then reference to the underlying statute alone – even if it were clear – cannot resolve the case. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, __ US __, 129 S.Ct. 2458, 2469 (2009), citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Instead, a reviewing court must look to the agency's regulations, which are entitled to deference if they resolve the ambiguity in a reasonable manner. *Id*. The FCC, under its broad regulatory power, has interpreted the statutory requirements of the 1996 Act in numerous orders and regulations, which have ultimately survived judicial scrutiny. *See, e.g., Verizon,* 535 U.S. at 538 (upholding TELRIC pricing methodology); *Covad Communications*, 450 F.3d at 551 (upholding all challenged provisions of the *TRRO*). Under these circumstances, deference to the FCC's interpretation of its rulings is absolutely proper. *Auer v. Robbins*, 519 U.S. 452, 464 (1997).

The particular subject matter at issue here is ambiguous and highly complex, involving both the manner in which telecommunications networks interconnect and the physical facilities that are used to achieve that interconnection. In such circumstances, the regulations issued by the agency may themselves be difficult to understand, especially where technical knowledge or expertise is required. When not only the positions of the parties differ, but also the opinions of lower courts, the meaning of an agency's regulations may remain unclear. *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 396 (2008). The ultimate question, then, is how to interpret the scope of the regulations. In such a case, the agency is entitled to further deference when it adopts a reason-

able interpretation of regulations it has put in force. *Id.* at 397, citing *Auer*, 519 U.S. at 461.

The Sixth Circuit specifically requested the FCC to file an *amicus* brief to address the particular provision in the *TRRO* at issue here. Normally, broad deference would be warranted here since the regulations concern "a complex and highly technical regulatory program," in which the identification and classification of telecommunications network facilities to be unbundled under the 1996 Act or needed for interconnection "necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994), citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). Rather than defer to the FCC's opinion, however, the panel majority, through an elaborate extension-cord-and-plug metaphor, attempted to simplify the complex technical issues in this case and then ruled, based upon a simplistic view of the network operations and technology, that the MPSC erred in determining that entrance facilities are available to competitors at cost-based rates when used for purposes of interconnection. In doing so, the panel majority declined to follow well-established precedent and afforded no deference to the agency charged with implementing the Act.

Indeed, the panel majority did not address deference in the body of its opinion, but explained its lack of *Auer* deference in a footnote responding to the dissent. There, it acknowledged that a federal agency's interpretation of its own ambiguous regulation – even an interpretation presented in an *amicus* brief – is controlling unless plainly erroneous or inconsistent with the regulation. Pet. App. 8a n. 6.

But it considered the FCC's *amicus* brief to be a mere interpretation of an interpretive rule which itself had not been enacted through a notice and comment rulemaking, thereby entitling it to little, if any, deference. *Id.* at 9a ("the FCC offers an *interpretation* of the *TRRO*, which is itself an 'interpretive rule' and not a true 'regulation.' *See A.D. Transp. Express, Inc. v. United States*, 290 F.3d 761, 768 (6th Cir. 2002) ('An interpretative rule is a rule that clarifies or explains an existing law or regulation.'; '[I]nterpretative rules fall within an exception to the [Administrative Procedures] Act and do not require notice and comment.')") (emphasis in original). This dismissal of the opinion of the FCC was unwarranted and is contrary to law.

B. The FCC's position set forth in its *Amicus* Brief should have been controlling.

Section 201(b) of the Communications Act of 1934 provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). Because Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934, this Court has held that the "FCC has rulemaking authority to carry out the 'provisions of this Act,' which include Sections 251 and 252, added by the Telecommunications Act of 1996." *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 377-378. The breadth of the FCC's regulatory authority has been repeatedly affirmed by subsequent opinions of this Court. *See, e.g., National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 1002 (2005) (upholding FCC classification of

cable modem service and noting the FCC is in a far better position to address questions concerning technical, complex, and dynamic subject matter than the courts). Hence, the FCC clearly had authority to adopt the *TRRO*, including paragraph 140 which is the core of the debate in this case. Consequently, deference is warranted because 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." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).

In its *amicus* brief, the FCC pointed out that the *TRRO* itself is not subject to scrutiny in this case because that would constitute an impermissible collateral attack on the Order. Any challenge to the FCC's interpretation of its own unbundling regulations in the *TRRO* had to be exercised by a petition for review within 60 days of the promulgation of the Order. Pet. App. 129a-130a. The FCC went on to state that the removal of entrance facilities from the list of network elements available as UNEs did not affect the continued availability of entrance facilities for purposes of interconnection at cost-based rates. Pet. App. 135a. Finally, the FCC urged the Sixth Circuit not only to join the other circuits who had decided the same question but to give deference to the FCC's support of the MPSC's decision. Pet. App. 140a. Thus, the FCC offered clear support for the MPSC's ruling, which was entitled to deference under the law.

C. The *TRRO* is not an "interpretive rule."

Contrary to the panel majority's implications, the *TRRO* is not an "interpretive rule." While it is settled law that interpretations such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines lack the force of law and thus may warrant less *Chevron*-style deference, that is because they are generally not subject to the rigors of notice and comment rulemaking and are not derived from the exercise of an agency's delegated lawmaking power. *See Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). Agency interpretations accompanying or explaining regulations, however, may carry the same weight as the regulations themselves, particularly when the statute and regulatory scheme are complex and the explanation is itself subject to notice and comments. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567 & n.10 (1980). As this Court has explained:

> [T]he ultimate question is whether Congress would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of "gap-filling" authority. Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable then a court ordinarily assumes that Congress intended it to defer to the agency's determination.

Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173 (2007).

Such is the case here. The *TRRO* is an order of the FCC, that includes in its Appendix B the rules resulting from the Order, and is a product of standard rulemaking activity. After the *USTA II* remand, the FCC issued an Order and Notice of Proposed Rulemaking on August 20, 2004, soliciting comments on changes to its rules that would be required as a result of the *USTA II* decision. *In re Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783 (2004). A search of comments in the FCC's Electronic Comment Filing System (ECFS) in WC Docket No. 04-313 from the period of March 21, 2004 when *USTA II* was issued to December 15, 2004 when the *TRRO* was adopted shows 917 filings by third parties, of which 120 were comments and reply comments. Indeed, the *TRRO* itself, in Appendix A, lists those third parties who filed comments during the proceeding.

Further, the fact that the language in question (*TRRO* ¶140) is in an order rather than a rule does not deprive the language of its legislative character. The FCC has a longstanding practice of issuing orders that direct parties to undertake some activity, many of which affect interconnection obligations, and only some of which include rules subsequently contained in the Code of Federal Regulations. *See, e.g., Bell Telephone Company of Pa. v. FCC*, 503 F.2d 1250 (3d Cir. 1974) (upholding FCC standalone order requiring AT&T to furnish specialized common carriers the interconnection facilities necessary to provide private line services), *cert. denied sub nom., AT&T*

v. FCC, 422 U.S. 1026 (1975). In many cases, an order – even when accompanied by rules – contains additional carrier obligations that do not appear anywhere in the associated rules. *See, e.g., TRRO,* 20 FCC Rcd at 2665, ¶ 234 (establishing self-certifying process for obtaining UNEs). Such orders are legislative pronouncements, applicable to multiple parties, and carry the same weight as the rules themselves.

Indeed, in *Verizon* and *AT&T v. Iowa Utils. Bd.*, this Court reviewed not simply the language of the rules contained in the Code of Federal Regulations, but also the reasoned justification supporting the rules as well as pronouncements affecting third parties' rights that had no counterpart in the rules. Such was also the case when the D.C. Circuit in *USTA II* remanded the entrance facilities issue that is addressed here. In the *TRO*, the FCC held in the order (not in the rules) that entrance facilities were not part of the ILEC's network so were not subject to the statutory impairment analysis or subject to unbundling. The D.C. Circuit determined that, while it might be legitimate to exclude entrance facilities from the list of UNEs available at cost-based rates, the FCC was required to conduct an impairment analysis before declaring so. Thus, the issue remanded from the *USTA II* court was not an FCC *rule*, but the language of the *order* that supported the omission of entrance facilities from the list of UNEs.

As is true for any agency, the FCC does sometimes issue clarifications or interpretive rulings. *See, e.g.*, *In re Cost-based Terminating Compensation for CMRS Providers' Interconnection between Local Exchange Providers and Commercial Mobile Radio Service Providers, Implementation of the Local Competition*

Provisions of the Telecommunications Act of 1996, Calling Party Pays Service Offering in the Commercial Mobile Radio Services, Order, 18 FCC Rcd 18441 (2003) (addressing a letter that clarified wireless providers' entitlement to compensation for switching); *Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106 (D.C. Cir. 1992) (upholding FCC notice that resolved ambiguity in its rules as properly issued without advance notice and comment). But neither the *TRO* nor the *TRRO* fall into that category. Their wording, including paragraphs explaining the continued availability of entrance facilities so long as they are used as interconnection facilities, should be considered as carrying the force of law or, at a minimum, accorded substantial deference.

D. The FCC has ruled consistently on the issue of interconnection facilities.

Courts sometimes limit the deference granted an agency's opinion because it has been inconsistent in its interpretation. *See, e.g.*, *Thomas Jefferson University*, 512 U.S. at 515 ("it is true that an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view") (internal citations omitted). Such is not the case here. The FCC was consistent in its rulings treating entrance facilities as a form of interconnection facilities in its orders prior to the 1996 Act, and has been consistent concerning the availability of entrance facilities as interconnection facilities (under § 251(c)(2)), even if they are not available as UNEs (under § 251(c)(3)).

The FCC's explanations regarding entrance facilities under the 1996 Act have focused on the dual functions of interconnection versus backhaul, which

was the distinction presented to the Sixth Circuit. For example, in the *TRO*, the FCC stated:

> However, in order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic.
>
> . . . In reaching this determination [that backhaul-type entrance facilities are unavailable as UNEs] we note that, to the extent that requesting carriers need facilities in order to "interconnect[] with the [incumbent LEC's] network," section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation.

TRO, 18 FCC Rcd at 17203-17204, ¶¶ 365, 366 (footnotes omitted).

On remand from *USTA II*, the FCC did not deviate from the above-quoted language, but changed only its rationale for excluding entrance facilities used for backhaul from the list of UNEs by doing an impairment analysis as required by the court. Indeed, it

reinforced the *TRO*'s conclusions concerning continued availability of entrance facilities as interconnection facilities by including ¶ 140, the paragraph at issue here, and virtually repeating its previous language:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

TRRO, 20 FCC Rcd at 2611, ¶ 140.

Contrary to the panel majority's supposition, this consistency demonstrates that the FCC has not created a new *de facto* regulation under the guise of interpreting the regulation, nor, as demonstrated in Part I of the Argument *supra*, is the FCC's interpretation so plainly erroneous or inconsistent with the regulation that the interpretation can be ignored. Consequently, the panel majority should have deferred to the agency's interpretation because an alternative reading was not compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation. *See Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988).

As this case makes abundantly clear, the federal regulations implementing the 1996 Act are technical, complex, and frequently controversial. Judicial deference to the expert views of the FCC not only is

important to the administration of justice, but also to provide regulatory certainty to all market participants. As Justice Scalia noted in his concurring opinion in *Coeur Alaska*: "It is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions." *Coeur Alaska,* 129 S.Ct. at 2479 (Scalia, J., concurring in part and concurring in the judgment). The panel majority's failure to defer to the FCC's interpretation of its own regulations resulted in an erroneous opinion that should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 27, 2011