Nos. 10-313 & 10-329

IN THE
Supreme Court of the United States

TALK AMERICA INC.
AND
ORJIAKOR N. ISIOGU, MONICA MARTINEZ, AND
GREG R. WHITE, COMMISSIONERS OF THE
MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners,

v.

MICHIGAN BELL TELEPHONE COMPANY
D/B/A AT&T MICHIGAN, ET AL.,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENT MICHIGAN BELL TELEPHONE COMPANY

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QUESTION PRESENTED

Whether 47 U.S.C. § 251(c)(2) — which requires an incumbent local exchange carrier to provide interconnection "for the facilities and equipment of any [competing] carrier" at a "point within the [incumbent] carrier's network" — requires the incumbent to provide to a competing carrier, at extremely low, regulated rates, all of the facilities and equipment that the competing carrier uses to span the distance (which may be miles) between its own network and the incumbent's network.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Michigan Bell Telephone Company d/b/a AT&T Michigan states the following:

Michigan Bell Telephone Company d/b/a AT&T Michigan is a wholly owned subsidiary of AT&T Teleholdings, Inc., which in turn is a wholly owned subsidiary of AT&T Inc., a publicly owned corporation. AT&T Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

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STATEMENT

Congress enacted the Telecommunications Act of 1996 ("1996 Act" or "Act")[1] to promote the development of facilities-based competition for local telephone service. One provision of the Act, 47 U.S.C. § 251(c)(3), requires incumbent local telephone companies, such as respondent AT&T, to lease their network facilities to competitors, such as petitioner Talk America Inc., at artificially low rates. The obligation to lease facilities under § 251(c)(3) applies *only* when the ability of competitors to compete with incumbents is impaired without access to the incumbent's facilities at those low rates. All parties agree that incumbents need not provide the facilities at issue here, known as "entrance facilities," under § 251(c)(3), because the Federal Communications Commission ("FCC" or "Commission") has found that competitors are not impaired without them: they can build their own entrance facilities or obtain them from providers other than incumbents.

Another provision of the Act, 47 U.S.C. § 251(c)(2), requires incumbents to provide "interconnection" for the facilities of a competitor at a point within the incumbent's network. Unlike § 251(c)(3), it does not create a facilities-leasing obligation. Rather, in the FCC's own words, interconnection refers only to the "physical linking of equipment and facilities" and does not include the "transport . . . of traffic."[2] Even so, petitioner the Michigan Public Service Commission, applying § 251(c)(2), required AT&T to lease

[1] Pub. L. No. 104-104, 110 Stat. 56 (amending the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*).

[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 176 (1996) ("*Local Competition Order*").

entrance facilities to competitors at the same artificially low rates that had applied under § 251(c)(3) when the FCC had found that competitors are impaired. The federal government has filed an *amicus* brief endorsing that ruling. The government's theory, at least in this Court, is that a few sentences in FCC orders in 2003 and 2005 implementing § 251(c)(3) created an obligation for incumbents to lease entrance facilities to competitors under § 251(c)(2).

The court of appeals correctly held that the Michigan commission's order finds no support in the text, structure, or purposes of the 1996 Act, or the FCC's implementing rules or orders, and is therefore unlawful. The government's effort to support the Michigan commission's ruling is unavailing: the FCC's position is not entitled to deference under either *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Auer v. Robbins*, 519 U.S. 452 (1997), and the government's current interpretation of a few sentences in two FCC orders is unreasonable and inconsistent with their text. Further, neither petitioners nor the government attempt to reconcile with the purposes of the Act the Michigan commission's requirement that AT&T provide entrance facilities to competitors at artificially low rates, when the FCC long ago recognized that competitors can build those facilities themselves or buy access to them in the marketplace. The court of appeals' judgment should be affirmed.

A. Statutory and Regulatory Background

The 1996 Act. In the 1996 Act, Congress "subject[ed]" incumbent local exchange carriers ("LECs"), such as AT&T, "to a host of duties intended to facilitate market entry" by competing providers of local telephone service. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Section 251(c) of the Act, 47 U.S.C. § 251(c), enables a competitor (a "requesting telecommunications carrier" in the statute's terminology) to "obtain access to an incumbent's network" in "three ways": interconnection, resale, and leasing of facilities (or "unbundling"). *Iowa Utils. Bd.*, 525 U.S. at 371.

First, under § 251(c)(2), the competitor "can interconnect *its own facilities* with the incumbent's network." *Id.* (emphasis added). Section 251(c)(2) states in pertinent part that an incumbent must "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier's network . . . at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2)(B). A competitor that chooses interconnection under § 251(c)(2) "decide[s] to engage in pure facilities-based competition, that is, to build its own network to replace or supplement the network of the incumbent." *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 491 (2002).

Second, "[a]t the other end of the spectrum," *id.*, the competitor "can purchase [retail] local telephone services at wholesale rates for resale" under § 251(c)(4), *Iowa Utils. Bd.*, 525 U.S. at 371. Section 251(c)(4) thus "permits an entrant to skip construction and instead simply to buy and resell 'telecommunications service,' which the incumbent has a duty to sell at wholesale." *Verizon*, 535 U.S. at 491.

Third, "[b]etween these extremes," *id.*, the competitor "can lease elements of the incumbent's network 'on an unbundled basis'" under § 251(c)(3), *Iowa Utils. Bd.*, 525 U.S. at 371. Section 251(c)(3) requires incumbents to "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). The statute defines a "network element" as "a facility or equipment used in the provision of a telecommunications service." *Id.* § 153(29). The Act delegates to the FCC authority to identify required unbundled network elements (or "UNEs"). The FCC can require unbundling of a particular network element only when it has determined that "the failure to provide access to [that] network element[] would impair the ability of [competitors] . . . to provide . . . service[]." *Id.* § 251(d)(2)(B).

Section 252(d)(1) establishes the pricing standard both "for the interconnection of facilities and equipment for purposes of [§ 251](c)(2)" and "for network elements for purposes of [§ 251](c)(3)." *Id.* § 252(d)(1).[3] The FCC implemented that pricing standard using a methodology based on the "hypothetical" cost of a "most efficient element," "untethered to" either the incumbent's "historical investment" or the cost of the "actual network element being provided." *Verizon*, 535 U.S. at 501. The FCC termed this pricing methodology "TELRIC" or "total element long-run incremental cost." *Id.* at 495-96.

The TELRIC formula results in very low rates that are "well below the costs the [incumbents] had actually historically incurred in constructing the elements." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 562 (D.C. Cir. 2004) ("*USTA II*"); *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 609 (7th Cir. 2008) ("*Illinois Bell II*") (Posner, J.) (TELRIC rates are "just above the confiscatory level"). In upholding the

[3] *Cf.* 47 U.S.C. § 252(d)(3) (establishing different pricing standard for resale under § 251(c)(4)).

FCC's TELRIC-pricing methodology in the context of § 251(c)(3), this Court recognized that TELRIC rates were limited to "bottleneck elements." *Verizon*, 535 U.S. at 510 & n.27, 515-17; *see also Local Competition Order* ¶ 702 (observing that "unbundled network elements and interconnection services" "generally are bottleneck, monopoly services").

Section 251's duties are implemented through "interconnection agreements" established pursuant to § 252. Incumbents and competitors first attempt to negotiate terms implementing the § 251 duties. *See* 47 U.S.C. §§ 251(c)(1), 252(a). If those negotiations are unsuccessful, § 252 authorizes state regulatory commissions to act as arbitrators, applying the provisions of the Act and implementing FCC regulations. *See id.* § 252(b)-(d). State-commission decisions setting the terms of interconnection agreements are subject to review in federal court. *See id.* § 252(e)(6).

The FCC's orders implementing the 1996 Act. In its initial order implementing the Act, the 1996 *Local Competition Order*, the FCC addressed both the interconnection duty in § 251(c)(2) and the unbundling duty in § 251(c)(3).

Interpreting § 251(c)(2), the FCC promulgated a series of interconnection regulations. It specified certain "point[s] within" the incumbent's network where interconnection would occur, 47 C.F.R. § 51.305(a)(2), and identified two "methods" by which competitors could obtain interconnection with an incumbent's network, *id.* § 51.321(b). The few challenges to the Commission's interconnection rules were, for the most part, rejected, and those regulations exist largely unchanged today. As the government here concedes (at 22 n.6), those regulations "do not expressly require incumbents to provide entrance facilities to satisfy the interconnection obligations under Section 251(c)(2)."

Interpreting § 251(c)(3), the FCC required incumbents to unbundle all of the network elements necessary to provide local telephone service. The basic components of the local telephone network, as this Court described them in *Iowa Utilities Board*, are "local loops (wires connecting telephones to switches)," "switches (equipment directing calls to their destinations)," and "transport trunks (wires carrying calls between switches)." 525 U.S. at 371.

Relevant here, the *Local Competition Order* required incumbents to "provide interoffice transmission facilities on an unbundled basis to requesting carriers." *Local Competition Order* ¶ 439. "Interoffice transmission facilities" are "transport facilities" that carry telecommunications traffic between switches. *Id.* ¶ 428; *see* 11 FCC Rcd at 16210-11 (promulgating 47 C.F.R. § 51.319(d)(1) (1996)).[4] They are the "transport trunks" to which this Court referred in *Iowa Utilities Board*. *See* 525 U.S. at 371.

The FCC further determined that unbundled interoffice transmission facilities included facilities running between incumbents' switches and competitors' switches. *See Local Competition Order* ¶ 440; 47 C.F.R. § 51.319(d)(1) (1996). Those are known as "entrance facilities." *See* App.[5] 3a; *USTA II*, 359 F.3d at 585 ("Entrance facilities are dedicated transmission facilities that connect [incumbent] and [competitor] locations."). The FCC ruled that competitors

[4] The buildings in which incumbents' switches and ancillary equipment are housed are referred to as "central offices" or "end offices." *See* 47 C.F.R. pt. 36, App. A.

[5] References to "App." are to the appendix to the petition for a writ of certiorari filed by Talk America in No. 10-313.

were impaired without access to entrance facilities as UNEs, which it recognized were used both to exchange traffic with incumbents[6] and to connect the competitors' switches to loops leased from incumbents as UNEs[7] (the latter is sometimes referred to in the industry as "backhauling").

The FCC's rules implementing § 251(c)(3)'s unbundling obligations did not fare well in the courts. In 1999, this Court vacated the Commission's initial unbundling rules, finding, among other things, that the FCC had erroneously read the 1996 Act to require "blanket access to incumbents' networks." *Iowa Utils. Bd.*, 525 U.S. at 390; *see id.* (rejecting FCC's conclusion that whatever "can be provided must be provided" under § 251(c)(3)).

Later that year, the FCC re-promulgated virtually all of the unbundling rules this Court had vacated, including the rule requiring incumbents to unbundle entrance facilities. As in the *Local Competition Order*, the FCC found that competitors were impaired without access to entrance facilities, again noting the two uses to which competitors put those facilities. *See UNE Remand Order*[8] ¶¶ 346-348. In 2002, the D.C. Circuit vacated the FCC's second set of unbundling rules. *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) ("*USTA I*").

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[6] *See Local Competition Order* ¶ 440 ("an interoffice facility could be used by a competitor to connect to the incumbent LEC's switch").

[7] *See id.* ("a competitor" may "use interoffice transmission facilities to connect loops directly to its switch").

[8] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

In 2003, the FCC issued its third unbundling order (the *Triennial Review Order*[9]), in which it revisited its prior determinations that § 251(c)(3) requires incumbents to unbundle entrance facilities. Characterizing its earlier approach as "overly broad" and "misguided," the FCC now concluded that entrance facilities "exist *outside* the incumbent LEC's local network" and, therefore, are excluded as a matter of definition from the category of network elements that could be subject to unbundling. *TRO* ¶¶ 365-366 & n.1116. As in prior orders, however, the FCC acknowledged that competitors had been using unbundled entrance facilities both to exchange traffic with the incumbent and to connect their own switches to loops leased from incumbents as UNEs, which the FCC now labeled "backhaul." *See id.* ¶¶ 365, 367; *see also id.* ¶ 480 (explaining that "[t]he need to backhaul the circuit [i.e., the loop] derives from the [competitor's] use of a switch located in a location relatively far from the end user's premises").[10]

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[9] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*").

[10] Although the *Triennial Review Order* was the first time the FCC used that term in the unbundling context, the FCC has used "backhaul" and its variants since at least 1975 to refer to a circumstance in which one carrier uses another carrier's network to transport traffic between its customer's premises and its switch. *See, e.g.*, Memorandum Opinion and Order, *International Record Carriers' Scope of Operations*, 54 F.C.C.2d 909, ¶ 33 (1975); Final Policy Statement, *International Record Carriers' Scope of Operations*, 58 F.C.C.2d 250, ¶¶ 17-18 (1976); Memorandum Opinion and Order, *AT&T Co. and the Bell System Operating Companies Restrictions on the Resale and Sharing of Switched Services used for Completion of Interstate Communications*, 94 F.C.C.2d 1110, ¶ 2 n.2 (1983).

On review, the D.C. Circuit did not accept the FCC's exclusion of entrance facilities from the Act's broad definition of "network elements." *USTA II*, 359 F.3d at 585. The court, however, did not question the FCC's conclusion that such facilities are outside the incumbents' local networks, noting that competitors depicted "entrance facilities" "as completely stand-alone items linking a [competitor's] switch with an [incumbent's] office" that "appear[] [to] exist exclusively for the convenience of the [competitors]." *Id.* at 586 (emphasis omitted). The D.C. Circuit therefore found it "anomalous that [competitors] do not themselves provide" their own entrance facilities. *Id.* Finding "the record too obscure to make any final ruling," the court "simply remand[ed] the matter for further consideration." *Id.*

In 2005, the FCC issued its fourth unbundling order (the *Triennial Review Remand Order*[11]), which responded to the D.C. Circuit's decision in *USTA II*. In light of the court's skepticism of the FCC's conclusion that entrance facilities are not "network elements," the FCC "reinstate[d] the *Local Competition Order* definition of dedicated transport to the extent that it included entrance facilities." *TRRO* ¶ 137; *see id.* n.384 ("entrance facilities . . . [are] a type of transport"). The FCC did not, however, revisit its conclusion that entrance facilities exist outside the incumbent's local network.

The FCC then performed the impairment analysis with respect to entrance facilities that it had not conducted in the *Triennial Review Order*. In contrast

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[11] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*").

to the findings in the *Local Competition Order* and *UNE Remand Order*, the FCC concluded that competitors are not impaired anywhere in the nation in their ability to provide service without access to entrance facilities at TELRIC rates: "entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between [two] incumbent LEC central offices." *Id.* ¶ 138; *see id.* ¶ 141 & n.395. Competing LECs can "choose to locate their switches" in order to "minimiz[e] the length and cost of entrance facilities" and to "increas[e] the possibility of finding an alternative wholesale suppl[ier]." *Id.* ¶ 138.[12] In making those findings, the FCC did not distinguish between uses to which competitors put those facilities. *See id.*[13]

The FCC accordingly amended its regulations to state that incumbents need not provide unbundled access to entrance facilities. *See* 47 C.F.R. § 51.319(e)(2)(i). Although various parties sought

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[12] Thus, as the FCC recognized, competitors can (and do) build their own entrance facilities or obtain them from suppliers other than incumbents; it is therefore incorrect to say categorically, as the government does (at 5), that entrance facilities "are owned by incumbent LECs."

[13] In two footnotes in the *Triennial Review Remand Order*, the word "backhaul" appears in parenthetical quotations. *TRRO* ¶¶ 138 n.389, 141 n.396. Those references cannot be read to suggest that the FCC limited its impairment analysis to entrance facilities when used for backhaul. In fact, the analysis was not so limited, *see id.* ¶¶ 138-139, 141, no different from the *Local Competition Order* and *UNE Remand Order*, in which the FCC also assessed impairment with respect to both uses of entrance facilities. Moreover, a contrary reading of the order would mean that the FCC violated the D.C. Circuit's mandate in *USTA II*, *see* 359 F.3d at 586, by conducting an incomplete impairment analysis for entrance facilities.

review of the *Triennial Review Remand Order*, none challenged that rule.

B. Procedural History

1. Following the *Triennial Review Remand Order*, AT&T announced that it would cease fulfilling new orders for TELRIC-priced entrance facilities and would begin billing existing entrance facilities at rates in its state and federal tariffs.[14] Other incumbents did the same.

Competitors, however, asserted that incumbents were still required to provide entrance facilities at TELRIC rates, at least when competitors use those facilities to exchange traffic with incumbents. To support that assertion, competitors relied on paragraph 140 in the *Triennial Review Remand Order*:

> 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 [i.e., TELRIC]

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[14] Following the *Triennial Review Order*, AT&T had sought to amend its interconnection agreements with competitors nationwide to implement the FCC's rulings in that order, a process the FCC required and expected could take nine months. *See TRO* ¶¶ 700-706. However, before the end of that nine-month period, the D.C. Circuit issued its *USTA II* decision vacating and remanding the *Triennial Review Order* in significant part. The FCC responded by ordering incumbents to continue providing UNEs on terms in existing interconnection agreements while it completed its proceeding on remand from *USTA II*. *See* Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements*, 19 FCC Rcd 16783, ¶¶ 1, 7 (2004) ("*TRRO NPRM*").

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

TRRO ¶ 140 (footnote omitted).

State commissions considered those competing contentions in arbitrating amendments to AT&T's (and other incumbents') existing interconnection agreements with competitors.[15] A number of state commissions rejected competitors' attempts to preserve TELRIC-priced access to entrance facilities. For example, the Ohio commission found that § 251(c)(2) requires an incumbent to "interconnect its network with . . . facilities and equipment" that are "provided by the [competitor], not leased from the [incumbent]" at TELRIC rates.[16]

Other state commissions, including the Michigan commission, accepted the competitors' contentions. In the order challenged here, the Michigan commission concluded that the FCC, in paragraph 140 of the

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[15] In those proceedings, state commissions also considered competitors' claims that a separate provision of the 1996 Act, 47 U.S.C. § 271, required incumbents to continue leasing at TELRIC rates various other elements the FCC had held should not be provided as UNEs. Although some state commissions accepted that claim, all five courts of appeals to consider the question rejected those arguments. *See*, *e.g.*, *Qwest Corp. v. Arizona Corp. Comm'n*, 567 F.3d 1109, 1116 (9th Cir. 2009) (collecting cases); *Illinois Bell II*, 548 F.3d at 612-13 (Posner, J.); *Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 7-9 (Boudin, C.J.), *on denial of reh'g*, 509 F.3d 13 (1st Cir. 2007) (per curiam).

[16] Arbitration Award at 22-23, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand*, Case No. 05-887-TP-UNC, 2005 WL 3018712 (Ohio Pub. Utils. Comm'n Nov. 9, 2005), http://dis.puc.state.oh.us/TiffToPDf/LZAH5X8NU6JSB7R+.pdf.

Triennial Review Remand Order, made the "specific finding[]" that competitors "have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2)." App. 185a. The Michigan commission therefore ordered that AT&T's interconnection agreements with competitors, including petitioner Talk America, be amended to require AT&T to provide entrance facilities at TELRIC rates to comply with § 251(c)(2). App. 185a, 232a.

On November 30, 2005, the Michigan commission approved an amendment to AT&T's interconnection agreement with Talk America, along with identical amendments to AT&T's interconnection agreements with more than 40 other competitors.[17] That amendment provided in relevant part as follows:

> Entrance facilities . . . In accordance with Paragraph 140 of the TRRO, nothing in this Section 1.1 nor the FCC's finding of non-impairment with respect to entrance facilities alters [Talk America]'s right to obtain interconnection facilities (entrance facilities or dedicated transport) pursuant to Section 251(c)(2) of the Act or to obtain access to such facilities at the same rates for dedicated transport as set forth in the [UNE] Pricing Schedule.[18]

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[17] Order at 3, *Joint Requests for Commission Approval of Interconnection Agreements and Amendments*, Case Nos. U-11340 et al. (MPSC Nov. 30, 2005), http://efile.mpsc.state.mi.us/efile/docs/13569/0012.pdf.

[18] Joint Application, Ex. A at 6, *Request for Commission Approval of An Interconnection Agreement between Talk America Inc. and Michigan Bell Telephone Company*, Case No. U-13569 (MPSC filed Nov. 7, 2005), http://efile.mpsc.state.mi.us/efile/docs/13569/0011.pdf.

2. AT&T challenged the Michigan commission's order in federal district court. The court ruled that it was "not reasonable" to interpret paragraph 140 of the *Triennial Review Remand Order* to require incumbent LECs to provide entrance facilities at TELRIC rates pursuant to § 251(c)(2). App. 158a. The court read the FCC's order to "convey[] [its] finding . . . that entrance facilities should be offered competitively," not at TELRIC rates. *Id.*

3. The Michigan commission and three competitors, including Talk America, appealed. The Sixth Circuit affirmed in a 2-1 decision.

The court of appeals agreed with the district court that paragraph 140 of the *Triennial Review Remand Order* could not be read to impose on incumbents the obligation to provide competitors with entrance facilities at TELRIC rates. Instead, the court found that the "most plausible" reading of paragraph 140 is that, "if [a competitor] build[s] [its] own entrance facility, the [incumbent] must still let [the competitor] hook [that entrance facility] up to [the incumbent's] network (i.e., use its 'interconnection facility') at wholesale rates." App. 17a-18a. The court accordingly held that a competitor that "chooses to use [an incumbent's] entrance facility" — rather than "build its own entrance facility," "rent someone else's," or "connect directly" to the incumbent's network without using an entrance facility — "must pay the rates determined by the [incumbent]" in its tariff, not TELRIC rates. App. 32a.

Thus, as the Sixth Circuit explained by way of an analogy to extension cords and electrical outlets, *see* App. 18a-21a, there is a critical difference between entrance facilities and the "interconnection facilities" that incumbents provide under § 251(c)(2) to accommodate interconnection with a competitor's facilities and equipment. The former span the entire physical distance between a competitor's switch and an incumbent's switch, which may "be very long," "even miles," if the competitor has elected to locate its switch far from the incumbent's. App. 3a. Interconnection facilities, in contrast, are the equipment *within* the incumbent's network (and in almost all cases within its central office buildings) to which the competitor's entrance facility attaches; that equipment can include, for example, a port on a frame connected to the incumbent's switch as well as a cross-connect cable attached to that frame. App. 19a-20a.[19]

The court of appeals rejected the Michigan commission's contrary reading of paragraph 140, holding that the interpretation "require[d] several assumptions, none of which is easily defended." App. 24a. In particular, the Michigan commission's interpretation presumed that the FCC had "used two separate terms" in paragraph 140 — "'entrance facility' and 'interconnection facility' — to describe the exact same wire, without any explanation why." *Id.* The Michigan commission's interpretation also was based on an "unnatural reading" of the "phrase 'provide . . . interconnection *with* the [incumbent]'s network'" in § 251(c)(2) that had "no support in the statute." App. 28a (quoting 47 U.S.C. § 251(c)(2)) (omission in original). The better reading of that statutory phrase, the court found, was that "the [incumbent] is obligated"

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[19] A port is a socket where a cable attaches to a switch. A cross-connect cable is used to connect two other wires together — *e.g.*, to connect a competitor's entrance facility to a wire in an incumbent's central office. A port and a cross-connect cable are rough equivalents of the "wall outlet" and "surge protector" in the Sixth Circuit's analogy. App. 21a.

to "'make a plug-in available' *for* connection with the [competitor]'s facilities and equipment," not "to 'lease a physical facility (or wire)' *to* the [competitor]." *Id.*

The Sixth Circuit acknowledged that its holding conflicted with decisions of the Seventh and Eighth Circuits, which had held that, when the FCC referred in paragraph 140 of the *Triennial Review Remand Order* to the "right of competitive LECs to obtain *interconnection facilities* pursuant to section 251(c)(2)," the agency actually "said . . . that [incumbents] must allow use of *entrance facilities* for interconnection" at TELRIC rates. *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1072 (7th Cir. 2008) ("*Illinois Bell I*") (emphases added); *see Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-84 (8th Cir. 2008) (following *Illinois Bell I*), *cert. denied*, 129 S. Ct. 971 (2009). The court below did "not find th[o]se two cases persuasive," because their "'reasoning' is entirely circular" as each "assum[ed] the very question to be decided": namely, that "interconnection facilities" and "entrance facilities" are the same thing. App. 28a-31a.

The Sixth Circuit also refused to defer to the position of the FCC in an *amicus* brief, finding that the FCC's position "is so plainly erroneous" that it could "only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation." App. 9a-10a n.6. In that *amicus* brief, the FCC urged the Sixth Circuit to reverse the district court, asserting that the district court had improperly treated the "FCC's statement in paragraph 140" as "a mere 'explanatory comment' without legal force." App. 129a & n.32. But the FCC conceded in its brief that, when it stated in the *Triennial Review Remand Order* that it did "not alter the right of competitive LECs to obtain *interconnection* facilities pursuant to section 251(c)(2)," *TRRO* ¶ 140 (emphasis added), the FCC "did not specifically define what it meant by the term 'interconnection facilities,'" Gov't C.A. Br. 20 (App. 137a-138a).

The Michigan commission and the competitor appellants filed petitions for rehearing, which the Sixth Circuit denied. App. 90a-91a.

SUMMARY OF ARGUMENT

A. Section 251(c)(2) does not obligate incumbents to lease entrance facilities to competitors. The statutory text provides that an incumbent has the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent's] network" at a "point within" the incumbent's network. 47 U.S.C. § 251(c)(2)(B). An incumbent's obligation under § 251(c)(2) is thus to enable competitors to connect *their own* facilities and equipment to the incumbent's network at an interconnection point. An incumbent is not required to lease to a competitor the transport facilities that the competitor will use to carry traffic from its network to the point within the incumbent's network at which interconnection occurs.

The 1996 Act's structure reinforces that conclusion. As this Court has recognized in multiple cases, § 251(c) imposes on incumbents multiple, distinct duties to assist competitors in entering the local telecommunications marketplace. Unlike § 251(c)(2), § 251(c)(3) explicitly imposes on incumbents an obligation to lease facilities to a competitor. The contrast between the statutory language addressing unbundling and interconnection confirms that § 251(c)(2) does not require incumbents to lease to competitors the transport facilities that competitors use to exchange traffic with incumbents.

The government concedes, and petitioners do not disagree, that "[t]he FCC's interconnection rules, which were adopted in 1996, do not expressly require incumbents to provide entrance facilities to satisfy their interconnection obligations under Section 251(c)(2)." Gov't Br. 22 n.6. Instead, those regulations confirm what the Act's text and structure demonstrate: § 251(c)(2) does not impose on incumbents an obligation to lease entrance facilities. By regulation, the FCC has defined "interconnection" to exclude "transport," 47 C.F.R. § 51.5, which further undermines the notion that § 251(c)(2)'s duty to "provide . . . interconnection" includes the duty to lease a transport facility, such as an entrance facility. The FCC's interconnection regulations also specify certain points within an incumbent's network at which interconnection occurs — notably, each of those points is within the incumbent's central office.

B. In defending the Michigan commission's mandate, petitioners rely on misinterpretations of a few isolated sentences in the FCC's *Triennial Review* orders, as well as the government's *amicus* briefs. That reliance is unavailing for three reasons.

First, there is no FCC interpretation of § 251(c)(2) that is eligible for deference under *Chevron*. The FCC statements on which petitioners and the government rely are, at most, informal statements of policy, not legislative rules; consequently, under this Court's decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000), no deference could be afforded to those statements (regardless of their proper interpretation).

Second, no deference to the government's views is warranted under *Auer*. Neither the FCC's orders nor the government's *amicus* briefs purport to interpret any specific FCC regulation to require entrance facilities under § 251(c)(2). Nor could the FCC have used an *amicus* brief to amend its interconnection regulations to impose such an obligation. The government's *amicus* briefs also cannot be treated as the FCC's fair and considered judgment on the issues in this case, because those two briefs offer shifting interpretations of the text of the *Triennial Review* orders.

Third, and in all events, the sentences in the FCC's orders on which petitioners and the government rely cannot be read to say that incumbents must provide entrance facilities under § 251(c)(2). Rather, those statements simply reiterate the FCC's long-held view that incumbents must accommodate interconnection with a competitor's facilities and equipment. That obligation to accommodate interconnection does not include a duty to lease a transport facility to a competitor.

C. Requiring incumbents such as AT&T to provide TELRIC-priced entrance facilities to competitors also conflicts with the 1996 Act's policy of encouraging facilities-based competition. Enabling competitors' continued dependence on non-bottleneck facilities leased from incumbents at artificially low prices discourages them from building or obtaining their own facilities. Neither petitioners nor their *amici* even attempt to explain why competitors need access to entrance facilities at TELRIC prices; nor could they, in light of the FCC's findings that competitors can — and do — build their own entrance facilities and obtain them from alternative providers.

ARGUMENT

AT&T IS NOT REQUIRED TO PROVIDE ENTRANCE FACILITIES TO COMPLY WITH § 251(c)(2)

A. The Sixth Circuit Correctly Held That Neither § 251(c)(2) nor the FCC's Implementing Rules or Orders Obligate Incumbents To Provide TELRIC-Priced Entrance Facilities to Competitors

1. Section 251(c)(2)'s text and the 1996 Act's structure demonstrate that § 251(c)(2) requires an incumbent to provide interconnection, not a transport facility spanning the distance between the incumbent's and competitors' switches. *See*, *e.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute.").

a. Section 251(c)(2) requires an incumbent to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier's network . . . at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2). Nothing in that text suggests that the incumbent's obligation to "provide . . . interconnection" includes the duty to lease a facility spanning the entire physical distance (miles, in some cases) between the competitor's network and its own. On the contrary, the only "facilities and equipment" to which the statute refers are those "*of* any requesting telecommunications carrier." *Id.* (emphasis added). The incumbent's duty is to "provide . . . interconnection" "*for*" the competitor's facilities and equipment at a "*point within*" the incumbent's network. *Id.* (emphases added).[20] Put differently, § 251(c)(2) obligates incumbents to enable competitors to connect their facilities and equipment to a point within the incumbent's network. It does not require the leasing of facilities to transport traffic from the competitor's network to that interconnection point.

This Court recognized the limited nature of the § 251(c)(2) duty in *Verizon*, in the course of rejecting a challenge to an FCC regulation that required an incumbent, "[u]pon request," "to combine unbundled network elements with elements possessed by the requesting telecommunications carrier." 47 C.F.R. § 51.315(d) (1997). As the Court understood the regulation, it required incumbents only "'to combine'" a "competitive carrier's element with the incumbent's network," such as by providing a cross-connect cable, and it applied only "when the entrant is unable to do the job itself." 535 U.S. at 532, 535 (quoting 47 C.F.R. § 51.315(d) (1997)); *see Local Competition Order* ¶¶ 294 & n.620, 386.

In upholding the regulation, the Court explained that the regulation "appears to be nothing more than an element-to-element version of the incumbents' statutory duty 'to provide, for the facilities and equipment of any requesting . . . carrier, interconnection with the local exchange carrier's network.'" 535 U.S. at 538 (quoting 47 U.S.C. § 251(c)(2)) (ellipsis added in *Verizon*). It found further that "it is hard

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[20] Neither petitioners nor the government address these aspects of § 251(c)(2)'s text. The California Public Utilities Commission ("CPUC") argues (at 13-15) that, to provide "interconnection" for a competitor's facilities at a point within its network, an incumbent must provide a transport facility extending (potentially) many miles from the interconnection point to a point within the competitor's network. Petitioners and the government rightly do not advance that absurd reading of the text.

to see how this rule is any less reasonable than § 251(c)(2), which imposes a statutory duty to interconnect." *Id.* The Court's description of § 251(c)(2) supports the natural reading of that provision's text, under which the interconnection duty is about attaching networks, not leasing a transport facility spanning the potentially miles-long space between two carriers' networks.

b. The structure of the 1996 Act further reinforces the conclusion that § 251(c)(2) does not require incumbents to provide the transport facilities that link competitors' switches to the point of interconnection within the incumbent's network. The 1996 Act sets up three different methods for new entry by competitors: interconnection under § 251(c)(2), unbundling under § 251(c)(3), and resale under § 251(c)(4). *See supra* pp. 3-4. This Court's cases have recognized the structural differences among those provisions, with § 251(c)(3) being the only provision that requires incumbents to lease facilities to competitors and § 251(c)(2) being limited to providing interconnection for *the competitor's* facilities.

As the Court explained in *Verizon*, when a competitor "decide[s] to engage in pure facilities-based competition," § 251(c)(2) "obligates the incumbent to 'interconnect' the competitor's facilities to its own network," whereas § 251(c)(4) sits "[a]t the other end of the spectrum" and permits competitors "to skip construction" entirely and instead "simply . . . resell" the incumbent's service. 535 U.S. at 491. Section 251(c)(3) lies "[b]etween these extremes"; it allows a competitor "to lease certain of an incumbent's 'network elements.'" *Id.* at 491-92. The Court described the same three-part structure in *Iowa Utilities Board*:

> [A] requesting carrier can obtain access to an incumbent's network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network "on an unbundled basis"; and it can interconnect *its own facilities* with the incumbent's network.

525 U.S. at 371 (emphasis added).

Like the Court, the government's briefs in *Verizon* and *Iowa Utilities Board* articulated the same distinction between paragraphs (c)(2) and (c)(3). *But cf.* Gov't Br. 2 (asserting here that § 251(c) creates "overlapping" duties). In *Verizon*, the government distinguished § 251(c)(3), which "entitles a new entrant to gain 'access' to . . . an incumbent's 'network elements,'" from § 251(c)(2), which "permits new entrants to 'interconnect' *their own facilities* with those in the incumbent's network." U.S. Br. 3-4, *Verizon* (emphasis added). In *Iowa Utilities Board*, the government similarly described § 251(c)(2) as "requir[ing] incumbent LECs to 'interconnect' their networks with those of other carriers," whereas § 251(c)(3) "permits new entrants . . . to lease from incumbents whatever combinations of elements they need . . . to provide telecommunications services to their customers." U.S. Br. 5-6, *Iowa Utils. Bd.* There, the government also emphasized the "*marked contrast*" between § 251(c)(2) and (c)(3) and observed that paragraph (c)(2) "obligates incumbents to 'interconnect' with 'the facilities and equipment' of other carriers, language that does not appear in Section 251(c)(3)." U.S. Reply Br. 27, *Iowa Utils. Bd.* (emphasis added).

Thus, as this Court and the government (in prior cases) have made clear, only § 251(c)(3), and not

§ 251(c)(2) or (c)(4), requires incumbents to provide a competitor with "access to network elements." The contrast between § 251(c)(3), which expressly imposes an obligation to lease facilities, and § 251(c)(2), which requires only "interconnection" "for" *the competitor's facilities* at a "point within" the incumbent's network, reinforces the conclusion that § 251(c)(2) does not obligate incumbents to lease entrance facilities to competitors at TELRIC rates. Section 251(c)(2)(D), which states that the required interconnection shall be provided at rates and on terms "in accordance with . . . the requirements of this section," further bolsters the conclusion that only § 251(c)(3) creates a facilities-leasing obligation: reading § 251(c)(2) to require leasing of facilities not required by § 251(c)(3) would not be "in accordance with" the requirements of § 251.

Section 252(d)(1), which contains the pricing standard for both the interconnection duty in § 251(c)(2) and the unbundling duty in § 251(c)(3), confirms that only the latter imposes a duty to lease facilities. With respect to the unbundling duty, § 252(d)(1) governs the "rate for [the] network elements" that incumbents must lease to competitors. 47 U.S.C. § 252(d)(1). In contrast, with respect to the interconnection duty, § 252(d)(1) applies to the "rate for the interconnection *of* facilities and equipment." *Id.* (emphasis added). If Congress had meant for § 251(c)(2) to require incumbents to lease facilities and equipment to other carriers, as § 251(c)(3) requires, it would instead have established a pricing standard "for the facilities and equipment used for interconnection," just as it established one "for the network elements" that must be unbundled. Here, again, the different language Congress used confirms that the interconnection obligation does not include a requirement to lease entrance facilities.

Finally, § 251(a)(1), which imposes an interconnection duty on all telecommunications carriers, also supports AT&T's interpretation of § 251(c)(2). Section 251(a)(1) requires all carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." *Id.* § 251(a)(1). The two interconnection provisions thus contain parallel language: both require interconnection with "the facilities and equipment" of another carrier, and, as construed by the FCC, "interconnect" under § 251(a)(1) has the same meaning as "interconnection" under § 251(c)(2).[21] Unlike § 251(c)(2), however, § 251(a)(1) can be satisfied through "indirect[ ]" interconnection, *see Local Competition Order* ¶ 997 — that is, an interconnection arrangement in which two carriers' networks are both connected to the network of a third carrier, but not to each other's. It is thus plain that the interconnection duty under § 251(a)(1) does not include a requirement to lease facilities, and there is no language in § 251(c)(2) that would distinguish it from § 251(a)(1) in that regard.

2. In its regulations implementing § 251(c)(2), the FCC has never attempted to impose an obligation on incumbents to lease entrance facilities to competitors at TELRIC rates, a point the government correctly concedes (at 22 n.6). On the contrary, the FCC's

[21] *See* Memorandum Opinion and Order, *Total Telecomms. Servs., Inc. v. AT&T Corp.*, 16 FCC Rcd 5726, ¶ 25 (2001) ("We find nothing in the statutory scheme to suggest that the term 'interconnection' has one meaning in section 251(a) and a different meaning in section 251(c)(2)."). On review, the D.C. Circuit upheld the FCC's conclusion on that point. *See AT&T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003).

interconnection regulations confirm what the Act's text and structure demonstrate: § 251(c)(2) does not impose on incumbents an obligation to lease entrance facilities.

a. In its first order implementing the Act, the 1996 *Local Competition Order*, the FCC defined "interconnection" under § 251(c)(2) as "the linking of two networks for the mutual exchange of traffic." 11 FCC Rcd at 16199 (promulgating 47 C.F.R. § 51.5). Relying on the 1996 Act's structure, the FCC specifically excluded from that definition "the *transport* and termination of traffic," precisely because it is addressed in a different statutory provision. *Id.* (emphasis added); *id.* ¶ 176.

In defending the FCC's definition of interconnection in the court of appeals, the government argued that its definition of interconnection ensures that paragraphs (c)(2) and (c)(3) serve independent purposes. As the government explained, "[i]f section 251(c)(2) interconnection included routing and transmission, section 251(c)(2) would overlap with other subsections that describe a duty to route and transmit or *a duty to lease facilities that will be used for routing and transmission*. . . . See especially subsections 251(b)(5) and *251(c)(3)*." U.S. Br. 13 & n.17, *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) ("U.S. CompTel Br.") (emphases added), *available at* http://www.khhte.com/public/US_CompTel_Br.pdf.[22] The FCC had similarly explained in the *Local Competition Order* that it is paragraph (c)(3), not (c)(2), that allows competitors "to substi-

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[22] The FCC later explained to the D.C. Circuit that its exclusion of transport from the definition of interconnection is "without qualification" and is not limited to the "compensation" due for individual calls under § 251(b)(5). U.S. Br. 34, *AT&T Corp. v. FCC*.

tute incumbent LEC facilities for some or all of the facilities the new entrant would have had to obtain in order to compete," which include (among others) entrance facilities. *Local Competition Order* ¶ 172.

Neither petitioners nor the government explain how § 251(c)(2)'s duty to "provide . . . interconnection" could include a requirement to furnish a transport facility spanning the distance between two networks, when "interconnection" expressly excludes "transport." 47 C.F.R. § 51.5. The government acknowledges the exclusion only in passing, while suggesting (at 3 n.1) that competitors pay incumbents, under § 251(b)(5), for their use of entrance facilities when sending calls to the incumbents' customers. Not so. The FCC's rules implementing the reciprocal-compensation duty in § 251(b)(5) require payment only "from the interconnection point" to the point of "delivery" to the called party. 47 C.F.R. § 51.701(c)-(d). The entrance facility runs between the competitor's switch serving the calling party and the point of interconnection on the incumbent's network; therefore, a competitor's payments under § 251(b)(5) do not cover its use of the entrance facility.

The Michigan commission concedes (at 28 n.13) that "[e]ntrance facilities are a 'type' of dedicated transport," but attempts to reconcile its concession with § 51.5 by asserting (at 26 n.12 & 28 n.13) that entrance facilities are "transmission facilities" (not transport) when used to exchange traffic with the incumbent. Nothing in § 51.5 suggests that "transmission facilities" are distinct from "transport"; in fact, as shown above, the FCC defended its definition of interconnection on the ground that it is § 251(c)(3), not § 251(c)(2), that imposes "a duty to lease facilities that will be used for . . . transmission." U.S. Comp-

Tel Br. 13; *see Local Competition Order* ¶ 439 (using the terms interchangeably). For its part, Talk America simply ignores the FCC's exclusion of "transport" from its definition of "interconnection."

b. The interconnection regulations promulgated in the *Local Competition Order* identified certain "point[s] within" the incumbent's network at which interconnection would occur. 47 U.S.C. § 251(c)(2). Those points include ports on switches and cross-connect cables in incumbents' central offices. *See Local Competition Order* ¶¶ 209-212; 47 C.F.R. § 51.305(a)(2). Although the FCC's list is not exclusive, all of the points of interconnection it identified are notably *inside* incumbents' central offices. *See* 47 C.F.R. § 51.305(a)(2).

The FCC also specified certain things that incumbents must do to accommodate interconnection at those points. Because incumbents' networks "were not designed to accommodate third-party interconnection . . . at all or even most points within the network," the FCC required incumbents, "at least to some extent, to adapt their facilities to interconnection." *Local Competition Order* ¶ 202; *see id.* ¶ 198 (FCC requires "modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection"). But the agency nowhere suggested that the incumbents' obligation "to *adapt* their facilities" to enable interconnection included an obligation to *lease* to competitors transport facilities spanning the distance between networks.

Consistent with the FCC's order, AT&T does a number of things within its central offices (at TELRIC prices) — such as providing cross-connect cables, conduits, riser space, and ports — to accommodate the interconnection of competitors' entrance facilities.[23] AT&T thus does not argue that the § 251(c)(2) obligation is a purely "passive" duty; nor did the Sixth Circuit so hold. *See* App. 19a.

c. In the *Local Competition Order*, the FCC also concluded that § 251(c)(6), which permits a competitor to "collocat[e]" (or install) its equipment in an incumbent's central office, did not identify the only method of interconnection that incumbents must provide. *See Local Competition Order* ¶¶ 550-551. The FCC promulgated a regulation requiring incumbents to provide "any technically feasible method of obtaining interconnection." 47 C.F.R. § 51.321(a). Other than the statutory collocation duty, however, the FCC identified only one technically feasible method of interconnection: "[m]eet point interconnection arrangements." *Id.* § 51.321(b)(2). The FCC's treatment of meet-point arrangements is instructive in three respects.

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[23] *See* AT&T California Br. 35, *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836 (9th Cir. 2010) (figure depicting steps AT&T undertakes within its central offices to comply with § 251(c)(2) to interconnect its network with a competitor-provided entrance facility). In contrast, the diagram in the Michigan commission's brief (at 23), which it copied from the CPUC's Ninth Circuit brief in *Pacific Bell* (*see* CPUC Br. 5 & App. 1), has numerous flaws. Among them, it shows separate cables used for backhauling and exchanging traffic, when (as Sprint concedes (at 9)) circuits performing each task can ride a single fiber-optic cable; the diagram also depicts the entrance facilities as covering a relatively short distance, when in fact the competitor may elect to locate its switch miles from the incumbent central office containing its chosen point of interconnection. No one rebuts the deficiencies AT&T identified in the diagram the Ninth Circuit created. *See Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836, 842 (9th Cir. 2010), *petition for cert. pending*, No. 10-838 (filed Dec. 23, 2010); Br. in Opp. 2 n.4.

First, "[i]n a meet point arrangement each party pays its portion of the costs to build out the facilities to the meet point." *Local Competition Order* ¶ 553. Thus, the competitor must provide its own facilities — and bear the cost of those facilities — to reach the meet point. *See id.* Nothing in the FCC's treatment of meet-point arrangements suggests that § 251(c)(2) allows competitors to insist that incumbents lease to them, at TELRIC rates, the transport facility between the competitor's switch and the meet point. But that is exactly what follows from petitioners' theory, because competitors use that transport facility "for the purpose of exchanging traffic with incumbent LECs." *Id.*

Second, the FCC made clear that the incumbent's obligation to engage in "some build out of facilities," if necessary to facilitate a meet-point arrangement, is "limited" to a "reasonable accommodation of interconnection." *Id.* Although the FCC left it to state commissions to determine the maximum "distance from an incumbent LEC's premises that an incumbent should be required to build out facilities," it never indicated that the incumbent might be required to build the entire facility extending between the two carriers' networks. *Id.* The FCC's Wireline Competition Bureau later rejected a competitor's effort to require an incumbent to "build[] new facilities all the way to [the competitor's] central office."[24]

Third, the FCC also held that, in a meet-point arrangement, the "'point' of interconnection for pur-

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[24] Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corp. Comm'n Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039, ¶ 134 (Chief, Wireline Comp. Bur. 2002) ("FCC Staff Order").

poses of section[] 251(c)(2)" would not be at the meet point outside the central office (where the two carriers' facilities actually connect), but instead would remain inside the incumbent's central office, "*e.g.*, [on its] main distribution frame, [or the] trunk-side of the switch." *Local Competition Order* ¶ 553. The FCC thus recognized the conflict between its decision to require incumbents to provide even these "limited" facilities outside their central offices and the text of § 251(c)(2), which requires that the point of interconnection remain "within" the incumbent's local network.[25]

B. Petitioners' Reliance on the *Triennial Review* Orders and the Government's *Amicus* Briefs Is Misplaced

The government's *amicus* briefs, which purport to interpret a few sentences in the *Triennial Review* orders, cannot bear the essentially dispositive weight that petitioners place on them. On the contrary, the government's position is erroneous, and entitled to no deference, for three reasons.

First, no deference is warranted under *Chevron* because none of the FCC statements on which petitioners and the government rely satisfies the standard of formality prescribed in *Mead* and *Christensen*. Second, no deference is warranted under *Auer* because neither the FCC's orders nor the government's *amicus* briefs purport to interpret any specific FCC regulation to require entrance facilities under § 251(c)(2); nor could the FCC have used an interpretive rule (or *amicus* brief) to add such an obligation to its interconnection regulations. Third, and in all events, the sentences in the FCC's orders on which

[25] The lawfulness of the FCC's meet-point rule was not tested in the courts of appeals.

petitioners and the government rely cannot be read to say that incumbents must provide entrance facilities under § 251(c)(2). Instead, the only permissible reading of those statements is that they reaffirm that incumbents must engage in the same limited network modifications, to accommodate interconnection with a competitor's facilities and equipment, that the FCC had long interpreted § 251(c)(2) to require.

1. *Chevron* deference is not warranted

Petitioners and the government principally seek to ground the supposed obligation to provide TELRIC-priced entrance facilities under § 251(c)(2) on a few sentences in the FCC's *Triennial Review* orders.[26] They rely on the FCC's statement in the *Triennial Review Order* that, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent'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* ¶ 366 (first alteration in original). They also rely on a two-sentence paragraph from the *Triennial Review Remand Order* in which the FCC stated that its "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)" and that competitors "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* ¶ 140.

To the extent those sentences are read as interpreting § 251(c)(2) — despite the FCC's express assurances that it was "not alter[ing]" its interpretation

[26] *See* App. 185a; MPSC Br. 11-13; Talk Am. Br. 25-27; Gov't Br. 16, 22 n.6.

of that section — they are not eligible for *Chevron* deference. In determining whether an agency's statutory interpretation is eligible for deference under *Chevron*, this Court evaluates the circumstances surrounding the issuance of the statement to determine whether Congress would have intended for such a statement to carry the force of law. *See Mead*, 533 U.S. at 229-31. Although not dispositive, *see id.* at 230-31, the paradigmatic example of agency action "meriting *Chevron* treatment" is a "process of rulemaking . . . that produces regulations," *id.* at 229. On the other end of the continuum, when an agency acts through less formal means, such as "opinion letters," "policy statements, agency manuals, and enforcement guidelines," it cannot claim "*Chevron*-style deference." *Christensen*, 529 U.S. at 587; *see Mead*, 533 U.S. at 231-34 (tariff classification rulings by the Customs Service, though authorized by statute, "are beyond the *Chevron* pale").

Here, although the government makes the sweeping claim (at 31) that *everything* in the *Triennial Review* orders is a "legislative act[]," the specific FCC statements on which petitioners and the government rely lack the necessary formality under *Mead* and *Christensen*. Indeed, the FCC did not even purport to exercise its rulemaking authority with respect to those statements. The notices of proposed rulemaking that preceded the *Triennial Review* orders did not even cite § 251(c)(2), let alone give any indication that the agency was contemplating promulgating binding rules implementing that provision.[27] Nor did the orders promulgate any new interconnection regu-

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[27] *See* Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781 (2001); *TRRO NPRM*.

lation or amend any existing interconnection regulations (with one exception not relevant here[28]). *See TRO*, 18 FCC Rcd at 17469-503 (appendix reproducing regulations promulgated in the *TRO*); *TRRO*, 20 FCC Rcd at 2677-84 (same, *TRRO*).

The orders themselves contain nothing putting parties on notice that the FCC had announced a new legal obligation that could or should have been challenged on judicial review. On the contrary, in the sentences on which petitioners and the government rely, the agency expressly reassured parties that it did "not alter" its prior interpretation of § 251(c)(2). *TRO* ¶ 366; *TRRO* ¶ 140.[29] The orders also make no effort to reconcile a requirement to provide TELRIC-priced entrance facilities under § 251(c)(2) with the text, structure, or policy of the Act. *See id.* Nor did the Commission attempt to square such an obligation with its regulation defining "interconnection" to exclude "the transport . . . of traffic," 47 C.F.R. § 51.5, along with any "duty to lease facilities that will be used for routing and transmission" of traffic between networks, U.S. CompTel Br. 13; *see supra* p. 26.

It also does not help — and in fact hurts — the government's case to point out, as it does (at 31), that

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[28] In response to *Iowa Utilities Board v. FCC*, 120 F.3d 753, 812 (8th Cir. 1997), the FCC in the *Triennial Review Order* amended 47 C.F.R. § 51.305 to remove a paragraph requiring incumbents to provide interconnection that "is superior in quality" to what the incumbent provides to itself (47 C.F.R. § 51.305(a)(4) (2003)). *See TRO* ¶¶ 15, 630, 633 n.1917, App. B.

[29] For that reason, the government rightly does not defend the Ninth Circuit's assertion that incumbents such as AT&T had to seek judicial review of the supposed conclusion in the *Triennial Review Order* that TELRIC-priced entrance facilities must be provided under § 251(c)(2). *See Pacific Bell*, 621 F.3d at 847.

a summary of the *Triennial Review Remand Order* was published in the Federal Register. Such a summary was also published for the *Triennial Review Order*. Neither summary mentioned § 251(c)(2). To make matters worse for the government, both summaries referred to the orders' determinations that entrance facilities would no longer be available under § 251(c)(3) *without mentioning* the qualifying language that the government now claims created a legal obligation to provide those facilities under § 251(c)(2). *See* 70 Fed. Reg. 8940, 8941 (Feb. 24, 2005); 68 Fed. Reg. 52,276, 52,280 (Sept. 2, 2003); *see also* 5 U.S.C. § 552(a)(1)(D)-(E) (requiring Federal Register publication of "substantive rules" and "amendment[s]" thereto).

Considering all of those deficiencies, "[i]t is difficult, in fact, to see in the agency practice itself any indication that [the FCC] ever set out with a lawmaking pretense in mind when it" made the remarks on which petitioners and the government rely. *Mead*, 533 U.S. at 233. Certainly, there is no reason to believe that Congress would have intended for the FCC to issue "rulings with the force of law" (*id.* at 231-32) in the manner in which it proceeded here.

To be sure, the FCC can issue an interpretation in a rulemaking order that is entitled to *Chevron* deference, even if not codified in the Code of Federal Regulations. *Cf. National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005). But where, as here, the agency in an order *affirmatively disclaims* any intention to alter its existing interpretation of a statute, it cannot assert — in an *amicus* brief years after the fact — that it actually promulgated a new legislative rule interpreting the statute. *Cf. Long Island Care at Home,* *Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (when an agency's interpretation creates "unfair surprise," its claim for deference is weakened).

2. *Auer* deference is not warranted

Under this Court's decision in *Auer*, an agency's "interpretation" of its "own regulation[]" is not entitled to deference if the interpretation is "inconsistent with the regulation" or "does not reflect the agency's fair and considered judgment on the matter in question." 519 U.S. at 461-62 (internal quotation marks omitted).

a. Here, the threshold predicate for *Auer* deference — an agency interpretation of a regulation — is lacking. In neither the passages from the *Triennial Review* orders on which petitioners and the government rely nor the government's *amicus* briefs in this case has the FCC ever attempted to interpret a specific Commission interconnection regulation to require incumbents to provide entrance facilities. Indeed, the pertinent passages of the *Triennial Review* orders do not even cite any of the FCC's interconnection regulations, let alone purport to interpret any of them. *See TRO* ¶ 366; *TRRO* ¶ 140. This case is thus fundamentally different from cases in which this Court has considered whether to give deference to an agency's construction of specific ambiguous language in one of its regulations. *See*, *e.g.*, *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880-81 & n.8 (2011) (deferring to agency's interpretation of the ambiguous phrase "[c]hange in terms" in Regulation Z, where the agency advanced a "consistent" interpretation of that phrase in *amicus* briefs before the court of appeals and this Court).[30]

b. Even if the FCC had purported in the *Triennial Review* orders or its *amicus* briefs to interpret 47 C.F.R. § 51.321(a), which requires incumbents to provide "any technically feasible method of obtaining interconnection . . . at a particular point," its interpretation would not be entitled to *Auer* deference. As the government concedes (at 22 n.6), neither this rule (nor any other) "expressly require[s] incumbents to provide entrance facilities to satisfy their interconnection obligations under Section 251(c)(2)."[31] Instead, the FCC has specified only two required "methods of obtaining interconnection": (i) "collocation" of equipment inside the incumbent's central offices, and (ii) meet-point arrangements. 47 C.F.R. § 51.321(b).

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[30] The term "interconnection facility" appears only once in the FCC's regulations implementing § 251(c)(2). *See* 47 C.F.R. § 51.305(a)(3) ("requir[ing] 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"). The government does not rely on this regulation, though Talk America (at 5) cites it in passing. The rule, by its terms, does not require leasing of facilities.

[31] The Michigan commission (at 31) and Talk America (at 13-14, 33), though not the government, cite 47 C.F.R. § 51.305(f), which requires incumbents to "provide two-way trunking upon request." A "trunk" is a circuit, which rides on a transport facility. *See id.*, pt. 36, App. A. The Commission promulgated this rule out of concern that a competitor might not have "a sufficient amount of traffic to justify separate one-way trunks" and required the incumbent to "accommodate two-way trunking" for such a competitor — that is, to configure its network so that traffic may be sent and received over a competitor's single trunk. *Local Competition Order* ¶ 219. Section 51.305(f) thus does not require the incumbent to lease facilities to a competitor.

The FCC cannot add to this list except by amending the regulation. As this Court has recognized and the court below explained, deference to an agency is unwarranted when the agency seeks, "under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588; *see* App. 10a n.6. Any other result would permit an agency to make an end run around the notice-and-comment rulemaking process. *See United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 569 (1st Cir. 2004) (Boudin, C.J.) ("[W]here, as here, the [agency's] interpretation has the practical effect of altering the regulation, a formal amendment — almost certainly prospective and after notice and comment — is the proper course.").

Thus, courts have rejected agency efforts to impose new mandates under the guise of "interpreting" open-ended regulatory language. *See Mission Group Kansas, Inc. v. Riley*, 146 F.3d 775, 781-83 (10th Cir. 1998) (rejecting Secretary of Education's attempt to impose a new requirement for eligibility for funding based on regulations providing that recipients must meet "any additional conditions"); *United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989) (rejecting Park Service effort to impose restrictions on a demonstrator pursuant to a Park Service regulation that listed certain restrictions and purported to authorize the Service to impose "additional reasonable conditions"); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1324-25 (3d Cir. 1987) (Becker, J.); I Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 452 (5th ed. 2010).

Moreover, contrary to the government's assertion (at 24-25), the incumbent's obligation to participate in meet-point arrangements is qualitatively different from the facilities-leasing obligation the Michigan commission imposed.[32] In a meet-point arrangement, the competitor "pays its portion of the costs to build out the facilities to the meet point." *Local Competition Order* ¶ 553. The competitor thus has the incentive to "locate [its] switch[] close to the incumbent LEC's central office, minimizing the length and cost" of its portion of the meet-point facility. *TRRO* ¶ 138. And the incumbent's obligation to provide facilities to the meet point is "limited" to that "required [for a] reasonable accommodation of interconnection." *Local Competition Order* ¶ 553. In contrast, the Michigan commission's order shifts to the incumbent all of the actual costs of establishing the entrance facility, while virtually eliminating the competitor's incentive to minimize those costs: under TELRIC, the competitor pays only the "hypothetical" cost of a "most efficient" entrance facility, "untethered to" the cost of the "actual network element" the incumbent must provide. *Verizon*, 535 U.S. at 501. The obligation the Michigan commission imposed, therefore, is anything but "limited" and "reasonable." *Local Competition Order* ¶ 553. Indeed, in Talk America's view (at 29), it is "absolute."

c. A final impediment to granting *Auer* deference is that the government's *amicus* brief in this Court cannot be said to "reflect the [FCC]'s fair and considered judgment on" the interpretation of the *Triennial Review* orders. *Auer*, 519 U.S. at 462. In this Court, the government asserts (at 22 n.6) that *both* the

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[32] As the government concedes (at 25 n.7), the FCC's staff rejected a competitor's attempt to use the meet-point obligation to require an incumbent to provide a transport facility spanning the entire physical distance between an incumbent's and a competitor's network. *See also supra* p. 30 & n.24.

Triennial Review Order and the *Triennial Review Remand Order* "clarif[ied] . . . that Section 251(c)(2) gives competitive LECs a right of access to [entrance] facilities for interconnection" at TELRIC rates. And it claims (at 18) that "entrance facilities are 'interconnection facilities,' as that term is used in the *Triennial Review Remand Order*."

But the government made no such claims in its brief in the Sixth Circuit. On the contrary, it discussed the *Triennial Review Order* only in passing and did not contend that this order adopted a rule requiring incumbents to provide entrance facilities. *See* Gov't C.A. Br. 17, 19 (App. 134a, 137a). The FCC also conceded that it "did not specifically define what it meant by the term 'interconnection facilities'" in paragraph 140 of the *Triennial Review Remand Order*. *Id.* at 20 (App. 138a).

The government offers no explanation for why it discovered only in preparing its brief in this Court that the references to "facilities" in the *Triennial Review Order* and "interconnection facilities" in the *Triennial Review Remand Order* in fact meant "entrance facilities." That unexplained inconsistency precludes treating the government's current assertions as the agency's "fair and considered judgment" and validates the court of appeals' refusal to defer to the government's unpersuasive *amicus* brief in that court. *Cf. Chase Bank*, 131 S. Ct. at 881 n.8 (noting that agency's brief in this Court was "consistent with" its brief in the court of appeals).[33]

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[33] There also is no indication that the full Commission, which is a multi-member body, approved the contents of the government's *amicus* brief in this Court or in the court of appeals. The briefs presumably reflect, at most, the views of the FCC Chairman and his staff. *Cf. Sprint Nextel Corp. v. FCC*, 508 F.3d

3. Petitioners and the government erroneously interpret the *Triennial Review* orders

In all events, irrespective of whether this Court applies a deferential standard, the few sentences in the *Triennial Review* orders on which petitioners and the government rely cannot be read to say that incumbents must provide entrance facilities under § 251(c)(2).

First, as discussed above, the FCC explicitly stated in both orders that it did "not alter" its prior interpretation of § 251(c)(2). *TRO* ¶ 366; *TRRO* ¶ 140. Nor did the FCC mention § 251(c)(2) in its notices of proposed rulemaking or its summaries of those orders in the Federal Register. *See supra* pp. 33-35. And the government concedes (at 22 n.6) that, before the *Triennial Review Order*, the FCC had never interpreted § 251(c)(2) to impose an obligation to provide TELRIC-priced entrance facilities under § 251(c)(2). These facts fatally undermine the government's effort to read the statements in the *Triennial Review* orders as having for the first time interpreted § 251(c)(2) to require entrance facilities.

The government seeks (at 22 n.6) to explain away the absence of any pre-2003 rule or order requiring entrance facilities under § 251(c)(2) by claiming that the question whether competitors could obtain entrance facilities under that provision was not salient while the FCC required unbundling of entrance facilities under § 251(c)(3). But that does not explain why no competitor even *argued* the point before

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1129, 1132 (D.C. Cir. 2007) (agreeing with the FCC that, because "[t]he Commission . . . acts by majority vote," "the Commissioners' individual statements . . . are not institutional Commission actions"). That further undermines the government's deference claim.

then if, as petitioners now claim, § 251(c)(2) provided a straightforward way to obtain TELRIC-priced entrance facilities without regard to the statutory impairment standard — a subject of "an ongoing, decade-long dispute," *Covad Communications Co. v. FCC*, 450 F.3d 528, 532-33 (D.C. Cir. 2006). Regardless, the important and controlling point is that, in both *Triennial Review* orders, the FCC denied articulating a new interpretation of § 251(c)(2), and it admittedly had never previously interpreted § 251(c)(2) to require entrance facilities.

Second, neither order actually states that incumbents must provide "*entrance* facilities" under § 251(c)(2). Instead, those orders refer to "facilities" (*TRO* ¶ 366) or "interconnection facilities" (*TRRO* ¶ 140). Neither petitioners nor the government offer a plausible explanation for why the FCC did not say "entrance facilities," a phrase it used repeatedly in the same passages in each order, if that is what it in fact meant. *See* App. 24a.[34] Indeed, it was not until the government's *amicus* brief in this Court that the government first asserted (at 16) that the *Triennial Review* orders "use the term 'interconnection facility' to refer to an entrance facility that is being used for

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[34] Talk America (at 36), though not the government, cites a statement in a 2002 FCC staff order that certain "'entrance facilities' are interconnection facilities." FCC Staff Order ¶ 58. The staff there was discussing facilities that a competitor proposed to sell to an incumbent, *see id.*, which the staff recognized § 251(c)(2) does not cover, *see id.* ¶ 71 n.200. When the staff addressed the entrance facilities it required the incumbent to provide to competitors, the staff grounded its analysis entirely in § 251(c)(3) and the FCC's since-rescinded unbundling rule, without describing those entrance facilities as "interconnection facilities" or relying on either § 251(c)(2) or the FCC's interconnection regulations. *See id.* ¶¶ 210-217.

interconnection." *Compare* Gov't C.A. Br. 20 (App. 138a) (FCC's concession that it "did not specifically define what it meant by the term 'interconnection facilities'").[35]

The references in the FCC's orders to "facilities" and "interconnection facilities" are instead naturally read to refer to the facilities (*e.g.*, cross-connect cables and ports) that the FCC had long required incumbents to provide as "accommodations" to facilitate interconnection at a point within the incumbent's network. *See supra* pp. 28-29; *see also* App. 19a-21a. Thus, the meaning of the FCC's qualifications in each order is plain, as the court of appeals recognized: the Commission intended to reassure competitors that incumbents were still obligated to assist competitors in attaching competitors' self-provided entrance facilities to a point within the incumbents' network. *See* App. 21a.[36]

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[35] The Michigan commission's suggestion (at 12 & n.7, 36) — which the government does not endorse — that "these facilities" in the second sentence of paragraph 140 should be read to mean "entrance facilities" is flawed. The phrase plainly refers back to "interconnection facilities," the immediately preceding referent. *See Webster's New International Dictionary* 2624 (2d ed. 1952) ("these" is the plural of "this"); *id.* at 2629 (when used as an adjective, "this" means "[t]hat is present, near, or *just referred to*, in time or place") (emphasis added); R.W. Burchfield, *Fowler's Modern English Usage* 780 (rev. 3d ed. 2000) (when used as an adjective, "this" "is used to indicate a thing or person present or near . . . , *esp. one just mentioned*") (internal quotation marks omitted; emphasis added).

[36] The suggestion in the Sixth Circuit's opinion (App. 19a-20a & n.9) that an incumbent could refuse to interconnect with a competitor's self-provisioned entrance facility — and instead require the competitor to interconnect with an incumbent-provided entrance facility — was incorrect. If a competitor builds an entrance facility and seeks to interconnect at a tech-

Third, the referenced "facilities" and "interconnection facilities" are limited to those that competitors "need" (*TRO* ¶ 366) or "require" (*TRRO* ¶ 140) to interconnect. The words "need" and "require" must have some meaning and cannot be read to mean whatever facilities competitors might "want" or "prefer."[37] Yet that is effectively how the government and petitioners read those words, which they never expressly address. The government thus takes the position that a competitor can demand continued TELRIC-priced access to *any* entrance facility it had obtained under the FCC's since-eliminated unbundling rules and was using to exchange traffic with the incumbent. *See* Gov't Br. 12-13, 23, 25, 29. Petitioners likewise give these words no meaning, with Talk America claiming (at 29) that AT&T's obligation to provide TELRIC-priced entrance facilities is "absolute."[38]

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nically feasible point within AT&T's network, AT&T is obligated to interconnect the competitor's entrance facility at that point. *See* 47 U.S.C. § 251(c)(2)(B). Even so, that suggestion was unnecessary to the Sixth Circuit's determination that the Michigan commission unlawfully required AT&T to provide entrance facilities at TELRIC rates.

[37] In *Verizon*, this Court similarly stressed that the combinations regulation that it sustained as analogous to § 251(c)(2), *see supra* pp. 21-22, applied only when the competitor is "unable" to make the combination itself. 535 U.S. at 534; *see id.* ("when requesting carriers cannot"), at 535 ("when the entrant is unable to do the job itself"), at 538 ("when the requesting carrier is unable to combine").

[38] The CPUC's claim (at 29 n.8) that a competitor "requires" an entrance facility whenever "it does not have one of its own" does not address the relevant question, which is whether the competitor requires the facility from the incumbent at TELRIC rates. *See TRRO* ¶ 140.

In fact, as the FCC found, competitors neither "need" nor "require" entrance facilities from incumbents at any price, because they can deploy their own entrance facilities or lease them from third parties. *See TRRO* ¶¶ 138-139, 141. Of course, there are facilities that competitors "need" or "require" in order to interconnect their own entrance facilities to a point within an incumbent's central office as an accommodation of interconnection: namely, the cross-connect cables, conduits, riser space, and ports that AT&T provides at TELRIC prices to competitors that supply their own entrance facilities. *See supra* pp. 28-29. For these reasons, the government is wrong to assert (at 20-21) that the FCC would have had no reason to refer to "interconnection facilities" in paragraph 140 of the *Triennial Review Remand Order* unless it meant "entrance facilities."

Fourth, yet another barrier to petitioners' and the government's reading of the *Triennial Review* orders is the Commission's finding that entrance facilities "are not inherently a part of the incumbent LEC's local network" and "exist *outside* the incumbent LEC's local network." *TRO* ¶ 366. The clear implication of this finding is (as the D.C. Circuit would recognize) that entrance facilities are more properly treated as part of the *competitor's* local network. *See USTA II*, 359 F.3d at 586 (finding it "anomalous that [competitors] do not themselves provide" their own entrance facilities). Thus, in the government's view, paragraph 366 obligates incumbents, to comply with their duty to provide interconnection at a "point within the [incumbent's] network," to furnish transport facilities that are not part of that network. That contradiction, which the government makes no attempt to address, is further evidence that the government's reading of paragraph 366 is erroneous.

The government implicitly acknowledges as much when (at 23) it claims support for its position from the FCC's supposed conclusion in the *Triennial Review Remand Order* that entrance facilities are part of the incumbent's network. Yet the government never explains how its current position — that § 251(c)(2) requires entrance facilities — made sense at the time of the *Triennial Review Order*, when the FCC allegedly first embraced that position.[39]

Fifth, the efforts of petitioners and their *amici* to bolster their interpretations of the *Triennial Review* orders by distinguishing between competitors' uses of entrance facilities is unavailing. Even if the FCC's analysis of impairment under § 251(c)*(3)* in those orders were limited to entrance facilities when used for backhaul — and it plainly was not, *see TRRO* ¶¶ 138-139, 141; *supra* note 13 — that would not show that the Commission's statements in those orders are properly read as creating an affirmative obligation to provide entrance facilities under § 251(c)*(2)*.

Finally, the government's reliance (at 18-19) on other rules supposedly permitting a competitor to use a facility for one purpose but not another — even if accurately described — would not show that the

[39] In fact, the *Triennial Review Remand Order* did not find that entrance facilities are within the incumbent's "local network." That order did not mention, let alone reverse, the *Triennial Review Order*'s determination that entrance facilities exist outside the incumbents' local networks. *Cf. TRRO* ¶ 137 n.383 (observing that the *USTA II* court "expressed skepticism that incumbent LECs should be required to build entrance facilities under any circumstances").

FCC's statements in the *Triennial Review* orders are reasonably read to impose such a use-specific requirement for entrance facilities.[40] Similarly, Talk America's attempted analogy (at 14-18, 34-36) to pre-1996 Act FCC orders requiring the tariffing of facilities for purchase by interconnecting carriers is misplaced. Indeed, AT&T's position is that it should be permitted to charge its tariffed rates for entrance facilities. Moreover, the orders that Talk America cites were adopted under 47 U.S.C. § 201, which (unlike § 251(c)(2)) obligates carriers "to establish physical connections with other carriers, to establish through routes . . . , and *to establish and provide facilities* and regulations for operating such through routes." 47 U.S.C. § 201(a) (emphasis added).

For all those reasons, petitioners' and the government's efforts to read the *Triennial Review* orders as purporting to require entrance facilities under § 251(c)(2) are plainly incorrect. *Cf. Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 356 (2000) (agency's regulatory interpretation must be rejected when it is "inconsistent with the text" of the regulation). Instead, the only reasonable interpretation of the FCC's statements in those orders is that "inter-

[40] In fact, those other restrictions are based on the type of carrier using the facility; they do not restrict how a single carrier can use a facility to which it is permitted access. Thus, the FCC has prohibited wireless and long-distance carriers from obtaining UNEs for any purpose, while permitting competing local telephone companies to obtain UNEs and to use them for multiple purposes. *Compare* 47 C.F.R. § 51.309(b) *with id.* § 51.309(d). Similarly, the FCC barred traditional long-distance carriers from obtaining interconnection under § 251(c)(2), while allowing companies that provide competing local telephone service to obtain interconnection and to route long-distance traffic over those interconnection arrangements. *See id.* § 51.305(b); *Local Competition Order* ¶¶ 190-191.

connection facilities" and "entrance facilities" are different things, as the Sixth Circuit correctly concluded.

C. Requiring Incumbents To Provide TELRIC-Priced Entrance Facilities Under § 251(c)(2) Conflicts with the 1996 Act's Policy of Encouraging Facilities-Based Competition

1. In the 1996 Act, Congress sought "[t]o promote competition and reduce regulation" in the telecommunications marketplace. Pub. L. No. 104-104, 110 Stat. 56 (preamble). To that end, the 1996 Act embodies a clear preference for "genuine, facilities-based competition." *USTA II*, 359 F.3d at 576, 579. That means a telecommunications marketplace with multiple providers using their own equipment to serve customers, rather than "synthetic" competition, *Covad*, 450 F.3d at 548 (internal quotation marks omitted), in which competitors depend on the facilities of incumbents. *See Illinois Bell II*, 548 F.3d at 610 ("as long as requesting carriers rely on network services supplied by incumbent local exchange carriers, competition is hampered"). Indeed, today, 15 years since Congress passed the Act, that is how competition has developed, with cable companies, wireless carriers, and Voice-over-Internet-Protocol providers, like Vonage, successfully competing for customers nationwide without leasing TELRIC-priced facilities from incumbents.

To promote that transition to facilities-based competition, the 1996 Act included some extraordinary measures intended to serve as temporary market-opening mechanisms. The unbundling requirement in § 251(c)(3) is one such measure, "perhaps [the] most intrusive." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 405 (2004); *see id.* at 410. The pricing standard in § 252(d)(1), which applies to both § 251(c)(3) and (c)(2), is another extraordinary measure. This Court has sustained the FCC's TELRIC pricing methodology implementing that standard, but only as applied to § 251(c)(3), and then only in recognition that paragraph (c)(3), properly interpreted, is limited to "bottleneck" facilities. *Verizon*, 535 U.S. at 510 & n.27, 515-17; *accord Local Competition Order* ¶ 702.[41]

As the D.C. Circuit and the FCC have explained on several occasions, there are well-recognized competitive harms that flow from mandating TELRIC pricing of non-bottleneck facilities. Far from being "an unqualified good," such mandates "inflict" significant costs "on the economy." *USTA I*, 290 F.3d at 429. Forcing incumbents to charge very low, regulated rates for access to their networks "reduce[s] or eliminate[s] the incentive for an [incumbent] to invest

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[41] The facilities and equipment within its central offices that AT&T provides to accommodate interconnection, *see supra* pp. 28-29, are effectively bottleneck items. Those items are located in restricted areas of AT&T's central offices that competitors are not permitted to enter. *See Local Competition Order* ¶ 598 (allowing incumbents "to require reasonable security arrangements to separate an entrant's collocation space from the incumbent LEC's facilities" and noting that such "physical security arrangements . . . protect both the [incumbent's] and competitor's equipment from interference by unauthorized parties"). Moreover, to connect its entrance facility to an AT&T switch, a competitor needs access to particular equipment inside AT&T's central office. Thus, for example, a competitor cannot use just any port to access AT&T's switch; it needs to use a port attached to that particular switch. Because a competitor can neither access the areas within AT&T's central offices where interconnection occurs nor duplicate the particular interconnection facilities within those central offices, the facilities and equipment that AT&T provides to accommodate interconnection are effectively bottleneck items.

in innovation" because "it will have to share the rewards with [competitors]." *Id.* at 424. Likewise, TELRIC pricing of facilities subject to competitive supply creates a disincentive "for a [competitor] to innovate" or to invest in its own network facilities because "it can get the element[s] cheaper" from the incumbent. *Id.*; *accord TRRO* ¶ 36.[42]

Entrance facilities are not bottleneck elements: the FCC found in 2005 not only that entrance facilities have "unique operational and economic characteristics" that render "self-deployment" and "alternative wholesale supply" possible, but also that it was undisputed that competitors were in fact "increasingly relying on competitively provided entrance facilities," which "are widely available." *TRRO* ¶¶ 138-139, 141. Neither petitioners nor any of their *amici* make any claim (let alone any showing) that entrance facilities are bottleneck elements.

Because entrance facilities are not bottleneck facilities, requiring incumbents to provide them at TELRIC rates contradicts the purpose of the 1996 Act, which was not "to guarantee competitors access

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[42] *See also Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part) ("Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement."); *USTA II*, 359 F.3d at 572 (TELRIC pricing for non-bottleneck elements "discourage[s] . . . investment in innovation"); *USTA I*, 290 F.3d at 429 (TELRIC pricing for non-bottleneck elements creates "disincentives to research and development by both [incumbents] and [competitors]"); *TRRO* ¶ 218 (TELRIC pricing for non-bottleneck elements can "seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition"); *TRO* ¶ 656 (TELRIC pricing for non-bottleneck elements is "no[t] necessary to protect the public interest").

to [incumbents'] network elements at the lowest price that government may lawfully mandate," but instead "to stimulate competition — preferably genuine, facilities-based competition." *USTA II*, 359 F.3d at 576; *see Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part) ("It is in the *un* shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge.").

Even more anticompetitive is the potential obligation of incumbents to build new entrance facilities for competitors at TELRIC rates. As the FCC recognized in the *Triennial Review Remand Order*, competitors "have a unique degree of control over the cost of entrance facilities . . . because they can choose the location of their own switches." *TRRO* ¶ 138. Requiring incumbents to provide competitors with newly built entrance facilities would dramatically reduce any incentive for competitors to act efficiently in choosing where to locate their switches in relation to their chosen point of interconnection.

The government's effort (at 25 n.7) to limit this case to "existing facilities" is unpersuasive. The interconnection-agreement language that the Michigan commission imposed, *see supra* p. 13, is not limited to those TELRIC-priced facilities already in place. The Michigan commission's order likewise reflects no such limitation. *See* App. 185a (competitors "have a right to entrance facilities"). And neither petitioner has disclaimed the view that AT&T must establish new TELRIC-priced circuits on existing facilities or construct new TELRIC-priced facilities (where facilities do not exist or existing facilities are at capacity). *See also* CPUC Br. 22 (asserting that § 251(c)(2) requires an incumbent to provide "existing or new" entrance facilities). Finally, the government itself suggests (at 23) that "the governing standard" is "whether providing competitive LECs access to those entrance facilities for interconnection is technically feasible," not whether the entrance facility was obtained while the FCC still required unbundled access to such facilities under § 251(c)(3). The government's statement (at 25 n.7) that the FCC "has not ruled on whether" incumbents must "build new entrance facilities for a competitor's use" is thus cold comfort to incumbents such as AT&T. Even so, the government's refusal to defend petitioners' position insofar as it extends to construction of new facilities is effectively a concession that obligating incumbents to build entrance facilities (or even to establish new circuits on existing facilities) at TELRIC rates would contravene the policy of the 1996 Act.

2. Neither petitioners nor their *amici* present a coherent policy rationale for the result they seek. In particular, there is no attempt in the government's *amicus* brief or the FCC orders on which the government relies to square the requirement to provide TELRIC-priced entrance facilities under § 251(c)(2) with the 1996 Act's purpose. That omission further undermines any claim for deference to the government's *amicus* brief or the FCC orders. The few policy-based assertions that petitioners and their *amici* do make are without merit.

a. The Michigan commission incorrectly asserts (at 32) that the Sixth Circuit's decision places a "burden" on a competitor to "recreate an entire network." That claim ignores that this case involves only the transport facility connecting two networks. Nothing in the Sixth Circuit's decision affects competitors' ability to resell incumbents' services under

§ 251(c)(4) or to obtain access to elements of incumbents' networks under the FCC's existing rules implementing § 251(c)(3). That would include, for example, so-called "last mile facilities," such as the local loops made of copper wire connecting residential customer premises to switches, which the FCC has found to be bottleneck facilities. *See TRO* ¶¶ 199, 348.

b. Contrary to Sprint's and the CPUC's claims (and the government's passing assertion), the court of appeals' decision does not permit incumbents to increase prices for entrance facilities "unilaterally." Sprint Br. 2, 15; *see* CPUC Br. 15 (Sixth Circuit decision allows incumbents to "charge competition-dampening rates") (internal quotation marks omitted); Gov't Br. 15 (Sixth Circuit decision permits incumbents to charge "unregulated rate[s]"). As an initial matter, the prices that AT&T seeks to charge are set out in state and federal tariffs. *See Illinois Bell I*, 526 F.3d at 1072 (recognizing that "AT&T wants to be able to charge the tariff price" for entrance facilities); 47 U.S.C. § 201(b) (requiring charges for communication services to be "just and reasonable"). Because AT&T's tariffed rates for entrance facilities are subject to regulatory oversight, it is incorrect to say that, under the Sixth Circuit's decision, rates for access to entrance facilities would be "unregulated" or that incumbents could raise those rates "unilaterally."

More fundamentally, the upshot of the FCC's conclusion that competitors are not impaired in their ability to provide service without access to entrance facilities under § 251(c)(3) is that competitors can build entrance facilities themselves or obtain them from competitive providers. *See TRRO* ¶¶ 138-139,

141. As the FCC found, entrance facilities "are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices." *Id.* ¶ 141. Competitors simply do not "need" access to *incumbents'* entrance facilities — at any price. Accordingly, if competitors are dissatisfied with incumbents' tariffed rates for entrance facilities, they can lease those facilities from another provider or build their own entrance facilities.

c. Equally erroneous is Sprint's assertion (at 28) that, under the decision below, its costs to provide wireless service will increase. That claim is based on the false premise that, until now, Sprint's wireless operations have been leasing entrance facilities from incumbents at TELRIC rates. In fact, to the extent Sprint has been leasing entrance facilities from AT&T, it has been paying AT&T's tariffed rates.[43] Thus, Sprint is not seeking to prevent a price increase; rather, it is hoping for a windfall in the form of lower rates for facilities that it uses to transport traffic to and from AT&T's network. Moreover, Sprint's evident failure even to assert an entitlement to TELRIC-priced entrance facilities under § 251(c)(2) for years after the 1996 Act's enactment undermines the claim that such an obligation has long existed.

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[43] Wireless carriers, such as Sprint, have long been barred from obtaining unbundled network elements under § 251(c)(3). *See TRRO* ¶ 36 & n.108 (explaining that "wireless carriers do not currently use UNEs in their provision of mobile wireless services" and refusing to allow wireless carriers to lease UNEs because of their demonstrated ability to compete "without access to UNEs").

d. Finally, petitioners and the government are incorrect to the extent they suggest that requiring incumbents to provide TELRIC-priced entrance facilities under § 251(c)(2) is sensible as a policy matter because, when used for backhauling, entrance facilities carry traffic between customers of a competitor. *Cf. Pacific Bell*, 621 F.3d at 847 (asserting that, "[w]here a competitive LEC uses an interconnection facility for backhaul, only the competitive LEC benefits — both the originator and the recipient of the call are competitive LEC customers"); MPSC Br. 25, 27.

As an initial matter, "backhauling" is not limited to calls between customers of a competitor (or of a competitor and customers of a wireless carrier).[44] "Backhauling" describes a competitor's use of an entrance facility to connect its own switch to a loop (the wire connecting a customer premises to a switch) that the competitor obtained from an incumbent as an unbundled element under § 251(c)(3). The competitor then uses its switch to provide telephone service to the customer connected to the unbundled loop. *See*, *e.g.*, *TRO* ¶ 480. Calls "backhauled" to the competitor's switch over that entrance facility might then be routed from the switch to other customers of the competitor (or to a wireless carrier), but also might be routed to customers of an incumbent, as Sprint recognizes (at 9). Thus, as a policy matter, the use of entrance facilities for backhauling cannot

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[44] For examples of misunderstandings of backhauling, see Talk Am. Br. 26 (asserting that backhauling occurs when a competitor uses entrance facilities "to carry traffic to and from its end users"); MPSC Br. 24-25 (illustrating backhauling as a call between two "competitive-carrier customers"); Gov't Br. 5-6 & n.4 (asserting that backhauling involves a call between two customers of a competitor or a call between a competitor's customer and a customer of a wireless carrier).

be distinguished from the use of entrance facilities to exchange traffic on the basis that only the competitor "benefits" (*Pacific Bell*, 621 F.3d at 847) from backhauling.

In all events, even if petitioners and their *amici* were correct that backhauling uniquely involves only a competitor's customers, that would not provide a policy justification for the result they seek. In particular, it would not explain why an incumbent should be required to provide competitors with entrance facilities at TELRIC rates, when the FCC has held that competitors can readily build those facilities themselves or buy them from a third party. *See TRRO* ¶¶ 138-139, 141.

* * *

Nothing in the text, structure, or purposes of the 1996 Act supports the claim of petitioners and their *amici* that the 1996 Act — a statute intended to promote facilities-based competition and to reduce regulation — obligates AT&T to provide entrance facilities to its competitors at artificially low prices, so that competitors can connect their own facilities and equipment to a point within AT&T's local network. The court of appeals was correct: if a competitor "chooses" to obtain an entrance facility from AT&T — rather than to "build its own entrance facility," "rent someone else's," or "connect" without using an entrance facility — the competitor "must pay the rates" in AT&T's tariffs. App. 32a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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STATUTORY AND REGULATORY ADDENDUM

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 47 U.S.C. § 201 provides:

47 U.S.C. § 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 ser-vices, 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.

2. 47 U.S.C. § 251 provides:

47 U.S.C. § 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty –

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether –

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification –

(A) is necessary –

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that –

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if –

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

3. 47 U.S.C. § 252 provides:

47 U.S.C. § 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning –

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall –

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that –

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission –

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

4. 47 C.F.R. § 51.5 provides in relevant part:

§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

* * * * *

Interconnection. Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

* * * * *

Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

* * * * *

5. 47 C.F.R. § 51.305 provides:

§ 51.305 Interconnection.

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

(1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) At any technically feasible point within the incumbent LEC's network including, at a minimum:

(i) The line-side of a local switch;

(ii) The trunk-side of a local switch;

(iii) The trunk interconnection points for a tandem switch;

(iv) Central office cross-connect points;

(v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and

(vi) The points of access to unbundled network elements as described in§ 51.319;

(3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires 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. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier; and

(4) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.

(g) An incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of this section.

6. 47 C.F.R. § 51.315(d) (1997) provided:

§ 51.315 Combination of unbundled network elements.

* * * * *

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

* * * * *

7. 47 C.F.R. § 51.319(e) provides:

§ 51.319 Specific unbundling requirements.

* * * * *

(e) *Dedicated transport*. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, as set forth in paragraphs (e) through (e)(4) of this section. A "route" is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (*e.g.*, wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (*e.g.*, wire center or switch "X"). Transmission paths between identical end points (*e.g.*, wire center or switch "A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any.

(1) *Definition*. For purposes of this section, dedicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

(2) *Availability*. (i) *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.

(ii) *Dedicated DS1 transport.* Dedicated DS1 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS1 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 1.544 megabytes per second and are dedicated to a particular customer or carrier.

(A) *General availability of DS1 transport.* Incumbent LECs shall unbundle DS1 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are Tier 1 wire centers. As such, an incumbent LEC must unbundle DS1 transport if a wire center at either end of a requested route is not a Tier 1 wire center, or if neither is a Tier 1 wire center.

(B) *Cap on unbundled DS1 transport circuits.* A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

(C) *Transition period for DS1 transport circuits.* For a 12-month period beginning on the effective date of the *Triennial Review Remand Order*, any DS1 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS1 transport pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, requesting carriers may not obtain new DS1 transport as unbundled network elements.

(iii) *Dedicated DS3 transport.* Dedicated DS3 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS3 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 44.736 megabytes per second and are dedicated to a particular customer or carrier.

(A) *General availability of DS3 transport.* Incumbent LECs shall unbundle DS3 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. As such, an incumbent LEC must unbundle DS3 transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) *Cap on unbundled DS3 transport circuits.* A requesting telecommunications carrier may obtain a maximum of 12 unbundled DS3 dedicated transport circuits on each route where DS3 dedicated transport is available on an unbundled basis.

(C) *Transition period for DS3 transport circuits.* For a 12-month period beginning on the effective date of the *Triennial Review Remand Order*, any DS3 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS3 transport pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, requesting carriers may not obtain new DS3 transport as unbundled network elements.

(iv) *Dark fiber transport*. Dedicated dark fiber transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dark fiber transport consists of unactivated optical interoffice transmission facilities.

(A) *General availability of dark fiber transport*. Incumbent LECs shall unbundle dark fiber transport between any pair of incumbent LEC wire centers except where, though application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. As such, an incumbent LEC must unbundle dark fiber transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) *Transition period for dark fiber transport circuits*. For an 18-month period beginning on the effective date of the *Triennial Review Remand Order*, any dark fiber dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled dark fiber transport pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, requesting carriers may not obtain new dark fiber transport as unbundled network elements.

(3) *Wire center tier structure.* For purposes of this section, incumbent LEC wire centers shall be classified into three tiers, defined as follows:

(i) Tier 1 wire centers are those incumbent LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Tier 1 wire centers also are those incumbent LEC tandem switching locations that have no line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.

(ii) Tier 2 wire centers are those incumbent LEC wire centers that are not Tier 1 wire centers, but contain at least 3 fiber-based collocators, at least

24,000 business lines, or both. Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center.

(iii) Tier 3 wire centers are those incumbent LEC wire centers that do not meet the criteria for Tier 1 or Tier 2 wire centers.

(4) *Routine network modifications*. (i) An incumbent LEC shall make all routine network modifications to unbundled dedicated transport facilities used by requesting telecommunications carriers where the requested dedicated transport facilities have already been constructed. An incumbent LEC shall perform all routine network modifications to unbundled dedicated transport facilities in a nondiscriminatory fashion, without regard to whether the facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier.

(ii) A routine network modification is an activity that the incumbent LEC regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; installing a repeater shelf; and deploying a new multiplexer or reconfiguring an existing multiplexer. They also include activities needed to enable a requesting telecommunications carrier to light a dark fiber transport facility. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the installation of new aerial or buried cable for a requesting telecommunications carrier.

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8. 47 C.F.R. § 51.321 provides:

§ 51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

(a) Except as provided in paragraph (e) of this section, an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and non-discriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.

(b) Technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to:

(1) Physical collocation and virtual collocation at the premises of an incumbent LEC; and

(2) Meet point interconnection arrangements.

(c) A previously successful method of obtaining interconnection or access to unbundled network elements at a particular premises or point on any incumbent LEC's network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points. A requesting telecommunications carrier seeking a particular collocation arrangement, either physical or virtual, is entitled to a presumption that such arrangement is technically feasible if any LEC has deployed such collocation arrangement in any incumbent LEC premises.

(d) An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.

(e) An incumbent LEC shall not be required to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. In such cases, the incumbent LEC shall be required to provide virtual collocation, except at points where the incumbent LEC proves to the state commission that virtual collocation is not technically feasible. If virtual collocation is not technically feasible, the incumbent LEC shall provide other methods of interconnection and access to unbundled network elements to the extent technically feasible.

(f) An incumbent LEC shall submit to the state commission, subject to any protective order as the state commission may deem necessary, detailed floor plans or diagrams of any premises where the incumbent LEC claims that physical collocation is not practical because of space limitations. These floor plans or diagrams must show what space, if any, the incumbent LEC or any of its affiliates has reserved for future use, and must describe in detail the specific future uses for which the space has been reserved and the length of time for each reservation. An incumbent LEC that contends space for physical collocation is not available in an incumbent LEC premises must also allow the requesting carrier to tour the entire premises in question, not only the area in which space was denied, without charge, within ten days of the receipt of the incumbent's denial of space. An incumbent LEC must allow a requesting telecommunications carrier reasonable access to its selected collocation space during construction.

(g) An incumbent LEC that is classified as a Class A company under § 32.11 of this chapter and that is not a National Exchange Carrier Association interstate tariff participant as provided in part 69, subpart G, shall continue to provide expanded interconnection service pursuant to interstate tariff in accordance with §§ 64.1401, 64.1402, 69.121 of this chapter, and the Commission's other requirements.

(h) Upon request, an incumbent LEC must submit to the requesting carrier within ten days of the submission of the request a report describing in detail the space that is available for collocation in a particular incumbent LEC premises. This report must specify the amount of collocation space available at each requested premises, the number of collocators, and any modifications in the use of the space since the last report. This report must also include measures that the incumbent LEC is taking to make additional space available for collocation. The incumbent LEC must maintain a publicly available document, posted for viewing on the incumbent LEC's publicly available Internet site, indicating all premises that are full, and must update such a document within ten days of the date at which a premises runs out of physical collocation space.

(i) An incumbent LEC must, upon request, remove obsolete unused equipment from their premises to increase the amount of space available for collocation.

9. 47 C.F.R. § 51.701 provides:

§ 51.701 Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.

(b) *Telecommunications traffic*. For purposes of this subpart, telecommunications traffic means:

(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (*see* FCC 01-131, paragraphs 34, 36, 39, 42-43); or

(2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) *Transport*. For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) *Termination*. For purposes of this subpart, termination is the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) *Reciprocal compensation.* For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.

10. 47 C.F.R. pt. 36, App. A, provides in relevant part:

APPENDIX TO PART 36 – GLOSSARY

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Central Office

A switching unit, in a telephone system which provides service to the general public, having the necessary equipment and operations arrangements for terminating and interconnecting subscriber lines and trunks or trunks only. There may be more than one central office in a building.

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Trunks

Circuit between switchboards or other switching equipment, as distinguished from circuits which extend between central office switching equipment and information origination/termination equipment.