

Nos. 10-313 & 10-329

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**In The  
Supreme Court of the United States**

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TALK AMERICA INC.,

*Petitioner,*

v.

MICHIGAN BELL TELEPHONE COMPANY  
d/b/a AT&T MICHIGAN,

*Respondent.*

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,

*Respondent.*

—◆—  
**On Writs Of Certiorari To The United States  
Court Of Appeals For The Sixth Circuit**

—◆—  
**BRIEF AMICUS CURIAE OF THE  
CALIFORNIA PUBLIC UTILITIES COMMISSION  
IN SUPPORT OF PETITIONERS**

—◆—  
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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

Amicus curiae California Public Utilities Commission (CPUC or amicus) is the state agency in California that regulates privately owned telecommunications, electric, natural gas, water, railroad, and passenger transportation companies. The CPUC is the respondent in a pending petition for a writ of certiorari in the United States Court of Appeals for the Ninth Circuit filed by AT&T California, an affiliate of Respondent Michigan Bell Telephone Co. (AT&T Michigan). *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836 (9th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3403 (U.S. Dec. 23, 2010) (No. 10-838). The question presented here is the same as that presented in the Ninth Circuit *Pacific Bell* petition. The CPUC submits this brief in continued support of both its decision at issue in the Ninth Circuit petition and, more broadly, the promotion of competition in local telecommunications services pursuant to section 251 of the Telecommunications Act of 1996 (the Act).

The CPUC has the consent of the parties to file this brief. On December 20, 2010 and January 4, 2011, respectively, Petitioners Isiogu, Martinez, and

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<sup>1</sup> Amicus California Public Utilities Commission and its counsel listed on the front cover authored this brief. No party or its counsel had any part in authoring this brief. No one other than amicus California Public Utilities Commission or its counsel has made any monetary contribution to the preparation or submission of this brief.

White and Petitioner Talk America Inc. (Talk America) sent letters to the Clerk of the Court giving consent to any amicus curiae brief. Respondent AT&T Michigan's December 20, 2010 letter indicating its consent is being filed concurrently with this brief.



## STATEMENT

**Telephone Networks and Entrance Facilities.** In the current local telecommunications market, incumbent local exchange carriers (ILECs) have their own separate infrastructures of wires and switches (computers that direct calls to their destinations), called networks, to move calls from one caller to another within their respective networks. Competitive local exchange carriers (CLECs) often have their own networks as well. A CLEC with its own network “interconnects” its network with an ILEC’s network to allow customers of the two different companies to talk to one another. A CLEC without its own network either leases part or all of an ILEC’s network or purchases telecommunications service from an ILEC and resells that service to its customers.

The telecommunications equipment at issue in this case is called an “entrance facility.” An entrance facility is a type of transmission facility (*i.e.*, a high capacity wire) that connects ILEC and CLEC networks, such that telephone traffic can transfer

seamlessly from one carrier's network to another. *Triennial Review Remand Order (TRRO)* ¶ 136;<sup>2</sup> *Pacific Bell*, 621 F.3d at 841-42, 844; *Michigan Bell Tel. Co. v. Covad Commc'ns Co.*, 597 F.3d 370, 372 (6th Cir. 2010), Pet. App. 3a.<sup>3</sup> The connection can be long or short, and multiple carriers' switches may be in the same building (known as "collocation"). *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1071 (7th Cir. 2008), Pet. App. 82a.

**Interconnection: One of the Two Uses of Entrance Facilities.** Entrance facilities have two different uses, which neither AT&T Michigan nor AT&T California disputes. *See, e.g.*, Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 6 n.9, *Michigan Bell*, 597 F.3d 370 (6th Cir. 2010) (Nos. 07-2469, 07-2473), 2008 WL 5098822<sup>4</sup> (the same entrance facility "can be used for multiple purposes"); Br. of Appellant AT&T Cal. at 4, *Pacific Bell*, 621 F.3d 836 (9th Cir. 2010) (Nos. 08-15568, 08-15716), 2008 WL 3312433, at \*4 ("CLECs can use entrance facilities in two different ways.").

First, for the telephone system to function, carriers must be able to "interconnect" – that is, calls

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<sup>2</sup> Order on Remand, *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, 20 FCC Rcd. 2533 (2005), *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

<sup>3</sup> References to "Pet. App." are to the Appendix to Talk America's petition in No. 10-313.

<sup>4</sup> No Westlaw star pagination is available for this document.

must be able to move from one carrier's customer (located in that carrier's network) to another carrier's customer (located in the second carrier's network). This practice originated over one hundred years ago when local telephone companies interconnected so that their respective customers could call each other. *See Pacific Bell*, 621 F.3d at 840 (“Without the ability to link its network to that of the incumbent LEC, the competitive LEC would have little prospect of selling its telephone services[.] . . . A local telephone service is of little use if it cannot connect to other local telephone users.”); *SBC, Inc. v. FCC*, 414 F.3d 486, 489-90 (3d Cir. 2005) (without interconnection, “customers of one carrier – e.g., the ILEC, that has historically served that area – would not be able to call customers of another carrier – e.g., a [CLEC], that has recently initiated service in that same area”). An entrance facility is a component of interconnection which enables a CLEC to physically connect its equipment to the ILEC's equipment, so that calls can move back and forth between the two networks.

Both AT&T Michigan here and AT&T California in *Pacific Bell* concede that entrance facilities serve this interconnection function. As AT&T Michigan stated, “[e]ntrance facilities are a *common means of achieving interconnection with an incumbent LEC*; AT&T Michigan and its incumbent LEC affiliates provide more than 15,000 entrance facility interconnection arrangements nationwide to competing LECs and wireless carriers today.” Br. for Resp't 18 (emphasis added). *See Pacific Bell*, 621 F.3d at 844 (“As the

term ‘entrance’ implies, entrance facilities provide a way for a competitive LEC’s calls to enter AT&T’s network and reach AT&T customers, a fact that AT&T concedes.”). *See also* Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 6 n.9, *supra* at 3 (“an entrance facility may be used to exchange traffic with the ILEC by connecting the CLEC’s switch to the ILEC’s switch”); Br. of Appellant AT&T Cal. at 4, *supra* at 3 (CLECs “can use [entrance facilities] to ‘interconnect’ with the ILEC, to enable the CLEC’s customer to call the ILEC’s customer (and vice versa)”).

As illustrated in Diagram 1 attached (a copy of the diagram the CPUC submitted to the Ninth Circuit in *Pacific Bell*), when CLEC customer C calls ILEC customer A, the call is first connected to the CLEC switch in the CLEC’s own network. Then the CLEC’s switch sends the call over the entrance facility to the ILEC’s switch in the ILEC’s switching center (the “tandem office”). The ILEC’s switch then routes the call through its own network to its own customer A. App. 1.

**Backhaul: The Second Use of Entrance Facilities.** A CLEC also can use an entrance facility to transport its own customers’ traffic from an ILEC’s central office to the CLEC’s switch. Using an entrance facility in this fashion – to route traffic to and from a CLEC’s end users located in the ILEC’s service territory – is known as an example of “backhauling” or “backhaul.” *See* Br. for Resp’t 25 n.28 (defining backhauling as the CLECs’ “use of an entrance facility to connect its own switch to a loop . . . that the

[CLEC] obtained from an [ILEC] as an unbundled element under § 251(c)(3); the [CLEC] then uses its switch to provide telephone service to the customer connected to the unbundled loop”); AT&T Cal.’s Pet. for Panel Reh’g & Suggestion for Reh’g En Banc at 8, *Pacific Bell*, 621 F.3d 836 (9th Cir. 2010) (Nos. 08-15568, 08-15716) (to backhaul is “to route calls over ILEC facilities to a CLEC customer”).

For example, and referring again to Diagram 1 attached, in order to allow CLEC customer C to call CLEC customer B (located in an ILEC’s service area), the call moves from the CLEC’s switch in its own network over the entrance facility to the ILEC’s tandem office, where the CLEC has collocated equipment pursuant to section 251(c)(6) of the Act. The call then moves to another ILEC switching center (the “end office”) where the CLEC also has collocated equipment, and then on to CLEC customer B via the ILEC’s local loop (the wire connecting telephones to switches). In this way, the entrance facility is part of a chain of dedicated transmission facilities connecting the CLEC customer to the CLEC switch. When the entrance facility is used for backhauling in this manner, no traffic is exchanged between the ILEC and CLEC networks. App. 1.

Both the ILEC and CLEC involved in the lease of the entrance facility know whether the CLEC is using the entrance facility for interconnection or backhaul purposes, a fact that was not at issue either in this case or in *Pacific Bell*. See *Pacific Bell*, 621 F.3d at 842 n.8 (ILECs are “capable of screening out calls

that would be used for backhauling. A computer identifies the destination of the call, and, if the call is bound for a customer of the competitive LEC, the computer can screen out the call.”); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 530 F.3d 676, 684 (8th Cir. 2008), Pet. App. 79a, *aff’g* 461 F. Supp. 2d 1055, 1072 (E.D. Mo. 2006) (the Missouri commission (and the district court) did not err in finding that “the entrance facilities requested by the CLECs would be used solely for interconnection purposes”); *Illinois Bell*, 526 F.3d at 1071-72, Pet. App. 84a (“The [Illinois] state commission tells us that ILECs can detect and block any attempted use of an entrance facility for backhauling. (Every carrier, ILEC or CLEC, must be able to determine the traffic’s destination in order to route it accurately.)”).

**The Circuit Courts’ Understanding of Backhaul.** The Seventh, Eighth, and Ninth Circuits recognized that backhaul includes the movement of calls between a CLEC’s switch and a CLEC customer located in an ILEC’s service territory. *See Pacific Bell*, 621 F.3d at 842 (diagram), *amending Pacific Bell Tel. Co. v. California Pub. Utils. Comm’n*, 597 F.3d 958, 964 (9th Cir. 2010), Pet. App. 53a (identical diagram); *Southwestern Bell*, 530 F.3d at 681, Pet. App. 72a-73a; *Illinois Bell*, 526 F.3d at 1071, Pet. App. 82a-83a. Although the courts explained backhaul using the narrower example of two CLEC customers calling one another, the courts’ use of the term backhaul is still accurate and correctly highlights the distinction between backhaul and interconnection, contrary to

AT&T Michigan's assertion otherwise. *See* Br. for Resp't 25 n.28. Regardless of what company serves the customer who ultimately receives the backhauled call, the CLEC nonetheless is using the entrance facility to move traffic to and from its own customer located within the ILEC's service area to a customer *other than the ILEC's customer*. Thus, no matter who is on the other end of the line, the CLEC is using the ILEC's network not to interconnect, but to serve its own customer.

In addition, the diagram in the Ninth Circuit's decision – albeit a simplified version of the diagrams the CPUC and AT&T California submitted – accurately depicts what an entrance facility is and its two different functions. *See Pacific Bell*, 621 F.3d at 842; *Pacific Bell*, 597 F.3d at 964, Pet. App. 53a. AT&T Michigan apparently believes the diagram places the entrance facility in, rather than connected to, the ILEC's switching facility (*i.e.*, the tandem office). Br. for Resp't 2 n.3. However, it is evident from the text of the decision that the Ninth Circuit understood how an entrance facility works. The court correctly described an entrance facility as a “high capacity wire that links telephone networks” and explained how the same entrance facility can be used for both interconnection and backhaul. *Pacific Bell*, 621 F.3d at 842.

**The Telecommunications Act of 1996 and the Implementing Orders.** Congress addressed interconnection in the Act. 47 U.S.C. §§ 201 *et seq.* (2011). The Act was designed to foster rapid development of competition in local telecommunications

services by requiring ILECs, such as AT&T Michigan and AT&T California, to share their networks with competitors seeking entry into the traditionally monopolistic local service market.

Pursuant to section 251, ILECs must provide interconnection for the CLECs' facilities and equipment "at any technically feasible point within the [ILEC's] network." *Id.* § 251(c)(2). Separate and distinct from the interconnection obligation, ILECs also must provide CLECs with access to the ILECs' "unbundled network elements" (UNEs), *e.g.*, loops, switches, and transport facilities. *Id.* § 251(c)(3). To determine what network elements ILECs must make available under section 251(c)(3), the Federal Communications Commission (FCC) must consider whether the failure to provide access to the network elements would "impair" the CLEC's ability to provide telecommunications service. *Id.* § 251(d)(2). The rates ILECs may charge for section 251(c)(2) interconnection and section 251(c)(3) access to unbundled network elements must be based on the ILECs' cost. *Id.* § 252(d)(1). The FCC implemented these provisions of the Act in the 1996 *Local Competition Order (LCO)*,<sup>5</sup> the 2003 *Triennial Review Order (TRO)*,<sup>6</sup>

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<sup>5</sup> First Report & Order, *Implementation of Local Competition Provisions in Telecomms. Act of 1996*, 11 FCC Rcd. 15499 (1996) (subsequent history omitted).

<sup>6</sup> Report & Order & Order on Remand & Further Notice of Proposed Rulemaking, *Review of Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, 18 FCC Rcd. 16978 (2003) (subsequent history omitted).

and the 2005 *Triennial Review Remand Order (TRRO)*.<sup>7</sup>

**The Ninth Circuit *Pacific Bell* Decision.** In 2006, the CPUC issued a decision ruling that CLECs are entitled to lease ILEC entrance facilities used for interconnection at cost-based rates pursuant to section 251(c)(2). AT&T California filed an action in the Northern District of California, appealing the CPUC's decision. In 2008, the district court ruled in the CPUC's favor. *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, No. 07-1797, 2008 WL 501390, at \*6-7 (N.D. Cal. Feb. 21, 2008). The Ninth Circuit affirmed the district court's decision in March 2010. *Pacific Bell*, 597 F.3d at 965-69, Pet. App. 56a-63a.

Just days before the Ninth Circuit issued its decision, the Sixth Circuit issued its split decision ruling the opposite way. Pet. App. 1a. In September 2010, the Ninth Circuit denied rehearing and issued an amended decision "reject[ing] the reasoning advanced by AT&T and the Sixth Circuit in its recent 2-1 decision." *Pacific Bell*, 621 F.3d at 844. On December 10, 2010, the Court granted certiorari in *Isiogu* and *Talk America*. AT&T California filed a petition for a writ of certiorari in *Pacific Bell* on December 23, asking the Court to hold the petition pending the Court's decision in *Isiogu* and *Talk America*. See Pet. for Writ of Cert. at 7, *Pacific Bell*, No. 10-838 (U.S. Dec. 23, 2010). By letter to the Clerk

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<sup>7</sup> See *supra* note 2.

of the Court dated January 10, 2011, the CPUC waived its brief in opposition to the *Pacific Bell* petition in light of the Court's grant of certiorari in these consolidated cases.



## **SUMMARY OF ARGUMENT**

Pursuant to the most reasonable interpretation of the Act, (1) a CLEC is entitled to access to an ILEC entrance facility to interconnect the CLEC's network with the ILEC's network so the customers of each can talk to one another, and (2) the appropriate rate for this use of the entrance facility is based on the ILEC's cost. Section 251(c)(2) requires ILECs to provide CLECs with interconnection at cost-based rates, and an entrance facility is just such a piece of equipment used to achieve interconnection. The Seventh, Eighth, and Ninth Circuits all agree.

The FCC's implementing orders support this interpretation. The FCC interpreted the interconnection obligation broadly in the *LCO* to include different methods and locations for interconnection at the CLEC's choosing. In the subsequent *TRO*, the FCC clarified that the interconnection duty includes the provision of entrance facilities. Ultimately, in the *TRRO*, the FCC found CLECs unimpaired without access to entrance facilities and declassified entrance facilities used for backhaul as an unbundled network element under section 251(c)(3). In paragraph

140, however, the FCC explicitly reaffirmed that its unbundling decision did not affect the section 251(c)(2) requirement (interpreted by the FCC in the *LCO* and the *TRO*) that ILECs provide interconnection facilities at cost-based rates. The issue in this case is whether an “entrance facility” used for interconnection is an “interconnection facility.” Based on logic, common sense, and the FCC’s interpretation of section 251(c)(2), the answer must be yes.

The Sixth Circuit’s split decision to the contrary conflicts with the language of and pro-competitive policy behind section 251(c)(2) of the Act and the FCC’s orders, all of which provide CLECs with a broad right to interconnect their networks with those of the ILECs for the mutual exchange of traffic and require ILECs to provide that interconnection. The CPUC urges the Court to reverse the Sixth Circuit’s decision.



**ARGUMENT****THE COURT SHOULD HOLD THAT ILECS MUST LEASE ENTRANCE FACILITIES TO CLECS AT COST-BASED RATES WHEN CLECS USE SUCH ENTRANCE FACILITIES FOR INTERCONNECTION PURSUANT TO SECTION 251(C)(2) OF THE ACT****A. Section 251(c)(2) Requires ILECs to Provide the Actual Facilities for Interconnection, Including Entrance Facilities**

Pursuant to section 251(c)(2) of the Act, an ILEC must provide, “for” a CLEC’s “facilities and equipment,” interconnection with the ILEC’s network “at any technically feasible point within the [ILEC’s] network.” 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305 (2011). The most rational interpretation of this section is that the interconnection the ILEC must provide includes the actual equipment to enable interconnection, one piece of which is an entrance facility.

First, an ILEC’s entrance facility provides the required interconnection “for” the CLEC’s “facilities and equipment,” *i.e.*, the CLEC’s network. Congress did not define the term “interconnection” or use the terms “interconnection facility” or “entrance facility.” Yet the Act also does not specify what ILECs must do to satisfy the interconnection obligation, much less establish that the interconnection duty affirmatively excludes the provision of the actual facilities to achieve interconnection, such as an entrance facility,

which all parties agree does indeed provide that interconnection function. Because an entrance facility connects on one end with a piece of CLEC network equipment (a switch) and on the other end with a piece of ILEC network equipment (another switch), the ILEC's entrance facility provides interconnection "for" the CLEC's equipment.

An ILEC's entrance facility also provides interconnection "at any technically feasible point within the [ILEC's] network." The point at which the entrance facility connects with the ILEC's switch is such a point. As the Seventh Circuit stated, "[a]n entrance facility, designed for the very purpose of linking two carriers' networks, meets the requirement of feasibility, so a CLEC is entitled to hand off traffic to an ILEC at any entrance facility." *Illinois Bell*, 526 F.3d at 1072, Pet. App. 84a.

Somewhat confusingly, AT&T Michigan concedes that an entrance facility is a "common means of achieving interconnection" but also contends that an entrance facility is "not . . . part of 'interconnection'" but part of the ILEC's network itself, such that a CLEC cannot lease part of a network to interconnect with that network. Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 32, *supra* at 3. AT&T Michigan argues that, because one end of an ILEC-provided entrance facility connects with the CLEC's switch, interconnection occurs at a point on the CLEC's, not the ILEC's, network. See Br. for Resp't 21. Yet AT&T Michigan cannot avoid the fact that an entrance facility does provide the *physical link* between CLEC and ILEC

switches that allows the customers of each network to talk to one another, and that physical link is interconnection. Indeed, whatever the interconnection method, interconnection by definition is always going to occur, on one end, at a point on the ILEC's network. It is just a question of where and how that physical link occurs.

Moreover, interpreting section 251(c)(2) to include the provision of entrance facilities used for interconnection is consistent with the policy behind the Act. Designed to promote competition in local telecommunications services by requiring ILECs to share their networks with new market entrants, the Act "ensures that incumbents do not charge competition-dampening rates for interconnection, a not insignificant risk given that entrants need interconnection more than incumbents do." *Michigan Bell*, 597 F.3d at 387-88 (Sutton, J., dissenting), Pet. App. 35a. Reading the Act to exclude the provision of equipment CLECs need to achieve interconnection (such as entrance facilities) would be contrary to the Act's pro-competitive purpose. Rather, section 251(c)(2) should be read (1) to require ILECs to provide the physical link between networks, a physical link that can occur in different ways and at different locations – "at any technically feasible point" the CLEC chooses – and (2) to include entrance facilities as such physical links.

## **B. Pursuant to the FCC’s Implementation of Section 251(c)(2), Entrance Facilities Are a Form of Interconnection ILECs Must Provide**

The FCC’s orders implementing the Act support this interpretation of section 251(c)(2) as requiring ILECs to provide the actual equipment – *e.g.*, an entrance facility – to interconnect two networks. In the *LCO*, the FCC interpreted the right to interconnection broadly. In the *TRO*, it distinguished between the two uses of entrance facilities under section 251(c)(2) (the interconnection use) and section 251(c)(3) (the backhaul use). Finally, in the *TRRO*, the FCC re-confirmed the CLECs’ right to obtain interconnection facilities – which include entrance facilities used for interconnection – at cost-based rates.

### **1. The *LCO* Set Forth the Breadth of Section 251(c)(2) Interconnection Choices**

In the *LCO* – the first and primary order implementing the Act’s interconnection requirements – the FCC emphasized the scope and breadth of the ILECs’ section 251(c)(2) interconnection obligation, as distinct from the section 251(c)(3) unbundling obligation. Although the FCC did not explicitly use the term “entrance facilities,” it broadly interpreted the interconnection duty to require ILECs to provide CLECs a wide range of physical facilities CLECs can use to interconnect their networks with the ILECs’

networks. An entrance facility used for interconnection is just such a physical facility.

**a. The FCC's Definition of Interconnection**

The FCC began by defining interconnection as the “physical linking of two networks for the mutual exchange of traffic.” *LCO* ¶ 176; 47 C.F.R § 51.5. The Circuit Courts have interpreted that “linking” to mean an actual facility or piece of equipment that physically joins two networks. *See Southwestern Bell*, 530 F.3d at 684, Pet. App. 79a, *citing AT&T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003) (looking to the District of Columbia Circuit’s interpretation of interconnection as referring to “facilities and equipment”); *Competitive Telecomms. Ass’n v. FCC*, 117 F.3d 1068, 1071-72 (8th Cir. 1997) (noting the Act does not define interconnection and upholding the FCC’s definition of interconnection as a “physical link”). *See also Southwestern Bell*, 461 F. Supp. 2d at 1072 (relying on the FCC’s definition of interconnection as a physical link using facilities and equipment and rejecting argument that ILECs do not need to lease the interconnection facilities themselves to CLECs).

Then, in further articulating the practicalities of interconnection, the FCC included the actual, physical facilities used for interconnection within the ILEC’s obligation and required ILECs to affirmatively “design” them. In the regulation entitled

“Interconnection,” the FCC used the term “interconnection facilities” to refer to the facilities ILECs must provide to CLECs to enable interconnection. The regulation requires LECs to “design interconnection facilities” that are at least of the same quality as that which the ILEC provides itself, a subsidiary, or an affiliate. 47 C.F.R. § 51.305(a)(3). Thus, the FCC’s initial analysis of interconnection included actual “interconnection facilities.”

According to AT&T Michigan, however, the provision of entrance facilities to allow different carriers’ customers to talk to one another involves the “transport” of CLEC traffic, such that the entrance facility does not fall under the FCC’s definition of interconnection. Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 32-33, *supra* at 3. However, as the FCC explained, defining interconnection as a physical link between networks did not remove the ILEC’s duty to route and terminate the traffic that moves through the interconnection point. *See LCO* ¶ 176 (“We also reject [the] argument that reading section 251(c)(2) to refer only to the physical linking of networks implies that incumbent LECs would not have a duty to route and terminate traffic.”). The Ninth Circuit similarly rejected this argument and reasoned that, if the interconnection obligation “did not include any duty to provide *any* transport of calls, then § 251(c)(2) would be meaningless because incumbents could physically link networks with the competitive LEC, but refuse to carry calls to the incumbent LEC’s terminal customers, thus effectively locking the

competitive LEC out of the market.” *Pacific Bell*, 621 F.3d at 846 n.16.

**b. The FCC’s Definition of “Technically Feasible” Points of Interconnection**

Consistent with its broad definition of interconnection – including ILECs’ provision of “interconnection facilities” in 47 C.F.R. § 51.305(a)(3) – the FCC similarly took a broad view of what constitutes a “technically feasible point” of interconnection. The FCC repeatedly emphasized that it is the CLEC’s choice regarding where and how interconnection occurs. Once again, entrance facilities used for interconnection fit within this broad interpretation of what is technically feasible.

In exploring the concept of technical feasibility, the FCC explained that section 251(c)(2) “lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC’s network at which they wish to deliver traffic.” *LCO* ¶ 209. The FCC concluded that a CLEC “may *choose any* method of technically feasible interconnection . . . at a particular point.” *Id.* ¶ 549 (emphasis added). *See also* 47 C.F.R. § 51.321(a) (ILECs are required to provide “any technically feasible method of obtaining interconnection”); *LCO* ¶ 202 (the term feasible “encompass[es] more than what is merely ‘practical’ or similar to what is ordinarily done”).

The FCC also refused to limit interconnection to any particular methods. *See id.* ¶ 549 (section 251(c)(2) “does not limit [the interconnection] duty to a specific method of interconnection”). Instead, the FCC concluded that it “should identify a minimum list of technically feasible points of interconnection” and gave examples of types. *Id.* ¶ 209. *See also id.* ¶ 550 (confining interconnection to just collocation – the only method section 251 explicitly mentions – would “dramatically” narrow the requirement that interconnection be made available at any technically feasible point). With that expansive view of interconnection in mind, “other methods of technically feasible interconnection . . . , such as meet point arrangements, in addition to virtual and physical collocation, must be available.” *Id.* ¶ 553. *See also* 47 C.F.R. § 51.321(b) (technically feasible interconnection methods “include, but are not limited to” collocation at ILEC’s premises and meet point interconnection arrangements). In this way, the FCC laid out an interconnection duty that “encompasses more than providing competitors with an outlet to plug into.” *Michigan Bell*, 597 F.3d at 389 (Sutton, J., dissenting), Pet. App. 38a.

Finally, and perhaps most significantly, the FCC concluded that the ILECs’ interconnection duty includes the modification and/or build-out of the ILECs’ network facilities to accommodate interconnection. *LCO* ¶ 198. *See also* 47 C.F.R. § 51.5 (defining “technically feasible” and noting that “[t]he fact that an incumbent ILEC must modify its facilities or

equipment to respond to [a CLEC's request for interconnection] does not determine whether satisfying such request is technically feasible"); *LCO* ¶ 202 (an ILEC "must accept the novel use of, and modification to, its network facilities to accommodate the interconnector"), ¶ 553 ("although the creation of meet point arrangements may require some build out of facilities by the incumbent LEC, we believe that such arrangements are within the scope of the obligations imposed by section[ ] 251(c)(2)").

This modification/build-out obligation does not unfairly burden the ILECs, as they can recoup the cost of accommodating the CLEC's choice of interconnection through rates, pursuant to section 252(d)(1). *See id.* ¶ 199 (a CLEC "that wishes a 'technically feasible' but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit"), ¶ 200 ("to the extent incumbent LECs incur costs to provide interconnection . . . , incumbent LECs may recover such costs from requesting carriers"), ¶ 209 ("because [CLECs] must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect"). *See also US W. Commc'ns, Inc. v. Minnesota Pub. Utils. Comm'n*, 55 F. Supp. 2d 968, 982-83 (D. Minn. 1999) (upholding state commission's order requiring an ILEC to build new facilities necessary for a new entrant to connect to the ILEC's network "at any technically feasible point of the CLEC's

choosing” and noting parties’ agreement that the new entrant would pay the cost).

Entrance facilities used for interconnection fall within this broad interconnection framework the FCC set out in the *LCO*. An entrance facility – whether existing or new – is a physical link between networks. As such, it meets the FCC’s definition of interconnection, and ILECs must provide it to CLECs at cost-based rates. As Judge Sutton stated, “[e]ntrance facilities come within the ordinary meaning of a ‘technically feasible method of obtaining interconnection.’” *See Michigan Bell*, 597 F.3d at 388 (Sutton, J., dissenting), Pet. App. 36a.

## **2. The *TRO* Confirmed That the Right to Interconnection Includes the ILECs’ Provision of Entrance Facilities**

In the *TRO*, the FCC concluded that ILECs no longer had to provide entrance facilities used for backhaul on an unbundled basis under section 251(c)(3), but did not touch the ILECs’ duty to provide entrance facilities used for interconnection under section 251(c)(2). In paragraphs 365 and 366, the FCC carefully distinguished between the two different uses for such transmission facilities and preserved the requirement that ILECs make available facilities for interconnection. An entrance facility is one such interconnection facility.

As set forth above, the FCC defined the CLECs’ right to interconnection in broad terms in the *LCO*.

In the *TRO*, the FCC took that broad duty and articulated a specific interconnection duty with regard to entrance facilities. See *Pacific Bell*, 621 F.3d at 846 (“Though the LCO did not expressly state that entrance facilities were one of the ‘network elements’ incumbent LECs were required to make available under 47 U.S.C. § 251(c)(2), the later [TRO] expressly interpreted the LCO to impose this obligation.”). In paragraph 365, the FCC made the explicit finding that CLECs use “transmission connections” between ILEC and CLEC networks – *i.e.*, entrance facilities – for both interconnection and backhaul:

[C]ompetitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users. These links constitute the incumbent LEC’s own transport network. However, in order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. *Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECs explicitly must make available for Section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission*

facilities connecting incumbent LEC networks to competitive LECs *for the purpose of backhauling traffic*.

*TRO* ¶ 365 (emphasis added; footnote omitted). Thus, the FCC removed the section 251(c)(3) unbundling requirement for entrance facilities (*i.e.*, transmission links) used for *backhaul*.

Then, in paragraph 366, the FCC stated that it was not changing the CLEC's statutory right to interconnect using those same transmission facilities:

In reaching this determination [that the “dedicated transport” unbundled network element includes only those transmission facilities within the ILEC's network] we note that, *to the extent that requesting carriers need facilities in order to “interconnect[] with the incumbent LEC's network,” section 251(c)(2) of the Act expressly provides for this* and we do not alter the Commission's interpretation of this obligation.

*Id.* ¶ 366 (emphasis added) (footnotes omitted).

These paragraphs of the *TRO* are still good law today, contrary to what the Sixth Circuit found or what AT&T Michigan asserts. *See Michigan Bell*, 597 F.3d at 383 n.13, Pet. App. 25a; Br. for Resp't 25 n.28. In *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), the District of Columbia Circuit remanded the *TRO*'s section 251(c)(3) unbundling issue of whether entrance facilities used for backhaul are a network element and whether CLECs

are impaired without access to that network element. *USTA II*, 359 F.3d at 585-86. The court focused on unbundling and did not address the FCC's discussion of the two uses for entrance facilities and/or the FCC's explicit preservation of the CLECs' right to obtain entrance facilities used for section 251(c)(2) interconnection. *See TRRO* ¶¶ 136-37.

Thus, as the Ninth Circuit aptly explained:

[T]his portion of the TRO [¶¶ 365-66] was not vacated in *USTA II*. *USTA II* vacated only the TRO's conclusion that entrance facilities are categorically excluded from the definition of "network elements" under § 251(c)(3). The court did not rule on the validity of the FCC's conclusion that, under § 251(c)(2), incumbent LECs are obligated to offer entrance facilities at TELRIC [total element long-run incremental cost, *i.e.*, cost-based] rates.

*Pacific Bell*, 621 F.3d at 846 n.15 (citations omitted). *See also id.* at 841 (the "relevant parts" of the *LCO* and *TRO* "were not invalidated by courts"). In the subsequent *TRRO*, the FCC itself cited to Paragraph 366 of the *TRO*. *See infra* § B.3.b. Moreover, from a practical, commonsense perspective, the factual distinction between backhaul and interconnection did not suddenly disappear following remand of the *TRO*. CLECs use entrance facilities in these two different ways, as the parties all agree here.

### **3. The *TRRO* Preserved the Right to Entrance Facilities Used for Interconnection**

In the *TRRO* – the FCC’s fourth attempt to promulgate valid unbundling regulations under section 251(c)(3) – the FCC continued to recognize the two different uses of entrance facilities and reaffirmed the CLECs’ right to obtain ILEC interconnection facilities – which include entrance facilities used for interconnection – at cost-based rates pursuant to section 251(c)(2). The FCC’s finding that CLECs are not impaired under section 251(c)(3) without access to entrance facilities for backhaul had no effect on the CLECs’ separate statutory right to lease entrance facilities used for section 251(c)(2) interconnection.

#### **a. The Entrance Facility Regulation Promulgated in the *TRRO* Only Addresses Entrance Facilities Used Pursuant to Section 251(c)(3)**

Like the *TRO*, the *TRRO* is a section 251(c)(3) unbundling order. *See TRRO* ¶¶ 1-4. In the section entitled “Entrance Facilities,” the FCC revisited the issue of whether ILECs must offer entrance facilities on an unbundled basis and decided the answer was no: to the extent a CLEC wants to use an entrance facility to move traffic to and from its customers located in the ILEC’s service territory, it should get its own entrance facility. *Id.* ¶¶ 136-141. *See also id.* ¶ 138 n.389 (noting that a particular CLEC “utilizes

third-party providers for backhaul from [the CLEC's] collocation arrangements to [the CLEC's] switches"), ¶ 141 n.396 (referring to "dedicated facilities used for backhaul between networks").

Accordingly, the FCC's regulation effectuating that finding, 47 C.F.R. § 51.319 (entitled "Specific unbundling requirements"), is a section 251(c)(3) unbundling regulation. It provides that entrance facilities a CLEC uses for backhaul are delisted as unbundled network elements – *i.e.*, ILECs are no longer required to provide entrance facilities used for backhaul at cost-based rates. 47 C.F.R. § 51.319(e)(2)(i) ("Entrance facilities. An incumbent LEC is not obligated to provide a requesting carrier [*i.e.*, CLEC] with *unbundled access* to dedicated transport that does not connect a pair of incumbent LEC wire centers.") (emphasis added).

Indeed, 47 C.F.R. § 51.319(e)(2)(i) specifically refers to access to entrance facilities on an *unbundled* basis, therefore implicating section 251(c)(3), not section 251(c)(2). Reading this regulation to remove the ILECs' obligation to provide *all* entrance facilities (including those used for interconnection) ignores that the FCC set forth the section 251(c)(2) obligation in another regulation entitled "Interconnection," 47 C.F.R. § 51.305. *See supra* § B.1.a.; *Michigan Bell*, 597 F.3d at 390 (Sutton, J., dissenting), Pet. App. 39a-40a (reading the unbundling regulation to eradicate the interconnection obligation "turns the phrase 'with unbundled access' into a useless appendage"). In

arguing that the FCC determined that CLECs also do not need cost-priced entrance facilities for interconnection (see Br. for Resp't 25-26), AT&T Michigan misreads the *TRRO*: the FCC only addressed entrance facilities used for backhaul on an unbundled basis under section 251(c)(3).

**b. Paragraph 140 Clarified That the Section 251(c)(2) Interconnection Duty Regarding Entrance Facilities is Unchanged**

Immediately following its discussion of removing the section 251(c)(3) unbundling requirement for entrance facilities, the FCC clarified that its decision to do so had no effect on the ILEC's separate section 251(c)(2) duty to provide interconnection. In paragraph 140, the FCC preserved the CLECs' right to use an entrance facility (a type of interconnection facility) at cost-based rates:

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.* [n.394 *Triennial Review Order*, 18 FCC Rcd at 17204, para. 366.] Thus, competitive LECs *will have access to these facilities at cost-based rates to the extent that they require*

*them to interconnect with the incumbent LEC's network.*

TRRO ¶ 140 (emphasis added).<sup>8</sup>

Although the FCC did not define the term interconnection facilities, it logically includes entrance facilities used for interconnection. First, as discussed above, paragraph 140 falls within a section of the TRRO entitled “Entrance Facilities,” in which the FCC addressed removal of the section 251(c)(3) unbundling requirement for entrance facilities. *See Pacific Bell*, 621 F.3d at 845 (“although the FCC did not use the term ‘entrance facilities’ in Paragraph 140, the paragraph appears in a section of the TRRO entitled ‘Entrance Facilities,’ which solely discusses the effect of the FCC’s finding as to entrance facilities”).

Second, if the same physical facility that the FCC decided was no longer a section 251(c)(3) unbundled network element could not also act as a section 251(c)(2) “interconnection facility,” the FCC would have had no reason to emphasize in its discussion of entrance facility unbundling that CLECs also have a right to interconnection facilities under section 251(c)(2). *See Michigan Bell*, 597 F.3d at 390 (Sutton,

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<sup>8</sup> A CLEC “requires” an entrance facility for interconnection when it does not have one of its own. *See Southwestern Bell*, 530 F.3d at 684, Pet. App. 78a-79a (“If a CLEC needs entrance facilities to interconnect with an ILEC’s network, it has the right to obtain such facilities from the ILEC.”).

J., dissenting), Pet. App. 40a-41a (“[W]hy would [the FCC] underscore the incumbents’ continuing obligation to provide interconnection facilities? These points of emphasis make little sense if entrance facilities never function as § 251(c)(2) interconnection facilities.”) (citations omitted). Similarly, AT&T Michigan’s assertion that paragraph 140 only assured CLECs that ILECs would still provide “patch cords” that link two wires together for interconnection is not convincing. Final Br. of Pl.-Appellee Michigan Bell Tel. Co. at 39 n.23, *supra* at 3. If these patch cords are merely “ancillary equipment” (*id.* at 40), the FCC would not have had to be so careful in its discussion of entrance facility unbundling to preserve the CLEC’s right to use them for interconnection.

Moreover, this interpretation is consistent with the FCC’s discussion of interconnection in the LCO and TRO, as well as the Act itself. Indeed, in the footnote in paragraph 140, the FCC itself *cited to paragraph 366* of the *TRO* in support of its statement that CLECs have the right to obtain interconnection facilities. *TRRO* ¶ 140 n.394. The FCC had no need to repeat what it stated in the *TRO* regarding the backhaul/interconnection distinction because those parts of the *TRO* were not vacated. *See supra* § B.2.

**c. The Continued Right to Entrance Facilities for Interconnection is Consistent with the FCC's Removal of the Unbundling Requirement**

Requiring ILECs to provide entrance facilities for section 251(c)(2) interconnection also is consistent with and in no way undermines the FCC's decision to remove the section 251(c)(3) unbundling obligation from entrance facilities. The Seventh Circuit phrased the ILEC position and the response as follows:

What's the point of specifying that CLECs cannot demand access to entrance facilities as unbundled network elements . . . if state commissions can turn around and require the same access at the same price anyway? The answer . . . is that CLECs do not enjoy the "same" access to entrance facilities under the state commission's decision as they did before the FCC's order. Until then CLECs could use entrance facilities for both interconnection and backhauling. Under the state's order, CLECs use entrance facilities exclusively for interconnection, just as the FCC said in ¶ 140.

*Illinois Bell*, 526 F.3d at 1071, Pet. App. 83a-84a.

Similarly, the Ninth Circuit concluded that, "[i]n light of the different economic considerations associated with the use of entrance facilities for interconnection, on the one hand, and for backhaul, on the other, the FCC could reasonably conclude that

different regulations were appropriate.” *Pacific Bell*, 621 F.3d at 847. The court further reasoned:

Where 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. But when the competitive LEC uses the entrance facility for interconnection, both competitor and incumbent benefit: the incumbent’s customers can reach customers of the competitor, and vice versa.

*Id.*

Because sections 251(c)(2) and (c)(3) impose separate ILEC obligations, the FCC can change one obligation without changing (or “negating”) the other. Conversely, retaining the interconnection requirement does not “re-impose” the “repealed” requirement. The section 251(d)(2) impairment analysis only applies under section 251(c)(3), so the FCC’s finding that CLECs have competitive alternatives to entrance facilities used as unbundled network elements is irrelevant to the CLEC’s right to the same equipment for interconnection under section 251(c)(2). Thus, the FCC’s removal of the unbundling requirement did not change the CLECs’ statutory right to obtain ILEC interconnection facilities, including entrance facilities used for interconnection. By maintaining the ILECs’ obligation to offer their entrance facilities to CLECs for interconnection, the FCC acted consistently with the Act’s purpose of promoting competition in local

telephone service, as well as with its own prior orders, the *LCO* and *TRO*.

**C. The Sixth Circuit Erred in Holding That an ILEC’s Only Duty is to Allow a CLEC to “Plug in” its Own Equipment into the ILEC’s Network**

According to the majority in the Sixth Circuit, paragraph 140 of the *TRRO* merely provides that, if a CLEC builds its own entrance facility, the ILEC must let the CLEC hook that entrance facility up to the ILEC’s network by providing an “interconnection facility” – nothing more than a place for the CLEC to “plug in” – at regulated rates. Yet the panel majority made a number of analytical errors, the most significant of which the CPUC discusses below, and misinterpreted the statute and the FCC’s orders contrary to both their plain meaning and the Act’s pro-competitive purpose.

**1. The Sixth Circuit Mistakenly Concluded That an Entrance Facility Used for Interconnection Is Not a Type of Interconnection Facility**

The panel majority concluded that the FCC used the terms “entrance facilities” and “interconnection facilities” to refer to different pieces of equipment. In doing so, the panel majority developed its own analogy of public park-goers in need of electricity plugging their “big orange extension cords” (*i.e.*,

entrance facilities) into a homeowner’s “outlet” (*i.e.*, the “interconnection facility”). *Michigan Bell*, 597 F.3d at 374 n.4, 379-82, Pet. App. 6a, 18a-23a. In their view, because entrance facilities “do not connect the CLEC with the ILEC network directly” (and instead connect the CLEC with the ILEC’s “interconnection facility”), entrance facilities are not a technically feasible means of interconnection. *Id.* at 382 n.12, Pet. App. 24a. The panel majority is mistaken.

The FCC is clear – and the parties agree – that an entrance facility is a way to interconnect ILEC and CLEC networks. The FCC defined entrance facilities simply as the transmission links between ILEC and CLEC networks, without any limitation on the length of that link. The fact that the FCC did not include an “interconnection facility” definition in or around paragraph 140 of the *TRRO* is not a reason to ignore the FCC’s consistently broad interpretation of interconnection in its prior orders, including its use of the term “interconnection facility” itself in 47 C.F.R. § 51.305(a)(3). Moreover, had the FCC not used the term before (which it had), the use of a term without an accompanying explicit definition does not foreclose a reasonable interpretation of that term’s plain language: “interconnection” plus “facility” is simply a piece of equipment used to physically link networks, and an entrance facility is just such a piece of equipment.

Also, entrance facilities do indeed connect ILEC and CLEC network equipment; there is no intermediary, additional “interconnection facility.” *See Talk*

America’s Pet. for Writ of Cert. 26 (in “practical reality,” the entrance facility provides the “bridge” between CLEC and ILEC networks); Br. of Appellant AT&T Cal. at 4 fig.2, *supra* at 3 (diagram showing only an “entrance facility” connecting CLEC switch with ILEC tandem office). Thus, by deciding that an entrance facility is somehow not a type of interconnection facility and creating an erroneous “big orange extension cord” analogy, the Sixth Circuit improperly developed its own definition of what an entrance facility is and then improperly substituted its definition in place of both the FCC’s interpretation of interconnection and the facts the parties presented.

## **2. The FCC’s Elimination of the Unbundling Requirement for Entrance Facilities Did Not Eliminate the Separate Interconnection Requirement, Contrary to the Sixth Circuit’s Determination**

The panel majority also improperly read the FCC’s regulation eliminating the unbundling requirement as removing the ILEC’s duty to provide all entrance facilities, regardless of how the CLEC uses them. *Michigan Bell*, 597 F.3d at 377, 382 n.12, 386, Pet. App. 12a-13a, 24a, 31a. This interpretation collapses the interconnection and unbundling obligations in direct conflict with the statutory language and the FCC’s orders.

The ILECs’ section 251(c)(2) interconnection duty and section 251(c)(3) unbundling duty are separate

and distinct obligations. The analysis by which a state commission determines whether a CLEC is impaired without access to a particular network element applies only to the unbundling duty. 47 U.S.C. § 251(d)(2) (“[i]n determining what network elements should be made available *for purposes of subsection (c)(3)*,” the FCC must consider whether the ILEC’s failure to provide access to a network element would impair the ability of the CLEC to provide the services it seeks to offer) (emphasis added). See *Michigan Bell*, 597 F.3d at 389 (Sutton, J., dissenting), Pet. App. 38a (“an impairment analysis has no role to play under § 251(c)(2), and the FCC has never, to my knowledge, considered impairment when analyzing an [ILEC’s] interconnection obligations”) (citations omitted); *Illinois Bell*, 526 F.3d at 1072, Pet. App. 84a (the rate an ILEC can charge for entrance facilities used for interconnection “is not related to the scope of an ILEC’s obligations under § 251(c)(3) to furnish unbundled network elements”).

When the FCC decided that CLECs were not impaired without access to entrance facilities under section 251(c)(3), it issued 47 C.F.R. § 51.319(e)(2)(i), a regulation which, by its terms, relates only to section 251(c)(3) unbundling and removes the ILEC’s obligation to provide entrance facilities on an unbundled basis. This regulation has no effect on ILECs’ separate and distinct duty to provide entrance facilities used for interconnection under section 251(c)(2). Contrary to the panel majority’s reasoning, the FCC did indeed explicitly apply two different rules (under

sections 251(c)(2) and 251(c)(3)) to the “same exact wire” based on the functions of that wire, and it was reasonable for the FCC to do so.

### **3. The Sixth Circuit Disregarded Both the Fact That CLECs Use the Same Entrance Facility in Two Different Ways and the FCC’s Regulatory Distinction Between These Uses**

In addition, the panel majority erroneously rejected the distinction between the backhaul and interconnection uses of entrance facilities. They reasoned that the *TRRO* did not discuss the backhaul versus interconnection distinction and that the *TRO*’s discussion of backhaul and interconnection is no longer valid. *Michigan Bell*, 597 F.3d at 381-82, 383 n.13, 384-86, Pet. App. 21a-23a, 25a, 27a-31a. However, there is no dispute here (or in *Pacific Bell*) – and the Sixth Circuit was wrong to create one where one did not exist – that a CLEC can use an entrance facility for either interconnection or backhaul. The FCC already had distinguished between these two different uses in paragraphs 365 and 366 of the *TRO*, and that discussion still stands. There was no reason for the FCC to repeat those findings in the *TRRO*.

#### **4. The Act Should be Interpreted to Expand the CLECs' Interconnection Choices, Not Limit Them**

In ultimately concluding that all an ILEC must do under section 251(c)(2) is make a “plug-in” location available to the CLEC, and not provide any actual equipment to facilitate that connection, the Sixth Circuit improperly limited that CLEC’s interconnection choices, in direct conflict with both the Act and the FCC’s orders. No longer is a CLEC able to interconnect via “any technically feasible” method under the statute; rather, the ILEC is given the power to choose whether a piece of equipment is an entrance facility or an interconnection facility. *See id.* at 390-91 (Sutton, J., dissenting), Pet. App. 41a. By concluding that an entrance facility becomes an interconnection facility only when the ILEC says the CLEC must use it, the majority granted ILECs control over choosing the point of interconnection where no such power should exist, ignored the ILEC’s duty to provide interconnection at any technically feasible point the CLEC picks, and interpreted section 251(c)(2) in a way that directly conflicts with the Act’s purpose of promoting competition.



**CONCLUSION**

For the reasons stated above, the CPUC urges the Court to reverse the Sixth Circuit's decision.

Respectfully submitted,

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App. 1  
Diagram 1

