Nos. 10-313 & 10-329

In the Supreme Court of the United States

TALK AMERICA INC., PETITIONER

v.

MICHIGAN BELL TELEPHONE CO.,
D/B/A AT&T MICHIGAN

ORJIAKOR N. ISIOGU, COMMISSIONER, MICHIGAN PUBLIC SERVICE COMMISSION, ET AL., PETITIONERS

v.

MICHIGAN BELL TELEPHONE CO.,
D/B/A AT&T MICHIGAN

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

BRIEF FOR SPRINT NEXTEL CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE

Sprint Nextel Corporation (Sprint) is one of the largest communications providers in the United States. Serving more than 48 million customers, Sprint is the Nation's third-largest provider of wireless communications and one of the largest providers of wireline long-distance service. In conjunction with various cable companies, Sprint also provides local telephone service.

In all of those markets, Sprint heavily depends on the ability to connect to the networks of incumbent local exchange carriers—and, specifically, on the ability to connect its customers with customers of those incumbents. As a result, the price that incumbents charge for access to their networks—access that they alone control—is of paramount importance to Sprint. That is particularly true because Sprint's two primary competitors for wireless service own a majority of the Nation's incumbent carriers (and therefore control access to a substantial portion of the Nation's local telephone network). Payments to incumbents already constitute a significant cost of Sprint's services, and affirmance of the erroneous decision below would permit incumbents unilaterally to increase that cost, to the detriment of Sprint's customers and of competition in the telecommunications industry more generally. Accordingly, Sprint has a significant interest in the disposition of this case.[1]

STATEMENT

Sprint respectfully submits that the Court cannot meaningfully review the court of appeals' decision in this case without a full understanding of the technology of telephone networks and the statutory and regulatory framework applicable to the instant dispute. Sprint in-

[1] Pursuant to Rule 37.6, Sprint affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than Sprint or its counsel made such a monetary contribution. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

cludes this statement in an effort to assist the Court in obtaining that understanding.

1. A "local exchange" is simply a network that connects "terminals" (*e.g.*, telephones) in a particular locality. Each terminal is connected by means of a wire known as a "local loop" to a "switch." Switches route calls to their proper destinations. Switches were originally operated manually; an operator would take an incoming call, ask for its destination, and forward the call to that destination. Those days, of course, are long gone, and switches now operate automatically, based on signals that accompany the call. Calls typically travel through more than one switch before reaching their final destination; switches that connect to local loops are known as "local switches" or "end office switches," and they are generally housed in a building known as the "local office" or "end office."

A local switch either directs a call between two terminals that are connected to that switch, or (more commonly) aggregates calls that are ultimately destined for other switches into a single wire known as a "trunk." Just as a local loop transmits a single call between a terminal and a local switch, a trunk transmits numerous calls between a local switch and a "tandem switch." A tandem switch is a switch that is connected only to other switches; tandem switches are housed in a building known as a "tandem office."[2] When a call arrives at a tandem switch, it is directed to its next destination, which may be another tandem switch or a local switch. The call eventually reaches the appropriate local switch, which in turn routes the call to the destination terminal.

[2] The term "central office" refers to any office that houses switches, including end offices and tandem offices.

See generally *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 489-490 (2002).

As the foregoing explanation illustrates, it is "easy to see" why a company that owns a local exchange—known as an "incumbent local exchange carrier" (ILEC)—would have an "almost insurmountable competitive advantage" absent regulatory intervention. *Verizon*, 535 U.S. at 490. A would-be competitor could not compete with the incumbent "without coming close to replicating the incumbent's entire existing network"—the cost of which would be extraordinary if not prohibitive, not least because the competitor would need to install local loops to every single residence and business in a given locality. *Ibid.* Because of its control of the local market, moreover, the incumbent could impose substantial fees as a condition of obtaining access or connecting to the incumbent's customers—or choose not to permit it at all. *Id.* at 490-491.

Until the early 1980s, nearly all of the local exchanges in the United States were controlled by the American Telephone & Telegraph Company (AT&T), which "possess[ed] overwhelming monopoly power" in the markets for local and long-distance services alike. *Verizon*, 535 U.S. at 480. Pursuant to a 1982 consent decree, AT&T's local telephone operations were broken up into seven regional Bell operating companies, known as the "Baby Bells." See *United States* v. *American Tel. & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). Each of those companies, however, continued to have monopoly power in the region it controlled. See *Verizon*, 535 U.S. at 475-476.

2. The Telecommunications Act of 1996 (Act) was intended, *inter alia*, to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises." *Verizon*, 535 U.S. at 476. The Act obligates an incumbent to

"share its network with competitors," which include "competitive local exchange carriers" (CLECs) and "commercial mobile radio service" (CMRS) providers. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

The Act provides three primary means of promoting competition between incumbents and competitors. First, a competitor can simply buy and resell an incumbent's "telecommunications service"; the incumbent is required to provide that service to the competitor at wholesale prices. *Verizon*, 535 U.S. at 491; 47 U.S.C. 251(b)(1) and (c)(4). Second, a competitor can "interconnect its own facilities with the incumbent's network." *AT&T*, 525 U.S. at 371; 47 U.S.C. 251(a) and (c)(2). Third, a competitor can "lease certain of an incumbent's 'network elements.'" *Verizon*, 535 U.S. at 491; 47 U.S.C. 251(c)(3) and (d)(2). This case implicates the last two of those methods.

If a competitor opts to "interconnect its own facilities with the incumbent's network," *AT&T*, 525 U.S. at 371, Section 251(c)(2) of the Act obligates the incumbent to provide interconnection on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2)(B) and (D). The parties are permitted to negotiate those rates privately. If they are unable to reach agreement, the matter is referred for arbitration to the relevant state utility commission, which determines a rate "based on the cost * * * of providing the interconnection" plus a "reasonable profit." 47 U.S.C. 252(d)(1). The Federal Communications Commission (FCC or Commission) has established the methodology for determining that rate, which is known as the "total element long-run incremental cost" (TELRIC) rate. As the District of Columbia Circuit has explained, "TELRIC rates are akin to wholesale prices." *Covad Commc'ns Co.* v. *FCC*, 450 F.3d 528, 532 (2006). Thus, when a competitor exercises its statutory right to interconnect with the incumbent's network, the "wholesale" TELRIC rate sets the price that the competitor pays in the absence of an otherwise negotiated rate.[3]

If, however, a competitor chooses to "lease certain of an incumbent's 'network elements,'" *Verizon*, 535 U.S. at 491, the appropriate rate may be either the TELRIC rate or a higher rate. The appropriate rate turns on whether the particular "network element" at issue is an "unbundled network element." 47 U.S.C. 251(c)(3). If it is, then the TELRIC rate applies; if it is not, the incumbent may charge a higher rate of its choosing. The FCC determines whether a network element is "unbundled" by considering, *inter alia*, whether "failure to provide access to [the element]" would "impair" a competitor's ability to provide service. 47 U.S.C. 251(d)(2). Not surprisingly, competitors "favor widespread unbundling" because it would reduce their costs, but incumbents do not. *Covad*, 450 F.3d at 532.[4] Critically for purposes of

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[3] The FCC has stated, and the parties do not dispute, that incumbents' obligations under Section 251(c)(2) extend to both wireline and wireless competitors. See 47 C.F.R. 20.11; Br. in Opp. 18 n.21.

[4] In *Covad*, the D.C. Circuit provided an illustration of the "unbundling" concept:

> Suppose a [competitor] (such as Covad) wants to serve customers in Washington, D.C. One way of doing so is for Covad to purchase its own switches, trunks, and loops, which it can then use to offer service to its new customers. However, given that the local [incumbent] (*e.g.*, Verizon) has already deployed switches, trunks, and loops to serve the market, it might be economically impossible for Covad to duplicate competitively Verizon's infrastructure. Through regulatory unbundling, however, Covad might be able to lease Verizon's switches, trunks, and loops as [unbundled network elements]. Covad could then use

this case, the "impairment" test applies only to a competitor's efforts to lease certain network elements under Section 251(c)(3), not to a competitor's efforts to interconnect its own facilities with the incumbent's network under Section 251(c)(2). Regardless of whether a competitor can obtain access to individual network elements at TELRIC rates, therefore, the competitor retains the right to interconnect its network to an incumbent's network at those lower rates. See *AT&T*, 525 U.S. at 371.

Following the Act's passage in 1996, a protracted dispute ensued between competitors and incumbents over the meaning of "impairment" for purposes of Section 251(c)(3). Competitors argued for a broader interpretation of that term, such that more network elements would be considered "unbundled" and thus available to them on an individual basis at TELRIC rates; incumbents argued for a narrower interpretation. The FCC's first two efforts to define "impairment" were invalidated—first by this Court, see *AT&T*, 525 U.S. at 387-392, and then by the D.C. Circuit, see *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415, 421-428 (D.C. Cir. 2002) (*USTA I*), cert. denied, 538 U.S. 940 (2003).

3. In the meantime, following the Act's passage, competitors began invoking the Act in efforts to compete with incumbents. As is relevant here, those efforts fell into two basic paradigms.

First, some competitors elected to build their own networks—*i.e.*, their own switches along with wires between those switches and their customers' terminals. Such a competitor had no need to lease network ele-

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> combinations of [unbundled network elements] to cobble together a network and compete against Verizon in Washington.

450 F.3d at 532.

ments of the incumbent's network, but it did still need *access* to the incumbent's network (so that its customers could call the incumbent's, and vice versa). The physical means of connecting two networks is through a "facility": *viz.*, a medium such as a fiber-optic cable through which communications are transmitted. As a general matter, such "facilities" existed even before the Act (*e.g.*, to provide long-distance providers with access to the incumbent's local exchange network, and vice versa), and were often added by the incumbents themselves to meet additional demand (*e.g.*, to accommodate population growth in a particular locality). After the Act, a competitor seeking access to an incumbent's network could obtain it simply through a single strand (potentially one of thousands) of the fiber-optic cable stretching from one of its switches to one of the incumbent's switches. If the customer of one of those competitors called an incumbent's customer, the call would travel (1) through the competitor's network to the competitor's switch; (2) across the connecting facility to the incumbent's switch; and (3) through the incumbent's network to its final destination. See 10-329 Pet. Br. 23 (depicting a call from CLEC Customer C to ILEC Customer A).

Second, some competitors sought to lease elements of incumbents' networks, rather than build particular pieces of their own network. For example, such a competitor might lure a local telephone customer away from the incumbent—and, in so doing, still need to lease the local loop that formerly connected the customer with the incumbent's local office. If that former customer of the incumbent called one of the incumbent's current customers, the call would not simply pass through the incumbent's local switch and then directly onward to its final destination along the incumbent's network, as it did before. Instead, it would terminate at a "collocation" site, a portion of the incumbent's local office which the competitor leases and in which it places its own equipment to aggregate the local loops it controls. See 47 C.F.R. 51.5. From the collocation, the call would travel onward to another collocation at the incumbent's tandem office and then to one of the competitor's switches. Only at that point would the call travel from the competitor's switch across to one of the incumbent's switches and, via the incumbent's network, on to its final destination. See 10-329 Pet. Br. 23 (depicting a call from CLEC Customer B to ILEC Customer A).

There is one crucial distinction between the two paradigms we have just discussed. In the first paradigm, only one "facility" is used, and it connects the competitor's network to the incumbent's network (specifically, a competitor's switch to an incumbent's switch). In the second paradigm, however, two "facilities" are used: one to connect the competitor's collocation at the tandem office to one of the competitor's own switches, and the other (as in the first paradigm) to connect the competitor's network to the incumbent's network. Those "facilities" may in fact be two strands in the same fiber-optic cable, because the call may effectively double back on itself when it travels from the collocation in the incumbent's tandem office to the competitor's switch and then back to the incumbent's switch in the same tandem office. But they are unquestionably separate and distinct facilities, whose signals never cross and which serve different and dedicated functions. The facility common to both paradigms, which we shall call "Facility A," connects a competitor's network to the incumbent's network for the purpose of exchanging traffic between the two networks; the other, which we shall call "Facility B," actually connects one component of the competitor's network (the competitor's collocation) to another component of the competitor's network (the competitor's switch), for a purpose known as "backhauling."

Competitors took advantage of both of these paradigms. The first paradigm describes wireless providers such as Sprint (which have their own network infrastructure in the form of towers and switches), as well as cable companies providing local telephone service (which employ their own wires and facilities to reach end users). Customers of these entities are completely outside the incumbent's network; as such, a provider need only have the ability to connect its network to an incumbent's network and to transmit its customers' calls to an incumbent's customers—thus requiring only one facility (Facility A). By contrast, a competitor for local telephone service that uses portions of the incumbent's network to provide that service will often have customers *within* the incumbent's network. For those customers, the competitor requires *two* facilities: one to "backhaul" a call out from the customer to the competitor's switch (Facility B), and another to connect to the incumbent's network and transmit the call to an incumbent's customer (Facility A).

4. In 2003, after its first two efforts to define "impairment" were invalidated, the FCC issued its third set of rules on the issue. See *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978 (2003) (*Triennial Review Order* or *TRO*). In addition to setting forth a new interpretation of the impairment standard, the FCC made a series of findings critical to this case. As is relevant here, the FCC undertook to define which types of "dedicated interoffice transmission facilities," or "dedicated transport," should be considered unbundled. As the name suggests, an "interoffice transmission facility" is a facility (again, such as a strand of fiber-optic cable) that

carries traffic between two offices in a network; a "dedicated" facility is simply one that is used by a single provider. *TRO*, 18 F.C.C.R. at 17,201 (¶ 361).

Before determining whether particular types of "dedicated transport" qualified as unbundled elements under its new impairment standard, the FCC first had to decide what exactly constituted "dedicated transport." In a reversal of a prior position, the FCC determined that it understood "dedicated transport" to include only facilities between an incumbent's own switches. *TRO*, 18 F.C.C.R. at 17,202 (¶ 362). Significantly, the FCC noted that competitors "require a transmission link from * * * the incumbent LEC network to their own equipment located elsewhere." *Id.* at 17,203 (¶ 365). According to the FCC, competitors "use these transmission connections between incumbent LEC networks and their own networks *both* for interconnection *and* to backhaul traffic." *Ibid.* (emphases added). The FCC reasoned that, "[u]nlike the facilities that incumbent LECs explicitly must make available for [S]ection 251(c)(2) interconnection [*i.e.*, Facility A in the examples discussed above], * * * the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks *for the purpose of backhauling traffic* [*i.e.*, Facility B]." *Ibid.* (emphasis added; footnote omitted).

The FCC ultimately determined that the latter type of transmission facilities—*i.e.*, facilities used for backhauling, or Facility B—"exist *outside* the incumbent LEC's local network" and therefore "are not appropriately included in the definition of dedicated transport." *TRO*, 18 F.C.C.R. at 17,203 (¶ 366). At the same time, however, the FCC noted that, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent's] network,'" *i.e.*, Facility A, "[S]ection 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation." *Id.* at 17,204 (¶ 366) (first alteration in original).

The FCC supported its determination that facilities used for backhauling do not qualify as "dedicated transport" by discussing the economics of those facilities. See *TRO*, 18 F.C.C.R. at 17,204 (¶ 367). The FCC explained at length why "backhaul facilities" are different from transport facilities that are entirely within an incumbent's network, citing the greater control of competitors over the design and placement of backhaul facilities and the potential for cost savings if competitors deploy those facilities themselves. *Ibid.*

In determining that facilities used for backhauling do not qualify as "dedicated transport," the FCC stated in a footnote that its determination "effectively eliminates 'entrance facilities' as [unbundled network elements]" under Section 251(c)(3). *TRO*, 18 F.C.C.R. at 17,204 n.1116 (¶ 366 n.1116). The FCC reiterated, however, that "all telecommunications carriers * * * will have the ability * * * to interconnect for the transmission and routing of telephone exchange service and exchange access, pursuant to [S]ection 251(c)(2)." *Id.* at 17,206 (¶ 368). The FCC thus indicated that interconnection facilities such as Facility A could qualify for the TELRIC rate under Section 251(c)(2), even if not under Section 251(c)(3).

b. Once again, the D.C. Circuit invalidated the FCC's effort to define "impairment." See *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554, 594-595 (D.C. Cir.) (*USTA II*), cert. denied, 543 U.S. 925 (2004). The D.C. Circuit briefly addressed the competitors' argument that the FCC had erred in determining that "entrance facilities" were not part of an incumbent's network in the first place (and thus could never be subject to TELRIC rates). See *id.* at 585-586. The court ultimately declined to rule on the merits of the FCC's determination, concluding that the record was "too obscure," and remanded the issue for further consideration. *Id.* at 586. The court added that, "[i]f entrance facilities are correctly classified as 'network elements,' an analysis of impairment would presumably follow." *Ibid.*

c. The FCC then issued a fourth set of rules on the "impairment" issue. See *In re Unbundled Access to Network Elements*, 20 F.C.C.R. 2,533 (2005) (*Triennial Review Remand Order* or *TRRO*). A short portion of those rules addressed the matter of "entrance facilities" that was previously covered in the *TRO* and *USTA II*. The FCC interpreted *USTA II* as holding that it had erred in excluding entrance facilities from the definition of "dedicated transport." *Id.* at 2,609-2,610 (¶ 136). The FCC therefore reinstated its prior view that "dedicated transport" included "entrance facilities"—and thus that those facilities could potentially qualify for the TELRIC rate under Section 251(c)(3). *Id.* at 2,610 (¶ 137).

Having concluded that "entrance facilities" were once again to be considered part of an incumbent's network, the FCC proceeded to determine whether the failure to provide access to those facilities would impair a competitor's ability to provide service, with the result that the facilities should be treated as unbundled network elements for purposes of Section 251(c)(3). *TRRO*, 20 F.C.C.R. at 2,610-2,612 (¶¶ 138-141). The FCC ultimately found that there would not be impairment, heavily relying on the subsidiary economic findings it had made with respect to "backhaul facilities" in the *TRO* and supporting those findings with evidence it had subsequently received. *Id.* at 2,610-2,611 (¶¶ 138-139). At the same time, as in the *TRO*, the FCC reiterated that its finding on impairment did not "alter the right of competitive LECs to obtain interconnection facilities pursuant to [S]ection 251(c)(2)"—and that such facilities were still available to competitors at TELRIC rates "to the extent that they require them to interconnect with the incumbent LEC's network." *Id.* at 2,611 (¶ 140).[5]

This time, the FCC's efforts were upheld in full. See *Covad Commc'ns Co.* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006). No party to that litigation challenged the FCC's determinations on "entrance facilities."

5. Following the *TRRO*, incumbents sought to revise the terms of their interconnection agreements with competitors, claiming that the *TRRO* entitled them to higher rates for facilities used for interconnection between their networks and those of competitors. Four federal courts of appeals have since reviewed decisions of state utility commissions on that question. Three of those courts held that, in determining in the *TRRO* that "entrance facilities" were not unbundled network elements, the FCC was referring only to facilities used for backhauling—and that facilities used for interconnection were subject to TELRIC rates under Section 251(c)(2). See *Illinois Bell Tel. Co.* v. *Box*, 526 F.3d 1069, 1071-1072 (7th Cir. 2008); *Southwestern Bell Tel., L.P.* v. *Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-684 (8th Cir. 2008), cert. denied, 129 S. Ct. 971 (2009); *Pacific Bell Tel. Co.* v. *California Pub. Utils. Comm'n*, 621 F.3d 836, 843-847 (9th Cir. 2010). By contrast, notwithstanding an invited amicus brief from the FCC confirming that understanding, a divided Sixth Circuit held that incumbents could charge higher rates even for facilities used for in-

[5] The FCC codified its finding that "entrance facilities" were not unbundled network elements at 47 C.F.R. 51.319(e)(2)(i).

terconnection. See 10-313 Pet. App. 1a-33a; *id.* at 33a-45a (Sutton, J., dissenting).

SUMMARY OF ARGUMENT

Although the technology and regulatory scheme at issue in this case are relatively complicated, the legal question at its core is not. The court of appeals' decision disregarding the FCC's own interpretation of its regulations cannot be justified under settled principles of agency deference. In two orders, the FCC made clear that, while facilities used for backhauling did not constitute unbundled network elements subject to TELRIC rates under Section 251(c)(3) of the Telecommunications Act of 1996, facilities used for interconnection were subject to TELRIC rates under Section 251(c)(2). The FCC made clear in each order that facilities used for interconnection were excluded from its analysis under Section 251(c)(3); the FCC's references to "entrance facilities" in the later order were plainly directed at backhaul facilities, rather than both categories of facilities. The FCC confirmed that understanding in an amicus brief before the court of appeals, and there is no valid basis for refusing to defer to the FCC's interpretation here.

Affirmance of the court of appeals' decision, moreover, would have enormously adverse consequences for competition in the telecommunications industry. The court of appeals' approach would run counter to the objectives of the Telecommunications Act, because it would permit incumbents unilaterally to exact higher prices for facilities used for interconnection and thereby undermine the ability of competitors to obtain access or connect to the incumbents' customers at cost-based rates. For Sprint, the consequences of permitting incumbents to charge those higher prices are particularly severe, because its two largest competitors in the wireless market also control a substantial portion of the Nation's local telephone network. If the court of appeals' decision is upheld, competition in the wireless market (and other markets across the telecommunications industry) will be undermined, and consumers disserved. This Court should reject the court of appeals' approach and hold that the FCC's interpretation is entitled to deference.

ARGUMENT

A. The Court Of Appeals' Decision Is Erroneous

The central question before the Court in this case is whether facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2). In the decision under review, the Sixth Circuit held that incumbents could charge higher rates for those facilities. See 10-313 Pet. App. 1a-33a. That holding cannot be squared either with the FCC's findings concerning "entrance facilities" or with the FCC's own interpretation of its regulations.

1. a. In the *TRRO*, the FCC ultimately determined that "entrance facilities" should not be treated as unbundled network elements for purposes of Section 251(c)(3) of the Act. See 20 F.C.C.R. at 2,610-2,612 (¶¶ 138-141). It is clear both from the *TRRO* and from the earlier *TRO*, however, that the FCC's determination applied only to facilities used for "backhauling" traffic from one component of a competitor's network to another (*e.g.*, Facility B in the examples discussed above), and not to facilities used to interconnect a competitor's network with the incumbent's (*e.g.*, Facility A).

In the *TRO*, the FCC expressly distinguished between those two types of facilities. With regard to a backhaul facility such as Facility B, the FCC determined that the facility not only did not qualify as an unbundled network element for purposes of Section 251(c)(3), but did not even qualify as a network element subject to the "impairment" test for unbundling in the first place (because it did not constitute "dedicated transport"). See *TRO*, 18 F.C.C.R. at 17,203-17,204 (¶¶ 365-366). In the course of so determining, the FCC also signaled that, even if a backhaul facility did qualify as a network element subject to the "impairment" test, it would not qualify as an unbundled network element, because competitors would not be economically disadvantaged by supplying their own backhaul facilities (and thus would not be impaired if they could not access incumbent-supplied backhaul facilities at TELRIC rates). See *id.* at 17,204-17,205 (¶ 367). The exact reasoning for the FCC's determination, however, was irrelevant to the outcome: either way, backhaul facilities would not be subject to TELRIC rates under Section 251(c)(3). Critically for present purposes, the FCC made clear that its determination applied only to backhaul facilities such as Facility B and not to facilities used for interconnection such as Facility A, which were subject to TELRIC rates under Section 251(c)(2) regardless of whether there was impairment. See *id.* at 17,204, 17,206 (¶¶ 366, 368).

After the D.C. Circuit, in invalidating the *TRO*, cast doubt on the FCC's determination that backhaul facilities did not even qualify as network elements subject to the impairment test in the first place, the FCC expressly found in the *TRRO* (as it had signaled it would in the *TRO*) that those facilities would not qualify as unbundled network elements because there would not be impairment. See 20 F.C.C.R. at 2,610-2,612 (¶¶ 138-141). To be sure, in the *TRRO*, the FCC did not expressly refer to "backhaul facilities" as often as it did in the *TRO*; instead, it primarily spoke of "entrance facilities." But in finding that there would not be impairment, the FCC relied on the subsidiary economic findings it had made with respect to "backhaul facilities" in the *TRO*. See *id.* at

2,610-2,611 (¶¶ 138-139). In the concluding paragraph of the relevant section, moreover, the FCC cited a paragraph of the *TRO* that expressly identified the backhauling function. See *id.* at 2,612 n.396 (¶ 141 n.396) (citing *TRO*, 18 F.C.C.R. at 17,204 (¶ 367)). And the FCC again made clear that its determination applied only to backhaul facilities and not to facilities used for interconnection, which were subject to TELRIC rates under Section 251(c)(2). See *id.* at 2,611 (¶ 140).

In short, aside from the FCC's retreat from its earlier position that backhaul facilities did not even qualify as network elements subject to the impairment test in the first place, there is no meaningful distinction between the FCC's positions in the *TRO* and the *TRRO*. In the *TRO*, the FCC expressly made economic findings concerning "backhaul facilities." And although the FCC was less explicit in the *TRRO* that its discussion pertained only to "backhaul facilities," there was no need for it to be as explicit as it had been in the *TRO*. As is relevant here, the D.C. Circuit had cast doubt on only one proposition from the *TRO*—that backhaul facilities were not subject to the impairment test in the first place. Accordingly, in the *TRRO*, the only adjustment that the FCC needed to make was to rescind that determination, and there was little reason for the FCC to do anything more than to reiterate the remainder of its findings from the *TRO* in relatively summary fashion. When read together, therefore, the FCC's orders make clear that, although facilities used for backhauling are not subject to TELRIC rates under Section 251(c)(3), facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2).

b. In its amicus brief before the court of appeals, the FCC confirmed the foregoing interpretation: *viz.*, that its determination for purposes of "unbundling" under

Section 251(c)(3) applies only to entrance facilities used for backhauling and that Section 251(c)(2) requires an incumbent to provide at TELRIC rates "facilities used for the physical linking of its network with the network of a competitive carrier." FCC C.A. Br. 20. An agency's interpretation of its own regulations is entitled to deference as long as it is not "plainly erroneous or inconsistent with the regulation[s]." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted), and such deference is amply warranted here.

As an initial matter, the most that can be said about the regulations and orders at issue is that they "do not give a definitive answer" to the question presented. *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2472-2473 (2009). In fact, as discussed above, the better view is that the FCC's orders themselves affirmatively indicate that facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2). The *TRO* states that, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent's] network,' [S]ection 251 (c)(2) of the Act expressly provides for this." 18 F.C.C.R. at 17,204 (¶ 366) (first alteration in original). And it further states that "all telecommunications carriers * * * will have the ability * * * to interconnect for the transmission and routing of telephone exchange service and exchange access, pursuant to [S]ection 251(c)(2)." *Id.* at 17,206 (¶ 368). For its part, the *TRRO* reiterates that its finding of no impairment does not "alter the right of competitive LECs to obtain interconnection facilities pursuant to [S]ection 251(c)(2)"—and that such facilities were still available to competitors at TELRIC rates "to the extent that they require them to interconnect with the incumbent LEC's network." 20 F.C.C.R. at 2,611 (¶ 140). In light of those statements (and the extended discussion of "backhaul facilities" in the *TRO*), it certainly cannot be said that the FCC's regulations and orders unambiguously compel a contrary interpretation. Deference to the FCC's interpretation is therefore appropriate.[6]

There is no other valid basis for refusing to defer to the FCC's interpretation here. This is not a situation in which the regulation at issue simply "restate[s] the terms of the statute itself," such that an interpretation of the regulation is nothing more than an interpretation of the corresponding statutory provision. *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006). Nor is this a situation in which the agency's position is simply "a '*post hoc*' rationalization' advanced * * * to defend past agency action against attack," because the FCC is not a party to these proceedings and no party is challenging any of its orders. *Auer*, 519 U.S. at 462 (brackets omitted) (quoting *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988)). Although the FCC has expressed its position in an amicus brief, "[t]here is simply no reason to suspect that the interpretation does not reflect the [FCC's] fair and considered judgment on the matter in question." *Ibid.*[7] Nor is this a situation in which the

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[6] The FCC's regulation codifying its finding that "entrance facilities" are not unbundled network elements is not to the contrary. That regulation provides that "[a]n incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers." 47 C.F.R. 51.319(e)(2)(i). It does not speak to an incumbent's obligation to provide access to facilities for interconnection.

[7] As recently as earlier this Term, the Court has repeatedly deferred to an agency's interpretation of its own regulations even when they are stated in a legal brief. See, *e.g.*, *Chase Bank USA, N.A.* v. *McCoy*, No. 09-329, slip op. 12-16 (Jan. 24, 2011); *Kennedy* v.

agency has taken inconsistent positions on the interpretive question at issue; the FCC has consistently held the view that facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2). Cf. *Kennedy* v. *Plan Administrator for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 872 & n.7 (2009) (deferring to an agency position expressed in an amicus brief notwithstanding that the position "ha[d] fluctuated"); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007) (deferring to an agency position notwithstanding that the agency had "clearly struggled" with the relevant issue).

Given the notorious complexity both of the underlying technology and of the applicable legal regime, see, *e.g.*, *USTA I*, 290 F.3d at 421-422 (noting the "extraordinary complexity of the Commission's task" in defining "impairment"); *AT&T*, 525 U.S. at 397 (describing the Act as "a model of ambiguity or indeed even self-contradiction"), this is the archetypal case in which deference to the views of an expert agency is appropriate. See 10-313 Pet. App. 36a (Sutton, J., dissenting). And because the FCC's interpretation is a "sensible and rational construction" that is consistent with the regulations at issue, *Coeur Alaska*, 129 S. Ct. at 2474, 2477, it is entitled to deference.

2. By contrast, the court of appeals' contrary interpretation cannot be reconciled with the FCC's orders. In response to the FCC's repeated statements in the *TRO* and the *TRRO* that facilities used for interconnection are subject to TELRIC rates under Section 251(c)(2), respondent contends that those statements merely refer to "pre-existing rights" under that provision. Br. in Opp.

Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865, 872 & n.7 (2009); *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 328-329 (2008).

24. In respondent's view, a competitor's "right" to interconnection extends only to "non-network element equipment" such as "cross-connects" (*i.e.*, short cords that link two wires together), rather than "the entire facility spanning the distance between" a competitor's network and an incumbent's. *Id.* at 23; Resp. C.A. Br. 38-39 & n.22. Put another way, respondent defines an "interconnection facility" not as Facility A in its entirety, but rather as the very limited portion of Facility A between the point at which it enters the incumbent's tandem office and the point at which it interfaces with the incumbent's switch within that office.

That interpretation is critical to respondent's argument, for respondent is attempting to give some meaning to Section 251(c)(2)—as it must in light of the FCC's findings in the *TRO* and *TRRO*. But it is ultimately unpersuasive. To begin with, as the FCC noted in its amicus brief below, the FCC has "consistently found" that an incumbent "may be required to provide facilities that are used for the physical linking of the two networks" at TELRIC rates in order to fulfill its duty to interconnect under Section 251(c)(2), without suggesting that the incumbent can satisfy that obligation by providing only a portion of those facilities. FCC C.A. Br. 18. In fact, the FCC has indicated that an incumbent has an affirmative obligation to "build out * * * facilities" for interconnection under "meet point arrangements," *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 15,780-15,781 (¶¶ 551-553) (1996), and has underscored the statutory obligation to provide for collocation of equipment necessary for interconnection, 47 C.F.R. 51.321(b). Those affirmative obligations are entirely inconsistent with respondent's interpretation, under which an incumbent would have only a passive obligation to provide the equivalent of a wall jack on the outside of its office for a competitor to plug in.

In addition, although respondent suggests that its interpretation reflects the "pre-existing" scope of Section 251(c)(2) before the *TRRO*, Br. in Opp. 24, no incumbent, to the best of Sprint's knowledge, has ever previously asserted that interpretation. And at least in the wake of the *TRO*, incumbents had every incentive to do so: if, as respondent now claims, TELRIC rates were available under Section 251(c)(2) only for the proverbial "last inch" of facilities used for interconnection, incumbents should have started making that argument as soon as the FCC determined in the *TRO* that at least some entrance facilities were not subject to TELRIC rates under Section 251(c)(3). But they do not appear to have done so. And to the extent respondent argues in the alternative that the *TRRO* somehow narrowed the extent to which competitors may obtain facilities for interconnection at TELRIC rates under Section 251(c)(2), one would expect the FCC to have specifically discussed such a narrowing, because, as Judge Sutton observed below, such a "novel analysis without comment" would be "surprising." 10-313 Pet. App. 38a-39a (dissenting opinion). The FCC did not address the issue, and there is therefore no reason to believe that the FCC suddenly adopted respondent's interpretation.

That interpretation, moreover, is affirmatively inconsistent with the FCC's findings in the *TRO*. In determining that certain facilities did not qualify as a network elements subject to the "impairment" test for unbundling, the FCC repeatedly discussed the economics of "backhaul facilities." *E.g.*, 18 F.C.C.R. at 17,204 (¶ 366). When the FCC distinguished those facilities from facilities that are used for interconnection under Section 251(c)(2), the FCC in no way suggested that TELRIC rates would not be available under Section 251(c)(2) for the *entirety* of the latter facilities. See *id.* at 17,204, 17,206 (¶¶ 366, 368). Indeed, it may have been for that reason that incumbents do not appear to have asserted respondent's proposed interpretation in the wake of the *TRO*.

In the court of appeals, respondent sought to explain away the *TRO* by arguing that it "did not survive review in the D.C. Circuit." Resp. C.A. Br. 24. But that is a gross oversimplification: the D.C. Circuit did not opine on the scope of the interconnection duty under Section 251(c)(2), but merely cast doubt on the FCC's determination that "entrance facilities" did not qualify as network elements subject to the "impairment" test in the first place. See *USTA II*, 359 F.3d at 586. In response, the FCC simply reverted to its prior view that those facilities were subject to that test, but would not qualify as unbundled network elements because there would not be impairment—and, in so doing, relied on the same economic findings it had made in the *TRO* in the specific context of backhauling. See 20 F.C.C.R. at 2,610-2,612 (¶¶ 138-141). Because the FCC consistently took the position in the *TRO* and the *TRRO* that facilities used for interconnection are subject to TELRIC rates in their entirety under Section 251(c)(2), respondent is in essence collaterally attacking the validity of those orders in this proceeding—which it is not permitted to do. See 28 U.S.C. 2342.

In short, because the court of appeals' interpretation cannot be reconciled with the FCC's orders and fails to afford sufficient deference to the FCC's interpretation of those orders, it should be rejected.

B. If Adopted By This Court, The Court Of Appeals' Approach Would Harm Competition In The Telecommunications Industry

A rule that exempts incumbent carriers from providing competitors with entrance facilities for interconnection at TELRIC rates would have profound and adverse consequences for competition in the telecommunications industry. If adopted by the Court, that rule would impose substantial costs on competitors, promote the inefficient use of resources, and work to the disadvantage of consumers who reap the benefits of competition and innovation in the industry. For that reason, too, the court of appeals' approach should be rejected.

1. As the Court will be aware, the overarching purpose of the Telecommunications Act of 1996 was to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, preamble (1996). The Act's legislative history confirms that the Act was intended to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapid[] private sector deployment of advanced * * * technologies and services * * * by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996).

Interconnection at TELRIC rates, in turn, is one of the primary mechanisms by which the Act "uproot[s] the monopolies that traditional rate-based methods had perpetuated" and thereby "jump-start[s]" competition in the telecommunications industry. *Verizon*, 535 U.S. at 488. Congress recognized that it would not be sufficient simply to preempt regulatory barriers to entry; new entrants would also require the ability to reach the customers of other networks. The interconnection requirement in Section 251(c)(2) allows a new entrant to compete without bearing the prohibitive cost of duplicating the whole array of facilities that constitute an incumbent's preexisting network (or the unregulated cost of obtaining access to an incumbent's customers, where the incumbent is willing to provide it). In essence, the interconnection requirement provides a new entrant with the ability to make calls to, and receive calls from, all of the consumers on the incumbent's network; an entrant with only a small network of its own can thereby sell telecommunications services that reach all consumers.

Permitting incumbents to charge higher rates than TELRIC rates for facilities used for interconnection would run counter to those legislative objectives. Thanks to their longstanding monopoly power, incumbents have built extensive networks that include ample facilities to which competitors can connect their networks. It is incongruous to suggest that, despite the seemingly undisputed existence of such incumbent-provided facilities, competitors should nevertheless either pay higher rates for those facilities or provide duplicate facilities of their own. It is equally difficult to maintain that the purposes of the Act are served by respondent's cramped interpretation of Section 251(c)(2), which would apply TELRIC rates only to the relatively low-cost, inconsequential facilities within an incumbent's office (*e.g.*, the "cross-connect"), instead of the entire facility connecting the two networks. To implement the Act's "novel ratesetting" approach only to the "last inch" of facilities used for interconnection would neuter legislation intended to be "radically unlike all previous statutes." *Verizon*, 535 U.S. at 489.

The difference between TELRIC and non-TELRIC rates, moreover, is substantial. Sprint recently conducted a nine-State survey examining the relationship between TELRIC rates and non-TELRIC rates for facilities used for interconnection. For a T1 connection, non-TELRIC rates are 75% higher on average than TELRIC rates; for a T3 connection, non-TELRIC rates are 63% higher. Those figures belie the proposition that a competitive market exists for facilities used for interconnection with incumbents' networks. And the additional resources that competitors will have to devote to interconnection facilities if the court of appeals' decision is upheld would necessarily be diverted from the deployment of new services and technologies—in contravention of the Act's objective of "accelerat[ing] rapid[] private sector deployment of advanced telecommunications services." H.R. Conf. Rep. No. 458, *supra*, at 113.

2. The court of appeals' approach threatens to entrench the competitive advantages of incumbent carriers. Interconnection links two networks for the mutual exchange of traffic; it inheres to the benefit not only of the networks but of consumers, and thus enhances overall consumer welfare. See *Verizon*, 535 U.S. at 490 n.11 (noting that "any value [of a network] to customers would be exponentially increased with the interconnection of more users to the network"). Although both competitors and incumbents benefit from interconnection, however, they do not benefit equally; it remains in the economic interest of incumbents to inhibit or deny interconnectivity to competitors such as Sprint. Where a competitor has a smaller customer base, the incumbent can raise the price of facilities used for interconnection, knowing full well that the competitor must agree to that price or suffer a severe competitive disadvantage (because its customers will have a greater need to connect with the incumbent's more numerous customers than vice versa).

For Sprint, the consequences of unrestrained costs of interconnection are particularly severe. As both a provider of wireless telephone service and a wholesaler of local telephone service to cable companies, Sprint's dependence on interconnectivity is substantial. In addition, Sprint's two largest competitors in the wireless market, AT&T and Verizon, own a majority of the Nation's incumbent carriers—and therefore control access to a substantial portion of the Nation's local telephone network.[8] If the court of appeals' decision is upheld, AT&T and Verizon will have the ability to harm Sprint's standing in the wireless market by the unfettered raising of the cost of connecting to their local wireline customers.

Unlike those companies, Sprint lacks substantial legacy networks developed by historical monopolies. In order to compete, therefore, Sprint relies on the combination of interconnectivity and the deployment of new services and technologies. Sprint invests substantial resources in developing new products, improving service quality, and expanding the reach of its own network. If it can efficiently interconnect with incumbents' networks, Sprint can continue to devote resources to those efforts, to the benefit of its customers and consumer welfare more generally.

Congress's objective in the Telecommunications Act of 1996 was "not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers" and thereby "give aspiring competitors every possible incentive to enter [new] markets." *Verizon*, 535 U.S. at

[8] Of the seven original "Baby Bells" that resulted from the AT&T breakup, AT&T has purchased four (including respondent) and Verizon has purchased two.

489. By ensuring that competitors such as Sprint can obtain access to facilities used for interconnection at TELRIC rates, the FCC's interpretation gives greatest measure to that objective, thereby fulfilling congressional intent. This Court should reverse the court of appeals' outlying decision and hold that the FCC's interpretation is entitled to deference.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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