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No. 10-313

IN THE

Supreme Court of the United States

TALK AMERICA INC.,
Petitioner,

v.

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

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

SUMMARY OF ARGUMENT

Every incumbent local exchange carrier ("ILEC") has the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." 47 U.S.C. § 251(c)(2). Interconnection is to be provided "at any technically feasible point within the carrier's network" and must be provided on a non-discriminatory basis and at rates that are just and reasonable. *Id.* The Federal Communications Commission ("FCC") in its initial rulemaking proceeding to implement the Telecommunications Act of 1996 (the "Act") interpreted the term "interconnec-

tion" to mean "the physical linking of two networks for the mutual exchange of traffic." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, ¶ 176 (1996) ("*Local Competition Order*"). Accordingly, the FCC's implementing regulations define "interconnection" as "the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. Furthermore, the FCC's regulations provide that ILECs must provide their competitors "any technically feasible method of obtaining interconnection." *Id.* § 51.321(a). These rulings remain unchanged.

The Act imposes a separate requirement on the ILECs to provide access to the ILECs' network elements on an "unbundled basis," i.e., as unbundled network elements ("UNEs"), at any technically feasible point, on a nondiscriminatory basis, and at rates that are just and reasonable. 47 U.S.C. § 251(c)(3). Unlike the obligation to provide interconnection, the obligation to provide UNEs is constrained. Congress directed that before the FCC could require ILECs to provide a network element as a UNE under § 251(c)(3), the FCC must at a minimum determine that access to the network element is "necessary" and "the failure to provide access to such network elements would impair the ability of" the competing carrier to offer its services. 47 U.S.C. § 251(d)(2).

These obligations—to provide interconnection and to provide access to UNEs—are separate and distinct under the Act. What is common to both, however, is that interconnection facilities and UNEs are each required by the Act to be provided at cost-based rates

by using Total Element Long Run Incremental Cost ("TELRIC") cost methodology. *Verizon Communications v. FCC*, 535 U.S. 467, 497 (2002).

The FCC's most recent examination of the ILECs' unbundling obligations pursuant to § 251(c)(3) removed the ILECs' obligation to provide entrance facilities as a UNE. *In re Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 137 (2005) (*"Triennial Review Remand Order" or "TRRO").* But, the FCC explicitly stated that CLECs' access to entrance facilities pursuant to § 251(c)(2) was not disturbed by its unbundling conclusions. The FCC stated that:

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

Id., 20 FCC Rcd 2533, ¶ 140 (footnotes omitted).

In its underlying analysis, the FCC focused on *the use* being made of the entrance facility—in one instance the exchange of traffic with the ILEC (interconnection) and in the other the transmission of traffic that was originated by or destined for the CLEC's own customers but not exchanged with

the ILEC (backhaul).[1] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, ¶ 365 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003) ("*TRO*").

CLECs' rights with respect to obtaining interconnection under § 251(c)(2) are absolute, in the sense that the methods of interconnection available to CLECs are limited only by technical feasibility rather than a prerequisite finding by the FCC that the "necessary and impair" standard has been satisfied for individual forms of interconnection. It is technical feasibility that Congress established as the singular "test," the "test" the FCC established in the *Local Competition Order* and the regulations adopted therein, and the "test" applied by the FCC in examining the forms of interconnection proposed by CLECs in that rulemaking and ultimately included as the minimum ways CLECs could obtain interconnection. *Local Competition* Order, 11 FCC Rcd 15499, ¶ 553 and ¶ 198; 47 C.F.R. § 51.321. The identification of this singular criterion is distinct from delineating

[1] AT&T criticizes the illustrative diagram and petitioners' and the FCC's description of backhaul (Resp. Br. 55, n.44), the wording in Talk America's brief mirrors the FCC's in the *TRO* and is not intended to be definitional. The precise nature of backhaul is not at issue here; no party is asserting that backhaul does not exist or that CLECs do not use entrance facilities for purposes of backhaul or that backhaul is not distinct from interconnection.

which network elements are UNEs that Congress determined required a finding of "impairment." Congress established a very broad interconnection obligation that required no specific findings as to specific methods of interconnection, but only that a method was technically feasible.

Because Congress has not directly spoken to the precise question at issue here—the continued availability of entrance facilities for interconnection—the FCC's interpretation in its interconnection rules must be sustained so long as it is based on a permissible construction of the statute. Although entrance facilities are not listed in 47 C.F.R. § 51.321(b), they were a pre-existing form of interconnection created by AT&T (Bell System). It is undisputed that entrance facilities had long been used by competitive long distance providers such as MCI, which were beginning to provide local service at the time the FCC established its interconnection rules. It is a reasonable interpretation of § 251(c)(2) that entrance facilities must continue to be made available to CLECs for purposes of interconnection even after they no longer need be provided as a UNE pursuant to § 251(c)(3). Under *Auer v. Robbins*, 519 U.S. 452, 464 (1997), the FCC's interpretation set out in its brief must be accorded deference.

Congress' policy objective of opening the local market to competition hinges on interconnection. None of the other requirements imposed on the ILECs by the Act is as critical as interconnection. Continuing to require ILECs to provide entrance facilities for interconnection furthers the policy of the Act.

ARGUMENT

I. Contrary to AT&T's assertions, interconnection required under § 251(c)(2) is an independent obligation; it is not constrained by the "necessary and impair" standard that limits ILECs' unbundling obligations, nor is it governed by the ILECs' obligation to transport calls under § 251(b)(5).

The FCC has consistently interpreted the interconnection obligation set out in § 251(c)(2) to be a requirement that the ILECs provide to their competitors a range of physical facilities that CLECs can use to interconnect their networks to those of the ILECs for the mutual exchange of traffic. In its first rulemaking proceeding implementing the requirements of § 251, the FCC ordered ILECs to provide various "methods of technically feasible interconnection or access" to their networks, including the provision of existing or newly built transmission facilities. *See Local Competition Order*, 11 FCC Rcd 15499, ¶ 553; 47 C.F.R. § 51.321 (requiring ILECs to provide "any technically feasible method of obtaining interconnection"). The FCC further concluded that "the term 'technically feasible' refers solely to technical or operational concerns, rather than economic, space, or site considerations" and that technically feasible as that term applied to "the obligations imposed by §§ 251(c)(2) and 251(c)(3) include[s] modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." *Local Competition Order*, 11 FCC Rcd 15499, ¶ 198.

AT&T does not deny that providing entrance facilities is technically feasible. AT&T, however, presents

a myriad of other reasons why the FCC and petitioners are wrong that entrance facilities must be provided for interconnection purposes under § 251(c)(2) at TELRIC rates. None of AT&T's arguments survive scrutiny. Many of AT&T's arguments boil down to the same false assertion that an ILEC's interconnection obligations are subject to the same constraints and the same limitations that apply to unbundling under § 251(c)(3). Others misstate and misapply the separate statutory obligation requiring ILECs to "route and transport" CLEC traffic delivered to them, a requirement imposed on ILECs by § 251(d)(5). Yet others are simply factually wrong.[2]

[2] AT&T states that Sprint concedes that entrance facilities used for backhaul and used for interconnection ride a single fiber-optic cable. Resp. Br. 29, n. 23. Sprint actually stated in its amicus brief that the same fiber facility can be used, with separate fiber strands designated for interconnection and for backhaul. Sprint Br. 9. In such a case, the competitor would pay for the interconnection fiber strand at TELRIC rates and it would pay for the backhaul fiber strand at a higher unregulated rate.

The amicus brief submitted by the US Telecom Association and Network Engineers adds a further, factually inaccurate reason to reject petitioners' and the FCC's position, that the ILECs cannot verify the use being made of entrance facilities. USTA Br. 29. The same argument can be made for other eligibility issues (*e.g.*, Enhanced Extended Loops ("EELs") must have a qualifying use), but that is not a valid justification to deny a competitor access to cost-based interconnection entrance facilities. ILECs are free to negotiate or arbitrate robust audit rights to verify whether a CLEC is properly accessing cost-based facilities. The traffic on entrance facilities used for interconnection by definition is exchanged with the ILEC and therefore hits the ILEC's central office switch for routing to the ILEC's customers. That traffic can be and is measured for purposes of computing the reciprocal compensation required under § 251(b)(5) of the Act.

AT&T points to the presence of the words "need" and "require" in the FCC's discussion of entrance facilities used for interconnection in the *TRO* and in paragraph 140 of the *TRRO*, and criticizes petitioners and the FCC for advocating what amounts to allowing CLECs to obtain entrance facilities simply because they "want" or "prefer" them. Resp. Br. 44. The underlying implication is that interconnection is voluntary and that CLECs could choose not to interconnect with an ILEC, and if not voluntary then CLECs should have to demonstrate that they require entrance facilities from the ILEC and cannot reasonably obtain them otherwise. That is precisely the "necessary and impair" standard for unbundling under § 251(c), a standard that is inapplicable to § 251(c)(2).[3] That AT&T is focused on the unbundling standard is clear from its reference to the FCC's finding that entrance facilities need not be provided as UNEs as justification for eliminating CLECs' right to obtain entrance facilities for interconnection.[4]

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[3] AT&T does not cite any authority for applying a threshold level of "need" to interconnection. It cites to the Court's opinion in *Verizon* (Resp. Br. 44, n.37), but the reference is misleading because the Court's analysis and the quoted language dealt exclusively with the ILECs' challenge to the FCC's combining rulings and referenced primarily § 251(c)(3). Specifically, the FCC had ruled that the ILECs must combine unbundled network elements for CLECs where the elements were located in the ILECs' central office and off limits to CLEC personnel. *Local Competition Order*, 11 FCC Rcd at 15647, ¶ 294.

[4] AT&T says that: "In fact, as the FCC found, competitors neither 'need' nor 'require' entrance facilities from incumbents at any price, because they can deploy their own entrance facilities or lease them from third parties. *See TRRO* ¶¶ 138-139, 141." Resp. Br. 45.

Similarly, AT&T argues that it cannot or should not be required to provide entrance facilities for interconnection because they are not "bottleneck" facilities. Resp. Br. 50. Again the problem with this argument is that CLECs' access to interconnection facilities under the Act is not contingent upon a finding that a "bottleneck" exists.

AT&T also asserts that only § 251(c)(3) requires ILECs to lease their facilities to CLECs (Resp. Br. 21), yet it presents a laundry list of what AT&T makes available to CLECs as leased elements and facilities for interconnection under § 251(c)(2) (Resp. Br. 28-29) and even more tellingly states that entrance facilities for interconnection would be provided as a regulated service under tariff, not at unregulated rates as Sprint and the FCC stated in their amicus briefs (Resp. Br. 53). AT&T thus expects to offer entrance facilities as a regulated service, but cites to no Michigan or federal law requiring it to do so.

All of AT&T's carefully constructed argument that it has no obligation to lease *any* facilities to CLECs under § 251(c)(2), if taken as true, leads inexorably to the conclusion that AT&T is not actually required to provide interconnection by any means that are technically feasible, but is only required to provide to CLECs something akin to a "plug-in" point. The sole exceptions would be whatever facilities the FCC determines are UNEs under § 251(c)(3).[5] The result is a perfect conflation of the requirements of

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[5] Resp. Br. 24 ("only § 251(c)(3) creates a facilities-leasing obligation: reading § 251(c)(2) to require leasing of facilities not required by § 251(c)(3) would not be 'in accordance with' the requirements of § 251").

§§ 251(c)(2) and 251(c)(3). Under AT&T's view of interconnection, once an ILEC is no longer required to lease a network element or facility as a UNE, it is not required to lease that network element or facility for interconnection either. And, if under this theory an ILEC has no obligation to provide entrance facilities for interconnection, it appears that it would be free to offer them under contract at an unregulated rate, or perhaps not at all.

AT&T's limited view of its interconnection obligations simply does not square with the language of the Act or the FCC's rulings implementing § 251(c)(2) in the *Local Competition Order*, particularly the requirement that the ILECs provide any technically feasible means of interconnection selected by a CLEC, and the FCC's explicit statement that the forms of interconnection ILECs must provide "include but are not limited to" those named in 47 C.F.R. § 51.321(b).

AT&T points to the FCC's identification of "meet point" interconnection in 47 C.F.R. § 51.321(b)(2) as "instructive" (Resp. Br. 29) and observes that no explication of entrance facilities appears in that rule or in the *Local Competition Order* (Resp. Br. 28-29). If anything, however, the FCC's affirmation that "meet point" interconnection is required by § 251(c)(2) substantiates rather than undermines petitioners' and the FCC's arguments. Interconnection cannot be a mere accommodation allowing a CLEC to "plug-in" to the ILEC's network, not even if the ILEC performs part of the work in its central office because it prohibits competitors from entering restricted areas. If the technical feasibility standard set out in § 251(c)(2) extends to requiring ILECs to build facilities to meet CLECs at a "meet point" of CLEC's selection, then surely a more modest requirement requir-

ing ILECs to lease existing entrance facilities to CLECs for purposes of interconnection comports with the law. The entrance facilities are not being provided solely for CLECs' benefit; by definition traffic is exchanged over these facilities, meaning that the ILECs are using these same facilities, solely paid for by the CLECs, to deliver their own traffic to the CLECs.[6]

In addition to conflating the requirements of §§ 251(c)(2) and 251(c)(3), while ignoring the FCC's pronouncements and historical experience with interconnection, AT&T argues that entrance facilities cannot be a form of interconnection because the FCC has defined interconnection as not including transport. Resp. Br. 18. AT&T distorts the FCC's conclusions. What the FCC determined in the *Local Competition Order* is that interconnection under § 251(c)(2) is distinct from the "routing and transmission" of traffic to be performed by ILECs under § 251(b)(5). The purpose of interconnection and the function performed by all interconnection facilities is "linking of two networks for the mutual exchange of traffic." *Local Competition Order*, 11 FCC Rcd 15499, ¶176. That physical link can be an entrance facility. AT&T uses the fact that an entrance facility is sometimes a type of transport facility to argue that it cannot be interconnection at any time. Resp. Br. 26-27. AT&T is wrong. The "routing and transport" obligation established under a separate portion of the Act, refers to the action the ILEC must take once the CLEC delivers into the ILEC's hands traffic that is destined for the ILEC's customers. In other words, the ILEC takes the "hand-off" and uses its switch to route each call and then transports each call over its

[6] *See* Pet. Br. 34, n.12.

network to the called party. In return for performing this function, the ILEC receives payment in accordance with the rules adopted by the FCC implementing § 251(b)(5) of the Act. CLECs have a reciprocal obligation—once the ILEC delivers calls to the CLEC that are destined for the CLEC's customers, the CLEC routes and transports each call to the called party. In both cases, the "routing and transport" function begins where the carrier receives the "hand-off," takes control of and routes the call, otherwise known as the interconnection point.

ILECs and CLECs have specific and different obligations under § 251(b)(5) than under § 251(c)(2). The FCC recognized the distinction in the *Local Competition Order*. The "routing and transport" of traffic is not the same as the "mutual exchange" of traffic. AT&T's arguments on this point are meritless.

II. Deference is appropriate; the FCC's statement in paragraph 140 of the *TRRO* is not a new regulation, but an affirmation of the ILECs' obligation to provide interconnection at any technically feasible point, the requirement stated in § 251(c)(2) and the regulations adopted in the *Local Competition Order*.

Where, as here, Congress has not "directly spoken" to the "precise question" at issue in a case, then reference to the underlying statute alone—even if it were clear—cannot resolve the case. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, __ U.S. __, 129 S.Ct. 2458, 2469 (2009), citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Instead, a reviewing court must look to the agency's regulations, which are entitled to deference if they resolve the ambiguity in

a reasonable manner. *Id*. The FCC, under its broad regulatory power, interpreted the statutory requirements of the 1996 Act in numerous orders and regulations, which ultimately survived judicial scrutiny. *See, e.g., Verizon*, 535 U.S. at 538 (upholding TELRIC pricing methodology); *Covad Communications*, 450 F.3d 528, 551 (D.C. Cir. 2006) (upholding all challenged provisions of the *TRRO*). Under these circumstances, deference to the FCC's interpretation of its rulings is absolutely proper. *Auer v. Robbins*, 519 U.S. 452, 464 (1997).

This Court held that the "FCC has rulemaking authority to carry out the 'provisions of this Act,' which include Sections 251 and 252, added by the Telecommunications Act of 1996." *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 377-378 (1999). The breadth of the FCC's regulatory expertise and authority has been repeatedly affirmed by subsequent opinions of this Court. *See, e.g.*, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 1002 (2005) (upholding FCC classification of cable modem service and noting the FCC is in a far better position to address questions concerning technical, complex, and dynamic subject matter than the courts). Hence, the FCC clearly had authority to adopt the *Local Competition Order*, establishing technical feasibility as the touchstone of the ILECs' interconnection requirements, and, subsequently, the *TRRO*, including paragraph 140. Consequently, deference is warranted because it "appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).

AT&T recasts the deference issue in a subtle but significant argument that if accepted by the Court would undermine the FCC's long-established rulings regarding the ILECs' interconnection obligations. Specifically, the core question raised by petitioners was "did the FCC totally eliminate the ILEC's obligation to provide entrance facilities at TELRIC rates when it ruled that entrance facilities no longer would be UNEs?" Petitioners read paragraph 140 of the *TRRO* to state that the FCC explicitly did not do so, recognizing that it was addressing unbundling under § 251(c)(3) and was not altering its prior rulings regarding interconnection under § 251(c)(2). The FCC has confirmed this reading of paragraph 140 in its brief submitted to the Sixth Circuit and in its briefs submitted here. Deference should be accorded to the FCC's interpretation of paragraph 140.

AT&T recasts the argument as if the opposite issue were before the Court, namely, "did the FCC establish entrance facilities as a form of interconnection for the first time in paragraph 140 of the *TRRO?"* Petitioner agrees that if entrance facilities were never a form of interconnection under § 251(c)(2) prior to the *TRRO*, the statement in paragraph 140 seems an unlikely way to comply with the requirements of administrative law, particularly given the FCC's express statement that it was not altering the ILECs' interconnection obligations. AT&T's effort to recast the argument sidesteps, but does not respond to, petitioners' and the FCC's arguments demonstrating that deference is appropriate in this case.

Paragraph 140 of the *TRRO* is not a new rule; it is a statement that the FCC's prior rules on interconnection were unchanged by its new decisions regarding unbundling. In arguing that it is wholly

new, AT&T is asking the Court to read into both § 251(c)(2) and the FCC's implementing regulations words that are not there. Section 251(c)(2) requires the ILECs to provide "*any* technically feasible" interconnection, not "those forms of interconnection the FCC identifies as being technically feasible." (Emphasis added.) The statutory language, the *Local Competition Order* and 47 C.F.R. § 51.321 all establish an expansive regime for interconnection, not a constrictive one.[7] What is abundantly clear from the *Local Competition Order* is the FCC's conclusion that Congress intended that all technically feasible forms of interconnection were required to be made available. Precisely what forms are technically feasible was informed by the comments submitted by the parties, but nothing in the *Local Competition Order* purports to establish a "fixed and final" list.[8] Indeed, AT&T names many interconnection facilities that it offers to

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[7] The FCC stated that "states may impose additional requirements that differ from state to state. 11 FCC Rcd 15499, ¶ 60. In its discussion of the role of state commissions in approving interconnection agreements, the FCC said that "[s]tate commissions may identify . . . additional points at which incumbent LECs must provide interconnection, where technically feasible." 11 FCC Rcd 15499, ¶ 136.

[8] The Administrative Law Professors ignore the plain language of § 251(c)(2) that requires interconnection at any technically feasible point, a requirement analyzed at length by the FCC in its *Local Competition Order* and embodied in both 47 C.F.R. 51.321(a) and (b). The amici state that the only possible regulation the FCC could have been interpreting was 47 C.F.R. 51.321(b), and conclude that because two examples of interconnection are set out in that rule, adding a third was tantamount to amending the rule. Admin. Law Br. 15. These amici ignore the longstanding existence of entrance facilities as interconnection facilities, even predating the FCC's rule.

competitors at TELRIC pricing (Resp. Br. 5) and that are not listed in the FCC's rule. Moreover, as petitioner Talk America demonstrated in its initial brief, entrance facilities have been a recognized form of interconnection between competitors' networks and the incumbents' networks for decades.[9] Nothing in the Act eliminated interconnection through entrance facilities; instead, by requiring ILECs to provide *any* technically feasible form of interconnection, § 251(c)(2) necessarily included the form of interconnection already in existence when the Act was passed.[10]

The requirement to provide entrance facilities as interconnection facilities is not a "new mandate []" (Resp. Br. 38), requiring the formalities of notice and comment rulemaking. It was an existing mandate and the FCC affirmed in paragraph 140 that it had not changed. The FCC's position is entitled to *Auer* deference.

III. Competition cannot exist without interconnection; the FCC's determination that Congress meant what it said in § 251(c)(2)—that CLECs have a right to interconnect in any technically feasible manner—furthers the policy objectives of the Act.

If any concept embodied in the Act is obvious and immutable, it is that competition cannot exist if a

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[9] Pet. Br. 17-21.

[10] Congress is presumed to have been aware of the FCC's actions enabling competition to arise with respect to long distance service and interconnection through entrance facilities. *See Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

market entrant cannot interconnect with the incumbent so that the customers the newcomer wins can place calls to and receive calls from the incumbent's customers. All of the other requirements imposed on the ILECs that are intended to enable CLECs to compete—access to UNEs, the ability to collocate, the right to attach to ILECs' poles, the ability of customers to port their telephone numbers when changing carriers—would be superfluous if the ILECs could prevent or restrict interconnection or, as AT&T appears to be arguing, that the FCC must first make a specific finding that a CLEC was impaired without access to a particular method of interconnection. It is no surprise then that Congress required the ILECs not just to *allow* competitors to "plug in" at whatever location and in whatever way the ILECs designated, but to *enable* competitors to interconnect and exchange traffic in any technically feasible manner. Congress made the policy choice to place no precondition, other than technical feasibility, on the way in which CLECs would interconnect to the ILECs' networks.

This Court has recognized the great difficulty competitors would face in attracting customers absent interconnection. *Verizon*, 535 U.S. at 490, n.11 ("a mininetwork connecting only some of the users in the local exchange would be of minimal value to customers"). This Court also has recognized the broad interconnection obligation that applies to ILECs even when the competitive carrier is a pure facilities-based carrier.[11]

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[11] Sprint is such a carrier. Sprint explained the need for interconnection and for entrance facilities provided by the ILECs in its amicus brief supporting petitioners.

> Section 251(c) addresses the practical difficulties of fostering local competition by recognizing three strategies that a potential competitor may pursue. First, a competitor entering the market . . . may decide to engage in pure facilities-based competition, that is, to build its own network to replace or supplement the network of the incumbent. If an entrant takes this course, the Act obligates the incumbent to "interconnect" the competitor's facilities to its own network to whatever extent is necessary to allow the competitor's facilities to operate. §§ 251(a) and (c)(2).

Verizon, 535 U.S. at 491.

AT&T nonetheless argues for a contrary view, a hyper-restrictive interpretation of both § 251(c)(2) and the FCC's implementing regulations. AT&T contends that because entrance facilities are not "bottleneck facilities" there is no policy reason to require ILECs to provide them at TELRIC rates (Resp. Br. 19), rates that AT&T disparages as being "just above the confiscatory level" (Resp. Br. 4) and "artificially low" (Resp. Br. 19).[12] In making this

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[12] In upholding the FCC's decision to require cost-based rates to be determined using TELRIC methodology, this Court observed that:

> Within the discretion left to it after eliminating any dependence on a "rate-of-return or other rate-based proceeding," the Commission chose a way of treating "cost" as "forward-looking economic cost," 47 CFR § 51.505 (1997), something distinct from the kind of historically based cost generally relied upon in valuing a rate base after *Hope Natural Gas.* In Rule 505, the FCC defined the "forward-looking economic cost of an element [as] the sum of (1) the total element long-run incremental cost of the element [TELRIC]; [and] (2) a reasonable allocation of forward-looking common costs," § 51.505(a), common costs being

argument, AT&T is once again attempting to engraft the "necessary and impair" limitation that applies to UNEs under § 251(c)(3) onto § 251(c)(2) where no such limitation exists. Nothing in § 251(c)(2) remotely suggests that the ILECs' interconnection obligation is dependent upon a threshold of level of need for a specific method of interconnection. AT&T's reliance on the Seventh Circuit's opinion in *Illinois Bell v. Box*, 548 F.3d 607, 609 (7th Cir. 2008) as support for this engrafting is misplaced. The court in *Box* used the phrase "bottleneck facilities" in its decision addressing only § 251(c)(3) network elements. The opinion does not address interconnection facilities provided under § 251(c)(2).

AT&T's related policy argument is that the market opening purposes of § 251(c)(2) have been achieved. Competition, technology, and networks are fluid, not static, however. New providers of local telecommunications services continue to enter the marketplace even as existing competitors are acquired by the ILECs,[13] merge with other CLECs,[14] or fail.[15] Even

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> "costs incurred in providing a group of elements that "cannot be attributed directly to individual elements," § 51.505(c)(1). Most important of all, the FCC decided that the TELRIC "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent['s] wire centers." § 51.505(b)(1).

Verizon, 535 U.S. at 495.

[13] For example, SBC Communications, Inc., the ultimate parent of Michigan Bell, acquired AT&T Corp. resulting in the current AT&T, Inc., in November 2005; Verizon Communications, Inc. acquired MCI, Inc. in January 2006; and Windstream Corporation acquired NuVox, Inc. in February 2010. All of these CLECs were operational at the time the *TRRO* was issued

the explosive growth of wireless communication, and the presence of wireless competition referenced by AT&T (Resp. Br. 48) is a form of competition that is less robust than it would at first appear. AT&T and Verizon are by far the largest wireless carriers, together having approximately 60% of both subscribers and revenue; Sprint and T-Mobile are the next largest in size but are significantly smaller.[16] And, AT&T has announced its plans to acquire ownership of T-Mobile.[17] A policy in which it is technical feasibility, not the ebbs and flows in the scope of competition, that determines where and how the all-important right to interconnect will be implemented is a policy that over time serves the country well. It is the policy Congress established and it is the policy the FCC's regulations further when they require ILECs to provide entrance facilities for purposes of interconnection. AT&T may wish Congress put

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and, indeed, were active participants in both the *TRO* and *TRRO* proceedings. *See TRRO* at 138, 139, 140

[14] PAETEC Holdings, Inc., for example, acquired Talk America Inc. in a merger that closed on December 6, 2010.

[15] The bursting of the dot-com bubble in 2000 saw a number of local service providers cease to exist, including e.spire Communications (March 2001), Winstar Communications Inc. (April 2001), Teligent, Inc. (May 2001), and Metromedia Fiber Networks (May 2002).

[16] Fourteenth Report at 6. *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, FCC 10-81.

[17] Deutsche Telekom will "hand over" 100% ownership of T-Mobile USA to AT&T; Deutsche Telekom will get approximately $25 billion in cash and take an approximately 8% stake in AT&T. T-Mobile Press Release, Mar. 20, 2011. http://newsroom.t-mobile.com/articles/att-acquires-tmobile-USA.

preconditions into § 251(c)(2) or an expiration date on its mandate once some level of competition emerged. Neither is in the statute, however.

AT&T objection to a requirement that it continue to provide entrance facilities at TELRIC rates is rooted in its opposition to TELRIC as a cost methodology. Resp. Br. 51. According to AT&T, TELRIC pricing for interconnection is leading competitors to opt to use the ILECs' facilities when the purpose of the statute is to stimulate facilities-based competition. Resp. Br. 50-51.[18] AT&T argues that the goal of the Act is not just to stimulate competition but to encourage facilities-based competition and that facilities-based competitors have no need to use the ILEC's network either as UNEs or as interconnection. Resp. Br. 50-51. The Act establishes a spectrum of ways that competitors can enter the market and serve their customers, however.[19] Moreover, the Act does not mandate that carriers achieve total reliance on only their own (or non-ILEC) facilities within any period of time.

Despite AT&T's disdain for TELRIC pricing, this cost methodology for interconnection facilities, in-

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[18] Ironically, AT&T and other ILECs strenuously opposed the FCC's decision to require the use of TELRIC methodology to set rates for interconnection and for UNEs on the grounds that they would not spur the growth of facilities-based competition. *Verizon*, 535 U.S. at 503-504.

[19] *Verizon*, 535 U.S. at 491.

cluding entrance facilities, has not lead to a lack of facilities-based competitors, or prevented competitors from constructing and using their own facilities for interconnection. If TELRIC rates were so low that they did not recover costs and provide a reasonable profit, other carriers would not have found it possible to build such facilities as they transition to becoming facilities-based.

AT&T nonetheless argues that requiring ILECs to provide entrance facilities at TELRIC is "anticompetitive" because CLECs will have no incentive to locate their switches in close proximity to the ILEC, thus imposing uncontrolled costs on the ILEC for facility construction. Resp. Br. 51.[20] As a practical matter, a CLEC requires interconnection to a number of carriers, including smaller ILECs serving nearby areas, long distance carriers and wireless carriers. Competitors historically have found it beneficial to locate in proximity to many carriers, making it unlikely that a CLEC would select a location for its central office that is deliberately far from the ILEC's

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[20] AT&T criticizes the MPSC's Order for its lack of a limitation on new facility construction (Resp. Br. 51), ignoring the fact that the arbitration conducted by the MPSC was a "baseball style" arbitration in which the MPSC chose between the participating CLECs' proposed language that mirrored paragraph 140 of the *TRRO* and AT&T's counter proposal, which only recognized CLECs' right to interconnect with AT&T's network pursuant to the Act for the exchange of traffic. AT&T offered no alternative language embodying any limitation on the pricing, the component parts, the length, or the conditions for the ordering, provision, or use of interconnection entrance facilities. The MPSC thus was required to choose between adopting language that matched what was contained in the *TRRO*, or rejecting that language entirely.

nearest central office, since doing so would also increase the distance to other carriers.

Moreover, states have authority to impose reasonable limits on the ILEC's interconnection obligations and to enable the ILEC to recover extra costs incurred to fulfill a CLEC's interconnection request. In the *Local Competition Order*, the FCC specifically delegated to state commissions the authority to decide the appropriate distance for a proposed meet-point interconnection, and stated that a CLEC requesting technically feasible but expensive interconnection would bear costs, including paying a higher, cost-based rate. 11 FCC Rcd 15499, ¶ 162, ¶ 198, ¶ 200, ¶ 209, and ¶ 553. The FCC, acting in the stead of the Virginia Corporation Commission as arbitrator of an interconnection agreement, declined to require Verizon to build new entrance facilities sought by a CLEC. *In re Petition of WorldCom, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum and Order, 17 FCC Rcd 27039, ¶ 134 (2002).

In any event, at issue here is the requirement for the ILEC to provide existing entrance facilities at TELRIC rates, not construct new facilities for interconnection.

There is no policy reason for rejecting the FCC's interpretation of paragraph 140 of the *TRRO*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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