

Nos. 10-313, 10-329

IN THE
Supreme Court of the United States

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 OF ADMINISTRATIVE LAW
PROFESSORS AS *AMICI CURIAE* IN SUPPORT
OF RESPONDENT MICHIGAN BELL
TELEPHONE COMPANY**

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INTEREST OF *AMICI CURIAE*¹

Amici are law professors who teach, research, and write in the areas of federal administrative law and procedure. They teach, research, and write about many of the issues in this case, including the proper scope of deference to agencies' interpretations of the statutes and regulations that govern agency conduct. *Amici* submit this brief to demonstrate that the proper scope of deference to administrative statutory and regulatory interpretations should exclude the government's claims for deference in this case.

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¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

² While previously in private practice, Mr. Burstein was on the briefs for AT&T California in *Pacific Bell Telephone Co. v. California Public Utilities Commission*, 621 F.3d 836 (9th Cir. 2010). That representation ended before the court of appeals heard argument in the case.

INTRODUCTION AND SUMMARY

This case concerns the proper regulatory treatment of “entrance facilities” under the Telecommunications Act of 1996 and the Federal Communications Commission’s implementing regulations and orders. “Entrance facilities” are cables used to transmit telecommunications traffic between the networks of two different carriers – an incumbent local exchange carrier (LEC) and a competitive LEC. *See* 47 C.F.R. § 51.319(e)(2)(i). The court below held that incumbent LECs are under no duty to provide entrance facilities to competitive LECs at regulated prices known as “TELRIC” rates. *See* Pet. App. 31a-33a.

The court below and the parties offer comprehensive treatments of the regulatory background. *See, e.g.*, Pet. App. 2a-8a; Gov’t Br. 2-8; AT&T Br. 2-11. As relevant here, the Act imposes two separate duties on incumbent LECs to facilitate entry by competitive LECs.³ Under § 251(c)(2) of the Act, the duty at issue here, incumbent LECs must “provide, for the facilities and equipment of any requesting [competitive LEC], interconnection with the [incumbent LEC’s] network” at a “technically feasible point within” that network. 47 U.S.C. § 251(c)(2). Under § 251(c)(3), incumbent LECs must “provide, to any requesting [competitive LEC] . . . access to [certain] network elements on an unbundled basis.” *Id.* § 251(c)(3). Shortly after the Act’s passage, the Commission promulgated regulations implementing those two sections. Those regulations were the

³ The Act also imposes on incumbent LECs the duty to “offer for resale at wholesale rates any telecommunications service that the [incumbent LEC] provides at retail,” 47 U.S.C. § 251(c)(4), but that duty is not at issue in this case.

subject of extensive litigation over many years in the courts. See Pet. App. 3a-5a.⁴ Nevertheless, from the Commission's initial rulemaking until its adoption of the *Triennial Review Order*⁵ in 2003, the Commission took the position that entrance facilities needed to be provided on an unbundled basis under § 251(c)(3). The Commission reversed course in the *Triennial Review Order* and later adhered to that position, albeit with different reasoning that could withstand judicial review, in the 2005 *Triennial Review Remand Order*.⁶

The question presented in this case is whether incumbents must nevertheless provide entrance facilities to competitors under the separate interconnection duty in § 251(c)(2) of the Act. Prior to this and similar litigation, the Commission had never expressly taken the position that § 251(c)(2) or the Commission's regulations implementing that section required incumbents to provide entrance facilities to competitors. See Gov't Br. 22 n.6. Yet in this case, petitioners and the United States ask the Court to give deference to the government's new construction of the Act, the Commission's implementing regulations, and the *Triennial Review* orders. Such deference is inappropriate. The Court has consistently declined to allow agencies to rely on deference

⁴ References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed by Talk America in No. 10-313.

⁵ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003) ("*Triennial Review Order*" or "*TRO*").

⁶ Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd. 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*").

doctrines to avoid using formal procedures like notice-and-comment rulemaking when making substantive rules. Each of the government's three possible bases for deference here constitutes just such an end-run around established administrative procedures.

First, the government's position that incumbent LECs must provide competitive LECs with entrance facilities for interconnection under § 251(c)(2) is not eligible for *Chevron* deference because the Commission's statements that purport to articulate that obligation do not have the force of law. See *United States v. Mead Corp.*, 533 U.S. 218, 230-32 (2001). Although those statements are found in the *Triennial Review* orders – documents that were the products of notice-and-comment rulemakings – the statements were not themselves subject to that process. The Commission never put any party on notice that it was considering amending its interconnection regulations, never actually amended those regulations, never solicited comments about the question whether incumbent LECs have a duty to provide entrance facilities under § 251(c)(2), and gave no indication that any party needed to petition for review of a new interpretation of § 251(c)(2). On the contrary, the agency in each order said that it was “not alter[ing]” its prior interpretation of § 251(c)(2). See *TRO* ¶ 366; *TRRO* ¶ 140. Granting *Chevron* deference to an interpretation rendered under such circumstances would allow an agency to bypass notice-and-comment procedures by simply tacking its desired statutory interpretations onto the products of unrelated rulemaking proceedings. The Court should not endorse such a rule.

Second, the government cannot reasonably claim that the statements in the *Triennial Review* orders

represent an interpretation of the existing interconnection regulations eligible for deference under *Auer v. Robbins*, 519 U.S. 452 (1997). The Commission’s purported rule would constitute an *amendment* of those regulations, not an interpretation. The relevant regulation, 47 C.F.R. § 51.321, articulates a general requirement – that incumbent LECs provide “any technically feasible method of obtaining interconnection,” *id.* § 51.321(a) – followed by a specification of two such methods, *id.* § 51.321(b). Well-established principles of administrative law require the Commission to act through notice-and-comment rulemaking to add a third. This Court should not allow the agency to avoid that procedural duty through deference.

Third, the government’s interpretations of the *Triennial Review* orders in this litigation do not qualify for *Auer* deference because they do not reflect the agency’s “fair and considered” judgment about the meaning of its orders. *Auer*, 519 U.S. at 462. The government makes no attempt to grapple with alternative – and more plausible – readings of the few sentences that it claims impose an obligation on incumbent LECs to provide entrance facilities under § 251(c)(2). The government must undertake a more complete explanation – preferably through rulemaking – of its orders in order to avoid “unfair surprise” to the regulated parties. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007).

ARGUMENT

I. *CHEVRON* DEFERENCE TO THE FCC’S INTERPRETATION OF SECTION 251(c)(2) IS NOT WARRANTED

In its brief in this Court, the government contends that § 251(c)(2) “includes an obligation [on AT&T’s

part] to provide entrance facilities” to competing carriers at cost-based rates upon request. Gov’t Br. 30. That interpretation is not eligible for deference under the doctrine of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Commission did not render its statutory interpretations under “circumstances reasonably suggesting that Congress ever thought . . . deserving [of] the deference claimed for them.” *Mead*, 533 U.S. at 231.

A. *Chevron* Deference Applies Only To Agency Interpretations Made In Accordance With Congressionally-Delegated Authority To Act With The Force Of Law.

In *Chevron*, this Court held that “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 865-66). But not all agency interpretations are entitled to deference from the Court. In *Mead*, the Court held that an agency’s interpretation of a statute qualifies for deference only “when 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.” 533 U.S. at 226-27; *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000).

Underlying *Mead*’s restriction of the scope of *Chevron* deference are two related concerns. First, the Court will only defer to an agency’s interpretation of an ambiguous statute when it is clear that Congress has granted the agency “the authority to

promulgate binding legal rules.” *Brand X*, 545 U.S. at 980-81; *see also Mead*, 533 U.S. at 230-31 & n.11; Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 *Geo. L.J.* 833, 871-72 (2001). Congress must have delegated to the agency primary interpretive authority over the statute. The procedures that Congress instructs an agency to use furnish one indication that such a delegation has occurred. *See, e.g., Mead*, 533 U.S. at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure.”).

An agency exercising its delegated interpretive authority, however, must still do so through administrative procedures designed to produce rules with the force of law. In *Mead* itself, for example, the Court observed that the Customs Service had a “general rulemaking power” by which it could make regulations with the force of law. 533 U.S. at 232. But the interpretations contained in classification rulings promulgated outside that power were not entitled to deference. The Court found it “difficult . . . to see *in the agency practice itself* any indication that [the agency] ever set out with a lawmaking pretense in mind” when it made the interpretations. *Id.* at 233 (emphasis added). Those interpretations were not themselves subject to the rigors of notice and comment, were of limited precedential value, and were issued with little deliberation. *See id.* at 233-34.

In short, administrative interpretations only have the force of law – only are eligible for deference – when they reflect “the fairness and deliberation that should underlie a pronouncement of such force.” *Id.* at 230; *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the*

Administrative State, 78 N.Y.U. L. Rev. 461, 538 (2003) (“Agencies may possess only so much authority (1) as Congress may grant them, and (2) as they may exercise consistent with the value of fairness, rationality, and predictability.”).

Although the Court may draw some inferences about the fairness and deliberation with which an agency has rendered an interpretation – and, therefore, the interpretation’s authority – from the formality of the procedures the agency employed, the Court has repeatedly noted that the inquiry does not end there. Interpretations found in relatively informal pronouncements such as “opinion letters,” “policy statements, agency manuals, and enforcement guidelines” usually are ineligible for *Chevron* deference. *Christensen*, 529 U.S. at 587. But not always. See, e.g., *Mead*, 533 U.S. at 230 & n.13 (citing *Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995)).

Similarly, “the *presence* or absence of notice-and-comment rulemaking” is not “dispositive.” *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (emphasis added). What matters instead, among other things, is “the careful consideration the [a]gency has given the question.” *Id.* To be eligible for deference, the agency at a minimum must have engaged in a rigorous analysis of the relevant law and policy in a relatively formal proceeding and give precedential effect to such formal determinations. See, e.g., *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1380 (Fed. Cir. 2001).

B. The FCC Did Not Articulate An Interpretation Of Section 251(c)(2) That Has The Force Of Law.

There is no doubt that the Commission has “the authority to promulgate binding legal rules.” *See Brand X*, 545 U.S. at 980-81; 47 U.S.C. §§ 151, 201(b). In this case, however, it did not exercise that authority. *Contra Brand X*, 545 U.S. at 981. The Commission asserts that its interpretations can be found in one sentence of ¶ 366 of the *Triennial Review Order*⁷ and two sentences of ¶ 140 of the *Triennial Review Remand Order*.⁸ *See* Gov’t Br. 16-18. Those sentences, however, are not themselves legislative rules and do not carry the force of law.

The government itself concedes that, “[a]lthough the *Triennial Review Order* and the *Triennial Review Remand Order* amended the unbundling rules, they did nothing to alter the FCC’s longstanding interconnection rules.” Gov’t Br. 28. Indeed, had the Commission attempted to set forth a rule in the *Triennial Review Order* or the *Triennial Review*

⁷ That sentence reads: “In reaching this determination we note that, to the extent that requesting carriers need facilities in order to ‘interconnect[] with the [incumbent LEC’s] network,’ section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission’s interpretation of this obligation.” *TRO* ¶ 366 (footnote omitted).

⁸ Those sentences read: “We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC’s network.” *TRRO* ¶ 140 (footnote omitted).

Remand Order that incumbent LECs had to provide entrance facilities to competitors under § 251(c)(2), it would have violated the Administrative Procedure Act's (APA) notice-and-comment procedures. Section 553 of the APA provides that before promulgating a rule, an agency must provide notice of "either the terms or substance of the proposed rule or a descriptions of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The agency must then allow interested persons the opportunity to comment on the subjects delineated in the notice. *Id.* § 553(c).

In this case, the notices of proposed rulemaking gave no indication that the Commission was preparing to render an interpretation of § 251(c)(2). Neither notice even cited that provision.⁹ Instead, the notices confined themselves primarily to seeking comments on proposed changes to the FCC's unbundling regulations that implemented § 251(c)(3). No party therefore could reasonably have been expected to comment on whether entrance facilities comprised part of incumbent LECs' obligation to provide interconnection under § 251(c)(2). In all events, the Commission's sentences themselves do nothing to establish such a rule. In the *Triennial Review Order*, the Commission merely observed that competitive LECs may require certain "facilities" for interconnection with incumbent LEC networks and stated that it was not "alter[ing]" its interpretation of § 251(c)(2). So too in the *Triennial Review Remand Order*, the Commission simply reiterated that its amendment of the unbundling rules "does not alter"

⁹ See Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd. 22781 (2001) ("*TRO NPRM*"); Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements*, 19 FCC Rcd. 16783 (2004) ("*TRRO NPRM*").

competitive LECs' rights to interconnection under § 251(c)(2). These sentences appear on their face to be mere clarifications rather than rules. Indeed, this language gives no indication – as would ordinarily be the case for a binding legislative rule – that any party was under an obligation to petition for review of the FCC's interpretation. *See* 28 U.S.C. § 2342; 47 U.S.C. § 402(a).

The government's contention (at 31) that the Commission's orders are "legislative acts" does not change the analysis. It is well established that the FCC can promulgate legislative rules (through either rulemaking or adjudication) that are not codified in the Code of Federal Regulations. *See, e.g., Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 142-43 (D.C. Cir.) (upholding FCC "rules" contained in series of orders but not codified), *cert. denied*, 131 S. Ct. (2010). But in order for interpretations contained in those rules to have the force of law, they must still be subjected to the "fairness and deliberation" that *Mead* insists accompany "a pronouncement of such force." *Mead*, 533 U.S. at 230. Regardless whether *other* sections of the *Triennial Review Order* or the *Triennial Review Remand Order* may satisfy that test and be entitled to *Chevron* deference, the sentences for which the Commission claims deference in this case bear none of the hallmarks of interpretations that, under *Christensen* and *Mead*, have the force of law.

Similarly, it is of no moment that these sentences are to be found in a document that otherwise may have complied with notice-and-comment procedures. In *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), for example, this Court considered whether deference to the Food and Drug Administration's interpretation of the scope of its preemption authority was warranted.

The notice of proposed rulemaking in that case stated that the agency was not considering “policies that have federalism implications or that preempt State law,” and therefore did not seek comment on the scope of permissible preemption. *Id.* at 1201 (quoting 65 Fed. Reg. 81,103 (Dec. 22, 2000)). Yet the final rule the agency promulgated “articulated a sweeping position on the [Food, Drug, and Cosmetic Act’s] preemptive effect in the regulatory preamble.” *Id.* The Court declined to find those pronouncements eligible for *Chevron* deference in part because the agency’s “procedural failure” made their authority “inherently suspect.” *Id.*

So too in this case, the Commission failed to adopt its interpretation through procedures “reasonably suggesting that Congress ever thought of [such pronouncements] as deserving the deference claimed for them here.” *Mead*, 533 U.S. at 231. To accord *Chevron* deference in the circumstances described above would be to invite agencies to avoid using such procedures – notice-and-comment rulemaking in particular – simply by including new language in final rules. The scope of *Chevron* deference cannot reach so far.

II. THE FCC’S INTERPRETATIONS OF ITS OWN REGULATIONS IN THIS CASE DO NOT QUALIFY FOR DEFERENCE UNDER *AUER*

In *Auer*, this Court held that an agency’s interpretation of its own regulations – even in an *amicus* brief – is owed deference unless the interpretation is “plainly erroneous or inconsistent with the regulation.” 519 U.S. at 461 (internal quotation marks omitted); see *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The Court has appropriately limited the scope of *Auer* deference, however, to ensure that agencies do not circumvent formal processes of articulating rules and making policy. An agency receives no deference when it interprets a regulation that merely recites the statutory language; in that circumstance it must rely on processes with the force of law, as described above. See *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006). Neither can an agency, “under the guise of interpreting a regulation, . . . create *de facto* a new regulation.” *Christensen*, 529 U.S. at 588. That is, agency interpretations of ambiguous regulations are entitled to deference because it is presumed that an agency is best placed to interpret its own words. But an agency cannot rightly claim to be “interpreting” a regulation when it is in fact *changing* that regulation. Finally, the Court has cautioned that an agency’s interpretation of its own regulations will not be accorded deference unless it “reflect[s] the agency’s fair and considered judgment on the matter in question,” *Auer*, 519 U.S. at 462, and does not work any “unfair surprise,” *Long Island Care at Home*, 551 U.S. at 170. The Court reaffirmed these principles just this Term in *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881-82 (2011). As the Court explained, deference ultimately depends on all “the circumstances of th[e] case.” *Id.* at 884 (quoting *Auer*, 519 U.S. at 462).

Together, the limitations described above ensure that agencies produce rules and interpretations of those rules that are sufficiently “clear and definite so that affected parties will have adequate notice concerning the agency’s understanding of the law,” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting). They also ensure that agencies do not exceed their delegated powers by

avoiding notice-and-comment rulemaking. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996) (“[O]ne must assess [*Seminole Rock*’s] validity in light of the incentives that it supplies to an agency engaged in rulemaking.”); see also *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 110-11 (1995) (O’Connor, J., dissenting).

A. The Commission Does Not Validly Interpret An Existing Regulation.

The Commission does not specify – in the *Triennial Review Order*, the *Triennial Review Remand Order*, or in its briefing in this litigation – any particular interconnection regulation that is susceptible of a deference-worthy interpretation. Indeed, neither *Triennial Review* order cites any interconnection regulation in the passages that the government now claims establish a rule that incumbent LECs must provide entrance facilities to competitors under § 251(c)(2).

The most likely candidate to support the government’s interpretation is 47 C.F.R. § 51.321, although the government only cites the rule in passing (at 3, 14, 22, 24) and does not claim to be interpreting that rule. Section 51.321 announces a general requirement that incumbent LECs “provide . . . any technically feasible method of obtaining interconnection . . . at a particular point” to competitors upon request. 47 C.F.R. § 51.321(a). The regulation then explains that “[t]echnically feasible methods of interconnection . . . include, but are not limited to” two particular arrangements: “[p]hysical collocation and virtual collocation at the premises of an incumbent LEC” and “[m]eet point interconnection arrangements.” *Id.* § 51.321(b).

To the extent the Commission is understood as “interpretating” this regulation, the claim must be that entrance facilities are a “technically feasible method of interconnection,” within the general obligation in § 51.321(a). But that is not an *interpretation* of the regulation. It is an *amendment* of the regulation. The regulation articulates a broad standard followed by two specific instances of that standard. The specific instances are articulated prospectively and meant to bind all potential entities that are subject to the regulation. They are classic legislative rules. See 5 U.S.C. § 551(4) (defining “rule” as “the whole or part of an agency statement of general or particular applicability and future effect”); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (holding that agency “interpretation” was a “rule” because it “reads like a ukase,” “[i]t commands, it requires, it orders, it dictates”); see also Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1485 (1992).

As the Seventh Circuit has explained, unless a rule “can be derived from the regulation by a process reasonably described as interpretation,” it is an amendment. *Hoctor v. USDA*, 82 F.3d 165, 170 (7th Cir. 1996) (Posner, J.). Arbitrarily specifying one particular instance of a general standard – as the government seeks to do here – is not interpretation. See *id.* at 171 (“There is no process of cloistered, appellate-court type reasoning by which the [agency] could have excogitated the [particular] rule from the [general] regulation.”). In the absence of *interpretive* reasoning, the agency’s choice must be justified by reference to policy concerns. Those concerns in turn must be articulated in notice-and-comment rule-makings or other agency actions that similarly require rigorous deliberation. If the Commission

wanted to add another category of “technically feasible methods of . . . interconnection” to the list in Rule 51.321(b), it needed to do so through those procedures. *See Appalachian Power*, 208 F.3d at 1024 (“It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.”).

Auer deference is inappropriate when, as here, an agency’s “interpretation” amounts to an amendment. “To defer to the agency’s position” in such circumstances, “would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.” *Christensen*, 529 U.S. at 588. Lower courts have refused to grant *Auer* deference in similar circumstances. In *Hoctor*, for example, the court held that because the agency’s interpretation was really an amendment, it could not be given “controlling weight.” 82 F.3d at 169 (quoting *Stinson v. United States*, 508 U.S. 36, 44-46 (1993)); *see id.* at 170-72. Other courts have reached similar conclusions. *See, e.g., United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 569 (1st Cir. 2004) (“The Department is free to interpret reasonably an existing regulation without formally amending it; but where . . . the interpretation has the practical effect of altering the regulation, a formal amendment – almost certainly prospective and after notice and comment – is the proper course.”); *Mission Grp. Kan., Inc. v. Riley*, 146 F.3d 775, 781-83 (10th Cir. 1998) (declining to apply *Auer* deference to interpretive specification of “any additional condition” language in regulation); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1324-25 (3d Cir. 1987) (refusing to defer to “a mere position about what the regulations require”

rather than “a reasoned interpretation of a regulation’s language”).

Indeed, to hold otherwise would be to invite agencies to “replace statutory ambiguity with regulatory ambiguity, thus creating . . . deference for any administrative action that might be squeezed within the unrestricted terms of a promulgated regulation.” *Mission Grp.*, 146 F.3d at 782; *see also* Manning, *supra*, at 655 (“[A]n agency’s right of self-interpretation should have an untoward effect upon its incentive to speak precisely and transparently when it promulgates regulations.”).

B. The FCC’s Interpretations Of The *Triennial Review Order* And *Triennial Review Remand Order* Are Not Entitled To Deference.

Alternatively, the Commission asserts that its interpretations of the *Triennial Review* orders in the course of this litigation are themselves subject to deference under *Auer*. Gov’t Br. 30-31. The agency’s position in this litigation is, in part, that ¶ 366 of the *Triennial Review Order* and ¶ 140 of the *Triennial Review Remand Order* require that an “incumbent’s entrance facilities [be made] available to competitors as ‘interconnection facilities’ if used for interconnection.” Gov’t Br. 15. But the government has not – either in the court below or in this Court – advanced any reasoning sufficient to explain how it derives that rule from the few sentences it cites from the *Triennial Review* orders. The government’s litigating position therefore cannot be said to “reflect the agency’s fair and considered judgment” regarding the proper interpretation of the *Triennial Review* orders. *Auer*, 519 U.S. at 462.

In its brief in the court below, the Commission did little more than recite the language of ¶ 366 of the *Triennial Review Order* and ¶ 140 of the *Triennial Review Remand Order*. See Pet. App. 137a. The Commission did not explain *how* that language could be read to impose an obligation on incumbent LECs to provide entrance facilities to competitors for interconnection. Indeed, the Commission *conceded* that it “did not specifically define what it meant by the term ‘interconnection facilities.’” *Id.* at 138a. Yet in the same sentence the Commission simply asserted – without any additional explanation – that the Michigan Public Service Commission’s “interpretation of that term” was “fully consistent with the FCC’s finding in the *TRRO*.” *Id.* The Commission did not specify the “finding” to which it referred.

The government’s brief in this Court still does not provide a “fair and considered” explanation of that rule, *Auer*, 519 U.S. at 462. The government argues that the court of appeals misread the *Triennial Review Remand Order*, but offers little competing interpretation. Gov’t Br. 15-16.

The government asserts, for example, that “the FCC’s orders use the term ‘interconnection facility’ to refer to an entrance facility that is being used for interconnection.” *Id.* at 16. But ¶ 140 of the *TRRO* appears on its face to draw a distinction between the “entrance facilities” that the Commission deemed unavailable as unbundled network elements in the preceding paragraphs, and “interconnection facilities” that competitive LECs are entitled to pursuant to § 251(c)(2). The government does not explain why the Commission would have chosen to use different terms for the same thing in the same paragraph, does not even attempt to justify its interpretation of the paragraph in light of a more natural reading, and

does not explain why it told the court below that it had left the term undefined (*see* Pet. App. 138a).

Similarly, ¶ 140 provides that competitive LECs “will have access to these [interconnection] facilities . . . to the extent that they *require* them to interconnect with the incumbent LEC’s network.” *TRRO* ¶ 140 (emphasis added).¹⁰ In its briefing, the government now appears to treat the word “require” as though it means “request.” *See* Gov’t Br. 26-27. But the government makes no attempt to explain how such a transformation of the language of the *Order* can be accomplished.

Finally both ¶ 140 and ¶ 366 of the *Triennial Review Order* state that the Commission is not “alter[ing]” its interpretation of the underlying statute, 47 U.S.C. § 251(c)(2). But the government does not explain the content of the interconnection obligation, as it existed at the time of the *Triennial Review* orders. On the contrary, the government concedes that, prior to the *Triennial Review Order*, its “interconnection rules . . . [did] not expressly require incumbents to provide entrance facilities to satisfy their interconnection obligations under Section 251(c)(2).” Gov’t Br. 22 n.6.

Affording deference to the interpretation proffered here would mark a significant expansion of the scope of *Auer* deference. This case is a far cry from the typical case where *Auer* deference is appropriate. In *Chase Bank*, for example, the Court considered whether certain increases in credit card interest rates constituted “change[s] in terms” under the Federal

¹⁰ The *Triennial Review Order* similarly referred only to facilities that competitive LECs “*need* . . . in order to interconnect” with incumbent LECs. *TRO* ¶ 366 (emphasis added; internal quotation mark and alteration omitted).

Reserve Board's Regulation Z. 131 S. Ct. at 879-80 (citing 12 C.F.R. § 226.9). In that case, the court concluded that a single phrase in a codified regulation was ambiguous, *see id.*, and deferred to the government's choice among two reasonable constructions, which the government had articulated consistently in briefs in the court of appeals and this Court. *See id.* at 880-81 & n.8. Similarly, in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009), the Court deferred to an agency interpretation of a single codified regulation that the Court itself found to be ambiguous because the agency provided "an instructive interpretive step" in explaining the regulation. *Id.* at 2473 (citing 40 C.F.R. § 122.3). In this case, by contrast, the government seeks deference to several narrative sentences in two distinct orders, unmoored from any codified regulation. The government does not explain how those sentences are ambiguous, what the competing constructions are, why one construction is better in its judgment than another, or why its position before the Sixth Circuit differed from its position here.

In short, the government's proposed rule poses a significant risk of "unfair surprise" to entities regulated under the Communications Act. *Long Island Care at Home*, 551 U.S. at 170. Regulated entities reading the text of the *Triennial Review* orders would have had little reason to expect that the three sentences at issue in those orders would yield a rule requiring incumbents to provide competitors with entrance facilities for interconnection. To derive that rule from ¶ 366 of the *Triennial Review Order* and ¶ 140 of the *Triennial Review Remand Order* requires the kind of analysis most likely to be carried out in notice-and-comment rulemaking. *Cf. Long*

Island Care at Home, 551 U.S. at 170-71 (finding no “unfair surprise” when agency pursued parallel notice-and-comment rulemaking); *Boose v. Tri-County Metro. Transp. Dist.*, 587 F.3d 997, 1005 n.13 (9th Cir. 2009) (same).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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