

Nos. 10-313 and 10-329

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

TALK AMERICA, INCORPORATED, PETITIONER
v.
MICHIGAN BELL TELEPHONE COMPANY, DBA AT&T
MICHIGAN, RESPONDENT.

ORJIAKOR ISIOGU, ET AL., PETITIONERS
v.
MICHIGAN BELL TELEPHONE COMPANY, DBA AT&T
MICHIGAN, RESPONDENT.

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

**BRIEF FOR CENTURYLINK, QWEST
COMMUNICATIONS INTERNATIONAL, AND
WINDSTREAM CORPORATION AS AMICI CURIAE
SUPPORTING RESPONDENT**

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INTEREST OF AMICI CURIAE¹

Amici Qwest Communications International Inc (“Qwest”), CenturyLink, Inc. (“CenturyLink”), and Windstream Corporation (“Windstream”) are, through their operating companies, among the nation’s largest incumbent local exchange carriers (“ILECs”) providing service in both urban and rural areas throughout the United States.

Qwest provides local exchange telecommunications, exchange access, information access, data and interexchange long distance services pursuant to tariffs and contracts within a 14-state incumbent local exchange region.

CenturyLink provides voice, broadband and video services to consumers and businesses in 33 states.

In 2010, Qwest Communications International Inc., the parent of Qwest, and CenturyTel, Inc. d/b/a CenturyLink, announced their intention to merge. Subject to remaining regulatory approvals, the merger is expected to close during the second quarter of 2011.

Windstream is one of the largest providers of telecommunications services, primarily in rural communities in the United States. It provides voice,

¹ The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

broadband, and video services to customers in 29 states.

Amici are identically situated to respondent Michigan Bell Telephone Company (“AT&T”). Like AT&T, amici are subject to the interconnection duty in 47 U.S.C. § 251(c)(2). Some state commissions in the states in which amici operate have interpreted that section to require amici to provide entrance facilities to competitive local exchange carriers (“CLECs”) at TELRIC rates. Other state commissions, however, have correctly rejected that interpretation,² as did the United States Court of Appeals for the Sixth Circuit.

SUMMARY OF ARGUMENT

Section 251 of the Telecommunications Act of 1996 (“the Act”) imposes on incumbent local exchange carriers (“ILECs”) the obligation to provide CLECs with “nondiscriminatory access to network elements on an unbundled basis.” 47 U.S.C. § 251(c)(3). The FCC determines the unbundled network elements (“UNEs”) ILECs are required to provide, and it can require unbundling of a network element only if it

² See, e.g., Order Addressing Applications for Rehearing, Reargument, or Reconsideration, *Sprint Communications Company L.P.’s Petition for Arbitration with CenturyTel of Eagle, Inc. Pursuant to § 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Docket No. 08B-121T, Decision No. C08-1218, 2008 WL 5158834 (Colo. Pub. Utils. Comm’n Nov. 20, 2008). But see Order, *Sprint Communications Company L.P. Petition for Arbitration of an Interconnection Agreement with CenturyTel of Oregon, Inc.*, ARB 830, Order No. 08-486, 2008 WL 4493108 (Or. Pub. Utils. Comm’n Mar. 31, 2009).

finds that an ILEC's failure to provide access to the element "would impair the ability of the [competitor] . . . to provide . . . service[]." *Id.* § 251(d)(2)(B).

The rates that apply to UNEs are set by state commissions applying the FCC's total element long-run incremental cost ("TELRIC") methodology. Under this pricing scheme, state commissions base rates on the hypothetical cost of a UNE, not on the cost the ILEC actually incurs to provide it. The statutory basis for TELRIC no longer exists when it becomes economically feasible for competitors to construct the facility in question or to obtain it from non-ILEC sources. At that point, requiring TELRIC prices for non-bottleneck facilities suppresses facilities-based competition, which is directly contrary to the ends the Act is designed to achieve.

The FCC's non-impairment finding for entrance facilities establishes that there is a competitive market for these facilities. Permitting petitioners to obtain entrance facilities at TELRIC rates in this circumstance would embrace a policy of long-term dependence on ILECs' facilities at below-market prices and contravene the Act's purposes. The judgment of the court of appeals should be affirmed.

ARGUMENT

A. Requiring Incumbents to Provide Non-Bottleneck Network Elements at TELRIC Rates Undermines the Objectives of the 1996 Act

1. The preamble to the Telecommunications Act of 1996 concisely describes the end and the means

Congress had in mind when it passed this landmark legislation. The Act is designed 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.³

The end is a competitive market in which service quality meets customer expectations and continuing investment in infrastructure leads to innovative services. Congress established competition as the means to these ends, particularly “facilities-based” competition for local telephone service. *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004) (“*USTA II*”).

To facilitate the opening of local telecommunications markets, Section 251 imposes on ILECs the obligation to provide CLECs with “nondiscriminatory access to network elements on an unbundled basis.” 47 U.S.C. § 251(c)(3). The FCC determines the UNEs ILECs are required to provide, and it can require unbundling of a network element only if it finds that an ILEC’s failure to provide access to the element “would impair the ability of the [competitor] . . . to provide . . . service[.]” *Id.* § 251(d)(2)(B). This unbundling obligation was based on the determination that economies of scale in certain portions of the ILECs’ networks created

³ Pub. L. No. 104-104, 110 Stat. 56 (preamble).

bottleneck facilities that could present insurmountable barriers to entry.⁴

The rates that apply to UNEs are set by state commissions applying the FCC's total element long-run incremental cost ("TELRIC") methodology. Under this pricing scheme, state commissions base rates on the "hypothetical cost" of a UNE, not on the cost the ILEC actually incurs to provide it.⁵ The FCC has recognized that requiring ILECs to provide network elements under this hypothetical pricing construct "is one of the most intrusive forms of economic regulation."⁶ And the Supreme Court has similarly commented that TELRIC gives CLECs access to UNEs at rates that are "just above the confiscatory level."⁷

Although TELRIC is meant to simulate the costs a carrier would incur to build a network in a competitive market, it does not in fact do so.

⁴ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 232 (1996) ("*Local Competition Order*"), modified on recon., 11 FCC Rcd 13042 (1996), vacated in part, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

⁵ *Local Competition Order* ¶ 672.

⁶ 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, ¶141 (2003) ("*Triennial Review Order*" or "*TRO*"), vacated in part by *USTA II*, 359 F.3d 554.

⁷ *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489 (2002).

Instead, it relies on hypothetical assumptions that understate the true costs of providing a network element, leading to prices that are consistently below those that would actually prevail in a competitive market.⁸ The methodology begins with the assumption that a hypothetical carrier is instantaneously replacing an ILEC's existing network with a new network comprised entirely of the most current, state-of-the-art technology and equipment.⁹

⁸ See *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 609 (7th Cir. 2008) (Posner, J.). See also *Verizon*, 535 U.S. at 501 (TELRIC is based on the “hypothetical” cost of a “most efficient element,” “untethered to” either the incumbent’s “historical investment” or the cost of the “actual network element being provided.”); *Qwest Corp. v. Arizona Corp. Com’n*, 567 F.3d 1109, 1114 (9th Cir. 2009) (describing TELRIC prices as “below-market” and “highly favorable to CLECs”); *USTA II*, 359 F.3d at 562 (the TELRIC formula results in very low rates that are “well below the costs the [incumbents] had actually historically incurred in constructing the elements”).

⁹ See 47 C.F.R. § 51.505(b)(1) (“The total element long-run incremental cost of an element 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 LEC’s wire centers.”); *Verizon*, 535 U.S. at 540 (Breyer, J., concurring in part and dissenting in part) (“the regulator must look to what it would cost a hypothetical perfectly efficient firm to supply that element in the future, assuming that the hypothetical firm were to build essentially from scratch a new, perfectly efficient communications network”); Notice of Proposed Rulemaking, *Review of the Commission’s Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, 18 FCC Rcd 18,945, ¶ 31 (2003) (“UNE NPRM”) (describing industry comments that TELRIC assumption of “new technology [being] deployed

In reality, carriers build networks over extended periods of time, and the equipment they use is therefore always a mix of new and older technologies. The FCC has recognized this disconnect between TELRIC and the reality of conditions in a competitive market:

One of the central internal tensions in the application of the TELRIC methodology is that it purports to replicate the conditions of a competitive market by assuming that the latest technology is deployed throughout the hypothetical network In the real world, however, even in extremely competitive markets, firms do not instantaneously replace all of their facilities with every improvement in technology. Thus, even the most efficient carrier's network will reflect a mix of new and older technology at any given time.¹⁰

TELRIC also assumes that the hypothetical carrier builds the right amount of capacity to meet present and future demand.¹¹ But in competitive

instantaneously and ubiquitously is unrealistic even in the most competitive markets”).

¹⁰ *TRO* ¶ 50.

¹¹ See *UNE NPRM* ¶ 49 (TELRIC models are designed “to build an efficient network today to serve all customer locations within a particular geographic area”); 47 C.F.R. § 51.505(b)(1) (“The total element long-run incremental cost of an element 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 LEC’s wire centers.”); *Verizon*, 535 U.S. at 505,

markets, carriers rarely have exactly the right amount of capacity to meet demand during any given period, and any excess or insufficient capacity raises costs above ideally efficient levels. The fundamental reality, therefore, is that no carrier – neither an ILEC nor a CLEC – could build a network facility at a TELRIC cost.¹²

Although TELRIC significantly understates the actual costs of providing network elements, the Court held in *Verizon* that the methodology was not an unreasonable interpretation of § 251(d)(2) as applied to the “bottleneck” elements mandated by § 251(c)(3), where an ILEC’s failure to provide access to the element “would impair the ability of the [competitor] . . . to provide . . . service[.]”¹³ In other

(“TELRIC requires ratesetters to calculate cost on the basis of ‘the existing location of the incumbent[’s] wire centers.”); *id.* at 540 (Breyer, J., concurring in part and dissenting in part) (“the regulator must look to what it would cost a hypothetical perfectly efficient firm to supply that element in the future, assuming that the hypothetical firm were to build essentially from scratch a new, perfectly efficient communications network. The only concession to the incumbent’s actual network is the presumption that presently existing wire centers—which hold the switching equipment for a local area—will remain in their current locations.”).

¹² The below-market rates that TELRIC provides are analogous to the discounted rates normally available in the marketplace only with long-term commitments. For example, a long-term car lease (*e.g.*, a 36-month lease) is significantly less expensive on a per-day basis than renting a car for a few days. With TELRIC, however, CLECs have the benefit of low rates without making any long-term commitment, which is another deviation from normal competitive marketplaces.

¹³ See *Verizon*, 535 U.S. at 510; 47 U.S.C. §251(d)(2)(B).

words, the question in *Verizon* was only whether TELRIC could be used for those network elements that meet the impairment test and are “unsuitable for competitive supply.” *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) (“*USTA I*”).

But that holding is inapplicable when a CLEC ceases to be “impaired” by the unavailability of a facility, which occurs when alternative facilities are readily available in the market or when it becomes economically feasible for competitors to construct their own facility. At that point, requiring hypothetical TELRIC prices for facilities suitable for competitive supply would produce results directly opposite to the ends the Act is designed to achieve. That is, the availability of TELRIC-priced network elements in this circumstance would actually suppress facilities-based competition, because the TELRIC price would be lower than a CLEC’s cost to build the element itself. Thus, once competitors are no longer “impaired” by the unavailability of a facility from the ILEC on an unbundled basis, the justification for requiring the facility to be priced at TELRIC no longer exists.

Applying these principles in the instant case, using TELRIC pricing for entrance facilities would undermine the central purposes of the Act. In the 2005 *Triennial Review Remand Order* (“*TRRO*”),¹⁴

¹⁴ 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), petitions for review denied, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

the FCC ruled that entrance facilities no longer meet the impairment standard of Section § 251(c)(3) and are not bottleneck elements. The FCC found that these facilities have “unique operational and economic characteristics” that permit CLECs to self-provide or to obtain them from other competitive carriers. *TRRO* ¶¶ 138-139, 141.

The FCC’s non-impairment finding was based on extensive evidence establishing that entrance facilities “are widely available” on a national basis. *Id.* Carriers demonstrated, for example, that CLECs “are steadily deploying their own entrance facilities,” proving an absence of economic obstacles to self-deployment. *Id.* ¶ 138 & n.387. Other evidence established that competing carriers are having “success in finding non-incumbent LEC providers of entrance facilities,” and that almost all competitively deployed transport links are entrance facilities.” *Id.* ¶ 139 & n.393. Thus, Verizon established that it had recently migrated more than 32,000 entrance facility circuits to non-Verizon facilities, and BellSouth similarly reported that between 10 to 20 percent of the entrance facilities it had provided to CLECs had recently been replaced by other sources. *Id.* ¶ 139. Indeed, the evidence of the broad availability of non-ILEC sources of entrance facilities was so compelling that the FCC implemented its non-impairment determination immediately, finding that there was no justification for a gradual phase-out that some CLECs had requested. *Id.* ¶ 141 & n. 395.¹⁵

¹⁵ Since the *TRRO*, CLECs have continued in full force to shift from ILEC entrance facilities, either through self-provisioning or, more commonly, by obtaining a cross-connect

2. The FCC's non-impairment finding establishes that there is a competitive market for entrance facilities and thus no need to simulate competitive prices for those facilities through TELRIC rates. Indeed, applying TELRIC in a market that is competitive would undermine the very competition that the pricing methodology is meant to encourage when applied to bottleneck facilities.

Permitting CLECs to obtain entrance facilities at TELRIC rates would embrace a policy of long-term dependence on ILECs' facilities at below-cost prices – prices designed to apply solely to network elements CLECs cannot build or obtain from other sources.¹⁶ It would have the effect of suppressing competition where the FCC has found it already exists. That is, if the prices that apply to bottleneck facilities were continued for entrance facilities, the CLECs and other providers that have been supplying entrance facilities would have difficulty competing with those prices and, over time, could have no choice but to

within an ILEC's central office that is linked to a transmission facility purchased from a competitive provider. Many competitive providers are established in this business. For example, Zayo Group provides fiber alternatives to ILEC entrance facilities in approximately 150 markets in 30 states and the District of Columbia. Regional providers also are major competitive players in the market for entrance facilities. DukeNet Communications, FPL FiberNet, and DeltaCom's Interstate FiberNet, for example, provide these facilities even in small markets and low-density communities. These providers advertise their network facilities on their websites.

¹⁶ See *Verizon*, 535 U.S. at 510, n. 27; *Local Competition Order*, ¶ 702.

stop supplying.¹⁷ These providers would have no economically rational incentive to focus their resources and energy on investing in facilities and producing the technological innovations and consumer benefits the Act is designed to foster.¹⁸

Similarly, CLECs that have not yet invested in their own facilities would be less likely to do so if regulated prices were available in a competitive market. Any rational carrier would have to think twice about putting its capital at risk to build a network element if a below-cost leasing option were available.¹⁹

¹⁷ *Michigan Bell Telephone Co. v. Covad Communications Co.*, 597 F.3d 370, 373-74 & n.4, 386 (6th Cir. 2010).

¹⁸ See *Local Competition Order* ¶¶ 125-39.

¹⁹ See *USTA I*, 290 F.3d at 424, 427 (“If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines.”); *Verizon New England, Inc. v. Maine Pub. Utils. Comm’n*, 509 F.3d 1, 9 (1st Cir. 2007) (Boudin, C.J.), *on denial of reh’g*, 509 F.3d 13 (1st Cir. 2007) (per curiam) (“[M]aking a monopolist share ... ‘essential facilities’ can promote competition; but it can also retard investment, handicap competition detrimentally, and discourage alternative means of achieving the same result that could conceivably enhance competition....”); *AT&T Commc’ns of Ill., Inc. v. Ill. Bell Tel.*, 349 F.3d 402, 404 (7th Cir. 2003) (“Prices for unbundled elements affect not only the allocation of income among producers but also new investment and innovation: if the price to rivals is too low, they won’t build their own plant (why make capital investments when you can buy for less, one unbundled element at a time?), and the incumbents won’t maintain or upgrade their facilities (why make costly capital investments if you have to sell local loops to rivals for less than it costs to produce them?)”).

For these reasons, the FCC itself has emphasized that market prices must prevail when there is a competitive supply of a network element, and that it would be “counter-productive” to use TELRIC prices in this circumstance because those prices are designed, “at best” to merely “reflect the pricing of a competitive market.”²⁰ Consistent with this pronouncement, federal courts have uniformly ruled that attempts by state commissions to apply TELRIC prices to non-impaired network elements violate the policies underlying the Act and are prohibited.²¹ And precisely the same logic applies to efforts by state commissions and others to obtain entrance facilities at TELRIC rates.

In sum, the Act’s ultimate objective is to move the telecommunications industry to competitive markets in which CLECs and ILECs invest, innovate and engage in facilities-based competition. That

²⁰ *TRO* ¶ 651 (emphasis added).

²¹ See *Qwest Corp.*, 567 F.3d at 1115-16 (state public utilities commissions lack authority under Section 271 to set cost-based pricing schemes); *Illinois Bell Telephone Co., Inc.*, 548 F.3d at 613 (“while network services provided by incumbent local exchange carriers that are necessary to enable a competing carrier to provide service are to be priced at cost, any additional network services that a Bell operating company (that wants to provide long-distance service) must provide unbundled access to can be priced at the market price”). *Verizon New England, Inc.*, 509 F.3d at 9 (“one issue is whether the states can require that section 271 elements be priced at TELRIC rates. The FCC orders provide carriers the authority to charge the potentially higher just and reasonable rates, in order to limit subsidization and to encourage investment by the competitors. To allow the states to require the lower TELRIC rates directly conflicts with, and undercuts, the FCC’s orders”).

objective can only be achieved by removing regulatory controls, including the requirement of unbundling at TELRIC rates, when there is no longer competitive impairment for network elements. Perpetuating TELRIC rates for entrance facilities, as petitioners request, would undermine facilities-based competition, reduce innovation, and deny consumers the full benefits of a competitive market.

3. Petitioners do not offer any persuasive policy reasons in support of their attempt to obtain entrance facilities at TELRIC rates and fail to reconcile the clash between their position and the Act's policies. Instead, they rely on an implausible reading of words in FCC orders. In claiming that the duty in § 251(c)(2) to “provide . . . interconnection” includes a requirement to lease a transport facility spanning the distance between two networks, petitioners do not address the fact that the FCC's definition of “interconnection” expressly excludes “transport.”²² 47 C.F.R. § 51.5; AT&T Br. at 27. Related to this oversight, petitioners also fail to recognize that there is a fundamental difference between entrance facilities and the “interconnection facilities” that incumbents provide under § 251(c)(2).

As the Sixth Circuit explained, entrance facilities span the entire distance between a CLEC's

²² Section 251(c)(2) requires incumbents to “provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent] local exchange carrier's network . . . at any technically feasible point within the [incumbent] carrier's network.” 47 U.S.C. § 251(c)(2).

switch and an ILEC's switch, which can be many miles.²³ By contrast, interconnection facilities are equipment within an ILEC's central office to which the competitor's entrance facility attaches.²⁴ ILECs perform a variety of tasks within their central offices, including providing cross-connect cables and conduit, to accommodate the interconnection of CLECs' entrance facilities. This equipment used to interconnect entrance facilities – which generally are provided at TELRIC prices and would continue to be under the Sixth Circuit's ruling – is distinct from the entrance facilities themselves.

This distinction directly undercuts petitioners' attempt to obtain entrance facilities at TELRIC rates. As demonstrated above, the FCC has found conclusively that entrance facilities are available from multiple sources and that there is a competitive market for them. By contrast, competitive markets do not exist for the interconnection facilities used to attach entrance facilities to ILECs' networks, because those facilities are contained entirely within the ILECs' central offices. Petitioners' position blurs these critical differences between entrance facilities and “interconnection facilities.” The former are non-

²³ *Michigan Bell Telephone Co.*, 597 F.3d at 372 (“But, just to be clear, an “entrance facility” is really just a fancy name for a cable or wire used to transport calls from a CLEC switch to an ILEC switch, and this wire can be very short (if the two switches are close together), or it can be very long, stretching for blocks or even miles (if the switches are far apart), depending on the relative locations of the two switches”).

²⁴ *Michigan Bell Telephone Co.*, 597 F.3d at 373-74 & n.4, 386.

bottleneck facilities and, as such, should not be governed by TELRIC pricing.

B. The Act's Pricing Provision Confirms that Section 251(c)(2) does not Impose a Network Element Leasing Obligation

Petitioners' attempt to obtain entrance facilities at TELRIC rates also presumes incorrectly that the duty to interconnect established by § 251(c)(2) provides a means separate from § 251(c)(3) for CLECs to lease network elements. Nothing in § 251(c)(2) suggests that an ILEC's obligation to "provide . . . interconnection" includes a facilities leasing duty. Section 251(c)(2) only obligates ILECs to allow CLECs to connect their equipment to a point within the incumbent's network, not to lease any facilities. *See* AT&T Br. at 20-25.

This conclusion is also supported by 47 U.S.C. § 252(d)(1), which establishes the pricing standard for both the interconnection duty in § 251(c)(2) and the network unbundling duty in § 251(c)(3). Addressing pricing for the unbundling duty, § 252(d)(1) expressly applies to the "rate for [the] network elements" that ILECs must lease to CLECs. By contrast, addressing the interconnection duty, § 252(d)(1) applies to the "rate *for* the interconnection *of* facilities and equipment," without referring at all to rates for any facilities or equipment that ILECs are (in petitioners' view) required to lease to CLECs. This contrast further confirms that Congress did not intend in § 251(c)(2) to require ILECs to lease facilities and equipment,

and that the leasing obligation is contained only in § 251(c)(3).

Given the Act's clear distinction between the duty to lease network elements under §251(c)(3) and the obligation to "provide . . . interconnection" under §251(c)(2), it is not surprising that CLECs never claimed before the *TRO* that they had a right to lease entrance facilities under §251(c)(2). That argument came into fashion only after the FCC definitively ruled in the *TRRO* that ILECs are no longer required to provide entrance facilities under § 251(c)(3). As the timing suggests, this new argument was an opportunistic effort by some carriers to hang onto the below-cost TELRIC rates for entrance facilities that they had previously enjoyed.

In this regard, the CLECs' strategy was no different from their attempts to persuade state commissions and courts to apply TELRIC pricing to other network elements that the FCC has removed from the unbundling requirements of § 251(c)(3) but which certain ILECs (the regional Bell Operating Companies) are still required to provide under § 271 of the Act. While a few state commissions accepted that argument, the five courts of appeals that considered the claim unanimously rejected it.²⁵

Writing for the Seventh Circuit in *Illinois Bell*, Judge Posner responded to this claim by emphasizing that consistent with the Act's objective

²⁵ See, e.g., *Qwest Corp.*, 567 F.3d 1109, 1116 (9th Cir. 2009) (collecting cases); *Illinois Bell Tel. Co.*, 548 F.3d at 612-13 (Posner, J.); *Verizon New England, Inc.*, 509 F.3d at 7-9.

of creating competitive markets, CLECs “are allowed to demand access at a price below the market price to [incumbent] carriers’ facilities only to the extent necessary to prevent those carriers from using their facilities to throttle their competitors.” *Illinois Bell*, 548 F.3d at 611-12. It is therefore only “bottleneck facilities,” he explained, that CLECs can demand access to at below-market rates. *Id.* at 612. Other non-bottleneck network elements to which an incumbent provides access “can be priced at the market price.” *Id.* at 613.

The First Circuit, per then-Chief Judge Boudin, similarly found that for network elements the FCC has removed from the unbundling requirements of §251(c)(3), incumbents have “the authority to charge the potentially higher just and reasonable rates, in order to limit subsidization and to encourage investment by the competitors.” *Verizon New England, Inc.*, 509 F.3d at 9. The court ruled that “requir[ing] the lower TELRIC rates directly conflicts with, and undercuts, the FCC’s orders” and is preempted.” *Id.*

Here, just as in *Illinois Bell*, *Verizon New England*, and the similar decisions from the other courts of appeals, this case is, at bottom, an attempt by CLECs to obtain at a below- market rate a network element for which the FCC has found no impairment. As these decisions hold, that result would conflict with federal law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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