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Nos. 10-313 & 10-329

IN THE
Supreme Court of the United States

TALK AMERICA INC.
AND
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, ET AL.,
Respondent.

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

**BRIEF FOR VERIZON AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT
MICHIGAN BELL TELEPHONE COMPANY**

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FCC MATERIALS

FCC, *Local Telephone Competition: Status as of December 31, 2005* (July 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266595A1.pdf.......... 12

FCC, *Local Telephone Competition: Status as of June 30, 2006* (Jan. 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270133A1.pdf.......... 13

FCC, *Local Telephone Competition: Status as of December 31, 2008* (June 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-299052A1.pdf.......... 7

TABLE OF AUTHORITIES—Continued

Page(s)

FCC, *Local Telephone Competition: Status as of December 31, 2009* (Jan. 2011), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0111/DOC-304054A1.pdf 7, 12, 13

Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, 25 FCC Rcd. 11407 (2010) 9

Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corp.*, 22 FCC Rcd. 5662 (2007) 9

Memorandum Opinion and Order, *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules*, 22 FCC Rcd. 5207 (2007) 9

Memorandum Opinion and Order, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona MSA*, 25 FCC Rcd. 8622 (2010) 11

Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp.*, 20 FCC Rcd. 18290 (2005) 8

Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc.*, 20 FCC Rcd. 18433 (2005) 8-9

TABLE OF AUTHORITIES—Continued

Page(s)

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), *aff'd*, *Covad Communications Co.* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006)...................... 5, 13

Report and Order, *Preserving the Open Internet*, 25 FCC Rcd. 17905 (2010).................................. 10

PUBLIC UTILITIES COMMISSION MATERIALS

Arbitration Award, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment*, No. 05-887-TP-UNC, 2005 WL 3018712 (Ohio PUC Nov. 9, 2005) 12

Opinion and Order, *Petition of Verizon Pennsylvania Inc. and Verizon North Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Pennsylvania Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, No. P-00042092, 2006 Pa. PUC LEXIS 58 (Penn. PUC July 21, 2006)... 12

TABLE OF AUTHORITIES—Continued

Page(s)

Opinion, *Petition of Verizon New England, Inc., d/b/a/ Verizon Vermont, for Arbitration of an Amendment to Interconnection Agreements*, No. 6932, 2006 Vt. PUC LEXIS 27 (Vt. Pub. Serv. Bd. Feb. 27, 2006) 13

Order, *Complaint, Nevada Bell Telephone Company, d/b/a/ SBC Nevada versus Various Competitive Providers of Telecommunications Services in Nevada to Resolve Dispute on Conforming Nevada Interconnection Agreements to Governing Law Under the Telecommunications Act of 1996*, No. 04-9019, 2005 WL 3610617 (Nev. PUC Nov. 16, 2005) 13

OTHER AUTHORITIES

Atlantic-ACM, *Wireless Wins, Wireline Wanes: U.S. Telecom Wired and Wireless Sizing and Share 2010-2015* (2010) 8

Barden, David W., et al., Banc of America Securities, *Wireline Services Pricing Update* (Oct. 8, 2004) 8

Barden, David W., et al., Bank of America/Merrill Lynch, *Battle for the Bundle: Cable Keeps the Pressure on Telco* (July 20, 2010) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Blumberg, Stephen & Julian Luke, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2010* (Dec. 21, 2010), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201012.pdf 9, 10

Brogan, Patrick & Evan Leo, *High-Capacity Services: Abundant, Affordable, and Evolving* (July 2009), *available at* http://www.ustelecom.org/uploadedFiles/News/News_Items/High.Capacity.Services.pdf 5

Clearwire Press Release, *Clearwire Reports Record Fourth Quarter and Full Year 2010 Growth* (Feb. 17, 2011), *available at* http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1530258&highlight= 11

CTIA, *Wireless Quick Facts*, *available at* http://www.ctia.org/advocacy/research/index.cfm/aid/10323........................ 9

Flannery, Simon, et al., Morgan Stanley, *Telecom Services: Wireless Substitution Reaches 26.6% in 1H10, Doubles Fixed-Line Only* (Jan. 30, 2011)........................ 10

NCTA, *Cable Phone Customers 1998-2009*, *available at* http://www.ncta.com/Stats/CablePhoneSubscribers.aspx (last visited Mar. 7, 2011) 7

TABLE OF AUTHORITIES—Continued

Page(s)

NCTA, *Industry Data: Operating Metrics* (as of September 2010), *available at* http://www.ncta.com/Statistics.aspx 7

PAETEC Press Release, *PAETEC Completes Acquisition of Cavalier Telephone* (Dec. 6, 2010), *available at* http://www.paetec.com/about-us/media-center/press-releases/PAETEC-Completes-Acquisition-of-Cavalier-Telephone.html 5

PAETEC Press Release, *PAETEC Holding Corp. Announces 2010 Full Year and Fourth Quarter Results* (Feb. 17, 2011), *available at* http://www.paetec.com/about-us/media-center/press-releases/PAETEC-Holding-Corp-Announces-2010-Full-Year-and-Fourth-Quarter-Results.html 5

Rodriguez, Paul, *A Strong Showing in Phone Service Competition*, CableTechTalk Blog (Jan. 13, 2011), *available at* http://www.cabletechtalk.com/digital-phone/2011/01/13/a-strong-showing-in-phone-service-competition/ 8

Vonage Press Release, *Vonage Crosses 400,000 Line Mark* (Jan. 5, 2005), *available at* http://pr.vonage.com/releasedetail.cfm?ReleaseID=194545 10

TABLE OF AUTHORITIES—Continued

Page(s)

Vonage Press Release, *Vonage Holdings Corp. Reports Fourth Quarter and Full Year 2010 Results* (Feb. 15, 2011), *available at* http://pr.vonage.com/releasedetail.cfm?ReleaseID=550145 10

INTEREST OF AMICUS CURIAE[1]

The Verizon telephone companies ("Verizon") filing this amicus curiae brief are incumbent local exchange carriers ("ILECs") in more than 20 states. Therefore, like Respondent Michigan Bell Telephone Company, d/b/a AT&T Michigan ("AT&T"), Verizon is subject to 47 U.S.C. § 251(c)(2). Verizon has opposed efforts by competitive local exchange carriers ("CLECs") to convince state regulators, such as the Michigan commission, that section 251(c)(2) requires ILECs to provide their competitors with entrance facilities at extremely low rates determined using a methodology designed by the Federal Communications Commission ("FCC") known by the acronym "TELRIC." Verizon has a significant interest in the proper interpretation of its obligations under 47 U.S.C. § 251(c)(2), and this decision will have a direct effect on Verizon's operations as an ILEC throughout the country.

SUMMARY OF ARGUMENT

Verizon agrees with AT&T that section 251(c)(2) does not require incumbents to provide competitors with entrance facilities at TELRIC rates and that the Sixth Circuit accordingly should be affirmed. Petitioners and their *amici* seek to portray the availability of entrance facilities at TELRIC rates as a crucial build-

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[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Verizon or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this amicus curiae brief have been filed with the Court.

ing block for local telephone competition. But that could not be further from the truth. In fact, competition for telecommunications services is flourishing today not because of entities that use incumbent-provided entrance facilities obtained at TELRIC rates, but because of intermodal, facilities-based competitors such as cable companies, wireless carriers, and Voice over Internet Protocol ("VoIP") providers. Carriers that rely on TELRIC-priced incumbent facilities are at best fringe competitors, and, even as to them, the FCC has previously found that they can economically self-provide entrance facilities or obtain them from third parties. Thus, the claim that competition and consumers will be harmed if entrance facilities are not made available at artificially low TELRIC prices is incorrect.

ARGUMENT

For the reasons set forth by AT&T, the Sixth Circuit correctly held that neither section 251(c)(2) nor any FCC order implementing that provision requires incumbent carriers to provide entrance facilities to competitors at TELRIC rates, and the arguments to the contrary by Petitioners and their *amici* are erroneous. As set forth below, that is confirmed by the fact that TELRIC-priced entrance facilities are not needed to fulfill the primary purpose of section 251—namely, to encourage local telephone competition.

I. REQUIRING INCUMBENT CARRIERS TO PROVIDE ENTRANCE FACILITIES AT TELRIC RATES UNDER SECTION 251(c)(2) WOULD NOT PROMOTE COMPETITION

Petitioners and their *amici* assert that section 251(c)(2) should be interpreted to impose a duty on incumbents to provide entrance facilities at TELRIC rates because that would serve the Act's purpose of encouraging the development of competition. But mar-

ketplace evidence demonstrates that incumbent-provided entrance facilities are not needed to foster competition.

1. In seeking to show that the Sixth Circuit's decision would harm competition, Petitioners and their *amici* substantially overstate what is at issue in this case. The Michigan commission's suggestion that the Sixth Circuit's decision requires competitors to "recreate an entire network" (Michigan Br. 32) is wrong. This case involves only the transport facility that connects two networks, not any of the other facilities that comprise a network. Competitors that choose not to engage in facilities-based competition can still lease unbundled network elements from incumbents under section 251(c)(3), and they have the right to resell incumbents' retail telecommunications services under section 251(c)(4).

Likewise, Sprint's paean to the importance of interconnection for competing carriers (Sprint Br. 25-26) misses the point. The right to interconnect is not in dispute here. Wholly apart from any alleged obligation to provide entrance facilities at TELRIC rates, *all* carriers are obligated "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). And incumbents in particular must "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." *Id.* § 251(c)(2).

Petitioners and their *amici* nevertheless suggest that, absent a requirement for incumbents to provide entrance facilities at TELRIC rates under section

251(c)(2), competing carriers will be unable to interconnect with incumbent carriers because incumbents will be able to unilaterally raise entrance facility rates to supracompetitive levels. Sprint Br. 28; *id.* at 15 ("The court of appeals' approach would run counter to the objectives of the Telecommunications Act, because it would permit incumbents unilaterally to exact higher prices for facilities used for interconnection[.]"); CPUC Br. 15 (Sixth Circuit decision allows incumbents to "charge competition-dampening rates" (internal quotation marks omitted)).

But this is incorrect for at least two reasons. First, incumbents provide entrance facilities at tariffed rates, which are subject to regulatory oversight for compliance with the statutory "just and reasonable" standard at the federal level, 47 U.S.C. § 201(b), and with similar standards at the state level, *see, e.g.*, Mass. G.L. c. 159 § 14. As a result, incumbent carriers do not have unfettered discretion to raise rates for entrance facilities, and federal and state regulators retain the authority to address claims that incumbents are raising such rates to unreasonable levels.

Second, as the FCC already found when it eliminated incumbents' obligation to provide entrance facilities as unbundled network elements, competing carriers are *not* captive to incumbents for obtaining these facilities. Entrance facilities are nothing more than easily replicable high-capacity fiber optic cables that transport large amounts of traffic between two networks. They are "characterized by unique operational and economic characteristics" that "justify self-

deployment by a competitive LEC."[2] Moreover, competitors "increasingly rely[] on competitively provided entrance facilities," which "are widely available."[3] Indeed, at least 28 different competitors have deployed fiber in the top 50 metropolitan areas in the country, for a total of over one hundred thousand local route miles of fiber.[4] In fact, Petitioner Talk America's parent company, PAETEC, owns thousands of these fiber route miles,[5] and last month reported to investors its "robust fiber network expansion."[6] Not surprisingly in light of this wide availability of fiber, the FCC has pointed to evidence showing that competitors often migrate from incumbent entrance facilities to those provided by other parties.[7] Verizon's own recent experi-

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[2] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd. 2533, ¶¶ 138, 141 (2005) ("*UNE Remand Order*"), *aff'd*, *Covad Communications Co.* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[3] *Id.* ¶¶ 139, 141.

[4] *See* Brogan & Leo, *High-Capacity Services: Abundant, Affordable, and Evolving* 24 (July 2009), *available at* http://www.ustelecom.org/uploadedFiles/News/News_Items/High.Capacity.Services.pdf.

[5] PAETEC Press Release, *PAETEC Completes Acquisition of Cavalier Telephone* (Dec. 6, 2010), *available at* http://www.paetec.com/about-us/media-center/press-releases/PAETEC-Completes-Acquisition-of-Cavalier-Telephone.html.

[6] PAETEC Press Release, *PAETEC Holding Corp. Announces 2010 Full Year and Fourth Quarter Results* (Feb. 17, 2011), *available at* http://www.paetec.com/about-us/media-center/press-releases/PAETEC-Holding-Corp-Announces-2010-Full-Year-and-Fourth-Quarter-Results.html.

[7] *UNE Remand* Order ¶¶ 138-139, 141.

ence as both an incumbent and a competitive LEC confirms that competitors often self-provision entrance facilities or obtain them from third parties instead of leasing them from incumbents at tariffed rates.

Petitioners and their *amici* claim that the FCC's determination is irrelevant here because it was made in the context of evaluating the incumbent's duty to provide unbundled network elements under section 251(c)(3), not what they emphasize is the distinct interconnection duty under section 251(c)(2). *See* Gov't Br. 27-30; Comptel Br. 5-9, 13-14; Sprint Br. 16-17. But the FCC's conclusion that competitors are not impaired without access to entrance facilities as an unbundled network element rested on the *factual* finding that competitors can and do self-provide those facilities or obtain them from third parties. Because, as Comptel itself notes (at 13), the *same* physical entrance facility is implicated under both section 251(c)(2) and section 251(c)(3), the FCC's factual finding concerning the ready availability of entrance facilities remains true regardless of the purpose for which the competitor seeks to use those facilities.

In short, competing carriers have numerous options for obtaining the facilities they need to interconnect with incumbent networks apart from entrance facilities provided by incumbents. And rates for incumbent-provided entrance facilities are, in all events, subject to state and federal regulation to ensure they are provided on just and reasonable terms. Thus, the specter of unilateral entrance facility price increases by incumbents is no threat to competition at all.

2. Marketplace evidence confirms that entrance facilities at regulated TELRIC rates are not necessary for competition to thrive. In fact, competition is flour-

ishing today. Crucially, that competition is coming overwhelmingly from facilities-based providers that do not rely on entrance facilities provided by incumbents, including intermodal providers such as cable companies, wireless carriers, and VoIP providers that offer service over broadband connections. As a result of such intermodal competition, the number of incumbent traditional switched access lines declined by more than *10 percent* in the space of just *one year* from December 2008 to December 2009.[8]

Cable. Customers have been migrating rapidly from traditional wireline services offered by incumbent telephone companies to cable providers. As of September 2010, there were approximately 23.5 million cable voice subscribers, an increase of 18 percent over the 19.6 million subscribers at the end of 2008, and nearly four times the 5.9 million subscribers at the end of 2005.[9] Cable companies currently provide phone service to about one in every four wireline phone house-

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[8] FCC, *Local Telephone Competition: Status as of December 31, 2009*, at 6, fig. 4 (Jan. 2011) ("*2009 Competition Report*"), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0111/DOC-304054A1.pdf; FCC, *Local Telephone Competition: Status as of December 31, 2008*, at 5, fig. 3 (June 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-299052A1.pdf (number of incumbent switched access lines went from 117,975,000 as of December 31, 2008, to 105,826,000 as of December 31, 2009).

[9] NCTA, *Industry Data: Operating Metrics* (as of September 2010), *available at* http://www.ncta.com/Statistics.aspx (citing SNL Kagan); NCTA, *Cable Phone Customers 1998-2009*, *available at* http://www.ncta.com/Stats/CablePhoneSubscribers.aspx (last visited Mar. 7, 2011).

holds in the U.S.[10] One study predicts that by 2015, cable companies will have captured more than 45 percent of revenues from consumers for wireline voice services.[11] Vigorous competition between cable companies and incumbent telephone companies has resulted in lower prices for consumers. Between the fourth quarter of 2004 and the second quarter of 2010, the average monthly price of unlimited local and long-distance voice service fell by 25 percent for telephone companies and 20 percent for cable operators.[12]

Wireless. As the FCC has repeatedly found, "increasing numbers of mass market customers are subscribing to mobile wireless services," and "growing numbers of subscribers in particular segments of the mass market are choosing mobile wireless service in lieu of wireline local services."[13] As of June 2010, wire-

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[10] Rodriguez, *A Strong Showing in Phone Service Competition*, CableTechTalk Blog (Jan. 13, 2011), *available at* http://www.cabletechtalk.com/digital-phone/2011/01/13/a-strong-showing-in-phone-service-competition/.

[11] *See* Atlantic-ACM, *Wireless Wins, Wireline Wanes: U.S. Telecom Wired and Wireless Sizing and Share 2010-2015*, at 20 (2010).

[12] *See* Barden et al., Bank of America/Merrill Lynch, *Battle for the Bundle: Cable Keeps the Pressure on Telco* 14, tbl. 9 (July 20, 2010) (voice component of triple-play packages cost $40.19 per month for telephone companies and $35.33 for cable operators); Barden et al., Banc of America Securities, *Wireline Services Pricing Update* 8 (Oct. 8, 2004) (in 4Q 2004, voice component of triple-play packages cost $53.72 per month for telephone companies and $44.24 for cable operators).

[13] Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp.*, 20 FCC Rcd. 18290, ¶¶ 89-90 (2005); Memorandum Opinion and Order, *Verizon Communications Inc. and*

less carriers had a total of 292.8 million subscribers nationwide, or 93 percent of the U.S. population.[14] Approximately 99.6 percent of the U.S. population is served by one or more mobile voice providers, with 98.6 percent served by at least two and 95.8 percent by at least three.[15]

Consumers have responded by increasingly substituting wireless voice service in place of wireline service.[16] As of June 2010, 42.5 percent of American households had either abandoned landline service altogether or still had that service but barely used it.[17] More than a quarter of American homes—26.6 percent—had completely "cut the cord" by June 2010, with another 15.9 percent using wireless phones for all, or

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MCI, Inc., 20 FCC Rcd. 18433, ¶¶ 90-91 (2005); *see also* Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corp.*, 22 FCC Rcd. 5662, ¶¶ 95-96 (2007).

[14] CTIA, *Wireless Quick Facts*, *available at* http://www.ctia.org/advocacy/research/index.cfm/aid/10323.

[15] Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, 25 FCC Rcd. 11407, 11414 (2010).

[16] Memorandum Opinion and Order, *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules*, 22 FCC Rcd. 5207, ¶ 38 (2007) ("[C]onsumers are increasingly finding that [wireless and wireline] services serve as substitutes.").

[17] Blumberg & Luke, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2010*, at 2, 4 (Dec. 21, 2010), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201012.pdf.

almost all, of their calls.[18] Cord-cutting continued to grow in the second half of 2010, increasing to 29 percent of all households by the end of 2010, with analysts projecting that figure would rise to as much as 55 percent by 2015.[19] In sum, wireless substitution is increasing "at a remarkable rate," driven by more competitive pricing, better devices, macro pressures, and changes in consumer preference, particularly among younger users.[20]

VoIP. As the FCC has recognized, "over-the-top" VoIP services—which are offered for use over a consumer's broadband Internet connection—"are increasingly being used as a substitute for traditional telephone service," and such services "contribute to the marketplace discipline of voice telecommunications services."[21] Vonage, the largest over-the-top VoIP provider, has about 2.4 million subscribers, a more than 600-percent increase from December 2004.[22] Clearwire—a wireless broadband provider that also offers

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[18] *See id.* tbls. 1 & 5.

[19] *See* Flannery et al., Morgan Stanley, *Telecom Services: Wireless Substitution Reaches 26.6% in 1H10, Doubles Fixed-Line Only* 1 (Jan. 30, 2011).

[20] *Id.* at 3 (noting that about 51 percent of those 25-29 years old have cut the cord).

[21] Report and Order, *Preserving the Open Internet*, 25 FCC Rcd. 17905, ¶ 125 (2010).

[22] *See* Vonage Press Release, *Vonage Holdings Corp. Reports Fourth Quarter and Full Year 2010 Results* (Feb. 15, 2011), *available at* http://pr.vonage.com/releasedetail.cfm?ReleaseID=550145; Vonage Press Release, *Vonage Crosses 400,000 Line Mark* (Jan. 5, 2005), *available at* http://pr.vonage.com/releasedetail.cfm?Release ID=194545.

VoIP service over its 4G WiMAX network—already has approximately 1.1 million retail subscribers, and its network reached 119 million people by the end of 2010.[23] Providers such as Skype and Google also have seen skyrocketing numbers of VoIP users.

The upshot is that most competition for voice services is coming from intermodal, facilities-based entities that do not rely on incumbent, TELRIC-priced entrance facilities. Thus, any implication that TELRIC-priced entrance facilities are needed for competition to develop is contrary to marketplace reality. Indeed, the FCC itself has recognized that providers that rely on incumbent facilities in the form of unbundled network elements are little more than "fringe" competitors.[24] Even if some of those providers have business plans that depend on access to TELRIC-priced entrance facilities, the role of regulation is not to provide special protections to a preferred class of "fringe" competitors. Instead, the goal of any such regulation should be "the protection of competition not competitors."[25] And the evidence demonstrates that the absence of TELRIC-priced entrance facilities does not harm *competition*.

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[23] *See* Clearwire Press Release, *Clearwire Reports Record Fourth Quarter and Full Year 2010 Growth* (Feb. 17, 2011), *available at* http://investors.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1530258&highlight=.

[24] Memorandum Opinion and Order, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona MSA*, 25 FCC Rcd. 8622, ¶ 80 (2010).

[25] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphases added; internal quotation marks omitted).

3. That conclusion is confirmed by the experience of states that have (rightly) concluded that section 251(c)(2) does not require incumbents to lease entrance facilities to competitors at TELRIC rates for purposes of interconnection. For example, in November 2005, the Ohio commission reached the same decision as the Sixth Circuit,[26] and competition in Ohio subsequently increased. The most recent data from the FCC show that the percentage of customer lines in Ohio served by a carrier other than the incumbent local exchange carrier (not including wireless carriers) almost doubled from 15 percent in December 2005 to 29 percent in December 2009.[27] Likewise, the July 2006 decision in Pennsylvania holding that entrance facilities should not be available at TELRIC prices[28] did not squelch competition: the percentage of non-ILEC lines stood at 20 percent as of June 2006 and then grew to 32 percent by

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[26] Arbitration Award, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment*, No. 05-887-TP-UNC, 2005 WL 3018712, at 22-23 (Ohio PUC Nov. 9, 2005).

[27] *2009 Competition Report*, tbl. 8; FCC, *Local Telephone Competition: Status as of December 31, 2005*, tbl. 8 (July 2006) ("*2005 Competition Report*"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266595A1.pdf.

[28] Opinion and Order, *Petition of Verizon Pennsylvania Inc. and Verizon North Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Pennsylvania Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, No. P-00042092, 2006 Pa. PUC LEXIS 58, at *16 (Penn. PUC July 21, 2006).

December 2009[29]—again, without even counting wireless. A similar pattern is evident in other states.[30]

* * *

The evidence therefore demonstrates that local telephone competition is flourishing without the availability of entrance facilities at TELRIC rates under section 251(c)(2). Indeed, because competitors have readily available alternatives to incumbent entrance facilities, requiring incumbents to make such facilities available at TELRIC rates creates a "disincentive to competitive LECs' infrastructure investment," which "hinder[s] the development of genuine, facilities-based competition" that the 1996 Telecommunications Act sought to foster. *UNE Remand Order* ¶ 218; *see also Illinois Bell Tel. Co.* v. *Box*, 548 F.3d 607, 610 (7th Cir.

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[29] *2009 Competition Report*, tbl. 8; FCC, *Local Telephone Competition: Status as of June 30, 2006*, tbl. 8 (Jan. 2007) ("*June 2006 Competition Report*"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270133A1.pdf.

[30] For example, in Nevada the percentage of non-incumbent lines (again, not including wireless) grew dramatically from 13 percent to 32 percent following the state commission's November 2005 decision not to price entrance facilities at TELRIC. Order, *Complaint, Nevada Bell Telephone Company, d/b/a/ SBC Nevada versus Various Competitive Providers of Telecommunications Services in Nevada to Resolve Dispute on Conforming Nevada Interconnection Agreements to Governing Law Under the Telecommunications Act of 1996*, No. 04-9019, 2005 WL 3610617, at *5 (Nev. PUC Nov. 16, 2005); *2009 Competition Report*, tbl. 8; *2005 Competition Report*, tbl. 8. Vermont saw a similar increase, from 12 to 27 percent. Opinion, *Petition of Verizon New England, Inc., d/b/a/ Verizon Vermont, for Arbitration of an Amendment to Interconnection Agreements*, No. 6932, 2006 Vt. PUC LEXIS 27, at *506-507 (Vt. Pub. Serv. Bd. Feb. 27, 2006); *2009 Competition Report*, tbl. 8; *June 2006 Competition Report*, tbl. 8.

2008) ("as long as requesting carriers rely on network services supplied by incumbent local exchange carriers, competition is hampered"); *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) (1996 Act was intended "to stimulate competition—preferably genuine, facilities-based competition"). Thus, far from promoting competition as regulatory proponents claim, incorrectly interpreting section 251(c)(2) as requiring the provision of entrance facilities at TELRIC rates would discourage competition and harm consumer welfare.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2011