No. 10-329

In the Supreme Court of the United States

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

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

REPLY BRIEF

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INTRODUCTION

According to the FCC, § 251(c)(2) of the Telecommunications Act means precisely what Petitioners have argued and competitive carriers have long understood: that incumbents have a broad duty to provide interconnection at TELRIC rates, and that duty encompasses entrance facilities. FCC Br. at 12–13 ("Under the [TRRO], an incumbent must make entrance facilities available to a competitor at cost-based rates when the competitor seeks to use those facilities to interconnect with the incumbent's network."). The FCC's position is dispositive of the question presented, because under this Court's precedent, the TRRO is a legislative rule entitled to *Chevron* deference, and the view the FCC sets forth in its amicus brief is entitled to *Auer* deference. Indeed, given the almost absurdly technical nature of the underlying issue, deference to the administrative agency's views should be at its peak.

Even absent deference, the FCC's and Petitioners' reading of § 251(c)(2) is supported by the statutory language and the FCC's regulations and legislative orders. AT&T's contrary arguments ignore dispositive language from all three of those sources. For example, and as discussed in more detail below:

- AT&T notes that entrance facilities are a type of dedicated transport, then cites 47 C.F.R. § 51.5 for the proposition that "interconnection" excludes "the transport and termination of traffic." But § 51.5 relates to an incumbent's entirely separate obligation to price the transport and termination of traffic *beginning* at the point

of interconnection and ending at the recipient's premises. 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.701. Section 51.5 does not purport to restrict the definition of "interconnection" to non-transport functions, nor could it.

- The FCC does not require an incumbent carrier to provide "miles and miles" of interconnection facilities. For example LCO ¶ 553 delegates to state commissions the authority to decide "reasonable" and "appropriate" distances for a proposed meet-point interconnection where the FCC requires construction of new facilities. Br. App. 27a.

- An incumbent's duty to "provide interconnection" is not limited to providing equipment "inside incumbents' central offices." AT&T can only take that position by improperly paraphrasing the key LCO language on which AT&T relies. There is also no language in § 251(c)(2) even suggesting that the duty to "provide . . . interconnection" excludes a duty to lease existing interconnection facilities at TELRIC rates.

- And the fact that entrance facilities used for backhauling are not a market-entry impairment has nothing to do with § 251(c)(2) interconnection. For example, when wireless and cable companies seek to interconnect with AT&T customers, they

> have no need for backhauling. But if confronted with anti-competitive rate increases from AT&T, such companies will be forced to provide duplicate entrance facilities, precisely the result that Congress sought to avoid in enacting § 251(c)(2).

In the end, AT&T's arguments establish, at best, mere ambiguities in the statute and the orders. And that result leads right back to where the analysis began—that this Court should defer to the FCC's interpretation of the Telecommunications Act and the FCC's implementing regulations and orders. Petitioners respectfully request that the Court reverse the court of appeals.

REPLY ARGUMENT

I. Section 251(c)(2) of the Act and TRRO ¶ 140 require an incumbent carrier to provide a competitive carrier with entrance facilities, at TELRIC rates, to the extent required for interconnection.

The logic supporting the FCC's views is simple. Section 251(c)(2) requires an incumbent carrier to "provide . . . interconnection" to a competitive carrier "at any technically feasible point within the carrier's network" and at TELRIC rates. 47 U.S.C. § 251(c)(2); 47 U.S.C. § 252(d)(1). "Interconnection" is a "linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5; Br. App. 1a. An entrance facility physically links two carriers' networks. TRRO ¶ 136; Br. App. 8a (entrance facilities are "the transmission facilities that connect competitive LEC networks with incumbent LEC networks"). Accordingly, when a

competitive carrier uses an entrance facility for the mutual exchange of traffic, the entrance facility serves an interconnection function, and § 251(c)(2) places on the incumbent the burden of providing the facility and charging for its use at TELRIC rates. Accord FCC Br. at 12–13 ("Under the [TRRO], an incumbent must make entrance facilities available to a competitor at cost-based rates when the competitor seeks to use those facilities to interconnect with the incumbent's network.").

The FCC confirmed this understanding in paragraph 140 of the TRRO, which states:

> 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, 20 FCC Rcd. at 2611 (¶ 140); Br. App. 15a (emphasis added).]

As the FCC explained in its amicus brief, its orders "use the term 'interconnection facility' to refer to an entrance facility that is being used for interconnection." FCC Br. at 16. Accordingly, the last sentence of ¶ 140 makes clear that "competitive LECs will have access to [entrance] facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." And 10 of the 12 circuit judges who have examined the

question agree. *Illinois Bell Tel. Co.* v. *Box*, 526 F.3d 1069, 1072 (7th Cir. 2008) (Easterbrook, J.) ("What the FCC said in ¶ 140 is that ILECs must allow use of entrance facilities for interconnection at 'cost-based rates.'"); *Southwestern Bell Tel. L.P.* v. *Missouri Public Serv. Comm'n*, 530 F.3d 676, 683–84 (8th Cir. 2008) ("If a CLEC needs entrance facilities to interconnect with an ILEC's network, it has the right to obtain such facilities from the ILEC."); *Pacific Bell Tel. Co.* v. *California Pub. Utils. Comm'n*, 621 F.3d 836, 846 (9th Cir. 2010) (the FCC has interpreted its orders "to allow competitive LECs to lease entrance facilities or 'transmission links' at TELRIC rates for the purpose of achieving interconnection"); Pet. App. 36a ("incumbents must lease their entrance facilities to competitors at cost-based rates when they use the facilities for interconnection") (Sutton, J., dissenting).

AT&T and its *amici* argue that deference to the FCC is unwarranted because the FCC's views conflict with the statute, regulations, and orders. But they can make that argument only by ignoring dispositive language in those very same sources.

A. "Interconnection" facilities can be used for transport under the FCC's rules.

AT&T's most superficially appealing argument is that an entrance facility is a type of dedicated transport, and the FCC has defined "interconnection" to *exclude* "the transport and termination of traffic." 47 C.F.R. § 51.5; Pet. App. 1a. Thus, AT&T argues, an entrance facility can never serve an interconnecting function. Resp. Br. at 26-28. AT&T's position represents a misunderstanding of the regulatory framework.

The FCC's use of the phrase "the transport and termination of traffic" in 47 C.F.R. § 51.5 relates to an incumbent's completely separate obligation, in 47 U.S.C. § 251(b)(5), to establish rate agreements "for the transport and termination of telecommunications." The FCC makes clear in 47 C.F.R. § 51.701 ("Scope of transport and termination pricing rules") that the phrase "transport and termination" refers to the incumbent's pricing for transporting traffic *from the point of interconnection*, across the incumbent's network, and to the end-office switch where the call is delivered to the recipient's premises. 47 C.F.R. § 51.701(c); Resp. App. 35a (defining transport as the transmission "from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party"); 47 C.F.R. § 51.701(d); Resp. App. 35a–36a (defining termination as the switching of traffic "at the terminating carrier's end office switch . . . and delivery of such traffic to the called party's premises").

In other words, the exclusionary language about transport in 47 C.F.R. § 51.5 is delineating two types of charges that an incumbent may assess a competitor for transmitting a call on the incumbent's network. See LCO ¶ 176 (explaining that § 251(c)(2) "refers only to the physical linking of two networks for mutual exchange of traffic" so that "[i]ncluding transport and termination of traffic within the meaning of section 251(c)(2) would result in reading out of the statute the duty of all LECs to establish 'reciprocal compensation arrangement for the transport and termination of telecommunications," under section 251(b)(5).").

The first type is the interconnection charge that all parties agree must be set at TELRIC rates under § 251(c)(2). The second type is the transmission charge that the incumbent assesses for moving the call from the interconnection point to the intended recipient under § 251(b)(5).

The regulation does not purport to restrict the definition of "interconnection" to non-transport functions, nor could it. "If the duty to provide 'interconnection' did not include any duty to provide *any* transport of calls, then § 251(c)(2) would be meaningless because incumbents could physically link networks with the competitive LEC but refuse to carry calls to the incumbent LEC's terminal customers, thus effectively locking the competitive LEC out of the market." *Pacific Bell*, 597 F.3d at 968 n.16. See also *CompTel* v. *FCC*, 117 F.3d 1068, 1072 (8th Cir. 1997) (explaining that the "LEC's duty is to provide interconnection for the facilities and equipment of the requesting carrier with the LEC's network," and the phrase "for the transmission and routing of telephone exchange service and exchange access" in § 251(c)(2) describes "what the interconnection, the physical link, would be used for."); *MCI MetroAccess Transmission Servs., Inc.* v. *Bellsouth Telecommcn's.*, 352 F.3d 872, 877 (4th Cir. 2003) (explaining that "the cost of interconnection" is "not the recurring cost of transport and termination of traffic."); see also FCC Br. at 3 n.1.

B. The FCC's interpretation of an incumbent's interconnection obligation does not require the incumbent to provide "miles and miles" of interconnection facilities.

AT&T and its amici repeatedly complain about having to pay for many "miles" of interconnection facilities. Res. Br. 21n.20. This is wrong for two reasons.

First, for the leasing obligation the incumbent's entrance facilities must already exist and the obligation is then to make them available at TELRIC rates. For leasing, there is *no* obligation to build new facilities to some remote location.

Second, even for the building of new facilties, the FCC has placed limits on an incumbent's interconnection obligations, specifically delegating to state commissions the authority to decide the "reasonable" and "appropriate" distance for a proposed meet-point interconnection, for example. LCO ¶ 553; Br. App. 28a ("Regarding the distance from an incumbent LEC's premises that an incumbent should be required to build out facilities for meet point arrangements, we believe that the parties and state commissions are in a better position than the Commission to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection.").

Moreover, incumbent carriers can recoup a competitive carrier's choice of interconnection points through rates under § 252(d)(1). E.g., LCO ¶ 199 (a CLEC "that wishes a 'technically feasible' but

expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit"); LCO ¶ 200 ("to the extent incumbent LECs incur costs to provide interconnection . . ., incumbent LECs may recover such costs from requesting carriers"); LCO ¶ 209 ("because [CLECs] must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect").

Most important, this case is about what AT&T can charge for leasing entrance facilities that are already in place. A wireless or cable company, like Sprint or Comcast, does not need entrance facilities for backhauling; customers are all connected by Sprint wireless towers or Comcast cable. But such companies *do* need to maintain the existing interconnection facilities AT&T provides. To accept AT&T's position will force companies like Sprint and Comcast to either charge their consumers for substantial AT&T rate increases, See Sprint Br. at 27, or to duplicate AT&T's entrance facilities with their own interconnection facilities, which is precisely what Congress sought to avoid when it enacted 47 U.S.C. § 251(c)(2).

C. An incumbent's duty to "provide interconnection" is not limited to providing only that equipment which is "inside incumbents' central offices," and includes a duty to lease existing interconnection facilities at TELRIC rates.

The Sixth Circuit below incorrectly believed that an incumbent's obligation to provide interconnection

was limited to making something available, such as a plug-in receptacle, and did not require the incumbent to do anything. But the FCC has already determined that § 251(c)(2) may require "some build out of facilities by the incumbent LEC." LCO ¶ 553; Pet. App. 27a. See also 47 C.F.R. § 51.5 ("A meet point interconnection arrangement is an arrangement by which each telecommunications carrier *builds* and maintains its network to a meet point.") (emphasis added).[1] This requirement is predicated on the incumbent carrier's obligation to make interconnection available at "any feasible point" within the "[incumbent][2] carrier's network." 47 U.S.C. § 251(c)(2)(B).

Critically, AT&T now concedes that the Sixth Circuit was wrong, i.e., that AT&T's § 251(c)(2) obligation is not a purely "passive" duty.[3] Resp. Br. at 29. But it tries to minimize that obligation by arguing that the interconnection obligation (1) does not extend beyond the incumbent's central-office walls, and (2) does not require an incumbent to lease existing interconnection facilities at TELRIC rates. Resp. Br. at

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[1] See also FCC Br. 24 ("Meet-point arrangements require an incumbent to build a transmission facility from its network to a designated meet point with a competitor 'for the mutual exchange of traffic.'").

[2] In Petitioners' Brief, the bracketed word "[incumbent]" was mistakenly replaced with the bracketed word "[competitor]." All parties agree that the proper word is "incumbent." The fact that § 251(c)(2) "may require, in some instances, that an incumbent carrier extend its own network to meet a competitive carrier's network," Pet. Br. 30–31, is found in the meet-point regulation, 47 C.F.R. § 51.321.

[3] This is one of many jarring examples where AT&T disavows the Sixth Circuit's reasoning and AT&T's own lower-court arguments.

20–25, 28–31. Again, AT&T's position is fundamentally at odds with the regulatory scheme.

In support of its first argument, AT&T relies on ¶ 553 of the Local Competition Order, which AT&T cites for the proposition that even in a meet-point arrangement, the point of interconnection remains on a point within the incumbent carrier's network, inside the incumbent's central office. Resp. Br. at 30–31. But in making that point, AT&T selectively quotes from LCO ¶ 553 and then only paraphrases when asserting that the point of interconnection "would remain inside the incumbent's central office." *Id.* at 31. All ¶ 553 actually says is that in a meet-point arrangement, the point of interconnection "remains on 'the local exchange carrier's network.'" LCO ¶ 553; Pet. App. 27a. And an incumbent's entrance facility is necessarily on the incumbent carrier's network, or there would have been no need for the FCC, in the TRRO, to conduct a § 251(c)(3) unbundling analysis for entrance facilities. That was the point of the D.C. Circuit's decision in *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554 (D.C. Cir. 2004), which rejected the FCC's conclusion, in the TRO, that entrance facilities were not part of the incumbent's network.

Moreover, there is no support for AT&T's position that the point of interconnection is typically in the incumbent's central office. E.g., Resp. Br. at 31. To the contrary, the FCC's regulations establish that a competitive carrier may choose to physically interconnect with an incumbent at a single point—of the competitor's choosing—within a Local Access Transport Area. *Application by SBC Communications Inc., et al. Pursuant to Section 271 of the*

Telecommunications Act of 1996 to Provide In-Region, InterLATA Service in Texas, 15 FCC Rcd. 18354, 18390 ¶ 78, n.174.

In support of the second argument, AT&T does not cite anything; it simply makes the naked assertion that nothing in the text of § 251(c)(2) suggests that the incumbent carrier has a duty to lease a facility at TELRIC rates. Resp. Br. at 20. But there is no limiting language in § 251(c)(2) that alleviates AT&T's duty to lease interconnection facilities at TELRIC rates. The broad duty is "to provide . . . interconnection" for the facilities and equipment of any requesting carrier. 47 U.S.C. § 251(c)(2). Having already acknowledged that the duty to provide may include the duty to build, there is no statutory basis for limiting the obligation in the manner AT&T suggests.[4]

D. AT&T's additional attacks on the FCC's conclusion lack merit.

The balance of AT&T's criticisms of the FCC's views can be rebutted in summary fashion.

For example, AT&T asserts that the FCC has conceded its regulations "do not expressly require incumbents to provide entrance facilities to satisfy the interconnection obligations under Section 251(c)(2)." Resp. Br. at 5–6, citing FCC Br. at 22 n.6. AT&T does not disclose that the FCC was talking about the rules it

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[4] AT&T's only explanation for this anomaly is to suggest that the obligation to build new facilities may be "[un]lawful"—even though this requirement has been in place since 1996. Res. Br. 31 n.25 ("The lawfulness of the FCC's meet-point rule was not tested in the court of appeals.").

issued in 1996, when entrance facilities were still considered a network element that had to be unbundled under § 251(c)(3). FCC Br. at 22 n.6. As the FCC explained, "[o]nly after the FCC eliminated access to entrance facilities as unbundled network elements did it have occasion to clarify, in the [TRO] and the [TRRO], that §251(c)(2) gives competitive LECs a right of access to such [entrance] facilities for interconnection at cost-based rates." *Ibid.*

Likewise, AT&T relies on ¶ 140 of the TRRO to argue that a competitive carrier is only entitled to interconnection it "requires," not interconnection it "wants" or "prefers." Resp. Br. at 44. But ¶ 140 does not limit a competitive carrier's access to entrance facilities at regulated rates to the extent the carrier requires such facilities "*for* interconnection." The paragraph says a competitive carrier will have access to entrance facilities at regulated rates to the extent that they require them "*to* interconnect" (as opposed to backhauling). Pet. App. 15a. Read in tandem with § 251(c)(2)(B), a competitive carrier has the authority to say where, within the incumbent carrier's network, interconnection is desired. If the competitive carrier requires facilities "to interconnect" at that point, the incumbent carrier must lease its facilities at TELRIC rates.

AT&T also attacks the "numerous flaws" in the very simplified diagram that Petitioners provided on page 23 of their Petitioners' Brief to show examples of interconnection and backhauling. In reality, AT&T identifies only two purported problems, Resp. Br. at 29 n.23, and neither is relevant to the issue presented. For example, it does not matter whether parties have

constructed a single wire or two wires for fulfilling an entrance facility's two purposes; what is important is that the FCC has distinguished between those two uses for purposes of determining how an incumbent can charge a competitive carrier.[5] Similarly, the interconnection distance has nothing to do with when an incumbent has a § 251(c)(2) duty to provide interconnection.

Finally, AT&T incorrectly suggests that the limitation in 47 U.S.C. § 201(b)—that uncapped rates must be "just and reasonable"—makes uncapping a non-event. As Sprint explains in its *amicus* brief, its nine-State survey demonstrated a difference between TELRIC and non-TELRIC rates that ranged from 63-75%. This is hardly the *de minimis* change AT&T makes it out to be.

Ultimately, however, AT&T's criticisms of the FCC are of only academic interest. That is because those criticisms show, at most, that there are statutory and regulatory ambiguities requiring resolution. And as this Court made clear in *Chevron* and *Auer*, it is exclusively within the FCC's regulatory power to resolve such ambiguities, and the FCC has done so here.

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[5] AT&T's amici, the United States Telecom Association and Network Engineers, assert that incumbents have no way to know when a competitive carrier is using an entrance facility for backhaul purposes. Telecom Assoc. Br. at 29. The Seventh and Ninth Circuits have correctly rejected that proposition. *Pacific Bell Tel.*, 621 F.3d at 842 n.8 ("Incumbent LECs are capable of screening out calls that would be used for backhauling."); *Illinois Bell Tel.*, 526 F.3d at 1071–72 (accepting the Illinois state commission's statement that "ILECs can detect and block any attempted use of an entrance facility for backhauling.").

II. The Court should begin and end its analysis by deferring to the FCC's conclusion that incumbent carriers must make entrance facilities available to competitors, at TELRIC rates, to the extent those facilities are used for interconnection.

When imposing the interconnection duty on incumbent carriers under § 251(c)(2), Congress did not explicitly address whether an incumbent is obligated to provide entrance facilities to a competitive carrier for the purpose of interconnecting the carriers' networks. In its orders, the FCC has provided a reasonable interpretation of § 251(c)(2) and § 251(c)(3) of the Act, and the FCC's orders are entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S 837, 842–45 (1984). *Nat'l Cable Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Under its § 251(d) statutory authority, the FCC lawfully promulgated regulations establishing unbundling requirements, which included what network elements should be unbundled. In the TRRO, the FCC determined that a competitive carrier is not impaired without access to entrance facilities, and therefore is not entitled to such facilities as an unbundled network element. In addition, the FCC specifically affirmed the TRO's statement that an incumbent carrier still has an obligation under § 251(c)(2) to provide entrance facilities available at TELRIC rates for the purpose of network interconnection. TRRO ¶¶ 136–41; Pet. App. 8a–16a; accord TRO ¶ 366; Pet. App. 20a.

This Court affords deference to an agency's fair and considered judgment unless it is plainly erroneous or inconsistent with the regulation. *Coeur Alaska, Inc.* v. *Se. Alaska Cons. Council*, 129 S. Ct. 2458, 2470 (2009); *Auer* v. *Robbins*, 519 U.S. 452, 461–62 (1997); *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945). Specific to this case, deference is warranted to the FCC's fair and considered opinion, set forth in its orders and the *amicus* brief submitted to the Court, acknowledging the dual use of entrance facilities and the incumbent's separate obligations under the Act.

A. The FCC's reasonable orders warrant *Chevron* deference.

Deference is given to an expert federal agency's reasonable interpretation of the statutes it administers. *Chevron*, 467 U.S. at 842–45. This includes deference to FCC rulemaking orders, like the TRO and TRRO, because these orders are legislative acts that interpret the Telecommunications Act. *Central Tex. Tel. Coop., Inc.* v. *FCC*, 402 F.3d 205, 211 (D.C. Cir. 2005).

In an attempt to justify why this Court should not defer to the TRRO, AT&T attempts to cavalierly dismiss portions of that order as constituting only "a few sentences." Resp. Br. at 32. But even AT&T acknowledges that the process of rulemaking (which would necessarily include FCC orders rationalizing and promulgating regulations) is the "paradigmatic example" of agency action subject to *Chevron* deference. Resp. Br. at 33, citing *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). In other words, an agency's interpretation qualifies for deference when

Congress grants an agency the general authority to make rules, and, as here, the agency's interpretation was promulgated while exercising that authority. *Id.* at 226–27.

In the TRO and TRRO, the FCC implemented the Act's provisions—precisely as Congress authorized—and adopted seven pages of amendments to the Code of Federal Regulations, all pursuant to a formal notice-and-comment period. TRRO, 20 FCC Rcd. at 2543–45 (¶¶ 17–19). See also TRRO, 20 FCC Rcd. at 2666–69 (¶¶ 235–51); Pet. Br. at 40. The FCC's orders, undertaken concurrently with the issuance of new regulations, are legislative acts that should be given deference. *Central Tex.*, 402 F.3d at 211.

While a notice-and-comment period provides an indicator for *Chevron* deference, the Court has not narrowly construed the application of deference to such a proceeding. E.g., *Bamhart* v. *Walton*, 535 U.S. 212, 221–22 (2002). The TRRO underwent a formal administrative process, and the FCC's reasoned interpretation of the Act, contained in its legislative orders, should be afforded *Chevron* deference.

AT&T's only other *Chevron* argument is that the FCC did not provide notice that it was using the TRRO to say something new about the interconnection obligation. E.g., Resp. Br. at 34–35. That is because the FCC did not say anything new; the FCC has never once suggested that an incumbent carrier's broad duty to provide interconnection does not include entrance facilities.

B. The FCC's amicus position warrants *Auer* deference.

Deference is also afforded to an expert agency's construction of a regulation it administers unless Congress has "directly spoken to the precise question at issue." *Auer*, 519 U.S. at 457. As discussed in this case, the FCC interpreted its regulations twice: 1) in its orders; and 2) in its *amicus* briefs to this Court and the Sixth Circuit. The Court should afford deference to the FCC's consistent interpretation.

AT&T argues that the application of *Auer* deference is improper when the agency's interpretation is "inconsistent with the regulation" or "does not reflect the agency's fair and considered judgment on the matter in question." Resp. Br. 36–40 (citing *Auer*, 519 U.S. at 461–62.) While recognizing the limitations this Court has placed on *Auer's* applicability, the three points AT&T raises are unavailing.

First, in an attempt to distinguish this case from the Court's most recent decision applying *Auer* deference, *Chase Bank USA, N.G.* v. *McAvoy*, 131 S. Ct. 871, 880-881 (2011), AT&T alleges that the FCC did not interpret a regulation here. Resp. Br. at 36. But there is no sound reason to defer to an agency interpretation of a regulation but not to an interpretation of a legislative order that has undergone notice and comment. Either way, the agency is interpreting a purported ambiguity in one of its own formal orders. Who is in a better position to render such an interpretation?

Second, AT&T contends that deference is unwarranted because, as the Court said in *Christensen*,

the FCC attempted "to create *de facto* a new regulation." Resp. Br. at 38, citing *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000). AT&T seeks to make this point by asserting that the FCC's interpretation of the TRRO was an attempt to *create* a new interconnection obligation.[6] Resp. Br. at 37–38. This statement is inaccurate, confusing the separate obligations AT&T has to unbundle network elements and to provide for interconnection. Thus, while 47 C.F.R. § 51.319(e)(2)(i) eliminates unbundled access of entrance facilities under § 251(c)(3), the FCC made clear in the *TRO* (well before the TRRO): "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; Pet. App. 20a.

Third, AT&T attempts to argue that the FCC's judgment is not "fair and considered" because the FCC supplemented arguments in its *amicus* brief to this Court. Resp. Br. at 40–41. While it is true that the FCC's brief in this Court elaborated on the FCC's

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[6] AT&T is wrong to suggest that the FCC, prior to filing its *amicus* brief, required only two methods of interconnection. Resp. Br. at 37. 47 C.F.R. § 51.321(b) says the contrary. "Technically feasible methods of obtaining interconnection or access to unbundled network elements include, *but are not limited to*: (1) Physical collocation and virtual collocation at the premises of an incumbent LEC; and (2) Meet point interconnection arrangements." 47 C.F.R. § 51.321(b); Resp. App. 32a (emphasis added); see also LCO ¶ 180 (explaining "that inflexible or overly detailed national rules implement section 251(c)(2) may inhibit the ability of the states or the parties to reach agreement that reflect technological or market advances and regional differences").

previous position, as did the briefs of the Petitioners and Respondent, the positions the FCC articulated in the Sixth Circuit and in this Court are identical.[7] Compare FCC 6th Cir. Br. at 14–22 with FCC Br. at 12–33. More precisely, in both briefs, the FCC maintains that the FCC's orders treat entrance facilities differently depending on their use; that incumbents have separate interconnection and unbundling obligations under §§ 251(c)(2) and 251(c)(3), respectively; and that the courts should defer to the FCC's reasonable interpretation of the statutes it administers and the orders it has adopted. FCC Br. at 15; FCC 6th Cir. Br. at 14–22.

This Court's decisions addressing when deference should be afforded to agency pronouncements cover a broad spectrum, ranging from regulations adopted by the agency (*Chevron*) to letter rulings issued by field agents (*Mead*). The legislative orders and *amicus* briefs the FCC has filed in this case fall far closer to the

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[7] AT&T argues that FCC deference is undermined by the fact that there is no indication that the full Commission approved the FCC's *amicus* brief. Resp. Br. at 40–41, n.33. AT&T's argument is in direct conflict with this Court's decisions. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 n.9. (1980) ("To be sure, the administrative interpretations proffered in this case were issued by the Federal Reserve staff rather than the Board. But to the extent that deference to administrative views is bottomed on respect for agency expertise, it is unrealistic to draw a radical distinction."); *Auer*, 519 U.S. at 462 ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference."). And the argument wrongly assumes that every administrative agency must formally approve every legal document filed in every court. Thankfully, this Court has not imposed such an onerous requirement on agencies.

Chevron/*Auer* end of the spectrum and should be afforded deference.

III. The Congressional goal of competition is advanced by the FCC's interpretation of § 251(c)(2), and hurt by AT&T's interpretation.

As Congress and the FCC have both recognized, cost-based interconnection is critical to creating the market competition that the Telecommunications Act was intended to provide. "[A]bsent interconnection between the incumbent LEC and the entrant, the customer of the entrant would be unable to complete calls to subscribers served by the incumbent LEC's network." LCO ¶ 10. And without the ability to connect to AT&T's millions of customers, a competitor's likelihood of survival is zero.

AT&T devotes a substantial portion of its brief arguing that the FCC's determination—that an incumbent's duty to provide interconnection encompasses entrance facilities—is a policy at odds with the FCC's determination that an incumbent need not unbundle its entrance facilities under § 251(c)(3). Resp. Br. at 48–56. AT&T's position is both misplaced and unfounded.

First, and most important, AT&T is advancing its policy argument in the wrong forum. It is not the FCC that chose to impose § 251(c)(2)'s extremely broad interconnection requirement, but Congress. If AT&T believed that its interconnection duty should be tied to a market-impairment analysis, like § 251(c)(3), then it should have lobbied for that result. The courts are not a second-shot forum for litigants to collaterally attack

Congressional policy, yet that is precisely how AT&T is treating this litigation.

Second, interconnection is more essential than unbundling. Many competitive carriers already have complete networks (e.g., Sprint wireless, or Comcast cable), and even though they do not require unbundling, they still need to interconnect their own complete networks with the incumbent for the networks to talk to one another (and for Sprint or Comcast to make inroads in the once-monopoly local market). This is consistent with the FCC's focus on promoting facilities-based competition, which it has found to be the underlying purpose of the 1996 Act.

For example, in *Brighthouse Networks LLC et al.*, v. *Verizon California*, *Inc.*, 23 FCC Rcd. 10704, ¶27 (2008), *aff'd Verizon California*, *Inc.* v. *FCC*, 555 F.3d 270 (2009), the FCC explained that it has "repeatedly described" the "promot[ion] of facilities-based competition" "as a fundamental policy of the act." Footnote 68 then lists several FCC decisions so finding, including the TRO and the TRRO, the latter of which at paragraph 3 explained that unbundled network elements are only a transitional device to aid the development of facilities-based competition.

The fact that § 251(c)(3) imposes a higher bar for unbundled network elements than § 251(c)(2) thus makes sense as a matter of policy: not every carrier needs UNEs, but every carrier needs (and will continue to need) interconnection. See *Time Warner Wholesale Services Order*, 22 FCC Rcd. 3513, 3519 (2007) ("ensuring the protections of section 251 interconnection is a critical component of the growth of facilities-based local competition.") Indeed, rather

than inhibiting facilities-based competition, as AT&T contends (Resp. Br. at 48–52), the FCC has concluded that broad interconnection rights under § 251(c)(2) actually promote facilities-based competition. AT&T's reading of § 251(c)(2), on the other hand, will leave in place the "insurmountable competitive advantage" of incumbent carriers like AT&T. See *Verizon* v. *FCC*, 535 U.S. 467, 490-91 (2002).

This point is illustrated vividly by a company like Sprint, which seeks to compete in the local telephone market by using its wireless network. To reiterate the point, Sprint has no need to backhaul; it connects its own customers wirelessly. But its business depends on the many thousands of *existing* interconnections it has with AT&T's network so that Sprint's customers can connect to AT&T's customers. If AT&T is successful in importing a § 251(c)(3) impairment analysis into § 251(c)(2)'s interconnection requirements, Sprint will be forced to make a choice: experience a 63-75% increase in charges for those interconnections, Sprint Br. at 27, or construct duplicate entrance facilities across the country to break AT&T's monopoly. That is precisely the conundrum that Congress sought to prevent when it imposed on incumbents the very broad interconnection duty in § 251(c)(2). In sum, the policy vindicated by a ruling in favor of Petitioners is precisely the one Congress and the FCC have sought to advance through their legislation and interpretation, respectively.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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