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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,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To promote competition for local telephone service, the Telecommunications Act of 1996 (Act) requires incumbent telephone companies to make entrance facilities available to competitors (1) for network interconnection at cost-based rates, and (2) as unbundled network elements. In the *Triennial Review Remand Order (TRRO)*, the Federal Communications Commission (FCC) maintained the incumbent local telephone company's obligation to provide entrance facilities, which allow for interconnection, at cost-based rates, but found that competitors could effectively compete without access to entrance facilities as unbundled network elements. The questions presented are:

I. Whether the Sixth Circuit erred by determining that the Act and *TRRO* permit incumbent local telephone companies to charge competing telephone companies competitive rates – which is more than cost-based rates – for entrance facilities used for interconnection, thereby creating a conflict with the Seventh, Eighth, and Ninth Circuits.

II. Whether the Sixth Circuit erred by disregarding the FCC's interpretation of its regulations, contrary to the deference standard established by this Court in *Auer v. Robbins,* thereby creating a conflict with the Ninth Circuit.

PARTIES TO THE PROCEEDING

Petitioners are Orjiakor N. Isiogu, Monica Martinez, and Greg R. White, in their official capacity as Commissioners of the Michigan Public Service Commission and not as individuals.[1] Respondent is Michigan Bell Telephone Company, d/b/a AT&T Michigan.

Intervenors in the lower courts have included American Farm Bureau, Inc., Covad Communications Company, CMC Telecom, Inc., Climax Telephone Company, GRID 4 Communications, Inc., Easton Telecom Services, L.L.C., LDMI Telecommunications, Inc., MCImetro Access Transmission Services L.L.C., McLeodUSA Telecommunications Services, Inc., Neutral Tandem – Michigan, L.L.C., NOW Communications, Inc., PNG Telecommunications Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., Talk America Inc., TCG Detroit, TelNet Worldwide, Inc., Trinsic Communications, Inc., XO Communications Services, Inc., and Zenk Group, Ltd., d/b/a Planet Access.

Amicus curiae before the Court of Appeals for the Sixth Circuit were Verizon, the Federal Communications Commission, and the Michigan Internet and Telecommunications Alliance.

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[1] Pursuant to Sup. Ct. R. 35.3, Orjiakor N. Isiogu, and Greg R. White have been automatically substituted as parties. Their predecessors, J. Peter Lark and Laura Chappelle, who were the named parties before the Court of Appeals, cease to hold public office.

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The February 23, 2010, Opinion of the U. S. Court of Appeals for the Sixth Circuit is published, and reported at *Michigan Bell Tel. Co. v. Covad Communications Co.*, 597 F.3d 370 (6th Cir. 2010). Pet. App. 1a – 53a. The Sixth Circuit's unpublished Order denying Rehearing was filed on June 2, 2010. Pet. App. 54a – 55a. The August 28, 2009, Opinion of the United States District Court reversing the Michigan Public Service Commission's Order is unpublished. Pet. App. 56a – 85a. The Michigan Public Service Commission's September 20, 2005, Order, which held that the Telecommunications Act of 1996 requires entrance facilities to be made available at cost-based rates when used for interconnection, is unpublished. Pet. App. 86a – 157a.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 [codified in numerous sections of Title 47 of the United States Code]. Section 251(c)(2)-(3) of the Act, 47 U.S.C. §§ 251(c)(2)-(3), is reproduced in the Appendix. Pet. App. 158a – 159a.

In the *Triennial Review Remand Order (TRRO)*, the Federal Communications Commission interprets the Act. The applicable paragraphs of the *TRRO*, 20

FCC Rcd. 2609-12, ¶¶ 136-141, are reproduced in the Appendix. Pet. App. 160a – 168a.

INTRODUCTION

The Sixth Circuit's decision should be reviewed because it involves important federal questions and directly conflicts with decisions of the Seventh, Eighth, and Ninth Circuits. Moreover, the Sixth Circuit failed to follow this Court's decision in *Auer v. Robbins*,[2] failed to defer to the Federal Communications Commission's (FCC) interpretation, and created another conflict with the Ninth Circuit.

Under the Telecommunications Act of 1996 (the Act), Congress sought to open up the local telephone markets to competition. Recognizing that incumbent monopolist providers of local telephone service have strong economic incentives to delay and impede competition, Congress required incumbent local exchange carriers (ILECs) to share their equipment and services with competitive local exchange carriers (CLECs). One of the specific obligations imposed was to make entrance facilities available to CLECs either as a means of interconnection with the ILEC's network or as unbundled network elements. 47 U.S.C. §§ 251(c)(2)-(3). Pet. App. 158a – 159a.

In the *Triennial Review Remand Order* (*TRRO*), the FCC addressed whether entrance facilities should be offered on an unbundled basis under Section

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[2] *Auer v. Robbins*, 519 U.S. 452 (1997).

251(c)(3) of the Act.[3] An entrance facility is a type of dedicated transport that provides a transmission path between ILEC and CLEC networks.[4] Pet. App. 160a – 161a. These facilities have two purposes. First, for interconnection, as a method to exchange traffic between the ILEC and CLEC networks. Second, as a network element, which allows the CLEC to carry traffic to and from its own customers.

The FCC found that CLECs could effectively compete without access to entrance facilities, and therefore are not entitled to use entrance facilities as part of the unbundling obligations imposed on ILECs under Section 251(c)(3) of the Act.[5] Pet. App. 167a. This finding, however, did not relieve ILECs of their separate duty to provide CLECs with access to entrance facilities under Section 251(c)(2) for the purpose of interconnection.[6] Pet. App. 167a. By maintaining an ILEC's obligation to offer entrance facilities to CLECs for interconnection, the FCC adhered to the Act's purpose of fostering competition in local telephone networks.

The Sixth Circuit, in a 2 – to – 1 decision, determined that the plain meaning of the Act and the *TRRO* permit ILECs to charge CLECs competitive rates – which are more than cost-based rates – for the use of the ILECs' entrance facilities, so long as the ILEC offers other interconnection facilities at cost-

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[3] *Unbundled Access to Network Elements and Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533 (2005) (*TRRO*).

[4] *TRRO*, 20 FCC Rcd. at 2609 (¶ 136).

[5] *TRRO*, 20 FCC Rcd. at 2611 (¶ 140).

[6] *TRRO*, 20 FCC Rcd. at 2611 (¶ 140).

based rates. But, that decision conflicts with decisions of the Seventh, Eighth, and Ninth Circuits. Each of those three Circuits held that the Act imposes separate obligations on ILECs to allow the use of entrance facilities under Sections 251(c)(2) and 251(c)(3) of the Act and that the FCC expressly recognized the Act's separate obligation for entrance facilities used for interconnection in the *TRRO*.

This split of authority is of considerable importance, not only because it creates uncertainty on a previously settled legal issue, but also because the Sixth Circuit's decision threatens to thwart competition, by increasing a CLEC's cost of market entry. Thus, the lower court's decision creates an advantage for incumbent carriers at the expense of consumers.

Lastly, the Sixth Circuit erred when it determined that it was not required to afford deference to the FCC's interpretation under this Court's decision in *Auer v. Robbins*.[7] In *Auer,* this Court held that a reviewing court should defer to an administrative agency's construction and interpretation of its own regulations. The Sixth Circuit's decision here to deny *Auer* deference to the FCC's interpretation also presents a second conflict because the Ninth Circuit afforded such deference to the FCC's interpretation when examining the identical issue.

STATEMENT OF THE CASE

The Michigan Public Service Commission (MPSC) has regulatory authority under the laws of the

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[7] *Auer*, 519 U.S. at 452..

State of Michigan over the intrastate operations of telecommunications carriers.

Michigan Bell Telephone Company, d/b/a AT&T Michigan (AT&T) is an ILEC that provides intrastate telecommunications service in Michigan.

On May 17, 2005, the Michigan Public Service Commission issued an order modifying the process used to bring current interconnection agreements into compliance with the FCC's *Triennial Review Order (TRO)*[8] and *TRRO*. Pet. App. 86a. One of the 29 disputed issues resolved by the MPSC was the treatment of entrance facilities. Pet. App. 86a – 91a.

After reviewing the evidence, the MPSC issued its decision on September 20, 2005. Consistent with the FCC's interpretation, the MPSC found that when used for interconnection purposes, ILECs must provide entrance facilities to CLECs at Total Element Long Run Incremental (TELRIC), or cost-based rates. Pet. App. 102a – 103a.

AT&T appealed the MPSC's Order to the U.S. District Court of the Eastern District of Michigan seeking declaratory and injunctive relief. Pet. App. 56a – 58a. Motions for summary disposition were filed by AT&T and participating CLECs. Following briefing and oral argument on the motions, the District Court issued a September 26, 2007, Order granting, in part,

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[8] *Review the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 16984 (2003), vacated in part, *United States Telecom Ass'n. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). (*TRO*).

AT&T's motion, and granting, in part, the CLEC's motion. Pet. App. 56a – 58a. On October 27, 2007, the District Court entered a judgment reversing in part, the MPSC's September 20, 2005, Order. Pet. App. 70a – 73a. The District Court determined that the MPSC's decision undermined the basic finding of the *TRRO* that entrance facilities were no longer required to be provided as an unbundled network element and should be offered at competitive pricing. Pet. App. 72a- 73a.

The MPSC Commissioners appealed the District Court's decision to the U.S. Court of Appeals for the Sixth Circuit. On February 23, 2010, the Sixth Circuit affirmed the District Court's Order finding that the "plain meaning" of the Act, its regulations, and the *TRRO* permits ILECs to charge CLECs competitive rates for the use of the ILECs' entrance facilities so long as the ILEC offers other interconnection facilities at cost-based rates.[9] Pet. App. 1a – 53a.

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[9] *Michigan Bell Tel. Co. v. Covad Communications Co.*, 597 F.3d 370 (6th Cir. 2010).

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's decision – which creates a conflict among the Circuits – is contrary to the Act's purpose of promoting competition in the provision of local telephone service.

When opening up local telephone markets to competition, Congress recognized the obstacles prospective competitors faced when attempting to compete with ILECs in providing consumers with telephone service. Instead of requiring CLECs to duplicate an ILECs existing infrastructure, the Act imposed certain duties on ILECs that would foster and promote competition. Each of these duties is separate and distinct from one another.[10] Two such duties are relevant to this case.

Under Section 251(c)(2) of the Act, an ILEC is required to provide interconnection between its network and CLEC networks. Under its statutory duty to interconnect, an ILEC must charge a CLEC rates that are cost-based.[11] Pet. App. 158a. In a separate requirement, under Section 251(c)(3) of the Act, ILECs must provide CLECs with unbundled access to elements of its network when a CLEC would be unable to effectively compete without such access, i.e., the CLEC would be impaired.[12] Pet. App. 158a – 159a. If the FCC makes a finding of impairment, the ILEC must charge the CLEC cost-based rates for that element.[13] Pet. App. 158a – 159a.

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[10] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 370 (1999).

[11] 47 U.S.C. § 251(c)(2).

[12] 47 U.S.C. § 251(c)(3).

[13] 47 U.S.C. § 251(c)(3).

An entrance facility is a type of dedicated transport that provides a transmission path between ILEC and CLEC networks.[14] Pet. App. 160a – 162a. As this facility is a connection between one telecommunication carrier's switch and another carrier's switch, an entrance facility can have two uses. The Ninth Circuit succinctly described entrance facilities saying:

> An entrance facility is a "dedicated transport" (a wire) that connects one LEC's "switch" (a computer that routes calls) to another LEC's switch. In other words, an entrance facility is the high capacity wire that links telephone networks. Entrance facilities may be used for two distinct purposes. First, a competitive LEC can use an entrance facility for interconnection – that is, to link the competitive LEC's network with that of the incumbent LEC so that the competitive LEC's customers may reach the incumbent LEC's customers. *See* TRRO P 138-40; TRO P 366-67. Second, a competitive LEC can use an entrance facility for what the industry calls "backhauling." In the case of backhauling, the competitive LEC uses the entrance facility to permit its *own* customers to

[14] *TRRO*, 20 FCC Rcd. at 2609 (¶ 136).

> reach *one another* over the incumbent LECs network.[15]

In the *TRRO*, the FCC determined that CLECs are not impaired without access to entrance facilities, and therefore are not entitled to such facilities as an unbundled network element.[16] Pet. App. 160a – 168a. An impairment finding is made when a CLEC's ability to competitively offer telecommunications service is materially diminished without access to an ILEC's network element.[17]

Pursuant to its finding, the FCC adopted a regulation stating that ILECs are not required to provide CLECs with access to entrance facilities on an unbundled basis.[18] Specifically, the FCC stated:

> (i) Entrance facilities. An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers.[19]

In addition to its determination regarding the unbundling of entrance facilities as network elements, the FCC explicitly recognized the ILECs' obligation,

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[15] *Pacific Bell Tel. Co. v. California Public Utilities Comm'n*, 597 F.3d 958, 963 (9th Cir. 2010) (emphasis added).

[16] *TRRO*, 20 FCC Rcd. at 2609-2612 (¶¶ 136-141).

[17] 47 U.S.C. § 251(d)(2)(B). *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3725 (¶ 51) (1999).

[18] 47 C.F.R. § 51.319(e)(2)(i).

[19] 47 C.F.R. § 51.319(e)(2)(i).

under Section 251(c)(2) of the Act, to make entrance facilities available to CLECs at cost-based rates when the CLEC requires them to interconnect with the ILEC's network:

> [O]ur finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to § 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.[20] [Pet. App. 167a.]

Consistent with the requirements of the Act, the FCC – in Paragraph 140 of the *TRRO* – recognized that CLECs use entrance facilities for more than one purpose and was careful to explain that only when an entrance facility was used as an unbundled network element was it affected by the *TRRO*'s unbundling determinations. As a result, the *TRRO* did not alter the Act's separate duty imposed on ILECs to provide access to entrance facilities when being used for interconnection purposes.

The FCC has consistently acknowledged that CLECs use entrance facilities in two distinct ways. In the *Triennial Review Order* (*TRO*), the FCC stated that CLECs use entrance facilities:

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[20] *TRRO*, 20 FCC Rcd. at 2611 (¶ 140).

- To provide a final link in the dedicated transmission path between a CLEC's customer and the CLEC's switch, and

- As interconnection facilities to exchange traffic between the CLEC's switch and the ILEC's switch.[21]

In the first use, CLECs are not employing entrance facilities for interconnection. Instead, the CLECs are using entrance facilities for "backhauling" or carrying traffic to and from its own customers. ILECs are permitted to charge competitive rates for "backhauling." In the second use, CLECs are using entrance facilities to interconnect with ILECs' networks. This provides a transmission path between the ILEC's switch and the CLEC's switch for the exchange of traffic between the two networks.[22]

In the *TRRO*, the FCC determined that when a CLEC uses entrance facilities for backhauling, the method outlined in the first bullet, the CLEC is not impaired without access to the entrance facility from the ILEC as an unbundled network element (i.e., at cost-based rates). But the FCC's *TRRO* also reaffirmed the ILEC's obligation under Section 251(c)(2) of the Act to provide entrance facilities to CLECs at cost-based rates when the CLEC uses the facility to interconnect with the ILEC's network.[23] Pet. App. 167a. Moreover, the FCC's *TRRO* reiterated that the Act mandates

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[21] *TRO*, 18 FCC Rcd. at 17202-17203 (¶¶ 365-366).

[22] *TRO*, 18 FCC Rcd. at 17202-17203 (¶¶ 365-366).

[23] *TRRO*, 20 FCC Rcd. at 2611 (¶ 140).

cost-based rates for network interconnection.[24] Pet. App. 167a.

In implementing the Act's mandate for cost-based rates and consistent with the plain language of 47 U.S.C. § 251(c)(2)-(3) and 47 U.S.C. § 252(d)(1), the FCC concluded that Congress intended to apply the same pricing rules to interconnection and unbundled network elements. The FCC stated:

> Sections 251(c)(2) and (c)(3) impose an identical duty on incumbent LECs to provide interconnection and access to network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." In addition, both interconnection and unbundled network elements are made subject to the same pricing standard in section 252(d)(1). Based on the plain language of sections 251(c)(2), (c)(3), and section 252(c)(1), *we conclude that Congress intended to apply the same pricing rules to interconnection and unbundled network elements. The pricing rules we adopt [i.e., TELRIC] shall, therefore apply to both.*[25]

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[24] *TRRO*, 20 FCC Rcd. at 2611 (¶ 140); See also 47 U.S.C. § 251(c)(2)(D) and 47 U.S.C. § 252(d)(1).

[25] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15816 (¶ 628) (1996), (emphasis added). (*Local Competition Order)* aff'd by *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 497 (2002). *See also* 47 C.F.R. 51.501(a) – 51.505 (2005).

The Sixth Circuit's Opinion contradicts established legal standards and challenges the Act's mandate that local telecommunication markets be opened to competition. The Sixth Circuit's attempt to clarify and simplify a highly technical and complex body of law has had precisely the opposite effect. That is, by substituting its judgment for the expertise of the agency that administers and enforces the Act, the Sixth Circuit has created ambiguity in a previously settled area of law and has invited anti-competitive behavior when Congress has plainly sought to open up the local telephone markets to competition.

The Sixth Circuit then compounds its error when it quotes portions of the Act, the FCC's implementing regulations, and the *TRRO* when purporting to engage in a "plain meaning" analysis, which concludes by finding that "an ILEC can charge competitive rates for the use of its entrance facilities."[26] Pet. App. 30a – 35a. But the Sixth Circuit's reasoning is based on a fundamentally flawed premise, i.e., that "interconnection facilities and entrance facilities are different things."[27] This finding disregards the fact that one of the functions that can be performed by an entrance facility is interconnection.

Given this fundamental error, it should come as no surprise that the Sixth Circuit's analysis and conclusion not only conflicts with the FCC's past and present interpretation of its statutes and regulations,[28] Pet. App. 30a – 40a, but that it is also contrary to the

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[26] *Michigan Bell Tel.*, 597 F.3d at 382.

[27] *Michigan Bell Tel.*, 597 F.3d at 384.

[28] *Michigan Bell Tel.*, 597 F.3d at 383.

decisions of other federal circuits, which have been presented with the same or similar issue.

No fewer than three Circuits – the Seventh, Eighth, and Ninth – have addressed this question, and each of their rulings is consistent with the FCC's interpretation. In *Southwestern Bell Telephone Co. v. Missouri Public Service Comm'n*, the Eighth Circuit acknowledged the separate obligation that the Act imposed on ILECs, in Section 251(c)(2) of the Act, to provide CLECs with entrance facilities needed for interconnection at TELRIC cost-based rates.[29] Specifically, the Eighth Circuit stated:

> The FCC has held CLECs are not impaired without access to entrance facilities and are not entitled to entrance facilities as UNEs under § 251(c)(3). The FCC's finding of non-impairment does not, however, alter the right of CLECs to obtain interconnection facilities pursuant to § 251(c)(2) for transmission and routing of telephone exchange service and exchange access service, i.e., CLEC to ILEC and ILEC to CLEC traffic. The FCC determined when a CLEC uses entrance facilities to carry traffic to and from its own end users, i.e., backhauling or CLEC to CLEC, the CLEC is not entitled to obtain entrance facilities as UNEs at TELRIC rates. If a CLEC needs entrance facilities to interconnect with an ILEC's

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[29] *Southwestern Bell Tel., L.P. v. Missouri Public Service Comm'n*, 530 F.3d 676, 683-684 (8th Cir. 2008) *cert. denied,* 129 S. Ct. 971 (2009).

> network, it has the right to obtain such facilities from the ILEC. Thus, CLECs must be provided access at TELRIC rates if necessary to interconnect with the ILEC's network.
>
> Additionally, "interconnection" means the physical linking of two networks for the mutual exchange of traffic. The term "interconnect" refers to "'facilities and equipment," not to the provision of any service."[30]

Likewise, the Seventh Circuit, in *Illinois Bell Telephone Co. v. Box*, performed a similar analysis and reached the same conclusion as the Eight Circuit.[31]

More recently, the Ninth Circuit, in *Pacific Bell Tel. Co. v. California Public Utilities Comm'n,* issued an opinion consistent with the decisions of the Seventh and Eighth Circuits, and which expressly applied *Auer* deference to the FCC's determination that the Act's separate statutory obligations requires ILECs to make entrance facilities available to CLECs at cost-based rates when those facilities are used for the purpose of interconnection.[32]

Finally, it should be noted that the Seventh, Eighth, and Ninth Circuits reached identical conclusions after reviewing the same statutes,

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[30] *Southwestern Bell Tel*, 530 F.3d at 683-684.

[31] *Illinois Bell Tel. Co v. Box*, 526 F.3d 1069, 1072-1073 (7th Cir. 2008).

[32] *Pacific Bell Tel. Co.*, 597 F.3d at 967-969.

regulations, and FCC interpretations that are presented here. For that reason, the existence of a conflict cannot be denied. Moreover, the decision of the Sixth Circuit by itself warrants review. For, without review, a CLECs ability to compete, and more importantly a consumer's ability to choose from competitive rates, may now depend on what Circuit they reside in.

II. The decision below conflicts with this Court's precedent, creating an additional split of authority with the Ninth Circuit, by failing to afford deference to the FCC's interpretation of the statutes and regulations it administers.

The FCC's interpretation of the statutes and regulations it administers should be afforded deference. In *Auer v. Robbins*, this Court stated that an expert agency's construction of the regulation it administers must be given deference unless Congress has "directly spoken to the precise question at issue."[33] This Court has consistently endorsed the principle that courts should afford "substantial deference" to an agency's construction of its own rules and regulations.[34] An expert agency's interpretation of its own regulations is "controlling" so long as it represents a "fair and considered judgment" and is not "plainly erroneous or inconsistent with the regulation."[35]

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[33] *Auer v. Robbins*, 519 U.S. at 457 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 842-843 (1984)).

[34] *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328 (2008); *Auer*, 519 U.S. at 461.

[35] *Coeur Alaska, Inc. v. Se. Alaska Cons. Council*, 557 U.S. __, 129 S. Ct. 2458, 2470 (2009); *Auer*, 519 U.S. at 461-462.

Here, the Sixth Circuit erred when it dismissed the opinion of the federal agency responsible for administering and interpreting the Act and its regulations. By failing to defer to the FCC's fair and considered interpretation, the lower court not only disregarded the persuasive opinions of the Seventh, Eighth, and Ninth Circuits to create its own "plain meaning" interpretation, but also failed to follow this Court's precedent by ignoring the standard of deference this Court has determined should be afforded to an expert agency's interpretation of its regulations.

A. The FCC's interpretation of the *TRRO* should be afforded *Auer* deference.

Absent Congress's express intent to address an issue, deference should be given by a court to an expert agency's construction of the statute it administers.[36] Review of the Act demonstrates that Congress did not directly speak to whether ILECs have a duty to provide entrance facilities to CLECs to interconnect their networks under Section 251(c)(2). In the absence of congressional direction, the FCC is authorized to interpret any statutory ambiguities.[37] Moreover, the federal appellate courts are required to follow the Court's directly controlling precedent.[38]

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[36] *Chevron,* 467 U.S. at 842-843.

[37] *Nat'l Cable Telecommuns. Ass'n v. Brand X Internet,* 545 U.S. 967, 280 (2005); *Chevron,* 467 U.S. at 843.

[38] *Nat'l Cable Telecommuns.,* 545 U.S at 986. citing *Agostini v. Felton,* 521 U.S. 203, 237 (1997) (requiring the Courts of Appeals to adhere to our directly controlling precedents, even those that rest on reasons rejected in other decisions).

Over a dissenting opinion, the Sixth Circuit, in a footnote, elected not to apply *Auer* deference.[39] In opposition to the Court's decision in *Auer*, the Sixth Circuit failed to afford any deference to the FCC's interpretation of the *TRRO* and its regulations. The Court of Appeals attempted to justify ignoring the FCC's interpretation by asserting the following:

> [T]he FCC's proffered interpretation is so plainly erroneous or inconsistent with the regulation, see *Auer*, 519 U.S. at 461, that we can only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting a regulation.[40] [Pet. App. 12a.]

The Sixth Circuit proceeded to restate the text of the *TRRO* based on its interpretation of the "plain meaning" of the language and then offered a new translation of the words in the FCC's order. It created what it described as a "simple" analogy, lasting two full pages of the opinion – involving a municipal ordinance, a park, a garage, and a big orange extension cord – that ostensibly supports the panel's "plain meaning" translation.[41] Pet. App. 23a – 27a. As Judge Sutton noted in his dissent, the majority made an admirable attempt to clarify complex, technical issues, but the attempt itself belies the claim that the FCC's interpretation is so plainly inconsistent with the language of the regulation that it is not entitled to be afforded deference. The Sixth Circuit also expressed

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[39] *Michigan Bell Tel.*, 597 F.3d at 375.

[40] *Michigan Bell Tel.*, 597 F.3d at 375.

[41] *Michigan Bell Tel.*, 597 F.3d at 379-381.

skepticism over deferring to the FCC's "interpretive rules" and expert agency opinions rendered in *amicus* briefs. Such concern is unwarranted.

An expert agency's interpretation should be afforded deference so long as it represents a fair and considered judgment. This Court has recognized expert agency interpretations in a variety of forms. In *Auer*, this Court requested the Secretary of Labor to file an *amicus* brief interpreting the salary-basis test set forth in the agency's regulations.[42] In reference to that agency's interpretation, this Court stated:

> Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless "'plainly erroneous or inconsistent with the regulation.'" *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945)).[43]

The Court continued, saying:

> 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. The

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[42] *Auer*, 519 U.S. at 461-463.

[43] *Auer*, 519 U.S. at 461.

> Secretary's position is in no sense a "*post hoc* rationalization" advanced by an agency seeking to defend past agency action against attack, *Bowen* v. *Georgetown Univ. Hospital*, 488 U.S. 204, 212, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.[44]

Furthermore, when reviewing an agency's "fair and considered judgment," the Court has extended deference beyond interpretations expressed in legal briefs. Deference has been afforded to expert agency opinion letters, which are issued on a more frequent basis.[45]

Recently, in *Coeur Alaska,* this Court applied *Auer* deference to an interagency memorandum.[46] In fact, in *Coeur Alaska*, Justice Scalia recognized in his concurring opinion that "[i]t is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions."[47]

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[44] *Auer*, 519 U.S. at 462.

[45] *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 563–564 (1980).

[46] *See Coeur Alaska*, 129 S.Ct. at 2473.

[47] *Coeur Alaska*, 129 S.Ct. at 2479.

In a further attempt to avoid the Court's deference standard, the Sixth Circuit suggests that the FCC's *TRRO* is no more than an "interpretive rule" and not a "regulation." As interpretive rules explain or clarify the expert agency's regulations and do not have to go through the same legislative notice and comment period, the lower court questioned the appropriateness of applying *Auer* deference to the FCC's Order.[48] Pet. App. 10a – 12a.

The FCC's Orders here are not loose assertions put forward by the agency. Indeed, they have undergone greater criticism than an interpretive rule. Through its *TRO* and *TRRO*, the FCC – as authorized by Congress – implemented the Act's provisions. Further, when the FCC adopted the *TRRO*, it simultaneously adopted its promulgated rules. A formal notice and comment period was held for both the *TRRO* and the regulations.[49]

Even if the FCC's Order was simply an interpretive rule, further consideration should be given to the FCC's opinion due to the nature of the regulations. The FCC is charged with administering the Telecommunications Act. A cursory review of the Act and its implementing regulations demonstrates that the relationship between ILECs and CLECs is a highly technical and complex subject matter. When examining areas of such a technical nature, this Court has recognized the importance of the administering agency's interpretation and at least a general level of

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[48] *Michigan Bell Tel.*, 597 F.3d at 375.

[49] *See TRRO*, ¶¶ 18–19, 239–251

deference should be afforded.[50] Judicial deference to expert agency interpretations of rules and regulations is an essential element to providing regulatory certainty to market participants.[51] The FCC is the agency with the expertise required to clarify the interpretative and technical issues arising from the Act and its implementation, and consistent with *Auer*, the Sixth Circuit should have deferred to the FCC's regulatory expertise.

B. The Ninth Circuit properly applied *Auer* deference when analyzing the same issue.

As previously discussed, the Ninth Circuit held that the FCC's regulations authorize ILECs to provide entrance facilities to CLECs at cost-based rates for the purpose of interconnection.[52] This analysis was in part predicated on deference to the FCC's interpretation of the relevant provisions of the *TRRO*. This creates an additional conflict between the Circuits.

After reviewing the applicable statutory provisions and regulations, the Ninth Circuit examined the FCC's interpretive orders, applied *Auer* deference, and concluded the FCC's interpretation was a reasonable one, saying:

> The TRO thus expressly interpreted the LCO to allow competitive LECs to lease entrance facilities or "transmission links" at TELRIC rates for the purpose of

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[50] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[51] *Coeur Alaska*, 129 S.Ct. at 2479.

[52] *Pacific Bell*, 597 F. 3d at 965.

> achieving interconnection. This interpretation of the LCO is reasonable and entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) (An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation.").[53]

The dissenting judge in the Sixth Circuit likewise noted the reasonableness of the FCC's interpretation. Pet. App. 41a – 53a. In his dissent, Judge Sutton explains:

> In deciding what incumbents may charge for the use of their entrance facilities, the FCC interprets its regulations to draw a distinction. On one side of the line, incumbents must lease their entrance facilities to competitors at cost-based rates when they use the facilities for interconnection. On the other side, incumbents may charge market-based rates, or not lease the facilities at all, when competitors use the facilities for backhauling. *See* FCC Br. at 15-17, 20. Everyone (at least everyone involved in this case) agrees that the FCC correctly concluded that incumbents may charge market-based rates for backhauling. What divides the parties is whether the FCC correctly concluded that incumbents cannot do the same for interconnection.

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[53] *Pacific Bell*, 597 F. 3d at 968 (footnotes omitted).

> In answering this question, we must keep in mind that Congress charged the FCC with administering § 251, *see* 47 U.S.C. § 251(d)(1), and the FCC wrote the regulations at issue, all of which means that the FCC's interpretation binds us unless it flouts the regulations' text. *See Auer*, 519 U.S. at 461.
>
> The line drawn by the FCC permissibly interprets its own regulation. In elaborating on § 251(c)(2)'s duty to "provide . . . interconnection," the FCC's regulation says that incumbents must provide "any technically feasible method of obtaining interconnection" at cost-based rates. 47 C.F.R. § 51.321(a).[54] [Pet. App. 43a – 44a.]

The problem with the Sixth Circuit's decision is it displaces a reasonable interpretation of laws and regulations that the FCC administers and enforces, which is what this Court recognized in *Auer*. In short, when there is no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question, a Court's inquiry should end. Here, however, the Sixth Circuit has not only substituted its judgment for the expertise of the agency in a complex and technical area of the law, but has done so in a manner which is based on a fundamentally flawed analysis that is at odds with the intent of Congress in passing the Act.

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[54] *Michigan Bell Tel.*, 597 F.3d at 387-388.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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