IN THE

Supreme Court of the United States

TALK AMERICA INC.,
Petitioner,

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

WILLIAM L. MAGNESS *
SUSAN C. GENTZ
CASEY, GENTZ & MAGNESS, L.L.P.
98 San Jacinto Blvd., Suite 1400
Austin, Texas 78701
(512) 480-9900
bmagness@cgmllp.com

* Counsel of Record

Counsel for Petitioner

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QUESTION PRESENTED

Was the Michigan Public Service Commission barred from requiring incumbent local exchange carriers ("ILECs") to offer their competitors telecommunications facilities known as "entrance facilities" at cost-based rates under § 251(c)(2) of the Telecommunications Act of 1996 as a result of a Federal Communications Commission rule eliminating ILECs' obligation to provide similar facilities under § 251(c)(3) when they are used by competitors for a different statutory purpose?

PARTIES TO THE PROCEEDING

In addition to Talk America Inc., Covad Communications Company and XO Communications were Intervenors-Defendants-Appellants in the court of appeals. Michigan Bell Telephone Company d/b/a AT&T Michigan was Plaintiff-Appellee in the court of appeals. The following parties, or their predecessors in office, were Defendants-Appellants in the court of appeals: Michigan Public Service Commission; J. Peter Lark, Laura Chappelle, and Monica Martinez, in their official capacities as Commissioners of the Michigan Public Service Commission. Commissioners currently appointed to the Michigan Public Service Commission are Chairman Orijakor N. Isiogu, Commissioners Monica Martinez, and Greg R. White. In addition, McLeodUSA Telecommunications Services, Inc. and TDS Metrocom, LLC were Intervenors in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 26, undersigned counsel states that no publicly held company owns 10% or more of the stock in Talk America Inc.

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Petitioner Talk America Inc. ("Talk America"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Court of Appeals Opinion is reported at 597 F.3d 370 and is reproduced in the Appendix herein at App. 1a. The order denying the motion for rehearing en banc is unreported, and is reproduced in the Appendix herein at App. 90a. The decision of the U.S. District Court for the Eastern District of Michigan is also unreported, and is reproduced in the Appendix herein at App. 143a.

JURISDICTION

The district court had jurisdiction pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331 and 1343(a)(3). The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on February 23, 2010, and it denied petitioner's timely filed petition for rehearing en banc on June 2, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Telecommunications Act of 1996, 47 U.S.C. §§ 251-252, are set forth in the Appendix, at App. 92a.

STATEMENT

This case presents a question of federal law, arising under the Telecommunications Act of 1996. Since 2008, the courts of appeals had unanimously held that federal law requires incumbent local exchange carriers ("ILECs") to offer "entrance facilities" to competitive local exchange carriers ("CLECs") at cost-based rates, for the purpose of interconnecting the respective LECs' networks.

On February 23, 2010, the Sixth Circuit, in a split panel decision, and over the vigorous dissent of Judge Jeffrey Sutton, rejected precedent established by the 2008 decisions of the Seventh and Eighth Circuits. The circuit split resulting from the Sixth Circuit's decision intensified when the Ninth Circuit issued its decision on precisely the same issue on March 4, 2010. The Ninth Circuit, consistent with the Seventh and Eighth Circuit decisions, as well as the Federal Communications Commission's ("FCC") interpreta-

tions of its applicable regulations, held that entrance facilities must be made available by ILECs (such as AT&T or Verizon) to CLECs (such as petitioner Talk America), at cost-based rates to facilitate interconnection of competing telecommunications networks.

The Sixth Circuit panel majority's decision is an outlier in two ways. First, it effectively rewrites provisions of the Telecommunications Act of 1996 that ensure efficient, non-discriminatory interconnection of the networks of competing providers of voice and data services. The other courts of appeals reviewing the issue held that federal law and the FCC's implementing regulations required incumbents to offer entrance facilities to competitors at cost-based rates to facilitate the seamless, interconnected telecommunications networks contemplated by the Telecommunications Act.

The Sixth Circuit's contrary view of the same provisions of the Telecommunications Act has significant ramifications in the telecommunications industry. For CLECs such as petitioner Talk America, the decision has substantial detrimental financial and competitive consequences. For all competitive and incumbent LECs, the decision re-opens what had been a settled legal issue, and threatens to drive up the cost of market entry by CLECs. The decision creates business uncertainty not only for companies operating in the Sixth Circuit's states of Michigan, Kentucky, Ohio, and Tennessee, but also for those operating in the twenty-seven states within the jurisdiction of the courts of appeals that have not faced the issue.

Second, contrary to this Court's precedents, the Sixth Circuit refused to defer to the FCC's interpretation of its own regulations regarding the use of

entrance facilities for interconnection of LEC networks. By contrast, the Ninth Circuit held that the FCC's interpretation of its applicable regulation is entitled to deference, based on this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997). Left undisturbed, the Sixth Circuit panel majority's misguided approach to *Auer* deference could have far-reaching implications for future cases reviewing regulations promulgated by the FCC or any other federal agency.

1. Prior to the Sixth Circuit's decision in *Michigan Bell Tel. Co. v. Covad Communications Co.*, 597 F.3d 370 (2010) App. at 1a. (*"Michigan Bell"*), the meaning of the federal law and rules regarding the availability and pricing of entrance facilities was settled. There is no dispute that an entrance facility is a "high capacity wire that links telephone networks." *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 597 F.3d 958, 963 (9th Cir. 2010) App. at 52a. (*"Pacific Bell"*). More specifically, as the Seventh Circuit explained:

> An "entrance facility" is a connection between a switch maintained by an ILEC and a switch maintained by a CLEC. In other words, it is a means of transferring traffic from one carrier's network to another. The connection may be by copper cable, fiber-optic cable, or radio-frequency link. The connection may be long or short ... . ILECs built entrance facilities to comply with their obligation to interchange traffic among networks.

Illinois Bell Tel. Co. v. Box, 526 F.3d 1069, 1071 (7th Cir. 2008) App. at 82a. (*"Illinois Bell"*). An entrance facility is "a means of transferring traffic from one carrier's network to another's, and facilitates an

ILEC's obligation under the Act to interchange traffic among networks." *Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 681 (8th Cir. 2008), *cert. denied on other grounds,* 129 S. Ct. 971 (2009) App. at 72a. ("*Southwestern Bell*").

An entrance facility "may be used for two distinct purposes," as described by the *Pacific Bell* court:

> First, a competitive LEC can use an entrance facility for interconnection – that is, to link the competitive LEC's network with that of an incumbent LEC so that the competitive LEC's customers may reach the incumbent LEC's customers. ... 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 reach *one another* over the incumbent LEC's network.

Pacific Bell, 597 F.3d at 963. (citations omitted; emphasis in original).[1] App. at 52a-53a. ILEC systems are able to distinguish the uses to which a CLEC puts a leased entrance facility. "[ILECs] are capable of screening out calls that would be used for backhauling. A computer identifies the destination of the call, and, if the call is bound for a computer of the competitive LEC, the computer can screen out the call." *Id.*, at n.8. App. at 53a. *See also Illinois Bell*, at 1071, App. at 84a. ("... ILECs can detect and block

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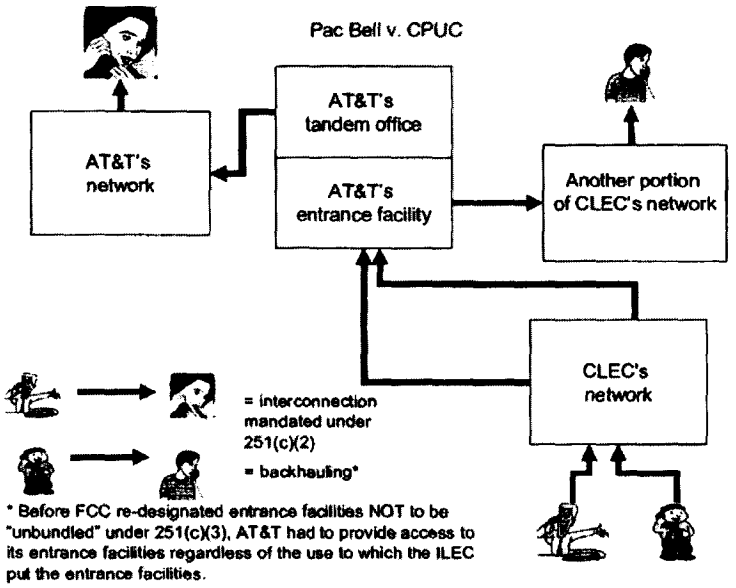
[1] As the Seventh Circuit notes in *Illinois Bell*, the use of the term "backhauling" may be misleading: "intra-CLEC traffic is related only loosely to loading freight on a truck, train, or boat at its destination for delivery to the vehicle's point of origin." *Illinois Bell*, 526 F.3d at 1071, App. at 83a.

any attempted use of an entrance facility for backhauling.")

The *Pacific Bell* decision, 597 F.3d at 964, App. at 53a, includes an instructive diagram depicting the different uses of entrance facilities, which is reproduced below:



2. The two distinct functions entrance facilities can be used to perform trigger two independent legal requirements under § 251 of the Telecommunications Act. Under § 251, ILECs "are subject to a host of duties intended to facilitate market entry"; "foremost among these duties is the LEC's obligation under [§ 251(c)] to share its network with competitors." *AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366, 371 (1999). Section 251 requires that ILECs lease certain facilities to CLECs, and charge "just and reasonable" lease rates based upon the Total Element Long Run Incremental Cost ("TELRIC") methodology adopted

by the FCC. *See Verizon Communications v. FCC*, 535 U.S. 467, 489 (2002). Section 251 requires TELRIC rates for the leasing of facilities used to provide interconnection (47 U.S.C. § 251(c)(2), App. at 94a) and for facilities utilized as unbundled network elements ("UNEs") (47 U.S.C. § 251(c)(3), *id.*). Entrance facilities used for interconnection purposes are subject to § 251(c)(2), and entrance facilities used for "backhauling" CLEC traffic are designated as UNEs subject to § 251(c)(3). The duties imposed on ILECs under "§ 251(c)(2) and 251(c)(3) are independent" obligations under the statute. *Pacific Bell*, 597 F.3d at 967, App. at 59a; *see Southwestern Bell*, 530 F.3d at 683-84, App at 78a-79a.

The § 251(c)(2) interconnection requirement provides that each ILEC "has the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange network." 47 U.S.C. § 251(c)(2). The FCC's implementing regulations define "interconnection" as "the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. Furthermore, the FCC's regulations provide that ILECs must provide CLECs "any technically feasible method of obtaining interconnection." *Id.*, § 51.321(a).

Interconnection is essential to a competitive telecommunications market. As the *Pacific Bell* court explained:

> Without the ability to link its network to that of the incumbent LEC, the competitive LEC would have little prospect of selling its telephone services, to say nothing of competing for the customers of the incumbent LEC. A local telephone service is of little use if it cannot connect to other local telephone users.

Pacific Bell, 597 F.3d at 961, App. at 48a. While entrance facilities are not mentioned specifically in the FCC's interconnection regulations, entrance facilities are "designed for the very purpose of linking two carriers' networks," which "meets the requirement of feasibility" under the FCC's regulations. *Illinois Bell*, 526 F.3d at 1072, App. at 84a. Based on these considerations, the Seventh, Eighth, and Ninth Circuits logically concluded that the statute and regulations "authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for purposes of interconnection." *Pacific Bell*, 597 F.3d at 965, App. at 56a. *See Southwestern Bell*, 530 F.3d at 684, App. at 79a; *Illinois Bell*, 526 F.3d at 1071-72, App. at 84a-85a. *See also Michigan Bell*, 597 F.3d at 388-90, App. at 39a-40a (in his dissent, Judge Sutton concurs in the legal analysis supporting the decisions in *Illinois Bell, Pacific Bell*, and *Southwestern Bell*).

The § 251(c)(3) unbundling requirement provides that ILECs have "[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). Network elements provided on an unbundled basis are known in the industry as "UNEs." The statutory purpose of unbundling is to:

> [P]ermit competitive LECs to lease, at regulated cost-based rates, parts of the incumbent's network, such as telephone wires, call exchanges, and routing systems. This provision promotes competition by allowing a competitive LEC to enter the telephone service market without having first to overcome capital barriers to entry,

> i.e., without having to construct, at high cost, every component necessary to operate a network.

Pacific Bell, 597 F.3d at 962. App. at 49a.

The statute also provides, however, that before an ILEC is obligated to provide any network element to competitors as a UNE under § 251(c)(3), the FCC must make a finding that unavailability of the UNE at TELRIC rates would "impair" competition. *Id.*, at § 251(d)(2)(B). Importantly, the interconnection provisions of the statute discussed above do not include this "impairment" standard; it's applicability is unique to the FCC's determinations regarding the ILECs' obligation to provide UNEs under § 251(c)(3).

The FCC addressed the question of whether ILECs must make entrance facilities available as UNEs for purposes of backhauling intra-CLEC traffic in several FCC unbundling orders. As it pertains to this case, the key FCC decision is the 2005 order known in the industry as the *"Triennial Review Remand Order"* (*"TRRO"*). *See* Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005). In the *TRRO*, the FCC "concluded that CLECs do not need entrance facilities for backhauling and should build their own equipment for handling CLEC-to-CLEC traffic." *Illinois Bell*, 526 F.3d at 1071. App. at 83a.

As it made clear that ILECs did not need to provide entrance facilities as UNEs, the FCC also addressed "the original (and principal) use of an entrance facility," the linking of networks "to allow CLEC-to-ILEC (and ILEC-to-CLEC traffic)." *Illinois Bell*, 526 F.3d 1071. App. at 83a. On that issue, the FCC stated:

> [O]ur finding of non-impairment with respect to entrance facilities does not alter the right of [CLECs] to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, [CLECs] will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the [ILEC's] network.

TRRO, at ¶ 140. The FCC made clear that its decision that entrance facilities need no longer be made available as UNEs pursuant to § 251(c)(3) did not alter the availability of entrance facilities to be used for interconnection pursuant to § 251(c)(2).

3. The FCC regulations implementing the interconnection and unbundling provisions of § 251(c) have very different histories. Interconnection regulations under § 251(c)(2) have remained relatively stable since the FCC issued its 1996 Local Competition Order, which included the first set of regulations promulgated under the Telecommunications Act. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15614-15, ¶ 224 (1996) ("*Local Competition Order*"). By contrast, the regulations governing availability of UNEs have been the subject of extensive litigation in the courts, including this Court's decision in *AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366 (1999). The legal controversies over UNEs culminated in the D.C. Circuit's approval of revised FCC regulations in *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). The FCC regulations affirmed by the D.C. Circuit were those issued by the FCC in 2005, in the *TRRO* order discussed above.

The major changes in federal rules governing UNEs that were included in the *TRRO* generated numerous regulatory proceedings at state utility commissions nationwide. Under the Telecommunications Act, state utility commissions have the role of approving "interconnection agreements" that delineate the rates, terms, and conditions under which an ILEC and CLEC do business. Interconnection agreements cover topics including interconnection, unbundling, and the other mandates of § 251(c) of the Act. See 47 U.S.C. § 252, App. at 102a; *Iowa Utils. Bd.*, 525 U.S. at 385 ("[T]he 1996 Act entrusts state commissions with the job of approving interconnection agreements ..."). If a CLEC and ILEC cannot come to terms, the state commission is authorized to resolve the parties' disputes in "arbitration" proceedings, the contours of which are detailed in § 252. The results of the state commission determinations reached in § 252 proceedings are reviewable in the federal courts. 47 U.S.C. § 252(e).

When the FCC changed the rules governing UNE availability in the *TRRO*, its decisions required the revision of the thousands of interconnection agreements executed by ILECs and CLECs. When the ILECs and CLECs could not agree on how the FCC's new rules should be reflected in their agreements, they turned to state commissions to resolve the disputes. The case below began with such a dispute resolution proceeding, involving ILECs and CLECs operating in Michigan.

4. The Michigan Public Service Commission ("MPSC") initiated a proceeding to address the parties' disputes over implementation of the *TRRO*. Michigan Public Service Commission, Case No. U-

14447, *In the Matter, on the Commission's Own Motion, To Commence A Collaborative Proceeding To Monitor and Facilitate Implementation of Accessible Letters Issued By SBC Michigan and Verizon.* Among the numerous disputed issues was the question of whether Michigan Bell had the right to price entrance facilities used for interconnection above the TELRIC rate, *i.e.*, the cost-based rate, required pursuant to § 251(c)(2). Michigan Bell argued that the *TRRO*, when it eliminated the ILECs' obligation to provide entrance facilities as UNEs, thereby eliminated any obligation to provide entrance facilities at TELRIC rates for any purpose, including interconnection.

The MPSC rejected Michigan Bell's arguments, and concluded that the FCC's decision eliminating the ILECs' duty to provide entrance facilities as UNEs under § 251(c)(3) nonetheless left intact the ILECs' separate obligation to provide entrance facilities used for purposes of interconnection under § 251(c)(2). *See* MPSC Case No. U-14447, Arbitration Order, at 11-13 (Sept. 20, 2005), App., at 183a-185a.

5. On April 28, 2006, Michigan Bell appealed portions of the MPSC Arbitration Order to the United States District Court for the Eastern District of Michigan. Among the portions of the Order Michigan Bell appealed was the MPSC's ruling requiring Michigan Bell, a/k/a AT&T Michigan, to continue to provide CLECs with entrance facilities at a cost-based rate when those entrance facilities are used for purposes of interconnection under § 251(c)(2). In an unpublished opinion dated September 26, 2007, the District Court issued its Order, including its ruling that the MPSC Arbitration Order did not comply with the rules regarding entrance facilities adopted

by the FCC in its *TRRO*, and that, therefore, the MPSC's ruling on that issue must be set aside. *See* App. at 156a-158a. The District Court entered its final judgment on October 23, 2007, granting, in part, Michigan Bell's motion for summary judgment and enjoining the MPSC from enforcing those portions of its Arbitration Order which the district court ruled to be unlawful.

6. The district court's decision on entrance facilities was timely appealed to the Sixth Circuit by the MPSC, and by a group of CLECs, including petitioner Talk America. While the appeal was pending in the Sixth Circuit, other decisions regarding the entrance facilities dispute were percolating from state utility commissions up through the courts of appeals. In 2006, a Missouri Public Service Commission order that reached the same conclusion on entrance facilities as the MPSC Arbitration Order was affirmed by the U.S. District Court for the Eastern District of Missouri, in *Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp.2d 1055 (E.D. Mo. 2006). In 2008, the Eighth Circuit affirmed the district court's conclusion that the *TRRO* did not change the § 251(c)(2) requirement that ILECs make entrance facilities available at TELRIC rates when used for interconnection. *Southwestern Bell*, 530 F.3d at 683-84. App. at 78a-79a. In an unpublished opinion in 2007, the U.S. District Court for the Northern District of Illinois affirmed an Illinois Commerce Commission decision that reached the same legal conclusion as the MPSC Arbitration Order. The Illinois district court's decision was affirmed by the Seventh Circuit in 2008. *Illinois Bell*, 526 F.3d at 1071-72. App. at 83a. In 2008, the U.S. District Court for the Northern District of California, also in an unpublished opinion, affirmed a California

Public Utilities Commission decision that mirrored the MPSC Arbitration Order. The California district court's decision was ultimately affirmed by the Ninth Circuit in *Pacific Bell*, 597 F.3d at 965-69. App. at 56a-63a. In summary, a consensus was rapidly developing in the district courts and the courts of appeals that supported the conclusion reached by the MPSC Arbitration Award regarding entrance facilities.

7. A three-judge panel of the Sixth Circuit heard oral argument in this case on December 10, 2008. At oral argument, panel members queried counsel whether it would be productive to seek input from the FCC, since the meaning of the *TRRO*, as well as other FCC orders and rules, was at issue in the case. On the same day as oral argument, the Clerk of the Sixth Circuit sent a letter to the General Counsel of the FCC inviting the FCC to file a brief as *amicus curiae*, stating its position on the issue on appeal.

8. The FCC filed its invited *amicus* brief on April 3, 2009. The FCC's brief is included in the Appendix at 112a. The FCC urged the Sixth Circuit to reverse the district court, stating its position in no uncertain terms:

> The FCC in paragraph 140 of the *TRRO* declared explicitly that its rule relieving incumbent LECs of the duty to unbundle entrance facilities and its non-impairment finding "do[] not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)." The FCC went on to state categorically that "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." The MPSC was correct in accepting the

> agency's authoritative interpretation of the scope of the unbundling rule and its specification of the incumbent LECs' section 251(c)(2) obligations.

Brief for Amici Curiae Federal Communications Commission in Support of Defendant-Appellants and Reversal of the District Court, at 10-11 (April 3, 2009), App. at 128a-129a. ("FCC Brief"). The FCC urged that "the district court (in contrast to two circuit courts previously confronting the same issue) improperly disregarded the FCC's authoritative construction of its own rules and authorizing statute," and that there was no question that the Sixth Circuit should reverse the district court's erroneous decision. FCC Brief, at 2. App. at 120a.

The FCC Brief detailed the errors in the district court's interpretation of FCC orders and rules, and also correctly noted that the district court decision failed to apply the level of deference to the FCC's decisions that this Court has held is required:

> The FCC ... reasonably determined in the *TRRO* both that competitive LECs are not impaired without access to entrance facilities (thus relieving them of the obligation to provide those facilities to competitive carriers as UNEs under section 251(c)(3)) and that this determination had no effect on the incumbent LECs' independent obligation to provide interconnection under section 251(c)(2). Because that regulatory interpretation "reflect[s] a 'fair and considered judgment' and [is] not 'plainly erroneous or inconsistent' with the unbundling rule, that construction is 'controlling.'" The district court erroneously found that the agency's interpretation of the scope of its unbundling regulation "undermines the plain meaning of the rule." The rule refe-

> renced by the court (which states that incumbent LECs need not provide entrance facilities as unbundled network elements) is codified in a section addressing an incumbent LEC's duties "in accordance with section 251(c)(3) of the Act." 47 C.F.R. § 51.319(e). Nothing in that rule suggests that it applies also to an incumbent LEC's separate obligation (embodied in a different rule, 47 C.F.R. § 51.305) to provide interconnection under section 251(c)(2). The FCC's statement in paragraph 140 recognized something that the district court appears to have overlooked: these are two separate statutory obligations that are not necessarily co-extensive.

Id., at 15-16, App., 132a-133a.

9. The case remained pending in the Sixth Circuit until February 23, 2010, when the panel issued its 2-1 decision. The panel majority's opinion rejected the reasoning of the prior on-point decisions of the Seventh and Eighth Circuits in *Illinois Bell* and *Southwestern Bell*. Likewise, the panel majority rejected the FCC's view of the meaning of its own orders and rules, which had been detailed in the FCC's *amicus* brief. Rather than rely on such legal authority, the panel majority conducted its own novel exegesis of the applicable FCC rules and orders, relying largely on an extended (and inaccurate) metaphorical conceit.

The panel majority "re-states" the text of the FCC's order based on its view of "plain meaning," then proceeds to offer a new "translation" of the words in the FCC's order. After positing this new "translation," which, petitioner Talk America submits, inaccurately reads the actual words in the *TRRO*, the panel majority then asks: "So, the question becomes:

does this mean what it says?" *Michigan Bell*, 597 F.3d at 379. App. at 18a. Because it had created the restatement (instead of relying on the actual language used by the FCC), the panel majority, of course, can answer "Yes!" The problem is that the "translation" process replaced the actual terms used by the FCC with other terms that re-frame the meaning intended by the FCC. The exegesis conducted by the panel majority, which it relies on in deciding the case, is not even being conducted on the legal text in question.

The panel majority attempts to "explain" entrance facilities by analogizing the FCC rules governing entrance facilities to an imagined municipal ordinance authorizing users of a public park to plug "big orange extension cords" into "the outlet in your garage" (assuming that your garage is in a house next to the park in question). This purportedly "simple" analogy is set up over several pages of the panel majority's opinion. *Id.*, at 379-81. App. at 18a-21a. The analogy is utterly original: nothing like it is included in the record before the court, nor in any other court decision addressing entrance facilities or other telecommunications issues. As the analogy rolls out, the "big orange extension cord" is, variously, the "entrance facility" or the "interconnection facility," although the panel majority ultimately pauses to note: "to ease the analogy, let's just assume you allowed them [the park-goers] to plug into the surge protector." *Id.* at 380. App. at 20a.

As noted in Judge Sutton's dissent, the panel majority's metaphorical conceit is an admirable attempt to clarify technical issues. *Id.*, at 387. App. at 33a. Petitioner Talk America submits, however, and argued in its motion for rehearing en banc, that

the analogy is factually and technically inaccurate, as well as based on legal premises that find no support in the applicable FCC orders and rules. When it affirmed the district court's decision, the panel majority did not let facts or precedent stand in the way of a creative metaphor. It is thus not surprising that, as the panel majority noted, "the MPSC Commissioners, the CLECs, the dissent, and the two Circuit Courts to have considered this all see it another way." *Id.*, at 381. App. at 22a.

10. Judge Sutton's dissent did, indeed, "see it another way." The dissent would have reversed the district court, for reasons consistent with the rationale underlying the decisions of the other courts of appeals. The dissent noted that the majority's view of the FCC's orders and rules "may be a reasonable interpretation." Judge Sutton went on to conclude: "So too, however, is the FCC's competing interpretation, one premised on an interpretation of its own regulations and one that we must respect as a result." *Id.*, at 387, App. at 33a. *citing Auer v. Robbins*, 519 U.S. 452 (1997). The dissent found this case a prime candidate for *Auer* deference, and objected to the panel majority's refusal to show even the slightest deference to the expert agency's interpretation of its own rules.

In footnotes to the majority opinion responding to the dissent, the panel majority takes an extremely narrow view of *Auer* deference. Ultimately, the panel majority contends that the FCC's interpretation of its rule "is so plainly erroneous or inconsistent with the regulation ... that we can only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation." *Id.*, at 375, n.6. App. at 10a. The panel majority's bold

allegation that the FCC was attempting to improperly alter its rules was supported neither by the facts of this case nor by any other appellate judge who has considered the issues presented in this case.

11. The MPSC and the CLEC intervenors filed timely motions for panel rehearing or rehearing en banc. The motions were denied on June 2, 2010, with Judge Sutton stating that he would have granted rehearing en banc for the same reasons he dissented from the panel majority's opinion. App. at 90a.

12. On March 4, 2010, after the Sixth Circuit issued its opinion but before it denied motions for rehearing en banc, the Ninth Circuit released its decision in *Pacific Bell*. As discussed above, the Ninth Circuit's ruling on the entrance facilities issue is consistent with the 2008 decisions of the Seventh and Eighth Circuits. The *Pacific Bell* decision did not cite or attempt to distinguish the Sixth Circuit's *Michigan Bell* decision.

13. Petitioner Talk America is aware of no other case addressing the entrance facilities issue pending in any of the other courts of appeals.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S DECISION CREATED A DAMAGING DIVISION BETWEEN THE CIRCUITS THAT THIS COURT SHOULD RESOLVE.

As discussed above, the decision of the panel majority in *Michigan Bell* is an outlier. The Sixth Circuit's decision stands apart from the decisions of every other court of appeals to have considered the same issue, as well as from the FCC's authoritative interpretation of its own orders and rules. The contested

legal issue is fully fleshed out in the four Circuit court decisions to have considered the status of entrance facilities in light of the FCC's *TRRO* unbundling order. This Court's consideration and resolution of the issue would foster uniformity among the courts of appeals.

The circuit split on this issue is damaging to the telecommunications industry. For CLECs like petitioner Talk America, if the Sixth Circuit's decision stands, the prices it must pay for entrance facilities used for interconnection will be dramatically higher in the four states in the Sixth Circuit than in other states. Unreasonably high prices for interconnection damage all CLECs' ability to compete, contrary to the purpose of the Telecommunications Act.

The circuit split also creates uncertainty in the states outside the four circuits where the issue has been decided. Under the Telecommunications Act, interconnection agreements are negotiated, arbitrated, and approved by state utility commissions on a state-by-state basis. *See* 47 U.S.C. § 252. As interconnection agreements expire, uncertainty regarding the terms and conditions applicable to entrance facilities will generate additional litigation regarding an issue that appeared to be settled until the Sixth Circuit issued its *Michigan Bell* decision. A decision on the issue by this Court would resolve that business uncertainty and prevent unnecessary, repetitive litigation before numerous state utility commissions and federal courts.

II. THE ISSUE PRESENTED IS PURELY ONE OF FEDERAL LAW THAT CAN BE DEFINITIVELY RESOLVED IN THIS CASE.

This case presents the question of whether the FCC rule relieving ILECs of their § 251(c)(3) duty to make entrance facilities available as UNEs bars the MPSC from construing § 251(c)(2) to require an ILEC to provide CLECs with similar facilities at cost-based rates when they are used solely for interconnection. This is undoubtedly a question of federal law, and its resolution does not rely on factual findings in the courts below, or on other factors that would prevent this Court from definitively deciding the issue.

To petitioner Talk America's knowledge, there are no other cases pending before the courts of appeals regarding the entrance facilities issue in this case. Further percolation of the issues in the lower courts is unnecessary: the issues dividing the Sixth Circuit from the other courts of appeals are clearly established. Likewise, the question of how *Auer* deference should apply to the FCC's interpretation of its interconnection regulations is fully developed and crystallized in the contrasting decisions of the Sixth and Ninth Circuits in *Michigan Bell* and *Pacific Bell*.

III. *MICHIGAN BELL* WAS WRONGLY DECIDED BY THE SIXTH CIRCUIT PANEL MAJORITY.

A. The decision of the Sixth Circuit panel majority overlooks or misapprehends legal standards established in long-standing FCC orders and rules.

The panel majority acknowledges that the other courts of appeals to have ruled on the entrance

facilities dispute ruled consistently with the position taken in Judge Sutton's dissent. The majority bases its singular view of the law on at least five premises that are contradicted by: (a) long-standing FCC decisions regarding the scope of ILEC obligations to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network," pursuant to 47 U.S.C. § 251(c)(2); or (b) the FCC's unbundling orders and rules, including the *TRRO* and its predecessor order, the *Triennial Review Order ("TRO"),* and the rules promulgated therein. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003) (*"Triennial Review Order" or "TRO").*

1. A fundamental and erroneous premise underlying the panel majority's opinion is that "interconnection facilities and entrance facilities are different things." *Michigan Bell*, 597 F.3d at 384, n.13. App. at 27a. This premise underlies the majority's rejection of the decisions of the other circuits upholding TELRIC pricing for entrance facilities used as interconnection facilities. The majority also erroneously concludes that because the term "interconnection facilities" does not appear in the FCC's 2003 *TRO*, that it "is a phrase new to the *TRRO*." *Id.* App. at 25a.

Contrary to the panel majority's assertions, the FCC has long recognized that "entrance facilities" may be a type of "interconnection facilities." Both phrases have been used in FCC orders and rules since the first proceedings implementing the Telecommunications Act. For example, the FCC Common Carrier Bureau arbitrated interconnection disputes between Verizon and various CLECs in Virginia, issuing its order in 2002. In one of those disputes, Verizon and the CLECs disagreed about the terms under which CLECs would provide "entrance facilities" to Verizon. The FCC noted: "These *'entrance facilities' are interconnection facilities* [CLECs] provide to Verizon that are used to transport Verizon-originated traffic to the [CLECs'] networks." *Petition of WorldCom, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum and Order, 17 FCC Rcd 27039, 27069, ¶ 58 (2002) (emphasis supplied). Thus, in 2002, prior to the issuance of the *TRO* and the *TRRO,* the FCC undoubtedly viewed entrance facilities as a subset of "interconnection facilities."

The quoted statement in the 2002 order is neither the first nor the only time the FCC used the term "interconnection facilities" in orders issued prior to the *TRRO.* When it first adopted interconnection rules in 1996, the FCC held that the statutory interconnection duty requires ILECs "to design interconnection facilities to meet the same technical criteria and service standards that are used within their own networks." 47 C.F.R. § 51.305(a)(3); *Local Competition Order,* 11 FCC Rcd 15499, 15614-15, ¶ 224 (1996). Although the FCC did not explicitly

define the term "interconnection facilities," a thorough review of the FCC's orders and rules demonstrates that there is no basis for the panel majority's claim that the FCC did not utilize the term "interconnection facilities" prior to the *TRRO*.

2. The panel majority held that once the FCC determined that ILECs were no longer obligated to make entrance facilities available on an unbundled basis pursuant to the "impairment standard" of 47 U.S.C. § 251(c)(3), *i.e.,* available as "UNEs," that this meant that "an ILEC is not obligated to provide entrance facilities at TELRIC rates." *Michigan Bell*, 597 F.3d at 377. App. at 13a. This holding misconstrues the statute and the FCC's rules, which have required, since the *Local Competition Order* in 1996, that ILECs offer interconnection facilities at cost-based, TELRIC rates, and that this statutory obligation is separate and distinct from the ILECs' statutory obligation to make UNEs available when those UNEs satisfy the statute's "impairment" standard.

Section 251(c)(2)(D) requires that ILECs provide interconnection facilities on the "rates, terms and conditions" that comply with the requirements of § 252. 47 U.S.C. § 251(c)(2)(D). App. at 94a. Section 252(d)(1) provides that "the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251" shall be cost-based. *Id.*, § 252(d)(1)(A)(i). App. at 105a. In implementing this rate-setting provision, the FCC established the TELRIC methodology. *See Local Competition Order*, 11 FCC Rcd. at 15,844, ¶ 672; *see also* 47 C.F.R. §§ 51.501(a)-.505 (2005) (applying TELRIC to the pricing of interconnection). The FCC concluded that Congress intended to apply the same

pricing rules to interconnection and UNEs, based on the plain language of the Act. *See Local Competition Order*, 11 FCC Rcd at 15, 816, ¶ 628; *Southwestern Bell v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1072-73 (E.D. Mo. 2006), *aff'd,* 530 F.3d 676 (8th Cir. 2008), *cert. denied,* 129 S. Ct. 971 (2009).

Thus, when the FCC ruled in the *TRRO* that entrance facilities would no longer be available as UNEs, *see* 47 C.F.R. § 51.319(e)(2)(i), that decision did not alter the requirement that interconnection facilities be priced at TELRIC, nor did it alter the prior FCC determination that entrance facilities constitute a form of interconnection. As Judge Sutton's dissent points out, to read the elimination of entrance facilities as UNEs to include their elimination as interconnection facilities ignores the language of § 51.319(e)(2)(i): the rule speaks only of the ILEC's obligation to "provide a carrier *with unbundled access*," and says nothing about the ILEC's interconnection obligation. *See Michigan Bell*, 597 F.3d at 390, *citing Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 59-60 (2007). App. at 39a. The panel majority overlooks the fact that unbundling and interconnection obligations each present a separate and independent basis for applying TELRIC pricing to wholesale ILEC facilities. Properly recognizing the existence of these separate bases for TELRIC pricing eliminates the conflict the panel majority perceives between the FCC's unbundling rule, which eliminates unbundling of entrance facilities, and the FCC's statement, in *TRRO* ¶ 140, that entrance facilities remain subject to TELRIC pricing when used for interconnection. *See Pacific Bell*, 597 F.3d at 967-68. App. at 57a-58a.

3. The panel majority relies on a factual finding that has no basis in the record of this appeal, is

contrary to the FCC's factual findings, and is inconsistent with the practical industry experience of petitioner Talk America. The panel majority opines that, "at least in our view, entrance facilities are not actually a 'technically feasible means of obtaining interconnection' because they do not connect the CLEC with the ILEC network directly; entrance facilities, when used, connect the CLEC with the interconnection facility." *Michigan Bell*, 597 F.3d at 382, n.12. App. at 24a. The panel majority's view is contradicted by practical reality, where companies like Talk America connect their networks to ILEC networks using entrance facilities running between ILEC and CLEC equipment. The entrance facility is the equipment that provides the "bridge" to the ILEC equipment; there is no intermediary "interconnection facility" that stands between the connection of the entrance facility equipment to the ILEC network.

Petitioner Talk America submits that the record does not include evidence on the technical feasibility of using entrance facilities to interconnect networks because neither the courts nor the FCC have ever held that use of an entrance facility could *not* serve as a "technically feasible method of obtaining interconnection" for purposes of 47 C.F.R. §§ 51.305 or 51.321. To the contrary, the FCC made the opposite fact-finding, based on an extensive evidentiary record, when it stated in the *TRO*, and affirmed in the *TRRO*, that CLECs use entrance facilities "between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic." *TRO*, 20 FCC Rcd at 17203 (¶ 365). The FCC again affirmed its view in the *amicus* brief filed in this case. *See* FCC Brief, at 20, App. at 137a-138a. The panel majority erred in adopting and relying on a

counter-factual conclusion regarding the use of entrance facilities for interconnection.

4. The panel majority discounts the conclusion reached by the dissent, as well as by the Seventh, Eighth and Ninth Circuits, that the FCC has applied different rules to what the panel majority characterizes as "the same exact wire," based on the different functions served by the "wire." *Michigan Bell*, 597 F.3d at 382. App. at 24a. The panel majority contends that the FCC's rules do not make distinctions between the different functions that could be served by a single telecommunications facility. That view, however, is flatly contradicted by the FCC's interconnection rules.

For example, in 47 C.F.R. § 51.305(c), the FCC distinguishes between interconnection established for purposes of a carrier "terminating its interexchange traffic" (*i.e.,* long distance calls) and for purposes of "providing to others telephone exchange service or exchange access" (*i.e.,* local calls or network access). Although the same "interconnection" – using the same "facilities and equipment," or the same "wire" – could be used for both purposes, the FCC's rule prohibits the use of the wire for terminating long distance traffic, but permits the use of the wire for offering local services in competition with the ILEC.

When it upheld this aspect of the FCC's rule in *Competitive Telecom. Ass'n v. FCC*, 117 F.3d 1068, 1073 (D.C. Cir. 1997), the D.C. Circuit found that "[o]bviously the services sought, while they might be technologically identical (a question beyond our expertise), are distinct." The different services provided over the same wire, the distinct functions to which the facilities could be put, justified different regulatory treatment under the interconnection rules.

Similarly, the FCC drew a functional distinction in the *TRO* and *TRRO*, finding that entrance facilities should not be available as UNEs (when used to backhaul traffic between a CLEC's customers), but should remain available as an interconnection method subject to TELRIC rates (when used as a CLEC's physical link with the ILEC network for the exchange of traffic).

5. The panel majority erroneously accepts Michigan Bell's view that all an ILEC must do to meet its statutory interconnection obligations is to "merely 'make a plug-in available' for connection with the CLEC's facilities and equipment." *Michigan Bell*, 597 F.3d at 384. App. at 28a. This view is inconsistent with the FCC's long-standing rules and orders regarding the scope of interconnection. As the dissent stated after reviewing the salient FCC rules and orders, "an incumbent's interconnection duty encompasses more than providing competitors with an outlet to plug into." *Id.*, at 389. App. at 38a. Indeed, the FCC's *amicus* brief details its prior rulings establishing the breadth of ILEC interconnection obligations, rulings in which "the FCC consistently has stated that an incumbent LEC, in fulfilling its duty to provide interconnection under section 251(c)(2), may be required to provide facilities to effectuate interconnection," FCC Brief, at 22, App. at 139a., facilities that go far beyond the "wall outlet" imagined in the Majority's "big orange extension cord" analogy.

Settled law supports the summary of the breadth of interconnection obligations stated in the FCC's brief:

> Since the adoption of the 1996 Act, the FCC has consistently found that an incumbent LEC, to fulfill [the] duty to interconnect, may be required

> to provide facilities that are used for the physical linking of the two networks. ... Indeed, the *Local Competition Order* and the implementing rule it adopted require the [ILEC] to provide interconnection not just at any feasible point, but by "any feasible method" of interconnection, such as a "meet point arrangement" by which the [ILEC] must build out its facilities to a designated "meet point."

FCC Brief, at 18-19, App. at 136a-137a (citations omitted).

In addition to disregarding settled FCC rulings, the panel majority also asserts the existence of (and then relies upon) concepts that are completely foreign to the FCC's rules. For example, the panel majority argues that "an ILEC's portion of a meet-point facility ... is an 'interconnection facility,' whereas the CLEC's portion of the meet-point is an 'entrance facility.'" *Michigan Bell*, 597 F.3d at 382, n.11. App. at 24a. This assertion is made without citation to any FCC rule or order, or any other factual or legal authority. In another footnote, the panel majority dismisses the well-established principles embodied in the FCC rules for determining whether interconnection methods are "technically feasible." *Id.*, n.12. App. at 24a-25a.

Each of these substantive legal errors contributed to the panel majority's incorrect conclusion that ILECs need not make entrance facilities available at cost-based rates for interconnection pursuant to § 251(c)(2).

B. The panel majority erred in failing to accord *Auer* deference to the FCC's interpretation of its own orders and rules.

1. The panel majority suggests that the *TRRO* is not entitled to deference because it is an "interpretive rule." Petitioner Talk America agrees with the analysis in Judge Sutton's dissent, which concludes that FCC orders like the *TRRO* constitute "legislative rules," rather than post-hoc agency interpretations of existing rules. Notably, when the FCC adopted the *TRO* and the *TRRO*, the agency officially adopted both the orders (including the disputed *TRRO* ¶ 140) and the rules it promulgated pursuant to the orders. In the context of FCC proceedings, the Commission's "orders" and "rules" are both adopted as legislative acts of the agency.

2. The panel majority contends that *Auer* deference may not be appropriate for legal briefs prepared by administrative agency staff, like the FCC *amicus* brief submitted at the panel's invitation in this case. While the Seventh Circuit opinion cited by the panel majority may have "expressed skepticism" concerning agency briefs or staff memoranda, the decisions of this Court do not share that skepticism. See *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."). *See also Ford Motor Credit v. Milhollin*, 444 U.S. 555, 566, n.9 (1980) ("it is unrealistic to draw a radical distinction between opinions issued under the imprimatur of the [Federal Reserve] Board and those submitted as official staff memoranda."). Notably, one of this Court's most recent decisions addressing

Auer deference held that an internal agency memorandum between two EPA staff members was entitled to *Auer* deference. See *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, -- U.S. --, 129 S.Ct. 2458, 2473 (2009).

3. As this case makes abundantly clear, the federal regulations governing CLECs' business are technical, complex, and frequently controversial. Judicial deference to the expert views of the FCC is important to the administration of justice, but also to provide regulatory certainty to CLECs, ILECs, and other market participants. As Justice Scalia noted last year in his concurring opinion in *Coeur Alaska*: "It 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." *Id.*, 129 S.Ct. at 2479 (Scalia, J., concurring in part and concurring in the judgment). The panel majority's analysis of *Auer* deference neglects this important principle, and Talk America urges this Court to correct it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM L. MAGNESS *
SUSAN C. GENTZ
CASEY, GENTZ & MAGNESS, L.L.P.
98 San Jacinto Blvd., Suite 1400
Austin, Texas 78701
(512) 480-9900
bmagness@cgmllp.com

* Counsel of Record

Counsel for Petitioner

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