Nos. 10-313 & 10-329

IN THE

Supreme Court of the United States

TALK AMERICA INC.
AND
ORJIAKOR N. ISIOGU, MONICA MARTINEZ, AND
GREG R. WHITE, COMMISSIONERS OF THE
MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners,

v.

MICHIGAN BELL TELEPHONE COMPANY
D/B/A AT&T MICHIGAN, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENT MICHIGAN BELL TELEPHONE COMPANY

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QUESTION PRESENTED

Whether 47 U.S.C. § 251(c)(2) — which requires an incumbent local exchange carrier to provide interconnection "*for* the facilities and equipment *of* any [competing] carrier" at a point "*within* the [incumbent] carrier's network" (emphases added) — requires the incumbent to provide to a competing carrier, at extremely low regulated rates, all of the facilities and equipment that the competing carrier uses to span the distance (which may be miles) between its own network and the incumbent's network.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Michigan Bell Telephone Company d/b/a AT&T Michigan states the following:

Michigan Bell Telephone Company d/b/a AT&T Michigan is a wholly owned subsidiary of AT&T Teleholdings, Inc., which in turn is a wholly owned subsidiary of AT&T Inc., a publicly owned corporation. AT&T Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

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Although the court below reached the correct decision, AT&T Michigan agrees with petitioners that review by this Court is warranted. The courts of appeals are intractably divided on a question involving one of the central provisions of the Telecommunications Act of 1996 ("1996 Act"), as to which the Federal Communications Commission ("FCC" or "Commission") has long recognized that there is a need for national uniformity. The Court should grant the petitions to resolve this division of authority and should affirm the Sixth Circuit's decision.[1]

STATEMENT

1. In the 1996 Act, Congress "fundamentally restructure[d] local telephone markets" and "subject[ed]" incumbent local exchange carriers ("incumbent LECs" or "ILECs"), like AT&T Michigan, "to a host of duties intended to facilitate market entry" by new providers of local telephone service. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). "Foremost among these duties is the [incumbent] LEC's obligation . . . to share its network with competitors" by providing competing LECs ("CLECs") with leased access to "elements of the incumbent's network 'on an unbundled basis.'" *Id.* (quoting 47 U.S.C. § 251(c)(3)).

In its initial order implementing the 1996 Act, the FCC interpreted § 251(c)(3) to require incumbent LECs to "provide interoffice transmission facilities

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[1] With respect to No. 10-329, AT&T Michigan's acquiescence is limited to the first question presented, which also is the sole question presented in No. 10-313. The second question presented in No. 10-329 — whether the court below properly applied this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997) — does not independently warrant review. *See infra* Part D.

on an unbundled basis," including such facilities "between . . . the wire centers of incumbent LECs and requesting carriers": that is, competing LECs.[2] The FCC also interpreted 47 U.S.C. § 252(d)(1), which sets the pricing standard for unbundled network elements, to require incumbent LECs to lease such elements to competitors using a methodology based on the "hypothetical" cost of a "most efficient element," "untethered to" either the incumbent LEC's "historical investment" or the cost of the "actual network element being provided." *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 501 (2002). The FCC termed this pricing methodology "TELRIC" or "total element long-run incremental cost." *Id.* at 495-96.

As a result of these two decisions, a competing LEC could pay TELRIC rates to lease from an incumbent LEC an "entrance facility," which is the "cable or wire used to transport calls from a CLEC switch to an ILEC switch." Pet. App.[3] 3a.[4] Those TELRIC

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[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 439-440 (1996) ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); 47 C.F.R. § 51.319(d)(1) (1996). "Wire centers are where . . . switches are located." *MCI WorldCom Communications, Inc. v. BellSouth Telecomms., Inc.*, 446 F.3d 1164, 1166 (11th Cir. 2006); *accord* 47 C.F.R. § 51.5. Switches are the "equipment [that] direct[s] calls to their destinations." *Iowa Utils. Bd.*, 525 U.S. at 371.

[3] References to "Pet. App." are to the appendix to the petition for certiorari filed by Talk America in No. 10-313.

[4] Petitioner Talk America (at 6) reproduces a diagram from the Ninth Circuit's opinion in *Pacific Bell Telephone Co. v. California Public Utilities Commission*, 597 F.3d 958, 964 (9th Cir.

rates were "well below the costs the ILECs had actually historically incurred in constructing the elements." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 562 (D.C. Cir. 2004) ("*USTA II*"). In addition, the rates were well below the tariffed rates at which incumbent LECs had long sold, and still sell, entrance facilities to other carriers. *See Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1072 (7th Cir. 2008).

2. The FCC's rules implementing the unbundling requirement in § 251(c)(3) did not fare well in the courts. In 1999, this Court vacated the Commission's initial unbundling rules, finding, among other things, that the FCC had erroneously read the 1996 Act to require "blanket access to incumbents' networks." *Iowa Utils. Bd.*, 525 U.S. at 390. In 2002, the D.C. Circuit vacated the FCC's second set of unbundling rules, in which the FCC — still improperly operating on the "belief that . . . more unbundling is better," *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) ("*USTA I*") — had repromulgated virtually all of the unbundling rules this Court

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2010), that depicts an entrance facility not as a wire running between competing LEC and incumbent LEC switches, but instead as a discrete piece of the incumbent's network that is adjacent to the incumbent's switch. The Ninth Circuit created that diagram out of whole cloth and with no support in the record before it; in fact, both parties in that case (AT&T California and the California Public Utilities Commission) provided the Ninth Circuit with diagrams depicting an entrance facility as a wire spanning the distance between an AT&T California switch and a competing LEC's switch. *See* Brief of Appellant AT&T California at 4, *Pacific Bell*, *supra* (Nos. 08-15568 & 08-15716), 2008 WL 3312433; Brief of Appellees California Public Utilities Commission and Commissioners at 7, *Pacific Bell*, *supra* (Nos. 08-15568 & 08-15716), 2008 WL 4205276.

had vacated, including the rule requiring incumbents to unbundle entrance facilities.[5]

In 2003, the FCC issued its third unbundling order (known as the *Triennial Review Order*[6]), in which it revisited (among other things) its prior determinations that § 251(c)(3) requires an incumbent LEC to unbundle the entrance facilities that connect an incumbent LEC's switch to a competing LEC's switch. Characterizing its prior approach as "overly broad" and "misguided," the FCC now concluded that entrance facilities — that is, "transmission links that simply connect a competing carrier's network to the incumbent LEC's network" — "exist *outside* the incumbent LEC's local network" and, therefore, are excluded as a matter of definition from the category of network elements that could be subject to unbundling. *TRO* ¶¶ 365-366. The FCC explained further that excluding entrance facilities from incumbents' unbundling requirements is "consistent with the Act" because competing LECs "have control over where to locate their network facilities to minimize self-deployment costs" and should "incorporate those costs . . . into their network deployment strategies rather than . . . rely[ing] exclusively on the incumbent LEC's network." *Id.* ¶ 367.

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[5] *See* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶¶ 347-348 (1999) ("*UNE Remand Order*"), *vacated and remanded*, *USTA I*, *supra*; 47 C.F.R. § 51.319(d) (1999).

[6] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded*, *USTA II*, *supra*.

The D.C. Circuit rejected the FCC's conclusion that entrance facilities fall outside the category of "network elements" that could be "subject to the statutory unbundling requirement[] of § 251(c)(3)." *USTA II*, 359 F.3d at 585. The court, however, did not question the FCC's policy analysis, noting that competing LECs themselves depicted "entrance facilities" "as completely stand-alone items linking a CLEC switch with an ILEC office" that "appear[] [to] *exist* exclusively for the convenience of the CLECs." *Id.* at 586. The D.C. Circuit therefore found it "anomalous that CLECs do not themselves provide" their own entrance facilities. *Id.*

In 2005, the FCC issued its fourth unbundling order (known as the *Triennial Review Remand Order*[7]), which responded to the D.C. Circuit's decision in *USTA II*. Applying the statutory "impairment" standard used to determine which elements incumbent LECs must unbundle pursuant to § 251(c)(3), *see Iowa Utils. Bd.*, 525 U.S. at 388-90, the FCC concluded that competing LECs are *not* impaired without unbundled access to entrance facilities: "entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC" switches. *TRRO* ¶ 138.[8] Competing LECs can "choose to locate their

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[7] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*"), *petitions for review denied, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[8] The FCC continued to require incumbent LECs to unbundle much of the dedicated transport that connects two incumbent LEC switches. *See TRRO* ¶¶ 125-135.

switches" in order to "minimiz[e] the length and cost of entrance facilities" and to "increas[e] the possibility of finding an alternative wholesale suppl[ier]." *Id.* ¶ 138. The FCC therefore promulgated a rule stating that "incumbent LEC[s] [are] not obligated to provide . . . unbundled access" to entrance facilities. 47 C.F.R. § 51.319(e)(2)(i). Although various parties sought review of the FCC's 2005 order, none sought review of this rule.[9]

3. In the *Triennial Review Remand Order*, the FCC noted that many of its new unbundling rules would be implemented as incumbent and competing LECs made "changes to their interconnection agreements," *TRRO* ¶ 233, which are the contracts that are "Congress's chosen mechanism for increasing competition in the local telecommunications market," *Quick Communications, Inc. v. Michigan Bell Tel. Co.*, 515 F.3d 581, 585 (6th Cir. 2008); *see Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003). Under the 1996 Act, disputes about the terms that should be included in interconnection agreements are presented in the first instance to state commissions, which must apply the provisions of the Act and the FCC's implementing rules. *See* 47 U.S.C. § 252(a)-(c).

In those proceedings before state commissions, competing LECs began to assert that incumbents were still required to provide entrance facilities at TELRIC rates, notwithstanding the FCC's new rule expressly excluding entrance facilities from incumbents' unbundling obligations under § 251(c)(3). These carriers argued that incumbent LECs' separate "duty

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[9] The D.C. Circuit denied all of the petitions for review of the *Triennial Review Remand Order*. *See Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [incumbent LEC's] network," 47 U.S.C. § 251(c)(2), includes the obligation to provide entrance facilities to a competing LEC that uses those facilities to interconnect the two LECs' networks. These carriers argued further that, because the FCC had applied its TELRIC pricing methodology to both § 251(c)(3) and § 251(c)(2), the same TELRIC rates that the competing LECs had been paying for unbundled entrance facilities should continue to apply. Finally, these carriers claimed to find support for their argument in the FCC's statement in paragraph 140 of the *Triennial Review Remand Order* that the agency's finding that § 251(c)(3) does not require incumbents to unbundle entrance facilities "does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)."

A number of state commissions rejected competitors' attempt to preserve TELRIC-priced access to a type of facility that the FCC found had "unique operational and economic characteristics" that rendered "self-deployment" and "wholesale provisioning" "viable alternatives" to obtaining entrance facilities from incumbent LECs at TELRIC rates. *TRRO* ¶ 141 & n.395. For example, the Ohio commission found that § 251(c)(2) requires an incumbent to "interconnect its network with . . . facilities and equipment" that are "provided by the CLEC, not leased from the ILEC," at TELRIC rates.[10] Similarly, the Texas

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[10] Arbitration Award at 22-23, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand*, Case No. 05-887-TP-UNC, 2005 WL 3018712 (Ohio Pub. Utils. Comm'n

commission found that, although competing LECs would continue to "obtain interconnection facilities pursuant to" § 251(c)(2), "entrance facilities are not subject to TELRIC rates," "whether [used] for interconnection or for unbundled access to network elements."[11]

Other state commissions, including the Michigan and California commissions, accepted the competing LECs' contentions. Both of those commissions concluded that the FCC, in paragraph 140 of its *Triennial Review Remand Order*, made the "specific finding[]" that competing LECs "have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2)." Pet. App. 185a.[12] AT&T Michigan and AT&T California each sought review of

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Nov. 9, 2005), *available at* http://dis.puc.state.oh.us/TiffToPDf/LZAH5X8NU6JSB7R+.pdf.

[11] Arbitration Award – Track I Issues at 16, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, P.U.C. Docket No. 28821 (Tex. Pub. Util. Comm'n Feb. 23, 2005), *available at* http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/28821_520_470294.PDF.

[12] *See* Order Granting Limited Rehearing of Decision (D.) 06-01-043 on the Issue Regarding Rules on Fiber-to-the-Home (FTTH), Fiber-to-the-Curb (FTTC) and Hybrid Loop, Modifying the Decision and Denying Rehearing, as Modified, in All Respects at 9, *Application of Pacific Bell Telephone Company d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996*, Application 05-07-024, Decision 07-01-019 (Cal. Pub. Utils. Comm'n Jan. 11, 2007) (holding that ¶ 140 "clearly refuted" AT&T California's argument that § 251(c)(2) does not require an incumbent LEC to provide a competing LEC with entrance facilities), *available at* http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/63687.pdf.

its respective commission's decision in federal district court.

4. The Michigan district court rejected the Michigan commission's conclusion, finding that it was "not reasonable" to interpret paragraph 140 of the *Triennial Review Remand Order* to require incumbent LECs to provide entrance facilities at TELRIC rates pursuant to § 251(c)(2). Pet. App. 158a. The court read the FCC's order to "convey[] [its] finding . . . that entrance facilities should be offered competitively," not at TELRIC rates. *Id.*

The Michigan commission and three competing LECs, including Talk America (petitioner in No. 10-313), appealed the district court's determination. The Sixth Circuit affirmed in a 2-1 decision.

The Sixth Circuit agreed with the district court that paragraph 140 of the *Triennial Review Remand Order* could not be read to impose on incumbent LECs the obligation to provide competing LECs with entrance facilities at TELRIC rates. Instead, the court found that the "most plausible" "plain reading" of paragraph 140 is that, "if [a competing LEC] build[s] [its] own entrance facility, the ILEC must still let [that carrier] hook it up to [the incumbent's] network (i.e., use its 'interconnection facility') at wholesale rates." *Id.* at 17a-18a. Therefore, the court below held that a competing LEC that "chooses to use [an] ILEC's entrance facility" — rather than "build its own entrance facility," "rent someone else's," or "connect directly" to the incumbent LEC, without using an entrance facility — "must pay the rates determined by the ILEC" in its tariff, not regulated TELRIC rates. *Id.* at 32a.

Thus, as the Sixth Circuit explained by way of an analogy to extension cords and electrical outlets, *see*

id. at 18a-21a, there is a critical difference between entrance facilities and the "interconnection facilities" that incumbents provide to comply with § 251(c)(2). The former span the entire distance between a competing LEC's switch and an incumbent LEC's switch, which may "be very long," "even miles," if the competing LEC has elected to locate its switch far from the incumbent's. *Id.* at 3a. An interconnection facility, in contrast, is the equipment within the incumbent LEC's network to which the competing LEC's entrance facility connects; that equipment may be a port on a frame connected to the incumbent's switch or a cross connect cable attached to that frame (rough equivalents of the "wall outlet" and "surge protector" in the court's analogy). *Id.* at 19a-20a.

The Sixth Circuit rejected the Michigan commission's contrary reading of paragraph 140, holding that this interpretation "require[d] several assumptions, none of which is easily defended." *Id.* at 24a. In particular, the Michigan commission's interpretation presumed that the FCC had "used two separate terms" in paragraph 140 — "'entrance facility' and 'interconnection facility' — to describe the exact same wire, without any explanation why." *Id.*[13] Furthermore, that interpretation was based on an "unnatural reading" of the "phrase 'provide . . . interconnection *with* the [ILEC]'s network'" in § 251(c)(2) that had "no support in the statute." *Id.* at 28a (quoting 47 U.S.C. § 251(c)(2)) (omission and alteration in

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[13] The Sixth Circuit also noted that the Michigan commission's position would require the court to adopt definitions of the terms "entrance facility" and "interconnection facility" that the FCC had never adopted and that, in the case of "interconnection facility," the FCC and courts had rejected. *See* Pet. App. 25a-28a.

original). The better reading of that statutory phrase, the court found, was that "the ILEC is obligated" to "'make a plug-in available' *for* connection with the CLEC's facilities and equipment," not "to 'lease a physical facility (or wire)' *to* the CLEC." *Id.*

The Sixth Circuit acknowledged that its holding conflicted with decisions of the Seventh and Eighth Circuits, which had held that, when the FCC referred in paragraph 140 of the *Triennial Review Remand Order* to the "right of competitive LECs to obtain *interconnection facilities* pursuant to section 251(c)(2)," the agency actually "said . . . that ILECs must allow use of *entrance facilities* for interconnection" at TELRIC rates. *Illinois Bell*, 526 F.3d at 1072 (emphases added); *see Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-84 (8th Cir. 2008) (following *Illinois Bell*).[14] The court below did "not find th[o]se two cases persuasive," because those two courts' "'reasoning' is entirely circular" as each "assum[ed] the very question to be decided": namely, that "interconnection facilities" and "entrance facilities" are the same thing. Pet. App. 28a-31a.

The Sixth Circuit also refused to defer to the position of the FCC in an *amicus* brief, finding that the FCC's position "is so plainly erroneous" that it could "only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of inter-

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[14] This Court denied the Missouri Public Service Commission's petition for certiorari seeking review of a different decision that the Eighth Circuit reached in *Southwestern Bell*. *See Missouri Pub. Serv. Comm'n v. Southwestern Bell Tel., L.P.*, 129 S. Ct. 971 (2009).

preting the regulation." *Id.* at 9a-10a n.6.[15] In that *amicus* brief, the FCC urged the Sixth Circuit to reverse the district court, asserting that the district court had improperly treated the "FCC's statement in paragraph 140" as "a mere 'explanatory comment' without legal force." *Id.* at 129a & n.32. But the FCC conceded in its brief that, while paragraph 140 stated that the FCC's decision not to require incumbents to unbundle entrance facilities "'does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2),'" *id.* at 125a (quoting *TRRO* ¶ 140), the FCC "did not specifically define what it meant by the term 'interconnection facilities,'" *id.* at 137a-138a. The FCC asserted only that the Michigan commission's "interpretation" of the term "interconnection facilities" "to include entrance facilities" was "fully consistent" with the agency's order. *Id.* at 138a.

5. Nine days after the court below ruled, the Ninth Circuit issued its decision in *Pacific Bell*. AT&T California had appealed a federal district court decision upholding the California commission's conclusion that, in paragraph 140, the FCC had "[c]learly . . . established" that incumbent LECs must lease entrance facilities to competing LECs at TELRIC rates. *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, No. C 07-1797 SI, 2008 WL 501390, at *7 (N.D. Cal. Feb. 21, 2008) (internal quotation marks omitted; alteration in original). The Ninth Circuit affirmed that decision, stating that it "agree[d] with our sister circuits" — that is, the Seventh and Eighth Circuits — "that FCC regulations authorize state public utilities commissions to

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[15] The panel requested the FCC's views following the December 10, 2008 oral argument. *See* Pet. App. 120a & n.1.

order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection." 597 F.3d at 965.

In reaching that decision, the Ninth Circuit did not address, or acknowledge the existence of, the Sixth Circuit's contrary decision, even though AT&T California brought that decision to the Ninth Circuit's attention on February 25, 2010 (one week before the Ninth Circuit issued its opinion). Nor did the Ninth Circuit mention — let alone defer to — the *amicus* brief that the FCC had filed with the Sixth Circuit, which the California commission had provided to the Ninth Circuit on May 18, 2009.

6. The Michigan commission and the competing LEC appellants sought rehearing of the Sixth Circuit's decision. The FCC took the unusual step of filing an *amicus* brief in support of those petitions for rehearing, in which it "inform[ed] the [Sixth Circuit] that the FCC continues to stand behind the interpretation and arguments set forth in its April 2009 *amicus* brief."[16] The Sixth Circuit sought a response to the petitions for rehearing but, on June 2, 2010, denied those petitions. *See* Pet. App. 90a-91a. The Michigan commission and Talk America filed petitions for a writ of certiorari on August 31, 2010.

The next day, the Ninth Circuit ruled on AT&T California's petition for rehearing of that court's decision in *Pacific Bell*. That court denied rehearing, but amended its opinion to state that the court

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[16] Brief for *Amicus Curiae* Federal Communications Commission in Support of Petitions for Rehearing and/or Rehearing *En Banc* at 3, *Michigan Bell Tel. Co. v. Covad Communications Co.*, Nos. 07-2469 & 07-2473 (6th Cir. filed Mar. 18, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296968A1.pdf.

"agree[s] with the Seventh and Eighth Circuits and reject[s] the reasoning advanced by AT&T [California] and the Sixth Circuit in its recent 2-1 decision." *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, Nos. 08-15568 & 08-15716, 2010 WL 3421187, at *5 (9th Cir. Sept. 1, 2010) (to be reported at --- F.3d ---).

ARGUMENT

The court of appeals below correctly held that incumbent LECs have no obligation under § 251(c)(2) to provide TELRIC-priced entrance facilities to competing LECs and that a competing LEC purchasing an entrance facility from an incumbent — rather than "build[ing] its own entrance facility," "rent[ing] someone else's," or "connect[ing] directly" without using an entrance facility — instead must pay the incumbent LEC's tariffed rates. Pet. App. 32a.

AT&T Michigan agrees with petitioners, however, that review by this Court is warranted, because this case presents a recurring question of substantial importance on which there is a direct and acknowledged conflict among four courts of appeals. Although AT&T California intends to petition for certiorari from the Ninth Circuit's conflicting decision in *Pacific Bell*, this case presents an appropriate vehicle for resolution of this question.[17] Review by this Court to resolve this division of authority therefore would be appropriate.[18]

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[17] AT&T California's petition for certiorari is currently due on November 30, 2010. AT&T California anticipates asking this Court to hold its petition pending the outcome of these petitions, which raise the same issue in an identical procedural posture.

[18] AT&T Michigan's acquiescence is limited to the first question presented by the Michigan commission (petitioner in No. 10-329), which also is the sole question presented by Talk

A. Review Is Warranted To Resolve the Acknowledged and Mature Conflict Between the Sixth, Seventh, Eighth, and Ninth Circuits

Petitioners are correct that the courts of appeals disagree about whether the interconnection duty in § 251(c)(2) requires incumbent LECs to provide competing LECs with TELRIC-priced entrance facilities, which span the entire distance between a competing LEC's switch and an incumbent LEC's switch. *See* MPSC Pet. 14-16; Talk America Pet. 19-20.

The court below extensively reviewed — and expressly rejected as "not . . . persuasive" and "entirely circular" — the decisions of the Seventh and Eighth Circuits that had upheld state commission decisions requiring incumbent LECs to provide TELRIC-priced entrance facilities under § 251(c)(2). Pet. App. 28a-31a (discussing *Illinois Bell* and *Southwestern Bell*). The Sixth Circuit, moreover, reached precisely the opposite conclusion from the Seventh and Eighth Circuits on the question of incumbent LEC's obligations under § 251(c)(2) in the context of entrance facilities.

The Ninth Circuit then deepened the circuit conflict when it "agree[d] with" the Seventh and Eighth Circuits "that FCC regulations authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection." *Pacif-*

America (petitioner in No. 10-313). The second question the Michigan commission presents — whether the court below properly applied this Court's decision in *Auer* — does not independently warrant review, as the court below properly stated the rule in *Auer* and its decision does not conflict with the decision of any other court. *See infra* Part D.

ic Bell, 597 F.3d at 965. Although the Ninth Circuit's opinion did not acknowledge the existence of the Sixth Circuit's contrary decision, the Ninth Circuit's decision on rehearing (issued the day after these petitions were filed) leaves no doubt of its view that the Sixth Circuit erred and that the Seventh and Eighth Circuits reached the correct decision. As explained above, that court amended its initial decision to state expressly that it "agree[s] with the Seventh and Eighth Circuits and reject[s] the reasoning advanced by . . . the Sixth Circuit in its recent 2-1 decision." *Pacific Bell*, 2010 WL 3421187, at *5.

Over the course of two years, four courts of appeals have addressed the issue, and the result is a square and acknowledged conflict among them. The conflict thus is fully developed without any realistic prospect of it being resolved by further litigation in the lower courts or by pending FCC action. Indeed, the Sixth Circuit and the Ninth Circuit each denied rehearing in its respective case, making it exceedingly unlikely that the circuit conflict will be resolved without this Court's intervention. The timing of the decision below and the directly conflicting decision from the Ninth Circuit nine days later underscores that the time is ripe for this Court to resolve the conflict and to bring much needed clarity to this significant issue of telecommunications law.

In addition, this case is an appropriate vehicle for resolving the question presented. The issue is squarely presented. There are no preliminary or threshold issues, and the essential facts are undisputed. Nor is there any alternative ground on which to affirm the decision below.

B. The Circuit Conflict Involves a Recurring Issue of Great Practical Importance

Petitioners also are correct that the issue raised by this case is of broad national importance, because it involves a key provision of the 1996 Act and affects the terms on which AT&T Michigan and other incumbent LECs must interconnect with numerous other carriers.

1. The FCC has long recognized the need for national, uniform rules regarding the obligations that § 251(c) imposes on incumbent LECs. *See Local Competition Order* ¶¶ 54, 56, 60. When it first promulgated rules to implement the 1996 Act, the FCC specifically "conclude[d] that national rules regarding interconnection pursuant to section 251(c)(2) are necessary to further Congress's goal of creating conditions that will facilitate the development of competition in the telephone exchange market." *Id.* ¶ 179. In defending its authority to promulgate national rules before this Court, the government likewise stressed the need for "nationally consistent interpretations of the Act's key provisions," explaining that "Congress did not leave room for each of 50 state commissions to disagree about the basic federal issues that arise under the 1996 Act." Opening Brief for the Federal Petitioners at 16, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (No. 97-831), *available at* http://www.justice.gov/osg/briefs/1997/3mer/2mer/97-0831.mer.pdf; *see id.* at 17 (urging deference to its "expert determination that the absence of a national framework would impair effective implementation of the 1996 Act").

The FCC also recognized the importance of the specific issue presented here, when it filed an uninvited *amicus* brief in support of the petitions for

rehearing of the Sixth Circuit's decision. *See supra* p. 1. This action not only appears to be unprecedented,[19] but also stands in stark contrast to the FCC's inaction in another recent case. In *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900 (8th Cir. 2009), the Eighth Circuit held that the Nebraska commission was preempted from requiring VoIP providers (such as Vonage) to contribute to the state's Universal Service Fund, despite the FCC's contention in its *amicus* brief (filed without a request from the court) that the Eighth Circuit should reject Vonage's preemption claim.[20] Although the Nebraska commission sought rehearing, the FCC did not file an *amicus* brief in support of that petition.

2. The question presented is frequently litigated and warrants this Court's immediate resolution.

Entrance facilities are a common means of achieving interconnection with an incumbent LEC; AT&T Michigan and its incumbent LEC affiliates provide more than 15,000 entrance facility interconnection arrangements nationwide to competing LECs and wireless carriers today.[21] Unsurprisingly, disputes

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[19] A review of the FCC's online archive of court filings, *see* http://www.fcc.gov/ogc/archivedfilings.html, as well as of publicly available online databases, reveals no other uninvited *amicus* filings by the FCC in support of a petition for rehearing.

[20] *See* Brief for Amici Curiae United States and Federal Communications Commission Supporting Appellants' Request for Reversal at 14, *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009) (No. 08-1764), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284738A1.pdf.

[21] Although wireless carriers are not entitled to lease TELRIC-priced unbundled network elements under § 251(c)(3), *see TRRO* ¶ 34, the FCC has long permitted wireless carriers to

about the price that incumbent LECs may charge for entrance facilities — whether they may charge tariffed rates set under the traditional just-and-reasonable standard or must charge far lower rates set under the FCC's TELRIC methodology — remain the subject of active litigation between incumbent LECs and both competing LECs and wireless carriers. For example, the Colorado and Oregon commissions weighed in for the first time on this issue in 2008, reaching opposite results.[22] And affiliates of AT&T Michigan have pending litigation raising this question before state commissions in a number of circuits, including the Fourth, Fifth, and Eleventh Circuits. Unless this Court resolves the question, the state commissions will be forced to navigate the division of authority in the courts of appeals as they attempt to fulfill their obligation to rule in accordance with "the requirements of section 251." 47 U.S.C. § 252(c)(1).

In addition, the issue is important and urgent. In upholding the FCC's TELRIC-pricing methodology, this Court recognized that TELRIC rates were

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benefit from incumbent LEC's interconnection obligations under § 251(c)(2), *see Local Competition Order* ¶ 1015.

[22] *See* Order Addressing Applications for Rehearing, Reargument, or Reconsideration at 5-8, *Sprint Communications Company L.P.'s Petition for Arbitration with CenturyTel of Eagle, Inc. Pursuant to § 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Docket No. 08B-121T, Decision No. C08-1218, 2008 WL 5158834 (Colo. Pub. Utils. Comm'n Nov. 20, 2008) (Issue 5); Order at 5-7, *Sprint Communications Company L.P. Petition for Arbitration of an Interconnection Agreement with CenturyTel of Oregon, Inc.*, ARB 830, Order No. 08-486, 2008 WL 4493108 (Or. Pub. Util. Comm'n Sept. 30, 2008) (Issue 6), *vacated in part on other grounds on recon.*, ARB 830, Order No. 09-109, 2009 WL 904645 (Or. Pub. Utils. Comm'n Mar. 31, 2009).

limited to "bottleneck elements." *See, e.g.*, *Verizon*, 535 U.S. at 510 & n.27, 515-17; *see also Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 609-10 (7th Cir. 2008) (Posner, J.) (explaining that unbundling is intended only for "bottleneck facilities"). There are well-recognized competitive harms that flow from mandating TELRIC pricing of non-bottleneck facilities. Requiring incumbent LECs to sell such facilities at below-market TELRIC rates "reduce[s] or eliminate[s] the incentive . . . for a CLEC" to self-deploy entrance facilities, "because it can get the element cheaper" from the incumbent. *USTA I*, 290 F.3d at 424. The FCC likewise has recognized that TELRIC pricing "create[s] disincentives for . . . competitive LECs to deploy . . . facilities." *TRRO* ¶ 36.[23]

Here, there can be no serious claim that entrance facilities are bottleneck elements: the FCC found in 2005 not only that entrance facilities have "unique operational and economic characteristics" that render "self-deployment" and "alternative wholesale supply" possible, but also that it was undisputed that competing LECs were in fact "increasingly relying on competitively provided entrance facilities," which "are widely available." *Id.* ¶¶ 138-139, 141. Requiring incumbents to provide entrance facilities at TELRIC rates thus contradicts the purpose of the 1996 Act, which was not "to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate," but instead "to stimulate competition — preferably genuine,

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[23] *See TRRO* ¶ 218 (TELRIC pricing for non-bottleneck elements can "seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition"); *see also TRO* ¶ 656 (TELRIC pricing for non-bottleneck elements is "no[t] necessary to protect the public interest").

facilities-based competition." *USTA II*, 359 F.3d at 576; *see Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring in relevant part) ("It is in the *un* shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge.").

C. The Decision Below Is Correct and Should Be Affirmed

The Sixth Circuit correctly held that § 251(c)(2) does not require incumbent LECs to provide TELRIC-priced entrance facilities to competing LECs.

1. Section 251(c)(2) requires an incumbent LEC, such as AT&T Michigan, "to provide, *for* the facilities and equipment *of* any requesting telecommunications carrier, interconnection with the local exchange carrier's network" at a "point *within* the [incumbent LEC's] network." 47 U.S.C. § 251(c)(2)(B) (emphases added). It is plain that the only "facilities and equipment" to which § 251(c)(2) refers belong to the requesting carrier,[24] not to the incumbent LEC, and the incumbent's duty is to "provide . . . interconnection" "for" the other carrier's facilities and equipment. Moreover, that interconnection is to occur at a point "within" the incumbent LEC's network, not by the incumbent LEC providing facilities that reach all the way to the competing LEC's switch, which is a point on the competing LEC's network.

The "[]natural reading" of the statute, as the Sixth Circuit found, is that an incumbent LEC must provide a place within its network for a competing LEC

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[24] The "requesting telecommunications carrier" is a competing LEC or other carrier (including wireless carriers) seeking to provide local telephone service in competition with the incumbent LEC. *See Local Competition Order* ¶¶ 190-191, 1015.

to "plug-in" its own facilities and equipment, and that the incumbent need not "'lease a physical facility (or wire)' *to* the CLEC" — that is, an entrance facility — to span the distance between the two carriers' networks. Pet. App. 28a.

That reading is supported by § 252(d)(1), which is the pricing provision that applies to both the interconnection duty in § 251(c)(2) and the unbundling duty in § 251(c)(3). With respect to the unbundling duty, § 252(d)(1) applies to the "rate for [the] network elements" that incumbent LECs must lease to competitors. 47 U.S.C. § 252(d)(1). In contrast, with respect to the interconnection duty, § 252(d)(1) applies to the "rate for the interconnection *of* facilities and equipment." *Id.* (emphasis added). If Congress had meant for § 251(c)(2) to require incumbent LECs to lease facilities and equipment to other carriers, as § 251(c)(3) requires, it would instead have established a pricing standard "for the facilities and equipment used for interconnection," just as it established one "for the network elements" that must be unbundled. But that is not what Congress did.

2. The FCC's orders and regulations interpreting and implementing the 1996 Act further support this reading of § 251(c)(2). In its first order implementing the Act, the FCC distinguished the interconnection duty in § 251(c)(2) from the unbundling duty in § 251(c)(3). The former duty allows competing LECs "to choose the most efficient points at which to exchange traffic with incumbent LECs," while it is the latter that "permits new entrants . . . to substitute incumbent LEC facilities for some or all of the facilities the new entrant would have had to obtain in order to compete." *Local Competition Order* ¶ 172.

Although the FCC has interpreted § 251(c)(2) to require incumbents, "at least to some extent, to adapt their facilities to interconnection . . . by other carriers" — as incumbent's networks "were not designed to accommodate third-party interconnection," *id.* ¶ 202 — the FCC has never found those required accommodations to include leasing to a competing LEC the entire facility spanning the distance between the two networks.[25] Instead, the only FCC regulations that ever required incumbents to provide entrance facilities to competitors were promulgated to implement the separate unbundling duty in § 251(c)(3).[26] The FCC's long-standing interconnection regulations, in contrast, simply identify the various "point[s] within the incumbent LEC's network" where interconnection may occur. 47 C.F.R. § 51.305(a)(2)(i)-(vi); *see also id.* § 51.321(b)(1).[27]

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[25] The furthest the FCC ever stretched the obligation to accommodate interconnection was to require incumbent LECs to enter into "meet point arrangements," where both the incumbent and the competing LEC each "pays its portion of the costs to build out the facilities to the meet point." *Local Competition Order* ¶ 553; *see* 47 C.F.R. § 51.321(b)(2) (codifying the meet-point obligation). The FCC stressed that meet-point arrangements would require incumbent LECs to engage in only "some," "limited build-out of facilities" as an "accommodation of interconnection," while requiring "each party to bear a reasonable portion of the economic costs of the arrangement." *Local Competition Order* ¶ 553.

[26] *See Local Competition Order* ¶¶ 439-440; 47 C.F.R. § 51.319(d)(1) (1996); *UNE Remand Order* ¶¶ 347-348; 47 C.F.R. § 51.319(d) (1999).

[27] The term "interconnection facility" appears only once in the FCC's regulations implementing § 251(c)(2). *See* 47 C.F.R. § 51.305(a)(3) ("requir[ing] an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network").

3. None of the three circuits to reach the opposite result sought to square their ruling with the text of § 251(c)(2). Nor do petitioners here do so. Instead, they rely on paragraph 140 of the *Triennial Review Remand Order*, claiming that the FCC there "explicitly recognized" that incumbents must provide competing LECs with TELRIC-priced entrance facilities. MPSC Pet. 9-10; *accord* Talk America Pet. 25. In fact, as the Sixth Circuit held, paragraph 140 "actually says no such thing." Pet. App. 30a. Instead, the FCC there stated only that § 251(c)(2) requires incumbent LECs to provide "interconnection facilities," which is a term that the FCC conceded in its *amicus* brief that it "did not specifically define." *Id.* at 138a. Petitioners thus err in claiming that the FCC has defined "interconnection facility" so broadly that it encompasses any (and every) incumbent-LEC-owned facility that a competing LEC could use in order to interconnect its network to the incumbent's. *See* Talk America Pet. 25; MPSC Pet. 13. Instead, as discussed above, an interconnection facility is the equipment within the incumbent LEC's network to which a competing LEC attaches its own facilities and equipment.

Moreover, in paragraph 140, the FCC stated only that its decision not to require incumbent LECs to provide entrance facilities as unbundled network elements under § 251(c)(3) "does not alter" competing LECs' "right[s]" under § 251(c)(2). *TRRO* ¶ 140. Therefore, paragraph 140 cannot be read to create a new right, but simply refers back to any pre-existing rights under § 251(c)(2). Yet no prior FCC order or regulation, or other source of legal authority, had found in § 251(c)(2) a right for competing LECs

to demand TELRIC-priced entrance facilities from incumbent LECs.[28]

Finally, as the court below concluded, the claim that paragraph 140 established a new obligation on incumbent LECs cannot be squared with the surrounding paragraphs of the FCC's order. *See* Pet. App. 17a-18a. The FCC noted in paragraph 140 that § 251(c)(2) means that competing LECs "will have access to these [interconnection] facilities at

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[28] Petitioners rely on the FCC's discussion in the *Triennial Review Order* regarding competing LECs' prior use of entrance facilities obtained as unbundled network elements under § 251(c)(3) for so-called "backhauling." *See* MPSC Pet. 8, 11; Talk America Pet. 5-9. However, that discussion was not repeated in the *Triennial Review Remand Order* and has no relevance here, as the Sixth Circuit found. *See* Pet. App. 25a n.13. Nonetheless, AT&T Michigan notes that the Seventh, Eighth, and Ninth Circuits all operated under a misunderstanding of "backhauling." "Backhauling" describes a competing LEC's use of an entrance facility to connect its own switch to a loop (the wire connecting a customer premises to a switch) that the competing LEC obtained from an incumbent LEC as an unbundled element under § 251(c)(3); the competing LEC then uses its switch to provide telephone service to the customer connected to the unbundled loop. *See, e.g.*, *TRO* ¶ 480 ("[t]he need to backhaul the circuit [*i.e.*, the loop] derives from the [competing LEC's] use of a switch located in a location relatively far from the end user's premises"). Traffic "backhauled" to the competing LEC switch over that unbundled entrance facility might then be routed from the switch to other customers of the competing LEC, but it also might be routed to customers of an incumbent LEC or a third-party carrier. The Seventh, Eighth, and Ninth Circuits thus were wrong to define "backhauling" as limited to "mov[ing] . . . traffic among CLEC customers." *Illinois Bell*, 526 F.3d at 1071; *see Southwestern Bell*, 530 F.3d at 681 (describing backhauling as "CLEC to CLEC traffic"); Pet. App. 53a (describing backhauling as a competing LEC "us[ing] the entrance facility to permit its *own* customers to reach *one another* over the incumbent LEC[']s network").

[TELRIC] rates *to the extent that they require them* to interconnect with the incumbent LEC's network." *TRRO* ¶ 140 (emphasis added). In the surrounding paragraphs, however, the FCC established that competing LECs do *not* require TELRIC-priced entrance facilities, which have "unique operational and economic characteristics" that both "justify self-deployment" and explain the widespread availability of "competitively provided entrance facilities." *Id.* ¶¶ 138-139, 141. This is yet another reason why the Sixth Circuit correctly rejected petitioners' attempt to equate "interconnection facilities" with "entrance facilities."[29]

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[29] Talk America takes issue (at 22, 26, 29) with various statements in footnotes in the decision below, rather than grappling with the centerpiece of the Sixth Circuit's reasoning: namely, its rejection of Talk America's "unnatural reading" of § 251(c)(2) and paragraph 140 of the *Triennial Review Remand Order*. Pet. App. 24a-28a. Talk America's challenges to the periphery of the Sixth Circuit's opinion lack merit and, in all events, provide no basis for rejecting the Sixth Circuit's core conclusions. In particular, Talk America is wrong to rely (at 23) on a paragraph of an FCC Staff order stating, in passing, that certain "'entrance facilities' are interconnection facilities." Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act of 1934 for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039, ¶ 58 (Chief, Wireline Comp. Bur. 2002). The facilities at issue there were ones the competitive LEC proposed to sell to the incumbent LEC. *See id.* As the FCC Staff recognized, § 251(c)(2) does not govern those facilities. *See id.* ¶ 71 n.200. Moreover, when the FCC Staff addressed the entrance facilities that the incumbent LEC would sell to the competing LEC — that is, the very same facilities at issue here — it grounded its analysis entirely in § 251(c)(3) and the FCC's then-effective unbundling regulations, without describing the entrance facilities as "interconnection facilities" or suggesting

D. Whether the Court Below Properly Applied *Auer* Does Not Independently Warrant Review

The Michigan commission — but not Talk America — presents as an independent question for review whether the court below erred in refusing to defer to the FCC's position in its *amicus* brief, which the Michigan commission claims conflicts with the Ninth Circuit's decision in *Pacific Bell*. Unlike the question of the proper construction of incumbent LEC's obligations under § 251(c)(2), on which there is a clear and acknowledged conflict among the circuits, the Sixth Circuit's application of this Court's decision in *Auer* does not conflict with any other circuit's decision. Instead, the Michigan commission's second question simply raises a claim for error correction, which does not independently warrant review. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").[30]

The court below correctly stated the rule applied in *Auer*: that "a federal agency's interpretation of its own ambiguous regulation — even an interpretation presented in an amicus brief — is 'controlling unless plainly erroneous or inconsistent with the regulation.'" Pet. App. 8a n.6 (quoting *Auer*, 519 U.S. at 461). The court found the FCC's position in its

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that § 251(c)(2) independently required the same result. *See id.* ¶¶ 210-217.

[30] Limiting the grant of the Michigan commission's petition to the first question will not affect the Court's ability to consider what deference, if any, to give to the position set out in the *amicus* brief on the merits that the FCC likely will file with this Court.

amicus brief here to be "so plainly erroneous or inconsistent with the regulation" that it "decline[d] . . . to apply *Auer* deference" to that position. *Id.* at 10a n.6. The lower court's ruling is correct and is consistent with this Court's own refusal to defer to an agency's unreasonable interpretation of a regulation. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (finding that "*Auer* deference is unwarranted" where the agency's interpretation conflicted with "the regulation's obvious meaning"). Courts of appeals routinely refuse to defer to agency interpretations under *Auer* (or, more generally, under the *Seminole Rock* line of authority) where the agency's interpretation is "plainly erroneous or inconsistent with the regulation."[31]

The Michigan commission, however, claims (at 4) that the decision below conflicts with the Ninth Circuit's decision in *Pacific Bell*, in which that court purportedly "afforded [*Auer*] deference to the FCC's interpretation when examining the identical issue."[32] In fact, the Ninth Circuit did not address the question whether the FCC's *amicus* brief warranted *Auer* deference. The Ninth Circuit did not discuss that *amicus* brief at all, even though the California commission had relied on the FCC's brief in defending its decision on appeal. As a result, the Ninth Circuit's decision cannot conflict with the Sixth Circuit's re-

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[31] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *see, e.g., City of Cleveland v. Ohio*, 508 F.3d 827, 847 (6th Cir. 2007); *Duchek v. NTSB*, 364 F.3d 311, 314 (D.C. Cir. 2004) (Roberts, J.); *Public Citizen Inc. v. Mineta*, 343 F.3d 1159, 1166-67 (9th Cir. 2003); *Moore v. Hannon Food Serv., Inc*, 317 F.3d 489, 497 (5th Cir. 2003).

[32] Although Talk America (at 30-31) criticizes the Sixth Circuit's treatment of the FCC's *amicus* brief, it makes no claim of a circuit conflict.

fusal to defer under *Auer* to the FCC's position in its *amicus* brief.

Furthermore, to the extent the Ninth Circuit discussed *Auer*, it did so only with respect to the FCC's 2003 *Triennial Review Order*, which the Ninth Circuit believed contained a "reasonable" interpretation of the FCC's 1996 *Local Competition Order* that supported the court's ruling. *Pacific Bell*, 597 F.3d at 968. However, no party before the Sixth Circuit — including the FCC as *amicus curiae* — advanced this claim about the *Triennial Review Order*, much less urged that court to defer to the FCC's supposed interpretation of its 1996 order. The FCC itself discussed its *Triennial Review Order* in only two short passages of its *amicus* brief, in which it described that order as preserving a pre-existing obligation to make "interconnection facilities" or "facilities" — not "entrance facilities" — available at TELRIC rates. *See* Pet. App. 137a, 138a.[33] The FCC's *amicus* brief thus confirms that it is the Ninth Circuit that erred in its application of *Auer*, by deferring to a reading of the *Triennial Review Order* different from the agency's own.

CONCLUSION

The petitions for a writ of certiorari in No. 10-313 and No. 10-329 (limited to Question 1) should be granted.

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[33] Consistent with this aspect of the FCC's position in its *amicus* brief, the court below read the *Triennial Review Order* as treating "interconnection facilities and entrance facilities [as] different things," with only interconnection facilities required to be provided at TELRIC rates. Pet. App. 27a n.13. The Seventh and Eighth Circuits, in reaching the same result as the Ninth Circuit, did not cite the *Triennial Review Order*.

Respectfully submitted,

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