

No. 10-329

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**In the Supreme Court of the United States**

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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

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

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**BRIEF FOR THE PETITIONERS**

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Bill Schuette  
Attorney General

B. Eric Restuccia  
Michigan Solicitor General  
*Counsel of Record*

P. O. Box 30212  
Lansing, Michigan 48909  
restucciae@michigan.gov  
(517) 373-1124

John J. Bursch  
Special Assistant Attorney General

Steven D. Hughey  
Public Service Division Chief

Anne M. Uitvlugt  
Assistant Attorney General  
Public Service Division

## QUESTIONS PRESENTED

1. Section 251(c) of the Telecommunications Act of 1996 (Act) requires an incumbent telephone carrier to make its network available to a competitive carrier, at cost-based rates, for “interconnection,” which is the “linking of two networks for the mutual exchange of traffic.” 47 C.F.R. § 51.5. An “entrance facility” is a transmission facility that physically connects a competitive-carrier network with an incumbent-carrier network, and which can be used for the mutual exchange of traffic between an incumbent-carrier customer and a competitive-carrier customer. The first question presented is:

Whether the Michigan Public Service Commission (MPSC) can, consistent with § 251(c), require an incumbent carrier to provide a competitive carrier with an “entrance facility” at cost-based rates, when the entrance facility is used for interconnection.

2. Under this Court’s decision in *Auer v. Robbins*, 519 U.S. 452 (1997), an agency’s construction of its own rules, even in the form of a legal brief, is controlling when the interpretation reflects a “fair and considered judgment” and is not “plainly erroneous or inconsistent with the regulation.” The Federal Communications Commission has filed legal briefing in this litigation that construes the FCC’s orders and rules in the same manner as the MPSC and three federal circuits. The second question presented is:

Whether the FCC’s interpretation is entitled to *Auer* deference.

## PARTIES TO THE PROCEEDING

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

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

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

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

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## OPINIONS BELOW

The February 23, 2010 opinion of the United States Court of Appeals for the Sixth Circuit is published and reported at *Michigan Bell Telephone Co. v. Covad Communications Co.*, 597 F.3d 370 (6th Cir. 2010). Pet. App. 1a–45a.<sup>2</sup> The Sixth Circuit filed its unpublished order denying rehearing on June 2, 2010. Pet. App. 90a–91a. The September 26, 2007 opinion of the United States District Court for the Eastern District of Michigan, reversing the Michigan Public Service Commission’s order, is unpublished. Pet. App. 143a–169a. The Michigan Public Service Commission’s September 20, 2005 order, which held that the Telecommunications Act of 1996 requires entrance facilities to be made available at cost-based rates when used for interconnection, is unpublished. Pet. App. 170a–233a.

## JURISDICTION

This Court’s jurisdiction rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 [codified in numerous sections of Title 47 of the United States Code]. Section

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<sup>2</sup> All the references in the brief to the petition appendix are from Talk America’s petition appendix.

251(c)(2)–(3) of the Act, 47 U.S.C. §§ 251–52, is reproduced in Pet. App. 92a–111a.

The Federal Communications Commission (FCC) has adopted regulations relevant for the Act, including 47 C.F.R. § 51.5, 47 C.F.R. § 51.305, and 47 C.F.R. § 51.319, which are reproduced in the Appendix to this brief. Br. App. 1a–7a.

In the Triennial Review Remand Order (TRRO), released on February 4, 2005, the FCC interprets the Act. The applicable paragraphs of the TRRO, 20 FCC Rcd. 2533, 2609–12, ¶¶ 136–141, are reproduced in the Appendix to this brief. Br. App. 8a–16a. The appendix also includes ¶¶ 365–367, 370 from the Triennial Review Order (TRO), issued on September 17, 2003, Br. App. 17a–26a, and ¶ 553 of the Local Competition Order (LCO), released on August 8, 1996, Br. App. 27a–29a.

Given the complexity of terms involved in this case, the Commissioners of the Michigan Public Service Commission have provided a Summary of Important Terms and Concepts Used in this Brief. Brief, pp. 45–54.

## INTRODUCTION

This case raises the important question of whether an incumbent (i.e., established) telephone carrier is obligated to provide so-called “entrance facilities” to competitive carriers (i.e., new local market entrants), at cost-based rates, when such facilities are used solely for interconnecting the networks of the incumbent carrier and the competitor. The Federal Communications Commission (FCC) has answered that question yes, and so should this Court.

Section 251(c) of the Telecommunications Act of 1996 (Act) allows a competitive telephone company to enter a local telephone market by using an incumbent carrier’s network of wires and switches. There are two, partially overlapping subsections that implement this policy. Section 251(c)(2) requires an incumbent carrier to provide cost-based “interconnection,” which is a “linking of two networks for the mutual exchange of traffic.” 47 C.F.R. § 51.5; Br. App. 1a. Section 251(c)(3) separately requires an incumbent carrier to provide cost-based access to certain elements of the incumbent’s network on an unbundled basis. The Act delegates to the FCC the responsibility to determine which network elements must be unbundled.

The present dispute involves a part of the network known as an “entrance facility.” In the 2005 Triennial Review Remand Order, commonly called the TRRO, the FCC defined entrance facilities as “the transmission facilities that connect competitive LEC [local exchange carrier] networks with incumbent LEC networks.” *In the matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange*

*Carriers, Order on Remand*, 20 FCC Rcd. 2533, 2609 ¶ 136 (2005)(TRRO<sup>3</sup>); Br. App. 8a. In other words, an entrance facility physically links two carriers' networks. As the FCC has explained, competitive carriers can use entrance facilities for multiple purposes. One use is for the mutual exchange of traffic between an incumbent-carrier customer and a competitive-carrier customer. Another use, known as "backhauling," allows a competitive carrier to connect, for example, two of its own customers by using the incumbent-carrier's network. *In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 17203, 17206–07 (¶¶ 365, 370) (2003) (TRO); Br. App. 17a–19a, 25a–26a.

In the TRRO, the FCC determined that an incumbent carrier is not obligated to provide a competitive carrier with unbundled, cost-based access to entrance facilities (as opposed to interconnection) under § 251(c)(3). TRRO, 20 FCC Rcd. at 2610–11 (¶¶ 137–40); Br. App. 10a–15a. But the FCC cautioned that this determination "does not alter the right of competitive [carriers] LECs to obtain interconnection facilities pursuant to section 251(c)(2)." *Id.* at 2611 (¶ 140); Br. App. 15a. The issue, then, is whether an "entrance facility" can, in some instances, be used as an "interconnection" for purposes of § 251(c)(2), thus triggering an incumbent carrier's statutory obligation to provide a cost-based entrance facility.

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<sup>3</sup> As explained in more detail below, the FCC has issued four sets of regulations implementing the Telecommunications Act. The third set, issued in 2003, is called the TRO. The fourth set, issued in 2005, is called the TRRO. Both are relevant to this dispute.

The answer is yes, for two reasons. First, as just noted, an entrance facility can be used to physically link two carriers' networks for the mutual exchange of traffic. TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a. When so used, an entrance facility fits easily within the plain meaning of "interconnection" for purposes of § 251(c)(2). 47 C.F.R. § 51.5; Br. App. 1a (defining "interconnection" as the "linking of two networks for the mutual exchange of traffic").

Second, the FCC has said, in its *amicus* briefing in this very litigation, that an entrance facility can be used as a § 251(c)(2) "interconnection." The Seventh, Eighth, and Ninth Circuits have all agreed. And the FCC's fair and considered judgment is entitled to deference under this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997). Accordingly, Petitioners respectfully request that this Court reverse the contrary holding of the Sixth Circuit.

## STATEMENT OF THE CASE

### A. The Telecommunications Act of 1996

Congress enacted the Telecommunications Act to end "the longstanding regime of state-sanctioned monopolies" of local telephone markets. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Recognizing that incumbent monopolist providers of local telephone service have strong economic incentives to delay and impede competition, Congress required incumbent carriers (sometimes described as "incumbent local exchange carriers," or "ILECs") to allow access to their equipment and services to carriers who hoped to enter a local market and compete (sometimes described as "competitive local exchange carriers," or "CLECs").

This sharing took the form of a number of statutory directives. Two are relevant to this litigation; both are contained in 47 U.S.C. § 251(c).

First, § 251(c)(2) requires that an incumbent carrier provide “interconnection” between its network and that of a competitive carrier at “just, reasonable, and nondiscriminatory” rates and terms. 47 U.S.C. § 251(c)(2). The term “interconnection” refers to the “linking of two networks for the mutual exchange of traffic.” 47 C.F.R. § 51.5; Br. App. 1a. And the FCC has explained that the purpose of this linking is for the transmission and routing of telephone exchange traffic:

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC’s network:

(1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) At any technically feasible point within the incumbent LEC’s network including... [47 C.F.R. § 51.305(a); Br. App. 3a.]

Second, § 251(c)(3) requires an incumbent carrier to provide a competitive carrier with non-discriminatory access to certain elements of the incumbent carrier’s network on an unbundled (i.e., *à la carte*) basis.<sup>4</sup> 47 U.S.C. § 251(c)(3); 47 C.F.R. § 51.319; Br. App. 6a–7a. Congress delegated to the FCC the

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<sup>4</sup> Examples of § 251(c)(3) elements that an incumbent carrier must provide on an unbundled basis include loops, subloops, and network interface devices. 47 C.F.R. § 51.319; Br. App. 6a.



responsibility to determine which of the incumbent carrier's non-proprietary network elements<sup>5</sup> must be made available on an unbundled basis, a decision that turns on whether a lack of access to the network element would "impair" the competitive carrier's ability to provide service. 47 U.S.C. § 251(d)(2)(B). The unbundling obligation allows a competitive carrier to create its own network using a combination of self-provided and incumbent-carrier-provided components (which the competitor leases), obviating the competitive carrier's need to build a duplicative and costly stand-alone network.

With respect to pricing for these two directives, § 252(d)(1) dictates that an incumbent carrier charge cost-based rates for both interconnection (under § 251(c)(2)) and access to unbundled network elements, (under § 252(c)(3)). 47 U.S.C. § 252(d)(1). The FCC's rules require an incumbent carrier to calculate these cost-based rates under a Total Element Long-Run Incremental Cost (TELRIC) methodology.<sup>6</sup> 47 C.F.R. § 51.505(b).

Finally, § 252 requires incumbent and competitive carriers to enter into a negotiated contract for interconnection or network elements, with the pertinent state

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<sup>5</sup> A "network element" is "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(35).

<sup>6</sup> The cost-based TELRIC is in contrast to the more expensive market-based rate and is a favorable rate for competitive carriers (and thus for consumers). See *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836, 841 (9th Cir. 2010), citing *Verizon v. FCC*, 535 U.S. 467, 489, 496–97 (2002). This Court affirmed the FCC's authority to establish the TELRIC cost-based rate in *Verizon*, 535 U.S. at 523.

public utility commission available to arbitrate any unresolved issues. 47 U.S.C. § 252.

## **B. Entrance facilities**

The part of the network at the core of this dispute is a “entrance facility.” The FCC has defined entrance facilities as “the transmission facilities that connect competitive [carrier] LEC networks with incumbent [carrier] LEC networks.” TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a. Put another way, “an entrance facility is the high capacity wire” that physically links two telephone networks. *Pacific Bell Tel. Co. v. California Pub. Utils. Comm’n*, 621 F.3d 836, 842 (9th Cir. 2010).

As the FCC has explained, entrance facilities have multiple uses. For example, a competitive carrier can use an entrance facility to link the competitive carrier’s network with that of an incumbent carrier so that the competitive carrier’s customers can reach the incumbent carrier’s customers. This is classic interconnection. *Pacific Bell*, 621 F.3d at 842 (citing TRRO, 20 FCC Rcd. at 2610–11 (¶¶ 138–40) (Br. App. 11a–15a)). A competitive carrier could also use an entrance facility to allow its own customers to reach one another using the incumbent carrier’s network. This is an example of “backhauling.” *Id.* (citing TRRO, 20 FCC Rcd. at 2610–11 (¶¶ 138–40) (Br. App. 11a–15a)); accord FCC 6th Cir. Br. at 6–7; Pet. App. 124a–125a; (comparing a competitive carrier’s use of an entrance facility for interconnection versus backhauling); TRRO, 20 FCC Rcd. at 2611 (¶ 138 n.389); Br. App. 13a.

When an entrance facility is used for backhauling, there is no “interconnection,” because there is no mutual exchange of traffic between two, linked networks. See TRO, 18 FCC Rcd. at 17203 (¶ 365); Br. App. 17a (“Competitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic *to and from its end users.*”) (emphasis added). Because there is no traffic between the customers of the incumbent carrier and the competitive carrier in such a use, this is only “transport,” not interconnection. See 47 C.F.R. § 51.5; Br. App. 1a (defining interconnection as the *mutual* exchange of traffic among two linked networks).

As explained below, the FCC has determined that an incumbent carrier does not need to provide entrance facilities for the purpose of backhauling. TRO, 18 FCC Rcd. at 17203 (¶ 365); Br. App. 18a (the Act does not require an incumbent carrier “to unbundle transmission facilities connecting [incumbent] networks to competitive LEC networks for the purpose of *backhauling traffic.*”). But that determination leaves unchanged the obligation under § 251(c)(2) and 47 C.F.R. § 51.305 for an incumbent carrier to provide for cost-based interconnection.

### C. The FCC Proceedings

#### 1. The FCC’s first two sets of implementing regulations require incumbent carriers to provide entrance facilities as unbundled network elements under § 251(c)(3).

The FCC issued its first set of implementing regulations in August of 1996. *In re Implementation of*

*the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 (1996). Finding impairment everywhere, the FCC required incumbent carriers to unbundle all of their interoffice-transmission facilities, which would have included entrance facilities. This Court vacated the FCC's order and remanded for a more-detailed impairment analysis. *Iowa Utils. Bd.*, 525 U.S. at 397.

The FCC issued new regulations in November 1999, known as the LCO. *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696 (1999). Again, the FCC found impairment everywhere and required incumbent carriers to unbundle all interoffice-transmission facilities. And again, a court vacated and remanded for a more-detailed impairment analysis. *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

**2. The FCC's third set of regulations concludes that an incumbent carrier does not need to provide entrance facilities on an unbundled basis under § 251(c)(3).**

In August 2003, the FCC issued its third set of regulations, known as the TRO. *In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003). This time, the FCC concluded that it was unnecessary to conduct an impairment test with respect to entrance facilities, based on the agency's finding that entrance facilities were not within the incumbent carrier's network and,

thus, did not meet the statutory definition of “network element” in § 251(c)(3). Accordingly, such facilities did not have to be unbundled. The reviewing court vacated and remanded the order for failing to conduct the impairment analysis for entrance facilities. The court did not discuss the FCC’s distinction between entrance facilities used for backhaul and entrance facilities used for interconnection. *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

**3. The FCC’s fourth set of regulations concludes that an incumbent carrier does not need to provide entrance facilities on an unbundled basis, but must offer a cost-based entrance facility when such facility is used for § 251(c)(2) interconnection.**

Finally, in February 2005, the FCC issued the TRRO, and this time, the rules were affirmed on appeal. *Covad Commc’ns. Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). The TRRO provisions that address “entrance facilities” comprise six paragraphs of analysis, ¶¶ 136 through 141. In this section, the FCC responded to the 2004 remand from the D.C. Circuit in *United States Telecom*, in which the court required the FCC to determine whether entrance facilities were “network elements” under § 251(c)(3) that would subject them to an “impairment analysis.” *United States Telecom*, 359 F.3d at 585–86.

In the TRRO, the FCC found that although an entrance facility is part of the incumbent carrier’s network, a competitive carrier could effectively compete without access to entrance facilities, and therefore was not entitled to use entrance facilities as part of the unbundling obligation that § 251(c)(3)

imposes on an incumbent carrier. TRRO, 20 FCC Rcd. at 2611 (¶ 140); Br. App. 15a. Critically, however, this finding did not relieve an incumbent carrier of its separate duty to provide a competitive carrier with access to entrance facilities under § 251(c)(2) for the purpose of interconnection. *Id.* As the FCC explained:

140. [O]ur finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. *Thus, competitive LECs will have access to these facilities<sup>7</sup> at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.* [*Id.*; Br. App. 15a (emphasis added).]

The MPSC interpreted this provision to mean that competitive carriers “still have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2) of the federal Act.” Pet. App. 185a. Accord *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1072 (7th Cir. 2008) (“What the FCC said in

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<sup>7</sup> The Sixth Circuit panel majority below assumed that the FCC’s last reference to “facilities” meant “interconnection facilities.” Pet. App. 16a. But as explained in more detail below, Section 251(c)(2) already makes clear that an incumbent carrier must provide interconnection at cost-based rates, so there would be no reason for the FCC to restate that rule in Paragraph 140. As the FCC explained in its Sixth Circuit *amicus* brief, “the MPSC’s interpretation of [the term ‘interconnection facilities’] to include entrance facilities when used for interconnection *is fully consistent with the FCC’s finding in the TRRO.*” FCC 6th Cir. Br. at 20; Pet. App. 138a.

¶ 140 is that ILECs must allow use of entrance facilities for interconnection at ‘cost-based rates.’”); *Southwestern Bell Tel., L.P. v. Missouri Public Service Comm’n*, 530 F.3d 676, 683–84 (8th Cir. 2008) (“The FCC’s finding of non-impairment does not, however, alter the right of CLECs to obtain interconnection facilities pursuant to § 251(c)(2) for transmission and routing of telephone exchange service and exchange access service, i.e., CLEC to ILEC and ILEC to CLEC traffic. . . . If a CLEC needs entrance facilities to interconnect with an ILEC’s network, it has the right to obtain such facilities from the ILEC.”); *Pacific Bell*, 621 F.3d at 846 (The FCC has interpreted its orders “to allow competitive LECs to lease entrance facilities or ‘transmission links’ at TELRIC rates for the purpose of achieving interconnection. This interpretation . . . is reasonable and entitled to deference.”) (citing *Auer*, 519 U.S. at 461).

## **D. Proceedings Below**

### **1. MPSC decision**

Under Michigan law, the MPSC has regulatory authority over the intrastate operations of telecommunications carriers. Mich. Comp. Laws § 484.2201 *et seq.* Michigan Bell Telephone Company, d/b/a AT&T Michigan (AT&T), is an incumbent carrier that provides intrastate telecommunications service in Michigan. So when AT&T announced it would begin charging higher (i.e., competitive rather than cost-based) rates for entrance facilities, various competitive carriers complained to the MPSC, arguing that TRRO, ¶ 140 says that a competitive carrier is still entitled to use an entrance facility at cost-based rates for

purposes of interconnection with an incumbent carrier's network.

On May 17, 2005, the MPSC issued an order modifying the process used to bring current interconnection agreements into compliance with the FCC's TRO and TRRO. Pet. App. 170a–233a. One of the 29 disputed issues the MPSC resolved was the treatment of entrance facilities. Pet. App. 183a–185a.

After reviewing the evidence, the MPSC issued its decision on September 20, 2005. Consistent with the interconnection obligations imposed by the Act and the TRRO, the MPSC found that, when used for interconnection purposes, an incumbent carrier must provide entrance facilities to a competitive carrier at cost-based (i.e., TELRIC) rates. Pet. App. 183a–185a. The MPSC further determined that eliminating the requirement that an incumbent carrier provide entrance facilities at cost-based rates for interconnection purposes would be contrary to the FCC's findings in the TRRO. The MPSC's decision allows a competitive carrier's cost of interconnection to remain at cost-based pricing, thus preserving a competitive environment that allows for the continual growth of competition and results in lower-cost telephone services for Michigan consumers.

## **2. District Court decision**

AT&T appealed the MPSC's Order to the U.S. District Court for the Eastern District of Michigan seeking declaratory and injunctive relief. Pet. App. 143a–144a. Following briefing and oral argument on cross-motions for summary judgment, the District Court issued a September 26, 2007 order granting, in



part, AT&T's motion, and granting, in part, the competitive carriers' motion. Pet. App. 143a–144a. On October 27, 2007, the District Court entered a judgment reversing in part the MPSC's September 20, 2005 Order. The District Court determined that the MPSC's decision undermined the TRRO's basic finding that entrance facilities were no longer required to be provided as an unbundled network element and should be offered at competitive pricing. Pet. App. 160a–161a.

### 3. Sixth Circuit decision

The MPSC Commissioners appealed to the United States Court of Appeals for the Sixth Circuit. At oral argument, the panel asked counsel whether to seek the FCC's view of its TRRO and other orders and rules. The same day, the Clerk of the Sixth Circuit sent a letter to the FCC's General Counsel inviting the FCC to file an *amicus curiae* brief.

The FCC filed its brief on April 3, 2009, urging the Sixth Circuit to reverse the district court's holding. Pet. App. 9a. In the brief, the FCC explained that entrance facilities “can be used for multiple purposes,” including interconnection and backhauling. FCC 6th Cir. Br. at 6–7; Pet. App. 123a–125a. The FCC emphasized that its non-impairment finding with respect to entrance facilities did not alter the right of competitive carriers to obtain interconnection facilities under § 251(c)(2). *Id.* at 7; Pet. App. 125a. Moreover, it states that “[a]lthough the FCC did not [in the TRRO] specifically define what it meant by the term ‘interconnection facilities,’ the MPSC's interpretation of that term to include entrance facilities *is fully consistent with the FCC's finding in the TRRO*. The district court was thus

wrong to overturn the MPSC’s decision on this point.” *Id.* at 20; Pet. App. 138a (emphasis added).

In so concluding, the FCC rejected the position of AT&T and its *amici* that the interconnection § 251(c)(2) requires an incumbent carrier to provide is limited to making the network available “for the facilities and equipment of” the competitor, and does not require the incumbent to provide necessary facilities. *Id.* at 21; Pet. App. 138a. As the FCC explained, “[t]hat language does not delineate what an incumbent LEC must do in order to provide the interconnection ‘for the facilities and equipment of’ the competitive carrier, let alone establish unambiguously that an incumbent LEC’s duty to provide interconnection does not include the provision of facilities that are necessary to achieve that interconnection.” *Id.*; Pet. App. 139a.

On February 23, 2010, the panel majority rejected the FCC views the panel had solicited and affirmed the district court, concluding that the “plain meaning” of the Act, its regulations, and the TRRO allowed an incumbent carrier to charge a competitive carrier at market-based rates for the use of the incumbent carrier’s entrance facilities as long as the incumbent carrier offers other interconnection facilities at cost-based rates. Pet. App. 1a–45a. The panel majority did not take issue with the FCC’s interpretation of the Act

in the TRRO.<sup>8</sup> Instead, the panel majority restated in its own words the key passages of the TRRO, then concluded that its own interpretation of the restated passages was more plausible than the FCC's. Pet. App. 17a–18a.

In dissent, Judge Sutton criticized the panel majority and concluded that the FCC's interpretation of its own regulations was fair and considered. Pet. App. 33a–45a. Judge Sutton stated:

In deciding what incumbents may charge for the use of their entrance facilities, the FCC interprets its regulations to draw a distinction. On one side of the line, incumbents must lease their entrance facilities to competitors at cost-based rates when they use the facilities for interconnection. On the other side, incumbents may charge market-based rates, or not lease the facilities at all, when competitors use the facilities for backhauling. *See* FCC 6th Cir. Br. at 15-17, 20. . . . [W]e must keep in mind that Congress charged the FCC with administering § 251, *see* 47 U.S.C. § 251(d)(1), and the FCC wrote the regulations at issue, all of which means that the FCC's interpretation binds us

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<sup>8</sup> In this respect, the Sixth Circuit was correct. A party seeking to challenge the FCC's authoritative interpretation of its own unbundling regulations in the TRRO was compelled to raise that claim in a petition for review within 60 days after the TRRO's entry. 28 U.S.C. § 2344. Although AT&T's predecessor did challenge the TRRO, it failed to assert any claim with respect to the FCC's statement in TRRO ¶ 140. *See* generally *Covad*, 450 F.3d 528. The propriety of ¶ 140 is therefore not subject to judicial review in this proceeding.

unless it flouts the regulations' text. *See Auer*, 519 U.S. at 461. [Pet. App. 36a.]

He concluded that “The line drawn by the FCC permissibly interprets its own regulation.” Pet. App. 36a–38a.

MPSC Commissioners petitioned for panel rehearing and rehearing *en banc*, noting that days after the panel’s decision, the Ninth Circuit issued a decision reaching the opposite result and specifically applied *Auer* deference. The Sixth Circuit denied the petition. Pet. App. 90a–91a.

On June 2, 2010, the MPSC Commissioners timely filed a petition for a writ of certiorari and invoked the Court’s jurisdiction under 28 U.S.C. § 1254(1). This Court granted the petition on December 10, 2010.

## SUMMARY OF ARGUMENT

The Telecommunications Act and its accompanying regulations are a technical labyrinth, exhibiting a degree of complexity found in few other areas of the law. Proof of this point can be found simply by reviewing the FCC’s TRRO, which spans nearly 200 pages of the FCC Record. But there is no need for judicial gloss on the Act or the FCC’s regulations. That is because the FCC’s interpretation of the TRRO in its *amicus* briefing in this very litigation “respects the words of [the FCC’s] regulations.” Pet. App. 45a (Sutton, J., dissenting). In fact, the FCC’s fair and considered interpretation of the TRRO has been endorsed by three of the four circuits to have addressed the entrance-facility issue, including 10 of the 12

circuit judges who have examined it. Because Congress has not specifically said whether an entrance facility can function as a § 251(c)(2) interconnection, and because the FCC’s interpretation is not plainly erroneous or inconsistent with its own regulations, the FCC’s interpretation is binding. *Auer*, 519 U.S. at 461–62

Turning to the language of the Act and the FCC’s regulations and orders, it is plain that the FCC’s *amicus* position in this litigation represents fair and considered judgment. While the TRRO reflects the FCC’s finding that there is no § 251(c)(3) impairment with respect to entrance facilities, the FCC expressly cautioned that an incumbent carrier was still obligated to provide cost-based interconnection. Interconnection “is the linking of two networks for the mutual exchange of traffic.” 47 C.F.R. § 51.5; Br. App. 1a. And when a competitive carrier seeks an entrance facility to provide for the mutual exchange of traffic between customers of its own network and that of the incumbent carrier (as opposed to the transport of traffic solely between the CLEC’s customers, an example of “backhauling”), the incumbent carrier must provide that interconnection, at cost-based rates, under § 251(c)(2). The MPSC’s conclusion—that the term “interconnection facilities” includes entrance facilities when used for interconnection—is consistent with this regulatory scheme.

## ARGUMENT

### **I. The Telecommunications Act and the FCC’s implementing regulations require an incumbent carrier to provide a competitive carrier with entrance facilities, at a cost-based rate, for interconnection.**

Section 251(c) makes clear that an incumbent carrier has two independent but overlapping duties to share its network with a competitive carrier. First, if the FCC finds impairment with respect to any particular element of an incumbent carrier’s network, the incumbent carrier must offer that element to a competitor, “unbundled” (i.e., *à la carte*) and at cost-based rates. 47 U.S.C. § 251(c)(3). Second, and wholly separate from the unbundling obligation, the incumbent carrier must provide to competitors interconnection with the incumbent-provider network so that customers of each network can seamlessly connect with customers on the other. 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.5; Br. App. 1a (defining interconnection as the “linking of two networks for the mutual exchange of traffic”).

In the TRRO, the FCC did not find § 251(c)(3) impairment with respect to entrance facilities. As a result, § 251(c)(3) does not require an incumbent carrier to provide entrance facilities at cost-based rates.

But the non-impairment finding did not answer the question of whether there are circumstances in which an incumbent carrier must provide an entrance facility at cost-based rates for § 251(c)(2) interconnection. The answer to that question is “sometimes.” When an

entrance facility is being used solely for backhauling, e.g., to connect a competitive-carrier customer to another competitive-carrier customer, there is no “*mutual* exchange of traffic” among two linked networks and thus no interconnection. 47 C.F.R. § 51.5; Br. App. 1a (emphasis added). In contrast, when an entrance facility is being used to connect a competitive-carrier customer with an incumbent-carrier customer, then by definition there is a “mutual exchange of traffic” among the two linked networks. *Id.* This is classic interconnection. Accordingly, § 251(c)(2) requires an incumbent carrier to provide an entrance facility at cost-based rates when used for interconnection.

**A. An entrance facility can be used for interconnection, such that § 251(c)(2) requires an incumbent carrier to provide the entrance facility at cost-based rates.**

**1. Entrance facilities can serve multiple purposes.**

As noted earlier, “entrance facilities” are “the transmission facilities that connect competitive [carrier] LEC networks with incumbent [carrier] LEC networks.” TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a. In the Sixth Circuit’s words, “an ‘entrance facility’ is really just a fancy name for a cable or wire used to transport calls from a CLEC switch [i.e., computer router] to an ILEC switch [same].” Pet. App. 3a.

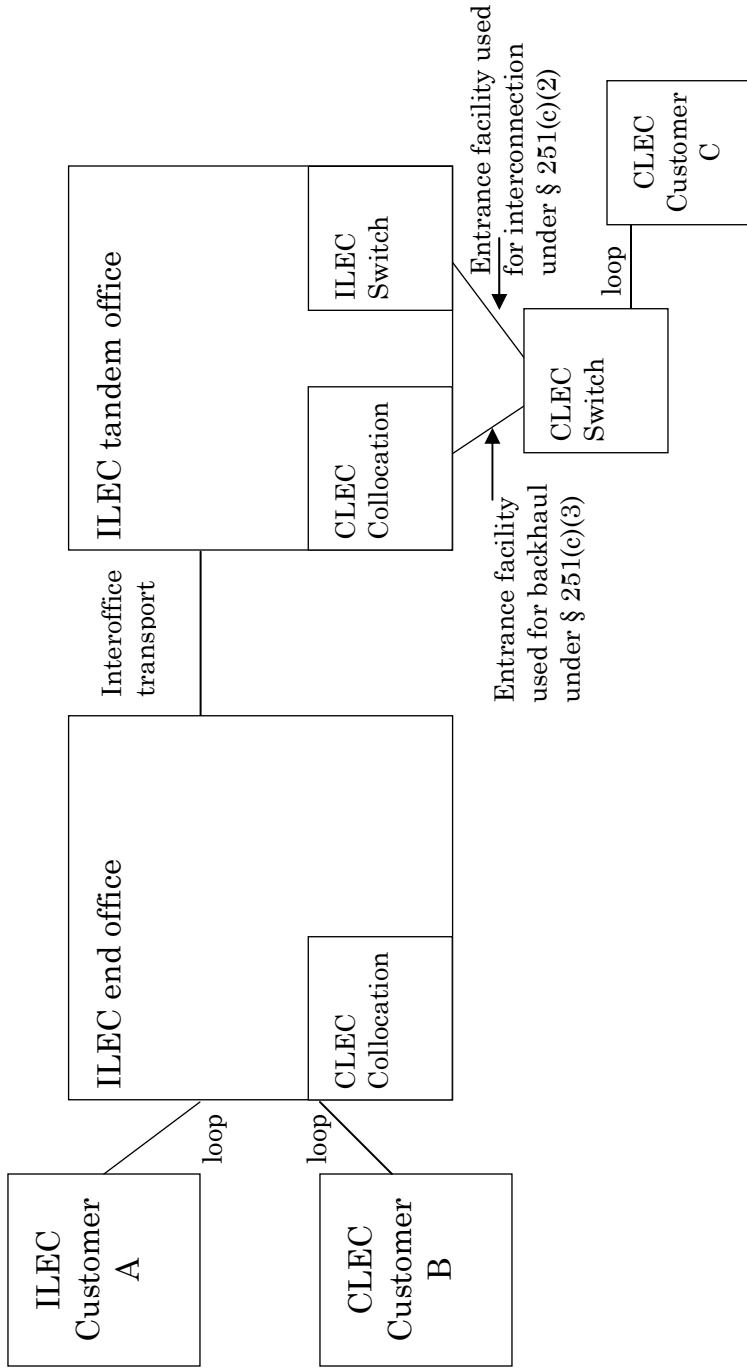
Wires and cables can be used in multiple ways, and entrance facilities are no exception. One example is when a competitive carrier uses an entrance facility to

link its own network to an incumbent carrier's network so that a competitive-carrier customer and an incumbent-carrier customer can call each other. This type of access is a foundational component for a competitive carrier. Without it, no rational consumer would switch from the incumbent to the competitive carrier, because the consumer would be unable to reach the vast number of customers on the incumbent carrier's network.

A second example is when a competitive carrier uses an entrance facility to link its own network with that of an incumbent carrier so that the competitive carrier can transport the call from one of its own customers to another of its customers. This latter example is one type of "backhauling." TRRO, 20 FCC Rcd. at 2610–11 (¶¶ 138–40)(Br. App. 11a–15a); accord FCC 6th Cir. Br. at 6–7 (Pet. App. 124a–125a). It is accomplished by using an entrance facility to transport traffic "from [a competitive carrier's] collocation arrangements to [the competitive carrier's] switches." TRRO, 20 FCC Rcd. at 2611 (¶ 138 n.389); Br. App. 13a. In this example, there is no "mutual" exchange of traffic between the two networks, because all of the traffic is between customers of only one network. Contra 47 C.F.R. § 51.5; Br. App. 1a (requiring a "*mutual* exchange of traffic" (emphasis added)).

These two ways to use an entrance facility are illustrated in the (very simplified) diagram that appears on the following page and is described in the accompanying text.





*a. Interconnection*

Example one, described above, is illustrated by customer C, a competitive-carrier customer, and customer A, an incumbent-carrier customer. Customer C places a call that travels via loop to the competitive-carrier's switch (i.e., a routing computer), which sends the call to the incumbent-carrier's switch (another routing computer). The incumbent's switch sends the call via interoffice transport to the end office, where it can travel via loop to customer A. A mutual exchange of traffic between the two carriers' linked networks has just occurred.

The entrance facility in this example links the competitive carrier's switch with the incumbent carrier's switch, and thereby meets the definition of an entrance facility in § 136 of the TRRO. The entrance facility also links the two networks, because it brings traffic from the competitive carrier's network to the incumbent carrier's network. TRRO, 20 FCC Rcd. at 2610–11 (¶ 138); Br. App. 11a. This is paradigm interconnection. 47 U.S.C. § 51.5.; Br. App. 1a.

*b. Backhauling*

Example two is illustrated by customers C and B, both competitive-carrier customers. Customer C's call again travels via a loop to the competitive-carrier's switch, but this time, the routing computer does not need the incumbent-carrier's routing computer, because the call destination is another competitive-

carrier customer. Using collocation<sup>9</sup> and the incumbent's interoffice transport, the call is instead sent directly to the incumbent-carrier's end office, bypassing the incumbent's switch altogether. It then travels through another competitive-carrier collocation and loop to customer B. This is one form of backhauling, because the competitive carrier is carrying traffic "to and from its end users" and is "connecting incumbent [carrier] switches or wire centers" to do so. TRO, 18 FCC Rcd. at 17202–03 (¶ 365); Br. App. 17a-19a. Accord TRRO, 20 FCC Rcd. at 2611 (¶ 138 n.389); Br. App. 13a (describing backhauling as the use of an entrance facility to transport traffic "from [a competitive carrier's] collocation arrangements to [the competitive carrier's] switches.").<sup>10</sup>

When backhauling is involved, the incumbent carrier is *not* obligated to provide the entrance facility at cost-based rates under § 251(c)(2), because there is no mutual exchange of traffic between the users of two networks. And because there is no impairment for competitive carriers to provide this service on their own under § 251(d), the competitive carriers must bear

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<sup>9</sup> The Act, in § 251(c)(6), requires the incumbent carrier to allow "physical collocation," which is the placement of the competitive carrier's equipment on the incumbent's premises to allow the competitive carrier to accomplish interconnection. *Verizon*, 540 U.S. at 406.

<sup>10</sup> The entrance facility is performing the function in both instances depicted as defined by the FCC regulations: it is "transport[ing] traffic to a switch[.]" TRRO, 20 FCC Rcd. at 2610 (¶ 138); Br. App. 11a–14a. In each, the entrance facility is also operating as "transmission facilities that connect competitive LEC networks with incumbent LEC networks." TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a-10a.

this cost, and incumbent carriers do not need to provide the entrance facility on an unbundled basis under § 251(c)(3). See TRRO, 20 FCC Rcd. at 2610–11 (¶¶ 137, 138); Br. App. 10a-14a.

The fact that entrance facilities can serve multiple purposes is underscored by the FCC’s TRO. In paragraph 365 of the TRO, the FCC describes two ways that competitive carriers use “entrance facilities”<sup>11</sup> between their own network and the incumbent network, “both for *interconnection* and to *backhaul* traffic.” TRO, 18 FCC Rcd. at 17203 (¶ 365); Br. App. 17a (emphasis added).<sup>12</sup>

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<sup>11</sup> Paragraph 365 refers to “transmission connections,” TRO 18 FCC Rcd. at 17203 (¶ 365), but ¶ 136 makes clear that entrance facilities *are* “transmission connections.” TRRO, 20 FCC Rcd. at 2609 (¶ 136) (defining entrance facilities as “transmission facilities that connect competitive LEC networks with incumbent LEC networks.”).

<sup>12</sup> AT&T argued below that by definition an entrance facility can never be a part of “interconnection” because entrance facilities are defined as a type of transport, see TRRO, 20 FCC Rcd. at 2609–10, 2612 (¶¶ 137, 141), and 47 C.F.R. § 51.5 (Br. App. 1a) then defines an interconnection as not including “transport.” AT&T 6th Cir. Br. at 32–33. This argument overlooks the fact that entrance facilities are also defined as “transmission facilities that connect competitive LEC networks with incumbent LEC networks.” TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a–10a. This latter definition easily includes the role of interconnecting two networks for the mutual exchange of traffic, the FCC’s definition of interconnection in 47 C.F.R. § 51.5; Br. App. 1a. Thus, entrance facilities are a dedicated transport only insofar as they perform the role of backhauling; the FCC’s TRO order, in evaluating dedicated transports in ¶ 365, makes clear the distinction between backhauling and interconnection.

The FCC’s recognition that entrance facilities may serve a different function depending on whether customers of two networks are exchanging traffic is consistent with the concept of “entrance.” In each circumstance, whether for interconnection or backhauling, the entrance facility links the competitive carrier’s network with the incumbent carrier’s network—in one circumstance for the mutual exchange of traffic of customers of two networks, and in the other to enable the competitive-carrier network’s own customers to communicate. In either case, the entrance facilities enable the traffic to literally “enter” the incumbent’s network.

Of course, in the situation in which the competitive carrier leases or otherwise accesses network elements from an incumbent carrier to allow for the communication only of its own customers (i.e., backhauling), the network that the competitive carrier creates is really its own, by filling in and using the necessary network elements owned by the incumbent carrier. See *Verizon*, 535 U.S. at 491–92 (describing that a competitive carrier “may choose to lease certain of an incumbent’s ‘network elements’” on an unbundled basis.) (footnote omitted); see also TRO, 18 FCC Rcd. at 17203 (¶ 365); Br. App. 17a. This dynamic is not present where a customer from the competitive carrier exchanges traffic with the incumbent carrier’s customer (i.e., interconnection). In the latter circumstance, there is necessarily a mutual exchange of traffic between two *different* networks, that of the

incumbent carrier, and that of the competitive carrier.<sup>13</sup>

In sum, entrance facilities serve at least two distinct purposes. The question this Court must answer is whether an entrance facility serves an “interconnection” function when it allows for the mutual exchange of traffic between a customer on a competitive-carrier’s network and a customer on an incumbent-carrier’s network.

**2. When an entrance facility connects a customer on a competitive-carrier’s network to a customer on an incumbent-carrier’s network, the entrance facility is serving the interconnection function that § 251(c)(2) contemplates.**

Once it is understood that an entrance facility can be used in multiple ways, there is precious little to dispute regarding when an entrance facility can serve as an “interconnection.” If a competitive carrier uses an entrance facility to connect a customer on the

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<sup>13</sup> 47 C.F.R. § 51.319(e), on which the Sixth Circuit relied, is consistent with the notion that an entrance facility can play multiple roles. That FCC regulation explains entrance facilities as a “dedicated transport that does not connect a pair of incumbent LEC wire centers.” 47 C.F.R. § 51.319(e); Br. App. 6a–7a. Entrance facilities are a “type” of dedicated transport, TRRO, 20 FCC Rcd. at 2612 (¶ 141)(Br. App. 15a), but they also are transmission facilities that “connect competitive LEC networks with incumbent LEC networks.” TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a. Consistent with the definition of entrance facility in 47 C.F.R. § 51.319(e), a dedicated transport that connects a pair of incumbent LEC wire centers obviously does not connect an incumbent LEC with a competitive LEC, i.e., it is not an entrance facility at all.

competitive carrier's network to a customer on the incumbent carrier's network, there is necessarily a mutual exchange of traffic occurring between two linked networks. This activity, by definition, is § 251(c)(2) interconnection. 47 C.F.R. § 51.5; Br. App. 1a ("Interconnection is the linking of two networks for the mutual exchange of traffic."). Accordingly, the incumbent carrier must provide interconnection for the transmission and routing of telephone exchange service and exchange access at cost-based rates. 47 U.S.C. § 251(c)(2). Conversely, if a competitive carrier uses an entrance facility to connect two customers on the competitive carrier's network, there is no mutual exchange of traffic. The entrance facility is serving a purely transport function, and such backhauling does not implicate § 251(c)(2).

One of the panel majority's errors below was its conclusion that an entrance facility connecting a competitive carrier's network to an incumbent carrier's network can never be an interconnection facility. Pet. App. 27a n.13. In fact, the panel majority's extraordinarily long and somewhat convoluted hypothetical involving extension cords and surge protectors connecting park visitors and a garage was based on the mistaken assumption that an incumbent carrier is not required to provide a connecting wire, only an outlet. The panel majority was wrong for numerous reasons.

First, 47 C.F.R. § 51.321(a) states that a carrier must provide "any technically feasible method of obtaining interconnection." Connecting a competitive-carrier switch to an incumbent-carrier switch through an entrance-facility wire is a feasible method of

obtaining interconnection. In fact, entrance facilities are “designed for the very purpose of linking two carriers’ networks.” *Ill. Bell Tel.*, 526 F.3d at 1072. Compare TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a (an entrance facility can be used to physically link two carriers’ networks), *with* 47 C.F.R. § 51.5; Br. App. 1a (defining “interconnection” as the “linking of two networks for the mutual exchange of traffic”).<sup>14</sup> And that is how competitors use entrance facilities: to connect with an incumbent-carrier network so the two networks can mutually exchange traffic. See *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 586 (D.C. Cir. 2004). Because an entrance facility is a technically feasible way of obtaining an interconnection, an incumbent carrier may be obliged, in some instances, to provide it if a competitive carrier asks for it. 47 C.F.R. § 51.321(a).

Second, the FCC’s regulations and orders make clear that an incumbent carrier’s duty to provide “interconnection” relates to the provision of a facility, not merely an outlet for plug-in. Section 251(c)(2) requires an incumbent carrier to provide interconnection to “any technically feasible point within the [competitive] carrier’s network.” In other words, § 251(c)(2) may require, in some instances, that an incumbent carrier extend its own network to meet a competitive carrier’s network, which necessarily

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<sup>14</sup> AT&T has argued that 47 C.F.R. § 51.319(e) states that an incumbent carrier has no obligation to provide entrance facilities. But what § 51.319(e) actually says is that an incumbent carrier “is not obligated to provide a requesting carrier with *unbundled access*” to entrance facilities. *Id.* (Br. App. 6a–7a)(emphasis added). AT&T could be correct only if the phrase “with unbundled access” is stricken from the regulation altogether.



requires the building or extending of the incumbent carrier's own facilities, not merely providing an outlet for the competitive carrier's plug.

The FCC regulations, in defining the phrase "technically feasible," support this understanding. The FCC explained that the incumbent may have to "modify" its facilities to meet a competitive carrier's request. 47 C.F.R. § 51.5; Br. App. 1a ("The fact that an incumbent LEC must *modify its facilities* or equipment to respond to such request does not determine whether satisfying such request is technically feasible.") (emphasis added). Again, an obligation to modify facilities indicates a duty to build or change existing facilities.

In the same way, in describing this duty of interconnection, the FCC regulations in § 51.305 require that the incumbent carrier "design" its interconnection facilities to meet the same standards used by the incumbent for its own network. 47 C.F.R. § 51.305(a); Br. App. 3a–4a ("At a minimum, this requires 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.") (emphasis added). This regulation is likewise predicated on the assumption that the duty of providing "interconnection" may require the establishment of new facilities. The same is true in § 51.305(f), in which the FCC requires, "[i]f technically feasible," that an incumbent carrier "provide two-way trunking upon request." Br. App. 5a.

Most telling, however, are the FCC's regulations requiring an incumbent carrier to "build[]" its network to meet its interconnection obligation. Under 47 C.F.R.

§ 51.321 (“Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act”), the FCC requires that the “technically feasible methods” of achieving interconnection include “meet point interconnection arrangements.” 47 C.F.R. § 51.321(b)(2). Meet-point facilities require both carriers to “build” transmission facilities from their networks to a designated meet point to link “for the mutual exchange of traffic.” 47 C.F.R. § 51.5.

In sum, the FCC’s regulations expressly contemplate that an incumbent carrier may have to build something to accomplish interconnection, rather than merely making an outlet available for plug-in.

Third, to follow the panel majority’s reasoning renders the Act futile and fails to accomplish the Act’s stated purpose. As this Court has repeatedly noted, Congress designed the Act to increase competition by regulating the relationship between the “monopolistic companies” that controlled local telephone service and the companies entering local markets to compete with the incumbents. *Verizon*, 535 U.S. at 476. One of the avenues used to provide for greater competition was “interconnection,” by allowing a competitive carrier to build its own network to supplement the incumbent carrier’s network. 47 U.S.C. § 251(c)(2); *Verizon*, 535 U.S. at 492.

The panel majority’s suggestion below—that a competitive carrier could recreate an entire network and then merely “plug in” to the incumbent carrier’s network to gain access to the incumbent’s customers—would defeat the very purpose of the Act. As this Court noted in *Verizon*, the burden on a competitive carrier of building an entirely new network would create an

“insurmountable competitive advantage” for the incumbents:

A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent’s entire existing network, the most costly and difficult part of which would be laying down the “last mile” of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses. [*Id.*, at 490–91.]

By reducing this obligation to a “plug in” alone, the panel majority abrogates the FCC’s regulations in several places (e.g., § 51.305(a), (f), and § 51.321(b)(2)) and leaves the competitive carriers in an untenable position. The panel majority’s construction would undermine the competitive dynamic (and accompanying benefit for consumers) that the Act was intended to introduce.

**B. The FCC’s TRRO and the FCC’s *amicus* briefing in this case affirm the conclusion that an incumbent carrier must charge cost-based rates when an entrance facility is used for § 251(c)(2) interconnection.**

In the TRRO, particularly paragraphs 136–39, the FCC engaged in the impairment analysis that 47 U.S.C. § 251(c)(3) and *Covad* required. But because that was a discussion about impairment, the discussion is irrelevant to the interconnection issue that § 251(c)(2) frames. See 47 U.S.C. § 251(d)(2); FCC 6th Cir. Br. at 16 (Pet. App. 134a); *Ill. Bell Tel.*, 526 F.3d at 1072 (whether an incumbent carrier can charge

market-based rates for interconnection “is not related to the scope of an ILEC’s obligations under § 251(c)(3) to furnish unbundled network elements”).

To the contrary, the only place where the TRRO deals with *interconnection* in the context of entrance facilities is paragraph 140. And there, the FCC cautions that its § 251(c)(3) analysis should not be confused as affecting an incumbent provider’s § 251(c)(2) interconnection duties. TRRO, 20 FCC Rcd. at 2611 (¶ 140); Br. App. 15a (“our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)”). In other words, “[w]hat the FCC said in ¶ 140 is that an incumbent carrier must allow use of entrance facilities for interconnection at ‘cost-based rates.’” *Ill. Bell. Tel.*, 526 F.3d at 1072. Accord *Southwestern Bell Tel.*, 530 F.3d at 681 (“The TRRO found CLECs did not need entrance facilities for backhauling CLEC to CLEC traffic. Conversely, the TRRO reiterated that ILECs are required to provide entrance facilities at TELRIC rates under § 251(c)(2) if necessary for interconnection purposes.”); *Pacific Bell*, 621 F.3d at 846 (the FCC allowed “competitive LECs to lease entrance facilities or ‘transmission links’ at TELRIC rates for the purpose of achieving interconnection.”); FCC 6th Cir. Br. at 20 (Pet. App. 138a) (“the MPSC’s interpretation of [the term ‘interconnection facilities’] to include entrance facilities when used for interconnection is fully consistent with the FCC’s finding in the TRRO”).

The TRRO also supports the view that entrance facilities can be used for interconnection or to

backhaul. To begin, two of the TRRO's key paragraphs addressing entrance facilities contained footnotes that dealt specifically with backhauling. TRRO, 20 FCC Rcd. at 2611 (¶ 138 n.389); Br. App. 13a (noting a competitive carrier's success in obtaining entrance facilities from third-party providers for "backhaul" from the competitive carrier's collocation arrangements to its switches; the statement is predicated on the fact that entrance facilities may provide for backhauling); TRRO, 20 FCC Rcd. at 2612 (Br. App. 16a) (¶ 141 n.396) (confirming that backhauling and interconnection are distinct functions for entrance facilities)(Br. App. 16a).

More important, the conclusion that "entrance facilities" may provide for interconnection or backhauling, depending on their use, is consistent with the FCC's recognition that "entrance facilities are used to transport traffic *to a switch*." TRRO, 20 FCC Rcd. at 2610 (¶ 138); Br. App. 11a–14a (emphasis added). The movement of traffic may occur when either providing for interconnection, i.e., for the mutual exchange of traffic from customers (end users) in two networks, or for backhauling, e.g., moving traffic between customers in only a single network. The fact that entrance facilities move traffic is compatible with these two purposes.

This distinction between "entrance facilities" providing for interconnection and those providing for backhauling is the only reason that the FCC bothered to provide the limitation included in ¶ 140 of the TRRO. The purpose of the six paragraphs of the TRRO governing entrance facilities is to explain that there is no obligation for the incumbent carrier to provide for

such facilities as unbundled network elements under § 251(c)(3) because there was no impairment; the competitive carriers are able to build entrance facilities themselves. TRRO, 20 FCC Rcd. at 2610–11 (¶¶ 137, 138); Br. App. 10a–14a. If entrance facilities could never provide for interconnection, as the panel majority asserted below, there would be no reason to explain any limitation. The entire point of ¶ 140 is to clarify that this non-impairment does not alter the right of competitive carriers to obtain “interconnection” under § 251(c)(2). If interconnection is a concept entirely distinct from entrance facilities, this would be a gratuitous point; the TRRO’s previous paragraphs would not have suggested any other outcome.

The panel majority’s mistakes are exemplified in its decision to literally rewrite ¶ 140 of the TRRO to say that “competitive LECs will have access to these [*interconnection*] facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC’s network.” Pet. App. 16a (emphasis added). To interpret the word “facilities” as referring to “interconnection facilities” makes the entire sentence a superfluous restatement of § 251(c)(3). The reading that makes sense is to interpret the word “facilities” in ¶ 140 as referring to “entrance facilities.” Under that interpretation, incumbent carriers are exempt from providing entrance facilities at cost-based rates except when these facilities are used for interconnection, just as the MPSC concluded.

## II. The FCC's interpretation of the statutes and regulations it administers is entitled to deference under *Auer*.

Through its orders, the FCC has interpreted the Act and the implementing regulations while acknowledging the dual use of entrance facilities. Consistent with its past orders, the *amicus* brief the FCC filed in this litigation provided an unmistakable answer regarding the expert agency's interpretation of its own regulations. Granting appropriate deference to the FCC's interpretation is a second reason why this Court should reverse the panel majority's decision.

Absent Congress's express intent to address an issue, a court should give deference to an expert agency's construction of a statute it administers. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Review of the Act here demonstrates that Congress did not speak directly to whether an incumbent carrier has a duty to provide entrance facilities to a competitive carrier for the purpose of interconnecting the carriers' networks under § 251(c)(2). In the absence of congressional direction, the FCC is authorized to interpret any statutory ambiguities. *Nat'l Cable Telecomm. Ass'n v. Brand X Internet*, 545 U.S. 967, 980 (2005); *Chevron*, 467 U.S. at 843.

Under its statutory authority in § 251(d), the FCC lawfully promulgated regulations establishing unbundling requirements, including what network elements should be unbundled. In the TRRO, the FCC determined that a competitive carrier is not impaired without access to entrance facilities, and therefore is not entitled to such facilities as an unbundled network

element. TRRO, 20 FCC Rcd. at 2609–12 (¶¶ 136–41); Br. App. 8a–16a. At the same time (and as noted in the FCC’s Sixth Circuit *amicus* briefing), the FCC explicitly recognized an incumbent carrier’s obligation under section 251(c)(2) to make entrance facilities available to a competitive carrier at cost-based rates when the competitive carrier requires them to interconnect with the incumbent carrier’s network. TRRO, 20 FCC Rcd. at 2611 (¶ 140); Br. App. 15a. And the FCC’s TRRO underwent a formal notice-and-comment period before being issued. TRRO, 20 FCC Rcd. at 2543–45 (¶¶ 17–19); see also TRRO, 20 FCC Rcd. at 2666–69 (¶¶ 235–51).

In *Auer*, this Court held that an expert agency’s construction of a regulation it administers must be given deference unless Congress has “directly spoken to the precise question at issue.” 519 U.S. at 457. An agency’s interpretation qualifies for deference when Congress authorizes an agency with the general authority to make rules, and, as here, the agency’s interpretation was promulgated while exercising that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Application of an agency’s regulations necessitates the agency’s specific expertise; thus, an agency’s ability to interpret its own regulations is “a component of the agency’s delegated lawmaking powers.” *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 151 (1991). See also *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566–68 (1980). When an agency provides an interpretation of its regulations, a court should not perform a *de novo* review of competing interpretations of the regulations; instead, courts should defer to the agency’s fair and considered judgment unless it is plainly erroneous or



inconsistent with the regulation. *Coeur Alaska, Inc. v. Se. Alaska Cons. Council*, 557 U.S. \_\_\_, 129 S. Ct. 2458, 2470 (2009); *Auer*, 519 U.S. at 461–62; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945).

These principles are important for all administrative agencies, but especially in the context of the FCC’s orders here. A cursory review of the Act and its implementing regulations demonstrates that the relationship between incumbent and competitive carriers is a highly technical and complex subject matter. The FCC’s orders delve into this technical area and provide guidance and regulatory certainty for market participants. “[B]road deference is all the more warranted when, as here, the regulation concerns ‘a complex and highly technical regulatory program,’ in which the identification and classification of relevant ‘criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.’” *Thomas Jefferson Univ.*, 512 U.S. at 512 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

**A. The FCC’s interpretation of its regulations in the TRRO is entitled to deference.**

The FCC’s interpretation of its regulations in the TRRO is a fair and considered judgment of the agency charged with administering the Act. While the panel majority below suggested that the TRRO is simply an “interpretative rule” and should not be afforded deference, Pet. App. 9a n.6, the TRRO is more than just an interpretive rule.

The purpose of interpretive rules is to explain or clarify an expert agency's regulations; however, interpretive rules are not subjected to a legislative notice-and-comment period. In contrast, through its TRO and TRRO, the FCC implemented the Act's provisions—precisely as Congress authorized—and adopted seven pages of amendments to the Code of Federal Regulations, all pursuant to a formal notice-and-comment period. TRRO, 20 FCC Rcd. at 2543–45 (¶¶ 17–19). See also TRRO, 20 FCC Rcd. at 2666–69 (¶¶ 235–51). Such procedure confirms that the TRRO is a legislative, not interpretive, rule. See *Lincoln v. Vigil*, 508 U.S. 182, 195–96 (1993).

Ultimately, however, whether the TRRO is a legislative or interpretive rule is entirely of academic interest. Courts defer to an agency's interpretation of its own rules because it “make[s] little sense” to impose a judicial interpretation on an agency that remains free to rewrite the rule the way it wants. *Auer*, 519 U.S. at 463. Moreover, consideration should be given to the FCC's interpretation due to the highly technical and complex nature of the Act and the regulations. When examining areas of such a technical nature, this Court has consistently recognized the importance of the administering agency's interpretation and that, at a minimum, a general level of deference should be afforded to the agency's interpretation. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). Judicial deference to expert agency interpretations of rules and regulations is an essential element to providing regulatory certainty to market participants. *Coeur Alaska*, 129 S. Ct. at 2479. The FCC is the agency with the expertise required to clarify the interpretative and technical issues arising from the Act and its

implementation, and, consistent with *Auer*, deference should be afforded to the FCC's regulatory expertise.

**B. The FCC's views as expressed in its *amicus curiae* brief are likewise entitled to deference.**

The FCC participated in this proceeding below at the Sixth Circuit's request. The *amicus* brief the FCC filed offered further insight as to how the FCC interpreted its TRO and TRRO, confirming the MPSC's view that an incumbent carrier must provide entrance facilities at cost-based rates when used for interconnection:

Although the FCC did not specifically define [in the TRRO] what it meant by the term "interconnection facilities," the MPSC's interpretation of that term to include entrance facilities when used for interconnection *is fully consistent with the FCC's finding in the TRRO*. The district court thus was wrong to overturn the MPSC's decision on this point.

FCC 6th Cir. Br. at 20; Pet. App. 138a (emphasis added). And it is legally irrelevant that the FCC's confirming views came in the form of an *amicus* brief. As this Court explained in *Auer*, substantial deference is still due:

Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a "*post hoc* rationalization" advanced by

an agency seeking to defend past agency action against attack, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question. [*Auer*, 519 U.S. at 462.]

Very recently, in fact, this Court, citing *Auer*, deferred to the Federal Reserve Board’s interpretation of a regulation that was similarly advanced in the Board’s *amicus* brief:

As in *Auer*, there is no reason to believe that the interpretation advanced by the Board is a “*post hoc* rationalization” taken as a litigation position. The Board is not a party to this case. And as is evident from our discussion of Regulation Z itself, see Part II-A, *supra*, the Board’s interpretation is neither “plainly erroneous” nor “inconsistent with” the indeterminate text of the regulation. In short, there is no reason to suspect that the position the Board takes in its *amicus* brief reflects anything other than the agency’s fair and considered judgment as to what the regulation required at the time this dispute arose.

*Chase Bank USA, N.A. v. McAvoy*, \_\_\_ U.S. \_\_\_, 2011 U.S. Lexis 914 (Jan. 24, 2011).

Moreover, when reviewing an agency’s “fair and considered judgment,” this Court has extended deference even beyond interpretations expressed in legal briefs, to those set forth in agency opinion letters.

E.g., *Coeur Alaska*, 129 S. Ct. at 2473; *id.* at 2479 (Scalia, J., concurring) (“[i]t is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions.”).

In sum, *Auer* demands deference to the FCC’s interpretation, both in the TRRO and the FCC *amicus* brief. It cannot be said that the FCC’s interpretation is plainly erroneous when it reasonably respects the words of the Act and the FCC’s own regulations, as described above, but also has the unanimous support of three federal-circuit opinions. *Illinois Bell Tel.*, 526 F.3d at 1072; *Southwestern Bell Tel.*, 530 F.3d 676 at 684; *Pacific Bell*, 621 F.3d at 846.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Bill Schuette  
Attorney General

B. Eric Restuccia  
Michigan Solicitor General  
*Counsel of Record*  
P. O. Box 30212  
Lansing, Michigan 48909  
restucciae@michigan.gov  
(517) 373-1124

John J. Bursch  
Special Assistant Attorney General

Steven D. Hughey  
Public Service Division Chief

Anne M. Uitvlugt  
Assistant Attorney General  
Public Service Division

Attorneys for Petitioners  
Orjiakor N. Isiogu, Monica  
Martinez, and Greg R. White,  
MPSC Commissioners

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## IMPORTANT TERMS AND CONCEPTS USED IN THE BRIEF

### **Backhauling**

“Backhauling” refers to a competitive carrier’s use of an entrance facility to transport traffic between the competitive carrier’s switch and the carrier’s collocation facilities (housed in the incumbent carrier’s office). TRRO, 20 FCC Rcd. at 2611 (¶ 138 n.389); Br. App. 13a (competitive carriers can obtain entrance facilities “for backhaul from [a competitive carrier’s] collocation arrangements to [that carrier’s] switches.”)); TRO, 18 FCC Rcd. at 17203 (¶ 365); Br. App. 17a (“[c]ompetitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users.”). This would include, for example, the transport of a call between two of the competitive carrier’s customers. FCC 6th Cir. Br. at 6-7; Pet. App. 124a–125a.

The need to backhaul “derives from the use of a [competitor carrier’s] switch located in a location relatively far from the end user’s premises, which effectively requires competitors to deploy much longer loops than the incumbent.” TRO, 18 FCC Rcd. at 17279 (¶ 480). To visualize this situation, please refer to the illustration on page 23 of this brief. When the competitive carrier desires to transport a call from CLEC customer C to CLEC customer B, one way to make that connection would be to run a wire (a “loop”) from the CLEC Switch directly to CLEC customer B. The problem is that over long distances, this is a very expensive connection. *Id.* The primary purpose of the Telecommunications Act is to allow a competitive-

carrier to use the incumbent carrier's existing wires for this transport rather than installing new (essentially parallel) wires. See generally 47 U.S.C. § 251(c). The same principles would apply if the call originated with customer B, because the competitive carrier would have to run a long loop from customer B to meet the incumbent carrier's switch.

## **CLEC**

A "competitive local exchange carrier." The Telecommunications Act refers to the competitive LEC, or CLEC, as the "requesting telecommunications carrier" in 47 U.S.C. § 251(c)(2) and (c)(3). The Telecommunications Act is designed to enable CLECs to introduce competition into an incumbent carrier's local market. *Iowa Utils. Bd.*, 525 U.S. at 371.

## **Collocation (Physical)**

This word is defined in the FCC regulations as part of the phrase "physical collocation." The concept is that a competitive carrier will be able to:

- (1) Place its own equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises;
- (2) Use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or to gain access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service;



(3) Enter those premises, subject to reasonable terms and conditions, to install, maintain, and repair equipment necessary for interconnection or access to unbundled elements; and

(4) Obtain reasonable amounts of space in an incumbent LEC's premises, as provided in this part, for the equipment necessary for interconnection or access to unbundled elements, allocated on a first-come, first-served basis. [47 C.F.R. § 51.5.]

The Telecommunications Act provides that collocation is available at just, reasonable, and nondiscriminatory rates. 47 U.S.C. § 251(c)(6).

### **Cost-based**

47 U.S.C. § 251(d) provides that § 251(c)(2) interconnection and § 251(c)(3) network elements charges “be based on the cost . . . of providing the interconnection or network element.” It is generally a more favorable rate for competitive carriers. See *Pacific Bell Tel. Co. v. California Pub. Util. Comm’n*, 621 F.3d 836, 841 (9th Cir. 2010), citing *Verizon v. FCC*, 535 U.S. 467, 489, 496–97 (2002).

### **Dedicated transport**

“Dedicated interoffice transmission facilities (dedicated transport or transport) are facilities dedicated to a particular competitive carrier that the carrier uses for transmission between or among incumbent LEC central offices and tandem offices, and to connect its

local network to the incumbent LEC's network." TRRO, 20 FCC Rcd. at 2576 (¶ 67).

### **End office**

In practical terms, an end-office switch connects directly to a customer; a tandem-office switch connects to other switches. FCC regulations refer to the "end office" as part of the incumbent-carrier network, in describing a shared transport: "Shared transport is defined as the transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network." 47 C.F.R. § 51.319(d)(4)(C).

### **Entrance facilities**

Entrance facilities are "the transmission facilities that connect competitive LEC networks with incumbent LEC networks." TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a. "[E]ntrance facilities are used to transport traffic to a switch," TRRO, 20 FCC Rcd. at 2610 (¶ 138); Br. App. 11a–14a, and they are a type of dedicated transport, TRRO, 20 FCC Rcd. at 2610 ¶ 137; Br. App. 10a ("[w]e reinstate the *Local Competition Order* definition of dedicated transport to the extent that it included entrance facilities"), TRRO, 20 FCC Rcd. at 2612 ¶ 141; Br. App. 15a–16a ("it would be inappropriate to apply the same impairment test to entrance facilities that we have adopted for other types of dedicated transport.").

## **ILEC**

An “incumbent local exchange carrier.” See 47 U.S.C. § 251(c). Congress enacted the Telecommunications Act to end “the longstanding regime of state-sanctioned monopolies” of local telephone markets. *Iowa Utils. Bd.*, 525 U.S. at 371. The Act in 47 U.S.C. §§ 251(h) and 252(j) define an incumbent local exchange carrier as the carrier that, as of the enactment of the Telecommunications Act, provided local exchange service to a specific area. This brief also refers to the incumbent LEC as the incumbent carrier.

## **Impairment**

The Telecommunications Act requires the FCC to determine whether the failure to provide access to a § 252(c)(3) network element would “impair” the ability of a carrier seeking access to provide the services it seeks to offer. 47 U.S.C. § 252(d)(2).

## **Interconnection**

“Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.” 47 C.F.R. § 51.5; Br. App. 1a.

## **Interconnection facilities**

The phrase appears in 47 C.F.R. § 51.305 regarding the quality of interconnection that an incumbent carrier must provide competitive carriers:

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

(1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) At any technically feasible point within the incumbent LEC's network including, at a minimum:

\* \* \*

(3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires 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. . . . [47 C.F.R. § 51.305(a); Br. App. 3a–4a (emphasis added).]

The phrase “interconnection facilities” also appears in ¶ 140 of the FCC's TRRO order (Br. App. 15a):

We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain *interconnection facilities* pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive

LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network. [Footnote omitted.] [TRRO, 20 FCC Rcd at 2611 ¶ 141.]

### **Local Competition Order (LCO)**

In August of 1996, with the Local Competition Order, or LCO, the FCC issued its first set of implementing regulations after the enactment of the Telecommunications Act. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 (1996).

### **Loops**

Loops include “wires connecting telephones to switches[.]” *Iowa Utils. Bd.*, 525 U.S. at 371.

### **Meet-point interconnection arrangement**

“A meet point interconnection arrangement is an arrangement by which each telecommunications carrier builds and maintains its network to a meet point.” 47 C.F.R. § 51.5.

### **Network**

A network is a combination of facilities that allows a carrier to provide a telecommunications service. As this Court has explained:

[A] local exchange carrier (LEC), . . . owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network. [*Iowa Utils. Bd.*, 525 U.S. at 371.]

### **Network elements**

“The term ‘network element’ means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.” 47 U.S.C. § 153(35).

### **Route**

A route is “a transmission path between one of an incumbent LEC’s wire centers or switches and another of the incumbent LEC’s wire centers or switches.” 47 C.F.R. § 51.319(e); Br. App. 6a.

### **Switches**

Switches are “equipment directing calls to their destinations[.]” *Iowa Utils. Bd.*, 525 U.S. at 371.

**Tandem office**

In practical terms, a tandem-office switch connects to other switches; an end-office switch connects directly to a customer. The FCC regulations refer to the “tandem office” as part of the incumbent LEC network, in describing a shared transport: “Shared transport is defined as the transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network.” 47 C.F.R. § 51.319(d)(4)(C).

**TELRIC**

The acronym means “Total Element Long Run Incremental Cost” i.e., the costing methodology adopted by the FCC to establish the cost-based rates required by 47 U.S.C. § 252(d). *Verizon Communications v. FCC*, 535 U.S. 467, 523 (2002).

**Transmission facilities**

The primary definition of entrance facilities relies on the use of the phrase: “the transmission facilities that connect competitive LEC networks with incumbent LEC networks.” TRRO, 20 FCC Rcd. at 2609 (¶ 136); Br. App. 8a. In this context, it conveys the meaning of equipment that moves telephone traffic.

**Triennial Review Order (TRO)**

In August of 2003, the FCC issued its revised regulations governing the unbundling of network

elements under 47 U.S.C. § 251(c)(3) with the Triennial Review Order, or TRO. See *In the matter of review of the Section 251 Unbundling Obligations of incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003).

### **Triennial Review Remand Order (TRRO)**

In February 2005, the FCC issued its most recent revised regulations governing the unbundling of network elements under 47 U.S.C. § 251(c)(3) with the Triennial Review Remand Order, or TRRO. See *Unbundled Access to Network Elements and Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533 (2005).

### **Wire center**

A wire center is “the location of an incumbent LEC local switching facility containing one or more central offices.” 47 C.F.R. § 51.5; Br. App. 2a.



**47 CFR 51.5**

§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

\* \* \*

Interconnection. Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

\* \* \*

Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

Wire center. A wire center is the location of an incumbent LEC local switching facility containing one or more central offices, as defined in the Appendix to part 36 of this chapter. The wire center boundaries define the area in which all customers served by a given wire center are located.

**47 CFR 51.305**

§ 51.305 Interconnection.

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

(1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) At any technically feasible point within the incumbent LEC's network including, at a minimum:

(i) The line-side of a local switch;

(ii) The trunk-side of a local switch;

(iii) The trunk interconnection points for a tandem switch;

(iv) Central office cross-connect points;

(v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and

(vi) The points of access to unbundled network elements as described in § 51.319;

(3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires 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. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier; and

(4) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing

substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.

(g) An incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of this section.

**47 CFR 51.319**

§ 51.319 Specific unbundling requirements.

\* \* \*

(e) Dedicated transport. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, as set forth in paragraphs (e) through (e)(4) of this section. A “route” is a transmission path between one of an incumbent LEC’s wire centers or switches and another of the incumbent LEC’s wire centers or switches. A route between two points (e.g., wire center or switch “A” and wire center or switch “Z”) may pass through one or more intermediate wire centers or switches (e.g., wire center or switch “X”). Transmission paths between identical end points (e.g., wire center or switch “A” and wire center or switch “Z”) are the same “route,” irrespective of whether they pass through the same intermediate wire centers or switches, if any.

(1) Definition. For purposes of this section, dedicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

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

\* \* \*

## TRRO – PARAGRAPHS 136-141

### D. Entrance Facilities

136. In the *Local Competition Order*, the Commission defined dedicated transport as:

incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.  
n375

The Commission reaffirmed this definition, which encompassed entrance facilities (the transmission facilities that connect competitive LEC networks with incumbent LEC networks), in the *UNE Remand Order*. n376 In the *Triennial Review Order*, we revised the definition of dedicated transport to exclude entrance facilities. n377 We determined that entrance facilities “exist *outside* the incumbent LEC’s local network” and should therefore -- given section 251’s focus on competition within the local network -- be excluded from the definition of dedicated transport. n378 We also limited the definition of dedicated transport to “those transmission facilities connecting incumbent LEC switches and wire centers within a LATA.” n379 Reviewing the *Triennial Review Order*, the *USTA II* court indicated that our exclusion of entrance facilities from the definition of dedicated transport was at odds with the definition of “network element” found in section 153(29) of the Act. n380 Specifically, the court



found that we erred in excluding these facilities from the definition of dedicated transport for purposes of implementing the section 251 unbundling obligation. n381 The court noted, moreover, that “if entrance facilities are correctly classified as ‘network elements,’ an analysis of impairment would presumably follow.” n382

n375 *Local Competition Order, 11 FCC Rcd at 15718, para. 440.*

n376 *UNE Remand Order, 15 FCC Rcd at 3842, paras. 322-23.*

n377 *Triennial Review Order, 18 FCC Rcd at 17203-04, para. 366.* We also determined in the *Triennial Review Order* that our decision with respect to entrance facilities applied to transmission facilities connecting mobile wireless carriers’ networks with incumbent LECs’ networks, and that wireless carriers were therefore not entitled to unbundled access to these facilities. *Id. at 17206, para. 368.* Because we now conclude that wireless carriers may not obtain UNEs solely to provide mobile wireless service, we find it unnecessary to reconsider whether facilities linking wireless and incumbent LEC networks are properly considered entrance facilities. *See supra* para. 36.

n378 *Triennial Review Order, 18 FCC Rcd at 17203-04, para. 366* (emphasis in original).

n379 *Id. at 17202, para. 365.*

n380 *USTA II*, 359 F.3d at 585-86; see also 47 U.S.C. § 153(29) (defining “network element” as “a facility or equipment used in the provision of a telecommunications service”).

n381 *USTA II*, 359 F.3d at 585-86. We do not interpret the court’s decision to mean that we have no discretion to refine the statutory definition of “network element” for purposes of unbundling under section 251(c)(3). As we noted in the *Triennial Review Order*, the Act “does not provide guidance on which transmission facilities should be included in the definition of the transport network element.” *Triennial Review Order*, 18 FCC Rcd at 17203, para. 366.

n382 *USTA II*, 359 F.3d at 585-86.

137. The *USTA II* court did not reject our conclusion that incumbent LECs need not unbundle entrance facilities, only the analysis through which we reached that conclusion. n383 In response to the court’s remand, we reinstate the *Local Competition Order* definition of dedicated transport to the extent that it included entrance facilities, but we find that requesting carriers are not impaired without unbundled access to entrance facilities. n384

n383 In fact, the court expressed skepticism that incumbent LECs should be required to build entrance facilities under any circumstances. *Id.* at 586.

n384 We reject suggestions that we define entrance facilities as a new UNE, Alpheus

Comments at 68-69, or as a member of the “loop” family, *id.* at 71; ATX, Bayring, *et al.* Reply at 48. Because the traffic aggregation potential inherent in entrance facilities more closely resembles that associated with dedicated transport, we reject these arguments and consider these facilities to be a type of transport. In any event, the distinction has no practical significance, because our analysis here does not rely in any way on our treatment of other loop or transport elements. Several commenters have argued that we should revise the definition of dedicated transport to replace the references to a requesting carrier’s “wire center” and “switch” with the term “location,” to ensure that the definition does not exclude non-switched services, particularly data services. Alpheus Comments at 72-73; ATX, Blackfoot, *et al.* Comments at 48-49. Because these commenters have supplied no evidence that otherwise-qualified data service providers have been unable to obtain unbundled transport under the definition we re-adopt today, and because in any case we make a national finding of non-impairment with respect to entrance facilities, we reject this proposal.

138. As the court suggested, we now conduct an impairment analysis with respect to entrance facilities and find that the economic characteristics of entrance facilities that we discussed in the *Triennial Review Order* support a national finding of non-impairment. n385 Specifically, 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 central offices. As we noted in the *Triennial Review Order*,

entrance facilities are used to transport traffic to a switch and often represent the point of greatest aggregation of traffic in a competitive LEC's network. n386 Because of this aggregation potential, entrance facilities are more likely than dedicated transport between incumbent LEC offices to carry enough traffic to justify self-deployment by a competitive LEC. n387 Moreover, competitive LECs have a unique degree of control over the cost of entrance facilities, in contrast to other types of dedicated transport, because they can choose the location of their own switches. n388 For example, they can choose to locate their switches close to other competitors' switches, maximizing the ability to share costs and aggregate traffic, or close to transmission facilities deployed by other competitors, increasing the possibility of finding an alternative wholesale supply. n389 In addition, they often can locate their switches close to the incumbent LEC's central office, minimizing the length and cost of entrance facilities. n390

n385 When the Commission last conducted an impairment analysis for entrance facilities, in the *UNE Remand Order*, the Commission concluded that competitive LECs were impaired without unbundled access to entrance facilities. *UNE Remand Order*, 15 FCC Rcd at 3851-52, paras. 347-48. The Commission found the record lacking in evidence that "the competitive entrance facility market is providing requesting carriers with effective alternatives to unbundled transport for all, or substantially all of the routes requesting carriers would need in order to provide the services they seek to offer." *Id.* at 3852, para. 348. At the same time, however, the Commission noted that

“the entrance facility market appears to be the most mature segment of the interoffice transport market, and thus may, in some situations, provide requesting carriers with effective alternatives to unbundled transport for certain point-to-point routes.” *Id.*

*n386 See Triennial Review Order, 18 FCC Rcd at 17204-05, para. 367.*

*n387 Id.* As described more fully below, the record contains evidence that competitive LECs are steadily deploying their own entrance facilities, or obtaining them from third-party providers, to replace entrance facilities formerly obtained from incumbent LECs. *See* Verizon Comments at 80-81; Verizon Comments, Attach. F, Declaration of Mohit Patel (Verizon Patel Decl.) at para. 15; BellSouth Comments at 54.

*n388 Triennial Review Order, 18 FCC Rcd at 17204-05, para. 367.*

*n389 Id. at 17204-05, para. 367.* The record contains evidence that competitive LECs are able to obtain entrance facilities from third-party providers. *See* NuVox Comments, Exh. A, Declaration of Keith Coker (NuVox Coker Decl.) at para. 3 (“Where available, NuVox utilizes third-party providers for backhaul from NuVox collocation arrangements to NuVox switches.”)

*n390 Triennial Review Order, 18 FCC Rcd at 17204-05, para. 367.* The record indicates that entrance facilities tend to be much shorter in

length than transport facilities between two incumbent LEC offices. AT&T Comments at 47-48, 52.

139. The record in this proceeding also demonstrates that competitive LECs are increasingly relying on competitively provided entrance facilities. BellSouth notes, for example, that between October 2003 and September 2004, 10 percent to 20 percent of the entrance facilities it had provided to competitive LECs were replaced by facilities obtained from other sources. n391 Verizon states that between early 2003 and mid-2004, it migrated more than 32,000 entrance facility circuits to non-Verizon facilities. n392 No commenters in this proceeding have disputed this evidence, which indicates that wholesale alternatives to entrance facilities provided by incumbent LECs are widely available. And it appears that incumbent LECs and competitors alike continue to agree that entrance facilities are more competitively available than other types of dedicated transport. n393

n391 BellSouth Comments at 54 & BellSouth Padgett Aff. at para. 39.

n392 Verizon Comments at 81 & Verizon Patel Decl. at para. 15.

n393 *See, e.g.*, AT&T Comments at 52 (indicating that “almost all competitively deployed transport links are entrance facilities”) (emphasis removed); Verizon Comments at 40-41; Verizon Comments, Attach. E, Declaration of Claudia P. Cuddy (Verizon Cuddy Decl.) at paras. 4-16 (describing Verizon’s success in finding non-

incumbent LEC providers of entrance facilities outside its region); *see also Triennial Review Order, 18 FCC Rcd at 17205, para. 367 & n.1122.*

140. We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. n394 Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

n394 *Triennial Review Order, 18 FCC Rcd at 17204, para. 366.*

141. The evidence described above convinces us that competitive LECs are not impaired without access to entrance facilities. n395 We also conclude that it would be inappropriate to apply the same impairment test to entrance facilities that we have adopted for other types of dedicated transport. n396 As we have explained, entrance facilities are characterized by unique operational and economic characteristics that justify separate treatment: they are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices. n397 For these reasons, we do not apply our test for other types of dedicated transport to entrance facilities.

n395 We find no justification in the record for making entrance facilities available on a transitional basis, as ALTS suggests, until carriers

have achieved sufficient volumes to make self-deployment efficient. ALTS *et al.* Comments at 90. As we explained above, the record shows that self-deployment or alternative wholesale provisioning of entrance facilities are viable alternatives given the possibilities for traffic aggregation and efficient location of competitive LEC switches. These factors demonstrate that requesting carriers are able to enter the market on an economic basis without unbundled access to entrance facilities, and we therefore decline to require such unbundling.

n396 *See Triennial Review Order, 18 FCC Rcd at 17204, para. 367* (“The economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an incumbent LEC’s network that our analysis must adequately reflect this distinction.”) We thus reject commenters’ suggestions that entrance facilities should be subject to the same test that applies to dedicated transport between incumbent LEC facilities. *See AT&T Comments at 50-52; Loop-Transport Coalition Comments at 87; ATX, Bayring, et al. Reply at 48; McLeod Reply at 37.*

n397 *See AT&T Comments at 32* (noting that entrance facilities, compared to other transmission facilities, are better suited to self-deployment because they involve “enormous traffic” and “very short distances”).



## TRO – PARAGRAPHS 365-367, 370

### 3. Definition of Dedicated Transport

365. We limit our definition of dedicated transport under section 251(c)(3) to those transmission facilities connecting incumbent LEC switches and wire centers within a LATA. n1111 The Commission previously defined dedicated transport as:

incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.  
n1112

We conclude that our previous definition was overly broad. As we explain in this Part, competitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users. These links constitute the incumbent LEC's own transport network. However, in order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the

facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection, n1113 we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic.

n1111 Section 271 of the Act prohibits BOCs from providing in-region interLATA services unless the BOC meets very specific requirements, but transport and other services are permitted within a LATA without meeting such requirements. *See 47 U.S.C. § 271*. Therefore, we find that LATA boundaries serve as a reasonable limitation on the scope of BOC obligations to unbundle transport.

n1112 *Local Competition Order, 11 FCC Rcd at 15718, para. 440, reaffirmed in UNE Remand Order, 15 FCC Rcd at 3842, paras. 322-23* (emphasis added); *see 47 C.F.R. § 51.319(d)(1)(i)*; *see NuVox et al. Reply at 34-36* (noting that the Commission's rules explicitly unbundle transmission facilities connecting incumbent LEC switches or wire centers with competitive LEC switches).

n1113 Specifically, section 251(c)(2) requires access to "the facilities and equipment" used by competing carriers for "interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access . . . ." The *Local Competition Order* discussed the relationship between sections 251(c)(2) and 251(c)(3) only to the extent that the obligation under section 251(c)(3)

“allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection.” *Local Competition Order, 11 FCC Rcd at 15636-37, para. 270.*

366. We find that a more reasonable and narrowly-tailored definition of the dedicated transport network element includes only those transmission facilities *within* an incumbent LEC’s transport network, that is, the transmission facilities between incumbent LEC switches. n1114 Because the Act does not provide guidance on which transmission facilities should be included in the definition of the transport network element, we believe we have discretion to adopt a definition that is in keeping with the section 251’s goal of opening the incumbent LEC’s local network to competition. We find that transmission facilities connecting incumbent LEC switches and wire centers are an inherent part of the incumbent LECs’ local network Congress intended to make available to competitors under section 251(c)(3). On the other hand, we find that transmission links that simply connect a competing carrier’s network to the incumbent LEC’s network are not inherently a part of the incumbent LEC’s local network. Rather, they are transmission facilities that exist *outside* the incumbent LEC’s local network. Accordingly, such transmission facilities are not appropriately included in the definition of dedicated transport. We note that a previous Commission reached a different result finding that, because unbundling this type of transmission facility is “technically feasible” and “will reduce entry barriers into the local exchange market,” it was appropriate to include such facilities within the definition of dedicated transport. n1115 We find that this approach was

misguided. The standard for unbundling is not “technical feasibility” and, moreover, just because a facility is capable of being unbundled does not mean that it is appropriately considered to be a network element for purposes of section 251(c)(3). We find that the more reasonable approach, and the one that is most consistent with the goals of section 251, is to not consider those facilities outside of the incumbent LEC’s local network as part of the dedicated transport network element that is subject to unbundling. n1116 In reaching this determination we note that, to the extent that requesting carriers need facilities in order to “interconnect[] with the [incumbent LEC’s] network,” section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission’s interpretation of this obligation. n1117 Therefore, we find that the dedicated transport network element includes only those “features, functions, and capabilities” of equipment and facilities that coincide with the incumbent LEC’s transport network -- the transmission links connecting incumbent LEC switches or wire centers. n1118

n1114 For further discussion of the Commission’s definition of “network elements,” see *supra* Part V.A.

n1115 *Local Competition Order, 11 FCC Rcd at 15718-19, paras. 440-43.*

n1116 Our determination here effectively eliminates “entrance facilities” as UNEs and, therefore, moots the Commission’s *Fourth Further NPRM* insofar as it proposes limitations on obtaining entrance facilities as UNEs. *UNE*

*Remand Order, 15 FCC Rcd at 3914-15*, paras. 492-96 (setting forth the *Fourth Further NPRM*). We note that the terms of the *Fourth Further NPRM* were expanded to include unbundled loop/transport combinations in addition to entrance facilities. See generally *Supplemental Order, 15 FCC Rcd 1760*; *Supplemental Clarification Order, 15 FCC Rcd 9587*. We address issues related to unbundled loop/transport combinations *infra* Part VII.A.

n1117 Section 251(c)(2) requires access to “the facilities and equipment” used by competing carriers for “interconnection with the local exchange carrier’s *network* . . . for the transmission and routing of telephone exchange service and exchange access.” 47 U.S.C. § 251(c)(2) (emphasis added).

n1118 *Id.* § 153(29).

367. Our conclusion in this respect is buttressed by the fact that the economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an incumbent LEC’s network that our analysis must adequately reflect this distinction. Competing carriers have control over where to locate their network facilities to minimize self-deployment costs, or the costs of using third-party alternatives for transport from the incumbent LEC’s network. n1119 These backhaul facilities from incumbent LEC networks to competitors’ networks are distinguished from other transport facilities because competing carriers have some control over the location of their network facilities that is lacking with regard to

transport as we define it here. Competing carriers control, in part, how they design and locate their networks, as opposed to obtaining a connection between two incumbent LEC wire centers. n1120 For instance, a competing carrier can choose to locate its switch very close to an incumbent LEC wire center to minimize costs associated with deploying fiber over longer distances. Similarly, a competing carrier can choose to locate its network equipment, such as its switch, near other competing carriers to share costs, or near existing competitive fiber providers that have already deployed competitive transport facilities. n1121 Competing carriers have no such choice in seeking to obtain transport within the network of incumbent LECs. We also note that transmission facilities used for backhaul from an incumbent LEC office to a competitive LEC network often represents the point of greatest aggregation of traffic in a competing carrier's network, and such carriers are more likely to self-deploy these facilities because of the cost savings such aggregation permits. n1122 Moreover, we find that our more limited definition of transport is consistent with the Act because it encourages competing carriers to incorporate those costs within their control into their network deployment strategies rather than to rely exclusively on the incumbent LEC's network. n1123

n1119 Although we are not in this subsection conducting an impairment analysis, we find that this economic difference significantly distinguishes our analysis of intra-incumbent LEC transmission facilities -- which we define to be transport -- from inter-network transmission facilities used for

backhaul. *See supra* Part V.B. (discussing the impairment standard).

n1120 The Commission recognized this principle in the *Local Competition Order* in its discussion of the choices competing carriers make in choosing an efficient point of interconnection. *See Local Competition Order, 11 FCC Rcd at 15608, para. 209.*

n1121 Additionally, the BOCs describe “collocation hotels” as points of telecommunications traffic aggregation used by multiple carriers and ISPs to interconnect with each other. These collocation hotels are often located very close to an incumbent LEC central office for carriers to connect to the incumbent LEC’s network. BOC UNE Fact Report 2002 at III-4 through III-5; *see also* Verizon Jan. 10, 2003 UNE-P *Ex Parte* Letter at 6 (describing the choice competitors have in the location of their network facilities when entering a market); WorldCom Reply at 130 (“Collocation hotels are useful places for carriers and very large customers to meet.”). We find that collocation hotels, however, do not provide a substitute for the need to access within an incumbent LEC’s network. *See* WorldCom Reply at 130.

n1122 Competing carriers agree that the most competitive type of transport is the link between an incumbent LEC wire center and a competitor’s network. *See* Letter from Ruth Milkman, Counsel for WorldCom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 7 (filed Nov. 18, 2002) (WorldCom Nov.

18, 2002 EELs *Ex Parte* Letter) (asserting that because “entrance facility” deployment is so pervasive, incumbent LEC special access pricing closely mirrors UNE rates); Letter from Patrick J. Donovan, Counsel for Cbeyond, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Declaration of Richard Batelaan at para. 10 (filed Nov. 22, 2002) (Cbeyond Nov. 22, 2002 Transport *Ex Parte* Letter) (stating that “alternative provider [transport] facilities are typically used between Cbeyond’s non-ILEC collocation point of presence (“POP”) and the ILEC tandem office or offices where Cbeyond aggregates traffic.”).

n1123 Finally, we do not want to delay the further development of intermodal solutions, such as point-to-point microwave, that competing carriers may use to hub traffic back to a common location. Some CMRS carriers state that they are able to use point-to-point microwave as an alternative to incumbent LEC transmission facilities on some routes. Nextel Comments at 6-7; Letter from Michael H. Pryor, Counsel for AT&T Wireless, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 11 (filed Jan. 7, 2003) (ATTWS Jan. 7, 2003 *Ex Parte* Letter) (approximately 4% of ATTWS transport links are microwave). We note that these carriers cite limitations on microwave including the need for zoning approval for towers, licensing, limited space on cell towers, and reliability concerns. *Id.* As a result, this type of self-provisioning is “not common.” Nextel Comments at



6-7; *see* ATTWS Jan. 7, 2003 *Ex Parte* Letter, Attach. at 11.

\* \* \*

#### **4. Impairment Analysis**

##### **a. General Economic and Operational Characteristics of Transport**

370. Competing carriers generally use dedicated transport as a means to aggregate end-user traffic to achieve economies of scale. Such transport carries their traffic within the incumbent LEC's network through the incumbent LEC's central offices to a point of aggregation. As noted above, ultimately, the traffic is carried to the competitor's switch, or other equipment, from an incumbent LEC central office along an inter-network facility often known as an entrance facility. When carriers self-deploy transport facilities, they typically deploy fiber rings that may connect several incumbent LEC central offices in a market. n1127 On these rings, carriers aggregate end-user traffic for backhaul to their switch, or other equipment, in a similar manner to the way in which carriers do in using incumbent LEC facilities. However, these fiber rings are often deployed to maximize the ability of competitors eventually to deploy loop facilities to connect directly buildings and customers to the transport fiber ring, without accessing unbundled loops at an incumbent LEC central office. n1128

n1127 *See* KMC Duke Aff. at para. 3 (stating that KMC typically invests in a local SONET network and collocates at three incumbent LEC

offices, including the tandem); Letter from Joan Marsh, Director - Federal Government Affairs, AT&T to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 5-8 (filed Oct. 4, 2002) (AT&T Oct. 4, 2002 *Ex Parte* Letter) (describing how AT&T deploys “metro rings”).

n1128 For example, KMC designs its networks to reach 80% of the commercial buildings in each local market that it serves by either direct “on-net” service, or by using unbundled loops aggregated at incumbent LEC offices. KMC Duke Aff. at para. 3. Of the 80% of total buildings KMC is able to reach, over 36% can be reached “on-net,” indicating that KMC’s fiber ring deployment is significantly designed to bypass the incumbent LEC loop network where possible, rather than simply mirroring the incumbent LEC’s transport network connecting incumbent LEC wire centers. *Id.*; AT&T Nov. 25, 2002 *Ex Parte* Letter, Attach. B at 1-2 (describing local “building rings” that are approximately 30 miles each and connect 10-15 buildings).

### LCO – PARAGRAPH 553

553. Consistent with this view, other methods of technically feasible interconnection or access to incumbent LEC networks, such as meet point arrangements, in addition to virtual and physical collocation, must be available to new entrants upon request. n1344 Meet point arrangements (or mid-span meets), for example, are commonly used between neighboring LECs for the mutual exchange of traffic, and thus, in general, we believe such arrangements are technically feasible. n1345 Further, although the creation of meet point arrangements may require some build out of facilities by the incumbent LEC, we believe that such arrangements are within the scope of the obligations imposed by sections 251(c)(2) and 251(c)(3). In a meet point arrangement, the “point” of interconnection for purposes of sections 251(c)(2) and 251(c)(3) remains on “the local exchange carrier’s network” n1346 (e.g., main distribution frame, trunk-side of the switch), and the limited build-out of facilities from that point may then constitute an accommodation of interconnection. n1347 In a meet point arrangement each party pays its portion of the costs to build out the facilities to the meet point. We believe that, although the Commission has authority to require incumbent LECs to provide meet point arrangements upon request, such an arrangement only makes sense for interconnection pursuant to section 251(c)(2) but not for unbundled access under section 251(c)(3). New entrants will request interconnection pursuant to section 251(c)(2) for the purpose of exchanging traffic with incumbent LECs. In this situation, the incumbent and the new entrant are co-carriers and each gains value from the interconnection

arrangement. Under these circumstances, it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement. In an access arrangement pursuant to section 251(c)(3), however, the interconnection point will be a part of the new entrant's network and will be used to carry traffic from one element in the new entrant's network to another. We conclude that in a section 251(c)(3) access situation, the new entrant should pay all of the economic costs of a meet point arrangement. Regarding the distance from an incumbent LEC's premises that an incumbent should be required to build out facilities for meet point arrangements, we believe that the parties and state commissions are in a better position than the Commission to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection.

n1344 See Teleport comments at 26-30; see also Washington Utilities and Transportation Commission, Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, in Part, (Washington Commission Oct. 31, 1995), Docket No. UT-941464, at 45; Application of Electric Lightwave, Inc., MFS Intelnet of Oregon, Inc., and MCI Metro Access Transmission Services, Inc., Public Utility Commission of Oregon Order, Order No. 96-021, (Oregon Commission Jan. 12, 1996), at 68-69; Rules for Telecommunications Interconnection and Unbundling, Arizona Corporation Commission Order, Decision No. 59483, (Arizona Commission Jan. 11, 1996), Proposed Rule R14-2-1303 (Attachment E hereto).

n1345 The Michigan Commission recently required Ameritech to provide meet point interconnection. Michigan Public Service Commission, Case No. U-10860 (Michigan June 5, 1996) at 18 n.4.

n1346 *47 U.S.C. § 251(c)(2)*.

n1347 See, supra Section IV.E., above, discussing accommodation of interconnection.