

BRIEF FOR AMICI CURIAE FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF
DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

—————
No. 07-2469 & 07-2473
—————

MICHIGAN BELL TELEPHONE COMPANY D/B/A/ AT&T MICHIGAN,
PLAINTIFF-APPELLEE,

v.

COVAD COMMUNICATIONS COMPANY; TALK AMERICA INC.;
XO COMMUNICATIONS SERVICES, INC.,
INTERVENORS-DEFENDANTS – APPELLANTS,

MCLEOD USA TELECOMMUNICATIONS SERVICES, INC.; TDS METROCOM, LLC,
INTERVENORS,

J. PETER LARK, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE MICHIGAN PUBLIC
SERVICE COMMISSION AND NOT AS AN INDIVIDUAL; LAURA CHAPPELLE, IN HER OFFICIAL
CAPACITY AS COMMISSIONER AND NOT AS AN INDIVIDUAL; MONICA MARTINEZ, IN HER
OFFICIAL CAPACITY AS COMMISSIONER AND NOT AS AN INDIVIDUAL,

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STATEMENT OF INTEREST

Pursuant to this Court's invitation,¹ the Federal Communications Commission ("FCC") respectfully files this brief as amicus curiae. The FCC has primary responsibility for implementing and enforcing the Communications Act of 1934, 47 U.S.C. § 151, et seq. This case involves this Court's review of a district court's interpretation of section 251(c) of that Act and the FCC orders and rules construing that statutory provision. The FCC has an interest in ensuring that the Act, its rules, and its precedents are correctly interpreted.

In addition, the FCC believes that the district court (in contrast to two circuit courts previously confronting the same issue) improperly disregarded the FCC's authoritative construction of its own rules and authorizing statute. The FCC has an interest in defending its regulatory judgments and in ensuring that they are challenged only in courts with jurisdiction to do so.

QUESTION PRESENTED

Whether an FCC rule relieving incumbent local exchange carriers ("LECs") of their duty under section 251(c)(3) of the Communications Act to make entrance facilities available to competitive carriers as unbundled network elements bars the Michigan Public Service Commission ("MPSC") from construing a different provision of the Act, section 251(c)(2), to require AT&T Michigan, an incumbent LEC, to provide its competitors with similar facilities at cost-based rates when they are used solely for interconnection.

¹ Letter from Leonard Green, Clerk, U.S. Court of Appeals for the Sixth Circuit to Matthew Berry, General Counsel, FCC (Dec. 10, 2008) ("Green Letter").

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

1. The Telecommunications Act of 1996,² which is part of the Communications Act, is designed to “‘end[] the longstanding regime of state-sanctioned monopolies’ in the local telephone markets”³ and “to open all telecommunications markets to competition.”⁴ Congress recognized that no prospective entrant could hope to compete with the incumbent LECs in providing consumers with telephone exchange service and exchange access service by replicating the existing local network infrastructure. Section 251(c), added by the 1996 Act, therefore entitles competitive carriers to enter local telephone markets by utilizing the incumbent LECs’ own networks in three distinct but overlapping ways. See 47 U.S.C. § 251(c)(2)-(4).

First, section 251(c)(2) requires incumbent LECs “to provide * * * interconnection” between their networks and those of other carriers, and to do so at “just, reasonable, and nondiscriminatory” rates and terms. 47 U.S.C. § 251(c)(2). See also 47 C.F.R. § 51.305(a). In simple terms, interconnection in this context means linking the physical networks of two carriers in order to exchange traffic

² Pub. Law No. 104-104, 110 Stat. 56 (“1996 Act”).

³ BellSouth Telecomms., Inc. v. Southeast Tel., Inc., 462 F.3d 650, 652 (6th Cir. 2006) (quoting AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999)).

⁴ H.R. Rep. No. 104-458, at 1 (1996) (Conf. Rep.). See AT&T, 525 U.S. at 371; Quick Commc’ns, Inc. v. Mich. Bell Tel. Co., 515 F.3d 581, 583 (6th Cir. 2008).

and complete calls between end user customers of the two carriers.⁵ Section 251(c)(2) “obligates the incumbent [LEC] to ‘interconnect’ the competitor’s facilities to its own network to whatever extent is necessary to allow the competitor’s facilities to operate.”⁶

Second, section 251(c)(3) requires all incumbent LECs to provide their competitors with non-discriminatory access to certain elements of the incumbents’ networks on an unbundled basis. 47 U.S.C. § 251(c)(3).⁷ In determining which non-proprietary network elements (“UNEs”) the incumbent LECs must make available to competitive carriers on an unbundled basis, the FCC must consider whether the failure to provide a requesting competitor access to such elements would “impair” the competitor’s ability to provision service. 47 U.S.C. § 251(d)(2)(B).⁸ The unbundling obligation enables a competitor to enter the local telephone market by assembling components of a network from various sources – some leased from the incumbent LEC, some perhaps self-provisioned, and some possibly obtained from a third party. This facilitates competition by obviating the

⁵ 47 C.F.R. § 51.5 (defining the term “interconnection” to refer to the “physical linking of two networks for the mutual exchange of traffic.”). See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15590 (¶ 176) (1996) (“Local Competition Order”) (subsequent history omitted).

⁶ Verizon Commc’ns, Inc. v. FCC, 535 U.S. 467, 491 (2002).

⁷ See 47 U.S.C. § 153(29) (defining a “network element” as “a facility or equipment used in the provision of a telecommunications service”).

⁸ The statute prescribes a different unbundling standard for so-called “proprietary” network elements, which are not at issue in this case. See 47 U.S.C. § 251(d)(2)(A).

need for a new market entrant to build a duplicative and costly stand-alone network.

Finally, section 251(c)(4) gives potential competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users. 47 U.S.C. § 251(c)(4).⁹

Section 252 establishes the procedures that incumbent LECs and their competitors must follow when implementing the substantive rights and obligations of section 251(c). 47 U.S.C. § 252. Section 252 provides that the parties enter into negotiated contracts — known as interconnection agreements — for interconnection, resale of services, or network elements, followed by expeditious arbitration by state public utility commissions of any unresolved issues. *Id.*¹⁰ Section 252(c)(1) requires state arbitrators to conform their disposition of "open issues" in interconnection agreements to "the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1). All interconnection agreements approved or arbitrated by state commissions are subject to review in federal district court to determine whether they "meet[] the requirements" of sections 251 and 252. 47 U.S.C. § 252(e)(4), (6).¹¹

⁹ See *Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs.*, 323 F.3d 348 (6th Cir. 2003); *Mich. Bell Tel. Co. v. Strand*, 305 F.3d 580 (6th Cir. 2002). Section 251(c)(4) is not at issue in this case.

¹⁰ Congress directed the FCC to resolve such disputes whenever a state commission opts out of its statutory role. See 47 U.S.C. § 252(e)(5).

¹¹ See *Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d 428, 431 (6th Cir. 2003).

Section 252(d)(1) requires the rates both for interconnection under section 251(c)(2) and for UNEs under section 251(c)(3) to be cost-based. 47 U.S.C. § 252(d)(1). The FCC’s rules require those cost-based rates to be calculated under a Total Element Long-Run Incremental Cost (“TELRIC”) methodology. See 47 C.F.R. § 51.505(b). The Supreme Court has upheld the TELRIC methodology as lawful and consistent with the statute.¹²

2. Under authority delegated by Congress, see 47 U.S.C. § 251(d)(2), the FCC has adopted rules establishing which network elements should be unbundled and made available to competitive carriers pursuant to section 251(c)(3). See 47 C.F.R. § 51.319. In its 2005 Triennial Review Remand Order (“TRRO”)¹³ revisiting the list of mandatory UNEs, the FCC considered whether so-called “entrance facilities” – the facilities at issue in this case – must be offered on an unbundled basis under section 251(c)(3). Entrance facilities are “the transmission facilities that connect competitive LEC networks with incumbent LEC networks.”¹⁴ Entrance facilities can be used for multiple purposes. For example, entrance facilities may be used simply to link two carriers’ networks for the purpose of exchanging traffic (i.e., interconnection). A competitive carrier may

¹² Verizon, 535 U.S. 467.

¹³ Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC Rcd 2533, 26109-10 (¶ 136) (2005) (“TRRO”) (subsequent history omitted).

¹⁴ TRRO, 20 FCC Rcd at 2609 (¶ 136). See Ill. Bell Tel. Co. v. Box, 526 F.3d 1069, 1071 (7th Cir. 2008) (describing “entrance facilities” as “connection[s] between a switch maintained by an ILEC and a switch maintained by a CLEC.”).

also use entrance facilities, however, to carry its own customers' traffic from an incumbent LEC's central office to the competitive carrier's switch or other equipment, a practice known as "backhauling."¹⁵

The FCC in the TRRO determined that competitive carriers are not impaired in their ability to provide service without access to entrance facilities as unbundled network elements.¹⁶ Accordingly, the FCC adopted an implementing rule specifying that an incumbent LEC is not obligated to provide a competitive carrier with access to entrance facilities on an unbundled basis at cost-based (i.e., TELRIC) rates under section 251(c)(3). 47 C.F.R. § 51.319(e)(2)(i). As it made this change, however, the FCC emphasized that its non-impairment finding "with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)."¹⁷ The FCC explained that "competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network."¹⁸

¹⁵ 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") (subsequent history omitted). See Southwestern Bell Tel. L.P. v. Mo. Pub. Serv. Com'n, 530 F.3d 676, 681-83 (8th Cir. 2008), cert. denied, 129 S.Ct. 971 (2009).

¹⁶ TRRO, 20 FCC Rcd at 2611 (¶¶ 137-39).

¹⁷ Id. at 2611 (¶ 140).

¹⁸ Id.

II. Background of This Proceeding

1. Shortly after the FCC issued the TRRO, AT&T Michigan¹⁹ notified competitive LECs that it would modify its interconnection agreements so as to eliminate entirely its obligation to provide entrance facilities at cost-based, TELRIC rates. A number of competitive LECs asked the MPSC to prohibit this modification on the ground that it improperly abrogated their right to cost-based interconnection under section 251(c)(2).²⁰ On September 20, 2005, the MPSC arbitrated the dispute in favor of the competitive LECs.²¹ Based upon the FCC's finding in paragraph 140 in the TRRO, the MPSC determined that "[competitive] LECs still have a right to entrance facilities to the extent required for interconnection pursuant to [s]ection 251(c)(2)."²² The MPSC determined that AT&T Michigan's proposal "would eliminate any responsibility to provide those facilities at TELRIC rates, contrary to the FCC's specific findings."²³

2. On April 28, 2006, AT&T Michigan filed a complaint in federal district court challenging the MPSC's ruling,²⁴ and on September 26, 2007, the district

¹⁹ At the time the dispute arose, AT&T Michigan was doing business as SBC Michigan Bell. To avoid confusion, the FCC throughout this brief refers to this company as AT&T Michigan.

²⁰ Record Entry No. 1, MPSC Order, Case No. U-14447 at 11-13 (Sept. 20, 2005) (J.A. 40-42).

²¹ Id. at 13 (J.A. 42).

²² Id. (citing TRRO, 20 FCC Rcd at 2611 (¶ 140)) (J.A. 42).

²³ Id.

²⁴ Record Entry No. 1, Complaint for Declaratory, Injunctive, and Other Relief of Plaintiff at 19, filed by AT&T Michigan (Apr. 28, 2006) (J.A. 26).

court set it aside.²⁵ The district court believed that the TRRO broadly “provides that entrance facilities need not be provided by incumbent carriers to competing carriers on an unbundled basis.”²⁶ The district court determined that the MPSC decision was inconsistent with that rule. The court acknowledged that the FCC in paragraph 140 of the TRRO had said that its unbundling determination did not alter incumbent LECs’ ongoing interconnection obligation to provide entrance facilities at cost-based rates but asserted that “[i]t is not reasonable to interpret an explanatory comment, such as the one found in ¶ 140 of the TRRO, in a manner that undermines the plain meaning of the rule.”²⁷

3. The MPSC and several competitive LECs appealed the district court’s decision to this Court. This Court held argument on December 10, 2008. On the day of oral argument, the Court by letter invited the FCC to file a brief setting forth its views on the cases and how they should be resolved.²⁸

ARGUMENT:

THE DISTRICT COURT ERRED IN HOLDING THAT THE RULE REMOVING AN INCUMBENT LEC’S DUTY TO PROVIDE ENTRANCE FACILITIES AS UNES ALSO RELIEVES AN INCUMBENT LEC OF ITS SEPARATE DUTY TO PROVIDE INTERCONNECTION.

At the outset, it is important to emphasize that incumbent LECs have two independent duties under section 251(c) that are relevant to this case. First, under

²⁵ Record Entry No. 32, District Court Order (Sept. 26, 2007) (J.A. 292-314).

²⁶ Id. at 14 (J.A. 305).

²⁷ Id.

²⁸ Green Letter, supra, note 1.

the “unbundling” duty of section 251(c)(3), if the FCC makes an “impairment” finding, an incumbent LEC must offer a particular element of its network to a competitor at cost-based rates. Separately, under the “interconnection” duty of section 251(c)(2), an incumbent LEC must agree to interconnect its network with a competitor’s network at cost-based rates at any technically feasible point of the competitor’s choosing. See AT&T, 525 U.S. at 371 (specifying the separate ways in which section 251(c) obligates incumbent LECs to provide access to their networks).

The question presented by this case is whether the FCC’s decision to remove the unbundling duty automatically relieves an incumbent LEC of its separate duty to provide interconnection to competitive carriers with regard to a type of facility that has multiple uses, one of which was addressed in the unbundling decision. As shown below, the FCC answered that question in the negative in the TRRO, and that determination is not subject to collateral attack in this proceeding. Even if the FCC’s statement on-point in the TRRO were reviewable here, it should still control the outcome because (1) the FCC’s considered construction of the scope of its own unbundling rule is clearly correct; and (2) even if there were some reason for doubt, its reasonable interpretation of section 251(c)(2) should be accorded deference by the Court.

I. THE TRRO IS NOT SUBJECT TO COLLATERAL ATTACK IN THIS CASE.

The FCC in paragraph 140 of the TRRO declared explicitly that its rule relieving incumbent LECs of the duty to unbundle entrance facilities and its non-

impairment finding “do[] not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2).”²⁹ The FCC went on to state categorically that “competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC’s network.”³⁰ The MPSC was correct in accepting the agency’s authoritative interpretation of the scope of the unbundling rule and its specification of the incumbent LECs’ section 251(c)(2) obligations.³¹ The district court purported to reject the FCC’s ruling,³² but it had no authority to do so.

Challenges to orders of the FCC are governed by section 402 of the Communications Act of 1934, which states that “any proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] under this chapter . . . shall be brought as provided by and in the manner prescribed in Chapter 158 of title 28, United States Code.” 47 U.S.C. § 402(a) (emphasis added). Chapter 158, which is known as the Hobbs Act and is codified at 28 U.S.C. §§ 2341 et seq., provides in relevant part that “[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set

²⁹ TRRO, 20 FCC Rcd at 2611 (¶ 140).

³⁰ Id.

³¹ Record Entry No. 1, MPSC Order at 13 (J.A. 42).

³² Record Entry No. 32, District Court Order at 14 (Sept. 26, 2007) (J.A. 305). The FCC’s statement in paragraph 140 was not a mere “explanatory comment” without legal force, as the district court apparently believed. Instead, it constituted an authoritative interpretation of the meaning of the FCC’s unbundling rules and a description of the incumbent LECs’ interconnection obligations with respect to these facilities.

aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. § 402(a)].” 28 U.S.C. § 2342(1). The statute specifies that “any party aggrieved by the [FCC’s] final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.” 28 U.S.C. § 2344 (emphasis added).

The Communications Act and the Hobbs Act thus specify the precise procedure for obtaining judicial review of FCC orders and vest exclusive jurisdiction in the courts of appeals considering petitions for review. “[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute.”³³ The “appropriate procedure for obtaining judicial review of the agency’s disposition of [regulatory] issues [is] to appeal to the Court of Appeals as provided by statute.”³⁴ This general rule applies when, as here, a district court is reviewing a state public utility commission

³³ Browning v. Levy, 283 F.3d 761, 778 (6th Cir. 2002) (quoting Telecomms. Research and Action Ctr. v. FCC, 750 F.2d 70, 77 (D.C. Cir. 1984)). See Thiokol Corp. v. Dep’t of Treasury, State of Mich., Revenue Div., 987 F.2d 376, 379 (6th Cir. 1993); Greater Detroit Res. Recovery Authority v. EPA, 916 F.2d 317, 321 (6th Cir. 1990).

³⁴ FCC v. ITT World Commc’ns, Inc., 466 U.S. 463, 468 (1984) (emphasis added).

decision under section 252(e)(6). In such cases, the district court is obligated to accept the FCC's previous resolution of any contested question.³⁵

If AT&T Michigan wanted to challenge the FCC's authoritative interpretation of its own unbundling regulations in the TRRO, its recourse was to raise this claim in a petition for review of that order within 60 days after its entry.³⁶ In fact, AT&T's predecessor SBC (and many others) did challenge the TRRO in this manner, but it failed to assert this claim.³⁷ The FCC's ruling in paragraph 140 of the TRRO thus has become final and is not subject to judicial review in this proceeding.

³⁵ See Qwest Corp. v. Pub. Utils. Comm'n of Colorado, 479 F.3d 1184, 1192 n.6 (10th Cir. 2007) ("The parties have not contested the validity of this FCC interpretation, nor could they. See 28 U.S.C. § 2342."); see also Vonage Holdings Corp. v. Minn. PUC, 394 F.3d 568, 569 (8th Cir. 2004) ("[n]o collateral attacks on the FCC order are permitted" in private party litigation); Wilson v. A.H. Belo Corp., 87 F.3d 393, 396-397 (9th Cir. 1996); Telecomms. Research & Action Ctr., 750 F.2d at 75; George Kabeller, Inc. v. Busey, 999 F.2d 1417, 1421-22 (11th Cir. 1993); Bywater Neighborhood Ass'n v. Tricarico, 879 F.2d 165, 167 (5th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); City of Peoria v. Gen. Elec. Cablevision Corp., 690 F.2d 116, 119 (7th Cir. 1982) (describing challenge to FCC rule in private party district court litigation as having been "brought in the wrong court at the wrong time against the wrong party").

³⁶ To the extent AT&T believed the FCC's statement in paragraph 140 was not clear, it could have filed a petition for reconsideration asking the agency to clarify it.

³⁷ See Covad Commc'ns, Inc. v. FCC, 450 F.3d 528 (D.C. Cir. 2006).

II. THE COURT IN ANY EVENT SHOULD DEFER TO THE FCC'S REASONABLE INTERPRETATION OF THE UNBUNDLING RULE AND SECTION 251(c)(2).

A. The FCC's Construction of the Scope of Its Own Unbundling Rule Is Controlling.

Under well-established law, an “agency’s reading of its own rule is entitled to substantial deference.”³⁸ Indeed, an agency’s construction of its own rule is “controlling” when, as in this case, “the interpretation reflect[s] a ‘fair and considered judgment’ and [is] not ‘plainly erroneous or inconsistent with the regulation.’”³⁹ Thus, even assuming, arguendo, that the district court were not precluded from reviewing the FCC’s definitive determination in its TRRO as to the scope of its unbundling rule, the district court should have deferred to it.⁴⁰

Section 251(c)(2) and 251(c)(3) are independent statutory obligations that serve different purposes. The cost-based UNEs that incumbent LECs must provide under section 251(c)(3) are designed to enable competitive carriers to assemble their own telecommunications networks by combining elements from various sources (including the incumbent LECs), whereas the interconnection that the incumbent LEC must provide under section 251(c)(2) simply enables a competitive carrier to connect its network with the network of the incumbent LEC to exchange

³⁸ Riegel v. Medtronic, Inc., 128 S.Ct. 999, 1010 (2008).

³⁹ Huffman v. C.I.R., 518 F.3d 357, 367-68 (6th Cir. 2008) (quoting Auer v. Robbins, 519 U.S. 452, 461-62 (1997)).

⁴⁰ See MCI Telecommns. Corp. v. Ohio Bell Tel. Co., 376 F.3d 539, 550 (6th Cir. 2004) (according deference to the agency’s own construction of an FCC rule).

traffic and complete calls.⁴¹ The FCC thus reasonably determined in the TRRO both that competitive LECs are not impaired without access to entrance facilities (thus relieving them of the obligation to provide those facilities to competitive carriers as UNEs under section 251(c)(3)) and that this determination had no effect on the incumbent LECs' independent obligation to provide interconnection under section 251(c)(2).⁴² Because that regulatory interpretation “reflect[s] a ‘fair and considered judgment’ and [is] not ‘plainly erroneous or inconsistent’” with the unbundling rule, that construction is “controlling.”⁴³

The district court erroneously found that the agency's interpretation of the scope of its unbundling regulation “undermines the plain meaning of the rule.”⁴⁴ The rule referenced by the court (which states that incumbent LECs need not provide entrance facilities as unbundled network elements) is codified in a section addressing an incumbent LEC's duties “in accordance with section 251(c)(3) of the Act.” 47 C.F.R. § 51.319(e). Nothing in that rule suggests that it applies also to an incumbent LEC's separate obligation (embodied in a different rule, 47 C.F.R.

⁴¹ See Local Competition Order, 11 FCC Rcd at 15636-37 (¶ 270) (“Subsection (c)(3), therefore, allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection.”).

⁴² See Southwestern Bell, 530 F.3d at 683-84 (holding that FCC rule eliminating the requirement that incumbent LECs provide entrance facilities as UNEs under section 251(c)(3) does not affect the incumbent LECs' continuing duty to offer such facilities at cost-based rates when used for interconnection facilities under section 251(c)(2)); Ill. Bell, 526 F.3d at 1071-72 (same).

⁴³ Huffman, 518 F.3d at 367-68 (quoting Auer, 519 U.S. at 461-62).

⁴⁴ Record Entry No. 32, District Court Order at 14 (J.A. 305).

§ 51.305) to provide interconnection under section 251(c)(2). The FCC's statement in paragraph 140 recognized something that the district court appears to have overlooked: these are two separate statutory obligations that are not necessarily co-extensive.

Nor is the FCC's interpretation inconsistent with the non-impairment determination set forth in the TRRO. Section 251(d)(2) affirmatively required the FCC to make an impairment determination in analyzing whether entrance facilities (or other network elements) should be classified as UNEs that an incumbent LEC must provide at cost-based rates under section 251(c)(3). See 47 U.S.C. § 251(d)(2). In contrast, the statute does not direct the FCC to analyze impairment in determining an incumbent LEC's interconnection duty under section 251(c)(2). So a finding of impairment or non-impairment under section 251(c)(3) is not relevant to the separate question of whether there is an ongoing interconnection obligation under section 251(c)(2).

As a factual matter, AT&T Michigan is mistaken in arguing that the MPSC ruling "circumvents [the FCC's] rule by re-imposing the repealed requirement under a different provision of the 1996 Act."⁴⁵ The FCC recognized that competitive LECs may use particular transmission facilities both as a means of interconnection, i.e., a link for the mutual exchange of traffic between an incumbent LEC and a competitive LEC, and to backhaul traffic, i.e., to carry its own customers' traffic from an incumbent LEC central office to the competitive

⁴⁵ Br. of AT&T Michigan at 17.

carrier's switch or other equipment.⁴⁶ In its 1996 Local Competition Order, the FCC interpreted section 251(c)(2) to require an incumbent LEC to provide interconnection facilities at cost-based rates.⁴⁷ Both the TRO and TRRO made clear that those section 251(c)(2) interconnection obligations continue despite the elimination of section 251(c)(3) unbundling obligations for entrance facilities.⁴⁸

A competitor thus continues to have cost-based access to incumbent interconnection facilities in order to exchange traffic between its customers and those of the incumbent LEC. The incumbent LEC, however, no longer has to provide such facilities at cost-based rates to a competitive carrier that procures the facility to back-haul traffic between the competitor's own customers.⁴⁹ The decision to no longer require unbundled access to entrance facilities under section 251(c)(3) thus has a material impact notwithstanding the remaining, narrower obligation to provide those facilities for purposes of interconnection.

B. The Court Should Defer to the FCC's Determination that an Incumbent LEC's Duty to Provide Interconnection under Section 251(c)(2) May Require the Carrier to Offer Cost-based Interconnection Facilities.

Unless Congress unambiguously has expressed an intent on the precise question at issue, a court must give deference to the expert agency's construction

⁴⁶ TRO, 18 FCC Rcd at 17203 (¶ 365).

⁴⁷ See Local Competition Order, 11 FCC Rcd at 15605, 15781 (¶¶ 198, 202, 533).

⁴⁸ See TRO, 18 FCC Rcd at 17203-04 (¶ 366); TRRO, 20 FCC Rcd at 2611 (¶ 140).

⁴⁹ See Southwestern Bell, 530 F.3d at 681; Ill. Bell, 526 F.3d at 1071.

of a statute that it administers.⁵⁰ Congress did not speak directly to whether an incumbent LEC's duty to provide interconnection under section 251(c)(2) could include the provision of entrance facilities used to link its network with those of a competitive carrier. By leaving the term "interconnection" undefined in section 251(c)(2) and not otherwise delineating its meaning, Congress delegated authority to the FCC to interpret the scope of an incumbent LEC's interconnection obligation in a permissible fashion.⁵¹

As noted above, section 251(c)(2) requires incumbent LECs "to provide * * * interconnection" to a requesting competitive LEC "at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2). AT&T Michigan misreads that language as imposing only a passive duty on the incumbent LEC to "to allow the CLEC to connect 'with' the incumbent LEC's network to 'accommodate interconnection,'"⁵² but that is plainly not what it says, or how the FCC has interpreted it. Since the adoption of the 1996 Act, the FCC has consistently found that an incumbent LEC, to fulfill that duty to interconnect, may be required to provide facilities that are used for the physical linking of the two networks. For example, in its Local Competition Order, the FCC stated that the right of a competitive LEC to obtain interconnection at any technically feasible

⁵⁰ Chevron USA Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984).

⁵¹ Chevron, 467 U.S. at 843; Nat'l Cable & Telecomms. Ass'n v. Brand X Internet, 545 U.S. 967, 980 (2005). See 47 U.S.C. § 251(d)(1) (directing the FCC to establish regulations to implement section 251); AT&T, 525 U.S. at 397 (Congress intended the FCC to resolve the ambiguities in the 1996 Act).

⁵² AT&T Michigan Br. at 29.

point may require “novel use of,” and “modifications to” an incumbent LEC’s facilities, pointing out that the competitive LEC would pay the cost, “including a reasonable profit.”⁵³ Indeed, the Local Competition Order and the implementing rule it adopted require the incumbent LEC to provide interconnection not just at any feasible point, but by “any feasible method” of interconnection, such as a “meet point arrangement” by which the incumbent LEC must build out its facilities to a designated “meet point.”⁵⁴ As the FCC explained: “Congress intended to obligate the incumbent to accommodate the new entrant’s network architecture by requiring the incumbent to provide interconnection “for the facilities and equipment” of the new entrant.”⁵⁵

In its TRO, the FCC reiterated its view that there are “facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection.”⁵⁶ Thus, the FCC stated, “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.”⁵⁷ See also 47 C.F.R. § 51.305(f) (FCC rule implementing section 251(c)(2) requires, where feasible, an

⁵³ Local Competition Order, 11 FCC Rcd at 15605 (¶¶ 198, 202).

⁵⁴ Id. at 15781 (¶ 553); 47 C.F.R. § 51.321(a), (b).

⁵⁵ Id. at 15605 (¶ 202).

⁵⁶ TRO, 18 FCC Rcd at 17203 (¶ 365).

⁵⁷ Id. at 17204 (¶ 366).

incumbent LEC to provide two-way trunking facilities to a requesting competitive LEC).⁵⁸

The FCC in its discussion of entrance facilities in its TRRO made clear that it was not altering the rights and duties under section 251(c)(2) with respect to facilities that are used for interconnection.⁵⁹ Section 251(c)(2) entitles competitive LECs “access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC’s network.”⁶⁰ Although the FCC did not specifically define 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.

AT&T Michigan and its supporting amici argue that the plain language of section 251(c)(2) prohibits the FCC from interpreting that subsection to require an incumbent LEC to provide facilities used for the physical linking of its network with the network of a competitive carrier. Because an incumbent LEC must provide interconnection with its network “for the facilities and equipment of any requesting telecommunications carrier,” 47 U.S.C. § 251(c)(2), these carriers claim

⁵⁸ See also Application by SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18391 (¶ 80) (2000) (“Interconnection trunking . . . and meet-point arrangements are among the technically feasible methods of interconnection.”).

⁵⁹ TRRO, 20 FCC Rcd at 2611 (¶ 140).

⁶⁰ Id.

that an incumbent LEC's duty to provide interconnection cannot reasonably be read to encompass a requirement to provide facilities necessary to link its network with the competitive carrier. That argument is unavailing for several reasons.

First, the statutory interpretation advanced by AT&T Michigan and the supporting amici is flatly inconsistent with prior FCC interpretations (described above) regarding the scope of the interconnection obligation and provision of facilities to achieve such interconnection, which were expressly left unaltered in the ruling issued by the FCC in the TRRO. As demonstrated at pages 10-13, the validity of the FCC's statutory interpretation in the TRRO (and the other prior interconnection and unbundling decisions) is not subject to collateral challenge in this case. The Court therefore should not engage in a review of the FCC's determinations nor entertain AT&T Michigan's contrary interpretation.

If the Court nonetheless does inquire into the scope of interconnection under section 251(c)(2), it should defer to the FCC's reasonable and consistent construction and reject AT&T Michigan's flawed interpretation. The language relied on by AT&T Michigan and the supporting amici states only that the interconnection that an incumbent LEC must provide under section 251(c)(2) — whatever that may be — is “for the facilities and equipment of” the competitive carrier. That language does not delineate what an incumbent LEC must do in order to provide 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.

Moreover, the “plain language” construction advanced by AT&T Michigan and its supporting amici is inconsistent with established administrative and judicial precedent. As noted above, the FCC consistently has stated that an incumbent LEC, in fulfilling its duty to provide interconnection under section 251(c)(2), may be required to provide facilities to effectuate interconnection, and that those obligations continue notwithstanding the FCC’s elimination of entrance facilities as an unbundled network element under section 251(c)(3).⁶¹ And both the Seventh and Eighth Circuits have ruled expressly that section 251(c)(2) entitles competitive carriers access to entrance facilities at cost-based rates for purposes of interconnecting with the incumbent LEC’s network.⁶²

Indeed, the agency charged with administering the Communications Act and every single federal appellate judge addressing the issue has construed section 251(c)(2) directly contrary to AT&T Michigan’s alleged “plain meaning” construction. Given this, and especially in light of the deference courts with jurisdiction afford the FCC in construing the Communications Act⁶³ and its regulations,⁶⁴ the Court should reject AT&T Michigan’s flawed interpretation.

⁶¹ TRRO, 20 FCC Rcd at 2611 (¶ 140).

⁶² Southwestern Bell, 530 F.3d 676; Ill. Bell, 526 F.3d 1069.

⁶³ Chevron, 467 U.S. at 844.

⁶⁴ Riegel, 128 S.Ct. at 1010.

CONCLUSION

The Court should reverse.

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April 3, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN BELL TELEPHONE COMPANY D/B/A)
AT&T MICHIGAN,)
PLAINTIFF-APPELLEE,)
)
v.) Nos. 07-2469 & 07-2473
)
J. PETER LARK, IN HIS OFFICIAL CAPACITY AS)
CHAIRMAN OF THE MICHIGAN PUBLIC SERVICE)
COMMISSION AND NOT AS AN INDIVIDUAL;)
ET AL.)
DEFENDANTS-APPELLANTS.)

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April 3, 2009

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Michigan Bell Telephone Company, Petitioner,

v.

Covad, et al.

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I, Laurel R. Bergold, hereby certify that on this 3rd day of April, 2009, I electronically filed the foregoing "Amicus Curiae Brief of the Federal Communications Commission" with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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