Nos. 10-313 and 10-329

In the Supreme Court of the United States

TALK AMERICA, INCORPORATED, PETITIONER

v.

MICHIGAN BELL TELEPHONE COMPANY, DBA AT&T MICHIGAN

ORJIAKOR ISIOGU, ET AL., PETITIONERS

v.

MICHIGAN BELL TELEPHONE COMPANY, DBA AT&T MICHIGAN

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Under 47 U.S.C. 251(c)(2), an incumbent local exchange carrier must "provide * * * interconnection" at cost-based rates to a requesting competitive local exchange carrier "at any technically feasible point within the [incumbent] carrier's network." An "entrance facility" is a transmission facility owned by an incumbent carrier that connects its network to that of a competitive carrier. The question presented is as follows:

Whether an incumbent must make an entrance facility available at cost-based rates when a competitive carrier seeks to use such a facility for interconnection.

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INTEREST OF THE UNITED STATES

These cases present the question whether an incumbent local exchange carrier must provide "entrance facilities" to a competitive local exchange carrier at cost-based rates under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, as amended by the Telecommunica-

tions Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56. The Federal Communications Commission (FCC or Commission) has rulemaking authority under the Communications Act, see 47 U.S.C. 201(b), and it has adopted several orders addressing the regulatory treatment of entrance facilities. The United States therefore has a significant interest in the resolution of the question presented. In the court of appeals, the FCC filed a brief as an amicus curiae at the invitation of the court.

STATEMENT

1. The 1996 Act "fundamentally restructure[d] local telephone markets" in order to "end[] the longstanding regime of state-sanctioned monopolies" and open those markets to competition. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Congress recognized that prospective competitors faced significant barriers to entering markets that were dominated by the pre-existing monopolists—incumbent local exchange carriers (incumbent LECs or ILECs). To aid new entrants in overcoming those barriers, Congress enacted 47 U.S.C. 251(c). That provision enables competitive carriers to enter local markets by using the incumbents' networks in distinct but overlapping ways, two of which are relevant here.

First, Section 251(c)(2) requires incumbent LECs to "provide * * * interconnection" between their networks and the networks of competitive LECs (CLECs). 47 U.S.C. 251(c)(2). Interconnection is "the physical linking of two networks for the mutual exchange of traffic." *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15,499, 15,590 ¶ 176 (1996) (subsequent history omitted) (*Local Competition Order*); see 47 C.F.R. 51.5. Such linking

enables customers of a competitive LEC to call the incumbent's customers, and vice versa. The absence of such interconnection would disadvantage the competitive LEC, whose customers would be unable to call (or receive calls from) the incumbent's much larger customer base.[1]

Section 251(c)(2) requires an incumbent LEC to provide interconnection to a requesting competitive carrier "at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. 251(c)(2)(B); see 47 C.F.R. 51.305. Recognizing the important role that interconnection plays in fostering local telephone competition, the FCC has directed that incumbents must provide competitors "any technically feasible method of obtaining interconnection * * * at a particular point upon a request." 47 C.F.R. 51.321(a); see *Local Competition Order*, 11 F.C.C.R. at 15,780-15,781 ¶ 553. Those methods "include, but are not limited to," "[p]hysical collocation," under which a competitive LEC installs its switching equipment in an incumbent's central office; "virtual collocation," under which an incumbent installs and maintains equipment in its central office for a competitor; and "[m]eet point interconnection arrangements," under which an incumbent and a competitor both build out their facilities to meet the other's. 47 C.F.R.

[1] Interconnection "does not include the transport and termination of traffic." 47 C.F.R. 51.5. Instead, compensation for transport and termination—that is, for delivering local telephone calls that are placed by the customer of another carrier—is governed by separate provisions in the 1996 Act. 47 U.S.C. 251(b)(5), 252(d)(2). Typically, a competitive LEC will pay an incumbent a cost-based rate for interconnection under Section 251(c)(2) and, in addition, will separately pay a cost-based rate to terminate local telecommunications traffic that travels from the competitor to the incumbent over the facilities the competitor has leased for interconnection.

51.321(b); see 47 C.F.R. 51.5; *Local Competition Order*, 11 F.C.C.R. at 15,779-15,781 ¶¶ 549-553.

Second, Section 251(c)(3) separately requires incumbent LECs to lease certain "network elements" to competitors "on an unbundled basis." 47 U.S.C. 251(c)(3); see *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 531 (2002) ("To provide a network element 'on an unbundled basis' is to lease the element, however described, to a requesting carrier at a stated price specific to that element."). That requirement gives competitors the right to lease parts of an incumbent's network, enabling them to "compete with the incumbent carrier to provide local service" without having to incur the expense of "replicating the incumbent's entire existing network." *Id.* at 490. Before a competitive LEC is entitled to lease an unbundled network element, however, the FCC must determine that lack of access to that element would "impair" the competitor's "ability * * * to provide the services that it seeks to offer" to its customers. 47 U.S.C. 251(d)(2)(B); see *AT&T Corp.*, 525 U.S. at 387-392.

The 1996 Act provides that rates for both interconnection and unbundled network elements must be cost-based and may include a reasonable profit. 47 U.S.C. 252(d)(1).[2] It also establishes procedures that incumbents and their competitors must follow when implementing Section 251(c)'s interconnection and unbundling obligations. Carriers may voluntarily negotiate contracts ("interconnection agreements"), but if negotiations fail, disputed issues are referred to state commis-

[2] The Commission's rules prescribe a methodology for calculating those rates that is known as "total element long-run incremental cost" (TELRIC). See 47 C.F.R. 51.505(b). This Court has upheld that methodology as lawful and consistent with the statute. *Verizon Commc'ns Inc.*, 535 U.S. at 501-523.

sions for mandatory arbitration. 47 U.S.C. 252(a)-(c). The decisions of state commissions are subject to review in federal district court. 47 U.S.C. 252(e)(6); see *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 641-644 (2002).

2. This case concerns the proper regulatory treatment of "entrance facilities"—transmission facilities (typically wires or cables) that are owned by incumbent LECs and "that connect competitive LEC networks with incumbent LEC networks." *Unbundled Access to Network Elements*, 20 F.C.C.R. 2533, 2609-2610 ¶¶ 136-137 (2005) (*Triennial Review Remand Order* or *TRRO*) (reprinted at Pet. App. 155a-158a),[3] aff'd, *Covad Commcn's Co.* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006). Entrance facilities have two distinct principal uses. First, a competitor can use an entrance facility to interconnect its equipment with the incumbent's equipment, so that calls can move back and forth between customers on the two networks. For example, when a competitor's customer calls the incumbent's customer, the call might travel through the competitor's switch and then over the entrance facility to the incumbent's switch, so that the incumbent can route the call to the appropriate destination on its network.

Second, a competitor can use an entrance facility to transport traffic between points on its own network. For example, a competitor might use an entrance facility to carry a call from one of its customers to its own switching equipment collocated at the incumbent's office, so that the call can then be routed to another customer of the competitor. Using an incumbent's entrance

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[3] All references to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 10-329.

facility in that manner is known as "backhauling." See *Pacific Bell Tel. Co.* v. *California Pub. Utils. Comm'n*, 621 F.3d 836, 842 (9th Cir. 2010) (diagram illustrating the use of an entrance facility for interconnection and backhauling), petition for cert. pending, No. 10-838 (filed Dec. 23, 2010).[4]

In 2003, the FCC adopted the *Triennial Review Order* (*TRO*), in which it determined that entrance facilities are "facilities that exist *outside* the incumbent LEC's local network" and therefore are not network elements that can be subject to mandatory unbundling under Section 251(c)(3). *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978, 17,203 ¶ 366, vacated in part, *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554 (D.C. Cir.), cert. denied, 543 U.S. 925 (2004) (*USTA*). The Commission recognized that "[c]ompetitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic," and it explained that "[u]nlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnec-

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[4] As respondent points out (Br. in Opp. 25 n.28), some courts have used imprecise language to describe backhauling. Backhauling is not limited to calls that originate and terminate with a competitive LEC's customers. Instead, it occurs whenever a competitive LEC uses an entrance facility for a purpose other than interconnection with an incumbent. For example, backhauling occurs when a competitive LEC leases an incumbent's entrance facility to transport a call originated by one of its customers to a customer served by a wireless provider with which the competitive LEC has interconnected. For purposes of this case, however, the precise definition of backhauling is not relevant. Rather, the crucial point is that the Commission's orders have treated entrance facilities differently based on whether the facilities are being used for interconnection or for backhauling.

tion, 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." *Id*. at 17,203 ¶ 365 (footnote omitted). At the same time, the Commission emphasized 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." *Id.* at 17,204 ¶ 366 (quoting 47 U.S.C. 251(c)(2)) (brackets in original).

The D.C. Circuit granted petitions for review of the FCC's order and rejected the Commission's finding that entrance facilities are not "network elements" for purposes of Section 251(c)(3). *USTA*, 359 F.3d at 585. Noting that the statute defines the term "network element" as "'a facility [or] equipment used in the provision of a telecommunications service,'" the court concluded that "the Commission's reasoning appears to have little or no footing in the statutory definition," and it remanded for further consideration. *Id.* at 585-586 (quoting 47 U.S.C. 153(29)). The court did not address the FCC's conclusion that Sections 251(c)(2) and 251(c)(3) impose distinct statutory obligations on an incumbent's provision of entrance facilities.

On remand, the FCC adopted the *Triennial Review Remand Order*, in which it found, contrary to its earlier conclusion, that entrance facilities are within the incumbent's network and therefore are correctly classified as "network elements." *TRRO*, 20 F.C.C.R. at 2609-2610 ¶¶ 136-137.[5] Based on the "economic characteristics of

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[5] Specifically, the *Triennial Review Remand Order* "reinstate[d] the *Local Competition Order* definition of dedicated transport to the extent

entrance facilities," however, the agency determined that competitive carriers are not impaired in their ability to provide service without unbundled access to entrance facilities. *Id*. at 2610 ¶ 138. Accordingly, the Commission adopted a regulation specifying that Section 251(c)(3) does not obligate incumbents to provide competitors with access to entrance facilities on an unbundled basis. 47 C.F.R. 51.319(e)(2)(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."). As it had in the *Triennial Review Order*, however, the FCC emphasized that its "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)." *TRRO*, 20 F.C.C.R. at 2611 ¶ 140. "[C]ompetitive LECs," the agency explained, "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." *Ibid*.

3. Respondent is an incumbent LEC in Michigan. Shortly after the FCC issued the *Triennial Review Remand Order*, respondent notified competitive LECs that it would no longer provide entrance facilities at a cost-

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that it included entrance facilities." 20 F.C.C.R. at 2610 ¶ 137. The FCC explained that, in the *Local Competition Order*, it had 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." *Id*. at 2609 ¶ 136 (citing *Local Competition Order*, 11 F.C.C.R. at 15,718 ¶ 440). Thus, according to the *Triennial Review Remand Order*, an entrance facility is dedicated transport, defined as an "incumbent LEC transmission facilit[y]," or a facility that by definition is part of the incumbent's network.

based rate, but instead would require competitive LECs to pay a higher rate if they wished to continue using such facilities. Pet. App. 8a. Various competitive LECs complained to the Michigan Public Service Commission that respondent's action unlawfully abrogated their right to cost-based interconnection under Section 251(c)(2). *Id.* at 98a-100a. The Michigan commission arbitrated the dispute in favor of the competitive LECs. *Id*. at 100a. Relying on the *Triennial Review Remand Order*, it concluded that competitive LECs "still have a right to entrance facilities to the extent required for interconnection pursuant to Section 251(c)(2)." *Ibid*.

4. Respondent challenged the Michigan commission's ruling in federal district court, and the district court vacated the ruling. Pet. App. 54a-82a. The court construed the *Triennial Review Remand Order* to reflect a conclusion by the FCC that "entrance facilities need not be provided by incumbent carriers to competing carriers on an unbundled basis." *Id.* at 70a. The court acknowledged the FCC's statement that its determination with respect to unbundling did not alter incumbents' distinct interconnection obligation. *Ibid.* The court held, however, 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"—*i.e.*, 47 C.F.R. 51.319(e)(2)(i). Pet. App. 70a.

5. The Michigan commission and several competitive LECs appealed. At the invitation of the court of appeals, the FCC filed an amicus brief urging the court to reverse the district court's decision. The Commission emphasized its statements in Paragraph 140 of the *Triennial Review Remand Order* "that its rule relieving incumbent LECs of the duty to unbundle entrance facili-

ties and its non-impairment finding 'do[] not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2),'" and "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.'" FCC C.A. Br. 10-11 (quoting *TRRO*, 20 F.C.C.R. at 2611 ¶ 140) (brackets in original). The FCC argued that the Michigan commission "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." *Id.* at 11.

6. The court of appeals affirmed. Pet. App. 1a-51a.

a. The court of appeals construed Section 251(c)(2)'s directive that an incumbent LEC shall "provide * * * interconnection with" its network as requiring the incumbent only to "'make a plug-in available' *for* connection with the CLEC's facilities and equipment," not "to 'lease a physical facility (or wire) *to* the CLEC.'" Pet. App. 33a. The court drew a distinction between an "entrance facility" and an "interconnection facility," which it understood to be a separate facility that allows a competitor to "plug into" an incumbent's network at "the ILEC's designated connection point." *Id.* at 37a. The court stated that an incumbent "has no obligation to provide any entrance facility." *Id.* at 38a (emphasis omitted). Instead, it believed that the "most plausible reading of the plain language of the *TRRO* is that the ILEC must allow the CLEC to connect its network to the ILEC's network, and may not charge the CLEC more than [cost-based] rates for this connection." *Id.* at 37a. The court concluded that "the link * * * between the ILEC's designated connection point and the ILEC's network" does not constitute an interconnection facility,

and therefore need not be made available at cost-based rates, unless "the ILEC requires the CLEC to connect at some point other than directly into its network." *Ibid.* In so holding, the court rejected the FCC's understanding of the *Triennial Review Remand Order* as "so plainly erroneous" that the court could "only conclude that the FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation." *Id.* at 11a n.6.

The court of appeals acknowledged that its decision conflicted with decisions of the Seventh and Eighth Circuits. Pet. App. 33a-37a. Those circuits (and the Ninth Circuit, in a subsequent decision) have construed Paragraph 140 of the *Triennial Review Remand Order*, in which the FCC referred to the "right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)," 20 F.C.C.R. at 2611, to mean that incumbent LECs "must allow the use of entrance facilities for interconnection" at cost-based rates, *Illinois Bell Tel. Co.* v. *Box*, 526 F.3d 1069, 1072 (7th Cir. 2008); accord *Southwestern Bell Tel., L.P.* v. *Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-684 (8th Cir. 2008), cert. denied, 129 S. Ct. 971 (2009); *Pacific Bell*, 621 F.3d at 843-847. The court of appeals found the Seventh and Eighth Circuit decisions unpersuasive, however, because it understood them as "assuming the very question to be decided"—namely, that "interconnection facilities" and "entrance facilities" are the same thing. Pet. App. 33a.

b. Judge Sutton dissented. Pet. App. 39a-51a. He observed that the majority's view of the FCC's order and rules "may be a reasonable interpretation," but he argued that "[s]o too * * * is the FCC's competing interpretation, one premised on an interpretation of its own regulations and one that we must respect as a re-

sult." *Id.* at 39a. "In the final analysis," Judge Sutton concluded, "the FCC's interpretation reasonably respects the words of its regulations and [*Auer* v. *Robbins*, 519 U.S. 452 (1997)] requires us to respect that interpretation." *Id.* at 51a.

SUMMARY OF ARGUMENT

In 47 U.S.C. 251(c)(2) and (3), Congress adopted two distinct mechanisms to promote competition in local telephone markets. Section 251(c)(2) requires incumbent carriers to provide interconnection to their competitors at cost-based rates, making it possible for the customers of a competitive carrier to call (and receive calls from) an incumbent's larger customer base. Separately, Section 251(c)(3) requires incumbents to provide certain network elements on an unbundled basis, thus enabling competitors to assemble their own telecommunications networks by combining elements from various sources, including incumbents' networks.

When it adopted the *Triennial Review Remand Order*, 20 F.C.C.R. 2533 (2005), the FCC concluded that incumbents would not be required to make entrance facilities available to their competitors as unbundled network elements under Section 251(c)(3). In the same order, however, the Commission stated that its determination did "not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)," and 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." *Id.* at 2611 ¶ 140. Under the *Triennial Review Remand Order*, an incumbent must make entrance facilities available to a competitor at cost-based rates when the competitor seeks to use those facilities to

interconnect with the incumbent's network. In reaching a contrary conclusion, the court of appeals committed three fundamental errors.

First, the court of appeals failed to appreciate that the FCC's orders treat the same facilities differently depending on the purpose for which they are used. The *Triennial Review Remand Order* makes clear that an incumbent is not categorically obligated to make entrance facilities available at cost-based rates. Rather, that obligation exists only when entrance facilities are being used as "interconnection facilities." The court of appeals misconstrued the term "interconnection facilities," as used in the Commission's order, to refer to facilities *different from* entrance facilities. In fact, that term simply refers to entrance facilities that are being used for interconnection.

Second, the court of appeals erroneously limited the scope of incumbent carriers' statutory duty to permit interconnection. The court concluded that an incumbent's only interconnection duty is to allow a competitor to "plug in" to its network, and that the incumbent may unilaterally designate the point at which interconnection will occur. That view cannot be reconciled with Section 251(c)(2)(B), which permits the requesting competitive carrier to select "any technically feasible" method and point of interconnection. And, to the extent that the statutory language is ambiguous, the FCC has long construed Section 251(c)(2) to give the competitive carrier, rather than the incumbent, the right to choose among "technically feasible" interconnection points.

Third, the court of appeals conflated the independent obligations imposed on incumbents by Sections 251(c)(2) and (3). Adopting an overly expansive reading of the FCC regulation relieving incumbents from an obligation

to make entrance facilities available as unbundled network elements under Section 251(c)(3), the court erroneously concluded that incumbents have no obligation to make such facilities available for interconnection under Section 251(c)(2).

Each of the court of appeals' errors is traceable in part to the court's failure to give adequate weight to the FCC's reasonable interpretation of the statutes it administers and of its own orders. Because the FCC's interpretation is reasonable, it is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and *Auer* v. *Robbins*, 519 U.S. 452 (1997). The court of appeals gave no sound reason for declining to defer to the views expressed in the FCC's amicus brief below, which was submitted at the court's own request. But in any event, the government's brief in *this* Court is entitled to deference under clearly established principles.

ARGUMENT

WHEN A COMPETITIVE LOCAL EXCHANGE CARRIER SEEKS TO USE AN ENTRANCE FACILITY FOR INTERCONNECTION, 47 U.S.C. 251(c)(2) REQUIRES AN INCUMBENT TO LEASE THE FACILITY AT A COST-BASED RATE

Under 47 U.S.C. 251(c)(2), an incumbent local exchange carrier has a "duty to provide" a competitive carrier with "interconnection with the [incumbent's] network," at cost-based rates, "at any technically feasible point within the [incumbent's] network." An FCC regulation implements that provision by directing incumbents to provide competitors with "any technically feasible method of obtaining interconnection * * * at a particular point upon a request." 47 C.F.R. 51.321(a). The issue in this case is whether an entrance facility—a link

owned by an incumbent that connects its network to the network of a competitor—must be made available at cost-based rates when the competitor seeks to use it for interconnection. The court of appeals held that no such obligation exists. The effect of the court's ruling is that, even when a competitor seeks to use an entrance facility for interconnection, an incumbent carrier may require as a condition of the lease that the competitor pay a higher, unregulated rate.

In reaching that conclusion, the court of appeals committed a series of errors. The court failed to appreciate that the FCC's orders treat the same facilities differently depending on the purpose for which they are used; it adopted an unduly narrow understanding of the incumbent's statutory obligation to permit interconnection; and it confused the interconnection obligation under Section 251(c)(2) with the unbundling obligation under Section 251(c)(3). At each step of its analysis, moreover, the court erred in failing to afford deference to the Commission's reasonable construction of the statutes it administers and the orders it has adopted.

A. Under The FCC's Orders, Entrance Facilities Must Be Made Available For Interconnection At Cost-Based Rates Even Though They Need Not Be Made Available At Cost-Based Rates For Other Purposes

The FCC has established different rules for competitors' access to an incumbent LEC's entrance facilities depending on how the competitor seeks to use those facilities. Under the *Triennial Review Remand Order*, 20 F.C.C.R. 2533 (2005), an incumbent's entrance facilities are available to competitors as "interconnection facilities" if used for interconnection, even though the same facilities need not be made available for use in back-

hauling as unbundled network elements under Section 251(c)(3). The court of appeals' misunderstanding of the *Triennial Review Remand Order* rests in part on the court's mistaken view that "interconnection facilities and entrance facilities are different things." Pet. App. 32a n.13. In fact, the FCC's orders use the term "interconnection facility" to refer to an entrance facility that is being used for interconnection, not to a distinct type of facility.

1. In the *Triennial Review Order*, 18 F.C.C.R. 16,978 (2003), the FCC made clear that the regulatory treatment of entrance facilities depends on the purpose for which those facilities are used. The agency explained that "[c]ompetitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic," and it determined 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." *Id*. at 17,203 ¶ 365. The agency made clear, however, 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." *Id.* at 17,204 ¶ 366 (quoting 47 U.S.C. 251(c)(2)) (brackets in original).

When the FCC revisited the treatment of entrance facilities in the *Triennial Review Remand Order*, it did not alter incumbents' Section 251(c)(2) obligation to provide such facilities at cost-based rates for the purpose of interconnection. The agency relied on the "economic characteristics of entrance facilities" to determine that competitors would not be impaired in their ability to

provide service if they lacked unbundled access to such facilities, and it therefore declined to order unbundling under Section 251(c)(3). 20 F.C.C.R. at 2610 ¶ 138. The FCC emphasized, however, that under Section 251(c)(2), incumbents remain subject to an independent duty to make entrance facilities available at cost-based rates when competitors seek to use them for interconnection. Specifically, in Paragraph 140 of the *Triennial Review Remand Order*, the FCC stated:

> 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 they require them to interconnect with the incumbent LEC's network.

Id. at 2611 ¶ 140 (footnote omitted).

Although the *Triennial Review Remand Order* did not expressly distinguish between backhauling and interconnection, the agency had no need to draw that contrast because the order, by its terms, did not "alter" the usage-based distinctions set out in the earlier *Triennial Review Order*. *TRRO*, 20 F.C.C.R. at 2611 ¶ 140. And although the D.C. Circuit had vacated the *Triennial Review Order* in its *USTA* decision, the court had addressed only the FCC's conclusion that entrance facilities could not be "network elements" for purposes of Section 251(c)(3). As the Ninth Circuit has correctly recognized, the court in *USTA* "did not rule on the validity of the FCC's conclusion that, under § 251(c)(2), incumbent LECs are obligated to offer entrance facilities

at [cost-based] rates." *Pacific Bell Tel. Co.* v. *California Pub. Utils. Comm'n*, 621 F.3d 836, 846 n.15 (2010), petition for cert. pending, No. 10-838 (filed Dec. 23, 2010); see *MAP Mobile Commc'ns, Inc.* v. *Illinois Bell Tel. Co.*, 24 F.C.C.R. 5582, 5592 ¶ 30 (Enforcement Bureau 2009) (explaining that the discussion of entrance facilities in the *Triennial Review Order*, "which was remanded on appeal, involved unbundling obligations * * *, not charges for interconnection") (footnote omitted).

Accordingly, entrance facilities are "interconnection facilities," as that term is used in the *Triennial Review Remand Order*, when they are being used for interconnection. Under Section 251(c)(2), "competitive LECs will have access to these facilities at cost-based rates to the extent they require them to interconnect with the incumbent LEC's network." *TRRO*, 20 F.C.C.R. at 2611 ¶ 140.

2. In concluding that entrance facilities should not be available as unbundled network elements when used to backhaul traffic, but should remain available for interconnection at cost-based rates when used as a competitive LEC's physical link with the incumbent's network for the mutual exchange of traffic, the *Triennial Review Order* and *Triennial Review Remand Order* were consistent with well-established FCC precedent. The Commission has long recognized that a single facility can be used for different functions, and that its regulatory treatment can vary depending on the use to which it is put. Indeed, the agency's regulations implementing Sections 251(c)(2) and 251(c)(3) frequently make such usage-based distinctions.

In other provisions of the *Triennial Review Remand Order*, for example, the FCC prohibited the use of

unbundled network elements "for the exclusive provision of mobile wireless services or interexchange [*i.e.*, long-distance] services." 47 C.F.R. 51.309(b); see *TRRO*, 20 F.C.C.R. at 2551-2558 ¶¶ 34-40. At the same time, the agency permitted "[a] requesting telecommunications carrier that accesses and uses an unbundled network element consistent with" that restriction to "provide any telecommunications services over the same unbundled network element." 47 C.F.R. 51.309(d). Thus, as with entrance facilities, the FCC's rules regulate access to network elements based on use: A competitive LEC may use an unbundled network element to provide local telephone service, even though the competitor may not use the same facility exclusively to provide long distance or mobile wireless services.

Similarly, 47 C.F.R. 51.305(b) prohibits a competitive LEC from requesting interconnection under Section 251(c)(2) "solely for the purpose of originating or terminating its interexchange traffic [*i.e.*, long distance traffic] on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service [*i.e.*, local telephone service], exchange access service [*i.e.*, network access], or both." Although "the same exact wire" could be used for both purposes, Pet. App. 29a, the FCC's rule prohibits the use of the interconnection arrangement for terminating long distance traffic, but permits its use to offer local telephone service. In upholding that aspect of the FCC's rules, the Eighth Circuit noted that "[o]bviously the services sought, while they might be technologically identical (a question beyond our expertise), are distinct." *Competitive Telecomms. Ass'n* v. *FCC*, 177 F.3d 1068, 1073 (1997) (*CompTel*). Section 51.305(b) confirms that the court below was wrong in asserting that "neither the FCC nor

any court has ever defined interconnection" in terms of "a particular use of" a facility. Pet. App. 32a.

3. The court of appeals misread Paragraph 140 of the *Triennial Review Remand Order* because it believed that the FCC could not have "used two separate terms—'entrance facility' and 'interconnection facility'—to describe the exact same wire." Pet. App. 29a. The court therefore concluded that "interconnection facilities and entrance facilities are different things," and that the *Triennial Review Order*'s emphasis on the distinction between backhauling and interconnection was intended to "describe and differentiate two types of *facilities* for which [the FCC] had not yet established names." *Id.* at 32a n.13. Contrary to the court of appeals' understanding, both orders make clear that the FCC regulates a single category of facilities—entrance facilities—based on how those facilities are being used.

If (as the court of appeals believed) interconnection facilities were categorically different from entrance facilities, the FCC would have had no reason to discuss interconnection facilities—or to underscore incumbents' continuing obligation to provide them—in Paragraph 140 of the *Triennial Review Remand Order*, which appears in a section of the order entitled "Entrance Facilities." 20 F.C.C.R. at 2609; see *Pacific Bell*, 621 F.3d at 845 (noting that the relevant section of the *Triennial Review Remand Order* "solely discusses the effect of the FCC's finding as to entrance facilities"). Moreover, if incumbents had no obligation to provide entrance facilities at cost-based rates under either Section 251(c)(2) or Section 251(c)(3), regardless of the manner in which entrance facilities are used, there would have been no reason for the agency to distinguish between entrance facilities being used for interconnection and those being used

for backhauling. Yet the Commission did draw such a usage-based distinction. See *TRO*, 18 F.C.C.R. at 17,202-17,204 ¶¶ 365-366. As Judge Sutton explained in his dissent below, "[t]hese points of emphasis make little sense if entrance facilities never function as § 251(c)(2) interconnection facilities." Pet. App. 47a.

B. Section 251(c)(2) Requires An Incumbent To Provide Interconnection At The Point And By The Method Requested By The Competitor Unless It Is Technically Infeasible To Do So

The court of appeals' decision appears to reflect the view that Section 251(c)(2) and the *Triennial Review Remand Order* require an incumbent to do nothing more than "make a plug-in available" for a competitor to connect to its network. Pet. App. 33a; see *id.* at 23a-26a (analogizing an "interconnection facility" to "an electrical outlet in your garage" and an entrance facility to "one of those big orange extension cords"). The court also read the *Triennial Review Remand Order* to allow the incumbent to determine unilaterally where interconnection will take place. *Id.* at 37a-38a. In both respects, the court misinterpreted Section 251(c)(2) and the FCC order.

1. Section 251(c)(2) requires an incumbent "to provide * * * interconnection" to a requesting competitor "at any technically feasible point within the carrier's network." 47 U.S.C. 251(c)(2). Since the enactment of the 1996 Act, the FCC has consistently construed that provision to mean that an incumbent may be required to provide facilities to a competitor in order to link the two carriers' networks. As the Commission explained in its 1996 *Local Competition Order*, "Congress intended to obligate the incumbent to accommodate the new en-

trant's network architecture by requiring the incumbent to provide interconnection 'for the facilities and equipment' of the new entrant." 11 F.C.C.R. 15,499, 15,605 ¶ 202. The agency recognized that "incumbent LEC networks were not designed to accommodate third-party interconnection or use of network elements at all or even most points within the network." *Ibid*. As a result, "[i]f incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of sections 251(c)(2) and 251(c)(3) would often be frustrated." *Ibid*. In light of the technical limitations of incumbents' existing networks, the FCC found that vindicating the rights of competitors to obtain interconnection at any technically feasible point could require "novel use of" and "modification to" incumbents' facilities—for which the competitors would pay the incumbents' costs plus a reasonable profit. *Ibid*. The *Local Competition Order* and the implementing rule it adopted therefore require an incumbent to provide interconnection not just at any feasible point, but by "any technically feasible method." 47 C.F.R. 51.321(a) and (b).[6]

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[6] The FCC's interconnection rules, which were adopted in 1996, do not expressly require incumbents to provide entrance facilities to satisfy their interconnection obligations under Section 251(c)(2). That is because, until 2003—when the FCC eliminated unbundled access to entrance facilities in the *Triennial Review Order*—a competitive LEC typically would elect to order a cost-priced entrance facility under Section 251(c)(3) since an unbundled network element can be used more expansively than the same facility provided solely for interconnection under Section 251(c)(2). See *Local Competition Order*, 11 F.C.C.R. at 15,636-15,637 ¶ 270 ("Subsection (c)(3) * * * allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection."); *TRO*, 18 F.C.C.R. at 17,203 ¶ 365 n.1113 (same). Only after the FCC eliminated access to entrance facilities as

Once the *Triennial Review Remand Order* reestablished that entrance facilities are part of the incumbent's network, the governing standard under Section 251(c)(2) became whether providing competitive LECs access to those entrance facilities for interconnection is technically feasible. 47 U.S.C. 251(c)(2)(B); see *Local Competition Order*, 11 F.C.C.R. at 15,602-15,607 ¶¶ 198-206. Respondent has not disputed that the feasibility standard is satisfied here. As the Seventh Circuit has observed, an entrance facility "meets the requirement of feasibility" because it is "designed for the very purpose of linking two carriers' networks." *Illinois Bell Tel. Co.* v. *Box*, 526 F.3d 1069, 1072 (2008); see *Pacific Bell*, 621 F.3d at 844; *Southwestern Bell Tel., L.P.* v. *Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 681 (8th Cir. 2008), cert. denied, 129 S. Ct. 971 (2009).

2. The court of appeals erred in holding that Section 251(c)(2) never obligates an incumbent "to lease a physical facility (or wire) *to* the" competitive LEC. Pet. App. 33a (internal quotation marks omitted). To the contrary, the FCC and the courts have consistently interpreted Section 251(c)(2) to require incumbents to provide a range of facilities to allow interconnection—including, in some circumstances, constructing new facilities where none already exist. See, *e.g.*, *CompTel*, 117 F.3d at 1071-1072 (affirming FCC's interpretation of Section 251(c)(2) as requiring an incumbent LEC to provide "a physical link, between the equipment of the carrier seeking interconnection and the LEC's network"); *US West Commc'ns, Inc.* v. *Minnesota Pub. Utils. Comm'n*, 55

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unbundled network elements did it have occasion to clarify, in the *Triennial Review Order* and the *Triennial Review Remand Order*, that Section 251(c)(2) gives competitive LECs a right of access to such facilities for interconnection at cost-based rates.

F. Supp. 2d 968, 982-983 (D. Minn. 1999) (affirming state commission order requiring incumbent to provide existing transmission facilities or build new ones to comply with Section 251(c)(2)); cf. *AT&T Corp.* v. *FCC*, 317 F.3d 227, 234-235 (D.C. Cir. 2003).

In the *Local Competition Order*, for example, the FCC determined that a "meet-point arrangement" is one of many "methods of technically feasible interconnection or access to incumbent LEC networks." 11 F.C.C.R. at 15,780-15,781 ¶ 553; see 47 C.F.R. 51.321(b). Meet-point arrangements require an incumbent to build a transmission facility from its network to a designated meet point with a competitor "for the mutual exchange of traffic." *Local Competition Order*, 11 F.C.C.R. at 15,781 ¶ 553; see 47 C.F.R. 51.5. "[E]ach party" to such an arrangement "pays its portion of the costs to build out the facilities to the meet point," a negotiated point between each carrier's respective network. *Local Competition Order*, 11 F.C.C.R. at 15,781 ¶ 553. In its discussion of interconnection through "meet point[s]," the FCC explained that "the limited build-out of facilities" from the incumbent's network "constitute[s] an accommodation of interconnection." *Ibid.* Recognizing that "the creation of meet point arrangements may require some build out of facilities by the incumbent," the FCC nonetheless found "that such arrangements are within the scope of the obligations imposed by section[] 251(c)(2)." *Ibid.*

When compared with that requirement, which has been implemented successfully throughout the telephone industry, the obligation to make entrance facilities available for interconnection is a modest one. A meet-point arrangement requires an incumbent to build a new segment of a dedicated transport facility at its own expense in order to interconnect with a competitor.

In those circumstances, it receives no interconnection compensation from the competitor. By comparison, under the *Triennial Review Remand Order*'s interpretation of Section 251(c)(2), an incumbent is only required to lease to a competitor, at a cost-based rate, an existing facility that is already part of its network.[7]

3. The court of appeals also erred in holding that an incumbent may choose whether to treat a facility as an entrance facility or an interconnection facility. See Pet. App. 47a (Sutton, J., dissenting). According to the court, "[i]f the ILEC requires the CLEC to connect at some point other than directly into its network, then the link * * * between the ILEC's designated connection point and the ILEC's network is * * * an 'interconnection facility' and the ILEC may charge only [cost-based] rates for the use of that * * * interconnection facility." *Id.* at 37a. By contrast, the court stated that "[a]ny facility * * * outside of the ILEC's designated connection point * * * is *not* itself an 'interconnection facility'; it is an 'entrance facility'" that the ILEC "most assuredly has *no obligation to provide*." *Id.* at 37a-38a. The apparent premise of the court of appeals' analysis

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[7] This case involves existing facilities that respondent leased to competitive LECs as unbundled network elements under Section 251(c)(3) before the *Triennial Review Remand Order* was adopted. Pet. App. 8a (explaining that respondent "had been charging CLECs regulated [cost-based] rates for use of * * * entrance facilities" until, "in light of the *TRRO*, [respondent] decided it would henceforth charge higher (*i.e.*, competitive) rates for the entrance facilities it was providing"). The FCC has not ruled on whether an incumbent has a duty under Section 251(c)(2) to build new entrance facilities for a competitor's use. In 2002, however, the agency's staff declined to require an incumbent to "bear[] the cost of building new facilities all the way to [a competitor's] central office location." *In re WorldCom, Inc.*, 17 F.C.C.R. 27,039, 27,109 ¶134 (Wireline Competition Bureau).

is that an incumbent carrier can satisfy its obligation to provide interconnection "at any technically feasible point within the carrier's network," 47 U.S.C. 251(c)(2)(B), by designating a single "technically feasible" point of interconnection, even if it refuses a competitive carrier's request for interconnection at a different point that is also "technically feasible."

That analysis is inconsistent with the text of Section 251(c)(2). If Congress had intended to limit the scope of the interconnection obligation in the manner the court of appeals contemplated, it could have required an incumbent carrier to provide interconnection upon request "at *a* technically feasible point." By instead requiring the incumbent carrier to provide requesting competitors with interconnection "at *any* technically feasible point within the [incumbent] carrier's network," 47 U.S.C. 251(c)(2)(B) (emphasis added), Congress conferred upon requesting carriers the right to choose among technically feasible points of interconnection.

To the extent that the statutory language is ambiguous, the FCC's rules clearly reflect the understanding that the incumbent must provide interconnection at the point in its network chosen by the competitor unless interconnection at that point is technically infeasible. See 47 C.F.R 51.305(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."). With respect to the choice among potential *methods* of interconnection, the FCC's rules similarly provide that "[a]n incumbent LEC that denies a request for a particular method of obtaining interconnection * * * on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection

* * * is not technically feasible." 47 C.F.R. 51.321(d); see *Local Competition Order*, 11 F.C.C.R. at 15,602, 15,605-15,606 ¶¶ 198, 203, 205. The court of appeals' reading of Section 251(c)(2) and the *Triennial Review Remand Order* cannot be reconciled with that long-standing regulatory approach.

By reading the *Triennial Review Remand Order* to permit an incumbent to determine unilaterally how and where competitive LECs may interconnect, the court of appeals effectively rewrote the interconnection regime established by Congress in the 1996 Act and implemented by the FCC thereafter. The text of the statute and years of Commission precedent make clear that the incumbent must make available at cost-based rates both the method and the point of interconnection requested by the competitive LEC, unless the incumbent can demonstrate that the request is technically infeasible.

C. An Incumbent's Interconnection Obligation Under Section 251(c)(2) Is Independent Of Its Unbundling Obligation Under Section 251(c)(3)

The court of appeals perceived a conflict between 47 C.F.R. 51.319(e)(2)(i), which eliminates unbundled access to entrance facilities under Section 251(c)(3), and the FCC's statement in the *Triennial Review Remand Order* that entrance facilities must be offered at cost-based rates when they are being used for interconnection under Section 251(c)(2). Section 51.319(e)(2)(i) states that "[a]n 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." 47 C.F.R. 51.319(e)(2)(i). The court read that provision to establish a categorical rule that an incumbent "is not obligated to provide entrance

facilities at [cost-based] rates," and it therefore concluded that an incumbent "can charge competitive rates for the use of its entrance facilities." Pet. App. 16a; see *id.* at 29a n.12. The court's analysis was flawed.

1. As the FCC made clear in Paragraph 140 of the *Triennial Review Remand Order*, Sections 251(c)(2) and 251(c)(3) impose separate and independent obligations on incumbent LECs. 20 F.C.C.R. at 2611. Although the *Triennial Review Order* and the *Triennial Review Remand Order* amended the unbundling rules, they did nothing to alter the FCC's longstanding interconnection rules. Indeed, as Judge Sutton pointed out, "[i]t would be surprising * * * if the *TRRO* exempted entrance facilities from the pre-existing obligations" in the FCC's interconnection rules "through a novel analysis without comment." Pet. App. 45a.

After explaining the FCC's conclusion that entrance facilities are part of the incumbent's network and therefore fall within the statutory definition of a "network element," the section of the *Triennial Review Remand Order* addressing entrance facilities analyzed whether competitors would be "impair[ed]" without unbundled access to those facilities. 20 F.C.C.R. at 2610-2611 ¶¶ 138-139. Under 47 U.S.C. 251(d)(2), the FCC must make an impairment determination when deciding whether network elements should be classified as unbundled network elements that an incumbent must provide under Section 251(c)(3). No impairment analysis is required, however, in determining an incumbent's interconnection duty under Section 251(c)(2). The *Triennial Review Remand Order*'s discussion of impairment therefore would have been irrelevant to an analysis of an incumbent's interconnection obligations. See *Illinois Bell*, 526 F.3d at 1072 (explaining that the determination

whether an ILEC must charge cost-based rates for interconnection "is not related to the scope of the ILEC's obligations under § 251(c)(3) to furnish unbundled network elements"); accord *Pacific Bell*, 621 F.3d at 844; *Southwestern Bell*, 530 F.3d at 683-684.

Respondent suggests (Br. in Opp. 26) that the FCC's interpretation of Section 251(c)(2) is inconsistent with the Commission's finding, in the course of its impairment analysis under Section 251(c)(3), that "competing LECs do *not* require [cost-based] entrance facilities." As explained above, however, although the statute generally requires an impairment showing for cost-based access to network elements, the duty to provide interconnection at cost-based rates exists so long as interconnection at a particular point is "technically feasible." 47 U.S.C. 251(c)(2)(B). Under Section 251(c)(2), an incumbent carrier's duty to provide interconnection at cost-based rates does not depend on whether the competitive LEC "require[s]" interconnection or would be impaired in its ability to provide service if interconnection were unavailable.

2. Like Paragraph 140 of the *Triennial Review Remand Order*, 20 F.C.C.R. at 2611, the rules promulgated in that order discuss only an incumbent's unbundling obligations, not its duty to provide interconnection. Section 51.319(e)(2)(i), the rule cited by the court of appeals, states that, "in accordance with section 251(c)(3)," 47 C.F.R. 51.319(e), an incumbent "is not obligated to provide a requesting carrier with unbundled access" to entrance facilities, 47 C.F.R. 51.319(e)(2)(i). Nothing in Section 51.319(e)(2)(i) suggests that the rule also applies to an incumbent's separate obligation—embodied in a different rule, codified at 47 C.F.R. 51.305—to provide interconnection under Section 251(c)(2). Accordingly,

the court of appeals erred in holding that Section 51.319(e)(2)(i) "could be rewritten as: an ILEC is not obligated to provide entrance facilities at [cost-based] rates." Pet. App. 16a. As Judge Sutton explained, the court's attempt to rewrite the rule "turns the phrase 'with unbundled access' into a useless appendage." *Id.* at 46a. Properly construed, Section 51.319(e)(2)(i) is not relevant to the interconnection question presented in this case.

D. The FCC's Interpretation Of Section 251(c)(2), And Of Its Own Orders And Rules, Is Entitled To Deference

1. Congress did not directly address the question whether, or under what circumstances, an incumbent's duty to provide "interconnection" under Section 251(c)(2) includes an obligation to provide entrance facilities used to link its network with the network of a competitor. By leaving the term "interconnection" undefined, Congress conferred upon the FCC significant discretion to delineate the scope of an incumbent's interconnection obligation. See 47 U.S.C. 201(b) (authorizing the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter"). The Commission's interpretation of Section 251(c)(2) is therefore entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984). See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

2. To the extent that the FCC orders at issue in this case are themselves ambiguous, the agency's authoritative interpretation of those orders is also entitled to deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945). The court of appeals erred in failing to defer

to the interpretation set out in the FCC's amicus brief below. In any event, the amicus brief for the United States filed in this Court reflects the FCC's considered interpretation of its own rules and orders, and it is entitled to deference under established administrative-law principles.

The court of appeals suggested that the agency's interpretation of the *Triennial Review Remand Order* is not entitled to deference because the order is an "interpretive rule" rather than a "true regulation." Pet. App. 11a. n.6 (internal quotation marks omitted). That is incorrect. The FCC conducted a notice-and-comment rulemaking before it adopted the order. *TRRO*, 20 F.C.C.R. at 2543-2545 ¶¶ 18-19. The order itself contained seven pages of new rules, including the version of 47 C.F.R. 51.319(e)(2)(i) on which the court below relied, 20 F.C.C.R. at 2667 ¶ 239; *id.* at 2677 (App. B), and the agency published a summary of it in the "Rules and Regulations" section of the Federal Register, 70 Fed. Reg. 8940 (2005). As Judge Sutton observed, "[a]ll of this confirms that the *TRRO* is a legislative rule." Pet. App. 50a. The fact that the *Triennial Review Remand Order* was denominated an "order" rather than a "rule" does not alter the deference analysis because the FCC's rulemaking "orders" are legislative acts of the agency. See *Central Tex. Tel. Coop., Inc.* v. *FCC*, 402 F.3d 205, 211 (D.C. Cir. 2005) ("Although the APA defines 'order' as a final disposition other than in a rulemaking, * * * the Commission uses the designation 'order' even when it issues legislative rules after overt § 553 rulemaking."). In any event, it is well settled that an "agency's interpretation of its own precedent," no less than its interpretation of its regulations, "is entitled to deference." *Boca Airport, Inc.* v. *FAA*, 389 F.3d 185, 190 (D.C. Cir. 2004)

(quoting *Cassell* v. *FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998)).

The court of appeals also erred in declining (Pet. App. 10a n.6) to give deference to the amicus brief filed by the FCC below. This Court has repeatedly deferred to agency interpretations set forth in briefs and in agency staff memoranda. See, *e.g., Chase Bank USA, N.A.* v. *McCoy*, No. 09-329 (Jan. 24, 2011), slip op. 15 ("Under *Auer*, * * * it is clear that deference to the interpretation in the Board's *amicus* brief is warranted."); *Auer*, 519 U.S. at 462 ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference."); see also *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 n.9 (1980). Like an amicus brief filed in this Court, the FCC's Sixth Circuit amicus brief should be assumed to "reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462; see Pet. App. 48a (Sutton, J., dissenting) ("A deference doctrine that turns on whether a brief was filed in the United States Supreme Court or a court of appeals has little to commend it."). The court's unwillingness to treat that brief as an authoritative statement of the agency's position was particularly unwarranted because the brief was "filed *at the request* of [the] court of appeals." *Id.* at 49a; see *id.* at 48a-49a (explaining that the Sixth Circuit "called for the views of the FCC in order to understand how the agency construed its regulations and to make sure [the court was] not missing something in the process"). In any event, the government's amicus brief in *this* Court is entitled to deference under established administrative-law principles, see *Chase Bank*,

slip op. 12-13, regardless of what weight should have been given to the brief filed below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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