No. 11-9900

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: FCC 11-161

On Petition for Review of
an Order of the Federal Communications Commission

UNCITED AT&T PRINCIPAL BRIEF

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October 23, 2012

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner AT&T Inc. ("AT&T") submits this Corporate Disclosure Statement.

AT&T is a publicly traded corporation that, through its wholly owned affiliates, is principally engaged in the business of providing communications services and products to the general public. AT&T has no parent company, and no publicly held company owns ten percent or more of its stock.

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GLOSSARY

CLEC	Competitive Local Exchange Carrier
ILEC	Incumbent Local Exchange Carrier
LEC	Local Exchange Carrier
VoIP	Voice over Internet Protocol

ISSUE PRESENTED

Whether the FCC failed to provide a reasoned explanation for changing its access charge rules to favor cable operators and other fixed-line VoIP providers over mobile wireless carriers.

STATEMENT OF FACTS AND CASE

AT&T supports most of the *Order* under review[1] because, on most issues (including many resolved against AT&T), the FCC grappled with the trade-offs it faced and gave considered explanations for its judgment calls. AT&T nonetheless challenges one access-charge-related rule change that the FCC made largely at the cable industry's behest and that benefits cable operators at the expense of mobile wireless carriers. AT&T opposed this change because it exposes wireless carriers to an arbitrary competitive disadvantage vis-à-vis their cable rivals. The FCC did not meaningfully respond to that concern and thus violated its duty of reasoned decisionmaking under the Administrative Procedure Act.

1. Background

As relevant here, "access charges" are the regulated rates that Carrier X pays Carrier Y when Carrier X hands off a long-distance call from one of *its* customers to Carrier Y for delivery to one of *Carrier Y's* customers. The rules governing whether X must pay such charges, and if so how much, depend in part on what

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[1] Report & Order, *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*Order*").

type of provider Y is. There are three likely possibilities: (1) a conventional "local exchange carrier" (LEC) such as CenturyLink, (2) a mobile wireless provider such as AT&T, Verizon Wireless, or Sprint, or (3) a provider of Voice over Internet Protocol (VoIP) services such as Cox or Time Warner Cable. VoIP is a means of providing voice telephony services over a broadband connection by means of the same family of digital technologies used for Internet communications. This appeal challenges the FCC's decision to privilege fixed-line VoIP services over wireless services for access charge purposes.[2]

We introduce this dispute with several scenarios illustrating which providers may collect access charges and for what types of network functions.

Scenario 1: calls to conventional wired telephone lines. Suppose that a friend in Los Angeles places a long-distance call to your home line in Denver. Your friend's long-distance company will transport the call to the Denver area and hand it off to your local telephone company there. If your phone company is a

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[2] *See Order* ¶¶ 968-971. A "fixed" VoIP provider supplies the last-mile broadband connection to the VoIP subscriber; examples include cable companies and integrated IP service providers such as AT&T in some locations. This appeal focuses only on fixed VoIP services because the FCC has effectively precluded, in relevant part, access charges for calls to subscribers of "over-the-top" VoIP services offered by providers such as Vonage or Skype that do *not* supply broadband transmission. *Id.* ¶ 970 & n.2028.

conventional wireline LEC such as CenturyLink,[3] it will bill your friend's long-distance company "access charges" for routing the call from the point of hand-off to you. The now-discredited theory underlying such charges has been that the calling party—your friend—"causes" all costs of a call from origin to destination and that his carrier should thus cover all costs your carrier incurs in routing the call from the place of hand-off to you, the called party. *See Order* ¶¶ 744-47.

The access charges that your telephone company imposes on your friend's long-distance carrier will likely have several components, corresponding to the distinct functions your telephone company performs in this process. When an incumbent LEC receives incoming calls from long-distance carriers, it often routes them first through an intermediate regional switching facility known as a "tandem"—a meta-switch that connects smaller, more local switches:

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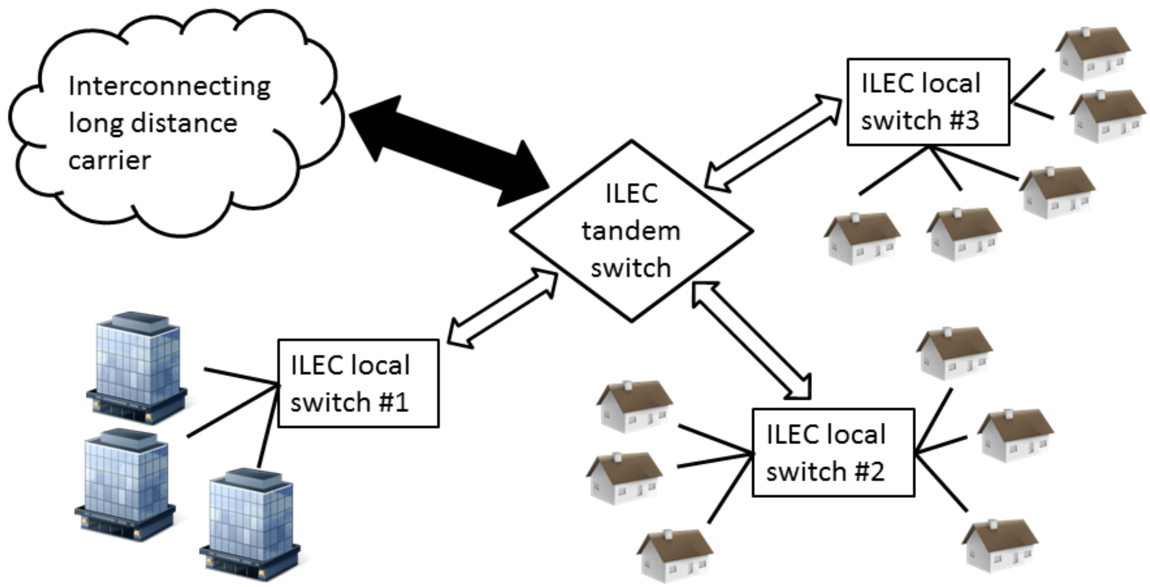
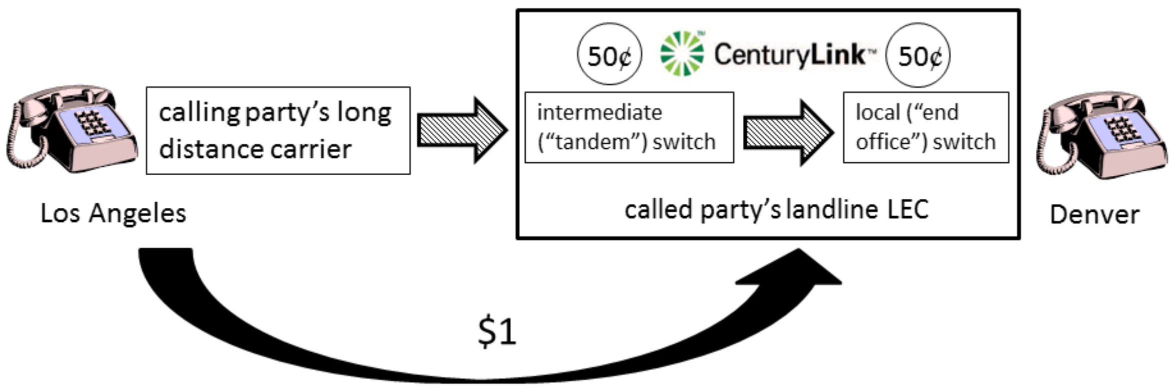
[3] The Communications Act defines "local exchange carrier" in terms of functions identified with conventional local telephone companies. *See* 47 U.S.C. § 153(32). Although both wireline and wireless carriers perform those functions, the Act carves out mobile wireless—"commercial mobile [radio] service" ("CMRS")—providers from the definition. *Id.* The term "LEC" thus encompasses local wireline but *not* wireless telephone companies. In turn, LECs are divided into (1) "incumbent LECs" ("ILECs") and (2) all other LECs, called "competitive LECs" ("CLECs"). AT&T is a national wireless provider; in various regions, it is also an ILEC, a CLEC, and a fixed-line provider of VoIP services (see below).



In this scenario, the ILEC assesses the long-distance carrier access charges corresponding to the separate functions the ILEC performs in routing the incoming call both (1) through the tandem and then (2) through the local ("end office") switches closest to the called party:



Of course, the amounts specified here ($0.50+$0.50=$1.00) are hypothetical.[4] The important point is that, for any given call, carriers impose distinct categories of access charges depending on which functions they actually perform in routing a call to the called party. The more functions they perform, the more they can collect.

In our hypothetical, your Denver LEC can unilaterally bill these charges to all interconnecting long-distance carriers by filing "access tariffs." Tariffs are formal rate sheets that, once approved, carry the force of law and prescribe what long-distance carriers must pay for each function your Denver LEC performs. As discussed in more detail below, your LEC can charge the aggregate amount shown only because it both (1) operates as a regulated LEC and is thus eligible to file tariffs and (2) actually performs the distinct network functions (tandem switching plus end-office switching) needed to transmit the call from the point of hand-off with the long-distance carrier to you, the called party.

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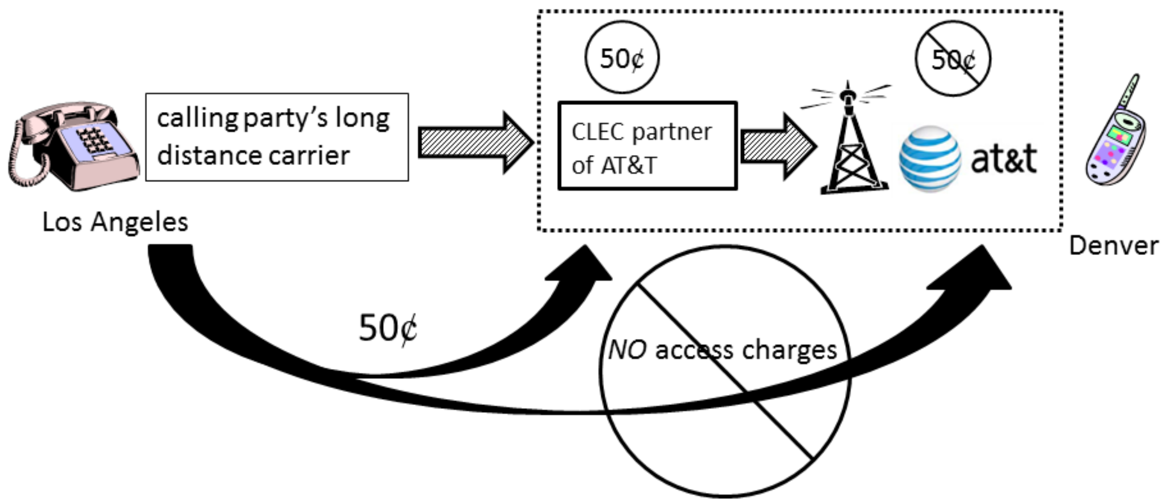
[4] Access-charge levels depend on several variables, including call duration, whether the call crosses state lines, and whether the called party's carrier is subject to "rate-of-return" or "price cap" regulation. Also, the charges for end-office switching typically exceed the charges for tandem switching; there are additional access charge elements beyond these two; and the set of functions we describe generically as "tandem switching" typically encompasses several discrete rate elements, including "tandem-switched transport." These details are immaterial to the basic legal question presented in this appeal.

Scenario 2: calls to cellphones. The access-charge rules are different if your friend in Los Angeles decides to call you on your cellphone instead. The FCC has long barred mobile wireless carriers such as AT&T from filing access tariffs, even though they perform many of the same call-routing functions as wireline LECs. This generally means that, unlike LECs, your wireless carrier cannot recover the relevant network costs from interconnecting long-distance carriers and must recover them instead from the retail rates it charges you and its other customers. *See* Declaratory Ruling, *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192 (2002), *appeal dismissed*, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003). All else being equal, a carrier's inability to obtain revenues from *other carriers* tends to exert upward pressure on the retail prices it must charge its own *end user subscribers*. Here, the wireless industry's inability to tariff access charges tends to raise wireless prices above levels that would prevail if wireless carriers could do what wireline LECs routinely do: unilaterally require interconnecting long-distance carriers to pay access charges.

In the early 2000s, some wireless carriers began looking for ways to overcome their ineligibility to tariff access charges by partnering with wireline LECs (often CLECs). In this scenario, when your Los Angeles friend calls your cellphone, his long-distance carrier is instructed to hand the call off to a CLEC partner that your wireless provider has contracted with behind the scenes. That CLEC partner routes the call through an intermediate switch that it operates, which is analogous to an ILEC tandem. The CLEC partner then hands the call off to your wireless carrier, which in turn routes the call through its own switching facilities en route to you. Because the wireline partner is a regulated LEC that may file access tariffs, it bills the long-distance carrier for the intermediate functions it performs ($0.50 in our example):[5]



[5] Although wireless providers have partnered with many LECs for these purposes, including both CLECs and ILECs, our discussion often follows the FCC's usual shorthand of referring to these wireline LEC partners as "CLECs." Although a CLEC files tariffs independently of any ILEC, the FCC has ensured the reasonableness of CLEC access charges by requiring CLECs to "benchmark" them to those the FCC has approved for the local ILEC (or to certain proxies for ILEC charges). *See* Seventh Report & Order, *Access Charge Reform*, 16 FCC Rcd 9923 (2001). For example, if an ILEC has tariffed access charges of $0.50 for tandem switching in a particular area, that is the maximum a CLEC in that area can tariff for performing comparable functions on its own network. *Id.* at ¶ 55 & n.126.

Almost ten years ago, some wireless carriers and their CLEC partners argued to the FCC that, in this scenario, a CLEC should also be able to tariff charges for *local* switching too, bringing the total bill to $1 ($0.50+$0.50), even though the non-tariff-eligible wireless carrier is performing that function. The FCC rejected that position in a 2004 order. It held that "the rate that a [CLEC] charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions," and thus a CLEC "has no right to collect access charges for the portion of the service provided by the [wireless] provider." Eighth Report & Order, *Access Charge Reform*, 19 FCC Rcd 9108 ¶¶ 16-17 (2004) ("*Eighth R&O*"); *see also id.* ¶ 21. In other words, if the CLEC middleman partners with a service provider that itself has no right to tariff access charges, the CLEC may tariff only the amount reflecting the work *it* performs (here, 50¢). It has no right to collect any further amount reflecting the work the *other*, non-tariff-eligible provider performs.

2. The *Order* under review

In the *Order* here, the FCC announced that it will gradually phase out terminating access charges for all calls, even those bound for wireline LEC customers, and will transition to a "bill-and-keep" system. In plain English, this means that, years from now, a carrier will owe nothing to a called party's LEC when it hands off a call at a defined point on the LEC's network, just as it now owes nothing when it hands off a call directly to a wireless carrier. Thus, like wireless carriers today, each LEC will have to recover its network costs from its own subscribers rather than from interconnecting carriers (and ultimately *their* subscribers).

AT&T fully supports this aspect of the FCC's decision. Although some FCC critics present bill-and-keep as an untried experiment, it is anything but that. As the *Order* notes (¶ 737), bill-and-keep has long been the governing methodology for countless long-distance calls placed to cellphones. Because the called party's wireless carrier cannot pass its network costs through to the interconnecting long-distance company, it has had to recover those costs from the called party and its other customers through its retail rates. The *Order* simply charts a course for eventually extending the same rule to all carriers, wireline as well as wireless. In *that* respect, the *Order* has made intercarrier compensation fairer and more symmetrical. By forcing wireline LECs to look increasingly to their own customers for revenues, the *Order* will gradually eliminate a regulatory asymmetry that wireless providers now confront as they compete with wireline LECs for customers on the basis of retail price.

Yet the FCC simultaneously imposed, for the first time, the same regulatory disadvantage on wireless carriers when they compete for customers with *cable companies* and other fixed VoIP providers during the long transition to bill-and-keep. This appeal challenges the FCC's imposition of that new and competitively significant regulatory asymmetry.

Scenario 3: calls to customers of VoIP providers. Almost all cable companies that offer voice telephone services today choose not to offer those services as regulated LECs. Instead, they offer VoIP as an unregulated "information service."[6] In the *Order*, the FCC reaffirmed that "retail VoIP providers … offering unregulated services … are not carriers that can tariff intercarrier compensation charges." *Order* ¶ 970. In that respect, a cable VoIP provider is like a wireless carrier; neither can itself impose tariffed access charges. The question before the FCC was how much these unregulated cable VoIP providers could circumvent that disability by partnering with (often affiliated) CLECs that accept calls from interconnecting long-distance carriers and route them to the cable companies' customers.

It is now undisputed that these cable-oriented CLECs may collect access charges for the functions that they, as regulated wireline carriers, actually perform when they stand between long-distance companies and unregulated cable VoIP providers—just as CLECs may collect the same limited access charges when they

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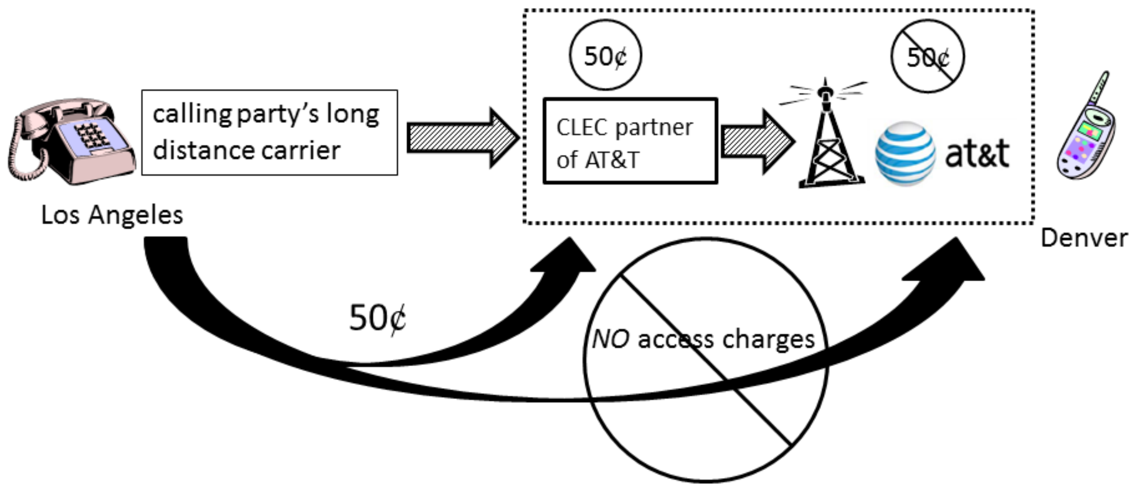
[6] *See* 47 U.S.C. § 153(24) (defining "information service"). AT&T's wireline operations sell VoIP services on the same unregulated basis as the cable companies in a number of locations where AT&T has upgraded its network to provide all-IP packages of voice, video, and Internet services. In other areas, AT&T's wireline affiliates still operate as conventional ILECs.

partner with wireless carriers. But the FCC went one step further. It entitled a CLEC in these circumstances to assess tariffed access charges not only for the services *it* performs, but also for "functions performed by … *its retail VoIP partner*." *Order* ¶ 970 (emphasis added); *see* 47 C.F.R. § 61.26(f) (final clause).

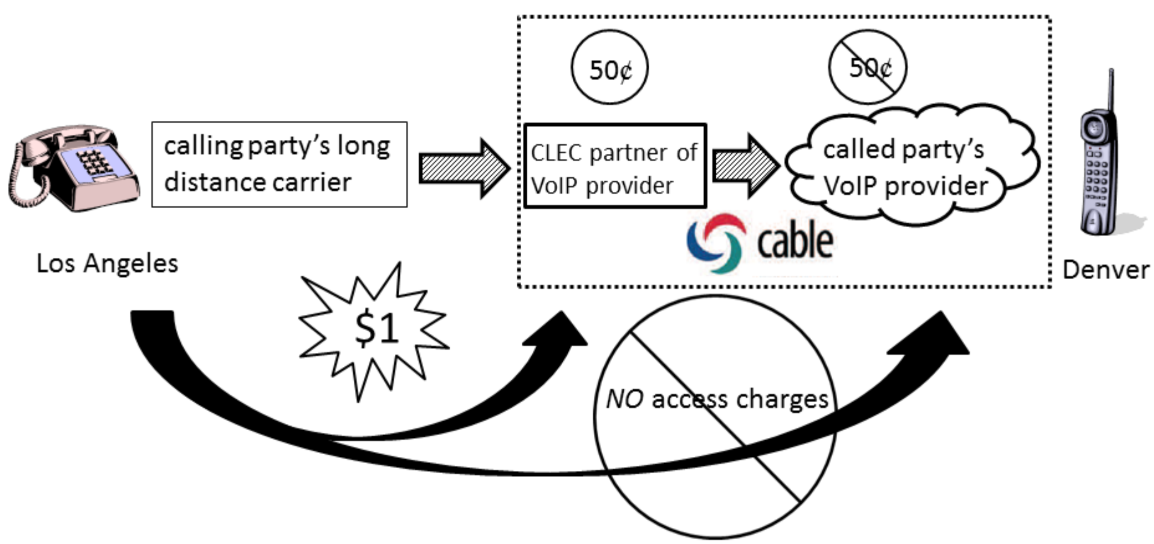
As the FCC acknowledged, this was an abrupt change from its prior rules, which were settled on this point.[7] The FCC "recognize[d] that under the Commission's historical approach in the access charge context, when relying on tariffs, LECs have been permitted to charge access charges to the extent that *they* are providing the functions at issue." *Order* ¶ 970 (emphasis added); *see also Eighth R&O* ¶¶ 16-17, 21; Order on Reconsideration, *Qwest Commc'ns Co. v. Northern Valley Commc'ns*, 26 FCC Rcd 14520, ¶¶ 4, 8 (2011). That, again, has long been the rule for long-distance calls to cellphones; CLECs that partner with

[7] It was settled that the CLEC in this scenario was entitled to *no more* than access charges keyed to the functions it performed; the only uncertainty was whether it was entitled to access charges *even for those functions*. In contrast, the pre-2011 rules were unsettled in the reverse scenario, where the *calling* party subscribes to a VoIP provider and calls someone *who subscribes to a conventional LEC* (rather than a wireless carrier or VoIP provider). In that context, it was previously unclear whether the LEC could collect full access charges for delivering the VoIP-originated call to the non-VoIP called party. The FCC resolved that question by entitling the LEC serving the called party to recover "interstate" access charges during the transitional period. *Order* ¶ 944. This was the overwhelming focus of the "VoIP access charge" issue in the proceedings below, and it should not be confused with the legal question addressed in this brief.

wireless carriers can collect access charges only for the intermediate call-routing functions they perform:



But the FCC decided to "adopt a different approach" in the VoIP context, *Order* ¶ 970, entitling CLECs serving cable VoIP providers to assess tariffed access charges *both* for the functions they perform *and* for the functions their VoIP partners perform (*id.*), even though the VoIP providers—just like wireless carriers—are ineligible to file tariffs:



In the example shown here, the CLEC/cable VoIP partnership may collect $1 in tariffed access charges even though (1) the only tariff-eligible provider in that partnership performs only 50¢ worth of network functionality and (2) CLEC-wireless partnerships may collect only 50¢ in tariffed access charges in indistinguishable circumstances.

This decision cuts sharply against the grain of the rest of the *Order*. Again, the *Order's* central objective is to phase out all access charges and gradually put every carrier in the same bill-and-keep position that both wireless carriers and cable VoIP providers occupied for many years. In essence, the FCC determined that it had gotten the rule right with respect to wireless carriers and VoIP providers and wished to bring wireline LECs into gradual alignment by reducing their access charges to zero as well. But the FCC simultaneously changed the rules for VoIP providers and entitled them to exploit (through their CLEC partners) the very access charge regime that the FCC had just decided was undesirable for all providers and needed to be phased out.

The FCC asserted that, by enabling VoIP-serving CLECs "to charge the same intercarrier compensation as incumbent LECs" during the multi-year transition to bill-and-keep, this new rule would create "symmetr[y]" in the regulatory treatment of cable companies and ILECs. *Order* ¶ 970. But the new rule simultaneously created a deep *asymmetry* in the treatment of cable companies and wireless carriers. Under this new rule, the CLEC/cable VoIP partnership can unilaterally recover more of its collective network costs from interconnecting long-distance carriers than the CLEC-wireless partnership can. And cable VoIP providers thus face a lesser need to recover their network costs from retail end users in the form of higher-than-otherwise retail rates. Wireless carriers must still generally recover the relevant costs from their own retail subscribers, whereas the FCC has now entitled cable VoIP providers to shift cost-recovery away from *their* retail subscribers to interconnecting long-distance carriers during the multi-year transition to bill-and-keep.

In sum, the FCC exposed wireless carriers to a new competitive disadvantage in the voice services marketplace by subjecting them to the same regulatory asymmetries vis-à-vis cable VoIP providers that they already confront vis-à-vis wireline LECs. And the FCC made that rule change even as it recognized that access charges should be gradually phased out for all carriers, including wireline LECs, precisely to eliminate such asymmetries. As discussed below, AT&T objected to this rule change as irrational and competitively biased, but the FCC provided no reasoned response.

SUMMARY OF ARGUMENT

Under the Administrative Procedure Act ("APA"), when an agency adopts regulations that harm private parties, it must face up to those parties' objections and provide a reasoned explanation for overriding them. The FCC violated that core principle of administrative law here. AT&T objected that the new access charge rule for cable VoIP services would inflict competitive harm on mobile wireless services. The FCC did not dispute that the new rule would cause such harm. Instead, the FCC merely observed that, by long historical tradition, no one may tariff access charges for functions performed by wireless providers. But the same has always been true of functions performed by unregulated cable VoIP providers as well. The FCC gave no reasoned justification for abruptly treating the two classes of providers differently. Indeed, the FCC did not mention AT&T's competitive-neutrality concerns *at all*, an omission that by itself requires invalidation of this aspect of the *Order*.

The FCC also cited distinctions without differences when it observed that cable VoIP providers rely on their wireline LEC partners for "interconnection, access to [ten-digit phone] numbers, and compliance with 911 obligations." *Order* ¶ 970. First, no less than cable VoIP providers, wireless providers also rely on wireline LEC partners for "interconnection" with long-distance carriers in the scenarios relevant here. The question is why the two classes of providers—VoIP and wireless—should be treated differently for access-charge purposes when they use wireline LECs for interconnection. The *Order* does not say. And although cable VoIP providers do rely on their wireline LEC partners for acquisition of phone numbers and compliance with 911 obligations, those are not functions that the disputed access charges even purport to cover; indeed, they have nothing to do with access charges at all. The question remains: why should such wireline LEC partners be able to recover access charges for functions that *cable VoIP providers* undertake, but not for analogous functions that *wireless providers* undertake, even though the result is competitive bias? Again, the *Order* does not say, and this Court should remand the *Order* in relevant part.

ARGUMENT

THE FCC VIOLATED THE ADMINISTRATIVE PROCEDURE ACT BY OFFERING NO REASONED EXPLANATION FOR CONFERRING A REGULATORY ADVANTAGE ON CABLE VOIP SERVICES OVER WIRELESS SERVICES

"An agency action is arbitrary and capricious under the APA if, *inter alia*, the agency fails to 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1220-1221 (10th Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); 5 U.S.C. § 706. An agency violates this duty of reasoned explanation if it fails to "'answer[] objections that on their face appear legitimate.'" *Mistick PBT v. Chao*, 440 F.3d 503, 512 (D.C. Cir. 2006). And even if an agency has offered *some* response, the reviewing court still must engage in a "'searching and careful' review of the record to ensure that the [agency] has applied [its] expertise in a reasoned manner." *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 216 (D.C. Cir. 2011). This "requirement of reasoned decisionmaking ensures" that the parties "at least know that the government has faced up to the meaning of its choice …. and prevents officials from cowering behind bureaucratic mumbo-jumbo." *Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 327 (D.C. Cir. 1992). The FCC violated that requirement here.

For the reasons discussed above, AT&T explained to the FCC that the new VoIP access charge rule would unjustifiably impair the competitive position of wireless carriers vis-à-vis their cable VoIP competitors. AT&T stressed that, "if the Commission were to modify its rules only for CLECs serving VoIP providers, but maintain those rules for CLECs (or ILECs) serving [wireless] providers, it would arbitrarily tilt the regulatory playing field in favor of [cable's] preferred technology (VoIP) and against the technology deployed by many of its competitors (wireless)." Letter from Robert Quinn, Jr. (AT&T) to Marlene Dortch (FCC), CC Docket No. 01-92 *et al.*, at 2 (Oct. 21, 2011) ("*AT&T Letter*") (JA__). And AT&T emphasized that this "arbitrary distinction" would constitute "competitiondistorting regulatory favoritism" of VoIP providers over their wireless rivals and would "arbitrarily pick[] winners and losers in the marketplace." *Id.* at 4-5 (JA__).

The duty of reasoned decisionmaking required the FCC to acknowledge this competitive concern and provide a considered explanation for whatever policy course it chose. The FCC violated that duty. Although it did not dispute that its new rule inflicts competitive harm on wireless providers, it made no effort to explain why that harm is justified. Indeed, it nowhere even acknowledged that AT&T had *raised* a concern about market-distorting competitive bias. That failure, by itself, requires the *Order*'s invalidation. *See, e.g.*, *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050-1051 (D.C. Cir. 2002) (noting that FCC had altogether failed to address certain competitive points raised by party, and "[t]hese failings alone require that we reverse as arbitrary and capricious"); *see also Cape Cod Hosp.*, 630 F.3d at 211-212 ("because [the agency] failed to address [a party's submission] when issuing its 2007 final rule, we shall remand for [the agency] to provide a reasoned response").

In a two-sentence footnote that ignored these competitive concerns, the FCC did mention AT&T's more general objection that the new rule would create an unjustified asymmetry in the regulatory treatment of wireless and VoIP providers. Yet even that footnote, so far as it went, was unreasoned. The FCC first noted that "retail VoIP providers rely on wholesale [CLEC] partners for, among other things, interconnection, access to numbers, and compliance with 911 obligations." *Order* ¶ 970. The FCC then concluded:

> Given the Commission's endorsement of these arrangements, we find these circumstances distinguishable from those in the [wireless] context, where the Commission prohibited [wireless] providers from partnering with competitive LECs to collect access charges [at tariff]. … We thus reject claims that there is no basis for distinguishing the historical treatment of [wireless] providers from our actions in this context.

Id. ¶ 970 n.2024. That passage is the *Order's* full response to AT&T's concerns about the new imbalance in the FCC's treatment of wireless and VoIP providers. It is conceptually hollow.

First, no one disputes that the FCC has "prohibited" wireless carriers (and their CLEC partners) from "collect[ing] access charges" at tariff (*Order* ¶ 970 n.2024) for the functions the wireless carriers perform in routing calls to end users. But the same has always been true of unregulated cable VoIP providers too. The question was why those VoIP providers, but not their wireless competitors, should be able to circumvent that rule by partnering with a LEC to collect tariffed access charges for the functions that they perform and the LEC does not. As AT&T explained, that asymmetry would give cable VoIP providers an artificial regulatory advantage over their wireless competitors by enabling them to cross-subsidize their retail services with a large category of tariffed wholesale charges that wireless carriers and their LEC partners may not impose. AT&T objected that it could make no sense to exacerbate the disadvantage wireless providers have always faced vis-à-vis wireline LECs by making them, in this respect, worse off than their VoIP rivals for the first time. In short, the FCC's observation that wireless carriers are ineligible to tariff access charges merely restated the basis for AT&T's objection; it did not face up to that objection on the merits, as the APA requires.

It is also irrelevant that VoIP providers "rely on wholesale [wireline LEC] partners for, among other things, interconnection, access to [ten-digit phone] numbers, and compliance with 911 obligations." *Order* ¶ 970. As for "interconnection," there is no relevant distinction in the first place between wireless and VoIP providers. As the diagrams above illustrate, in *each* scenario relevant here, a wireline LEC middleman interconnects with the caller's long-distance carrier, receives calls from it, and forwards them to the called party's voice provider—either a wireless carrier or a VoIP provider. Because the wireline LEC partner plays the same role in either scenario, "interconnection" cannot justify the FCC's new wireless-vs.-VoIP asymmetry.

As for "access to numbers" and "compliance with 911 obligations," *Order* ¶ 970, wireless carriers do typically address those matters themselves, whereas VoIP providers typically outsource them to their CLEC partners, but that fact has no conceivable relevance to access charges.[8] The disputed new charges that the FCC has entitled a VoIP-partnering CLEC to impose on interconnecting long-distance carriers are not charges for "access to numbers" or "compliance with 911 obligations," which are functions performed by the CLEC. Instead, as the FCC acknowledges, the disputed access charges are assessed for the unrelated functions that the *VoIP provider* rather than the CLEC performs—functions that the FCC deems equivalent to the local end-office switching performed by a wireline incumbent LEC such as CenturyLink. *Id.* The question remains: why does it make sense to let a CLEC unilaterally impose *those* charges on interconnecting long-distance companies if it is partnering with a VoIP provider but not if it is partnering with a wireless carrier? The *Order* does not explain.

The FCC separately asserted that, by entitling VoIP-serving CLECs "to charge the same intercarrier compensation as incumbent LECs," it was creating "a symmetrical approach" as between cable VoIP providers and incumbent LECs

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[8] "Access to numbers" refers to a carrier's acquisition of ten-digit telephone numbers from the FCC's administrative delegate for assignment to the carrier's customers. "Compliance with 911 obligations" refers to a carrier's deployment of the systems responsible for routing 911 calls to the appropriate local public safety authorities. Wireless providers typically incur the costs of these functions directly, whereas VoIP providers incur them only indirectly (through their CLEC partners). It is thus, if anything, ironic that the FCC would cite these functions as a rationale for making wireless providers *worse* off than VoIP providers for cost-recovery purposes.

such as CenturyLink.[9] But the FCC never explained why its preference for this purported "symmetr[y]" justified the creation of a new, competitively biased *asymmetry* between calls to cable VoIP subscribers and calls to *wireless* subscribers. If the FCC believed that its solicitude for cable VoIP providers warranted sacrificing the interests of wireless carriers, it had an obligation to provide an explicit, reasoned explanation for that policy choice, demonstrating that it "has faced up to the meaning of its choice." *Competitive Enter. Inst.*, 956 F.2d at 327. Again, the FCC provided no such explanation.

In any event, no reasoned explanation would be available because the FCC could have achieved its purported cable-ILEC "symmetry" without creating a new cable-wireless asymmetry. AT&T had urged the FCC to keep calls to cellphones on the same footing as calls to cable VoIP subscribers during the multi-year transition to bill-and-keep—whether that meant preserving, or changing, the

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[9] *Order* ¶ 970. This goal of "symmetr[y]" between ILECs and cable providers is at best perplexing because those two categories of providers are not similarly situated in the first place. *See AT&T Letter* at 5 (JA__). Like wireless carriers, ILECs are regulated carriers under Title II of the Communications Act. In contrast, cable VoIP providers "take the position that they are offering unregulated services" outside the scope of Title II. *Order* ¶ 970. The FCC identified no reasoned basis for creating formal "symmetry" in Title II regulatory *benefits* (access charges) between ILECs, which accept Title II regulatory obligations, and cable VoIP providers, which reject those obligations. In any event, it is indefensible to confer *greater* Title II benefits on those Title II-abjuring cable VoIP providers (via their LEC partners) than on Title II-bound wireless providers (and their LEC partners).

access-charge rules for both classes of calls in tandem. *See AT&T Letter* at 2, 4-5 (JA__, __-__). The FCC identified no coherent rationale for treating wireless-bound calls *worse* than VoIP-bound calls during this lengthy transition.

In short, the FCC provided no "satisfactory explanation" for its rule change, and that portion of the *Order* is "arbitrary and capricious under the APA." *Sorenson*, 567 F.3d at 1220-1221. This Court should thus remand for further proceedings. *See id.* at 1222.

CONCLUSION

The *Order* should be remanded in the single respect addressed above.

Respectfully submitted,

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October 23, 2012

REGULATORY ADDENDUM

47 C.F.R. § 61.26: Tariffing of competitive interstate switched exchange access services.

* * *

(f) If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may, to the extent permitted by § 51.913(b) of this chapter, assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.

* * *

CERTIFICATE OF COMPLIANCE AND ANTI-VIRUS SCAN

1. This filing complies with the type-volume limitation of the Amended First Briefing Order because, according to the word-count function in Microsoft Word 2003, it contains 5,050 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(a)(7)(B)(iii). If the words in the diagrams were included, the total would be 5,154 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Office Word 2003 word processing program in 14 point Times New Roman font.

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/s/ Daniel T. Deacon
Daniel T. Deacon

October 23, 2012

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I hereby certify that on October 23, 2012 I caused the foregoing Uncited AT&T Principal Brief to be filed by delivering a copy to the Court via e-mail at FCC_briefs_only@ca10.uscourts.gov. I further certify that the foregoing documents will be furnished by the Court through (ECF) electronic service to all parties in this case through a registered CM/ECF user. This document will be available for viewing and downloading on the CM/ECF system.

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October 23, 2012