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 REPLY BRIEF

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GLOSSARY

AT&T Letter	Letter from Robert Quinn, Jr. (AT&T) to Marlene Dortch (FCC), CC Docket No. 01-92 *et al.* (filed Oct. 21, 2011) (JA __-__)
CLEC	Competitive Local Exchange Carrier
ILEC	Incumbent Local Exchange Carrier
LEC	Local Exchange Carrier
Order	Report & Order, *Connect America Fund et al.*, 26 FCC Rcd 17663 (2011)
VoIP	Voice over Internet Protocol

SUMMARY OF ARGUMENT

Agatha Christie once noted that, to perform a magic trick, "[y]ou've got to make people look at the wrong thing and in the wrong place—Misdirection, they call it." THE MOVING FINGER 166 (1942). The FCC and its intervenors have followed that advice, focusing on FCC decisions that AT&T does not challenge and distracting attention from the decision that AT&T does challenge. For example, AT&T agrees that cable telephony providers may choose to operate as regulated common carriers and may file access-charge tariffs if they do. But this appeal concerns only those cable VoIP providers "that take the position that they are offering unregulated services." *Order* ¶970. And *those* providers, just like wireless providers, "are not carriers that can tariff intercarrier compensation charges." *Id.* AT&T also agrees that a cable provider in this latter category may partner with a CLEC and that the CLEC may tariff access charges for the functions *it performs*. This appeal, however, challenges the FCC's new rule that the CLEC may extract access charges not only for those functions, but also for the functions that its *unregulated cable VoIP partner* performs.

That new rule is a sharp break from precedent, and the FCC's contrary suggestion (Br. 14) contradicts the *Order* itself. The *Order* confirms that CLECs serving non-tariff-eligible entities like cable VoIP providers were previously allowed to collect from their access-charge tariffs only "to the extent that they

[we]re providing the functions at issue." *Order* ¶970; *accord id.* n.2020. Any CLEC that sought to collect from its tariff for the functions performed by some other provider—including a non-tariff-eligible VoIP provider—was thus violating the law.

In any event, whether or not the FCC was reversing course, it was indisputably creating law, and it thus faced a basic APA obligation to address AT&T's core objections. It violated that obligation. For example, the FCC does not deny that the APA required it to consider AT&T's competitive concerns about the new policy, and it candidly acknowledges that it "made no specific reference" to those concerns. Br. 18. The case should thus be remanded. AT&T is *not* asking this Court to substitute its policy judgment for the FCC's. The Court need only hold the FCC to its basic APA obligation to consider objections, face up to trade-offs, and provide a reasoned explanation for whatever decision it reaches.

ARGUMENT

I. THE FCC AND ITS INTERVENORS MISSTATE AT&T'S CHALLENGE

Although the FCC and its intervenors suggest otherwise, several key propositions are not in dispute. First, AT&T agrees that cable providers may collect access charges for all the work they perform if they offer telephony services as common carriers and submit to regulation. This case is not about those cable providers. Instead, it is about the cable providers that choose to avoid the LEC

designation by offering VoIP as an unregulated information service. These non-LEC providers want it both ways: they wish to avoid the *burdens* of common-carrier status (such as retail rate oversight) but still enjoy the *benefits* of common-carrier status (tariffed access charges).

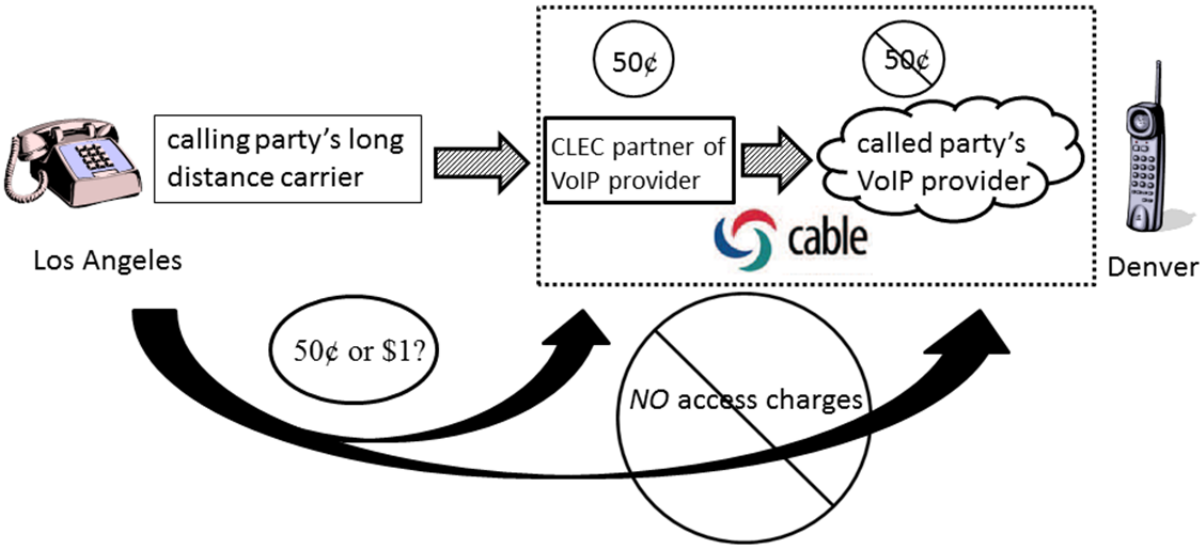
Second, there is no dispute that "retail VoIP providers that take the position that they are offering unregulated services … are not carriers that can tariff intercarrier compensation charges." *Order* ¶970. Intervenors assert (Br. 6) that a few retail cable operators have tariffed access charges. But that is only because *those* cable providers operate as LECs and have submitted to common-carrier regulation. The only cable operators at issue here, however, are the non-LEC cable providers "that take the position that they are offering unregulated services," and the *Order* reaffirms that they remain categorically disqualified from tariffing access charges. *Order* ¶970. In that respect, they are exactly like wireless carriers, not "differently situated" from them (Intervenors' Br. 9).

Third, AT&T agrees that these non-LEC cable providers may partner with CLECs for interconnection purposes and that those CLEC middlemen (often cable affiliates) may tariff access charges for the functions that *they perform*. The FCC's intervenors criticize AT&T for supposedly "assert[ing] that the *Order* gave such LECs the right to tariff 'for the first time.'" Br. 3-4. This is nonsense. As we made clear in our opening brief (at 10-11), everyone acknowledges 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 partner with wireless carriers." As discussed next, the question is not *whether* such a CLEC may collect tariffed access charges, but for *what functions*.

II. THE FCC'S DESCRIPTION OF THE PRE-*ORDER* LEGAL LANDSCAPE IS BOTH INCONSISTENT WITH THE *ORDER* AND IRRELEVANT

In the diagram below, the cable-affiliated CLEC performs functions (intermediate switching and transport) costing 50 cents and its non-LEC VoIP partner performs functions (final routing to the called party) costing another 50 cents. The basic issue is this: May the CLEC collect a full $1 in tariffed access charges, even though it is collecting much of that amount for work it does not perform and on behalf of an entity that cannot file its own access-charge tariffs?



Until the *Order*, the answer was no. Whether it was serving a wireless carrier or a VoIP provider (or any other entity), a CLEC was entitled to collect only the 50 cents in tariffed access charges for the functions it performed. The *Order* confirms this point: "we recognize 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). Similarly, the *Order* reaffirms that "our long-standing policy" was that LECs (ILECs and CLECs) "should charge *only* for those services that *they* provide." *Id.* ¶970 n.2020 (emphasis added). The Commission nonetheless decided to reverse course and "adopt a different approach" (*id.* ¶970) by allowing a cable-oriented CLEC to charge not only the 50 cents it had been entitled to charge before, but an additional 50 cents that it had been prohibited from charging.

The FCC asserts that a few cable-oriented CLECs may have previously billed not only for their own functions, but also for functions performed by non-tariff-eligible VoIP partners.[1] If so, those CLECs were acting unlawfully: they

[1] The *Order* itself does not contain this finding, and the passages the FCC cites in its brief (at 10 n.8) do not squarely support it. For their part, the intervenors are instructively coy. They assert that CLECs "partnering with retail VoIP providers had filed tariffs" and "routinely collected access charges." Br. 3. But no one disputes that they had every right to do *that*. The question is whether such CLECs "collected access charges" for functions they did not perform (because the retail VoIP providers performed them), and the intervenors' brief

were sending bills to unwitting long-distance carriers for tariffed functions that these LECs did not perform and had no right to charge for. A scofflaw does not alter the law by breaking it. And a history of unlawful conduct does not excuse an agency from meeting its APA obligation to provide a reasoned explanation if it changes the law to legalize that conduct prospectively. Similarly, the FCC obfuscates matters when it claims (Br. 11) that "the law governing intercarrier compensation for CLEC-VoIP partnerships was unsettled before the FCC issued the *Order*." As explained in our opening brief, there were indeed "unsettled" VoIP compensation issues before the *Order*, but they were all distinct from the issue presented here. *See* AT&T Br. 11 n.7; *see also* n.4, *infra*. The FCC ignores that point.

In any event, it is ultimately irrelevant whether the law was "unsettled." Whether the FCC was changing the rules or merely imposing rules where none existed before, it was indisputably creating law and was thus subject to the APA's requirement of reasoned decisionmaking. *See, e.g., Local Joint Exec. Bd. v. NLRB*, 309 F.3d 578, 585 (9th Cir. 2002). The APA thus required the Commission to

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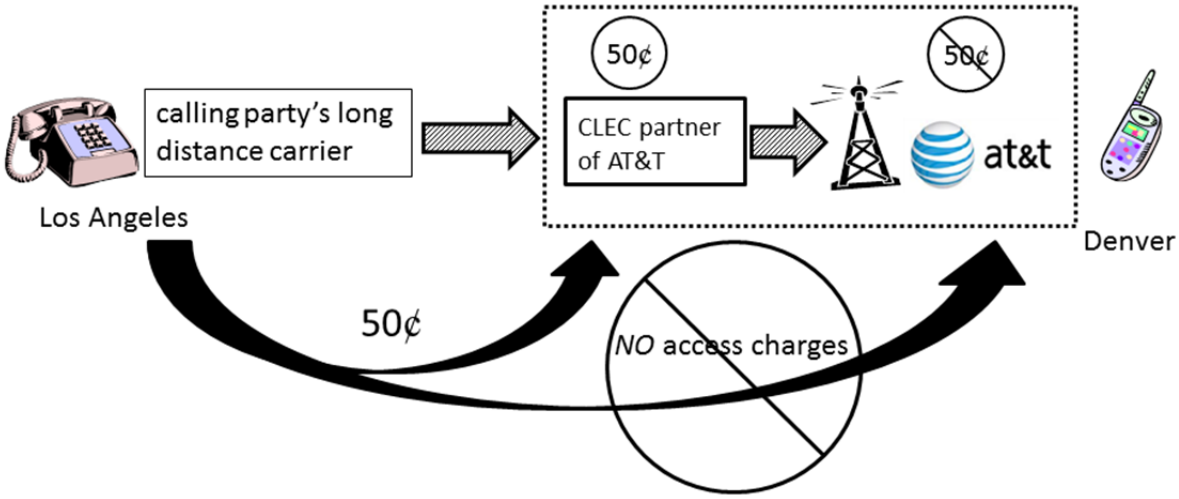
never clearly states that any CLEC did so. And for good reason: if any CLECs were engaged in such conduct, it was unlawful.

Intervenors also note (Br. 4) that the FCC has long allowed a LEC to bill "'on behalf of itself and another *carrier* for jointly provided access services.'" (Emphasis added.) That is irrelevant: each provider in that scenario is a LEC entitled to file tariffs, and one carrier is merely acting as a collection agent for the other's lawful, separately tariffed charges.

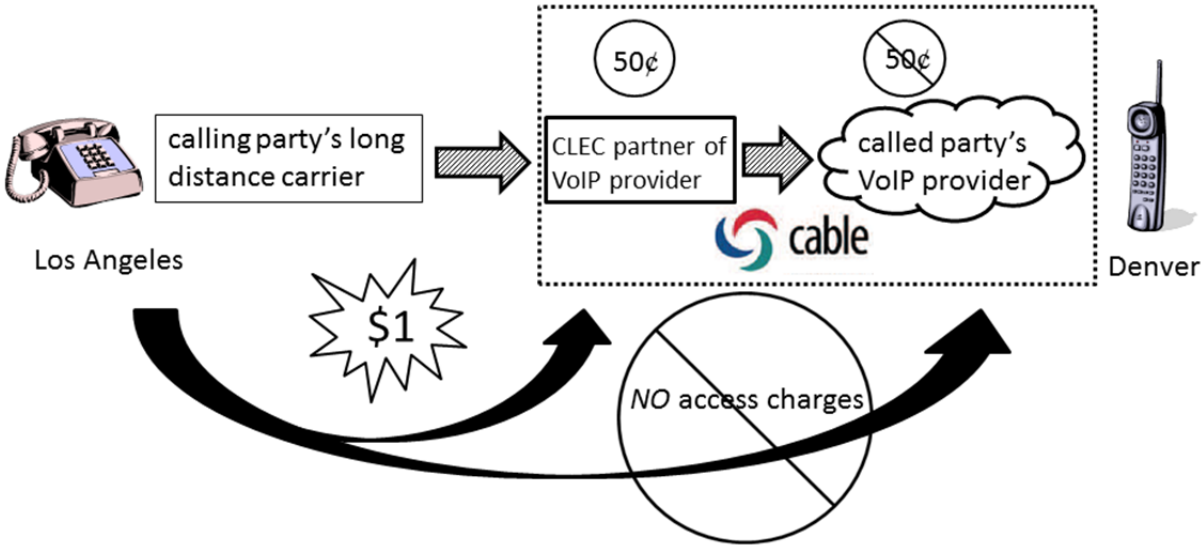
grapple with AT&T's objections and articulate a reasoned justification for its outcome. As discussed before and below, it did not.

III. THE *ORDER* VIOLATES REASONED-DECISIONMAKING REQUIREMENTS

The *Order* maintained the prior rule that wireless-oriented CLECs may collect access charges only for the functions that they perform:



But the *Order* exempted cable-oriented CLECs from that restriction and entitled *them* to collect for the functions performed by their tariff-ineligible VoIP partners:



AT&T opposed this regulatory asymmetry. It argued 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)." *AT&T Letter* at 2 (JA__). And AT&T emphasized that this "arbitrary distinction" would constitute "competition-distorting 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 FCC does not dispute that the APA required it to address this competitive concern on the merits, weigh it against its other policy objectives, and articulate a reasoned explanation for striking whatever balance it chose. *See* AT&T Br. 16-17 (discussing APA case law).[2] And the FCC forthrightly concedes that the *Order* "made no specific reference to AT&T's claim of 'competitive

[2] Intervenors implausibly contend (Br. 13 n.10) that "it is questionable" whether AT&T pressed this objection sufficiently to satisfy exhaustion requirements. But the FCC raises no exhaustion defense here, and its "failure to join [an intervenor's exhaustion claim] undermines [that] claim, since the only litigant with an institutional interest in such an exhaustion requirement has not argued for it." *US Airways, Inc. v. National Mediation Bd.*, 177 F.3d 985, 995 (D.C. Cir. 1999). Also, while the intervenors fault AT&T for objecting "only at the last minute" (Br. 13), AT&T had little choice; it was responding to a belatedly-filed request for the new rule the FCC ultimately adopted. *See AT&T Letter* at 1 (JA__).

bias.'" Br. 18. The FCC thus resorts to arguing that a court should "'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Id.* But there is no path to discern here. The *Order* gives no indication that the FCC even considered AT&T's competitive concerns. That alone requires a remand. *See* AT&T Br. 16-18.[3]

The FCC notes that it did identify some "differences between CLEC-VoIP partnerships and CLEC-wireless partnerships." Br. 18. Specifically, unlike most wireless telephony providers today, cable providers have a choice: they can either (1) "voluntarily submit to common carrier regulation" and "obtain state certification as LECs," or (2) operate as unregulated "non-LEC VoIP provider[s]" and "partner[] with a CLEC." Br. 4. The FCC stresses that cable operators *that voluntarily choose this second option* "must use a 'LEC middleman' to interconnect" with the telephone system, whereas "wireless carriers need not" do so because they all operate as regulated common carriers today and may thus invoke statutory interconnection rights themselves. Br. 17 (emphasis omitted).

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[3] Intervenors cite an irrelevant passage of the *Order* in erroneously suggesting that the FCC addressed AT&T's competitive concerns. Br. 14 (citing *Order* ¶952). In that passage, the FCC addressed a separate question: whether and when, on the *regulated PSTN end* of a VoIP-PSTN call, a conventional ILEC may recover intrastate access charges, interstate access charges, or reciprocal compensation. In resolving that question, the FCC did not analyze AT&T's competitive objections here; to the contrary, it *adopted AT&T's proposal* on that separate question. *Order* ¶941 (adopting ABC Coalition proposal). The FCC is thus right that the *Order* "made no specific reference to AT&T's claim of 'competitive bias.'" Br. 18.

The FCC does not explain, however, how this "difference" could plausibly support the Commission's decision to disadvantage CLEC-wireless partnerships vis-à-vis CLEC-VoIP partnerships. First, under the FCC's own logic, it is never the case that a cable operator "*must* use a 'LEC middleman' to interconnect" with the telephone system. *Id.* According to the FCC, cable operators remain free to do what wireless carriers all do: submit to regulation as common carriers and demand interconnection in their own right. The FCC articulates no discernible reason why cable providers that elect to avoid common-carrier regulation should paradoxically enjoy *greater regulatory benefits* than their wireless competitors that remain subject to common-carrier regulation.

In any event, even if the FCC had identified some coherent rationale for granting greater regulatory benefits to providers that opt out of regulation, the APA still would have required the FCC to explain why that rationale outweighed the competitive concerns that AT&T raised below (and that the FCC ignored). The FCC receives substantial deference for whatever reasoned policy decision it reaches after balancing the relevant interests. But a precondition for such deference is a reasoned explanation for an agency's choice. Here, there was no explanation, and thus no reasonably articulated judgment call to which a reviewing court may defer. *See* AT&T Br. 16-17 (citing APA cases).

There is likewise no merit to the FCC's invocation of "investment in and deployment of IP networks" (Br. 18-19) as a rationale. To begin with, the *Order* itself makes no clear finding that allowing the CLEC partners of VoIP providers to collect increased access charges will actually promote IP investment. Instead, the cited passage finds that the FCC's "comprehensive reforms" as a whole will promote broadband investment, and the FCC tacked on the rule challenged here mainly to benefit established cable companies "that *already have made* these investments." *Order* ¶968 (emphasis added). More important, even if the FCC had identified some reason to believe that the rule might marginally increase incentives for broadband investment, the APA still would have required the FCC to analyze whether that hoped-for marginal increase outweighs the competitive concerns that AT&T raised below. Instead, the FCC ignored those competitive concerns.

Finally, the FCC argues (Br. 22) that if it had avoided this competitive asymmetry between VoIP and wireless providers, "it would have created an asymmetry between VoIP providers and *wireline* carriers[.]" This is untenable. For starters, the FCC would not have "created" any asymmetry in that scenario. It simply would have preserved the legal status quo—all LECs may collect access charges only for the functions they perform—en route to a unified transition to bill-and-keep for all providers. In any event, the FCC could have avoided any

asymmetry altogether simply by extending the same access-charge benefits to CLEC-wireless partnerships as to CLEC-VoIP partnerships. *See* AT&T Br. 22-23. Most important, the FCC cannot reasonably choose any of these outcomes, affecting hundreds of millions of dollars in revenues, without analyzing the competitive consequences of its actions. The case should be remanded so that the FCC may now perform the competitive analysis that the *Order* omits.

CONCLUSION

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

Respectfully submitted.

s/ Jonathan E. Nuechterlein

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June 12, 2013

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/s/ Daniel T. Deacon

Daniel T. Deacon

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June 12, 2013