# United States Court of Appeals
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Argued May 4, 2021 Decided July 9, 2021

No. 19-1233

GREAT LAKES COMMUNICATION CORP., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

AT&T CORP., ET AL.,
INTERVENORS

Consolidated with 19-1244

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

*Lauren J. Coppola* argued the cause for petitioners. With her on the joint briefs were *G. David Carter*, *Dwayne D. Sam*, *Anthony T. Caso*, *John C. Eastman*, *Henry Goldberg*, and *W. Kenneth Ferree. Robert Callahan* entered an appearance.

*James M. Carr*, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *Michael F. Murray*, Deputy Assistant Attorney General, U.S. Department of Justice, *Robert B. Nicholson* and *Andrew N. Delaney*, Attorneys, *Thomas M. Johnson, Jr.*, General Counsel, Federal Communications Commission, *Ashley S. Boizelle*, Deputy General Counsel, and *Richard K. Welch*, Deputy Associate General Counsel. *Jacob M. Lewis*, Associate General Counsel, and *Matthew J. Dunne*, Counsel, Federal Communications Commission, entered an appearance.

*Timothy J. Simeone*, *Deepika H. Ravi*, *Michael J. Hunseder*, *James P. Young*, *Christopher M. Heimann,* and *David L. Lawson* were on the joint brief of intervenors AT&T Corp., et al. in support of respondents. *C. Frederick Beckner III*, *Jonathan E. Nuechterlein*, and *Christopher J. Wright* entered appearances.

Before: WILKINS and RAO, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SILBERMAN.

SILBERMAN, *Senior Circuit Judge*: Petitioners challenge an FCC rule that discourages competitive carriers from stimulating access fees that long-distance carriers must pay when routing calls to a local carrier. We deny the petitions because the Commission has ample statutory authority and its rule is reasonable.

**I**

As we previously described, so-called "competitive carriers" compete with legacy "incumbent carriers," who are descendants of AT&T's broken-up monopoly. *See generally Comptel v. FCC*, 978 F.3d 1325 (D.C. Cir. 2020). Typically, the latter own the local phone network, while the former lease or purchase at wholesale the use of the incumbent's network to deliver services.

The smaller of the incumbent carriers—operating largely in rural areas—are known as rate-of-return carriers because their prices are set by a regulatory formula based on their costs plus a profit percentage. Competitive carriers benchmark their rates to an incumbent operating in the same area, whose rates have already been approved. *See Connect America Fund*, Notice of Proposed Rulemaking, 26 FCC Rcd. 4569 ¶ 36 (2011). Since competitive carriers use the networks of others, they have greater geographic flexibility. And this flexibility allows them to act quickly to exploit profitable market opportunities and engage in regulatory arbitrage.

In a previous case, we described the competitive carriers' targeting of a market niche servicing large business and government entities. *Comptel,* 978 F.3d at 1331. In this case, the FCC focuses on the competitive carriers' pursuit of another market segment—toll conference centers. They host telephone conferences where multiple people call in to a meeting.

Servicing toll conference centers has been a particularly lucrative business for competitive carriers. Under existing (and congressionally-sanctioned) regulations, long-distance carriers must pay an "access fee" to local carriers that deliver calls to their recipients. The access fee covers the responsibility of tandem switching and transportation to the local carrier's end office. The more people who call into the conference center, the more profit the carrier generates, because fees exceed the marginal cost to the carrier. This provides a competitive carrier an incentive to operate in areas where the incumbents have high per-minute interstate access rates, and then to inflate the amount of traffic on its system.

Calls to rural areas are more expensive (and profitable) for technological and regulatory reasons. So competitive carriers will often route calls through rural areas and encourage toll conference centers to operate there. Indeed, some carriers operating in rural areas have had explicit agreements with call centers to share revenue from access charges—thereby stimulating conference callers to offer artificially low rates (even totally free calls).

As a result of these incentives, some sparsely populated rural areas receive a disproportionate and overwhelming number of calls. The Commission credited AT&T's observation, for instance, that twice as many calling minutes were routed in a month to Redfield, South Dakota (population 2,300) and one end office as were routed to Verizon's facilities in New York City (population 8,500,000) and 90 end offices. Similarly, Sprint explained that Iowa, with 1% of the U.S. population, accounts for 48% of Sprint's access fee payments. In addition to higher fees, the Commission notes that access stimulation may result in overloaded networks, call blocking, and dropped calls. *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 34 FCC Rcd. 9035 ¶¶ 15, 95, 111 (2019) ("*Order*").

The long-distance carriers complained to the FCC. Under existing rules they could not charge their customers separately for such calls; long-distance rates for customers are calculated as flat rates without regard to the length of call or geographic distance. *See* 47 U.S.C. § 254(g); *Connect America Fund*, Report and Order, 26 FCC Rcd. 17663 ¶ 663 ("*2011 Order*"). The interexchange carriers claimed, therefore, that the costs generated by the few who were making these calls to conference centers were borne by all customers.

In a 2011 rule, the FCC agreed with the long-distance carriers' complaints. *2011 Order* ¶ 675. The FCC designated carriers who exploited this regulatory loophole as "access stimulators." That designation included both competitive carriers and rate-of-return carriers who (1) had a revenue sharing agreement with a third-party based on access charges and (2) had three times as many long-distance calls coming in ("terminating") as going out ("originating").[1] If designated an access stimulator, regulators would reduce the access fees that a carrier was permitted to charge. *2011 Order* ¶¶ 684–86, 688–90.[2]

But the 2011 rule was not completely successful. Some competitive carriers continued to stimulate access fees notwithstanding the sanction. Others successfully circumvented the ban on direct revenue sharing with the conference call centers by using third parties. *See Order* ¶ 44; *AT&T Corp. v. FCC*, 970 F.3d 344, 351–53 (D.C. Cir. 2020).

So, in 2018, the Commission revisited the problem. It issued a Notice of Proposed Rulemaking that, importantly, inquired "whether, and if so how, to revise the current definition of access stimulation to more accurately and

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[1] Even if a carrier didn't meet the 3:1 ratio, it could still be an access stimulator if it had doubled either its interstate originating or terminating switched access minutes in a month, year over year.

[2] Certain carriers challenged the 2011 rule in the Tenth Circuit, which sided with the Commission. *See generally In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

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