IN THE SUPREME COURT OF THE UNITED STATES

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TALK AMERICA, INC., :

Petitioner : No. 10-313

v. :

MICHIGAN BELL TELEPHONE COMPANY, :

DBA AT&T MICHIGAN :

- - - - - - - - - - - - - - - - - - - x

and

- - - - - - - - - - - - - - - - - - - x

ORJIAKOR ISIOGU, ET AL., :

Petitioners : No. 10-329

v. :

MICHIGAN BELL TELEPHONE COMPANY, :

DBA AT&T MICHIGAN :

- - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Wednesday, March 30, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

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SCOTT H. ANGSTREICH, ESQ., Washington, D.C.; on behalf of Respondents.

C O N T E N T S

ORAL ARGUMENT OF	PAGE
JOHN J. BURSCH, ESQ.	
On behalf of the Petitioners	4
ORAL ARGUMENT OF	
ERIC D. MILLER, ESQ.	
On behalf of the United States, as amicus curiae, supporting the Petitioners	19
ORAL ARGUMENT OF	
SCOTT H. ANGSTREICH, ESQ.	
On behalf of the Respondents	29
REBUTTAL ARGUMENT OF	
JOHN J. BURSCH, ESQ.	
On behalf of the Petitioners	55

P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 10-313, Talk America v. Michigan Bell, and the consolidated case.

Mr. Bursch.

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONERS

MR. BURSCH: Thank you, Mr. Chief Justice, and may it please the Court:

Interconnection is the lifeblood of local phone competition. That is why, in section 251(c)(2) of the Telecommunications Act, Congress guaranteed that competitors would have interconnection at the location and at the method of their choosing and at TELRIC rates irregardless of market impairment. The question in this case is whether that 251(c)(2) obligation encompasses the tens of thousands of existing entrance facilities that even today are interconnecting competitive and incumbent networks. And the answer --

JUSTICE SCALIA: Did you get -- you get (c)(2) at TELRIC rates?

MR. BURSCH: Yes, you do, Your Honor. You get (c)(2) and (c)(3) at TELRIC rates.

And so, the answer to the question presented

is yes, for three reasons: First, because the FCC says so. And, as the expert agency charged with interpreting and implementing the Act, that conclusion is entitled to deference.

Second, the FCC's conclusion is consistent with the plain text of the statute and the implementing regulations.

And, third, the FCC's conclusion is consistent with the policies embodied in the Act, because the practical result of affirming the Sixth Circuit opinion in this case is that a competitive carrier, like Sprint for example, will be forced to either charge its customers more for interconnection or lay tens of thousands of duplicate entrance facility cables, and those are precisely what the Act were designed to prevent.

I'd like to start with the Sixth Circuit opinion -- and, specifically, this is at page 20a of the Talk America cert petition appendix -- because this goes to the heart of AT&T's position and the Sixth Circuit's conclusion with respect to the orange plugs and cords analogy. You'll recall that the Sixth Circuit said this was like a situation where a homeowner had a plug in their garage and a long orange cord extending out to a park, which the court called the entrance facility, and

then the competitive carrier would be that person in the park.

On page 20a of the petition appendix in footnote 9, about halfway down, this is the key flaw in the Sixth Circuit's reasoning: The Sixth Circuit says, "If you, as the homeowner" -- that's the -- I'm sorry, that's the incumbent -- "had said that they may plug into the surge protector, then the big orange extension cord is just an 'entrance facility.' But, if you had said they must plug into the big orange extension cord, then the big orange extension cord becomes the 'interconnection facility' and, consequently, the park goers" -- the competitors -- "may plug into it."

The problem with this is that the Sixth Circuit was wrong in that the incumbent doesn't get to choose where the point of connection is. The statute and the regulations and the FCC make clear it's the competitor that gets to choose. So, if the competitor chooses the end of the extension cord where it connects to the CLEC network in the park, then even the Sixth Circuit agrees with us and the Seventh, Eighth, and Ninth Circuits that the entrance facility is the interconnection facility.

JUSTICE KENNEDY: I have just one small question on that.

MR. BURSCH: Yes.

JUSTICE KENNEDY: Suppose that there are two competitors and each of them wants to connect, but each of them wants to connect at a different point and in a different way. Must the incumbent accommodate both if they're technically feasible?

MR. BURSCH: Justice Kennedy, the answer is yes. The statute gives the competitive carrier the opportunity to choose the point and the method, all at TELRIC rates.

JUSTICE GINSBURG: Doesn't it say something about feasible? It -- it doesn't -- it doesn't give free choice entirely. It says -- what are the words? That the -- the interconnection doesn't have to be put just anyplace if it's not feasible or it's undue expense or something to that effect.

MR. BURSCH: Justice Ginsburg, the statute and the regulations make clear that it must be technically feasible, but there is an almost irrebuttable presumption that when there are already facilities in place performing that function, that is technically feasible.

JUSTICE SCALIA: But you -- you want the incumbent here to -- to build the -- the orange cord and extend it to wherever you have your switching equipment.

And what they say is, no, you -- you bring your switching equipment here; we'll -- we'll allow you to connect at, you know, the end of our facilities; but, by God, you -- you make -- you make your own connection to -- to the switches.

Now -- now, moreover, you're -- you're making them -- you'll pay them for the orange cord, but only at TELRIC rates, which are not realistic. Now, why -- why are they wrong and you're right, especially when you have legislation, the purpose of which was to encourage the independent building of new facilities? I mean, it's clear that the Act wanted these new entrants where -- where possible to build new facilities, and not simply to glom on to the extant facilities of the incumbents.

MR. BURSCH: Three responses to that argument, Your Honor. First, this case is about existing facilities, not about facilities to be built, although there's a lot of talk about that. This isn't a head-on challenge to the statute or the regulations. The procedural posture is that this was AT&T trying to get out of arbitration agreements that it had for existing entrance facilities. And so, that's the posture of our case.

JUSTICE SCALIA: Well, but the logic of your

case, as you described it, would also require AT&T to build out the orange cord.

MR. BURSCH: Right. And -- and two additional points, Your Honor, on that. First, they say this is a large obligation because we're talking about miles and miles. That is not the position that AT&T took with the FCC when they were commenting on the TRRO. At page 16a of the Michigan blue brief, in footnote 397 of the TRRO, the FCC acknowledges AT&T's statement that entrance facilities involve very short distances. In addition, we have the FCC's regulation and the Local Competition Order, paragraph 553 --

JUSTICE SCALIA: Excuse me, excuse me.

MR. BURSCH: Yes.

JUSTICE SCALIA: Extant entrance facilities I assume they were referring to.

MR. BURSCH: Yes. I believe that's correct, yes.

JUSTICE SCALIA: Okay. Well --

MR. BURSCH: They're very short distances.

JUSTICE SCALIA: Right. But if you ask for a longer distance, they would presumably have to build it.

MR. BURSCH: Well, not necessarily --

JUSTICE SCALIA: And charge you TELRIC

rates.

MR. BURSCH: Right, because the FCC has promulgated in -- in 521, the meet-point obligation, which is another way that you can have interconnection. And that demonstrates two things: First, that sometimes AT&T as the incumbent is required to build out facilities, that it's not just a passive obligation.

But, in addition, when they're talking about meet point, they say that it's up to State commissions to decide the appropriate and reasonable distance.

So, even if we were presented with the case -- not this case, but a different case -- where you're talking about what's the appropriate length of the facilities, the FCC has already acknowledged there could be some reasonable limits on that.

And the most important fundamental point, the fourth point on this, is that Congress already in (c)(2) said you're going to have interconnection without regard to market impairment, and so we're not going to look at the availability of other entrance facilities in the market. If a competitor asks to have this location and this method and it's technically feasible, they do get the TELRIC rates.

And the competitive carriers would take issue with the presumption that TELRIC rates are -- are

unfair. You know, the regulations do contemplate that they're going to recover not only their cost but a reasonable profit. And we can disagree about the congressional wisdom of requiring rates like that, but in the Verizon case, this Court definitively put to bed the question of the reasonableness of the TELRIC rates.

JUSTICE BREYER: Where would I read this? As I read the statute, the statute says the cheap system here is where they provide -- they have a duty to provide the incumbent interconnection, okay? That requires some physical stuff.

MR. BURSCH: Yes.

JUSTICE BREYER: Okay. And they have to -- they -- you have to -- you're not charged a lot for that; there's a limit on what they can charge you for the interconnection.

MR. BURSCH: Correct.

JUSTICE BREYER: Now, somebody is going to have to decide whether if Pacific Tel and Tel is being tried to forced to connect with Maine, you know, they have to pay for a wire across country to get the interconnection or not. That seems unreasonable. Across the street, maybe they do.

My candidate would normally be the FCC or some regulator decides that kind of thing, and it's up

to them to say whether this is or is not what's needed for interconnection. That would be an intuitive account I would have, without having read the statute in depth.

So, now what do I read to find out how this works? What is it that distinguishes something that is ridiculous, like my California example, from something that makes a lot of sense, like they're next door and have to make 50 feet of wire.

MR. BURSCH: Justice Breyer, if you look at paragraph 553 of the Local Competition Order, which appears at page 27a of the Michigan blue brief --

JUSTICE BREYER: Michigan blue --

MR. BURSCH: At least that's where it begins. If you flip over to -- to page 28a, this is the second page of the paragraph.

JUSTICE BREYER: Where -- where -- 28a, okay.

MR. BURSCH: Very good.

About halfway down the -- that paragraph there, it says: "Regarding the distance from an incumbent LEC's premises that an incumbent should be required to build out facilities for meet-point arrangements" -- so, again, this is in the meet-point context -- "we believe that the parties and State commissions are in a better position than the commission

to determine the appropriate distance that would constitute the required reasonable accommodation for interconnection." So, again --

JUSTICE BREYER: Okay. So, it's up to the State commission.

MR. BURSCH: Exactly.

JUSTICE BREYER: This is the FCC speaking?

MR. BURSCH: The FCC is speaking --

JUSTICE BREYER: All right. And the State commission says -- they say it's up to the State commission. And the State commission here said?

MR. BURSCH: Well, here, the State commission didn't say anything, because we're talking about existing facilities. There's no one requesting a new entrance facility to be built, for example, from Lansing to Detroit. That's not this case. This case is about the existing facilities.

JUSTICE SCALIA: Mr. Bursch, the -- the key to your case is -- is that an entrance facility is interconnection, right?

MR. BURSCH: Correct.

JUSTICE SCALIA: You have to equate those two -- those two terms.

MR. BURSCH: I do.

JUSTICE SCALIA: What do you rely upon to

equate them? Because the -- as I read the regulations, they -- they use them as separate terms.

MR. BURSCH: Regulation 51.5 defines "interconnection" as the mutual -- or, I'm sorry -- as the linking of two networks for the mutual exchange of traffic. There is no dispute that an entrance facility physically links a competitive network with an incumbent network; thus, when that entrance facility is used for the mutual exchange of traffic, it is providing interconnection. And that's exactly what the FCC has concluded.

JUSTICE SCALIA: Doesn't -- doesn't the interconnection -- doesn't it have to be part of the internal system of the incumbent carrier?

MR. BURSCH: It has to be part of their network. But in the TRRO, the FCC made clear repeatedly that entrance facilities constructed by incumbents are part of their network. And so, there's really no dispute that it can be part of the network. And so --

JUSTICE KENNEDY: You say that this is a link, and your -- the opposition says that it's a -- that it's transport. Is that correct?

MR. BURSCH: It is transport. By definition, interconnection has to include transport because it involves the mutual exchange of traffic from

one to another.

JUSTICE KENNEDY: But the -- but the reg says interconnection does not include transport.

MR. BURSCH: Well, we address that point at length in our reply brief, because AT&T advances that argument, and it's really a fundamental misconception or misunderstanding of the regulation. 51.5 --

JUSTICE KENNEDY: I have -- I've got it in front of me. It says, "This term does not include transport." But you -- you say it does?

MR. BURSCH: Yes. Well, the entrance facilities do include transport. All interconnection facilities --

JUSTICE KENNEDY: No, I'm talking about --

MR. BURSCH: Yes.

JUSTICE KENNEDY: -- interconnection.

MR. BURSCH: Right. What 51.5 -- I assume that's what you're looking at.

JUSTICE KENNEDY: Yes.

MR. BURSCH: That -- that goes to a term of art or a phrase of art, "transport and termination of traffic." And as the FCC made clear in its regulation 51.701, which is at page 35a of the red brief, what they're really distinguishing there are the two types of charges. You have 251(c)(2) interconnection charges and

you have 251(b)(5) transport and termination of traffic charges. And those are two separate concepts.

The interconnection charge runs from the competitive network to the incumbent network. The transport and termination of traffic charge runs from the point of interconnection to the incumbent's end customer, and that's very clear. The Ninth Circuit specifically acknowledged that point in note 16 of the Pacific Bell case. But common sense tells you that has to be right because under AT&T's view, the way they interpret 51.5, there would be no interconnection obligation because there's always going to be transport, a mutual exchange of traffic when interconnection is involved.

CHIEF JUSTICE ROBERTS: Is that right or --

JUSTICE BREYER: Do you read --

CHIEF JUSTICE ROBERTS: Is there a mutual exchange of traffic when you're talking about backhauling?

MR. BURSCH: No, there is not, and we don't take that position. The mutual exchange is when a competitive customer talks to an incumbent customer or vice versa. Everything else we can call backhauling, and that's not what's at issue when we're talking about 251(c)(2).

JUSTICE BREYER: Can I go back to my question? Because I haven't gotten an answer.

MR. BURSCH: Yes.

JUSTICE BREYER: You see, I would think -- you said, well, this is an existing facility.

MR. BURSCH: Yes.

JUSTICE BREYER: But my intuition would be that makes no difference whatsoever. You could have some kind of mechanism that connects two companies. Now, half of it is a simple wire and half of it is bells and whistles. And so, we have to decide which part is the part that's necessary for the interconnection and which part is some kind of -- well, I don't know, extra bells and whistles, and therefore, since it's not an impairment kind of problem, they have to pay full price for it.

That, again, seems like the kind of job that Congress would leave up to a commission, but I guess I want you to tell me: Who's to decide that kind of thing, and how do we decide it?

MR. BURSCH: Are you talking about the distance, or what the bells and whistles are--

JUSTICE BREYER: I don't know what it is. Often, these things are not distance. Often, a connection is all kinds of complex things, you know?

And some are necessary and some aren't. But I can -- can't you imagine with me the same kind of California problem arising, but it just arises in -- in kind, rather than in distance?

MR. BURSCH: Well, as far as --

JUSTICE BREYER: My -- if I'm so far off base you can't get the question, forget it.

MR. BURSCH: No, not at all, Justice Breyer.

JUSTICE BREYER: I mean, I might not be able to get an answer.

MR. BURSCH: I think it's a very good question. And really --

JUSTICE BREYER: You don't have to think it's that.

MR. BURSCH: I'll take it in two parts. You know, again, with respect to distance, in the meet-point context, the FCC has already delegated in LCO paragraph 553 appropriate and reasonable distances.

With respect to the bells and whistles, it's really not that complicated. You've got a cable. That's your entrance facility, you know, typically a fiberoptic cable. And there's going to be a conduit that it needs to run through. There might be, you know, risers or spacers with little twisty ties or something similar to that, zip cords, that will allow the cable to

be run into a building and up a wall and connect into the appropriate place. But to the extent those are interconnection facilities, those are necessarily part of the 251(c)(2) obligation.

And unless there are any further questions, I'll reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. BURSCH: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Miller.

ORAL ARGUMENT OF ERIC D. MILLER

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

MR. MILLER: Mr. Chief Justice, and may it please the Court:

There are a lot of statements by the FCC at issue in this case, but I'd like to focus on two statements by the commission in its published regulation and orders that, taken together, resolve the question presented here. And the first is the commission's determination in 47 CFR 51.305(e), which appears at page 5a of Michigan's brief, that it is the competitor, not the incumbent, that gets to select the point at which interconnection takes place.

Specifically, that regulation says that if an incumbent wants to deny a request for

interconnection, it has -- at a particular point, it has the burden of proving that interconnection at that point would be technically infeasible. And that undercuts a key premise of the decision below, which was that as long as the incumbent provides interconnection at some technically feasible point that it has selected, then it's discharged its obligation, and if the competitor doesn't like it, that's just too bad. They can build their own facility if they want to interconnect somewhere else. That's --

JUSTICE SOTOMAYOR: Counsel, underlying that question is an issue that I think Justices Ginsburg and Scalia were asking. Technically feasible is different from economically ridiculous or economically burdensome. How does that, "economically burdensome" -- does it get considered by anyone so that -- because one could imagine, as Justice Breyer said, that a competitor could come in and say, now, build me the Taj Mahal as an entrance facility or as an interconnection facility. So, is there anyone controlling for that latter issue?

MR. MILLER: In terms of the definition of "technical feasibility" -- that's a defined term in section 51.5 of the regulations, and it does not include economic considerations.

Nonetheless, as the commission explained

when it adopted those regulations in 1996 at paragraph 209 of the Local Competition Order, competitors have an incentive to ask for an economically efficient means of interconnection because they have to pay for it. I mean, the -- they don't pay as much as AT&T would like -- because they're paying TELRIC rates -- but they do still have to pay for interconnection, so they have incentive to ask for a reasonable method of it.

And what's at issue in this case, to get to the second part of your question, is not --

JUSTICE GINSBURG: That's why it's only technically feasible, because the economic burden is -- is not on the company. It has to provide it at the place if it's technically feasible, but it doesn't pay for it.

MR. MILLER: That -- that's right.

CHIEF JUSTICE ROBERTS: Mr. Miller, you began by saying there were two regulations that disposed of the case. You got one. What's the second?

MR. MILLER: The -- the second is the commission's determination in the Triennial Review Remand Order in response to the D.C. Circuit's remand of its previous order, that entrance facilities are, indeed, part of the incumbent's network because the statutory obligation, of course, is to allow

interconnection at any technically feasible point within the incumbent carrier's network.

JUSTICE BREYER: Where do I find that?

MR. MILLER: That's in paragraph 137 of the Triennial Review Remand Order, which appears at page 10a of Michigan's brief. And in the preceding paragraph, the commission traced the history of its definition of the dedicated transport network elements in the Local Competition Order, its revision of that in the Triennial Review Order, in which it had said that the facilities are not part of the network. The D.C. Circuit then vacated that.

JUSTICE SCALIA: What section are you referring to? On page 10a? Which one is it?

MR. MILLER: Well, I've -- I've just gone back to the previous two pages, but it -- 10a is paragraph 137, where the court says, "In response" -- excuse me -- where the commission says, "In response to the court's remand" -- that's the D.C. Circuit's remand in the USTA case -- "we reinstate the Local Competition Order of dedicated" -- "Order definition of dedicated transport." And that was a definition of a network element that included entrance facilities. So, what the commission was saying there by its reference back to that definition --

JUSTICE SCALIA: You -- you do not need to provide unbundled access under (c)(3) to entrance facilities, right?

MR. MILLER: That -- that's correct, and the court of appeals, I think, perceived a contradiction between saying that this isn't something to which you have to provide unbundled access under (c)(3), but it is something that has to be made available for interconnection under (c)(2).

And there is no contradiction there because these are separate, independent statutory obligations, and what's particularly significant about the difference between the two statutes -- statutes is that (c)(3) has an impairment test. You only have to make available those network elements without which the competitor would be impaired in its provision of service.

(C)(2) does not have an impairment test, and that's because Congress recognized that interconnection is absolutely fundamental to any effective telephone competition.

JUSTICE BREYER: So, what's the definition difference between entrance facility and interconnection facility? How do we know which is which?

MR. MILLER: If you're referring to the --

what the -- in the way the commission used those terms in the --

JUSTICE BREYER: No, no, I'm not. I want to know what's the difference. Tell me in English what the difference is.

MR. MILLER: An entrance facility --

JUSTICE BREYER: No, no. I mean, how do we know which is which? We see some big lines and stuff in it; how do we know which is which?

MR. MILLER: The -- an entrance facility, as the commission explained in the TRRO, is just the link between the incumbent's office and the competitor's office. And an interconnection facility is anything -- any part of the network that's being used for interconnection.

JUSTICE SCALIA: It's a genus and -- and the entrance facility is the species --

MR. MILLER: It can be.

JUSTICE SCALIA: -- in your estimation?

MR. MILLER: It -- it can be when it is used for interconnection. It could also sometimes be used for other things, but we're talking about the situation where the competitor wishes to use the entrance facility for interconnection.

CHIEF JUSTICE ROBERTS: I'm sorry. Could

you run that by me again?

MR. MILLER: The -- the entrance facility is just the link between the two offices --

CHIEF JUSTICE ROBERTS: Okay.

MR. MILLER: -- the incumbent and the competitor.

CHIEF JUSTICE ROBERTS: Got it.

MR. MILLER: That can be used for a couple of different purposes, but one of the purposes for which it can be used is interconnection. And when it is being used for that purpose, it is appropriately described as a -- as an interconnection facility.

JUSTICE GINSBURG: Mr. Miller, would you, before you sit down, explain what is the Government's position when an agency is asked to file a brief? The Sixth Circuit asked -- invited the FCC to file a brief, it did, and then the Sixth Circuit disagreed. And there was some suggestion that when an agency files a brief here in this Court, as opposed to a court of appeals, it deserves more weight.

MR. MILLER: We -- we agree with the view expressed by Judge Sutton in his dissenting opinion below, that there really is no reason to distinguish between amicus briefs, particularly those filed at the invitation of a court, in the court of appeals, from

those -- filed here. In this case, of course, the question of --

JUSTICE SCALIA: But there may be a -- a reason to give less weight to briefs in this Court, different from the briefs filed with a court of appeals. And you've taken a different position here on -- on the issue of whether, when backhauling is included, it's part of the -- it's -- it's part of the interconnection facility?

MR. MILLER: No.

JUSTICE SCALIA: I do not think you made that distinction below about, you know, oh, it is part where there is back -- where there is not backhauling, but where there is, it isn't.

MR. MILLER: I think our briefs in -- in the two cases are consistent. Our brief here provides more detail in explaining the commission's orders, but in both cases, we have taken the view, as the commission has consistently taken the view since the TRRO, that entrance facilities don't have to be made available as unbundled elements for purposes of back haul, but they do have to be made available when the incumbent seeks to use them for interconnection. And I think this is precisely the sort of case where --

JUSTICE SCALIA: Wait. They have to be as

unbundled elements? I thought they never had to be --

MR. MILLER: No, they -- they --

JUSTICE SCALIA: -- made available as unbundled elements. That's (c)(3).

MR. MILLER: That's right. Then they are --

JUSTICE SCALIA: Your argument here is that only have to be made available under (c)(2)?

MR. MILLER: Exactly.

JUSTICE SCALIA: Which is not unbundled?

MR. MILLER: Right. And it's only for purposes of -- of interconnection. And I think this is precisely the sort of case where deference under Auer is appropriate, given that you have a highly complex statute regulating a very complex, dynamic industry, and so the commission's regulations involve not only the exercise of --

JUSTICE SCALIA: You certainly encourage us to throw up our hands. There's no doubt about it.

(Laughter.)

MR. MILLER: I -- another way of saying that would be that it's appropriate to recognize the commission's not only policy-making discretion but technical expertise in the industry that's being regulated. And certainly the commission has tried to be as clear as it can in its regulations, but this is an

area where some level of imprecision is probably inevitable. And I think that's why it's appropriate to defer to --

JUSTICE KENNEDY: Well, I don't know why -- why it's so hard. I mean, I got out my orange cord, and I --

(Laughter.)

JUSTICE KENNEDY: But I -- I wasn't sure of if -- if it was a transport or link. That -- that's my concern.

MR. MILLER: Well, I guess I would say maybe we need to put the difference between interconnection and transport in concrete terms. It would be the interconnection charge which is at TELRIC rates under 252(d)(1). There would be a flat fee for setting it up and then a flat monthly fee just for having the link there.

CHIEF JUSTICE ROBERTS: Oh, continue.

MR. MILLER: Thank you. And that's independent of usage.

Then, separately, each time a call is made, there is a charge under 252(d)(2) for the transport and termination of the call. And that goes both ways. So, when the competitor's customer calls the ILEC, the customer -- the competitor pays the ILEC for terminating

the call and vice versa.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Miller.

Mr. Angstreich.

ORAL ARGUMENT OF SCOTT H. ANGSTREICH

ON BEHALF OF THE RESPONDENTS

MR. ANGSTREICH: Thank you, Mr. Chief Justice, and may it please the Court:

In this case, the agency is trying to use an amicus brief to interpret a few sentences in orders from years ago to create a new legal rule without ever going through a process that would result in judicial review. In fact, in the Triennial Review Orders, where the agency supposedly announced this new obligation, it assured incumbents like AT&T that it was not altering its interpretation of the statutory interconnection duty. And the Government correctly concedes here that before those orders, the Government had never interpreted the statutory interconnection duty to require companies like AT&T to sell a fiberoptic cable at TELRIC rates. Yes --

JUSTICE SOTOMAYOR: Counsel, I know you're saying that, but everybody's arguing about what the -- what the TRO and the TRRO say or don't say. But I go behind that and I go -- I think the Government's entire

argument is not based even on those. It's based on the LCO regulations themselves. They've cited two, which is 51.305 and 51.321. They're not relying on those TROs in their back and forth there; they're relying on the regulation.

MR. ANGSTREICH: Well, Your Honor, I actually read their brief differently, and I note that in the Sixth Circuit, they didn't rely on any regulations at all. The argument was entirely based on paragraph 140.

But going to the regulations, at the same time they promulgated those rules, the government did define interconnection to exclude transport, and when they defended that exclusion --

JUSTICE SOTOMAYOR: So, how do you address their point that there are two different charges at issue?

MR. ANGSTREICH: There are --

JUSTICE SOTOMAYOR: That one -- that interconnection by definition includes transport. It's hard for me to think of how it doesn't because they've got to travel from one place to another, so --

MR. ANGSTREICH: Your Honor, when the FCC explained this to the Eighth Circuit, what it said is there are really three things going on. One is (c)(2),

is the duty to interconnect at a point, not to provide a whole host of facilities that get you to the point, but literally the duty to interconnect at a specific point in the world; selected by the competitor to be sure, but that only tells you where interconnection occurs. That's the point.

The commission then said: Okay, then there are other obligations in the statute. One of them is in section 251(b)(5), and that's what obligates the incumbent to accept telephone calls that are sent to that point and to send telephone calls through that point to the competitor.

And then, there's the third thing, and this is directly from the government's brief to the Eighth Circuit, where they explain that section (c)(2) --

JUSTICE SCALIA: The Sixth Circuit?

MR. ANGSTREICH: The Eighth Circuit. We cite this at -- from 1996, this is the contemporaneous view of the agency at the time it promulgated the interconnection regulations. It's defending those regulations against a challenge that they are too narrow. And what the agency says to the Eighth Circuit, which then deferred to this interpretation, is if section (c)(2), interconnection, included routing and transmission, (c)(2) would overlap with other sections

that, one, describe a duty to route and transmit traffic, telephone calls; and, two, a duty to lease facilities that will be used for routing and transmission. Footnote: Those duties are (b)(5) and (c)(3). To the extent there is a duty to lease the facilities, the fiberoptic cables that competitors are going to use to get to the interconnection point of their choice, that duty has to arise, the commission is saying here, only under section 251(c)(3).

And we know it doesn't arise under that section because these aren't things that are bottleneck elements. These aren't things that competitors can't get themselves. Competitors are interconnecting today. Wireless carriers, other competitors, everyone in the State of Ohio has since 2005 not been paying TELRIC rates, and as the amicus brief showed, there has been no detriment to competition. Interconnection is occurring.

And so, what the Government is trying to do here is impose this leasing obligation under the interconnection duty in a way that never gave AT&T and other incumbents any opportunity to challenge it. They never explain how it squares with the text and structure of the statute, with their prior statements, or why there's any policy basis for interpreting what they claim is an ambiguous statute to require TELRIC pricing

for things that are not bottleneck elements.

Back in the Local Competition Order, Justice Sotomayor, when they adopted the TELRIC methodology, they recognized -- this is in paragraph 702 -- interconnection services -- that's what they called it back then -- are bottlenecks, not things that competitors can build themselves or buy from third parties in the marketplace, as the agency has found is the case since 2005. They never --

JUSTICE SOTOMAYOR: Well, now you're reading limitation into the statute. All the statute says is you're obligated to provide interconnection services. It doesn't say how or limit it only to things that are not bottlenecks or things that are bottlenecks. It just says you're obligated to do X. And that's what the agency's saying.

MR. ANGSTREICH: I understand this, Your Honor. But if the agency had ever done that through notice and comment with a rule and published it in the Federal Register -- which they concede that before 2003 they hadn't done that as to entrance facilities -- and they claim they had no occasion to address the question -- and then in 2003 we get a single sentence in a paragraph of an order where there was no notice they were considering interconnection duties, no publication

of a new regulation, no publication -- nothing that would have, you know, told AT&T and other incumbents you should seek judicial review of this if you think it's wrong.

And now we're being told 8 years later that when they said "facilities" in that paragraph, they meant entrance facilities. And we're being told 2 years later when they said "interconnection facilities," that they meant entrance facilities, even though when they were asked that question by the Sixth Circuit they said we didn't define that term. And Mr. Miller might want to say they've just said a little bit more now, but they've said something radically different.

JUSTICE SOTOMAYOR: I -- in that regard, in all of these years, are -- you mean to tell me there is no other incumbent that has provided interconnection services at an entrance facility and charged TELRIC rates?

MR. ANGSTREICH: Prior to 2003 and 2005, when there was an unbundling rule in place -- and the commission had always recognized when it established that unbundling rule in 1996 that competitors would use unbundled transport facilities to connect to incumbent switches, so to connect to those interconnection points. And, sure, prior to 2005 when the unbundling rule was in

place, competitors would lease these facilities and pay TELRIC rates and use them to get to the interconnection point, but there was never during that time any statement that even if there was no impairment, section 251(c)(2) would require the exact same thing to get to the interconnection point.

JUSTICE SCALIA: What happened to the unbundling rule?

MR. ANGSTREICH: It got -- it was gotten rid of. It doesn't exist anymore. So, now AT&T has said those things you used to buy under the unbundling rules, we don't have to sell them to you at TELRIC rates anymore. We have a tariff. We've always had a tariff. We'll sell them to you at just and reasonable rates under the tariff. You can build them yourself, as competitors and wireless carriers are doing. You can buy them from the third parties that build them and advertise their offering of them.

But what you can't do is say all of a sudden that the interconnection duty had always required the exact same thing as the unbundling duty, at least not without going through a rulemaking where you lay out your policy grounds.

JUSTICE SCALIA: Why was the unbundling rule abandoned?

MR. ANGSTREICH: It was abandoned because the record evidence showed unambiguously that competitors don't need these things from incumbents.

JUSTICE SCALIA: It's not a bottleneck?

MR. ANGSTREICH: It's not in any way, shape, or form a bottleneck. And I guess that gets to the second point I'd make, which is that, again -- and I don't think they rely on the regulations, Justice Sotomayor, and they've never -- and the Government concedes in footnote 6 that the regulations themselves don't get them to where they want to go. They need these statements they made in 2003 and 2005. And even if you credit their new position that when they said facilities and interconnection facilities, that was just an imprecise way of saying entrance facilities, those statements don't get you to the rule that they're endorsing.

What the agency actually said is that competitors will have access to these facilities -- and let's pretend that means entrance facilities for the time being -- will have access to entrance facilities at cost-based rates to the extent that they require them to interconnect, and that's paragraph 140 of the Triennial Review Order and -- remand order, and they said the same thing, although they used the word "need," not

"require."

JUSTICE SCALIA: Which is (c)(3).

MR. ANGSTREICH: Well, I think the point is what they -- this is why we think the right reading of those statements is that the facilities they're referring to are things they actually do require and need, which are the things inside AT&T buildings that they can't replicate, that it's strange for them to have said you're going to get these facilities you require, but to have meant something that they don't in fact require.

But even if you want to read, again, facilities and interconnection facilities to mean entrance facilities, the rule that they're endorsing -- and, you know, Michigan now wants, if it's in the ground we have to provide it; if we'd have to build it, we don't have to provide it. It's the first time we've heard of that in the scope of this litigation. The Government seems to only be willing to -- to talk about those few facilities that had been gotten under the old, now-gone unbundling rules, but that's not the distinction that the commission drew when it said this thing that's supposedly imposing an obligation on AT&T and other companies. It limited it to those things that competitors require.

JUSTICE SOTOMAYOR: But that's -- that's (c)(3).

MR. ANGSTREICH: But that's what --

JUSTICE SOTOMAYOR: (C)(2) says you just -- you have to. It imposes an affirmative obligation to provide interconnection -- an interconnection.

MR. ANGSTREICH: Well, it imposes an obligation, Your Honor, to provide interconnection at a point -- it's at a point within our network.

JUSTICE SCALIA: Excuse me. That's your point, I thought. I thought it is precisely your point that it is (c)(3) rather than (c)(2).

MR. ANGSTREICH: Well, that's -- my point is, yes, if there is a facilities leasing obligation, it has to exist under (c)(3). That's absolutely right, Justice Scalia, that -- we think that's the right reading of the statute, we think that's what the FCC told the Eighth Circuit, we think it's what the FCC said in the Local Competition Order.

JUSTICE BREYER: I don't -- what I -- there's no way for you all to go to the FCC and decide what part of this thing is -- or any State regulator, what part of it is -- part of what's necessary to facilitate interconnection and what part of it is really providing the work primarily of the -- simply

transporting services?

MR. ANGSTREICH: Your Honor --

JUSTICE BREYER: What part is doing something else?

MR. ANGSTREICH: There's really no dispute --

JUSTICE BREYER: There's no way to do that?

MR. ANGSTREICH: No.

JUSTICE BREYER: Okay, so a judge has to say, on the basis of what, on the basis -- the judge has to say on the basis of the statute, which just uses the word "interconnection"?

MR. ANGSTREICH: The Michigan commission decided that the FCC in that paragraph 140 created this obligation.

JUSTICE BREYER: Yes. But the -- the --

MR. ANGSTREICH: That's wrong.

JUSTICE SCALIA: Excuse me. I -- I thought it was conceded that -- that none of this is -- is necessary under (c)(3). I thought that's what the Eighth Circuit said and which is why they eliminated the unbundling obligation under (c)(3).

MR. ANGSTREICH: That's -- that's absolutely right, Your Honor.

JUSTICE SCALIA: So, it is accepted by both

sides, I think, that this is not necessary.

MR. ANGSTREICH: That's right, and because it's not necessary, you can't read, as the government tries to, belatedly, years after the fact, those statements in their orders from 2003 and 2005, those few statements in these matching orders --

JUSTICE BREYER: It doesn't help because it's a network element if it's in (3), and what this is, is something that's going to be needed to -- to interconnect. If it's -- if it's in -- if it's in the first one. And I don't know which is which, and I gather that sometimes it would be tough. And what courts use to do with the ICC when they got into this kind of situation is a doctrine called primary jurisdiction, and they'd ask them for a brief. All right? So, if that's what we've done hypothetically, we have the brief.

MR. ANGSTREICH: Well, Your Honor --

JUSTICE BREYER: Now, why don't we have to follow the brief?

MR. ANGSTREICH: Because the brief here doesn't do what a decision on a primary jurisdiction referral would do, which is square what the agency is doing with the text and structure of the statute with prior statements that contradict --

JUSTICE SCALIA: Do you agree that it has to be needed to interconnect?

MR. ANGSTREICH: Your Honor --

JUSTICE SCALIA: The whole problem here is it doesn't have to be needed to interconnect.

MR. ANGSTREICH: Our --

JUSTICE SCALIA: It has to be needed under (c)(3), but under (c)(2), it's -- it's up to the -- to the new company to say I want to interconnect here; and -- and the incumbent cannot say, oh, no, you -- you don't have interconnect here; you can interconnect somewhere else.

MR. ANGSTREICH: That -- Your Honor, that's absolutely right, Justice Scalia. They get to pick a point. The point has to be within our network. Rule 51.305 identifies a series of illustrative points, all of which exist inside AT&T buildings. And that's what they've done. They've picked a point --

JUSTICE SOTOMAYOR: But wait a minute. Does -- don't the regulations now and the commission's TRO, et cetera, say that an entrance facility is within your network? You haven't challenged that.

MR. ANGSTREICH: We do disagree. I mean, at the time of the Triennial Review Order, they said it was outside of our network.

JUSTICE SOTOMAYOR: And it's now they --

MR. ANGSTREICH: That's when they also supposedly adopted this rule. So, somehow, this rule they've adopted has to coexist with the notion that these things are outside of our network. But in or out, I think it's important to recognize they're not claiming --

JUSTICE SOTOMAYOR: If they're in your network --

MR. ANGSTREICH: Pardon me. I think -- if you have the Network Engineers' brief, figure 4 on page 19, I think it does a very good job of illustrating what it is we're talking about.

JUSTICE SCALIA: Like orange wires and such?

(Laughter.)

MR. ANGSTREICH: They draw them in black, but yes.

JUSTICE SCALIA: In black?

JUSTICE SOTOMAYOR: Figure 4.

MR. ANGSTREICH: Figure 4 on page 19. What the competitors in this case and Michigan have long said is that the competitor has picked as its point of interconnection a point inside the box on the right labeled Incumbent Local Exchange Carrier Central Office. And then they need some fiberoptic cable to bridge the

gap to that interconnection point. That's how Judge Sutton understood it in dissent. That's how Judge Batchelder understood it in the majority.

And all the interconnection duty talks about, all any of the interconnection regulations talk about, is letting the competitors pick that point. How they get to the point is up to them.

JUSTICE BREYER: That's not what the statute says. The statute says the carriers have a duty to provide interconnection.

MR. ANGSTREICH: Right.

JUSTICE BREYER: Now, in carrying out a duty to provide, you say that's just picking a point. Somebody could equally well say, no, it's a duty to provide means to get to the point. Now, either of those seem equally consistent with the language.

MR. ANGSTREICH: Your Honor, there's more language that I think forecloses those interpretations. It's not just the duty to provide interconnection. It's the duty to provide interconnection for the competitor's facilities and equipment --

JUSTICE BREYER: Yes.

MR. ANGSTREICH: -- at a point within the incumbent's network. Nothing in that statutory language says that the duty is to provide the competitor with the

facilities and equipment --

JUSTICE BREYER: No, it doesn't say that, but it doesn't say the opposite. And, therefore, you might have an agency reasonably deciding that to provide -- to fulfill that duty, you must provide equipment reasonably necessary to allow the competitor to connect. That's equally sensible.

MR. ANGSTREICH: And, Justice Breyer, you might have an agency that did that.

JUSTICE BREYER: Yes.

MR. ANGSTREICH: We don't have an agency that did that.

JUSTICE BREYER: Apparently, you have an agency that never really said one way or the other.

MR. ANGSTREICH: And that means that Michigan was wrong when it thought that the agency had said it, and the Sixth Circuit was right when it agreed.

JUSTICE SCALIA: Well, it used to say the other. You -- you contend it used to say the other, and it has never, by proper means, gainsaid its prior position.

MR. ANGSTREICH: That's correct, Justice Scalia.

JUSTICE BREYER: I don't see what the other -- I didn't hear anything that said they said the

other. They've said when you have wires and you're using the wires for communication, then they don't fall outside this; that's true. But if you're using them for interconnection, and they're necessary to use for interconnection, maybe it does fall inside this. I don't --

MR. ANGSTREICH: Well, Justice Breyer, again, we point you to their definition of "interconnection" where they excluded transport from interconnection and explained to the Eighth Circuit's -- you know --

JUSTICE BREYER: Excluded -- they excluded transport -- all transport to the point of interconnection, where you could not provide the facility to interconnect unless you had the transport? Is that what they did?

MR. ANGSTREICH: What they said is --

JUSTICE BREYER: Did they do that? Yes or no? I bet the answer is no.

MR. ANGSTREICH: What they -- I -- Your Honor, I just -- I don't think you're describing it in the way that consists --

JUSTICE BREYER: All right.

MR. ANGSTREICH: -- comports with the language of the Act.

What they said is a duty to lease facilities that will be used for routing and transmission of telephone calls to the point, that's (c)(3). That's not part of the interconnection duty. When they contrasted, in their Local Competition Order, paragraph 172, they said what interconnection does is it lets the competitor pick the place where they're going to drop the traffic off. But it is section (c)(3) that lets the competitor say: I'd prefer to use incumbent facilities at TELRIC rates to get to that point.

They have made that very distinction. But what they're trying to do through their amicus brief here is to turn (c)(2) into a facilities leasing provision.

Now, again, we don't think this Court needs to say that they could never have promulgated a rule with reasons that would get you there, but they've never done it. If they had done it, we would have had the opportunity to seek judicial review. They would have had to explain themselves. We've never had that opportunity.

When they've said -- put, you know -- I think it's important, when they put out these sentences in the Triennial Review Order and Triennial Review Remand Order that supposedly told us of this new

obligation, they never asked for notice about this, even though, in their notice of proposed rulemaking, they said, should we get rid of entrance facilities under (c)(3)? They didn't say, and if we do, what would that mean for (c)(2)? They didn't ask the question.

JUSTICE SCALIA: I thought they said, moreover, that they were not amending (c)(2), specifically.

MR. ANGSTREICH: That's exactly right. In the orders themselves, they assured AT&T and others that they weren't changing anything with regard to (c)(2).

JUSTICE BREYER: But there are -- there are cases, I think, in primary jurisdiction where what a district court has done, anyway, is to hold the case while the ICC went and had a proceeding. And I'm sure that hasn't been used in a long time.

MR. ANGSTREICH: No, that is still used, Justice Breyer.

JUSTICE BREYER: It is?

MR. ANGSTREICH: But I'd point --

JUSTICE BREYER: Well, maybe this is the case for it.

MR. ANGSTREICH: Well, I don't think there's -- and I'd point to this Court's decision by Justice Ginsburg in Northwest Airlines v. Kent, 510 U.S.

355, where this Court said: Nobody has asked us to invoke the doctrine of primary jurisdiction; we're not going to do it; instead, we will adopt an interpretation of the statute that will suffice for the purposes at hand. And as the Court later recognized in Brand X, that leaves it open to the agency, in a rulemaking, to actually do the work that, as Justice Scalia noted, the agency has never done here.

And so. It's -- rather than imposing something through a combination of amicus briefs and statements that don't actually set forth the rule that the agency is trying to defend here, we'd have a real rulemaking --

JUSTICE SOTOMAYOR: I --

MR. ANGSTREICH: -- and a chance --

JUSTICE SOTOMAYOR: I guess the problem I'm having is that you tell me on the one hand that up until, what, 2005, you were always paying the cost plus profit rates, the TELRIC's rates, for interconnection at a -- at an entrance facility.

MR. ANGSTREICH: That's not quite right, Justice Sotomayor. Up until 2005, companies like Talk America were allowed to get both the actual physical linking at TELRIC rates and the transport facility at TELRIC rates, but under two separate statutory

provisions. They were getting the transport facility under (c)(3); that's gone away. They were getting the linking under (c)(2).

Now, there were other companies like wireless carriers. They were getting the linking at TELRIC rates under (c)(2), but they were paying full freight for the transport, because they have never been allowed to get unbundled network elements. So, this notion that there's going to be a price increase to wireless carriers is a fiction.

But what -- so, competitors were doing two things under two provisions. One of those has gone away. And it was only after it went away that anybody raised this notion that maybe that transport facility had always been required under (c)(2) also. But that's nothing the commission has ever done in a rulemaking.

It never did that in the proper way in the Triennial Review Order or the Triennial Review Remand Order. As Justice Scalia noted, it assured AT&T and other incumbents that it wasn't changing the law. When it published things in the Federal Register, which is where it's supposed to publish substantive rules, it identified specifically the elimination of entrance facilities as unbundled network elements, and said not a word about any continued duty to provide them under

section --

JUSTICE SOTOMAYOR: Well, it did in its footnotes. It said -- that's what the whole dispute is about, which is we're not changing the obligation to provide interconnection services. So, it said it clearly.

MR. ANGSTREICH: It -- it said it --

JUSTICE SOTOMAYOR: Its view --

MR. ANGSTREICH: -- but then the question, Justice Sotomayor, is: Well, what was that obligation? And the government concedes in footnote 6 that prior to making those statements, it had never interpreted that obligation to include the duty to lease that transport facility. It claims the question never came up because, while it was an unbundled element, it didn't matter.

Now, I think it's quite telling that while it was an unbundled element and we were having 10 years of litigation about what the right standard is for an unbundled element, nobody even thought to say: By the way, all of this litigation is beside the point with respect to the use of these facilities when we attach them to an interconnection point.

JUSTICE SCALIA: The Eighth Circuit's decision would have been unnecessary and the revision of the rule?

MR. ANGSTREICH: Exactly, Justice Scalia. It's very strange that no -- I mean -- and I think from the fact that nobody thought to say it comes to what we view has happened, is that this is a rear-guard effort to preserve TELRIC pricing for things that the commission has said should no longer be available as TELRIC -- at TELRIC pricing.

JUSTICE SCALIA: Maybe the commission didn't like the Eighth Circuit's decision.

MR. ANGSTREICH: I -- I think it's probably a fair statement that the commission does not like the decisions vacating its unbundling rules, but nonetheless, that's what happened, and the new rules get rid of this element.

Again, what the Michigan commission found was that the FCC had specifically determined that there is a leasing obligation under (c)(2). That never happened. The Sixth Circuit was right about that. There is no leasing obligation that the commission has ever established.

I think, Justice Breyer, to go back to your question, whether they could do it is a separate question. I don't think they could. I think we have an incredibly good chance to prevail if they were to ever promulgate such a rule, but they never did it. They

said things directly to the contrary.

JUSTICE BREYER: It all didn't matter because, in fact, they got the TELRIC rates under (c)(3) until they changed the impairment part?

MR. ANGSTREICH: Right.

JUSTICE BREYER: So, who cared? And now after that, they care.

MR. ANGSTREICH: Right, they care.

JUSTICE BREYER: And now -- now -- now the other side cares, of course. And so, now -- now we're faced with a situation where they're just putting this in the brief for the first time, but they can't base it on anything the commission actually did?

MR. ANGSTREICH: That's exactly right. And if the commission had actually --

JUSTICE BREYER: Amd I'm glad it's right because I don't know what I'm talking about.

(Laughter.)

MR. ANGSTREICH: I'm glad -- I'm glad we're at least agreeing with each other, Justice Breyer. But -- and I think that really is the key administrative law point here, is that if the agency in the Triennial Review Order or Triennial Review Remand Order had actually said what they say in their brief, we never had occasion to consider this question before. Now we're

considering it, and here is why we think it's appropriate to read (c)(2) to impose leasing.

And despite the fact that, you know -- again, the commission claims that the statute's ambiguous. They'd need a policy reason why it's appropriate to read this ambiguous statute to require TELRIC pricing for things that third parties are actually investing in and selling at marketplace rates, why it's appropriate to undercut those third-party business models with this TELRIC pricing for something the competitors can and are building themselves, third parties are selling --

JUSTICE SOTOMAYOR: If we accept their policy arguments, what does that do to your main argument?

MR. ANGSTREICH: I --

JUSTICE SOTOMAYOR: Because I think they've explained it to my satisfaction why this is necessary because (c)(2) requires interconnection. Congress has made a judgment that interconnection is the mainstay of competition in this area. So, if I accept that --

MR. ANGSTREICH: With due respect, Justice Sotomayor, I don't think they've made that policy claim here, and in particular this is not a case about whether interconnection is going to occur.

Competitors and wireless carriers are picking their points of interconnection. They are interconnecting today. They have been doing it. And wireless carriers never had TELRIC priced transport facilities, and yet they're interconnected. Competitors in nearly a dozen States that have addressed this issue and disagreed with Michigan and agreed with the Sixth Circuit are interconnecting today using their own facilities, using third-party facilities. And when they come to AT&T and say we'd like to plug our facility into this point, AT&T says, absolutely, and does the work necessary to get those two things connected.

JUSTICE SCALIA: It doesn't say it that happily. It really doesn't.

MR. ANGSTREICH: You're right. It certainly --

JUSTICE SCALIA: Well, okay.

MR. ANGSTREICH: It's -- it's an imposition on AT&T. But the notion that in any way, shape, or form the price of the cable will alter the interconnection of telephone networks is simply false. Yes, interconnection is an important policy, and Congress said we have to provide it at points within our networks selected by competitors. And we do that.

But Congress didn't say, and the FCC has

never said, that we also have to provide them whatever it is that they want to use to get to that point. And there really is -- and I think some of the questioning pulled that out, though they want to say I think because the Government won't endorse the absolute position the Petitioners were taking in their opening briefs, that this is only about things that used to be ordered as unbundled elements or things already in the ground.

But their position, their interpretation of the statute has no stopping point. It would cover anything a competitor might ever want to use to get telephone calls to the interconnection point. And they've never defended that limitless reading. And if the agency ever wanted to adopt it, we would challenge it. And as I've said, I like our chances, but until they do it, Michigan was wrong to conclude that the commission had done it, and the Sixth Circuit was correct to reject that.

If there are no further questions, I'll sit down.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Bursch -- Bursch, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONERS

MR. BURSCH: Your Honors, everything you heard in the last 30 minutes is premised on the idea that the FCC is doing something new and that there was never a promulgated regulation. That is demonstrably false.

If you turn with me to page 32a of the red brief, this is the FCC's regulation, promulgated all the way back in 1996, which defined the scope of the (c)(2) interconnection obligation. It's 47 CFR 51.321. And this goes directly to the points that Justice Sotomayor was making.

On page 32a, the FCC says that an incumbent must provide interconnection at a particular point upon a request by a telecommunications carrier, such as a competitor. "Technically feasible methods" -- this is in sub (b) -- "include, but are not limited to" -- and they give two examples: collocation and meet points. But this isn't the be-all-end-all of interconnection obligations. These are exemplary.

To take an analogy, assume you had a high school cafeteria, and the school board said you have to provide vegetables to students when they ask for them, and you have to give them the vegetable that they ask for; those include broccoli and green beans. And they don't say anything else. Then you have a separate

obligation in (c)(3), and the school board says until we see that the kids have enough nutrition, you must give them peas. That's entrance facilities unbundled under (c)(3).

So, some time goes by, and the school board says, okay, the kids are getting enough peas; we're going to wipe away that second restriction, but the initial restriction, the obligation in 321, is still there; and if a student asks for peas, it's within the scope of 321 because broccolis and green beans were representative examples, and peas are another one. And that's where entrance facilities fit.

JUSTICE SCALIA: Why did they fight the Eighth Circuit litigation? Why did -- I mean, it -- you're telling me it made no difference whether (c)(3) allowed them to do what they wanted to do and what the Eighth Circuit said they couldn't do, right?

MR. BURSCH: The premise -- no, that's incorrect, Your Honor, because if you have an entrance facility under (c)(3), you can use it for more things than you can under (c)(2) because under (c)(3) you can have it for backhauling and still get TELRIC rates. Under (c)(2), you're limited to interconnection. So, it's a different question.

But the idea that somehow the FCC can --

JUSTICE SCALIA: Very slightly different. That's not that big a deal.

MR. BURSCH: Backhauling is a big deal to competitors. And so, to say that they did something new in the TRRO is wrong. And to prove that point, if you look at the comments --

JUSTICE SCALIA: Incidentally, where do you -- where do you get that backhauling restriction from?

MR. BURSCH: The backhauling --

JUSTICE SCALIA: Yes, yes. The --

MR. BURSCH: From the TRO and the TRRO, and the FCC discussed that distinction in the Sixth Circuit briefing at pages 6 to 7. So, this isn't anything new, either.

So, the fact that this is not something new is demonstrated conclusively by comments in the TRRO proceedings from Bell South, which is now an AT&T subsidiary. And Bell South says, at page 59 of its comments, fully recognizing the obligation that went all the way back to 1996 in reg 321: Because entrance facilities may be required for interconnection purposes and Congress explicitly enacted provisions that govern carrier obligations to provide interconnection in 251(c)(2), it was altogether reasonable for the

commission to exclude these network elements from a definition of ILEC dedicated transport intended for unbundled access under 251(c)(3).

So, even incumbent carriers knew what the FCC was doing in paragraph 140 of the TRRO, and there was nothing new there.

One other small point with respect to the Network Engineers' map. This entrance facility right here on page 19 already exists. We're talking about existing facilities. And it's true, as the Sixth Circuit said, that if the point of interconnection is here at the ILEC switch, then that's where interconnection takes place, and this entrance facility is -- is truly providing transport, not interconnection.

But when a competitive carrier chooses its own switch as the point of interconnection, this is the end of the AT&T entrance facility, then interconnection takes place there. And even in the Sixth Circuit's view, that entrance facility is interconnection under (c)(2). And as Congress has said, that's the obligation that is immutable because it is so important, fundamental to competition.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

MR. BURSCH: Thank you.

(Whereupon, at 12:05 p.m., the case in the above-entitled matter was submitted.)

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abandoned 35:25 36:1
able 18:9
above-entitled 1:20 60:2
absolute 55:5
absolutely 23:19 38:15 39:23 41:14 54:11
accept 31:10 53:13,21
accepted 39:25
access 23:2,7 36:19,21 59:3
accommodate 7:5
accommodation 13:2
account 12:2
acknowledged 10:14 16:8
acknowledges 9:9
Act 4:13 5:3,9,15 8:12 45:25
actual 48:23
addition 9:11 10:8
additional 9:4
address 15:4 30:15 33:22
addressed 54:6
administrative 52:21
adopt 48:3 55:14
adopted 21:1 33:3 42:3,4
advances 15:5
advertise 35:18
affirmative 38:5
affirming 5:10
agency 5:2 25:15 25:18 29:9,14 31:19,22 33:8 33:18 36:18 40:23 44:4,9,11 44:14,16 48:6,8 48:12 52:22 55:14
agency's 33:16
ago 29:11
agree 25:21 41:1
agreed 44:17 54:7
agreeing 52:20
agreements 8:22
agrees 6:21
Airlines 47:25
AL 1:11
allow 8:2 18:25 21:25 44:6
allowed 48:23 49:8 57:16
alter 54:20
altering 29:15
altogether 58:25
ambiguous 32:25 53:5,6
Amd 52:16
amending 47:7
America 1:3 4:4 5:19 48:23
amicus 2:3 3:7 19:11 25:24 29:10 32:16 46:12 48:10
analogy 5:22 56:20
Angstreich 2:5 3:10 29:4,5,7 30:6,18,23 31:17 33:17 34:19 35:9 36:1 36:5 37:3 38:3 38:7,13 39:2,5 39:8,13,17,23 40:2,18,21 41:3 41:6,13,23 42:2 42:10,16,20 43:11,17,23 44:8,11,15,22 45:7,17,20,24 47:9,17,20,23 48:15,21 50:7,9 51:1,10 52:5,8 52:14,19 53:16 53:22 54:15,18
announced 29:14
answer 4:20,25 7:7 17:2 18:10 45:19
anybody 49:13
anymore 35:10 35:13
anyplace 7:15
anyway 47:14
Apparently 44:13
appeals 23:5 25:19,25 26:5
APPEARANC... 1:23
appears 12:11 19:20 22:5
appendix 5:19 6:3
appropriate 10:10,13 13:1 18:18 19:2 27:13,21 28:2 53:2,6,9
appropriately 25:11
arbitration 8:22
area 28:1 53:21
arguing 29:23
argument 1:21 3:2,5,9,12 4:3,7 8:17 15:6 19:10 27:6 29:5 30:1 30:9 53:15 55:24
arguments 53:14
arises 18:3
arising 18:3
arrangements 12:23
art 15:21,21
asked 25:15,16 34:10 47:1 48:1
asking 20:13
asks 10:21 57:9
Assistant 2:1
assume 9:16 15:17 56:20
assured 29:15 47:10 49:19
attach 50:21
AT&T 1:7,15 8:21 9:1,6 10:6 15:5 21:5 29:15 29:20 32:20 34:2 35:10 37:7 37:23 41:17 47:10 49:19 54:10,11,19 58:18 59:17
AT&T's 5:20 9:9 16:10
Auer 27:12
availability 10:20
available 23:8,14 26:20,22 27:3,7 51:6
a.m 1:22 4:2

B

b 32:4 56:16
back 17:1 22:16 22:24 26:13,21 30:4 33:2,6 51:21 56:8 58:21
backhauling 16:19,23 26:7 26:13 57:22 58:3,8,10
bad 20:8
base 18:7 52:12
based 30:1,1,9
basis 32:24 39:10,10,11
Batchelder 43:3
beans 56:24 57:10
bed 11:5
began 21:18
begins 12:14
behalf 1:25 2:3,5 3:4,7,11,14 4:8 19:11 29:6 55:25
belatedly 40:4
believe 9:17 12:24
Bell 1:6,14 4:5 16:9 58:18,19
bells 17:10,14,22 18:19
bet 45:19
better 12:25
be-all-end-all 56:18
big 6:8,10,11 24:8 58:2,3
bit 34:12
black 42:16,18
blue 9:8 12:11,12
board 56:21 57:1 57:5
bottleneck 32:11 33:1 36:4,6
bottlenecks 33:6 33:14,14
box 42:23
Brand 48:5
Breyer 11:7,13 11:18 12:9,12 12:16 13:4,7,9 16:16 17:1,4,7 17:23 18:6,8,9 18:13 20:17

22:3 23:21 24:3 24:7 38:20 39:3 39:7,9,16 40:7 40:19 43:8,12 43:22 44:2,8,10 44:13,24 45:7 45:12,18,23 47:12,18,19,21 51:21 52:2,6,9 52:16,20
bridge 42:25
brief 9:8 12:11 15:5,23 19:21 22:6 25:15,16 25:18 26:16 29:10 30:7 31:14 32:16 40:15,17,20,21 42:11 46:12 52:12,24 56:7
briefing 58:14
briefs 25:24 26:4 26:5,15 48:10 55:6
bring 8:1
broccoli 56:24
broccolis 57:10
build 7:24 8:13 9:2,22 10:6 12:22 20:8,18 33:7 35:15,17 37:16
building 8:11 19:1 53:11
buildings 37:7 41:17
built 8:18 13:15
burden 20:2 21:12
burdensome 20:14,15
Bursch 1:24 3:3 3:13 4:6,7,9,23 7:1,7,17 8:16 9:3,14,17,20 9:24 10:2 11:12 11:17 12:9,13 12:18 13:6,8,12 13:18,21,24 14:3,15,23 15:4 15:11,15,17,20 16:20 17:3,6,21 18:5,8,11,15 19:8 55:22,22 55:24 56:1 57:18 58:3,10 58:12 59:25
business 53:10
buy 33:7 35:11 35:17

C

c 3:1 4:1,22,24 4:24 10:18 23:2 23:7,9,13,17 27:4,7 30:25 31:15,24,25 32:5 37:2 38:2 38:4,12,12,15 39:20,22 41:8,8 46:3,8,13 47:4 47:5,7,11 49:2 49:3,6,15 51:17 52:3 53:2,19 56:8 57:1,4,15 57:20,21,21,23 59:20
cable 18:20,22 18:25 29:20 42:25 54:20
cables 5:15 32:6
cafeteria 56:21
California 12:6 18:2
call 16:23 28:21 28:23 29:1
called 5:25 33:5 40:14
calls 28:24 31:10 31:11 32:2 46:3 55:12
candidate 11:24
care 52:7,8
cared 52:6
cares 52:10
carrier 5:12 6:1 7:8 14:14 42:24 56:14 58:24 59:15
carriers 10:24 32:14 35:16 43:9 49:5,10 54:1,4 59:4
carrier's 22:2
carrying 43:12
case 4:4,5,17 5:11 8:17,24 9:1 10:12,12,12 11:5 13:16,16 13:19 16:9 19:16 21:9,19 22:20 26:1,24 27:12 29:9 33:9 42:21 47:14,22 53:24 59:24 60:1
cases 26:16,18 47:13
Central 42:24
cert 5:19
certainly 27:17 27:24 54:16
cetera 41:21
CFR 19:20 56:9
challenge 8:20 31:21 32:21 55:14
challenged 41:22
chance 48:15 51:24
chances 55:15
changed 52:4
changing 47:11 49:20 50:4
charge 5:13 9:25 11:15 16:3,5 28:14,22
charged 5:2 11:14 34:17
charges 15:25,25 16:2 30:16
cheap 11:8
Chief 4:3,9 16:15 16:17 19:7,9,13 21:17 24:25 25:4,7 28:18 29:2,7 55:21 59:23
choice 7:13 32:8
choose 6:16,18 7:9
chooses 6:19 59:15
choosing 4:15
Circuit 5:11,17 5:22 6:5,15,21 16:7 22:11 25:16,17 30:8 30:24 31:15,16 31:17,22 34:10 38:18 39:21 44:17 51:18 54:8 55:17 57:14,17 58:13 59:11
Circuits 6:22
Circuit's 5:20 6:5 21:22 22:19 45:10 50:23 51:9 59:18
cite 31:18
cited 30:2
claim 32:25 33:22 53:23
claiming 42:7
claims 50:14 53:4
clear 6:17 7:18 8:12 14:16 15:22 16:7 27:25
clearly 50:6
CLEC 6:20
coexist 42:4
collocation 56:17
combination 48:10
come 20:18 54:10
comes 51:3
comment 33:19
commenting 9:7
comments 58:6 58:17,20
commission 12:25 13:5,10 13:11,11,13 17:18 19:17 20:25 22:7,18 22:24 24:1,11 26:18 27:24 31:7 32:8 34:21 37:22 39:13 49:16 51:6,8,11 51:15,19 52:13 52:15 53:4 55:17 59:1
commissions 10:9 12:25
commission's 19:19 21:21 26:17 27:15,22 41:20
common 16:9
communication 45:2
companies 17:9 29:20 37:24 48:22 49:4
company 1:6,14 21:13 41:9
competition 4:12 9:12 12:10 21:2 22:9,20 23:20 32:17 33:2

38:19 46:5 53:21 59:22
competitive 4:19 5:11 6:1 7:8 10:24 14:7 16:4 16:22 59:15
competitor 6:18 6:18 10:21 19:21 20:7,17 23:15 24:23 25:6 28:25 31:4 31:12 42:22 43:25 44:6 46:6 46:8 55:11 56:15
competitors 4:14 6:13 7:3 21:2 32:6,12,13,14 33:7 34:22 35:1 35:16 36:3,19 37:25 42:21 43:6 49:11 53:11 54:1,5,24 58:4
competitor's 24:12 28:24 43:20
complex 17:25 27:13,14
complicated 18:20
comports 45:24
concede 33:20
conceded 39:19
concedes 29:17 36:10 50:11
concepts 16:2
concern 28:10
conclude 55:16
concluded 14:11
conclusion 5:3,5 5:8,21
conclusively 58:17
concrete 28:13
conduit 18:22
Congress 4:13 10:17 17:18 23:18 53:19 54:22,25 58:23 59:20
congressional 11:4
connect 7:3,4 8:3 11:20 19:1 34:23,24 44:6
connected 54:12
connection 6:16 8:4 17:25
connects 6:19 17:9
consequently 6:12
consider 52:25
considerations 20:24
considered 20:16
considering 33:25 53:1
consistent 5:5,9 26:16 43:16
consistently 26:19
consists 45:22
consolidated 4:5
constitute 13:2
constructed 14:17
contemplate 11:1
contemporane... 31:18
contend 44:19
context 12:24 18:17
continue 28:18
continued 49:25
contradict 40:25
contradiction 23:5,10
contrary 52:1
contrasted 46:4
controlling 20:20
cord 5:24 6:9,10 6:11,19 7:24 8:7 9:2 28:5
cords 5:21 18:25
correct 9:17 11:17 13:21 14:22 23:4 44:22 55:18
correctly 29:17
cost 11:2 48:18
cost-based 36:22
counsel 19:7 20:11 29:22 55:21 59:23
country 11:21
couple 25:8
course 21:25 26:1 52:10
court 1:1,21 4:10 5:25 11:5 19:14 22:17 23:5 25:19,19,25,25 26:4,5 29:8 46:15 47:14 48:1,5
courts 40:13
court's 22:19 47:24
cover 55:10
create 29:11
created 39:14
credit 36:13
curiae 2:3 3:8 19:11
customer 16:7 16:22,22 28:24 28:25
customers 5:13

D

D 2:1 3:6 4:1 19:10
DBA 1:7,15
deal 58:2,3
decide 10:10 11:19 17:11,19 17:20 38:21
decided 39:14
decides 11:25
deciding 44:4
decision 20:4 40:22 47:24 50:24 51:9
decisions 51:12
dedicated 22:8 22:21,21 59:2
defend 48:12
defended 30:14 55:13
defending 31:20
defer 28:3
deference 5:4 27:12
deferred 31:23
define 30:13 34:11
defined 20:22 56:8
defines 14:3
definition 14:24 20:21 22:7,21 22:22,25 23:22 30:20 45:8 59:2
definitively 11:5
delegated 18:17
demonstrably 56:4
demonstrated 58:17
demonstrates 10:5
deny 19:25
Department 2:2
depth 12:3
describe 32:1
described 9:1 25:11
describing 45:21
deserves 25:20
designed 5:16
despite 53:3
detail 26:17
determination 19:20 21:21
determine 13:1
determined 51:16
detriment 32:17
Detroit 13:16
difference 17:8 23:12,22 24:4,5 28:12 57:15
different 7:4,5 10:12 20:13 25:9 26:5,6 30:16 34:13 57:24 58:1
differently 30:7
directly 31:14 52:1 56:10
disagree 11:3 41:23
disagreed 25:17 54:7
discharged 20:7
discretion 27:22
discussed 58:13
disposed 21:18
dispute 14:6,19 39:6 50:3
dissent 43:2
dissenting 25:22
distance 9:22 10:10 12:20 13:1 17:22,24 18:4,16
distances 9:10 9:20 18:18
distinction 26:12 37:22 46:11 58:13
distinguish 25:23

distinguishes 12:5
distinguishing 15:24
district 47:14
doctrine 40:14 48:2
doing 35:16 39:3 40:24 49:11 54:3 56:3 59:5
door 12:7
doubt 27:18
dozen 54:6
draw 42:16
drew 37:22
drop 46:7
due 53:22
duplicate 5:14
duties 32:4 33:25
duty 11:9 29:17 29:19 31:1,3 32:1,2,5,8,20 35:20,21 43:4,9 43:12,14,19,20 43:25 44:5 46:1 46:4 49:25 50:13
dynamic 27:14
D.C 1:17 2:2,5 21:22 22:11,19

E

E 3:1 4:1,1
economic 20:24 21:12
economically 20:14,14,15 21:3
effect 7:16
effective 23:19
efficient 21:3
effort 51:4
Eighth 6:21 30:24 31:14,17 31:22 38:18 39:21 45:10 50:23 51:9 57:14,17
either 5:13 43:15 58:15
element 22:23 40:8 50:15,17 50:19 51:14
elements 22:8 23:15 26:21 27:1,4 32:12 33:1 49:8,24 55:8 59:1
eliminated 39:21
elimination 49:23
embodied 5:9
enacted 58:23
encompasses 4:17
encourage 8:11 27:17
endorse 55:5
endorsing 36:17 37:14
Engineers 42:11 59:8
English 24:4
entire 29:25
entirely 7:13 30:9
entitled 5:3
entrance 4:18 5:14,25 6:9,22 8:23 9:10,15 10:20 13:15,19 14:6,8,17 15:11 18:21 20:19 21:23 22:23 23:2,22 24:6,10 24:17,23 25:2 26:20 33:21 34:7,9,17 36:15 36:20,21 37:14 41:21 47:3 48:20 49:23 57:3,12,19 58:21 59:8,13 59:17,19
entrants 8:12
equally 43:14,16 44:7
equate 13:22 14:1
equipment 7:25 8:2 43:21 44:1 44:5
ERIC 2:1 3:6 19:10
especially 8:9
ESQ 1:24 2:1,5 3:3,6,10,13
established 34:21 51:20
estimation 24:19
et 1:11 41:21
everybody's 29:23
evidence 36:2
exact 35:5,21
exactly 13:6 14:10 27:8 47:9 51:1 52:14
example 5:12 12:6 13:15
examples 56:17 57:11
exchange 14:5,9 14:25 16:13,18 16:21 42:24
exclude 30:13 59:1
excluded 45:9,12 45:12
exclusion 30:14
excuse 9:13,13 22:18 38:10 39:18
exemplary 56:19
exercise 27:16
exist 35:10 38:15 41:17
existing 4:18 8:18,23 13:14 13:17 17:5 59:10
exists 59:9
expense 7:15
expert 5:2
expertise 27:23
explain 25:14 31:15 32:22 46:20
explained 20:25 24:11 30:24 45:10 53:18
explaining 26:17
explicitly 58:23
expressed 25:22
extant 8:14 9:15
extend 7:25
extending 5:24
extension 6:8,10 6:11,19
extent 19:2 32:5 36:22
extra 17:13

F

faced 52:11
facilitate 38:24
facilities 4:18 7:21 8:3,11,13 8:14,18,18,23 9:10,15 10:7,14 10:20 12:22 13:14,17 14:17 15:12,13 19:3 21:23 22:10,23 23:3 26:20 31:2 32:3,6 33:21 34:6,7,8,9,23 35:1 36:14,14 36:15,19,20,21 37:5,9,13,13 37:14,20 38:14 43:21 44:1 46:1 46:9,13 47:3 49:24 50:21 54:5,9,9 57:3 57:12 58:22 59:10
facility 5:14,25 6:9,12,22,23 13:15,19 14:6,8 17:5 18:21 20:9 20:19,19 23:22 23:23 24:6,10 24:13,17,23 25:2,12 26:9 34:17 41:21 45:15 48:20,24 49:1,14 50:14 54:10 57:20 59:8,13,17,19
fact 29:13 37:10 40:4 51:3 52:3 53:3 58:16
fair 51:11
fall 45:2,5
false 54:21 56:5
far 18:5,6
FCC 5:1 6:17 9:7 9:9 10:2,14 11:24 13:7,8 14:10,16 15:22 18:17 19:15 25:16 30:23 38:17,18,21 39:14 51:16 54:25 56:3,12 57:25 58:13 59:5
FCC's 5:5,8 9:11 56:7
feasibility 20:22
feasible 7:6,12 7:15,19,22 10:22 20:6,13 21:12,14 22:1

56:15
Federal 33:20 49:21
fee 28:15,16
feet 12:8
fiberoptic 18:22 29:20 32:6 42:25
fiction 49:10
fight 57:13
figure 42:11,19 42:20
file 25:15,16
filed 25:24 26:1,5
files 25:18
find 12:4 22:3
first 5:1 8:17 9:4 10:5 19:19 37:17 40:11 52:12
fit 57:12
flat 28:15,16
flaw 6:4
flip 12:14
focus 19:16
follow 40:20
footnote 6:4 9:8 32:4 36:10 50:11
footnotes 50:3
forced 5:12 11:20
forecloses 43:18
forget 18:7
form 36:6 54:19
forth 30:4 48:11
found 33:8 51:15
fourth 10:17
free 7:13
freight 49:7
front 15:9
fulfill 44:5
full 17:15 49:6
fully 58:20
function 7:21
fundamental 10:16 15:6 23:19 59:22
further 19:5 55:19

G

G 4:1
gainsaid 44:20
gap 43:1
garage 5:24
gather 40:12
General 1:24 2:2
genus 24:16
getting 49:1,2,5 57:6
Ginsburg 7:11 7:17 20:12 21:11 25:13 47:25
give 7:12 26:4 56:17,23 57:2
given 27:13
gives 7:8
glad 52:16,19,19
glom 8:14
go 17:1 29:24,25 36:11 38:21 51:21
God 8:4
goers 6:13
goes 5:19 15:20 28:23 56:10 57:5
going 10:18,19 11:2,18 16:12 18:22 29:11 30:11,25 32:7 35:22 37:9 40:9 46:7 48:3 49:9 53:25 57:7
good 12:18 18:11 42:12 51:24
gotten 17:2 35:9 37:20
govern 58:23
government 29:17,18 30:12 32:18 36:9 37:19 40:3 50:11 55:5
government's 25:14 29:25 31:14
green 56:24 57:10
ground 37:15 55:8
grounds 35:23
guaranteed 4:13
guess 17:18 28:11 36:6 48:16

H

H 2:5 3:10 29:5
half 17:10,10
halfway 6:4 12:19
hand 48:5,17
hands 27:18
happened 35:7 51:4,13,18
happily 54:14
hard 28:5 30:21
haul 26:21
head-on 8:20
hear 4:3 44:25
heard 37:18 56:2
heart 5:20
help 40:7
high 56:20
highly 27:13
history 22:7
hold 47:14
homeowner 5:23 6:6
Honor 4:23 8:17 9:4 30:6,23 33:18 38:8 39:2 39:24 40:18 41:3,13 43:17 45:21 57:19
Honors 56:1
host 31:2
hypothetically 40:16

I

ICC 40:13 47:15
idea 56:2 57:25
identified 49:23
identifies 41:16
ILEC 28:24,25 59:2,12
illustrating 42:12
illustrative 41:16
imagine 18:2 20:17
immutable 59:21
impaired 23:16
impairment 4:16 10:19 17:15 23:14,17 35:4 52:4
implementing 5:3,6
important 10:16 42:6 46:23 54:22 59:21
impose 32:19 53:2
imposes 38:5,7
imposing 37:23 48:9
imposition 54:18
imprecise 36:15
imprecision 28:1
incentive 21:3,8
Incidentally 58:7
include 14:24 15:3,9,12 20:23 50:13 56:16,24
included 22:23 26:7 31:24
includes 30:20
incorrect 57:19
increase 49:9
incredibly 51:24
incumbent 4:20 6:7,15 7:5,24 10:6 11:10 12:21,21 14:7 14:14 16:4,22 19:22,25 20:5 22:2 25:5 26:22 31:10 34:16,23 41:10 42:24 46:9 56:12 59:4
incumbents 8:15 14:17 29:15 32:21 34:2 36:3 49:20
incumbent's 16:6 21:24 24:12 43:24
independent 8:11 23:11 28:20
industry 27:14 27:23
inevitable 28:2
infeasible 20:3
initial 57:8
inside 37:7 41:17 42:23 45:5
intended 59:2
interconnect 20:9 31:1,3 36:23 40:10 41:2,5,9,11,11 45:15
interconnected 54:5
interconnecting 4:19 32:13 54:3 54:8
interconnection 4:11,14 5:13 6:12,23 7:14

10:4,18 11:10 11:16,22 12:2 13:3,20 14:4,10 14:13,24 15:3 15:12,16,25 16:3,6,11,13 17:12 19:3,23 20:1,2,5,19 21:4,7 22:1 23:9,18,23 24:13,15,21,24 25:10,12 26:8 26:23 27:11 28:12,14 29:16 29:19 30:13,20 31:5,20,24 32:7 32:17,20 33:5 33:12,25 34:8 34:16,24 35:2,6 35:20 36:14 37:13 38:6,6,8 38:24 39:12 42:23 43:1,4,5 43:10,19,20 45:4,5,9,10,14 46:4,6 48:19 50:5,22 53:19 53:20,25 54:2 54:20,22 55:12 56:9,13,18 57:23 58:22,24 59:11,13,14,16 59:17,19

internal 14:14

interpret 16:11 29:10

interpretation 29:16 31:23 48:3 55:9

interpretations 43:18

interpreted 29:19 50:12

interpreting 5:2 32:24

intuition 17:7

intuitive 12:2

investing 53:8

invitation 25:25

invited 25:16

invoke 48:2

involve 9:10 27:15

involved 16:14

involves 14:25

irrebuttable 7:20

irregardless 4:16

ISIOGU 1:11

issue 10:25 16:24 19:16 20:12,20 21:9 26:7 30:17 54:6

J

J 1:24 3:3,13 4:7 55:24

job 17:17 42:12

JOHN 1:24 3:3 3:13 4:7 55:24

judge 25:22 39:9 39:10 43:1,2

judgment 53:20

judicial 29:12 34:3 46:19

jurisdiction 40:15,22 47:13 48:2

Justice 2:2 4:3,9 4:21 6:24 7:2,7 7:11,17,23 8:25 9:13,15,19,21 9:25 11:7,13,18 12:9,12,16 13:4 13:7,9,18,22 13:25 14:12,20 15:2,8,14,16 15:19 16:15,16 16:17 17:1,4,7 17:23 18:6,8,9 18:13 19:7,9,13 20:11,17 21:11 21:17 22:3,13 23:1,21 24:3,7 24:16,19,25 25:4,7,13 26:3 26:11,25 27:3,6 27:9,17 28:4,8 28:18 29:2,8,22 30:15,19 31:16 33:2,10 34:14 35:7,24 36:4,8 37:2 38:1,4,10 38:16,20 39:3,7 39:9,16,18,25 40:7,19 41:1,4 41:7,14,19 42:1 42:8,14,18,19 43:8,12,22 44:2 44:8,10,13,18 44:22,24 45:7 45:12,18,23 47:6,12,18,19 47:21,25 48:7 48:14,16,22 49:19 50:2,8,10 50:23 51:1,8,21 52:2,6,9,16,20 53:13,17,22 54:13,17 55:21 56:10 57:13 58:1,7,11 59:23

Justices 20:12

K

Kennedy 6:24 7:2,7 14:20 15:2,8,14,16 15:19 28:4,8

Kent 47:25

key 6:4 13:18 20:4 52:21

kids 57:2,6

kind 11:25 17:9 17:13,15,17,19 18:2,3 40:14

kinds 17:25

knew 59:4

know 8:3 11:1,20 17:13,23,25 18:16,21,23 23:23 24:4,8,9 26:12 28:4 29:22 32:10 34:2 37:15 40:11 45:11 46:22 52:17 53:3

L

labeled 42:24

language 43:16 43:18,24 45:25

Lansing 1:24 13:16

large 9:5

Laughter 27:19 28:7 42:15 52:18

law 49:20 52:22

lay 5:14 35:22

LCO 18:17 30:2

lease 32:2,5 35:1 46:1 50:13

leasing 32:19 38:14 46:13 51:17,19 53:2

leave 17:18

leaves 48:6

LEC's 12:21

legal 29:11

legislation 8:10

length 10:13 15:5

letting 43:6

let's 36:20

level 28:1

lifeblood 4:11

limit 11:15 33:13

limitation 33:11

limited 37:24 56:16 57:23

limitless 55:13

limits 10:15

lines 24:8

link 14:21 24:11 25:3 28:9,16

linking 14:5 48:24 49:3,5

links 14:7

literally 31:3

litigation 37:18 50:18,20 57:14

little 18:24 34:12

local 4:11 9:11 12:10 21:2 22:8 22:20 33:2 38:19 42:24 46:5

location 4:14 10:21

logic 8:25

long 5:24 20:5 42:21 47:16

longer 9:22 51:6

look 10:20 12:9 58:6

looking 15:18

lot 8:19 11:14 12:7 19:15

M

Mahal 20:18

main 53:14

Maine 11:20

mainstay 53:20

majority 43:3

making 8:7 50:12 56:11

map 59:8

March 1:18

market 4:16 10:19,21

marketplace 33:8 53:8

matching 40:6

matter 1:20

50:15 52:2 60:2
mean 8:12 18:9 21:5 24:7 28:5 34:15 37:13 41:23 47:5 51:2 57:14
means 21:3 36:20 43:15 44:15,20
meant 34:7,9 37:10
mechanism 17:9
meet 10:9 56:17
meet-point 10:3 12:22,23 18:16
method 4:15 7:9 10:22 21:8
methodology 33:3
methods 56:15
Michigan 1:6,7 1:14,15,25 4:5 9:8 12:11,12 37:15 39:13 42:21 44:16 51:15 54:7 55:16
Michigan's 19:21 22:6
miles 9:6,6
Miller 2:1 3:6 19:9,10,13 20:21 21:16,17 21:20 22:4,15 23:4,25 24:6,10 24:18,20 25:2,5 25:8,13,21 26:10,15 27:2,5 27:8,10,20 28:11,19 29:3 34:11
minute 41:19
minutes 55:22 56:2
misconception 15:6
misunderstand... 15:7
models 53:10
monthly 28:16
morning 4:4
mutual 14:4,5,9 14:25 16:13,17 16:21

N

N 3:1,1 4:1
narrow 31:22
nearly 54:6
necessarily 9:24 19:3
necessary 17:12 18:1 38:23 39:20 40:1,3 44:6 45:4 53:18 54:12
need 23:1 28:12 36:3,11,25 37:7 42:25 53:5
needed 12:1 40:9 41:2,5,7
needs 18:23 46:15
network 6:20 14:7,8,16,18 14:19 16:4,4 21:24 22:2,8,11 22:22 23:15 24:14 38:9 40:8 41:15,22,25 42:5,9,11 43:24 49:8,24 59:1,8
networks 4:20 14:5 54:21,23
never 27:1 29:18 32:20,22 33:9 35:3 36:9 44:14 44:20 46:16,17 46:20 47:1 48:8 49:7,17 50:12 50:14 51:17,25 52:24 54:4 55:1 55:13 56:4
new 8:11,12,13 13:15 29:11,14 34:1 36:13 41:9 46:25 51:13 56:3 58:4,14,16 59:6
Ninth 6:22 16:7
normally 11:24
Northwest 47:25
note 16:8 30:7
noted 48:7 49:19
notice 33:19,24 47:1,2
notion 42:4 49:9 49:14 54:19
now-gone 37:21
nutrition 57:2

O

O 3:1 4:1
obligated 33:12 33:15
obligates 31:9
obligation 4:17 9:5 10:3,7 16:12 19:4 20:7 21:25 29:14 32:19 37:23 38:5,8,14 39:15 39:22 47:1 50:4 50:10,13 51:17 51:19 56:9 57:1 57:8 58:20 59:20
obligations 23:11 31:8 56:19 58:24
occasion 33:22 52:25
occur 53:25
occurring 32:17
occurs 31:5
offering 35:18
office 24:12,13 42:24
offices 25:3
oh 26:12 28:18 41:10
Ohio 32:15
okay 9:19 11:10 11:13 12:17 13:4 25:4 31:7 39:9 54:17 57:6
old 37:20
open 48:6
opening 55:6
opinion 5:11,18 25:22
opportunity 7:9 32:21 46:19,21
opposed 25:19
opposite 44:3
opposition 14:21
oral 1:20 3:2,5,9 4:7 19:10 29:5
orange 5:21,24 6:8,10,11 7:24 8:7 9:2 28:5 42:14
order 9:12 12:10 21:2,22,23 22:5 22:9,10,21,21 33:2,24 36:24 36:24 38:19 41:24 46:5,24 46:25 49:18,19 52:23,23
ordered 55:7
orders 19:18 26:17 29:10,13 29:18 40:5,6 47:10
ORJIAKOR 1:11
outside 41:25 42:5 45:3
overlap 31:25

P

P 4:1
Pacific 11:19 16:9
page 3:2 5:18 6:3 9:8 12:11,14,15 15:23 19:20 22:5,14 42:11 42:20 56:6,12 58:19 59:9
pages 22:16 58:14
paragraph 9:12 12:10,15,19 18:17 21:1 22:4 22:6,17 30:10 33:4,24 34:6 36:23 39:14 46:5 59:5
Pardon 42:10
park 5:25 6:2,12 6:20
part 14:13,15,18 14:19 17:11,12 17:13 19:3 21:10,24 22:11 24:14 26:8,8,12 38:22,23,23,24 39:3 46:4 52:4
particular 20:1 53:24 56:13
particularly 23:12 25:24
parties 12:24 33:8 35:17 53:7 53:12
parts 18:15
passive 10:7
pay 8:7 11:21 17:15 21:4,5,7 21:14 35:1
paying 21:6 32:15 48:18 49:6

pays 28:25
peas 57:3,6,9,11
perceived 23:5
performing 7:21
person 6:1
petition 5:19 6:3
Petitioner 1:4
Petitioners 1:12 1:25 2:4 3:4,8 3:14 4:8 19:12 55:6,25
phone 4:12
phrase 15:21
physical 11:11 48:23
physically 14:7
pick 41:14 43:6 46:7
picked 41:18 42:22
picking 43:13 54:2
place 7:21 19:2 19:23 21:14 30:22 34:20 35:1 46:7 59:13 59:18
plain 5:6
please 4:10 19:14 29:8
plug 5:23 6:7,10 6:13 54:10
plugs 5:21
plus 48:18
point 6:16 7:4,9 10:9,16,17 15:4 16:6,8 19:22 20:1,2,6 22:1 30:16 31:1,2,3 31:6,11,12 32:7 35:3,6 36:7 37:3 38:9,9,11 38:11,13 41:15 41:15,18 42:22 42:23 43:1,6,7 43:13,15,23 45:8,13 46:3,10 47:20,24 50:20 50:22 52:22 54:11 55:2,10 55:12 56:13 58:5 59:7,11,16
points 9:4 34:24 41:16 54:2,23 56:10,17
policies 5:9
policy 32:24 35:23 53:5,14 53:23 54:22
policy-making 27:22
position 5:20 9:6 12:25 16:21 25:15 26:6 36:13 44:21 55:5,9
possible 8:13
posture 8:21,24
practical 5:10
preceding 22:6
precisely 5:15 26:24 27:12 38:11
prefer 46:9
premise 20:4 57:18
premised 56:2
premises 12:21
presented 4:25 10:11 19:19
preserve 51:5
presumably 9:22
presumption 7:20 10:25
pretend 36:20
prevail 51:24
prevent 5:16
previous 21:23 22:16
price 17:15 49:9 54:20
priced 54:4
pricing 32:25 51:5,7 53:7,10
primarily 38:25
primary 40:14,22 47:13 48:2
prior 32:23 34:19 34:25 40:25 44:20 50:11
probably 28:1 51:10
problem 6:14 17:15 18:3 41:4 48:16
procedural 8:21
proceeding 47:15
proceedings 58:18
process 29:12
profit 11:3 48:19
promulgate 51:25
promulgated 10:3 30:12 31:19 46:16 56:4,7
proper 44:20 49:17
proposed 47:2
protector 6:8
prove 58:5
provide 11:9,10 21:13 23:2,7 31:1 33:12 37:16,17 38:6,8 43:10,13,15,19 43:20,25 44:4,5 45:14 49:25 50:5 54:23 55:1 56:13,22 58:24
provided 34:16
provides 20:5 26:16
providing 14:9 38:25 59:14
proving 20:2
provision 23:16 46:14
provisions 49:1 49:12 58:23
publication 33:25 34:1
publish 49:22
published 19:17 33:19 49:21
pulled 55:4
purpose 8:10 25:11
purposes 25:9,9 26:21 27:11 48:4 58:22
put 7:14 11:5 28:12 46:22,23
putting 52:11
p.m 60:1

Q

question 4:16,25 6:25 11:6 17:2 18:7,12 19:18 20:12 21:10 26:2 33:23 34:10 47:5 50:9 50:14 51:22,23 52:25 57:24
questioning 55:3
questions 19:5 55:19
quite 48:21 50:16

R

R 4:1
radically 34:13
raised 49:14
rates 4:15,22,24 7:10 8:8 10:1 10:23,25 11:4,6 21:6 28:14 29:21 32:16 34:18 35:2,12 35:14 36:22 46:10 48:19,19 48:24,25 49:6 52:3 53:8 57:22
read 11:7,8 12:3 12:4 14:1 16:16 30:7 37:12 40:3 53:2,6
reading 33:10 37:4 38:17 55:13
real 48:12
realistic 8:8
really 14:18 15:6 15:24 18:12,20 25:23 30:25 38:24 39:5 44:14 52:21 54:14 55:3
rear-guard 51:4
reason 25:23 26:4 53:5
reasonable 10:10,15 11:3 13:2 18:18 21:8 35:14 58:25
reasonableness 11:6
reasonably 44:4 44:6
reasoning 6:5
reasons 5:1 46:17
REBUTTAL 3:12 55:24
recall 5:22
recognize 27:21 42:6
recognized 23:18 33:4 34:21 48:5
recognizing 58:20
record 36:2

recover 11:2
red 15:23 56:6
reference 22:24
referral 40:23
referring 9:16 22:14 23:25 37:6
reg 15:2 58:21
regard 10:19 34:14 47:11
Regarding 12:20
Register 33:20 49:21
regulated 27:24
regulating 27:14
regulation 9:11 14:3 15:7,22 19:17,24 30:5 34:1 56:4,7
regulations 5:7 6:17 7:18 8:20 11:1 14:1 20:23 21:1,18 27:15 27:25 30:2,9,11 31:20,21 36:8 36:10 41:20 43:5
regulator 11:25 38:22
reinstate 22:20
reject 55:18
rely 13:25 30:8 36:8
relying 30:3,4
remainder 19:6
remaining 55:23
remand 21:22,22 22:5,19,19 36:24 46:25 49:18 52:23
repeatedly 14:16
replicate 37:8
reply 15:5
representative 57:11
request 19:25 56:14
requesting 13:14
require 9:1 29:20 32:25 35:5 36:22 37:1,6,9 37:11,25 53:6
required 10:6 12:22 13:2 35:20 49:15 58:22
requires 11:11 53:19
requiring 11:4
reserve 19:6
resolve 19:18
respect 5:21 18:16,19 50:21 53:22 59:7
Respondents 2:6 3:11 29:6
response 21:22 22:17,18
responses 8:16
restriction 57:7,8 58:8
result 5:10 29:12
review 21:21 22:5,10 29:12 29:13 34:3 36:24 41:24 46:19,24,24 49:18,18 52:23 52:23
revision 22:9 50:24
rid 35:9 47:3 51:14
ridiculous 12:6 20:14
right 8:9 9:3,21 10:2 13:9,20 15:17 16:10,15 21:16 23:3 27:5 27:10 37:4 38:15,16 39:24 40:2,16 41:14 42:23 43:11 44:17 45:23 47:9 48:21 50:18 51:18 52:5,8,14,16 54:15 57:17 59:8
risers 18:24
ROBERTS 4:3 16:15,17 19:7,9 21:17 24:25 25:4,7 28:18 29:2 55:21 59:23
route 32:1
routing 31:24 32:3 46:2
rule 29:11 33:19 34:20,22,25 35:8,24 36:16 37:14 41:15 42:3,3 46:16 48:11 50:25 51:25
rulemaking 35:22 47:2 48:6 48:13 49:16
rules 30:12 35:11 37:21 49:22 51:12,13
run 18:23 19:1 25:1
runs 16:3,5

S

S 3:1 4:1
satisfaction 53:18
saying 21:18 22:24 23:6 27:20 29:23 32:9 33:16 36:15
says 5:1 6:5 7:13 11:8 12:20 13:10 14:21 15:3,9 19:24 22:17,18 31:22 33:11,15 38:4 43:9,9,25 54:11 56:12 57:1,6 58:19
Scalia 4:21 7:23 8:25 9:13,15,19 9:21,25 13:18 13:22,25 14:12 20:13 22:13 23:1 24:16,19 26:3,11,25 27:3 27:6,9,17 31:16 35:7,24 36:4 37:2 38:10,16 39:18,25 41:1,4 41:7,14 42:14 42:18 44:18,23 47:6 48:7 49:19 50:23 51:1,8 54:13,17 57:13 58:1,7,11
school 56:21,21 57:1,5
scope 37:18 56:8 57:10
SCOTT 2:5 3:10 29:5
second 5:5 12:15 21:10,19,20 36:7 57:7
section 4:12 20:23 22:13 31:9,15,24 32:9 32:11 35:4 46:8 50:1
sections 31:25
see 17:4 24:8 44:24 57:2
seek 34:3 46:19
seeks 26:22
select 19:22
selected 20:6 31:4 54:24
sell 29:20 35:12 35:14
selling 53:8,12
send 31:11
sense 12:7 16:9
sensible 44:7
sent 31:10
sentence 33:23
sentences 29:10 46:23
separate 14:2 16:2 23:11 48:25 51:22 56:25
separately 28:21
series 41:16
service 23:16
services 33:5,12 34:17 39:1 50:5
set 48:11
setting 28:15
Seventh 6:21
shape 36:5 54:19
short 9:10,20
showed 32:16 36:2
side 52:10
sides 40:1
significant 23:12
similar 18:25
simple 17:10
simply 8:14 38:25 54:21
single 33:23
sit 25:14 55:19
situation 5:23 24:22 40:14 52:11
Sixth 5:10,17,20 5:22 6:5,5,14 6:20 25:16,17 30:8 31:16

34:10 44:17 51:18 54:7 55:17 58:13 59:10,18
slightly 58:1
small 6:24 59:7
Solicitor 1:24 2:1
somebody 11:18 43:14
sorry 6:6 14:4 24:25
sort 26:24 27:12
Sotomayor 20:11 29:22 30:15,19 33:3,10 34:14 36:9 38:1,4 41:19 42:1,8,19 48:14,16,22 50:2,8,10 53:13 53:17,23 56:10
South 58:18,19
spacers 18:24
speaking 13:7,8
species 24:17
specific 31:3
specifically 5:18 16:8 19:24 47:8 49:23 51:16
Sprint 5:12
square 40:23
squares 32:22
standard 50:18
start 5:17
State 10:9 12:24 13:5,9,10,11 13:12 32:15 38:22
statement 9:9 35:4 51:11
statements 19:15,17 32:23 36:12,16 37:5 40:5,6,25 48:11 50:12
States 1:1,21 2:3 3:7 19:11 54:6
statute 5:6 6:16 7:8,17 8:20 11:8,8 12:3 27:14 31:8 32:23,25 33:11 33:11 38:17 39:11 40:24 43:8,9 48:4 53:6 55:10
statutes 23:13 23:13
statute's 53:4
statutory 21:25 23:11 29:16,19 43:24 48:25
stopping 55:10
strange 37:8 51:2
street 11:23
structure 32:22 40:24
student 57:9
students 56:22
stuff 11:11 24:8
sub 56:16
submitted 59:24 60:2
subsidiary 58:19
substantive 49:22
sudden 35:19
suffice 48:4
suggestion 25:18
supporting 2:4 3:8 19:12
Suppose 7:2
supposed 49:22
supposedly 29:14 37:23 42:3 46:25
Supreme 1:1,21
sure 28:8 31:4 34:25 47:15
surge 6:8
Sutton 25:22 43:2
switch 59:12,16
switches 8:5 34:24
switching 7:25 8:2
system 11:8 14:14

T

T 3:1,1
Taj 20:18
take 10:24 16:21 18:15 56:20
taken 19:18 26:6 26:18,19
takes 19:23 59:13,18
talk 1:3 4:4 5:19 8:19 37:19 43:5 48:22
talking 9:5 10:8 10:13 13:13 15:14 16:18,24 17:21 24:22 42:13 52:17 59:9
talks 16:22 43:4
tariff 35:13,13 35:15
technical 20:22 27:23
technically 7:6 7:19,22 10:22 20:3,6,13 21:12 21:14 22:1 56:15
Tel 11:19,19
telecommunic... 4:13 56:14
telephone 1:6,14 23:19 31:10,11 32:2 46:3 54:21 55:12
tell 17:19 24:4 34:15 48:17
telling 50:16 57:15
tells 16:9 31:5
TELRIC 4:15,22 4:24 7:10 8:8 9:25 10:23,25 11:6 21:6 28:14 29:21 32:15,25 33:3 34:17 35:2 35:12 46:9 48:24,25 49:6 51:5,7,7 52:3 53:7,10 54:4 57:22
TELRIC's 48:19
tens 4:18 5:14
term 15:9,20 20:22 34:11
terminating 28:25
termination 15:21 16:1,5 28:23
terms 13:23 14:2 20:21 24:1 28:13
test 23:14,17
text 5:6 32:22 40:24
Thank 4:9 19:7,8 28:19 29:2,7 55:21 59:23,25
they'd 40:15 53:5
thing 11:25 17:20 31:13 35:5,21 36:25 37:23 38:22
things 10:5 17:24 17:25 24:22 30:25 32:11,12 33:1,6,13,14 35:11 36:3 37:6 37:7,24 42:5 49:12,21 51:5 52:1 53:7 54:12 55:7,8 57:20
think 17:4 18:11 18:13 20:12 23:5 26:11,15 26:23 27:11 28:2 29:25 30:21 34:3 36:8 37:3,4 38:16,17 38:18 40:1 42:6 42:10,12 43:18 45:21 46:15,23 47:13,23 50:16 51:2,10,21,23 51:23 52:21 53:1,17,23 55:3 55:4
third 5:8 31:13 33:7 35:17 53:7 53:11
third-party 53:9 54:9
thought 27:1 38:11,11 39:18 39:20 44:16 47:6 50:19 51:3
thousands 4:18 5:14
three 5:1 8:16 30:25
throw 27:18
ties 18:24
time 19:6 28:21 30:12 31:19 35:3 36:21 37:17 41:24 47:16 52:12 57:5
today 4:19 32:13 54:3,8
told 34:2,5,7 38:18 46:25
tough 40:12
traced 22:7

traffic 14:6,9,25 15:22 16:1,5,13 16:18 32:2 46:7
transmission 31:25 32:4 46:2
transmit 32:1
transport 14:22 14:23,24 15:3 15:10,12,21 16:1,5,12 22:8 22:22 28:9,13 28:22 30:13,20 34:23 45:9,13 45:13,15 48:24 49:1,7,14 50:13 54:4 59:2,14
transporting 39:1
travel 30:22
tried 11:20 27:24
Triennial 21:21 22:5,9 29:13 36:23 41:24 46:24,24 49:18 49:18 52:22,23
tries 40:4
TRO 29:24 41:20 58:12
TROs 30:3
TRRO 9:7,9 14:16 24:11 26:19 29:24 58:5,12,17 59:5
true 45:3 59:10
truly 59:14
trying 8:21 29:9 32:18 46:12 48:12
turn 46:13 56:6
twisty 18:24
two 7:2 9:3 10:5 13:23,23 14:5 15:24 16:2 17:9 18:15 19:16 21:18 22:16 23:13 25:3 26:16 30:2,16 32:2 48:25 49:11,12 54:12 56:17
types 15:24
typically 18:21

U

unambiguously 36:2
unbundled 23:2,7 26:21 27:1,4,9 34:23 49:8,24 50:15,17,19 55:8 57:3 59:3
unbundling 34:20 34:22,25 35:8 35:11,21,24 37:21 39:22 51:12
undercut 53:9
undercuts 20:3
underlying 20:11
understand 33:17
understood 43:2 43:3
undue 7:15
unfair 11:1
United 1:1,21 2:3 3:7 19:11
unnecessary 50:24
unreasonable 11:22
usage 28:20
use 14:2 24:23 26:23 29:9 32:7 34:22 35:2 40:13 45:4 46:9 50:21 55:2,11 57:20
uses 39:11
USTA 22:20
U.S 47:25

V

v 1:5,13 4:4 47:25
vacated 22:12
vacating 51:12
vegetable 56:23
vegetables 56:22
Verizon 11:5
versa 16:23 29:1
vice 16:23 29:1
view 16:10 25:21 26:18,19 31:19 50:8 51:4 59:19

W

wait 26:25 41:19
wall 19:1
want 7:23 17:19 20:9 24:3 34:11 36:11 37:12 41:9 55:2,4,11
wanted 8:12 55:14 57:16
wants 7:3,4 19:25 37:15
Washington 1:17 2:2,5
wasn't 28:8 49:20
way 7:5 10:4 16:10 24:1 27:20 32:20 36:5,15 38:21 39:7 44:14 45:22 49:17 50:20 54:19 56:8 58:21
ways 28:23
Wednesday 1:18
weight 25:20 26:4
went 47:15 49:13 58:20
weren't 47:11
we'll 4:3 8:2,2 35:14
we're 9:5 10:19 13:13 16:24 24:22 34:5,7 42:13 48:2 50:4 52:10,19,25 57:6 59:9
we've 35:13 37:17 40:16 46:20
whatsoever 17:8
whistles 17:11 17:14,22 18:19
willing 37:19
wipe 57:7
wire 11:21 12:8 17:10
wireless 32:14 35:16 49:5,10 54:1,4
wires 42:14 45:1 45:2
wisdom 11:4
wishes 24:23
word 36:25 39:12 49:25
words 7:13
work 38:25 48:7 54:11
works 12:5
world 31:4
wrong 6:15 8:9 34:4 39:17 44:16 55:16 58:5

X

x 1:2,8,10,16 33:15 48:5

Y

years 29:11 34:5 34:7,15 40:4 50:17

Z

zip 18:25

1

10 50:17
10a 22:5,14,16
10-313 1:4 4:4
10-329 1:12
11:07 1:22 4:2
12:05 60:1
137 22:4,17
140 30:10 36:23 39:14 59:5
16 16:8
16a 9:8
172 46:5
19 3:8 42:12,20 59:9
1996 21:1 31:18 34:22 56:8 58:21

2

2 4:22,24 10:18 23:9,17 27:7 30:25 31:15,24 31:25 34:7 38:4 38:12 41:8 46:13 47:5,7,11 49:3,6,15 51:17 53:2,19 56:8 57:21,23 59:20
20a 5:18 6:3
2003 33:20,23 34:19 36:12 40:5
2005 32:15 33:9 34:19,25 36:12 40:5 48:18,22
2011 1:18
209 21:2
251(b)(5) 16:1 31:9

251(c)(2) 4:12,17 15:25 16:25 19:4 35:5 58:25
251(c)(3) 32:9 59:3
252(d)(1) 28:15
252(d)(2) 28:22
27a 12:11
28a 12:14,16
29 3:11

3

3 4:24 23:2,7,13 27:4 32:5 37:2 38:2,12,15 39:20,22 40:8 41:8 46:3,8 47:4 49:2 52:3 57:1,4,15,20 57:21
30 1:18 56:2
32a 56:6,12
321 57:8,10 58:21
35a 15:23
355 48:1
397 9:8

4

4 3:4 42:11,19,20 55:22
47 19:20 56:9

5

5 32:4
5a 19:21
50 12:8
51.305 30:3 41:16
51.305(e) 19:20
51.321 30:3 56:9
51.5 14:3 15:7,17 16:11 20:23
51.701 15:23
510 47:25
521 10:3
55 3:14
553 9:12 12:10 18:18
59 58:19

6

6 36:10 50:11 58:14

7

7 58:14
702 33:4

8

8 34:5

9

9 6:4