OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: AT&T CORP., ET AL., Petitioners v. IOWA UTILITIES BOARD, ET AL; CALIFORNIA, ET AL.;
MCI TELECOMMUNICATIONS CORPORATION, Petitioner v. IOWA UTILITIES BOARD, ET AL.;
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, ET AL., Petitioners v. IOWA UTILITIES BOARD, ET AL;
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, Petitioners v. IOWA UTILITIES BOARD, ET AL.;
AMERITECH CORPORATION, ET AL., Petitioners v. FEDERAL COMMUNICATIONS COMMISSION, ET AL.;
GTE MIDWEST, INCORPORATED, Petitioner v. FEDERAL COMMUNICATIONS COMMISSION, ET AL.;
U S WEST, INC., Petitioner v. FEDERAL COMMUNICATIONS COMMISSION, ET AL.; AND
SOUTHERN NEW ENGLAND TELEPHONE COMPANY, ET AL., Petitioners v. FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CASE NOs: 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141 C.2

PLACE: Washington, D.C.

DATE: Tuesday, October 13, 1998

PAGES: 1-104

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IN THE SUPREME COURT OF THE UNITED STATES

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AT&T CORP., ET AL., :

Petitioners :

v. : No. 97-826

IOWA UTILITIES BOARD, ET AL; :

CALIFORNIA, ET AL.; :

- - - - - - - - - - - - - - - - - -X

MCI TELECOMMUNICATIONS :

CORPORATION, :

Petitioner :

v. : No. 97-829

IOWA UTILITIES BOARD, ET AL.; :

- - - - - - - - - - - - - - - - - -X

ASSOCIATION FOR LOCAL :

TELECOMMUNICATIONS SERVICES, :

ET AL., :

Petitioners :

v. : No. 97-830

IOWA UTILITIES BOARD, ET AL; :

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FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, Petitioners	:	
v.	:	No. 97-831
IOWA UTILITIES BOARD, ET AL.;	:	
AMERITECH CORPORATION, ET AL., Petitioners	:	
v.	:	No. 97-1075
FEDERAL COMMUNICATIONS COMMISSION, ET AL.;	:	
GTE MIDWEST, INCORPORATED, Petitioner	:	
v.	:	No. 97-1087
FEDERAL COMMUNICATIONS COMMISSION, ET AL.;	:	

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U S WEST, INC., :

Petitioner :

v. : No. 97-1099

FEDERAL COMMUNICATIONS :

COMMISSION, ET AL.; AND :

- - - - - - - - - - - - - - - - - -X

SOUTHERN NEW ENGLAND :

TELEPHONE COMPANY, ET AL., :

Petitioners :

v. : No. 97-1141

FEDERAL COMMUNICATIONS :

COMMISSION, ET AL. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, October 13, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

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BRUCE J. ENNIS, JR., ESQ., Washington, D.C.; on behalf of the Private Petitioners.

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LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on behalf of the Private Respondents.

WILLIAM P. BARR, ESQ., Washington, D.C.; on behalf of the Cross-Petitioners/Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in a number of consolidated cases, 97-826, AT&T Corporation v. Iowa Utilities Board, et cetera, et cetera.

(Laughter.)

CHIEF JUSTICE REHNQUIST: And we'll have an hour for the jurisdictional argument. Then we'll take a very brief pause while counsel adjust their seatings at the table, and then we'll go on for the next hour of argument.

General Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE FEDERAL PETITIONERS

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

In 1996, Congress enacted general standards designed to bring competition to local telecommunications markets rapidly and throughout the country. In doing so, it expressly extended Federal law to cover the rates, terms, and conditions under which incumbents must provide new entrants access to their facilities.

No one doubts that the FCC has authority to promulgate some rules interpreting these provisions. The jurisdictional issue presented in this case is whether in certain specific respects, principally regarding the

methodology for setting lease rates for network elements, Congress has for the first time denied the FCC rulemaking authority with respect to a substantive provision of the Communications Act.

The answer is no. The 1996 amendments preserved the Commission's existing authority under section 201(b) to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this act.

QUESTION: But, General Waxman, 201(b) -- you find before that, of course, naturally 201(a), and there it says, it shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio. So, don't you think the rule -- the rulemaking provision is limited to that kind of things?

MR. WAXMAN: No, I don't, Mr. Chief Justice, and for a variety of reasons.

First of all, section 201(b), in which the relevant rulemaking grant is not so limited -- and we think that in any event, the specific sentence in 201(b) that I quoted should be interpreted according to its plain meaning. Moreover, in the --

QUESTION: But you think its plain meaning means it should extend beyond the section in which it's found?

MR. WAXMAN: I think that it means -- section

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201(a) is -- itself is limited to intrastate and foreign commerce. The last sentence of section 201(b) is not so limited.

QUESTION: Yes, but --

MR. WAXMAN: And I think it should be interpreted according to its terms.

QUESTION: But, you know, if this were a general thing that were to extend throughout the Federal communications statutes, why would you find it tucked away here at the very end of section 201(b)?

MR. WAXMAN: Well, Mr. Chief Justice, two responses.

First of all, in -- in I think what can only be described as belt and suspenders, the Commission has other statutory provisions that granted the same plenary rulemaking authority, 47 U.S.C., section 154(i) and section 303(r).

QUESTION: Well, but doesn't that suggest that each of those grants is limited to the sections in which they're found?

MR. WAXMAN: I don't think it does, and moreover, with respect to 201(b), it's clear that Congress in 1996 had this section specifically in mind because section 251(i) of the 1996 amendments, which is entitled Savings Provision, specifically says that nothing in this

act shall be deemed to limit -- nothing in section 251 shall be deemed to limit or impair the applicability of the provisions of section 201. So, we think it -- Congress had it in mind and wanted it to be interpreted according to its plain meaning, but --

QUESTION: But -- but if shall not be deemed to impair 201, 201 contains (a) as well as (b).

MR. WAXMAN: That's true.

QUESTION: And it could be read as a limitation on (b).

MR. WAXMAN: I do think, with respect, Mr. Chief Justice, first of all, that that would require you to read the sentence, the rulemaking provision in 201(b), not in accordance with its plain meaning.

And secondly, the 1996 act itself, in any event, in section 251(d)(1) mandated the FCC within 6 months to promulgate rules, quote, as necessary to implement the requirements of this section, and that section requires incumbents to provide access to network elements at rates that are just, reasonable, and in accordance with the terms of section 252.

The fact that section 252 itself directs State commissions in arbitration proceedings to set the specific rates charged by a particular carrier in a particular market for a particular element is completely consistent

with the FCC's authority to prescribe the general methodology by which those rates should be set. In fact --

QUESTION: Staying with 201(a) for just a minute, if the suggestion by the Chief Justice were one we thought correct, and the first sentence in (a) was a limitation on the rule -- the last sentence in the rulemaking authority in (b), do you have a fall-back position with, oh, we're really talking about interstate commerce anyway?

MR. WAXMAN: Well --

QUESTION: Or -- or is -- is -- would -- would your case necessarily founder if we accepted the Chief Justice's --

MR. WAXMAN: It -- my case would --

QUESTION: -- suggestion?

MR. WAXMAN: My case wouldn't founder at all for three reasons.

First of all, section 154(i) of the act provides in a general provision that's not limited to radio or cable or anything else, similarly provides the Commission with broad rulemaking authority to implement for any provisions of the act.

Second of all, section 251(d) is an express jurisdictional mandate to promulgate rules implementing

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the provisions of 251 which includes the requirements that rates be reasonable and in accordance with section 252.

And finally, if your question is directed at the operation, I guess, of section 2(b) of the act, we think that section 2(b) of the act, which is a rule of construction, is inapplicable to this case because sections 251 and 252 apply Federal law to facilities that are used interchangeably for both interstate and intrastate calls. Just like the telephone handset that we use every day, the local telephone network is neither an intrastate or an interstate facility. It's both.

QUESTION: Well, if you applied that argument, then 2(b) wouldn't have kept -- wouldn't have kept the FCC out of intrastate phone rates, even -- even before the 1996 act. I mean, doesn't that prove too much?

MR. WAXMAN: No, it doesn't prove too much because before the 1996 act -- well, first of all, before the 1996 act, the FCC did regulate how local incumbents charge other carriers for use of their network, for example, in the cases involving exchange access or private lines or customer provided equipment.

QUESTION: But only with regard to interstate calls.

MR. WAXMAN: No, with respect to both. All of the court of appeals' rulings upholding the jurisdiction

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of the FCC with respect to private lines and customer premises equipment were premised on the fact that these are used inextricably for both. And since the FCC clearly has rulemaking authority with respect to the interstate component, under footnote 4 of this Court's decision in Louisiana Public Service Commission, they had authority to regulate the use of all of the uses, interstate and intrastate, of those elements because they could not be, quote, **separated**.

And, moreover, the section 2(b) does not apply to this case for two independent reasons.

First, because no construction of any provision of the law is required. The local competition provision, sections 251 and 252 indisputably apply to intrastate matters, and sections 201(b) and 2 --

QUESTION: Well, you mean they're parts of the act that don't have to be construed?

MR. WAXMAN: Well, I don't think --

QUESTION: Is that the gravamen of your argument?

MR. WAXMAN: I -- no, I think the import of section 2(b), as this Court announced in Louisiana Public Service Commission, is that an -- a provision of the Communications Act won't be understood to apply to a purely interstate matter unless it clearly does. It's not

a rule that says disregard what everybody agrees the act does.

QUESTION: Don't you think 2(b) has been repealed by the -- it is impossible, is it not, after the 1960 -- 1996 act, to give effect to 2(b)?

MR. WAXMAN: Oh, I don't think so at all.

QUESTION: Why? How is it possible to -- not to construe any provision of the act to apply to intrastate communications?

MR. WAXMAN: Well, I think it is not possible to apply any provisions of the -- or certainly the provisions that we're dealing with here, 251, 252, 253, 254, 271, as dealing inextricably with interstate and intrastate matters.

But the -- there is nothing in the act, for example, that would permit the FCC to impose or to take away the State commissions' authority to set maximum retail rates for -- for customers. And, in fact, if Congress had repealed section 2(b) or made section 2(b) inapplicable to these sections -- I don't know whether it would have, but the FCC could have said, well, we've now got ancillary jurisdiction to take over the State's retail ratemaking function.

QUESTION: But 2(b) has its exceptions written in, except as provided in sections 223 through 227,

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inclusive, and section 332, and subject to 301 in title 6. Nothing in this act shall be construed to apply or give the Commission jurisdiction with respect to, blah, blah, blah, blah, blah. It's just impossible to apply that anymore.

MR. WAXMAN: Well, we think that it is, in fact, impossible to apply it to the local competition provisions in this case, first, because those provisions plainly do apply to interstate matters, and the FCC has statutory authority to implement them.

And second -- and this is a fundamental, independent point -- even if 2(b) applied under the rule expressed in footnote 4 of Louisiana Public Service Commission, because there is also no doubt that 251 and 252 also apply inextricably to interstate matters over which the Commission has unquestioned jurisdiction.

QUESTION: As to your first argument, are you saying that the act has changed the boundaries between what's local and what's interstate?

MR. WAXMAN: No.

QUESTION: The 1996 --

MR. WAXMAN: No.

QUESTION: I thought that you could say that --

MR. WAXMAN: Well, what it --

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QUESTION: -- that it -- that it has made what was previously thought to be local now interstate. So, the act -- so the prohibition of 2(b) is irrelevant.

MR. WAXMAN: I think, Justice Kennedy, rather than say change the definition, the definitions were already becoming quite blurred, as I've indicated, by the decisions involving private lines and private branch exchanges and exchange access.

QUESTION: Are those decisions of this Court?

MR. WAXMAN: They're all decisions of the FCC that were -- that were approved on appeal without -- without exception by the courts of appeals.

QUESTION: By courts of appeals?

MR. WAXMAN: And some of those decisions, Mr. Chief Justice, are referred to or referenced in footnote 4 of this Court's opinion in Louisiana Public Service Commission.

What the -- Justice Kennedy, what the act did, if you look at sections 251 and 252, it doesn't even use the words interstate or intrastate because Congress recognized that the use of network elements is -- is inextricably entwined with both, and what it --

QUESTION: So, then Justice Scalia is right, that 2(b) is just not really applicable anymore.

MR. WAXMAN: We think that it is not applicable

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with respect to these provisions, and to the extent that it did apply, the exception for inseverability would nonetheless give the FCC the authority to promulgate rules about this methodology.

QUESTION: But what about using 2(b) in what I think is a rather difficult statutory problem, which is to reconcile -- assuming there is rulemaking authority, reconcile the word rates, you know, in 251 where it talks about unbundled access. It says there's a duty to provide unbundled access, you know, at rates that are just and reasonable. And then when you get over to 252, it says that State commissions will establish rates, and they have to be just and reasonable.

Now, why wouldn't 2(b) come in right there, trying to interpret and reconcile those two words? Rates in both --

MR. WAXMAN: Right. There's --

QUESTION: -- reconciling them by saying --

MR. WAXMAN: There's nothing --

QUESTION: -- look at history and look at the extent to which a rate is traditionally up to the carrier for State regulation, look at it traditionally Federal regulation, and say that's what we look to, and that's what the difference between the rates in the two sections means. Why wouldn't we use 2(b) as a guide there?

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MR. WAXMAN: Because there is nothing irreconcilable about -- about section 252(b), (c), and (d) and the requirement you pointed out in section 251(c)(3) that rates be just, reasonable, and in accordance with section 252. 251(c) incorporates expressly the right -- the requirements and the standards of 252(d), and in 252 -- 252(b) gives the State commissions jurisdiction and the mandate to resolve open issues in arbitration between carriers. And it tells them in (c) that in resolving any open issue, which surely includes open issues about rates, that they must -- that they must resolve any open issue and ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251.

Now --

QUESTION: Yes.

MR. WAXMAN: Now, if you were to -- a reading that says that the references to what State commissions do in arbitration ousts the Federal -- Federal Communications Commission with respect to any matter -- any reference to or any responsibility with respect to carrier-to-carrier rates, you are required to -- you -- you encounter a half-dozen or more irreconcilable interpretive anomalies elsewhere in the statute. And I'll point you just to the most significant one.

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This act has two principal provisions. Provision number one, which is reflected in 251, means that the local incumbents have got to give new entrants access to their markets for local competition. And section 271 is the provision that lets the local incumbents, once they have satisfied certain conditions to the FCC's satisfaction, to enter into competition in the long-distance markets from their home regions. We have a cert petition pending with respect to another decision of the Eighth Circuit interpreting 271.

But the point is this. Section 271 -- under section 271(d), the FCC must determine on its own -- it must find on its own and without deference to State commissions, but after giving, quote, substantial weight to the views of the Attorney General, that the Bell operating companies have satisfied the terms of section 251 and 252, including the pricing terms. And if section 251 is given its plain meaning, we must be right about the Commission's ability to issue general, methodological rules on ratemaking under 251 --

QUESTION: Yes.

MR. WAXMAN: -- and 252.

QUESTION: General, methodological rules, yes.

MR. WAXMAN: Okay.

QUESTION: But not rules that take 75 years of

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ratemaking and turn them on their heads --

MR. WAXMAN: Well --

QUESTION: -- preventing commissions, State commissions, in effect, should they so wish, to permit a local monopolist to recover his fixed costs. For example, someone who follows these rules sees in them 1,000 pages of detail, and therefore, using 2(b) one would say the Commission would lack the power to write rules with 1,000 pages of detail such that they, in effect, become a system called TELRIC, the like of which has not been known previously. And it seems inconsistent with State regulation.

MR. WAXMAN: Justice --

QUESTION: Now, I'm trying to summarize their argument in like one sentence, but that's what I've tried to do.

(Laughter.)

MR. WAXMAN: Justice Breyer, what -- this act does not take away the State commissions' historical ratemaking role. Historically they made rate -- they determined retail rates and they still do that. What this act has done --

QUESTION: That part was what I didn't get because I read through these over the summer, and I don't see how the State maintains a significant rate-setting

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role. And I don't know that -- that was what was bothering me.

MR. WAXMAN: The role that the State commissions have always had is to determine the maximum rates that the telephone company can charge retail and wholesale customers, and they still have that.

What the act does was create something new, that is, the ability to set rates between competitors, carrier-to-carrier rates, for elements, and it -- and the act makes that a Federal standard, but doesn't reserve all the responsibilities to the FCC. It gives the FCC rulemaking authority and gives the State commissions the authority to apply those rules and determine those standards.

QUESTION: General Waxman, may I -- do I have it right, that the validity of TELRIC would be -- if you prevail on the jurisdictional question, that's open.

MR. WAXMAN: That's --

QUESTION: That hasn't been considered yet.

MR. WAXMAN: That's right. And TELRIC -- it's not fair to say that there's a thousand pages applying rules. TELRIC is contained in a specific, discrete regulation. The Commission was required to deal with tens of thousands of pages of comments, and it did so.

QUESTION: You're right. I think I overstated that. But I think several hundred is fair.

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MR. WAXMAN: But there are explanations of this carrier wanted this, this commenter wanted that. The specific rules can be succinctly stated.

May I reserve the balance of my time, please?

QUESTION: Yes, you may, General Waxman.

Mr. Ennis, we'll hear from you.

ORAL ARGUMENT OF BRUCE J. ENNIS, JR.

ON BEHALF OF THE PRIVATE PETITIONERS

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

I would like to make two points. The potential competitors have challenged the Eighth Circuit's jurisdictional ruling because the inevitable and now demonstrated effect of that ruling has been to severely undermine the prospects for rapid competition, which was the principal purpose of this act.

Because State commissions had first to determine the meaning of the Federal rate requirements before they could establish particular rates, they failed to meet the 9-month deadline for establishing rates required by Congress.

Moreover, there are already hundreds of Federal district court challenges to the State arbitration decisions, and the vast majority of them specifically challenge the rate methodologies employed by the States.

Until all of those challenges are finally resolved after appeals, potential competitors cannot even know how much they would have to pay for access and interconnection.

This already substantial delay, and the delays still ahead regarding multi-billion dollar investment decisions, has seriously frustrated the act's central purpose. A construction of the act that so frustrates the principal purpose of the act cannot be right.

QUESTION: Mr. Ennis, one of the briefs said that most of the Sate commissions on their own have adopted TELRIC. Is that true?

MR. ENNIS: The great majority of the State commissions on their own have adopted TELRIC or some other forward-looking cost scheme rather than historical embedded costs, but not all have. And those State decisions have been challenged in Federal district courts. They could be reversed. Until that whole process is over, the process of rapid competition is on hold.

QUESTION: But how do I vote? This is -- this is what's actually bothering me. How would I decide this case if I thought, well, yes -- and I'm -- just for the sake of argument, assume yes, I accept that the FCC has the power to set some rules in respect to rates. But suppose I'm worried about this particular set of rules and really not because of their detail, but rather because of

their content, which is a system that the State might be free to adopt on its own. But it seems by telling the State what system to adopt to over -- to go too deeply into the matters that 2(b) seemed, historically speaking, to reserve to States -- suppose I thought that. How should I decide this case?

MR. ENNIS: Justice Breyer, let me respond to that by saying, first, Congress has itself expressly in the statute taken away from the States their historic function of deciding rates based on rate of return proceedings. The statute says that itself. Congress has already overturned State prerogatives and has preempted the State laws that barred local competition.

Second, the issue of the TELRIC method is not presently before the Court. The merits of that have not been reached because of the court -- Eighth Circuit's jurisdictional ruling.

Third, if it were before the Court, the TELRIC method leaves the States very substantial discretion. It allows them to determine depreciation methods, which this Court in Louisiana said was a very significant component of the ratemaking process. It allows the States to determine joint and common cost allocation issues. It allows the States to determine the level of profit on those costs. In fact, TELRIC itself --

QUESTION: TELRIC does, but -- but if -- if your interpretation of the statute is correct, you would say the FCC could prescribe those things as well.

MR. ENNIS: Justice Scalia, as far as FCC's jurisdiction is concerned, that's correct. Then there would be the question whether the exercise of that jurisdiction on the merits went too far, it so interfered with the clear intent of Congress, that the States have a parallel role in this process, that it would violate the clear language of the statute.

QUESTION: Well, why -- why suddenly be worried about that at that point? Why not be worried -- worried about it earlier?

MR. ENNIS: Well, in fact --

QUESTION: That's a point of whether the FCC can adopt TELRIC at all.

MR. ENNIS: In fact, Justice Scalia, I think your point about earlier and later is a very important point, but I see it a little differently. Solicitor General Waxman made the point that section 271 requires the FCC itself to determine whether 252(d) has been fully implemented. 252(d) relates only to rates.

Clearly Congress understood that, at least at the back end, the FCC had the authority to determine the meaning of the Federal rate requirements. Why would

Congress give the FCC that authority at the back end, but withhold that very same authority at the front end when FCC interpretations could meaningfully speed the negotiation and arbitration process and thereby further the principal purpose of the act?

QUESTION: That makes good sense, but artificially limiting it the way you were a moment ago doesn't make good sense it seems to me --

MR. ENNIS: Well --

QUESTION: -- by saying that, well, you know, if and when the FCC goes further and doesn't even let the States make these determinations as to proper allocations and so forth, then we can worry about those. It seems to me if we come out the way you want us now, we would come out the same way on those issues later on. I don't see -- I don't see --

MR. ENNIS: Well, I wouldn't want to prejudge how the Court would come out on the merits, Your Honor, but let me --

QUESTION: Give me a good reason for -- from separating the one from the other.

MR. ENNIS: I think the reason is the reason I just gave.

QUESTION: Which was? I didn't hear it.

MR. ENNIS: Well, perhaps I didn't understand

your question, Justice Scalia.

The point I was trying to make is that section 271 and, in fact, section 252(e)(6) and section 160 and numerous sections of the act plainly require the FCC itself, at some point in the process, to determine the meaning of the Federal rate requirements, a traditional authority for a Federal agency interpreting Federal law that is supposed to be, as the conference report says, nationally uniform. Why would Congress want to give that -- that very clear authority to the FCC at the back end of the process and withhold it at the beginning?

QUESTION: I can't imagine, but why -- but why -- the argument you were making was that, look it, TELRIC doesn't go all the way. It has reserved certain important questions to the States. And my point is, well, that's out of the grace of the FCC. But the logic of your argument is that the FCC wouldn't have had to reserve those questions to the States.

MR. ENNIS: Well, not as a matter of jurisdiction.

QUESTION: Right.

MR. ENNIS: But then under Chevron deference, whether on the merits that was appropriate or not is exactly the question that this Court is going to decide in the second hour of the argument. The FCC has --

QUESTION: But I take it it's your position that the FCC has no -- has no discretion about reserving the adjudicatory jurisdiction to the States. The FCC could not say in a non-default situation, we're going to make all the rates too. The FCC has no authority over that under -- under your argument, does it?

MR. ENNIS: Justice Souter, I think the FCC, as a jurisdictional matter, would have the authority to set particular rates if he thought -- if it thought that was necessary in order to ensure local competition, just as it has the authority under --

QUESTION: Would it do -- would it have that authority at the front end as well as at the back end?

MR. ENNIS: Yes, it would, Your Honor. At the back end, it clearly has it. Under 253, if the States set rates that the FCC concludes are anti-competitive rates, it can squarely preempt those rates, and I think it would have the same jurisdictional authority at the front end. Whether on the merits it would be okay under Chevron deference is a different question.

Let me just point out in my remaining time that there are other interpretive anomalies that flow from the Eighth Circuit's ruling.

First, if the Eighth Circuit's ruling were correct, the very same phrase, quote, the requirements of

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section 251, would have to mean radically different things in section 251 which discusses the regulatory responsibilities of the FCC than it means in section 252 discussing the judicial responsibilities of Federal district courts.

252 requires that all State arbitration decisions can be reviewed by Federal district courts. Federal district courts are supposed to determine whether there has been compliance with, quote, the requirements of section 251. Plainly that means all of the requirements of section 251. But when talking about the regulatory responsibilities of the FCC, the Eighth Circuit had to construe that very same phrase to mean only those requirements of section 251 which themselves call for FCC involvement. That's a conflict.

Furthermore, section 271 also makes clear that cannot be correct because 271 requires the FCC to determine whether there's been full compliance with section 251(c)(2) and (c)(3), and that cannot mean only those requirements of (c)((2) and (c)(3) that call for FCC involvement because those provisions do not themselves call for FCC involvement.

My time is up. Thank you very much.

QUESTION: Thank you, Mr. Ennis.

Ms. Munns, we'll hear from you.

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ORAL ARGUMENT OF DIANE MUNNS

ON BEHALF OF THE STATE COMMISSION RESPONDENTS

MS. MUNNS: Mr. Chief Justice, and may it please the Court:

Congress created a national framework but -- to bring competition to the local markets, but did not delegate full authority to the Federal Communications Commission. It defined States the duty to set prices when parties can agree, and it specifically left section 2(b) and the dual jurisdictional scheme in tact under the Telecommunications Act.

So, where the statute is clear is in section 252 with respect to pricing. The language must be given full effect. If there is an ambiguity in the statute, then Congress intended for the dual jurisdictional scheme to continue.

QUESTION: May I ask you a question about 252? It plainly gives the States authority to fix rates in certain circumstances, but it does that, as I understand it, only when it's resolving arbitration disputes.

MS. MUNNS: That is correct.

QUESTION: And in doing so, it is to apply a Federal standard, is it not? The States are to apply a Federal standard.

MS. MUNNS: It is. It is applying Federal

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standards.

QUESTION: And their -- whether they've applied it correctly or incorrectly is subject to review by the Federal district court.

MS. MUNNS: And that's correct.

QUESTION: Now, is this -- does that -- and this is in a procedural section, 252, whereas the requirements are in 251.

Now, is it your -- is it your thought that the Federal -- basic Federal standards that must be applied are already in the statute or that nobody is to implement them with further rulemaking. Can the FCC do it, the States do it, or nobody?

MS. MUNNS: It's our position that the standards are in section 252. They're in section 252(d), but they are to be implemented in the arbitration proceedings when the facts are brought forward to the State commissions.

QUESTION: But that's not quite responsive to my question. My question is, does the statute contemplate further rulemaking to define the methodology for ratemaking in greater detail than is already found in the statute? And if so, who is to be the rulemaker under your view of the statute?

MS. MUNNS: Not the FCC. The FCC has no authority under 252.

QUESTION: So, the only learning about the meaning of the Federal standard is in the statute itself without further guidance.

MS. MUNNS: Yes, I think the State --

QUESTION: Could the States issue regulations setting forth their interpretation of what this says? Federal --

MS. MUNNS: Yes, I believe that the States could do that.

QUESTION: But they would have to be litigated in -- in Federal district court?

MS. MUNNS: Now, that's an interesting question because those would be under the State's Administrative Procedures Act.

QUESTION: Well, but they'd relate to the standards set forth in the Federal statute I assume.

MS. MUNNS: Yes, that's correct.

QUESTION: I assume those would be Federal questions.

MS. MUNNS: Yes.

QUESTION: And you could have 50 different States having 50 different sets of regulations.

MS. MUNNS: Yes, you could, Your Honor.

QUESTION: Until they were all litigated out eventually, you know.

MS. MUNNS: And many different decisions under the Federal standards that are in section 252. Congress set those standards and set very broad standards and assigned to the States the jurisdiction to do the pricing in the arbitrations.

QUESTION: So, the State regulatory authorities would be given, in effect, Chevron deference, a standard similar to Chevron in the Federal system?

MS. MUNNS: I don't think with respect -- you know, what the Federal courts are to look at when they look at those arbitration decisions is to see whether or not they're in compliance with the statute, and with respect to questions of law, there would be no deference.

QUESTION: Well, but we usually give the agency committed with initial interpretation of the statute deference. So, you know, if it's within the range of ambiguity, we say if you want to pick it here, that's fine.

Now, can we do that with the States? Maybe you can have -- maybe -- maybe you were too quick in responding to my question or maybe I was too quick in answering -- in asking it. Maybe you can have 50 different State interpretations of -- of what 252 requires. If we give Chevron deference to each of the 50 States and no one of them is so outrageous as to fail

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Chevron, I guess we could have 50 different interpretations.

MS. MUNNS: I think that's a question that's being litigated in the courts right now, as those arbitrations go through the Federal district courts.

QUESTION: But then that would seem to make illusory the congressional scheme to have Federal review. I mean, we have the district court in San Francisco giving deference to one set of rules and in New York, the other. That doesn't make sense.

MS. MUNNS: Well, I don't -- I don't think that -- that that's necessarily right. I believe that this is a Federal statute and that the -- that Congress wanted review to be at the Federal courts to assure some uniformity in the --

QUESTION: Ms. Munns, if it's a Federal statute, then who is taking care to see that the Federal law is faithfully executed? I thought that was the job of the Federal executive. And I don't know, frankly, any scheme where you have Federal law governing, Federal courts doing the review, but no Article II agency. There's no Federal executive presence in it. So, you have the legislature. The legislation is Federal. The enforcement in court is Federal, but in between no Federal executive presence.

And is there any other -- in all of Federal law,

is there any other such scheme, and if there is, how does it measure up to Article II?

MS. MUNNS: And I'm not aware of any scheme like this, but --

QUESTION: There might be a scheme if you didn't take the position that the States could issue regulations. If the States couldn't issue regulations and could only adjudicate, you'd have a scheme like section 1983 I guess where -- where you can sue in State courts, but no regulations are issued by State entities. But you can sue in State court and State judges would interpret 1983 I suppose. Right?

MS. MUNNS: Yes. I'm not aware of --

QUESTION: You could do that, but you couldn't have any regulations coming out of the States then.

QUESTION: But here, as I understand it, the 252 gives the State agencies jurisdiction just in an adjudicatory way. They're resolving specific disputes that arise out of arbitrations. So, they are basically adjudicators within the scheme of the statute.

MS. MUNNS: They are adjudicators, but the standards are also in section 252. And when it gives the State commissions that duty, it says for the purposes of setting just and reasonable rates --

QUESTION: Follow the Federal standard.

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MS. MUNNS: -- for section 251, and it makes no reference to Federal standards.

QUESTION: Well, what do you think of 252(c)(1), which General Waxman alluded to, which binds the adjudicators in those circumstances to applying the regs issued under 251? 251(d) does not make any textual distinction in -- in the regulation granting authority between regulations over rates and -- and other subjects that the Commission could address. Therefore, it seems to say -- the two seem to say combined -- that the State adjudicatory authorities have got to follow Commission regs even when those Commission regs refer to -- to rate, i.e., ratemaking methodology. What's your answer to that?

MS. MUNNS: Section 252(c) that you're referring to says that when the State is making a decision in an arbitration, it must look to make sure that the decision is in compliance with section 251, including the FCC's regulations under 252 and the standards under section 252(d). There's no reference to any kind of Commission regulations with respect to those pricing standards.

QUESTION: Well, but maybe I'm missing -- I know I'm missing the point because I thought the reference back to 251 and regs issued under 251 was a reference, in effect, to the rulemaking authority under 251(d). And I don't think there's any textual distinction in 251(d)

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between regs that may affect the ratemaking methodology and regs on other subjects. So, that's why I thought the reference in 252(c)(1) would, in effect, be a reference back to Commission regulations insofar as they deal with ratemaking.

MS. MUNNS: Well, section 251(d) is not a grant of authority to the FCC. What it says is it must do -- must complete its rulemaking within a 6-month period to meet the requirements of that section. As I said, the -- the standards, the pricing standards, for State commissions to follow are -- are in section 252. They're not in section 251. It says, for purposes of setting just and reasonable rates for section 251(c), the State commissions shall, and then it sets out those pricing standards. The FCC doesn't have a role with respect to pricing unless the State fails to act. In that case, then the FCC may step forward.

QUESTION: So, basically your answer is that 251(d) refers solely to timing.

What about the reference in the preceding -- whether or not I agree with that, what about the references in the preceding sections with respect to -- interconnection, unbundled access, and so on that themselves refer to regulations?

MS. MUNNS: And -- and it's our position that

the FCC does have authority with respect when -- 252(d) says --

QUESTION: But they include regulations dealing with rates.

MS. MUNNS: I think that when -- when Congress in 252 said that the State commissions shall establish for -- shall set rates for the purposes of section 251, that it became clear that the State commissions were to do that. When you look at section 251(d), the rulemaking just goes for the requirements of this section. That kind of reading is required under section 2(b) of the act. Any authority that's granted to the FCC must be expressed straightforward and unambiguous under the rule that you set in Louisiana. So, when -- if there is no reference to the FCC, then they have no rulemaking authority. That's the rule that was set in Louisiana.

QUESTION: But Louisiana was before the 1996 act. And doesn't the 1996 act change the character of the -- there was once a clear divide, and that's why these 1934 parts that weren't changed are written as they are. But now the 1996 act becomes part of the total legislative package. And so, all of these restrictions that were appropriate in 1934 have to be adjusted so that 1996 legislation can fit. Isn't that so?

MS. MUNNS: You know, Your Honor, these are

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still dual-use facilities. The 1996 act has not changed that. These facilities have been -- they have interstate components and they have intrastate components.

When Congress promulgated the '96 acts, they -- they looked at whether or not they should retain the applicability of 2(b) to the '96 act. There was a point where it was excepted from the title 2 provisions, the local competition provisions. When it came out of the conference committee, it was back in. It is applicable. And that says, nothing in this act shall be construed to apply or to give the FCC jurisdiction over intrastate matters unless they have express and unambiguous authority from Congress.

QUESTION: Where does it say that?

MS. MUNNS: In section --

QUESTION: It doesn't say any unless it's explicit.

MS. MUNNS: Louisiana.

QUESTION: Are you quoting 2(b)?

MS. MUNNS: This Court in -- no, I'm quoting this Court in Louisiana.

QUESTION: I see.

MS. MUNNS: That's an interpretation of 2(b) from Louisiana.

QUESTION: 2(b) doesn't really mean what it

says. It says -- it just -- unless it's clear, you shouldn't interpret it to allow authority over intrastate matters.

MS. MUNNS: That -- that was what this Court has said in Louisiana, that there has to be two parts: first, that the statute has to apply; but secondly, that Congress has to make an assignment of an intrastate duty to the FCC.

If you look at other acts where the -- where Congress has legislated in the intrastate areas -- I take you specifically to the Cable Act -- Congress both legislated in the area and gave the FCC express authority. The pay phone section, 276, of this act. Congress both legislated in the area and gave express authority to the FCC.

QUESTION: Well, as I interpret the Solicitor General's argument, at least from the brief, there's -- one line is between interstate and intrastate. Another line is between what the act covers and what the act doesn't cover. And I think it's the Government's position that they're relying more on the latter, that this act covers the prices, and therefore the FCC's authority has to extend to that.

MS. MUNNS: Their argument is that --

QUESTION: And we -- and Louisiana did not

address that point, did it?

MS. MUNNS: No, but Louisiana said that 2(b) acts as both a rule of construction and a congressional denial of power to the FCC. So, in order for it to -- for the authority to apply and for the FCC to have authority, the act must both apply and express delegation must be made to the FCC.

I'd like to point you to section 225(b)(2) which is in the telecommunications services for the hearing -- for hearing and speech impaired individuals. There's a section in there where Congress expressly made the FCC's authority co-extensive with the terms of the act. They said all the general authority that the FCC has extends to this section.

So, the question is, why did they take that additional step? If, when Congress legislates in an intrastate area, FCC authority attaches, why was it necessary in section 225(b) to make that statement that all their general authority attach? Why when the passed the Pay Phones Act did they also make very clear that it related to both interstate and to intrastate?

QUESTION: But you do agree, Ms. Munns, do you not, that insofar as 2(b) refers to what -- how far the act shall apply, that it's been repealed?

MS. MUNNS: We concede that the 1996 act covers

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intrastate matters --

QUESTION: And therefore, that that portion of 2(b) is no longer have any meaning in this case.

MS. MUNNS: No, that the statute must both apply and the FCC must --

QUESTION: No. I was just asking insofar as it talks about where it applies, you agree the '96 act does apply in a manner that's inconsistent with the language of 2(b).

MS. MUNNS: No. No, I don't, Your Honor.

Thank you.

QUESTION: Thank you, Ms. Munns.

Mr. Tribe, we'll hear from you.

ORAL ARGUMENT OF LAURENCE H. TRIBE

ON BEHALF OF THE PRIVATE RESPONDENTS

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

Could I have some water? Thanks.

I think it would be more important and more useful for me to focus on the interaction of the precise statutory provisions of this act rather than to dwell too long on the boiler plate background provisions of, for example, section 201(b) where I'm afraid I read it as the Chief Justice does, as limited to its context.

It's quite clear that when Congress takes the

trouble that it did here to provide with great precision for who shall have jurisdiction to do what --

QUESTION: Great -- great precision?

MR. TRIBE: Well, it took me a while --

(Laughter.)

QUESTION: You can describe this piece of legislation as great precision?

(Laughter.)

MR. TRIBE: Not -- not, Justice Scalia, as great elegance.

(Laughter.)

MR. TRIBE: But let me try to say why I think it precise.

Section 251 imposes, quite clearly, a duty on all incumbent LEC's to provide various things, interconnection, unbundled access, resale -- to provide them at just and reasonable rates in accordance with the requirements of 252. Now, that I think is unambiguous. That's precise.

If you look at 252, it in turn quite precisely says the State commissions -- not the FCC, but the State commissions -- shall establish those rates according -- and I quote it -- to section 252(d). Now, 252(d) in turn spells out what the State commissions, quote, determinations of the just and reasonable rates for

purposes of section 251 shall be based on.

QUESTION: Mr. Tribe, is it not significant that they are given that statutory duty in the context of resolving arbitrations? They are not given that statutory duty in the context of rulemaking.

MR. TRIBE: Justice Stevens, with all respect, I do not agree with that.

QUESTION: Now, what in the statute -- what in the statute gives them rulemaking authority with regard to pricing?

MR. TRIBE: Well, in section 261(b) and 261(c), it's quite clear that rulemaking authority is contemplated, and indeed the preemptive structure established there shows that we're talking about State regulations. 261(b), for example, says that nothing in this part shall be construed to prohibit a State commission from enforcing regulations prescribed before a certain date or from prescribing regulations after the date of enactment -- and listen to this -- in fulfilling the requirements of this part, that is, 251 to 61, if such regulations are not inconsistent with its provisions. And if you look --

QUESTION: That's the key point. That's the key point: if not inconsistent with the provisions.

MR. TRIBE: Well, with the provisions.

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But notice how that differs, Justice Stevens, from the next section. That is, those things that fulfill the act are to be tested only against the provisions of the statute. Those, however, which go beyond are to be not inconsistent -- the end of 261(c) -- with this part or the Commission's regulations to implement this part.

And if you combine that with 251(d)(3), I think you can see what the -- what structure here emerges. If you look at 251(d)(3)(A), in prescribing and enforcing regs to implement the requirements of this section, the Commission -- that is, the FCC -- shall not preclude the enforcement of any regulation, order, or policy of a State commission that establishes access and interconnection obligations of local exchange carriers.

And it's clear in --

QUESTION: And is consistent with the requirements of this section.

MR. TRIBE: Of this section, but no reference to regulations of the FCC, and nothing in the section precludes the commissions from carrying out the duty. Let me just --

QUESTION: What about (d)(1)?

QUESTION: Let me ask -- let me ask one question just to summarize it, Mr. Tribe, because I want to be sure I understand your position.

Is it your view that in -- that beyond the statutory provisions that do impose certain requirements, certain standards, Federal standards, on pricing that there is no agency that has further rulemaking authority, that it's a Federal agency, or it's State agencies?

MR. TRIBE: The State commissions have rulemaking authority contemplated by this act to implement it including doing what they are told they must do in 252(d)(1).

QUESTION: And are they then promulgating in your view Federal standards or State standards?

MR. TRIBE: I think they are promulgating State standards to implement a general Federal principle. That is, the Federal rule under 252(d) says what the standards must achieve. It says that they must be based on cost, that they can include profit, that they should not be old-style ratemaking standards. Within that broad framework, there is room left for the 50 States to interpret that in somewhat different ways. You don't need Chevron deference.

QUESTION: We don't need Chevron deference.

MR. TRIBE: I don't think so, Justice Scalia. If the Federal Government says that certain functions are to be carried out by State commissions, as this law does, and that they are to carry them out to achieve certain --

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within certain parameters -- they must use costs -- you have a Federal standard applied by the Federal district court, on review of the Commission, see if they have complied with that. But 50 States can have 50 somewhat different conceptions of what --

QUESTION: Somewhat different? Could some have historical costs and others not?

MR. TRIBE: I don't think that's yet clear, Justice Ginsburg, because so far, as you know, most of them, as you pointed out, are using TELRIC or something very close to it.

QUESTION: Well, if there's a limit -- I mean, only the word cost.

MR. TRIBE: That's right, and the limit --

QUESTION: And who defines the limits of that word cost?

MR. TRIBE: The Federal judiciary ultimately. That is, this was passed by a Congress --

QUESTION: The Federal judiciary without any Federal executive in between.

MR. TRIBE: That's what --

QUESTION: Isn't that an unusual scheme?

MR. TRIBE: Well, but it's not unique, Justice Ginsburg. There is, for example, the Hinshaw amendment in the natural gas area, 17 U.S.C., section 717(c), and there

are other provisions in this statute dealing with border towns and pole attachment rates and rural exemptions where it's clear that Congress was doing something a bit different. It was, though, not unique.

QUESTION: I don't understand why you say that Federal courts will determine them. It seems to me you can't say, on the one hand, the Federal courts will determine the meaning of cost, and on other hand, you know, within the range of ambiguity, the States can determine the meaning of the words. I mean, take one position or the other.

MR. TRIBE: I think, Justice Scalia --

QUESTION: Cost -- does cost mean a single thing that Federal courts will determine or is it up to the States?

MR. TRIBE: The concept of cost is ultimately up to the Federal judiciary to determine.

QUESTION: Okay.

MR. TRIBE: But some concepts have latitude. That is, there are a lot of different -- if I say --

QUESTION: Like the concept of cost.

MR. TRIBE: Like the concept of cost.

QUESTION: Right. Well, it either has latitude or it doesn't have latitude.

MR. TRIBE: It has latitude.

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QUESTION: Okay, so it's up to the States.

MR. TRIBE: But -- but it has borders. I still think --

QUESTION: It can't mean non-costs.

QUESTION: No, no.

QUESTION: That's just Chevron deference you're talking about. That's no different from Chevron.

MR. TRIBE: Well, the difference I think, Justice Scalia, is that in the Chevron context, one would tell the governing Federal agency that within a permissible range of meanings, we're not going to decide what it means. We're actually going to let you decide what it means. That's different from saying we decide what it means.

QUESTION: Why what it means? What Justice Ginsburg said was about the limits on what it means. I take it you're saying that a State commission would have considerable leeway to decide whether to determine costs on the basis of a price cap, on the basis --

MR. TRIBE: Right.

QUESTION: -- of some kind of historical rate base like, despite that parenthetical which is there for no purpose --

MR. TRIBE: But that's -- that I think is unclear.

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QUESTION: -- is there for another purpose.

All right, but there are ways, or future oriented. But there might still be limits on what it can do. Fine. Those limits would be determined by a Federal judge in your view.

MR. TRIBE: That's right.

QUESTION: But in section 6 of duties, it imposes a duty upon a carrier to make an unbundled element available at a rate that is reasonable.

Now, the Commission, if we assume they have some rulemaking authority, would, I take it -- and this is my question -- at least have authority to determine when a rate is unreasonable.

MR. TRIBE: Justice Breyer, there's nothing in this intricate statute --

QUESTION: Yes.

MR. TRIBE: -- that gives the Commission authority to speak to the issue of reasonableness of rates, because even though the words appear in that general section --

QUESTION: I don't mean reasonableness by being too high. I mean reasonableness because a system was adopted by a State commission that, were it to be generalized throughout that State, would seriously undermine the purposes of the act.

MR. TRIBE: But then there is section 253, which says that when a particular system of any kind, not just about rates, when a policy or order or regulation has been promulgated by a State and when you can show, when the Commission can show after notice and hearing that it, that particular one, will operate as an impermissible barrier to competition, then it may be preempted, says the statute, but only to the extent necessary to cure the violation. It seems to me --

QUESTION: Do I have to choose between all or none? That is -- that is, could we view the word rates in section 6 and the negative phrase, rulemaking authority, later on as giving the Commission the authority to say when something, a system, for example, is unreasonable, but not to dictate which among several systems should -- the State should use?

MR. TRIBE: I think, Justice Breyer, as long as it does that not ex ante and across the board, but by looking at a particular action of a State, then it's operating within the ambit of the statute.

QUESTION: Thank you.

MR. TRIBE: But this statute rejects I think very clearly anything that resembles a kind of prior restraint invalidation across the board of some set of rates. And if ratemaking were delegated to the States

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here only for purposes of arbitrations in 252(c), then perhaps you could understand the distinction the SG is making between rulemaking, which he says is for us, although as he admits when pressed, the rules can get right down to the last details, the way their proxy prices did, where they averaged from six States and applied specifics -- basically he's saying rulemaking is for us and applying is for you.

But if you look at 252(d), it's very clear that when the States set prices, they are doing it, quote, for purposes of section 251, not for arbitrations, but for 251, which is the generic provision defining the obligations of the incumbent LEC's --

QUESTION: Yes, but --

MR. TRIBE: -- and indeed, also for 251(f). That is, their dilemma about section 271 is solved by 251(f). In 271, at what they call the back end, the FCC has to decide whether a Bell operating company that wants to go into long distance has complied with the rate regulations. But it's got to comply with the rate regulations and rules promulgated by the States because the State commissions --

QUESTION: Did I understand you to answer Justice Breyer that the Commission, FCC, could examine whether any particular application of a rate was

reasonable? I mean, how would it do that?

MR. TRIBE: Well, the way --

QUESTION: What's the mechanism for it doing that other than by promoting a rule -- promulgating the rule?

MR. TRIBE: Under 253(d) the mechanism is described. If after notice and an opportunity for comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) which talks about excluding competition, then its enforcement may be -- the enforcement of such statute, regulation, or requirement, to the extent necessary to correct such violation or inconsistency, shall be preempted.

QUESTION: So, the Congress limits the FCC to an adjudicative role?

MR. TRIBE: Well, in this area, I think if you immerse yourself in this statute, what happens is that the FCC is permitted essentially in this limited special area of rates -- and there are a few others in the statute like it -- not its customary role of promulgating regulations, but to the role of backstop --

QUESTION: But, Mr. Tribe, that --

MR. TRIBE: -- intervening in particular cases.

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QUESTION: -- that isn't a fair reading of 251(c)(2)(D) because (c)(2)(D) refers to the interconnection on rates, terms, and conditions that are just and reasonable, and that's in 251 itself. And I think it's -- everyone seems to agree that -- that the FCC has rulemaking authority with respect to 251.

MR. TRIBE: Well, with respect to terms and conditions and as to rates, perhaps --

QUESTION: Rates, terms and conditions that are just, reasonable, and nondiscriminatory.

MR. TRIBE: But I suppose the word nondiscriminatory could apply to rates, but in determining what is just and reasonable, the statute says that that's to be done in accord with the standards of 252(d), and that's with the State commissions.

But there was one point that I was trying to make a bit earlier that I want to come back to --

QUESTION: No, it did say -- it doesn't say that. It says in accordance with the terms and conditions of the agreement and the requirements not just of section 252. And the requirements of this section and section 252.

MR. TRIBE: Right.

QUESTION: And that's crucial.

MR. TRIBE: But I think, Justice Scalia, that

the only way to give coherent meaning to these provisions is to understand that when it refers to the requirements of this section, of 251, it's not saying this section and any regulations promulgated thereunder. This statute draws that distinction repeatedly; 10 times I believe it refers to section 251 and regulations promulgated thereunder.

QUESTION: Thank you --

MR. TRIBE: Here it does not.

QUESTION: Thank you, Mr. Tribe.

MR. TRIBE: Thank you.

QUESTION: General Waxman, you have about 30 seconds left.

(Laughter.)

REBUTTAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE FEDERAL PETITIONERS

MR. WAXMAN: Every question that has been raised in this oral argument can be answered with reference to section 251(c)(3) which requires -- that deals with unbundled network elements and requires that they provided -- be provided at rates, terms, and conditions that are just, reasonable, and -- and consistent with the standards of section 252.

Four of the five issues we're going to be talking about in the next hour deal with that.

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QUESTION: Thank you. General Waxman, your time has expired.

Now we'll take a very momentary respite from sections 251 and 252 while counsel change their tables.

(Pause.)

QUESTION: Spectators are admonished, do not talk until you get out of the courtroom. The Court remains in session.

Mr. Barr.

ORAL ARGUMENT OF WILLIAM P. BARR

ON BEHALF OF THE CROSS-PETITIONERS/RESPONDENTS

MR. BARR: Thank you, Mr. Chief Justice. May it please the Court:

I'm Bill Barr and I'm representing the local telephone companies.

To promote local phone competition, Congress granted a right of access to incumbent facilities, and this required drawing a line, a line through the business of the local telephone companies.

On one side of the line where no access is granted, the entrants are told here is where you can and should compete. Here is where you put in your inputs. Here is where you try to become more efficient. That's where competition is, and the more of that the merrier.

On the other side of the line, Congress says

there may be areas where we can't have competition because of the legacy of monopoly. Maybe it is not fair to ask you to replicate or duplicate the input of the incumbent, and so here, you may have access.

Now, in drawing this line, Congress set two standards. First, it said, the only thing you can get access to are network facilities. As to everything else, we expect you to compete. You put in your inputs. And even as to network facilities, you don't automatically get all of those. We want you to compete there too the best you can, but if the FCC finds that there is part of the facility that you need, that if you fail to get it, it will impair your ability to offer service, then you can use that and get access to that part.

Now, we're not here today because we are quibbling over the application of those standards and think the line should be drawn a little bit to one side or the other. We're here because the FCC obliterated those lines. They did not apply either standard. They ended up by saying that need doesn't mean need, it means technical feasibility. Anything you can possibly get access to you must get access to. That's their rule.

And as to network, they say, network? No, no. Anything that's used in the overall commercial offering of your service to the public -- anything -- anything that

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differentiates you, anything that makes you more efficient in offering to the public -- is up for grabs.

So, what does this mean? This is the most promiscuous right of access that you can imagine. And to use the metaphor that you often use, Justice Breyer, about the spring and the mousetrap, they haven't take our spring. They haven't taken our mousetrap. They haven't stopped there. They're taking the cheese.

(Laughter.)

MR. BARR: Now, let's look at what they did on need. Three paragraphs in the order are dispositive. Paragraphs 278, 285, and 286. Congress said in section 251(d)(2), apply a need-based standard, determine whether their failure to get access will impair their ability to provide service. That's what you have to consider.

What do they do? They obliterate that standard. They adopt a rule in paragraphs 285 and 286 that say we refuse to look at any alternative outside the incumbent's network. We must start with the incumbent's network. We close our eyes and put on blinders. We will not look at any alternative outside the incumbent's network.

QUESTION: Mr. Barr, just as a matter of information, what else is there for the would-be entrant who has no facilities of its own? What other source would there be to obtain network elements?

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MR. BARR: Well --

QUESTION: Where else could they go?

MR. BARR: That -- that's the inquiry that should have been made, and in fact, in many markets there are many facilities. There are wires into the home from cable companies. There are dozens of switches in major metropolitan areas put in by CLEC's, competitive LEC's. There's more fiber under the streets of some cities than there is concrete above. Signaling services are things that are typically bought from vendors. Many ILEC's, many incumbents, don't even provide their own. They go out and buy it.

For AT&T to suggest -- they were the manufacturers of switches up until the time they divested Lucent -- that somehow they can't get a switch is ludicrous. There are many things to look out -- look at out there. But that's what they didn't do. They didn't make the inquiry, and by definition, that violates the plain meaning of any need standard.

Whether the need standard is indispensability, reasonable need, a little need, fairness, to apply any standard other than want or than technical feasibility, by definition you have to look at the alternatives. How can you tell if someone is hurt or impaired unless you look at the consequences of them not getting access? They came up

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with a rule that says we take access as a given in every case. We start out with access.

Now, why do they do that? This is the interesting thing. They do that -- if you look at paragraph 278 of their order, they do that because their entire premise was that there was an absolute technical feasibility standard and anything that can be given must be given. They got that by misreading a provision in the statute that said access must be given to an element at any technically feasible point.

So, what do they say in paragraph 278? Oh, any technically feasible point. That means they have to give up everything that's technically feasible to give up.

Now, the Eighth Circuit knocked them down on that and said, that's ridiculous. That talks to the point of access, not what you have to give access to.

But what the Eighth Circuit failed to appreciate is that just seven paragraphs later in the order, when they encounter the need standard, the FCC scratches its head and says, oh, that's funny. There's an absolute requirement for them to give everything and here there seems to be some discussion of need. What do we do? Well --

QUESTION: Mr. Barr, can I just ask for help? You're referring to 278 of the order?

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MR. BARR: Yes.

QUESTION: Where in the papers is that?

MR. BARR: That's joint appendix 49, Your Honor.

QUESTION: Is it in the petitioners' appendix? They seemed to have skipped those paragraphs.

MR. BARR: It's in the joint appendix at page 49.

QUESTION: Joint appendix. Thank you. It's not in the other.

MR. BARR: They say, gee, how do we reconcile this absolute standard, which is now bogus? They have not appealed the Eighth Circuit order. It's a bogus standard. And they say, how do we give that effect to this so-called absolute right of access? Well, we'll read the need standard out of the statute. We'll adopt a rule that says you never look beyond the incumbent's network.

So, our point is they refused to apply the standard that Congress told them to apply. They adopted a rule which by definition contravenes the plain meaning of a need or an impairment standard, and they did all of this premised on giving an effect to an error, something they haven't even appealed. Now they say, well, we didn't have to apply the standard --

QUESTION: Mr. Barr, what again is what you say is the error that they have not appealed?

MR. BARR: Their premise was that the language technical feasibility, the point of technical feasibility meant not just the point at which you grant access to an element, but that you have to give access to every element that's technically feasible to give access to. The Eighth Circuit said, no, that's not right.

But what the Eighth Circuit didn't appreciate is that seven paragraphs later --

QUESTION: Point of technical feasibility where in the statute?

MR. BARR: 251(c)(3) --

QUESTION: Right.

MR. BARR: -- says you get access to unbundled elements at any technically feasible point. They took that language and said, that means you get access to every element that's technically feasible to get access to. The Eighth Circuit said, no, that means that, assuming you get access to an element, it's at the technically feasible point.

QUESTION: That's what 278 says.

MR. BARR: No, no. That's what the Eighth Circuit said.

278 says -- 278, which is their order, the FCC order before the Eighth Circuit case, said we interpret at any technically feasible point to mean you have to give

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access to everything.

QUESTION: Right.

MR. BARR: Then seven paragraphs later, when they come across the need standard, they say, gee, that's funny. There seems to be a tension here. Congress told us to give access to everything. This seems to talk about need. We'll interpret need by saying you never look outside the network. You always assume access to the incumbent's network. You start out with saying that you get access to the incumbent's network. You never look to see if there's another switch in the market. That violates the plain meaning of any need standard, not just need and impairment here, but any standard above technical feasibility.

So, it violates the plain meaning and it's premised -- the whole premise of their approach is predicated on an error, an error that was detected by the Eighth Circuit, an error which they have not appealed.

But now they say, well, we can just rely on what people want. If there's something out there, then -- then -- then -- the -- the person will want it. The entrant will take it. So, we don't have to apply a need standard.

The problem there is, Congress used a need standard precisely because it knew that -- that entrants sometimes want what they don't need. It doesn't make a

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differentiation between advantages that an incumbent may have that flow from the positive forces of competition, skill and innovation, from those that are the products of natural monopoly. So, it does not make any differentiation. Something that -- that a incumbent has that's a good thing an entrant may want, but maybe they don't need it because it is a competitive advantage that was fairly acquired by skill and innovation.

Now, let's see what they do to the definition of network element. The game is in the first sentence of that definition which is --

QUESTION: Before you go away from the need and impair, what would be a fair way of implementing that statutory provision?

MR. BARR: What the FCC should have done was to engage in the fundamental task here, which is to differentiate what are the advantages and the things about the incumbent's business that can be fairly competed against, that can be counteracted by an effective competitor, and what are the things in their business that even an effective competitor could not reasonably counteract in a short period of time because of the legacy of monopoly. They never made that differentiation.

QUESTION: Is it right -- I'm thinking in my mind that -- for example, a local loop, which means wires

that go under the street to my house, spread out throughout a city, would be something that would be quite difficult for a new competitor to do. He'd have to get permission from the city council and dig up the streets. But a computer which handles the switching, you call up IBM and you order one.

MR. BARR: That's absolutely --

QUESTION: Is that what you're trying to get at?

MR. BARR: That's absolutely correct. In fact, in Canada, the only thing unbundled is the loop, and in the U.K., nothing is -- nothing is made available because cables are another wire under the house and they could be made two-way. And that's why 10 percent of the British population is already using cable --

QUESTION: Certainly Congress here thought that there could be elements of the system where it would be possible to introduce competition.

MR. BARR: Absolutely.

QUESTION: And so, certainly the FCC is reasonable in trying to figure out which those elements are.

MR. BARR: They -- they should have. They didn't try. They didn't apply a need standard.

QUESTION: Well, they said, we don't know, and since we don't know, we're going to assume that what those

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elements are is anything that somebody wants.

MR. BARR: Well --

QUESTION: Maybe that's the best they can do before -- you know, you say, well, we tried. Come up with something better.

MR. BARR: That's not what they say in their order. They didn't say --

QUESTION: Well, suppose they have. They said, you don't like this. You think this is silly because obviously the computer is different from the -- from the loop going into a person's house, and one you can order from IBM and the other you can't. Very well. You come up with a standard. I didn't see in any of these briefs a better standard.

MR. BARR: Well, as I say, number one, they didn't do it, and number two, if they applied that standard, it's inconceivable that they would find that in every market, every competitor needs everything.

QUESTION: Why not? I mean, you say, it impairs my ability to enter the market if it -- if -- if providing it by myself would raise my rates. In other words, if I can't get it as cheaply as you can give it to me, it impairs my ability to enter the market. And the only condition on which I would want it or desire it is you can give it to me more cheaply than I can develop it for

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myself. That makes sense.

MR. BARR: No, it doesn't make sense.

QUESTION: So long as you take impair to mean, you know, come at a higher price.

MR. BARR: No. If they had used a cost standard, which they didn't do, they didn't apply a -- just a pure cost standard. Remember, they just said technical feasibility. But if they had, I would be here saying they can't do that either. They can't do that either because all -- that -- that assumes that all advantages that the incumbent has -- all advantages -- have to be given over, even those that a good competitor could counteract.

The key insight here is that you don't advance competition by taking things that a competitor could actually compete on and turning it over to a competitor.

QUESTION: I mean, that's absolutely correct, but I want to ask you again to see if I -- if the answer is going to be negative.

This morning I was thinking along the lines that you just state, and I was tempted to criticize the FCC for not getting a better standard. And then I asked myself the question, how well could I have done? You see? And I think it is a defense to say, well, it isn't good but it's the best we could do.

And therefore, I would like to ask you to give me an example of how you would have made the intuitive -- how you would have embodied the intuitive distinction you mention in a rule that would be better than this one.

MR. BARR: Yes. We are dealing -- first, I would bear in mind that we're dealing with local markets, and I -- and the FCC promulgates -- has the tools to address local markets. They promulgate rules every day of the week that make distinctions between concentrated urban markets and dispersed rural markets. Every day of the week. Moreover, they have the tool of arbitration which gets you down to a carrier-by-carrier level.

They could easily say in New York where there are dozens of switches, in New York where there are companies that have built from soup to nuts entire networks -- there are people building it today without taking any of our pieces. They could say that in certain markets, certain kinds of businesses don't need certain things. The notion that everybody in every market needs, as a perquisite -- as a prerequisite to competition everything we have is ludicrous.

QUESTION: Well, from -- from an economic standpoint, if they don't need it, why will they ask for it?

MR. BARR: Because people will want what they

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don't need. For example, if something is --

QUESTION: Well --

(Laughter.)

MR. BARR: If there is something cheaper out there --

QUESTION: That sounds maybe like some of the old-day telephone companies, not the new telephone companies.

(Laughter.)

MR. BARR: There are two examples. If something -- if there's an alternative that's cheaper out there, there are powerful incentives for the entrant to still use the incumbent. He avoids investment risk and innovation risk. He invests -- if he puts -- if he buys his own --

QUESTION: That's why he needs it.

MR. BARR: Excuse me?

QUESTION: That's why it needs it.

MR. BARR: He needs it to avoid competing. That's what -- that's what that answer is. He can compete. There's an alternative out there. He doesn't want to use it because he wants to avoid competing. The purpose of the statute is to make him compete.

Now, suppose that the incumbent has something that's a little more efficient. The fact that he wants it doesn't mean he needs it because the efficiency may come

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from skill and innovation, not as a legacy of the natural monopoly. A want rule is not the same as a need rule. And they made no inquiry as to what's available.

This is the most promiscuous unbundling rule you can imagine. It's the only country in the world that does it this way, and that's why we're behind because boards of directors are not going to authorize billions of dollars of investment in alternative facilities as long as the FCC is out there waving total access at TELRIC prices which, by definition, are the lowest price you can possibly have in a competitive market.

Now, look at the game they play on definition of the element. The key phrase there is used in the provision of the --

QUESTION: What section are you talking about?

MR. BARR: Section 153, paragraph 29.

The key language there is used in the provision of a telecommunications service. Now, what they try to say is used in the provision means used in the offering, the overall commercial --

QUESTION: Could you help us again? Where is that in the materials?

MR. BARR: It is section 153 of the statute, paragraph 29.

QUESTION: Oh, of the -- you're referring to the

statute.

MR. BARR: The statute. It's the definition of network elements.

They say used --

QUESTION: We don't -- we don't have that in the -- it's not in the petitioners' appendix.

MR. BARR: It's in the back of -- of our brief, the red brief.

QUESTION: It's on page A-3 of the appendix there.

QUESTION: What the subsection?

QUESTION: Page A-3.

QUESTION: What's your subsection? 153?

MR. BARR: 153, paragraph 29. It's the definition of network element. That's what they get access to, or that's a candidate for access, if they need it.

Now, the whole battle is in that first sentence because that tells you what equipment are we talking about. Are we talking about equipment in the business, or are we talking about some other kind of equipment like the transmission facility, the stuff that operates it? They say --

QUESTION: Where again are we talking about, Mr. --

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QUESTION: I have it at page A-3 of Professor Tribe's brief.

MR. BARR: Page A-3 of Professor Tribe's brief. It's the first page on our brief in the back on the statute.

QUESTION: Thank you.

MR. BARR: It says that a network element is equipment or facilities used in the provision of a telecommunications service. They say that means used in offering to the public the service, everything that goes into offering. We say it means no. It's used to produce the service that is offered. It's the input, the equipment input, into the production, the generation of the service.

QUESTION: Mr. Barr, you say the FCC says it means one thing. You say it means something else. You have to show that what they're saying is wrong, don't you?

MR. BARR: Their definition clearly conflicts with the statute.

QUESTION: Why?

MR. BARR: Number one, it doesn't comport with the -- with the word network. Network has a meaning, a common, ordinary meaning of the wires and switches, the transmission system.

Second, they -- they are deleting the word

provision from the statute. As the second sentence of that definition shows, provision is not the synonym for offering. As the last phrase of the second sentence shows, it says, transmission routing or other provision. They're talking about the steps in producing the service, the steps in carrying the traffic.

QUESTION: But the sentence says, such term also includes. Now, you take that second sentence to mean despite the -- the prior definition?

MR. BARR: No.

QUESTION: We're adding to it information sufficient for billing and collection? Information for billing and collection isn't -- isn't something that is needful for the provision of the telecommunications service.

MR. BARR: It's or. It's or.

Here's how it works. First, you tell what equipment you're talking about. That's done in the first sentence. The work done in the first sentence is, is it equipment that's in the transmission facility or is it some other equipment?

The second sentence then says, once you got that equipment, it includes the features of that equipment and data and information provided by that equipment that is either sufficient for billing or used --

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QUESTION: But that's not what it says. It doesn't say what you have just said. It says, such term, and the term is network element includes da-da, da-da, da-da, features and capabilities. That's not what you said.

MR. BARR: Of such -- yes. It's provided by such equipment. It's the features provided by such equipment.

QUESTION: So, the term then is equipment. Okay.

MR. BARR: Yes. So, equipment. Then the features of that equipment. Then information generated by that equipment that's used. For example --

QUESTION: But it said provided by means of such and so. If you have an answering system, an operator, a 411 operator, live operator, she or he, that operator, is providing that service by means of the physical facility. So, it would include that.

MR. BARR: Well, it would include -- it would include the operator's facility, not the operator. We would say it's the equipment input --

QUESTION: Well, why wouldn't it include the operator because --

MR. BARR: Because an operator, we would say is not a facility.

QUESTION: -- because it is a capability

provided by means of the physical plant.

MR. BARR: That's right. A capability provided by the physical plant is included.

And another example would be a switch captures the duration of a call. That's information. It generates a record, how long a call took. That's information provided by means of the equipment that we have to make available. No doubt about it.

The point is whether the equipment we're talking about is anything we used in offering -- anything we used in offering or anything we use in producing the service, the transmission activities.

And the other -- the legislative history makes it crystal clear that what Congress was talking about was the bottleneck facilities which they defined as the elements needed to originate or terminate a telephone call, the equipment with capabilities of routing and signaling calls. And ultimately, if you take what is supposed to be a line that is dividing the business to encourage competition wherever it can occur, and you say it's anything in the business that gives you an advantage in offering, you've obliterated the line.

But let's look at OSS as an example, and why we need the Court's intervention here is because they adopted this sweeping rule with no limiting principle --

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QUESTION: What is OSS? Office of Special Services --

(Laughter.)

MR. BARR: Right, the predecessor to the CIA.

(Laughter.)

MR. BARR: No. It's a very broad category of operational support systems, anything in our business that supports our operations. And I'd like to give you a tangible example of how this works.

We develop a screen that comes up for a sales representative when someone calls. Let's say we pulled together a lot of information. It has their past billing records and their records of interaction with us. It has their credit history, so we could do a credit history check. And it also has a box that allows us to activate the switch and turn on their service.

Now, we have no problems giving them the box that activates the service because that's part of the operation, the continued operation, of the transmission system.

But if we've developed a system ourselves that let's us do credit checks on customers and let's us, you know, have better customer care because we're aware of the whole background of that customer and their interaction with us, that is not used in the provision of the service.

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And the only way they're getting that is to say it's used in the general offering. And if you look at paragraphs - -

QUESTION: Wait. You say it's provided by means of the same equipment that -- that enables you to activate their -- their service.

MR. BARR: No. Our -- the outboard equipment, the system, the OSS system, which is outboard of the network, is a means that we have of accessing our network to turn it on. They have a right to access our network that's nondiscriminatory. So, we could say to them, put in your remote triggering device or inherently we can give you the same access we had. You can use our system.

QUESTION: But this is what makes your definition so -- I don't know -- manipulable. You could look on it as the fact that this screen, which you have developed in such a fashion that you can push one side of the screen and it will activate, it will send a signal, that that equipment is -- is itself equipment which has these other functions on it.

MR. BARR: This is exactly the thing that the FCC didn't do. They didn't sort out what is necessary to operate the network and the stuff that we've developed to enhance our marketing. And they -- by adopting a broad category, they just sweeped it all in. We're not asking

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you to make those distinctions. We're saying they didn't make those distinctions.

And this is important because their broad rule is binding on the States, and we're facing situations in the States where we're being -- people are coming in and saying your people have to put velcro patches on with AT&T name on it. Your trucks have to have magnetic things that shift back and forth. AT&T, GTE, and so forth. We -- we need a principled basis, a rule for them to apply and they didn't -- and they didn't do that.

I'd like to reserve the balance of my time.

QUESTION: Very well, Mr. Barr.

General Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE FEDERAL CROSS-RESPONDENTS/PETITIONERS

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

Because Congress has authorized the FCC to promulgate rules implementing the Communications Act, those rules must be given effect unless they are arbitrary, capricious, unreasonable, or manifestly contrary to the statute.

There are five substantive rules that are at issue in this portion of the case, and each one is fully consistent with the text of the act. The incumbents

object to those rules based on their predictions about how competition will proceed if the rules were permitted to go into effect.

But each of those objections was considered by the Commission within the mandatory 6-month period and in an atmosphere in which there was no competition to speak of in any market, and the Commission, after hearing thousands and tens of thousands of pages of comments, resolved those policy objections on the record in a manner that promotes the paramount objective of the 1996 amendments to produce vigorous competition in this country's monopoly local telephone markets as rapidly as possible by giving potential new entrants a range of competitive options.

Take, for example, the two issues that, at least before this morning, appeared to be at the center of the case. They certainly were at the center of the briefs of the case.

First, this is rule 315(b). Applying the nondiscrimination requirement of section 251(c)(3) that we talked about, the FCC promulgated a rule that prohibits incumbents from imposing completely gratuitous costs on new entrants by ripping apart network elements that are already combined in the incumbent's system.

Second, the Commission declined to legislate a

requirement nowhere present in the language of the statute that new entrants build one or more network elements before invoking the right to these others. The incumbents, but notably in this regard not the State commissions, argue that these rules, taken together, will undermine the current system of implicit universal service subsidies. That is correct.

In section 254 of the act, Congress mandated an end to this monopoly-based system to be replaced by a new system of explicit charges, applied equally among all carriers, regardless of the means by which they compete. The FCC is implementing its part of the reform, and it has found on the record that the State commissions will do as well, as soon as cost-based competition is introduced into their local markets.

The incumbents argue that these rules would, quote, eviscerate resale as a competitive option. But the Commission found that they would not and it explained why in its order and its predictive judgments are entitled to deference.

QUESTION: I rather missed the reason. I mean, I read the section, but I missed the reason. That is -- maybe I'll say what -- the part that's bothering me, and I think the reason they've gotten to this is, if I saw this act as having two parts, the first part is that the BOC's

are supposed to bring competition to long distance, that they can't do that because the others said we're not going to let you compete with us unless you let us compete with you. But the difficulty, as you put in your brief very well, you say on page 4 of your brief -- you explained it beautifully -- that there are large elements of this that are naturally monopolistic, loops, et cetera, and no one knows where they break off.

So, their complaint is that what happened with this rule is it says, Steve Breyer or you or anybody else in the world could go to Bell Atlantic and say, sell us your whole system. Now, why would someone do that? Because for years and years Bell Atlantic has had to charge high prices to business customers, for example, because, one, the universal service, but also because of allocation rules on their fixed costs which shove a lot of the fixed costs onto business people. So, you or I can make a fortune by buying up their system, and using this TELRIC system, which -- by the way, the best criticism of which comes from Holmes and Brandeis in Missouri v. Southwestern Bell.

But regardless of that, isn't what they say factually true? And if that's factually true, how could that be consistent with a statute which is designed to allow new competition in some but not all elements,

indeed, not in the elements that you state on page 4?

Now, that's my one question, but it's fairly long and fairly basic.

MR. WAXMAN: Let me try and address it if I understand what the -- I understand the question to be why isn't there fear that new incumbents will use the opportunity to lease all elements to, in effect, make an end run around the resale option that the statute permits under (c)(4) which is priced as a discount to retail rates. Is that --

QUESTION: If you can answer that, you will go a long way towards answering the question.

MR. WAXMAN: I will -- okay, I will take a try, and to the extent to which there is some part of your question I haven't answered, please give me the chance.

The assertion that allowing new entrants to lease all network elements would obliterate resale as a competitive option is both empirically wrong, as the Commission found on the record -- and I will point you to the provisions -- but it is also -- and before I get to it, I think it fundamentally misconceives the statute. There is no textual basis in the statute for preferring one mode of competition or the other.

The FCC found -- and I think it's correct in this regard -- that Congress, in passing this statute, in

effect, acted in the role of Aristotle's prime mover. It set -- it created a set of options for private choice to ensure that something would work to bring competition in each disparate local market whether it's rural residential or downtown Manhattan, and like natural selection, what matters is not that every variation survives for every possible competitive strategy, but that at least one works in each environment. So, I disagree with the -- and the FCC disagreed with the premise of their understanding of the act.

Now, creating a rule --

QUESTION: Excuse me. That's assuming that what Congress means by competition is just having competing salesmen for the same network.

MR. WAXMAN: Well, that -- that is the problem for --

QUESTION: Do you think that's what -- do you think that's what Congress meant by -- by competition? We're going to have -- just one single network, but we're going to have competing salesmen.

MR. WAXMAN: No. Congress wanted facilities -- new entrants to build facilities. And the FCC has embraced that. We're now talking about the means to get there. What your comment suggests is the reason why resale, using the (c)(4) option, will not -- can't produce

this -- construction of new facilities and doesn't even produce real price competition because the resalers --

QUESTION: The producers --

MR. WAXMAN: -- are just getting a discount.

QUESTION: Right, exactly.

MR. WAXMAN: Now, with respect to the empirical findings that the Commission made -- and recall, Justice Breyer, that these were findings that had to be made within 6 months by mandate in a period in which there is no competition. Someone's predictive judgment is going to have to be given weight, either the FCC's, which for 65 years has been regulating this industry, or local -- or local incumbents who have never experienced and certainly have not embraced cost-based competition.

What the FCC found -- and I would direct you to paragraphs 331 through 334 of the First Report and Order principally, although there are some other subsidiary references -- is as follows.

First, that resale allows quicker entry because you don't have to go through this detailed, bottoms-up costing determination. It provides, unlike leasing network elements, a guaranteed return. You know what you are going to be making when you resell and you know what your costs will be.

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It also is better, Justice Breyer, for an entrant that only wants to offer a narrow range of services or an entrant that has little up-front capital. I mean, this act was not enacted to protect AT&T or Bell Atlantic or any other giant that may be able to compete on its own terms. The purpose of this act was to allow vigorous competition even by little guys a la what happened when long-distance services were deregulated because AT&T at the time had to give access to its elements at the best rate it offered to anybody.

And moreover, even in the short-term period before State universal service is reformed from a monopoly-implicit subsidy situation to what Congress has mandated, explicit subsidies that apply to and are charged against all entrants, even entrants that are competing on the basis of network elements, during that period rural customers can only receive competition through resale. And in general, residential customers who don't make long-distance calls will be serviced through the (c)(4) mechanism.

The Commission also found -- I think it's paragraph 334 -- that just as resale has certain advantages and disadvantages with respect to leasing elements, leasing elements has greater risks and operational costs for all potential competitors.

First of all, there are fixed costs. Some network elements, like the loop, like the network interface device, like certain sub-elements within the switch, are leased on a flat rate per month basis, and those costs have to be paid whether you get enough revenues from the customer or not. And in many instances -- and they're documented I think in AT&T's reply brief -- the -- the fixed costs for leasing the loop alone, which is only one of the seven elements, is greater than the retail charge that the incumbent is making for that service.

In addition, TELRIC and other pricing mechanisms allow incumbents to charge -- make nonrecurring charges like one-time provisioning and installation charges. That's money that you pay on the barrel head whether you want to get out quickly or not and whether your customer ends up generating enough revenue to satisfy you or not.

Even as to usage-sensitive rates, there are risks. You can say, well, you know, you only pay for so much of the switch as you use. That's true, but you have to be able to collect it from your customer, and if you have a customer, for example, who doesn't make any long distance calls, all he does is call his Internet service provider and he spends 5 hours a day surfing the web, you will end up having to -- if you resell, you don't have any

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risks, but if you lease the switch as a network element, you will have very significant usage costs and yet will only be able to --

QUESTION: Get a new customer.

MR. WAXMAN: Well, exactly right. Exactly right.

QUESTION: It seems virtually inconceivable intuitively that somebody goes and says -- the loop costs like $30 a month or something and -- or $12 a month and the chance that the customer who has it attached to her house is not going to pay the $12 a month or $14 or something like that -- I mean, it's conceivable I grant you, but when looking through those three paragraphs, if that's what the FCC is driving at, I think they'd have to use some example that's a little better than just announcing that there is some risk that the loop won't be paid for.

MR. WAXMAN: Well, let me make two points, Justice Breyer. I don't want to dwell on this point for all of my time.

The FCC again was promulgate -- it had 6 months to -- to essentially review all of this record.

QUESTION: I quite sympathize with the FCC on this. You're absolutely right.

MR. WAXMAN: The FCC has said at many times

during this order there's no competition now and we don't have a crystal ball about the way it's going to compete, but we have to make a predictive judgment. And if competition develops in a way that our rules don't accommodate, we will change them. They say that over and over again with respect to the need and impair standard --

QUESTION: But the reason that it's so serious I think is because of what they say in their brief, that -- that given the present structure of rates and given the fact that universal system subsidies have not yet come into effect, to follow this particular system, at least they say, runs the risk that people will, where in fact fixed costs have been shoved into business rates, go and buy this wholesale TELRIC thing which will give them rates that are well below.

MR. WAXMAN: Absolutely.

QUESTION: On the other hand, where you're talking about residential consumers, what they'll do is they there will appeal to the resale wholesale business for a totally different reason. It's because those costs are really below the costs of providing the service, and that's what they're worried about.

And I don't -- in reading this, I didn't see an answer to that.

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MR. WAXMAN: Okay.

QUESTION: And because I didn't see an answer, I began to think, well, maybe they're right in saying this just goes too far, this interpretation.

MR. WAXMAN: Let me give you an answer that looks to the two paradigms you've just addressed.

With respect to rural residential customers, the paradigmatic customers that under old universal service are getting service below cost --

QUESTION: No. I'm not so much thinking of them because --

MR. WAXMAN: Okay. I just -- I just --

QUESTION: I'm really thinking of residential customers who weren't getting subsidies in a straight sense, but in fact they were not bearing a proportionate share of the fixed costs.

MR. WAXMAN: Okay. With -- let me -- let me focus --

QUESTION: Maybe that comes to the same thing.

MR. WAXMAN: Well, I -- let me just say that any time, if there is a subsidized customer under the old system, that a new incumbent takes over on the basis of resale, the local incumbent isn't hurt at all. It gets the same costs and the same revenues it always would have gotten. It's not hurt by having a new entrant take that

subsidized customer away.

QUESTION: Why would the residential customer be hurt because they'll grab away all the business with this wholesale thing and then, at least in the interim, they'd have to -- the Commission would have to raise the price of the -- maybe we're getting too complicated.

MR. WAXMAN: No, no, no. It --

QUESTION: Forget my question.

MR. WAXMAN: Okay. Let's look at the business customer, what they refer to as the cream-skimming mode, that if these Commission rules are allowed to come into effect, the barbarians at the gate will come rushing in and -- and take away instantly all of their business customers, thus depriving them of what they need to provide universal service.

First, again I think we have to refer to what the Commission considered and what the Commission decided, and unfortunately to do that, you need to look not only at the First Report and Order in this case, but the Commission's Report and Order with respect to access charge reform that is -- was affirmed in the Eighth Circuit decision we lodged with the Court, and the Commission's findings in its universal service reform order, which is on appeal now to the Fifth Circuit.

The -- the -- I think it's important to say here

a few things. One, the State -- it's very significant that the State commissions, who have, after all, with the FCC the real interest in protecting universal service, have not challenged any of these unbundling rules.

Second of all, the FCC made a finding. It made an empirical finding that the pace of cost-based competition has not and is not likely to outstrip the incumbents' ability to bear it. And it has found on the record that if that happens, the FCC like the States can take interim measures to protect the incumbents and to protect universal service.

QUESTION: Are all of the points you have just made responsive to Mr. Barr's argument that the Commission failed to heed the word need in the statute?

MR. WAXMAN: No, but could I ask your indulgence and just finish this answer --

QUESTION: Yes.

MR. WAXMAN: -- and then address --

QUESTION: -- Kennedy has a question. Go ahead --

QUESTION: You --

MR. WAXMAN: I just want to make sure I -- I answer you fully.

If you look at -- in our reply brief, for example, at pages 31 and 32, notes 21 and 22, you'll see

some, but not all of the findings that the Commission made. And in fact, the Commission has already taken steps to provide interim relief to make sure --

QUESTION: Mr. Waxman, you can't put questioners on hold.

MR. WAXMAN: Okay.

QUESTION: When your red light goes on, it goes on.

MR. WAXMAN: Justice Kennedy, with respect to the -- the -- the question -- the point that -- I do apologize. I didn't realize I was that much out of time.

With respect to the question that they've raised with respect to the Commission's interpretation of 251(d)(2), 251(d)(2) says nothing about **State** commissions. It says that in -- I'm quoting from the statute here. In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider need and impairment.

Now, there is no question in this case that the Commission applied dictionary definitions for those words, and there is no question in the First Report and Order that it considered both need and impair not only in general in the section that addresses this standard, but as to each of the seven network elements that it identified, loops, switches, trunks, NID's, signaling. It

has a section with respect to each one that applies the need and impairment standard and states the reasons why it thinks that it was met.

Again, this is an order that was required to be produced within 6 months, a time when there was no competition, a time in which all of the incumbents are monopolists and the Commission determined, again making specific references to the fact that it may change its requirements as conditions develop -- it expressly said for present purposes in this environment where there's no competition, we're only going to look within the incumbent monopolist's own network. And that is a reasonable requirement in a monopoly regime.

QUESTION: Thank you, Mr. Waxman.

Mr. Carpenter, we'll hear from you.

ORAL ARGUMENT OF DAVID W. CARPENTER

ON BEHALF OF THE PRIVATE CROSS-RESPONDENTS/PETITIONERS

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

Mr. Barr made two principal arguments. He objects to the fact that new entrants can obtain all elements, and he objects to the application of the need standard.

The implication and necessary consequence of his arguments, if accepted, would mean that there would be no

price constraints whatsoever on the incumbent local monopolies in any area of the country until some local facility were constructed by ATT or anyone else who had the resources to do so, and even in those areas, the only constraint would be that that ATT would provide -- you have a duopoly rather than a monopoly.

And that position follows from the fact that the only option people could use is resale, and when you use resale, you can only offer one of the two services that any local exchange network offers. You could only offer exchange service and you could only offer it on terms that don't affect the margins that the local monopolists run at all. So, there's no --

QUESTION: What about Mr. Barr's point that there are other sources?

MR. CARPENTER: Pardon me?

QUESTION: That Mr. Barr said -- I asked, suppose someone has no facilities, how do they get into this, apart from using the incumbent's facilities? And Mr. Barr answered, the FCC never looked around. If they did, they would see that there were other places where the new entrants --

MR. CARPENTER: Just let's put this in context. What Mr. Barr wants is a rule of the FCC that means that when these States conduct arbitrations, when any

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individual requesting carrier asks for something, you litigate whether, for that requesting carrier, it has options. There's lots of people who concededly under even his view, the non-ATT's of this world, can't build -- can't construct alternative facilities. So, he wants to tie up these -- these arbitration proceedings with case-by-case, area-by-area litigation of whether particular entrants can acquire particular facilities.

The FCC said that that was pointless. When it was applying the standards of 252(d), it said need means added cost. People -- it found people won't request things they don't need, paragraph 287, and it found that to give the LEC's this -- yet another weapon in slowing down competition would delay the -- delay entry and increase the costs --

QUESTION: People won't request things they don't need. It's essentially as though that requirement weren't there. So, it doesn't really mean anything other than what would happen if it weren't there.

MR. CARPENTER: The FCC considered the consequences of the rule that Mr. Barr is urging and it found it would serve no positive purpose because people won't request things that they don't need. And it found that it would slow down entry and --

QUESTION: But if --

MR. CARPENTER: -- impose added costs.

QUESTION: If Congress provided that need is the standard, the FCC has got to defer to that. It can't just say Congress made a mistake.

MR. CARPENTER: Absolutely, Your Honor. But the -- but the -- but the FCC doesn't make elements available. The States do. The FCC adopts regulations that define the conditions under which States must make them available. And what he's complaining about is that those regulations didn't allow case-by-case litigation of whether particular carriers --

QUESTION: What he's complaining about is the -- is the transition from need to want, which is a statutory question.

MR. CARPENTER: It's a statutory question. The FCC was required to consider that in promulgating rules. It did consider that. It defined need as added cost, and no one disputes that that's a permissible interpretation. And it -- it found that carriers who didn't need things, who could acquire them at a lower cost elsewhere, wouldn't ask for them, and that his rule would impose added litigation costs on new entrants and would delay entry.

QUESTION: But doesn't he have a textual basis for his claim to individualized determinations? In the language in (d)(2)(B), which refers to impairing the

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ability of the telecommunications carrier seeking access to provide the service, that sounds like an individualized determination.

MR. CARPENTER: No, Your Honor. That's the standard that applies to the FCC when it adopts rules that the States will apply when they perform the adjudicatory function of determining which elements are to be made available. So, it's -- that is a -- that is a standard that --

QUESTION: So you say.

MR. CARPENTER: And --

QUESTION: But it sounds like an individualized determination is contemplated, and I think that's what he's asking.

MR. CARPENTER: Well, if -- I would submit that the FCC doesn't make anything available. Only the States do that in arbitrations. Only the States are ever going to make individualized determinations under the structure of this act.

QUESTION: But he wants that determination to be individualized where it is made.

MR. CARPENTER: That's right, and the FCC determined that -- that it would defeat the objectives of the act and would impose added costs on people for no reason if that individualized determination were required

to be made in each separate arbitration proceeding. And it rests on -- on a finding that people won't ask for things they don't need, so that people will only be asking for things that they do need. So, it satisfies the -- the standard under that definition.

I wonder, if I might, just refer to the other major point here, which is the -- the fact that people can obtain all the elements --

QUESTION: Just before you do that, would you -- would you explain to me if Congress really meant these two to be available kind of at the entrant's option, why was there conditioning of the long-distance carrier on the -- getting into the resale business but not on the networks element, if Congress thought you could get everything by the networks element route?

MR. CARPENTER: Yes, and that relates to my second point. The point is that when you obtain elements, even if you obtain all the elements, you -- you are -- you are investing in the network in much the same way that an owner would be.

Justice Breyer, if you look at the Commission's TELRIC rules, paragraphs 686 to 687, you will see that all the investment risks that a new entrant -- you know, that a new entrant has to -- has to take on all the investment risks of the -- of the carrier to the extent the new

entrant is leasing the carrier's facilities. So, the new entrant is fundamentally a lessee that is much in the position of an owner.

And in response to you, Justice Ginsburg, when the -- when the FCC found that only people who engaged in resale under (c)(4) were prohibited from jointly -- jointly marketing long-distance services, it was on the basis that it only covered resale, didn't prohibit owners of facilities, and that lessees of network elements had investments like those of owners, not like those of resellers.

And the difference between resale and -- and leasing network elements is absolutely fundamental. When you -- when you're a reseller under (c)(4), you're just buying the same services that each of us use in our homes, the same services. When you're -- it's -- local telephone networks are plants that provide two things: exchange services we each buy, exchange access services that inter-exchange carriers buy and that account for 35 percent of the revenues. When you resell -- when you resell, you only get to resell what we use in our homes. When you lease elements, you're paying for the whole -- whole ball of wax, everything that's there, covering all the investment risks, and you're in a position to provide all the services that the LEC is currently providing and

impose price constraints that otherwise won't exist.

And this will have no effect on the incentives of people to build new facilities because even if you lease all these things at precisely their economic cost, you're going to have higher costs than they do because of the enormous transaction costs of -- of depending on a monopoly competitor to try to get what you need to compete.

The FCC found throughout this order that they have incentives to slow roll us in negotiation. They have the incentive and ability to discriminate against us. We -- no one in their right mind would rely on these people for -- for facilities if they could obtain -- could -- could obtain them from another source themselves at anything remotely approaching the sum of the costs if you lease all the elements. So -- so, this is as fundamental difference as one can imagine.

Now, Mr. -- Mr. Barr talks about the specific definition of operator support systems. I think the text of the first sentence forecloses this. The text of the second sentence establishes that the -- this is not something that's limited to routing and transmission.

But I just want to point out that a separate regulation that no one has ever challenged -- 313(d) I think it is -- independently requires the same access to

operations for systems based on a finding that if you don't have the information that those systems provide, you're in a position where you never can get access to the six other elements that are not being challenged.

He also complains about the fact that the -- this rule supposedly give access to live operators. They don't. The specific regulation says the access to operator facilities and all the functions they provide. We get the access to those functions irrespective of whether those functions are performed by humans or by machines, as most operator functions are, by the way. And every single element in this network to some extent relies on humans.

Thank you.

QUESTION: Thank you, Mr. Carpenter.

Mr. Barr, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF WILLIAM P. BARR

ON BEHALF OF THE CROSS-PETITIONERS/RESPONDENTS

MR. BARR: There's a pivotal word in section 251(c)(3). It's the word on an unbundled basis. What does that mean?

If I have a statute that says -- we say it means unbundled from the whole. So, it means less than the whole. That's what you're taking under that provision. If I have a statute that says to promote automobile

manufacturers and it says you can buy GM's car and resell it if you want, or to make your own car, you can get parts from General Motors on an unbundled basis, to suggest that I can put an order in to General Motors saying please give me all the constituent parts of a car on a preassembled basis so I get the same output unit a car, and if that's the purpose of the provision, it's ludicrous.

What unbundled means in every context I'm aware of is disaggregating the stuff you're taking from the whole. And this is why it relates back to the need inquiry. What the FCC was supposed to do was say, what do they need, what don't they need. And the stuff they don't need from the incumbent they provide themselves, and in order to induce them to put that into the marketplace so you have competition at least on those parts, we have an unbundling provision that lets them get the rest unbundled from the whole.

So, our argument is that that provision simply is not available to go in and engage in a fiction that you're getting anything on an unbundled basis when you buy our entire network from stem to stern.

QUESTION: But suppose they only had 6 months in the statute. So, the Solicitor General says, look, this isn't perfect. We only had 6 months. We had to do the best we can, and we'll change it --

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MR. BARR: We say --

QUESTION: -- if necessary.

MR. BARR: -- if you -- if you -- if you have to rely on everything that the incumbent has, that's why resale is there. Resale is there to build scale so you can deploy facilities.

The second point I want to make about 251(c)(3) is this notion that there's something different is bogus. There's no different risk. And more importantly, because you pay by the line, by the month, just as you would if you bought it resale and you only pay for what you actually use on capacity.

But the more important point is the opportunities they talk about. They say, oh, we have all these opportunities if we do it this way. Please focus. Those opportunities are restatements of the evasion. They say, under resale we can't joint market, but if we do it this way, we have the additional opportunity of selling long distance. Under resale, we can't provide access, but if we do it this way, we can sell access as well.

There's no new input by them. There is merely evasion of the restriction. They have taken the position that it's meant to induce them to bring inputs into the marketplace, partial inputs which otherwise couldn't be deployed unless they could fill in the gaps with the

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unbundling provision, and converted it into nothing more than another label for resale without the restrictions.

QUESTION: What about the right-mind point that Mr. Carpenter made? He said nobody in his right mind is going to deal -- want to deal with you if he's got an alternative. What's your answer to that?

MR. BARR: I -- I -- I would like someone to tell that to the Chairman of AT&T because they have been standing around with their hands in their pockets for 3 years talking about a UNE platform, that their entry strategy was to buy a UNE platform, which means our network, nothing different, totally our network under the fiction that they're buying pieces. That was their entry strategy.

The Eighth Circuit stopped it, and so they finally had to go out and buy, guess what? Facilities, TCI and -- and a teleport. So, they're now introducing facilities into the marketplace because the scam of taking a free ride on our network and using the arbitrage -- the person that is hurt by arbitrage is Aunt Tilly because the money that the business people are paying was supposed to support her service.

What the FCC rule does is it takes that money and diverts into the -- uses it as a subsidy for people to come in and provide Potemkin competition. I'm reselling

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the same network as these guys, and I'm taking the money that was supporting Aunt Tilly and putting it in my pocket.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Barr.

The case is submitted.

(Whereupon, at 12:06 p.m., the case in the above-entitled matter was submitted.)

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MCI TELECOMMUNICATIONS CORPORATION, Petitioner v. IOWA UTILITIES BOARD, ET AL.;
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, ET AL., Petitioners v. IOWA UTILITIES BOARD, ET AL;
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, Petitioners v. IOWA UTILITIES BOARD, ET AL.;
AMERITECH CORPORATION, ET AL., Petitioners v. FEDERAL COMMUNICATIONS COMMISSION, ET AL.;
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U S WEST, INC., Petitioner v. FEDERAL COMMUNICATIONS COMMISSION, ET AL.; AND
SOUTHERN NEW ENGLAND TELEPHONE COMPANY, ET AL., Petitioners v. FEDERAL COMMUNICATIONS COMMISSION, ET AL.
CASE NOs: 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141

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BY Ann Marie Fedrico

(REPORTER)