

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TALK AMERICA, INC., :

4 Petitioner : No. 10-313

5 v. :

6 MICHIGAN BELL TELEPHONE COMPANY, :

7 DBA AT&T MICHIGAN :

8 - - - - - x

9 and

10 - - - - - x

11 ORJIAKOR ISIOGU, ET AL., :

12 Petitioners : No. 10-329

13 v. :

14 MICHIGAN BELL TELEPHONE COMPANY, :

15 DBA AT&T MICHIGAN :

16 - - - - - x

17 Washington, D.C.

18 Wednesday, March 30, 2011

19

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

23 APPEARANCES:

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4 supporting Petitioners.

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

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P R O C E E D I N G S

(11:07 a.m.)

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

Mr. Bursch.

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONERS

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

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

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

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

And so the answer to the question presented

1 is yes, for three reasons. First, because the FCC says
2 so and, as the expert agency charged with interpreting
3 and implementing the act, that conclusion is entitled to
4 deference.

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

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

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

1 and then the competitive carrier would be that person in
2 the park.

3 On page 20a of the petition appendix in
4 footnote 9, about halfway down, this is the key flaw in
5 the Sixth Circuit's reasoning. The Sixth Circuit says
6 if you, as the homeowner, that's the -- I'm sorry,
7 that's the incumbent -- had said that they may plug into
8 the surge protector, then the big orange extension cord
9 is just an entrance facility. But if you had said they
10 must plug into the big orange extension cord, then the
11 big orange extension cord becomes the interconnection
12 facility; and consequently the parkgoers, the
13 competitors, may plug into it.

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

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

1 MR. BURSCH: Yes.

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

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

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

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

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

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

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

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

25 JUSTICE SCALIA: Well, but the logic of your

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

3 MR. BURSCH: Right; and -- and two
4 additional points, Your Honor, on that. First they say
5 this is a large obligation because we're talking about
6 miles and miles. That is not the position that AT&T
7 took with the FCC when they were commenting on the TRRO.
8 At page 16a of the Michigan blue brief in footnote 357
9 of the TRRO the FCC acknowledges AT&T's statement that
10 entrance facilities involve very short distances. In
11 addition, we have the FCC's regulation and the local
12 competition order, paragraph 553 --

13 JUSTICE SCALIA: Excuse me, excuse me.

14 MR. BURSCH: Yes?

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

17 MR. BURSCH: Yes. I believe that's correct,
18 yes. They are very short distances.

19 JUSTICE SCALIA: Okay. Well, right. But if
20 you ask for a longer distance they would presumably have
21 to build it?

22 MR. BURSCH: Well, not necessarily.

23 JUSTICE SCALIA: And charge you TELRIC
24 rates.

25 MR. BURSCH: Right. Because the FCC has

1 promulgated in -- in 521, the meet-point obligation,
2 which is another way that you can have interconnection.
3 And that demonstrates two things. First, that sometimes
4 AT&T as the incumbent is required to build out
5 facilities, that it's not just a passive obligation.
6 But in addition, when they're talking about meet points,
7 they say that it's up to State commissions to decide the
8 appropriate and reasonable distance.

9 So even if we were presented with the
10 case -- not this case, but a different case -- where
11 you're talking about what's the appropriate length of
12 the facilities, the FCC has already acknowledged there
13 could be some reasonable limits on that. And the most
14 important fundamental point, the fourth point on this,
15 is that Congress already in (c)(2) said you're going to
16 have interconnection without regard to market
17 impairment, and so we're not going to look at the
18 availability of other entrance facilities in the market.
19 If a competitor asks to have this location and this
20 method and it's technically feasible, they do get the
21 TELRIC rates.

22 And the competitive carriers would take
23 issue with the presumption that TELRIC rates are -- are
24 unfair. The regulations do contemplate that they're
25 going to recover not only their cost but a reasonable

1 profit. And we can disagree about the congressional
2 wisdom of requiring rates like that, but in the Verizon
3 case this Court definitively put to bed the question of
4 the reasonableness of the TELRIC rates.

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

10 MR. BURSCH: Yes.

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

15 MR. BURSCH: Correct.

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

22 My candidate would normally be the FCC or
23 some regulator decides that kind of thing, and it's up
24 to them to say whether this is or is not what's needed
25 for interconnection. That would be an intuitive account

1 I would have, without having read the statute in depth.

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

7 MR. BURSCH: Justice Breyer, if you look at
8 paragraph 553 of the local competition order, which
9 appears at page 27a of the Michigan blue brief --

10 JUSTICE BREYER: Michigan blue --

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

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

16 MR. BURSCH: Very good.

17 About halfway down the -- that paragraph
18 there, it says: "Regarding the distance from an
19 incumbent LEC's premises that an incumbent should be
20 required to build out facilities for meet-point
21 arrangements" -- so again this is in the meet-point
22 context -- "we believe that the parties and State
23 commissions are in a better position than the commission
24 to determine the appropriate distance that would
25 constitute the required reasonable accommodation for

1 interconnection."

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

4 MR. BURSCH: Exactly.

5 JUSTICE BREYER: This is the FCC speaking?

6 MR. BURSCH: Exactly. The FCC is speaking,
7 so --

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

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

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

20 MR. BURSCH: Correct.

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

23 MR. BURSCH: I do.

24 JUSTICE SCALIA: What do you rely upon to
25 equate them? Because the -- as I read the regulations,

1 they -- they use them as separate terms.

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

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

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

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

22 MR. BURSCH: It is transport. By
23 definition, interconnection has to include transport,
24 because it involves the mutual exchange of traffic from
25 one to another.

1 JUSTICE KENNEDY: But the -- but the rate
2 says interconnection does not include transport.

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

7 JUSTICE KENNEDY: I have got it in front of
8 me. It says "This term does not include transport."
9 But you say it does?

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

13 JUSTICE KENNEDY: No, I'm talking about
14 interconnection.

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

17 JUSTICE KENNEDY: Yes.

18 MR. BURSCH: That -- that goes to a term of
19 art or a phrase of art, "transport and termination of
20 traffic." And as the FCC made clear in its regulation
21 51.701, which is at page 35a of the red brief, what
22 they're really distinguishing there are the two types of
23 charges. You have 251(c)(2) interconnection charges and
24 you have 251(b)(5), transport and termination of traffic
25 charges. And those are two separate concepts.

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

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

16 MR. BURSCH: No, there is not, and we don't
17 take that position. The mutual exchange is when a
18 competitive customer talks to an incumbent customer or
19 vice versa. Everything else we can call backhauling and
20 that's not what's at issue when we're talking about
21 251(c)(2).

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

24 MR. BURSCH: Yes.

25 JUSTICE BREYER: I would think -- you said,

1 well, this is an existing facility.

2 MR. BURSCH: Yes.

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

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

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

19 JUSTICE BREYER: I don't know what it is.
20 Often, these things are not distance. Often a
21 connection is all kinds of complex things, you know?
22 And some are necessary and some aren't. But I can --
23 can't you imagine with me the same kind of California
24 problem arising, but it just arises in -- in kind,
25 rather than in distance?

1 MR. BURSCH: Well, as far as --

2 JUSTICE BREYER: If I'm so far off base you
3 can't get the question, forget it.

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

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

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

9 JUSTICE BREYER: You don't have to --

10 MR. BURSCH: I'll take it in two parts. You
11 know, again, with respect to distance, in the meet point
12 context, the FCC has already delegated in LCO paragraph
13 553 appropriate and reasonable distances.

14 With respect to the bells and whistles, it's
15 really not that complicated. You have got a cable;
16 that's your entrance facility, typically a fiberoptic
17 cable, and there's going to be a conduit that it needs
18 to run through. There might be, you know, risers or
19 spacers with little twisty ties or something similar to
20 that, zip cords, that will allow the cable to be run
21 into a building and up a wall and connect into the
22 appropriate place. But to the extent those are
23 interconnection facilities, those are necessarily part
24 of the 251(c)(2) obligation.

25 And unless there are any further questions,

1 I'll reserve the remainder of my time.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. BURSCH: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Miller.

5 ORAL ARGUMENT OF ERIC D. MILLER,

6 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING THE PETITIONERS

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

10 There are a lot of statements by the FCC at
11 issue in this case, but I would like to focus on two
12 statements by the commission in its published regulation
13 and orders that, taken together, resolve the question
14 presented here. And the first is the commission's
15 determination in 47 CFR 51.305(e), which appears at page
16 5a of Michigan's brief, that it is the competitor, not
17 the incumbent, that gets to select the point at which
18 interconnection takes place.

19 Specifically, that regulation says that if
20 an incumbent wants to deny a request for
21 interconnection, it has -- at a particular point, it has
22 the burden of proving that interconnection at that point
23 would be technically infeasible. And that undercuts a
24 key premise of the decision below, which was that as
25 long as the incumbent provides interconnection at some

1 technically feasible point that it has selected then
2 it's discharged its obligation, and if the competitor
3 doesn't like it, that's just too bad. They can build
4 their own facility if they want to interconnect
5 somewhere else. That's --

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

16 MR. MILLER: In terms of the definition of
17 technical feasibility, that's a defined term in section
18 51.5 of the regulations, and it does not include
19 economic considerations.

20 Nonetheless, as the commission explained
21 when it adopted those regulations in 1996 at paragraph
22 209 of the local competition order, competitors have an
23 incentive to ask for an economically efficient means of
24 interconnection, because they have to pay for it. I
25 mean, the -- they don't pay as much as AT&T would

1 like -- they're paying TELRIC rates -- but they do still
2 have to pay for interconnection, so they have incentive
3 to ask for a reasonable method of it.

4 And what's at issue in this case, to get to
5 the second part of your question --

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

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

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

15 MR. MILLER: The -- the second is the
16 commission's determination in the Triennial Review
17 Remand Order in response to the D.C. Circuit's remand of
18 its previous order, that entrance facilities are indeed
19 part of the incumbent's network, because the statutory
20 obligation, of course, is to allow interconnection at
21 any technically feasible point within the incumbent
22 carrier's network.

23 JUSTICE BREYER: Where do I find that?

24 MR. MILLER: That's in paragraph 137 of the
25 Triennial Review Remand Order, which appears at page 10a

1 of Michigan's brief. And in the preceding paragraph,
2 the commission traced the history of its definition of
3 the dedicated transport network element and the local
4 competition order, its revision of that in the Triennial
5 Review Order, in which it had said that the facilities
6 are not part of the network. The D.C. Circuit then
7 vacated that.

8 JUSTICE SCALIA: Which section are you
9 referring to on page 10a? Which one is it?

10 MR. MILLER: Well, I've -- I've just gone
11 back to the previous two pages, but it -- 10a is
12 paragraph 137, where the Court says in response --
13 excuse me -- where the commission says, in response to
14 the Court's remand, that's the D.C. Circuit's remand in
15 the USTA case, we reinstate the local competition order
16 of dedicated -- order definition of dedicated transport.
17 And that was a definition of a network element that
18 included entrance facilities. So what the commission
19 was saying there by its reference back to that
20 definition --

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

24 MR. MILLER: That -- that's correct, and the
25 court of appeals, I think, perceived a contradiction

1 between saying that this isn't something to which you
2 have to provide unbundled access under (c)(3), but it is
3 something that has to be made available for
4 interconnection under (c)(2).

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

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

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

20 MR. MILLER: If you're referring to the --
21 what the -- in the way the commission used those terms
22 in the --

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

1 MR. MILLER: An entrance facility --

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

5 MR. MILLER: An entrance facility, as the
6 commission explained in the TRRO, is just the link
7 between the incumbent's office and the competitor's
8 office. And an interconnection facility is anything,
9 any part of the network that's being used for
10 interconnection.

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

13 MR. MILLER: It can be.

14 JUSTICE SCALIA: -- in your estimation?

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

20 CHIEF JUSTICE ROBERTS: I'm sorry. Could
21 you run that by me again?

22 MR. MILLER: The -- the entrance facility is
23 just the link between the two offices, the incumbent's
24 and the competitor.

25 CHIEF JUSTICE ROBERTS: Okay, got it.

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

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

14 MR. MILLER: We -- we agree with the view
15 expressed by Judge Sutton in his dissenting opinion
16 below that there really is no reason to distinguish
17 between amicus briefs, particularly those filed at the
18 invitation of a court, in the court of appeals, from
19 those file -- filed here. In this case, of course, the
20 question of --

21 JUSTICE SCALIA: But there may be a -- a
22 reason to give less weight to briefs in this Court
23 different from the briefs filed with the court of
24 appeals. And you've taken a different position here
25 on -- on the issue of whether, when backhauling is

1 included, it's part of the -- it's -- it's part of the
2 interconnection facility?

3 MR. MILLER: No.

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

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

18 JUSTICE SCALIA: Wait, they have to be as
19 unbundled elements? I thought they never had to be --

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

21 JUSTICE SCALIA: -- as unbundled elements.
22 That's (c)(3).

23 MR. MILLER: That's right.

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

1 MR. MILLER: Exactly.

2 JUSTICE SCALIA: Which is not unbundled?

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

10 JUSTICE SCALIA: It certainly encourages us
11 to throw up our hands, there's no doubt about it.

12 (Laughter.)

13 MR. MILLER: Another way of saying that
14 would be that it's appropriate to recognize the
15 commission's not only policy-making discretion, but
16 technical expertise in the industry that's being
17 regulated. And certainly the commission has tried to be
18 as clear as it can in its regulations, but this is an
19 area where some level of imprecision is probably
20 inevitable, and I think that's why it's appropriate to
21 defer to --

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

25 (Laughter.)

1 JUSTICE KENNEDY -- but I -- I wasn't sure
2 of -- if it was a transport or link. That -- that's my
3 concern.

4 MR. MILLER: Well, I guess I would say maybe
5 we need to put the difference between interconnection
6 and transport in concrete terms. It would be the
7 interconnection charge which is at TELRIC rates under
8 252(d)(1). There would be a flat fee for setting it up,
9 and then a flat monthly fee just for having the link
10 there.

11 CHIEF JUSTICE ROBERTS: Continue.

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

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Miller.

22 Mr. Angstreich.

23 ORAL ARGUMENT OF SCOTT H. ANGSTREICH

24 ON BEHALF OF THE RESPONDENTS

25 MR. ANGSTREICH: Thank you, Mr. Chief

1 Justice, and may it please the Court:

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

15 JUSTICE SOTOMAYOR: Counsel, I know you're
16 saying that, but everybody's arguing about what the TRO
17 and the TRRO say or don't say. But I go behind that and
18 I go -- I think the government's entire argument is not
19 based even on those. It's based on the LCO regulations
20 themselves. They've cited two, which is 51.305 and
21 51.321. They're not relying on those TROs in their back
22 and forth there, they are relying on the regulation.

23 MR. ANGSTREICH: Well, Your Honor, I
24 actually read their brief differently, and I note that
25 in the Sixth Circuit they didn't rely on any regulations

1 at all. The argument was entirely based on paragraph
2 140.

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

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

10 MR. ANGSTREICH: There are --

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

15 MR. ANGSTREICH: Your Honor, when the FCC
16 explained this to the Eighth Circuit, what it said is
17 there are really three things going on. One is (c)(2),
18 is the duty to interconnect at a point, not to provide a
19 whole host of facilities that get you to the point, but
20 literally the duty to interconnect at a specific point
21 in the world; selected by the competitor to be sure, but
22 that only tells you where interconnection occurs.
23 That's the point.

24 The commission then said: Okay, then there
25 are other obligations in the statute. One of them is in

1 section 251(b)(5, and that's what obligates the
2 incumbent to accept telephone calls that are sent to
3 that point and to send telephone calls through that
4 point to the competitor.

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

8 JUSTICE SCALIA: The Sixth Circuit?

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

18 (C)(2) would overlap with other sections
19 that, one, describe a duty to route and transmit
20 traffic, telephone calls; and, two, a duty to lease
21 facilities that will be used for routing and
22 transmission. Footnote: Those duties are (b)(5) and
23 (c)(3). To the extent there is a duty to lease the
24 facilities, the fiber optic cables that competitors are
25 going to use to get to the interconnection point of

1 their choice, that duty has to arise, the commission is
2 saying here, only under section 251(c)(3). And we know
3 it doesn't arise under that section because these aren't
4 things that are bottleneck elements, these aren't things
5 that competitors can't get themselves.

6 Competitors are interconnecting today.
7 Wireless carriers, other competitors, everyone in the
8 state of Ohio has since 2005 not been paying TELRIC
9 rates, and as the amicus brief showed, there has been no
10 detriment to interconnection. Interconnection is
11 occurring.

12 And so what the government is trying to do
13 here is impose this leasing obligation under the
14 interconnection duty in a way that never gave AT&T and
15 other incumbents any opportunity to challenge it. They
16 never explain how it squares with the text and structure
17 of the statute, with their prior statements, or why
18 there's any policy basis for interpreting what they
19 claim is an ambiguous statute to require TELRIC pricing
20 for things that are not bottleneck elements.

21 Back in the level competition order, Justice
22 Sotomayor, when they adopted the TELRIC methodology,
23 they recognized -- this is in paragraph 702 --
24 interconnection services -- that's what they called it
25 back then -- are bottlenecks, not things that

1 competitors can build themselves or buy from third
2 parties in the marketplace, as the agency has found is
3 the case since 2005. They never --

4 JUSTICE SOTOMAYOR: Now you're reading
5 limitation into the statute. All the statute says is,
6 you're obligated to provide interconnection services.
7 It doesn't say how or limit it only to things that are
8 not bottlenecks or things that are bottlenecks. It just
9 says you're obligated to do X, and that's what the
10 agency's saying.

11 MR. ANGSTREICH: I understand this, Your
12 Honor. But if the agency had ever done that through
13 notice and comment with a rule and published it in the
14 Federal Register -- which they concede that before 2003
15 they hadn't done that as to entrance facilities -- and
16 they claimed they had no occasion to address the
17 question -- and then in 2003 we get a single sentence in
18 a paragraph of an order where there was no notice they
19 were considering interconnection duties, no publication
20 of a new regulation, no publication -- nothing that
21 would have, you know, told AT&T and other incumbents you
22 should seek judicial review of this if you feel it's
23 wrong.

24 And now we're being told 8 years later that
25 when they said facilities in that paragraph, they meant

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

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

13 MR. ANGSTREICH: Prior to 2003 and 2005,
14 when there was an unbundling rule in place -- and the
15 commission had always recognized when it established
16 that unbundling rule in 1996 that competitors would use
17 unbundled transport facilities to connect to incumbent
18 switches, so to connect to those interconnection points.
19 And sure, prior to 2005 when the unbundling rule was in
20 place, competitors would lease these facilities and pay
21 TELRIC rates and use them to get to the interconnection
22 point; but there was never during that time any
23 statement that even if there was no impairment, section
24 251(c)(2) would require the exact same thing to get to
25 the interconnection point.

1 JUSTICE SCALIA: What happened to the
2 unbundling rule?

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

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

18 JUSTICE SCALIA: Why was the unbundling rule
19 abandoned?

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

23 JUSTICE SCALIA: It's not a bottleneck?

24 MR. ANGSTREICH: It's not in any way, shape
25 or form a bottleneck. And I guess that gets to the

1 second point I'd make, which is that again -- and I
2 don't think they rely on the regulations, Justice
3 Sotomayor, and they've never -- and the government
4 concedes in footnote 6 that the regulations themselves
5 don't get them to where they want to go. They need
6 these statements they made in 2003 and 2005. And even
7 if you credit their new position that when they said
8 facilities and interconnection facilities, that was just
9 an imprecise way of saying entrance facilities, those
10 statements don't get you to the rule that they're
11 endorsing.

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

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

22 MR. ANGSTREICH: Well, I think the point is
23 what they -- this is why we think the right reading of
24 those statements is that the facilities they're
25 referring to are things they actually do require and

1 need, which are the things inside AT&T buildings that
2 they can't replicate, that it's strange for them to have
3 said "you're going to get these facilities you require,"
4 but to have meant something that they don't in fact
5 require.

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

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

22 MR. ANGSTREICH: But that's what --

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

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

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

7 MR. ANGSTREICH: Well that's -- my point is,
8 yes; if there is a facilities leasing obligation it has
9 to exist under (c)(3), that's absolutely right, Justice
10 Scalia. That we think that's the right reading of the
11 statute, we think that's what the FCC told the Eighth
12 Circuit, we think it's what the FCC said in the local
13 competition order.

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

21 MR. ANGSTREICH: Your Honor --

22 JUSTICE BREYER: What part is doing
23 something else?

24 MR. ANGSTREICH: There -- there is really no
25 --

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

2 MR. ANGSTREICH: No.

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

7 MR. ANGSTREICH: Well, the Michigan
8 commission decided that the FCC in that paragraph 140
9 created this obligation.

10 JUSTICE BREYER: Yes.

11 JUSTICE SCALIA: But the -- the --

12 MR. ANGSTREICH: That's wrong.

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

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

20 JUSTICE SCALIA: So it is accepted by both
21 sides, I think, that this is not necessary.

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

1 statements in these --

2 JUSTICE BREYER: It doesn't help because
3 it's a network element, if it's in (3) and what this is,
4 is something that's going to be needed to -- to
5 interconnect. If it's -- if it's in -- if it's in the
6 first one.

7 MR. ANGSTREICH: But --

8 JUSTICE BREYER: And I don't know which is
9 which, and I gather that sometimes it would be tough,
10 and what courts use to do with the ICC when they got
11 into this kind of situation is a doctrine called primary
12 jurisdiction, and they would ask them for a brief. All
13 right? So if that's what we've done hypothetically, we
14 have the brief.

15 MR. ANGSTREICH: We don't --

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

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

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

25 MR. ANGSTREICH: Your Honor --

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

3 MR. ANGSTREICH: Our --

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

10 MR. ANGSTREICH: That -- Your Honor, that's
11 absolutely right, Justice Scalia. They get to pick a
12 point. The point has to be within our network. Rule
13 51.305 identifies a series of illustrative points all of
14 which exist inside AT&T buildings, and that's what
15 they've done. They've picked a point --

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

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

23 JUSTICE SOTOMAYOR: It's now --

24 MR. ANGSTREICH: And that's when they also
25 supposedly adopted this rule. So somehow, this rule

1 they've adopted has to coexist with the notion that
2 these things are outside our network. But in or out, I
3 think it's important to recognize they're not
4 claiming --

5 JUSTICE SOTOMAYOR: If they're not --

6 MR. ANGSTREICH: Pardon me. I think -- if
7 you have the network engineer's brief, figure 4 on page
8 19, I think it does a very good job of illustrating what
9 it is we're talking about.

10 JUSTICE SCALIA: Like, orange wires and
11 such?

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

14 JUSTICE SCALIA: In black?

15 JUSTICE SOTOMAYOR: Figure 4.

16 MR. ANGSTREICH: Figure 4 on page 19. What
17 the competitors in this case in Michigan have long said
18 is that the competitor has picked as its point of
19 interconnection the point inside the box on the right
20 labeled incumbent local exchange carrier's central
21 office, and then they need some fiberoptic cable to
22 bridge the gap to that interconnection point. That's
23 how Judge Sutton understood it in dissent. That's how
24 Judge Batchelder understood it in the majority.

25 And all the interconnection duty talks

1 about, all any of the interconnection regulations talk
2 about, is letting the competitors pick that point. How
3 they get to the point is up to them.

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

7 MR. ANGSTREICH: Right.

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

13 MR. ANGSTREICH: Your Honor, there's more
14 language that I think forecloses those interpretations.
15 It's not just a duty to provide interconnection. It's a
16 duty to provide interconnection for the competitor's
17 facilities and equipment at a point within the
18 incumbent's network. Nothing in that statutory language
19 says that the duty is to provide the competitor with the
20 facilities --

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

1 equally sensible.

2 MR. ANGSTREICH: And Justice Breyer, you
3 might have an agency that did that. We don't have an
4 agency that did that.

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

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

10 JUSTICE SCALIA: Well, it used to say the
11 other. You contend it used to say the other, and it has
12 never, by proper means, gainsaid its other position.

13 MR. ANGSTREICH: That's right.

14 JUSTICE BREYER: I don't see what the
15 other -- I didn't hear anything that said they said the
16 other. They said when you have wires and you're using
17 the wires for communication, then they don't fall
18 outside of this; that's true. But if you're using them
19 for interconnection, and they're necessary to use for
20 interconnection, maybe it does fall inside this. I
21 don't --

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

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

6 MR. ANGSTREICH: What they said is --

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

9 MR. ANGSTREICH: What they -- I -- Your
10 Honor, I just -- I don't think you're describing it in a
11 way that consists -- comports with the language of the
12 act.

13 What they said is a duty to lease facilities
14 that will be used for routing and transmission of
15 telephone calls to the point. That's (c)(3). That's
16 not part of the interconnection duty. When they
17 contrasted, in their local competition order, paragraph
18 172, they said what interconnection does is it lets the
19 competitor pick the place where they're going to drop
20 the traffic off. But it is section (c)(3) that lets the
21 competitor say, I would prefer to use incumbent
22 facilities at TELRIC rates to get to that point. They
23 have made that very distinction. But what they're
24 trying to do through their amicus brief here is to turn
25 (c)(2) into a facilities leasing provision.

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

8 When they've said -- and you know, I think
9 it's important, when they put out these sentences in the
10 Triennial Review Order and Triennial Review Remand Order
11 that supposedly told us of this new obligation, they
12 never asked for notice about this, even though in their
13 notice of proposed rulemaking, they said, should we get
14 rid of entrance facilities under (c)(3)? They didn't
15 say, and if we do, what would that mean for (c)(2)?
16 They didn't ask the question.

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

20 MR. ANGSTREICH: That's exactly right. In
21 the orders themselves, they assured AT&T and others that
22 they weren't changing anything.

23 JUSTICE BREYER: But there are -- there are
24 cases, I think, in primary jurisdiction where what a
25 District Court has done, anyway, is to hold the case

1 while the ICC went and had a proceeding, and I'm sure
2 that hasn't been used in a long time.

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

5 JUSTICE BREYER: It is?

6 MR. ANGSTREICH: But I point --

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

9 MR. ANGSTREICH: Well, I don't think
10 there's -- and I point to this Court's decision by
11 Justice Ginsburg in *Northwest Airlines v. Kent*, 510 U.S.
12 355, where this Court said: Nobody has asked us to
13 invoke the doctrine of primary jurisdiction; we're not
14 going to do it; instead, we will adopt an interpretation
15 of the statute that will suffice for the purposes at
16 hand. And as the Court later recognized in *Brand X*,
17 that leaves it open to the agency, in a rulemaking, to
18 actually do the work that, as Justice Scalia noted, the
19 agency has never done here.

20 And so it's -- rather than imposing
21 something through a combination of amicus briefs and
22 statements that don't actually set forth the rule that
23 the agency is trying to defend here, we would have a
24 real rulemaking and a chance --

25 JUSTICE SOTOMAYOR: I guess the problem I'm

1 having is that you tell me on the one hand that up
2 until, what, 2005, you were always paying the cost plus
3 profit rates, the TELRIC's rates, for interconnection at
4 a -- at an entrance facility.

5 MR. ANGSTREICH: That's not quite right,
6 Justice Sotomayor. Up until 2005, companies like Talk
7 America were allowed to get both the actual physical
8 linking at TELRIC rates and the transport facility at
9 TELRIC rates, but under two separate statutory
10 provisions. They were getting the transport facility
11 under (c)(3); that's gone away. They were getting the
12 linking under (c)(2).

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

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

1 rulemaking.

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

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

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

24 Now, I think it's quite telling that while
25 it was an unbundled element and we were having 10 years

1 of litigation about what the right standard is for an
2 unbundled element, nobody even thought to say: By the
3 way, all of this litigation is beside the point with
4 respect to the use of these facilities when we attach
5 them to an interconnection point.

6 JUSTICE SCALIA: The Eighth Circuit's
7 decision would have been unnecessary in the revision of
8 the rule?

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

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

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

23 Again, what the Michigan commission found
24 was that the FCC had specifically determined, that there
25 is a leasing obligation under (c)(2). That never

1 happened. The Sixth Circuit was right about that.
2 There is no leasing obligation that the commission has
3 ever established.

4 I think, Justice Breyer, to go back to your
5 question, whether they could do it is a separate
6 question. I don't think they could. I think we have an
7 incredibly good chance to prevail if they were to ever
8 promulgate such a rule, but they never did it. They
9 said things directly to the contrary.

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

13 MR. ANGSTREICH: Right.

14 JUSTICE BREYER: So who cared. And now
15 after that they care.

16 MR. ANGSTREICH: Right, they care.

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

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

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

1 (Laughter.)

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

9 Now we're considering it, and here is why we
10 think it's appropriate to read (c)(2) to impose these.
11 And despite the fact that, you know -- again, sufficient
12 claims of the statute's ambiguous. They need a policy
13 reason why it's appropriate to read this ambiguous
14 statute to require TELRIC pricing for things that third
15 parties are actually investing in and selling at
16 marketplace rates, why it's appropriate to undercut
17 those third party business models with this TELRIC
18 pricing for something the competitors are can and are
19 building themselves, third parties are selling --

20 JUSTICE SOTOMAYOR: Accepting their policy
21 arguments, what does that do to your main argument?
22 Because I think they've explained it to my satisfaction
23 why this is necessary because (c)(2) requires
24 interconnection. Congress has made a judgment that
25 interconnection is the mainstay of competition in this

1 area, so if I accept that --

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

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

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

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

22 JUSTICE SCALIA: Well, okay.

23 MR. ANGSTREICH: It's -- it's an imposition
24 on AT&T. But the notion that in any way, shape or form
25 the price of cable will alter the interconnection of

1 telephone networks is simply false. Yes,
2 interconnection is an important policy, and Congress
3 said we have to provide it at points within our networks
4 selected by competitors and we do that.

5 But Congress didn't say and the FCC has
6 never said that we also have to provide them whatever it
7 is that they want to use to get to that point. And
8 there really is, and I think some of the questioning
9 pulled that out, though they want to say I think because
10 the government won't endorse the absolute position, the
11 Petitioners were taking in their opening briefs, that
12 this is only about things that used to be ordered as
13 unbundled elements or things already in the ground.

14 But their position, their interpretation of
15 the statute has no stopping point. It would cover
16 anything a competitor might ever want to use to get
17 telephone calls to the interconnection point. And
18 they've never defended that limitless reading. And if
19 the agency ever wanted to adopt it would challenge it,
20 and as I've said, I like our chances, but until they do
21 it, Michigan was wrong to conclude that the commission
22 had done it and the Sixth Circuit was correct to reject
23 that if there are no further questions, I'll sit down.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Bursch, you -- Bursch, you have 4

1 minutes remaining.

2 REBUTTAL ARGUMENT OF JOHN J. BURSCH

3 ON BEHALF OF THE PETITIONERS

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

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

15 On page 32a, the FCC says that an incumbent
16 must provide interconnection at a particular point upon
17 a request by a telecommunications carrier, such as a
18 competitor. Technically feasible methods -- this is in
19 sub B -- include but are not limited to, and they give
20 two examples: colocation and meet points. But this
21 isn't the be-all-end-all of interconnection obligations.
22 These are exemplary.

23 Take an analogy. Assume you had a high
24 school cafeteria and the school board said you have to
25 provide vegetables to students when they ask for them,

1 and you have to give them the vegetable that they ask
2 for. Those include broccoli and green beans, and they
3 don't say anything else. Then you have a separate
4 obligation in (c)(3) and the school board says until we
5 see that the kids have enough nutrition, you must give
6 them peas, that's entrance facilities unbundled under
7 (c)(3).

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

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

21 MR. BURSCH: The premise -- no, that's
22 incorrect, Your Honor, because if you have an entrance
23 facility under (c)(3), you can use it for more things
24 than you can under (c)(2), because under (c)(3) you can
25 have it for backhauling and still get TELRIC rates.

1 Under (c)(2) you're limited to interconnection. So it's
2 a different question. But the idea that somehow the
3 FCC --

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

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

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

13 MR. BURSCH: The backhauling --

14 JUSTICE SCALIA: Yes, yes. The --

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

19 So the fact that this is not something new
20 is demonstrated conclusively by comments in the TRRO
21 proceedings from Bell South which is now an AT&T
22 subsidiary. And Bell South says at page 59 of its
23 comments, fully recognizing the obligation that went all
24 the way back to 1996 in reg 321: Because entrance
25 facilities may be required for interconnection purposes

1 and Congress explicitly enacted provisions that govern
2 carrier obligations to provide interconnection in
3 251(c)(2), it was altogether reasonable for the
4 commission to exclude these network elements from a
5 definition of ILEC dedicated transport intended for
6 unbundled access under 251(c)(3).

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

10 One other small point with respect to the
11 network engineers map. This entrance facility right
12 here on page 19 already exists. We're talking about
13 existing facilities; and it's true, as the Sixth Circuit
14 said, that if the point of interconnection is here at
15 the ILEC switch, then that's where interconnection takes
16 place, and this entrance facility is -- is truly
17 providing transport, not interconnection.

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

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 The case is submitted.

3 MR. BURSCH: Thank you.

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

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