

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VERIZON MARYLAND INC., :

4 Petitioner :

5 v. : No. 00-1531

6 PUBLIC SERVICE COMMISSION OF :

7 MARYLAND, ET AL.,; :

8 and :

9 UNITED STATES, :

10 Petitioner :

11 v. : No. 00-1711

12 PUBLIC SERVICE COMMISSION OF :

13 MARYLAND, ET AL. :

14 - - - - -X

15 Washington, D.C.

16 Wednesday, December 5, 2001

17 The above-entitled matter came on for oral
18 argument before the Supreme Court of the United States at
19 11:01 a.m.

20 APPEARANCES:

21 MARK L. EVANS, ESQ., Washington, D.C.; on behalf of the
22 Petitioner in No. 00-1531.

23 BARBARA B. McDOWELL, ESQ., Assistant to the Solicitor
24 General, Department of Justice, Washington, D.C.; on
25 behalf of the Petitioner United States.

1 APPEARANCES:

2 SUSAN S. MILLER, ESQ., General Counsel, Public Service
3 Commission, Baltimore, Maryland; on behalf of the
4 State Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-1531, Verizon Maryland v. the Public Service Commission of Maryland and United States v. Public Service Commission of Maryland.

Mr. Evans.

ORAL ARGUMENT OF MARK L. EVANS

ON BEHALF OF THE PETITIONER

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

Unlike Mr. Smith, Verizon takes the position that these contracts are, in fact, pervasive and Federal, and I'd like to tell you why. The statute, by its terms, requires us to enter into these relationships whether we want to or not. It dictates the subject matter of the negotiations, it provides that the agreement has to be approved by the State commission but under Federal standards spelled out in the statute. Once approved, moreover, these agreements are binding not as a matter of State law but as a matter of Federal law, which is provided for in 252(a)(1) of the statute.

QUESTION: 252(a)(1)?

MR. EVANS: (a)(1), and finally, and in some ways most tellingly, every provision of an approved

1 agreement is like a tariff made available automatically to
2 every other carrier that wishes to adopt them, and the
3 Court upheld that in the Iowa utilities case even though
4 it was challenged, but the function of not only the
5 agreement's terms but every interpretation of an
6 agreement's terms has Federal reverberations. These are
7 not cases that -- with which the Federal Government has
8 washed its hands.

9 QUESTION: Well, what about Justice Stevens'
10 example in the previous case, do you pay on Tuesday or do
11 you pay on Thursday?

12 MR. EVANS: Mr. Chief Justice, I think that is a
13 hard question in terms of the way it was put, and I think
14 the answer, to be consistent, is yes it belongs in Federal
15 court, and the reason I say that is because just like a
16 Federal tariff, where there's a question about the payment
17 date, it belongs in Federal court. That -- the Court has
18 held that in many cases involving Federal tariffs, one of
19 which we've -- two of which we've dealt with in the brief,
20 one of which is Thurston Motor Lines, which is in 460 U.S.

21 QUESTION: How many of these agreements,
22 negotiated or otherwise, are there Nation-wide?

23 MR. EVANS: They're -- they're

24 QUESTION: Do you have any idea? I mean, give
25 me --

1 MR. EVANS: -- limited to --

2 QUESTION: -- a magnitude.

3 MR. EVANS: I'm sorry. They're limited to the
4 boundaries of the State in most instances, although the
5 negotiations in one State have reverberations for the same
6 two parties in other States, as, for example, with
7 Verizon.

8 QUESTION: I'm just wondering how many pure
9 contract cases are being dumped into Federal courts by
10 your --

11 MR. EVANS: Oh, I see.

12 QUESTION: 100,000?

13 MR. EVANS: I think the -- I don't have a
14 number, Justice Scalia. I can say that I don't think once
15 the big issues are resolved there's going to be many of
16 them, and the big issues tend to be like the issue in this
17 case, where the very contract says, on the point in
18 dispute, that the parties agree that reciprocal
19 compensation will be paid only to the extent required by
20 the statute, naming a specific section of the statute.

21 QUESTION: Yes, but you say every time there's
22 any dispute on this contract, even as to what date payment
23 should be made, you run into Federal court.

24 MR. EVANS: Well, I mean, yes, but as a
25 practical matter the issues will not be brought to Federal

1 court unless there's a lot of money involved and the
2 issues are very important for a variety of reasons. It's
3 not a cost-free proposition to go to Federal court.

4 QUESTION: I thought a tariff -- I mean, you're
5 talking about a State railroad tariff?

6 MR. EVANS: No, not a --

7 QUESTION: No, of course a Federal railroad
8 tariff is a Federal question. Nobody doubts that. What
9 they're saying is, here, the structure of this statute is
10 to have State commissions run these agreements, period.
11 Now, of course, they have to be sure that the State
12 commission satisfies certain Federal standards, which
13 might have been minimal but have turned out not to be so
14 minimal.

15 MR. EVANS: Well --

16 QUESTION: But -- so I don't see how in answer
17 to Justice Stevens -- and I think it does create a
18 problem. I don't see how you can put all the -- every
19 detail of this State contract in a Federal court, calling
20 it a Federal question, and once that's so, there does
21 become an issue as to whether Congress bifurcated this and
22 said, as is true of all other State agencies, you have a
23 Federal question, you can go into Federal court. Or said,
24 throw them all in the State.

25 MR. EVANS: Well --

1 QUESTION: What's your response?

2 MR. EVANS: Well, two things, Justice Breyer.

3 First, the -- if you look back at this Court's Federal
4 tariff cases you find that the reason these cases wound up
5 in Federal court, even though lower courts in the cases
6 have almost routinely said this looks to us like a run-
7 of-the-mill state contract issue, is because the tariff
8 itself derives its authority and depends entirely upon the
9 Federal statute. That's what makes them Federal statutes,
10 because of the Federal Government's interest in the whole
11 process.

12 QUESTION: What's your answer to the Jackson
13 Transit case, then?

14 MR. EVANS: Jackson Transit actually was a case
15 involving a contract under the Urban Mass Transit Act in
16 which the Court's analysis proceeded as follows. First,
17 it said these are inherently, pervasively Federal
18 contracts -- e agree with that -- and but for a contrary
19 indication in the text of the statute or the legislative
20 history we would view those as Federal issues that belong
21 in Federal court, but the Court went on to look first at
22 the text where they found the issue not conclusive, and
23 then to the legislative history where it found that
24 Congress made a specific determination that it did not
25 want these cases in Federal court. There is no such

1 analogy in the case here, and in fact, if anything, the
2 suggestion is to the contrary, because when Congress did
3 address the question of jurisdiction, albeit it perhaps in
4 narrower terms than we would have liked. It made clear
5 that the -- that there's jurisdiction in the Federal
6 courts and that, moreover, State courts are foreclosed
7 from involvement.

8 It's odd to imagine why an issue like the one in
9 this case which could just as well have come up at the
10 approval stage, but didn't until the interpretation stage,
11 in part because the Internet exploded in the interim. In
12 one case it goes to Federal court, in the other case it
13 goes to State court. It just doesn't -- it doesn't make
14 sense that Congress would have envisioned that outcome.

15 There has been discussion about whether
16 252(e)(6) in some way restricts the provisions of --
17 excuse me, the availability of jurisdiction under section
18 1331, and we think the answer to that is quite clear not
19 only from the general presumption against that kind of
20 restriction that the Court has articulated from time to
21 time, but also because in this statute Congress actually
22 enacted a specific rule of construction in section 601(c)
23 of the act which is actually not in the joint appendix and
24 not codified. It appears as a -- in the note to 47 U.S.C.
25 152, and what it said there was that nothing in the act

1 should be construed to modify, impair, or supersede
2 Federal law unless expressly so provided.

3 So Congress spoke to what inferences could be
4 drawn from a limitation of jurisdiction in 252(e)(6) and,
5 moreover, there -- the Court has -- I mean, the Congress
6 has shown repeatedly, both in this statute and in other
7 statutes, that when it wishes to preclude review in one
8 court system or another it spells that out specifically,
9 as it does in 252(e)(4) here with respects to States, as
10 it's done in a variety of statutes that we and the
11 Government have cited in our briefs with respect to the
12 other -- with respect to the medicare act.

13 And finally, let me just say a word about the
14 impracticality of the bifurcation that I think Mr. Smith
15 is striving for here. It would mean a bizarre separation
16 where a case could come up with an interpretation not only
17 of -- not only of the issues we think are binding as a
18 matter of Federal law, but also State law issues that the
19 State put in as part of its review, and from Mr. Smith's
20 point of view, if it's interpretive, it all goes right to
21 State court.

22 In our view, at least all of the Federal issues
23 come to Federal court, and probably the State issues can
24 come along under supplementary jurisdiction, although
25 there may be a -- may not be possible to name the State in

1 that context.

2 QUESTION: You say they're going there under
3 1331?

4 MR. EVANS: Yes, and this Court once before had
5 before it a bifurcation scheme that had been proposed,
6 actually decided by the Seventh Circuit, as it was in this
7 case, and that's the Bank One case in 516 U.S., and the
8 Court said, this is just too unwieldy and inefficient a
9 system for us to impute the Congress, even if the language
10 were clear, and here the language by no means even
11 supports the outcome.

12 Unless there are further questions, Your
13 Honor --

14 QUESTION: Thank you, Mr. Evans.

15 Ms. McDowell.

16 ORAL ARGUMENT OF BARBARA B. McDOWELL

17 ON BEHALF OF PETITIONER UNITED STATES

18 MS. McDOWELL: Initially, I'd like to note that
19 although this -- in this case the Court granted certiorari
20 only on the question of jurisdiction under section 1331,
21 if the Court determines that there is a standing problem
22 in the Mathias case, all of the other questions on which
23 the Court granted cert in that case are also presented
24 here, and section 1331 gives the district courts
25 jurisdiction over claims at least that a State commission

1 has acted contrary to controlling Federal law in
2 construing or enforcing an interconnection agreement.
3 Such claims arise under the laws of the United States
4 within the meaning of section 1331.

5 QUESTION: Excuse me, how does a State
6 commission act contrary to Federal law in construing an
7 agreement that clearly says X, which is contrary to
8 Federal law, but I mean, the State commission is just
9 saying what is the truth. How is that acting contrary to
10 Federal law?

11 MS. McDOWELL: For example, let's say that the
12 FCC had issued a different order with respect to Internet
13 calls than it actually did. What if the FCC had said that
14 no agreement under section 252 can be construed as
15 providing reciprocal compensation for Internet service
16 provider --

17 QUESTION: They wouldn't say that. What do you
18 mean, can be construed? Can be enforced, which provides,
19 I mean, that's fine.

20 MS. McDOWELL: Well, it -- the commission
21 conceivably could have said if the contract is silent on
22 the specific subject --

23 QUESTION: Oh -- yes.

24 MS. McDOWELL: -- or whatever.

25 In any event, one can envision circumstances in

1 which --

2 QUESTION: Okay, but you -- but sure, I mean, if
3 you posit that the Federal regulation says no contract
4 shall be construed this way, no matter what it says, no
5 matter how clearly it says that, then I agree with you,
6 the commission would be violating Federal law, but let's
7 assume a more normal FCC regulation which just says that
8 this particular disposition is unlawful, even if you do
9 agree with it, okay, and all that happens is that the
10 State commission says, yes, they're -- that's what they
11 agreed to, okay. Now, how does that violate State law?

12 MS. McDOWELL: It may not. It may be --

13 QUESTION: Federal law, excuse me.

14 MS. McDOWELL: It may be the rare case in which
15 a State commission decision interpreting a negotiated
16 agreement will -- can be alleged to violate Federal law.
17 I think the questions are more likely to come up with
18 respect to interpretation of terms of an arbitrated
19 agreement where the State commission was --

20 QUESTION: What is the actual question before
21 the commission? Is it, what did these parties mean by
22 their agreement, and nothing more than that, or is it
23 something with more legal overtones to it?

24 MS. McDOWELL: This has been sort of a moving
25 target, because the FCC's orders have been subject to

1 review and have been vacated, so -- but the claim was that
2 under the commission's initial order with respect to
3 Internet calls

4 QUESTION: No, I meant the rules of the State
5 commission, not the FCC.

6 MS. McDOWELL: Well, the State commission, after
7 looking at the FCC's orders and the statute, decided that
8 there was -- the FCC had said it was permissible to adopt
9 either rule, to read these agreements either as providing
10 reciprocal compensation for these calls or not, and gave
11 some factors that State commissions might look to in
12 construing agreements, and that is what it did.

13 QUESTION: For instance, if you go to a State
14 court, I'm A, I'm suing B because we have a contract, the
15 final decision of the State court isn't just necessarily
16 the parties agree to this. They have to go further and
17 say, well, is this -- is there any State law prohibition
18 against this kind of an agreement, and what are the
19 results in this particular case, does A owe B money. Does
20 the commission, State commission have that broad an area
21 to deal with the contracts under this statute?

22 MS. McDOWELL: Yes, and certainly it's subject
23 to the standards of 252(d) with respect to assuring that
24 the public interest, convenience, and necessity is served,
25 and it needs to look at the policies as articulated in the

1 Telecommunications Act and by the FCC in its regulations
2 and orders, so it's a broader mandate than just looking at
3 the parties' intent, yes.

4 Whether this will always present an issue of
5 Federal law is, of course, not clear, but where there is a
6 claim that what the State commission has done is contrary
7 to the 1996 act, to the FCC's orders under the act, or to
8 some other provision of Federal, constitutional, or
9 statutory law --

10 QUESTION: Ms. McDowell, would you clarify what
11 you define as the Federal question in this case? There
12 were a lot of arguments that were made by Verizon like,
13 this is a Federal tariff, in effect, like the State
14 commissioner simply is saying that it is for this purpose
15 a Federal agency.

16 In your brief, the only thing that I recall --
17 maybe I got this altogether wrong -- was, you said the
18 Federal question is an FCC order which would be
19 controlling, and that FCC order, it turns out, has been
20 vacated by the D.C. Circuit, so I'm really left at sea
21 about what is the Federal question.

22 MS. McDOWELL: Verizon's complaint, and that's
23 in the court of appeals joint appendix, was really quite
24 bare bones. It alluded to the FCC order that's since been
25 vacated, as you mentioned, and to other principles of

1 Federal law, and it just simply alleged that the Maryland
2 commission's decision was inconsistent with Federal law,
3 also with the language of the agreement, and is arbitrary
4 and capricious, so it was a very general claim.

5 The district court construed Verizon's claim as
6 being that the Public Service Commission's order is in
7 direct conflict with a declaratory ruling of the FCC, and
8 that's on pages 1 to 2 of the court of appeals joint
9 appendix. I think the principal --

10 QUESTION: That ruling has been vacated.

11 MS. McDOWELL: That's true. There's now a new
12 ruling, and that's being litigated in the D.C. Circuit.

13 I think as currently articulated Verizon
14 contends that among other things the Maryland commission's
15 order is contrary to section 252(a)(1) of the act, which
16 requires these agreements to be binding, and the
17 allegation is that the commission has violated that
18 commission by writing additional terms into a party's
19 agreement. Whether that is a viable claim or not need not
20 be decided at this point. It's at least a sufficiently
21 nonfrivolous claim to state a Federal claim.

22 QUESTION: Can I get a clear restatement, if you
23 like, of just what you think -- I mean, on the overall
24 question I now see three possible ways you could go. Way
25 number 1 is just what we heard. These contracts are

1 creatures of the Federal law, so much so that everything
2 about them is Federal, they all go into Federal court.
3 The opposite view, no, everything about them goes into
4 State court, with one exception. The exception is
5 approval or rejection, which is a narrow proceeding that
6 happens once. That puts 98 percent of the cases in State
7 court for everything.

8 Choice 3, the compromise, which is some form of
9 which I think you're advocating. That would have to be,
10 the Federal questions come into Federal court under either
11 252 or 1331. I don't know if it makes any difference, but
12 they're in Federal court, the Federal questions, and where
13 they're all mixed up with State interpretation you have
14 three choices. Each Federal judge is on his own. 1) It's
15 their supplementary jurisdiction, 2) they have some form
16 of abstention, to wait, 3) they do something else. I
17 don't know what it is, all right. But in other words,
18 let's call that a hybrid approach.

19 I want to know which of those three positions
20 the Government takes, and I think it's the last one, and I
21 want to know precisely how all this works out.

22 MS. McDOWELL: I wish I could tell you precisely
23 how it would work out in every case. When the --

24 QUESTION: 5 minutes or less.

25 (Laughter.)

1 QUESTION: You know your favorite view of it.

2 MS. McDOWELL: Yes. When there is a claim that
3 a State commission order is contrary to controlling
4 Federal law, that claim should come into Federal court.
5 If the only claim is a violation of State law, it should
6 go into State court. If there are both kinds of claims,
7 they can perhaps be brought in Federal court under
8 supplemental jurisdiction, but then there's a question of
9 the State officials' sovereign immunity, assuming that
10 they're a party and they haven't waived sovereign
11 immunity, because the State law claims can't be
12 adjudicated under -- according to Pennhurst in Federal
13 court.

14 So the optimal solution in many of these cases
15 may be to bifurcate, or may be to bring the case in State
16 court, and the State courts, of course, are competent to
17 hear these cases as well, but we don't think that Congress
18 intended to preclude the opportunity of parties to go to
19 Federal court on these claims when they have a Federal
20 claim under --

21 QUESTION: Let's put the question the other way.
22 Why would Congress have wanted to provide for a bifurcated
23 scheme, which we know is going to lead to all kinds of
24 pleadings chicanery in order to get it into one court or
25 another court, and we're going to have endless disputes

1 about the pleadings. Why would Congress have wanted that
2 kind of a system?

3 MS. McDOWELL: Well, it is the system that we
4 have generally, Your Honor. Parties do have the option of
5 taking their claims to State court or to Federal court,
6 and Congress may have been --

7 QUESTION: But I think you're -- aren't you
8 positing a system in which there -- I was going to say,
9 aren't you positing a system in which, as a system, we
10 assume there is going to be some kind of a system of
11 utility regulation, and there isn't going to be a system.
12 Some utility regulation through contract interpretation is
13 going to be done in State courts, some of it's going to be
14 done in Federal courts, parties in essentially the same
15 situation are going to be making inconsistent choices, and
16 you're not going to have a resulting coherent system.

17 MS. McDOWELL: Well, we already know, of course,
18 under section 252(e)(4) of the act that a number of these
19 cases are going to be in Federal court, and what seems
20 particularly irrational is that if there was exclusive
21 Federal court jurisdiction over some category of cases and
22 exclusive State court jurisdiction over the same sorts of
23 issues when they arise in an interpretation context as
24 opposed to an approval context, so that seems clearly what
25 Congress could not have meant.

1 QUESTION: May I ask -- oh, excuse me. May I
2 ask just sort of a broader question? My recollection is
3 that all the cases we're familiar with so far run around
4 as one issue about local calls to the Internet and so
5 forth. I have the -- a feeling that there must be a
6 pattern. All these agreements have a great deal of
7 similarity, same kind of issue, same kind of litigants on
8 both sides. I wonder if there really is a mountain of
9 litigation out there, or if they only have -- a very few
10 test cases may resolve most of these issues. What's your
11 view on that?

12 MS. McDOWELL: Well, I think this particular
13 issue involves large amounts of money --

14 QUESTION: Right.

15 MS. McDOWELL: -- tens if not hundreds of
16 millions of dollars, and that's why it's being litigated.

17 QUESTION: But are there similar issues bouncing
18 around in State and Federal courts, or is this sort of the
19 only thing they're fighting about?

20 MS. McDOWELL: I wouldn't say it's the only
21 thing they've been fighting about, and I'm not familiar
22 with all the cases that may have been brought, but
23 certainly these are the leading categories of cases at the
24 interpretation stage. Certainly at the initial approval
25 stage there are a number of cases that have made their way

1 to Federal court on a variety of issues which principally
2 concern whether the State commission has --

3 QUESTION: At the approval stage, there's no
4 doubt about where those go.

5 MS. McDOWELL: Right. It also should be noted
6 that most of these interconnection agreements build in
7 some form of alternative dispute resolution process that
8 there is some negotiation between the parties. Sometimes
9 there is formal arbitration to resolve these disputes, so
10 it's not necessarily clear that they will all proceed
11 through this particular process.

12 QUESTION: Do you know -- do you have any sense
13 of this in the hybrid -- in the hybrid system that we're
14 describing as concerning Justice Souter, that I agree with
15 you is supposed to be the norm in respect to State
16 agencies after the Chicago case. Now, one of the concerns
17 in Chicago, and you may have come across this in your
18 reading, or just experience, would be there would be,
19 then, a lot of cases, because it covers every State
20 agency, where people would run into Federal court on a
21 Federal question related to a basically State matter, and
22 they'd bring in and get review through the supplementary
23 jurisdiction of all kinds of State issues.

24 Has that happened? I mean, is this the norm?
25 Do you have any sense of what actually happens in, let's

1 say, the 40 million State proceedings that go on every
2 week?

3 MS. McDOWELL: I don't think there are nearly
4 that many State proceedings. In some of these cases
5 involving reciprocal compensation for Internet calls, yes,
6 parties have asserted, as they have here, State law claims
7 as well as Federal law claims, and some Federal courts, at
8 least where there's been no objection raised by the State
9 commission, relating to sovereign immunity, have exercised
10 supplemental jurisdiction over these claims.

11 QUESTION: Ms. McDowell, regarding your earlier
12 answer to Justice Souter as to why Congress would have
13 wanted such a crazy, hybrid system, I mean, this piece of
14 legislation was an extraordinary intrusion of the Federal
15 Government into local utility regulation, wasn't it? I
16 mean, this is an area that has traditionally been
17 regulated by the States. The Government has regulated
18 interstate communications, but here they are getting into
19 local communication regulation.

20 MS. McDOWELL: But this isn't their --

21 QUESTION: And was there not a feeling in
22 Congress that we should take as little as possible away
23 from the States, if they want to continue their
24 traditional regulation, and if it ended up in a hodge
25 podge system, maybe many in Congress said, so be it. Is

1 that not a sufficient explanation?

2 MS. McDOWELL: That might indeed be a sufficient
3 explanation. I would preface this by saying that although
4 local competition surely has traditionally been regulated
5 by the States, this act dealt with something a little
6 different, encouraging competition between local carriers,
7 which was quite new at the time this 1996 act was adopted.

8 QUESTION: Well, it may be a new Federal policy,
9 but to regulate concededly local telecommunications was a
10 major step for the Federal Government, and maybe they
11 didn't want to get into the business of doing that, which
12 is why they leave it optional to the States whether they
13 want to implement it or not. The Federal Government
14 didn't want to take on these things, neither at the FCC
15 level nor, as far as we know, at the Federal district
16 court level.

17 MS. McDOWELL: Well, it certainly is clear from
18 the act that Congress hoped that State commissions would
19 want to regulate these agreements to bring their expertise
20 with local conditions and with local telecommunications to
21 bear, although Congress, of course, also gave States the
22 option of allowing the FCC to do that.

23 QUESTION: Let me ask the question Justice
24 Scalia doesn't want to ask, and that is, do you have any
25 legislative history that indicates that they really did

1 intend the hodge podge?

2 (Laughter.)

3 QUESTION: I mean, if they intended a hodge
4 podge, I will say God bless the hodge podge, but I
5 don't -- I haven't heard anyone getting into the
6 legislative background to indicate that they didn't. Do
7 you have anything?

8 MS. McDOWELL: Not really, no. The only
9 arguable legislative history that seems relevant is that
10 the State utility commissioners through their
11 organizations came to Congress and said, we've started to
12 do this, we would like to have a role in this, and
13 Congress apparently heard them in enacting --

14 QUESTION: What about the provision of the
15 statute itself, that says if the States want to do it,
16 they can do it? On the other hand, if they don't do it,
17 the Federal Government -- isn't that -- don't you start
18 off with a hodge podge? It's going to be State regulation
19 some places, Federal regulation other places?

20 MS. McDOWELL: Yes, and that all argues all the
21 more for Federal court review under 1331 to assure some
22 uniformity in the application of the Federal standards in
23 the act.

24 If I could reserve --

25 QUESTION: If there's FTC participation, the

1 State doesn't participate and there's an agreement, does
2 that subsequently raise some issues of State law
3 interpretation, of interpretation that can go into State
4 court?

5 MS. McDOWELL: I believe that if the FCC
6 resolves these issues it may turn to State law. It hasn't
7 had the opportunity to issue a decision on this yet, but
8 those decisions would be reviewable only in the courts of
9 appeals under the Hobbs act, whether they involve State
10 law or Federal law issues.

11 QUESTION: On the Eleventh Amendment point, if
12 we find that there's a waiver under 252, rather than Ex
13 parte Young as a theory, would that simplify the question
14 of determination of State law issues?

15 MS. McDOWELL: It might or might not. One would
16 think the extent of the waiver would be governed by
17 section 252(e)(6), which refers to review to ascertain
18 whether the agreement or statement complies with sections
19 251 and 252. That might be too narrow to encompass State
20 law as well.

21 If I could reserve the remainder of my time.

22 QUESTION: Thank you, Ms. McDowell. The second
23 person doesn't reserve. You use it or lose it.

24 QUESTION: She's the first.

25 QUESTION: She's the first person.

1 QUESTION: Oh, Mr. Evans I thought was the
2 first.

3 Ms. Miller.

4 ORAL ARGUMENT OF SUSAN S. MILLER

5 ON BEHALF OF THE STATE RESPONDENT

6 MS. MILLER: Mr. Chief Justice, and may it
7 please the Court:

8 I'd like to start out with giving you a little
9 factual background of what the commission considered and
10 what Verizon appealed. Essentially, the FCC issued an
11 order saying that ISP calls to ISP's were largely
12 interstate. That order also said, for those companies
13 that had already approved agreements, the State commission
14 was to look at contract principles to see if the parties
15 should be bound by their previous agreements, and whether
16 their previous agreements should be interpreted to include
17 calls to ISP's being local. That's what the Maryland
18 commission did in this instance.

19 Verizon appealed to Federal district court
20 raising two issues. The first issue was that, under
21 Maryland contract law, the commission had misinterpreted
22 the contract. That's the first issue that they raised.
23 That was clear from their motion for summary judgment,
24 which is part of the record of the case, but I don't
25 believe it's included in any appendix to the case.

1 The second issue they raised is, after the
2 commission had interpreted the contract principles, the
3 commission determined that the FCC order required them to
4 develop an intercarrier compensation mechanism until such
5 time as the FCC had developed its own compensation
6 mechanism.

7 Now, what Verizon said was that the commission
8 was wrong, that the FCC didn't require that, that they
9 made it discretionary for the commission, and those were
10 the only two issues raised by Verizon in this case.

11 QUESTION: Excuse me, Verizon was objecting to a
12 misinterpretation of Maryland contract law, but up here
13 they're saying that this contract isn't governed by
14 Maryland contract law, but rather by Federal contract law.

15 MS. MILLER: Their --

16 QUESTION: Is that a change of position?

17 MS. MILLER: Their claim -- what they argued on
18 their motion for summary judgment was that Maryland
19 contract law became Federal common law, and that thus it
20 was --

21 QUESTION: Maryland contract law became Federal
22 common law, I see.

23 MS. MILLER: That was their argument.

24 QUESTION: So that we have a Federal contract
25 law that consists of Federal adoption of the common law of

1 each of the 50 States that --

2 MS. MILLER: Whatever their contract law is.

3 QUESTION: I understand it, I guess.

4 (Laughter.)

5 MS. MILLER: So those were the two issues that
6 were raised by Verizon.

7 QUESTION: I just want to be sure I understand
8 the thrust of your point. That's entirely consistent with
9 the argument we heard this morning, though, is it not,
10 because they're basically saying it's all a matter of
11 Federal law.

12 MS. MILLER: I just want to make clear that what
13 they were raising was a contract issue. They're claiming
14 that all contract issues are also Federal law now.

15 QUESTION: Right.

16 MS. MILLER: I just wanted to make sure the
17 Court was clear that what -- the sole thing they were
18 raising was a contract issue.

19 QUESTION: But they made the same argument at
20 the district court level, if I understand you correctly.

21 MS. MILLER: That --

22 QUESTION: Yes --

23 MS. MILLER: It had become Federal common law,
24 that's correct.

25 QUESTION: And the Federal law is borrowed law

1 so far as it involves the interpretation of a contract.

2 MS. MILLER: That's correct.

3 Now, the Fourth Circuit dismissed the 1331 claim
4 on the basis of three alternative grounds. The first
5 ground was that in relying on Jackson Transit they found
6 that Verizon's claim did not meet the arising under
7 standard contained in 1331. According to the Fourth
8 Circuit, the fact that interconnection agreements are
9 creations of Federal law did not in and of itself raise a
10 substantial Federal question.

11 The Fourth Circuit also relied on Shoshone
12 Mining, which said that Federal question jurisdiction
13 isn't established where local rules or customs would
14 govern the result, which is what we have here, of course.
15 Maryland contract law is what governed the result here,
16 that under -- specifically under 252 the negotiating
17 parties had absolutely no obligation to include anything
18 from 251 and 252 in their contract. For that reason,
19 negotiated contracts are kind of taken away from those
20 aspects of the Telecommunications Act.

21 QUESTION: Would you think the -- would you
22 assert that the result would be different and you would
23 take a different position if this were not a voluntarily
24 negotiated contract?

25 MS. MILLER: We still believe it wouldn't come

1 under 1331, but for differences other than Jackson
2 Transit.

3 QUESTION: It would be a harder question for
4 you.

5 MS. MILLER: Yes.

6 QUESTION: Okay.

7 MS. MILLER: The petitioners really haven't
8 distinguished Jackson Transits. Both cases involve the
9 precise question of whether an action for breach of
10 contract arises under Federal law merely because the
11 contract required -- merely because Congress required the
12 contract to be formed, or required that the contract --

13 QUESTION: Mr. Evans offered one distinction,
14 that there was substantial legislative history there
15 saying that Congress wanted these actions to be brought in
16 State court.

17 MS. MILLER: I disagree with that reading of
18 Jackson Transit. They noted one sentence that they said
19 led them to believe that Congress wouldn't have wanted
20 these. There are also several other circuit court cases,
21 however, that have interpreted Jackson Transit to say that
22 where State law governs the decision before the Court,
23 then there is no Federal question jurisdiction regardless
24 of whether the contract terms were required to be
25 incorporated or not.

1 QUESTION: I saw two Federal questions, and
2 either way it seems Federal. His first point, as Justice
3 Stevens said, was there's some words in this contract.
4 This contract is a creature of Federal law. The
5 interpretation of every one of those words is a Federal
6 question, whatever source of law that you might come --
7 turn to to figure out what Federal law is, whether it's
8 Maryland, or whether it's Alaska, or whether it's some
9 totally different place.

10 Argument 2, that the Federal Communications
11 Commission in a series of decisions, whatever may be true
12 of other words in the contract, has said that these words
13 in the contract, A, B, C, D, mean, and then he gets the
14 result he wants, all right, so he's looking both to the
15 F -- which obviously the FCC does have the power to do
16 that, doesn't it?

17 I mean, it could say as a matter of FCC rule any
18 contract that has words A, B, and C, must be interpreted
19 to mean thus and so under this statute.

20 MS. MILLER: I believe it --

21 QUESTION: Okay. Now, it seemed to me they're
22 making some combination of those two arguments. Is that
23 right?

24 QUESTION: Excuse me, it can say that before the
25 fact or after the fact? Do you think the FCC has the

1 power to say that after a contract has already been
2 voluntarily negotiated?

3 MS. MILLER: Well --

4 QUESTION: And the FCC can say, as a matter of
5 Federal law, what the parties agreed to voluntarily is
6 this, even though it plainly is not that?

7 MS. MILLER: I think --

8 QUESTION: Can the FCC do that?

9 MS. MILLER: I don't believe they can, and I
10 think that was what was the problem with --

11 QUESTION: If I got us into this, I'd modify the
12 question.

13 (Laughter.)

14 QUESTION: It's simply a matter of, wouldn't
15 that state a Federal question? I don't know what the
16 answer is, but somebody who says just what I said has
17 raised a Federal question, haven't they, just as somebody
18 who says this contract is a creature of Federal law, the
19 word interpretation is Federal, has raised a Federal
20 question, and you would reply, you're wrong about what the
21 answer to the question is, but that's different from
22 saying you haven't raised a Federal question.

23 MS. MILLER: I think under Jackson Transit what
24 they've said is that you haven't raised a Federal
25 question. That's what Jackson Transit said. If you take

1 a contract, and your only basis of the contract was that
2 it was required by Federal law, then that doesn't even
3 raise a Federal question.

4 QUESTION: They're not saying it was required by
5 Federal law. They're saying that the words of the
6 contract, what they mean is Federal law.

7 MS. MILLER: That would be a closer question as
8 to whether that actually raises a substantial Federal
9 question regarding whether -- because it would obviously
10 limit a State commission's interpretation. The State
11 commission could not interpret the word in a different
12 way.

13 The second basis for the Fourth Circuit's
14 dismissal of the 1331 claim was essentially based on this
15 Court's Merrell Dow decision. In Merrell Dow, the court
16 found that where a Federal statute includes a limited
17 grant of jurisdiction, that any other broader grant of
18 jurisdiction would flout the intent of Congress. Based on
19 that, the Fourth Circuit found that 252(e)(6) was a
20 limited grant of jurisdiction and that therefore it should
21 not allow suit to be brought under 1331.

22 The respon -- the petitioners have argued that
23 the rule is otherwise that essentially the courts have
24 this broad grant authority unless there is some
25 limitation, but all the cases cited by the respondents

1 involve Federal agencies, and there's a distinction here,
2 because what the Federal agencies were arguing was
3 essentially that there was absolutely no review of what
4 was at issue, that you couldn't bring it under 1331, there
5 was no other statute, essentially it was a discretionary
6 act of the agency, and you couldn't bring it, and in that
7 sense the Court --

8 QUESTION: Oh, now --

9 QUESTION: Your position is that there's no
10 jurisdiction under 252, and there's also no jurisdiction
11 under 1331. Is that right?

12 MS. MILLER: That's correct.

13 QUESTION: And is it because 252 by implication
14 prohibits 1331 jurisdiction, or just that 1331 isn't broad
15 enough to cover this?

16 MS. MILLER: It's that 252 represents a limited
17 grant of jurisdiction on behalf of Congress, and that
18 Congress only intended such a limited grant of
19 jurisdiction, and that therefore to use a broader grant of
20 jurisdiction such as 1331 would defy congressional intent.

21 QUESTION: In other words, Congress intended
22 Federal jurisdiction over review of approval agreements,
23 but didn't intend Federal jurisdiction over anything else?

24 MS. MILLER: That's correct.

25 QUESTION: What do you say to the provision that

1 your brother quoted to the effect that there will be no
2 modification of Federal statutory law unless it's express
3 modification, which would preserve the full extent of
4 1331, I suppose?

5 MS. MILLER: It -- but it also preserves the --
6 how 1331 has been analyzed in the past, and how 1331 has
7 been analyzed under Merrell Dow is that you look at the
8 statute, and if the statute has a limited grant of
9 authority, then that's congressional intent that that be
10 the only authority, so 601 didn't change the analysis, it
11 just says you use the same analysis, and in this case the
12 analysis is, under Merrell Dow, there is a jurisdictional
13 statute in the statute at issue, so no other statutes --
14 so 1331, which is a broader grant of jurisdiction, should
15 not be used.

16 QUESTION: What about section 251 of the
17 Telecommunications Act, which does seem to have a lot of
18 standards for these agreements. Wouldn't that make it a
19 Federal question?

20 MS. MILLER: Well, but they're -- for negotiated
21 agreements they're not required to incorporate anything
22 involving 251 and 252, so they've made the choice to not
23 include those Federal standards by negotiating an
24 agreement rather than having it arbitrated, so in that
25 sense, no, it would not raise a Federal question.

1 QUESTION: We're told that the agreements that
2 are negotiated are not very far distant from what the
3 standards are under the -- of the statute. The thing is
4 so set up that the parties will come down to pretty much
5 what's in the statute. Is that not so?

6 MS. MILLER: I don't know that it's so in any --
7 in every instance. In this instance, for a matter of
8 fact, the initial contract at issue with MFS and Telenet,
9 Verizon actually agreed to a reciprocal compensation rate
10 that was higher than the commission's arbitrated rate.
11 Now, for what reason, I don't know. Presumably they
12 traded something else for that.

13 So it's not necessarily so that whatever's in
14 the statute the parties agree to, and if the parties agree
15 to that, then they've chosen to agree to that rather than
16 go to the State commission and say, Federal law requires
17 this, we don't want to agree to it, but we recognize that
18 you have the authority to order us to do it.

19 QUESTION: So you say that what has been created
20 is this weird system in which challenges to the
21 interpretation or validity of negotiated agreements can't
22 go to Federal court, but if it's a challenge to an
23 arbitrated agreement, it does go to Federal court?

24 MS. MILLER: Well, we think it would not end up
25 in Federal court for other reasons, but we -- but --

1 QUESTION: What are the other reasons, because
2 it makes some difference to me whether there's going to be
3 this strange line between negotiated and --

4 MS. MILLER: Well, if you're talking about 13 --
5 going into Federal court under 1331 --

6 QUESTION: Yes.

7 MS. MILLER: -- our argument would be the
8 private right of action argument, that 1331, you have to
9 look at the four court factors and things like that, and
10 that therefore those wouldn't end up under 1331 either,
11 and also the same argument --

12 QUESTION: But then you're blending together two
13 things --

14 QUESTION: Right.

15 QUESTION: -- that I think this Court's
16 decisions keep separate. One is 1331, general Federal
17 question jurisdiction.

18 QUESTION: Right.

19 QUESTION: That you have to have first, and then
20 do you have, would you survive a 12(b)(6) motion, do you
21 have a claim for relief, and you treated that in your
22 brief, and now again, as though they're the same question,
23 and they're not.

24 MS. MILLER: I don't believe, in answer to
25 Justice Scalia's question, I was treating them the same.

1 He asked me what other issues would we raise to say that
2 this arbitration case shouldn't be in this Court, and that
3 was one of the issues we raised.

4 I believe that there are cases that essentially
5 say that a cause of action is a matter, a matter of
6 subject matter jurisdiction. There are several circuit
7 courts that have interpreted this Court's Merrell Dow case
8 in that manner, but I don't think it's necessary for the
9 Court to even reach this, because I think the cases can be
10 upheld based on the Fourth Circuit analysis, and any one
11 of the three alternatives raised.

12 QUESTION: I thought we wrestled with that issue
13 in Steel Co.,

14 MS. MILLER: And --

15 QUESTION: You're not going to drag us back into
16 that again, are you?

17 MS. MILLER: Do you want to know what the Fourth
18 Circuit -- how the Fourth Circuit distinguished your Steel
19 Co. case?

20 QUESTION: Yes. I defended in Steel Co., so I'd
21 like to know that.

22 (Laughter.)

23 MS. MILLER: What the Fourth Circuit claimed you
24 were doing in Steel Co. is that you were distinguishing
25 between Article III subject matter jurisdiction, which had

1 to be decided before you reached the merits, and statutory
2 subject matter jurisdiction, which you didn't have to
3 decide before you reached the merits under that
4 hypothetical jurisdiction issue. That's how the Fourth
5 Circuit has interpreted Steel Co.

6 So in this instance I believe the petitioners
7 are wrong in their analysis that you have 1331
8 jurisdiction unless Congress specifically precludes 1331
9 jurisdiction. The only cases that has occurred has been
10 with regard to Federal agencies, as I mentioned earlier,
11 and that was because to find that 1331 wasn't broad enough
12 to encompass a Federal agency would mean that there would
13 be absolutely no review, so I think that there is a
14 distinction that is important between the two cases.

15 The final reason the Fourth Circuit found that
16 the 1331 claim should be dismissed was the Rooker-Feldman
17 doctrine. Under that doctrine, it involves essentially a
18 statutory interpretation element and a federalism element.
19 The statutory interpretation element is that 1257 grants
20 original jurisdiction to this Court and this Court alone
21 over State -- I'm sorry. 1257 alone grants this Court
22 appellate review of State court decisions, and that the
23 Federal district courts only have review over original
24 actions, original civil actions, and that by implication,
25 therefore, Federal district courts have no review over

1 State court actions.

2 QUESTION: Well, how does that fit in with City
3 of Chicago, where a Federal district court did sit on
4 those supplemental jurisdiction claims as a reviewer of a
5 State administrative agency?

6 MS. MILLER: I think that's distinguishable
7 because in the case you referred to the district court
8 already had jurisdiction over Federal claims that were
9 totally separate and apart from the on-record
10 administrative review. Essentially, the Federal claims
11 could have been brought without actually reviewing the
12 record and the order in the case. It was because the
13 Federal district court already had that jurisdiction over
14 those claims that this Court found it could exercise its
15 supplemental jurisdiction and also hear those claims that
16 involved the on-the-record State court -- actually, I
17 think it was actually a local administrative agency in
18 that case, but the on-the-record review.

19 So I think this is different in that Verizon
20 raises no claims that are separate and apart from the on-
21 the-record review and decisions of the Maryland Public
22 Service Commission, so in this instance the Federal
23 district court will be acting as an appellate court,
24 particularly since I believe virtually every Federal
25 district court that has considered the issue has said in

1 telecommunications cases it's not a de novo review, it is
2 an on-the-record review, so in this instance they will be
3 performing an appellate action rather than an original
4 civil action.

5 QUESTION: Could you -- in your opinion, if
6 there is -- suppose it isn't a communications case, it's
7 common, isn't it, if, say the California State Coastal
8 Authority, a State agency, orders someone to do thus-and-
9 so, they could say in Federal court, that order violates a
10 Federal statute, all right.

11 Now, in your case, if there were plaintiff just
12 like this one, and he went into a Federal court and said,
13 your State court order violates a Federal statute -- so in
14 other words, suppose it were much more clear, are you
15 saying there, there's no jurisdiction?

16 MS. MILLER: There, there would be Federal
17 jurisdiction if the basis of that claim didn't require the
18 appellate -- the Federal district court, excuse me, to
19 actually -- to review the determinations of the Maryland
20 Public Service Commission to reach the conclusion that
21 their order violated a Federal law, essentially --

22 QUESTION: Well, there may often be, with the
23 California State Coastal Commission somebody says, this is
24 a taking of my property, or something simpler. Now, it
25 could be that you have to look at the underlying State

1 order in order to deal with the Federal question.

2 MS. MILLER: To a certain extent you would be
3 looking at the Federal -- the State order, but you would
4 not be overturning the State order on the basis that the
5 State commission found. You would be saying, yes, you
6 found this, but the problem is, what you found now
7 implicates this, so --

8 QUESTION: Well, but what if the Federal
9 objection was raised at the administrative level, so that
10 the administrator, the administrative body had said, no
11 Federal problem. In that case, I take it, your answer
12 would be no, they can't go into Federal court.

13 MS. MILLER: That would be correct. They would
14 have to go through the State court proceedings in that,
15 and have it resolved in that manner.

16 QUESTION: May I ask you a procedural question?
17 I hate to do this, but it seemed to be in the case. Your
18 client's the commission.

19 MS. MILLER: That's correct.

20 QUESTION: Now, it's my understanding that the
21 commission first raised an Eleventh Amendment problem.

22 MS. MILLER: That's correct.

23 QUESTION: And then it was dismissed from the
24 case.

25 MS. MILLER: We were not dismissed from the case

1 The whole case was dismissed.

2 QUESTION: The whole case -- how did the 1331
3 come up, then?

4 MS. MILLER: Well --

5 QUESTION: It decided as to your client, you're
6 out of it because of Eleventh Amendment. As to the rest
7 of them they were out of it because of 1331, or --

8 MS. MILLER: No, Your Honor. At the Federal
9 district court level, essentially the court decided that
10 we had Eleventh Amendment immunity and that we were
11 indispensable parties and, as such, the entire case had to
12 be dismissed.

13 The Federal district court also addressed the
14 1331 issue and found that it would not imply a private
15 right of action, and that the -- and that his Eleventh
16 Amendment analysis probably would pertain to the 1331
17 claim as well.

18 That's all I have, unless there are any other
19 questions.

20 QUESTION: Thank you, Ms. Miller.

21 Mr. Evans, you have 1 minute remaining.

22 REBUTTAL ARGUMENT OF MARK L. EVANS

23 ON BEHALF OF THE PETITIONER IN NO. 00-1531

24 MR. EVANS: I would just like to read two
25 provisions, very short provisions from the contract that's

1 being interpreted here. The first says, reciprocal
2 compensation is as described in the act. The second says,
3 as described in the act means, as described in or required
4 by the act, meaning the '96 telecom act, and as from time
5 to time interpreted in the duly authorized rules and
6 regulations of the FCC or the State commission.

7 Now, if you look at the decision of the agency
8 here, the State agency here, it is full of a discussion of
9 what it means, what reciprocal compensation is required
10 under the act. That was the basis for the interpretation.

11 The effect of the interpretation was to say,
12 even though the act doesn't require it, you have to
13 provide it, because your agreement says you're going to
14 provide it, and we -- this statement says just the
15 opposite.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Evans.
17 The case is submitted.

18 (Whereupon, at 11:51 a.m., the case in the
19 above-entitled matter was submitted.)
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