

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

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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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25 Michigan; on behalf of Petitioners.

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

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1 P R O C E E D I N G S

2 (11:07 a.m.)

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

6 Mr. Bursch.

7 ORAL ARGUMENT OF JOHN J. BURSCH

8 ON BEHALF OF THE PETITIONERS

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

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

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

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

25 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'd 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'll recall that the Sixth Circuit said this
23 was like a situation where a homeowner had a plug in
24 their garage and a long orange cord extending out to a
25 park, which the court called the entrance facility, and

1 then the competitive carrier would be that person in the
2 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
8 into the surge protector, then the big orange extension
9 cord is just an 'entrance facility.' But, if you had
10 said they must plug into the big orange extension cord,
11 then the big orange extension cord becomes the
12 'interconnection facility' and, consequently, the park
13 goes" -- the 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
22 Ninth 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 -- it doesn't give
13 free choice entirely. It says -- what are the words?
14 That the -- the interconnection doesn't have to be put
15 just anyplace if it's not feasible or it's undue expense
16 or something 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 is an almost
20 irrebuttable presumption that when there are already
21 facilities in place performing that function, that is
22 technically 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
2 switching equipment here; we'll -- we'll allow you to
3 connect at, you know, the end of our facilities; but, by
4 God, you -- you make -- you make your own connection
5 to -- to the 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 toglom 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
24 posture 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 397
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.

19 JUSTICE SCALIA: Okay. Well --

20 MR. BURSCH: They're very short distances.

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

24 MR. BURSCH: Well, not necessarily --

25 JUSTICE SCALIA: And charge you TELRIC

1 rates.

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

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

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

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

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

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

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

12 MR. BURSCH: Yes.

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

17 MR. BURSCH: Correct.

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

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

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

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

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

12 JUSTICE BREYER: Michigan blue --

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

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

18 MR. BURSCH: Very good.

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

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

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

6 MR. BURSCH: Exactly.

7 JUSTICE BREYER: This is the FCC speaking?

8 MR. BURSCH: The FCC is speaking --

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

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

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

21 MR. BURSCH: Correct.

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

24 MR. BURSCH: I do.

25 JUSTICE SCALIA: What do you rely upon to

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

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

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

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

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

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

1 one to another.

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

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

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

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

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

15 MR. BURSCH: Yes.

16 JUSTICE KENNEDY: -- interconnection.

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

19 JUSTICE KENNEDY: Yes.

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

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

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

15 CHIEF JUSTICE ROBERTS: Is that right or --

16 JUSTICE BREYER: Do you read --

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

20 MR. BURSCH: No, there is not, and we don't
21 take that position. The mutual exchange is when a
22 competitive customer talks to an incumbent customer or
23 vice versa. Everything else we can call backhauling,
24 and that's not what's at issue when we're talking about
25 251(c)(2).

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

3 MR. BURSCH: Yes.

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

6 MR. BURSCH: Yes.

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

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

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

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

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

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

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

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

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

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

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

15 MR. BURSCH: I'll take it in two parts. You
16 know, again, with respect to distance, in the meet-point
17 context, the FCC has already delegated in LCO paragraph
18 553 appropriate and reasonable distances.

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

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

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

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 MR. BURSCH: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Miller.

10 ORAL ARGUMENT OF ERIC D. MILLER

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

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

15 There are a lot of statements by the FCC at
16 issue in this case, but I'd like to focus on two
17 statements by the commission in its published regulation
18 and orders that, taken together, resolve the question
19 presented here. And the first is the commission's
20 determination in 47 CFR 51.305(e), which appears at page
21 5a of Michigan's brief, that it is the competitor, not
22 the incumbent, that gets to select the point at which
23 interconnection takes place.

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

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

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

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

25 Nonetheless, as the commission explained

1 when it adopted those regulations in 1996 at paragraph
2 209 of the Local Competition Order, competitors have an
3 incentive to ask for an economically efficient means of
4 interconnection because they have to pay for it. I
5 mean, the -- they don't pay as much as AT&T would
6 like -- because they're paying TELRIC rates -- but they
7 do still have to pay for interconnection, so they have
8 incentive to ask for a reasonable method of it.

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

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

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

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

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

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

3 JUSTICE BREYER: Where do I find that?

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

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

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

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

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

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

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

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

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

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

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

6 MR. MILLER: An entrance facility --

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

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

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

18 MR. MILLER: It can be.

19 JUSTICE SCALIA: -- in your estimation?

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

25 CHIEF JUSTICE ROBERTS: I'm sorry. Could

1 you run that by me again?

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

4 CHIEF JUSTICE ROBERTS: Okay.

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

7 CHIEF JUSTICE ROBERTS: Got it.

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

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

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

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

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

10 MR. MILLER: No.

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

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

25 JUSTICE SCALIA: Wait. They have to be as

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

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

3 JUSTICE SCALIA: -- made available as

4 unbundled elements. That's (c)(3).

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

6 JUSTICE SCALIA: Your argument here is that

7 only have to be made available under (c)(2)?

8 MR. MILLER: Exactly.

9 JUSTICE SCALIA: Which is not unbundled?

10 MR. MILLER: Right. And it's only for

11 purposes of -- of interconnection. And I think this is

12 precisely the sort of case where deference under Auer is

13 appropriate, given that you have a highly complex

14 statute regulating a very complex, dynamic industry, and

15 so the commission's regulations involve not only the

16 exercise of --

17 JUSTICE SCALIA: You certainly encourage us

18 to throw up our hands. There's no doubt about it.

19 (Laughter.)

20 MR. MILLER: I -- another way of saying that

21 would be that it's appropriate to recognize the

22 commission's not only policy-making discretion but

23 technical expertise in the industry that's being

24 regulated. And certainly the commission has tried to be

25 as clear as it can in its regulations, but this is an

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

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

7 (Laughter.)

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

11 MR. MILLER: Well, I guess I would say maybe
12 we need to put the difference between interconnection
13 and transport in concrete terms. It would be the
14 interconnection charge which is at TELRIC rates under
15 252(d)(1). There would be a flat fee for setting it up
16 and then a flat monthly fee just for having the link
17 there.

18 CHIEF JUSTICE ROBERTS: Oh, continue.

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

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

1 the call and vice versa.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Miller.

4 Mr. Angstreich.

5 ORAL ARGUMENT OF SCOTT H. ANGSTREICH
6 ON BEHALF OF THE RESPONDENTS

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

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

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

1 argument is not based even on those. It's based on the
2 LCO regulations themselves. They've cited two, which is
3 51.305 and 51.321. They're not relying on those TROs in
4 their back and forth there; they're relying on the
5 regulation.

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

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

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

18 MR. ANGSTREICH: There are --

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

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

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

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

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

16 JUSTICE SCALIA: The Sixth Circuit?

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

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

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

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

1 for things that are not bottleneck elements.

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

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

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

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

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

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

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

1 place, competitors would lease these facilities and pay
2 TELRIC rates and use them to get to the interconnection
3 point, but there was never during that time any
4 statement that even if there was no impairment, section
5 251(c)(2) would require the exact same thing to get to
6 the interconnection point.

7 JUSTICE SCALIA: What happened to the
8 unbundling rule?

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

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

24 JUSTICE SCALIA: Why was the unbundling rule
25 abandoned?

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

4 JUSTICE SCALIA: It's not a bottleneck?

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

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

1 "require."

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

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

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

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

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

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

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

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

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

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

1 transporting services?

2 MR. ANGSTREICH: Your Honor --

3 JUSTICE BREYER: What part is doing
4 something else?

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

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

8 MR. ANGSTREICH: No.

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

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

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

17 MR. ANGSTREICH: That's wrong.

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

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

25 JUSTICE SCALIA: So, it is accepted by both

1 sides, I think, that this is not necessary.

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

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

18 MR. ANGSTREICH: Well, Your Honor --

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

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

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

3 MR. ANGSTREICH: Your Honor --

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

6 MR. ANGSTREICH: Our --

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

13 MR. ANGSTREICH: That -- Your Honor, that's
14 absolutely right, Justice Scalia. They get to pick a
15 point. The point has to be within our network. Rule
16 51.305 identifies a series of illustrative points, all
17 of which exist inside AT&T buildings. And that's what
18 they've done. They've picked a point --

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

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

1 JUSTICE SOTOMAYOR: And it's now they --

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

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

10 MR. ANGSTREICH: Pardon me. I think -- if
11 you have the Network Engineers' brief, figure 4 on page
12 19, I think it does a very good job of illustrating what
13 it is we're talking about.

14 JUSTICE SCALIA: Like orange wires and such?
15 (Laughter.)

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

18 JUSTICE SCALIA: In black?

19 JUSTICE SOTOMAYOR: Figure 4.

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

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

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

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

11 MR. ANGSTREICH: Right.

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

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

22 JUSTICE BREYER: Yes.

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

1 facilities and equipment --

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

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

10 JUSTICE BREYER: Yes.

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

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

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

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

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

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

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

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

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

17 MR. ANGSTREICH: What they said is --

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

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

23 JUSTICE BREYER: All right.

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

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

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

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

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

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

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

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

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

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

19 JUSTICE BREYER: It is?

20 MR. ANGSTREICH: But I'd point --

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

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

1 355, where this Court said: Nobody has asked us to
2 invoke the doctrine of primary jurisdiction; we're not
3 going to do it; instead, we will adopt an interpretation
4 of the statute that will suffice for the purposes at
5 hand. And as the Court later recognized in Brand X,
6 that leaves it open to the agency, in a rulemaking, to
7 actually do the work that, as Justice Scalia noted, the
8 agency has never done here.

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

14 JUSTICE SOTOMAYOR: I --

15 MR. ANGSTREICH: -- and a chance --

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

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

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

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

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

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

1 section --

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

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

8 JUSTICE SOTOMAYOR: Its view --

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

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

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

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

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

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

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

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

1 said things directly to the contrary.

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

5 MR. ANGSTREICH: Right.

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

8 MR. ANGSTREICH: Right, they care.

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

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

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

18 (Laughter.)

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

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

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

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

16 MR. ANGSTREICH: I --

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

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

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

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

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

17 JUSTICE SCALIA: Well, okay.

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

25 But Congress didn't say, and the FCC has

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

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

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

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

24 REBUTTAL ARGUMENT OF JOHN J. BURSCH

25 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

25 But the idea that somehow the FCC can --

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

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

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

10 MR. BURSCH: The backhauling --

11 JUSTICE SCALIA: Yes, yes. The --

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

16 So, the fact that this is not something new
17 is demonstrated conclusively by comments in the TRRO
18 proceedings from Bell South, which is now an AT&T
19 subsidiary. And Bell South says, at page 59 of its
20 comments, fully recognizing the obligation that went all
21 the way back to 1996 in reg 321: Because entrance
22 facilities may be required for interconnection purposes
23 and Congress explicitly enacted provisions that govern
24 carrier obligations to provide interconnection in
25 251(c)(2), it was altogether reasonable for the

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 MR. BURSCH: Thank you.

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

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