

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

RICHARD L. MATHIAS, ET AL., :

Petitioners :

v. : No. 00-878

WORLD COM TECHNOLOGIES, INC., :

ET AL. :

- - - - -X

Washington, D.C.

Wednesday, December 5, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:00 a.m.

APPEARANCES:

JOEL D. BERTOCCHI, ESQ., Solicitor General of Illinois,  
Chicago, Illinois; on behalf of the Petitioners.

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

PAUL M. SMITH, ESQ., Washington, D.C.; on behalf of the  
Respondents WorldCom Technologies, Inc., MCI WORLD COM  
Network Services, Inc., MCI metro Access Services LLC,  
and Focal Communications Corp.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

ORAL ARGUMENT OF	PAGE
JOEL D. BERTOCCHI, ESQ.	
On behalf of the Petitioners	3
ORAL ARGUMENT OF	
BARBARA B. McDOWELL, ESQ.	
On behalf of the Respondent United States	25
ORAL ARGUMENT OF	
PAUL M. SMITH, ESQ.	
On behalf of the Respondents WorldCom	
Technologies, Inc., MCI WORLDCOM Network Services,	
Inc., MCImetro Access Services LLC, and Focal	
Communications Corp.	39
REBUTTAL ARGUMENT OF	
JOEL D. BERTOCCHI, ESQ.	
On behalf of the Petitioners	53

(10:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 000-878, Richard L. Mathias v. WorldCom Technologies.

Mr. Bertocchi. Am I pronouncing your name correctly?

MR. BERTOCCHI: Yes, you are, Mr. Chief Justice.

ORAL ARGUMENT OF JOEL D. BERTOCCHI

ON BEHALF OF THE PETITIONERS

MR. BERTOCCHI: Good morning, Mr. Chief Justice, and may it please the Court:

The local telecommunication provisions of the Telecommunications Act of 1996 introduced competition into local telephone markets. The act did so in sections 251 and 252. Section 251 imposes the obligation to interconnect, and requires incumbent carriers to enter into agreements that will provide access to their competitors to those incumbents' networks.

Section 252 prescribes procedures under which those agreements, contracts, as they are, are negotiated, arbitrated, approved, and filed, and the act stops there. It does not go on to interpret -- to discuss interpretation or enforcement of those agreements.

From its title through its text, section 252

1 demonstrates that Congress was silent regarding  
2 interpretation and enforcement. Nonetheless,  
3 interpretation is not unaccounted for, because into that  
4 silence, under preexisting law, stepped the States. That  
5 preexisting law, still good under the 1996 act, not  
6 preempted or repealed by it, provides that the  
7 interpretation of these contracts is a State law process  
8 which has been deliberately left by Congress to State  
9 regulators, including State judges, who will apply State  
10 contract law to those provisions.

11 QUESTION: Can I ask a very preliminary, quick,  
12 I hope -- and I hope you'll have a conclusive answer. I  
13 can't get an answer. It's a procedural matter. I take it  
14 you won below.

15 MR. BERTOCCHI: We --

16 QUESTION: You won on the merits.

17 MR. BERTOCCHI: Yes.

18 QUESTION: All right. Now, I've always thought  
19 that you appeal from a judgment, basically. The judgment  
20 now under the Seventh Circuit says, you win. But what  
21 you're saying is, their reason was the wrong one. We  
22 should have won because there was no jurisdiction or there  
23 was a Fourth Amendment bar.

24 MR. BERTOCCHI: Yes, Your Honor.

25 QUESTION: And the reason they gave for our

1 winning was wrong. Well, I didn't think you could appeal  
2 that kind of thing. Judges make mistakes in their  
3 reasoning all the time. I do, too, and if you could  
4 appeal from the reasoning of an opinion, as opposed to the  
5 judgment, we'd be here 700 days a year, so -- and I can't  
6 find a case where that happened, so is that -- and I hope  
7 there's a conclusive answer to what I say, because it's  
8 terrible if the case washes out for that reason.

9 MR. BERTOCCHI: Your Honor, I believe the  
10 conclusive answer is that our assertion that there was no  
11 jurisdiction over us and that we -- if there was  
12 jurisdiction over us and over this cause of action, we are  
13 asserting immunity as a claim that we can bring regardless  
14 of the result on the merits.

15 QUESTION: And is there any precedent at all  
16 where that's ever happened before?

17 MR. BERTOCCHI: Your Honor, I cannot -- I'm  
18 afraid I cannot cite you to any. I believe that these  
19 questions are preserved regardless of the merits. I  
20 cannot point you to --

21 QUESTION: Does the opinion below cause you some  
22 kind of continuing injury?

23 MR. BERTOCCHI: Well, it does, Your Honor, in  
24 the sense that it is going to, if it stands, result in our  
25 continuing to be brought to Federal court, in spite of the

1 immunity that we assert, and it is going to continue to  
2 place these cases in Federal court even though we believe  
3 that they are properly State court cases completely, and  
4 that our State court should have the opportunity to review  
5 these, to review all the matters that are raised, and to  
6 fulfill both their duty to apply State law and their  
7 obligation to consider whether their State law  
8 construction in any way is inconsistent with Federal law.

9 QUESTION: There's a patent case in 307 U.S.  
10 that says -- where the lower court ruled both on  
11 infringement and on the validity of the patent, and the  
12 person who sought to -- had won on one of them. This  
13 Court said you could have a decision on the other point.  
14 That might be of some help to you.

15 MR. BERTOCCHI: I appreciate that, Your Honor,  
16 and I will have a look.

17 QUESTION: Except, isn't it the ordinary rule  
18 that when -- there may be a special consideration in that  
19 patent context, and maybe yours is also, but I had thought  
20 that reasons that went against the judgment winner do not  
21 get any kind of preclusive effect, so that you would not  
22 be bound by this jurisdictional holding which was against  
23 you. You prevailed on the merits, you have that judgment,  
24 so you don't -- you're not stopped, precluded from  
25 relitigating the case. In other words, the two go

1 together. If you can't appeal it, then you're not bound  
2 by it. Isn't that --

3 MR. BERTOCCHI: I understand, Your Honor. I  
4 believe, though, that we -- that the district courts of  
5 the Seventh Circuit would consider themselves bound by the  
6 Seventh Circuit's decision, and we would have to go to  
7 court to litigate that, which we believe would be a  
8 violation of our immunity, and in addition, we believe  
9 that the jurisdiction would not be there, and by doing  
10 that we would essentially be being kept out, as we have  
11 been kept out of our State courts for at least some period  
12 of time, and in that sense I believe that there is a  
13 continuing injury that results from this.

14 QUESTION: Your injury results at least in a  
15 formal sense from the fact that, in order to get the  
16 review which the companies sought, they made your State  
17 regulators defendants in a case, is that correct?

18 MR. BERTOCCHI: They subjected them to -- the  
19 individual commissioners to suit and made them defend  
20 their rule, yes, sir.

21 QUESTION: But the essence of what they were --  
22 the essence of what the companies were claiming was not  
23 some kind of right asserted against the State as a  
24 sovereign entity or against these regulators in official  
25 or individual capacity. The essence of what was going on

1 was an attempt to review in effect a regulatory decision.  
2 Why does that implicate immunity in the sense that we  
3 usually think of immunity in Eleventh Amendment issues to  
4 be implicated?

5 MR. BERTOCCHI: Your Honor, I think it does so  
6 for two reasons. First, if you take a look at the  
7 complaint that Ameritech filed, Ameritech asserted in its  
8 complaint that it had been injured by the actions of the  
9 State commissioners.

10 QUESTION: Well, but that's -- anyone who loses  
11 a case has been injured by the actions of the judge who  
12 made a mistake of law, or by the regulator in a regulatory  
13 case, so that in itself doesn't take it out of the usual  
14 attempt simply to get review of a judicial or a quasi-  
15 judicial decision that you say is wrong.

16 MR. BERTOCCHI: That's correct, Your Honor, but  
17 the result -- the other thing that the complaint does is,  
18 it names the individual commissioners as defendants. It  
19 subjects them to the jurisdiction of the Federal court,  
20 and it raises issues as to whether -- which we have argued  
21 at great length in all of our briefs, as to whether that  
22 violates sovereign immunity.

23 QUESTION: But that's a formality. It seems to  
24 me that by naming them the -- those who are appealing are  
25 doing nothing more than saying, look, these people in



1     their adjudicatory capacity made a mistake, we want that  
2     mistake reviewed, in the same sense that people work their  
3     way up through levels of appeal in the judicial system,  
4     and that certainly is not a classic example of the kind of  
5     implication of State sovereignty which the immunity  
6     doctrines and the Eleventh Amendment have addressed. I  
7     guess I'm saying, is this really a case that implicates  
8     Eleventh Amendment immunity?

9             MR. BERTOCCHI: Your Honor, we believe it does.  
10    I will admit that as things have turned out, in light of  
11    the fact that the district court and the Seventh Circuit  
12    did not disagree with the decision of the commission,  
13    there have -- none of the parade of possible bad things  
14    have happened to us. There has been no injunction entered  
15    against us. There has been no contempt proceeding. At  
16    this point there might not be an award of attorney's fees,  
17    but that's because of the way the case came out.

18            QUESTION: Is it your position that the private  
19    parties could have brought the case to the district court  
20    without naming the commission?

21            MR. BERTOCCHI: Your Honor, not in this  
22    interpretation case, no. We believe we were necessary  
23    parties, but we believe that because we believe these are  
24    State actions and that we are -- and we are necessary  
25    parties under State law to administrative review.

1           QUESTION: But does that, again, put you in any  
2 different position from a State commission in a run-of-  
3 the-mill utilities case, even within -- let's say just  
4 within the State system, to keep it simple? In some,  
5 maybe all States, if there is an appeal from a rate order  
6 the regulatory body can be represented by counsel and say,  
7 you know, we got it right, don't reverse us, but they are  
8 not regarded as parties to litigation in the classic  
9 sense.

10           So you could have been -- I guess what I'm  
11 saying is, you could have been heard, which is one of the  
12 consequences of the way they went about this procedurally,  
13 but you could have been heard without being a party in the  
14 usual sense.

15           MR. BERTOCCHI: Your Honor, given the fact that  
16 this was a Federal court reviewing a State proceeding, we  
17 might well have been able to be heard if the district  
18 judge had allowed us in, and again, as I indicated -- and  
19 I believe this is still in response to the question -- it  
20 has turned out that because the district court agreed with  
21 us, nothing has happened to us that doesn't happen to us  
22 in State court when our decisions are affirmed.

23           But in State appellate proceedings from Illinois  
24 Commerce Commission orders, when the appellate court  
25 disagrees, it enters a decree that invalidates or in some

1 way amends or remands the order. That is not the type of  
2 relief that is contemplated in the full range of a Federal  
3 equity suit in which commissioners are named as  
4 individuals or even, I would submit, in a case in which  
5 the State commission were named as a party.

6 In this case, Ameritech did not sue the State  
7 commission, for reasons I'm not quite sure I understand,  
8 but we're willing to, because we're here, assume that the  
9 commissions are -- commissioners are an acceptable  
10 substitute, but even in that instance, the order is  
11 entered by the tribunal, by the appellate tribunal on the  
12 State side against -- an order is entered that simply  
13 supervenes the commission's order.

14 In this instance, Ameritech filed a complaint  
15 asking for the Federal court to enter orders that are  
16 specifically directed at the commissioners and, if they  
17 had sued the commission, would have been specifically  
18 directed at the commission. That is relief that we don't  
19 believe is contemplated by the statute, but we also think  
20 it's significantly -- it could be significantly different.  
21 It hasn't turned out that way -- excuse me. It hasn't  
22 turned out that way in this case, because the district  
23 court and the Seventh Circuit have agreed on the merits,  
24 but it could have, and that was our concern, and that is  
25 why we are here, because we don't know how it's going to

1 turn out in the next case.

2 Your Honors, these proceedings, interpretive of  
3 the contracts as they were, did not take place under  
4 section 252. That qualifier is critical to jurisdiction  
5 under section (e)(6) and, indeed, limits any application  
6 of (e)(6). It does not make any difference -- respondents  
7 have devoted a substantial amount of energy to this, but  
8 really it does not make any difference if we are talking  
9 about an action, a case, a determination, whatever it is  
10 that the commission does still must be done under 252 in  
11 order for jurisdiction to attach under 252(e)(6), and in  
12 that respect the text and scope of section 252 is plain.  
13 It goes as far as the filing, the formation and filing of  
14 the agreement --

15 QUESTION: Where do we find section 252 in the  
16 briefs?

17 MR. BERTOCCHI: Your Honor, if you take a look  
18 at the blue brief in -- we've attached both sections 251  
19 and 252 as an appendix, and 252 starts at page 12a of that  
20 appendix.

21 QUESTION: Suppose that you're in the State  
22 court and you've won, and they've sued you in the State  
23 court, and then suppose that their claim is the following,  
24 the agreement as interpreted by the commission does not  
25 meet the requirements of section 251, including the

1 regulations prescribed in the FCC pursuant to section 251,  
2 and then the judge asks you this question: Counsel, where  
3 is the law that says it has to meet the requirements of  
4 section 251, including the regulations prescribed by the  
5 FCC pursuant to section 251? Where is that law? What was  
6 the answer?

7 MR. BERTOCCHI: Your Honor, if we're talking  
8 about an interpretation case, the answer is essentially a  
9 combination of State law, which now makes compliance with  
10 Federal law, with the act, a requirement, and the general  
11 requirement that in any case that a State court hears, it  
12 not contravene Federal law. That law --

13 QUESTION: It's not in 252?

14 MR. BERTOCCHI: No, Your Honor, it's not, if we  
15 are talking about an interpretation. To read that  
16 language into 252 is to suggest that an interpretation is  
17 really a modification, and I think those things are very  
18 distinct concepts of the law.

19 If it happens during an approval process, that's  
20 different, but that would be my response. I think in the  
21 end the result would be the same, because the State court  
22 is clearly required in any case, and certainly in one of  
23 these cases, to determine whether it -- its decision, its  
24 construction of the contract follows Federal law. That's  
25 what the commission did in this case, and that's what the

1 Illinois appellate court would do.

2 QUESTION: Are you saying that in a post  
3 determination interpretation case, that the commission  
4 doesn't look to 251 and 252, it can't look there?

5 MR. BERTOCCHI: It -- well, Your Honor,  
6 interestingly enough, in this case it can't, because this  
7 was -- the provisions that deal with reciprocal  
8 compensation in this case were negotiated, and they're not  
9 required to comply with the act, but even in a case where  
10 there had been an arbitration, and where there was an  
11 issue with respect to that, I believe that certainly the  
12 commission -- certainly the court could look to Federal  
13 law and see if there was anything that didn't comply with  
14 251 and 252.

15 QUESTION: I mean, it's just a very odd concept  
16 that the State commission launches this vehicle having  
17 looked at the Federal law, and then subsequent  
18 interpretation doesn't involve Federal law. It's just --  
19 that's just hard for me to understand.

20 MR. BERTOCCHI: I think the interpretation will  
21 involve Federal law in many instances, Your Honor, but the  
22 interpretation cases are going to be driven by State law,  
23 and this case is another good example of that.

24 In this case, the way the commission, I think,  
25 looked at this case is the proper way. They construed the

1 contract first and then determined whether their  
2 construction violated any Federal law, including FCC  
3 rulings, and decided that it did not, so I am not at all  
4 suggesting --

5 QUESTION: What if they had decided that it did?  
6 I think that's the question. What if they had decided,  
7 having construed it, well, you know, this is really what  
8 it says, but boy, if we interpret it this way, it violates  
9 the act? Then what do they do?

10 MR. BERTOCCHI: Then I think that they would  
11 have to construe it differently. They would have to --

12 QUESTION: How can you construe it differently?  
13 I mean, it says what it says.

14 MR. BERTOCCHI: Well, they cannot -- they are --

15 QUESTION: So then they're not doing  
16 construction any more, they're doing application of  
17 Federal law.

18 MR. BERTOCCHI: I think, Your Honor, in that  
19 instance, if they wanted -- if the contract could survive,  
20 what they would do is, they would say the Federal law  
21 superseded whatever State contract principle they applied  
22 in construing it in the first place.

23 QUESTION: Well, there isn't any Federal law of  
24 contracts. There may be a lot of Federal law of  
25 telecommunications, but the two could certainly be

1       regarded as separate, I think.

2               MR. BERTOCCHI:   Exactly, Your Honor.   There is  
3       not a law --

4               QUESTION:   And if they came to that conclusion,  
5       that although they construe the law of contracts to have  
6       reading A, nonetheless reading A violates or does not  
7       violate the Federal statute, do you still maintain there  
8       is no Federal jurisdiction to review that, neither under  
9       the provision at issue in this case nor under 1331?

10              MR. BERTOCCHI:   We do maintain that, Your Honor.

11              QUESTION:   Even though it's no longer an  
12       interpretation question?   They are no longer interpreting  
13       the contract.   They have interpreted it, but they say,  
14       having interpreted it this way, we find that this way  
15       violates Federal law, and therefore we disallow it, and  
16       there's still no review of that --

17              MR. BERTOCCHI:   Yes --

18              QUESTION:   -- under 1331?

19              QUESTION:   Well, it seems to me your position  
20       on 252 and in response to your question from Justice -- is  
21       very likely well-taken.   I think your position is 1331 is  
22       harder to defend.   How do you defend that?

23              MR. BERTOCCHI:   Well, Your Honor, with respect  
24       to section 1331, we start our analysis back at section  
25       252.   We believe that -- and I think that the case that



1 comes closest to describing the way this would work is the  
2 Jackson Transit case.

3 Jackson Transit -- in Jackson Transit, the Court  
4 seemed to assume 1331 jurisdiction but went on to say, we  
5 have to take a look at congressional intent to determine  
6 whether those contracts which are required to be in place  
7 by Federal law, whether litigation over whether those  
8 contracts are binding and what they mean should take place  
9 in Federal or State court, and we believe, again, that the  
10 silence regarding interpretation in section 252 and the  
11 remedy provided in section 252(e)(6) suggests that that is  
12 the remedy that Congress intended to be made available.

13 QUESTION: But you're relying on silence  
14 regarding interpretation, and in the hypothesis we were  
15 just discussing, it was no longer an interpretive  
16 question. The State court, or the State commission had  
17 decided the interpretation. Having decided it, they moved  
18 to another question, does this interpretation violate the  
19 Federal statute?

20 MR. BERTOCCHI: Yes, Your Honor --

21 QUESTION: You say they have to move to that  
22 second question, and if they do, they just override their  
23 interpretation, but that's no longer an interpretive  
24 question, it seems to me, at that point, so your  
25 distinguishing of section 252 doesn't --

1           MR. BERTOCCHI: Your Honor, I -- it is no longer  
2 an interpretive question, but the proceeding is still an  
3 interpretive proceeding. We read 252 to cover a certain  
4 type of proceeding that leads to approval and ends at a  
5 very particular point.

6           Respondents point out that this is not the end  
7 point for disputes under the contract, and that is  
8 certainly likely to be true, but it is the end point for  
9 how far 252 goes, and the fact that Federal issues may  
10 come up afterwards does not change the fact that Congress  
11 in 252(e)(6) provided a very specific remedy that was  
12 designed to review matters that were decided in the  
13 approval process. We believe that that jurisdictional  
14 restriction operates both with respect to 252(e)(6) and  
15 suggests that it applies under -- that a limitation should  
16 be placed on 1331 jurisdiction as well.

17          QUESTION: But it suggests there's a large  
18 lacuna between the approval process and the interpretation  
19 process, which is -- you know, I can understand how you  
20 can construe 252 that way, but I think you have to read  
21 252 as precluding 1331 jurisdiction, and I think that's a  
22 more difficult question.

23          MR. BERTOCCHI: It is more difficult, Your  
24 Honor, but I believe that that's what it does. We're  
25 talking about --

1           QUESTION: Isn't it -- isn't the difficulty  
2   this, that -- I mean, we don't lightly imply a negative on  
3   1331 jurisdiction, and it's perfectly possible to read the  
4   sentence in subsection (6) as simply saying, whatever the  
5   State commission may do in applying these two sections  
6   gets Federal court review, and going no further than  
7   simply to make it clear that you do get Federal court  
8   review of it, in effect as a regulatory matter. If you  
9   read it that way, which the text certainly allows you to  
10  do, 1331 stands.

11           MR. BERTOCCHI: Your Honor, I believe that to  
12  read it that way and then -- and to include  
13  interpretation, enforcement proceedings under it would  
14  essentially read the words under 252 under the statute.  
15  Certainly there is a difference between the language, the  
16  word determination and the language in the actual  
17  preemption provision in (e)(4) that says, approvals or  
18  rejections, but -- and the respondents argue that that  
19  suggests that determinations is a broader term.

20           Our position is that it doesn't matter whether  
21  it's a broader term, but our -- that if it's not under  
22  252, it doesn't matter what kind of action it is, and  
23  interpretations and enforcements are not covered by that  
24  statute. It's a very particular statute that goes only so  
25  far and no further.

1           In addition, it seems that that argument and the  
2   use of those words is somewhat inconsistent, because the  
3   United States suggests that the more specific terms in  
4   (e)(4) suggest that determinations must mean anything that  
5   happens in a case related to these contracts, but it seems  
6   to me if approvals and agreements in (e)(4) is a narrow  
7   term, then approvals and agreements, which is all 252  
8   addresses, is -- must be read equally as a narrow term,  
9   and it's inconsistent to say that determinations under 252  
10   goes beyond that.

11           QUESTION: Well, approvals, agreements and  
12   arbitration. You would agree that would be covered, too?

13           MR. BERTOCCHI: Yes.

14           QUESTION: Yes.

15           MR. BERTOCCHI: Yes, Your Honor.

16           QUESTION: And did you say -- did I understand  
17   you correctly to say that if this particular issue had  
18   come up at the time of approval, then there would be  
19   Federal court review, so if something -- the character of  
20   the issue has nothing to do with it. It's just, if it  
21   comes up in one proceeding, Federal court, if it doesn't  
22   come up simultaneously, the very same question doesn't  
23   come up simultaneously, then you have this split.

24           MR. BERTOCCHI: Exactly, Your Honor. We believe  
25   that that procedural difference is the basis for the

1 distinction, but we believe that that distinction is  
2 entirely rational is in accord with what happens in the  
3 life of contracts.

4 In real life, in contracts outside the context  
5 of telecommunications, issues will come up in negotiation  
6 and maybe there'll be a contract and maybe there won't.  
7 If the same issue comes up once the contract is in force  
8 and the parties can't reach an agreement, which they have  
9 the opportunity to do in any case, then they have to go to  
10 court, someone has to go to court to get it enforced, so  
11 the notion that the timing of an issue affects where it's  
12 going to be litigated is not at all surprising, and is  
13 entirely consistent with what we believe Congress' intent  
14 was in 252.

15 QUESTION: Yes, but in an ordinary private  
16 contract, if the State court refuses to enforce the  
17 contract, let's say on the ground that it would be a  
18 contract combination or conspiracy in restraint of trade  
19 and thus violate the Sherman Act, you would be able to get  
20 review of that determination in Federal court, wouldn't  
21 you?

22 But you're saying that this contract can be  
23 overridden and disallowed by a State court on a Federal  
24 ground with no review of that Federal ground by any  
25 Federal court, so that you can have different

1     interpretations of the Sherman Act all around the country,  
2     with no Federal court being able to review it.

3             MR. BERTOCCHI: Your Honor, my belief is that if  
4     a State court invalidated a contract on Federal grounds,  
5     appeal would be to the State appellate court, and the  
6     Federal court that would be able to review that  
7     determination if it was wrong is this Court, so there is  
8     always going to be a Federal court that can determine  
9     that. What -- and the --

10            QUESTION: We can review it because there is a  
11     Federal question involved --

12            MR. BERTOCCHI: If that were --

13            QUESTION: -- but for purposes of 1331 there's  
14     no Federal question involved?

15            MR. BERTOCCHI: For purposes of 1331, there may  
16     be Federal issues involved, but we believe that there is a  
17     specific congressional intent, reflected in the  
18     specificity of 252 -- you can look at it as silence, or  
19     you can look at it as specificity -- in the specificity of  
20     252 to have these matters litigated in State court, and  
21     again I would cite Jackson Transit for the proposition  
22     that whether there is an arising under question under 1331  
23     does not mean you still don't look to the question of  
24     where the contracts are litigated.

25            In that case, the contracts had to be there

1 because of Federal law. They had to be honored because of  
2 Federal law, but there was a legislative intent that was  
3 discerned by this Court to have those -- the binding -- to  
4 have the litigation concerning those contracts take place  
5 in State court.

6 QUESTION: Why --

7 QUESTION: Let's assume we can --

8 QUESTION: Why would they?

9 MR. BERTOCCHI: I'm sorry.

10 QUESTION: I mean, you know in order to --

11 QUESTION: That's my question, too.

12 (Laughter.)

13 QUESTION: I'm going to ask the same question.

14 QUESTION: In order to win your 1331 point, you  
15 have to show that Congress really wanted this  
16 interpretation that you're giving of 252, right, it really  
17 wanted it and had a pretty good reason for it.

18 MR. BERTOCCHI: Yes, Your Honor.

19 QUESTION: What's the reason? I mean, it  
20 creates a pretty big mess, doesn't it? We're going to get  
21 into a new jurisprudence of what's an interpretation and  
22 what's an approval, and you're going to start splitting  
23 the documents apart and it sounds to me like a mess, and I  
24 don't know why -- maybe Congress wrote those words, but  
25 why would they want such a thing?

1 MR. BERTOCCHI: Your Honor, I think they would  
2 want such a thing because the Telecommunications Act  
3 represents a change in the way utilities are regulated,  
4 and although everybody agrees that that is true, I think  
5 that the respondents misapprehend the change. The change  
6 is to reduce regulation over the parties to  
7 telecommunications transactions once access is assured.  
8 The interest in this case was access, and once that's over  
9 with, these are to be -- these cases are to be treated, I  
10 believe, like regular contracts cases.

11 This case, again, is a good example. It was  
12 driven by State law and the Federal questions came up  
13 afterwards in determining whether the construction was  
14 proper, and in that instance I think Congress intended to  
15 leave the matters to State -- to the State commission  
16 under State law and to State courts.

17 QUESTION: No, but that still doesn't explain --  
18 I mean, you've still got the mess that Justice Breyer  
19 referred to. Why would Congress want to legislate that  
20 kind of bifurcation that makes for all of this confusion?

21 MR. BERTOCCHI: Your Honor, I think Congress  
22 would want to do it because it recognized that most of  
23 these cases were going to be like this one. This is not a  
24 case about access, which is --

25 QUESTION: And Congress would have wanted this



1 to happen?

2 MR. BERTOCCHI: Yes, Your Honor.

3 QUESTION: Why?

4 MR. BERTOCCHI: Well, Your Honor, I think --  
5 this, in the sense of State courts deciding, construing  
6 these contracts and then deciding any incidental Federal  
7 law questions under their normal obligation to do so.  
8 Yes, we think that's what they wanted, and we think that's  
9 what they wanted because they would recognize, as in this  
10 case, that these cases are State-law driven.

11 The goal of the act is access. This case is not  
12 about access. The respondent, the competing telecom  
13 companies had had access, they will have access, they have  
14 it today, and they will have it tomorrow. This case is  
15 about whether Ameritech owes them money. That is a  
16 contracts case. It may implicate Federal law, as any  
17 State contracts case theoretically could, but we believe  
18 that Congress wanted them to be treated as contracts  
19 cases.

20 I'll reserve the remainder of my time, if I may.

21 QUESTION: Very well, Mr. Bertocchi.

22 Ms. McDowell, we'll hear from you.

23 ORAL ARGUMENT OF BARBARA B. McDOWELL

24 ON BEHALF OF THE RESPONDENT UNITED STATES

25 MS. McDOWELL: Thank you, Mr. Chief Justice, and

1 may it please the Court:

2 The Federal district courts have subject matter  
3 jurisdiction over cases contending that a State public  
4 utility commission has construed and enforced an  
5 interconnection agreement in a manner contrary to Federal  
6 law. That's true whether one looks specifically at  
7 section 252(e)(6) of the 1996 act, or more generally at --

8 QUESTION: Well, let's look specifically at 252,  
9 and 252(6), where it says in any case in which a State  
10 commission makes a determination under this section, and  
11 all the section talks about is approval.

12 MS. McDOWELL: Well, Your Honor, the section  
13 establishes specific procedures to be followed at the  
14 arbitration and approval stage.

15 QUESTION: But it talks only about -- you agree,  
16 don't you, that it -- substantively it deals only with the  
17 approval?

18 MS. McDOWELL: That's correct, but these  
19 agreements exist only by virtue of section 252. The State  
20 commissioners have authority to regulate these agreements  
21 only by virtue of section 252. They're subject to the  
22 standards of section 252, and --

23 QUESTION: But all it talks about is approval.  
24 I don't think you've answered my question.

25 MS. McDOWELL: No, it doesn't speak specifically

1 about interpretation and enforcement.

2 QUESTION: Speak specifically or any other way  
3 about it.

4 MS. McDOWELL: But this Court said in the  
5 Ardestani case, for example, that under a statutory  
6 provision means subject to or by authority of, and State  
7 commissions are acting by authority of section 252 when  
8 they're construing and enforcing interconnection  
9 agreements. They have no other authority under Federal  
10 law to do that.

11 QUESTION: Well, Ms --

12 QUESTION: Do they have authority under State  
13 law to do that? If we asked the Solicitor from  
14 Illinois -- I didn't have time to ask him -- what is the  
15 authority by which the State commission proceeded in this  
16 case, what would he have said, do you think, and would  
17 you -- and is that the same as your position?

18 (Laughter.)

19 MS. McDOWELL: Well, we don't have to guess,  
20 because the State commission specifically said what  
21 authority it was proceeding under, and it cited both  
22 section 252 and Illinois law, and certainly a State  
23 commission, whenever it takes an official act, is acting  
24 at least in part under its own State law --

25 QUESTION: Absent --

1 MS. McDOWELL: -- and here it's acting also  
2 acting under section 252.

3 QUESTION: So you say it -- are you saying that  
4 necessarily the State commission must be acting under 252?

5 MS. McDOWELL: When it's regulating an  
6 interconnection agreement that's established by virtue of  
7 section 252, yes, Your Honor.

8 QUESTION: 252 --

9 QUESTION: Ms. McDowell, I -- go on, Tony,  
10 finish.

11 QUESTION: Well, I was just going to say, 252  
12 refers to public interest, convenience, and necessity. Is  
13 that a Federal standard, or does that just incorporate  
14 State standards from State to State, or is it a little bit  
15 of both, because most States have a formulation something  
16 like that.

17 MS. McDOWELL: Well, it's a Federal standard.  
18 It's a standard that's been incorporated in the  
19 communications laws for many years. The States, pursuant  
20 to section 252(e)(3), are allowed to also impose  
21 consistent State standards in the course of their  
22 approval, and interpretation we would say of the  
23 interconnection agreements as well, but it's basically a  
24 Federal standard. It's one under which the FCC could  
25 promulgate regulations to instruct the State commissions

1 and to --

2 QUESTION: Ms. McDowell, I have a problem with  
3 other language in this (e)(6). One of the arguments you  
4 make is that it doesn't make any sense to bifurcate these  
5 proceedings, that they should all be in the Federal court,  
6 the interpretation as well as the approval. The problem  
7 is, the only thing that (e)(6) allows the Federal district  
8 court to determine is not the interpretation of the  
9 contract. It does not give the Federal court authority to  
10 determine what the contract says. It only gives it  
11 authority, I quote, to determine whether the agreement or  
12 statement meets the requirements of section 25 and this  
13 section.

14 Now, in some cases, there may be a dispute  
15 between the parties as to whether a particular  
16 interpretation will violate the Federal rules, but there  
17 are going to be a lot of other contract disputes that have  
18 nothing to do with whether there's a violation of the  
19 Federal rules. Now, are all of those contract cases going  
20 to go to State court, and all of the contract cases that  
21 somehow involve the question of whether the agreement or  
22 statement meets the requirements of this section, do they  
23 go to Federal court, or do you just ignore those words,  
24 that limitation? To determine whether the agreement or  
25 statement meets the requirements of section 25 and this

1 section, that's the only authority the Federal court has.

2 MS. McDOWELL: I agree with you, Your Honor, and  
3 the --

4 QUESTION: So you're still going to have some  
5 bifurcation? You're still going to have some contract  
6 cases that go to the State court, and some that go to the  
7 Federal court? Is that --

8 MS. McDOWELL: Well, you may have bifurcation,  
9 or there are other alternatives. For example, at the  
10 interpretation and enforcement stage the parties would be  
11 free to go to State court. There's not an exclusive  
12 direction of the parties to Federal court, as there is at  
13 the approval stage under section (e)(4), and in some of  
14 these cases State commissions may waive their sovereign  
15 immunity and decide that they would rather have these  
16 claims heard entirely in Federal court, and that would be  
17 permissible as well under the supplemental --

18 QUESTION: What about under 1331? Would you say  
19 everything gets into court under 1331, whether it deals  
20 with deciding whether the agreement meets the requirements  
21 of this section or not? You would say the contract is a  
22 Federal contract, so that under 1331 even the  
23 interpretation of that contract gets into Federal court,  
24 wouldn't you?

25 MS. McDOWELL: We're not pressing that argument,

1 Your Honor, although Ameritech --

2 QUESTION: Well, gee, you ought to, because  
3 that's the only thing that will stop this terrible  
4 bifurcation that you're so worried about. It's still  
5 going to be a mess. You're going to have some cases in  
6 Federal court and some in State court.

7 MS. McDOWELL: Well, there may be some such  
8 cases, but as I was suggesting, there are alternatives to  
9 that. In addition, there may not be that many cases in  
10 which there's a viable claim that a State commission has  
11 interpreted an agreement contrary to Federal law.

12 These cases have typically come up only with  
13 respect to this particular issue of compensation for  
14 Internet calls, a very important issue to the carriers,  
15 and one that they've been willing to litigate extensively,  
16 but it's not clear at this early stage in the  
17 implementation of the 1996 act that there are going to be  
18 a large number of claims of this sort, so the thought that  
19 there are going to be -- there's going to be a bifurcation  
20 problem in every case is not clear, at least at this  
21 stage.

22 QUESTION: I'm still not entirely clear on what  
23 your position is if the -- if there's an interpretation  
24 dispute that doesn't raise any Federal question at all.  
25 Do you agree that that has to be resolved only in a State

1 court, or do you think they have a choice of forum?

2 MS. McDOWELL: Unless there was some basis for  
3 Federal jurisdiction, they would have to go to State court  
4 for that --

5 QUESTION: The only question is, do they have to  
6 pay on Tuesday instead of Thursday, and that's governed by  
7 some State common law rule or something. That, you would  
8 agree, could not be litigated in Federal court?

9 MS. McDOWELL: We haven't yet taken a definitive  
10 position on this question, Justice Stevens. Ameritech is  
11 arguing that these contracts, interconnection agreements  
12 are pervasively Federal, similar to a Federal tariff, so  
13 that every question that arises under them is necessarily  
14 Federal.

15 We think for purposes of this case, and what the  
16 court of appeals decided, what's relevant are only those  
17 claims that contend that a State commission has violated  
18 the 1996 act in its interpretation of an agreement, so  
19 there may be a large category of cases that can come to  
20 State court and that would present only issues of State  
21 law.

22 QUESTION: But, and could not go to Federal  
23 court. That's the other part of my question. I didn't  
24 quite get your answer to that.

25 MS. McDOWELL: Well, yes, unless there was a



1 waiver of sovereign immunity by the State commission and  
2 diversity or some other basis for jurisdiction.

3 QUESTION: Well, even if there's a waiver, I  
4 mean, what is -- you have to have Federal jurisdiction  
5 before you can sue in Federal court.

6 MS. McDOWELL: That's correct, and there may be  
7 diversity. Diversity was asserted, for example, in the  
8 North Carolina case.

9 QUESTION: Well, assume there's no diversity,  
10 just a normal State law. I'm still not quite clear  
11 whether you say yes or no. Do you agree with the carrier  
12 that it is a pervasive -- like a tariff, so that anything  
13 relating to it raises a Federal question, or do you agree  
14 that they are a category of contract issues that could  
15 only be regulated at State, or litigated in State court?

16 MS. McDOWELL: We see it as a difficult question  
17 on which we haven't taken a definitive position. The  
18 question ultimately is one of Congress' intent, and  
19 certainly there is much in the statute to suggest that  
20 Congress was creating federalized contracts. These are  
21 not simply private party agreements. They are Federal  
22 regulatory instruments.

23 On the other hand, Congress also left room for  
24 States to apply their own consistent standards under  
25 section (e)(5), and Congress also expressly preserved

1 existing State and Federal law to the extent that it was  
2 not expressly preempted, so it's a more difficult question  
3 whether these contracts are entirely Federal, and we have  
4 not take a --

5 QUESTION: In all of the instances projected by  
6 Justice Stevens, do you think the State would be a  
7 necessary party, or would there be any cases in which, a  
8 contract dispute where the State isn't a necessary party?  
9 The State is a necessary party because it goes first  
10 through the commission?

11 MS. McDOWELL: We don't think they're necessary  
12 parties. We think they're valuable parties to have  
13 because it makes it easier to enforce the Federal court  
14 or, indeed, a State court judgment, but we think that in  
15 the ordinary case --

16 QUESTION: Well but doesn't -- even in the case  
17 Justice Stevens describes about paying Tuesday or  
18 Thursday, isn't the presumption that there would have been  
19 a State commission order which is now being set aside?

20 MS. McDOWELL: Yes, or its enforcement is being  
21 enjoined. Typically, though, a --

22 QUESTION: And they're not a necessary party,  
23 then?

24 MS. McDOWELL: No. To the extent that there  
25 will be two adverse parties to the proceeding, one

1 challenging the State commission's order and one defending  
2 it, the party defending the order can ordinarily be  
3 expected adequately to represent the State commission's  
4 interest.

5 QUESTION: District judges aren't parties to an  
6 appeal from their decisions, are they?

7 MS. McDOWELL: That's correct, and certainly  
8 Federal statutes are often challenged in cases in which  
9 the United States is not involved.

10 QUESTION: But if the FCC were performing this  
11 role -- take Virginia's statement -- and you are appealing  
12 the FCC's order, all those cases are you against the  
13 commission. Isn't it -- isn't that routine?

14 MS. McDOWELL: That's correct. That's the  
15 standard practice in the Federal system, and when the FCC  
16 acts in the place of a State commission the FCC's  
17 decisions will be reviewable in a proceeding in the court  
18 of appeals under the Hobbs Act, in which the FCC is named  
19 as a party. That's the standard procedure, as we  
20 understand it, and most States as well, that the agency  
21 issuing a decision will be a party to proceedings  
22 challenging it. We don't see that as essential, though,  
23 in this particular context. We see no particular reason  
24 to think the parties will not abide by the Federal court's  
25 decision, and that the State commission also will not

1     abide by that.

2                 QUESTION:   And the -- I mean, I take it the  
3     reason you assume that is that the commission is not a  
4     party in interest in the sense of having a personal stake.  
5     They have the same kind of stake, I suppose, that any  
6     judge does when an order of his gets appealed, but that's  
7     their only interest.

8                 MS. McDOWELL:   That's correct, Your Honor.

9                 If I could turn briefly to the sovereign  
10    immunity questions, as several courts of appeals have  
11    recognized, this is a straightforward Ex parte Young case  
12    against State officials.   The case is seeking prospective  
13    injunctive relief to include their enforcement of orders  
14    that are alleged to be contrary to Federal law.   Ex parte  
15    Young itself was, the underlying action was one against  
16    State regulatory commissioners, and there have been many  
17    cases in this Court that have involved Federal challenges  
18    to State regulatory decisions of this nature.

19                We see nothing in section 252(e)(6) or anything  
20    else in the 1996 act that suggests a congressional intent  
21    to preclude this sort of ex parte Young --

22                QUESTION:   Ex parte Young, though -- I'm trying  
23    to recall the facts.   It was decided even before I was on  
24    the Court.

25                (Laughter.)

1           QUESTION: It was enjoining a Minnesota Attorney  
2 General, wasn't it, from doing something in the future?

3           MS. McDOWELL: From enforcing rate orders issued  
4 by the State commission. The specific case before the  
5 Court was contempt sanctions against the Attorney General,  
6 but the underlying case was also against the State  
7 regulatory commissioner. Also, in Ex parte Young the  
8 Court cited a number of prior decisions as authority,  
9 including Reagan v. Farmer's Loan & Trust, which was  
10 another similar type of action against State regulatory  
11 commissioners.

12           We have --

13           QUESTION: It's also -- would you correct -- as  
14 long as we're on Ex parte Young, as I understand it, in Ex  
15 parte Young, there was no action brought until the  
16 executive branch of the State said, we're going to take  
17 certain action here in accordance with this order. In  
18 other words, they -- Ex parte Young was not brought  
19 immediately upon the issuance of the State rate order --

20           MS. McDOWELL: I think it --

21           QUESTION: -- as simply to review the order.

22           QUESTION: It was brought because a -- somebody  
23 in a different branch or agency of the Government said,  
24 oh, now we are going to take some action under that which  
25 is, in effect, going to hurt the person who brought the Ex

1     parte Young action.  Is my understanding correct?

2             MS. McDOWELL:  As I recall, and my understanding  
3     may be inaccurate, the case was brought before any  
4     enforcement action had actually been threatened or taken.

5             QUESTION:  But the Attorney General of the State  
6     was going to enforce it, isn't that right?

7             MS. McDOWELL:  Oh, I think the Attorney General  
8     was expected to enforce it.  There was a specific  
9     Minnesota statute, as I recall, that --

10            QUESTION:  He had to.

11            MS. McDOWELL:  -- required him to enforce the  
12     rate orders, but I don't think that that was critical to  
13     the Court's holding.  There are many, many cases,  
14     including several, in fact, against members of the  
15     Illinois Commerce Commission, that have involved  
16     challenges under Ex parte Young to rate orders and other  
17     sorts of regulatory orders.

18            QUESTION:  Do you think it's sustainable to say  
19     that there has been a waiver because -- by participation  
20     in the State scheme, so that you don't need Ex parte  
21     Young?

22            MS. McDOWELL:  We've argued that as well, Your  
23     Honor.  That's dependent on whether the statute was  
24     sufficiently clear to put the State commissioners on  
25     notice that by exercising Federal regulatory authority

1 under the act they would thereby be subject to suit in  
2 Federal court.

3 QUESTION: Thank you, Ms. McDowell.

4 Mr. Smith, we'll hear from you.

5 ORAL ARGUMENT OF PAUL M. SMITH

6 ON BEHALF OF THE RESPONDENTS WORLDCOM TECHNOLOGIES, INC.,  
7 MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS  
8 SERVICES LLC, AND FOCAL COMMUNICATIONS CORP.

9 MR. SMITH: Mr. Chief Justice, and may it  
10 please the Court:

11 The complaint that Ameritech filed in this case  
12 in Federal court specifically alleged not only that the  
13 ICC had misinterpreted the interconnection agreements at  
14 issue, but also that its order requiring payment of  
15 reciprocal compensation for a particular category of calls  
16 violated several specific sections of the  
17 Telecommunications Act as well as several allegedly  
18 applicable FCC rulings.

19 For that reason, our position, and I'm arguing  
20 today for WorldCom and several other companies who had  
21 signed interconnection agreements with Ameritech and also  
22 were sued as codefendants along with the ICC, our position  
23 is that the complaint stated straightforward preemption  
24 claims alleging ongoing violations of Federal law by State  
25 officials and therefore those claims were within Federal

1 jurisdiction and also actionable notwithstanding the  
2 Eleventh Amendment.

3 Where we differ with Ameritech and actually with  
4 the final respondent AT&T is on the question that was  
5 being discussed earlier, which is the scope of valid  
6 Federal claims in enforcement cases, and specifically  
7 whether a claim of mere misinterpretation of an  
8 interconnection agreement raises any Federal issue or not.  
9 Our position is that in most cases, at least, a claim of  
10 misinterpretation of an interconnection agreement would  
11 raise claims only under State common law contracts and  
12 therefore has to be treated as a State law claim, but in  
13 terms of this case, since the contract -- the complaint  
14 did allege violations of the statute and FCC rulings,  
15 there certainly was jurisdiction, we believe.

16 Now, let me turn first to the jurisdiction  
17 issue, and then I want to get to --

18 QUESTION: Before you get into that, you're  
19 separating interpretation of the contract from violation  
20 of the Federal law.

21 MR. SMITH: Yes, sir.

22 QUESTION: Does that mean the State still has  
23 control over what the contract means? It's still a State  
24 contract, and the ultimate determiner of what the contract  
25 means ought to be the State, if it's State law, right?



1           MR. SMITH: Certainly it ought to be done by  
2     virtue of some analysis of the intent of the parties, if  
3     it's a negotiated agreement. There also are agreements  
4     which are imposed through arbitration, and then the  
5     commission is essentially analyzing its own intent in  
6     imposing --

7           QUESTION: Yes, but different States have  
8     different approaches. They may even have different rules  
9     of evidence and so forth. What's going -- I don't see how  
10    the Federal Government gets into this business without  
11    taking on itself the burden of interpreting these  
12    contracts.

13          MR. SMITH: Well, Congress, Your Honor, very  
14    specifically turns over responsibility for developing  
15    these contracts, reviewing them, to State commissions, and  
16    in the process of doing that says that while the State  
17    commissions have to follow various substantive standards  
18    in 251, they also are authorized in more than one place in  
19    the act to impose their own policies that are not  
20    inconsistent with the Federal policies, and it also said  
21    the parties can negotiate agreements notwithstanding the  
22    substantive provisions of the act, and that the State  
23    commission can't overturn them unless they find that they  
24    violate the public interest and necessity.

25          So what you have here is a very clear

1 recognition by Congress that they want these to be real  
2 contracts, not merely orders applying Federal standards,  
3 and that there will be lots of issues which under this  
4 Court's ruling should be viewed as State law contract  
5 issues that will come up in the enforcement proceedings,  
6 so we don't see any basis under Jackson Transit and this  
7 Court's other cases dealing with the development of  
8 Federal common law for saying that the contract  
9 interpretation rules, the rules for determining how the  
10 contract ought to be read, ought to be elaborated as a  
11 matter of Federal common law in the Federal courts rather  
12 than through analysis of State common law which already  
13 exists.

14 Now, these cases will be sometimes in Federal  
15 court and sometimes in State court, because there will be  
16 some times when there are Federal claims that are brought  
17 that can sustain a motion to dismiss. I don't happen to  
18 think these claims would have sustained a motion to  
19 dismiss, but --

20 QUESTION: What if you have a case in which one  
21 of the arguments made by one of the parties is that if you  
22 interpret the contract this way, it will violate the  
23 Federal act? Does that stay in the State court, or is  
24 that a Federal question?

25 MR. SMITH: I see that as a Federal question,

1 Your Honor. I don't think there's any question about  
2 that. That is essentially what Ameritech claimed here.  
3 The district court and the court of appeals, of course,  
4 rejected that on the merits, but their claim was that this  
5 interpretation was barred by the FCC's interpretation of  
6 the act.

7 QUESTION: Well, I mean, interpretation is  
8 barred? I mean, if a contract says something, it very  
9 plainly on its face says something that violates the  
10 Federal act, there's only one way to interpret it.

11 MR. SMITH: Their claim was that even if that is  
12 what the parties intended, that Federal law had evolved to  
13 the point where that was preempted by Congress, or by the  
14 FCC.

15 QUESTION: I just don't understand how you play  
16 that game. I mean, you're assuming that it's always  
17 ambiguous whether you can interpret in a -- so that you  
18 can interpret it in a way that violates Federal law or in  
19 a way that doesn't, and that somehow therefore that  
20 interpretation becomes a Federal question. Even if that's  
21 correct, it's certainly not always true that there is the  
22 possibility of interpreting it in a way that does not  
23 violate Federal law, and I guess you're saying that  
24 nonetheless, in that case, the case becomes a Federal  
25 case.

1 MR. SMITH: I'm not sure I really meant to say  
2 that every case becomes a Federal case. I think there are  
3 lots of situations in which the interpretation as done by  
4 the commission is then a matter -- whether that's correct  
5 or not is a State law issue.

6 What I meant to answer in response to your  
7 question was then, if a party says that interpretation of  
8 what the parties really intended has somehow brought the  
9 contract into some inconsistency with applicable FCC  
10 regulations, that's a Federal claim. At the same time, if  
11 the commission says, we think they probably intended this,  
12 but we're not going to do that because we think Federal  
13 law requires us to do Y instead of X, that also raises a  
14 Federal question.

15 QUESTION: Okay.

16 MR. SMITH: But if they're merely looking at the  
17 intent, there will be lots of situations where there isn't  
18 any Federal preemption because the law, after all, says if  
19 you negotiate it, the substantive provisions of 251 don't  
20 apply. In most of those situations, you're going to have  
21 State law contract issues which will be then analyzed by  
22 the State commission and, absent some additional Federal  
23 issue that comes along, the place where that would be  
24 appealed would be the State court, in my understanding.

25 QUESTION: And it could not be appealed in the

1 Federal court?

2 MR. SMITH: Unless there was some odd situation  
3 involving diversity, my sense is -- my understanding is --

4 QUESTION: Well, I guess the claim would be,  
5 look, the very contract that you're interpreting is a  
6 contract which is authorized, and authorized only by  
7 Federal law, and that's enough to get us into Federal  
8 court, and you reject that position.

9 MR. SMITH: Our position, Your Honor, is that  
10 under Jackson Transit, that the fact that the Federal  
11 statute requires that a contract exists but doesn't  
12 specify the terms of the contract, in that situation the  
13 contract itself remains a matter of State law.

14 QUESTION: Well, aren't we slightly outside of  
15 that situation, because there are some Federal standards  
16 here, aren't there?

17 MR. SMITH: Well, actually, as to negotiated  
18 contracts, the Federal standards --

19 QUESTION: They can be --

20 MR. SMITH: -- are very, very loose.

21 QUESTION: I see.

22 MR. SMITH: It has to either be discriminatory  
23 or a violation of public interest, which is -- and the  
24 specific rules of 251 don't apply.

25 QUESTION: Is public interest a State concept or

1 a Federal concept?

2 MR. SMITH: I would view that as something that  
3 is authorizing the State commission to --

4 QUESTION: It has to be State on your --

5 MR. SMITH: -- to apply its -- no, obviously,  
6 they can look at Federal policies if they want to, but I  
7 wouldn't suggest that it's inherently Federal in the way  
8 that the Solicitor General does.

9 Now, there are other situations that could come  
10 up. A contract could expressly incorporate Federal law,  
11 and that might or might not create a Federal claim. This  
12 Court has wrestled for 100 years with the issue of when  
13 Federal law incorporated into State law causes of action  
14 do or don't create Federal question jurisdiction.

15 In other situations, the State commission might  
16 have imposed the terms of the contract in an area where  
17 the parties didn't agree, and in that situation, if they  
18 are imposing it by virtue of their interpretation of the  
19 Federal regulations, and then that particular clause is  
20 later interpreted in some way that deviates from the  
21 Federal regulations, that might well be a Federal claim as  
22 well.

23 QUESTION: That issue we've been wrestling with  
24 for 100 years exists in one of these cases, doesn't it? I  
25 mean, don't one of these contracts refer to Federal law?

1           MR. SMITH: Well, there have been assertions,  
2   Your Honor, that that's the case. My reading of these  
3   contracts is that they make -- that they -- and certainly  
4   in this case, the Illinois case, it specifically gives a  
5   definition of when reciprocal compensation will be paid,  
6   and both the commission and the two lower courts all said  
7   that this is not a case where there has been an  
8   incorporation of Federal regulations. This is a case  
9   where we can divine the actual intent of the parties, that  
10   these calls should be treated as calls where this  
11   compensation would be paid.

12           And so what they said was, this is not an  
13   incorporation case, and I believe the contract in the  
14   Verizon case, to come next, is the same, that there was an  
15   intent at the time that was -- that the State commissions  
16   have said we're going to hold you to -- even though  
17   Federal law may have moved on, every time it moves on they  
18   say, if you agreed to something else, you're still stuck  
19   with it, and that's what the courts in both of these cases  
20   have said as well as the commissions.

21           Maybe if I could turn, then, to the Eleventh  
22   Amendment issues, it is certainly our view that the five  
23   circuits that have said these cases present  
24   straightforward Ex parte Young cases, those circuits are  
25   correct, because they do involve, in situations where

1     there is a Federal claim being asserted against an action  
2     of a State commission, either an enforcement case or an  
3     approval case, a claim seeking an order bringing the State  
4     commission into compliance with Federal law, and it is, I  
5     think, an ongoing violation of Federal law, because when  
6     they approve and enforce an interconnection agreement, or  
7     they enforce it in some way, interpret it in some way,  
8     they are then telling the parties that they have to live  
9     by that interpretation during the term of the agreement.

10           QUESTION:  You think the commission is a  
11     necessary party, then?

12           MR. SMITH:  It's our position that they are a  
13     necessary party, but to use the technical term under the  
14     Federal rules, if there was a reason why they can't be  
15     sued and that the case can't go forward, then they may not  
16     be an indispensable party.  The distinction is drawn in  
17     Rule 19 between those two.  Certainly, they've --

18           QUESTION:  If that's the case, then, it says  
19     we've got an unusual action here, because we're talking  
20     about parties who have no personal or even official  
21     interest except as interpreters of law.

22           MR. SMITH:  That's true, Your Honor, but what  
23     makes them a necessary party is that the private parties  
24     have an interest in having the administrative body that  
25     has told them to do X be bound by a ruling from the



1 Federal court which they're trying to get which says don't  
2 do X, do Y, and that --

3 QUESTION: You're in effect saying that they  
4 might dispute the application of the Supremacy Clause.  
5 That's --

6 MR. SMITH: And the reason why a Federal  
7 district court is not named as a defendant in the court of  
8 appeals is because the court of appeals has the power in a  
9 unitary system to direct the district court to do  
10 something. When a Federal court, though, is --

11 QUESTION: Yes, but the State court is not named  
12 as a party when a case gets from a State supreme court on  
13 a Federal question here.

14 MR. SMITH: Right, but I think --

15 QUESTION: It's assumed that they will respect  
16 the Supremacy Clause if there is a Federal declaration of  
17 law, and why shouldn't the same assumption govern if there  
18 is Federal review of a State order on, in effect, a  
19 Federal question jurisdiction basis?

20 MR. SMITH: It may be factually true that most  
21 of the time State commissions will obey Federal courts,  
22 but 100 years of jurisprudence under Ex parte Young and  
23 before all follow the Federal administrative model and say  
24 that as to Federal -- State executive officials, when they  
25 violate Federal law, that you name them as a defendant.

1           QUESTION: Oh, I agree. The only thing that I  
2     have been suggesting takes this out of that simple case is  
3     that you don't have, I think, here the classic case of the  
4     State executive official. You have a State regulator that  
5     is acting in a kind of a quasi-judicial capacity, and it  
6     seems that one way to look at it would be to think of it  
7     more as a court than as an executive office.

8           MR. SMITH: Well, Your Honor, though, the -- a  
9     large number of these Ex parte Young cases, going back to  
10    the Reagan v. Farmer's Loan case that Ms. McDowell  
11    mentioned, an Ex parte Young, cases involving rate-making  
12    commissions, railroad commissions and others that are --  
13    have always been named as the defendants. In their  
14    official capacity the individuals are named, and that  
15    Reagan case in 1894 said that's not an Eleventh Amendment  
16    problem.

17           You're not really suing the State, you're suing  
18    them to bring them into compliance with the Federal  
19    statute. Ex parte Young, the defendants included not just  
20    the Attorney General but also the rate-making  
21    commissioners, and that is just the way it's done, and I  
22    don't think it has any, as you have suggested, any great  
23    intrusion on the sovereign interests of the State to have  
24    them named.

25           In fact, that's the essence of Ex parte Young,

1     that it's not an intrusion on their interests to have them  
2     brought into compliance under the Supremacy Clause, and it  
3     would be, I think, an odd rule to say, well, we're going  
4     to start having review of State actions, or some category  
5     of State actions in Federal court for compliance with  
6     Federal law where we don't name the defendants as -- the  
7     State as -- State individuals as defendants.

8             QUESTION:   Well --

9             MR. SMITH:   Now, there's been a number of other  
10     arguments raised against the application of Ex parte Young  
11     here.   I don't think any of them is very substantial.  
12     There's a notion that somehow there's an elaborate  
13     remedial scheme here comparable to the one in Seminole  
14     Tribe, but in fact there isn't any elaborate remedial  
15     scheme in the statute.   It just says you can sue State  
16     commissions in Federal court, or to the extent we're  
17     relying on 1331, there's no scheme at all.

18             We also have an -- the invocation of the Larson  
19     case which was discussed by this Court in detail in  
20     Pennhurst.   Larson, I believe, is the case that you apply  
21     in a situation where you don't have Supremacy Clause  
22     considerations at stake.

23             Essentially, what the Court said in Pennhurst  
24     is, when the Supremacy Clause is at issue, we basically  
25     allow lawsuits to proceed against all prospective ongoing

1 violations of Federal law by State officials, but Larson  
2 provides a test that says where you're suing without  
3 Supremacy Clause considerations to enforce State law  
4 against State officials or Federal law against Federal  
5 officials, in that situation you try to differentiate  
6 between mere violations of Federal law and violations that  
7 are so serious that we won't treat the State official or  
8 the Federal official as an agent of the State any more.  
9 That is not the test that ought to be applied under Ex  
10 parte Young, and certainly has not been applied in the  
11 past.

12 We also have the Fourth Circuit's analysis in  
13 which it undertook an entire sort of ad hoc balancing test  
14 trying to weigh State interests against Federal interests.  
15 I think this Court is clearly on record as saying that in  
16 the Ex parte Young context we're not going to get into  
17 that kind of balancing test. The balancing test of the  
18 Fourth Circuit I thought was particularly unfortunate,  
19 because basically what that Court did is, it looked at the  
20 merits of the case and said, well, we don't think that the  
21 Federal claims are very strong here, so therefore we're  
22 going to say there's no ability to sue the State under Ex  
23 parte Young, and that doesn't seem like a very helpful way  
24 to go about -- thank you, Your Honor.

25 QUESTION: Thank you, Mr. Smith. Mr. Bertocchi,

1     you have 3 minutes remaining.

2                   REBUTTAL ARGUMENT OF JOEL D. BERTOCCHI

3                   ON BEHALF OF THE PETITIONERS

4           MR. BERTOCCHI: Thank you, Mr. Chief Justice.

5           In response to questions from Justice Souter,  
6     adjudicative context really provides the reasoning that Ex  
7     parte Young doesn't apply here. Contrary to what  
8     Mr. Smith said, the statute doesn't say you can sue State  
9     commissioners in Federal court. (e)(6) doesn't reference  
10    State commissioners at all.

11           This case is in a sense more like Larson than  
12    Larson. Larson was not about whether the case -- whether  
13    the authority for the contracting official came from  
14    Federal or the State law. It was about the  
15    characterization of what he was doing, and the Court  
16    assumed he was wrong in what he did in that instance, and  
17    in this instance, in the adjudicative context, it makes  
18    even more sense.

19           Certainly with respect to, I believe, Mr.  
20    Smith's remark about a -- Mr. Smith referred to the fact,  
21    or there was a question about the fact that the commission  
22    might dispute the application of the Supremacy Clause, and  
23    certainly, if a commission did that, if a commission  
24    declined to follow Federal law, that would be a different  
25    story, and undoubtedly there would be some ability to

1 correct that action.

2 But the Illinois commission isn't doing that.  
3 As a matter of fact, the Illinois Commerce Commission has  
4 never tried. This is, I think, correctly characterized as  
5 a quasi-judicial proceeding, not executive or legislative.  
6 It is not accurately compared to rate-making cases, which  
7 are much more legislative.

8 This is adjudication of a contract issue  
9 regarding a particular contract, and in that respect I  
10 would go back -- that would lead me to the last point I  
11 want to make, which is that this is a case about a  
12 contract to which the act does not apply. It's  
13 interesting, Mr. Smith said he didn't think the complaint  
14 in this case would survive a motion to dismiss, and yet  
15 he's here arguing that it belongs in Federal court.

16 I'm assuming that -- and I may be wrong. I  
17 don't want to speak for him. I'm assuming that the motion  
18 to dismiss would be an attempt to throw it out of Federal  
19 court. These cases, this case is a contract case  
20 regarding a contract to which the act does not apply, and  
21 section 252(a), which allows the courts to negotiate --  
22 allows the parties to negotiate contracts any way they  
23 want clearly suggests that they have the right to do so  
24 without regard to Federal law.

25 In this instance, Ameritech has put Federal

1     allegations in the complaint. One of them is that this  
2     contract violates the act, but if you look in their brief,  
3     they'll see -- you'll see that they say that this can't be  
4     restricted to violations of Federal law because in  
5     negotiated cases that would allow jurisdiction to move on  
6     to the -- to move to what they call the vanishing point.  
7     We agree with that entirely. Jurisdiction over  
8     interpretation does go to the vanishing point.

9             The only way Federal issues are going to come up  
10    in these cases is if State courts construe a contract in a  
11    certain way and then disregard Federal law. That is not  
12    what the Illinois Commerce Commission is going to do.

13            Thank you, Your Honor.

14            CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
15    Bertocchi. The case is submitted.

16            (Whereupon, at 11:00 a.m., the case in the  
17    above-entitled matter was submitted.)