Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099 & 97-1141

In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL.

AND RELATED CASES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS AND BRIEF FOR THE FEDERAL CROSS-RESPONDENTS

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QUESTIONS PRESENTED

The questions presented in these cases are those set forth in our opening brief (at (I)), as well as the following:

4. Whether the Federal Communications Commission reasonably implemented 47 U.S.C. 251(c)(3)—which entitles "any requesting telecommunications carrier" to obtain access to the incumbent carrier's network elements—in determining that requesting carriers may obtain access to such elements as a means of providing telecommunications services whether or not they have constructed some facilities of their own.

5. Whether the Commission reasonably implemented 47 U.S.C. 251(d)(2), which directs the Commission to "consider" certain factors when determining "what network elements should be made available."

6. Whether the Commission reasonably implemented 47 U.S.C. 153(29) and 251(c)(3) in determining that new entrants may have nondiscriminatory access to operational support systems, operator services, and similar network facilities and functionalities.

7. Whether the Commission reasonably implemented 47 U.S.C. 153(29) and 251(c)(3) in determining that new entrants that have obtained access to the switching element also have access to the "vertical features" of that element.

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ARGUMENT[1]

I. THE COMMISSION'S PLENARY RULEMAKING AUTHORITY EXTENDS TO THE LOCAL COMPETITION PROVISIONS OF THE 1996 ACT

A. Respondents' View Of The Commission's Jurisdiction Has No Coherent Textual Basis

1. A proper understanding of this jurisdictional dispute begins with the provision that respondents usher off to the back pages of their discussion (*e.g.*, Bell Atl. Br. 43). Without qualification, Section 201(b) provides: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." It is undisputed that Congress incorpo-

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[1] We refer the Court to the Statement in our opening brief (at 2-15) and to the summary (pp. 19-22, *infra*) introducing Point II below, which addresses the questions presented in cross-petitioners' briefs. "1996 Act" refers to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, to be codified in the 1996 Supplement to the United States Code. "Pet. App." refers to the appendix to the petition in No. 97-826.

rated Sections 251 and 252 into "this Act." Together with the Commission's specific obligation to issue expedited regulations "to implement *the requirements*" of Section 251 (47 U.S.C. 251(d)(1) (emphasis added)), Section 201(b) provides the simple and correct answer to every jurisdictional question presented here: In telecommunications regulation, federal rulemaking authority remains coextensive with the substantive scope of federal law, which *once* was confined to interstate matters, but now (as all agree) is not. See pp. 10-11, *infra*.

The easiest way to understand why *respondents'* answer to the jurisdictional question must be *wrong* is to consider a jarring anomaly deep within their exposition of this case. The parties have briefed two basic sets of disputes: disputes about the FCC's statutory jurisdiction to issue rules addressing certain provisions of the 1996 Act, and disputes on the merits about the substantive validity of FCC rules addressing other provisions that undeniably *do* fall within the Commission's jurisdiction. Most of the disputes in the latter category concern the Commission's implementation of the centerpiece of the local competition provisions: Section 251(c)(3), which entitles new entrants to lease network elements of an incumbent telephone company's network at "*rates, terms, and conditions* that are just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3) (emphasis added).

That provision does not itself mention the Commission, much less its jurisdiction to issue the rules challenged here only on the merits. Nonetheless, the premise of half this case, which respondents very much affirm, is that the Commission does have jurisdiction to issue precisely such rules: rules ensuring, in a broad variety of ways, that the "terms and conditions" of access to network elements are "just, reasonable, and nondiscriminatory." The Commission's jurisdiction to issue such rules, however, must come from somewhere, or else this statutory scheme would lapse into incoherence.

The problem for respondents is that any source of *that* jurisdiction necessarily also authorizes the Commission to issue rules addressing the other critical guarantee appearing *in the same statutory phrase*: the guarantee that a new entrant's access to network elements will be provided not just on non-pricing "terms and conditions," but also at "*rates*," that "are just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3) (emphasis added). That is so whether the Commission's jurisdiction to address network elements arises from the Commission's general rulemaking authority under Section 201(b), or from its more specific obligation "to establish regulations to implement *the requirements* of [Section 251]" on a six-month timetable (47 U.S.C. 251(d)(1) (emphasis added)). Under either or both of those sources of authority, the Commission's jurisdiction encompasses each of the words of Section 251(c)(3); it does not stop in mid-sentence.[2]

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[2] One reason that respondents must and do acknowledge the Commission's authority to address some aspects of Section 251(c)(3) is that a separate provision, Section 251(d)(2), presupposes that authority in addressing the substance of a subcategory of nonpricing network-element issues. Section 251(d)(2) provides: "In determining what network elements should be made available for purposes of subsection (c)(3), *the Commission* shall consider" certain proprietary and other issues (emphasis added). To prop up its argument about pricing jurisdiction, Bell Atlantic is driven to argue (Br. 39) that Section 251(d)(2) alone "necessarily authorizes" the Commission to issue rules implementing Section 251(c)(3). That remarkable contention is unsound on three levels. First, it is countertextual: the subordinate clause at the beginning of Section 251(d)(2) *alludes to* the Commission's jurisdiction but obviously is not an affirmative *grant* of jurisdiction. Second, the contention is self-defeating: if that subordinate clause *were* a jurisdictional grant, the parallel construction in the very next subsection—"In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude" certain state policies (Section 251(d)(3))—would itself be an affirmative grant of jurisdiction to the Commission "to implement the requirements" of Section 251 *in their entirety*. See also 47 U.S.C. 251(d)(1). Last but not least, Section 251(d)(2) addresses only a subcategory of nonpricing network-element issues: "*what* network elements should be made available" (emphasis added). Bell Atlantic

Put another way, respondents' jurisdictional argument fails not simply because their countertextual interpretation of Sections 201(b) and 251(d)(1) is wrong for the reasons discussed below. It also fails because their interpretation of those provisions *must be* wrong for this Court to make sense of the Commission's undisputed jurisdiction to address the many substantive issues in this case involving access to network elements. And respondents' argument fails not just as a matter of textual compulsion, but also as a matter of common sense: there is no reason why Congress would have intended to centralize national authority in the Commission to make basic regulatory choices concerning only an arbitrary subset of the inextricably interrelated pricing and nonpricing guarantees appearing in the same sentence of Section 251(c)(3). See p. 36, *infra*.

2. Whether the source of the Commission's undisputed jurisdiction to address access to network elements is identified as Section 251(d)(1) or Section 201(b) or both, that jurisdiction is not limited to Section 251(c)(3) (in its pricing and nonpricing aspects) but necessarily also extends—at a bare minimum, under Section 251(d)(1)—to the other substantive provisions of Section 251. Those include the other pricing provisions of Section 251(c), such as the obligation of incumbent LECs to provide interconnection at "*rates* * * * that are just, reasonable, and nondiscriminatory" and to offer services for resale "*at wholesale rates*." 47 U.S.C. 251(c)(2) and (4) (emphasis added); accord 47 U.S.C. 251(b)(5); see also pp. 17-18, *infra* (discussing Sections 251(b)(3) and 251(f)).

Respondents seek to deny the Commission any rulemaking authority to address those pricing standards. They try in two different ways to square that position

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does not even try to explain how that provision could account for the Commission's unquestioned authority to address the many *other* network-element issues disputed on the merits in this case, see pp. 22-41, *infra*, or, more fundamentally, why the line should be drawn between pricing and nonpricing issues.

with the inconvenient proximity of Section 251's pricing standards to the nonpricing network-element provisions that the Commission has undisputed authority to address. The first strategy, favored by Bell Atlantic, is to assert that no pricing standards appear in Section 251 and to conclude that Section 251 "can have nothing to do with pricing." Br. 24; accord Br. 34-35. That contradicts the statutory text: Section 251(c)(3) addresses, all in the same phrase, the "rates, terms, and conditions" for access to network elements, and Sections 251(c)(2) and 251(c)(4) address, respectively, the "rates" for interconnection and resale. Other respondents acknowledge the rate standards of Section 251(c), but dismiss them as mere "passing reference[s]" (GTE Br. 32) to "just, reasonable, and nondiscriminatory" rates. In fact, however, statutory provisions mandating "just and reasonable" rates have been central to American regulatory law for much of this century, and Congress has commonly employed that very standard in delegating broad pricing authority to federal agencies, including the FCC.[3] That is just what Congress has done here.

Respondents' jurisdictional challenge ultimately boils down, then, to the following proposition: that the inclusion of *additional* pricing standards among the procedural provisions of Section 252 somehow eclipses the pricing standards in Section 251(c) as well as the Commission's authority to address them. That proposition fails not just because Sections 251(c)(2) and 251(c)(3) in fact incorporate "the requirements * * * of section 252" by reference, but also because Section 201(b) *directly authorizes* the Commission to prescribe "regulations * * * to carry out the provisions of this [Communications] Act," which now includes both Sections 251 *and* 252.

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[3] See, *e.g.*, 47 U.S.C. 205(a) (common carrier rates), 254(b)(1) (universal service); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-603 (1944) (FPC authority over natural gas rates); *Baltimore & Ohio R.R.* v. *Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968) (ICC authority over joint rates).

And even if respondents' reliance on Section 252 did not fail on its own terms, it would still be wrong. As discussed above, under any coherent interpretation of this statutory scheme, the Commission has—at a minimum—jurisdiction to issue rules that implement the pricing standards of Section 251(c), just as it has undisputed jurisdiction to issue rules that implement the nonpricing terms of Section 251(c)(3). The question is how to reconcile that grant of *rulemaking* authority—and each state commission's duty to follow "the regulations prescribed by the Commission" when arbitrating "any open issues" between carriers (47 U.S.C. 252(c)(1))—with Section 252's separate grant of authority to the state commissions to set specific carrier-to-carrier rates in individual *adjudicatory* proceedings. Respondents do not try to conduct that inquiry: they seek to have all pricing authority conferred on the state commissions and to deprive the Commission of any role at all. But "[s]tatutes must be interpreted, if possible, to give each word some operative effect." *Walters* v. *Metropolitan Educ. Enters.*, 117 S. Ct. 660, 664 (1997). The Commission's view of its statutory obligations recognizes the complementary rulemaking and adjudicatory roles of federal and state authorities in implementing the 1996 Act and, unlike respondents' approach, fits the provisions of the Act together to form a coherent whole. See Opening Fed. Br. 28 & n.10; Pet. App. 190a-195a (¶¶ 83-92).[4]

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[4] Respondents contend (*e.g.*, Bell Atl. Br. 23) that a state commission's duty to adhere to Section 252(d) when arbitrating open *rate* issues, see 47 U.S.C. 252(c)(2), somehow nullifies its primary and quite consistent duty, when arbitrating "*any* open issues," to follow "the requirements of section 251, including the *regulations prescribed by the Commission* pursuant to section 251," 47 U.S.C. 252(c)(1) (emphasis added). As we explain in our opening brief (at 27-28), that contention is illogical: rate issues are "issues." Nor would our position, which avoids that illogic, render Section 252(c)(2) "superfluous" (Bell Atl. Br. 24). To the contrary, that provision directs the state commissions to adhere both to the Commission's rules, which may not be comprehensive, and also to the standards of Section 252(d), which Sections 251(c)(2) and

Drifting from the question presented, respondents also claim that the Commission's actual rules are so specific that they would deprive the States of an important role in implementing the 1996 Act. *E.g.*, GTE Br. 38-39. As an initial matter, the claim is incorrect, as our opening brief explains (at 26-27). To take just one example, while the Commission's methodology for network element rates is based on economic and not historical costs, the state commissions, in applying that methodology, would retain the critical and complex task of determining the economic costs of an efficient telephone network.[5] In any event, respondents' claim is immaterial to the disposition of this jurisdictional dispute. The question before this Court is not whether individual Commission pricing rules are either substantively invalid or sufficiently specific that they cross a hypothetical line between federal rulemaking authority and state adjudicatory authority. The question is whether the Commission may play *any* role at all in giving nationally consistent meaning to these core federal guarantees, a task that would otherwise fall entirely to the federal courts (see pp. 15-17, *infra*). The answer is yes.

(c)(3) incorporate by reference. See also 47 U.S.C. 252(e)(2)(B). Section 252(c)(2) also ensures that the state commissions will apply Section 252(d)(1)'s pricing standards during periods in which, for any reason, the Commission has not issued applicable pricing regulations that have taken effect and been upheld on the merits. But Section 252(c)(2) obviously does not foreclose the Commission from issuing regulations substantively consistent with Sections 251(c) and 252(d). Finally, there is no merit to respondents' use of legislative history (*e.g.*, State Comm'n Br. 25) to argue that the inclusion of some of the Act's pricing terms among the procedural provisions of Section 252 suggests, for reasons not evident on the face of the Act, that the Commission lacks all pricing authority. As petitioner MCI demonstrates (see Opening Br. 32-33), the legislative history points in quite the opposite direction.

[5] As respondents are aware (GTE Br. 15), the Commission's temporary and optional "default proxies" (see J.A. 134 (¶ 623)) were designed for a past period in which no cost studies could have been made available to the state commissions. They have no relevance to this case.

B. The Traditional Principles Of The Communications Act Confirm The Commission's Jurisdiction

Respondents' extensive reliance on Section 2(b) of the Communications Act of 1934, 47 U.S.C. 152(b), is no more persuasive than their account of the 1996 Act.

1. Section 2(b) was designed for a telecommunications world with sharp divisions between the *subjects* of state and federal regulation, a world in which substantive federal law governed the "interstate" component of telecommunications and substantive state law governed the "intrastate" component. To enforce that distinction, Congress provided, in 1934, that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to * * * intrastate communication service." 47 U.S.C. 152(b).

Respondents attribute extraordinary significance to that provision as a basis for understanding the new telecommunications world created by the 1996 Act. One basic problem with their argument is that, as they concede, the 1996 Act displaces the traditional jurisdictional divide in many critical respects. In particular, although it preserves the state commissions' authority to regulate intrastate retail rates, the 1996 Act pervasively "appl[ies]" to, and repeatedly "give[s] the Commission jurisdiction with respect to," local competition matters, which defy characterization as either "interstate" or "intrastate."

We note some conspicuous examples. Section 253 invalidates every "State or local legal requirement" that "ha[s] the effect of prohibiting the ability of any entity to provide any interstate *or intrastate* telecommunications service," and it directs "the Commission" to "preempt the enforcement of such * * * legal requirement." 47 U.S.C. 253(a), (d) (emphasis added). Sections 251 and 252 themselves displace state law—and impose mandatory *federal* standards—on virtually every regulatory issue associated with opening local markets to competition. Moreover, as all agree, the FCC must issue rules to implement many of those substantive federal standards, and, in arbitrating disputes between competing carriers, state commissions must "ensure that [their] resolution" of "any open issues * * * meet[s] the requirements" of the Commission's rules. 47 U.S.C. 252(c)(1). Indeed, the Commission's obligation to issue such preemptive federal rules is not even discretionary. Section 251(d)(1) compels the Commission to issue expedited rules implementing "the requirements" of Section 251, and the new "forbearance" provision further provides that "the Commission may not forbear from applying the requirements of section 251(c) * * * until it determines that those requirements have been *fully implemented*." 47 U.S.C. 160(d) (emphasis added); see Opening Fed. Br. 24-25.[6]

In sum, in local competition matters, Congress has now displaced the traditional jurisdictional divide, even though it saw no need to amend Section 2(b) to reflect the many respects, most of them undisputed, in which that is true. The 1996 Act adopts a new jurisdictional approach that simultaneously extends federal authority into the intrastate sphere *and* extends state authority into the interstate sphere—an approach under which federal and state authorities work together in complementary rulemaking and adjudicatory capacities in applying federal law to the same subjects. See Opening Fed. Br. 26-27, 37. Respondents cannot seriously dispute that fact: to restate an obvious example, the premise of five of the seven questions presented in this Court is that, despite Section 2(b), the Commission has jurisdiction to issue rules, which the state commissions must apply in arbitration, concerning a new entrant's access to network elements. That new jurisdictional model can and should be understood on its own terms, not by reference to the jurisdictional divide that it displaces.

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[6] Contrary to the suggestion of some respondents (*e.g.*, Bell Atl. Br. 41 n.22), petitioners did not somehow waive reliance on the "forbearance" provision below, and the Eighth Circuit in fact addressed the provision on the merits. See Pet. App. 86a.

2. Moreover, respondents' reliance on Section 2(b) would be unsound even if the appropriate point of reference were that traditional jurisdictional divide. First, respondents' approach would improperly place Section 2(b) in unnecessary conflict with Section 201(b). Second, as discussed below (see pp. 11-15), the matters at issue here defy characterization as "intrastate" in any event.

Section 201(b) provides: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." It is undisputed that "this Act" includes all relevant portions of the 1996 Act, including Sections 251 and 252. See Opening Fed. Br. 19-20 & n.5 (discussing codification); see also 47 U.S.C. 251(i) ("savings provision" preserving "Commission's authority under Section 201"). To resist the logical conclusion—that Section 201(b) authorizes the Commission to issue rules addressing Sections 251 and 252—respondents observe only that the original substantive scope of the Communications Act was confined to "interstate" matters, as indicated by Section 201*(a)*. *E.g.*, Bell Atl. Br. 43. But of course it does not follow that the Commission's rulemaking authority is forever confined to what the Act's substantive scope used to be. Instead, Section 201(b) makes that rulemaking authority coextensive with whatever substantive boundaries Congress has fixed for the Act. Under Section 201(b), as Congress has extended the scope of the Act to local competition matters, it has extended the scope of the Commission's rulemaking authority to those matters as well.

Here, federal law indisputably *applies* to the regulatory matters at issue, despite Section 2(b)'s primary prohibition against "constru[ing]" the Act "to apply" to intrastate matters. 47 U.S.C. 152(b). Wherever federal law applies, Section 201(b) "straightforward[ly]" gives the Commission coextensive rulemaking authority: and that is the end of the inquiry. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 377 (1986). Respondents nonetheless retreat to Section 2(b)'s disjunction—"nothing in this Act shall be construed to apply *or* to give the Commission jurisdiction with respect to" intrastate matters (emphasis added)—and argue that the second half of that phrase survives the displacement of the first half in the many matters now governed by federal law. In their view, the second half must survive, and must cancel out much of Section 201(b), if the word "or" is to have "effect" (GTE Br. 45).

It is not so. To give "effect" to Section 2(b)'s disjunction, it is unnecessary to violate Section 201(b) by detaching the Commission's rulemaking authority from the scope of federal telecommunications law. Instead, the disjunction's intended effect, which is consistent with Section 201(b), is to prohibit the Commission from exercising regulatory jurisdiction over intrastate matters arguably related to, but *not* expressly covered by, substantive federal law. The extent to which Section 2(b) limits the Commission's exercise of jurisdiction in *those* circumstances was the sole subject of this Court's analysis in *Louisiana*, despite respondents' efforts to wring greater significance out of that case. Indeed, as the Eighth Circuit recognized, the question posed here is the exact "opposite" (Pet. App. 19a) of the question decided in *Louisiana*: here, the substantive applicability of federal law is clear, and the question is what role the Commission may play in implementing it. *Louisiana* nowhere suggests that, despite the plain language of Section 201(b), the Commission's rulemaking authority is narrower than the explicit substantive reach of the Communications Act.

3. Finally, respondents' reliance on Section 2(b) is misdirected because the crucial matters at issue here defy characterization as "intrastate."

Respondents' objective in this litigation is far broader than the objective they profess. They claim to seek only the preservation of traditional state control over intrastate communications. *E.g.*, GTE Br. 11. That characterization is wrong for several reasons: to begin with, introducing competition into local markets is not a traditional subject of state concern—that is one reason why monopolists still enjoy 98% of local revenues (see Opening Fed. Br. 41)—and the jurisdictional dispute in this case is not about the preservation of substantive state law in any event. But respondents have mischaracterized their objective on a still deeper level. The central regulatory areas in which they seek to deny the FCC any rulemaking role are no more accurately characterized as "intrastate" than as "interstate," and, in extending their logic to the implementation of Section 271's long-distance provisions, they have waged an offensive against the core of the Commission's interstate authority. See pp. 14-15, *infra*.

Consider, first, the subject of the parties' substantive disputes about Section 251(c)(3)'s guarantee of nondiscriminatory access to network elements, the centerpiece not just of this litigation but of the local competition provisions themselves. Those disputes concern a new entrant's right to lease network elements (such as the loop) to provide each of its customers with a variety of telecommunications services, including both local and long-distance service. That guarantee cannot be classified as either "intrastate" or "interstate," because the same leased facilities used for local calls will also be used for interstate calls. See Opening Fed. Br. 35-36. For that reason, the rates, terms, and conditions on which new entrants may exercise their new rights will have profound consequences for competition not just in local markets, but also in the long-distance and other interstate markets.[7]

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[7] The same is true of decisions under Section 251(f) about whether to relieve rural LECs from full compliance with Section 251(c)(3): The question there is also whether, and on what terms, new entrants will be able to use an incumbent's facilities to provide customers with both intrastate and interstate services. Cf. USTA/Rural Carrier Br. 26. California's separate reliance on Section 2(b) to limit the Commission's authority to address Section 251(b)(3)'s dialing parity obligation is unsound for the still more basic reason that Section 2(b)'s distinction is not even the distinction that California invokes Section 2(b) to support. Like the court of appeals (Pet. App. 87a-88a & n.5), California does *not*

In a passage that some respondents ignore (*e.g.*, GTE Br. 47), the Commission found that it would violate congressional intent to try to "separate" the carrier-to-carrier prices for (*e.g.*) network elements into distinct "intrastate" and "interstate" components governed under distinct state and federal regulatory schemes. See Opening Fed. Br. 36-37. Respondents did not propose such a "separations" regime at the time. Indeed, they do not seek it now. They seek instead to deny the Commission *any* role in this regulatory area, even though the area defies classification as either "interstate" or "intrastate." That gets the law exactly backwards. Where it is "not possible" to fulfill congressional intent by "separat[ing] the interstate and the intrastate components" of telephone regulation, jurisdictional conflicts must be resolved in favor of a continued federal role. *Louisiana*, 476 U.S. at 375 n.4.[8]

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challenge the Commission's authority to address dialing parity as to an enormous class of intrastate calls: those that cross the lines of the more than 160 exchange areas—known as "local access and transport areas" or LATAs—created at the time of the AT&T divestiture. See California Br. 20-21; 47 U.S.C. 251(g). Section 2(b) cannot plausibly be read to divide up authority *between subcategories* of intrastate calls: *i.e.*, between "*intra*LATA" intrastate and "*inter*LATA" intrastate calls.

[8] The Bell Companies argue that our position on this point must be wrong because, they say, it suggests that the Commission always had authority to take regulatory measures ensuring competition in local markets. Bell Atl. Br. 32. In fact, the Commission had begun taking such measures, with judicial approval, in a variety of regulatory settings before 1996, and the Commission had set unitary rates for "private lines" and other facilities with both interstate and intrastate uses. See AT&T Opening Br. 4-9; Opening Fed. Br. 37-38; see also 47 U.S.C. 251(g). As AT&T observes in its opening brief (at 6, 9, 12), Section 253, added by the 1996 Act, answers the principal questions about the scope of that authority. Moreover, by creating new substantive federal standards addressing local competition, Sections 251 and 252 confirm that, when implementing those standards, the Commission acts within its express authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. 201(b); see pp. 10-11, *supra*. Bell Atlantic makes no attempt to address those points.

But respondents do not stop there. Like the Eighth Circuit in its mandamus order, respondents contend (*e.g.*, State Comm'n Br. 29) that Sections 251 and 252 operate to impair the Commission's jurisdiction over an additional subject that has always been a matter of uniquely federal concern: Bell Company entry into the interstate long-distance market, now governed by Section 271. Section 271 provides that "[t]he Commission shall not approve" a Bell Company's long-distance application "unless *it finds*," among other things, that the Bell Company has provided interconnection, network elements, and resale "in accordance with the requirements"—pricing and otherwise—of Sections 251(c)(2)-(4) and 252(d)(1) and (3). 47 U.S.C. 271(c)(2)(B)(i), (ii), (xiv) and (d)(3) (emphasis added); see Opening Fed. Br. 29.

Respondents would ban the Commission from playing any role in determining what it means to meet those requirements *as a prerequisite to long-distance entry*. *E.g.*, State Comm'n Br. 29. Instead, as respondents acknowledge, they would compel the Commission to abdicate core aspects of that long-distance inquiry to each of the 50 state commissions, with potentially radical state-by-state differences in both methodology and result. *Ibid.*[9] As the

[9] The Bell Companies acknowledge the same point but contend that, under their position, the FCC would retain an undefined residual role in determining "whether a Bell company is in *compliance*" with the States' pricing requirements. Bell Atl. Br. 42. That claim is both irrelevant and (in the Bells' own view, expressed elsewhere) untrue. First, the subject of any "compliance" inquiry would of course be compliance *with* the States' disparate methodological choices, to which respondents would bind the Commission, despite Section 271's contrary mandate. (Under the Bells' approach, the Commission would be bound until after the lengthy process of federal court review under Section 252(e)(6) has run its course, at which point the Commission would need to reconsider, and perhaps revoke, any earlier order approving an application based on an invalidated state methodology. See 97-1519 Pet. 22 n.7.) Second, the Bells themselves have elsewhere argued that the logic of the Eighth Circuit's decision—under which each state commission arbitrates all compliance disputes between carriers (Pet. App. 32a-34a)—precludes *any* role for the FCC in addressing pricing

D.C. Circuit has confirmed, that approach flatly contradicts the Commission's statutory obligation, before granting a Bell Company long-distance application, to "conclude[] *to its own satisfaction*" that the applicant has in fact met Section 271's requirements. *SBC Communications Inc.* v. *FCC*, 138 F.3d 410, 416 (1998) (emphasis added). Indeed, respondents' approach to Section 271 exemplifies what they hope to achieve in this litigation, and what the text of the Act forecloses: a dramatic shift in interstate regulatory authority from the federal government to the States.[10]

C. Respondents' Approach Would Impose Immense Burdens On Potential Competitors And The Federal Courts

Respondents' jurisdictional analysis is unsound for one final reason: They cannot keep the federal courts from giving nationally consistent content to the 1996 Act's central guarantees, but they can delay the process of federal interpretation of federal law and, in so doing, impose enormous interim burdens on potential competitors and the federal courts.

Congress is presumed to intend that the meaning of the laws it enacts will be consistent throughout the country. The federal guarantees of Sections 251 and 252 have highly consequential content, which the state commissions are not free to interpret however they please. The job of the federal courts, in reviewing state arbitration decisions

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issues under Section 271. See 97-1519 Reply Br. in Supp. of Pet. 4-5 n.3 (quoting Bell briefs); see also J.A. 292 (mandamus order) (to perform its "quite simple" role under Section 271, FCC should, *inter alia*, "simply ask[] the state commission whether the applicant BOC has complied with the state commission's pricing rules").

[10] Resolution of the FCC's authority to implement Sections 251 and 252 must accommodate, but cannot change, the plain meaning of Section 271. We have separately challenged the Eighth Circuit's mandamus order because, even if respondents were to prevail here as to Sections 251 and 252, the Eighth Circuit's view of Section 271 would still be invalid and should still be reversed. See 97-1519 Pet. 27-28.

under Section 252(e)(6), is to ensure that those new federal guarantees are consistently observed. The dispute here is not, as respondents seek to portray it (*e.g.*, Bell Atl. Br. 45), whether the federal courts may accommodate the expertise of state commissions in resolving the distinctive factual issues that arise in particular regions and involve particular carriers. They may do that. What the federal courts assuredly may *not* do is to "defer" to 50 potentially inconsistent legal interpretations of the 1996 Act's core substantive guarantees.[11]

For example, Congress provided that the rates charged for access to an incumbent's network elements must be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing [such elements]" and "may include a reasonable profit." 47 U.S.C. 252(d)(1). Congress did not intend for 50 state commissions to diverge on such basic federal issues as whether "cost" means forward-looking economic costs or historical costs. The "cost" standard has a determinate content, although the parties of course disagree about what that content is. Indeed, the respondent LECs themselves have urged the federal courts to overturn many state commission determinations that the Act calls for network-element rates to be based on forward-looking rather than historical costs (as the FCC had also determined in its now-vacated rules).

That and many other substantive disagreements about the 1996 Act must ultimately be decided by the federal courts. The question is whether the federal courts will decide the parties' core substantive disagreements on the

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[11] See, *e.g.*, *AT&T Communications of Cal., Inc.* v. *Pacific Bell*, No. C 97-0080, 1998 WL 246652, at *3 (N.D. Cal. May 11, 1998) (conducting de novo review of state interpretations of 1996 Act because "'[s]tate commissions, while having experience in regulating local exchange carriers in intrastate matters, have little or no experience in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency'") (quoting *U.S. West Communications, Inc.* v. *Hix*, 986 F. Supp. 13, 17 (D. Colo. 1997)).

merits in a single proceeding on direct review of the FCC's rules or, as the respondent LECs would prefer, in piecemeal review proceedings under Section 252(e)(6) stretching well into the next century. The latter approach would inflict anticompetitive uncertainties and severe transaction costs on potential competitors, to the ultimate detriment of consumers. It would also greatly burden the federal courts, which, without applicable Commission rules, would have to interpret many of the 1996 Act's guarantees from scratch. But, sooner or later, the federal courts will give content to this federal law. See Opening Fed. Br. 39-41.

The principal question, then, is whether the incumbent monopolists, which still control 98% of local revenues (see Opening Fed. Br. 41), will succeed in placing logistical obstacles in the way of the "federal deregulatory power needed to complete American telephony's transition from command-and-control regulation to open competition." Jim Chen, *TELRIC In Turmoil, Telecommunications in Transition*, 33 Wake Forest L. Rev. 51, 54 (1998). Congress gave the Commission the rulemaking powers at issue here precisely because it wanted a smooth and expeditious transition to open competition, not a chaotic and dilatory one. And if Congress had left any doubt about the degree of federal regulatory authority necessary to make this federal statute work, the Commission's considered answer would be entitled to substantial deference. See Opening Fed. Br. 41-42.

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The Commission's authority to adopt rules addressing the 1996 Act's pricing provisions is by far the most important jurisdictional issue in this case, and that is why the parties have focused on it. Several respondents suggest that, even if the Commission's rulemaking jurisdiction extends to many of the provisions of Section 251, including the rate provisions, it does not extend to certain others: *e.g.*, the "dialing parity" provision of Section 251(b)(3) (see California Br. 40-48) or the "rural exemptions" provision of Section 251(f) (see USTA/Rural Carrier Br. 17-20).

That is incorrect. The same provisions that give the Commission its undisputed authority to implement the nonpricing network-element provisions of Section 251(c)(3) also authorize the Commission to issue general rules addressing, at a minimum, the other provisions of Section 251. See p. 4, *supra*. Moreover, the Eighth Circuit based its disposition of Sections 251(b)(3) and 251(f) on the same general grounds that underlay its primary decision denying the Commission any role in addressing the 1996 Act's pricing provisions.[12] If this Court resolves the pricing issues in the Commission's favor, the Eighth Circuit's rationale for denying the Commission authority to address Sections 251(b)(3) and 251(f) would collapse, and those portions of the decision below should be reversed. Alternatively, if this Court were to have any doubt about the proper disposition of these secondary jurisdictional issues after resolving the parties' principal dispute, it should remand those aspects of the case to the court of appeals for further consideration.[13]

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[12] Those were, *first*, an unwillingness to recognize Section 251(d)(1) as an explicit declaration of the Commission's obligation to "implement the requirements of this section"; *second*, a belief that the Commission's general regulatory authority under Section 201(b) is confined to exclusively interstate matters, even though that provision imposes no such limitation; *third*, an expansive interpretation of Section 2(b); and *fourth*, a nearly irrebuttable presumption that, wherever the 1996 Act contemplates *some* role for the state commissions, the Commission may play *no* role at all (even though the state commissions and the FCC indisputably play overlapping roles in many areas, such as access to network elements). See Pet. App. 10a-24a, 27a-30a, 34a-36a, 83a-86a. As we have discussed, each of those grounds is invalid. See also note 7, *supra*; Opening Fed. Br. 26 n.9; Opening AT&T Br. 30-31 (discussing 47 U.S.C. 208).

[13] The Rural and Mid-Sized Carriers rely heavily on 47 U.S.C. 261(b), which the Eighth Circuit cited only in passing (Pet. App. 39a), and to which the state commission respondents devote no discussion. Entitled "[e]xisting [s]tate [r]egulations," Section 261(b) preserves state regulations that "fulfill[] the requirements of this part" and are

II. THE COMMISSION'S RULES REASONABLY IMPLEMENT THE 1996 ACT'S GUARANTEE OF NONDISCRIMINATORY ACCESS TO NETWORK ELEMENTS

A. Introduction And Summary Of Argument

The 1996 Act is a comprehensive legislative package that is designed to open all telecommunications markets to competition. In many respects, the Act greatly benefits the incumbent monopolists that challenge the Commission's rules governing access to network elements.[14] For example, the Act "as a whole *relieves* the [Bell Companies] of several of the burdens imposed by [the 1982 AT&T consent decree], particularly by prescribing in § 271 a method whereby the [Bell Companies] can achieve a long-sought-after presence in the long-distance market." *BellSouth*

"not inconsistent with the provisions of this part." The "provisions" with which such regulations must be "consistent" include, of course, any provisions recognizing the Commission's rulemaking role, *e.g.*, 47 U.S.C. 251(d)(1), 252(c)(1); see also 47 U.S.C. 261(c), and respondents' reliance on Section 261(b) is therefore circular. Moreover, the scope of Section 261(b) is confined to state regulations "fulfilling the requirements of this part," and the 1996 Act elsewhere indicates that the scope of its "requirements * * * includ[es] the regulations prescribed by the Commission." 47 U.S.C. 252(c)(1); see also 47 U.S.C. 261(c). For that reason, as well as the others discussed in our opening brief (at 23 & n.7), there is also no merit to the Rural and Mid-Sized Carriers' argument that the anti-field-preemption provision of Section 251(d)(3) somehow limits the legal effect of validly issued Commission rules. And, in part because Section 251(d)(3) "was designed" for "state statutes or regulations that are independent from the Telecommunications Act of 1996," the Eighth Circuit squarely held that, *despite Section 251(d)(3)*, state commissions must "ensure that arbitrated agreements comply with the Commission's regulations" whenever those commissions "are fulfilling their roles as arbitrators of agreements pursuant to the [1996 Act]." Pet. App. 38a-39a; see 47 U.S.C. 252(c)(1). *No* party has challenged that aspect of the Eighth Circuit's holding.

[14] The state commissions do not challenge any of the network-element rules disputed here on the merits, even though they are bound by those rules when arbitrating disputes under Sections 251 and 252. See 47 U.S.C. 252(c)(1); Pet. App. 38a.

Corp. v. *FCC*, No. 97-1113, 1998 WL 242244, at *7 (D.C. Cir. May 15, 1998); see also 1996 Act, Pub. L. No. 104-104, Tit. VI, § 601(a)(2), 110 Stat. 143 (superseding GTE consent decree). And the Act enables all incumbent LECs to offer competitive services in the traditional markets of other incumbents.

The incumbents have little appetite, however, for any interpretation of the local competition provisions that would bring competition to their home markets.[15] Instead, they seek to engraft various limitations onto Section 251(c)(3)'s core guarantee of "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Through such limitations, they seek to impede the 1996 Act's basic objectives: an infusion of competition into traditional monopoly markets "as quickly as possible," H.R. Rep. No. 204, 104th Cong., 1st Sess. 89 (1995) (House Rep.); and (what is the same) the rapid conversion of those markets, with their webs of hidden and inefficient cross-subsidies, into rational markets in which the price of services reflects the cost of providing them.

The limitations that the incumbents seek, however, do not appear either in Section 251(c)(3) or anywhere else in the 1996 Act. In fact, the incumbents cannot point to any actual *restrictions* that Section 251(c)(3) places on a new entrant's rights of access to network elements; instead, they principally contend that various provisions either

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[15] See generally *Alarm Bells: Is This Really What Congress Had in Mind with the Telecom Act?*, Wall St. J., May 12, 1998, at A1 ("Two years ago, the federal government enacted a law designed to crack local telephone monopolies and bring consumers the benefits of competition. By sweeping away decades of regulation, Washington thought it was paving the way for a free-for-all among the Baby Bells, long-distance carriers, cable operators and other telecommunications providers. Instead, the urge to merge has overwhelmed the compulsion to compete."); *A Bid Too Far?*, The Economist, May 16, 1998, at 63 ("Like it or not, there is precious little competition in America's $100 billion local telephone market[.]").

enhancing those rights in specific respects or creating *other* rights (such as resale) should be construed, by negative inference, to have imposed implicit limitations on the basic guarantees of Section 251(c)(3). As we discuss below, those textual arguments would be unpersuasive even if this Court were reviewing this statutory scheme *de novo*: Congress wrote Section 251(c)(3) broadly because it recognized that nondiscriminatory access to network elements would be the only effective means of creating robust local competition in the foreseeable future. The incumbents' textual arguments are particularly unsound, moreover, as arguments for overcoming the deference that the Commission is due in effectuating this many-dimensioned statutory scheme. And the incumbents' other textual arguments fare no better. The Commission reasonably implemented Section 251(d)(2), which instructs it to "consider" certain factors when determining "what network elements should be made available"; and it reasonably implemented the 1996 Act's definitional and other provisions in directing incumbents to provide new entrants with nondiscriminatory access to certain specific elements disputed here.

The incumbents thus fall back on a variety of policy contentions. We discuss those contentions in more detail below, but three points warrant mention at the outset. First, the "arbitrage" that the incumbents resist is another name for the rational, cost-based competition that, under *any* interpretation, Section 251(c)(3) is designed to create. Because such competition is both intended and inevitable, the incumbents' essential submission is that this Court should read *permanent*, countertextual limitations into the 1996 Act to accommodate *interim* concerns, properly addressed in a separate proceeding, about the pace of universal-service reform under Section 254. This statute, however, is designed to last well into the next century; the incumbents' approach would lock it firmly in the past.

Second, there is no dispute here about whether the construction of new facilities is often desirable; the question is *who* should decide *what* new facilities it would be *efficient* to construct. The Commission's approach would generally leave those decisions to market forces, which (when rates for access to an incumbent's network elements are set properly) will give new entrants incentives to construct facilities when, and only when, it is efficient to do so. The incumbents' contrary approach would necessitate the very "edict[s] of central planning" (GTE Br. 17) that they profess to dislike, and it would warp the course of competition.

Finally, Congress created resale of an incumbent's existing services as an entry *option*, one among several, and it left the choice of those options to private market actors. Nothing in the 1996 Act requires new entrants to pick the resale option when, by its terms, Section 251(c)(3) also gives them the option of leasing network elements, with its very different mix of advantages and disadvantages. The incumbents' argument for creating such a requirement has no textual foundation; instead, it is derivative of, and no sounder than, their other policy contentions.[16]

B. The Commission Reasonably Rejected The Incumbents' General Proposals For Limiting The Competitive Effects Of Section 251(c)(3)

The incumbents' most ambitious challenges, which they present together (*e.g.*, Bell Atl. Br. 53-63), are the two that the Eighth Circuit viewed as related: related in the sense that either, if accepted, would effectively remove network elements as an entry option for many carriers. See Pet. App. 56a-57a. The first challenge, which the Eighth

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[16] This brief addresses the major contentions in the numerous briefs (three by the Bell Companies alone) filed on behalf of the cross-petitioners. To the extent that we have not addressed other contentions, that is attributable to the page limitation, not to any substantive agreement with cross-petitioners.

Circuit did accept (*id.* at 69a-72a), concerns Rule 315(b)'s ban on an incumbent's infliction of discriminatory costs on new entrants. The second challenge, which the Eighth Circuit rejected (*id.* at 53a-60a), concerns the Commission's decision not to impose a "facilities ownership" requirement on new entrants invoking Section 251(c)(3).

1. Rule 315(b) Is A Reasonable Implementation Of Section 251(c)(3)

Rule 315(b), 47 C.F.R. 51.315(b), forbids an anticompetitive practice that we describe in our opening brief (at 43-48), and which the incumbents nowhere disavow as their objective: They want to disconnect previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants. Put another way, the incumbents want to drain value out of their facilities to ensure that their competitors either spend money unnecessarily to replace the lost value or stay out of the market altogether. The result: an unnecessary expenditure of resources, no net increase in value, and thwarted prospects for competition.

That anticompetitive exercise in economic waste is so plainly discriminatory that, even in the absence of a Commission rule, it would violate an incumbent's statutory obligation to provide "*nondiscriminatory* access to network elements * * * on rates, terms and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3) (emphasis added). But because the Commission *has* interpreted Section 251(c)(3) to forbid this practice, see Opening Fed. Br. 43-46; note 17, *infra*, the incumbents must show that the statute somehow forecloses that interpretation. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). They cannot.

The incumbents rely principally on the second sentence of Section 251(c)(3), which supplements the nondiscrimination rights of the first sentence, and further bars incumbent LECs from frustrating a new entrant's right "to combine [requested] elements" where (for example) the elements were not previously combined as the new entrant wishes to combine them or where the new entrant wishes to combine them with its own elements. The incumbents argue that "it cannot be * * * 'discriminatory' for an incumbent to do just what section 251(c)(3) expressly requires of it—provide network elements in a manner that allows a new entrant to combine them." Bell Atl. Br. 56. That is illogical. The inclusion of specific obligations in the second sentence of Section 251(c)(3) does not give incumbent LECs a free pass through the nondiscrimination mandate of the first sentence. An incumbent's duty to "allow" new entrants to combine elements that they wish to combine does not somehow entitle the incumbent to disconnect elements, against the new entrants' wishes, simply to impose anticompetitive costs on them.[17]

The incumbents also claim that imposing such costs cannot be discriminatory because, after all, "it was the incumbent that did the work and spent the money to design a network and combine the individual elements that comprise it." U.S. West Br. 52. The argument reduces to this: "because we are the regulated monopolists who put value into this network, we have the right to take much of that value away, and force new entrants to waste money in putting it back, before we let them share in our economies of scale." Few propositions could be more antithetical to the 1996 Act. To create local competition, Congress wished to preserve, not waste, the accumulated value of existing facilities. See Pet. App. 137a (¶ 11). And, al-

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[17] As the Commission explained, the discriminatory and wasteful character of the conduct prohibited in Rule 315(b) justifies that rule quite apart from a separate issue on which we have not sought this Court's review: whether an incumbent must itself *combine* previously *uncombined* elements before making them available to new entrants. *Third Order on Reconsideration*, FCC No. 97-295, ¶ 44 (Aug. 18, 1997) (J.A. 247-248), petitions for review pending *sub nom*. *Southwestern Bell Tel. Co.* v. *FCC*, Nos. 97-3389, *et al.* (8th Cir., argued Jan. 15, 1998); see generally Pet. App. 230a-231a (¶¶ 289-293).

though the incumbents wrongly suggest otherwise (*e.g.*, Bell Atl. Br. 56), a new entrant must of course compensate incumbents for access to precombined elements at cost-based rates: rates that take the costs of combination into account and "may include a reasonable profit" for the incumbent. 47 U.S.C. 252(d)(1)(B).

The incumbents also renew their argument (*e.g.*, Bell Atl. Br. 53-55) that the term "unbundled" means "disconnected" and that compliance with Section 251(c)(3) thus entitles them to disconnect requested elements whenever they wish, no matter what the anticompetitive harm. As we observe in our opening brief (at 44-45), however, the prevailing definition of "unbundled" during the 15 years leading up to the 1996 Act was "offered at separate prices"; indeed, in some contexts, it would have been nonsensical for "unbundled" to have meant "disconnected." See Opening MCI Br. 19-20.[18] Here, recognizing that many new entrants would enter local markets incrementally, Congress entitled those entrants to elements on an "unbundled" basis to ensure that an incumbent would not charge them for more elements than they want. But, by protecting new

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[18] As noted in our opening brief (at 45), the incumbents' approach to "unbundled elements" ignores the technical reality of the telephone network, including, in particular, the signaling system. The incumbents respond only that "the FCC's rules consider signaling and switching to be part of the *same* element" when new entrants seek access to both. Bell Atl. Br. 57. That is incorrect. The Commission's rules define switching (47 C.F.R. 51.319(c)) and signaling (47 C.F.R. 51.319(e)) as separate elements, and that separate definition of the signaling system element continues to apply "[w]hen a requesting telecommunications carrier purchases unbundled switching capability from an incumbent LEC." 47 C.F.R. 51.319(e)(1)(ii). The incumbents (*e.g.*, Bell Atl. Br. 54) separately argue that, in paragraph 44 of the Third Order on Reconsideration (J.A. 247-248), the Commission departed from its preferred usage and employed the term "unbundled" to mean "physically severable." The passage in question, however, addressed the precedential effect of the Eighth Circuit's initial opinion in this case. It is of course that Eighth Circuit opinion (along with the subsequent order invalidating Rule 315(b)) whose misapplication of the term is at issue here.

entrants in that respect, Congress did not entitle incumbents to make the elements that new entrants *do* want less valuable than they are when the incumbents use them. Indeed, the incumbents cannot point to any context in which the term "unbundled" has been used that way: to compel someone, against that person's will, to accept requested items on a disconnected basis. In the end, even the incumbents recede from that construction and appeal to "context." *E.g.*, Bell Atl. Br. 54. But, as discussed, "context" defeats them; and, even if it did not, it surely accommodates the Commission's construction of Section 251(c)(3)'s nondiscrimination mandate.

One final point: The incumbents' textual arguments (*e.g.*, Bell Atl. Br. 53-56) for invalidating Rule 315(b) are detached from, and much broader than, their general policy arguments for limiting the competitive effects of Section 251(c)(3). Whereas their policy arguments purport to favor facilities-based competitors (*e.g.*, *id.* at 64), their textual arguments for challenging Rule 315(b) would disadvantage *all* new entrants alike. If Section 251(c)(3) meant what they say, incumbents could disconnect any two previously combined network elements whenever they wished to disadvantage the requesting carrier—whether or not the requested elements could by themselves be used to provide finished services, and whether or not the requesting carrier had facilities of its own. The incumbents' construction of this statute would thus undermine all element-based competition equally, with no conceivable public benefit.[19]

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[19] Respondent Association for Local Telecommunications Services (ALTS), which represents niche-market carriers with some local facilities of their own, seeks to defend *both* the Eighth Circuit's judgment concerning Rule 315(b) *and* the Commission's authority to "requir[e] the incumbents to provide any and all existing combinations that are *not* similar to resold services." ALTS Opposing Br. 14. ALTS can accomplish that feat only by rejecting the incumbent LECs' textual position and by arguing instead that, "to save the statutory structure" (*id.* at 18), Section 251(c)(3) should be construed not to give new entrants efficient access to all elements needed to provide services

2. The Commission Reasonably Interpreted Section 251(c)(3) Not To Include An Implicit "Facilities Ownership" Requirement

The incumbents next challenge the Commission's decision *not* to issue rules imposing a "facilities ownership" limitation on Section 251(c)(3). In their view, a new entrant should be able to obtain elements under that provision only if it already has "at least some network facilities of its own." Bell Atl. Br. 57. The argument has no textual or policy basis.

a. As the Commission found (Pet. App. 242a (¶ 328)), and as the Eighth Circuit reaffirmed (*id.* at 55a), neither Section 251(c)(3) nor any other provision of the 1996 Act requires a new entrant to build its own facilities before obtaining access to the elements of an incumbent's network. To the contrary, Section 251(c)(3) compels incumbents to provide access "to *any* requesting telecommunications carrier for the provision of a telecommunications service" (emphasis added), which the Act elsewhere defines as "the offering of telecommunications for a fee directly to the public * * * *regardless* of the facilities used," 47 U.S.C. 153(46) (emphasis added). In marked contrast, the immediately preceding subsection, Section 251(c)(2), obligates incumbents to "interconnect" with "the facilities and equipment" of other carriers, language that does not appear in Section 251(c)(3).

An incumbent's simple obligation to provide access "to any requesting * * * carrier" disposes of this issue. But the incumbents' textual problems do not stop there. The incumbents contend that new entrants must have "at least some" facilities of their own (Bell Atl. Br. 57) before invoking Section 251(c)(3). What does "some" mean? As the Commission observed, the incumbents presumably seek a rule that is not "so easy to meet it would ultimately be

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independently available under Section 251(c)(4). But that argument, which we separately address below (at pp. 36-41), is unhinged from any textual basis for challenging Rule 315(b) itself.

meaningless." Pet. App. 248a (¶ 339). A meaningful rule would require extensive federal regulations governing the number and kinds of facilities that a new entrant must own before invoking rights under Section 251(c)(3). Apart from the dubious policy merits of distorting the market with such regulations, see p. 34, *infra*, Congress's failure even to suggest statutory standards for such regulations confirms what the statutory text already makes clear: that Congress did not intend to limit Section 251(c)(3) so as to necessitate such regulations in the first place.

b. With no textual basis for their proposed rule, the incumbents turn to a phrase that *protects* new entrants' rights in particular respects and mischaracterize that phrase as an implicit *restriction* of new entrants' rights in more general respects. They argue that, because Section 251(c)(3) entitles new entrants to gain access to an incumbent's elements "at any technically feasible point," Congress must have "contemplate[d] a physical interconnection of networks" (Bell Atl. Br. 57); and because Congress "contemplate[d]" that particular circumstance, Congress must also have intended to *limit* Section 251(c)(3) to that circumstance, and thus to carriers that wish "to make a physical connection" (*id.* at 58) with the incumbent.

That argument is unsound and, in any event, irrelevant. It is unsound because, as the Commission observed, the guarantee of network access "at any technically feasible point" addresses the points of the network at which new entrants *may* obtain access to elements; it does not *require* new entrants to connect their own facilities to the incumbent's elements at those points. See Pet. App. 242a-243a (¶ 329) ("If we were to conclude otherwise, then new entrants would be prohibited from requesting two network elements that are connected to each other because the new entrant would be required to connect a single network element to a facility of its own.").[20]

And the argument could not help the incumbents in any event. To manipulate particular facilities used in providing service under Section 251(c)(3), a new entrant must typically establish a "physical connection" (Bell Atl. Br. 58) between its own operational support systems (OSS) and the OSS of the incumbent LEC. See *In re Application of Ameritech Mich. Pursuant to Section 271*, FCC No. 97-298, ¶¶ 134-143 (Aug. 19, 1997) (*Ameritech Michigan Order*) (lodged with this Court in No. 97-1519); see also J.A. 118 (¶ 518). That is so whether or not OSS is itself considered a "network element." See pp. 46-47, *infra*. For that reason, if Congress had meant to base a "facilities ownership" requirement on a phrase *protecting* a new entrant's rights (a dubious proposition by itself), it could not have chosen more inapt language than the phrase it used here, which guarantees access "at *any* technically feasible point." Congress's choice of language was not inapt, however, because Congress made Section 251(c)(3) applicable to "any requesting * * * carrier" and did not intend to impose any "facilities ownership" requirement at all.

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[20] There is similarly no merit to the incumbents' efforts (*e.g.*, Bell Atl. Br. 58-59) to infer a "facilities ownership" requirement from Section 251(c)(6), which gives new entrants a right to "physical collocation" with an incumbent's facilities. Again on the false premise that whenever Congress creates one competitive option it implicitly withdraws another, the incumbents argue that "Congress would have had no need to require physical collocation for this purpose if, as the FCC asserts, entrants would never actually be required to enter onto the incumbent's premises to connect equipment." *Ibid.* That does not follow. The fact that Section 251(c)(6) specifically entitles a new entrant to physical collocation if that is what it seeks does not mean that Section 251(c)(3) compels every new entrant to construct facilities of its own before gaining access to network elements.

3. The Incumbents' Policy Arguments Lack Merit

In sum, the text of the 1996 Act itself forecloses the incumbents' principal efforts to limit Section 251(c)(3), and even if it did not, the Commission's resolution of any ambiguities would be at least reasonable. See *Chevron*, 467 U.S. at 842-843. The incumbents nonetheless challenge the Commission's decision on several discrete policy grounds. Each is invalid.

a. *Universal service*. Under the traditional system of hidden cross-subsidies for universal service, many customers have paid above-cost telephone rates so that other customers may pay what the incumbent LECs have long characterized as below-cost rates. (The extent to which the above-cost rates truly fund universal service, rather than pad monopoly profits, has always been a subject of debate.) The incumbents contend that, because the price of access to network elements is based on cost, such access would allow new entrants to undersell incumbents in providing service to end users who pay the above-cost prices that currently subsidize universal service.

Here it is crucial to focus on what the incumbents do and do not argue. They do not deny that, under *any* interpretation of Section 251(c)(3), the availability of elements at cost-based rates will ultimately have the effect, which Congress very much intended, of driving prices to cost by permitting new entrants to attract customers who would otherwise pay supracompetitive prices. That market-oriented, efficiency-inducing process is what the incumbents call "arbitrage" and "gamesmanship." *E.g.*, Bell Atl. Br. 50. Congress called it "competition."

Congress also recognized, no less than the incumbents, that driving prices to cost will require replacement of the traditional universal service regime. Congress chose a solution that accommodates, rather than distorts, rational and cost-based competition in local markets. In a provision that the incumbents rarely discuss, Congress called for the creation of a new universal service regime funded not by covertly above-cost rates exacted from urban and business customers, but by explicit and competitively neutral contributions from "*[a]ll* providers of telecommunications services," *including* new entrants that provide service under Section 251(c)(3). 47 U.S.C. 254(b)(4) (emphasis added). In a May 1997 order, the Commission, following the general recommendations of a Federal-State Joint Board, see 47 U.S.C. 254(a), began implementing the transition to the new regime.[21]

Because the incumbents cannot indefinitely keep competition from driving prices to cost, their complaint, at bottom, is about the details of the transition from the old telecommunications world into the new. In particular, they ask this Court to find some way to impede the competitive effects of Section 251(c)(3) to accommodate what they contend will be a "potentially lengthy period" (Bell Atl. Br. 50) of universal service reform. That argument is unsound on two levels.

First, it is misdirected. As the Commission found, the proper way to reconcile universal service concerns with the emergence of robust local competition is not to erect arbitrary new barriers to competition, as the incumbents would like, but to ensure timely implementation of the universal service reforms ordered in Section 254. See Pet. App. 132a-136a (¶¶ 3-9). In whatever respects the incumbents dispute the implementation plan designed by the Commission and the Federal-State Joint Board, they should pursue those disputes in their Fifth Circuit challenge to that plan. See *Texas Office of Pub. Util. Counsel*,

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[21] See *In re Federal-State Joint Board on Universal Serv.*, 12 FCC Rcd. 8776 (May 8, 1997) (*Univ. Serv. Order*), petitions for review pending *sub nom. Texas Office of Pub. Util. Counsel* v. *FCC*, Nos. 97-60421 *et al.* (5th Cir. filed June 25, 1997). The Commission contemporaneously indicated that competition was not developing in a way that would require instantaneous reforms. See *In re Access Charge Reform*, 12 FCC Rcd. 10,175, 10,184 (June 18, 1997), petitions for review pending *sub nom. Southwestern Bell Tel. Co.* v. *FCC*, Nos. 97-2618, *et al.* (8th Cir., argued Jan. 15, 1998).

supra. But those disputes are no basis for thwarting the local competition guarantees. Congress intended to move both competition and universal service into a dynamic and rational future; the incumbents' essential proposal is to stop the clock on competition because, they suggest, Congress enacted Section 254 largely in vain.[22]

That suggests the second problem with their argument. To address *interim* concerns about the timing of universal service reform, the incumbents would read *permanent* limitations into the guarantees of Section 251(c)(3). But Congress wrote those guarantees to last well into the next century, long after the process of reforming universal service has run its course, and long after any conceivable objection to widespread cost-based competition has vanished. Congress enacted Section 254 precisely to ensure that universal service concerns would not warp the process of bringing competition to local markets. By assuming away the efficacy of Section 254, however, the incumbents would permanently impair competition to accommodate a hidden-subsidy system that the 1996 Act itself has made obsolescent.

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[22] Some incumbents suggest (*e.g.*, Bell Atl. Br. 49-50; U.S. West. Br. 47) that Section 254 may be ineffectual in reforming intrastate universal service subsidies. Congress thought otherwise. Section 254(f) provides that, under state regulatory direction "not inconsistent with the Commission's rules," "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis," to universal service funding mechanisms. See also 47 U.S.C. 253(b). The Commission adds:

> [A]s competition develops, the marketplace itself will identify intrastate implicit universal service support, and * * * states will be compelled by those marketplace forces to move that support to explicit, sustainable mechanisms consistent with section 254(f). As states do so, we will be able to assess whether additional *federal* universal service support is necessary to ensure that quality services remain "available at just, reasonable, and affordable rates."

Univ. Serv. Order, 12 FCC Rcd. at 8785-8786 (emphasis added) (quoting 47 U.S.C. 254(b)(1)).

In the end, the incumbents' real quarrel is with Congress's carefully considered decision to reform universal service *and* promote robust local competition "as quickly as possible." House Rep. 89; compare 47 U.S.C. 251(d)(1) with 47 U.S.C. 254(a)(2). But this is no place to second-guess that decision. And, with their 98% market shares holding fast more than two years after the Act's passage (see Opening Fed. Br. 41), the incumbents are particularly ill-positioned to do any second-guessing.

b. *Facilities-based competition*. The incumbents also propose to engraft atextual limitations onto Section 251(c)(3) to give new entrants greater incentives to build new facilities. *E.g.*, Bell Atl. Br. 63-64. That argument is also unsound. The issue here is not, as the incumbents portray it, *whether* the construction of new facilities is desirable. The issue, instead, is *who* should decide *which* facilities it would be *efficient* to build, and *when*. As a general matter, the Commission's approach would leave those decisions to market forces, which best reflect what is efficient. The incumbents would assign those decisions to government regulators and, specifically, to the Commission. The Commission reasonably declined the invitation.

Congress recognized, and the incumbents do not deny, that it would make little social or economic sense to try to induce new entrants to duplicate *all* of the telecommunications facilities they might need to provide service, including, for example, the multitude of wires, buried cables, switches, and transport trunks that are part of the existing infrastructure. Absent radical technological change, *some* of those facilities will indefinitely embody such immense economies that the social costs of duplicating them would far outweigh the benefits: important resources would be spent, and streets would be dug up, with no commensurate increase in the value or diversity of telecommunications services. In other circumstances, however, the benefits of building new facilities would outweigh the costs: where, for example, new facilities would enable a new entrant to offer more, better, or less costly services.

The question is how to distinguish between efficient and inefficient construction of new facilities and who should draw the distinction. The Commission rejected the incumbents' proposal for a government-imposed "facilities ownership" limitation on Section 251(c)(3) because "it would not be possible to identify the elements carriers must own [to make such a limitation meaningful] without creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation"; that result, the Commission observed, would frustrate "the 1996 Act's goals of promoting competition." Pet. App. 248a (¶ 339). The incumbents do not answer that concern. Instead, they simply argue that the absence of a facilities-ownership rule would impose *greater* harms because, they say, it would "undermine" any incentive for new entrants to build their own facilities. *E.g.*, Bell Atl. Br. 64.

That is simply incorrect. New entrants invoking rights under Section 251(c)(3) may obtain access to an incumbent's facilities only at cost-based rates that "may include a reasonable profit" for the incumbent. 47 U.S.C. 252(d)(1)(B). If those rates are set at the proper levels (see pp. 35-36, *infra*), new entrants will rationally choose to construct facilities of their own whenever that is the efficient choice: for example, where customer demand exceeds the capacity of existing facilities, or where the new entrant needs new facilities to offer different or more efficient services. See, *e.g.*, J.A. 132-133, 140, 172 (¶¶ 620, 685, 743); see also G. Stigler, *The Theory of Price* (4th ed. 1987). Those incentives are as applicable to new entrants that start out with no local facilities of their own—those who initially seek access to the "platform"—as to new entrants that have already constructed some facilities. Moreover, the incentive to build new facilities will often be enhanced because new entrants will wish to reduce the burdens of negotiating with, and relying on, their chief competitors—the incumbent LECs—in order to do business. See, *e.g.*, D. Carlton & J. Perloff, *Modern Industrial Organization* 501 (2d ed. 1994).

Ultimately, it is the incumbents' approach, not the Commission's rules, that would suppress efficient facilities development, because their approach would deter many potential competitors from entering local markets at all. See pp. 40-41, *infra*. Moreover, the incumbents' calls for more regulation would force new entrants that *do* enter local markets to construct new facilities inefficiently. Whether through a "facilities ownership" requirement or through an "essential facilities" theory that the statutory language rejects, see p. 43, *infra*, the incumbents would have the government tell private market actors to build new facilities even where they would rather pay a hostile incumbent for the use of its facilities at cost-based rates that "may include a reasonable profit." The Commission reasonably determined that private actors are in a better position to know when such construction makes economic sense. See, *e.g.*, J.A. 63-64, 132-133 (¶¶ 339-340, 620); see also J.A. 54-55 (¶ 287).[23]

Of course, those private actors will have the correct incentives to construct efficient (and not inefficient) facilities only if the prices for access to an incumbent's facilities are set at levels that promote such construction. The Commission's vacated pricing rules do call for prices set at those levels. See, *e.g.*, J.A. 140 (¶ 685). And many state commissions have voluntarily followed the Commission's approach, as the incumbents pointed out in opposing certiorari. *E.g.*, 97-826 Regional Bell Br. in Opp. 19-20; 97-826 GTE Br. in Opp. 24. The incumbents say little about the obvious interrelationship between pricing and nonpricing rules in this context. That reticence is revealing. At bottom, the incumbents' mistaken suggestion that the Commission's nonpricing rules will "undermine" new

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[23] As discussed above (p. 26), the incumbents' challenge to Rule 315(b) is not even arguably calculated to induce facilities-based competition; it is designed to suppress competition generally.

facilities construction (Bell Atl. Br. 64) can amount to nothing more than a prediction that prices for network elements will be set too low and that new entrants will thus have the wrong incentives.[24] See J.A. 131 (¶ 618) ("The price levels set by state commissions will determine whether the 1996 Act is implemented in a manner that is *pro-competitor* * * * or, as we believe Congress intended, *pro-competition*."). Their argument here is therefore misdirected: their real quarrel is with particular pricing policies, not with the Commission's underlying refusal to inject itself unnecessarily into the determination of which new facilities are efficiently constructed.

Finally, under *any* approach to this statute, there must of course be close coordination between the pricing and nonpricing determinations needed to give effect to Section 251(c)(3). The need for such coordination illustrates why, as discussed in Point I above, it is illogical to suppose that Congress gave the Commission *no* methodological role in addressing the pricing issues that are inextricably bound up in the nonpricing issues that, as all insist, the Commission does have authority to decide. See p. 4, *supra*; see also *American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 118 S. Ct. 1956, 1963 (1998) ("Rates * * * do not exist in isolation.").

c. *The distinction between resale and network elements*. The incumbents propose one final justification both for restricting Section 251(c)(3)'s guarantees to new entrants with "facilities of [their] own" and for compelling all new entrants to perform the "additional work" of recombining elements that an incumbent has disconnected solely to burden competition. Bell Atl. Br. 47. They argue

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[24] That concern is the flip side of a wish: some incumbents (see GTE Br. 41) seek to inflate network element rates to cover universal service costs and to recover the historical costs of their investments, even though the 1996 Act provides that those rates shall be based on "the *cost* (determined *without* reference to a rate-of-return or other rate-based proceeding) of providing the * * * network element." 47 U.S.C. 252(d)(1)(A)(i) (emphasis added).

that reading such limitations into Section 251(c)(3) is required to avoid "utterly obliterat[ing] the statutory distinction between resale and the use of unbundled elements." *Ibid.* That is incorrect for several independent reasons.

i. Section 251 contains several entry options designed collectively to infuse local markets with competition. Congress included several options because it did not know exactly how competition would develop, and it left those decisions to private market actors. It enacted Section 251(c)(4) because it knew that resale would be particularly important in the very near term and that, even thereafter, new entrants would still prefer resale over network elements in certain contexts. See pp. 38-40, *infra*. It enacted Section 251(c)(3) because it recognized that, unlike resale, access to network elements is the only option that can promote full entry into, and dynamic competition in, local telephone markets. *Ibid.* But nothing in Section 251 compels new entrants to pick one entry option over another when either, by its terms, is available. Nor should the Commission, much less the federal courts, create artificial limitations on one option to encourage greater use of another.

What the incumbents seek, though, is a rule confining new entrants to one option (resale) when the statutory text makes another option (network elements) available as well. Unable to find any textual hook for that rule, the incumbents argue that such a rule must be created to avoid "inconsisten[cy] with the scheme" of the 1996 Act. Bell Atl. Br. 61. But the incumbents cannot be speaking about any inconsistency between the Commission's approach and *the text of the Act*. It is natural and common for Congress to create a set of options for private actors and to leave the choice of those options to the private actors, as it has done here. And even the incumbents concede that the Commission's approach will preserve resale as an attractive entry option in many circumstances. Bell Atl. Br. 62-63; see also pp. 38-40, *infra*.

Instead, when the incumbents speak of "inconsisten[cy] with the scheme," they mean that the Commission's approach is inconsistent *with their policy concerns*, which they wrongly attribute to Congress. They claim, in particular, that the Commission's approach is inconsistent with the obsolescent system of universal service cross-subsidies that Section 254 seeks to abolish, and with their own invalid theories about the degree of regulatory intervention needed to spur facilities construction. *E.g.*, Bell Atl. Br. 16. Just as those policy concerns are unsound for the reasons found by the Commission and set forth above, so too is the incumbents' wholly derivative rationale for dictating a new entrant's choice between two equally available statutory options.

ii. Moreover, the incumbents' argument is independently invalid because it rests on a false factual premise. They assert that, under the Commission's plain-language approach, new entrants providing service under Section 251(c)(3) without first building local facilities of their own —those seeking access to the "platform"—would obtain "the exact equivalent of resale" (Bell Atl. Br. 60), "the same thing using different words" (*id.* at 52). That is incorrect, as the Commission has found.

Section 251(c)(4) restricts a new entrant to repackaging the incumbent's *existing retail* services under its own brand name. By contrast, a new entrant that invokes Section 251(c)(3) does not "resell" anything: it leases an incumbent's underlying elements. With those elements, it can provide retail services that the LEC does *not* provide its customers (see Pet. App. 244a-245a (¶ 333) (discussing Centrex)), and, just as important, it can provide crucial *non*-retail services that are necessarily unavailable under Section 251(c)(4). For example, one responsibility that new entrants would typically assume when providing service through Section 251(c)(3), but *cannot* assume when they resell retail services under Section 251(c)(4), is "exchange access": the task of originating and terminating telephone traffic between their customers and the various long-distance networks. See Pet. App. 245a (¶ 333); see also J.A. 65-71 (¶¶ 356-365). For those reasons, only Section 251(c)(3), and not Section 251(c)(4), enables new entrants to make full, flexible, and truly competitive entry into local markets.

With that greater flexibility come greater risks and operational costs. Because a reseller pays an incumbent only for the retail services it actually resells, the wholesale rates applicable to resale guarantee a predictable margin between the new entrant's resale revenues and what it owes the incumbent for the resold services (although the new entrant's additional costs may deny it any actual profit). See 47 U.S.C. 251(c)(4), 252(d)(3). In contrast, the profitability of using *cost*-based network elements to compete against incumbents depends on several variables, including whether, after agreeing to serve particular customers, the new entrant can recover enough revenues from particular services (including exchange access) to recover its flat-rated charges for loops and all other network elements needed to provide service. See Pet. App. 245a-246a (¶ 334).[25]

The elements option also poses greater operational burdens: unlike resale, with its relatively simple back-office requirements, the elements approach requires new en-

[25] Indeed, the loop cost *alone*, which is charged at a flat rate, commonly exceeds the wholesale price of residential telephone service in both urban and non-urban areas. The flat-rated cost of that and other elements needed for service illustrates one reason why, as the Commission has determined, access to network elements poses greater risks for new entrants than resale whether or not "shared transport" is a network element, a discrete issue now pending in the Eighth Circuit. See *Third Order on Reconsideration*, ¶ 47 (J.A. 248-249); cf. Bell Atl. Br. 62. More generally, the incumbents mischaracterize the cost differences between network elements and resale. *E.g.*, Bell Atl. Br. 52 (discussing "discount"). When access to network elements is more profitable to a new entrant than resale, that is often largely attributable not to the difference in what the new entrant pays the incumbent, but to a new entrant's additional *receipt* of (for example) fees for exchange access, a service that new entrants can provide only under Section 251(c)(3).

trants to deploy additional systems to keep track of element-specific usage data and to bill interexchange carriers for originating and terminating exchange access. The reduced risks and transaction costs of resale thus permit more immediate and more narrowly focused entry into telecommunications markets, which is why resale is a particularly important entry option in the very near term.[26] For those reasons, as the Commission found, it is unnecessary to carve exceptions out of the plain language of Section 251(c)(3) to preserve "distinctions" between these two very different entry options. See Pet. App. 243a-246a (¶¶ 331-334); *Third Order on Reconsideration* ¶ 47 (J.A. 248-249).[27]

iii. The incumbents' arguments about "gaming the regulatory system" (Bell Atl. Br. 63) through access to the "platform" are illogical for one final, independent reason. The incumbents simply assume that, once a new entrant gains such access, it will not thereafter build local

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[26] The relative ease of, and absence of risk in, using resale for immediate entry into local markets is also one reason why the 1996 Act briefly restricts the ability of certain long-distance carriers to market long-distance services jointly with resold local services in some areas, a restriction that will terminate at the latest in February 1999. 47 U.S.C. 271(e)(2); see Pet. App. 246a-247a (¶¶ 336-337). At the same time, Congress expected that local competition resulting from a proper construction of Section 251(c)(3) would help satisfy an important condition (as resale alone could not) for Bell Company entry into the long-distance market. See 47 U.S.C. 271(c)(1); *Ameritech Michigan Order*, ¶¶ 92-101. Such entry would itself terminate the joint-marketing restriction if it occurred before the February 1999 sunset. 47 U.S.C. 271(e)(2).

[27] As the incumbents acknowledge (Bell Atl. Br. 62-63), the different pricing regimes for these two entry options ensure that resale will be a more attractive entry option than network elements for new entrants seeking to recruit customers who (according to the incumbents) are currently served below cost, based on hidden subsidies that are available only to the incumbent. The Act squarely authorizes such resale, which places the incumbents at no competitive disadvantage, no matter what the mechanics of the incumbent's universal service subsidies. See, *e.g.*, *Univ. Serv. Order*, 12 FCC Rcd. at 8866.

facilities of its own: facilities that would satisfy the incumbents' proposed "facilities ownership" rule and would entitle the new entrant, *under the incumbents' own analysis*, to exercise rights under *either* Section 251(c)(3) *or* Section 251(c)(4). But, under a proper pricing regime, all new entrants, including those with access to the platform, will have powerful incentives to develop their own facilities whenever that would contribute to efficiency and consumer welfare. See pp. 34-36, *supra*. And, unlike a reseller, a new entrant that leases elements becomes directly familiar with those elements' costs and usage patterns and can judge when it would be efficient to build new elements. What the incumbents seek, then, is a rule that nips in the bud the very facilities-based competition that would moot their policy arguments: a rule that discourages the initial entry, and the development of a customer base, that would make subsequent facilities investments attractive.

C. The Commission Reasonably Applied The Statutory Definition Of "Network Element" And Reasonably Determined Which Elements Must Be Made Available

Moving from the general to the more specific, the incumbents challenge the Commission's determinations of the "elements that incumbents must provide." Bell Atl. Br. 65. There are two discrete subjects of that challenge (see *id.* at 65-72): the Commission's application of the "necessary" and "impair" standards of Section 251(d)(2), and its specific determinations that Section 251(c)(3) entitles new entrants to gain access to an incumbent's "operational support systems," "vertical switching features," and operator services.

1. The Commission Reasonably Applied Section 251(d)(2)

Section 251(d)(2) instructs the Commission, when "determining what network elements should be made available," to "consider, at a minimum," whether access to *proprietary* elements is "necessary," and whether failure to provide access to *other* elements "would impair the ability of the * * * carrier seeking access to provide the services that it seeks to offer." The Commission defined "necessary" to mean "that an element is a prerequisite for competition," J.A. 50 (¶ 282), and it defined "impair" to mean " 'to make or cause to become worse; diminish in value,' " J.A. 53 (¶ 285) (quoting *Random House College Dictionary* 665 (rev. ed. 1984)). The Commission further observed that Section 251(d)(2) sets forth "minimum *considerations* that the Commission shall take into account," but that it does not require the Commission, after considering those factors along with various others, to assign them dispositive weight. J.A. 54 (¶ 286) (emphasis added). The Commission explained that, in the same order, it had expressly taken these considerations into account when formulating its limited initial set of network elements that must be unbundled. J.A. 48-49 (¶ 277).[28] It added that the state commissions should also follow those considerations "to the extent [those commissions] impose additional unbundling requirements." *Ibid.* The Eighth Circuit upheld the Commission's approach. See Pet. App. 47a-50a.

The nature of the incumbents' challenge here is difficult to discern. If they are contending that Section 251(d)(2) itself should have compelled a different outcome in the Commission's initial categorization of "what network elements" must be made available, they do not clearly say so or even specify the "elements" that (in their view) Section 251(d)(2) somehow removes from the scope of a new entrant's access rights. If they are contending that Section 251(d)(2) requires a further case-by-case inquiry into a *particular* new entrant's need for a *particular*

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[28] See, *e.g.*, First Report and Order ¶¶ 388-389 (loops), 393 (network interface device), 410-411, 419-420 (switching), 425 (tandem switching), 482 (signaling), 491, 497 (call-related databases), 521-522 (OSS), 539-540 (operator and directory assistance systems); compare *id.* at ¶ 414 (determining that additional unbundling of switching element to create independent vertical feature elements is *not* "necessary to promote local competition").

facility or functionality that falls within one of the Commission's categories, their frequent use of the passive voice—"*some* inquiry into actual market conditions should be made" (Bell Atl. Br. 66)—leaves unanswered *who* would be conducting that inquiry. The incumbents would presumably foist most of that proposed chore on the state commissions in individual arbitration proceedings, even though Section 251(d)(2) does not, by its terms, even speak to their role.

The incumbents theorize that Section 251(d)(2) somehow confines a new entrant's access rights to an incumbent's "essential facilities." But the antitrust term "essential facilities" does not appear anywhere in this statute. Instead, Congress chose other words with quite different meanings. As to most network elements, what the Commission must "consider" is *not* whether the element is "essential," but whether deprivation of the element "would impair the ability" of a requesting carrier "to provide the services that it seeks to offer." 47 U.S.C. 251(d)(2)(B). The Commission reasonably determined that a new entrant's ability to offer service is "impaired" ("diminished in value") if "the quality of the service the entrant can offer, absent access to the requested element, declines" or if "the cost of providing the service rises." J.A. 53 (¶ 285). That is the plain meaning of the term. And, as to "proprietary" elements, Congress directed the Commission to "consider" whether access to the element is "necessary," a term that, as the Eighth Circuit observed, this Court itself has broadly defined to mean "convenient, or useful," rather than "essential." Pet. App. 48a (quoting *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819)); accord *Armour & Co.* v. *Wantock*, 323 U.S. 126, 129-130 (1944) (rejecting claim that "necessary" means "essential").

Moreover, Section 251(d)(2) does not even direct the Commission (as the incumbents suggest) to give the "necessary" and "impair" standards dispositive weight. See J.A. 54 (¶ 286). Instead, it directs the Commission to "consider" those factors, "at a minimum," "[i]n determining what network elements should be made available." And that is what the Commission did. It considered those factors together with the competitive goals of the 1996 Act; it then created an initial categorization of network elements that must be unbundled; and it further concluded that, in most (but not all) circumstances,[29] new entrants may decide, without case-by-case regulatory second-guessing, when the use of existing elements would avoid costly inefficiencies in providing service. See J.A. 50-55 (¶¶ 282-288); p. 42 and note 28, *supra*. No more was required. When a "statute by its terms merely requires the Commission to consider" certain factors, "[t]hat means only that it must reach an express and considered conclusion about the bearing of a factor, but is not required to give any specific weight to it." *Time Warner Entertainment Co.* v. *FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995) (internal quotation marks omitted), cert. denied, 516 U.S. 1112 (1996); see also *United States* v. *RCA*, 358 U.S. 334, 351-352 (1959).

Finally, there is no merit to the incumbents' unelaborated proposal for greater regulatory intervention "to

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[29] As the Eighth Circuit observed, the Commission's application of Section 251(d)(2) "is not toothless." Pet. App. 49a; see, *e.g.*, J.A. 52-53 (¶ 284) (describing circumstances in which a "new entrant should not have access to proprietary information * * * where it is not necessary to provide service"). The incumbents nonetheless claim that, as to proprietary elements, restrictive regulations are required to preserve an incumbent's incentive to offer innovative services. *E.g.*, Bell Atl. Br. 67-68. In a passage they ignore, however, the Commission determined that its approach "will stimulate innovation in the market, offsetting any hypothetical reduction in innovation by the incumbent LEC," and that "the threat to competition" from the incumbents' restrictive alternative "would far exceed any costs to consumers resulting from reduced innovation by the incumbent LEC." J.A. 51 (¶ 282). That predictive judgment is entitled to particular deference, as the Eighth Circuit observed. Pet. App. 49a-50a. Finally, it bears repeating that, when incumbents make any of their facilities available to new entrants under Section 251(c)(3), they are entitled to compensation at cost-based rates that "may include a reasonable profit." 47 U.S.C. 252(d)(1)(B).

promote facilities-based competition." Bell Atl. Br. 66. As discussed, when rates for an incumbent's elements are set properly, new entrants will have incentives to build new facilities when, and only when, it is efficient to do so. See pp. 34-36, *supra*. "As a practical matter, if it is more efficient and less costly for new entrants to obtain network elements from a source other than an incumbent LEC, new entrants will likely pursue the more efficient and less costly approach." J.A. 54 (¶ 287). In effect, the incumbents want a rule restricting new entrants to more expensive or less efficient means of obtaining the elements they seek. Such a rule, the Commission reasonably found, would "inhibit new entry," "restrict the potential for meaningful competition," and thus "undermine the procompetitive goals of the 1996 Act." *Ibid.*; see also Pet. App. 48a (agreeing with Commission).

2. The Commission's Determinations Concerning OSS, Vertical Switching Features, And Operator Services Were Reasonable

a. Because an incumbent retains ultimate physical control over its network elements even when new entrants lease them under Section 251(c)(3) (see J.A. 38 (¶ 258)), it keeps detailed information in various databases about the underlying facilities serving all customers, including customers who have chosen other local carriers. Those databases and their associated programs—which handle maintenance, repair, ordering, provisioning, billing, and other functions—are the incumbent's "operational support systems," or OSS. The question here is whether a new entrant may gain access to the incumbent's OSS as an efficient means of obtaining needed network and service information and of manipulating network elements to provide services to its new customers.[30] Without an efficient electronic interface between the incumbent's OSS and the

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[30] The question is thus *not* whether new entrants may appropriate an incumbent's general "business skills" (Bell Atl. Br. 69). See J.A. 118 (¶ 518); 47 C.F.R. 51.319(f)(1).

new entrant's own systems, a new entrant would have to resort, at best, to slower and more cumbersome means of obtaining essential network information, processing customer requests, and securing maintenance and repair functions. The new entrant might find it impossible, for example, to conduct basic customer transactions (such as providing an installation date) in a single call. As the Commission found, that disparity in responsiveness would preclude a competitor from making efficient, competitive use of the incumbent's network elements. See J.A. 116-122 (¶¶ 516-522).

The Commission directed incumbents to provide nondiscriminatory access to their OSS on alternative grounds: (1) OSS falls within the statutory definition of "network element" (in two different respects), and (2) "nondiscriminatory access to the functions of operations support systems, which would include access to the information they contain, could be viewed as a 'term or condition' of unbundling *other* network elements under section 251(c)(3), or resale under section 251(c)(4)." J.A. 117-118 (¶ 517) (emphasis added). The latter ground is independent of, and as important as, the first: a new entrant's access to elements used in providing service cannot be "nondiscriminatory," as required by Section 251(c)(3), if the incumbent, by denying access to its OSS, can prevent the new entrant from using those elements as efficiently as the incumbent could use them. See also 47 C.F.R. 51.311(b). Significantly, as in the court of appeals, and as in their cross-petitions for certiorari, the incumbents *do not challenge this nondiscrimination ground*. See 97-1087 Fed. Br. in Opp. 14-15 (noting waiver of claim). That waiver is fatal to their challenge: the Commission emphasized that this was an independent basis for its decision. See J.A. 117-118 (¶ 517) ("under *any* of these interpretations, operations support systems functions are subject to the nondiscriminatory access duty imposed by section 251(c)(3)") (emphasis added). For that reason alone, this

Court should affirm the portion of the judgment below addressing OSS.

In any event, the Commission reasonably *also* found that OSS falls within Section 3(29)'s two-part definition of "network element." See 47 U.S.C. 153(29). First, operational support systems readily qualify as "facilit[ies] * * * used in the provision of a telecommunications service," and their functions are "features, functions, and capabilities that are provided by means of such facilit[ies]." *Ibid.*; see J.A. 117 (¶ 517)); Pet. App. 42a-43a (agreeing with Commission).[31] Moreover, the second sentence of Section 3(29) includes what is largely an express *itemization* of OSS: "databases * * * and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. 153(29); J.A. 117 (¶ 517); Pet. App. 43a. The incumbents' approach would exclude several *enumerated* items—such as "databases" and "billing and collection" information—from the scope of the network elements to which new entrants may gain efficient, nondiscriminatory access, and that alone confirms that their approach is wrong.[32] See Pet. App. 43a-44a.

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[31] See *Random House Dictionary of the English Language* 690 (2d ed. 1987) (defining "facility" as "something designed, built, installed, etc., to serve a specific function affording a convenience or service" or "something that permits the easier performance of an action, course of conduct, etc."); 47 U.S.C. 153(46) (defining "telecommunications service" as "the *offering* of telecommunications for a *fee* directly to the public") (emphasis added).

[32] The incumbents suggest (*e.g.*, Bell Atl. Br. 69) that the definition of "network element" is restricted to "equipment used to route or transmit a call." That is plainly incorrect, as the statutory references to "billing," "collection," and "databases" make clear. Moreover, as the Commission and the Eighth Circuit observed, the incumbents' view would read out much of Section 3(29), which embraces a range of items "used in the transmission, routing, *or other provision* of a telecommunications service" (emphasis added). See J.A. 40, 116-117 (¶¶ 261, 516); Pet. App. 42a-44a. In any event, OSS *is* used in the "ordering, provisioning, maintenance and repair" of network transmission facilities. J.A. 118 (¶ 518); see also 47 C.F.R. 51.5. Similarly, as discussed

Finally, if Sections 3(29) or 251(c)(3) were ambiguous on this or any other issue, the Commission's approach would be entitled to substantial deference. See *Chevron*, 467 U.S. at 843-844.

b. The incumbents next contend that the Commission improperly designated vertical switching features (*e.g.*, call forwarding, caller identification, and call waiting) as "network elements." Bell Atl. Br. 71-72. In fact, however, the Commission expressly declined to unbundle the switch "into a basic switching element and independent vertical feature elements." J.A. 88 (¶ 414). What the Commission *did* determine is that vertical features "are provided through operation of hardware and software comprising the 'facility' that is the switch"; that they are thus " 'features' and 'functions' of the switch"; and that new entrants obtaining access to the switch are entitled to make use of those functions (just like other functions) of the element they have paid for. J.A. 87-88 (¶ 413) (quoting 47 U.S.C. 153(29)).

Without any textual basis, the incumbents would carve out of that switching element, and deny to new entrants, whatever functions the incumbents provide as retail services to their customers. See Bell Atl. Br. 72. That proposal flies in the face of Sections 3(29) and 251(c)(3), and the Commission reasonably rejected it. J.A. 87-88 (¶ 413). As the Eighth Circuit recognized, Section 251(c)(3) entitles new entrants to gain access to elements used in providing services whether or not the incumbent also offers those services to its customers and whether or not the new entrant could therefore resell them. Pet. App. 45a; see also pp. 36-41, *supra*. Indeed, the incumbents' approach would invite obvious abuse, as the Commission found: it would encourage them to evade their unbundled access duties altogether by recharacterizing elements as

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below, operator services and vertical switching features (*e.g.*, call forwarding) are also part of the call-routing network.

"services" and selling them as such to end users. J.A. 41 (¶ 263); see also Pet. App. 45a.

c. "Operator services" are the increasingly automated network "facilities and functionalities" (J.A. 125 (¶ 534)) that use hardware and software to route calls through the network and perform a variety of other call-related tasks, such as the disposition of calling-card (and other "0+") calls. See 47 C.F.R. 51.5. Similarly, "directory assistance" facilities enable callers to find, and complete calls to, the numbers they wish to call. The Commission found that "these facilities and functionalities are important to facilitate competition in the local exchange market," and that they fall within the two-part definition of "network element." J.A. 125-126 (¶ 534). The Eighth Circuit affirmed. Pet. App. 42a.

Because they are directly involved in call-routing, "operator services" fall within even the incumbents' cramped misdefinition of "network elements." See p. 47 and note 32, *supra*. The incumbents nonetheless conflate "operator services" with "live operators" and conclude that Congress could not have meant to include "people" within the scope of Section 251(c)(3). GTE Br. 57. "Operator services" and "directory assistance," however, describe complex network facilities and functionalities, not just the people who run them. Any element is controlled by people, and human involvement does not somehow remove an element from the scope of Section 3(29). Moreover, the incumbents' equation of "operator services" with "live operators" is anachronistic, as anyone with a calling card knows: such services, like directory assistance, are largely (and increasingly) automated. Finally, as with vertical features, nothing in the Act prohibits new entrants from obtaining access to network elements that an incumbent, characterizing such elements as "services," may provide to its customers. Pet. App. 42a, 44a-45a.[33]

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[33] We rest on the discussion in our opening brief (at 48-50) of the Commission's rules interpreting Section 252(i). We add two brief observations here. First, respondents' interpretation of that provision

CONCLUSION

The relevant portions of the judgments below invalidating the Commission's rules should be reversed, and the relevant portions upholding those rules should be affirmed.

Respectfully submitted.

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JUNE 1998

(*e.g.*, Bell Atl. Br. 73) reads "any * * * element" (of an agreement) to mean "all elements." That is not what Congress wrote or meant. Second, if this issue turns on a dispute about the extent to which the Commission's rules protect the incumbents against the plain language of this provision (see Bell Atl. Br. 74 n.43), the proper course is to remand to the Commission for clarification on that issue, not to impose respondents' own countertextual view of Section 252(i).