

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WORLDCOM, INC. et al.,

Petitioner,

No. 00-1002

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND THE UNITED STATES OF AMERICA,  
Respondents.

Wednesday,  
February 21, 2001

Washington, D.C.

The above-entitled matter came on for oral  
argument, pursuant to notice.

BEFORE:

THE HONORABLE STEPHEN F. WILLIAMS, Judge

THE HONORABLE DAVID B. SENTELLE, Judge

THE HONORABLE JUDITH W. ROGERS, Judge

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1 the origination or termination of telephone toll  
2 service. In other words, when you connect to your  
3 ISP, whether it be by dial up or whether it by DSL,  
4 you're doing that to get information services, not to  
5 make a long distance call.

6 The FCC cited the order of remand to this  
7 Court in Bell Atlantic. It made the same arguments in  
8 Bell Atlantic that it makes here. That is, at times  
9 noncarriers can be purchasers of exchange access, that  
10 the statement in nonaccounting safeguards order that  
11 ISPs do not use exchange access was wrongly decided,  
12 that historically, this has always been an interstate  
13 access service and the Court rejected them, rejected  
14 those arguments. First said in Bell --

15 THE COURT: Did we say they were wrong or  
16 simply that they were not adequately supported?

17 MR. BRADFORD: I think that the Court said  
18 that they were not adequately supported. I would go  
19 further and say they were wrong --

20 THE COURT: I understand you would go  
21 farther, but you're not saying we went farther?

22 MR. BRADFORD: No, I think -- the way I  
23 look at it, Your Honor, is that this Court sets some  
24 hurdles --

25 THE COURT: And it may be good enough.

1 You may not be giving up any essential ground when you  
2 say that.

3 MR. BRADFORD: Well, yes, Your Honor, but  
4 I think the way I look at this is you set some  
5 hurdles. You said you've got some questions you've  
6 got to answer here if you're going to go where you're  
7 going.

8 THE COURT: That's what I'm saying, it may  
9 be enough. You're not giving up your argument to  
10 admit that we didn't go as far as you're now trying to  
11 go.

12 MR. BRADFORD: Point 1 is the one I think  
13 that you're making, Judge Sentelle, which is if you're  
14 going to get there you at least got to try and jump  
15 the hurdles and this order doesn't do it. But  
16 moreover, I mean this is the second time around where  
17 they've given their best shot at jumping the hurdles.  
18 At some point you say if this is as good as you can  
19 do, if this is the best argument and it's not a  
20 reasonable argument, then it's foreclosed. It's not  
21 a permissible meaning of the --

22 THE COURT: Yes, except that this one  
23 didn't have the benefit, whatever that may be, of the  
24 Bell Atlantic decision, right?

25 MR. BRADFORD: That's right. I always

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1 MR. INGLE: Well, yesterday you put a  
2 "yes" into one of our advocates.

3 THE COURT: Depends on what the question,  
4 how the question is phrased.

5 MR. INGLE: I guess it is. The Commission  
6 is on remand looking into the matters that were sent  
7 back in the Bell Atlantic case in the context of  
8 reciprocal compensation. This is a different context.

9 I have to say that I found the arguments  
10 this morning as to what this Court did and did not  
11 decide in Bell Atlantic to be a little different from  
12 my reading of Bell Atlantic.

13 I felt the Bell Atlantic decision said at  
14 least with respect to the analysis that the Commission  
15 had put in this remand order, I thought the Court was  
16 saying those arguments were not presented in the  
17 Commission order that's on review and therefore  
18 Chenery bars them. The Court made some other  
19 observations, but I'm not sure those were necessarily  
20 parts of its holding. It seemed to me that what the  
21 Court held in that case was that the Commission had  
22 not sufficiently justified what it had done.

23 I did not perceive the Court there as  
24 saying --

25 THE COURT: I think Mr. Bradford finally

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1 admitted that during his tenure at the stand there.

2 MR. INGLE: Well, I suppose that's right.  
3 One quick point, my red light is on, if you don't mind  
4 my making it. Qwest has told us this morning that  
5 until the remand order that the Commission adopted,  
6 the whole world assumed that Section 251(c) applied  
7 only to -- well, this proceeding was started by an  
8 application, a petition filed by Qwest's predecessor,  
9 U.S. West in which they spent page after page after  
10 page in their entire summary asking for forbearance  
11 from the application of this statute to their advance  
12 services.

13 THE COURT: Not the whole world assumes,  
14 certainly.

15 MR. INGLE: Not the whole world, that's  
16 right. Thank you.

17 ORAL ARGUMENT OF DANIEL MERON, ESQ.

18 ON BEHALF OF INTERVENORS

19 May it please the Court, my name is Daniel  
20 Meron and I represent the Intervenors in support of  
21 the FCC and against the Qwest Petitioners.

22 Judge Sentelle, I'd just like to start  
23 addressing your question about the statute and the  
24 word "that is engaged in". The contrast, I think, the  
25 telecommunications carrier definition is pretty

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