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September 28, 2004

**Ex Parte**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; and Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68**

Dear Ms. Dortch:

On September 27, 2004, Michael Glover, Mark Evans (by phone), Ed Shakin, Scott Angstreich and the undersigned, representing Verizon, met with Austin Schlick, John Stanley, and Nick Bourne of the FCC's Office of General Counsel and Tamara Preiss and Steve Morris of the Wireline Competition Bureau to discuss Verizon's position in the ISP Reciprocal Compensation proceeding. Verizon's discussion was consistent with the Further Supplemental White Paper it filed on September 24, 2004. In particular, Verizon explained why an FCC finding that ISP-bound traffic is subject to *both* Section 201 and Section 251(b)(5) is legally unsustainable and why such a finding would significantly limit the FCC's current regulatory authority. Verizon also discussed why this concurrent jurisdiction approach would dim the prospects for any meaningful reform of the inter-carrier compensation regime. The attached transcript was also discussed in the meeting.

Consistent with Commission rules, I am filing one electronic copy of this notice and request that you place it in the record of the above-referenced proceedings.

Sincerely,

A handwritten signature in cursive script that reads "Donna Epps".

Attachment

cc: Nick Bourne  
Steve Morris  
Tamara Preiss  
Austin Schlick  
John Stanley

# TRANSCRIPT OF PROCEEDINGS

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

---

WORLDCOM INC., ET AL.,

Petitioner,

v.

No. 00-1002

FEDERAL COMMUNICATIONS COMMISSION  
AND THE UNITED STATES OF AMERICA,

Respondents.

---

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

WORLDCOM, INC. et al.,

Petitioner,

v.

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

No. 00-1002

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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APPEARANCES:On Behalf of Qwest Communications International,  
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C-O-N-T-E-N-T-S

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

(9:38 a.m.)

THE CLERK: Case No. 00-1002, et al.

WORLDCOM, INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

Mr. Frankel for Petitioner Qwest Communications; Mr. Bradford for Petitioner WorldCom, Inc.; Mr. Ingle for Respondents Federal Communication Commission; and Mr. Meron for Intervenors.

ORAL ARGUMENT OF JONATHAN J. FRANKEL, ESQ.

ON BEHALF OF PETITIONER QWEST COMMUNICATIONS, INC.

Good morning, Your Honors. Jonathan Frankel for Petitioner Qwest. I would like to try to reserve two minutes for rebuttal this morning.

Your Honors, I think the best way to understand this case is to look at what the Telecommunications Act did and did not change when it was adopted. Before the Act, communications companies were generally confined to one segment of the marketplace be it local, long distance, internet, cable. And each of these segments was regulated separately. The Act got rid of the barriers that

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1 limited companies to one kind of service, but it did  
2 not change the fact that different rules applied to  
3 different services. As a result, under Congress'  
4 design, a company can now provide a full range of  
5 services, but it still has to follow different rules,  
6 depending on which of these services it's engaged in  
7 providing.

8 This is how the Act was universally  
9 understood before the remand order, even for incumbent  
10 telephone companies. Congress provided a set of  
11 regulatory tools in Section 251(c) that were geared to  
12 the specific place, the local exchange network where  
13 Congress thought incumbents possessed some kind of  
14 legacy power.

15 Everyone accepted that when an incumbent  
16 used this network to provide telephone exchange  
17 service or exchange access, it would be subject to  
18 251(c), but they also accepted that when the incumbent  
19 would start from scratch in a new market, like long  
20 distance, where it wasn't using the local exchange  
21 bottleneck, Section 251(c) did not apply.

22 The remand order ignores Congress' service  
23 by service regulatory structure and turns Section  
24 251(c) into a ball and chain and incumbents carry with  
25 them into every new market they enter from now until

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1 the end of time, even when they aren't using the local  
2 exchange network at all.

3 No other type of communications company is  
4 regulated this way and it's a mistake. Congress  
5 defined what services made a communications company  
6 subject to local exchange carrier regulation, but the  
7 remand order never even bothered to cite that  
8 definition and the FCC does its best in its brief in  
9 this Court to run away from it.

10 Your Honors, there's a lot of  
11 fear-mongering in the FCC's and AT&T's briefs and I  
12 think it's important to take a minute to clarify what  
13 is and what is not at issue in this case, what will  
14 and won't happen if Qwest's petition for review is  
15 granted.

16 Granting the petition is not going to end  
17 the FCC's power to regulate DSL and it's not going to  
18 prevent new entrants from getting the loops they need  
19 to provide their own competitive DSL services. This  
20 appeal is about how DSL will be regulated, not whether  
21 it's going to be regulated.

22 As the FCC said in its brief, even if  
23 Qwest's petition is granted, the Agency still has  
24 authority under Sections 201 and 202 of the Act to bar  
25 unreasonable practices and prevent discrimination

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1 against competitors. Incumbents --

2 THE COURT: Isn't the impair standard the  
3 real limit for the degree of horrors that you've  
4 depicted?

5 MR. FRANKEL: Your Honor, it's only a  
6 partial limit at best. There's six duties of  
7 incumbent carriers in Section 251(c). The necessary  
8 and impair standard is only a limitation on the  
9 unbundling of local network elements under 251(c)(3).  
10 There's no such limitation for the obligation to  
11 resell services under 251(c)(4). There's no such  
12 limit on the obligation to interconnect at discounted  
13 rates under (c)(2) or the obligation to co-locate the  
14 equipment of your competitors in your own physical  
15 premises under 251(c)(6).

16 Just other things the FCC can still do  
17 after, if Qwest's petition for review is granted, the  
18 incumbents are still going to be required to tariff  
19 their DSL services and the FCC has authority over  
20 those tariffs. They're still going to have to  
21 interconnect their networks under the standards in  
22 251(a) to the networks of their competitors because  
23 those standards apply to telecommunications carriers  
24 generally, not local exchange carriers. And every  
25 single bottleneck facility that we care about will

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1 still be available to competitors under 251(c)(3)  
2 because all of these bottleneck exchange facilities  
3 are used to provide telephone exchange service and  
4 exchange access.

5 What will happen is that incumbents won't  
6 be required under 251(c)(4) to give their services to  
7 competitors at a steep discount, to be rebranded and  
8 resold as the competitor's own. Incumbents won't be  
9 required under 251(c)(3) to share their investments in  
10 nonbottleneck advance services elements with  
11 competitors who bore none of the costs of developing  
12 and deploying them.

13 Imposing regulations like those when there  
14 isn't actually some competitive bottleneck to worry  
15 about doesn't further competition. What it does is  
16 tie one competitor's hands behind its back to the  
17 detriment of consumers.

18 Your Honor, turning to the statutory  
19 argument we make, by the terms of the Act, a carrier  
20 is a local exchange carrier and subject to regulation  
21 as a LEC when it is engaged in the provision of  
22 telephone exchange service or exchange access.

23 Congress gave the FCC a certain set of  
24 regulatory tools and defined the circumstances when  
25 the Agency can use them. The FCC can't just ignore

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1 this definition and it can't turn its limited grant of  
2 authority into a roving commission to police the  
3 market however it sees fit.

4 THE COURT: As a pure matter of language,  
5 LEC has to meet the backward looking test and it has  
6 to be in the present an exchange -- what is the --

7 MR. FRANKEL: Local exchange carrier.

8 THE COURT: Local exchange carrier. What  
9 was I going to say? Go ahead, I --

10 THE COURT: It's concerning the matter of  
11 language.

12 MR. FRANKEL: Yes.

13 (Laughter.)

14 THE COURT: Looking back.

15 THE COURT: As a pure matter of language,  
16 doesn't the -- isn't the FCC's position permissible?

17 MR. FRANKEL: I don't think so, Your  
18 Honor. It's not -- the test that's backward looking  
19 is incumbent LEC, not local exchange carrier.

20 THE COURT: And it first must be a LEC to  
21 be an ILEC.

22 MR. FRANKEL: That's exactly right, Your  
23 Honor. If you look at how 251(b) and 251(c) are  
24 structured, all local exchange carriers are subject to  
25 regulation under 251(b). Some subset of those

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1 carriers are subject to additional obligations under  
2 251(c). It's right there on the face of 251(c).

3 THE COURT: Yes. Isn't it reasonable to  
4 say a LEC is a LEC, even when it's doing non-LEC  
5 things?

6 MR. FRANKEL: I don't think so, Your  
7 Honor. Congress chose language that focuses on the  
8 present activity or the activity whose regulatory  
9 status is in question, is engaged in the provision of.  
10 It did not say elect as a provider of local exchange  
11 services, like it said for telecommunications  
12 carriers. It did not say that a LEC is an entity that  
13 provides telephone exchange service or exchange  
14 access.

15 The second sentence of the definition of  
16 a local exchange carrier makes clear that the phrase  
17 "is engaged in the provision of" has to refer to your  
18 specific activity and not your general involvement in  
19 the line of business because you are a local exchange  
20 carrier if you are engaged in providing telephone  
21 exchange service or exchange access, but you are not  
22 a local exchange carrier if you are engaged in  
23 providing commercial mobile services.

24 Now given that every large LEC in the  
25 country is in both the wire line and the wireless

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1 businesses, that provision makes no sense unless  
2 engaged in the provision of refers to your particular  
3 activity and not your general involvement in a line of  
4 business.

5 Your Honor, there are many different kinds  
6 of --

7 THE COURT: That's 153 what?

8 MR. FRANKEL: 26.

9 THE COURT: 26. Okay, thank you.

10 MR. FRANKEL: Is the definition of a local  
11 exchange carrier.

12 Your Honors, there are many different  
13 kinds of local service and Section 251 itself  
14 recognizes three of them: telephone exchange service,  
15 exchange access and information access. And it's only  
16 the first two that define a LEC according to Congress.

17 The FCC concedes in its brief that DSL  
18 falls squarely within that third category, information  
19 access. This is exactly what the Commission had held  
20 in the Nonaccounting Safeguards Order where it said  
21 that internet service providers use information access  
22 and not exchange access to connect to their customers.  
23 That's at page 262 of the Joint Appendix, note 621.  
24 The FCC addressed the very question at issue in this  
25 case and found exactly as Qwest is arguing right now.

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1           The FCC tries to respond by saying well  
2 information access is nothing more than a species of  
3 exchange access and always has been, but this is  
4 incorrect.       The AT&T consent decree defined  
5 information and exchange access as complementary  
6 services sold to two groups of customers.    The  
7 Nonaccounting Safeguards Order at the same place  
8 acknowledges that the MFJ, the AT&T consent decree  
9 recognized the difference between the two and Congress  
10 sharpened the differences between the two terms by  
11 adding the telephone toll service requirement when it  
12 amended those definitions in 1996.

13           Your Honors, I would like to reserve some  
14 time for my rebuttal.   I see I have a minute left.  
15 Thank you.

16           THE COURT:   That's fine.

17           MR. FRANKEL:   Thank you.

18           ORAL ARGUMENT OF DARRYL M. BRADFORD, ESQ.

19           ON BEHALF OF PETITIONER WORLDCOM, INC.

20           Good morning, Your Honors.    Darryl  
21 Bradford.   I too would like to try and reserve two  
22 minutes for rebuttal.

23           My petition is narrower.   It focuses on  
24 the FCC's finding that the link between a subscriber  
25 and an ISP when using DSL technology is exchange

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1 access.

2 The FCC made that determination based on  
3 its reciprocal compensation ruling that this Court  
4 vacated in Bell Atlantic for want of reasoned decision  
5 making. It utilized the same analysis that it did in  
6 support of the reciprocal compensation ruling which  
7 this Court vacated for want of reasoned decision  
8 making and it did so without considering this Court's  
9 analysis in Bell Atlantic. It can't do that. When  
10 this Court gives an interpretation and finds a defect  
11 in the FCC's analysis, it's got to address that defect  
12 in an order. And as a summary matter, I think it has  
13 to go back to them for them to perform their statutory  
14 duty.

15 Traffic is exchange access if it is made  
16 for the purpose of the origination or termination of  
17 telephone toll service. It's undisputed that ISPs do  
18 not provide telephone toll service. That's what this  
19 Court indicated in Bell Atlantic.

20 ISPs provide information service, a  
21 category mutually exclusive from telephone toll  
22 service.

23 ISPs, therefore, connect as this Court  
24 suggested in Bell Atlantic, for the purpose of  
25 providing information service, not for the purpose of

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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.

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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

1 wondered --

2 THE COURT: And you've justly argued that  
3 the Commission ought to try again with those benefits,  
4 whatever they may be.

5 MR. BRADFORD: Yes, and the fact that they  
6 chose not to do so, I think is very telling. They're  
7 saying this is what it is. This is our argument, this  
8 is our best shot.

9 THE COURT: I've wondered why they didn't  
10 do that. It occurred to me one thing is they might be  
11 embarrassed by the fact that they had already asked  
12 for this one to be remanded.

13 MR. BRADFORD: Well, maybe so, Your Honor,  
14 but I wouldn't give that much of an excuse to -- they  
15 may be, but nonetheless, if it's the right thing to  
16 do, then that's what the Agency should do. I mean I  
17 feel a little bit awkward quoting this Court's  
18 language to itself, but here's the language --

19 THE COURT: That doesn't slow people down  
20 at all.

21 (Laughter.)

22 MR. BRADFORD: You know me too well, Judge  
23 Sentelle.

24 With reference, as I read it, to the order  
25 on remand, after you said that look it, you didn't

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1 deal with this in the order. These arguments aren't  
2 in the order so under Chenery we can't count it, but  
3 you went on to say -- you could have stopped there,  
4 but you went on there to leave the challenge which was  
5 you said at page 8, "Nor did the Commission even  
6 consider how regarding noncarriers as purchasers of  
7 exchange access fits with the statutory definition of  
8 that term. A call is exchange access if offered for  
9 the purpose of the origination or termination of  
10 telephone toll services. Citation omitted. As MCI  
11 WorldCom argued, ISPs provide information services  
12 rather than telecommunications. As such, ISPs connect  
13 to the local network for the purpose of providing  
14 information services, not originating or terminating  
15 telephone toll services", citing to MCI WorldCom's  
16 brief.

17 The FCC doesn't deal with this language in  
18 its order. It doesn't deal with this analysis in its  
19 order.

20 THE COURT: So given the time line  
21 involved, wouldn't it be an order for us to at most  
22 vacate and remand for the FCC to deal with that  
23 language rather than to reach the decision saying  
24 you're wrong in your decision ultimately in this case?

25 MR. BRADFORD: I suggest it as a summary

1 matter, Your Honor, that right away that it ought to  
2 be remanded given the time line and they ought to have  
3 a chance to do that over again.

4 I though am having read their brief and  
5 having seen it in two orders now, at a point where I  
6 think the Court would be well within its discretion to  
7 say look, we gave them an opportunity. There is not  
8 a reasonable construction of this statute that they  
9 have come up with where this link becomes exchange  
10 access. I mean they don't deal with this language at  
11 all in their brief. They come up in one fleeting  
12 reference and they say well the words for the purpose  
13 of meaning in order to cause. Well, that's not in the  
14 order, so it's a problem. But even if you took it, I  
15 mean for the purpose that language is not ambiguous.  
16 It's very clear. It means what the aim, what the  
17 goal, what the intent and that's not in order to  
18 cause. You can have many purposes in taking an action  
19 that cause other actions, but that's not necessarily  
20 your purpose. I think the FCC confuses purpose and  
21 effect.

22 THE COURT: Could I just go back to Judge  
23 Sentelle's question. Is there any indication that the  
24 Commission has determined not to consider this further  
25 after the Bell Atlantic remand?

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1 MR. BRADFORD: Its decision, Your Honor,  
2 to come forward in this Court and defend this order.

3 THE COURT: But that's it, the filing of  
4 this brief? Is that what you're totally relying on?

5 MR. BRADFORD: I am not aware of anything  
6 where they have -- if this Court tells them to  
7 reconsider their decision, Your Honor, obviously I  
8 trust the FCC will do that.

9 But there's no indication anywhere that  
10 I've seen that they intend to reconsider this decision  
11 absent this Court compelling them to do so.

12 THE COURT: Aren't there proceedings?  
13 Aren't there remand proceedings from Bell Atlantic?

14 MR. BRADFORD: There is. There is that  
15 order that is back before them. I mean there is sort  
16 of this round robin of you knock down one order and  
17 then there's an other one up and they cite to the  
18 other order and they say well as we found in this  
19 order and then that one gets remanded and --

20 THE COURT: But isn't there a sign of  
21 Agency activity with relation to that one?

22 MR. BRADFORD: Yes, with relation to that  
23 issue, absolutely, Your Honor. That is on  
24 reconsideration and it would be -- it will be  
25 interesting to see what that order comes back. I

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1 would suggest that these two orders in this respect go  
2 hand in hand rather than constantly having this sort  
3 of treadmill of appeals on the issue and get the issue  
4 resolved once and for all as to what this link is.

5           The other point that I'd like to make,  
6 Your Honor, is that with regard to whether this is  
7 telephone exchange service, I think it's very telling  
8 that the FCC itself found that this same  
9 communication, when it's directed to a corporate  
10 headquarters is telephone exchange service. So the  
11 FCC had no problems saying this meets all the  
12 requirements of telephone exchange service except for  
13 one and then citing back to the reciprocal  
14 compensation order they say well the one difference  
15 between this being terminated to a corporate network  
16 and terminated to an ISP even though they could be in  
17 the same physical building next to each other, is that  
18 the call doesn't terminate at the ISP which takes us  
19 right back to the analysis in the reciprocal  
20 compensation ruling.

21           The language of the Act doesn't say that  
22 for it to be telephone exchange service it must  
23 terminate within the exchange. It just says it has to  
24 be service within the exchange. And whether or not  
25 it's telephone exchange service can't be dependent

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1 upon the identity of the end user. So even if you  
2 were going to look at this which I don't think you  
3 should do as an end to end basis, I don't see how you  
4 can say on an end to end basis, an ISP which the Court  
5 has found to be an end user isn't at one of the ends.

6 The real distinction between telephone  
7 exchange service and exchange access is the purpose  
8 for which the local exchange is being utilized.  
9 Exchange access is defined by incorporating access to  
10 telephone exchange service within its definition, so  
11 it can't be termination as the key.

12 Thank you, Your Honor.

13 THE COURT: Thank you.

14 ORAL ARGUMENT OF JOHN E. INGLE, ESQ.

15 ON BEHALF OF RESPONDENTS, FEDERAL COMMUNICATION

16 COMMISSION

17 Good morning. My name is John Ingle. I'm  
18 representing the FCC in this. Can you hear me?

19 We've really got a couple of cases here  
20 that are quite different. I think the first question  
21 is to what set of carriers and perhaps services that  
22 those carriers provide does Section 251(c) apply? The  
23 second set of issues has to do with whether various  
24 advance services that are provided through this  
25 technology are local exchange telephone exchange

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1 services or exchange access services and I think I'd  
2 like to address them in that order. I'd like to  
3 address first the Qwest argument.

4 Section 251 sets forth a hierarchy of  
5 responsibilities that various types of carriers have  
6 and it's sort of an increasing obligation that depends  
7 on the status, the marketplace status of the various  
8 carriers. Section A has certain requirements that  
9 apply to everybody who is a common carrier. Section  
10 B has certain obligations that apply to everybody who  
11 is a local exchange carrier. And Section C applies  
12 only to incumbent local exchange carriers who are the  
13 people who were there on the ground and had what was  
14 effectively a monopoly that the 1996 Act was designed  
15 to combat.

16 Now it's our view --

17 THE COURT: What do you see as the bad  
18 consequences, the frustration of congressional purpose  
19 from Qwest's interpretation?

20 MR. INGLE: The frustration, it seems to  
21 me that Qwest's interpretation would leave Qwest free  
22 to defeat, in particular, the unbundled element  
23 provision of Section 251(c) which by the way, which in  
24 the way Congress wrote it is supposed to apply to all  
25 telecommunications services.

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1           Now these advanced technologies that we're  
2 talking about here are used to provide services both  
3 the data services and the voice services that I  
4 believe Qwest acknowledges are telecommunications  
5 services. There's another case in the pipeline and I  
6 hate to keep bringing up other cases because these  
7 things are tripping over each other. By the way, I  
8 think we probably in hindsight should have asked for  
9 a second remand in this case after Bell Atlantic and  
10 I think the answer to that is that we do at some level  
11 have embarrassment that causes us not to want to do  
12 that sort of thing. It probably would have been  
13 better practice had we done that and I think our  
14 litigation staff has to take the responsibility for  
15 that.

16           There were reasons why that wasn't such a  
17 silly choice and I'll try to come to those in a  
18 minute.

19           The advance services that we're talking  
20 about here are provided through the local loop. It's  
21 a conditioned local loop that an ILEC uses in order to  
22 provide its own version of these XDSL, DSL services.  
23 If the ILECs could refrain from making that available  
24 to competitors as an unbundled network element, those  
25 competitors would essentially have to start from

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1 scratch if they wanted to offer competing XDSL-type  
2 services, whereas if XDSL facilities are made  
3 available to them as an unbundled element, they don't  
4 have to go through that expense. And one of Congress'  
5 purposes in Section 251(c) and in particular in (c)(3)  
6 which is the network element provision was to give  
7 options to competitors as to how they were going to  
8 make their entry into the marketplace and it was  
9 believed that using the network elements, particularly  
10 those network elements that are part of a bottleneck  
11 would enhance their ability to get in and compete  
12 effectively.

13 Now the case that I mentioned --

14 THE COURT: What about the resulting  
15 application of these -- of the duties other than  
16 251(c)(3)?

17 MR. INGLE: Well, I don't know --

18 THE COURT: The Qwest argument is that  
19 that's completely pointless.

20 MR. INGLE: It is certainly true that  
21 there is elsewhere a requirement to interconnect, for  
22 example. It is true also that there is a requirement  
23 elsewhere for resale. But Congress didn't just say  
24 interconnect and allow resale. It has special  
25 provisions for interconnection and special provisions

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1 for resale in (c) that are different from the  
2 interconnection and resale provisions that are  
3 elsewhere in the act. For example, interconnection in  
4 subsection (c) requires that rates be set at a certain  
5 just and reasonable level, whereas interconnection  
6 under subsection (a) requires only that it be  
7 nondiscriminatory. Resale under subsection (c)  
8 requires that there be a discount allowed to resellers  
9 of any service that an ILEC provides to the public at  
10 a retail basis, whereas resale under subsection (b)  
11 does not require the discount. So there is a  
12 difference and there is a frustration in our view of  
13 the congressional purpose.

14 THE COURT: No, I'm sure that Qwest is  
15 very alert to there being a difference.

16 MR. INGLE: Yes.

17 THE COURT: The question is whether it  
18 makes sense, whether Congress would plausibly have  
19 intended from the prior history of a LEC that it be  
20 subject to the more demanding duty.

21 MR. INGLE: Well, it seems that Congress  
22 addressed that --

23 THE COURT: With respect to something  
24 other than the things that bring it into the LEC  
25 definition.

1 MR. INGLE: Well, once again, the LEC  
2 definition is not meaningless. We don't assert that.  
3 We assert that the significant definition for purposes  
4 of 251(c) is the definition that's contained in  
5 Section 251(h) and that is a definition that says once  
6 again, it's a LEC. To begin with, it is a LEC, but --

7 THE COURT: I hoped you weren't going to  
8 go the other way --

9 MR. INGLE: No, no, no. But it is the LEC  
10 who on such and such a date, the date of enactment of  
11 this legislation was provided.

12 THE COURT: But it's still got to be a  
13 live LEC.

14 MR. INGLE: Yes, yes. And I mean Qwest is  
15 certainly live.

16 THE COURT: But the question is whether in  
17 some activity that is not a component of its being a  
18 LEC, it should be subject to the duties?

19 MR. INGLE: Well, I'll say it seems to me  
20 that what the statute did was say that the LECness of  
21 Qwest and others is established as of that date and  
22 that --

23 THE COURT: But if it has to be a LEC and  
24 if the definition of LEC has present tense verb  
25 involved in it, isn't the question of what it is doing

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1 -- I hope we're not going to get down to what the  
2 definition of "is" is --

3 (Laughter.)

4 -- but what it is doing at the time of the  
5 putative regulation here.

6 MR. INGLE: Yes, but what -- the problem  
7 with the reading that Qwest would give the statute is  
8 that Qwest would add words to the statute to the  
9 effect that a LEC is one who provides these services  
10 and only to the extent that is providing these  
11 services. In other words, a LEC is defined as someone  
12 who provides local exchange service and exchange  
13 access. They would add to that definition and if a  
14 LEC provides other services it is no --

15 THE COURT: You're doing what you're  
16 saying they're doing. You're changing the wording of  
17 the definition.

18 A LEC is not a person who provides. A LEC  
19 is a person that is engaged in the provision of.

20 MR. INGLE: Yes.

21 THE COURT: Now grant you, their argument  
22 puts words in, but yours just changed the wording too.

23 MR. INGLE: Well, let me suggest, Judge  
24 Sentelle, that when Congress wanted to restrict the  
25 activities that are being regulated to those that were

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1 specifically listed in the definition itself, it knew  
2 how to do that. It did that with respect to  
3 telecommunications carrier, for example. It defined  
4 telecommunications carrier and then it said that  
5 you're going to regulate those people as common  
6 carriers only to the extent that they're doing what  
7 was in the definition. They didn't do that here.

8 THE COURT: But there's even a suggestion  
9 in the LEC definition, while it's not exactly  
10 parallel, but such term does not include a person  
11 insofar as the person is engaged in the provision of  
12 commercial mobile.

13 MR. INGLE: I think that cuts our way  
14 because --

15 THE COURT: I'm saying it does.

16 MR. INGLE: Yes, yes.

17 THE COURT: I'm suggesting that it does,  
18 yes.

19 MR. INGLE: Congress there specifically  
20 picked out one. There's another definition that has  
21 the same sort of provision, the definition of rural  
22 telephone company. A rural telephone company is one  
23 who does certain things. But it's rural only to the  
24 extent that it is doing those things. Qwest has got  
25 many rural telephone companies in its family, in its

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1 corporate family, but Qwest itself is not a rural  
2 telephone company by virtue of that, simply because  
3 the definition made that clear by saying to the extent  
4 that language is missing from the LEC definition and  
5 we think has no place in --

6 THE COURT: Is it the case that your  
7 position rests on the first step of Chevron analysis,  
8 that is to say that it clearly is supported by the  
9 intent and language of Congress or is this the second  
10 step where yours is a permissible or reasonable  
11 reading?

12 MR. INGLE: I like the second better. We  
13 briefed the case giving ourselves both outs. We think  
14 this is the best reading of the language because of  
15 the absence of words that are crucial to the argument  
16 that Qwest is making, but the Commission believes also  
17 that there is some ambiguity in this and that's our  
18 position on that.

19 I think having said that, the obligations  
20 themselves under subsection (c) contain some  
21 limitations on this and prevent this from going too  
22 far. For example, as Judge Williams pointed out, the  
23 impair and necessary standard limits the Commission's  
24 ability to go out and bring in just any --

25 THE COURT: Right, well, that works for 3.

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1 MR. INGLE: That works on 3. Now as to  
2 the interconnection and co-location requirements,  
3 there the obligations themselves are limited  
4 specifically. They're limited specifically locally to  
5 telephone exchange and exchange access services. As  
6 to resale, I think you've got me there. I don't know  
7 what the limitation would be, except for the fact that  
8 we now have some competition in some of these markets  
9 and there's some hope that the resale discount  
10 wouldn't be a whole lot.

11 THE COURT: But does (c) (4) incorporate --  
12 we agreed (3) probably does incorporate a competition  
13 problem, but (4) doesn't seem to literally, does it?

14 MR. INGLE: No, I don't think. I don't  
15 think it does.

16 THE COURT: The Commission hasn't actually  
17 acted, has it, under (4) to -- acted to apply (4) to  
18 LECs not engaged in LEC activity?

19 MR. INGLE: Well, this Court did in the  
20 Ascent case. That's the decision this Court made a  
21 few weeks ago in which we were reversed because the  
22 Commission tried to exempt a LEC from the resale  
23 requirement under subsection (c) by virtue of the fact  
24 that we were requiring the LEC in a merger situation  
25 to create a separate entity in order to provide

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1 advance services.

2 Now the question of the applicability of  
3 c(4) of Section (c) to advance services was not  
4 strictly speaking before the Court, but the Court and  
5 all the parties to that proceeding assumed that the  
6 merged LEC in that circumstance would have been  
7 obliged to offer its services for resale, its advance  
8 services for resale, but for the Commission's grant of  
9 this exemption by virtue of the -- so (a) the  
10 Commission has addressed it in quite the terms that  
11 you suggest, but this Court has at least in one  
12 published opinion assumed the applicability of this  
13 statute to that circumstance.

14 I'm going to have to move on to the MCI  
15 argument in order to get anything said at all about  
16 that, the WorldCom argument.

17 THE COURT: Is there essentially anything  
18 that can be said to overcome the proposition that the  
19 Commission should look at it again?

20 MR. INGLE: Judge Williams, we are looking  
21 at it again in the direct remand of the Bell Atlantic  
22 situation. Bell Atlantic --

23 THE COURT: Is that a way of saying no,  
24 there's nothing that can be said to --

25 (Laughter.)

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 wre 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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1 telling because there Congress said that a  
2 telecommunications carrier shall be regulated as a  
3 common carrier only to the extent that it is engaged  
4 in, so obviously Congress didn't think that the words  
5 "that it is engaged in" in themselves had that effect  
6 without the addition of the words "only to the extent  
7 that".

8 In addition, if you look at the definition  
9 of rural telephone exchange carrier, that provision  
10 also says that a rural telephone carrier and this is  
11 153(37) means a local exchange carrier or operating  
12 entity to the extent that such entity provides service  
13 in certain rural areas. And Congress did that  
14 intentionally because obviously you can have a carrier  
15 that provides service in some rural areas and also in  
16 some city areas.

17 The Commission's statutory argument is  
18 also supported strongly by the structure of 251 itself  
19 in that certain of the duties very clearly say, for  
20 example, 251(c)(2) that you get interconnection for  
21 the purposes of routing exchange service and exchange  
22 access, whereas for example, 251(c)(3) or (c)(4) uses  
23 the phrase "any telecommunications service."

24 Now if Qwest were correct, Qwest's  
25 argument is that in fact the resale duty apply only to

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1 its exchange service and exchange access services. If  
2 that was true, Congress easily would have written,  
3 just like it did in 251(c)(2) it would have said  
4 251(c)(4) you have a duty to provide for resale your  
5 exchange service and exchange access services. It  
6 didn't say that. It said "any telecommunications  
7 service."

8 Now addressing Judge Williams, the  
9 question you asked as to what would be ultimate impact  
10 of this, our concern to competition. The reality is  
11 is that incumbent LECs by virtue of the fact that they  
12 had a monopoly in their areas, have monopoly control  
13 over certain facilities that are used to provide lots  
14 and lots of different telecommunications services.  
15 Now today Qwest says well, every bottleneck facility  
16 we own you can already get under 251(c)(3) even if we  
17 prevail in this case, but what they're carefully  
18 omitting is any reference in their brief, even in  
19 reply when they were challenged about this very point,  
20 with respect to the Commission's line sharing order.  
21 What the Commission has done subsequent to the local  
22 competition order is the Commission determined that  
23 the high frequency portion of the loop, it's basically  
24 the high spectrum in the loop can be available as a  
25 separate network element, two competitors who want

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1 only to provide advance broadband services and who do  
2 not want to provide voice services. And that's a  
3 separate element.

4 Now that's an element that at least today  
5 Qwest has not used to provide voice services. It uses  
6 it only to provide advance services and we very much  
7 believe Qwest's agenda is here is to argue in light of  
8 all of the disputes about that order that it has no  
9 obligation to provide that high frequency portion of  
10 the loop to people as an element because it only uses  
11 that element for advance services. But what's  
12 ridiculous about that is although you're talking about  
13 different spectrums, this is the same twist of copper  
14 wire pair that they have monopoly power over by virtue  
15 of the fact that they wired up these neighborhoods at  
16 a time they had a monopoly. It's the same monopoly  
17 paradigm. It would be very strange to say that they  
18 have an obligation to enable their loops to provide it  
19 for voice but not for data when you want just a high  
20 frequency portion of the loop.

21 And it turns out their contrary parade of  
22 horrors that they offer to the Court, the mass  
23 majority of them if you go through their brief are  
24 addressed already by the other express provisions of  
25 the Act. In their briefs, they argue that -- they

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1 mention, for example, information services and cable  
2 services. Well --

3 THE COURT: If we write a sentence in an  
4 opinion that says the DSL is the same copper wire as  
5 any other exchange service in that geographic  
6 location, is that going to be a correct sentence?  
7 There's no other mechanics involved, mechanical entity  
8 involved here, physically, except the same wire that  
9 would be there without the DSL. Is that correct?

10 MR. MERON: The connection between the  
11 home and equipment in the central office is the same  
12 copper wire pair. That is correct. There's  
13 additional electronics that you add to that in order  
14 to --

15 THE COURT: But there has to be an  
16 additional component added, right?

17 MR. MERON: That's right.

18 THE COURT: So it's not the case that  
19 would simply a silly claim that you're using the same  
20 copper wire and nothing else for the advance services.

21 MR. MERON: That's right, you are adding  
22 stuff and the things that you're adding, for example,  
23 the --

24 THE COURT: So I understood you to be  
25 making the argument that there was nothing additional

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1 added for the advance services. That's not the case,  
2 is it? I mean there is something additional added,  
3 right?

4 MR. MERON: There's something additional  
5 added, but the additional things that are added, for  
6 example, the packet switch, the Commission has  
7 determined that is not a network element. We do not  
8 access, competitors do not get access to the packet  
9 switch.

10 The question is do you get access to the  
11 loop or to the high frequency portion of the loop or  
12 to other facilities that are being used for other  
13 forms of telecommunications service.

14 Now in terms of the parade of horrors,  
15 Judge Williams, the Act in the definition of  
16 telecommunications carrier has a provision which I  
17 reference earlier, 153(44), that says "a  
18 telecommunications carrier shall be subject to common  
19 carriage regulation only to the extent it is providing  
20 telecommunications services." That means that when  
21 Qwest is providing cable services or information  
22 services which are not telecommunications services,  
23 none of the Title 2 obligations apply at all, let  
24 alone the specific obligations in 251(c).

25 As for wireless, I'm so perplexed by their

1 argument because they point out repeatedly that  
2 there's an express carve out for wireless in the  
3 definition of local exchange carrier.

4 And finally, in their briefs they mention  
5 satellite services. Again, an express carve out.  
6 153(44)'s last clause allows the Commission in its  
7 discretion to determine that fixed and mobile  
8 satellite services do not constitute common carriage.

9 And so most of their parade of horrors  
10 actually can't even occur under a statute. They're  
11 already addressed in other ways. And so at the end of  
12 the day, Mr. Ingle already explained why the  
13 limitations of 251(c)(3) and (c)(2) and that are  
14 incorporated in (c)(6) and since (c)(6) you only get  
15 access to -- for co-location, you only can use co-  
16 location for either interconnection which has  
17 limitations in (c)(2) or for access to elements which  
18 is (c)(3) which is subject of a (d)(2) necessary and  
19 impair test.

20 So at the end of the day what you're  
21 talking about is just the resale obligation. The  
22 truth is it's not that perplexing. The resale  
23 obligation is a revenue neutral obligation, at least  
24 if it's priced according to the Act's standards for  
25 the ILEC because it's priced at the retail services

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1 minus the cost that they avoid. And inter-exchange  
2 carriers which they constantly say well, assert to  
3 suggest that we have a duty to make our inter-exchange  
4 services available for resale.

5 Long distance carriers already have an  
6 obligation to make their services available for resale  
7 and the effect of the competitive market and the fact  
8 that there's a vigorous competition --

9 THE COURT: Mr. Ingle acknowledged a  
10 different duty, right?

11 MR. MERON: Well, the only --

12 THE COURT: The ordinary resale duty is  
13 different from the (c) (4) resale duty.

14 MR. MERON: In only one respect and that  
15 is that there is a pricing requirement, a formula.

16 THE COURT: Prices are often pretty  
17 important.

18 MR. MERON: They are, Your Honor, but with  
19 the pricing formula that (c) (4) contains or 252(d)  
20 incorporates is a formula designed to replicate what  
21 the forces of the competitive market already do and  
22 that is the inter-exchange services market is  
23 competitive. That means that the retail prices  
24 approach cost and what 251(c) (4) says is that the  
25 price for the wholesale service is your price for the

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1 retail minus the cost that you avoid in not having to  
2 retail the service. Well, if a long distance carrier  
3 like AT&T tried to price its wholesale services in a  
4 way that kept some of that as excess profit, MCI would  
5 come in or WorldCom would come in and undercut it. So  
6 really at the end of the day you're just left with the  
7 same competitive market effect.

8 THE COURT: All right, thank you. Mr.  
9 Frankel?

10 REBUTTAL ARGUMENT OF JONATHAN J. FRANKEL, ESQ.

11 ON BEHALF OF PETITIONER QWEST COMMUNICATIONS, INC.

12 Your Honor, I have a series of brief  
13 points to make and I would like to address the  
14 definition of a telecommunications carrier which seems  
15 to be the centerpiece of the FCC's and AT&T's  
16 arguments, but first, I'd like to say in Qwest's  
17 original petition before the Commission that Mr. Ingle  
18 referred to, all the petitions are in the Joint  
19 Appendix. It's very clear that Qwest said we do not  
20 believe 251(c) applies at all. Given that the  
21 Commission is going the other way, we'd like  
22 forbearance.

23 Second, as to Qwest's so-called agenda  
24 about line sharing, you'll notice in AT&T's reply  
25 brief where they accuse of us trying to do this

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1 they're not citing a single piece of Qwest advocacy  
2 anywhere in the country. Qwest has voluntarily  
3 entered into line sharing agreements throughout the  
4 country. In addition, the full frequency spectrum  
5 within the loop is used for telephone exchange  
6 service. It will still be available as a bottleneck  
7 element under Section 251(c)(3).

8 As for the definition of the  
9 telecommunications carrier in Section 153(44), I think  
10 it's helpful to actually look at the definition  
11 because it actually makes Qwest's point. It's  
12 reprinted on page A5 of WorldCom's brief in the  
13 statutory addendum. And what's most important about  
14 that definition is that it contains two sentences.  
15 The first sentence says that the term  
16 "telecommunications" means any provider of  
17 telecommunications services with certain exceptions.  
18 The second sentence talks about how there's a carve  
19 out if you are engaged in providing telecommunications  
20 services.

21 Your Honor, it's clear from the very  
22 definition that the FCC and AT&T are citing from the  
23 fact that one sentence uses the term "provider", the  
24 other sentence uses the term "is engaged in providing"  
25 which the relevant language that we're trying to

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1 figure out what it means, that the two mean different  
2 things. Being a provider of service it is a general  
3 status. And you need a carve out for certain  
4 activities, engaged in providing telecommunications  
5 services in the second sentence doesn't refer to the  
6 whole of your activities.

7 The reason that you've got the phrase "to  
8 the extent that" there and the reason you've got the  
9 "insofar as" phrase in the definition of a LEC is  
10 simply because they're carve outs of the first  
11 obligation that's articulated.

12 Next point I'd briefly like to make is  
13 about the remand or about WorldCom's request for a  
14 remand. Qwest is not opposed to vacating and  
15 remanding this order as long as it is vacated so that  
16 we don't have the same kinds of problems that we had  
17 in the Ascent case where the FCC continued to apply  
18 the order while it was supposedly reconsidering all  
19 the issues.

20 I would like to point out though that in  
21 the remand order, the FCC has interpreted, finally, as  
22 far as its concern what both telephone exchange  
23 service and exchange access mean. The Bell Atlantic  
24 decision doesn't talk about the meaning of telephone  
25 exchange service at all.

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1 THE COURT: Your time being up I feel  
2 quite at ease in asking you a question.

3 MR. FRANKEL: Sure.

4 (Laughter.)

5 THE COURT: I want to make sure I fully  
6 understand the extent of your argument on what a LEC  
7 is.

8 MR. FRANKEL: Sure.

9 THE COURT: You would say that the  
10 sentence "the local exchange carrier" means any person  
11 that is engaged in the provision of telephone exchange  
12 services or exchange access, clearly to the extent of  
13 getting you to defeat the FCC on a Chevron basis,  
14 means that that person is a local exchange carrier  
15 only when it is engaged in that process?

16 MR. FRANKEL: That's right, Your Honor.

17 THE COURT: Is that what you're saying?

18 MR. FRANKEL: Yes. As you can see from  
19 the contrasting language in --

20 THE COURT: If I were to say that a lawyer  
21 is a person who is engaged in the practice of law,  
22 does that mean that you're not a lawyer any more when  
23 you are pitching softball for the firm team?

24 MR. FRANKEL: Your Honor, I'm not subject  
25 to the rules of professional responsibility or the

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1 D.C. Bar regulations when I'm playing softball.  
2 That's the relevant distinction.

3 This question is about when you can be  
4 regulated as a local exchange carrier when you're  
5 subject to the specific rules in 251(c) that apply to  
6 one subset of local exchange carriers.

7 Your Honor, just going back to this  
8 question of the remand, the only point I would like to  
9 make is that again, the FCC has finally interpreted  
10 what these statutory terms --

11 THE COURT: Totally unfair, but to draw an  
12 analogy to an area of law you probably don't practice  
13 in, in labor law when you have established that a  
14 company is engaged in interstate commerce, the federal  
15 labor law applies to that company even when the  
16 particular acts that are being regulated of the  
17 company employing the employee who's trying to  
18 organize under the NLRB is not engaged in interstate  
19 commerce.

20 Why is this not at least for Chevron  
21 purposes, ambiguously possibly interpreted to act like  
22 the labor law does, rather than like the D.C. Bar code  
23 does?

24 MR. FRANKEL: Sure, I mean Your Honor,  
25 I'll admit, I don't know the specific text of the

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1 labor laws and it does seem to be a question of  
2 statutory texture.

3 We have taken the position and we still  
4 believe that this is a Chevron step one argument and  
5 we would also think that the same arguments that we've  
6 presented in our brief would demonstrate why the  
7 Commission's interpretation of this language --

8 THE COURT: Well, without going through  
9 either code, bar code or labor law, it would seem that  
10 as a language element that we suggested a while ago  
11 the terms "that is engaged in the provision of"  
12 etcetera can be simply a modifying phrase, modifying  
13 the person, describing the person and is regulated by  
14 or defined by this sentence as opposed to being a  
15 present tense active verb describing what that person  
16 is doing at this moment.

17 Why does that not at least create enough  
18 ambiguity to take the FCC past Chevron 1 defeat?

19 MR. FRANKEL: Because Your Honor, I think  
20 Section 153(26) is the definition. It doesn't -- it  
21 seems to be a strange way to read the statute to say  
22 that the regulatory obligation that applies to a  
23 defined class determines what the definition of the  
24 class is.

25 Your Honor, this is very different from

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1 your typical Telecom. Act case where all of the terms  
2 have been left vague and undefined. I mean Congress  
3 went out of its way to define every single relevant  
4 term and subterm that we're dealing with here. That  
5 effort makes clear that Congress didn't intend to  
6 leave the scope of Section 251(c) to the Commission's  
7 discretion.

8 Thank you, Your Honor.

9 THE COURT: Thank you, case is submitted.  
10 Court will take a brief recess.

11 (Whereupon, oral argument was concluded.)  
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