No. 97-831

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.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.

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

OPENING BRIEF FOR THE FEDERAL PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has statutory authority to issue rules implementing the core provisions of the Telecommunications Act of 1996 that open local telephone markets to competition, see 47 U.S.C. 251 *et seq.*, including, *inter alia*, the provisions governing dialing parity and the standards for the prices that an incumbent local exchange carrier (LEC) may charge potential competitors for the right to interconnect with or gain unbundled access to the incumbent's network and the right to resell the incumbent's retail services.

2. Whether the Commission reasonably implemented 47 U.S.C. 251(c)(3) by prohibiting an incumbent LEC, when it receives a request from another carrier for access to network elements, from separating previously combined elements over the objection of the requesting carrier.

3. Whether the Commission reasonably interpreted 47 U.S.C. 252(i), which requires an incumbent LEC to "make available any interconnection, service, or network element provided under an agreement * * * to which it is a party to any other requesting telecommunications carrier," to entitle a requesting carrier to select some specific terms of a preexisting agreement without having to accept the entire agreement.

PARTIES TO THE PROCEEDING

The petitioners are the Federal Communications Commission and the United States of America.

The parties to the underlying proceedings are listed in the appendix to the petition for a writ of certiorari in *AT&T Corp.*, *et al.* v. *Iowa Utilities Board et al.*, at 1a-4a, 73a-78a, 92a. See note 1, *infra*.

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OPINIONS BELOW

The principal opinion of the court of appeals in *Iowa Utilities Board* v. *FCC* (Pet. App. 1a-67a)[1] is reported at 120 F.3d 753. The court's order on rehearing (Pet. App. 69a-72a) was incorporated into the published opinion reported at 120 F.3d 753. The opinion of the court of appeals in *People of the State of California* v. *FCC* (Pet. App. 73a-91a) is reported at 124 F.3d 934. A writ of mandamus and accompanying opinion (J.A. 284-301), issued by the court of appeals on January 22, 1998, are reported at 135 F.3d 535.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *AT&T Corp.* v. *Iowa Utilities Board*, cert. granted, No. 97-826 (Jan. 26, 1998), which has been consolidated with this case.

The First Report and Order of the Federal Communications Commission (FCC) is reported at 11 FCC Rcd. 15,499, and the Second Report and Order of the FCC is reported at 11 FCC Rcd. 19,392.

JURISDICTION

The judgment of the court of appeals in *Iowa Utilities Board* was entered on July 18, 1997. A subsequent order in that case, granting rehearing in part and denying rehearing in part, was issued on October 14, 1997. The judgment in *People of the State of California* was entered on August 22, 1997. Petitions for certiorari in Nos. 97-826, 97-829, 97-830, and 97-831 were filed, respectively, on November 17, November 17, November 18, and November 19, 1997. Cross-petitions for certiorari in Nos. 97-1075, 97-1087, 97-1099, and 97-1141 were filed, respectively, on December 24, 1997, December 30, 1997, January 5, 1998, and January 8, 1998. All eight petitions were granted on January 26, 1998 (118 S. Ct. 879). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at Pet. App. 93a-130a and in the appendix to this brief. In referring to the provisions of the 1996 Act, we have cited the 1996 Supplement to the United States Code.

STATEMENT

In the Telecommunications Act of 1996 (the 1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress directed the Federal Communications Commission (FCC) to complete, within six months of the Act's passage, "all actions necessary to establish regulations to implement" the Act's new "interconnection" provision—Section 251—which opens local telephone markets to competition. 47 U.S.C. 251(d)(1). This case involves challenges to the Commission's implementation of that statutory directive. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499 (1996) (First Report and Order) (excerpts printed at Pet. App. 131a-337a, J.A. 13-200); *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 19,392 (1996) (Second Report and Order) (excerpts printed at Pet. App. 338a-353a, J.A. 201-223).

1. Since the breakup of the Bell System in 1984, two sets of carriers have provided most telephone service in the United States: local exchange carriers (LECs), including the Bell Companies and GTE, and long-distance (or "interexchange") carriers, including AT&T, MCI, and others. In virtually all areas, local exchange service is controlled by a single incumbent LEC. That LEC owns, among other network elements, almost all of the "loops" (the wires or buried cables connecting telephones to switches) in its service area, along with the switches themselves and the transport "trunks" that connect the switches. That "local exchange network" plays an indispensable role in the provision of all telephone service, whether local or long-distance.

A long-distance call begins in one local exchange and ends in another. To place such "interexchange" calls, long-distance carriers must rely on the same facilities that LECs use to provide service within local calling areas. Thus, a long-distance call from Washington to Atlanta is transported from the caller's telephone through Bell Atlantic's local network to a point of interconnection with a long-distance carrier (say, MCI); MCI then transports the call along its interexchange network to Atlanta, where BellSouth completes the call through its network to the appropriate destination. In originating or completing an interexchange call, a LEC provides "exchange access" (47 U.S.C. 153(16)) to the interexchange carrier. Interexchange carriers pay LECs billions of dollars each year in interstate "access charges." See *Access Charge Reform*, 11 FCC Rcd. 21,354, 21,371 (1996).

2. The 1984 breakup of the Bell System spurred the growth of competition in the long-distance market, and average retail long-distance prices have dropped more than 70% since then. See *AT&T Reclassification*, 11 FCC Rcd. 3271, 3308-3312 (1995). But the incumbent LECs have retained virtually total monopoly control of local telephone markets: even today, the incumbents receive approximately 98% of the $100 billion in annual revenues generated by the provision of exchange access and local exchange services. FCC, *Telecommunications Indus. Revenue* Tab. 2 (Common Carrier Bur. Nov. 1997). Ending the incumbents' monopoly control of local markets is a principal goal of the Telecommunications Act of 1996.

a. The barriers to entry into local telephone markets are different from, and vastly more formidable than, the barriers to entry into the long-distance market. It has been economically practicable for some long-distance carriers to build their own interexchange infrastructures—*e.g.*, to lay cable or build microwave networks connecting local calling areas to one another—so long as they can rely (albeit at a cost) on the LECs on either end of an interexchange call to route the call through various switches and local loops from the calling party to the call's destination. But to duplicate a LEC's local network—to create a new network of switches and a complete new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another—would be economically impracticable even for the largest prospective competitor, at least with current technology. Moreover, without rights of access to the existing network, a potential competitor could not gradually enter the market through *partial* duplication of local telephone facilities: An upstart carrier would win few customers if its customers could call only one another and not customers on the incumbent LEC's separate (and completed) network.

For many years, telephone regulators assumed "that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network." Pet. App. 131a. Until recently, therefore, "[s]tate and federal regulators devoted their efforts * * * to regulating the prices and practices of these monopolies and protecting them against competitive entry." *Ibid.* By 1996, however, Congress had concluded that a revolutionary change in regulatory objectives was necessary to serve the public interest. It therefore designed the local competition provisions of the 1996 Act, 47 U.S.C. 251, *et seq.*, to end the dominance of regulated monopolies in local telephone markets and to open those markets to full competition.

Congress recognized that no prospective entrant could hope to compete with the incumbent LECs in providing consumers with telephone exchange service and exchange access by replicating the existing local network infrastructure. The 1996 Act therefore entitles potential competitors to enter local telephone markets by using the incumbent monopolists' own networks in three distinct but complementary ways. See 47 U.S.C. 251(c)(2)-(4). *First*, Section 251(c)(2) requires incumbent LECs to "interconnect" their networks with those of other carriers, and to do so at "just, reasonable, and nondiscriminatory" rates and terms. *Second*, Section 251(c)(3) entitles new entrants to gain access to elements of an incumbent LEC's network "on an unbundled basis": *i.e.*, to lease individual network elements (*e.g.*, loops, switching capability, etc.) at separate prices. See also 47 U.S.C. 153(29) (defining "network element"). That provision permits new entrants, some of which may also construct network elements of their own, to lease from incumbents whatever combinations of elements they need (and not elements they do not need) to provide telecommunications services to their customers. Section 251(c)(3) further directs incumbent LECs to make unbundled elements available on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *Finally*, Section 251(c)(4) gives potential competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users.

A separate provision, 47 U.S.C. 252, sets forth the procedures that individual entrants and incumbent LECs must follow when implementing the requirements of Section 251. Section 252 provides for a period of negotiation between incumbents and new entrants, followed by expeditious arbitration by state public utility commissions of any unresolved issues.[2] Section 252(c)(1) requires state arbitrators to conform their disposition of "any open issues" in such agreements to federal standards: to "the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251." Section 252(c)(2) further instructs state arbitrators to resolve open *rate* issues consistently with Section 252(d), which provides that, in addition to the requirements of Section 251, rates for interconnection under Section 251(c)(2) and unbundled elements under Section 251(c)(3) must be "based on * * * cost (determined without reference to a rate-of-return or other rate-based proceeding)" and "may include a reasonable profit." 47 U.S.C. 252(d)(1). Section 252(d)(3) provides that the "wholesale rates" charged to resellers under Section 251(c)(4) must be based on retail rates, excluding the portion of those rates attributable to "costs that will be avoided." All agreements approved or arbitrated by state commissions are subject to review in federal district court—and not in any state court—to deter-

[2] Congress directed the FCC to resolve such disputes whenever a state commission opts out of its statutory role. See 47 U.S.C. 252(e)(5).

mine whether they "meet[] the requirements" of Sections 251 and 252. See 47 U.S.C. 252(e)(4) and (6).

b. As part of a comprehensive legislative package that breaks down barriers to competition in all telecommunications markets, the 1996 Act also sets forth a procedure, codified in 47 U.S.C. 271, under which the Bell Companies may seek authorization from the FCC to provide, for the first time, the long-distance services that a 1982 consent decree had previously barred them from offering. See Pub. L. No. 104-104, Tit. VI, § 601(a)(1), 110 Stat. 143 (superseding decree); see also 47 U.S.C. 272-276.[3]

Section 271 generally bars a Bell Company from providing long-distance services originating in its "in-region" States—*i.e.*, the States in which it has traditionally exercised monopoly power over local service—unless it first applies for, and receives, authorization from the FCC to do so. See 47 U.S.C. 271(a) and (b)(1). The FCC may grant such authorization only if "it finds," after giving "substantial weight" to the Justice Department's evalua-

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[3] In the 1970s, the United States sued AT&T (which at that time owned the Bell Companies) under the Sherman Act, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree that required it to divest its local operations. The decree prohibited the newly independent Bell Companies from providing long-distance service. In approving that restriction, the district court overseeing the decree explained that a Bell Company, if permitted to enter the long-distance market, could use its monopoly control over local bottleneck facilities to impede long-distance competition in two principal ways: it could subject competitors to discriminatory terms of access to the local network, and it could cross-subsidize its own long-distance operations with its monopoly local revenues. See *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 186-188, 223 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

tion, 47 U.S.C. 271(d)(2)(A), that the Bell Company has satisfied the requirements of a "competitive checklist" designed to open the Bell's own local exchange markets to fair competition (see 47 U.S.C. 271(c)(2)(B)); that the Bell Company will conduct its long-distance operations in accordance with certain structural separation requirements set forth in 47 U.S.C. 272; and that granting the application would serve "the public interest, convenience, and necessity," 47 U.S.C. 271(d)(3)(C). Before determining that a Bell Company has met the checklist requirements, the Commission must specifically find, among other things, that the Bell Company has provided "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)"; "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)"; and telecommunications services "for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." 47 U.S.C. 271(c)(2)(B)(i), (ii), and (xiv).[4]

3. Section 251(d)(1) directs the Commission, within six months of the Act's passage, to complete "all actions necessary to establish regulations to implement the requirements" of Section 251. The Commission fulfilled that obligation on August 8, 1996, after a massive rulemaking proceeding in which interested parties filed approximately 17,000 pages of comments.

The Commission first determined that Congress had authorized it to adopt general rules implementing the local competition provisions, including the provisions governing

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[4] On December 31, 1997, a federal district court held that Section 271 and related provisions are unconstitutional "bills of attainder," reasoning that they improperly "punish" the Bell Companies by subjecting them to more regulation than other LECs. See *SBC Communications, Inc.* v. *FCC*, 981 F. Supp. 996 (N.D. Tex. 1997). We and others have appealed that ruling, and, on February 11, 1998, the district court stayed its decision pending appeal.

the prices that incumbent LECs may charge new entrants for interconnection, unbundled elements, and services for resale. Under the "dual" regulatory regime of the original Communications Act of 1934, "interstate" telecommunications had generally been subject to regulation under federal law, and exclusively "intrastate" telecommunications had generally been subject to regulation under state law. See generally pp. 32-39, *infra*. As the Commission observed, however, the 1996 Act creates, for the first time, comprehensive *federal* standards governing a new entrant's use of an incumbent's existing local network to provide both intrastate and interstate telephone service. See Pet. App. 191a-195a. The Commission determined that here, as elsewhere, Congress had given it plenary rulemaking authority to implement the Communications Act of 1934, 47 U.S.C. 151 *et seq.* (Communications Act), into which all relevant portions of the 1996 Act were incorporated. See Pet. App. 198a (citing 47 U.S.C. 154(i), 201(b), and 303(r)). The Commission also explained that Section 251(d)(1) explicitly requires it to "implement the requirements" of Section 251, such as the rate requirements of Section 251(c). *Ibid.* For those reasons, the Commission determined that Congress had directed it to create a national framework for the state commissions to apply in arbitrating carrier-to-carrier disputes.

Indeed, the Commission found, such a framework is needed to reduce anticompetitive uncertainties and to ensure effective implementation of the 1996 Act. See Pet. App. 165a-173a. Because existing telephone networks embody significant economies of scale, the Commission sought to ensure that those economies would "be shared in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices." Pet. App. 137a. The Commission knew, however, that incumbent LECs have little incentive to open their networks to new entrants that seek to compete for the incumbents' customers. *Id.* at 136a-137a, 139a, 167a-168a. The Commission concluded that the disparity in bargaining power and incentives between incumbents and new entrants is best addressed by defining the requirements of the new Act in enough detail to advise parties of their minimum rights and obligations, and by establishing a national regulatory baseline to reduce transaction costs. *Id.* at 167a-173a.

In particular, the Commission deemed it "critical * * * to establish among the states a common, pro-competition understanding of the pricing standards" for interconnection, unbundled elements, and resale. J.A. 131-132 (¶ 618). Section 251(c) provides that rates for interconnection and unbundled elements must be "just, reasonable, and nondiscriminatory," and Section 252(d)(1) adds that a "just and reasonable rate * * * for purposes of" Section 251(c) is "based on * * * cost (determined without reference to a rate-of-return or other rate-based proceeding)." The Commission determined that, to be consistent with the Act and to ensure meaningful competition, the rates for interconnection and access to unbundled network elements should be based on economic (*i.e.*, forward-looking) costs rather than on the embedded costs reflected on the ratemaking accounting books. J.A. 132-133 (¶ 620). In brief, the forward-looking cost methodology adopted by the Commission asks what it would cost to construct and operate an efficient telephone network today, and it creates a framework for setting prices for network elements on that basis. See *ibid.* The Commission preserved for the state commissions the critical task of applying that methodology to establish actual carrier-to-carrier rates in light of carrier- and region-specific variables.

The Commission then turned to a variety of non-pricing issues arising under the local competition provisions. In implementing the requirement that incumbent LECs give new entrants "nondiscriminatory access to network elements," 47 U.S.C. 251(c)(3), the Commission provided that, "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. 51.315(b) (Rule 315(b)); see also Pet. App. 230a-233a. The Commission also construed the nondiscrimination mandate of Section 251(c) to require incumbent LECs to "permit third parties to obtain access * * * to any individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252" without having to accept the entire agreement. *Id.* at 263a. The FCC found that interpretation consistent with, and effectively compelled by, the language of 47 U.S.C. 252(i). See Pet. App. 261a-264a; 47 C.F.R. 51.809. The court of appeals referred to the Commission's regulation on that issue as "the pick and choose rule."

In its Second Report and Order, also issued on August 8, 1996, the Commission adopted rules generally implementing the 1996 Act's requirement that LECs "provide dialing parity to competing providers of telephone exchange service and telephone toll service." 47 U.S.C. 251(b)(3); see Pet. App. 338a-353a. Dialing parity permits a new entrant's subscribers to make calls without having to dial an access code of extra digits.

4. a. Respondents filed petitions for judicial review of the First Report and Order in a number of federal circuits. Those petitions were consolidated and assigned by lottery to the Eighth Circuit. See 28 U.S.C. 2112(a)(3). A challenge to the Commission's dialing parity rules, originally filed in the D.C. Circuit, was subsequently transferred to the Eighth Circuit. On October 15, 1996, the court of appeals granted motions to stay the Commission's pricing and "pick and choose" rules. 109 F.3d 418. Without opinion, this Court denied applications filed by the Commission and several other parties to lift the stay. See 117 S. Ct.

378, 379 (1996) (Thomas, J., in chambers); 117 S. Ct. 429 (1996).

On July 18, 1997, the Eighth Circuit issued its principal decision on the merits. The court first held that Sections 252(c)(2) and (d) give state commissions exclusive authority to interpret the pricing terms of Sections 251 and 252 and that they implicitly deny the Commission any rule-making role in that area. Pet. App. 10a-14a; see also *id.* at 27a-30a, 34a-36a (holding that Commission lacks jurisdiction to implement 47 U.S.C. 251(f) and 252(a)(1)). Moreover, the court held (*id.* at 15a), "[a]ny ambiguity" regarding the Commission's jurisdiction over pricing and other issues arising under Section 251 "is resolved by the operation of section 2(b)" of the Communications Act, which provides 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). The court posited that the matters governed by Sections 251 and 252 "are fundamentally intrastate in character" because—even though the local exchange network is indispensable to the origination and completion of any call, whether intrastate or interstate—that putatively "tangential impact on interstate services is not sufficient to overcome the operation of section 2(b)." Pet. App. 22a, 23a.

In its subsequent decision invalidating the Commission's dialing parity rules (Pet. App. 73a-91a), the court of appeals reemphasized its view that Section 2(b) divests the FCC of jurisdiction to implement any provision of Sections 251 and 252 that does not itself specifically "mention" (*id.* at 85a) the Commission. The court barred the Commission from addressing dialing parity as to some categories (but not all categories, see Pet. App. 87a n.5, 89a n.6; 47 U.S.C. 251(g)) of intrastate calls because the particular substantive terms of the dialing parity provision, 47 U.S.C. 251(b)(3), "make[ ] no reference whatsoever to the FCC." Pet. App. 85a. In the absence of such a "reference," the court held, the FCC may play no role in implementing the terms of the local competition provisions, despite Congress's plenary grant of rulemaking authority to the Commission to implement the substantive terms of the Communications Act, *e.g.*, 47 U.S.C. 201(b), and despite the 1996 Act's highly specific grant of rulemaking authority to "complete all actions necessary to establish regulations to implement the requirements" (47 U.S.C. 251(d)(1)) of Section 251. See Pet. App. 85a; accord *id.* at 12a n.10, 29a n.23, 37a.

Apart from those "jurisdictional" holdings, the court of appeals also invalidated, on their merits, two central regulations on subjects that it acknowledged the FCC has statutory authority to address. First, although the court upheld several of the Commission's unbundling rules, it invalidated Rule 315(b). The court reasoned that Section 251(c)(3), which compels incumbent LECs to give new entrants "nondiscriminatory access to network elements on an unbundled basis," entitles incumbent LECs to *disconnect* previously combined elements—even if the new entrant seeks to use them in the same combination—solely to impose costs on the new entrant. Pet. App. 70a-71a.

Second, the court vacated the "pick and choose rule." It acknowledged that the text of Section 252(i) "could indicate that the FCC's approach was intended by Congress." Pet. App. 25a n.22. Nonetheless, the court concluded that, by allowing entrants to select the favorable portions of a prior agreement "without being bound by the corresponding tradeoffs that were made in exchange for the favorable provisions," the Commission's plain-language approach would frustrate a perceived congressional preference for "voluntary" agreements. *Id.* at 25a.

b. In August 1997, the Commission denied the application of Ameritech Corporation, a Bell Company, to provide in-region long-distance service in Michigan under Section

271. *In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934*, FCC No. 97-298 (relevant excerpts printed at 97-1519 Pet. App. 21a-34a). Although the Commission ultimately denied that application on non-pricing grounds, it responded to industry requests for guidance by affirming that it would apply national standards, and in particular a forward-looking cost methodology, for the specific purpose of adjudicating Section 271 applications. The Commission explained (*id.* at 24a-28a) that—whether or not it has jurisdiction to adopt generally applicable rules implementing the pricing provisions of Sections 251(c) and 252(d) for purposes of any interconnection agreement between any incumbent LEC and any new entrant—no reasonable understanding of the statutory scheme could relieve the Commission of its independent responsibility to grant a Bell Company's Section 271 application only if "it finds," among other things, that the Bell Company has in fact met "the requirements" of Sections 251(c) and 252(d). See pp. 7-8, *supra* (quoting Section 271).

Although the D.C. Circuit has exclusive jurisdiction to review "any order of the Commission granting or denying any application" under Section 271 (47 U.S.C. 402(b)(6) and (9)), Ameritech did not appeal the Commission's order to that court. Instead, it and several other parties returned to the Eighth Circuit. On January 22, 1998, the Eighth Circuit, ostensibly to "enforce the mandate" of the decision below, issued a writ of mandamus ordering the Commission "to confine its pricing role under section 271(d)(3)(A) to determining whether applicant [Bell Companies] have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such [Bell Companies] seek to provide in-region, [long-distance] services." J.A. 298; see also J.A. 294 (foreclosing any Commission "attempt to utilize section 271(d)(3)(C)" to resolve pricing issues).

5. In November 1997, we and potential new entrants filed four separate petitions for certiorari challenging the court of appeals' underlying judgments in this case. See also note 11, *infra* (discussing petitions challenging mandamus order). Subsequently, various incumbent LECs filed four separate cross-petitions challenging certain FCC "unbundling" rules that the court of appeals had upheld on the merits. See p. 47, *infra*. On January 26, 1998, this Court granted all eight petitions and cross-petitions for certiorari, and consolidated the cases for review. 118 S. Ct. 879.

SUMMARY OF ARGUMENT

I. The local competition provisions of the 1996 Act prescribe new *federal* standards to govern the development of competitive local telephone markets. To ensure nationally consistent interpretation of those standards sooner rather than later, Congress directed the FCC to create a national framework for individual state commissions to apply when arbitrating specific disputes about the new federal requirements. The Commission's authority to create that framework is evident both from the face of the 1996 Act itself and from the Commission's general statutory authority to issue rules implementing federal telecommunications law.

The Eighth Circuit's contrary view, which would deny the Commission authority to implement any provision that does not in some respect "mention" the Commission by name, is illogical. There is no coherent textual basis for attributing to the Commission jurisdiction to implement some, but not all, of the core federal standards of the local competition provisions. The Eighth Circuit was also mistaken in relying on Section 2(b) of the Communications Act of 1934 to override the Commission's authority to implement the 1996 Act. The 1996 Act itself pervasively addresses competition in local markets, despite Section 2(b)'s provision against "constru[ing]" federal law "to apply" to intrastate matters, and Section 2(b) does not detach the Commission's regulatory authority from the scope of federal telecommunications law. In any event, the core regulatory subjects of the 1996 Act are inextricably both interstate and intrastate in nature, and the traditional principles reflected in Section 2(b) thus *support* the Commission's authority to address those subjects by rule.

The court of appeals' mistaken concern about federal "intru[sion] on the states' intrastate turf" (Pet. App. 23a) serves not to protect that "turf" from the application of federal standards, but only to impede the competition that Congress sought to bring to local markets. Congress directed the federal district courts to ensure that state arbitration decisions comport with federal law. Because Congress did not leave room for each of 50 state commissions to disagree about the basic federal issues that arise under the 1996 Act, the federal courts must ultimately supply nationally consistent interpretations of the Act's key provisions. Under the decision below, fundamental disputes about the core provisions of the 1996 Act would proliferate throughout the federal judiciary until, many years from now, the courts of appeals and ultimately this Court address those provisions one by one and determine—without comprehensive regulatory direction from the Commission—what they mean. Congress did not intend to subject potential competitors (and the federal courts) to such protracted and piecemeal litigation. Instead, it directed the Commission, on an expedited timetable, to issue rules comprehensively addressing the most fundamental controversies arising under the Act so that, in one consolidated review proceeding, a single court of appeals (subject to review by this Court) could resolve those controversies on the merits soon after the Act's passage.

Finally, if there were any ambiguity in the statutory language directing the Commission to create a national framework for implementation of the local competition provisions, "it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment). The Commission's interpretation of the provisions defining its authority, as well as its expert determination that the absence of a national framework would impair effective implementation of the 1996 Act, are entitled to substantial deference.

II. In invalidating Rule 315(b), the Eighth Circuit misconstrued an incumbent LEC's *duty* under Section 251(c)(3) to provide access to network elements "on an unbundled basis" as a *right* to disconnect previously combined elements in order to impose gratuitous reassembly costs on new entrants. That construction is unsound in several respects. It rests on the flawed premise that "unbundled" means "disconnected," rather than "offered at separate prices"; it makes little sense either as a technical or as a grammatical matter; and, most important, it permits anticompetitive conduct that violates Section 251(c)(3)'s nondiscrimination requirement. In any event, the Commission's resolution of any ambiguity in the meaning of Section 251(c)(3), and its understanding of the economic and technical considerations underlying that provision, are entitled to particular deference.

III. The Commission interpreted Section 252(i) to mean exactly what it says: that a new entrant is entitled, on "the same terms and conditions" as any other new entrant, to "*any* interconnection, service, *or* network element provided under an [existing] agreement" without also having to accept *all other* terms of that agreement. 47 U.S.C. 252(i) (emphasis added). Although the Eighth Circuit conceded that the text of Section 252(i) "could indicate that the FCC's approach was intended by Congress," Pet. App. 25a n.22, it nonetheless rejected that approach on policy grounds. Those policy grounds lack merit, and the Commission's plain-language approach is correct.

ARGUMENT

I. THE COMMISSION HAS STATUTORY AUTHORITY TO ISSUE RULES IMPLEMENTING THE FEDERAL STANDARDS OF THE LOCAL COMPETITION PROVISIONS

A. Both The 1996 Act And The Commission's General Rulemaking Powers Authorize The Commission To Implement The Local Competition Provisions

1. The 1996 Act prescribes a set of new federal standards to govern the development of competitive local telephone markets. The court of appeals wrongly held that the Commission lacks statutory authority to implement those federal standards, except in the very limited circumstances in which the substantive provision at issue *itself* happens to "mention" the Commission by name. Pet. App. 85a; see also *id.* at 12a n.10, 29a n.23, 37a, 85a.

a. Congress explicitly directed the Commission, "[w]ithin 6 months after the date of enactment of [the 1996 Act]," to "complete all actions necessary to *establish regulations to implement the requirements*" of Section 251. 47 U.S.C. 251(d)(1) (emphasis added). "[T]he requirements" of Section 251, which the Commission must "implement" by rule, include the core federal standards of the local competition provisions. They include, for example, the requirement that the "rates" (as well as the other "terms" and "conditions") of interconnection and unbundled elements be "just, reasonable, and nondiscriminatory." See also 47 U.S.C. 251(b)(3) (dialing parity obligation), 251(b)(5) (duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications"), 251(c)(4) (duty to offer services "for resale at wholesale rates"); 251(f) (establishing criteria by which rural carriers may claim exemption from requirements of Section 251(c)).

The Eighth Circuit, however, held that Section 251(d)(1) "operates primarily"—the court meant *only*—"as a time constraint," rather than as a source of authority to implement the requirements of Section 251. Pet. App. 12a. That is incorrect. By its terms, Section 251(d)(1) is plainly *both* a six-month deadline *and* a declaration of the Commission's obligation to "establish regulations to implement *the requirements* of this section." Properly construed, Section 251(d)(1) "gives the FCC precisely what the agency unsuccessfully claimed [before the Eighth Circuit]: an overarching, plenary grant of authority to issue rules relating to any aspects of § 251." Jim Chen, *TELRIC In Turmoil, Telecommunications In Transition*, 33 Wake Forest L. Rev. 51, 73 (1998); see also *ibid.* (criticizing Eighth Circuit's construction of Section 251(d)(1) as "implausible").

Moreover, the Commission's authority to implement the local competition provisions independently rests on the general rulemaking powers that Congress has conferred upon it. Congress incorporated all relevant portions of the 1996 Act into the principal body of federal telecommunications law: the Communications Act of 1934, 47 U.S.C. 151 *et seq.* (Communications Act). See 1996 Act § 1(b), 110 Stat. 56. Section 201(b) of the Communications Act authorizes the Commission 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) (emphasis added).[5] Congress gave the Commission

[5] Independently conferring the same authority is 47 U.S.C. 303(r), which authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent

"expansive" general rulemaking powers to avoid the need for "an itemized catalogue of the specific manifestations of the general problems" in "regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943) (discussing Section 303(r)); see also *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). By its terms, Section 201(b) makes that authority coextensive with the substantive reach of the Communications Act, which now includes the local competition provisions of the 1996 Act and, in particular, both Sections 251 and 252.

The Eighth Circuit was thus mistaken in holding that the scope of the Commission's authority under Section 201(b) is "expressly limited to interstate or foreign communications services by subsection 201(a)." Pet. App. 12a. To begin with, the court's reasoning rests on the unsound premise—which we address in Point I(B) below—that the regulatory subjects of the local competition provisions are "fundamentally intrastate in character" (*id.* at 22a). And, in any event, nothing in Section 201(a) limits the Commission's unqualified textual authority under Section 201(b) to implement "*the provisions of this Act*." The 1996 legislation enlarges the *range* of "the provisions of this Act" by creating comprehensive rights of access to local networks, but it does not detach the scope of the Com-

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with law, as may be necessary to carry out the provisions of this Act." See also 47 U.S.C. 151 (establishing FCC to "execute and enforce the provisions of this Act"); 47 U.S.C. 154(i) (authorizing FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions"). As codified, references to "this Act," *e.g.*, 52 Stat. 588 (1938), appear as references to "this chapter" (Chapter 5 of Title 47), which essentially encompasses the Communications Act, see 47 U.S.C. 609, and now contains all relevant portions of the 1996 Act, see 110 Stat. 56 (1996).

mission's rulemaking authority from the substantive scope of the Communications Act. Indeed, to our knowledge, the court of appeals' decision marks the first time any court has held that, despite Section 201(b), the Commission lacks statutory authority to implement key substantive provisions of the Communications Act.

b. The Commission's plenary authority to "establish regulations to implement" the local competition provisions is evident not just from Sections 251(d)(1) and 201(b), but also from the conspicuous interpretive anomalies that arise from the Eighth Circuit's cramped view of the Commission's jurisdiction. Perhaps the most striking anomaly is this: If, as the Eighth Circuit held, Sections 251(d)(1) and 201(b) do not give the Commission plenary authority to implement (for example) the substantive terms of Section 251, what *does* give the Commission its undisputed authority to address the non-pricing requirements of the "unbundling" provision, Section 251(c)(3)?

Section 251(c)(3) directs incumbent LECs to provide new entrants with access to network elements "on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." In turn, Section 251(d)(2) requires the Commission to consider certain proprietary interests "[i]n determining what network elements should be made available for purposes of subsection (c)(3)." Section 251(d)(2) thus assumes that the Commission has jurisdiction to issue regulations identifying the elements that must be made available. Indeed, like the court of appeals (see Pet. App. 40a-64a), respondents acknowledge that the Commission has broad jurisdiction to implement the non-pricing provisions of Section 251(c)(3). That is why respondents have challenged Rule 315(b)—a non-pricing unbundling rule (see generally Point II, *infra*)—on its merits and not on jurisdictional grounds.

Even though Section 251(d)(2) plainly assumes that the Commission has jurisdiction to address at least some unbundling issues arising under Section 251(c)(3), nothing in Section 251(d)(2) itself serves as an affirmative grant of that jurisdiction. That jurisdiction must therefore derive from independent sources of rulemaking authority: from Section 251(d)(1) and, more generally, from Section 201(b). But those same sources necessarily authorize the Commission to issue rules relating to the other provisions of Section 251 that require implementation, including, most obviously, the other provisions of Section 251(c)(3) itself. If the Commission has rulemaking authority to address the non-pricing "terms" and "conditions" of access to unbundled elements (47 U.S.C. 251(c)(3)), there is no coherent textual basis for denying the Commission rulemaking authority to ensure, at the same time, that the "rates" charged for such access will be "just, reasonable, and nondiscriminatory" (*ibid.*).[6]

The Eighth Circuit's holding is also inconsistent with Section 251(d)(3), which ensures that state commission orders consistent with federal law are not invalidated on the theory that the Commission's rules preempt a regulatory field. Section 251(d)(3) provides that, "[i]n prescribing and enforcing regulations to implement the requirements of

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[6] For similar reasons, the Commission's plenary rulemaking role is evident on the face of Section 252 as well. For example, amid provisions relating to a "State commission['s]" case-by-case arbitration of transport-and-termination charges, Section 252(d)(2)(B)(ii) forbids "*the Commission* or any State Commission to engage in any rate regulation proceeding" to establish certain costs. (Emphasis added.) And, even though Section 252(i) does not itself "mention" the Commission (cf. Pet. App. 85a), neither the Eighth Circuit nor respondents have questioned the Commission's jurisdiction to interpret that provision. See Point III, *infra*; compare Pet. App. 24a-27a (addressing "pick and choose" rule on the merits) with *id.* at 34a-36a (holding that Commission lacks jurisdiction to implement 47 U.S.C. 252(a)(1)). See also note 10, *infra*.

this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission" *if* the state rule "is consistent with the requirements of this section" *and* the rule "does not substantially prevent implementation of the requirements of this section and the purposes of this part." Section 251(d)(3) confirms the Commission's jurisdiction in two respects. First, it reiterates that the Commission has authority—under Sections 251(d)(1) and 201(b)—to "prescrib[e] * * * regulations to implement *the requirements* of" Section 251. Second, it confirms the Commission's authority to preempt state laws, even laws not directly inconsistent with the statutory terms, if the Commission determines that such laws undermine the "implementation" and "purposes" of the 1996 Act.[7]

The Eighth Circuit's holding further contradicts the provisions of Section 253, another preemption provision added by the 1996 Act. Entitled "Removal Of Barriers To Entry," Section 253 authorizes the Commission to "preempt the enforcement" of any state legal requirement

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[7] The court of appeals sought to avoid that conclusion by suggesting, in one passage, that Section 251(d)(3) entitles the Commission to invalidate only those state rules that violate "the terms of section 251," Pet. App. 37a-38a, not state rules that conflict with the Commission's interpretation of those terms. That distinction is without merit. The meaning and "purposes" of Section 251—for example, of the requirement that interconnection rates be "just, reasonable, and nondiscriminatory"—require explication, and it is illogical to presume that Congress withheld that interpretive role from the agency to which it gave preemptive authority. See generally *City of New York* v. *FCC*, 486 U.S. 57 (1988); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153-154 (1982). In a later passage, the Eighth Circuit drew into question the significance of its own distinction, recognizing that, when conducting arbitrations under Section 252, state commissions must "meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251." 47 U.S.C. 252(c)(1); see Pet. App. 38a.

that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a) and (d). Because the Commission, like other administrative agencies, may accomplish by rulemaking what it could otherwise do by adjudication, see, *e.g.*, 47 U.S.C. 154(i); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947), Section 253(d) authorizes the Commission to preempt, by rule, any state regulatory practice that "ha[s] the effect" of enabling incumbent LECs to perpetuate their monopolistic grip on local telephone markets. See 141 Cong. Rec. S8212 (daily ed. June 13, 1995) (statement of Senator Gorton) (Section 253(d) reflects "a very, very broad prohibition against State and local activities"). Many of the Commission's rules at issue here, such as the general rule against basing rates for unbundled elements on an incumbent LEC's embedded costs, are designed to remove precisely the "[b]arriers [t]o [e]ntry" that Section 253 addresses, even though the Commission did not invoke Section 253 directly. See pp. 9-10, *supra*. It is illogical to suppose that Congress gave the Commission the broad preemptive powers contained in Section 253 but, at the same time, denied the Commission an affirmative rulemaking authority to ensure effective implementation of the 1996 Act. See generally *City of New York* v. *FCC*, 486 U.S. 57 (1988).

The Eighth Circuit's holding is also inconsistent with the conditions that the 1996 Act places on the Commission's exercise of its "forbearance" authority. Cf. Pet. App. 86a. The Act authorizes the Commission to "forbear" from regulating (for example) a carrier's "charges" and "practices" if the Commission determines that such regulation is unnecessary as a policy matter. 47 U.S.C. 160(a). Congress simultaneously instructed the Commission not to "forbear from applying the requirements of section 251(c) * * * under subsection (a) of this section until it determines that those requirements have been fully implemented." 47 U.S.C. 160(d). If the Commission lacked authority to "apply" the central "requirements" of Section 251(c)—such as the requirement of "just, reasonable, and nondiscriminatory" rates for interconnection and unbundled elements—it would have made little sense for Congress to have taken special measures to ensure that the Commission would in fact "apply[ ] *the requirements* of section 251(c)" until "it determines that *those requirements* have been *fully implemented*." That Congress did qualify the Commission's forbearance authority that way confirms that Congress very much intended for the Commission to adopt regulations ensuring full implementation of "the requirements" of Section 251(c), including, for example, the "charge"-related requirements that 47 U.S.C. 160(a) would otherwise have permitted it not to enforce.[8]

c. The statutory rights of new entrants would be meaningless if an incumbent could charge such high rates for the use of its network that new entrants could not profitably offer competing services to consumers. See pp. 9-10, *supra*. That is why Congress instructed incumbent LECs to provide (for example) interconnection and unbundled elements at "just, reasonable, and nondiscriminatory" rates. 47 U.S.C. 251(c)(2) and (3); see also 47 U.S.C. 251(c)(4) (imposing duty to offer services "for resale at wholesale rates"). In the most important portion of its jurisdictional holding, however, the Eighth Circuit held that the Commission lacks authority to set national standards to guide resolution of carrier-to-carrier pricing disputes.

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[8] These interpretive anomalies do not constitute an exhaustive list. For examples of others, see Chen, *supra*, 33 Wake Forest L. Rev. at 70-76 (noting that Eighth Circuit's decision "overflows with interpretive pronouncements that contradict assumptions underlying numerous aspects of the Act, with interpretive solecisms that flatly contradict the structure of §§ 251 and 252") (footnote omitted). *E.g.*, *id.* at 71 (discussing 47 U.S.C. 251(g)).

The court based that ruling largely on the observation that Sections 252(c)(2) and 252(d) authorize state commissions to "establish * * * rates" when arbitrating specific disputes between incumbent LECs and new entrants. See 47 U.S.C. 252(c)(2); see also 47 U.S.C. 252(d). But from those provisions it does not follow that Congress *sub silentio* negated the Commission's general authority to implement the 1996 Act and gave each of the 50 state commissions *exclusive* jurisdiction to define, at the most basic methodological level, the standards that govern what constitute "just, reasonable, and nondiscriminatory" rates as a matter of *federal law*.[9]

Instead, Congress assigned to the FCC and the state commissions concurrent and complementary pricing roles in fostering competition in local telephone markets. The FCC must "establish regulations to implement" (47 U.S.C. 251(d)(1)) the rate provisions of Sections 251(c)(2)-(4) by resolving general methodological issues. Then, in arbitrating specific interconnection disputes, state commissions may exercise their considerable discretion to establish actual carrier-to-carrier rates in light of carrier- and region-specific variables such as geography, population density, and so forth. That role is important and com-

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[9] Other aspects of the court's decision also rested on the same unsound negative inference: a barely rebuttable presumption that, wherever Congress assigned the state commissions *some* role in implementing the 1996 Act, it must have intended for the Commission to play *no* role at all. See, *e.g.*, Pet. App. 27a-30a (divesting Commission of any role in implementing "rural exemptions" provision of Section 251(f)); *id.* at 32a-33a (divesting Commission of authority under 47 U.S.C. 208 to enforce terms of interconnection agreements); *id.* at 88a-89a (relying on Section 271(e)(2)(B) to divest Commission of dialing-parity authority under Section 251(b)(3)). As discussed in the text, that reasoning is irreconcilable with the complementary roles that Congress assigned to the FCC and the state commissions in implementing the Act. See also p. 37, *infra*.

plex: few tasks, for example, require as much expertise as the determination of the forward-looking economic costs of an efficient network, an inquiry that, under the FCC's rules, belongs to the state commissions. But Congress did not authorize the state commissions to determine, and inevitably to diverge on, such basic federal issues as whether interconnection and unbundling rates should be based on forward-looking or embedded costs. Instead, in Section 252(c)(1), it ordered state commissions, when arbitrating "*any* open issues," to adhere to "the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section 251*" (emphasis added)—and thus including the Commission's regulations implementing the pricing provisions of Sections 251(c)(2)-(4).

The court of appeals sought to avoid the plain meaning of that language by noting that, in the next sentence of the same subsection, Congress *also* directed the state commissions to set rates "according to" the requirements of Section 252(d). 47 U.S.C. 252(c)(2); see Pet. App. 13a-14a. Among other things, Section 252(d) provides that, to be "just and reasonable * * * for purposes of" Sections 251(c)(2) and (3), rates for interconnection and unbundled elements must be "based on * * * cost (determined without reference to a rate-of-return or other rate-based proceeding)." The Eighth Circuit reasoned that, because Section 251(c)(2) makes no "reference" to the Commission, "Congress did not envision the FCC's participation" in creating any methodological framework for rates. Pet. App. 13a. That reasoning is illogical. In effect, the Eighth Circuit held that a state commission's specific obligation to adhere to Section 252(d) when arbitrating open rate issues, see 47 U.S.C. 252(c)(2), somehow cancels out its broader obligation, applicable to "*any* open issues," to conform its disposition to "the regulations prescribed by the Commission pursuant to section 251," 47 U.S.C. 252(c)(1) (emphasis added). That holding rests on the self-refuting premise that "open rate issues" are not "open issues."

There is also no merit to the Eighth Circuit's view that Section 252(d) "provides statutory standards" that somehow "negat[e] any need for additional FCC-mandated ratemaking standards or guidelines." Pet. App. 14a.[10] Those "standards," like the substantive rate provisions of Section 251(c) that they cross-reference, require considerable interpretation, and their meaning is the subject of widespread disagreement. For example, Section 252(d)(1) provides that rates for unbundled elements shall be "based on * * * cost," a term that has historically assumed many meanings and that has now spawned numerous disputes in state arbitration proceedings on such basic issues as whether an incumbent LEC may recover historic costs or forward-looking costs and, if the latter, which forward-looking pricing methodology is appropriate. Cf. *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968). Resolving such policy-laden disputes about federal law in light of congressional intent is the kind of interpretive task that federal agencies are routinely expected to undertake—and that Congress specifically directed the Commission to undertake here.

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[10] As discussed above, the Commission's authority to interpret Section 252(d) derives from two independent sources. First, Section 201(b) gives the Commission plenary authority to issue general rules implementing the Communications Act, of which Section 252 is now a part. Second, Section 251(d)(1) specifically obligates the Commission to "implement the requirements of this section," which includes the requirement that the "rates" for interconnection and unbundled elements be "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2) and (3); see also 47 U.S.C. 251(b)(5) (transport-and-termination rates) and (c)(4) (resale rates). In fulfilling that obligation, the Commission must ensure the consistency of its rules with the standards of Section 252(d)—indeed, Sections 251(c)(2) and (c)(3) incorporate all of "the requirements of this section and section 252" by reference—and it must therefore determine what those standards are.

d. Compelling evidence of the Commission's plenary authority to issue rules implementing the local competition provisions can also be found in another part of the 1996 Act: in Section 271, which sets forth the procedure under which the Bell Companies may apply to the FCC for authorization to provide, for the first time, full long-distance service originating within the geographic regions in which they now exercise monopoly power.

Section 271 instructs the FCC to grant such an application only if "it finds," among other things, that the Bell Company has "fully implemented" (or, in certain special circumstances, has offered to implement) all of the requirements of a competitive checklist. 47 U.S.C. 271(d)(3); see pp. 7-8, *supra*. Those requirements include "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)" and "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." 47 U.S.C. 271(c)(2)(B)(i), (ii). Before ruling on an application, the Commission must "consult" with both the Attorney General and the relevant state commissions, but it need give "substantial weight" only to the views of the Attorney General. See 47 U.S.C. 271(d)(2)(A) and (B).

As the D.C. Circuit recently observed, the meaning of Section 271 is quite clear: the FCC may grant an application only if "the FCC concludes *to its own satisfaction*" that the Bell Company has met the requirements of the checklist; in particular, "[a]lthough the Commission must consult with the State commissions, *the statute does not require the FCC to give the State commissions' views any particular weight*." *SBC Communications Inc.* v. *FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added). Put another way, Congress directed the Commission to apply national standards when "it finds" whether (for example) a Bell Company has provided network elements at rates that meet "the requirements of sections 251(c)(3) and 252(d)(1)." Congress did not permit, much less compel, the Commission to abdicate that compliance inquiry to each of 50 state commissions, an approach that could require the Commission to reach different and incompatible outcomes on identical facts, depending on the pricing methodology favored by the particular State in which a given application arises.

The FCC's role under Section 271 is powerful evidence that Congress meant to authorize the Commission to create a national regulatory framework that the state commissions would apply in adjudicating particular carrier-to-carrier disputes under Sections 251 and 252. The decision below holds that the state commissions may apply radically disparate methodologies for determining compliance with Sections 251(c) and 252(d), at least until, many years from now, the lengthy process of piecemeal federal-court litigation under Section 252(e)(6) has run its course (see Point I(C), *infra*). That decision thus detaches the inquiry in state arbitration proceedings from the national standards that Section 271 instructs the FCC to apply when reviewing a Bell company's long-distance application. That result would greatly encumber the Commission's ability to determine, within 90 days of receiving a Section 271 application (see 47 U.S.C. 271(d)(3)), whether the Bell Company has in fact complied with those national standards.

In January 1998, the Eighth Circuit sought to resolve that jurisdictional tension by imposing its own interpretation of Section 271 on the Commission, despite the D.C. Circuit's exclusive statutory jurisdiction to review the Commission's Section 271 decisions. See pp. 13-15, *supra*. At the request of several parties that had challenged the reasoning in one of the Commission's Section 271 orders, the Eighth Circuit issued a writ of mandamus, ostensibly to "enforce the mandate" of the decision below, compelling the FCC—*when adjudicating Section 271 applications*—

to apply the disparate pricing methodologies of 50 state commissions in determining whether a Bell Company has complied with Sections 251(c) and 252(d). J.A. 284-301.[11]

The Eighth Circuit's mandamus order barely mentions the language or structure of Section 271. Instead, it rests on the following logic: (1) the Eighth Circuit's August 1997 local competition decision divested the Commission of jurisdiction to issue rules implementing the pricing provisions of Sections 251 and 252; (2) the Commission's application of national standards in adjudicating Bell Company long-distance applications would permit the Commission to construe those pricing provisions for the specific purposes of Section 271; and (3) national consistency in the adjudication of Section 271 applications must therefore be abandoned to accommodate the Eighth Circuit's decision. See J.A. 284-301. The central problem with the court's logic is that Section 271 says, and means, precisely what the Commission construed it to mean, as the D.C. Circuit recently confirmed in *SBC Communications*. Any tension between that meaning and the decision below is evidence not that Section 271 means something other than what it says, but that the decision below was wrong.

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[11] On March 13, 1998, we and several private parties filed separate petitions for certiorari challenging the Eighth Circuit's mandamus order. See *FCC* v. *Iowa Utilities Board*, No. 97-1519; *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-1520. (The Eighth Circuit issued that order on literally the afternoon before the Conference at which this Court, as previously announced (see 118 S. Ct. 683 (1998)), considered our petition in this case. On that same afternoon, we informed the Court by letter of the issuance of the mandamus order.) Our petition discusses in detail the procedural history of the mandamus proceedings, as well as the structure of Section 271. We have asked this Court to consolidate its review of the mandamus order with its review of the rest of this case. See 97-1519 Pet. 27-28.

B. Section 2(b) Of The Communications Act Of 1934 Does Not Limit The Commission's Jurisdiction To Implement The Telecommunications Act Of 1996

Central to the Eighth Circuit's jurisdictional holding was its interpretation of Section 2(b) of the Communications Act of 1934, which provides that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to * * * charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C 152(b); see generally *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986). That provision, the court declared, "is hog tight, horse high, and bull strong," and bars the Commission from "intruding on the states' intrastate turf." Pet. App. 23a. The court identified, as part of that protected "intrastate turf," the implementation of federal competition standards that *supplant* the traditional role of state commissions in managing and sustaining local exchange monopolies.[12] For two independent reasons, the court's reliance on Section 2(b) was wrong.

1. First, even if the regulatory subjects of the local competition provisions were properly characterized as "fundamentally intrastate in character" (Pet. App. 22a)—which they are not, as we discuss below—Section 2(b) is a rule of construction and, as such, is inapplicable where Congress "straightforward[ly]" subjects an aspect of in-

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[12] Sections 251 and 252 do not affect the scope of a state commission's traditional authority to regulate the *retail* rates that LECs may charge their customers for local and intrastate long-distance service. Instead, those provisions address a subject that, before 1996, neither the federal government nor most state commissions had ever addressed: the terms under which a new LEC may use an incumbent LEC's network to provide a broad range of competing telecommunications services. That subject has not been a traditional part of state regulation of telephone service, despite the court of appeals' misplaced concern about the "states' intrastate turf."

trastate telecommunications to federal regulation. *Louisiana*, 476 U.S. at 377; see also Pet. App. 16a (same). Here, it is undisputed that Congress "straightforwardly" and comprehensively subjected competition in local telephone markets to regulation under the Communications Act, despite Section 2(b)'s unamended provision against "constru[ing]" the substance of that Act "*to apply*" to intrastate matters. The only question is whether, as the Eighth Circuit believed, Congress *sub silentio* repealed the Commission's plenary authority "to carry out the provisions of this [Communications] Act." 47 U.S.C. 201(b).

Congress did no such thing. As discussed above, even apart from Section 251(d)(1), key provisions of the 1996 Act presuppose the Commission's authority, without themselves serving as a source of that authority, to regulate certain local-exchange matters that the Act has made a subject of federal law. *E.g.*, 47 U.S.C. 251(d)(2) (assuming that Commission would have authority to define "network elements" for unbundling purposes); see pp. 21-22, *supra*. Congress saw no need to amend Section 2(b) to confirm that presupposition.[13] Congress also saw no need to amend

[13] Nor, again, did Congress perceive any need to amend Section 2(b) to confirm that the substantive terms of the Act obviously apply to the matters at issue here, despite Section 2(b)'s policy against "constru[ing]" federal law "to apply" to intrastate matters. See *Illinois Pub. Telecomm. Ass'n* v. *FCC*, 117 F.3d 555, 561-562, clarified on other grounds on reh'g, 123 F.3d 693 (D.C. Cir. 1997), cert. denied, No. 97-1072 (Mar. 30, 1998). Despite the court of appeals' contrary suggestion (see Pet. App. 18a n.17), the legislative history addressing the relationship between Section 2(b) and the 1996 Act is consistent with, and in fact supports, the Commission's position on the scope of its authority to implement the 1996 Act. Although early versions of the 1996 legislation would have expressly amended Section 2(b) to except Sections 251 and 252 (among other provisions), Congress indicated that the omission of that amendment from the final legislation was a technical, non-substantive change, see S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113

Section 2(b) to confirm that, under Sections 201(b) and 251(d)(1), it has squarely authorized the Commission to implement the other local competition provisions of the same Act, including the provisions relating to dialing parity and pricing.

More generally, Section 2(b) does nothing to detach the Commission's plenary rulemaking authority from the substantive scope of the Communications Act. As respondents have noted (see Regional Bell Br. in Opp. 15), the language of Section 2(b) appears in the disjunctive: "nothing in this Act shall be construed to apply *or* to give the Commission jurisdiction with respect to" intrastate matters. See also Pet. App. 19a. But that disjunction cannot logically be construed to mean that Section 2(b) limits the scope of the Commission's authority *more* than it limits the substantive reach of federal telecommunications law. By its terms, Section 2(b)'s rule of construction applies equally to the substantive scope of federal law and to the Commission's authority to implement it; indeed, Congress could not have meant to distinguish between the two, because when Section 2(b) was enacted in 1934, federal telecommunications law did not apply to intrastate communications.

Section 2(b) refers to the Commission's authority as well as to the applicability of federal law *not* because Congress wished to detach the scope of one from the scope of the other, but because Congress intended to bar the Commission from exercising its "ancillary" jurisdiction, see generally *Southwestern Cable Co.*, 392 U.S. at 172-178, over intrastate matters that may be loosely related to implementation of the Act but to which the Act itself does not clearly extend. See *Louisiana Pub. Serv. Comm'n*, *supra*; see also *Houston, E. & W. Tex. Ry.* v. *United*

(1996), a characterization that belies the court's view that the omission had profound jurisdictional consequences.

States, 234 U.S. 342 (1914) (*Shreveport Rate Case*). As the court of appeals itself recognized (Pet. App. 19a), that concern, which led to this Court's jurisdiction-restrictive decision in *Louisiana*, is absent here. *Louisiana* nowhere suggests that the Commission's authority is narrower than the substantive scope of the Communications Act, and, until now, no court had ever so held.

2. The Eighth Circuit's reliance on Section 2(b) was misplaced for an independent reason as well. The core regulatory subjects at issue here—including, in particular, the rates for access to an incumbent's local facilities to provide a range of competitive services—are inextricably *both* interstate *and* intrastate in character. For that reason alone, Section 2(b) could not serve as a basis for resolving, against the FCC, any question about the Commission's jurisdiction to address those subjects. The court of appeals' contrary premise—that those regulatory matters are "fundamentally intrastate in character" (Pet. App. 22a) and therefore beyond the Commission's jurisdiction—rests on a basic misunderstanding of the telecommunications industry and of telecommunications law.

The same facilities that are used to provide local service are also used to provide interstate exchange access. See p. 3, *supra*. Thus, "[t]he same loop that connects a telephone subscriber to the local exchange necessarily connects that subscriber into the interstate network as well." *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 737 F.2d 1095, 1113 (D.C. Cir. 1984) (*NARUC*), cert. denied, 469 U.S. 1227 (1985). For that reason, and consistently with Section 2(b), retail rates designed to cover the cost of the "local" network (and reflected on a consumer's local telephone bill) have long included both "intrastate" charges determined by state regulators and "interstate" charges determined by the FCC. See generally *id.* at 1103-1110; see also *Louisiana*, 476 U.S. at 375-376. Likewise, incumbent

LECs derive many billions of dollars in annual revenues from long-distance carriers for the use of the local network to originate and complete interstate calls. Courts and regulators have thus consistently recognized that, for jurisdictional purposes, the "local" network is inherently both intrastate *and* interstate in character. See, *e.g.*, *Public Serv. Comm'n of Maryland* v. *FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990); see also cases cited at p. 38, *infra*.

It has been feasible, and consistent with congressional intent, to divide some subjects of local exchange regulation—such as retail rates for consumers—into their interstate and intrastate components for separate regulation by federal and state agencies. See *Louisiana*, 476 U.S. at 377-378; see also note 12, *supra*. As this Court has recognized, however, where it is "*not* possible to separate the interstate and the intrastate components" of telephone regulation, the Commission may ensure effective regulation of the interstate component, despite Section 2(b), by preempting inconsistent state regulation of the matter in issue. *Louisiana*, 476 U.S. at 375 n.4; accord *Illinois Bell Tel. Co.* v. *FCC*, 883 F.2d 104, 114-115 (D.C. Cir. 1989); *Public Util. Comm'n of Texas* v. *FCC*, 886 F.2d 1325, 1331 (D.C. Cir. 1989); *North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036, 1045-1046 (4th Cir.) (*NCUC II*), cert. denied, 434 U.S. 874 (1977); see also 47 U.S.C. 253(d).

For that reason, the traditional jurisdictional principles embodied in Section 2(b)—even if Congress had not superseded them here—would affirm the FCC's exercise of jurisdiction in this context. Sections 251 and 252 entitle new entrants to make broad use of facilities that incumbent LECs now use, and the new entrants would use, to provide both intrastate and interstate telecommunications services. As the Commission determined (Pet. App. 191a, 194a-195a), it would be economically and technologically nonsensical, and wholly inconsistent with the 1996 Act, for the FCC and the state commissions to treat the rates for interconnection with and unbundled access to those facilities like retail rates, such that the ultimate rate a competing carrier must pay an incumbent LEC would reflect a combination of an "intrastate" rate set by a state commission and an "interstate" rate set by the FCC. (Indeed, during the Commission's rulemaking proceedings, *no party even suggested such a regime*. See *id.* at 195a.) That is why, in assigning authority to implement the terms of Sections 251 and 252, Congress divided responsibility between the FCC and the state commissions along lines of legislative and adjudicatory *function*, see pp. 26-27, *supra*, not along lines of separate "interstate" and "intrastate" *subject matter*. For example, in authorizing the state commissions to arbitrate disputes concerning unbundled elements often used for access to the interstate long-distance network, Congress extended the jurisdiction of the state commissions into the interstate sphere, while simultaneously directing them to follow "the regulations prescribed by the Commission pursuant to section 251." 47 U.S.C. 252(c)(1).

Because (as all conceded before the FCC) it is "not possible" to effectuate congressional intent by "separat[ing] the interstate and the intrastate components" of the regulatory matters at issue, see *Louisiana*, 476 U.S. at 375 n.4 (emphasis omitted), it is incorrect, for that reason alone, to invoke Section 2(b) to divest the FCC of jurisdiction to address those matters. That conclusion follows not just from *Louisiana* itself, but from numerous decisions of the courts of appeals in analogous circumstances. For example, both the Fourth and the D.C. Circuits have held that the Commission has preemptive authority, consistent with Section 2(b), to facilitate competition by deregulating or detariffing terminal equipment (such as home telephones) that customers plug into the local telephone network, *whether or not* a given customer uses that equipment to make interstate calls. See *Computer & Commu-*

nications Indus. Ass'n v. *FCC*, 693 F.2d 198, 214-216 (D.C. Cir. 1982) (*Computer II*), cert. denied, 461 U.S. 938 (1983); *NCUC II*, 552 F.2d at 1045-1046; *North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787, 791-794 (4th Cir.) (*NCUC I*), cert. denied, 429 U.S. 1027 (1976); see also *California* v. *FCC*, 39 F.3d 919, 932-933 (9th Cir. 1994), cert. denied, 514 U.S. 1050 (1995); *Public Util. Comm'n of Texas*, 886 F.2d at 1331; *Illinois Bell*, 883 F.2d at 112-116. Indeed, in an opinion that this Court cited approvingly in *Louisiana*, see 476 U.S. at 375 n.4, the Fourth Circuit held that, in cases of conflict, state commission jurisdiction must yield to the FCC's preemptive authority even where the facility at issue is "used predominantly for local communications," because Congress did not "create[] a regulatory scheme that depends on the calling habits of telephone subscribers to determine the jurisdictional competence of the FCC versus state utility commissions." *NCUC II*, 552 F.2d at 1046; accord *NCUC I*, 537 F.2d at 791-794; see also *NARUC*, 737 F.2d at 1114-1115 (affirming Commission's authority to impose subscriber line charge to recover interstate component of costs of local network, "although the plant in question is necessary to make local calls, and although some subscriber[s] might use it only to make local calls").

The Eighth Circuit, however, chose precisely the opposite course. It held that the FCC may play *no* role in implementing any substantive provision of the 1996 Act that does not itself "mention" the Commission (Pet. App. 85a), despite the inseparably interstate and intrastate character of the facilities whose regulation is at issue. As this Court indicated in *Louisiana*, see 476 U.S. at 375 n.4, however, Section 2(b) is not a *reverse*-preemption provision that relieves the Commission, in matters of jurisdictional conflict, from its statutory duty to regulate interstate matters. In particular, if Section 2(b) were construed "to give the states primary authority" over facilities "used interchangeably for interstate and intrastate service," the Commission "would necessarily be prevented from discharging its statutory duty * * * to regulate interstate communication," a result that Congress never intended. *NCUC II*, 552 F.2d at 1045; accord *Illinois Bell*, 883 F.2d at 116; *Computer II*, 693 F.2d at 215-216; *NARUC*, 737 F.2d at 1114-1115.

C. The Court Of Appeals' Narrow View Of The Commission's Jurisdiction Would Raise Immense Obstacles To Effective Implementation Of The 1996 Act

1. The greatest irony of the decision below, which graphically illustrates why that decision is wrong, is this: The Eighth Circuit's concern about federal "intru[sion] on the states' intrastate turf" (Pet. App. 23a) serves not to protect that "turf" from the application of federal standards, but only to impede the competition that Congress sought to bring to local telephone markets throughout the United States. The 1996 Act does not leave local competition matters to the States to govern under state law; instead, it subjects those matters to regulation under federal law and offers the States a role in implementing that federal law. Moreover, the federal standards of the 1996 Act require national application. Although Congress assigned the States the important task of tailoring those standards to accommodate region- or carrier-specific variables, it did not leave room for 50 state commissions to disagree about the basic legal issues that inevitably arise under the Act, such as what dialing parity is and whether rates for unbundled elements should be based on forward-looking economic costs or on an incumbent carrier's embedded costs.

Sooner or later, the federal courts will have to decide those issues. Congress provided two methods of federal-court review of issues arising under Sections 251 and 252: comprehensive court of appeals review of all FCC regulations under the Administrative Procedure Act, and federal district court review of individual state arbitration decisions under Section 252(e)(6) to determine whether those decisions comply with the 1996 Act and the Commission's implementing regulations. In holding that the Commission lacks jurisdiction to adopt regulations addressing the core local competition provisions of the 1996 Act, however, the court of appeals has deprived the district courts of a national regulatory framework within which to review state arbitration decisions and has relegated many of the fundamental disputes under the Act to piecemeal litigation throughout the United States.

Thus, the principal question here is not *whether* the federal judiciary will supply nationally consistent interpretations of the key provisions of the 1996 Act, but *when* it will do so and in what type of proceeding. We believe that Congress directed the Commission to address the most fundamental issues arising under the Act by August 1996 so that a single court of appeals could resolve those issues on the merits (subject to review by this Court) soon after the Act's enactment.[14] By contrast, under the cumbersome approach favored by the court of appeals and the incumbent monopolists, full resolution of those issues would not come until many years later, after the various pricing and other issues have wound their way through 50 state commissions, numerous federal district courts, various courts of appeals, and ultimately this Court, all without comprehensive direction from the federal agency with the expertise to interpret federal telecommunications law.

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[14] Under 28 U.S.C. 2342(1), known as the Hobbs Act, "exclusive jurisdiction * * * to determine the validity" of the Commission's orders lies with the federal courts of appeals on direct review. Where the reviewing court upholds the Commission's rules on the merits, those rules (absent additional review by this Court) are no longer subject to further challenge in district court proceedings under Section 252(e)(6). See generally *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Wilson* v. *A.H. Belo Corp.*, 87 F.3d 393, 400 (9th Cir. 1996).

Congress did not intend to subject new entrants and the federal courts to such protracted and redundant litigation on the basic methodological issues that the Commission sought to address nearly two years ago. But that is the regime that the Eighth Circuit has created, to the detriment of competition and, ultimately, American consumers. The federal district courts have already received more than 100 challenges under Section 252(e)(6) to the arbitration decisions of various state commissions; to date, the district courts have adjudicated only a tiny number of those challenges on the merits. In the absence of national standards, would-be competitors remain uncertain about the scope of their basic rights under the statute. That pervasive uncertainty is a principal reason why local exchange monopolists still receive approximately 98% of the $100 billion in annual revenues generated by the provision of exchange access and local exchange services. See FCC, *Telecommunications Indus. Revenue* Tab. 2 (Common Carrier Bur. Nov. 1997); see also Chen, *supra*, 33 Wake Forest L. Rev. at 54 (arguing that Eighth Circuit's decision undermines "federal deregulatory power needed to complete American telephony's transition from command-and-control regulation to open competition").

2. The Commission determined that a national framework for implementing the 1996 Act—a framework that, for the foreseeable future, only the Commission can provide—is necessary to avoid the anticompetitive uncertainties that would impair effective implementation of the 1996 Act. See pp. 9-10, *supra*. That determination was reasonable: Congress did not anticipate that, two years after enactment of the 1996 Act, incumbent monopolists would retain a 98% market share. And, more generally, the Commission reasonably interpreted the disparate provisions of federal law governing its rulemaking authority to create such a national framework.

Even if there were some ambiguity in those provisions, the Commission's interpretation of them would be entitled to substantial deference, for "it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction," including "an agency's interpretation of a statute designed to confine its authority. * * * Congress would neither anticipate nor desire that every ambiguity in statutory authority would be addressed, *de novo*, by the courts." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring in the judgment) (addressing scope of agency's preemptive authority); accord *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 844 (1986); *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 830 n.7 (1984); see also *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 495-497 (1996); see generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984). The jurisdictional question presented here is a question of authority to implement federal law and, at bottom, of the need for nationally consistent standards to ensure effective implementation of federal law. That question, if left unresolved by the relevant statutory provisions, should be answered by the agency in the best institutional position to answer it: the same agency to which Congress has always turned for interpretation of federal telecommunications law. Cf. *Martin* v. *OSHRC*, 499 U.S. 144, 152-153 (1991).

II. RULE 315(b) IS A REASONABLE EXERCISE OF THE COMMISSION'S AUTHORITY TO ENSURE NONDISCRIMINATORY ACCESS TO NETWORK ELEMENTS

A. The Eighth Circuit also addressed the substantive validity of the FCC's rules implementating several provisions of the 1996 Act as to which the Commission's jurisdiction is not in dispute. Among those rules were the Commission's regulations giving effect to the non-pricing requirements of Section 251(c)(3), which directs incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis" and to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements to provide * * * telecommunications service." 47 U.S.C. 251(c)(3).

Section 251(c)(3) gives a new entrant the option to lease from incumbent LECs, on reasonable and nondiscriminatory terms, whatever network elements it needs. It further entitles a new entrant, which may or may not have constructed some facilities of its own, to receive the specified elements in a manner that enables it to combine its total package of elements however it wishes, to provide whatever services it wishes. The Commission reasonably determined that those guarantees do not give incumbent LECs a unilateral *right* to inflict gratuitous reassembly costs on a new entrant, and possible service outages on the new entrant's customers, by disconnecting previously combined network elements that the new entrant wishes to use in the same (or in a lesser-included) combination. See Pet. App. 230a-234a; see also *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98), Third Order on Reconsideration, FCC 97-295, ¶ 44 (Aug. 18, 1997) (J.A. 247-248), petitions for review pending, *Southwestern Bell Tel. Co.* v. *FCC*, Nos. 97-3389 et al. (8th Cir. filed Sept. 5, 1997). The Commission therefore adopted Rule 315(b), which provides that, "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. 51.315(b).

The Eighth Circuit invalidated Rule 315(b) principally on the ground that the language of Section 251(c)(3) "requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis." Pet. App. 71a. That holding is erroneous for several reasons.

First, the Eighth Circuit misunderstood the term "unbundled." The court's reasoning assumes that elements are "unbundled" for purposes of Section 251(c)(3) only if they are disconnected (rather than "combined" within the network). But the duty to "unbundle" network elements is an obligation to offer those elements for individual leasing at individual prices, not an invitation to disconnect them over the objection of the requesting carrier. That use of the term "unbundle"—to denote giving someone a choice of elements at separate prices rather than separating those elements over the recipient's objection—is the same use that the Commission and other regulatory agencies have consistently employed when, over the course of the past 15 years, they have adopted "unbundling" policies designed to promote competition. *E.g.*, *Second Computer Inquiry*, 77 F.C.C.2d 384, 443-444 (1980), aff'd, *Computer II*, *supra*; see also *Bell Atlantic Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1443, 1444 (D.C. Cir. 1994); *California* v. *FCC*, 4 F.3d 1505, 1509 (9th Cir. 1993); *Northern Natural Gas Co.* v. *FERC*, 929 F.2d 1261, 1263 (8th Cir.), cert. denied, 502 U.S. 856 (1991). That meaning, and not the court of appeals' interpretation, also represents the consistent dictionary definition of "unbundle." See, *e.g.*, *The Random House Dictionary of the English Language* 2055 (2d ed. 1987) ("to separate the charges for (related products or services usually offered as a package)"); *Webster's Ninth New Collegiate Dictionary* 1283 (1986) ("to give separate prices for equipment and supporting services"). In promulgating Rule 315(b), the Commission reasonably determined that Congress intended to incorporate the established meaning of "unbundled" when it included that industry term in the text of Section 251(c)(3). See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991).

Second, the Eighth Circuit's premise that "unbundled" means "disconnected" misapprehends the technical reality of the telephone network. Some network elements—such as the signalling systems that help to route calls—are "shared" by all users of the network, rather than (like loops) "dedicated" to particular users. The Eighth Circuit elsewhere recognized that a signalling system is a "network element" under the Act (see Pet. App. 44a) and that new entrants may therefore gain "access" to that element "on an unbundled basis." 47 U.S.C. 251(c)(3). But it would make no sense for an incumbent LEC to provide such access by *disconnecting* the signalling system from other network elements, because, among other things, that would disrupt service to all users of the network. Congress obviously did not equate "unbundled" with "disconnected" in that context, and it would be illogical to suppose that, using the same language, it did mean to equate those concepts in other contexts.

Third, the Eighth Circuit's interpretation of Section 251(c)(3) is, in several respects, unsound as a matter of grammar. The court reasoned that an incumbent LEC's "duty to provide" access to elements "on an unbundled basis," along with its duty to provide them in a "manner that allows requesting carriers to combine such elements," somehow encompasses a *right* (though presumably not, in the court's view, a duty) to disconnect those elements for the sole purpose of imposing costs on the LEC's competitors. Pet. App. 71a. But a "duty" is an obligation, not a right, and the grammatical implication of the Eighth Circuit's construction (which no party has embraced) is that incumbent LECs *must* provide access to network elements, including shared facilities, only on a *disconnected* basis. Congress did not create such a bizarre duty. Similarly, there is no textual basis for construing a provision governing what an incumbent LEC must "allow" new entrants to do as an entitlement to *compel* new entrants to incur gratuitous costs.

Finally, and most important, the Eighth Circuit's interpretation of Section 251(c)(3) simply ignores that provision's nondiscrimination mandate. The language upon which the court principally relied—the clause directing incumbent LECs to provide elements "in a manner that allows requesting carriers to combine such elements"—appears in the second sentence of Section 251(c)(3) and augments a requesting carrier's more general rights under the first sentence of that provision. Among those general rights is "*nondiscriminatory* access to network elements." It is the essence of discrimination for a telephone monopolist to impose gratuitous disassembly and reassembly charges on new entrants that it would not impose upon itself in any analogous circumstance (for example, when setting up service for its own customers) or to impose such charges for the purpose of raising a potential competitor's costs of entry into the monopolist's market. Cf. *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Yet that is precisely the anticompetitive tactic that the Commission sought to foreclose, see Third Order on Reconsideration, ¶ 44 (J.A. 247-248); Pet. App. 231a-232a, 293a, and that respondents have now pursued throughout the United States. Through its misinterpretation of Section 251(c)(3), the court of appeals has converted one of the 1996 Act's most important procompetitive tools into a statutory authorization of anti-competitive conduct.

B. There is no merit to the Eighth Circuit's unelaborated policy concern (Pet. App. 71a) that "[t]o permit * * * acquisition of already combined elements at cost based rates" would "obliterate" Congress's "careful distinctions" between unbundled elements and resale as methods for competitive entry. The court evidently deemed it appropriate for incumbent LECs to raise the costs of unbundled elements simply to make access to those elements a less attractive entry option than resale rights under Section 251(c)(4). In their cross-petitions for certiorari, which this Court granted and consolidated with the rest of this case, the respondent LECs relied principally on that and related policy concerns to challenge a variety of other unbundling rules that the Eighth Circuit upheld. In essence, respondents argue that it is necessary to read one antitextual limitation or another into Section 251(c)(3) to limit the competitive significance of unbundled elements as an option.

We will address that argument in more detail in our response to respondents' opening brief on the issues presented in their cross-petitions. Two points are appropriate here. First, Congress intended both the Commission and the federal courts to apply Sections 251(c)(3) and 251(c)(4) by their plain terms, not to create arbitrary limitations on the applicability of one to increase the commercial attractiveness of the other. Second, as the Commission explained, resale and unbundled elements are in fact two quite distinct means of entering local markets, each with its own advantages and disadvantages, which vary with a particular carrier's circumstances, overall entry strategies, and willingness to incur investment risks. See Pet. App. 244a-246a; Third Order on Reconsideration, ¶ 47 (J.A. 248-249). Rule 315(b) poses no danger of "obliterat[ing]" the distinction between those two options, and the Eighth Circuit had no basis for misreading Section 251(c)(3) to fine-tune the economics of local competition.

In any event, even if it were plausible to construe Section 251(c)(3) as the Eighth Circuit did in invalidating Rule 315(b), the Commission's contrary interpretation is—at a minimum—reasonable and entitled to deference. See *Chevron*, 467 U.S. at 843-844. Indeed, the need for such deference in this technical context is particularly acute. The Commission is uniquely well-equipped both to interpret what Congress meant by the term "unbundle" and to understand the potential competitive and technical effects of the various interpretations of Section 251(c)(3). The Eighth Circuit erred in substituting its own speculations for the Commission's institutional expertise.

III. THE COMMISSION'S INTERPRETATION OF SECTION 252(i) IS REASONABLE

Section 252(i) requires each LEC to "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. 252(i). The Commission interpreted that nondiscrimination requirement to mean exactly what it says: that a new entrant is entitled, on the same terms and conditions as any other new entrant, to "*any* interconnection, service, *or* network element provided under an [existing] agreement" without also having to accept *all other* terms of that agreement. Pet. App. 261a-268a.[15]

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[15] As a protection for incumbent LECs, the Commission provided that a requesting carrier may invoke that right only if (1) it agrees to the terms and conditions of the existing agreement relating to the particular service or element it wishes to purchase, and (2) the incumbent's provision of the service or element on those terms and

The court of appeals "acknowledge[d] that the words [of the statute] could indicate that the FCC's approach was intended by Congress." Pet. App. 25a n.22. It nonetheless invalidated the Commission's interpretation and instead construed Section 252(i) to force potential entrants to accept an existing agreement on an all-or-nothing basis, because it feared that a literal approach would "discourage the give-and-take process that is essential to successful negotiations." *Id.* at 26a.

The court of appeals had no valid basis for supplanting the will of Congress with its own policy concern. As the legislative history of Section 252(i) suggests,[16] and as the provision's plain language confirms, Congress believed that giving requesting carriers a right to select "any" element or service on the same terms and conditions as contained in a preexisting agreement is a necessary means of ensuring full and nondiscriminatory competition in local telephone markets. Moreover, even if Congress had left some ambiguity on that point, the Commission's interpretation was at least reasonable, and the court of appeals had no basis for supplanting that interpretation with its own policy speculation. See *Chevron*, *supra*. Indeed, the court's approach threatens to undermine any role for Section 252(i) in many negotiations, because it creates an incentive for incumbent LECs to include extraneous terms in their contracts to ensure that any given agreement, taken as a whole, will be unpalatable to future would-be competitors.

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conditions would subject it to costs no greater than those it incurred under the existing agreement. Pet. App. 264a-265a, 336a-337a.

[16] See S. Rep. No. 23, 104th Cong., 1st Sess. 21-22 (1995) (Congress intended earlier version of Section 252(i) to "prevent discrimination among carriers and to make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated").

The court belittled that concern on the theory that "incumbent LECs have as much interest in avoiding the costs of prolonged negotiations or arbitrations as do the requesting carriers, which gives the incumbent LECs an incentive to negotiate initial agreements that would be acceptable to a wide range of later requesting carriers." Pet. App. 27a. That reasoning is invalid on its face. Incumbent monopolists benefit enormously from any delay in opening their markets to competition, and they will of course prefer "the costs of prolonged negotiations" to the rapid erosion of their monopoly market shares. Contrary to the court of appeals' holding, both Congress and the Commission were entitled to act on that economic premise.

CONCLUSION

The judgment of the court of appeals should be reversed as discussed above and the case remanded for further proceedings.

Respectfully submitted.

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