No. 98-1381

# In the Supreme Court of the United States

OCTOBER TERM, 1998

AMERITECH CORPORATION, ET AL., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

## BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION


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## QUESTION PRESENTED

Whether this Court should summarily vacate the decision below and remand for further proceedings in light of *AT&T Corp.* v. *Iowa Utilities Board*, 119 S. Ct. 721 (1999).

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-24a) is reported at 153 F.3d 597. The Federal Communications Commission's *Third Order on Reconsideration and Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (Pet. App. 26a- 84a), is reported at 12 F.C.C.R. 12,460.

## JURISDICTION

The judgment of the court of appeals was entered on August 10, 1998. Pet. App. 1a-5a. A petition for rehearing was denied on December 4, 1998. Pet. App.

25a. The petition for a writ of certiorari was filed on February 26, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. *Statutory background.* For many years, incumbent telephone companies—known as local exchange carriers (LECs)—have maintained monopoly control over local telephone facilities and the provision of local telephone service. To open local telephone markets to competition, Congress enacted the local competition provisions of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. 251 *et seq.* Those provisions impose on incumbent LECs "a host of duties intended to facilitate market entry." *AT&T Corp.* v. *Iowa Utils. Bd.*, 119 S. Ct. 721, 726 (1999). Of greatest significance here, Section 251(c)(3) compels incumbents to provide new entrants with "nondiscriminatory access to network elements on an unbundled basis * * * on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3); see also *Iowa Utils. Bd.*, 119 S. Ct. at 726-727, 736-738.

The 1996 Act broadly defines the term "network element" to encompass any "facility or equipment used in the provision of a telecommunications service" as well as any "features, functions, and capabilities that are provided by means of such facility or equipment." 47 U.S.C. 153(29). The Act does not give new entrants automatic access, however, to every facility or functionality that falls within the scope of that definition. Instead, Section 251(d)(2) directs the Federal Communications Commission (FCC or Commission) to "consider, at a minimum," certain factors when determining "what network elements should be made available" to

new entrants. 47 U.S.C. 251(d)(2). Those factors are whether "access to such network elements as are proprietary in nature is necessary" and, as to other elements, whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. 251(d)(2)(A) and (B).

2. *The First Report and Order.* The substantive challenges presented in this petition—which relate to the Commission's application of the "necessary" and "impair" standards of Section 251(d)(2)—were raised on review of the FCC order that was before this Court in *Iowa Utilities Board*, not on review of the subsequent FCC order underlying *these* proceedings. For purposes of background, we discuss each FCC order in turn.

a. In August 1996, the FCC issued its *First Report and Order*, which adopted a comprehensive set of regulations to implement the local competition provisions of the 1996 Act. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 15,616-15,775 (1996) (¶¶ 226-541), aff'd in part and vacated in part, *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and rev'd in part, *AT&T Corp.* v. *Iowa Utils. Bd.*, *supra*. One of those regulations was Rule 319, 47 C.F.R. 51.319, which listed seven basic categories of network elements that incumbent LECs must make available to new entrants.

The Commission included "interoffice transmission facilities" on that list. *First Report and Order*, 11 F.C.C.R. at 15,714-15,722 (¶¶ 428-451). Such facilities perform a critical function called "transport": *i.e.*, they

convey calls between switches.[1] In the *First Report and Order*, the FCC explained that the "interoffice transmission" element to which new entrants may gain access includes both "dedicated transport," which is the "exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier," and "shared transport," which is the "use of the features, functions, and capabilities of interoffice transmission facilities shared by *more than one* customer or carrier." 47 C.F.R. 51.319(d)(2)(i) (1997) (emphasis added).

b. On direct review, the incumbent LECs and other parties challenged the *First Report and Order* on a variety of grounds. Two of those challenges are relevant here. First, petitioners claimed that the FCC had misinterpreted the "necessary" and "impair" standards of Section 251(d)(2) and that this error had affected the Commission's determination, in Rule 319, of the elements that incumbents must make available to new entrants. Second, petitioners challenged a separate FCC regulation—Rule 315(b)—that bars incumbents from disconnecting previously combined elements when new entrants request access to those elements in combination. 47 C.F.R. 51.315(b). In challenging the latter regulation, the incumbents reasoned that Section 251(c)(3) requires incumbents to make network elements available only "on an unbundled basis," and they construed the term "unbundled" to mean "disconnected" rather than "separately priced." The incumbents also contended that, because Rule 315(b) gives new entrants efficient access to existing configurations

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[1] A network makes use of many switches to route telephone calls. Some of those switches are located at local "end offices." Others, called tandem switches, route telephone traffic between end offices (among other functions).

of network elements, it improperly blurs the statutory distinction between two different entry options: access to an incumbent's network elements under 47 U.S.C. 251(c)(3) and resale of an incumbent's finished services under 47 U.S.C. 251(c)(4).

In July 1997, the Eighth Circuit invalidated some portions of the *First Report and Order* and upheld others. First, the court upheld the Commission's application of the "necessary" and "impair" standards as a reasonable interpretation of Section 251(d)(2). 120 F.3d at 810-812. But, in a subsequent order issued in October 1997 and ultimately incorporated within its original opinion, the court invalidated Rule 315(b). It reasoned:

> [Section] 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. § 51.315(b), which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis.

*Id.* at 813.

c. This Court granted certiorari to review the Eighth Circuit's decision, and, in January 1999, it decided *Iowa Utilities Board*. It repudiated the Eighth Circuit's basis for invalidating Rule 315(b) and held that the rule is a reasonable interpretation of Section 251(c)(3). See 119 S. Ct. at 737. In reinstating the rule, the Court specifically rejected the incumbents' two principal bases for challenging Rule 315(b): the arguments that the right of access to "unbundled" elements under Section 251(c)(3) is a right of access only to *disconnected* elements; and that Rule 315(b), by ensuring efficient, nondiscriminatory access to an incumbent's elements, had improperly "eviscerate[d]" the statutory distinction between network elements and resale. *Ibid.*

The Court separately determined, however, that the FCC had "not adequately consider[ed]" the "necessary" and "impair" standards of Section 251(d)(2) when setting forth the list of elements, contained in Rule 319, that incumbents must make available to new entrants. 119 S. Ct. at 734-736. The Court therefore vacated Rule 319 in its entirety and remanded that aspect of the case to the Commission for further consideration of *all* network elements under those standards.[2]

3. *The Third Order on Reconsideration.* In August 1997, after the Eighth Circuit had issued its initial decision in *Iowa Utilities Board* but shortly before that

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[2] On April 16, 1999, the FCC issued a notice of proposed rulemaking concerning application of the "necessary" and "impair" standards in light of this Court's decision in *Iowa Utilities Board*. See *Second Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 99-70. Those rulemaking proceedings are pending.

court issued its subsequent decision invalidating Rule 315(b), the FCC issued the order underlying *these* proceedings: the *Third Order on Reconsideration*, which clarified the obligation of incumbent LECs to provide shared transport. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 F.C.C.R. 12,460, 12,475-12,477 (1997) (¶¶ 25-26) (Pet. App. 26a- 84a) (*Third Order*).

In the *First Report and Order*, the Commission had determined that incumbents must "provide unbundled access to shared transmission facilities between end offices and the tandem switch." 11 F.C.C.R. at 15,718 (¶ 440). In the *Third Order*, the Commission clarified that when competing carriers request shared transport, incumbents must provide access to all of their interoffice transmission facilities—not just the links between end office switches and tandem switches, but also the trunks that transport phone calls from one end office to another or from one tandem switch to another. Pet. App. 47a-48a. The FCC also reaffirmed that shared transport falls within the statutory definition of network element, and it clarified, among other things, that the duty to provide shared transport requires incumbents, upon request, to share with new entrants the same interoffice transmission facilities that the incumbents themselves use. *Id.* at 58a-69a. Finally, the FCC reaffirmed its earlier finding in the *First Report and Order* that shared transport meets the "necessary" and "impair" standards of Section 251(d)(2). *Id.* at 52a-57a.

Petitioners, who are incumbent LECs, sought judicial review of the *Third Order* on several related theories. First, they claimed that, because the Commission had previously defined each interoffice transmission facility as a discrete network element, the

definition of shared transport in the *Third Order* combined multiple network elements into a single network element; similarly, they contended that the *Third Order* required them to provide interoffice transport in combination with switching, a separate network element. In both respects, they claimed, the Commission had done indirectly what the Eighth Circuit had recently ruled it could not do directly under Rule 315(b): compel incumbents to provide pre-assembled combinations of network elements to new entrants. Petitioners further claimed that, by requiring incumbents to provide separate elements in combination, the Commission's shared transport rules, like Rule 315(b) itself, would eviscerate the distinction between network elements and resale.

In August 1998, the Eighth Circuit rejected those arguments and upheld the *Third Order*. Pet. App. 1a-24a.[3] The court first held that the Commission had acted reasonably in determining that "shared transport" falls within the broad statutory definition of "network element" (47 U.S.C. 153(29)), even though shared transport might also be said to embrace a combination of constituent elements. See Pet. App. 15a-17a. In so holding, the court distinguished its earlier decision invalidating Rule 315(b). *Id.* at 19a-22a. The court also "decline[d] at this time" to invalidate the *Third Order* on the "speculative assumption" that, as implemented, the Commission's shared transport rules would ultimately blur the distinction between network elements and resale. *Id.* at 17a-19a.

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[3] The court observed that petitioners "d[id] not argue that the FCC failed to give adequate consideration" to the "necessary" and "impair" standards of Section 251(d)(2). Pet. App. 18a.

**ARGUMENT**

Petitioners base their request for relief on the proposition that the Commission misapplied the "necessary" and "impair" standards of Section 251(d)(2) in determining that shared transport should be made available to new entrants. But petitioners raised all of their judicial challenges concerning those standards in *Iowa Utilities Board*, on direct review of the *First Report and Order*, not in this case, on direct review of the *Third Order*. In *Iowa Utilities Board*, this Court addressed those challenges, vacated the Commission's implementation of Section 251(d)(2), and required the Commission to reconsider whether interoffice transport, along with all the other elements listed in the now-vacated Rule 319, meets the "necessary" and "impair" standards. That relief, which this Court has already ordered, is the only relief that petitioners could legitimately seek, and they will receive that relief if this petition is denied. The petition therefore *should* be denied, because nothing in *Iowa Utilities Board* casts doubt on the continuing validity of the independently significant holdings below, which had nothing to do with the "necessary" and "impair" standards.

1. A summary order (known as a GVR) granting certiorari, vacating the judgment below, and remanding the case is "potentially appropriate" where "intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). That, indeed, is the legal formulation on which petitioners appear to rely in

seeking a GVR. See Pet. 5 (citing quoted passage of *Lawrence* v. *Chater*). But that very formulation reveals why a GVR would be inappropriate here. Petitioners do not and could not claim that any aspect of this Court's decision in *Iowa Utilities Board* draws the holdings of the decision below into question.

a. Although petitioners inaccurately suggest otherwise (Pet. 5), the court of appeals was correct when it observed that petitioners "d[id] not argue" on review of the *Third Order* "that the FCC failed to give adequate consideration" to the "necessary" and "impair" standards of Section 251(d)(2). Pet. App. 18a.[4] Instead,

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[4] Petitioners did not even cite Section 251(d)(2) in their opening brief in the court of appeals. In their reply brief, they cited that provision only in arguing that "[t]he FCC's discretion under section 251(d)(2)(B) to determine what network elements must be made available is necessarily constrained by the *other* provisions of the 1996 Act—sections 251(c)(3) and (4) and section 3(29)[.]" Ameritech C.A. Reply Br. 17 (emphasis added). Petitioners did not argue that the *Third Order* violated Section 251(d)(2) itself, and the court therefore had no occasion to address the issue. See Pet. App. 18a. For its part, the court of appeals referred to Section 251(d)(2) as a source of the FCC's statutory "authority" to determine what network elements must be made available (*e.g.*, *id.* at 17a, 21a), but that reference did not relate to the content of the "necessary" and "impair" standards. Instead, the court relied on the introductory clause of Section 251(d)(2)—which identifies the FCC as the agency that "determin[es] what network elements should be made available"—as the Commission's *source of jurisdiction* to issue *any* rules regarding network elements. The Eighth Circuit needed to rely on that introductory clause for that purpose because it had earlier held that no other provision of law authorized the Commission (as opposed to state public utility commissions) to exercise such jurisdiction. See 120 F.3d at 793-807. This Court subsequently clarified that 47 U.S.C. 201(b) grants the FCC plenary regulatory jurisdiction to implement the

petitioners challenged the *Third Order* on the quite different ground that "shared transport" is not properly defined as an element in its own right, but is instead a combination of separate constituent elements. See Ameritech C.A. Br. 24-30. Petitioners argued that entitling new entrants to any preassembled combination of elements would violate the rationale of the Eighth Circuit's prior decision vacating Rule 315(b), in which the court had held (120 F.3d at 813) that the text and structure of the 1996 Act prevent new entrants from gaining access to elements in their precombined form. See Ameritech C.A. Br. 24-30; see generally pp. 7-8, *supra*. The Eighth Circuit rejected that argument and distinguished its earlier decision vacating Rule 315(b). See Pet. App. 19a-22a.

In *Iowa Utilities Board*, this Court reinstated Rule 315(b) and, in so doing, refuted the very premise of the arguments petitioners had presented to the Eighth Circuit on review of the *Third Order*. This Court determined that, contrary to the Eighth Circuit's prior rationale for invalidating Rule 315(b), "[i]t was entirely reasonable for the Commission to find" that the 1996 Act compels incumbents to provide network elements in their precombined form rather than "in discrete pieces." 119 S. Ct. at 737. The Court similarly rejected, as a basis for challenging Rule 315(b), the incumbents' related argument that entitling a new entrant to preassembled combinations of an incumbent's elements would "eviscerate[] the distinction between resale and unbundled access." *Ibid.*

*Iowa Utilities Board* thus forecloses every argument that petitioners raised on review of the *Third Order* as

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provisions of the 1996 Act, including Section 251. See 119 S. Ct. at 729-733.

a basis for withholding shared transport from new entrants. And even if that were not the case, the relevant question here is whether *Iowa Utilities Board* "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. at 167. Petitioners could not possibly satisfy that test. They do not and could not contend that anything in *Iowa Utilities Board* casts doubt on whether the arguments that they raised on review of the *Third Order*—the only arguments considered in the decision below—were properly rejected. See p. 14, *infra*. There is accordingly no basis for vacating that decision, and the petition should be denied.

b. Denial of the petition would not deprive petitioners of the ultimate relief they ostensibly seek: reconsideration by the Commission, in light of this Court's order vacating Rule 319, of whether shared transport meets the "necessary" and "impair" standards of Section 251(d)(2).

On direct review of the *First Report and Order*, petitioners presented a global challenge to the Commission's interpretation of the "necessary" and "impair" standards. They claimed that the Commission's misapplication of those standards had infected the entire list of elements, set forth in Rule 319, that "should be made available" to new entrants. 47 U.S.C. 251(d)(2). One of the items on that list was interoffice transport, of which shared transport is a species. In *Iowa Utilities Board*, this Court vacated Rule 319 on the ground that the Commission had indeed misinterpreted Section 251(d)(2) with respect to *all* network elements,

including interoffice transport. See 119 S. Ct. at 734-736.[5]

This Court's decision therefore requires the Commission to reconsider the question that was not presented on direct review of the *Third Order*: whether shared transport, like the other elements listed in Rule 319, meets the "necessary" and "impair" standards. Until the Commission conducts that inquiry, Rule 319 will remain vacated and could not impose enforceable obligations to provide shared transport or any other element, although in particular cases such obligations might independently rest on other sources of law. And,

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[5] As petitioners observe (Pet. 3), "the *Third Order* addressed the definition of 'interoffice transmission facilities,' one of the network elements to which unbundled access was required in (the now-vacated) Rule 319." In particular, the *Third Order* amended the definition of "shared transport" in Rule 319(d)(1), while leaving intact Rule 319(d)(2), "which imposed the actual obligation upon incumbent LECs to provide unbundled access to interoffice transport." Pet. 4. Because this Court vacated Rule 319 in its entirety, it vacated all portions of Rule 319 imposing an obligation to provide interoffice transport, including shared transport. There is thus no respect in which a denial of certiorari in this case could shield the Commission from its obligation to reconsider whether shared transport meets the "necessary" and "impair" standards of Section 251(d)(2). That is so even though—in a passage of the *Third Order* which petitioners did not challenge in the court of appeals, and which that court thus had no occasion to review—the Commission addressed those standards under its prior, now-vacated interpretation. See Pet. App. 52a-57a. Of course, if our analysis on this point were incorrect, and if this Court's vacatur of Rule 319 for some reason did *not* require the Commission to reconsider whether shared transport meets the "necessary" and "impair" standards, it would then follow that petitioners had waived their present challenge by failing to preserve it on direct review of the *Third Order*. See generally Pet. App. 18a; see also note 4, *supra*.

most important for present purposes, the Commission will have to conduct the "necessary" and "impair" inquiry with respect to every element, including shared transport, whether or not this Court vacates the decision below. Put another way, petitioners will obtain the exact relief they ostensibly seek here even if their petition is denied.

Especially in light of that consideration, the petition *should* be denied. The only effect of a GVR would be to vacate important Eighth Circuit holdings that are distinct from any question about the content of the "necessary" and "impair" standards and are not even disputed here. The Eighth Circuit upheld the *Third Order* over petitioners' claims that the FCC had erred in defining shared transport as a network element in the first place and that the availability of shared transport would eviscerate the distinction between network elements and resale as entry options. See Pet. App. 15a-22a. Petitioners do not challenge the Eighth Circuit's disposition of *those* issues, nor do they claim that the court's reasoning is materially inconsistent with *Iowa Utilities Board*. Indeed, as discussed, *Iowa Utilities Board* in fact forecloses the very arguments that petitioners pressed in the Eighth Circuit.

Thus, far from justifying a GVR, *Iowa Utilities Board* in fact confirms that petitioners have no basis for relitigating the issues decided below. Although a GVR would leave the Eighth Circuit free to reinstate its prior holdings, and even though that would be the proper course for it to take,[6] the very issuance of a

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[6] In two passages, petitioners appear to seek not a GVR—which would permit the Eighth Circuit to consider in the first instance the effect, if any, of *Iowa Utilities Board* on its prior decision—but an order affirmatively directing the Eighth Circuit

GVR would undoubtedly incite an unnecessary round of litigation in that court on the significance of this Court's summary order. As this Court has explained, "if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Lawrence* v. *Chater*, 516 U.S. at 168. Here a GVR would create no "potential benefits" at all, but only "delay and further cost."

2. Although they do not clearly say so, petitioners suggest more broadly that the decision vacating Rule 319, and lifting any current obligation under that rule to provide shared transport or switching, requires invalidation of *any* determination concerning shared transport, no matter how consistent the determination may be with the reasoning of *Iowa Utilities Board*. See Pet. 5-6. Any such argument would be irreconcilable with *Iowa Utilities Board* itself.

Apart from vacating Rule 319, this Court addressed and upheld a variety of FCC determinations concerning network elements. The Court perceived no inconsistency between upholding those determinations and invalidating Rule 319. The Court held, for example, that the Commission had reasonably determined that "operator services" and "operational support systems" (OSS) fall within the statutory definition of network element (47 U.S.C. 153(29)), even though the Court simultaneously vacated the portions of Rule 319

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to vacate the *Third Order*. See Pet. i (question presented), 5; but cf. Pet. 6 (conclusion). Such substantive relief would be inappropriate even if a GVR were warranted. If this Court does not deny the petition outright, it should at most enter a standard GVR order granting the petition, vacating the judgment *of the court of appeals*, and remanding *to that court* for further proceedings. See, *e.g.*, *Lawrence* v. *Chater*, 516 U.S. at 175.

requiring *those* elements to be made available, and even though on remand the Commission must reconsider whether they should even appear on the list of elements to which new entrants may gain access. See 119 S. Ct. at 733-736. Similarly, the Court held that the FCC had "reasonably omitted a facilities-ownership requirement" (which would have compelled new entrants to obtain facilities of their own before gaining access to any of an incumbent's elements), even though the Court added that "[t]his issue may be largely academic in light of our disposition of Rule 319." *Id.* at 736.

In each of those holdings, this Court made clear that its invalidation of Rule 319, and its remand for reconsideration by the Commission of the "necessary" and "impair" standards, does not somehow foreclose resolution of network-element disputes that are analytically distinct from disputes about the "necessary" and "impair" standards themselves. Here, the Eighth Circuit's holdings about shared transport have nothing to do with those standards, are important in their own right, and remain just as valid in the wake of *Iowa Utilities Board* as this Court's own holdings about operator services, OSS, and the proposed "facilities ownership" requirement.

## CONCLUSION

The petition for a writ of certiorari should be denied.[7]

Respectfully submitted.

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[7] See also note 6, *supra*.