No.

IN THE

# Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION ET AL.

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit violated this Court's precedent by upholding the FCC's errant usurpation of the states' right to set rates for local intrastate communications by replacing those state rates with a mandatory interstate rate contrary to this Court's ruling that federal law requires states to set the rates for local intrastate telecommunications using a cost-based FCC pricing model.

## PARTIES TO THE PROCEEDING

Pennsylvania Public Utility Commission, Petitioner

Federal Communications Commission; United States of America, AT&T, Inc., Carolina Telephone and Telegraph Company LLC, Central Telephone Company, Central Telephone Company of Texas, Central Telephone Company of Virginia, Embarq Communications, Inc, Embarq Florida, Inc; Embarq Minnesota, Inc; Embarq Missouri, Inc; Level 3 Communications, LLC; MetroPCS Communications, Inc.; Qwest Communications International Inc.; Sprint Nextel Corporation; The United Telephone Company of Pennsylvania LLC, doing business as Embarq; United Telephone Company of Eastern Kansas, doing business as Embarq; United Telephone Company of Indiana, Inc, doing business as Embarq; United Telephone Company of Kansas, doing business as Embarq; United Telephone Company of New Jersey, Inc., doing business as Embarq; United Telephone Company of Ohio, doing business as Embarq; United Telephone Company of Southcentral Kansas, doing business as Embarq; United Telephone Company of Texas, Inc, doing business as Embarq; United Telephone Company of the Carolinas LLC, doing business as Embarq; United Telephone Company of the Northwest, doing business as Embarq; United Telephone Company of the West, doing business as Embarq; United Telephone Southeast, LLC, doing business as Embarq; Verizon, Core Communications, Inc., EarthLink, Inc., O1 Communications, Inc., Pac-West Telecomm, Inc., Public Service Commission of the State of New York, National Association of Regulatory Utility Commissioners, National Association of State Utility Consumer Advocates, Respondents

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

**FEDERAL CASES**



**FEDERAL STATUTES**

**STATE STATUTES**



**ADMINISTRATIVE DECISIONS**

**Federal**

**State**



**OTHER AUTHORIES**

**Ex Parte Filings**

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The Pennsylvania Public Utility Commission (PaPUC) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals, reproduced in the Appendix to Core Communication, Inc.'s, Petition, is reported at 592 F.3d 139 (D.C. Cir. 2010) Core Pet. App. 1a-14a, (the *Core Decision*).[1] The *Core Decision* upheld an Order of the Federal Communications Commission (FCC) on *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*; *Order on Remand and Report and Order and Further Notice of Proposed Rulemaking* in CC Docket Nos. 96-98 and 99-68, and is reported at 24 FCC Rcd. 6475 (2008) (*Core* Pet. App. 15a-59a). The FCC order is commonly referred to as the "*Order on Mandamus.*"

## JURISDICTION

The DC Circuit Court released its *Core Decision* on January 12, 2010, upholding the FCC's *Order on Remand.* The DC Circuit Court denied the PaPUC Petition for Rehearing En Banc or Rehearing on March 26, 2010. Core Pet. App. 1085a and 1087a-1088a. This petition is timely filed by operation of Rule 13, including an extension granted on June 15, 2010. The

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[1]The PaPUC relies on the Core Appendix for citations in the Petition for Writ of Certiorari for judicial and petitioner economy.

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS INVOLVED

The appropriate provisions of the Communications Act of 1934 and the Telecommunications Act of 1996, set forth at 47 U.S.C. §§ 1, *et seq.*, are set forth in the Petitioner's Appendix. PaPUC Pet. App. 1a-22a.

## STATEMENT

This petition for writ of certiorari seeks this Court's review of a three-member panel decision in *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010), 2010 WL 86672, Core Pet. App. 1a-14a, including the Court of Appeal's denial on March 26, 2010, of the Commonwealth of Pennsylvania's Petition for Rehearing or Reargument En Banc. (*Core Decision)*, Core Pet. App. 1085a-1086a and 1087a-1088a

Following enactment of the Telecommunications Act of 1996 (TA-96), the FCC issued rules implementing TA-96 in its First Report and Order. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* First Report and Order, 11 FCC Rcd 15499 (1996) (*First Report and Order*) Docket Nos. 96-98 and 95-185 (August 8, 1996).

The FCC found that it could set proxy rates and that the FCC would develop the cost model for those rates *i.e.*, Total Element Long Run Incremental Cost (TELRIC). *Id.* at ¶¶ 625, and 672, 690-698.

In 1999, the Supreme Court partially affirmed the FCC by holding that the states were expected to set rates, since the FCC had no authority to set rates under Section 252, using a pricing model developed by the FCC. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 384-385, 119 S.Ct. 721 (1999) (*AT&T*).

The Eighth Circuit later vacated the FCC's proposed "proxy" rates the states were to use in setting Section 252 reciprocal compensation rates based on TELRIC. The Eighth Circuit read the *AT&T* precedent as requiring the FCC to establish the pricing model but that the states were responsible for setting the reciprocal compensation rates. *Iowa v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000) (*Iowa*) *aff'd in part and rev'd in part*, *Verizon v. FCC*, 535 U.S. 467, 468-473 (2002).

**Introduction**

The *Core Decision* that is the subject of the PaPUC's Writ of Certiorari is the third in a series of attempts by the FCC to secure judicial imprimatur for the FCC's usurpation of the states' right to set rates for local intrastate telecommunications. The PaPUC seeks this Court's review to correct the erroneous conclusion of law that Sections 201 and 251(i) of federal law, 47 U.S.C. §§ 201 and 251(i), empower the FCC to replace state-set rates for local intrastate telecommunications with a new mandatory interstate rate of $.0007 per Minute of Use for local intrastate telecommunications.

The question is whether it is the FCC or the states that set the intercarrier compensation rate for local intrastate telecommunications, in this case local dial-up telephone calls when a carrier's customer makes a local intrastate telephone call to access the internet over the customer's local telephone line.

The PaPUC submits that the *Core Decision* ignores this Court's precedent holding that states are responsible for setting the rates for local intrastate calls under federal law using a pricing model developed by the FCC and approved by this Court under the Telecommunications Act of 1996. *AT&T*, 525 U.S. at 384-85; *Verizon v. FCC*, 535 U.S. at 468.

The *Core Decision* wrongly affirmed the FCC's conclusion that Section 201 authorizes the FCC to impose a mandatory $.0007 reciprocal compensation rate for local intrastate telecommunications when a customer uses the local telephone line to make a local intrastate call that later provides access the internet.

This Court's precedent directing states to set the rates for intrastate local calls based on an FCC model is controlling and the *Core Decision* and *Order on Remand* are incorrect. The *Core Decision* upholds a mandatory interstate rate of $.0007 per Minute of Use (MOU) for local intrastate telecommunications. *Compare Core Decision*, Core Pet. App. 5a-6a with Core Pet. App. 10a.

Precedent of this Court upheld the FCC's TELRIC model and the ancillary requirement that rates set under TELRIC include "joint and common" network costs. The *Core Decision* below ignores that precedent and allows the FCC to unilaterally abandon that model and the underlying rates in favor of a rate of $.0007 per MOU that is, by the FCC's own admission, unrelated to actual cost.

The PaPUC submits that state rates based on the TELRIC model are more consistent with this Court's precedent than the fixed interstate rate of $.0007 per MOU. The PaPUC argues that the fixed rate is not related to cost but may better reflect some carriers' changed business interest.

The FCC's mandatory interstate rate is so low and without cost justification as to be unjust and confiscatory. Moreover, the FCC apparently intends to use this usurpation of the states' right to set rate for local intrastate telecommunications well beyond the narrow confines of local intrastate calls to access the internet.

The PaPUC maintains that the fact that carriers terminate an end user's local dial-up call at an Internet Service Provider's (ISP's) premises, where the ISP reformats the call as part of its delivery of an information service not regulated by the states, is critical. The fact that a terminated local call is reformatted to provide information services does not affect how and where the call is originated and terminated. This reformatting does not exempt the local call from this Court's determination that states must set the rates for local intrastate telecommunications using the TELRIC pricing model.

A terminated intrastate call is not transformed into an interstate call under Section 201 of the

Communications Act of 1934. Further, the FCC cannot rely on Section 251(i) to reach intrastate telecommunications and set rates under Section 201 because the power claimed did not exist before 1996.

**Summary of Argument**

The PaPUC seeks a writ of certiorari for three reasons.

*First*, the *Core Decision* ignores Supreme Court precedent that requires states to set compensation rates for local intrastate telecommunications using an FCC pricing model upheld by this Court.

The *Core Decision* departs from that precedent by holding that Section 201 of the Communications Act of 1934 and Section 251(i) give the FCC *ultra vires* ratemaking power over local intrastate telecommunications to impose a mandatory interstate rate for a certain class of intrastate local telecommunications, i.e., local dial-up local calls used to access the internet. The decision is contrary to this Court's ruling that Sections 251(b)(5) and 252(d) of TA-96 limit the FCC to developing rules like a pricing model but require the states to set the rates for local intrastate telecommunications. The decision cannot be distinguished from precedent by claiming that Section 251(i)'s savings clause for Section 201 allows the FCC to reach intrastate telecommunications. The FCC lacked power under Section 201 before 1996 to regulate local intrastate telecommunications rates and TA-96 does not extend the FCC's jurisdiction into setting rates for local intrastate calls. Thus, there was no FCC authority to impose rates for local intrastate telecommunications to save. *AT&T*, 525 U.S. at 384-85.

*Second*, the *Core Decision* ratifies the FCC's arbitrary and capricious abandonment of the Court-approved Total Element Long Run Incremental Cost (TELRIC)[2] pricing model, a model that requires the inclusion of joint and common network costs, in favor of an arbitrary rate that: (1) bears no relationship to actual cost, by the FCC's own admission;[3] (2) mandates a rate that is so far below cost-based TELRIC rates as to be unjust and confiscatory; and (3) overturns the states' right to set rates for local calls upheld by this Court.

*Third*, the *Core Decision* reflects the FCC's explanation that a mandatory interstate rate for local intrastate telecommunications is required because of alleged "rate arbitrage" attributed to "traffic imbalances" in the market for local intrastate telecommunications calls used to access the internet.

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[2] TELRIC is the formula used by state commissions to determine the rates for the use of equipment and facilities already in place. Rather than encourage competitive carriers to construct new and separate networks in order to enter the market, the FCC required incumbent carriers to lease their equipment and facilities to the competitors. TELRIC determines the payment for those leases. First Report and Order, ¶¶ 690-698. This Court approved TELRIC. *Verizon v. FCC*, 535 U.S. at 468.

[3] *Order on Mandamus*, 24 FCC Rcd 6475, ¶ 24 (2008), Core Pet. App. 41a. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier-Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151*, ¶ 7 *(2001) (ISP Remand Order)*, Core Pet. App. 891a-892a

In fact, the FCC decision ratifies some carriers' changed interests reflected in their business plans at the expense of other carriers but in a manner that is without policy justification, is contrary to this Court's precedent, and overturns the states' right to set local rates for local calls as required by this Court's precedent.

The FCC's claim that it is remedying "rate arbitrage" attributed to "traffic imbalances" is disingenuous. Asymmetrical traffic flows existed in the intrastate local calling markets *before* end-user customers started making local dial-up calls to access the internet. Indeed, cost-based reciprocal compensation is necessary precisely because of asymmetrical flows and economies of scale. Those imbalances and asymmetrical compensation initially favored *incumbents* over *competitors* because competitors have fewer customers compared to incumbents in the market for delivery of narrowband voice.

The *Core Decision* ignores precedent, abandons the FCC's pricing model, confiscates smaller carriers' property, and replaces the states right to set intrastate rates with a mandatory interstate rate of $.0007 per MOU for local intrastate calls that bear no relationship to cost.[4]

A writ is needed to prevent the significant harm sure to follow if, as the FCC has stated, the legal theory

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[4]*Order on Mandamus,* Core Pet. App. 41a; ISP Remand Order, Core Pet. App. 891a-892a.

in the *Core Decision* allows the FCC to impose mandatory federal rates on all telecommunications, including intrastate telecommunications, a claim far beyond the confines of existing law. *Compare Order on Mandamus*, ¶¶ 6-7, 28 and 29, Core Pet. App. 23a, and 45a, Appendix A, ¶¶ 198, 205, 221, Core Pet. App. 249a-250a, 256a, 271a and Appendix C, ¶¶ 200, 216, Core Pet. App. 592a, 606a-607a *with Iowa*, 219 F.3d at 757.

## REASONS FOR GRANTING THE PETITION

### I. THE *CORE DECISION* ERRONEOUSLY ALLOWS THE FCC TO USURP THE STATES' RIGHT TO SET LOCAL INTRASTATE TELECOMMUNICATIONS RATES AS REQUIRED BY THIS COURT AND REPLACES THOSE STATE RATES WITH A MANDATORY FCC RATE OF $.0007.

The Court must grant a writ of certiorari to correct the United States Court of Appeal for the District of Columbia's (DC Circuit Court) departure from prior rulings of this Court.

The current precedent of this Court holds that Section 251(b)(5) and Section 252(d) of the Telecommunications Act of 1996 (TA-96) limits the FCC's authority to establishing a pricing model for intrastate telecommunications subject to reciprocal compensation under Section 251(b)(5) and Section 252(d) and requires the states to set intrastate reciprocal compensation rates based on the FCC's pricing model, in this case the TELRIC model. *AT&T,*

525 U.S. at 384-385 (1999); *Iowa,* 219 F.3d at 757; *Verizon v. FCC*, 535 U.S. 467, 468 (2002).

The *Core Decision* concludes that the FCC has a newly-discovered authority under Section 201 to impose a mandatory interstate wholesale interconnection rate which replaces state-set rates for intrastate communications. *Compare* Core Pet. App. 5a and 10a.

The departure from precedent in this *Core Decision* tramples the states' right to set rates for intrastate local calls.

The PaPUC requests a Writ of Certiorari to rectify the FCC and lower court's mistaken conclusion that Section 201 of the Communications Act of 1934 allows the FCC to ignore this Court's precedent on who establishes the model (the FCC) and who sets the resulting rates (the states) for local intrastate telecommunications under TA-96. *AT&T*, 525 U.S. at 384-85; *Iowa*, 219 F. 3d at 757; *Verizon v. FCC*, 535 U.S. at 468.

This interminable litigation on jurisdiction over the pricing model and the resulting rate when a local intrastate call is used to access the internet had its genesis in the FCC's First Report and Order issued pursuant to the Telecommunications Act of 1996. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499 (1996) (*First Report and Order*).

There, the FCC found that it could set proxy rates and that the FCC would develop the cost model for those rates. The model developed and adopted is the TELRIC model. *Id.* at ¶¶ 113, 625, 672, and 690-698 .

In decisions starting in 1999, the Supreme Court affirmed the FCC by holding that the states were required to set rates based on the pricing model developed by the FCC, since the FCC had no authority of its own to set intrastate rates under Section 252. *See AT&T*, 525 U.S. at 384-385 (1999); *Verizon v. FCC*, 535 U.S. at 468.

The Eighth Circuit, however, vacated an FCC attempt to force states to use the FCC's "proxy" rates when setting Section 252 reciprocal compensation rates based on the TELRIC model. *Iowa*, 219 F. 3d at 757.

Importantly, the Eighth Circuit read this Court's precedent in *AT&T* to require the FCC to establish only the pricing model and left it to the states to apply the model to the facts and thereafter set reciprocal compensation rates. *Iowa*, 219 F.3d at 757.

While this jurisdictional issue was being litigated, the market for local intrastate telecommunications underwent an unanticipated change with the explosion in the use of local telephone calls to access an internet service. At that time, the competitive market for traditional local calls and the long-standing asymmetrical traffic flows based on market share experienced a paradigm shift because competitors acquired many dial-up customers from incumbents.

As a result, the incumbents saw their interests change. With that, their prior support for reciprocal compensation rates set by the state commissions changed to opposition to those rates. Those carriers sought a federal solution favoring a uniform rate.

Those carriers asked the FCC to remedy a new problem they described as reciprocal compensation rate imbalances. Some carriers concluded that a federal solution was necessary to overturn state-established reciprocal compensation rates notwithstanding this Court's precedent holding that states set rates for intrastate local calls based on the approved TELRIC model.

The FCC first attempted to provide those carriers with a federal remedy to the issue of compensation for intrastate local calls used to access the internet in the *1999 Declaratory Ruling. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶¶ 1, 10-12 (1999) (*1999 Declaratory Ruling*), Core Pet. App. 1033a-1035a and 1043a-1046a.

In that decision, the FCC found that intrastate local calls that originate and terminate within a state are not local because they do not "terminate" at the ISP's premises. The FCC explained that, while the *physical facilities* originated and terminated a call within a state at the ISP's premises, the *service* removed the compensation determination for that traffic outside the states' authority under Section 251(b)(5), despite the FCC's earlier conclusion that all local telecommunications were subject to

Section 251(b)(5). *1999 Declaratory Ruling* (emphasis added), Core Pet. App. 1040a-1041a, 1043a, 1045a-1046a.

The FCC reasoned that the terminated local dial-up telephone calls that originated and terminated within a state did not really end at the carrier's physical facilities but, instead, the call actually terminated at a website. Absent a finding that the call did not end where the call terminated, a carrier's call that originates and terminates at the ISP's premises would be subject to compensation based on state-set rates under Sections 251(b)(5) and 252(d)(2). *Id.* ¶ 12, Core Pet. App. 1045a-1046a.

The DC Circuit Court rejected this reasoning. The Court faulted the FCC for inadequately explaining why its "end-to-end" jurisdictional analysis of *the service* was relevant to its decision on the legal authority over an intrastate local call. The Court questioned how carrier calls that terminated on the carriers' *facilities* at the ISP's premises were not considered "local" and not subject to Section 251(b)(5). *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 3, 5, 8 (D.C. Cir. 2000). Core Pet. App. 1018a, 1020a, 1023a-1024a (*Bell Atlantic*) (emphasis added).

Following that reversal, the FCC tried a second rationale to explain the FCC's authority to impose a federal solution for intrastate local calls in the *ISP Remand Order*. There, the FCC concluded that intrastate local calls which terminated at an ISP's premises were "information access" service subject to Section 251(g) of the Act. Core Pet. App. 911a.

The FCC also relied on its general rulemaking authority under Section 201 of the Act to prohibit state rates as the FCC now sets rates and rules for this traffic as part of an "interim" solution pending final resolution of intercarrier compensation. Core Pet. App. 950a-956a, 956a-957a.

However, the FCC conceded that, if the call originated and terminated within a state at an ISP's premises, the call would be within the ratemaking authority of states under Section 251(b)(5). *ISP Remand Order,* ¶¶ 32, 77-82, Core Pet. App. 911a, 950a-956a.

The DC Circuit Court rejected this second explanation but failed to overturn the interim rules. *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002) (*WorldCom*), Core Pet. App. 872a, 878a-879a, and 881a.

The lower court also ruled that Section 251(g) did not provide a basis for the FCC's decision. The *Court lacked a meaningful context for reviewing the* merits of the interim compensation regime despite sustaining the interim regime. Core Pet. App. 880a.

The issue languished for years. Finally, Core filed a writ of mandamus asking the DC Circuit Court to require the FCC to explain the legal basis for the rules and rates set out in the *ISP Remand Order. In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008) (*In re Core*), Core Pet. App. 792a-818a.

The Court's order granting mandamus noted that, if an ISP-bound call was governed by

Section 251(b)(5), reciprocal compensation would be required for the ILEC-to-CLEC hand-off and ILECs would be required to compensate other CLECs for completing their customer calls. *In re Core,* 531 F. 3d at 851, Core Pet. App. 794a.

The Court criticized the FCC's delay in responding to the *WorldCom* decision as "egregious," and "grant[ed] the writ of mandamus and direct[ed] the FCC to respond to [the Court's] 2002 *WorldCom* remand by November 5, 2008." *In re Core,* 531 F. 3d at 850, 861-62, Core Pet. App. 793a.

"That response," the Court continued, "must be in the form of a final, appealable order that explains the legal authority for the Commission's interim intercarrier compensation rules that exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5)." *In re Core,* 531 F. 3d at 862, Core Pet. App. 816a. "No extensions of this deadline will be granted," and "[t]he rules are hereby vacated on November 6, 2008, unless the court is notified that the Commission has complied with our direction before that date." Id. at *862,* Core Pet. App. 816a.

At 11:52 p.m. on November 5, 2008, the FCC filed the *Order on Mandamus* with the Court. The FCC now ruled that all telecommunications exchanged by Local Exchange Carriers, including telecommunications which originated and terminated within a state at the carrier's facilities on behalf of its ISP customer, are subject to Sections 251(b)(5) and 252(d). *Order on Mandamus,* ¶15, Core Pet. App. 31a.

The FCC recognized that Section 251(b)(5) defines the scope of traffic subject to reciprocal compensation and that Section 252(d)(2)(A)(i) deals with who pays what to whom. Core Pet. App. 29a.

The FCC went on to say that a carrier's telecommunications for its ISP customers that terminate at the ISP's premises is just like telecommunications to other customers. Core Pet. App. 29a-30a. In spite of this, the FCC then concluded that an intrastate local dial-up call that originated and terminated within a state at an ISP's premises was just like other local calls except that this discrete class of local calls would now be interstate and subject to the FCC's authority. Core Pet. App. 32a.

The FCC justified that result with a conclusion that the FCC's interstate authority under Section 201 sustained jurisdiction by virtue of Section 251(i) and imposition of a mandatory reciprocal compensation rate of $.0007 per MOU even if, by the FCC's own recognition, the rate bore no relationship to actual cost. *Order on Mandamus,* ¶¶ 11, 12, 13, 17, and 24, Core Pet. App. 28a, 29a, 30a, 32a, and 40a-41a.

On January 12, 2010, a three-judge panel issued the *Core Decision* affirming the FCC's *Order on Mandamus.* Core Pet. App. 1a-15a. Core and the Commonwealth of Pennsylvania sought Rehearing. The DC Circuit Court denied those petitions on March 10, 2010, resulting in the writ pending before this Court. Core Pet. App. 1085a-1086a and 1087a-1088a.

Review is appropriate because the *Core Decision* upends precedent by holding that intrastate dial-up local calls, which originate and terminate within a state at an ISP's premises, after which the ISP reformats the call in order to provide an unregulated information service, i.e., internet access, now brings this discrete class of terminated intrastate local calls within the FCC's exclusive interstate jurisdiction.

The FCC's claim that an ISP's delivery of an unregulated information *service* transforms the terminated local intrastate call on *facilities* into an "interstate" call is untenable. The FCC attempts to distinguish precedent by focusing on a *service* to make a jurisdictional determination on setting *rates* for access to *facilities*. By failing to consider the calls use of carriers' facilities, the FCC effectively ignores or rejects this Court's precedent in order to mandate an interstate wholesale intercarrier compensation rate of $.0007 for a local intrastate call.

The states developed rates for local intrastate telecommunications based on the FCC's TELRIC model as required by prior rulings of this Court. That precedent holds that the FCC's authority in Sections 251(b)(5) and 252(d) is limited to developing a pricing model and that the states are responsible for setting intrastate rates based on that model. Moreover, the FCC has not alleged that the states are misapplying the TELRIC model.

The Commonwealth of Pennsylvania seeks a writ of certiorari so that this Court can affirm that precedent and conclude that calls on *facilities*, which originate and terminate within a state, remain intrastate local calls subject to this Court's precedent regardless of the nature of *any subsequent service* rendered following termination of that intrastate local call. Such a view is entirely consistent with the states' prior pleading and other FCC decisions. *See Brief of the Petitioner and Intervenor States*, C.A. Joint Brief, pp. 30-33; *In re: Time Warner, Inc.*, Docket No. WC 06-55 (March 1, 2007); *Fiber Technologies v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-014 (February 23, 2007); *DQE Communications Network Services v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-027; *Wireline Broadband Order*, 20 FCC Rcd at 14910-11, ¶ 104.

A writ is necessary so that this Court can resolve this protracted litigation and affirm this Court's holding that, under TA-96, it is *the FCC* that sets the *pricing methodology* for local intrastate calls but it is *the states* that apply that model to the fact and set the resulting *reciprocal compensation rates.*

This Court's precedent does not distinguish the price modeling or rate making authority over local intrastate calls under federal law based on any subsequent reformatting after an intrastate local call originates and terminates within a state. The *Core Decision* does just that and, in so doing, upends precedent by allowing the FCC to assert interstate jurisdiction over intrastate local calls and to replace intrastate rates with a mandatory interstate rate.

## II. THE CORE DECISION ERRONEOUSLY AUTHORIZES THE FCC'S ARBITRARY AND CAPRICIOUS ABANDONMENT OF THE COST-BASED TELRIC MODEL, WHICH WAS UPHELD BY THIS COURT AND WHICH THE STATES MUST USE IN SETTING RATES FOR INTRASTATE TELECOMMUNICATIONS.

A writ of certiorari is necessary to prevent the FCC from arbitrarily and capriciously abandoning the TELRIC pricing model approved by this Court. The FCC's decision to jettison a pricing model approved by this Court and extending that abandonment to claim a right to set rates for intrastate local calls that originate and terminate within a state cannot be justified merely because access to the internet follows the termination of that intrastate call.

In addition to the departure from this Court's precedent, the *Core Decision* upholds a rate of $.0007 per MOU, the rate proposed by the FCC in the *Order on Remand* and which rests on four incumbent interconnection agreements of some dominant carriers.[5] The FCC relies on the agreements and rates of the proposing carriers in setting the interstate rate.[6]

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[5] *ISP Remand Order*, ¶ 85, n.158, Core Pet. App. 959a-960a.

[6] *See ISP Remand Order*, ¶85, Core Pet. App. 959a-960a and *Compare MFS I*, 1995 Pa. PUC Lexis 87 at *68-*80 and *In re City Signal*, 1995 Mich. PSC Lexis 31 (1995) *with Bell Atlantic Ex Parte Filing*, Reciprocal Compensation for Internet Traffic, Correspondence of Edward Young, III and Thomas J. Tauke, July 1, 1998, Docket Nos. 96-98; CCB/CPD 97-90; *Developing a Unified Compensation Regime*, Docket No. 01-92, Ex Parte Letter of Verizon (July 28, 2010) *with ISP Remand Order*, ¶ 8, Core Pet.

*footnote continued on next page*

The PaPUC contends that imposition of a mandatory federal interstate rate of $.0007 per MOU for local intrastate calls is arbitrary, unlawful and capricious. The decision, with its resulting rate, arbitrarily and capriciously discards the TELRIC model and imposes a new federal rate by fiat that, by the FCC's own admission, bears no relationship to cost.[7]

This is arbitrary because it is not consistent with precedent holding that an agency may not depart from a policy *sub silentio*. *FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S.Ct. 1800, 1811 (2009) (citing *United States v. Nixon*, 418 U.S. 683, 696, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)). In this case, the FCC arbitrarily and capriciously abandoned the TELRIC model upheld by this court *sub silentio*, although Sections 251 and 252 require rates to reflect costs.

The PaPUC also submits that imposing this rate based on the FCC's *sub silentio* abandonment of TELRIC is capricious because the rate is set so far below actual costs as to be unjust and confiscatory. The TELRIC model upheld by this court contained a requirement that rates include a contribution to joint and common costs. *In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Docket No. 96-98 (August 8, 1996) (*First Report*

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App. 892a-894a and *Order on Mandamus*, ¶¶ 24 and 25, Core Pet. App. 40a-43a.

[7] *Order on Mandamus*, ¶ 24, Core Pet. App. 40a-41a; *ISP Remand Order*, ¶ 7, Core Pet. App. 891a-892a.

*and Order),* ¶ 672-698 *AT&T,* 525 at 384-385; *Iowa,* 219 F.3d at 757; *Verizon v. FCC,* 535 U.S. at 468.

The mandatory interstate rate of $.0007 per MOU replaces state-set rates that, in turn, were set by the states as required by this Court's precedent. The FCC ignores that precedent and vacates the rates set by the states to impose a mandatory interstate rate that extends the FCC's jurisdiction well beyond established boundaries.

The resulting mandatory interstate rate is so low as to be unjust, not just because the rate is not based on any methodology but because it reflects a rate in four agreements involving some incumbent carriers. Even if the FCC had authority to impose a rate based on four agreements, this rate is so low that it effectively confiscates other carriers' facilities, including their networks.

This Court's precedent holds that "[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public interest which is so 'unjust' as to be confiscatory." *Duquesne Light Company v. Barasch,* 488 U.S. 299, 307 (1989) (citing *Covington & Lexington Turnpike v. Sandford,* 164 U.S. 578, 597 (1896)).

In this case, confiscation occurs because smaller carriers or competitors must provide other carriers network access at a mandatory fixed interstate rate that is unjust and confiscatory. The new rate simply bears no relationship to actual cost, by the FCC's own admission. The rate also rests on the capricious abandonment of the TELRIC model.

This decision clearly is not based on economics. While prior precedent does not require the FCC to establish "purely cost-based rates" for communications, the FCC must specifically justify any rate differential that does not reflect cost. *Competitive Telecommunications Association v. FCC,* 87 F.3d 522, 529 (1996) *(CTA).*

In the *Core Decision,* there is no cost basis for the mandatory interstate rate. The holding in *CTA* that rates need not be "purely" cost based does not mean the FCC can set a rate that has absolutely no basis in cost.

Because the TELRIC model and state-set rates paradigm was abandoned *sub silentio*, the FCC is unable to associate the fixed $.0007 rate to costs, precedent or established policy. Moreover, there is no indication that the FCC even examined any relevant data in order to attempt to articulate a satisfactory explanation for its action as required by this Court's precedent. *Motor Vehicle Mfrs. Assn. of United States Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

The FCC's arbitrary, unlawful, and capricious departure from prior policy contravenes precedent of this Court. There is no longer any federal pricing model. The states are no longer setting rates for local intrastate telecommunications based on a federal pricing model. Additionally, the FCC has acted *sub silentio* with no explanation for its new policy imposing a mandatory, yet confiscatory, interstate rate for local intrastate telecommunications. What remains is the *ultra vires* goal of placing all traffic under one umbrella through the elimination of all jurisdictional and regulatory distinctions.[8]

The abandonment of precedent, the lack of any underlying cost justification for a mandatory interstate rate that supplants state-set rates for local intrastate telecommunications, and the adoption of a new interpretation of law and policy *sub silentio* warrants correction by this Court based on its precedent.

### III. THE CORE DECISION ERRONEOUSLY UPHOLDS THE FCC'S *ULTRA VIRES* RATIFICATION OF SOME CARRIERS' BUSINESS INTERESTS IN A MANNER CONTRARY TO PRECEDENT AND WHICH VIOLATES THE STATES' RIGHT TO SET THE RATE FOR LOCAL INTRASTATE TELECOMMUNICATIONS.

A writ is necessary to review the *Core Decision* because the decision wrongly ratifies some carriers' proposals for an interstate rate of $.0007 for intrastate local calls because that rate better reflects their changed business interest. The FCC's action favors some carriers over others with a mandatory rate despite precedent of this Court affirming the TELRIC model.

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[8] *Compare Order on Mandamus*, ¶¶ 24, 28 and 29, Appendix A at ¶ 221, Core Pet. App. 40a-41a and 45a, Core Pet. App. 271a and Appendix C at ¶ 216, Core Pet. App. 606a-607a.

The *Core Decision* rests on a conclusion that an interstate rate in place of state-set rates for reciprocal compensation for intrastate local calls is needed to remedy "rate arbitrage" attributed to "traffic imbalances."

This is without merit.

A careful analysis of the history of reciprocal compensation rates, including the rates at issue in this writ, demonstrates otherwise. The carriers defending the FCC's federalization of intrastate local calls and the mandatory interstate rate justify the result as a solution to some alleged problem with "rate arbitrage" attributed to "traffic imbalances."

Carriers supporting the FCC's *ultra vires* interstate authority to impose a mandatory interstate rate in place of state-set intrastate reciprocal compensation rates avoid discussing their prior position of support for reciprocal compensation rates for local calling. Incumbents turned against reciprocal compensation rates set by the states in favor of a new mandatory interstate rate of $.0007 only when market and technological changes made a change in their interest necessary.

The PaPUC's experience before 1996 in addressing competition and intercarrier compensation for local intrastate calls is illustrative, particularly regarding the debate on whether "reciprocal compensation" rates or "bill and keep" rates should govern compensation between competitors and incumbents for local intrastate calls. At that time, many states enacted pro-competitive statutes that authorized certification of CLECs.[9]

A major issue was the compensation a CLEC should pay an ILEC for "transport and termination" service if a CLEC's customer called an ILEC's customer. CLEC customers making local calls were fewer compared to ILEC customers calling CLEC customers.[10]

CLECs asked state commissions to adopt "bill and keep[11], for compensation for intrastate local calls due to their smaller size and the asymmetrical traffic flow. ILECs sought higher "reciprocal compensation" rates[12] given their larger customer base, market share, and resulting economies of scale.

The resulting asymmetrical traffic flow between *incumbents* and *competitors* in the market for intrastate local calls in states with reciprocal compensation before the emergence of dial-up intrastate local calls did not stir incumbents to decry that asymmetry. The incumbents supported "reciprocal compensation" rates set by the states because they

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[9]1993, July 8, P.L. 456, No. 67, 66 Pa.C.S. § 3009(a); 66 Pa.C.S. § 3019. These provisions authorized the PaPUC to grant CLECs certificates to operate in local exchange territories. The first expired on December 31, 2003. The successor version was enacted in 2004. See Nov. 30, P.L 1308, Act 183.

[10]*MFS I,* 1995 Pa. PUC Lexis 87 at *68-80.

[11]*MFS I,* *68-80. "Bill and Keep" is a pricing scheme where all networks would agree to terminate calls from other networks at no charge.

[12]*MFS I,* *68-80. Reciprocal compensation rates would require payment for the use of local facilities.

benefitted from the asymmetrical traffic flow. Their support changed when the money stopped flowing in their direction.

The change stemmed from the use of a local intrastate call, a call which originates and terminations within a state's boundary, to access the internet using the local telephone line. Those calls were markedly longer than traditional local intrastate local calls.

Suddenly, incumbent or larger carriers no longer received payments from competitors. Instead, competitive carriers were receiving payments from incumbents. Competitors were more successful than the incumbents in attracting customers for the delivery of local dial-up calls. Accordingly, it was the competitors success in receiving payments for one-directional calling, albeit at TELRIC rates, which concerned the incumbents even if it reflected ISP customers' desire to make, but not receive, local calls.[13]

Some carriers witnessed this previously favorable asymmetrical traffic flow and decried the compensation structure. They sought a federal solution. Ten years later, the litigation attributed to the changed business interest has culminated in this *Core Decision*.[14]

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[13]Any focus on one-directional calling ignores market demand and actually supports rates based on cost, i.e., TELRIC. A mandatory interstate rate of $.0007 is not consistent with TELRIC.

[14]*Compare MFS I* at *68-80 *with Bell Atlantic Ex Parte Filing,* Reciprocal Compensation for Internet Traffic, Correspondence of Edward Young, III and Thomas J. Tauke, July 1, 1998, Docket Nos. 96-98; CCB/CPD 97-90; *ALTS Ex Parte Filing,* Request for

*footnote continued on next page*

It was a change in business interest, not any concern with asymmetrical traffic flow, *per se*, that is at issue in the *Core Decision*.

The FCC remedied a revenue imbalance and a change in business interest arising because smaller competitive carriers were out-competing incumbents and acquiring ISPs as customers.

The FCC's remedy is to adopt the incumbents' proposed $.0007 rate as a mandatory interstate rate. The FCC's remedy ignores precedent of this Court and rests on an arbitrary abandonment of a cost model upheld by this Court.

In addition, the *Core Decision*'s reliance on the savings clause of Sections 251(i) to justify imposition of a mandatory interstate rate of $.0007 per MOU for intrastate local calls, as justified by Section 201 due to the "special nature" of dial-up local calls, is untenable.

Section 251(i) preserves the FCC's 1934 authority in Section 201 over interstate telecommunications. Nonetheless, this case is ultimately not about the FCC's 1934 authority over interstate facilities or services.

This case is about the FCC's attempt to enlarge Section 201 using Section 251(i) far beyond the power over interstate communications granted in 1934. The FCC intends to use Section 201 to replace state rates

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Expedited Letter Clarification, July 2, 1998, Docket Nos. 96-98; CCB/CPD 97-30.

for intrastate communications with a uniform FCC rate for *all* communications. *Compare Mandamus Order*, ¶¶28 and 29, Core Pet. App. 45a *with* Appendix A, ¶221, Core Pet. App. 271a.

This appeal turns on the *Core Decision*'s conclusion that Sections 251(i) and 201 constitute an intersection that allows the FCC to arbitrarily, unlawfully, and capriciously discard the TELRIC pricing model and impose an interstate rate using the savings clause of Section 251(i) for Section 201. The FCC then would be able to totally remove state authority to set intrastate rates. *Compare ISP Remand Order*, ¶82. Core Pet. App. 956a-957a *with Order on Mandamus*, ¶¶28-29, Core Pet. App. 45a and App. C, ¶216, Core Pet. App. 606a-607a.

However, there was no FCC intrastate authority in Section 201 that could have been saved by Section 251(i). Prior to the 1996 Act and this Court's precedent, the FCC lacked power to impose a pricing model, let alone rates, on intrastate communications.

The 1996 Act altered the balance between intrastate and interstate authority by authorizing the FCC to promote local competition. However, this Court's precedent interpreting that altered balance does not give the FCC jurisdiction to set the rates for local intrastate telecommunications.

Instead, this Court's precedent reconciled the FCC's 1934 authority with the FCC's 1996 authority and with the states' traditional authority. This Court held that the states must set reciprocal compensation rates for local intrastate calls using the FCC's TELRIC model. *AT&T*, 525 U.S. at 384-385; *Iowa*, 219 F.3d at 757; *Verizon v FCC*, 535 U.S. at 468.

This Court's precedent reconciling the 1934 Act with the 1996 Act did not differentiate between local intrastate telecommunications based on some reformatting that occurs after a local intrastate call is terminated.

The FCC attempts to insert that distinction in order to ratify some proponents' changed interests. The FCC effectuates that distinction by conflating the *facilities* where a local call originates and terminates with any *service* that may be provided. By focusing on the service rather than the facility, the FCC tries to justify its assertion of federal jurisdiction and thus transforms a local intrastate call into an interstate matter subject to a mandatory interstate rate. In so doing, the FCC summarily removes any state ratemaking authority, possibly raising Tenth Amendment questions.

Moreover, the FCC's own precedent carefully distinguishes between the *facilities* and the jurisdiction over *facilities* independent of any service provided over those facilities. *In re: Time Warner, Inc.*, Docket No. WC 06-55 (March 1, 2007); *Fiber Technologies v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-014 (February 23, 2007); *DQE Communications Network Services v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-027; *Wireline Broadband Order*, 20 FCC Rcd at 14910-11, ¶ 104.

In the case at hand, the origination and termination of a local intrastate call occurs on *facilities* independent of the service provided over those *facilities.* Consequently, the *Core Decision* is inconsistent with this Court's precedent and the FCC's own approach.

### IV. THE LEGAL PREMISE UPHELD IN THE CORE DECISION HAS RAMIFICATIONS FAR BEYOND THIS CASE.

The PaPUC's concern is heightened because the FCC's legal theory, upheld in the *Core Decision,* could be extended to other intrastate local calls and compensation rates – matters that go far beyond the boutique market for intrastate dial-up local calls. *Compare Order on Mandamus,* at ¶¶ 6-7, 28 and 29, Core Pet. App. 23a-24a and 45a; Appendix A at ¶ 205 and 221, Core Pet. App. 256a and 271a, and Appendix C at ¶ 200 and 216, Core Pet. App. 592a and 606a-607a *with AT&T*, 525 U.S. at 384-385; *Iowa,* 219 F.3d at 757; and *Verizon v. FCC*, 535 U.S. 468.

The FCC apparently intends to apply this new legal interpretation well beyond the boutique market for local intrastate calls to access the internet[15] and thereby contradicts the lower court's finding that "a local chat with a schoolmate about the evening's homework would not – at least under conditions typical today – involve interstate communications. . . ." *Compare Order on Mandamus,* ¶¶ 6-7, 28 and 29, Core Pet. App. 23a-24a and 45a, Appendix A, ¶¶ 205 and 221, Core Pet. App. 256a and 271a, and Appendix C, ¶¶ 200 and 216, Core Pet. App. 592a and Core Pet App.

[15] *Mandamus Order* at ¶¶ 28 and 29, Core Pet. App. 45a.

606a-607a *with Core Decision*, 592 F.3d 139, 144 (D.C. 2010), Core Pet. App. 8a.

The *Order on Mandamus* leaves few illusions about the FCC's long-term view of its jurisdiction. The FCC reiterates "its intention to move to a more unified intercarrier compensation regime." *Order on Mandamus* at ¶ 28, Core Pet. App. 45a. The FCC later repeats its commitment "to moving towards a more unified intercarrier compensation regime, as evidenced by the Further Notice issued in conjunction with this Order." *Order on Mandamus* at ¶ 28, Core Pet. App. 45a. The FCC makes it clear that it intends to maintain the $.0007 cap and the mirroring rule pursuant to our section 201 authority." *Order on Mandamus* at ¶ 29, Core Pet. App. 45a.

In the Further Notice, incorporated by reference in the ISP Remand Order, the FCC's view is pronounced in the Appendices. Although the FCC admits that the $.0007 rate bears no relationship to "actual cost," it takes a different view in Appendix A. *Compare Order on Mandamus* at ¶ 28, Core Pet. App. 45a *with* Appendix A at ¶¶ 198, 202 and 221, Core Pet. App. 249a-250a, 254a, 271a.

The FCC considers the $.0007 compensation rate an "interim intercarrier compensation regime" but concludes "that it is appropriate to retain these rules, but only on a transitional basis *until a state commission, applying the 'additional costs' standards adopted in this order, has established reciprocal compensation rates that are at or below $.0007 per minute-of-use*." *Order on Mandamus*, Appendix A at ¶ 198, Core Pet. App. 249a-250a (emphasis added).

The FCC also states its expectation that "state commissions, applying the new 'additional costs' standard adopted in this order, will set final reciprocal compensation rates at or below $.0007 per minute-of-use." *Order on Mandamus* at ¶ 28, Core Pet. App. 45a, Appendix A at ¶ 202, Core Pet. App. 254a.

The FCC's reliance on Section 201 is reflected in its intention to "maintain the $.0007 cap and the mirroring rule, on a transitional basis, pursuant to our section 201 authority." *Order on Mandamus* at ¶ 29, Core Pet. App. 45a. This underscores the importance of the need to review the *Core Decision*.

The FCC's view of federalism is clear. The FCC states that "[b]y placing all traffic under the umbrella of one compensation scheme, *we eliminate jurisdictional and regulatory distinctions* that are not tied to economic or technical differences between services." *Order on Mandamus*, Appendix A at ¶ 221, Core Pet. App. 271a (emphasis added). The FCC ignores not only limitations of the 1934 Act but also this Court's interpretation of the 1996 Act in an effort to dismantle jurisdictional and regulatory distinctions. The FCC elevates economic or technical differences over a federalist structure.

The FCC repeats its reasoning and reiterates its intention to "maintain the $.0007 cap and the mirroring rule, on a transitional basis, pursuant to our section 201 authority." *Compare Order on Mandamus* ¶ 29, Core Pet. App. 45a *with* Appendix C at ¶ 200, Core Pet. App. 592a. The FCC repeats its goal to place "all traffic under the umbrella of one compensation scheme" in order to "eliminate jurisdictional and regulatory distinctions that are not tied to economic or technical differences between services." *Order on Mandamus*, Appendix C at ¶ 216, Core Pet. App. 606a-607a.

The FCC's interpretation of law is focused on going beyond the discrete class of dial-up local intrastate calls. The FCC's goal of usurping states' rights has become more pronounced and likely is only emboldened by the *Core Decision*.

For example, the FCC recently decried intercarrier compensation because "[t]he current ICC system also has fundamental problems that create inefficient incentives." FCC's National Broadband Plan, March 2010 at 142. The FCC expressed concern about "unproductive economic activity" because "terminating rates are not uniform despite the uniformity of the function of terminating a call." FCC's National Broadband Plan, March 2010 at 142. The FCC notes that "[r]ates vary from zero to 35.9 cents per minute, depending on the jurisdiction of the call, the type of traffic and the regulatory status of the carrier." FCC's National Broadband Plan, March 2010 at 142-43.

The FCC's intention to use its new legal interpretation well beyond the boutique market for local intrastate calls to access the internet contradicts the lower court's finding that a local chat about homework would be unaffected. *Compare ISP Remand Order*, ¶¶ 6-7, 28 and 29, Core Pet. App. 23a and 45a, Appendix A, ¶¶ 198, 205 and 221, Core Pet. App. 249a-250a, 256a, 271a and Appendix C, ¶¶ 200 and 216, Core Pet. App. 592a and 606a-607a *with Core Decision*, 592 F.3d 139, 144 (D.C. Cir. 2010), Core Pet. App. 8a.

Precedent does not require the FCC to establish "purely cost-based rates" for communications. *CTA*, 87 F.3d at 529. The *CTA* decision holds that rates need not be "purely" cost based. This decision, however, does not mean that the FCC can set a rate that has absolutely no basis in cost.

Precedent requires the FCC to develop a cost model which the states use to set intrastate rates. This precedent does not authorize the FCC to ignore constitutional limitations and impose a mandatory interstate rate on a discrete class of local intrastate telecommunications. Precedent certainly does not allow the FCC to simultaneously expand this usurpation to other local intrastate telecommunications.

The issue before this Court goes well beyond the narrow confines of dial-up local calls that terminate within a state. The trampling of precedent and the threat to federalism, Congressional intent, and this Court's precedent identified in this petition for writ of certiorari to the *Core Decision* can only be stopped by a grant of review.

## CONCLUSION

For these reasons, a writ of certiorari is appropriate.

Respectfully submitted,

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