Nos. 10-185 & 10-189 OCT 12 2010

IN THE
Supreme Court of the United States

CORE COMMUNICATIONS, INC.
AND
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioners,
v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS AT&T, LEVEL 3, METROPCS, SPRINT NEXTEL, AND VERIZON

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QUESTION PRESENTED

Whether the local competition provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), which amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, abrogated the Federal Communications Commission's authority to regulate one type of interstate telecommunications (dial-up Internet traffic) under § 201 of the Communications Act, even though the relevant provision of the 1996 Act expressly states that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title," 47 U.S.C. § 251(i).

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents AT&T Inc., Level 3 Communications, LLC, MetroPCS Communications, Inc., Sprint Nextel Corporation, and Verizon state the following:

AT&T Inc. AT&T Inc. is a publicly held company that has no parent company, and no publicly held company owns 10% or more of its stock.

Level 3 Communications, LLC. Level 3 Communications, LLC is a wholly owned subsidiary of Level 3 Financing, Inc. Level 3 Financing, Inc. is a wholly owned subsidiary of Level 3 Communications, Inc. Level 3 Communications, Inc. has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

MetroPCS Communications, Inc. MetroPCS Communications, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Sprint Nextel Corporation. As relevant to this case, Sprint Nextel Corporation provides wireless telecommunications services. Sprint Nextel Corporation has no parent company, and no publicly traded company owns 10 percent or more of its stock.

Verizon. The Verizon companies participating in this filing are Cellco Partnership d/b/a Verizon Wireless and the regulated, wholly owned subsidiaries of Verizon Communications Inc. Cellco Partnership, a general partnership formed under the law of the State of Delaware, is a joint venture of Verizon Communications Inc. and Vodafone Group Plc. Verizon Communications Inc. and Vodafone Group Plc indirectly hold 55 percent and 45 percent partnership interests, respectively, in Cellco Partnership. Both Verizon Communications Inc. and Vodafone

Group Plc are publicly traded companies. Verizon Communications Inc. has no parent company. No publicly held company owns 10 percent or more of Verizon Communications Inc.'s stock. Insofar as relevant to this litigation, Verizon's general nature and purpose is to provide communications services.

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INTRODUCTION

In the order petitioners challenge, the Federal Communications Commission ("the Commission" or "the FCC") placed on firm statutory footing the pricing methodology that it adopted in 2001 for dial-up traffic to Internet Service Providers ("ISPs"). The Commission reaffirmed both its longstanding conclusion that such traffic is jurisdictionally interstate and its authority under 47 U.S.C. § 201(b) to promulgate pricing rules to ensure that rates for this interstate traffic are just and reasonable. The Commission further held that Congress did not divest its § 201(b) authority over interstate traffic that also falls within 47 U.S.C. § 251(b)(5); on the contrary, in § 251(i), Congress expressly preserved that authority. Finally, the Commission concluded that the same policy concerns that motivated the Commission to adopt its ISP-bound-traffic pricing methodology — namely, the unique uneconomic arbitrage opportunities that one-way ISP-bound traffic presents — justified retaining those pricing rules. The D.C. Circuit denied petitions for review of the Commission's order, agreeing with the Commission's statutory analysis and its weighing of the policy considerations.

Further review of the D.C. Circuit's judgment is unwarranted for three reasons.

First, that decision does not conflict with any decision of this Court or another court of appeals. Petitioners are incorrect in claiming that the decision conflicts with the Court's decisions in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002), as well as the Eighth Circuit's decision in *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part and rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S.

467 (2002). Those cases involved the Commission's authority to implement § 251 as to *intra*state telecommunications traffic or as to individual physical components of the local telephone network that are neither intrastate nor interstate. None addressed whether the Commission can regulate *inter*state telecommunications traffic under § 201, where § 251(b)(5) also applies to that interstate traffic. In fact, § 251(i) expressly preserves the Commission's authority to regulate directly under § 201.

Second, the D.C. Circuit's decision is correct. Petitioners' principal statutory argument is that 47 U.S.C. §§ 251-252 are more specific provisions that trump § 201. As the D.C. Circuit explained, however, § 201 and §§ 251-252 apply to overlapping sets of cases; therefore, neither is more specific than the other. The specific-controls-the-general canon is thus inapplicable here, especially considering Congress's express preservation in § 251(i) of the Commission's § 201 authority. In any event, even if §§ 251-252 did govern here, the Commission's pricing methodology is fully consistent with those provisions.

Third, the question presented lacks continuing importance. The Commission's pricing methodology responds to the unique characteristics of "dial-up" ISP-bound traffic. But dial-up is a means of Internet access that is "being rapidly replaced by various forms of higher-speed [*i.e.*, broadband] service." Pet. App. 2a n.1. Moreover, the Commission imposed this interim regime in response to uneconomic arbitrage, which threatened consumers, distorted the development of competitive markets by encouraging carriers to pay ISPs to be their customers, and even led to instances of outright fraud. In the wake of the Commission's 2001 order, parties have negotiated voluntary commercial arrangements consistent with the Commission's pricing methodology that apply to the overwhelming majority of traffic local exchange carriers and wireless carriers exchange.

The petitions should be denied.

STATEMENT

1. Section 201 of the Communications Act of 1934 requires that the "charges" of "every common carrier engaged in interstate or foreign communication by wire" be "just and reasonable," and also authorizes the Commission to "prescribe such rules and regulations as may be necessary . . . to carry out the provisions of" the Act. 47 U.S.C. § 201(b). Initially, the Communications Act granted the Commission jurisdiction over interstate and foreign communications, *see id.* §§ 151-152(a), and generally preserved state jurisdiction over intrastate communications, *see id.* § 152(b).

In the Telecommunications Act of 1996 ("1996 Act"), Congress amended the Communications Act and extended federal authority to cover "the regulation of local [*i.e.*, *intra*state] telecommunications competition." *AT&T*, 525 U.S. at 378 n.6; *see also id.* at 378-80. In expanding federal authority over intrastate communications, Congress expressly left unchanged the Commission's pre-existing authority under § 201 over rates for interstate traffic. *See* 47 U.S.C. § 251(i) ("[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201").

To open local telephone markets to competition, the 1996 Act imposed a number of obligations on companies providing local telephone service (known as local exchange carriers or "LECs"). One of those duties is the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.* § 251(b). As a general matter, "[r]eciprocal compensation arrangements require that when a customer of one carrier makes a local call to a customer of another carrier (which uses its facilities to connect, or 'terminate,' that call), the originating carrier must compensate the terminating carrier for the use of its facilities." Pet. App. 3a.

2. This case involves the Commission's response to a regulatory problem involving "dial-up" Internet access. "When a customer accesses the internet via 'dial-up,'" her call goes to her local exchange carrier, "which commonly hands the call off to another LEC, which in turn connects the customer to an internet service provider ('ISP')." Pet. App. 1a-2a. The ISP then provides the customer with access to the Internet. *See id.* at 2a. Dial-up is a means of Internet access that is "being rapidly replaced by various forms of [broadband] service." *Id.* at 2a n.1.

With respect to reciprocal compensation, dial-up ISP-bound traffic has an unusual feature: it flows only one way. *See id.* at 4a. Consequently, under a traditional reciprocal-compensation scheme, the caller's LEC would pay compensation to the ISP's LEC when the customer accesses the Internet through the ISP. But, because ISPs do not make any (or nearly any) calls, the ISP's LEC, to the extent it had ISP customers, would pay little or nothing to other LECs.

In addressing the consequences of these unique features, the Commission explained that, although "Congress had intended to facilitate" the "entry of LECs . . . offering viable local telephone competition," "some LECs saw the opportunity to sign up ISPs as customers" in order to collect "large one-way flows of cash." Pet. App. 904a. The Commission found further that incumbent LECs were being billed approximately $1.8 billion annually in reciprocal compensation (at rates set by state commissions) by LECs with ISP customers. *See id.* at 889a. The Commission explained that the availability of these payments "led to classic regulatory arbitrage that had two troubling effects": first, "it created incentives for inefficient entry of LECs intent on serving ISPs exclusively," and, second, "the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services." *Id.* at 904a.

3.a. In 1999, the Commission issued an order in which it took its "first step" (Pet. App. 5a) to address ISP-bound traffic. *See id.* at 1032a-1074a. The Commission explained that it "traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points." *Id.* at 1043a. Employing that "end-to-end" jurisdictional analysis, the Commission determined that ISP-bound traffic should be analyzed "for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site." *Id.* at 1047a-1049a. It accordingly concluded that, because "a substantial portion of Internet traffic involves accessing interstate or foreign websites," *id.* at 1054a, "ISP-bound traffic is non-local interstate traffic," *id.* at 1060a n.87.

The Commission previously had interpreted § 251(b)(5), the 1996 Act's reciprocal-compensation provision, to apply only to local telecommunications traffic.[1] Adhering to that construction, the Commission held that, because ISP-bound traffic is "non-local

[1] *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1034 (1996) (subsequent history omitted).

interstate traffic," "the reciprocal compensation requirements of section 251(b)(5) . . . do not govern intercarrier compensation for this traffic." *Id.*

On review, the D.C. Circuit vacated the Commission's order and remanded. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000). The D.C. Circuit recognized that there was "no dispute that the Commission has historically been justified in relying on" its end-to-end analysis "when determining whether a particular communication is jurisdictionally interstate." *Id.* at 5. It held, however, that the Commission "ha[d] not provided a satisfactory explanation" for its conclusion that its jurisdictional analysis controlled whether § 251(b)(5) applies to ISP-bound traffic. *Id.* at 8.

b. In 2001, the Commission issued its order on remand from *Bell Atlantic*. *See* Pet. App. 882a-993a. The Commission began its analysis by reaffirming its determination that, on an end-to-end basis, ISP-bound traffic is jurisdictionally interstate. *See id.* at 928a-939a.

Next, responding to the D.C. Circuit's decision, the Commission revisited its interpretation of § 251(b)(5). *See id.* at 912a-913a. It stated that § 251(b)(5) establishes a general rule requiring "reciprocal compensation for transport and termination of *all* telecommunications traffic" a LEC "exchanges . . . with another carrier." *Id.* at 911a. The Commission concluded, however, that another provision of the 1996 Act, 47 U.S.C. § 251(g) — which provides for continued enforcement of certain requirements existing at the 1996 Act's enactment, including those governing "receipt of compensation" for access traffic — excludes from § 251(b)(5) ISP-bound traffic, among other traffic. *See* Pet. App. 912a-923a.

The Commission next decided to exercise its § 201 authority over jurisdictionally interstate traffic and to promulgate an interim intercarrier-compensation regime for ISP-bound traffic. The Commission found "convincing evidence in the record" that state-commission decisions requiring payment of reciprocal compensation for ISP-bound traffic had "led to classic regulatory arbitrage" and "distort[ed] the development of competitive markets." *Id.* at 887a, 904a, 909a. Reciprocal-compensation payments of nearly $2 billion annually to LECs serving ISPs had encouraged some LECs to provide free service to ISPs and even to pay ISPs to be their "customers." *See id.* at 887a, 889a-890a, 904a, 943a-944a, 948a-950a.

To "limit the regulatory arbitrage opportunity presented by ISP-bound traffic," *id.* at 887a, the Commission adopted a four-part, market-based pricing methodology. First, the Commission set a market-based cap on the payments that a carrier can receive from another carrier for ISP-bound traffic, based on "recently negotiated" contracts. *Id.* at 959a. Second, to the extent a carrier with ISP customers does not recover all of its costs of handling ISP-bound traffic from the originating carrier, the Commission's methodology directs that carrier to look to its own customers for cost recovery. *See id.* at 953a; *see also id.* at 961a-963a. Third, the Commission adopted a mirroring rule; under that rule, for a LEC to obtain the benefits of the pricing methodology as to ISP-bound traffic, it must offer to extend the rate cap to the voice traffic subject to § 251(b)(5) that it exchanges with other LECs (and wireless carriers). *See id.* at 964a-966a. Fourth, the Commission established a "growth cap" and a "new markets rule," both of which limited the number of minutes of ISP-bound traffic for which a LEC could obtain payment from another carrier. *See id.* at 951a-952a, 955a-956a, 960a-961a.

On review, the D.C. Circuit rejected the Commission's reliance on § 251(g) and remanded the matter to the Commission. *See WorldCom, Inc. v. FCC*, 288 F.3d 429, 432-34 (D.C. Cir. 2002). Apart from deciding that § 251(g) did "not provide a basis for the Commission's action," the D.C. Circuit did not resolve any other issue, including "petitioners' claims that the interim pricing limits . . . are inadequately reasoned." *Id.* at 434. Because there was a "non-trivial likelihood" that the Commission had authority to adopt its pricing methodology, the court "d[id] not vacate the order." *Id.*

c. In 2004, the Commission modified its ISP pricing methodology by granting (in part) a petition filed by Core Communications, Inc. ("Core") (petitioner in No. 10-185). *See* Pet. App. 849a-869a. The Commission eliminated the "growth cap" and the "new markets rule," both of which had limited the number of minutes of ISP-bound traffic for which a carrier could seek payment. *See id.* at 853a-855a, 862a-863a, 865a-866a, 867a-868a. The Commission, however, retained the rate caps and the mirroring rule, finding that those rules "remain necessary to prevent regulatory arbitrage and promote efficient investment in telecommunications services and facilities." *Id.* at 862a.

On review, the D.C. Circuit upheld the Commission's order and rejected Core's challenge to the Commission's decision to retain the rate caps and the mirroring rule. *See In re Core Communications, Inc.*, 455 F.3d 267, 277-79 (D.C. Cir. 2006). The court recognized that Core "challenge[d] the [FCC's 2001 order] itself" and rejected Core's claims, approving as reasonable the Commission's "economic analysis" of the problems ISP-bound traffic raises. *Id.*

d. On November 5, 2008, the Commission issued its order responding to the D.C. Circuit's *WorldCom* decision, which led to the D.C. Circuit decision that is the subject of the petitions here. *See* Pet. App. 15a-59a.[2] Modifying its statutory analysis to account for the *WorldCom* court's rejection of its reliance on § 251(g), the Commission placed its pricing methodology for ISP-bound traffic on a firm statutory footing.

The Commission first held that § 251(b)(5) is "broad enough to encompass ISP-bound traffic." *Id.* at 23a-24a. It explained that ISP-bound traffic is subject to § 251(b)(5) because such traffic satisfies the Commission's rule defining "termination" for this limited and specific purpose as the "switching of traffic . . . at the terminating carrier's end office switch . . . and delivery of that traffic to the called party's premises." *Id.* at 29a (internal quotation marks omitted; second ellipsis in original); *see* 47 C.F.R. § 51.701(d).

The Commission also "re-affirm[ed]" its "consistent[]" conclusion that ISP-bound traffic is "jurisdictionally interstate" and therefore subject to the Commission's authority over interstate traffic under § 201. Pet. App. 32a, 35a & n.69. The Commission explained that this conclusion was "reinforced by"

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[2] In July 2008, the D.C. Circuit granted Core's petition for a writ of mandamus and directed the Commission to issue an order responding to *WorldCom* by November 5, 2008. *See* Pet. App. 816a. The court made clear that, in granting mandamus, it was not directing the Commission "to promulgate any particular rule or policy." *Id.* at 811a.

§ 251(i), *id.* at 35a-36a, which directs that "[n]othing in [§ 251] shall be construed to limit or otherwise affect the Commission's authority" under § 201, 47 U.S.C. § 251(i). The Commission accordingly concluded that the applicability of § 251(b)(5) to ISP-bound traffic did not eliminate the Commission's independent § 201 authority to establish rules for that traffic. *See* Pet. App. 35a-37a.

The Commission also retained the market-based pricing methodology it adopted in 2001, again finding that the rules it promulgated could and should be maintained under its § 201 authority. *See id.* at 44a. The Commission reiterated the necessity of addressing the "significant arbitrage opportunities" created by the unique "one-way nature of ISP-bound traffic." *Id.* at 40a. It explained that the "policy justifications" it had provided in 2001 for adopting the rules had "not been questioned by any court" and, in fact, had been sustained by the D.C. Circuit in *Core*, 455 F.3d at 279. Pet. App. 44a. The Commission stated that it would keep those provisions in place until it "adopt[s] more comprehensive intercarrier compensation reform." *Id.* at 45a.

4. The D.C. Circuit denied petitions for review of the Commission's November 2008 order filed by Core, the New York Public Service Commission ("the NYPSC"), and the National Association of Regulatory Utility Commissioners ("NARUC"). *See* Pet. App. 1a-14a.[3]

The D.C. Circuit agreed with the Commission's interpretation of § 201 and § 251(i) as granting and

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[3] The Pennsylvania Public Utility Commission ("the PaPUC") (petitioner in No. 10-189) participated in the proceedings before the D.C. Circuit as an intervenor.

preserving the Commission authority to regulate ISP-bound traffic. *See id.* at 7a. It noted that the savings provision in § 251(i) "fortifie[d] the Commission's position" and that the petitioners generally "accept[ed] the [Commission's] end-to-end [jurisdictional] analysis and its application to ISP-bound calls." *Id.* (citing *id.* at 35a-37a & n.69); *see id.* at 1043a-1046a, 1052a-1054a.

The D.C. Circuit rejected the petitioners' contention that the provisions respecting reciprocal compensation in §§ 251-252 "must trump" the Commission's authority under § 201 on the theory that, "where both a specific and a general provision cover the same subject, the specific provision controls." *Id.* at 7a-8a (internal quotation marks omitted). The court explained that "it is inaccurate to characterize § 201 as a general grant of authority and §§ 251-252 as a specific one" because "[n]either regime is a subset of the other." *Id.* at 8a. Rather, the "'two statutes apply to intersecting sets,'" the court reasoned, because "[n]ot all inter-LEC connections are used to deliver interstate communications, just as not all interstate communications involve an inter-LEC connection." *Id.* (quoting *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 264 (7th Cir. 1998) (Easterbrook, J.)). Therefore, because "'neither [statutory provision] is more specific,'" the specific-controls-the-general canon is inapplicable. *Id.* (quoting *Hemenway*, 159 F.3d at 264). The court further explained that, because dial-up traffic falls within the intersection of § 201 and §§ 251-252, "§ 251(i)'s specific saving of the Commission's authority under § 201 against any negative implications from § 251 renders the Commission's reading of the provisions at least reasonable." *Id.* at 8a-9a.

Turning to the petitioners' contention that, "because the call to the ISP terminates locally" for purposes of § 251(b)(5), "the FCC's authority over interstate communications is inapplicable," the D.C. Circuit held that the argument "fails because it implicitly assumes inapplicability of the end-to-end analysis, which petitioners have not challenged." *Id.* at 9a. The court noted that "the FCC has consistently applied [the end-to-end] analysis to determine whether communications are interstate for purposes of § 201" and that the petitioners did "not dispute that dial-up internet traffic extends from the ISP subscriber to the internet, or that the communications, viewed in that light, are interstate." *Id.* The court explained that "it has no significance for the FCC's § 201 jurisdiction over interstate communications that these telecommunications might be deemed to 'terminat[e]' at a LEC for purposes of § 251(b)(5)," under the FCC's specific definition for this provision. *Id.* (alteration in original).

The D.C. Circuit also observed that the petitioners "appear[ed] indirectly to invoke" an Eighth Circuit decision stating that the Commission lacks authority "to set actual prices" when implementing § 252. *Id.* at 9a-10a (referring to *Iowa Utilities Board*). The D.C. Circuit took "no position on the issue before the 8th Circuit," explaining that the Eighth Circuit case was "quite different" in that it did not involve "FCC ratesetting authority for a leg of an interstate communication" and "did not address the FCC's power to implement 'just and reasonable' rates under § 201 or how that power was affected by §§ 251-252." *Id.* at 10a.

The D.C. Circuit also rejected the petitioners' argument that the Commission acted arbitrarily in establishing its pricing methodology for ISP-bound traffic. It explained that the Commission "provided a solid grounding" for its pricing methodology in its findings that the normal balance between incoming and outgoing calls "is utterly absent from ISP-bound traffic" and that "the rates for such traffic were so distorted that CLECs were in effect paying ISPs to become their customers." *Id.* at 10a-11a. The court agreed with the Commission that "the continued application of the reciprocal compensation regime to ISP-bound traffic would 'undermine[] the operation of competitive markets.'" *Id.* at 11a (quoting *id.* at 944a) (alteration in original).

Finally, the D.C. Circuit "note[d] the presence of a number of arguments introduced outside of the petitioners' opening briefs." *Id.* at 12a. It explained that, under settled circuit precedent, those arguments were not properly presented. *See id.* at 12a-13a. The court accordingly "d[id] not consider" them. *Id.* at 13a.

Core and the PaPUC sought rehearing, which the D.C. Circuit denied. *See id.* at 1085a-1088a.

REASONS FOR DENYING THE PETITIONS

I. THERE IS NO DIVISION OF AUTHORITY WARRANTING THIS COURT'S INTERVENTION

Core asserts (at 14-19) that the D.C. Circuit's decision conflicts with this Court's decisions in *AT&T* and *Verizon*, as well as the Eighth Circuit's decision in *Iowa Utilities Board*. It claims (at 15) that those cases stand for the proposition that, as to matters to which a provision of the 1996 Act applies, the FCC can establish rate methodologies but cannot "set actual rates" — the latter task (it asserts) is left to state commissions. *See also* PaPUC Pet. 9-11.

Petitioners' claim of conflict fails because the cases on which they rely do not address the question presented. Even aside from that fact, the Commission's order is fully consistent with the proposition that petitioners attribute to those cases — namely, that the FCC cannot set rates for traffic to which § 251(b)(5) applies — because the FCC established a pricing methodology; it did not set rates.

A. The Cases on Which Petitioners Rely Involve Implementation of the 1996 Act as to Intrastate Traffic and Network Components, Whereas This Case Concerns the Commission's Longstanding Authority To Regulate Interstate Traffic Under § 201 of the Communications Act

Petitioners incorrectly invoke the decisions they cite. Each involved the Commission's authority *to implement the 1996 Act* as to *intra*state telecommunications traffic or as to individual physical components of the local telephone network that are neither interstate nor intrastate. None addressed the issue in this case, which is whether the Commission can regulate *inter*state telecommunications traffic *under § 201*, where § 251(b)(5) also applies to the traffic in question. Further, none of those cases considered any of the statutory arguments pressed in the petitions — that is, none considered whether §§ 251-252 are "more specific" statutory provisions that control § 201, and none addressed the proper scope and meaning of the savings clause in § 251(i).

1. In *AT&T*, the court of appeals had held that the Commission lacked authority to promulgate a pricing methodology for state commissions to follow in setting rates under the 1996 Act for intrastate traffic and physical network components. That court had reasoned that "the general rulemaking authority conferred upon the Commission by the Communications Act of 1934 extended only to interstate matters, and that the Commission therefore needed specific congressional authorization before implementing provisions of the 1996 Act addressing intrastate telecommunications." *AT&T*, 525 U.S. at 374. This Court disagreed, concluding that the Commission's general "rulemaking authority" under § 201(b) extended "to implementation of the local-competition provisions" of the 1996 Act. *Id.* at 377-78.

In the discussion on which Core relies (at 15-16), the *AT&T* Court rejected the contention that the Commission's pricing rule contravened language in the 1996 Act empowering state commissions to "establish any rates." 47 U.S.C. § 252(c)(2). The Court explained that having state commissions "apply" and "implement" the Commission's pricing methodology was "enough to constitute the establishment of rates" for purposes of § 252(c)(2). *AT&T*, 525 U.S. at 384. The Court did not address — because it was not presented — whether § 252(c)(2) prohibited rate-setting by the FCC in cases where the FCC is not implementing the 1996 Act but instead is acting under § 201 to regulate interstate telecommunications directly. Instead, the Court "assume[d]" that § 252(c)(2) required state-commission ratemaking as to intrastate telecommunications and physical network elements, and held that the Commission's promulgation of a pricing methodology did not usurp that state-commission role. *Id.* at 385 n.10.

The discussion in *AT&T* regarding the Commission's authority to promulgate rules to implement §§ 251 and 252 as to intrastate telecommunications is inapplicable where, as here, the Commission is not implementing the 1996 Act but instead is exercising the independent authority § 201(b) grants it to regulate jurisdictionally interstate traffic. Indeed, *AT&T* construed only the grant of rulemaking authority in the last sentence of § 201(b); it did not address the Commission's authority to regulate rates found in the first sentence of that subsection. Moreover, § 251(i) resolves any doubt in that regard by specifying that the regulatory regime the 1996 Act creates to promote local competition does not "limit or otherwise affect the Commission's authority under section 201." 47 U.S.C. § 251(i).

2. This Court's decision in *Verizon* is even further afield. There, the parties took as a given the Court's conclusion in *AT&T* that the Commission possesses rulemaking authority to implement the pricing provisions of the 1996 Act, and the background language Core cites (at 16) simply restates that conclusion. The controversy in *Verizon* concerned whether the pricing rule the Commission promulgated to implement § 251(c)(3) (requiring access to the physical components of the local network) comported with

§ 252(d)(1) and the 1996 Act as a whole. *See* 535 U.S. at 495 ("the incumbent carriers' primary challenge [in the appeal] went to the method that the Commission chose" to implement the 1996 Act); *id.* at 497-501 (addressing incumbents' contention that Commission's implementation of the 1996 Act was inconsistent with § 252(d)(1)); *see also id.* at 523 (reversing "Eighth Circuit's judgment insofar as it invalidated [the Commission's] method for setting rates *under* the [1996] Act") (emphasis added). Because the Commission did not purport to implement the 1996 Act in this proceeding, which also implicates neither § 251(c)(3) nor § 252(d)(1), the discussion in *Verizon* is beside the point.

3. The Eighth Circuit's decision in *Iowa Utilities Board*, issued on remand from this Court's decision in *AT&T*, also is inapt. The Eighth Circuit's analysis, no different from the Court's in *AT&T*, was limited to the question of the Commission's actions to implement the 1996 Act as to intrastate telecommunications traffic and components of the local network. Thus, as the D.C. Circuit explained, the "issue before the 8th Circuit" was "quite different from" the issue presented here, involving Commission regulatory "authority for a leg of an interstate communication," so the Eighth Circuit "did not address the FCC's power to implement 'just and reasonable' rates under § 201 or how that power was affected by §§ 251-252." Pet. App. 10a. For those reasons, the D.C. Circuit correctly recognized that the Eighth Circuit's decision has no bearing on this case and declined to take a "position on the issue before the 8th Circuit." *Id.*

In all events, *Iowa Utilities Board* does not assist petitioners because the court there rested its rejection of certain FCC-established proxy prices on the doctrine of judicial estoppel. The parties contesting the proxy prices "argue[d] the proxy prices should be vacated for three reasons" — the Commission "expressly disavowed the proxy prices before" this Court in *AT&T*; the proxy prices "are based on [an] unlawful [pricing] method and employ [an] impermissible definition of 'avoided retail costs'"; and the proxy prices "were developed using unreliable cost models." 219 F.3d at 756.

The court "agree[d] with the petitioners" that the Commission was "estopped from" defending the proxy prices. *Id.* The language on which Core relies (at 18) appears as part of the Eighth Circuit's discussion of why it was "not persuaded" by the FCC's effort to explain away its "position before the Supreme Court" and thereby to avoid judicial estoppel. 219 F.3d at 756. The concluding sentence of the paragraph from which Core quotes (at 18) makes clear that the Eighth Circuit was still expounding its judicial-estoppel holding: "we now *agree with the FCC* that its role" in implementing the 1996 Act "is to resolve 'general methodological issues.'" 219 F.3d at 757 (quoting the Commission's brief in *AT&T*) (emphasis added).

B. In Any Event, the Commission's Order Would Be a Permissible Implementation of the 1996 Act Because It Established a Pricing Methodology

There is, moreover, no conflict between the D.C. Circuit's decision in this case and *AT&T*, *Verizon*, and *Iowa Utilities Board* for an additional reason: the premise of Core's claim of conflict — that the Commission here "set rates" for ISP-bound traffic (Core Pet. 11) — is incorrect. The Commission did not prescribe a fixed rate for ISP-bound traffic;

instead, the Commission established a market-based pricing methodology for such traffic, which includes a rate cap among other features.

The Commission's market-based pricing methodology currently has three components. *See supra* pp. 7-8. First, the Commission established a market-based cap on the payments that a carrier can receive from another carrier for ISP-bound traffic, based on "recently negotiated" contracts containing rates for ISP-bound traffic. Pet. App. 959a. But the Commission did not mandate that all carriers charge a specific rate. Carriers remain free to negotiate rates irrespective of the cap, and the record showed that many carriers had negotiated rates significantly below the cap. *See* FCC C.A. Br. 49 (filed June 19, 2009) (noting that the record "contained substantial evidence that most calls to ISPs were now being terminated at rates well *under* the $.0007 cap pursuant to voluntary agreements").

Second, the Commission's methodology provides that any carrier that does not recover all of its costs of handling ISP-bound traffic from the originating carrier should seek to recover the remainder of its costs from its ISP customers. *See* Pet. App. 953a, 961a-963a. Moreover, competitive LECs' recovery from their customers "is generally not regulated," *id.* at 953a n.151, and the Commission did not limit the ability of competitive LECs to recover costs from their ISP customers, even though it has limited recovery from customers in other areas of the marketplace. Thus, a competitive LEC with ISP customers remains free to recover any remaining costs from its customers at whatever rates the market will bear.

Third, the Commission adopted a mirroring rule. Under that rule, for a LEC to obtain the benefits of the pricing methodology, it must offer to extend the rate cap to voice traffic subject to § 251(b)(5) that it exchanges with other LECs (and wireless carriers). *See id.* at 964a-966a. If a LEC elects not to make that offer, the rate cap does not apply to ISP-bound traffic. *See id.* at 965a. Thus, the mirroring rule likewise is not a rate prescription, but a means of structuring negotiations so that carriers "will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic." *Id.* at 966a.

Because the Commission's orders established a pricing methodology for ISP-bound traffic, rather than "set[ting] actual rates" (Core Pet. 15), they are fully consistent with the cases on which petitioners rely. Each of those cases recognized the Commission's authority to promulgate pricing methodologies that are binding on the states, even where the Commission is implementing the 1996 Act as to intrastate traffic (which, as explained above, is not the case here). *See AT&T*, 525 U.S. at 385; *Verizon*, 535 U.S. at 489; *Iowa Utils. Bd.*, 219 F.3d at 757.

II. THE D.C. CIRCUIT'S DECISION IS CORRECT

The D.C. Circuit correctly held that the Commission's order sets forth a reasonable interpretation of the pertinent statutory provisions and a rational explanation for the Commission's pricing methodology for ISP-bound traffic, which responds to that traffic's unique characteristics and the opportunities for regulatory arbitrage it creates. Petitioners' criticisms of the D.C. Circuit's reasoning lack merit.

A. The Commission Reasonably Interpreted the Statute and Rationally Responded to the Unique Characteristics of ISP-Bound Traffic

As the D.C. Circuit concluded, § 201 provides authority for the Commission's pricing methodology for ISP-bound traffic. That section authorizes the Commission "to regulate charges for traffic and services subject to federal jurisdiction." Pet. App. 35a; *see also Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 53 (2007) (noting that the Commission has "long implemented § 201(b)" and its prohibition of unjust and unreasonable rates and practices "through the issuance of rules and regulations"). Under the Commission's end-to-end jurisdictional analysis, which petitioners "have not challenged," Pet. App. 9a, ISP-bound traffic is "subject to federal jurisdiction" and, accordingly, "falls under the Commission's section 201 authority," *id.* at 35a. Because § 201 grants the FCC power to regulate interstate traffic and because ISP-bound traffic is jurisdictionally interstate, § 201 provides authority for the Commission to establish a pricing methodology (or an actual price) for ISP-bound traffic. *See id.* at 7a.

Nothing in § 251 or § 252 strips the Commission of its authority to regulate ISP-bound traffic under § 201. On the contrary, in § 251(i), Congress expressly preserved the Commission's pre-existing authority over interstate telecommunications. Thus, as the D.C. Circuit explained, the Commission's construction of the relationship between its authority to regulate jurisdictionally interstate traffic under § 201(b) and the 1996 Act's provisions for promoting local competition was "at least reasonable" — and therefore entitled to deference — especially given "§ 251(i)'s specific saving of the Commission's authority under § 201 against any negative implications from § 251." *Id.* at 8a-9a.

Nor did Congress, in § 252(d)(2), establish a comprehensive pricing regime for § 251(b)(5) traffic that could displace the Commission's longstanding authority under § 201. The pricing standard in § 252(d)(2)(A) applies only "[f]or the purposes of compliance by an *incumbent* local exchange carrier," 47 U.S.C. § 252(d)(2)(A) (emphasis added), whereas § 251(b)(5) imposes duties on *all* local exchange carriers. Even with respect to incumbents, the FCC has noted that "[s]ection 252(d)(2)(A)(i) does not address what happens when carriers exchange traffic that originates or terminates on a third carrier's network." Pet. App. 29a. Moreover, § 252(d)(2)(A) addresses only what a "State commission" may do and does not limit the FCC's authority.

The Commission's resolution of the problems ISP-bound traffic posed also was eminently rational. The Commission faced a massive economic disruption resulting from the unique characteristics of ISP-bound traffic. *See id.* at 4a. The statutory construction urged by certain carriers (such as Core) would have led to continued irrational results, including carriers paying ISPs to be their customers. *See id.* at 4a, 11a. That would have converted the 1996 Act — a statute intended to "promote competition," 1996 Act, Preamble, 110 Stat. 56 — into one that undermined investment and harmed competition. Those irrational results weighed heavily against the reading that Core and others urged. (Notably, other carriers with ISP customers supported the Commission's position before the D.C. Circuit and oppose certiorari here.)

B. Core's Challenges to the D.C. Circuit's Reasoning Lack Merit

Core contends (at 19-26) that the D.C. Circuit erred in concluding that § 201 authorized the Commission to establish its pricing methodology for ISP-bound traffic, notwithstanding the restrictions in §§ 251-252. To the extent preserved for review, Core's arguments are incorrect; in any event, Core's premise — that the Commission's pricing methodology is inconsistent with §§ 251-252 — is erroneous.

1. Core asserts (at 19-21) that §§ 251-252 are "more specific" statutory provisions that trump the assertedly "more general" provision in § 201. But, as the D.C. Circuit explained, "it is inaccurate to characterize § 201 as a general grant of authority and §§ 251-252 as a specific one," because the "'two statutes apply to intersecting sets.'" Pet. App. 8a (quoting *Hemenway*, 159 F.3d at 264). Indeed, Core does not dispute that "[n]ot all inter-LEC connections are used to deliver interstate communications, just as not all interstate communications involve an inter-LEC connection." *Id.* Consequently, "'neither [statutory provision] is more specific,'" and the specific-controls-the-general canon is inapplicable. *Id.* (quoting *Hemenway*, 159 F.3d at 264); *cf. Louisiana Pub. Serv. Comm'n v. FCC*, 479 U.S. 355, 377 n.5 (1986) (rejecting application of canon where "the sections are not general or specific with respect to each other").

Core asserts (at 20), however, that §§ 251-252 control nonetheless, because they contain the more specific "standard for determining just and reasonable rates." Even aside from the fact that, as explained above, Core is wrong in claiming that § 252(d)(2) establishes a comprehensive pricing standard for § 251(b)(5), accepting Core's argument would eviscerate the specific-controls-the-general canon. If the statute with the more detailed substantive provisions always governed, then a statute covering an entire set of cases (a "more general" statute) would control over a statute that covered a subset of those cases (a "more specific" one), so long as the broader statute had more specific substantive provisions. That would allow the statute with broader application to render the more specific statute meaningless, in violation of the venerable "canon against interpreting any statutory provision in a manner that would render another provision superfluous." *Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010); *cf. Hemenway*, 159 F.3d at 264 ("When one statute applies to a subset of another, the canon about general and specific statutes does not really do anything; all the useful work is done by the presumption that every statute serves a function.").[4]

Further, the specific-controls-the-general canon applies only in the absence of other statutory evidence of how to reconcile a general and specific provision. *See Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (rejecting application of "the specific governs

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[4] Tellingly, neither of the cases Core cites (at 20-21) supports its understanding of the canon. In *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002), the "more specific" statute covered a subset of the cases reached by the "more general" provision. Thus, the Court — focusing on the scope of the statutes and not the specificity of their substantive provisions — explained that the "more specific" statute controlled, "but only within its self-described scope." *Id.* at 335-36. Similarly, the ratemaking provision that was held to control in *Ohio Power Co. v. FERC*, 954 F.2d 779 (D.C. Cir. 1992), applied to a subset of the cases covered by the Federal Energy Regulatory Commission's more general ratemaking statute.

over the general" canon and noting that "[c]anons of construction . . . are simply rules of thumb which will sometimes help courts determine the meaning of legislation") (internal quotation marks omitted). Here, in § 251(i), Congress expressly instructed courts how to reconcile the relationship between § 201 and § 251. There accordingly is no role for an interpretive rule of thumb.

2. Core presents (at 22-26) multiple criticisms of the D.C. Circuit's reliance on § 251(i). None of those arguments, however, was properly pressed or passed on below. Core mentioned § 251(i) only in passing in the background section of its petitioner's brief. *See United States v. Baugham*, 449 F.3d 167, 178 n.3 (D.C. Cir. 2006) (argument mentioned only in background section does not satisfy the requirements of Federal Rule of Appellate Procedure 28(a)(9) and is waived); Pet. App. 12a-13a (declining to consider arguments not presented in petitioners' opening briefs).[5] Accordingly, those arguments provide no basis on which to grant certiorari. *See, e.g.*, *Duignan v. United States*, 274 U.S. 195, 200 (1927) (Court generally does not review "questions not pressed or passed upon below"); *see also United States v. Galletti*, 541 U.S. 114, 120 n.2 (2004) (party "forfeited [an] argument by failing to raise it in the courts below").[6]

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[5] For their part, in the D.C. Circuit, the NYPSC and NARUC asserted, in a single sentence and with no explanation, that § 251(i) was meant to preserve only the Commission's pre-1996 Act § 201 authority over interconnection. Even if that assertion (which neither petitioner presses in this Court) were sufficient to preserve the argument, it is incorrect; § 251(i)'s text is broad and contains no limitation to authority over interconnection.

[6] Core admits (at 24 n.7) that one of its arguments regarding § 251(i) — its reliance on 47 U.S.C. § 205 — was not considered

3. Finally, Core's claim (at 23) that the Commission's rate methodology violates § 252(d)(2) is incorrect even on its own terms. That provision requires only that reciprocal-compensation arrangements provide for "the mutual and reciprocal recovery" of a "reasonable approximation" of the costs involved in carrying the traffic that is subject to § 251(b)(5). 47 U.S.C. § 252(d)(2)(A). And it does not authorize either the FCC or state commissions to determine carriers' costs "with particularity." *Id.* § 252(d)(2)(B)(ii).

Section 252(d)(2) thus does not require that a carrier recover all of its particular costs of delivering traffic to its customers from the originating carrier, rather than from its customers. In fact, the statute expressly provides that "arrangements that afford the mutual recovery of costs" for purposes of § 252(d)(2) include "bill-and-keep arrangements," *id.* § 252(d)(2)(B)(i), under which no intercarrier compensation is paid and each carrier recovers its costs from its own customers, *see* Pet. App. 886a n.6. Because an arrangement in which a carrier recovers all of its costs from its customers and none from other carriers satisfies § 252(d)(2), it follows that § 252(d)(2) can be satisfied through an arrangement where a carrier recovers some costs from originating carriers and some from its customers.

What is more, nothing in the text of § 252(d)(2) requires (or precludes) that the "terms and conditions

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by the D.C. Circuit, and it does not claim to have preserved that argument. Indeed, neither of the petitioners' briefs in the D.C. Circuit even cited § 205. Although, as Core notes, the Court has authority to consider some forfeited claims, *see Yee v. City of Escondido*, 503 U.S. 519, 534 (1992), Core does not suggest that there is anything "exceptional" (*Duignan*, 274 U.S. at 200) about this case that would justify exercising such discretionary authority here.

[that] provide for the mutual and reciprocal recovery" of costs take the form of a single rate for all traffic subject to § 251(b)(5). The Commission's finding that ISP-bound traffic creates unique regulatory-arbitrage problems, along with the ability of LECs to recover costs from the ISPs, would support the creation of a distinct rule for the "mutual and reciprocal recovery" of costs of this unique category of traffic. Moreover, as the D.C. Circuit previously found, the Commission included the mirroring rule as part and parcel of its ISP pricing methodology, and that rule acts to extend the Commission's ISP-bound-traffic rate caps to voice traffic subject to § 251(b)(5), *see Core*, 455 F.3d at 278, so that a single rate applies to both ISP-bound traffic and such voice traffic, where mirroring occurs.

In sum, by allowing a carrier with ISP customers to recover costs up to a market-based cap from an originating carrier, with any further costs recovered from that carrier's customers, and by requiring that LECs offer to use the same rate cap for § 251(b)(5) voice traffic, the Commission's ISP-bound-traffic pricing methodology provides for the "mutual and reciprocal recovery" of a "reasonable approximation" of costs. Although the Commission was not obligated to abide by § 252(d)(2) here, that section requires nothing more; claims that the Commission's actions are inconsistent with the requirements of § 252(d)(2) are therefore unavailing.

C. The PaPUC's Challenges to the D.C. Circuit's Reasoning Are Equally Unpersuasive

1. The PaPUC repeatedly refers (*e.g.*, at 3) to the traffic at issue as "local" and suggests that the FCC's § 201(b) authority over interstate communications is inapplicable. But, as the D.C. Circuit correctly concluded, that contention "fails because it implicitly assumes inapplicability of the end-to-end analysis, which petitioners have not challenged." Pet. App. 9a. "Petitioners," the court below explained, "do not dispute that dial-up internet traffic extends from the ISP subscriber to the internet, or that the communications, viewed in that light, are interstate." *Id.* Thus, "[g]iven that ISP-bound traffic lies at the intersection of the § 201 and §§ 251-252 regime, it has no significance for the FCC's § 201 jurisdiction over interstate communications that these telecommunications might be deemed to 'terminat[e]' at a LEC for purposes of § 251(b)(5)." *Id.* (second alteration in original).

2. The PaPUC's multiple references to the Commission's rate cap as "mandatory" (*e.g.*, at 21) and assertions that state authority over intrastate communications has been "usurp[ed]" (*e.g.*, at 3) ignore the actual application of the Commission's mirroring rule, an aspect of the Commission's treatment of ISP-bound traffic that neither petitioner challenges in this Court. As the Commission explained to the D.C. Circuit shortly after that rule was adopted, the mirroring rule is a "set of conditions for negotiations." Brief for FCC at 57, *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. filed Nov. 15, 2001); *see id.* at 20 (explaining that carriers that seek to pay no more than the rate caps for ISP-bound traffic must "voluntarily offer" to exchange local voice traffic with other LECs and wireless carriers at the rate caps; those other carriers must still "voluntarily elect[] to take advantage of that offer").

Under the mirroring rule, therefore, the rate caps apply to ISP-bound traffic only if the carrier originating such traffic elects to offer to exchange all non-

ISP-bound traffic that is subject to § 251(b)(5) at the same rate cap. *See* Pet. App. 965a. If the other carrier accepts the offer, the parties have agreed to exchange § 251(b)(5) traffic "without regard to the standards set forth in" § 251(b), as Congress expressly permitted. 47 U.S.C. § 252(a)(1). If the other carrier rejects the offer, the intrastate, non-ISP-bound traffic that is subject to § 251(b)(5) will be exchanged at reciprocal compensation rates set by state commissions (or by negotiation).

3. The PaPUC also asserts (at 20) that the Commission acted arbitrarily and capriciously in not applying "TELRIC" rates to ISP-bound traffic. But the Commission "provided a solid grounding for the differences between the treatment of inter-LEC compensation for delivery of dial-up internet traffic [under § 201] and the regime generally applicable to inter-LEC compensation under § 251(b)(5)." Pet. App. 10a. Because the normal balance of incoming and outgoing calls "is utterly absent from ISP-bound traffic," the application of state-commission reciprocal-compensation rates to that traffic had encouraged carriers to "pay[] ISPs to become their customers" and threatened to "undermine[] the operation of competitive markets." *Id.* at 10a-11a (internal quotation marks omitted; second alteration in original).

III. THE QUESTION PRESENTED AFFECTS ONLY A SMALL AND DIMINISHING CLASS OF CASES

The question presented implicates a regulatory response to a discrete and transitory problem. The rules in question apply only to dial-up ISP-bound traffic, and dial-up is "being rapidly replaced by various forms of [broadband] service." Pet. App. 2a n.1.

Indeed, the PaPUC (at 30, 33) describes dial-up as only a "boutique market" today. A rule affecting only a disappearing type of traffic is unworthy of this Court's review.

More fundamentally, petitioners' complaints about the effects of the Commission's interim pricing methodology ignore the Commission's findings regarding the problem to which it was responding. The Commission found that state-commission decisions requiring payment of reciprocal compensation for ISP-bound traffic had led to "classic regulatory arbitrage" and "uneconomical results." Pet. App. 904a. It further found that such decisions "distort[ed] the development of competitive markets" by encouraging some carriers to pay ISPs to be their "customers," as well as inducing a number of "fraudulent schemes to generate dial-up [ISP] minutes." *Id.* at 909a, 944a & n.135. In the wake of the Commission's 2001 order, parties have negotiated commercial arrangements consistent with the Commission's pricing methodology for the overwhelming majority of traffic that LECs and wireless carriers exchange. *See* FCC C.A. Br. 49; Joint C.A. Br. of Intervenors in Supp. of FCC 26 (filed June 19, 2009). The existence of those binding arrangements further undermines the significance of the question presented.

Core's attempts to imbue the question presented with importance, and its vain efforts to connect this case to current policy debates, are unavailing.

A. The Commission's Pricing Methodology Neither Increases Costs of Dial-Up nor Improperly Discriminates Against Particular Carriers

1. Core asserts (at 26-29) that certiorari is warranted because the Commission's pricing methodology increases the cost of dial-up Internet access service. But, even if true, that would not justify this Court's review, in light of the undisputed fact that the number of subscribers to dial-up service is "rapidly" shrinking. Pet. App. 2a n.1. Moreover, contrary to Core's claim that national policy favors promoting dial-up service, the relevant national policy is promoting deployment and adoption of higher-speed broadband services, not continued reliance on dial-up. *See, e.g.*, 47 U.S.C. § 1302(a), (d)(1) ("[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced [*i.e.*, broadband] telecommunications capability to all Americans"); FCC, *Connecting America: The National Broadband Plan* 5 (2010) ("[B]roadband is essential to opportunity and citizenship."), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf.

In any event, the Commission's findings, based on record evidence and the Commission's expertise, contradict Core's unsupported assertion (at 28) that the Commission's pricing methodology leads to higher prices for dial-up service. In its 2001 order, the Commission found that "the evidence in the record [did] not demonstrate" that "the cost of Internet access ha[d] increased" in "the growing number of states that ha[d] adopted bill and keep for ISP-bound traffic." Pet. App. 962a. Indeed, the Commission noted that it had "reason to believe that [a] failure to act, rather than the actions [it] t[ook] [in 2001], would lead to *higher* rates for Internet access," on the theory that LECs paying large amounts of reciprocal compensation on ISP-bound traffic would pass those costs on to their customers making dial-up calls. *Id.*

at 962a-963a (emphasis added); *see id.* at 11a. Moreover, the Commission concluded that, to the extent LECs recovered those costs from all customers, it would create "a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access," and "no public policy rationale . . . support[s]" such a subsidy. *Id.* at 963a; *see id.* at 11a.

In addition, Core's repeated assertion (at 2, 9, 23, 27) that the Commission's rate cap is "far below cost" ignores the Commission's findings. The Commission explained that it

> derived the rate caps from contemporaneous interconnection agreements, in which carriers voluntarily agreed to rates comparable to the rate caps adopted by the Commission. The interconnection agreements included lower rates for unbalanced traffic than for balanced traffic, and the rates declined over time, like the rate caps. Although the Commission made no specific findings [in its 2001 order] with regard to the actual costs associated with delivering traffic to ISPs, it noted evidence in the record that technological advances were reducing the costs incurred by carriers when handling all forms of traffic. The Commission also noted that "negotiated reciprocal compensation rates continue to decline as ILECs and CLECs negotiate new agreements."

Pet. App. 41a (footnotes omitted).

2. Core's contention (at 26) that the rule at issue is "discriminatory" also fails. The Commission's pricing methodology does not discriminate against carriers serving ISPs because the Commission's mirroring rule leads to carriers originating ISP-bound traffic applying the same rates to both voice traffic subject to § 251(b)(5) and ISP-bound traffic. *See Core*, 455 F.3d at 277-78.

Nor can Core credibly contend that the Commission's rules discriminate against LECs with ISP customers by forcing them to seek compensation from those customers. The Commission has long required incumbent LECs to seek additional compensation from their ISP customers if necessary fully to recover their costs of handling dial-up ISP-bound traffic. *See* Pet. App. 954a n.151. Moreover, that § 252(d) explicitly *permits* bill-and-keep arrangements (in which carriers recover *all* of their costs from their customers) destroys Core's claim (at 29) that requiring a carrier to recover *some* of its costs from its customers violates congressional policy. *See* 47 U.S.C. § 252(d)(2)(B)(i) (providing that § 252(d)(2) "shall not be construed . . . to preclude . . . bill-and-keep arrangements").

3. Equally unfounded are Core's (at 28-29) and the PaPUC's (at 8, 24) objections to the Commission's and the D.C. Circuit's conclusion that the problem to which the Commission's rules are a response is appropriately considered uneconomic regulatory arbitrage. The D.C. Circuit previously considered such objections and rejected "[t]he derision that Core levels at the FCC's terminology," explaining that the Commission's "economic analysis" is "reasonable." *Core*, 455 F.3d at 279. "In a nutshell," the D.C. Circuit stated, "the FCC determined in [its 2001 order] that, because ISP-related traffic flows overwhelmingly in one direction, a reciprocal compensation regime creates an opportunity for CLECs to sign up ISPs as customers and collect [compensation from], rather than pay [] compensation to, other carriers. In the FCC's view, this led to classic regulatory arbitrage."

Id. (citation and internal quotation marks omitted; alterations in original).

B. This Case Is Not a Vehicle in Which To Consider Regulation of Broadband or VoIP

Core asserts (at 31-33) that this case has relevance to other Commission initiatives, such as the regulation of broadband and VoIP. But it fails to explain how the resolution of the question presented — which involves the interaction between § 201 and §§ 251-252 — has any *legal* significance for those other issues.[7] Core's claim thus boils down to the unsupported notion that upholding the Commission's order in this case will encourage it "to adopt similarly extravagant interpretations of its statutory authority" in other contexts. Core Pet. 2. But this Court does not grant review to "send messages" to agencies.

Further, in addressing preemption of state regulation of VoIP, Core fails to mention that the Eighth Circuit — the court whose precedent Core asserts conflicts with the decision below — upheld the Commission's order on that subject. *See Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). In addition, although Core expresses surprise that the Commission has preempted state requirements regarding 911 service, it ignores that the FCC has expressly addressed (via a federal regime) 911

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[7] Core's suggestion (at 31) that the Commission's end-to-end jurisdictional analysis could have implications for other cases provides no reason to grant the petition. Neither petitioner properly challenged that analysis in the D.C. Circuit. *See* Pet. App. 7a, 9a. This case therefore is not a vehicle for addressing that analysis, which in any event is correct and comports fully with decades of previous FCC and federal court decisions.

service as to VoIP and has "requir[ed] providers of interconnected VoIP service to provide E911 services to all of their customers as a standard feature of the service." First Report and Order and Notice of Proposed Rulemaking, *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 1 (2005), *petitions for review denied*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).[8]

CONCLUSION

The petitions for a writ of certiorari should be denied.

[8] Core also asserts (at 30) that the decision below "upsets the federal-state balance" in the 1996 Act. But it ignores this Court's recognition in *AT&T* that the 1996 Act "unquestionably" took "the regulation of local telecommunications competition away from the States." 525 U.S. at 378 n.6. Even assuming that the 1996 Act required state rate-setting here (and, as the D.C. Circuit explained, it does not), this would not be a debate "about whether the States will be allowed to do their own thing," but about whether rates are set by the FCC or by a state commission implementing a federal methodology dictated by the FCC. *Id.* at 378. It is "hard to spark a passionate 'States' rights' debate over that detail." *Id.*

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