No. 00-1531 and 00-1711

In the Supreme Court of the United States

VERIZON MARYLAND INC., PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a federal district court has subject-matter jurisdiction under 28 U.S.C. 1331 to determine whether a state public utility commission's order interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996.

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OPINIONS BELOW

The opinion of the court of appeals (reproduced in the Appendix to Verizon Maryland's petition for a writ of certiorari in No. 00-1531, [hereinafter Verizon Pet. App.] at 1a-72a) is reported at 240 F.3d 279. The opinion of the district court (Verizon Pet. App. 73a-90a) is unreported. The order of the Maryland Public Service Commission (Verizon Pet. App. 91a-111a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2001. Verizon Maryland filed a petition

for a writ of certiorari on April 5, 2001, and the United States filed a petition for a writ of certiorari on May 15, 2001. Both petitions were granted on June 25, 2001, limited to the second question presented in each petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, the relevant portions of the Telecommunications Act of 1996, the Federal Communications Commission's implementing regulations, and 28 U.S.C. 1331 are set forth at Verizon Pet. App. 112a-134a. Citations of the Act are of the 1999 Supplement to the United States Code.

STATEMENT

The Telecommunications Act of 1996 (1996 Act or Act), Pub. L. No. 104-104, 110 Stat. 56, effected a comprehensive overhaul of telecommunications regulation designed to "open[] all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996); see generally *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). The 1996 Act establishes procedures to encourage competition in local telecommunications markets, including the requirement that incumbent carriers enter into agreements with competitors concerning interconnection with, and access to elements of, the incumbent's network. The Act authorizes state public utility commissions to assume certain regulatory authority respecting those agreements (commonly referred to as interconnection agreements). This case concerns whether the federal district courts have subject matter jurisdiction under 28 U.S.C. 1331 to review state commission decisions

construing and enforcing interconnection agreements for compliance with federal law.

1. For many years, most telephone service in the United States was provided by AT&T and its local-exchange affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, 15 U.S.C. 1 *et seq.*, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). In 1982, AT&T entered into a consent decree in settlement of that suit that required AT&T to divest its local exchange operations. The newly independent Bell Operating Companies, together with approximately 1,500 non-Bell carriers, continued to provide monopoly local exchange service in their respective service areas. What remained of AT&T continued to provide nationwide long-distance service, increasingly in competition with other long-distance carriers, such as MCI and Sprint. See H.R. Rep. No. 204, 104th Cong., 1st Sess. Pt. 1, at 48-50 (1995).

a. In considering how to facilitate the entry of competitors into local telephone markets, Congress recognized that the economic barriers to entry into those markets would remain formidable even if the regulatory restrictions on competition were removed. H.R. Conf. Rep. No. 458, *supra*, at 113. It would be economically impracticable, at least with the current technology, for even the largest prospective competitor to duplicate an incumbent carrier's entire local network —*i.e.*, to create a new network of switches and a new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another. Moreover, without rights of access to the

existing network, a prospective competitor could not gradually enter the market through partial duplication of local exchange facilities; the competitor would win few customers if, for example, those customers could call only one another and not customers of the incumbent's separate (and already established) network.

Congress addressed those concerns in Sections 251 and 252 of the 1996 Act. It imposed various obligations on all local exchange carriers, incumbents and new entrants alike, including the obligations to provide number portability (so that a consumer may change carriers without changing telephone numbers), to allow competitors to have access to certain services (*e.g.*, directory assistance) and facilities (*e.g.*, poles, ducts, conduits, and rights-of-way), and "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). The underlying dispute in this case concerns an arrangement to pay reciprocal compensation, which is a payment made by the carrier whose customer originates a call to the carrier whose facilities are used to complete the call.

Congress also imposed on incumbent carriers the obligation to open their networks to new entrants in three distinct but complementary ways. First, new entrants are entitled to "interconnect" their networks with the incumbent's existing network, and to do so at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2). Second, new entrants are entitled to gain access to elements of an incumbent's network "on an unbundled basis"—*i.e.*, to lease individual network elements (loops, switching capability, etc.) at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3). Third, new entrants

are entitled to buy an incumbent's retail services "at wholesale rates" and to resell those services to end users. 47 U.S.C. 251(c)(4).[1]

The 1996 Act requires incumbents to negotiate in good faith with new entrants on agreements regarding reciprocal compensation, interconnection, access to network elements, resale of services, and the other arrangements contemplated by the Act. 47 U.S.C. 251(c), 252. The Act provides for binding arbitration if the parties cannot conclude an interconnection agreement through negotiation. 47 U.S.C. 252(b).

The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, set the terms and conditions for those agreements (subject to the standards set forth in the Act and in regulations promulgated by the Federal Communications Commission (FCC) pursuant to the Act), arbitrate disputes that arise in the negotiation of the agreements, and exercise review and enforcement authority. If a state commission elects not to assume such authority, the FCC will perform that role. 47 U.S.C. 252(e)(5).

b. All interconnection agreements, whether arrived at through negotiation or arbitration, are subject to approval by the state commission or, if it declines that role, the FCC. 47 U.S.C. 252(e)(1) and (5). A negotiated agreement may be approved by the state commission (or the FCC) only if it does not "discriminate[] against a telecommunications carrier not a party to the

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[1] The Court is currently considering a challenge to the methodology developed by the Federal Communications Commission (FCC) for establishing the rates that incumbents may charge new entrants for interconnection and access to network elements. See *Verizon Communications, Inc.* v. *FCC*, Nos. 00-511 et al. (to be argued Oct. 10, 2001).

agreement" and is "consistent with the public interest, convenience, and necessity." 47 U.S.C. 252(e)(2)(A).

If the parties are unable to conclude an agreement through negotiations and proceed to arbitration, the state commission (or, if it declines that role, the FCC) will resolve any open issue. Such issues may concern the rates, terms, and conditions under which competitors will interconnect with or lease network elements from incumbents, as well as the charges that the incumbent and the new entrant will pay each other for transport and termination of calls. The 1996 Act sets forth standards for state commissions to follow in setting such rates; the state commissions are also required to follow FCC regulations issued pursuant to Section 251(d)(1). 47 U.S.C. 252(c). Once an agreement has been concluded through arbitration, the parties must submit it to the state commission (or, if it declines that role, the FCC) for approval. An arbitrated agreement may be approved only if it complies with Sections 251 and 252 of the Act and applicable FCC regulations. 47 U.S.C. 252(e)(1) and (2)(B).

The 1996 Act provides for federal court "[r]eview of State commission actions" with respect to interconnection agreements. 47 U.S.C. 252(e)(6) (title). The Act states, in relevant part:

> In any case in which a State commission makes a determination under this section [*i.e.*, Section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. 252(e)(6). The Act divests state courts of "jurisdiction to review the action of a State commission

in approving or rejecting an agreement under this section." 47 U.S.C. 252(e)(4).

Where a state commission has elected not to assume regulatory authority under the 1996 Act and the FCC has acted in its place, the Act provides that the FCC proceeding and "any judicial review of the [FCC's] actions shall be the exclusive remedies for a State commission's failure to act." 47 U.S.C. 252(e)(6). The FCC's final orders with respect to interconnection agreements are reviewable, as are other final orders of the FCC, in the federal courts of appeals pursuant to the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*

2. The Maryland Public Service Commission (MPSC) has elected to exercise regulatory authority under the 1996 Act. The MPSC approved interconnection agreements, which were arrived at through negotiations, between Bell Atlantic, the incumbent provider of local telecommunications service in Maryland (and a predecessor to Verizon Communications, Inc.), and prospective entrants into the local telecommunications market, including MCI WorldCom. As required under the Act and the FCC's implementing regulations, those agreements provided for the payment of reciprocal compensation for "local" calls. See 47 U.S.C. 251(b)(5); 47 C.F.R. 51.701(a) (2000).

A dispute subsequently arose among the parties as to whether Bell Atlantic had an obligation under the agreements to pay reciprocal compensation for its customers' calls to Internet service providers (ISPs) to gain access to the Internet. The MPSC exercised regulatory authority over the dispute. It issued a determination that such calls are "local" and ordered the payment of reciprocal compensation.

3. Bell Atlantic sought review of the MPSC's decision in the United States District Court of the District of Maryland, asserting that the MPSC's decision was contrary to federal law, as reflected in a recent ruling of the FCC under the 1996 Act (see pp. 18-19, *infra*), and invoking the court's jurisdiction under 47 U.S.C. 252(e)(6) and 28 U.S.C. 1331. Bell Atlantic named as defendants the MPSC, the individual MPSC commissioners in their official capacities, and the competing carriers that are parties to the agreements.

The MPSC and its commissioners moved to dismiss. They argued that federal district courts lack subject-matter jurisdiction to review decisions of state public utility commissions interpreting and enforcing a previously approved interconnection agreement. They also argued that state commissions and their commissioners are immune from such suits under the Eleventh Amendment. The United States intervened to defend the constitutionality of the judicial review provisions of the 1996 Act.

The district court dismissed the suit. The court concluded that the Eleventh Amendment barred suit against the MPSC and its individual members. Verizon Pet. App. 77a-84a. The court rejected the argument that the MPSC had waived its sovereign immunity by voluntarily electing to exercise regulatory authority under the 1996 Act. *Id.* at 77a-79a. The court also rejected the argument that the suit could proceed against the individual commissioners under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which permits suits against state officers in their official capacities to enjoin ongoing violations of federal law. Verizon Pet. App. 79a-83a. The court then concluded that the MPSC was an indispensable party to the action under Rule 19 of the Federal Rules of Civil Procedure, and thus that

the action had to be dismissed against the other defendants as well. *Id.* at 84a-86a.

4. A divided panel of the United States Court of Appeals for the Fourth Circuit affirmed. The court held that state public utility commissions and their commissioners are immune from suit in federal court under the Eleventh Amendment. The court also held that the district courts lack subject-matter jurisdiction to review state commission decisions enforcing or interpreting previously approved interconnection agreements. Verizon Pet. App. 1a-51a.

First, the court held that the MPSC had not waived its sovereign immunity by electing to exercise regulatory authority over interconnection agreements entered into pursuant to the 1996 Act. Verizon Pet. App. 14a-21a. The court accepted that "a State commission that elects to make § 252 determinations must, of necessity, also be electing to have its determinations reviewed by a federal court under § 252(e)(6)." *Id.* at 14a-15a. But the court declined to "infer from this consent to federal-court review a consent by a State commission itself *to be made a party* to that federal review." *Id.* at 15a. The court noted that no provision of the Act expressly states that a state commission, by electing to regulate under the 1996 Act, "thereby agrees to be named as a party in federal court or * * * waives its Eleventh Amendment immunity." *Ibid.* The court concluded that, absent such an "unmistakably clear and unequivocal" expression of Congress's intent "to condition State utility commissions' participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit," no such waiver could properly be inferred. *Id.* at 18a-19a.

Second, the court held that the individual commissioners could not be made parties to the action

under *Ex parte Young*. Verizon Pet. App. 21a-30a. The court focused its analysis on "the federal interests served by permitting [such] a federal suit." *Id.* at 24a. The court reasoned that "[t]he federal interest furthered by the 1996 Act is to have § 252 determinations made by State commissions reviewed in federal court," and not "to discipline individual State officials or to expose them to any liability." *Ibid.* The court concluded that "this interest would not be frustrated if we were to preserve the Eleventh Amendment immunity of State officials with respect to such suits." *Id.* at 24a-25a.

In addition, the court expressed doubt that "Bell Atlantic's action is designed to prevent an ongoing violation of federal law," noting that federal law does not clearly prohibit the treatment of ISP-bound calls as "local" traffic. Verizon Pet. App. 25a-27a. The court suggested that, "in any suit against State commissioners, it is more likely that State contract-law, rather than federal-law, violations would be redressed." *Id.* at 29a.

The court also suggested that allowing *Ex parte Young* actions to challenge the decisions of state commissions "would improperly expand the federal remedy selected by Congress." Verizon Pet. App. 29a. The court construed the 1996 Act as reflecting Congress's determination to limit federal court review to only those decisions of state commissions that involve the initial approval or rejection of interconnection agreements. *Id.* at 28a-29a.

Third, the court held that federal district courts do not have jurisdiction under Section 252(e)(6) to review state commission decisions enforcing previously approved interconnection agreements, as distinguished from decisions approving or rejecting interconnection

agreements in the first instance. Verizon Pet. App. 30a-47a. The court noted that Section 252(e)(6) provides, by its terms, for review of state commission "determination[s] under this section [*i.e.*, Section 252]" to ascertain whether those determinations "meet[] the requirements of section 251 and this section [*i.e.*, Section 252]." *Id.* at 38a-39a. The court reasoned that "in the final analysis, the State commission determinations under § 252 involve only approval or rejection of such agreements." *Id.* at 39a. The court concluded that other state commission determinations, including those enforcing interconnection agreements, are "left for review as specified by State law." *Ibid.*

Here, the court noted that the MPSC had approved the interconnection agreements between Bell Atlantic and MCI WorldCom and that "no party challenged that approval" in the district court. Verizon Pet. App. 40a. The court concluded that the MPSC's subsequent decision construing and enforcing that agreement "was not a § 252 determination and therefore was not reviewable in federal court by virtue of § 252(e)(6)." *Id.* at 43a.

Finally, the court held that 28 U.S.C. 1331 likewise does not provide a basis for federal court jurisdiction to review state commission decisions enforcing interconnection agreements. Verizon Pet. App. 47a-50a. The court construed Section 252(e)(6) as reflecting a congressional intent to confine federal court review to state commission decisions approving or rejecting interconnection agreements. "[I]n light of the limited grant of federal jurisdiction in 47 U.S.C. § 252(e)(6)," the court observed, "the exercise of § 1331 general federal-question jurisdiction would 'flout, or at least undermine, congressional intent.'" *Id.* at 48a (quoting *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804 (1986)).

5. Judge King dissented from the court's holdings on both the jurisdictional issue and the Eleventh Amendment issue, which he noted were in conflict with holdings of the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits. Verizon Pet. App. 52a-53a (citing cases). On the jurisdictional issue, Judge King concluded that federal district courts have jurisdiction under Section 252(e)(6) to review state commission decisions enforcing previously approved interconnection agreements. Verizon Pet. App. 54a-58a. He reasoned that "the power granted to states under § 252 to approve or reject interconnection agreements * * * necessarily includes the power to enforce the interconnection agreement." *Id.* at 55a (citation and internal quotation marks omitted). He therefore concluded that state commission decisions enforcing interconnection agreements are "determinations under [Section 252]" within the meaning of the grant of federal court jurisdiction in Section 252(e)(6). *Id.* at 57a. He did not reach the question whether federal courts also, or alternatively, have jurisdiction under 28 U.S.C. 1331 to review such state commission decisions.

On the Eleventh Amendment issue, Judge King concluded that the MPSC waived its sovereign immunity by electing to exercise regulatory authority under the 1996 Act. Verizon Pet. App. 59a-67a. He disagreed with the court's determination that Congress had not invited the States to waive their sovereign immunity with sufficient clarity. He viewed the judicial review provisions of the Act as "clearly show[ing] Congress's intent to subject participating states to suits in federal court." *Id.* at 60a-61a.

In the alternative, Judge King concluded that the individual MPSC commissioners are amenable to suit under *Ex parte Young*. Verizon Pet. App. 67a-71a. He

reasoned that the 1996 Act does not impose an elaborate remedial scheme that would be improperly "expand[ed]" by allowing such review, *id.* at 69a-70a, and that Maryland has no "special sovereignty interest" in the regulation of those aspects of local telecommunications that now are governed by the Act, *id.* at 71a.

SUMMARY OF ARGUMENT

The federal district courts have subject-matter jurisdiction over suits that challenge, as contrary to federal law, orders of state public utility commissions interpreting or enforcing interconnection agreements. That jurisdiction derives from either, or both, of two sources: 47 U.S.C. 252(e)(6), the judicial review provision of the 1996 Act, and 28 U.S.C. 1331, the general federal-question jurisdiction statute. The Court is considering in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, whether Section 252(e)(6) confers jurisdiction on the district courts to review such orders. This case concerns whether jurisdiction also, or alternatively, exists under Section 1331.

Section 1331 provides, in pertinent part, that "[t]he district courts shall have original jurisdiction of all civil actions arising under the * * * laws * * * of the United States." Section 1331 thus encompasses suits that seek "injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). This is such a suit. Bell Atlantic contends that the MPSC has construed its interconnection agreements in a manner that conflicts with, and thus is preempted by, federal law, specifically

a declaratory ruling issued by the FCC pursuant to the 1996 Act.

The court of appeals, while not disputing that Bell Atlantic's suit is one "arising under the * * * laws * * * of the United States," nonetheless held that the suit was not within the district court's jurisdiction under Section 1331. The court of appeals construed Section 252(e)(6), which provides the district courts with jurisdiction to review a state commission's "determination under [Section 252]" of the 1996 Act, as applying only to a determination approving or rejecting a new interconnection agreement, and not to a determination interpreting or enforcing an existing agreement. The court of appeals then concluded that it would "undermine" congressional intent to allow state commission determinations that are not (in the court's view) reviewable in district court under Section 252(e)(6) nonetheless to be reviewable under Section 1331.

The court of appeals' reasoning is not supported by the text of Section 252(e)(6) or by the congressional purpose underlying the local competition provisions of the 1996 Act. Section 252(e)(6) simply provides that the district courts possess jurisdiction with respect to certain categories of cases arising under the Act. It does not purport to curtail the district courts' existing jurisdiction under Section 1331 with respect to cases arising under federal law generally. Moreover, in a companion provision of the Act, Congress expressly provided that "[n]o State court shall have jurisdiction to review the action of a State commission" in certain contexts, 47 U.S.C. 252(e)(4). Presumably, if Congress intended similarly to restrict the jurisdiction of the federal courts, Congress would have used similarly preclusive language.

Congress enacted the 1996 Act with the purpose of establishing a federal regulatory regime with respect to local telecommunications competition. Congress permitted state commissions, if they chose, to play a role in that regime, but only in accordance with the new federal standards and procedures. Congress wanted the federal district courts to be available to assure that state commissions properly apply those federal standards; indeed, Congress made the federal courts the exclusive forum to review state commissions' orders approving or rejecting interconnection agreements under the Act. It does not stand to reason that Congress at the same time intended to divest the district courts of jurisdiction over suits contending that other actions of state commissions with respect to interconnection agreements violate controlling federal law.

ARGUMENT

FEDERAL DISTRICT COURTS HAVE JURISDICTION UNDER 28 U.S.C. 1331 TO ADJUDICATE SUITS "ARISING UNDER THE * * * LAWS * * * OF THE UNITED STATES" TO CHALLENGE STATE COMMISSION ORDERS INTERPRETING OR ENFORCING INTERCONNECTION AGREEMENTS

1. This Court granted certiorari in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, to consider, among other things, whether 47 U.S.C. 252(e)(6), the judicial review provision of the 1996 Act, grants the district courts jurisdiction to review state commission orders interpreting or enforcing existing interconnection agreements for compliance with the Act. Section

252(e)(6), titled "Review of State commission actions," states, in pertinent part:

> In any case in which a State commission makes a determination under this section [*i.e.*, Section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. 252(e)(6).

Section 252 expressly provides that, when an interconnection agreement is concluded through either negotiation or arbitration, the agreement must be submitted to the state commissions for its approval or rejection. See 47 U.S.C. 252(a) and (b). It is therefore undisputed that a state commission "makes a determination under [Section 252]" when it approves or rejects an interconnection agreement in the first instance. Those are not, however, the *only* state commission decisions that are reviewable under Section 252(e)(6), as every court of appeals that has addressed the question, with the exception of the Fourth Circuit here, has recognized.[2] A state commission's authority under Section 252 to approve an interconnection agreement necessarily encompasses the authority to interpret and enforce the agreement as disputes subsequently arise in its implementation. Accordingly, a

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[2] See *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 496-497 (10th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000), cert. denied, 121 S. Ct. 896 (2001); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479-480 (5th Cir. 2000).

state commission's order interpreting or enforcing an existing agreement is a "determination under [Section 252]" that is reviewable in federal district court under Section 252(e)(6). See U.S. Br. 16-29, *Mathias*.

The question on which the Court granted certiorari in this case concerns an alternative basis of federal jurisdiction to review orders interpreting or enforcing interconnection agreements—namely, 28 U.S.C. 1331, the general federal-question jurisdiction statute. The Court need not resolve that question if, in *Mathias*, the Court holds that Section 252(e)(6) encompasses such orders. In any event, whether or not Section 252(e)(6) affirmatively vests the district courts with jurisdiction to review state commission orders interpreting or enforcing interconnection agreements, that provision certainly does not *divest* the district courts of the jurisdiction that they ordinarily possess under Section 1331 with respect to claims arising under federal law. Accordingly, the district court has jurisdiction under Section 1331 to adjudicate Bell Atlantic's claim that the MPSC construed and enforced its interconnection agreements in a manner that is contrary to, and thus is preempted by, controlling federal law.

2. Section 1331 states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331. This Court has recognized that Section 1331 provides the district courts with jurisdiction over suits to enjoin state regulatory action on the ground that such action is contrary to federal law:

> A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of

> the Supremacy Clause of the Constitution, must prevail, * * * presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing cases); see also, *e.g.*, *Lawrence County* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259 n.6 (1985) (noting that a suit seeking "a declaratory judgment that [a] state statute conflicted with [a] federal Act and was therefore invalid under the Supremacy Clause" was "one arising under federal law for purposes of federal jurisdiction under 28 U.S.C. § 1331").

This is such a case. The gravamen of Bell Atlantic's complaint in the district court is that the MPSC issued an order that "is in direct conflict with a declaratory ruling issued February 26, 1999 by the Federal Communications Commission" pursuant to the 1996 Act. Verizon Pet. App. 73a-74a; see also *id.* at 75a-76a (describing allegations of complaint). The interconnection agreements between Bell Atlantic and competing carriers provide for the payment of reciprocal compensation "for the transport and termination of Local Traffic." *Id.* at 109a. The agreements do not specify whether the term "Local Traffic" includes calls to ISPs to gain access to the Internet. After the agreements took effect, the FCC issued a declaratory ruling that, among other things, characterized ISP calls as "largely interstate," and thus as outside the scope of any obligation to pay reciprocal compensation imposed by the 1996 Act and its implementing regulations. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (Declaratory Ruling), 14 F.C.C.R. 3689, 3690 (1999), vacated and re-

manded, *Bell Atlantic Tel. Cos.* v. *FCC*, 206 F.3d 1 (D.C. Cir. 2000). The MPSC nonetheless continued to construe the agreements at issue here, with their provision for the payment of reciprocal compensation for "Local Traffic," as requiring reciprocal compensation for ISP calls.[3]

Bell Atlantic's suit thus turns on the resolution of a federal question: whether the FCC's Declaratory Ruling (or the considerations underlying that Ruling) precludes state commissions from construing existing interconnection agreements to require the payment of reciprocal compensation for ISP calls. The task of resolving that question on the merits has been complicated by the decision of the District of Columbia Circuit vacating the Declaratory Ruling and the

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[3] Although the 1996 Act imposes a general duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications," 47 U.S.C. 251(b)(5), the FCC's implementing regulations at that time limited the requirement to "local telecommunications traffic," 47 C.F.R. 51.701(a) (2000). See Verizon Pet. App. 26a-27a. In the Declaratory Ruling, the FCC concluded that calls to ISPs are primarily interstate, reasoning that the communication does not terminate with the local ISP, but instead extends to out-of-state websites. See 14 F.C.C.R. at 3690 (para. 1). The FCC also stated, however, that parties may include in their interconnection agreements a provision for the payment of reciprocal compensation for ISP calls and that state commissions may construe existing agreements as requiring such payment. *Id.* at 3703-3705 (paras. 24-25). On review, the D.C. Circuit principally held that the FCC had not adequately justified the use of a so-called "end-to-end" analysis, which the FCC has traditionally used to determine whether a call is within its interstate jurisdiction, to determine whether ISP calls are local or non-local for purposes of 47 U.S.C. 251(b)(5) and 47 C.F.R. 51.701(a). See *Bell Atlantic Tel Cos.* v. *FCC*, 206 F.3d at 4-5. The court vacated the Declaratory Ruling and remanded the matter to the FCC for further proceedings.

pendency of further FCC proceedings on remand. See note 3, *supra*. But that does not affect the jurisdictional question on which this Court has granted review; nor does it detract from the quintessentially federal character of the underlying question sought to be resolved by the invocation of the district court's jurisdiction in this case.

3. The court of appeals, although holding that the federal courts do not have jurisdiction over Bell Atlantic's suit pursuant to Section 1331, did not dispute that the suit is one "arising under the * * * laws * * * of the United States" within the meaning of Section 1331.[4] Instead, the court of appeals perceived the grant of jurisdiction to federal courts in 47 U.S.C. 252(e)(6) as *curtailing* the jurisdiction otherwise available to federal courts under 28 U.S.C. 1331. Verizon Pet. App. 48a. Thus, the court of appeals reasoned, "in light of the limited grant of federal jurisdiction in 47 U.S.C. § 252(e)(6), the exercise of § 1331 general federal-question jurisdiction would 'flout, or at least undermine, congressional intent.'" *Ibid.* (quoting *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804 (1986)). That conclusion is incorrect.

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[4] In holding that this suit could not proceed against the state commissioners under *Ex parte Young*, the court of appeals suggested that a carrier, such as Bell Atlantic here, could not "allege an ongoing violation of federal law when the State commission determines as a matter of State contract law that the parties agreed to treat ISP-bound calls as local for purposes of reciprocal compensation." Verizon Pet. App. 27a-28a. But that suggestion itself depends on the court of appeals' conclusion concerning a question of federal law: that the FCC's Declaratory Ruling "explicitly allows for a result of the kind reached by the State commission in this case." *Id.* at 28a.

a. Nothing in the text of Section 252(e)(6), which makes clear that the federal courts possess jurisdiction with respect to certain cases arising under the 1996 Act, purports to restrict the federal courts' jurisdiction under Section 1331 with respect to other cases. Congress enacted the 1996 Act, including its judicial review provisions, against the backdrop of Section 1331, with its conferral of jurisdiction over "*all* civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331 (emphasis added). Congress must be presumed to understand that, in order to withdraw the federal courts' existing jurisdiction over some category of cases arising under federal law, a statute would have to speak in language of divestment. See *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991) (recognizing that the district courts' "general federal-question jurisdiction under 28 U.S.C. § 1331 to hear [an] action remains unimpaired" unless Congress has clearly precluded such jurisdiction). But Congress did not employ such language in Section 252(e)(6).[5]

Moreover, in a companion provision of Section 252, Congress declared, in no uncertain terms, that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. 252(e)(4).

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[5] The MPSC argued to the court of appeals, as the state commissioners argue to this Court in *Mathias*, that Section 252(e)(6) does not confer federal jurisdiction to review orders interpreting or enforcing interconnection agreements, because the 1996 Act does not specifically refer to such orders. At the same time, the MPSC argued that Section 252(e)(6) revokes federal court jurisdiction under Section 1331 with respect to suits challenging such orders as contrary to federal law, even though the Act does not specifically refer to such orders. Both of those propositions cannot be correct; but both may be, and in fact are, incorrect.

Presumably, if Congress intended similarly to deprive the federal courts of jurisdiction over certain categories of cases arising under federal law, Congress would have spoken in similar terms. Instead, however, Congress used entirely different language in Section 252(e)(6), which is consistent with federal court jurisdiction over all cases arising under the 1996 Act, whether jurisdiction is based on Section 252(e)(6) or Section 1331. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Congress knows quite well how to preclude judicial review under Section 1331 if it so desires. For example, in *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U.S. 449 (1999), this Court confirmed that a provision of the Medicare Act, 42 U.S.C. 405(h), bars suits under Section 1331. That provision states, in relevant part, that "[n]o action against * * * the [Secretary] or any officer or employee thereof shall be brought under section 1331 * * * of title 28 to recover on any claim arising under this subchapter." 525 U.S. at 456. No comparable language in the 1996 Act purports to divest the federal courts of jurisdiction under Section 1331 with respect to suits contending that certain orders of state commissions violate federal law.

b. Nor is there any indication in the purpose or history of the 1996 Act that Congress intended to deprive the district courts of the jurisdiction that they ordinarily possess with respect to cases arising under federal law. Indeed, all indications are to the contrary.

In the 1996 Act, Congress established a new federal regulatory regime to govern local telecommunications

competition; as this Court has observed, "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). Congress allowed the States, through their state commissions, to play a role in that new regime, but only in accordance with the new federal standards (and any consistent state standards). Congress wanted the federal courts to be available to assure that state commissions properly apply those federal standards. Thus, Congress made the federal courts the exclusive forum to review state commissions' orders approving or rejecting interconnection agreements under the 1996 Act. It does not stand to reason that Congress at the same time stripped the federal courts of jurisdiction over suits contending that other regulatory actions of state commissions with respect to interconnection agreements are contrary to federal law.

Congress would have understood that important issues of federal law would be implicated by state commissions' decisions interpreting and enforcing interconnection agreements as well as by decisions approving or rejecting such agreements in the first instance. It may often be the case that such issues do not arise until an agreement has been in place for some time. For example, given the rapidity of technological change within the telecommunications industry, disputes may arise during the term of the agreement as to whether, or to what extent, old terminology applies to new circumstances. The underlying dispute in this case concerning the characterization of calls to ISPs is illustrative. Congress could not have intended to deprive the district courts of jurisdiction to consider whether a

state commission has resolved such a dispute in a manner contrary to federal law.

c. The Sixth Circuit has held that certain state commission orders, although not reviewable in district court under Section 252(e)(6), are nonetheless reviewable under Section 1331. *GTE North, Inc.* v. *Strand*, 209 F.3d 909, 919-920, cert. denied, 531 U.S. 957 (2000).[6] In so holding, the Sixth Circuit rejected the jurisdiction-stripping interpretation of Section 252(e)(6) adopted by the Fourth Circuit in this case, concluding that Section 252(e)(6) is not "the exclusive basis" for district court review of "state commission actions that in any way relate to interconnection agreements." *Id.* at 919. The court noted that construing Section 252(e)(6) to preclude the district courts from exercising jurisdiction over federal preemption challenges to state commission orders that are not themselves reviewable under that provision "would have enormous negative implications." *Ibid.* The court suggested, for example, that such a construction of Section 252(e)(6) would enable "state commissions [to] insulate regulatory requirements that violate the [1996 Act] from federal * * * court review," and would undermine "Congress's decision to establish federal procedures for negotiating interconnection rights and to concentrate judicial review of interconnection agreements in the federal courts." *Ibid.*

4. Finally, the court of appeals perceived that "it would violate basic tenets of federalism" to allow

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[6] *Strand* did not concern judicial review of a state commission order, such as the one at issue here, that construes and enforces an existing interconnection agreement. Rather, *Strand* concerned judicial review of a state commission order that imposed certain requirements on incumbent carriers independent of any interconnection agreement. See *Strand*, 209 F.3d at 914.

federal court review of the decisions of a state commission "in the absence of specific federal authorization." Verizon Pet. App. 50a (citing *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983)). This Court has recognized, however, that general statutory language is sufficient to confer jurisdiction on the district courts over suits challenging the decisions of a state agency or state official as contrary to federal law. See, *e.g.*, *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156, 169 (1997) ("federal jurisdiction generally encompasses judicial review of state administrative decisions"); *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 786-787 n.4 (1991).

The assertedly "quasi-judicial" status of the MPSC under state law (Verizon Pet. App. 50a) does not alter the analysis. The *Rooker-Feldman* abstention doctrine, which bars the lower federal courts from entertaining challenges to the decisions of state courts, rests on a rationale that does not extend to the decisions of state commissions. "The *Rooker-Feldman* doctrine interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court." *Asarco Inc.* v. *Kadish*, 490 U.S. 605, 622 (1989); see *Rooker*, 263 U.S. at 415-416. Section 1257 does not itself address judicial review of the decisions of state commissions. Nor is there any statutory counterpart to Section 1257 that applies to decisions of state commissions, even those commissions that might arguably be characterized as performing "quasi-judicial" functions.

Finally, any federalism concerns presented by federal court review in the circumstances of this case are significantly attenuated. As noted above, the States

have chosen to participate in the federal regulatory scheme established by the 1996 Act, which requires the application of federal standards set by Congress and the FCC. Even the court of appeals acknowledged that States made that choice on the understanding that many state commission decisions would be reviewable in federal court. Verizon Pet. App. 14a-15a. It is thus neither surprising nor offensive to federalism principles for Congress to have contemplated that, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel," *Iowa Utils. Bd.*, 525 U.S. at 379 n.6, either under Section 252(e)(6) or under Section 1331.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings, which may, if appropriate, include further consideration in light of the Court's decision in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878.

Respectfully submitted.

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