Nos. 10-185 and 10-189

In the Supreme Court of the United States

CORE COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 47 U.S.C. 201(b), which empowers the Federal Communications Commission to regulate the rates charged for interstate communications services, authorizes the agency to regulate the rates charged between carriers that carry dial-up Internet access traffic.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a)[1] is reported at 592 F.3d 139. The order of the Fed-

[1] All citations to the petition appendix are to the appendix filed in No. 10-185.

eral Communications Commission (Pet. App. 15a-791a) is reported at 24 F.C.C.R. 6475.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2010. Petitions for rehearing were denied on March 26, 2010 (Pet. App. 1085a-1088a). On June 15, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari in No. 10-185 to and including July 23, 2010. On July 14, 2010, the Chief Justice further extended the time in No. 10-185 to August 6, 2010. On June 15, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari in No. 10-189 to August 6, 2010, and both of the petitions were filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 (Communications Act or Act), 47 U.S.C. 151 *et seq.*, empowers the Federal Communications Commission (FCC or Commission) to regulate the rates, terms, and conditions of interstate telecommunications. "In broad terms, the Act grants to the FCC the authority to regulate 'interstate and foreign commerce in wire and radio communication.'" *Louisiana Pub. Serv. Comm'n* v. *FCC,* 476 U.S. 355, 360 (1986) (quoting 47 U.S.C. 151). The Act requires that regulated carriers' "charges, practices, classifications, and regulations for and in connection with" interstate telecommunications services be "just and reasonable." 47 U.S.C. 201(b). The Communications Act authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out" that requirement, as well as other provisions of the Act. *Ibid.*

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (codified in various sections of Title 47 of the United States Code), amended and was inserted into the Communications Act. The 1996 Act "fundamentally restructure[d] local telephone markets." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (*AT&T*). Under the 1996 Act, "States may no longer enforce laws that impede competition, and incumbent [local exchange carriers] are subject to a host of duties intended to facilitate market entry" by new competitors. *Ibid*.

Among those duties is the requirement in Section 251 that local exchange carriers "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). "Reciprocal 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. Incumbent carriers and new entrants may voluntarily negotiate contracts (called interconnection agreements) to satisfy these market-opening duties. 47 U.S.C. 252(a). But if private negotiations fail, disputed issues are referred to state commissions for compulsory arbitration, which is subject to FCC rules promulgated under Section 251. See 47 U.S.C. 252(b) and (c); see also *AT&T*, 525 U.S. at 371-373.

Although the 1996 Act fundamentally restructured local telecommunications markets, it preserved the FCC's long-standing authority over interstate services. See *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 50 (2007) (The 1996 Act "left many traditional requirements and related statutory provisions, including [Section] 201(b) * * * in place."). In particular, the 1996 Act provides that "[n]othing" in Section 251 "shall be construed to limit or otherwise affect the Commission's authority under [S]ection 201." 47 U.S.C. 251(i).

2. This case involves payments made between carriers that cooperate to carry "dial-up" traffic between customers and the Internet. Under a typical dial-up arrangement, a customer of an Internet Service Provider (ISP) directs his or her computer modem to dial a telephone number, thereby using the telephone network of his local exchange carrier, as well as the network of the carrier providing service to the ISP. The ISP, in turn, enables the customer to access Internet content and services from distant websites over the telephone connection. *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 F.C.C.R. 3689, 3691 (1999) (¶ 4) (*Declaratory Ruling*), vacated, *Bell Atl. Tel. Cos.* v. *FCC*, 206 F.3d 1 (2000). After enactment of the 1996 Act, a number of state commissions interpreted existing interconnection agreements to subject these communications to the reciprocal compensation obligations of the statute. Under that approach, the ISP customer's carrier was required to pay the ISP's carrier on a per-minute basis for "termination" of a call every time the customer dialed in. 47 U.S.C. 251(b)(5).

The FCC has explained that per-minute reciprocal compensation schemes make sense in the context of voice traffic on telecommunications networks because incoming and outgoing voice traffic tends to be "relatively balanced." See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 F.C.C.R. 9151, 9162 (2001) (¶ 20) (*ISP Re-*

mand Order). Unlike telephone voice traffic, however, "traffic to an ISP flows exclusively in one direction"—from the LEC customer who initiates the connection to the ISP that connects to the Internet—"creating an opportunity for regulatory arbitrage and leading to uneconomical results." *Id.* at 9162 (¶ 21). As the Commission explained,

> [i]t was not long [after enactment of the 1996 Act] before some LECs saw the opportunity to sign up ISPs as customers and collect, rather than pay, compensation because ISP modems do not generally call anyone in the exchange. In some instances, this led to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) 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, potentially driving ISP rates to consumers to uneconomical levels.

Ibid.; see Pet. App. 4a.

3. In 1999, the Commission began an effort to counteract the economic distortions that resulted from the state commission decisions "applying the reciprocal compensation system to ISP-bound traffic." Pet. App. 4a. Employing its "traditional[]" end-to-end analysis to determine whether a particular call falls within the FCC's jurisdiction over interstate communications or the States' jurisdiction over intrastate traffic, the FCC concluded that ISP-bound traffic should be analyzed "for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site." *Declara-*

tory Ruling, 14 F.C.C.R. at 3699 (¶ 13). This approach accorded with Commission precedent that regulated interstate wire communication "from its inception to its completion," *id.* at 3696 (¶ 11), and with the practical reality of dial-up Internet access, taking into account "the totality of the communication," *id.* at 3698 (¶ 13). In its 1999 ruling, the Commission concluded that dial-up Internet traffic "do[es] not terminate at the ISP's local server * * * but continue[s] to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." *Id.* at 3697 (¶ 12). In light of that finding, the FCC determined that ISP-bound calls were not "local" within the meaning of agency rules that (at that time) limited the Section 251(b)(5) reciprocal compensation requirement to "local traffic." *Id.* at 3690 (¶ 1); see 47 C.F.R. 51.701(a) (1999).[2]

On petitions for review, the D.C. Circuit recognized that "the Commission has historically been justified in relying" on its "end-to-end analysis" "when determining whether a particular communication is jurisdictionally interstate." *Bell Atl. Tel. Cos.* v. *FCC*, 206 F.3d 1, 5 (2000) (*Bell Atlantic*). The court did not question the applicability of that analysis to dial-up Internet traffic. The court held, however, that "the Commission ha[d] not supplied a real explanation for its decision to treat end-to-end analysis as controlling" the question whether such traffic was "local" under the agency's regulations

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[2] The Commission concluded that it did not "have an adequate record upon which to adopt a rule regarding inter-carrier compensation for ISP-bound traffic." *Declaratory Ruling*, 14 F.C.C.R. at 3707 (¶ 28). In the absence of such a rule, the agency determined that carriers "should be bound by their existing interconnection agreements, as interpreted by state commissions." *Id.* at 3690 (¶ 1).

and thus subject to reciprocal compensation obligations. *Id.* at 8; see *id.* at 5.

On remand, the FCC found that ISP-bound traffic was excluded from the 1996 Act's reciprocal compensation obligation by 47 U.S.C. 251(g), which requires LECs to provide "exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and non-discriminatory interconnection restrictions and obligations * * * that apply to such carrier on the date immediately preceding" the date of enactment of the 1996 Act. See *ISP Remand Order*, 16 F.C.C.R. at 9152-9153 (¶ 1), 9166-9167 (¶¶ 32-36).[3] The Commission also suggested that a "bill and keep regime," under which carriers recover their costs from their end-user customers rather than from the other carriers involved in transmitting a call, might eventually "eliminate" the "opportunity for regulatory arbitrage." *Id.* at 9184 (¶ 74).

Pending the possible establishment of a permanent intercarrier rate structure, the Commission adopted an interim payment regime intended to "limit, if not end, the opportunity for regulatory arbitrage." *ISP Remand Order*, 16 F.C.C.R. at 9187 (¶ 77). The first component of the interim rate regime consisted of caps on the rates for ISP-bound traffic, beginning at $.0015 per minute of use and declining to $.0007 per minute of use. See *id.* at

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[3] In its remand order, the Commission also abandoned its previous view that Section 251(b)(5) applied to only "local" traffic. *ISP Remand Order*, 16 F.C.C.R. at 9167 ¶ 34 ("We * * * refrain from generically describing traffic as 'local' traffic because the term 'local,' not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in [S]ection 251(b)(5) or [S]ection 251(g).").

9187 (¶ 78). The FCC also adopted a "mirroring rule," which required an incumbent seeking to cap its payments to competitors serving ISP customers at the new rates to accept payment for *all* voice traffic subject to Section 251(b)(5) under those same rates. See *id.* at 9193-9194 (¶ 89). The FCC concluded that the rate caps it adopted—set on the basis of contemporaneous voluntarily negotiated interconnection agreements—appeared to be fair, and it noted that competing LECs (CLECs) could recover cost shortfalls, if any, from their ISP customers rather than from their connecting carriers. *Id.* at 9188 (¶ 80), 9192 (¶ 87).

On further petitions for review, the D.C. Circuit rejected the FCC's conclusion that 47 U.S.C. 251(g) excluded ISP-bound traffic from Section 251(b)(5)'s reciprocal compensation obligations. *WorldCom, Inc.* v. *FCC,* 288 F.3d 429, 433-434 (2002), cert. denied, 538 U.S. 1012 (2003). The court of appeals held that Section 251(g) was simply "a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules," *id.* at 430, and therefore was inapplicable because "there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic," *id.* at 433. The court made "no further determinations," however. *Id.* at 434. Instead, recognizing a "non-trivial likelihood that the Commission has authority to elect" a bill-and-keep system, the court "remand[ed] the case to the Commission for further proceedings" without vacating the Commission's order. *Ibid.*

4. On November 5, 2008, the FCC issued the order currently under review, which "respond[ed] to the D.C.

Circuit's remand order." Pet. App. 23a.[4] The FCC concluded that Section 251(b)(5), which imposes reciprocal compensation obligations on LECs "for the transport and termination of telecommunications," is "broad enough to encompass ISP-bound traffic." *Ibid.* The FCC observed that the Act defines "telecommunications" broadly to include "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* at 24a-25a (quoting 47 U.S.C. 153(43)). In addition, the FCC found that ISP-bound traffic satisfies the agency's definition of "termination" 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). The agency explained that traffic bound for the Internet via ISPs "is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'" *Id.* at 29a-30a (citing *Bell Atl.*, 206 F.3d at 6).

The FCC's conclusion that ISP-bound traffic is within the scope of Section 251(b)(5), however, "d[id] not end [the Commission's] legal analysis." Pet. App. 32a. The Commission "reaffirm[ed] [its] findings concerning the interstate nature of ISP-bound traffic." *Id.* at 35a & n.69. It thus found that, "despite acknowledging that such traffic is [S]ection 251(b)(5) traffic," the agency retained the authority to regulate ISP-bound traffic (and to issue pricing rules) pursuant to its Section 201(b)

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[4] The D.C. Circuit had issued a writ of mandamus directing the Commission to "explain the legal basis for its ISP-bound compensation rules" by November 5, 2008. *In re Core Commc'ns*, 531 F.3d 849, 850, 862 (2008).

authority to establish "just and reasonable 'charges, practices, classifications and regulations'" for interstate services. *Id.* at 35a (quoting 47 U.S.C. 201(b)). In concluding that it retained its pricing authority over this interstate service, the agency relied in part on 47 U.S.C. 251(i), which provides that "[n]othing in [Section 251] shall be construed to limit or otherwise affect the Commission's authority under [S]ection 201." Pet. App. 33a; see *id.* at 35a-37a.

5. Petitioner Core Communications, Inc. (Core)—a CLEC "engaged in delivering large quantities of incumbent LEC-originated Internet-bound dial-up traffic to Internet service providers," *Core Commc'ns, Inc.* v. *FCC*, 545 F.3d 1, 3 (2008) (internal citation omitted)—and several state public utility regulatory organizations filed petitions for review in the D.C. Circuit. Petitioner Pennsylvania Public Utility Commission and other parties intervened. The court of appeals denied the petitions for review. Pet. App. 1a-14a.

Noting that "all parties agree[d] that the familiar principles of *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), apply to the FCC's construction of the Communications Act," Pet. App. 7a (parallel citation omitted), the court of appeals held that the Commission's interpretation of the relevant statutory provisions was reasonable, *id.* at 8a-9a. The court noted that Section 201 prohibits interstate carriers from charging rates that are not "just and reasonable" and authorizes the Commission to prescribe regulations to implement that prohibition. *Id.* at 7a. The court also observed that petitioners generally "accept[ed] the end-to-end analysis and its application to ISP-bound traffic." *Ibid.*; see *id.* at 9a ("Petitioners 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.").

The court of appeals rejected petitioners' contention that the FCC's Section 201 authority was circumscribed by the 1996 Act's compensation provisions. In particular, the court rejected petitioners' contention that, under the interpretive canon that specific statutory provisions control over general ones, the statute's reciprocal compensation pricing regime should control over Section 201(b). Pet. App. 7a-9a. The court explained that "it is inaccurate to characterize [Section] 201 as a general grant of authority and [Sections] 251-252 as a specific one" because the "two statutes apply to intersecting sets." *Id.* at 8a (citation omitted). As the court noted, "[n]ot all inter-LEC connections" governed by Section 251 "are used to deliver interstate communications," and "not all interstate communications" (governed by Section 201) "involve an inter-LEC connection." *Ibid.* (citation omitted). "Given this overlap," the court concluded, "[Section] 251(i)'s specific saving of the Commission's authority under [Section] 201 against any negative implications from [Section] 251 renders the Commission's reading of the provisions at least reasonable." *Id.* at 8a-9a.

The court of appeals also rejected petitioners' contention that the FCC's interim rules were arbitrary and capricious because they "discriminate[d]" against ISP-bound traffic. Pet. App. 10a-11a. "[A]ssum[ing] *arguendo* that the concept of discrimination is relevant to regimes created under entirely different statutory provisions," the court explained that the Commission's desire to prevent regulatory arbitrage "provided a solid grounding for the differences between the treatment of inter-LEC compensation for delivery of dial-up internet traffic and the regime generally applicable to inter-LEC compensation under [Section] 251(b)(5)." *Id.* at 10a.[5]

ARGUMENT

The court of appeals correctly held that the Communications Act's longstanding grant of authority to the FCC over interstate communications provided a sound basis for the Commission's compensation rules for ISP-bound traffic. The court also correctly held that those rules were a reasonable response to the agency's valid concern about regulatory arbitrage. The court's decision does not conflict with any decision of this Court or any other court of appeals. Moreover, the subject matter of this case (the FCC's compensation rules for dial-up Internet access) is of limited and rapidly diminishing practical significance. Further review is not warranted.

1. Petitioners contend (10-185 Pet. 19-26; 10-189 Pet. 9-18) that the Commission exceeded its authority when it issued pricing rules for ISP-bound traffic under Section 201 rather than allowing such traffic to be governed by reciprocal compensation rates prescribed by state commissions under Section 252. Petitioners identify no sound basis for concluding that the FCC's approach reflects an unreasonable interpretation of the Communications Act. See Pet. App. 7a.

a. The Communications Act authorizes the FCC to regulate the rates and terms of interstate common carrier services. 47 U.S.C. 201(b); see *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 49 (2007) (*Global Crossing*). As the court of appeals explained, Section 201(b) "prohibits carriers

[5] The court of appeals declined to address "a number" of additional arguments because they appeared for the first time "outside of the petitioners' opening briefs." Pet. App. 12a.

engaged in the delivery of interstate communications from charging rates that are not 'just and reasonable,' and grants the FCC authority to prescribe regulations to implement the 1934 Act, which include all provisions of the 1996 Act." Pet. App. 7a. Moreover, the FCC has "consistently found that ISP-bound traffic is jurisdictionally interstate," *id.* at 35a n.69, and it properly reaffirmed that determination in the order under review, *id.* at 35a. The Commission thus had authority under Section 201 to issue the pricing rules at issue here.

Petitioner Pennsylvania PUC asserts (*e.g.*, 10-189 Pet. 17) that ISP-bound traffic is "local" because part of the communication—the call from the end-user customer to the ISP—"originate[s] and terminate[s] within a state." As the court of appeals explained, this argument "fails because it implicitly assumes inapplicability of the [FCC's] end-to-end [jurisdictional] analysis, which petitioners have not challenged." Pet. App. 9a. In the court of appeals, "[p]etitioners [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." *Ibid.*[6]

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[6] Even if the Pennsylvania PUC had challenged the FCC's end-to-end jurisdictional analysis in the court of appeals, its claim would have failed. The existence of an intrastate segment within an end-to-end interstate service does not deprive the FCC of its Section 201(b) authority over the entire service. See, *e.g.*, *Verizon New England, Inc.* v. *Maine Pub. Utils. Comm'n,* 509 F.3d 1, 8 (1st Cir. 2007) (facilities "located in individual communities * * * have been used for decades to provide both interstate and intrastate service as part of a unified network" and as such are regulated by the FCC). Indeed, the whole point of end-to-end analysis is that, at least where the various components are inseparable, the jurisdictional nature of the overall communication is determined by the ultimate pathway, not by any discrete local component. See *ISP Remand Order*, 16 F.C.C.R. at 9175 (¶ 52). The Com-

b. Petitioner Core asserts that Sections 251 and 252, rather than Section 201, should control because the former provisions are "more specific" and therefore trump the "more general" Section 201. 10-185 Pet. 19-21. For two independent reasons, the specific-controls-the-general canon does not apply here.

First, as the court of appeals explained, "[n]ot all inter-LEC connections are used to deliver interstate communications," and "not all interstate communications involve an inter-LEC connection." Pet. App. 8a. Accordingly, neither provision comprises a "subset" of the other. *Ibid.* Instead, the two statutes "intersect, and dial-up internet traffic falls within that intersection." *Ibid.* "When . . . two statutes apply to intersecting sets . . . neither is more specific." *Ibid.* (quoting *Hemenway* v. *Peabody Coal Co.*, 159 F.3d 255, 264 (7th Cir. 1998)).[7]

Core contends that "[t]he specific-governs-general canon applies here, not solely because the 1996 Act covers a more specific category of communications, but also because it imposes a *more specific just-and-reasonable standard* for rates falling within" Sections 201 and 251-

mission has "consistently found that ISP-bound traffic is jurisdictionally interstate." Pet. App. 35a-36a n.69 (citing examples).

[7] The decisions Core cites (Pet. 21) are thus inapposite because they involved circumstances in which one statutory provision addressed a subset of a larger set covered by another provision. In *National Cable & Telecommunications Ass'n* v. *Gulf Power Co.,* 534 U.S. 327 (2002), for example, the "more specific" statute covered a subset of the cases covered by the "more general" provision. This Court explained that the "more specific" statute controlled, "but only within its self-described scope." *Id*. at 335-336. Similarly, the controlling ratemaking provision in *Ohio Power Co.* v. *FERC,* 954 F.2d 779 (D.C. Cir.), cert. denied, 506 U.S. 981 (1992), applied to a subset of the cases covered by FERC's more general rulemaking statute. See *id.* at 784-785.

252. 10-185 Pet. 21. That argument fails to take into account Congress's decision to authorize the Commission to promulgate specific rules implementing the "just and reasonable" standard in Section 201. Section 201(b) provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter," including the provision in Section 201 itself requiring that interstate rates be "just and reasonable." 47 U.S.C. 201(b). The Commission exercised that delegated authority to establish the rules at issue here, and they are no less specific than the rate-setting methodology prescribed by Sections 251 and 252.

Second, the interpretive canon that the "specific governs over the general" is simply a "rule[] of thumb which will sometimes help courts determine the meaning of legislation." *Varity Corp.* v. *Howe,* 516 U.S. 489, 511 (1996) (internal quotation marks omitted). The canon generally applies only in the absence of other statutory direction as to the proper means of reconciling potentially conflicting provisions. See *Gallenstein* v. *United States*, 975 F.2d 286, 290 (6th Cir. 1992) (canon does not apply "when the plain language of the two subsections can be reconciled without the need for the application of a general rule"). Here, the 1996 Act specifically provides that "[n]othing" in Section 251 "shall be construed to limit or otherwise affect the Commission's authority under section 201." 47 U.S.C. 251(i). That provision dispels any inference that might otherwise be drawn from the assertedly more specific character of Sections 251 and 252. As the court below explained, in light of "[Section] 251(i)'s specific saving of the Commission's authority under [Section] 201 against any negative implications from [Section] 251," the Commission's construction of Section 201—which is entitled to *Chevron* deference—was "at least reasonable." Pet. App. 9a.

c. Core raises a number of challenges to the court of appeals' reliance on Section 251(i). 10-185 Pet. 22-26. Those arguments provide no basis for review by this Court, however, since they were neither presented to the court of appeals in Core's opening brief as petitioner nor passed on by the court below. See, *e.g., Duignan* v. *United States*, 274 U.S. 195, 200 (1927) (the 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").[8]

In any event, Core's contentions lack merit. Core first argues that Section 251(i) "does not permit the FCC to exercise [its Section 201] authority in a way that contravenes specific provisions of the 1996 Act," such as Section 252's requirements that intercarrier termination rates be determined by state commissions and based on carrier costs. 10-185 Pet. 23. But the Commission properly found (Pet. App. 35a), and the court of appeals agreed (*id.* at 9a), that the Commission's Section 201 authority over interstate rates remains intact even

[8] As the court of appeals observed, Core filed a brief as intervenor "raising a number of arguments that it did not raise as petitioner." Pet. App. 12a. The court properly refused to consider those arguments under its established rule that "[a]n intervening party may join issue only on a matter that has been brought before the court by another party." *Ibid.* (citing *Illinois Bell Tel. Co.* v. *FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)). The court likewise refused to consider arguments that first appeared in petitioners' reply briefs. *Id.* at 13a (citing *Board of Regents of the Univ. of Wash.* v. *EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996)).

where Section 251 applies.[9] By contrast, Core's interpretation of Section 251(b)(5) as divesting the FCC of its historical authority over interstate traffic conflicts with the language of Section 251(i). See 47 U.S.C. 251(i) ("Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under [S]ection 201 of this title."). The Commission is "authorized" by Section 201 to declare any interstate charge unjust or unreasonable, *Global Crossing*, 550 U.S. at 49, and it has power, under the last sentence of Section 201(b), to promulgate the "rules and regulations" that may be necessary to implement the Act.[10]

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[9] Core's reliance on *Morales* v. *TWA,* 504 U.S. 374, 385 (1992), is misplaced. That case involved the interplay between a general savings clause in 49 U.S.C. App. 1506 (1988), which provided that "nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute," and a specific preemption provision in the Airline Deregulation Act (ADA), which prohibited the States from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." *Morales,* 504 U.S. at 383-384. Unlike the ADA's preemption provision, 47 U.S.C. 252(d)(2)(A) does not purport to limit the Commission's authority—by its terms, the pricing standard in that section speaks only to what a "State commission" may do when arbitrating interconnection disputes. Because Core has identified no "specific substantive pre-emption provision" that conflicts with the savings clause in Section 251(i), *Morales*, 504 U.S. at 385, Core's attempt to analogize this case to *Morales* is unavailing. In addition, Section 251(i) is not a "general 'remedies' saving clause," *ibid.*, but rather a very specific one preserving the Commission's authority under a particular statutory provision: Section 201.

[10] Core contends that the Commission's authority to set rates for ISP-bound traffic is undermined by the fact that Section 251(i) refers only to Section 201 and not also to 47 U.S.C. 205, which authorizes the Commission to prescribe rates after a formal hearing or investigation. Pet. 24 n.7. That argument was neither raised before the agency nor properly asserted in the court of appeals, so it is not properly before this

Core also argues that Section 251(i) preserves the FCC's authority under Section 201 only from encroachment by Section 251, and not by Section 252. 10-185 Pet. 24-25. But Sections 251 and 252 cannot be separated in this way. Section 251(b)(5) establishes carriers' basic obligation to enter into "reciprocal compensation arrangements for the transport and termination of telecommunications," 47 U.S.C. 251(b)(5), and Section 252(d)(2)(A) specifies the terms and conditions for reciprocal compensation "[f]or the purposes of compliance by an incumbent local exchange carrier *with [S]ection 251(b)(5)*," 47 U.S.C. 252(d)(2)(A) (emphasis added). By providing that the Commission's Section 201 authority is not limited by anything in Section 251, Congress necessarily protected that authority from displacement by the interdependent provisions of Section 252 that effectuate the obligations of Section 251.

d. Core asserts (10-185 Pet. 14) that the court of appeals' decision conflicts with this 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) (*Verizon*), and with the Eighth Circuit's decision in *Iowa Utilities Board* v. *FCC,* 219 F.3d 744 (2000), aff'd in part and rev'd in part, 535 U.S. 467 (2002). The Pennsylvania PUC appears to make a simi-

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Court. See 47 U.S.C. 405(a) (a petition for agency reconsideration is a "condition precedent to judicial review" of any "question[] of fact or law" upon which the Commission "has been afforded no opportunity to pass."); Pet. App. 12a-13a. In any event, Core misinterprets Section 205. That provision sets out available remedies when the Commission conducts a Section 204 adjudicatory investigation of individual tariffed charges filed under Section 203. See 47 U.S.C. 203, 204. Section 205 does not limit the Commission's independent (and generally applicable) rulemaking authority under Section 201.

lar claim. See 10-189 Pet. 9-10. Petitioners' reliance on those decisions is misplaced.

In *AT&T*, the Court considered challenges by States and local telephone companies to FCC rules implementing provisions of the 1996 Act that were designed to "end[] the longstanding regime of state-sanctioned monopolies" and facilitate competition in the provision of "local phone service." 525 U.S. at 371. Relying on 47 U.S.C. 152(b) ("[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to * * * charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service"), some parties argued that the FCC lacked authority to establish a pricing methodology for States to follow in arbitrations when setting rates for *intrastate* telecommunications under the 1996 Act. *AT&T*, 525 U.S. at 374; see 47 U.S.C. 252. This Court disagreed, explaining that the FCC's "rulemaking authority [under Section 201(b)] would seem to extend to implementation of the local-competition provisions" of the 1996 Act. *AT&T*, 525 U.S. at 377-378. The Court noted that the FCC's Section 252(d) pricing rules did not "prevent[] the States from establishing rates," because having state commissions "apply" and "implement" the federal pricing methodology was "enough to constitute the establishment of rates" under Section 252(c)(2). *Id.* at 384. The Court in *Verizon* likewise addressed the 1996 Act's local competition pricing provisions. In that case, the Court explained that the 1996 Act establishes a "hybrid jurisdictional scheme with the FCC setting a basic, default methodology for use in setting rates when carriers fail to agree, but leaving it to state utility commissions to set the actual rates." 535 U.S. at 489.

In neither *AT&T* nor *Verizon* did the Court address the scope of the Commission's authority (under Sections 201(b) and 251(i)) over rates for *interstate* communications. In *AT&T*, the Court assessed the constraints on the Commission's expanded authority to establish rules to implement the local competition pricing standards in Section 252(d). See 525 U.S. at 384-385. The *Verizon* decision simply summarized, for purposes of background discussion, that aspect of the 1996 Act discussed in the *AT&T* opinion. See 535 U.S. at 489. The Court had no occasion in either case to address whether Section 252(c)(2) prohibited rate-setting by the FCC in cases where the FCC is acting under its traditional—and independent—authority under Section 201 to regulate interstate telecommunications.

For substantially the same reason, there is no conflict between the decision below and the Eighth Circuit's decision in *Iowa Utilities Board*. In that decision, the Eighth Circuit, like this Court in *AT&T,* considered the FCC's authority to implement the local competition pricing standards of Section 252—in that case by means of "proxy prices" for reciprocal compensation (that is, "upper limits higher than which the rates set by the state commission shall not go," 219 F.3d at 756). Acknowledging that the Commission's Section 252 jurisdiction extends to establishing a "pricing methodology," *id.* at 757 (quoting *AT&T*, 525 U.S. at 385), the Eighth Circuit held that "the FCC does not have jurisdiction to set the actual prices for the state commissions to use" when acting under that provision. *Ibid.*

As the court below explained, the Eighth Circuit "reached its finding for purposes quite different from" the issue presented in this case, which involves FCC "ratesetting authority for a leg of an interstate communication." Pet. App. 10a. Because the Eighth Circuit "did not address the FCC's power to implement 'just and reasonable rates' under [Section] 201 or how that power was affected by [Sections] 251-252," the court below was not required to "take [a] position on the issue before the [Eighth] Circuit." *Ibid*.

2. Petitioners also contend that the FCC's order was arbitrary and capricious. These record-specific contentions lack merit and do not warrant this Court's review.

The Pennsylvania PUC contends (10-189 Pet. 20) that the Commission acted arbitrarily and capriciously in basing its interim rate caps on prices set in interconnection agreements, rather than on a determination of the cost of terminating ISP-bound traffic. But under Section 201, "[t]he FCC is not required to establish purely cost-based rates" as long as the FCC clearly explains the reasons for a departure from cost-based ratemaking. *Competitive Telecomms. Ass'n* v. *FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996).

The FCC met its burden of explanation here. It explained that it adopted a rate cap that declined to $0.0007 per minute of use in order to limit arbitrage opportunities that arose from "excessively high reciprocal compensation rates." Pet. App. 41a (citation omitted); see *ISP Remand Order*, 16 F.C.C.R. at 9186-9187 (¶¶ 77-78). As the FCC noted, "[m]ost commenters urge[d] the Commission to maintain the[se] compensation rules governing ISP-bound traffic" because "a higher compensation rate would create new opportunities for arbitrage" and impose other economic burdens. Pet. App. 38a-39a.

Although Core asserts that the interim rates are "below-cost," 10-185 Pet. 26, 27, it fails to support that assertion with any evidence. In any event, the intercarrier compensation rates are not the only way for carriers to recover their costs. A carrier whose costs are not covered by the interim rates is free to recover those costs from its ISP customers. *ISP Remand Order*, 16 F.C.C.R. at 9156 (¶ 7). Indeed, the Commission's goal in adopting the interim rates was to encourage "decreased reliance by carriers upon carrier-to-carrier payments and an increased reliance upon recovery of costs from end-users, consistent with the tentative conclusion * * * that bill and keep is the appropriate intercarrier compensation mechanism for ISP-bound traffic." *Ibid.*

Core contends that the interim rates are "discriminatory." 10-185 Pet. 27. As an initial matter, it is not clear "that the concept of discrimination is relevant to regimes created under entirely different statutory provisions." Pet. App. 10a. Moreover, the interim rates apply "to ISP-bound traffic only to the extent that an incumbent carrier offer[s] to exchange all traffic at the same rate." *Id.* at 42a-43a. The rules thus give competitive carriers that send traffic to incumbents the benefit of the same (lower) rate the incumbents pay for terminating ISP-bound traffic.

As the court of appeals correctly held, it was reasonable for the Commission to establish special rules for ISP-bound traffic. Pet. App. 10a. *Inter alia*, the court explained that the generally even balance between incoming and outgoing calls that typifies ordinary telephone service "is utterly absent from ISP-bound traffic," and that rates for such traffic were so distorted under the reciprocal compensation regime that the "CLECs were in effect paying ISPs to become their customers." *Id.* at 10a-11a. "To the extent that [incumbent LECs (ILECs)] simply passed the costs on to their customers generally," the court concluded, "they would force their noninternet customers to subsidize those making ISP-bound calls, and the system would send inaccurate price signals to those using their facilities for internet access * * * and to those not doing so." *Id.* at 11a. "On the other hand," as those LECs sought to recover their reciprocal compensation liability from "their customers," the rates for such calls would be "'higher' than cost, correctly computed." *Ibid.* (quoting *ISP Remand Order*, 16 F.C.C.R. at 9192 (¶ 87)). The court therefore sustained the Commission's determination that "the continued application of the reciprocal compensation regime to ISP-bound traffic would 'undermine[] the operation of competitive markets.'" *Ibid.* (quoting *ISP Remand Order*, 16 F.C.C.R. at 9183 (¶ 71)).

3. Finally, this case presents a narrow question of diminishing practical significance.

The FCC order at issue here concerns only dial-up Internet access, which is a small and steadily shrinking percentage of the Internet access market due to the rapid growth of broadband Internet services. See *In re Core Commc'ns, Inc.*, 455 F.3d 267, 280 (D.C. Cir. 2006); Pet. App. 2a n.1. In 1998, "approximately 98 percent of households with Internet connections then used traditional telephone service to 'dial-up' their Internet access service provider." *In re Framework for Broadband Internet Service,* 25 F.C.C.R. 7866, 7871 (2010) (¶ 13). Today, fewer than 6 percent of Americans use dial-up Internet connectivity as their main form of home access. John B. Horrigan, *Broadband Adoption and Use in America* 3 (FCC, OBI Working Paper Series No. 1, 2010), http://hraunfoss.fcc.gov/edocs_pub/attachmatch/DOC-296442A1.pdf. Moreover, Congress recently directed the FCC to promote broadband deployment, and the agency's efforts in response will likely further the already substantial decline in use of dial-up services.[11]

Core contends (Pet. 30) that the decision below will have significance beyond dial-up Internet because it "substantially alters the 1996 Act's allocation of federal-state authority" by allowing "the FCC to set rates and thereby displace state authority whenever a communication also happens to fall within the FCC's claimed Section 201 authority." The decision below results in no such displacement. Although the 1996 Act gave the FCC new authority over areas traditionally governed by the States, the FCC did not exercise that new authority here. Rather, the FCC exercised its traditional jurisdiction over *interstate* communications under Section 201, a provision "left * * * in place" by the 1996 Act. *Global Crossing*, 550 U.S. at 50. The order on review thus preserves the longstanding allocation of authority between the FCC and the States.

Core speculates that the "theory" underlying the FCC's order has "wide-ranging implications" for other contexts, including the Commission's authority to regulate "broadband Internet service," Pet. 31, and Voice over Internet Protocol (VoIP) communications, Pet. 32, and that it would relegate the States to "an increasingly

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[11] The American Recovery and Reinvestment Act of 2009 directed the Commission to develop a National Broadband Plan that includes "an analysis of the most effective and efficient mechanisms for ensuring broadband access by all people of the United States." American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(A), 123 Stat. 516 (47 U.S.C. 1305(k)(2)(A)). The Commission delivered the Plan to Congress on March 16, 2010, Press Release, *FCC Sends National Broadband Plan to Congress*, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296880A1.pdf, and has initiated proceedings to consider recommendations contained in the Plan. *In re Connect America Fund,* 25 F.C.C.R. 6657 (2010).

trivial category of cases," 10-185 Pet. 31; see also 10-189 Pet. 30-33. "[T]his Court reviews judgments, not opinions." *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984). The judgment below does not extend beyond the limited context of the Commission's authority under Section 201(b) to promulgate intercarrier rates for dial-up Internet traffic. The courts of appeals can address additional issues concerning the Commission's jurisdiction over interstate communications if and when such issues arise. See, *e.g.*, *Comcast Corp.* v. *FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (broadband Internet service); *Minnesota Pub. Util. Comm'n* v. *FCC*, 483 F.3d 570 (8th Cir. 2007) (VoIP).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2010