No. 00-1711

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, establishes comprehensive procedures to open local telecommunications markets to competition through the formation of interconnection agreements between incumbent local exchange carriers and potential competitors providing, *inter alia*, for the lease of incumbents' network elements. The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over those agreements and provides that such exercises of authority are subject to review in federal court. The questions presented in this case are:

1. Whether a state commission's action relating to the interpretation or enforcement of an interconnection agreement entered into pursuant to 47 U.S.C. 252 (Supp. IV 1998) is a "determination under [Section 252]" and therefore is reviewable in federal court under 47 U.S.C. 252(e)(6) (Supp. IV 1998).

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

3. Whether a state commission waives its Eleventh Amendment immunity by accepting Congress's invitation to implement a federal regulatory scheme that provides for review of state commission determinations in federal court.

4. Whether the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), permits an action against the members of a state commission in their official capacities to enjoin ongoing violations of federal law in performing regulatory functions under the 1996 Act.

PARTIES TO THE PROCEEDINGS

The United States of America was an intervenor and appellant in the courts below and is a petitioner in this Court. Verizon Maryland Inc. (formerly Bell Atlantic) was an appellant in the court of appeals. The appellees in the court of appeals were the Public Service Commission of Maryland, together with its members Glenn F. Ivey, Claude M. Ligon, E. Mason Hendrickson, Susan Brogan, and Catherine I. Riley; American Communications Services of Maryland, Inc.; RCN Telecom Services of Maryland, Inc.; Starpower Communications, LLC; TCG-Maryland; MCImetro Access Transmission Services, Inc.; Maryland Office of People's Counsel; and MCI WorldCom, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

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 App.] at 1a-72a) is reported at 240 F.3d 279. The opinion of the district court (Verizon App. 73a-90a) is unreported. The order of the Maryland Public Service Commission (Verizon App. 91a-111a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2001. The jurisdiction of this Court is invoked under 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 App. 112a-134a.

STATEMENT

The Telecommunications Act of 1996 (1996 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). This case concerns the provisions of the 1996 Act aimed at enhancing competition in local telecommunications markets.

1. For many years, most telephone service in the United States was provided by AT&T and its corporate 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*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree that required it to divest its local exchange operations. The newly independent Bell Operating Companies continued to

provide monopoly local exchange service in their respective regions. What remained of AT&T continued to provide nationwide long-distance service. See H.R. Rep. No. 204, 104th Cong., 1st Sess. 48-50 (1995).

a. In considering how to encourage competition in 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 fully to duplicate an incumbent carrier's 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.

Accordingly, Congress, in Section 251 of the 1996 Act, 47 U.S.C. 251,[1] provided for prospective competitors to enter local telephone markets by using incumbent carriers' own networks 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

[1] All citations of the 1996 Act are of Supp. IV 1998.

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). Incumbents are also required to provide physical access to their poles, ducts, conduits, and rights-of-way, in order to allow new entrants to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. 251(b)(4) and (c)(6).

The 1996 Act requires an incumbent to negotiate in good faith with a new entrant that requests interconnection, access to network elements, resale of services, and other arrangements contemplated by the Act. 47 U.S.C. 251(c), 252. The Act provides for binding arbitration in the event that the parties cannot conclude such "interconnection agreements" through negotiation. 47 U.S.C. 252(b).

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

Under the 1996 Act, the extent of the regulatory responsibilities of the state public utility commission, or alternatively the FCC, depends, in part, on whether the interconnection agreement was negotiated or arbi-

trated. A negotiated agreement is subject to review by the state commission (or, if the state commission chooses not to regulate, by the FCC) to determine whether the agreement discriminates against non-party carriers 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 public utility commission (or, if the state commission chooses not to regulate, the FCC) will resolve any open issue, including the rates, terms, and conditions under which competitors will enter the local market, as well as prices that the incumbent and the new entrant will pay one another 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. 47 U.S.C. 252(c). An arbitrated agreement is subject to review by the state commission to determine whether the agreement complies with Sections 251 and 252 of the 1996 Act and applicable FCC regulations. 47 U.S.C. 252(e)(1) and (2)(B). If the state commission does not act to approve or reject an agreement within the allotted time period, the agreement is deemed approved. 47 U.S.C. 252(e)(4).

The 1996 Act provides that any party "aggrieved" by a determination of a state public utility commission may file suit in federal district court for a determination "whether the agreement * * * meets the requirements of" Sections 251 and 252 of the Act. 47 U.S.C. 252(e)(6). If the FCC rather than the State has assumed the regulatory role, the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* (1994 & Supp. V 1999), authorizes federal appellate court review of the FCC's orders.

2. The Public Service Commission of Maryland (MPSC) has voluntarily exercised regulatory authority under the 1996 Act. The MPSC approved interconnection agreements between Bell Atlantic, the incumbent service provider in Maryland (and a predecessor to Verizon Communications, Inc.), and prospective entrants to the local telephone markets, including MCI WorldCom. As required under the 1996 Act, those agreements provided for the payment of reciprocal compensation (*i.e.*, payments by the carrier of the party originating a local call to the carrier of the party receiving the call) for "local" calls. See 47 U.S.C. 251(b)(5). When a dispute subsequently arose concerning Bell Atlantic's obligation to pay reciprocal compensation for calls bound for internet service providers, the MPSC again exercised regulatory authority under the 1996 Act, issuing a determination that such calls are "local" and ordering the payment of reciprocal compensation.

3. Invoking 47 U.S.C. 252(e)(6) and 28 U.S.C. 1331, Bell Atlantic sought review of the MPSC's reciprocal compensation order in federal district court, arguing that the order was contrary to federal law. Bell Atlantic named as defendants the MPSC, its individual commissioners in their official capacities, and the affected carriers.

The MPSC and its commissioners moved to dismiss. They argued that the district courts lack subject-matter jurisdiction to review decisions of a state public utility commission enforcing (as opposed to approving or rejecting) a previously approved interconnection agreement. They also argued that state commissions and their commissioners are immune from such actions 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 action. The court concluded that the Eleventh Amendment barred suit against the MPSC and its individual members. Verizon 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 action could proceed against the individual commissioners under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which authorizes actions against state officers in their official capacities to enjoin violations of federal law. Verizon 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. Verizon App. 84a-86a.

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

First, the panel 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 App. 14a-21a. The panel 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 panel 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 panel 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 panel 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 panel held that the individual commissioners are not amenable to suit under *Ex parte Young*. Verizon App. 21a-30a. The panel focused its analysis on "the federal interests served by permitting [such] a federal suit." *Id.* at 24a. The panel reasoned that "[t]he federal interest furthered by the 1996 Act is to have § 252 determinations made by State commissions reviewed in federal court," *not* "to discipline individual State officials or to expose them to any liability." *Ibid.* The panel 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 25a.

In addition, the panel 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 App. 25a-27a. The panel 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 panel 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 App. 29a. The panel 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 panel 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 App. 30a-47a. The panel 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 panel reasoned that "in the final analysis, the State commission determinations under § 252 involve only approval or rejection of such agreements." *Id.* at 39a. The panel concluded that other state commission determinations, including those enforcing interconnection agreements, are "left for review as specified by State law." *Ibid.*

Here, the panel 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 App. 40a. The panel concluded that the MPSC's decision enforcing that previously approved 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 panel 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 App. 47a-50a. The panel reasoned that Congress intended to limit federal court review with respect to the Section 252 process to the circumstances specified in Section 252(e)(6). "[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 Pharms. Inc.* v. *Thompson*, 478 U.S. 804, 812 (1986)).

5. Judge King dissented from the panel'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 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 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 (internal quotation marks omitted). He therefore concluded that a state commission decision enforcing an interconnection agreement is a "determination under [Section 252]" within the meaning of the grant of federal court jurisdiction in Section 252(e)(6). *Ibid.*

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 App. 59a-67a He disagreed with the panel majority'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 suit 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 App. 67a-71a. He reasoned that the 1996 Act does not create 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 aspects of local telecommunications now governed by the Act, *id.* at 71a.

DISCUSSION

1. On March 5, 2001, this Court granted the petition for a writ of certiorari in *Mathias* v. *WorldCom Technologies, Inc.* (No. 00-878). See 121 S. Ct. 1224. The questions presented in *Mathias*, which arises from a decision of the Seventh Circuit, are essentially identical to the questions presented in this case: whether federal district courts have subject-matter jurisdiction over actions to review state public utility commission decisions enforcing interconnection agreements entered into pursuant to the 1996 Act, and whether state commissions or their commissioners may be made defendants in such actions consistent with the Eleventh Amendment.

The United States has intervened in a number of cases, including the present case, in order to address

those issues.[2] The United States has taken the position that the district courts possess jurisdiction, under 47 U.S.C. 252(e)(6) and 28 U.S.C. 1331, over actions seeking review of state commission decisions enforcing previously approved interconnection agreements. In addition, the United States has taken the position that the Eleventh Amendment does not preclude such actions against state commissions or individual state commissioners in their official capacities. The United States has argued that state commissions waived their sovereign immunity by electing to exercise regulatory authority under the 1996 Act; alternatively, the United States has argued that state commissioners are amenable to such suits under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

The Court's decision in *Mathias* will very likely affect the proper disposition of this case. The petition for a writ of certiorari should, therefore, be held pending this Court's decision in *Mathias* and then disposed of as appropriate in light of that decision.

2. We note, however, that there are two considerations that might warrant also granting plenary review in this case.

First, Verizon, in its own petition for certiorari, urges that this case affords the Court an opportunity to

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[2] See, *e.g.*, *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 238 F.3d 636 (5th Cir. 2001); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942 (8th Cir. 2000); *MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000), cert. denied, 121 S. Ct. 896 (2001); *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929 (10th Cir. 2000), cert. denied, 121 S. Ct. 1167 (2001); *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862 (6th Cir.), cert. denied, 121 S. Ct. 54 (2000). The United States did not intervene, however, in the lower court proceedings in *Mathias*.

consider whether 28 U.S.C. 1331 provides an alternative basis for federal court jurisdiction to review state commission determinations enforcing interconnection agreements. See Pet. at 3-4, 15-26, *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, No. 00-1531. As Verizon notes, the jurisdictional question on which the Court granted certiorari in *Mathias* refers only to 47 U.S.C. 252(e)(6), and the Seventh Circuit did not address the question of jurisdiction under 28 U.S.C. 1331 in that case. See Pet. App. at 24a, 29a n.3, *Mathias* v. *WorldCom Techs., Inc.*, No. 00-878.

In our view, however, this Court could consider in *Mathias* whether federal court jurisdiction to review such state commission determinations exists under 28 U.S.C. 1331, if this Court were to disagree with the Seventh Circuit's holding that jurisdiction exists under 47 U.S.C. 252(e)(6). The plaintiff in *Mathias* cited 28 U.S.C. 1331 as an alternative basis for jurisdiction. See Pet. at 7, *Mathias*, *supra*, No. 00-878. The district court, after determining that federal court jurisdiction existed under 47 U.S.C. 252(e)(6), noted that it therefore did not have to consider whether jurisdiction also existed under 28 U.S.C. 1331. See Pet. App. at 29a n.3, *Mathias*, *supra*, No. 00-878. The Seventh Circuit likewise had no reason to reach the issue of Section 1331 jurisdiction in light of its conclusion that jurisdiction existed under Section 252(e)(6). In opposing the petition for certiorari in *Mathias*, the respondents noted the availability of 28 U.S.C. 1331 as an alternative basis for jurisdiction. See Br. in Opp. of Worldcom Technologies, Inc., *et al.*, at 20, *Mathias*, *supra*, No. 00-878.

As Verizon's petition for certiorari notes (at 14), the telecommunications industry and federal and state regulators have a need for prompt and definitive

resolution of the question whether federal courts may review state commission decisions enforcing interconnection agreements. Accordingly, if the Court has substantial doubt about its ability in *Mathias* to consider Section 1331 as an alternative basis for jurisdiction, we suggest that the Court grant our petition and Verizon's petition in this case, rather than hold the petitions pending the disposition of *Mathias*, so that the jurisdictional question may be definitively resolved during the Court's October 2001 Term.

Second, some question may exist as to the standing of the Illinois Commerce Commission (ICC) and its commissioners in *Mathias* to seek review of the Seventh Circuit's Eleventh Amendment and jurisdictional holdings. The Seventh Circuit affirmed the ICC's underlying ruling that was challenged in *Mathias*. A decision by this Court in the ICC's favor on the Eleventh Amendment or jurisdictional issues would afford the ICC no greater relief with respect to that case. This Court may conclude, however, that the ICC and its commissioners have standing to raise those issues.[3] Again, if the Court has any substantial concern about the ICC's standing in *Mathias*, the Court may wish to grant plenary review in this case as well.

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[3] It would nonetheless appear that the ICC would be able to assert its Eleventh Amendment arguments on an interlocutory appeal in future litigation. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). And, because the issue of statutory jurisdiction is logically antecedent to that of Eleventh Amendment immunity, see *Vermont Agency of Natural Resources* v. *United States*, 529 U.S. 765, 779 (2000), an interlocutory appeal also could properly present the jurisdictional question.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, and disposed of as appropriate in light of the decision in that case. Alternatively, the petition should be granted and the case should be considered together with *Mathias*.

Respectfully submitted.

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MAY 2001