# COURTSIDE

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This Term, the U.S. Supreme Court will decide three significant telecommunications cases. The first, argued on October 10, was Verizon Communications, Inc. v. Federal Communications Commission, Nos. 00–511, 00–555, 00–587, 00–590, and 00–602. This is the second time that the Court has chosen to review an Eighth Circuit decision dealing with challenges to FCC regulations to implement the local competition provisions of the 1996 Telecommunications Act. Under that Act, would-be competitive carriers have a federal statutory right to interconnect with incumbent carriers, and to purchase and use—at "cost"—"elements" of the incumbents' networks. Congress recognized that competition would be hampered if competitors were required to replicate entire local networks, including the "local loops" that connect every home to the network.

The primary issue in the Verizon case is the methodology mandated by the FCC to establish the "costs" of the incumbents that must form the basis of the prices charged to competitors. The FCC required that cost be calculated on a "forward-looking" basis, i.e., based on what it would cost a new and efficient carrier to provide the particular element or service at issue using current technology. The FCC concluded that the statute mandated no particular way to measure cost, and that forward-looking "economic cost," i.e., the current value of the incumbents' partially outmoded networks, would more accurately replicate the costs that would prevail in a competitive market. Accordingly, the FCC concluded, a forward-looking measure of cost would allow the local market to move quickly towards competition.

The Eighth Circuit agreed that the statute permitted the use of forward-looking costs and that this methodology furthers the statutory purpose. Somewhat inscrutably, the court also held that that the statute mandated the calculation of the "forward-looking costs" of the incumbents' existing network. Both incumbents and would-be competitors took the case to the Supreme Court. The incumbents argued that the Takings Clause of the Constitution requires that they be reimbursed for the actual historical cost of providing a service to a competitor, even where costs have declined. Competitive carriers and the FCC, by contrast, argued that the FCC appropriately based rates for network elements on the forward-looking costs of an efficient provider using current technology.

A second pair of cases deals with another aspect of the local interconnection provisions. Under the 1996 Act, the terms of interconnection among competing local providers are contained in "interconnection agreements" that are approved in proceedings conducted by state public utility commissions. The Act divests state courts of jurisdiction to review such decisions, and instead makes it clear that only federal courts may review those administrative actions. In Mathias v. WorldCom Technologies, Inc., No. 00–878, and Verizon Maryland, Inc. v. Public Service Commission of Maryland, No. 00–1531, the Court will address arguments that the Eleventh Amendment bars federal court review of state public utility commission orders that interpret and approve a previously approved interconnection agreement.

The two questions before the Court are (1) whether the Act grants federal courts jurisdiction to review a decision of a public utility commission enforcing an interconnection agreement, and (2) whether such a procedure violates the Eleventh Amendment, which, with certain exceptions, bars suits against states in federal courts. The jurisdictional issue in turn has two aspects, because jurisdiction could be grounded either in the 1996 Act or in the general federal question jurisdictional statute, 28 U.S.C. § 1331.

The states have contended that the Eleventh Amendment precludes the federal district court from exercising such jurisdiction. Opponents of the states' arguments assert that the states waived their immunity from suit in federal court when they chose to administer a portion of the 1996 Act. They further contend that, in any event, the lawsuits at issue fall within the *Ex parte Young* exception to Eleventh Amendment immunity, which allows a federal court to enter prospective relief against state officials to bring their conduct into compliance with federal law. The Court will hear argument in these consolidated cases on December 5.

The third case, National Cable Television Ass'n v. Gulf Power Co., Nos. 00–832, 00–843, was argued on October 2. Gulf Power involves FCC rules promulgated in 1998 to implement the Pole Attachments Act. That Act, which was amended in the Telecommunications Act of 1996 to apply to any attachment by a cable system or provider of telecommunications services, provides certain protections, including for rates, for cable operators and telecommunications carriers that access utility poles.

In its 1998 rules, the FCC concluded that attachments that are used simultaneously for providing both data (specifically, Internet access via cable) and cable television services are covered by the Act. A number of electric utility companies filed petitions for review of the FCC's Order. Those cases were consolidated in the Eleventh Circuit, which reversed the FCC in relevant part.

The Eleventh Circuit concluded that Internet access is neither a cable service nor a telecommunications service, and that the FCC thus has no jurisdiction to regulate pole attachments if a cable company provides simultaneous access to Internet services. The FCC and the NCTA assert that the Commission's implementation of the Act is entitled to deference, and that sound policy justifications, including the FCC's desire to encourage the rapid deployment of broadband Internet access, support the challenged regulations.

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