No. 07- 07-721

IN THE

Supreme Court of the United States

AMERICAN TELECOM CO., L.L.C.;
AMERICAN TELECOM GROUP-USA, L.L.C.,

Petitioners,

v.

REPUBLIC OF LEBANON, a foreign State,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Pursuant to the "commercial activity exception" of the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1605(a)(2), subject matter jurisdiction exists in a suit against a foreign state if: (1) the foreign state's conduct is commercial in nature; and (2) the foreign state's conduct causes a direct effect in the United States. The Sixth Circuit affirmed the District Court's dismissal of Petitioners, American Telecom Company, LLC, ("ATC") and American Telecom Group-USA, LLC's, ("ATG's") complaint for lack of subject matter jurisdiction on the grounds that the effects in the United States were not "direct effects". The following questions are presented:

I. Was there a "direct effect" in the United States pursuant to the FSIA where the Republic of Lebanon, a foreign state, fraudulently induced ATC and ATG, two American corporations, to participate in a bid on a contract, then tortiously and intentionally disqualified them from the bidding solely because ATC and ATG are American corporations and where such intentional, tortious and fraudulent conduct caused effects in the United States?

II. What standard should be used to determine whether an effect is a "direct effect" under the "commercial activity exception", the "legally significant acts" test, as has been adopted by the Second, Eighth, Ninth and Tenth Circuits and has been explicitly rejected by the Fifth and Sixth circuits, or the test used by Fifth and Sixth circuits?

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The Order of the United States District Court for the Eastern District of Michigan from which Petitioners seek review was issued on September 9, 2005 (attached hereto as Appendix A) and was affirmed by the United States Court of Appeals for the Sixth Circuit in an Opinion dated August 29, 2007 (attached hereto as Appendix B) and ensuing Judgment of the same date.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE IN THIS CASE

28 U.S.C. § 1330:

§ 1330. Actions against foreign states

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603 (a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

> (c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

28 U.S.C. § 1604:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605(a)(2):

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–
>
> * * *
>
> > (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

From 1994 through 2002, two companies held contracts with Respondent, Lebanon, to manage the two Global System for Mobile ("GSM") networks in Lebanon (the "GSM Networks") for a fee of $7,500,000 per month. R.28-29, Plaintiffs' Brief in Opposition to Motion to Dismiss, Exh. O at ¶¶ 5 and Exh. P, Joint Appendix filed by the parties in the Sixth Circuit ("JA")[1] at 1066, 1081. In 2002, Lebanon terminated the contracts, and announced that it would soon be holding an auction-tender for the management of the GSM Networks. *Id.*

In January 2003, after forming a team of affiliates[2], Petitioners, ATC and ATG, paid a fee of $25,000 for a good faith and fair opportunity to participate in the auction-tender. *Id.*, Exh. O at ¶¶ 7-14 and Exh. P, JA at 1055-1056, 1081. Despite the fact that Petitioners' team satisfied every requirement to be pre-qualified for the auction-tender, Petitioners' team, the only American

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1. The exhibits relied upon by Petitioners which are not attached in the Appendix hereto are referenced by page number to the Joint Appendix that was submitted to the Sixth Circuit in connection with the underlying proceedings.

2. The team contained specialists in operational management and consultation services to the telecom industry in the United States and around the world, and experts in the implementation and management of wireless communications networks. R.28-29, Plaintiffs' Brief in Opposition to Motion to Dismiss, Exhs. O at ¶ 11 and P, JA at 1055-1056, 1081. In addition, the team brought together 60 professionals experienced in operating wireless and wireline companies in the United States, Europe and Asia, most of whom were professionals with Ameritech International's European investments and had over 20 years of experience. *Id.*

group that applied to participate in the auction-tender, was disqualified with absolutely no explanation. *Id.*, Exh. O at ¶¶ 7-16 and Exh. P, JA at 1055-1057, 1081.

Inasmuch as the auction-tender was eventually cancelled due to questionable conduct by the Lebanese official running it, Lebanon announced a new tender (the "New Public Tender") to be run by a different department of the government of Lebanon, the Ministry of Telecommunications. *Id.*, Exh. O at ¶¶ 22-24 and Exh. P, JA at 1058, 1081.

Petitioners were concerned about submitting a proposal for the New Public Tender inasmuch as many less qualified non-American companies had been pre-qualified in the auction-tender while Petitioners' group had been disqualified. *Id.*, Exh. O at ¶ 25 and Exh. P, JA at 1058-1059, 1081. However, Petitioners opted to submit a proposal only after the Minister of Telecommunications and other Lebanese officials convinced Petitioners that Lebanon wanted Americans to participate and that the New Public Tender would be handled in an appropriate manner, ensuring that every company, including any American company, would be treated in a fair manner and in good faith. *Id.*, Exh. O at ¶¶ 25-30 and Exh. P, JA at 1058-1060, 1081. With the assurances of the Lebanese Government, Petitioners paid Lebanon a fee of $5,000 for a good faith and fair opportunity to participate in the New Public Tender. *Id.*

However, unbeknownst to Petitioners, Lebanon only wanted an American company to participate in the New Public Tender in order to lend legitimacy to the process and to drive down the bids of the European and Arab

companies. In fact, Lebanon had no intention of ever allowing an American company to be awarded a GSM Network management contract. *Id.*, Exh. O at ¶ 29 and Exh. P, JA at 1059, 1081.

After months of preparation costing hundreds of thousands of dollars, Petitioners submitted their bid for the four-year management contract of the GSM Networks pursuant to all of the rules and requirements contained in the Tender Information and Procedures (the "TIP") (*Id.*, Exh. Q, JA at 1089-1229), which outlined the guidelines, requirements and timetable for the New Public Tender. *Id.*, Exh. O at ¶¶ 31-34 and Exh. P, JA at 1060-1061, 1081. In particular, Petitioners submitted emailed copies of several submission documents inasmuch as the TIP did not bar Petitioners from submitting emailed copies, and inasmuch as a Lebanese government employee had confirmed that emailed copies would be acceptable for the submission. *Id.*, Exh. O at ¶¶ 40-42, Exh. P and Exh. Q, JA at 1063, 1081, 1089-1229.

Inasmuch as the bidding process as designated in the TIP called for an "open tender" period where the parties could adjust their bids after the initial bids were revealed, Petitioners strategically made an initial bid at $6.16 million per month for the management of the GSM Network and were prepared to lower its bid to $3.99 million per month during the "open tender" portion of the bidding. *Id.*, Exh. Q, Exh. O at ¶ 43 and Exh. P, JA at 1103, 1063-1064, 1081.

On March 29, 2004, the date of the New Public Tender, Lebanon shockingly informed Petitioners that they were disqualified from participating because one

of the documents in Petitioners' submission was an email document instead of an original document. *Id.*, Exh. O at ¶ 44 and Exh. P, JA at 1064, 1081. Defendant then announced the pre-qualification of seven non-American companies: Detecon of Germany, Orange of France, Orascom of Egypt, Mobile Telecom Company of Kuwait, Telenor of Norway, Telcom Italia Mobile of Italy and Digicel of Ireland. *Id.*, Exh. O at ¶ 45 and Exh. P, JA at 1064, 1081.

At the conclusion of the bidding, Detecon and Mobile Telecom Company were the low bidders and were awarded the management contracts for the GSM Networks. *Id.*, Exh. O at ¶ 46 and Exh. P, JA at 1064-1065, 1081. Detecon was awarded the four-year management contract for one network for $4.2 million per month, or $201 million total, and Mobile Telecom Company was awarded the four-year management contract for the other network for $4.25 million per month, or $204 million total. *Id.* If Petitioners had not been improperly disqualified, Petitioners would have been the low bidder at $3.99 million per month ($191.5 million total) and would thus have been awarded the management contracts for at least one of the GSM Networks. *Id.*, Exh. O at ¶ 50 and Exh. P, JA at 1065, 1081.

On July 14, 2004, Petitioners, ATC and ATG, filed their Complaint alleging breach of contract, fraud, promissory estoppel and breach of quasi contracts. R.1, Complaint, JA at 10-37. The Complaint set out the relevant facts regarding Lebanon's wrongful and tortious acts committed against ATC and ATG in connection with the two separate tenders for the

extremely lucrative commercial contract for the management of one of the two GSM Networks in Lebanon. *Id.*

On August 24, 2005, Petitioners served the Summons and Complaint upon Lebanon at its Office of the Counsel General in Detroit, Michigan, as had been agreed upon by the parties. R.19, Plaintiffs Brief in Opposition to Motion to Set Aside Default Judgment, Exhs. 2, 3, 7, 8 and 9, JA at 388-389, 393-506. However, Lebanon failed to answer the Complaint, and Petitioners sought and obtained a clerk's entry of default, moved for entry of default judgment, appeared for a motion hearing, and obtained a default judgment in the amount of $420 million. R.4, Default, JA at 107; R.5, Motion for Default Judgment, JA at 108-155; R.11, TR of March 9, 2005 Hearing, JA at 1299-1309 ; R.8, Default Judgment, JA at 157.

After the default judgment was entered, Lebanon finally appeared for the very first time in the District Court and moved to get an extension of time to file a motion to set aside default judgment. R.13, Defendant's Ex-Parte Motion to Extend, JA at 160-163. On April 15, 2005, Lebanon filed a Motion to Set Aside Default Judgment and a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(2)[3]. Lebanon R.15, Defendant's

3. The District Court divided up the hearings for the two portions of Lebanon's motions, and scheduled for hearing Defendant's Motion to Set Aside Default Judgment only on May 9, 2005 and set Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(2) for hearing on June 15, 2005. R.16, Notice of Hearing on Motion to Set Aside Default Judgment and (Cont'd)

Motion to Set Aside Default Judgment and Motion to Dismiss, JA at 166-356.

On May 9, 2005, the District Court issued an opinion granting Respondent's motion to set aside the default judgment. R.23, Order Granting Motion to Set Aside Default Judgment, JA at 38-51. On September 7, 2005, the District Court held the hearing on Lebanon's motion to dismiss. R.39, TR of September 7, 2005 Hearing, JA at 1329-1340. On September 9, 2005, the District Court issued an opinion and order granting Respondent's motion to dismiss for lack of subject matter jurisdiction, and a final judgment in favor of Respondent. R.33, Order Granting Defendant's Motion to Dismiss, JA at 52-63; R.34, September 9, 2005 Judgment, JA at 64.

Petitioners filed their Notice of Appeal on October 6, 2005. R.35, Notice of Appeal, JA at 65. On August 29, 2007, the Sixth Circuit issued an Opinion (Appendix B) and Judgment affirming the District Court's decision on the faulty grounds that the effects that resulted from Lebanon's improper disqualification of ATC and ATG were not "direct effects" under the commercial activity exception of the FSIA.

(Cont'd)

Motion to Dismiss, JA at 357; R.17, Notice of Hearing on Motion to Set Aside Default Judgment, JA at 358. The hearing for Lebanon's Motion to Dismiss was subsequently moved to September 7, 2005 after Lebanon withdrew the prior motion and filed a new motion to dismiss. R.25, Notice of Withdrawal of April 15, 2005 Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(2), JA at 623; R.26, Defendant's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(1), JA at 626; R.27, Notice of Motion Hearing, JA at 895.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted To Determine Whether A Foreign State Is Entitled To Immunity Under The FSIA Where It Fraudulently Induced An American Corporation To Bid On A Contract And Then Intentionally And Tortiously Disqualified The American Corporation From The Bidding Solely Because It Was An American Corporation And Where Such Intentional And Tortious Conduct Caused Effects In The United States.

Whether a foreign state should be granted immunity under the FSIA when it committed intentional and tortious acts that injured an American corporation or citizen is a profoundly important question that should be addressed by this Court. If the Sixth Circuit's decision is allowed to stand, it would signal to every foreign state that it can defraud any American without having to face the consequences of such fraudulent conduct in the United States. Indeed, in this increasingly global economy, the Sixth Circuit decision effectively bars any American from even attempting to enter into contracts or to do business with any foreign states or even any agents or instrumentalities of a foreign state inasmuch as the American company has no protection whatsoever by the United States courts for any fraud committed by the foreign state. In fact, even if the foreign state fraudulently induces an American citizen or company to do business with it, and then breaches a contract or otherwise acts improperly, the foreign state would still be granted immunity under the improper application of the commercial activity exception by the Sixth Circuit.

A. The Commercial Activity Exception of the FSIA Applies to this Action.

28 U.S.C. § 1330 grants subject matter jurisdiction to a United States District Court over any non jury civil action against a foreign state for which the foreign state is not entitled to immunity under the Foreign Sovereign Immunity Act ("FSIA"). *See*, 28 U.S.C. § 1330. The FSIA specifically provides that a foreign state does not have immunity if one of several exceptions apply. 28 U.S.C. § 1605 provides, in pertinent part:

> (a) *A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–*
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; *or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.*

Indeed, this Court has held that the *jurisdictional immunity granted to foreign states by the FSIA is restricted to suits involving public acts and does not extend to commercial or private acts. See, Gould, Inc.*

v. Pechiney Ugine Kuhlmanm, 853 F.2d 445 (6th Cir. 1988). "The FSIA is designed to facilitate suits in courts in the United States arising from commercial or private acts of foreign states." *Id.*

The most significant of the exceptions to sovereign immunity is the commercial activity exception of § 1605(a)(2). *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Specifically, the commercial activity exception provides an exception to sovereign immunity where:

> the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; *or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.*

28 U.S.C. § 1605(a)(2) (emphasis added).

There is no dispute that Lebanon is a foreign state and that Lebanon's actions were commercial in nature under the FSIA. Appendix B at 4. Therefore, the only dispute here is whether the act caused a direct effect in the United States.

The proper standard to be used in determining the existence of a "direct effect in the United States" is dictated by the this Court's decision in *Weltover*, 504 U.S. 607. In *Weltover*, this Court was faced with the question

of whether subject matter jurisdiction was present in a lawsuit filed in a United States district court by two *foreign corporations and a foreign bank* against a foreign nation. The foreign corporate plaintiffs sued Argentina when Argentina attempted to reschedule the payment of bonds that had been issued by Argentina with a specific date for payment. *Id.* The *only connection* to the United States was that the foreign corporate plaintiffs had designated a New York bank for the delivery of the money owed to them on the bonds. *Id.* Despite the fact that *none of the parties were American*, and there was *very minimal connections to the United States*, this Court agreed with the Second Circuit Court of Appeals' ruling that there was a *direct effect to the United States.* However, this Court declined to follow the Appeals Court's reasoning that the effect was direct enough on the United States because the court should try to "preserve New York City's status as a preeminent commercial center." *Id. Instead, this Court held that a direct effect was present when the effect on the United States follows "as an immediate consequence of the defendant's ... activity."* *Id.* at 618. This Court then stated that "[b]ecause New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a "direct effect" in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 619.

B. Lebanon's Conduct Caused a Direct Effect in the United States

The Sixth Circuit somehow contends that the effect upon the United States which resulted from Lebanon's fraudulent inducement of Petitioners to participate in the Auction-Tender and New Public Tender and subsequent fraudulent disqualification of Petitioners from the New Public Tender was not the "immediate consequence" of Lebanon's activity. However, the Sixth Circuit's holding in this regard is flat wrong and gives the green light to any foreign state to fraudulently induce any American into conducting business with it without any possible recourse in the United States against the foreign state for any fraudulent conduct.

In the case at bar, when the "immediate consequence" test is applied, it is clear that *Lebanon does not have immunity.* Indeed, it is patently obvious that Petitioners suffered significant and immediate damages as a result of Lebanon's tortious conduct in fraudulently inducing Petitioners to participate in the Auction-Tender and the New Public Tender even though Lebanon never had any intention whatsoever of allowing Petitioners to actually participate in either tender. In fact, as a direct and immediate result of these fraudulent misrepresentations, Petitioners, two American corporations, paid a total of $30,000 in fees from a United States bank to participate in the two tenders, plus paid over $500,000 in expenditures that came directly from the United States in the supposed "pursuit" of a contract for which Lebanon never intended to even consider Petitioners. R.1, Complaint, ¶¶ 9, 13-14, 24, 29-30, Apx. 12-17.

Shockingly, the Sixth Circuit held that such conduct was not "immediate" because Petitioners were not *required* to submit payment from an American bank, but merely chose to do so. Appendix B at 6. However, this reasoning completely undermines the commercial activity exception in situations such as here where a foreign state fraudulently induces an American company to pay monies to it. Indeed, the Sixth Circuit decision allows a foreign state to fraudulently induce an American company to pay monies to it so long as it does not require that the money come from a United States bank. However, both the harm to the American company and the effect upon the United States remains exactly the same.

Moreover, the Sixth Circuit reasoning is entirely flawed with respect to Petitioners' theory. Indeed, the Sixth Circuit reasoned as follows:

> Under [Petitioners'] theory, the direct effect requirement is effectively excised from the statute because, under this theory, any bidding process conducted – or not conducted – anywhere in the world would have a direct effect in the United States. For example, if a U.S. bidder wins a bid, money flows to the U.S., and if the U.S. bidder loses, then no money flows to the U.S.; win or lose, according to the theory, bidding causes a direct effect. If a U.S. bidder is disqualified and does not bid at all, then no money flows to the U.S. – a direct effect. If a U.S. company is not invited to bid, then no money flows to the U.S. – another direct effect. A foreign country's

> failure even to conduct a bidding process would have a direct effect in the United States because no money would flow to a U.S. company that would presumably have won the bid and brought money back to the U.S. It is hard to imagine a circumstance under [Petitioners'] theory that would not cause a direct effect in the United States.

Appendix B at 6. However, this characterization of Petitioners' theory is absolutely untrue and it completely ignores the fact that here, Lebanon fraudulently induced Petitioners into participating in the Auction-Tender and the New Public Tender in the first place. Indeed, Petitioners do not argue that an American Company should be able to sue a foreign state in the United States just because it somehow was tangentially damaged by a foreign state's failure to not conduct a bidding process, or to not invite it to participate. However, when a foreign state *fraudulently induces* an American company to participate in a bidding process in which it otherwise would not have participated but for the representations by the foreign state, causes them to pay over $500,000 in pursuit of the contract, and then improperly disqualifies the American company even though it would have won the bidding process, it certainly holds true that such injuries to the American company were, and should be, a direct effect of the foreign state's conduct.

In addition, besides the money that American Petitioners were induced to pay from the United States to Lebanon as a result of the fraudulent inducement and fraudulent misrepresentations, there were significant other direct effects in the United States as a result of Lebanon's improper disqualification of Petitioners.

First and foremost, there is no doubt that the direct result of the improper disqualification of Petitioners was to deprive two American corporations from receiving the lucrative contracts at issue which derive hundreds of millions of dollars in revenue for the contract holder. Not only did Lebanon's conduct thus prevent money from being paid *into* the United States, but it also prevented money from being paid *to* the United States. Indeed, Petitioners, as American corporations, are required to pay taxes to the United States on all earnings realized, including the earning from the management of the GSM Networks. Such earnings would have been in the hundreds of millions of dollars, and the tax liability would have been substantial, if Lebanon had not fraudulently disqualified Petitioners from the New Public Tender. Furthermore, the United States lost tax revenue of all of the American employees of Petitioners that it would have earned but for Lebanon's tortious and improper conduct in improperly disqualifying Petitioners.

II. Review Is Further Warranted To Resolve A Circuit Split Regarding The Proper Test To Use In Determining Whether There Is A Direct Effect In The United States Under The Commercial Activity Exception.

This Court held in *Weltover*, *supra*, that "an effect is direct if it follows as an immediate consequence of the defendant's activity." However, as the Sixth Circuit noted in its Opinion, lower courts have found the "immediate consequences" test difficult to apply. Appendix B at 5. This difficulty has resulted in a distinct circuit split with respect to applying the Weltover "immediate

consequence" test. Indeed, the Second[4] and Ninth[5] Circuits have both adopted the "legally significant acts" test, which provides that a direct effect can only be found if a legally significant act (such as the payment of monies on a contract) occurs in the United States. The Eighth[6] and Tenth[7] Circuits find the "legally significant acts" test helpful but do not explicitly require that it be met in order to find a direct effect. On the other hand, the Fifth[8] and Sixth[9] Circuits have explicitly renounced the "legally significant acts" test altogether.

Here, the Sixth Circuit incorrectly held that it did not have to reach the issue of whether the "legally significant acts" test or any of the other well reasoned grounds contained in the opinions from other Circuits, was the proper test. However, although Petitioners concedes that there were no legally significant acts which occurred in the United States, the Sixth Circuit was absolutely wrong in determining that there was not a direct effect in the United States as explained in Part I above. Accordingly, a decision overturning the Sixth Circuit's opinion below would provide this Court with an opportunity to clarify the decision in *Weltover* and

4. *Filetech SA v Fr. Telecom SA*, 157 F.3d 922 (2d Cir. 1998).

5. *Adler v. Fed. Republic of Nig.*, 107 F.3d 720 (9th Cir. 1997).

6. *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993).

7. *United World Trade v. Mangyshlakneft Oil Prod. Ass'n.*, 33 F.3d 1232 (10th Cir. 1994).

8. *Voest-Alpine Trading USA Corp. v Bank of China*, 142 F.3d 887 (5th Cir. 1998).

9. *Keller v Cent. Bank of Nig.*, 277 F.3d 811 (6th Cir. 2002).

provide a uniform test for determining whether a direct effect is present among all of the Circuits of the United States Court of Appeals.

CONCLUSION

For all the foregoing reasons, Petitioners, American Telecom Company, LLC and American Telecom Group-USA, LLC, respectfully request that this Honorable Court grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

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November 27, 2007