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Press Statement Of Commissioner Harold Furchtgott-Roth On The Commission's Reciprocal Compensation Order

I dissent from the Commission's reciprocal compensation order. Today, the Commission rules, once again, that section 251(b)(5) of the Act does not apply to ISP-bound traffic. The Commission makes this ruling in response to the decision of the Court of Appeals, which vacated the Commission's first attempt to address reciprocal compensation for ISP-bound traffic. The court concluded that the Commission's first order failed to explain adequately why ISP-bound traffic should be considered "long-distance" rather than "local," which the Commission had ruled was the relevant question for determining when to apply section 251(b)(5). Today, in a set of convoluted arguments that sidestep the court's objections to its previous order, the Commission concludes that section 251(b)(5) is not limited to local traffic as it had previously maintained, but instead applies to all "telecommunications" traffic except the categories specifically carved out in section 251(g). The Commission concludes that ISP-bound traffic falls within one of these categories – "information access" – and is therefore exempt from section 251(b)(5). Thus, the Commission rules, such traffic is subject only to the Commission's general powers under section 201(b).

This results-driven decision requires a complete reversal of the Commission's recent decision in the *Advanced Services Remand Order*.¹ In that decision, the Commission rejected an argument virtually identical to the one it now embraces. Specifically, the Commission found meritless the argument that "information access" is a distinct statutory category exempt from section 251's requirements under section 251(g). In my view, the Commission's new reading of section 251(g) stretches the meaning of that provision past the breaking point. Among other things, section 251(g) does not even mention "exclusion," "section 251(b)(5)," or "reciprocal compensation."

The Commission adopts this tortured analysis solely to enact a plan of nationwide price regulation. Only by holding that section 201(b) applies to this traffic rather than section 251(b)(5) could the Commission avoid specific limitations of the 1996 Act, which mandate that reciprocal compensation arrangements be made by contracts between carriers, under the oversight of State utility commissions. In evading these carefully drafted limitations, the Commission shows little respect for States, their lawmakers, their regulators, federal law, or the Congress that enacted the 1996 Act.

The result of the Commission's order will be another round of litigation, and, in all likelihood, this issue will be back at the agency in another couple of years. In the meantime, the uncertainty that has clouded the issue of compensation for ISP-bound traffic for the last five years will continue.

¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd 385 [¶¶ 46-49] (1999) ("*Advanced Services Remand Order*").