IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Core Communications, Inc.,	)	
	)	No. 07-1446
Petitioner	)	
	)	
	)	

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO PETITION FOR A WRIT OF MANDAMUS

In accordance with the Court's order of November 27, 2007, the Federal Communications Commission respectfully files this opposition to the petition of Core Communications, Inc. for a writ of mandamus. Core asks the Court to compel the Commission to "adopt an order within 60 days" that "establishes its statutory authority to regulate 'reciprocal compensation' among telecommunications carriers for traffic bound for Internet Service Providers ('ISPs')." Pet. 2. Alternatively, in the absence of such a decision, Core requests that the Court vacate the Commission's interim rules governing compensation for ISP-bound traffic. *Ibid.*

Core has failed to show that it is entitled to mandamus relief. As the Commission previously informed the Court, the agency is conducting a rulemaking proceeding in which it is considering comprehensive, industry-wide reforms to the system of intercarrier compensation. The Commission has stated that this broad rulemaking will, among other things, address the issues raised by this Court's remand in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003). That still active

proceeding has not been subject to any unreasonable delay. The Court should therefore deny Core's petition for a writ of mandamus.

If the Court does not deny Core's petition outright, it should defer consideration of it until it resolves Core's petition for review in No. 07-1381. In that case, Core is challenging the Commission's denial of its petition for forbearance from enforcement of certain intercarrier compensation rules. Core has told the Court that it intends to argue that its forbearance petition was "deemed granted" in its entirety by operation of law and, as a consequence, the interim regulations at issue in this case are no longer in effect. Thus, Core in its mandamus petition is asking the Court to order the Commission to explain its statutory authority for regulations that Core contends are no longer in effect, and, in the alternative, to vacate regulations that Core claims are no longer operative. Although we believe Core's arguments in the forbearance case lack merit and should be rejected, if Core were to prevail in No. 07-1381 on that theory, its present claim for mandamus relief would likely become moot. As a result, Core's mandamus petition is asking the Court to put the cart before the horse. The Court should decline such an invitation and instead should not adjudicate the merits of Core's mandamus petition until it determines whether Core, in light of its anticipated argument in No. 07-1381, has any grounds for pursuing a mandamus remedy.

BACKGROUND

Regulatory Treatment of Dial-Up Calls to ISPs. "Before high-speed broadband connections (such as cable modem and digital subscriber line (DSL) service) became widely available, consumers generally gained access to the Internet through 'dial-up' connections provided by local telephone companies." *In re Core Communications, Inc.*, 455 F.3d 267, 270 (D.C. Cir. 2006). In a typical dial-up arrangement, the incumbent local exchange carrier (ILEC) serving the Internet user hands off the call to the competitive local exchange carrier (CLEC) serving the ISP. *Ibid.* After receiving the call from the CLEC, the ISP then connects the user to web sites and other distant locations on the Internet.

Soon after the passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), disputes began to arise between ILECs and CLECs as to how CLECs should be compensated for completing ISP-bound calls. Some CLECs argued that such calls were governed by 47 U.S.C. § 251(b)(5), which requires local exchange carriers (LECs) "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Under reciprocal compensation, "ILECs would be required to compensate CLECs for completing their customers' calls to ISPs." *In re Core Communications*, 455 F.3d at 270. And because ISPs receive large volumes of calls from dial-up Internet users, but tend not to make outgoing calls to end users, "traffic to ISPs flows one way"—from ILEC to CLEC—"as does money in a reciprocal compensation

regime."[1] Thus, neither traffic nor money was "reciprocal"; to the extent that § 251(b)(5) applied in these circumstances, ILECs would be required to pay huge sums of money to CLECs—such as Core—that target ISPs as customers as a business model.

In 1999, the Commission issued a declaratory ruling concluding that § 251(b)(5) did not apply to ISP-bound traffic.[2] The Commission explained that, in its 1996 *Local Competition Order*, it had determined that the reciprocal compensation regime applied only to "local" (*i.e.*, not long distance) traffic.[3] In the *Declaratory Ruling*, the Commission determined that, with respect to ISP-bound traffic, the ultimate destination was not the local ISP, but distant locations on the Internet. 14 FCC Rcd at 3697 ¶ 12. Because those communications often crossed state lines, the FCC concluded that such traffic was not governed by § 251(b)(5), but instead was subject to the Commission's traditional regulatory authority over interstate (and international) communications. *Id.* at 3701 ¶ 18. Nonetheless, the

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[1] *Id.* at 278 (bracket removed) (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, 9162 ¶ 21 (2001) (*ISP Remand Order*), *remanded*, *WorldCom*, 288 F.3d 429).

[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689 (1999) (*Declaratory Ruling*), *vacated*, *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

[3] *Id.* at 3693 ¶ 7 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013 ¶¶ 1033-34 (1996) (*Local Competition Order*) (subsequent history omitted)).

Commission permitted LECs to negotiate (and state commissions in arbitration proceedings to impose) reciprocal compensation arrangements to cover ISP-bound traffic pending adoption of a federal rule to regulate compensation for such traffic. *Id.* at 3703-05 ¶¶ 24-25.

This Court vacated and remanded the *Declaratory Ruling* in *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). Although the Court accepted the Commission's determination that ISP-bound traffic was interstate in nature, it concluded that the Commission had not adequately explained the relationship between that jurisdictional determination and the issue of whether ISP-bound traffic was "local" for purposes of § 251(b)(5). 206 F.3d at 5.

In the *ISP Remand Order*, the Commission reaffirmed its conclusion that § 251(b)(5) did not apply to ISP-bound calls, although it did not rest its conclusion on a dichotomy between local and long distance traffic. 16 FCC Rcd at 9166-67 ¶ 34. Instead, the Commission read 47 U.S.C. § 251(g) to limit the reach of § 251(b)(5). Section 251(g) requires LECs, after enactment of the 1996 Act, to continue to provide "exchange access, information access, and exchange services for such access to interexchange carriers and information service providers" in accordance with the same restrictions and obligations "(including receipt of compensation) that appl[ied] to such carrier[s] on the date immediately preceding the date of enactment . . . until such restrictions and obligations are explicitly superseded by [Commission] regulations." The Commission explained that

this provision " 'carve[d] out' from § 251(b)(5) calls made to [ISPs] located within the caller's local calling area." *WorldCom*, 288 F.3d at 430; *see ISP Remand Order*, 16 FCC Rcd at 9171 ¶ 44.

The Commission also explained that applying reciprocal compensation to high-volume, one-way Internet-bound traffic resulted in competitive distortions, in which local ratepayers were effectively subsidizing CLECs that were targeting ISPs as customers in order to obtain reciprocal compensation from ILECs. *See ISP Remand Order*, 16 FCC Rcd 9162 ¶ 21, 9181-83 ¶¶ 67-71. Indeed, the Commission cited record evidence suggesting that "CLECs target ISPs in large part" to obtain "the reciprocal compensation windfall" and that, for some, "this revenue stream provided an inducement to fraudulent schemes to generate dial-up minutes." *Id.* at 9183 ¶ 70.

To ameliorate these problems pending more comprehensive reforms, the Commission adopted an interim federal regime governing compensation for ISP-bound traffic. *See ISP Remand Order*, 16 FCC Rcd at 9186 ¶ 77. The interim rules included: (1) rate caps on the payments that CLECs could receive for ISP-bound traffic (*id.* at 9187 ¶ 78); (2) a "mirroring rule" that required ILECs that sought to take advantage of the rate caps to agree to exchange all traffic at those rates (*id.* at 9193 ¶ 89);[4] (3) growth caps on the

[4] The mirroring rule benefits CLECs because it "imposes equivalent caps on the rates that an ILEC may charge." *In re Core Communications*, 455 F.3d at 279.

amount of new ISP-bound traffic for which CLECs could receive compensation each year (*id.* at 9191 ¶ 86); and (4) a "new markets" rule that required CLECs serving ISP customers in new markets to adopt a "bill and keep" arrangement under which LECs do not compensate each other directly but instead recover their costs from their customers (*id.* at 9188 ¶ 81).

In *WorldCom*, this Court remanded the *ISP Remand Order* because it concluded that the Commission could not rely on § 251(g) to exclude ISP-bound traffic from the scope of § 251(b)(5). 288 F.3d at 430. The Court expressly "ma[de] no further determinations" in that case. *Id.* at 434. The Court also expressly declined to address a number of specific questions left open in *Bell Atlantic*, including "the scope of the 'telecommunications' covered by § 251(b)(5)" and "whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5)." *WorldCom*, 288 F.3d at 434. The Court emphasized that "these are only samples of the issues we do not decide, which are in fact all issues other than whether § 251(g) provided the authority claimed by the Commission for not applying § 251(b)(5)." *Ibid.* Finding that "there is plainly a non-trivial likelihood that the Commission has authority to elect . . . [the bill-and-keep] system" reflected, in part, in the Commission's interim cost recovery regime, the Court declined to vacate the *ISP Remand Order* and instead "simply remand[ed] the case to the Commission for further proceedings." *Id.* (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm.*, 988 F.2d 146, 150-151 (D.C. Cir. 1993)). The following year, the Supreme Court rejected

Core's request that it review this Court's decision not to vacate the *ISP Remand Order*. 538 U.S. 1012.

As mentioned, the *ISP Remand Order* adopted a set of interim rules—rate caps, the mirroring rule, growth caps, and the new markets rule—that regulate compensation for ISP-bound traffic. Currently, only the rate caps and the related mirroring rule remain in force. In 2004, the Commission granted Core's request that it forbear from enforcing the growth caps and the new markets rule.[5] The Commission explained that "[r]ecent industry statistics" showed that "the number of end users using conventional dial-up to connect to ISPs is declining as the number of end users using broadband services to access ISPs grows." 19 FCC Rcd at 20186 ¶ 20; *see also id.* at ¶ 21. That trend, the Commission determined, mitigated its concern that growth caps and the new markets rule were necessary "to prevent continued expansion of the arbitrage opportunity presented by ISP-bound traffic." *Id.* at 20186 ¶ 20. At the same time, the Commission denied Core's request that it forbear from enforcing the rate caps and the mirroring rule. The Commission explained that "Core [had] not challenge[d] the Commission's conclusion that rate caps help avoid arbitrage and market distortions that otherwise would result from the availability of reciprocal compensation for ISP-bound traffic." *Id.* at 20186 ¶ 18. This Court affirmed the

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[5] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179 (2004) (*2004 Core Forbearance Order*), *aff'd*, *In re Core Communications*, 455 F.3d 267.

Commission's forbearance order in all respects. *In re Core Communications*, 455 F.3d 267.

Comprehensive Intercarrier Compensation Reform. In the *ISP Remand Order*, the Commission observed that the "market distortions" produced by ISP-bound traffic "may result from any intercarrier compensation regime that allows a service provider to recover some of its costs from other carriers rather than from its end-users." *ISP Remand Order*, 16 FCC Rcd at 9153 ¶ 2. Accordingly, on the same day the Commission released the *ISP Remand Order*, it initiated a rulemaking to conduct a "fundamental re-examination of all currently regulated forms of intercarrier compensation" in order to "test the concept of a unified regime for the flows of payments among telecommunications carriers." *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9611 ¶ 1 (2001) ("*Intercarrier Compensation NPRM*"). The Commission sought comment "on the feasibility of a bill-and-keep approach for such a unified regime," as well as "alternative comment on modifications to existing intercarrier compensation regimes." *Ibid.* The Commission expressed its intent "to move forward from . . . transitional intercarrier compensation regimes"—such as the interim rules adopted in the *ISP Remand Order*—"to a more permanent regime." *Ibid.*

The *Intercarrier Compensation NPRM* generated a great deal of industry interest and activity. According to the Commission's docket report for that proceeding, the Commission received more than 150 formal

comments and 100 reply comments, as well as approximately 750 informal or *ex parte* filings, in response to the *NPRM*.

Among these voluminous filings, the Commission in mid-to-late 2004 received nine different proposals or governing principles for comprehensive reforms from the Intercarrier Compensation Forum; Expanded Portland Group; Alliance for Rational Intercarrier Compensation; Cost-Based Intercarrier Compensation Coalition; Home Telephone Company and PBT Telecom; Western Wireless; National Association of State Utility Consumer Advocates; National Association of Regulatory Utility Commissioners (NARUC); and CTIA–The Wireless Association. In response to these proposals and other "extensive comment[s]" filed by various parties, the Commission in March 2005 released a *Further Notice of Proposed Rulemaking* in the *Intercarrier Compensation* proceeding. *See Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, 4686 ¶ 2 (2005) ("*Intercarrier Compensation FNPRM*"); *see also id.* at 4687 ¶ 4; 4705-15 ¶¶ 40-59 (describing industry proposals). The Commission explained that the record compiled to date had "confirm[ed] the need to replace the existing patchwork of intercarrier compensation rules with a unified approach" and that "the current rules make distinctions based on artificial regulatory classifications that cannot be sustained in today's telecommunications marketplace." *Id.* at 4687 ¶ 3. In particular, those rules "create both opportunities for regulatory arbitrage and incentives for inefficient investment and deployment decisions," resulting in "distortions in

the marketplace at the expense of healthy competition." *Ibid.* The Commission "confirm[ed] the urgent need to reform the current intercarrier compensation rules" to mitigate these competitive problems. *Ibid.*

As with the initial notice, the *Intercarrier Compensation FNPRM* generated significant interest and debate within the industry. According to the Commission's docket report, the agency has received more than 1000 separate filings since it released the *Intercarrier Compensation FNPRM* in 2005. Those filings include not only comments and reply comments filed in response to the *FNPRM*, but also responses to three additional requests for comment that the agency issued in 2006 and 2007 relating to various aspects of another comprehensive reform proposal, known as the "Missoula Plan," submitted by the NARUC Task Force on Intercarrier Compensation.[6] The last of these formal comment cycles closed in April 2007.[7]

Core's 2004 Mandamus Petition. In June 2004, Core filed a mandamus petition with this Court seeking (as it does now) an order directing the Commission to respond to the *WorldCom* remand or,

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[6] *Comments Sought on Missoula Intercarrier Compensation Reform Plan*, 21 FCC Rcd 8524 (2006); *Comment Sought on Missoula Plan Phantom Traffic Interim Process and Call Detail Records Proposal*, 21 FCC Rcd 13179 (2006); *Comment Sought on Amendments to the Missoula Plan Intercarrier Compensation Proposal to Incorporate a Federal Benchmark Mechanism*, 22 FCC Rcd 3362 (2007).

[7] *Pleading Cycle Extended for Comment on Amendments to the Missoula Plan Intercarrier Compensation Proposal to Incorporate a Federal Benchmark Mechanism*, 22 FCC Rcd 5098 (2007).

alternatively, vacating the interim rules adopted in the *ISP Remand Order*.[8] After the Commission responded that agency staff had provided then-FCC Chairman Powell with a draft order addressing the *WorldCom* remand,[9] and that the Commission had granted Core relief from growth caps and the new markets rule in the *2004 Core Forbearance Order*,[10] this Court issued an order deferring consideration of Core's mandamus petition and requiring the Commission to submit periodic status reports. Order, *In re Core Communications, Inc.*, No. 04-1179, filed Nov. 22, 2004.

As noted above, in the latter half of 2004, while the case involving Core's 2004 mandamus petition was pending before this Court, the Commission received numerous industry proposals for comprehensive intercarrier compensation reform. In view of these various competing proposals, the Commission did not adopt the staff's draft order referenced above, which was focused only on the narrow issue of ISP-bound traffic, but instead adopted the *Intercarrier Compensation FNPRM*. In status reports, the Commission informed the Court of its "intent to use that [*Intercarrier Compensation*] proceeding as the vehicle to replace the interim

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[8] Petition for a Writ of Mandamus to the Federal Communications Commission, *In re Core Communications, Inc.*, No. 04-1179 (D.C. Cir.), filed June 10, 2004 (Core Pet., Exh. A).

[9] Response of the Federal Communications Commission to Petition for Writ of Mandamus, *In re Core Communications, Inc.*, No. 04-1179 (D.C. Cir.), filed June 10, 2004 (Core Pet. Exh. B).

[10] Letter from Laurence N. Bourne, Counsel, FCC, to Mark J. Langer, Clerk, D.C. Circuit, No. 04-1179, filed Oct. 12, 2004.

compensation rules for ISP-bound traffic that this Court addressed in *WorldCom*."[11] In response, Core filed a "supplemental" petition in which it argued that the agency's decision to proceed by *FNPRM* rather than address ISP-bound traffic in a discrete order supported its claim for a writ of mandamus.[12] The Court rejected that argument and, in an unpublished order, denied Core's mandamus petition without prejudice. Order, *In re Core Communications, Inc.*, No. 04-1179, filed May 24, 2005.

Core's 2006 Forbearance Petition. In April 2006, two months before this Court issued its *In re Core Communications* opinion affirming the *2004 Core Forbearance Order*, Core filed another forbearance petition in which it asked the Commission to forbear from enforcing 47 U.S.C. § 251(g) (as well as 47 U.S.C. § 254(g)) and related implementing rules.[13] Petition for Forbearance of Core Communications, Inc., WC Docket No. 06-100, filed Apr. 27, 2006. Core argued that, if its forbearance petition were granted, the reciprocal compensation regime would automatically govern

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[11] *See* Status Report, *In re Core Communications, Inc.*, No. 04-1179, filed Feb. 22, 2005, at 3; *see also* Supplemental Status Report, *In re Core Communications, Inc.*, No. 04-1179, filed Mar. 4, 2005; Status Report, *In re Core Communications, Inc.*, No. 04-1179, filed May 23, 2005.

[12] Supplemental Petition for a Writ of Mandamus to Enforce the Mandate of this Court, *In re Core Communications, Inc.*, No. 04-1179, filed Mar. 2, 2005.

[13] As explained above, § 251(g) preserves certain pre-1996 obligations on LECs until the Commission adopts regulations superseding those obligations. Section 254(g), in effect, prohibits long distance carriers from charging customers who live in rural areas or high-cost states rates that are higher than those charged to customers in urban areas or low-cost states.

intercarrier compensation arrangements for all types of telecommunications traffic. *Id.* at 18. The Commission denied Core's forbearance petition in July 2007.[14]

On September 20, 2007, Core filed a petition for review of the *2007 Core Forbearance Order* in this Court. *Core Communications, Inc. v. FCC*, No. 07-1381 (D.C. Cir.). Among other things, Core intends to argue that, notwithstanding the Commission's order denying its forbearance petition, the petition had been "deemed granted" because, in Core's view, the agency failed to meet the statutory deadline set forth in 47 U.S.C. § 160(c). Statement of Issues to be Raised, No. 07-1381, filed Oct. 26, 2007. Core will also presumably argue that even if its petition was not deemed granted, the Commission erred by denying it. The Court has not yet established a briefing schedule in that case.

ARGUMENT

I. CORE HAS FAILED TO SHOW THAT A WRIT OF MANDAMUS IS WARRANTED

"Mandamus is a 'drastic' remedy, 'to be invoked only in extraordinary situations.'" *In re Papandreou*, 139 F.3d 247, 250 (D.C. Cir. 1998) (quoting *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976)); *accord Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Recognizing that the grant of mandamus "contributes to piecemeal appellate

[14] *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, 22 FCC Rcd 14118 (2007) (*2007 Core Forbearance Order*).

litigation," *Allied Chem. Corp.*, 449 U.S. at 35, courts require the petitioner, at a minimum, to show that its right to the writ is "clear and indisputable," *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (internal quotation marks omitted), and that " 'no other adequate means to attain the relief' exist," *In re Papandreou*, 139 F.3d at 250 (quoting *Allied Chem. Corp.*, 449 U.S. at 35. Even when that stringent showing has been made, "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr*, 426 U.S. at 403.

The Commission is "entitled to considerable deference in establishing a timetable for completing its proceedings." *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987). Accordingly, in the case of mandamus petitions predicated upon allegations of unreasonable administrative delay, "a finding that delay is unreasonable does not, alone, justify judicial intervention." *In re Barr Labs.*, 930 F.2d 72, 75 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991); *accord Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001); *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999). Rather, a court will intervene only where "the agency's delay is so egregious as to warrant mandamus." *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) (*TRAC*). In *TRAC*, the Court set forth a list of considerations for evaluating whether that high bar has been cleared:

(1) the time agencies take to make decisions must be governed by a rule of reason;

(2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
(3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
(4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
(5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
(6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

750 F.2d at 80 (citations and internal quotation marks omitted). Considering all of the relevant factors, Core has failed to show that this case is "one of the exceptionally rare cases," *In re Barr Labs.*, 930 F.2d at 76, that warrants a judicial decree directing agency action.

1. Core's mandamus petition largely rests on the first *TRAC* factor. It suggests that any delay over three years is "objectively egregious" so as to warrant mandamus. Pet. 20. That argument conflicts with this Court's precedent. "Resolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003). Accordingly, the issue of unreasonable delay "cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part . . . upon the

complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Id.* at 1102. Consistent with this view, this Court has refused to issue writs of mandamus even when the complained-of delay was "objectively" longer than the period at issue here. *See Her Majesty the Queen of Right of Ontario v. EPA*, 912 F.2d 1525, 1534 (D.C. Cir. 1990) (nine-year delay not unreasonable in light of the "complexity of the factors facing the agency"); *Harvey Radio Labs., Inc. v. United States*, 289 F.2d 458 (D.C. Cir. 1961) (10-year delay held not so egregious to require mandamus); *cf. In re United Steelworkers of Am.*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (declining to conclude that a possible seven-year delay in completing rulemaking was unreasonable notwithstanding the "seriousness of the health risks" created by the absence of regulation).

As the agency informed the Court in Core's 2004 mandamus litigation, the Commission is of the view that intercarrier compensation reform is best implemented in the context of a comprehensive rulemaking proceeding, rather than on a piecemeal basis. That policy decision is entitled to substantial deference. *See, e.g., Action on Smoking & Health v. Department of Labor*, 100 F.3d 991, 994 (D.C. Cir. 1996). In *Action on Smoking and Health,* for example, a public interest organization petitioned for mandamus compelling the Occupational Safety and Health Administration (OSHA) to issue a final rule regulating second-hand smoke in the workplace. This Court denied the petition, reasoning that OSHA had

decided to address the issue in "one massive rulemaking" that covered "not only tobacco smoke but many other indoor air quality contaminants." *Id.* at 995. The Court explained that OSHA had "already given good, logical reasons for dealing broadly with the subject of indoor air pollutants," and thus the petitioner's "point raises a policy question for the agency, not the courts." *Ibid.*

The Commission likewise has reasonably explained its policy reasons for addressing intercarrier compensation in a comprehensive manner, as opposed to taking up individual compensation mechanisms—such as reciprocal compensation under § 251(b)(5)—in isolation.[15] The Commission explained that it is "particularly interested in identifying a unified approach to intercarrier compensation" in light of "increasing competition and new technologies, such as the Internet and Internet-based services," which affect the entire industry. *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9612 ¶ 2. Similarly, in the *Intercarrier Compensation FNPRM*, the Commission reiterated that the "record [in the

[15] Citing a 2007 Commission adjudicatory order (Pet. 16), Core suggests that the Commission is willing to address intercarrier compensation issues outside the context of the *Intercarrier Compensation* rulemaking proceeding. The order in question, however, addressed a complaint filed under 47 U.S.C. § 208, which imposes a statutory duty on the Commission to investigate and resolve such complaints. *See American Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 731-732 (D.C. Cir. 1992), *cert. denied*, 509 U.S. 913 (1993). In any event, the mere fact that there may be discrete intercarrier compensation issues that the Commission can resolve prior to implementing broader reforms does not diminish the deference to which the Commission is entitled in managing the conduct of its proceedings.

proceeding] confirms the need to replace the existing patchwork of intercarrier compensation rules with a unified approach." 20 FCC Rcd at 4687 ¶ 3. That is partly because, as the Commission has explained, the problems exemplified by ISP-bound traffic—regulatory arbitrage and distorted economic incentives—"may result from any intercarrier compensation regime that allows a service provider to recover some of its costs from other carriers rather than from its end-users." *ISP Remand Order*, 16 FCC Rcd at 9153 ¶ 2; *accord FNPRM*, 20 FCC Rcd at 4687 ¶ 3 (stating that current regulatory distinctions "create both opportunities for regulatory arbitrage and incentives for inefficient investment and deployment decisions"). These are "good, logical reasons for dealing broadly with the subject" of intercarrier compensation in a consolidated proceeding. *Action on Smoking and Health*, 100 F.3d at 995.

Indeed, recent market developments have confirmed the reasonableness of the Commission's approach toward compensation reform. Increasingly, end users are *not* using dial-up connections to connect to the Internet, but, rather, cable modem, DSL, and other broadband platforms. These broadband services, which involve only one provider and therefore do not trigger reciprocal compensation obligations, have led to a significant decline in demand for dial-up ISP services since 2001. In fact, by 2004, the Commission found that there had been such a decline in "the usage of dial-up ISP services" that it granted Core's request that the agency forbear from

enforcing the interim growth caps and new markets rules.[16] In affirming the Commission's decision, this Court noted that the record before the Commission showed "a ten-fold increase in high-speed access lines between 1999 and 2003" and "forecasted a decline in the percentage of on-line subscribers using dial-up from 76% in 2002 to 25% in 2008." *In re Core Communications*, 455 F.3d at 280.

More recent data reinforces the nation's growing reliance on broadband technologies for Internet access. In 2006, high-speed lines in service increased by 61%, from 51,218,145 lines at the end of 2005 to 82,547,651 lines at the end of 2006.[17] By way of contrast, there were fewer than 2.5 million high-speed lines in service in 1999 when the Commission issued the *Declaratory Ruling* and fewer than 12.4 million high-speed lines when it released the *ISP Remand Order* in 2001.[18]

In light of the diminishing importance of dial-up ISP traffic and the interrelated policy issues presented by all forms of intercarrier compensation, "it makes sense to treat them together" in a comprehensive manner, rather than in a piecemeal fashion. *Action on Smoking and Health*, 100 F.3d at 995. Although Core complains (Pet. 16) that the Commission

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[16] *2004 Core Forbearance Order*, 19 FCC Rcd at 20186 ¶ 20 & n.56.

[17] *High-Speed Services for Internet Access: Status as of December 31, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau (Oct. 2007), at 1 & Table 1, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-277784A1.pdf.

[18] *Id.* at Table 1.

has not yet adopted an "omnibus ruling on intercarrier compensation," that proceeding remains extremely active, with the Commission issuing three requests for further comment (one of them earlier this year), and with parties submitting well over 1000 separate filings, since adoption of the *Intercarrier Compensation FNPRM*. And Core itself recognizes that "a unified intercarrier compensation regime is indeed an ideal solution" to the questions it raises here. Pet. 15. Given the complexities associated with reforming compensation mechanisms spanning the whole of the telecommunications industry—as Core itself admits, it is just one of a "multitude of voices advocating its views" on compensation reform (Pet. 15)—"it is to be expected that consideration of such matters will take longer than might rulings on more routine items." *In re Monroe Communications*, 840 F.2d 942, 946 (D.C. Cir. 1988); *see also Cutler*, 818 F.2d at 898 ("complexity of the task confronting the agency" is relevant to ascertaining reasonableness of delay).

2. Core attempts to invoke the second *TRAC* factor, which states that "where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason." *TRAC*, 750 F.2d at 80. Core argues (Pet. 22) that the Commission has "directly contravene[d]" 47 U.S.C. § 251(d)(1), which require[d] the Commission to "complete all actions necessary to establish regulations to implement the requirements of this section" within "6 months after February 8, 1996," the

date on which the 1996 Act was enacted. That argument is frivolous. The Commission complied with § 251(d)(1) when it issued the *Local Competition Order* on August 8, 1996. *See* 11 FCC Rcd 15499. Nothing in § 251(d)(1) suggests that the deadline it establishes has any continuing force beyond that date.

In the absence of a congressional timetable, this case is governed by the general principle that an agency has "broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing." *Cutler*, 818 F.2d at 896. That principle, applicable to all agencies, should apply with even greater force to the Commission because of the unique impact of the forbearance provision in 47 U.S.C. § 160. That provision permits telecommunications carriers to petition the Commission for regulatory forbearance and sets a deadline of one year (which the agency can extend by an additional 90 days) for Commission action on the petition, after which, if the agency has not acted, the petition is "deemed granted." 47 U.S.C. § 160(c); *see also Sprint Nextel v. FCC*, No. 06-1111, 2007 WL 4270579 (D.C. Cir. Dec. 7, 2007). The forbearance provision represents Congress's view as to how the agency should "prioritize in the face of limited resources" when it comes to regulatory decisions involving telecommunications carriers. *Cutler*, 818 F.2d at 898. In fact, given the "deemed grant" remedy Congress included in the forbearance statute, the Commission must continually adjust its agenda and shift its priorities whenever a carrier elects to file a forbearance petition.

The Commission's forbearance docket has been particularly active in the period since June 2004, the date Core filed its 2004 mandamus petition with this Court. Since that time, the Commission has issued 17 forbearance orders,[19] and its staff has had to undertake the process of evaluating the merits of 18 other forbearance petitions that were later withdrawn before the statutory deadline. In fact, Core itself is a repeat forbearance petitioner, having twice endeavored to use the forbearance remedy to press its views on intercarrier compensation. The Commission's focus on forbearance petitions filed by Core and other carriers (along with other pressing matters that have demanded the agency's attention) shows that the Commission has not

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[19] *Verizon Telephone Companies*, WC Docket No. 06-172, FCC 07-212 (rel. Dec. 5, 2007) (available at 2007 WL 4270630); *Embarq Local Operating Cos. et al.*, WC Docket No. 06-147, FCC 07-184 (rel. Oct. 24, 2007) (available at 2007 WL 3119515); *AT&T, Inc. et al.*, 22 FCC Rcd 18705 (2007); *Applications for License and Authority to Operate in the 2155-2175 MHz Band*, 22 FCC Rcd 16563 (2007), *pet. for review filed*, *M2Z Networks, Inc. v. FCC*, No. 07-1360 (D.C. Cir.); *AT&T, Inc.*, 22 FCC Rcd 16556 (2007); *ACS of Anchorage, Inc.*, 22 FCC Rcd 16304 (2007); *Iowa Telecom*, 22 FCC Rcd 15801 (2007); *Core Communications*, 22 FCC Rcd 14118, *pet. for review filed*, *Core Communications, Inc. v. FCC*, No. 07-1381 (D.C. Cir.); *Qwest Communications Int'l, Inc.*, 22 FCC Rcd 5207 (2007); *ACS of Anchorage, Inc.*, 22 FCC Rcd 1958 (2007); *Fones4All Corp.*, 21 FCC Rcd 11125 (2006), *pet. for review filed*, *Fones4All Corporation v. FCC*, No. 06-75388 (9th Cir.); *Qwest Corporation*, 20 FCC Rcd 19415 (2005), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007); *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 15095 (2005); *SBC Communications, Inc.*, 20 FCC Rcd 9361 (2005), *remanded*, *AT&T, Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006); *ACS Wireless, Inc.*, 20 FCC Rcd 3596 (2004); *Verizon Telephone Cos. et al.*, 19 FCC Rcd 21496 (2004), *aff'd*, *Earthlink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006); *Core Communications*, 19 FCC Rcd. 20179, *aff'd*, *In re Core Communications*, 455 F.3d 267.

engaged in unreasonable delay, but rather has reasonably used its "unique—and authoritative—position to view its projects as a whole [and] allocate its resources in the optimal way." *In re Barr Labs.*, 930 F.2d at 76.

3. The fourth and fifth *TRAC* factors direct the Court to consider "the effect of expediting delayed agency action on agency activities of a higher or competing priority" and the "nature and extent of the interests prejudiced by delay." 750 F.2d at 80.[20] In that regard, "the Commission is entitled to substantial deference 'when it acts to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated' including the objective of implementing large-scale revisions 'in a manner that would cause the least upheaval in the industry.' " *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002) (internal citation reference omitted) (citing *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984)).

The importance of maintaining the interim rate caps (and the related mirroring rule designed to protect CLECs from non-reciprocal ILEC charges) pending comprehensive intercarrier compensation reform has been well documented. In *In re Core Communications*, this Court upheld as reasonable the Commission's conclusion that "rate caps are necessary to prevent the subsidization of dial-up Internet access consumers by consumers

[20] Because compensation for ISP-bound traffic involves purely economic regulation, Core correctly does not claim any support from the third *TRAC* factor. Nor does Core claim (much less demonstrate) any agency impropriety under the sixth *TRAC* factor.

of basic telephone service." 455 F.3d at 278. They also help deter "inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition" and limit CLECs' ability to "pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels." *Id.* at 279 (quoting *ISP Remand Order*, 16 FCC Rcd at 9162 ¶ 21); *see also WorldCom*, 288 F.3d at 431 ("Because ISPs typically generate large volumes of one-way traffic in their direction, the old system attracted LECs that entered the business simply to serve ISPs, making enough money from reciprocal compensation to pay their ISP customers for the privilege of completing the calls. The Commission saw this as leading, at least potentially, to ISPs' charging *their* customers below cost."). In fact, this Court cited the continued existence of rate caps as a basis for concluding that the Commission's decision to forbear from growth caps and the new markets rule was a reasonable exercise of the agency's forbearance authority. *In re Core Communications*, 455 F.3d at 282.

Moreover, there is no basis here for "interfer[ing] with the agency's internal processes." *In re United Mine Workers*, 190 F.3d at 553. Granting Core's mandamus petition could substantially disrupt the ongoing, industry-wide dialogue that is taking place within the context of the *Intercarrier Compensation* rulemaking. Significantly, that dialog covers the full range of issues implicated by compensation reform—not just the narrow issue of how ever-diminishing ISP-bound traffic should be regulated.

Core alleges that a Commission ruling on ISP-bound traffic is necessary to "resolve the fractured, dysfunctional ISP-bound compensation rulings that presently plague the telecommunications industry." Pet. 24. But Core has failed to identify any difficulties entitling it to extraordinary relief. Core's only complaint is that state commissions in Maryland and Massachusetts have adopted different policies for so-called "VNXX" calls to ISPs, Pet. 25, but that is the outcome Core seeks: to return to the pre-*ISP Remand Order* days when "the right to reciprocal compensation was largely established and settled by the various state commissions," *ibid.*[21] Moreover, a writ of mandamus would not necessarily resolve any controversy concerning VNXX calls, *i.e.*, calls that appear to be to a local ISP but that are actually routed to an ISP in a different local calling area from the Internet user. *See Global NAPs, Inc. v. Verizon New England Inc.*, 444 F.3d 59, 64 (1st Cir. 2006). As this Court recognized in *WorldCom*, the *ISP Remand Order* addressed only those calls to ISPs "within the caller's local calling area." 288 F.3d at 430. VNXX-related issues, therefore, are not within the scope of the *WorldCom* remand.[22]

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[21] Although Core contends (Pet. 25) that Maryland regulates VNXX calls differently from Massachusetts, the only authority Core cites for Maryland's regulatory regime is *Verizon Md., Inc. v. Global NAPs, Inc.*, 377 F.3d 355 (4th Cir. 2004). *Verizon*, however, does not discuss VNXX and, in any event, dealt only with a state commission order that antedated the *ISP Remand Order*. *See id.* at 361, 367. That case, therefore, does not speak to the effect of the *ISP Remand Order* on state commissions or the industry.

[22] Because the *ISP Remand Order* did not purport to address VNXX calls, it is not surprising that the FCC's amicus brief in the First Circuit's *Global*

II. THE COURT SHOULD NOT ADDRESS THE MERITS OF CORE'S MANDAMUS PETITION BEFORE RESOLVING CORE'S ALTERNATIVE ARGUMENT IN NO. 07-1381 THAT THE INTERIM RULES ADOPTED IN THE *ISP REMAND ORDER* ARE NO LONGER IN EFFECT

As explained above, the Court should deny Core's mandamus petition because it has failed to demonstrate that the Commission has engaged in unreasonable delay, much less egregious delay warranting extraordinary relief. If the Court does not deny Core's mandamus petition outright, however, it should not resolve the merits of the petition until the Court issues its decision in No. 07-1381. In that case, Core intends to argue that the *2007 Core Forbearance Order*, which denied Core's request that the Commission forbear from 47 U.S.C. § 251(g), is invalid because its petition allegedly had been "deemed granted" by operation of law. Further, Core's position in that case appears to be that, as a result of the purported "deemed grant," compensation for all telecommunications traffic—including ISP-bound traffic—is now governed by § 251(b)(5)'s reciprocal compensation regime.

Core's anticipated argument in No. 07-1381 is fundamentally inconsistent with its request for mandamus relief. In effect, Core is

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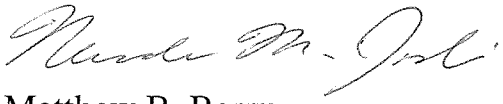
NAPs case did not put forth a definitive agency position on that question. *See* Core Pet. 26. And although Core portrays *Global NAPs* as an example of "confusion" in the industry, *id.* at 25, the First Circuit had no difficulty recognizing that the *ISP Remand Order* did not address the regulatory treatment of VNXX calls—a position that the court noted was consistent with the Commission's amicus brief in that case. *See* 444 F.3d at 74.

simultaneously arguing to this Court that (1) the interim rules adopted in the *ISP Remand Order* no longer remain in force because Core's forbearance petition was "deemed granted" by operation of law and (2) a writ of mandamus is necessary because those very same interim rules "have become *de facto* permanent rules," Pet. 28. Core cannot have it both ways. Although we believe Core's argument in No. 07-1381 lacks merit and should be rejected, it is nonetheless the case that, if the Court agrees with Core in No. 07-1381 that the interim compensation rules are no longer in effect, the mandamus petition in this case would likely become moot. In these circumstances, the Court should first resolve Core's argument in No. 07-1381, a case brought under statutory review procedures, before adjudicating Core's request for extraordinary relief. *See*, *e.g.*, *In re Papandreou*, 139 F.3d at 250 (mandamus available only if "no other adequate means to attain the relief exist") (internal quotation marks omitted); *see also Power v. Barnhart*, 292 F.3d 781, 787 (D.C. Cir. 2002) (holding that, where there are "alternative means of vindicating a statutory right, a plaintiff's preference for one over another is insufficient to warrant a grant of the extraordinary writ").

CONCLUSION

For the foregoing reasons, the Court should deny Core's request for mandamus relief. In the alternative, the Court should defer consideration of Core's mandamus petition until the Court issues its decision in No. 07-1381.

Respectfully submitted,



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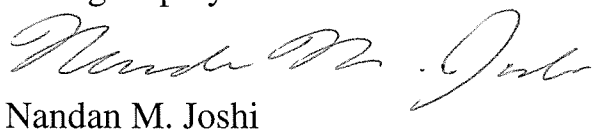

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