BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

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

NOS. 08-1365, *ET AL.*

CORE COMMUNICATIONS, INC., *ET AL.*,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE
UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL
COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

1. All parties that participated in the agency proceedings below are identified in Addendum A to the brief for petitioner Core Communications, Inc.

2. All parties, intervenors, and amici appearing in this Court are listed in the brief for petitioner Core Communications, Inc., and in the joint brief for petitioners Public Service Commission of the State of New York and National Association of Regulatory Utility Commissioners.

B. Rulings Under Review

The rulings under review are:

-- *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151; *summarized at*, 66 Fed. Reg. 26800 (2001) ("*ISP Remand Order*") (J.A. 11), *remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

-- *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic* (CC Docket Nos. 96-98, 99-68 (among others)), FCC 08-262, __ FCC Rcd __ (released Nov. 5, 2008), *summarized at* 73 Fed. Reg. 72732 (Dec. 1, 2008) ("*Order*") (J.A. 515).

C. Related Cases

The *ISP Remand Order* was previously before this Court in *WorldCom, Inc. v. FCC*, 288 F.3d 429, which resulted in a remand to the agency. This Court issued a writ of mandamus directing the Commission to act on remand in *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008).

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* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

1996 Act	Telecommunications Act of 1996
APA	Administrative Procedure Act
Br.	Brief
CLEC	competitive local exchange carrier
Core	Core Communications, Inc.
DSL	digital subscriber line
FCC	Federal Communications Commission
ILEC	incumbent local exchange carrier
ISP	Internet Service Provider
J.A.	Joint Appendix
LEC	local exchange carrier

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STATEMENT OF ISSUES PRESENTED

In the *Order* on review, the Commission – as directed by a writ of mandamus that this Court issued in *In re Core Commc'ns, Inc.*, 531 F.3d 849 (D.C. Cir. 2008) – provided a revised explanation of the legal authority underlying intercarrier compensation rules for Internet-bound traffic that the Court had remanded without vacating in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir.

2002).[1] The Commission concluded that its authority over interstate communications under 47 U.S.C. § 201(b), which had been expressly preserved in 47 U.S.C. § 251(i), provided a basis for maintaining those rules pending more comprehensive reform. *Order* ¶¶ 6, 29 (J.A. 518, 529).

Petitioner Core Communications, Inc. ("Core"), as well as the Public Service Commission of the State of New York and the National Association of Regulatory Utility Commissioners (collectively, the "state petitioners"), challenge the Commission's decision. The case presents the following issues for the Court's review.

1. Whether 47 U.S.C. § 201(b), which grants the Commission broad power over interstate communications and which Congress explicitly preserved in 1996 in 47 U.S.C. § 251(i), authorizes the Commission to maintain its intercarrier compensation rules for interstate traffic that is delivered to Internet Service Providers ("ISPs") en route to destinations on the Internet.

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[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic* (CC Docket Nos. 96-98, 99-68 (among others)), FCC 08-262, __ FCC Rcd __ (released Nov. 5, 2008), *summarized at* 73 Fed. Reg. 72732 (Dec. 1, 2008) ("*Order*") (J.A. 515).

2. Whether the Commission's decision to maintain those rules pending more comprehensive reform was the product of reasoned decisionmaking.
3. Whether the Commission's decision complied with the Court's writ of mandamus in *In re Core Commc'ns.*

STATEMENT OF JURISDICTION

The *Order* on review, which was released on November 5, 2008, and summarized in the Federal Register on December 1, 2008, provides the legal justification for four interim intercarrier compensation rules that this Court previously remanded to the Commission in *WorldCom*. Each of the relevant Commission documents in the proceedings leading to the issuance of the *Order* was duly published in the Federal Register. *See Reciprocal Compensation, Inter-Carrier Compensation for ISP-Bound Traffic* (CC Docket Nos. 96-98 & 99-68), Notice, 65 Fed. Reg. 43331 (July 13, 2000) (J.A. 7); Order on Remand and Report and Order, *summarized at* 66 Fed. Reg. 26800 (May 15, 2001); *Order*, *summarized at* 73 Fed. Reg. 72732 (Dec. 1, 2008). The *Order* on review is an order issued "in notice and comment * * * rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. §§ 552, 553, to be published in the Federal Register," within the meaning of the Commission's timing rule. 47 C.F.R. § 1.4(b). Pursuant to that timing rule, the date from which the 60-day period for seeking judicial

review of the *Order* under 28 U.S.C. § 2344 ran from the December 1, 2008, date of "publication in the Federal Register." *Ibid.*

Petitioner Core timely filed its petition for review of the *Order* in consolidated Case No. 08-1393 on December 23, 2008, within the 60-day filing window prescribed by 28 U.S.C. § 2344.[2] State petitioners Public Service Commission of the State of New York (consolidated Case No. 09-1044) and the National Association of Regulatory Utility Commissioners (consolidated Case No. 09-1046) likewise timely filed their petitions for review of the *Order* on January 30, 2009, within the statutory 60-day time limit. This Court has jurisdiction to

[2] Core's November 21, 2008, petition for review in consolidated Case No. 08-1365 was premature because it was filed prior to Federal Register publication of the *Order*. However, Core corrected that jurisdictional defect with its December 23, 2008, filing. The Court should dismiss Core's premature petition filed in Case No. 08-1365 and assert jurisdiction over Core's petition in Case No. 08-1393.

consider these petitions for review of the *Order* under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344.[3]

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended in an addendum to this brief.

COUNTERSTATEMENT

I. INTERNET-BOUND COMMUNICATIONS

A. Introduction

The Internet is "'an international network of interconnected computers that enables millions of people to communicate with one another in "cyberspace" and to access vast amounts of information from around the world.'" *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 4 (D.C. Cir. 2000) (quoting *Reno v. ACLU*, 521 U.S. 844, 844 (1997)). Subscribers can gain access to the Internet either through "dial-up" or broadband (*e.g.*, cable modem or digital subscriber line ("DSL")) connections.

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[3] Core and the state petitioners also nominally seek direct review of the 2001 rulemaking order in which the Commission first adopted the intercarrier compensation rules that are the subject of the *Order*. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") (subsequent history omitted) (J.A. 11). The Court lacks jurisdiction to consider those direct challenges, since the 60-day period for filing petitions for review of the *ISP Remand Order* has long since passed. *See* 28 U.S.C. § 2344. This jurisdictional defect has no practical effect, however, since the petitions for review of the *ISP Remand Order* are superfluous. Petitioners' timely challenges to the 2008 *Order* provide the Court with jurisdiction to review the statutory underpinnings and substantive reasonableness of the Commission's pricing rules for ISP-bound traffic.

Under a typical dial-up arrangement, a customer of an Internet Service Provider, by programming his or her computer to dial a seven-digit number, uses the circuit-switched telephone network(s) of one or more local exchange carriers ("LECs") to reach an ISP. The ISP, in turn, combines "computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services" from distant websites. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic* (CC Docket Nos. 96-98 & 99-68), Declaratory Ruling, 14 FCC Rcd 3689 (¶ 4) (1999) ("*ISP Declaratory Ruling*") (internal citation omitted), *vacated and remanded*, *Bell Atlantic*, 206 F.3d 1. Because dial-up Internet access "maintains an end-to-end channel of communication for the entire duration of the call" and permits the transmission of "only a relatively modest stream of information," it is not the most efficient method of enabling Internet communication. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, 13 FCC Rcd 24011, 24026 (¶ 28) (1998) ("*Advanced Services Order*"), *voluntary remand granted, US WEST Communications, Inc. v. FCC*, 1999 WL 728555 (D.C. Cir. 1999) (not reported in F.3d).

In contrast with dial-up Internet access, broadband access largely bypasses the conventional circuit-switched telephone network and offers consumers the

capability to transmit and receive vastly greater quantities of data at greater speeds – enabling the efficient provision of video communications and other new services. *See Advanced Services Order* ¶ 7. Not surprisingly given their greater capabilities, broadband Internet access services have been growing rapidly in recent years, resulting in a sharp decline in dial-up usage. *See In re Core Commc'ns, Inc.*, 455 F.3d 267, 280 (D.C. Cir. 2006).

This case involves compensation for traffic in connection with the shrinking market for dial-up Internet access.

B. Past Regulatory Treatment of Dial-Up Calls to ISPs

In the Telecommunications Act of 1996 (the "1996 Act"),[4] Congress imposed a number of duties on local exchange carriers to open local telephone markets to competition. *See, e.g.*, 47 U.S.C. § 251(b). Among those obligations is the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.* § 251(b)(5). While state commissions play an important role in implementing local exchange carriers' section 251 obligations, *see id.* § 252, section 251 contains a savings clause that makes clear that, in enacting section 251, Congress did not modify the Commission's pre-

[4] Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at various sections of Title 47 of the United States Code).

existing authority under 47 U.S.C. § 201 over rates for jurisdictionally interstate traffic. *See id.* § 251(i) ("[n]othing in [section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201").

The *Local Competition Order*. The Commission first promulgated rules implementing section 251(b)(5) in its *Local Competition Order*, holding that section 251(b)(5) applies only to local telecommunications traffic.[5] On review of the *Local Competition Order*, the Eighth Circuit held that the Commission lacked authority under the 1996 Act to establish pricing rules (including reciprocal compensation rules) for wireline traffic,[6] but held further that 47 U.S.C. § 332(c)(1)(B) provided the Commission with additional (and independent) rulemaking authority for *wireless* traffic. The court thus upheld the Commission's reciprocal compensation rules "as those provisions apply to [wireless] providers," concluding that those rules remained valid, regardless of the scope of the Commission's authority over wireline traffic under section 251(b)(5). *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997).

The *ISP Declaratory Ruling*. Exploiting ambiguities in the reach of the reciprocal compensation rules adopted in the *Local Competition Order*, numerous

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[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1034 (1996) ("*Local Competition Order*") (subsequent history omitted).

[6] The Supreme Court would later reverse this holding. *See AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366, 384-86 (1999).

competitive LECs ("CLECs") began to focus primarily (if not exclusively) on signing up ISPs as customers. ISP customers offered these CLECs the opportunity to claim millions of dollars in reciprocal compensation payments from other LECs – arising from the unique one-way nature of ISP-bound traffic – if the CLECs could convince regulators to require reciprocal compensation payments under sections 251(b)(5) and 252(d)(2) for ISP-bound traffic.

In February 1999, the Commission issued its first order expressly addressing that issue. The Commission's analysis involved two separate steps. First, based on its "traditional[]," end-to-end analysis to determine whether a particular call falls within the FCC's jurisdiction over *inter*state communications or the states' jurisdiction over *intra*state traffic, the Commission concluded that ISP-bound traffic should be analyzed "for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site." *ISP Declaratory Ruling* ¶ 13. Second, the Commission concluded that, because ISP-bound traffic is jurisdictionally "non-local interstate traffic," "the reciprocal compensation requirements of section 251(b)(5) * * * and * * * of the Commission's rules do not govern inter-carrier compensation for this traffic." *Id.* ¶ 26 n.87.

Incumbent LECs ("ILECs") and CLECs filed petitions for review of the *ISP Declaratory Ruling*. On review, the Court did not take issue with the Commission's end-to-end analysis of ISP-bound traffic for purposes of

determining jurisdiction. On the contrary, the Court found there is "no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate." *Bell Atlantic*, 206 F.3d at 5. However, the Court held that the Commission "ha[d] not provided a satisfactory explanation" for its conclusion that its jurisdictional analysis was dispositive of whether ISP-bound traffic is local traffic subject to section 251(b)(5). *Id.* at 8. The Court vacated and remanded the *ISP Declaratory Ruling* to the Commission to provide the missing explanation. *Id.* at 9.

The *ISP Remand Order*. In 2001, the Commission issued an order on remand from the Court's *Bell Atlantic* decision. In the *ISP Remand Order*, the Commission again held that ISP-bound traffic is not subject to reciprocal compensation under section 251(b)(5). *ISP Remand Order* ¶¶ 34, 42 (J.A. 26-27, 30). The Commission held that, "[u]nless subject to further limitation," section 251(b)(5) "would require reciprocal compensation for transport and termination of *all* telecommunications traffic" that a LEC "exchanges * * * with another carrier." *Id.* ¶¶ 31-32, 46 (J.A. 25-26, 33). The Commission held, however, that 47 U.S.C. § 251(g) provided one such "further limitation," *id.* ¶ 32 (J.A. 26), which excluded ISP-bound traffic, among other types of traffic, from section 251(b)(5). *Id.* ¶¶ 34, 37, 44 (J.A. 26-27, 28, 31-32).[7]

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[7] Section 251(g) provides:

The Commission also reaffirmed that, on an "end-to-end basis," ISP-bound traffic is "indisputably interstate in nature" for jurisdictional purposes, because "[t]he 'communication' taking place is between the dial-up customer and the global computer network of web content," not "with ISP modems." *Id.* ¶ 59 (J.A. 38-39); *see id.* ¶¶ 58, 63-64 (J.A. 38, 40). Because most "end-to-end communications involving" the ISP continue on to the global Internet and thus "cross state lines," the link that connects the ILEC's end-user customer to the CLEC's ISP customer "is properly characterized as *interstate* access." *Id.* ¶¶ 57, 59 (J.A. 37-38).

Exercising its section 201 jurisdiction over this interstate traffic, the Commission found that "convincing evidence in the record" showed that state commission decisions requiring payment of reciprocal compensation for ISP-bound traffic had "distort[ed] the development of competitive markets" and had led to "classic regulatory arbitrage" of nearly $2 billion annually – in some cases,

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> On or after February 8, 1996 [the date of enactment of the 1996 Act], each local exchange carrier * * * shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order or policy of the [Federal Communications] Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996.

47 U.S.C. § 251(g).

enabling competitors to provide free service to ISPs and to pay ISPs to be their "customers," as well as inducing outright fraud. *Id.* ¶¶ 2, 5, 21, 29, 70 n.134, 76 (J.A. 13, 14-15, 22, 24-25, 43, 45-46).

To "limit the regulatory arbitrage opportunity presented by ISP-bound traffic," the Commission adopted an interim four-part payment regime. *Id.* ¶ 2 (J.A. 13). The first component of that regime consisted of a series of declining caps on the rates for ISP-bound traffic. *See id.* ¶¶ 78, 80-81 (J.A. 47, 48-49). The Commission also adopted a "mirroring rule," which required an incumbent seeking to cap its payments to competitors with ISP customers to accept payment for *all* voice traffic subject to section 251(b)(5) under the same rate caps applicable to ISP-bound traffic. *See id.* ¶ 89 n.179 (J.A. 53-54). In addition, the Commission adopted two rules limiting the number of minutes of ISP-bound traffic for which a competitor could seek payment under the new regime. *See id.* ¶¶ 78, 81 (J.A. 47, 48-49) (describing "growth cap" and "new markets" rules). The Commission concluded that, although rate caps – set on the basis of contemporaneous voluntarily negotiated interconnection agreements – appeared to be fair, CLECs also reasonably could recover cost shortfalls, if any, from their ISP customers. *Id.* ¶¶ 24, 80, 87 (J.A. 23, 48, 52).

On review, this Court rejected the Commission's reliance on section 251(g). *See WorldCom*, 288 F.3d at 432, 434. Apart from deciding that section 251(g) did

"not provide a basis for the Commission's action," the Court was clear that it did *not* decide any other issue, including "petitioners' claims that the interim pricing limits * * * are inadequately reasoned." *Id.* at 434. Because there was a "non-trivial likelihood" that the Commission had authority to adopt its pricing rules for ISP-bound traffic on other grounds, the Court "d[id] not vacate the order." *Id.*

The *Core Forbearance Order.* In 2004, the Commission modified its ISP payment regime by granting (in part) a forbearance petition that Core had filed.[8] In doing so, the Commission eliminated enforcement of the "growth cap" and "new markets" rules limiting the number of minutes of ISP-bound traffic for which a competitor could seek payment. *See Core Forbearance Order* ¶¶ 7, 9, 15. However, the Commission retained the rate cap and the mirroring rules, finding that these rules "remain necessary to prevent regulatory arbitrage and promote efficient investment in telecommunications services and facilities." *Id.* ¶ 19.

This Court upheld the Commission's forbearance decision. The Court "quoted * * * at length" – and with approval – the Commission's determination that, "because ISP-related traffic flows overwhelmingly in one direction, a reciprocal compensation regime creates an opportunity for CLECs 'to sign up ISPs as customers and collect [compensation from], rather than pay[] compensation' to,

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[8] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, 19 FCC Rcd 20179 (2004) ("*Core Forbearance Order*") (subsequent history omitted).

other carriers," leading to "'classic regulatory arbitrage' that had * * * negative effects" on the development of "'viable local telephone competition.'" *In re Core Commc'ns, Inc.*, 455 F.3d at 279 (quoting *ISP Remand Order* ¶ 21 (J.A. 22)).

The Mandamus Decision. On July 8, 2008, this Court granted a petition for a writ of mandamus that Core had filed to compel the Commission, on remand from the Court's earlier *WorldCom* decision, "to explain the legal authority upon which [the Commission's interim pricing] rules [for ISP-bound traffic] are based." *In re Core Commc'ns*, 531 F.3d at 850. The Court directed the Commission to issue "a final, appealable order," by November 5, 2008, that responded to the *WorldCom* remand. *In re Core Commc'ns*, 531 F.3d at 862. The Court made clear that, in granting mandamus, it was not directing the Commission "to promulgate any particular rule or policy." *Id.* at 859.

II. THE *ORDER* ON REVIEW

On November 5, 2008, the Commission issued the *Order* on review "respond[ing] to [this Court's] remand order in *WorldCom*." *Order* ¶ 6 (J.A. 518). The Commission first held that section 251(b)(5) "is not limited to local traffic" and is "broad enough to encompass ISP-bound traffic." *Id.* ¶ 7 (J.A. 519). Specifically, the Commission held that ISP-bound traffic is subject to section 251(b)(5) because such traffic satisfies the Commission's rule defining "termination" as the "switching of traffic * * * at the terminating carrier's end

office switch * * * and delivery of that traffic to the called party's premises." *Order* ¶ 13 (J.A. 522) (internal quotation marks omitted). The Commission stated that, in the case of ISP-bound traffic, the "traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'" *Ibid.*

The Commission's conclusion that ISP-bound traffic is within section 251(b)(5), however, "d[id] not end [the Commission's] legal analysis." *Id.* ¶ 17 (J.A. 523). The Commission "re-affirm[ed]" its conclusion that such traffic is jurisdictionally "interstate" and, therefore, remains subject to the Commission's authority under section 201(b) to ensure "just and reasonable" charges and practices "for and in connection with" interstate traffic. *Id.* ¶ 21 (J.A. 524-25). The Commission explained that this conclusion was reinforced by section 251(i), which directs that "[n]othing in [section 251] shall be construed to limit or otherwise affect the Commission's authority" under section 201. 47 U.S.C. § 251(i); *see Order* ¶ 21 (J.A. 524-25). The Commission also noted that it similarly retains independent authority over interstate wireless traffic, which is subject to both section 251(b)(5) and section 332. *See Order* ¶¶ 19-20, 22 n.76 (J.A. 524, 526). Therefore, the fact that ISP-bound traffic is subject to section 251(b)(5) does not eliminate the Commission's section 201 authority to establish rules for ISP-bound traffic. *See Order* ¶ 21 (J.A. 524-25).

The FCC next reaffirmed the pricing rules for ISP-bound traffic that it had adopted in the 2001 *ISP Remand Order* – again finding that such rules could and should be maintained pursuant to its section 201 authority. *Order* ¶ 27 (J.A. 529). The Commission explained that the "policy justifications" it had provided in 2001 for adopting the rules – particularly, the need to curb the "significant arbitrage opportunities" created by the "one-way nature of ISP-bound traffic" (*id.* ¶ 24 (J.A. 527)) – had "not been questioned by any court" and, in fact, had been affirmed by this Court in 2006 when it denied Core's petition for review of the *Core Forbearance Order*. *Id.* ¶ 27 (J.A. 529). The Commission explained that it would keep in place those pricing rules as to which it had not granted forbearance – including the $0.0007 per minute rate cap – until it "adopt[s] more comprehensive intercarrier compensation reform." *Id.* ¶ 29 (J.A. 529).

SUMMARY OF ARGUMENT

1. The Commission reasonably concluded that it had authority under section 201(b) to adopt its interim intercarrier compensation rules for ISP-bound traffic. It is well-settled that ISP-bound traffic is jurisdictionally interstate traffic. Indeed, this Court in *Bell Atlantic*, 206 F.3d at 5, acknowledged as much. It is equally well-settled that the Commission has jurisdiction to regulate the rates of interstate services under section 201(b). *Global Crossing Telecomms. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 49 (2007). In the 1996 Act, Congress

expressly preserved this authority over interstate telecommunications traffic when it enacted section 251(i) – providing that "[n]othing in [section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201."

Petitioners' contention that sections 251(b)(5) and 252(d)(2) establish a comprehensive and exclusive regulatory regime for traffic falling within the scope of section 251(b)(5) ignores clear gaps in the coverage of those two provisions, as well as judicial recognition that the Commission may regulate traffic between LECs and wireless carriers under pre-1996 Act authority, notwithstanding the fact that such traffic falls within the scope of sections 251 and 252. *See Iowa Utils. Board v. FCC*, 120 F.3d at 800 n.21. More fundamentally, however, petitioners' theory conflicts with section 251(i), which precludes a reading of section 251 and 252 that would divest the Commission of its section 201 authority over ISP-bound traffic.

2. Having concluded that it had authority under section 201(b) to promulgate pricing rules for ISP-bound traffic, the Commission reasonably decided to retain the $.0007 cap and mirroring rule that it had adopted in the *ISP Remand Order*. The cap had been predicated in 2001 upon rates contained in contemporaneous interconnection agreements into which carriers voluntarily had entered, and the Commission credited evidence of a continuing decline in

negotiated reciprocal compensation rates. *Order* ¶ 24 (J.A. 527). The mirroring rule, moreover, ensured that the cap would have no discriminatory effect on competitive carriers relative to incumbents. *Id.* ¶ 25 (J.A. 528).

The Commission sensibly concluded that the policy rationale underlying the pricing rules, which this Court had acknowledged as reasonable in *In re Core Commc'ns*, 455 F.3d at 278-79, remained valid. The rules were needed "to prevent the subsidization of dial-up Internet access consumers by consumers of basic telephone service' and to avoid regulatory arbitrage and discrimination between services." *Order* ¶ 25 (J.A. 528).

Petitioners' complaints to the contrary, the record before the Commission provided ample evidence that the prescribed cap level remained justified. And, as the Commission has stressed, if the costs to a CLEC of terminating ISP-bound traffic exceed the cap, that CLEC reasonably can recover such costs from its end-user customers, as incumbent LECs have always done with respect to their ISP customers. *ISP Remand Order* ¶¶ 80, 87 (J.A. 48, 52). Petitioners' remaining claims under the Administrative Procedure Act ("APA") are insubstantial.

3. Core's contention that the Commission violated the Court's writ of mandamus in *In re Core Commc'ns* is without merit. First, Core's suggestion (Br. 55-56) that the mandamus Court directed the Commission to construe section 251(b)(5) to *exclude* ISP-bound traffic is absurd – particularly given that Core

itself agrees with the Commission's construction of that provision to *include* such traffic. The mandamus Court simply directed the Commission to provide a new legal justification (if it could) for the compensation rules it had adopted in the *ISP Remand Order*. The Commission did so in the *Order* on review.

Core also errs in contending (Br. 56-57) that the *Order* violated the Court's writ of mandamus by failing to provide a legal basis for the growth cap and new markets rules from which the Commission had forborne in the *Core Forbearance Order*. After analyzing its authority under sections 251(b)(5), 201(b), and 251(i), the Commission concluded that *all* of the *ISP Remand Order*'s "pricing rules governing the payment of compensation between carriers for ISP-bound traffic" were within its authority. *Order* ¶ 21 & n.72 (J.A. 524-25). That finding fully satisfied the writ of mandamus.

STANDARD OF REVIEW

Petitioners' challenge to the FCC's interpretation of the Communications Act is governed by *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Under *Chevron,* if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the

implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires this Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *Nat'l Cable & Telecomms Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). This deference applies not only to the Commission's implementation of ambiguous statutory terms regarding matters that clearly are within its delegated authority, but also to the agency's threshold "interpretation of the scope of its [regulatory] jurisdiction" under the governing statute. *Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 479 (D.C. Cir. 2008); *accord Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007). *See also Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 844-45 (1986).

Petitioners also challenge the reasonableness of the FCC's *Order* under the APA. The Court must reject such a challenge unless the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "[h]ighly deferential" standard of review "presumes the validity of agency action;" the Court "may reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal quotations omitted); *see also Bell Atlantic Tel. Cos. v. FCC*, 79

F.3d 1195, 1202 (D.C. Cir. 1996). Ultimately, the Court should affirm the Commission's decision if the agency examined the relevant data and articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

ARGUMENT

I. THE COMMISSION'S CONCLUSION THAT IT HAD AUTHORITY UNDER SECTION 201(b) TO ADOPT THE INTERIM INTERCARRIER COMPENSATION RULES FOR ISP-BOUND TRAFFIC WAS BASED UPON A REASONABLE READING OF THE COMMUNICATIONS ACT

Core and the state petitioners agree with the FCC's conclusion in the *Order* that the telecommunications traffic covered by the Commission's interim pricing rules – *i.e.*, that which occurs when two LECs collaborate to deliver calls to an ISP within a local calling area – falls within the scope of section 251(b)(5). Core Br. 33 & n.3; State Br. 27 n.18.[9] They contend, however, that this conclusion necessarily: (a) subjects the pertinent traffic to the pricing standard set out in section 252(d)(2); and (b) assigns to the relevant state commissions the exclusive

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[9] The state petitioners dispute the Commission's reasonable conclusion that section 251(b)(5) extends beyond the pertinent ISP-bound traffic to all "telecommunications" that are not exempted by section 251(g). State Br. 21-26. As we discuss in section I.C., below, that argument is not justiciable in this case and, in any event, is insubstantial.

authority to establish rates under that standard. Core Br. 33-43; State Br. 20-23. They argue, accordingly, that the Commission lacked authority in the *Order* to justify the agency's interim pricing rules under section 201(b) of the Communications Act. The Court should reject petitioners' claims.

A. ISP-Bound Traffic Is Jurisdictionally Interstate Traffic, Over Which The FCC Has Jurisdiction Under Section 201

It is well-settled – as a matter of Commission precedent and court decisions – that ISP-bound traffic is jurisdictionally interstate traffic. The Commission first addressed the jurisdictional status of ISP-bound traffic in the *ISP Declaratory Ruling*, and found that, on an end-to-end basis, dial-up calls to access the Internet are a single communication. *See ISP Declaratory Ruling* ¶¶ 10-17. The Commission further found that "a substantial portion of Internet traffic involves accessing interstate or foreign websites." *Id.* ¶ 18. And this Court, in reviewing the *ISP Declaratory Ruling*, recognized that "[t]here is no dispute" that the Commission was "justified in relying on" its end-to-end analysis in concluding that ISP-bound traffic is "jurisdictionally interstate." *Bell Atlantic*, 206 F.3d at 5.

In 2001, the Commission returned to this issue and reaffirmed its jurisdictional findings. The Commission stressed that, "[f]or jurisdictional purposes," ISP traffic is viewed without regard to "intermediate points of switching or exchanges between carriers." *ISP Remand Order* ¶ 57 (J.A. 37). And

the Commission concluded, once again, that "[m]ost" ISP-bound traffic is "indisputably interstate" on an end-to-end basis. *Id.* ¶ 58 (J.A. 38). The agency also noted that the Eighth Circuit recently had "affirmed the Commission's consistent view that ISP-bound traffic is, as a *jurisdictional* matter, predominantly interstate." *Id.* ¶ 64 (J.A. 40).[10] The Commission concluded that, in light of the predominantly interstate nature of ISP-bound traffic and the Eighth Circuit's decision that interstate and intrastate components were inseparable, ISP-bound traffic is interstate and subject to the Commission's authority under section 201(b). *Id.* ¶ 52 (J.A. 35). This conclusion was undisturbed by this Court's remand in *WorldCom*.

This uniform understanding that dial-up calls to ISPs are jurisdictionally interstate is consistent with, and supported by, the Commission's numerous decisions regarding other forms of Internet access. In 1998, the Commission found that digital subscriber line ("DSL") service is jurisdictionally interstate. *See GTE Tariff Order* ¶ 28 ("finding that GTE's [DSL] service is subject to federal

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[10] The Eight Circuit had recognized that, under the Commission's jurisdictional analysis, "services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements," and that "the FCC cannot reliably separate the two components involved in completing a particular call." *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998).

jurisdiction" and is "an interstate service").[11] More recently, the Commission has built upon this ruling – finding that it has jurisdiction over a variety of broadband Internet access services because they are jurisdictionally mixed and inseverable. *See Cable Modem Declaratory Ruling* ¶ 59 (finding that, "on an end-to-end analysis," "cable modem service is an interstate information service");[12] *Wireline Broadband Order* ¶ 110[13]; *Wireless Broadband Declaratory Ruling* ¶ 28;[14] *Broadband over Powerline Order* ¶ 11.[15]

In light of this substantial precedent, the Commission correctly reaffirmed in the *Order* its consistent finding "that ISP-bound traffic is jurisdictionally

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[11] *GTE Tel. Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998) ("*GTE Tariff Order*").

[12] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"), *aff'd*, *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[13] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*"), *aff'd*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

[14] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) ("*Wireless Broadband Declaratory Ruling*").

[15] *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) ("*Broadband Over Powerline Order*").

interstate" because it is jurisdictionally mixed and inseverable. *Order* ¶ 21 n.69 (J.A. 525) (citing precedent); *see also ISP Remand Order* ¶ 52 (J.A. 35). In making this finding, the Commission noted that this traffic "melds a traditional circuit-switched local telephone call over the [public switched telephone network] to packet switched IP-based Internet communication to Web sites." *Order* ¶ 21 n.69 (J.A. 525).

Because ISP-bound traffic involves jurisdictionally interstate communications, the Commission has well-established authority to regulate it. "When Congress enacted the Communications Act of 1934, it granted the FCC broad authority to regulate interstate telephone communications." *Global Crossing Telecomms. v. Metrophones Telecomms., Inc.*, 550 U.S. at 48. Specifically, the Communications Act assigns the task of regulating the rates, terms, and conditions of interstate communications to the Commission. *See* 47 U.S.C. § 152(a) (assigning to the Commission jurisdiction over all "interstate and foreign communication by wire * * * which originates and/or is received within the United States"); *see also, e.g., Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) ("The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates.").

Indeed, the Communications Act grants authority over the reasonableness of charges, practices, and classifications in interstate communications to the

Commission. The Act specifically requires that regulated carriers' "charges, practices, classifications, and regulations for and in connection with" interstate telecommunications services be "just and reasonable." 47 U.S.C. § 201(b); *see also Global Crossing*, 550 U.S. at 49 (noting section 201(b) "authorize[s] the commission to declare any carrier 'charge,' 'regulation,' or 'practice' in connection with the carrier's services to be 'unjust or unreasonable'"); *id.* at 53 (noting the Commission has "long implemented § 201(b)" and its prohibition of unjust and unreasonable rates and practices "through the issuance of rules and regulations").[16] ISP-bound traffic is no different from any other interstate traffic or services in this regard, which the FCC also regulates under section 201.

Petitioners and their intervenors do not dispute that the Commission has authority over jurisdictionally interstate traffic under 47 U.S.C. § 201(b) and raise few challenges to the Commission's long-standing and repeatedly affirmed determination that ISP-bound traffic is jurisdictionally interstate. The claims they do raise lack merit.

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[16] The authority over *rates* for interstate traffic granted in the first sentence of § 201(b) is *distinct from* section 201(b)'s general grant of rulemaking authority, which is found in the final sentence of section 201(b) and which gives the Commission the authority to promulgate rules to enforce the Communications Act *as a whole*. *See* 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Communications Act.]").

Their primary challenge to the Commission's conclusion that ISP-bound calls are jurisdictionally interstate rests on the alleged inconsistency of that finding with the Commission's separate conclusion that such calls "terminate" at an ISP within the meaning of the Commission's rules implementing section 251(b)(5). *See* Core Br. 47-48; State Br. 30-34. But the Commission's long-standing view that ISP-bound traffic is interstate for *jurisdictional* purposes is entirely consistent with the Commission's conclusion that, for purposes of Commission rules implementing *section 251(b)(5)*, CLECs "terminat[e]" traffic to ISPs. In particular, this Court has already held that the jurisdictional status of ISP-bound traffic does *not* answer the question whether ISP-bound traffic is subject to section 251(b)(5). *See Bell Atlantic*, 206 F.3d at 5; *see also Order* ¶ 22 (J.A. 525) ("[T]he D.C. Circuit[] * * * concluded that the jurisdictional nature of traffic is not dispositive of whether reciprocal compensation is owed under section 251(b)(5)."). The state petitioners' own brief acknowledges this. *See* State Br. 31 ("as this Court correctly recognized in *Bell Atlantic*, the FCC's traditional 'end-to-end' jurisdictional analysis is not necessarily determinative as to the scope of traffic covered under § 251(b)(5)").

Consistent with *Bell Atlantic* and the Commission's rules, the Commission determined in the *Order* that a CLEC delivering ISP-bound traffic performs "termination" – as defined in the Commission's rules implementing section

251(b)(5), *see* 47 C.F.R. § 51.701(d) – for purposes of section 251(b)(5), while the ISP is not an "end" point of the communication for purposes of the Commission's jurisdictional analysis under section 201. *See Order* ¶ 13 & n.47 (J.A. 521-22). The Commission's rules implementing section 251(b)(5) define "termination" for the purposes of section 251(b)(5) only as "the switching of telecommunications traffic at the terminating carrier's end office switch * * * and delivery of such traffic to the called party's premises." 47 C.F.R. § 51.701(d); *see also id.* (definition applies only "[f]or purposes of this subpart," *i.e.*, the Commission's regulations governing reciprocal compensation). The definition is thus functional, and focuses on the conduct of the CLEC as the basis for determining when termination occurs.[17]

Moreover, for *jurisdictional* purposes, the Commission has explained that it does *not* focus on "intermediate points of switching or exchanges between carriers (or other providers)," *ISP Remand Order* ¶ 57 (J.A. 37), yet the definition of termination adopted to implement section 251(b)(5) rests on those very factors: the "switching of telecommunications traffic" and the exchange between carriers are relevant to defining "termination" for purposes of section 251(b)(5).

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[17] This conclusion is consistent with this Court's previous statements that "[c]alls to ISPs appear to fit 'this definition,'" *Bell Atlantic*, 206 F.3d at 6 – *i.e.*, the unique definition of termination adopted by the Commission to implement section 251(b)(5). *See* 47 C.F.R. § 51.701(d).

Accordingly, the jurisdictional question and the question of construing the Commission's regulations interpreting section 251(b)(5) are not the same.[18]

Nor is Core correct that this analysis is changed by the Commission's recognition that end users sometimes dial seven digits to connect to an ISP. *See* Br. 48 (citing *ISP Remand Order* ¶ 61 (J.A. 39)). Jurisdictional analysis focuses on the overall communication – not the dialing pattern – and the Commission has repeatedly found that Internet communications are interstate. *See ISP Remand Order* ¶ 58 (J.A. 38); *ISP Declaratory Ruling* ¶ 13 (noting "the Commission analyzes the totality of the communication when determining the jurisdictional

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[18] The cases Core cites (Br. 49 n.5) do not support the conclusion that a call terminates at the ISP for *jurisdictional* purposes. Rather, they merely upheld state commission decisions interpreting existing contracts as reflecting voluntary agreements among the parties to pay reciprocal compensation for ISP-bound traffic. *See Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 496 (10th Cir. 2000) (noting that the "subject of t[he] lawsuit" is the "reciprocal compensation provision[] of the Agreement between Southwestern Bell and Brooks Fiber"); *id.* at 499 ("The OCC required reciprocal compensation for calls to ISPs not because federal law requires such compensation, but because the Agreement, as construed under Oklahoma state law, requires it."); *Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 477 (5th Cir. 2000) (affirming judgment of district court, which like the Texas PUC, "held that the carriers' contracts require such calls to be treated as local calls and as such, to be compensated for reciprocally"); *id.* at 484-85; *Michigan Bell Telephone Co. v. MFS Intelnet of Michigan, Inc.*, 339 F.3d 428, 435-36 (6th Cir. 2003) (noting Commission statements that parties could voluntarily agree to reciprocal compensation and interpreting agreement to that effect).

nature of a communication"). Therefore, the fact that end users sometimes dial seven digits does not mean that the communication is intrastate.[19]

Finally, Core sets up and knocks down a straw man in arguing (Br. 49) that "calls to ISPs are not 'purely interstate.'" In the *ISP Declaratory Ruling*, the Commission found, "[a]fter reviewing the record, * * * that, although *some* Internet traffic is intrastate, a substantial portion of Internet traffic involves accessing interstate or foreign websites" and thus the traffic is "jurisdictionally mixed." *ISP Declaratory Ruling* ¶ 19 (emphasis added). In the *ISP Remand Order*, the Commission concluded that the interstate and intrastate components are inseparable and thus that the Commission has jurisdiction over such traffic under section 201. *See ISP Remand Order* ¶¶ 52-53 (J.A. 35-36).

The Commission need not demonstrate that such traffic is "purely interstate" to have jurisdiction over it. The Commission's authority to find interstate and

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[19] Indeed, the sentences following the sentence Core quotes from the *ISP Remand Order* make this clear: "Long-distance service in some network configurations is initiated in a substantially similar manner. In particular under 'Feature Group A' access, the caller first dials a seven-digit number to reach the IXC, and then dials a password and the called party's area code and number to complete the call. Notwithstanding this dialing sequence, the service the LEC provides is considered *interstate* access service, not a separate local call." *ISP Remand Order* ¶ 61 (J.A. 39); *see Local Competition Order* ¶ 873 n.2091; *AT&T Corp. v. Bell Atlantic-PA*, Memorandum Opinion and Order, 14 FCC Rcd 556, ¶¶ 71, 80 (1998) *recon. denied*, 15 FCC Rcd 7467 (2000) (holding – in the context of a service that allows a customer to dial a "local" number to reach a business actually located in another state – that such calls are subject to interstate access charges).

intrastate components inseparable is well-established. The "'impossibility exception' of 47 U.S.C. § 152(b) * * * allows the FCC to preempt state regulation of a service which would otherwise be subject to dual federal and state regulation where it is impossible or impractical to separate the service's intrastate and interstate components, and the state regulation interferes with valid federal rules or policies." *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 576 (8th Cir. 2007); *see California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 112-13 & n.7 (D.C. Cir. 1989); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 215-16 (D.C. Cir. 1982); *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787, 791 (4th Cir. 1976). *See generally Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986).

The state petitioners focus on the fact that part of the communication – between the incumbent and competitor – occurs in a single state. *See* State Br. 32-33. But it is not the law that the intrastate segment of end-to-end interstate traffic falls outside the Commission's section 201(b) ratemaking authority. *See Verizon New England, Inc. v. Maine Public Utils. Comm'n*, 509 F.3d 1, 8 (1st Cir. 2007) (facilities "located in individual communities * * * have been used for decades to provide both interstate and intrastate service as part of a unified network" and such facilities are regulated by the FCC); *North Carolina Utils. Comm'n v. FCC*, 552

F.2d 1036, 1045-46 (4th Cir. 1977) (the Communications Act "commit[s] jurisdiction over facilities utilized in interstate communication to the FCC").

Indeed, the whole point of end-to-end analysis is that the jurisdictional nature of the overall communications is determined by the ultimate pathway, not any discrete local component – at least where those components are inseparable. *See ISP Remand Order* ¶ 52 (J.A. 35) (concluding, based on the Eighth Circuit's decision in *Southwestern Bell Telephone Co. v. FCC*, that the interstate and intrastate component are jurisdictionally inseparable); *id.* ¶ 57 (J.A. 37) ("[f]or jurisdictional purposes, the Commission views LEC-provided access to enhanced services providers * * * on the basis of the end points of the communication, rather than intermediate points of switching or exchanges between carriers (or other providers)"); *see also GTE Tariff Order* ¶ 17 ("the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers"); *id.* ¶ 20 ("the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication").

The Court should reject petitioners' claims that ISP-bound traffic is not jurisdictionally interstate.

B. The FCC Retains Its Section 201 Authority Over ISP-Bound Traffic That Is Also Subject To Section 251(b)(5)

The Commission properly found that it retains its independent section 201(b) authority to ensure just-and-reasonable rates and practices with respect to jurisdictionally interstate ISP-bound traffic, even though that traffic also falls within the scope of section 251(b)(5). *Order* ¶¶ 17-22 (J.A. 523-26).

Petitioners contend that even if ISP-bound traffic is jurisdictionally interstate, the language and structure of sections 251 and 252 make clear that Congress established a comprehensive pricing regime for *all* section 251(b)(5) traffic – a regime under which such traffic is subject only to the substantive pricing standard of section 252(d)(2), and under which the rates may be established only by state commissions. Core Br. 35-38, 43-45; State Br. 22, 26-27. This claim fails, as an initial matter, under the plain terms of sections 251(b)(5) and 252(d)(2) themselves.

There is no provision in the statute that gives state commissions exclusive jurisdiction over reciprocal compensation matters, or that strips the Commission of authority in the area. By its terms, the pricing standard in section 252(d)(2)(A) speaks only to what a "State commission" may do and does not purport to limit the FCC's authority. At the same time, section 252(d)(2)(B) precludes *both* "the Commission [and] any State commission" from engaging in a "proceeding to

establish with particularity" "costs" for purposes of setting rates under section 252(d)(2). This contrast suggests that Congress contemplated that, even where section 252(d)(2) applies, there *will be* circumstances under which the Commission may be the entity determining rates as well as ratemaking methodologies.

Similarly, petitioners' contention that sections 251(b)(5) and 252(d)(2) are coextensive in scope ignores the fact that section 252(d)(2), by its terms, speaks explicitly only to state commission review of an *incumbent* local exchange carrier's compliance with section 251(b)(5). *See* 47 U.S.C. § 252(d)(2)(A) ("[f]or the purposes of compliance by an incumbent local exchange carrier * * *"). Section 251(b)(5), by contrast, imposes duties on *all* local exchange carriers (including competitors) and, as the Commission has held, applies as well to traffic those local exchange carriers exchange with wireless carriers.

Moreover, petitioners' claim that section 252(d)(2) provides the exclusive regime for regulating section 251(b)(5) traffic conflicts with the judicially approved treatment of wireless traffic. *See Order* ¶¶ 19-20 (J.A. 524). Like its authority over interstate communications under section 201(b), the Commission has authority over wireless traffic under 47 U.S.C. § 332(c)(1)(B). In the *Local Competition Order*, the Commission concluded that – notwithstanding sections 251 and 252 – it retained the authority to set interconnection rates between local exchange carriers and wireless carriers under section 332 (c)(1)(B), although it

elected not to exercise that authority and, instead, allowed intercarrier payments for certain wireless traffic (including traffic subject to section 251(b)(5)) to be governed under the section 251/252 framework. *See Local Competition Order* ¶¶ 1008, 1023.

The Commission's conclusion that it retains independent authority under section 332 to set rates for wireless traffic that is also within the section 251/252 framework was affirmed on review. In *Iowa Utils. Board v. FCC*, 120 F.3d 753, the Eighth Circuit vacated the Commission's pricing rules (later reinstated by the Supreme Court) under sections 251 and 252, including its reciprocal compensation rules. In doing so, however, the court held that "section 332 (c)(1)(B) gives the FCC the authority to order LECs to interconnect with [wireless] carriers" and thus that the "Commission has the authority to issue the rules of special concern to [wireless] providers" under section 332. *Id.* at 800 n.21. The court's vacatur of the Commission's rules accordingly did not extend to the application of those rules – including reciprocal compensation rules – to wireless providers. *See id.*[20]

The state petitioners attempt to distinguish the wireless context on the ground that section 332 "establishes special requirements" for interconnection with

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[20] This Court has applied the Eighth Circuit's holding on this point. *See Qwest Corp. v. FCC*, 252 F.3d 462, 463 (D.C. Cir. 2001) (noting that the Eighth Circuit had "rejected the LEC's claim" that a pricing rule was "wholly *ultra vires*," and had held that, as applied to wireless providers, "the regulation was validly grounded in 47 U.S.C. § 332, a provision adopted well before the 1996 Act").

wireless providers and, they claim, "the FCC cannot and does not cite any analogous statutory text pertaining to ISP-bound traffic." State Br. 30. But section 201(b) is that authority: it grants the Commission ratemaking authority over *interstate* traffic, of which ISP-bound traffic is a subset. And, as discussed below, section 251(i) expressly preserves that interstate authority.

The CLEC intervenors attempt to distinguish the wireless context by noting that, there, the Commission brought additional (wireless) traffic within the rules it had promulgated to implement sections 251(b)(5) and 252(d)(2), while here it is seeking to withdraw (ISP-bound) traffic from the section 251/252 regulatory framework. *See* CLEC Br. 12. But nothing in the Eighth Circuit's decision to affirm the Commission's retained authority under section 332 turned on that question. Instead, just as section 332 provides special authority over wireless providers, section 201(b) gives the Commission special authority over interstate traffic (of which ISP-bound traffic is a subset).[21]

Most fundamentally, petitioners' arguments that the Commission lacked authority to adopt its interim intercarrier compensation rules for ISP-bound traffic largely ignore the fact that Congress expressly preserved the agency's section 201

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[21] Nor are the CLEC intervenors correct (Br. 13) that section 332's preemption provision has any bearing on this analysis. The issue here is not one of preemption: the question is the role that state commissions have in implementing federal law. *See Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

authority over jurisdictionally interstate traffic, notwithstanding the enactment of the local competition provisions of sections 251 and 252. Section 251(i) states that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title." 47 U.S.C. § 251(i). That section 201 authority includes the Commission's historical authority over jurisdictionally interstate traffic. Reading section 251(b)(5) – alone or in combination with section 252(d) – to divest the Commission of that authority with respect to ISP-bound traffic would directly countermand section 251(i), as the Commission correctly concluded in the *Order*. *See Order* ¶¶ 17-22 (J.A. 523-26).[22]

This reading of section 251(i) not only follows from its plain text; it also is consistent with the general structure of the 1996 Act, which the Supreme Court has recognized reveals no intent to abandon section 201(b). *Cf. Global Crossing*, 550 U.S. at 50 (in enacting the 1996 Act and promulgating regulations under the Act, "[n]either Congress nor the Commission * * * totally abandoned traditional regulatory requirements" and "[t]he new statutes and amendments left many traditional requirements and related statutory provisions" in place, including "[section] 201(b)"). But even if there were ambiguity regarding the meaning of section 251(i), the Commission's interpretation of that provision is subject to

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[22] *See also Local Competition Order* ¶ 91 (section 251(i) "affirms that the Commission's preexisting authority under section 201 continues to apply for purely interstate activities"); *ISP Remand Order* ¶¶ 50-51 (J.A. 34-35).

Chevron deference and is plainly reasonable. *See Maine Public Utils. Comm'n v. FERC*, 520 F.3d at 479 (agency "interpretation of the scope of its jurisdiction is entitled to *Chevron* deference").

Core mentions section 251(i) only in passing in the background section of its brief (at 10), asserting that "section 251(i) preserved the Commission's rulemaking authority" to allow the Commission to carry out the directions set forth in section 251(d). *See also* CLEC Br. 19 (asserting that "section 251(i) merely preserves the Commission's general section 201 authority to promulgate rules"). But nothing in the text of section 251(i) suggests that the authority preserved by that section was limited to the rulemaking power contained in the last sentence of section 201(b) (but not section 201(a) or any other sentence of section 201(b)); instead, the text refers broadly to "section 201." *See* 47 U.S.C. § 251(i) ("Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.").

The state petitioners, as well, are dismissive of section 251(i), although in a manner inconsistent with Core's reading. In a single sentence – based on an elliptical reference to a House Report and with no explanation – the states assert that section 251(i) "was meant to preserve the FCC's pre-*Telecom Act* § 201 authority over interconnection." State Br. 29. But just as nothing in section 251(i) is limited to the rulemaking power conferred by the last sentence in section 201(b),

nothing in that savings provision is confined to the power over interconnection identified in section 201(a). Rather, the text of section 251(i) broadly preserves Commission authority under *all* of section 201. There is no basis for imposing a restriction on the text of section 251(i) that is not there (especially when Congress easily could have made such an intent clear). *See Moskal v. United States*, 498 U.S. 103, 111 (1990) (there is no "require[ment] that every permissible application of a statute be expressly referred to in its legislative history").[23]

The CLEC intervenors (Br. 15-18) attempt to dismiss the applicability of section 251(i), because it refers only to section 201 and not also to 47 U.S.C. § 205, which authorizes the Commission to prescribe rates after a formal hearing or investigation. This argument is not properly before the Court because no petitioner raised it. *See Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8, 18 (D.C. Cir. 2002) (intervenor may not raise a claim that petitioner did not make). The claim fails on the merits, in any event, as the intervenors misinterpret section 205. That provision sets out remedies that obtain when the Commission conducts a section

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[23] *See also Brogan v. United States*, 522 U.S. 398, 403 (1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy – even assuming that it is possible to identify that evil from something other than the text of the statute itself* * * * [T]he reach of a statute often exceeds the precise evil to be eliminated."); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (courts should "not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply").

204 adjudicatory investigation of individual tariffed charges filed under section 203. *See* 47 U.S.C. §§ 203, 204. Section 205 does not limit the Commission's authority to adopt pricing methodologies using its section 201 ratemaking and rulemaking authority. Indeed, the Commission on multiple occasions has prescribed rate levels through general notice and comment rulemaking proceedings, rather than through hearings on specific tariffs under sections 204 and 205.[24]

Core contends (Br. 35) that, under the Supreme Court's decision in *AT&T Corp. v. Iowa Utils. Board*, the Commission's "rulemaking authority" under "section 201" allows it to establish rules to implement sections 251 and 252, but "section 252(d)" nonetheless confines that authority by requiring that "states set the actual rates." But the Supreme Court, in the cited discussion, was not purporting to address the Commission's authority over rates in section 201(b) – the issue here. Rather, the Court was assessing the constraints on the Commission in establishing rules to implement the pricing standards in section 252(d). *See* 525 U.S. at 377-78 (quoting and discussing the general rulemaking provision in

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[24] *See, e.g.*, *Access Charge Reform* (CC Docket Nos. 96-262, et al.), First Report and Order, 12 FCC Rcd 15982 (¶¶ 75-87) (1997), *aff'd*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (prescribing new limits on subscriber line charges for non-primary residential and multi-line business lines); *Access Charge Reform* (CC Docket Nos. 96-262, *et al.*), Sixth Report and Order, 15 FCC Rcd 12962 (¶¶ 58, 70-75) (2000), *aff'd in pertinent part*, *Texas Office of Pub. Util. Counsel*, 265 F.3d 313 (5th Cir. 2001) (prescribing revised ceilings on subscriber line charges).

section 201(b)). That case, accordingly, stands for the principle that rules *implementing* section 252(d) must accord with the terms of that section. Here, by contrast, the Commission was not implementing section 252(d). It was exercising its separate – and protected – *ratemaking* authority over interstate traffic that otherwise falls within section 251(b)(5).[25]

Core also contends (Br. 36-37) that the Eighth Circuit's vacatur of the Commission's proxy prices for reciprocal compensation confirms that the Commission may not set actual rates for section 251(b)(5) traffic. But the Eighth Circuit did not address the independent (and longstanding) authority of the Commission to ensure just and reasonable rates for *interstate* traffic under section 201(b). The issue before the court of appeals with respect to reciprocal compensation proxy rates was the authority of the Commission over local *intra*state traffic. *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000). Indeed, as noted above, the Eighth Circuit had previously held that the

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[25] Core's reliance (Br. 35, 37-38) on the Supreme Court's decision in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002), is misplaced for similar reasons. That case involved the proper interpretation of 47 U.S.C. § 252(d)(1), and the passages cited by Core are plainly discussing the scheme established to *implement* that section. The opinion does not discuss section 252(d)(2), nor does it cite the rate regulation provision of section 201(b), let alone address the question here of whether the Commission retains its independent, interstate ratemaking authority under section 201(b) over interstate traffic that is also within section 251(b)(5).

Commission *could* set rates for wireless traffic pursuant to the Commission's independent authority under section 332, despite the Commission's conclusion that this wireless traffic is within section 251(b)(5). *See Iowa Utils. Board v. FCC*, 120 F.3d at 800 n.21; *see also Order* ¶ 22 n.76 (J.A. 526). The Commission's analysis of this issue was thus entirely correct. *See Order* ¶ 22 (J.A. 526) (noting that the Eighth Circuit "did not address the Commission's authority to set reciprocal compensation rates for interstate traffic").

Finally, the state petitioners argue that section 201(b) ratemaking authority cannot override state authority under sections 251 and 252 with respect to ISP-bound traffic, because "where both a specific and general provision cover the same subject, the specific provision controls." State Br. 28. But that canon applies in the absence of other statutory evidence of how to reconcile a general and specific provision. *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (rejecting application of "the specific governs the general" canon, noting that "[c]anons of construction * * * are simply rules of thumb which will sometimes help courts determine the meaning of legislation") (internal quotation marks omitted). Here, in section 251(i), Congress *expressly* told courts how to reconcile the relationship between sections 201 and 251. There is accordingly no role for an interpretive rule of thumb. *See Gallenstein v. United States*, 975 F.2d 286, 290 (6th Cir. 1992) (specific-versus-general "canon of construction does not apply when the plain

language of the two subsections can be reconciled without the need for the application of a general rule").

The Commission reasonably concluded that it had authority under section 201(b) to adopt the pricing rules for ISP-bound traffic.

C. The State Petitioners' Claim That The Commission Erred In Concluding That Section 251(b) Applies To All Telecommunications Is Not Ripe

The state petitioners devote much of their brief to the claim that the Commission erred in finding that section 251(b)(5) applies to all telecommunications, rather than solely to local telecommunications traffic. That argument is not ripe, because it is pertinent, if at all, only to the potential precedential effect of the Commission's analysis to traffic that is beyond the scope of ISP-bound traffic addressed in the *Order*.

Consistent with the Court's *WorldCom* remand and its mandamus order, the *Order* provides the rationale only for the Commission's promulgation in 2001 of its ISP-bound traffic pricing rules. *See Order* ¶ 1 (J.A. 516) ("we have authority to impose ISP-bound traffic rules"); *id.* ¶ 5 (J.A. 518) ("we conclude that the scope of section 251(b)(5) is broad enough to encompass ISP-bound traffic"); *id.* ¶ 6 (J.A. 518) (holding that "ISP-bound traffic falls within the scope of section 251(b)(5)"). All parties (including the state petitioners) *agree* that the dial-up calls to ISPs

subject to those pricing rules fall within the scope of section 251(b)(5). *See, e.g.*, State Br. 27 n.18 ("[s]tate petitioners agree that ISP-bound calls are subject to reciprocal compensation obligations under Section 251(b)(5) of the *Telecom Act*"); Core Br. 33 n.3 ("agree[ing]" with the Commission's conclusion that ISP-bound traffic falls within section 251(b)(5)). Thus, no one disputes that section 251(b)(5) is at least broad enough to encompass the only traffic at issue in this proceeding.

The states' only disagreement is with respect to *why* such ISP-bound traffic is subject to section 251(b)(5) – *i.e.*, the Commission held that section 251(b)(5) includes ISP-bound traffic because it is "telecommunications," whereas the states contend that section 251(b)(5) applies to ISP-bound traffic because it is "local." But the pertinent question of the lawfulness of the Commission's view that it retains section 201(b) ratemaking authority to adopt the ISP-bound traffic pricing rules does not depend upon reasons *why* such ISP-bound traffic also falls within section 251(b)(5). As shown above, Core and the state petitioners make effectively the *same* claims about the legal consequences of the determination that this ISP-bound traffic fits within the scope of section 251(b)(5), *compare* Core Br. 33-43 *with* State Br. 26-30, even though they disagree on why ISP-bound traffic comes within section 251(b)(5).

This Court has repeatedly held that petitioners must challenge the holding of an agency order, not merely the reasoning in that order. *US West, Inc. v. FCC*, 778

F.2d 23, 27-28 (D.C. Cir. 1985) (a petition that did "not challenge any substantive act of the Commission" but "[o]nly the Commission's reasoning" was not ripe); *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").[26] As pertinent here, the difference between the state petitioners' interpretation of the scope of section 251(b)(5) and that of the Commission may have implications in *other* cases involving *other* types of traffic, but the Commission has not applied its interpretation to those other cases. It is simply guesswork if and how the Commission will regulate other traffic – *e.g.*, whether it will promulgate rules governing that traffic at all and/or whether it will determine that such traffic falls within section 251(b)(5). The states would be free to challenge any future determination that section 251(b)(5) applies to non-local traffic at that time. The Court should not consider the states' purely theoretical challenge here.

The states' challenge to the Commission's reasoning is insubstantial, in any event. As the Commission reasonably found, section 251(b)(5), by its plain terms,

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[26] *See also City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1515-16, 1518 (D.C. Cir. 1994) (challenges to the precedential effect of a ruling are not justiciable). *Accord Alabama Mun. Distributors Group v. FERC*, 312 F.3d 470, 473 (D.C. Cir. 2002); *Sea-Land Service, Inc. v. Dept. of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998); *American Family Life Assurance Co. v. FCC*, 129 F.3d 625, 629 (D.C. Cir. 1997).

"imposes on all LECs the 'duty to establish reciprocal compensation arrangements for the transport and termination of *telecommunications*.'" *Order* ¶ 8 (J.A. 519) (quoting section 251(b)(5)) (emphasis added). Moreover, the Commission explained, the statutory term "telecommunications" is "not limited geographically ('local,' 'intrastate,' or 'interstate') or to particular services." *Order* ¶ 8 (J.A. 519).[27] The Commission observed that, "had Congress intended to preclude the Commission" from bringing certain types of traffic within section 251(b)(5), "it could have easily done so by incorporating restrictive terms in section 251(b)(5)." *Ibid.* (J.A. 519-20). Instead, Congress "used the term 'telecommunications,' the broadest of the statute's defined terms." *Ibid.* Thus, although acknowledging that it had once interpreted section 251(b)(5) to be limited to "local" traffic, the Commission concluded that the "better view" is that that provision is not so limited. *Order* ¶ 7 (J.A. 519). This reasonable analysis is entitled to *Chevron* deference. *See Smiley v. Citibank (S.D.) N.A.*, 517 U.S. 735, 742 (1996) (An agency's "change [in interpretation] is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.").

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[27] *See* 47 U.S.C. § 153(43) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received").

II. THE COMMISSION'S PRICING RULES ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE OTHERWISE REASONABLE

Having concluded that it had statutory authority under section 201(b) to adopt pricing rules for ISP-bound traffic, the Commission reasonably decided to "maintain the $.0007 cap and mirroring rule" that it had adopted in the *ISP Remand Order* pending the adoption of "more comprehensive intercarrier reform." *Order* ¶ 29 (J.A. 529). The Commission explained that the rate cap had been adopted at that time on the basis of "contemporaneous interconnection agreements" into which carriers had voluntarily entered and that there had been a continuing decline in such "negotiated reciprocal compensation rates." *Order* ¶ 24 (J.A. 527) (citing *ISP Remand Order* ¶¶ 84-85 (J.A. 50-51)). Moreover, the mirroring rule – under which the cap would apply "only to the extent that an incumbent carrier offered to exchange all traffic at the same rate" – ensured that the cap would have no discriminatory impact on competitive carriers. *Order* ¶ 25 (J.A. 528). The Commission further explained that the policy rationale underlying the pricing rules – "prevent[ing] the subsidization of dial-up Internet access customers at the expense of consumers of basic telephone service and * * * avoid[ing] regulatory arbitrage and discrimination between services" – had been affirmed by this Court and remained valid. *Order* ¶¶ 25-26 (J.A. 528-29) (citing *In re Core Commc'ns*, 455 F.3d at 278-79).

These findings render baseless Core's general contention (Br. 45) that "[t]here is no rational basis for preserving" the $ 0.0007 termination rate for traffic bound to ISPs, as well as the CLEC intervenors' more detailed contention that the cap was inconsistent with the record. Although both parties contend that predicating the rate cap on interconnection agreements rather than a determination of the cost of terminating ISP-bound traffic is unreasonable, as this Court has recognized, under section 201 "[t]he FCC is not required to establish purely cost-based rates" as long as the Commission clearly explains the reasons for a departure from cost-based ratemaking. *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996). Here, the Commission adopted a rate designed to limit arbitrage opportunities that arose from "excessively high reciprocal compensation rates." *Order* ¶ 24 (J.A. 527) (citing *ISP Remand Order* ¶ 75 (J.A. 45)). Indeed, "[m]ost commenters urge[d] the Commission to maintain the compensation rules governing ISP-bound traffic," contending that "a higher compensation rate would create new opportunities for arbitrage" and impose other economic burdens. *Order* ¶ 23 (J.A. 526-27). Thus, regardless of whether the $ 0.0007 termination rate precisely reflects a particular carrier's costs, the Commission adequately justified its approach under section 201.

This conclusion is not altered by the CLEC intervenors' contention that the Commission ignored evidence in the record – including some interconnection

agreements – that suggested that termination costs were higher than $.0007. CLEC Br. 21-24. The record also contained substantial evidence that most calls to ISPs were now being terminated at rates well *under* the $.0007 cap pursuant to voluntary agreements.[28] It was entirely reasonable in these circumstances to retain the cap level that the Commission had adopted in 2001.

Moreover, even if, in individual instances, the cost to a CLEC of terminating ISP-bound traffic exceeds the cap, the Commission has found that the CLEC reasonably can recover such costs from its end-user customers, as incumbent carriers have always done with respect to ISP customers. *ISP Remand Order* ¶¶ 80, 87 (J.A. 48, 52). Given the documented risk of regulatory arbitrage associated with one-way ISP-bound traffic, there is nothing unreasonable about requiring competitors serving ISPs to look to their customers for cost recovery of transport and termination.

Core argues (Br. 53-55) that the Commission's rules create, rather than prevent, arbitrage. Not so. The Commission adopted a payment regime aimed at "limit[ing], if not end[ing], the opportunity for regulatory arbitrage" in 2001 based on its detailed findings. *ISP Remand Order* ¶¶ 2, 70 n.134, 77, 86 (J.A. 13, 43, 46-47, 51-52). Core challenged these arbitrage findings (raising the same arguments it

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[28] *See, e.g.*, Letter, dated August 18, 2008, from John Nakahata to FCC Secretary, CC Docket Nos. 99-68 and 01-92, at 5-6 (J.A. 103-04) (describing interconnection agreements setting rates as low as $.00035 and $.00004 per minute).

raises here) in seeking review of the Commission's refusal in 2004 to forbear from enforcing the rate caps. *See* Brief of Petitioner Core Communications, Inc., *In re Core Commc'ns*, Nos. 04-1368 et al., at 40-43 (D.C. Cir. filed June 21, 2005). This Court nonetheless had no trouble finding that the Commission's arbitrage findings were entirely reasonable. In fact, the Court credited the Commission's determination that the relevant rules were necessary to counter the "'classic regulatory arbitrage' that had * * * negative effects" on the development of "'viable local telephone competition.'" *Core Commc'ns*, 455 F.3d at 279 (quoting *ISP Remand Order* ¶ 21 (J.A. 22)). The Commission's decision to reaffirm those findings was thus well-supported. *See Order* ¶ 24 (J.A. 527).[29]

Core incorrectly contends that the Commission's rules are an "interim" rate to "nowhere" (Br. 51-53). Although the Commission's rules were initially adopted as the first step toward broader reform (a process that remains underway, *see Order* ¶¶ 38-41 (J.A. 532-33) (further notice of proposed rulemaking on intercarrier compensation)), those rules can stand on their own as a just and

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[29] The CLECs argue that the Commission ignored "the fundamental economic fact that the cost of terminating traffic to ISP customers is the same as terminating traffic to any other type of customer." CLEC Br. 26. But that is no answer to the Commission's recognition that carriers are not the only source for recovering those costs; instead, as the Commission found, ISP-bound traffic is unique not only because of the potential for arbitrage but because CLECs can recover their costs from those ISP customers. *ISP Remand Order* ¶¶ 69-71, 80, 87 (J.A. 42-44, 48, 52).

reasonable response to the unique features and arbitrage problems of ISP-bound traffic. In any event, Core bases its claims on two proposals that the *Order* makes clear are "Draft Proposal[s]" of a single Commissioner (the former Chairman). The Commission, as a collective body, has taken no action with respect to either of the proposals, other than to solicit comments, and has not, as Core claims, "abandoned its rationale" for adopting the ISP pricing rules. In addition, even the two proposals on which Core relies ultimately call for the establishment of rates that are at *or below* the $0.0007 rate cap that currently applies to ISP-bound traffic. *See Order* App. A. ¶ 205 (J.A. 629); *id.* App. C ¶ 200 (J.A. 827).

Finally, the CLEC intervenors' argument that the Commission "never issue[d] any type of notice describing what it was considering in response to the Court's mandamus" can be rejected quickly. CLEC Br. 30. To begin with, petitioners do not raise this argument, and it is therefore procedurally barred. *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d at 18. In any event, the Commission issued the *Order* on remand from the Court's *WorldCom* decision in response to the Court's mandamus order, directing the Commission to provide a legal rationale for its ISP-bound pricing rules. It is not unusual for the Commission, on remand of a rulemaking order, to act without seeking additional comment. *See, e.g., Time Warner Entertainment Co. v. FCC*, 144 F.3d 75, 78 (D.C. Cir. 1998) (noting that the Commission had "issued an order in response to

our remand" "without issuing a proposed rule or seeking public comment on how to proceed"). Where, as here, the remanded issue was a narrow and purely legal one, the Commission's decision to proceed without issuing a new notice of proposed rulemaking was entirely reasonable. The CLECs cite no authority for the counterintuitive principle that the Commission was under an obligation to tell the parties in which direction it was leaning in responding to the Court's decisions in *WorldCom* and the mandamus order. *See, e.g., Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 790 (D.C. Cir. 2000) (although "'[a]gencies are free to grant additional procedural rights in the exercise of their discretion,' 'reviewing courts are generally not free to impose them if the agencies have not chosen to grant them'") (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978)).

The Commission's decision to maintain its existing intercarrier compensation rules for ISP-bound traffic was reasonable.

III. THE *ORDER* FULLY COMPLIES WITH THE COURT'S WRIT OF MANDAMUS IN *IN RE CORE COMMC'NS*

Core's two cursory assertions (*see* Br. 55-58) that the Commission violated the Court's writ of mandamus in *In re Core Commc'ns* are baseless.

Core states, first, that although the Court's mandamus order required the Commission to issue an order that "'explains the legal authority for the

Commission's interim intercarrier compensation rules that *exclude* ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5),'" the *Order* on review "does the opposite" by finding that calls to ISPs are "telecommunications" that "fall within the reciprocal compensation framework of sections 251(b)(5) and 252(d)(2)." Br. 55-56. In other words, although Core says elsewhere that it "*agrees*" with the Commission's view that "'telecommunications' traffic to ISPs 'falls within the scope of section 251(b)(5),'" Core Br. 33 n.3 (emphasis added), it argues that this Court's mandate prohibited the Commission from adopting that position.

This claim, however, is little more than an effort to play word games with the language quoted from the Court's mandamus decision. In stating that the Commission must explain the legal authority for interim rules that "exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5)," the Court quite clearly was directing the Commission to provide a new legal justification (if it could) for the differing treatment the interim rules accorded ISP-bound traffic vis-a-vis certain other types of traffic. Other formulations used by the Court make this clear. *See In re Core Commc'ns*, 531 F.3d at 850 ("direct[ing] the FCC to explain the legal basis for its ISP-bound compensation rules"); *id.* at

860 (FCC must "explain its legal basis for [the interim] rules" or have them vacated).[30]

The Court was not dictating the legal theory that the Commission was required to adopt in doing so, and made clear that it was not directing the Commission "to promulgate any particular rule or policy." *Id.* at 859. The Court certainly did not forbid the Commission from attempting to sustain the interim rules on a revised legal theory in which ISP-bound traffic is found to "fall[] within the scope of section 251(b)(5)." *Order* ¶ 16 (J.A. 523); *see also id.* ¶¶ 17-22 (J.A. 523-26) (stating that the "section 251(b)(5) finding * * * does not end our legal analysis" and sustaining the interim rules with reference to sections 201(b) and 251(i), as well as section 251(b)(5)).

Equally insubstantial is Core's contention that the *Order* violates the Court's mandamus decision by offering "*no* legal basis" for the growth cap and new markets rules that the Commission had adopted in 2001. Br. 57. In fact, the Commission concluded, after analyzing its authority under sections 251(b)(5), 201(b), and 251(i), that *all* of the interim "pricing rules governing the payment of compensation between carriers for ISP-bound traffic" – including the growth cap and new markets rules – were within its authority. *Order* ¶ 21 (J.A. 525). *See also*

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[30] This Court in *WorldCom* likewise had directed the Commission generally to explain the "legal basis for adopting the rules chosen by the Commission." *WorldCom*, 288 F.3d at 434.

id. ¶ 21 n.72 (J.A. 525) (finding that "the Commission had the authority to adopt the [interim] pricing regime [for ISP-bound traffic] pursuant to our broad authority under section 201(b) to issue rules governing interstate traffic"). Core's argument to the contrary is predicated entirely on the Commission's statement (*Order* ¶ 27 n.103 (J.A. 529)) that Core's separate Administrative Procedure Act claim that the growth cap and new markets rules lacked a reasonable explanation was moot in light of the Commission's previous decision to forbear from applying those rules. Br. 57. As discussed above, however, the *Order* addressed the Commission's statutory authority to adopt *all* of the components of the interim rules – including the growth cap and new markets rules. And, in any event, a renewed Commission decision on the reasonableness of the interim rules under the APA – as opposed to the Commission's statutory authority to adopt those rules – was never part of the *WorldCom* mandate with which the Commission was required to comply. *See WorldCom*, 288 F.3d at 434 (noting that, "[h]aving found that § 251(g) does not provide a basis for the Commission's [interim rules], we make no further determinations" and, in particular, that "we do not decide petitioners' claims that the interim pricing limits imposed by the Commission are inadequately reasoned").

In granting the writ of mandamus in *In re Core Commc'ns*, the Court directed the Commission "to respond to our 2002 *WorldCom* remand by November 5, 2008" by issuing an order "that explains the legal authority for the

Commission's interim intercarrier compensation rules * * * *" 531 F.3d at 861-62. The Commission did precisely that when it timely issued the *Order*. That *Order* (¶¶ 6-29 (J.A. 518-29)) sets forth in detail a revised legal basis for the ISP-bound compensation rules that the Court had remanded in *WorldCom*. That is all the mandamus order required.

Finally, the CLEC intervenors' contention (Br. 36) that the *Order* did not comply with this Court's mandamus decision directing the Commission to act by November 5, 2008, because Federal Register publication occurred later is barred and, in any event, meritless. First, no petitioner makes this argument (Core asserts it only in its role as an intervenor), so it is not properly before the Court. *See Competitive Telecomms. Ass'n*, 309 F.3d at 18. Moreover, we are not aware of any party arguing – prior to issuance of the *Order* – that the Commission had to not only release an order in response to this Court's mandamus decision by November 5, but also have it published in the Federal Register by that date. This is accordingly a "question[] of * * * law upon which the Commission * * * has been afforded no opportunity to pass" and is not properly before the Court for this reason as well. 47 U.S.C. § 405(a).

In any event, we respectfully submit that the panel's reference to a "final and appealable" order (*see In re Core Commc'ns*, 531 F.3d at 861-62) is best understood as reflecting a concern about the possibility that the Commission's

response to the mandamus order would take the form of a staff-level decision (which could not be challenged immediately in court, but only after further review by the full Commission) or the issuance of a press release, with the order to follow at some (unspecified) later date. Intervenors offer little reason to believe that the mandamus panel instead intended for the Commission to ensure that a separate agency – the National Archives and Record Administration – had published the Commission's response in the Federal Register.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review insofar as they present justiciable claims and should otherwise dismiss them.

Respectfully submitted,

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May 1, 2009

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

CORE COMMUNICATIONS, INC., ET Al.,	)	
	)	
PETITIONERS,	)	
	)	
V.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF America,	)	NOS. 08-1365, ET AL.
	)	
	)	
RESPONDENTS.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Federal Communications Commission" in the captioned case contains 13291 words.

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June 19, 2009

STATUTORY ADDENDUM

5 U.S.C. § 706(2)(A)
28 U.S.C. § 2342(1)
28 U.S.C. § 2344
47 U.S.C. § 152
47 U.S.C. § 153(43)
47 U.S.C. § 201
47 U.S.C. § 203
47 U.S.C. § 204
47 U.S.C. § 205
47 U.S.C. § 251
47 U.S.C. § 252
47 U.S.C. § 332
47 U.S.C. § 402(a)
47 U.S.C. § 405(a)
47 C.F.R. § 1.4(b)
47 C.F.R. § 51.701(d)

5 U.S.C.A. § 706(2)(A)

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

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(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

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28 U.S.C.A. § 2342(1)

UNITED STATES CODE ANNOTATED CURRENTNESS
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 158. ORDERS OF FEDERAL AGENCIES; REVIEW

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

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UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 158. ORDERS OF FEDERAL AGENCIES; REVIEW

§ 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C.A. § 153(43)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires--

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(43) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

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47 U.S.C.A. § 201

UNITED STATES CODE ANNOTATED CURRENTNESS
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C.A. § 203

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CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder;

and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 U.S.C.A. § 204

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§ 204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.

(B) The Commission shall, with respect to any such hearing initiated prior to November 3, 1988, issue an order concluding the hearing not later than 12 months after November 3, 1988.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

(3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

47 U.S.C.A. § 205

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PART I. COMMON CARRIER REGULATION

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

47 U.S.C.A. § 251

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CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART II. DEVELOPMENT OF COMPETITIVE MARKETS

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An

incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C.A. § 252

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CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART II. DEVELOPMENT OF COMPETITIVE MARKETS

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

47 U.S.C.A. § 332

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CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that--

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be

authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section--

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

47 U.S.C.A. § 402(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

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47 U.S.C.A. § 405(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

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47 C.F.R. § 1.4(b)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART A. GENERAL RULES OF PRACTICE AND PROCEDURE
GENERAL

§ 1.4 Computation of time.

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(b) General Rule--Computation of Beginning Date When Action is Initiated by Commission or Staff. Unless otherwise provided, the first day to be counted when a period of time begins with an action taken by the Commission, an Administrative Law Judge or by members of the Commission or its staff pursuant to delegated authority is the day after the day on which public notice of that action is given. See § 1.4(b)(1)-(5) of this section. Unless otherwise provided, all Rules measuring time from the date of the issuance of a Commission document entitled "Public Notice" shall be calculated in accordance with this section. See § 1.4(b)(4) of this section for a description of the "Public Notice" document. Unless otherwise provided in § 1.4(g) and (h) of this section, it is immaterial whether the first day is a "holiday." For purposes of this section, the term "public notice" means the date of any of the following events: See § 1.4(e)(1) of this section for definition of "holiday."
(1) For all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. 552, 553, to be published in the Federal Register, including summaries thereof, the date of publication in the Federal Register.

Note to paragraph (b)(1): Licensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2).

Example 1: A document in a Commission rule making proceeding is published in the Federal Register on Wednesday, May 6, 1987. Public notice commences on Wednesday, May 6, 1987. The first day to be counted in computing the beginning date of a period of time for action in response to the document is Thursday, May 7, 1987, the "day after the day" of public notice.

Example 2: Section 1.429(e) provides that when a petition for reconsideration is timely filed in proper form, public notice of its filing is published in the Federal Register. Section 1.429(f) provides that oppositions to a petition for reconsideration shall be filed

within 15 days after public notice of the petition's filing in the Federal Register. Public notice of the filing of a petition for reconsideration is published in the Federal Register on Wednesday, June 10, 1987. For purposes of computing the filing period for an opposition, the first day to be counted is Thursday, June 11, 1987, which is the day after the date of public notice. Therefore, oppositions to the reconsideration petition must be filed by Thursday, June 25, 1987, 15 days later.

(2) For non-rulemaking documents released by the Commission or staff, including the Commission's section 271 determinations, 47 U.S.C. 271, the release date.

Example 3: The Chief, Mass Media Bureau, adopts an order on Thursday, April 2, 1987. The text of that order is not released to the public until Friday, April 3, 1987. Public notice of this decision is given on Friday, April 3, 1987. Saturday, April 4, 1987, is the first day to be counted in computing filing periods.

(3) For rule makings of particular applicability, if the rule making document is to be published in the Federal Register and the Commission so states in its decision, the date of public notice will commence on the day of the Federal Register publication date. If the decision fails to specify Federal Register publication, the date of public notice will commence on the release date, even if the document is subsequently published in the Federal Register. See Declaratory Ruling, 51 FR 23059 (June 25, 1986).

Example 4: An order establishing an investigation of a tariff, and designating issues to be resolved in the investigation, is released on Wednesday, April 1, 1987, and is published in the Federal Register on Friday, April 10, 1987. If the decision itself specifies Federal Register publication, the date of public notice is Friday, April 10, 1987. If this decision does not specify Federal Register publication, public notice occurs on Wednesday, April 1, 1987, and the first day to be counted in computing filing periods is Thursday, April 2, 1987.

(4) If the full text of an action document is not to be released by the Commission, but a descriptive document entitled "Public Notice" describing the action is released, the date on which the descriptive "Public Notice" is released.

Example 5: At a public meeting the Commission considers an uncontested application to transfer control of a broadcast station. The Commission grants the application and does not plan to issue a full text of its decision on the uncontested matter. Five days after the meeting, a descriptive "Public Notice" announcing the action is publicly released. The date of public notice commences on the day of the release date.

Example 6: A Public Notice of petitions for rule making filed with the Commission is released on Wednesday, September 2, 1987; public notice of these petitions is given on September 2, 1987. The first day to be counted in computing filing times is Thursday, September 3, 1987.

(5) If a document is neither published in the Federal Register nor released, and if a descriptive document entitled "Public Notice" is not released, the date appearing on the document sent (e.g., mailed, telegraphed, etc.) to persons affected by the action.

Example 7: A Bureau grants a license to an applicant, or issues a waiver for non-conforming operation to an existing licensee, and no "Public Notice" announcing the action is released. The date of public notice commences on the day appearing on the license mailed to the applicant or appearing on the face of the letter granting the waiver mailed to the licensee.

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47 C.F.R. § 51.701(d)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 51. INTERCONNECTION
SUBPART H. RECIPROCAL COMPENSATION FOR TRANSPORT AND TERMINATION OF TELECOMMUNICATIONS TRAFFIC

§ 51.701 Scope of transport and termination pricing rules.

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(d) Termination. For purposes of this subpart, termination is the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

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