



1200 EIGHTEENTH STREET, NW

WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301

WWW.HARRISWILTSHIRE.COM

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By Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68

Dear Ms. Dortch:

The purpose of this letter, filed on behalf of Level 3 Communications, LLC, is to outline a legal basis under which the FCC could conclude that ISP-bound traffic falls within both Section 201 and Section 251(b)(5), but nonetheless establish rules, particularly further interim rules, governing compensation for the exchange of ISP-bound traffic between a LEC and another telecommunications carrier.

Section 201(a) grants the Commission authority over “physical interconnections” of “common carrier[s] engaged in interstate or foreign communication by wire or radio.” ISP-bound communications are jurisdictionally interstate because it is not “practically and economically possible to separate interstate and intrastate components” of such communications. *See, e.g., Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, ¶ 20 (2004). Accordingly, prior to adoption of the 1996 Act, the Commission had authority under Section 201 to establish both pricing standards and specific rates governing the exchange of ISP-bound traffic among LECs. Of course, the FCC did not actually exercise that authority because, except in a few states, CLECs did not exchange switched traffic with

ILECs prior to the 1996 Act, and there was no established statutory right to termination compensation.

Section 251(i) expressly reaffirms the Commission's pre-existing authority under Section 201 regarding intercarrier compensation for the exchange of interstate traffic, including ISP-bound traffic. Section 251(i) provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201." The Conference Report on the Act specifically elaborates: "New subsection 251(i) makes clear the conferees' intent that *the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority regarding interconnection under section 201 of the Communications Act.*" H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 116 (1996) (emphasis added).

Section 251(i)'s significance was widely acknowledged following adoption of the 1996 Act, particularly in the context of the FCC's pricing jurisdiction with respect to CMRS providers. A number of such providers (and potential providers) pointed out that Section 251(i)'s preservation of the Commission's pre-existing authority under Section 201 would enable the Commission to use its Section 201 authority to establish CMRS-LEC interconnection rates, rather than relying upon Sections 251 and 252. *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1017 & n.2403 (1996) (citing numerous comments to that effect). Moreover, the Commission expressly acknowledged Section 201 (and Section 332, to the extent necessary to establish jurisdiction over intrastate traffic) as "a basis for jurisdiction over LEC-CMRS interconnection." *Id.* at ¶ 1023. In short, just as Section 251(i) preserves the FCC's pre-1996 Act pricing jurisdiction with respect to CMRS providers, it also preserves the FCC's pre-1996 Act pricing jurisdiction with respect to interstate traffic. *Cf. Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 & n.21 (8th Cir. 1997) (leaving in place the Commission's pricing rules governing CMRS carriers, notwithstanding vacatur as to other carriers).

Section 252(d)(2) sets forth specific substantive standards applicable to the determination of just and reasonable compensation for the transport and termination of telecommunications pursuant to Section 251(b)(5). 47 U.S.C. § 252(d)(2)(A) (intercarrier compensation "shall not" be considered "just and reasonable unless" such terms and conditions comply with the 252(d)(2) standards). Any rules or rates governing intercarrier compensation for ISP-bound traffic established by the FCC pursuant to its Section 201 authority would, accordingly, have to be consistent with Section 252(d)(2)'s more specific substantive definition of "just and reasonable" in the reciprocal compensation context. So long as any Section 201 pricing determinations made by the FCC comport with those substantive standards, however, section 252(d)(2) is satisfied.¹ The FCC could then choose to implement these federal rates through other Title II mechanisms, such as tariffs, or it could simply recognize that terms and conditions for reciprocal compensation prescribed by FCC rule, including ISP-bound rates, will be reflected in the

¹ Pursuant to the final sentence of Section 201(b) and 251(d)(1), the FCC can also prescribe pricing methodologies, including "bill-and-keep," for all Section 251(b)(5) traffic that does not also fall within Section 201(a). *See AT&T v. Iowa Utility Board*, 525 U.S. 366, 384-5 (1999).

interconnection agreements reviewed and approved by state commissions pursuant to Section 252. In the latter circumstances, of course, the state commissions' role in "arbitrating" prices for ISP-bound traffic would properly be limited to ensuring that agreements reflect the Section 252(d)(2)-compliant prices determined by the FCC.

Moreover, the FCC may also, on an interim basis, provide for a reasonable transition to Section 252(d)(2)-compliant rates, particularly to the extent that it views state-arbitrated rates as established for non-ISP-bound traffic as inadequately reflecting the Section 252(d)(2) standard.² The Commission could also provide interim rules to govern during the time necessary to complete such an evaluation. The impending submission of the ICF Plan, which provides such a transition for *all* traffic, including ISP-bound traffic, further supports a reasonable interim and transitional rule.

Accordingly, the FCC could conclude that ISP-bound traffic falls within both Section 201 and Section 251(b)(5), but nonetheless establish rules, particularly interim rules, governing compensation for the exchange of ISP-bound traffic between a LEC and another telecommunications carrier.

Respectfully submitted,

/s/ John T. Nakahata

John T. Nakahata
Counsel for Level 3 Communications, LLC

cc: Austin Schlick Jeff Dygert
Chris Killion Tamara Preiss
Rob Tanner Steve Morris
Victoria Schlesinger Jane Jackson

Christopher Libertelli Dan Gonzalez
Scott Bergmann Jessica Rosenworcel
Matt Brill

² The Commission suggested as much in its 2001 *Intercarrier Compensation NPRM*, 16 FCC Rcd 9610 (2001).