Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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

SECTIONS 251(B)(5) AND 252(D)(2) GOVERN ISP-BOUND TRAFFIC AND ARE NOT LIMITED TO "LOCAL" TERMINATION

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INTRODUCTION AND SUMMARY

Level 3 Communications LLC ("Level 3") hereby responds to arguments presented by Verizon and BellSouth Corporation in Section I of the *ex parte* filing they submitted on May 17, 2004.[1] In particular, Level 3 addresses the erroneous contention that Sections 251(b)(5) and 252(d)(2) of the Communications Act ("Act") do not apply to the exchange of ISP-bound traffic between LECs.[2]

Verizon and BellSouth ask the Commission to abandon the statutory analysis of Sections 251(b)(5) and 251(g) adopted in the *ISP Remand Order*,[3] and to re-adopt the view – expressly repudiated by the *ISP Remand Order* – that Section 251(b)(5) only applies to "local" telecommunications traffic. The Commission's reasons for repudiating the "local"/"long distance" distinction in this context three years ago remain valid. Most importantly, the express language of Section 251(b)(5) applies on its face to *all* telecommunications traffic, not just "local" telecommunications traffic.

The D.C. Circuit's decision in *WorldCom v. FCC* underscores that Section 251(b)(5) means what it says.[4] *WorldCom v. FCC* involved a challenge to the Commission's claim that it could make new rules governing intercarrier compensation for ISP-bound traffic because such traffic purportedly fell within the term "information

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[1] See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Internet-Bound Traffic Is Not Compensable Under Section 251(b)(5) and 252(d)(2) (*ex parte* submission of Verizon and BellSouth Corporation) (filed May 17, 2004) ("Verizon/BellSouth *Ex Parte*").

[2] Level 3 will respond separately to the remaining arguments raised by Verizon and BellSouth, including the argument that ISP-bound traffic constitutes "exchange access."

[3] *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*").

[4] *WorldCom v. FCC*, 288 F.3d 429 (2002).

access" in Section 251(g), and therefore *not* within Section 251(b)(5). In reversing, the D.C. Circuit held that Section 251(g) authorizes only "continued enforcement" of pre-1996 Act requirements, and pointed out that there *is no such requirement* as to intercarrier compensation for ISP-bound calls[5] – precisely as the Commission itself had found in the *ISP Declaratory Ruling*.[6] In short, because Section 251(b)(5) *on its face* covers ISP-bound traffic, because there are *no* relevant pre-1996 Act rules, and because the Commission has *no* authority to promulgate new rules inconsistent with Section 251(b)(5), it is plain that intercarrier compensation for ISP-bound traffic is governed solely by Section 251(b)(5).

The Act is not a marionette that may be made to dance to the tune of Verizon's and BellSouth's parochial interests, while broader interests go begging. Here, bending the plain language of Section 251(b)(5) to read a "local"/"long distance" distinction into the statute could cripple unified intercarrier compensation reform by fracturing the Commission's statutory authority. That would undercut the Commission's ability to achieve *comprehensive* intercarrier compensation reform, particularly with respect to circuit-switched communications.

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[5] *Id.* at 433.

[6] *See Implementation of Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Propose Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, 3695 (¶ 9) (1999) ("*ISP Declaratory Ruling*"), *rev'd and remanded sub nom. Bell Atlantic v. FCC*, 206 F.3d 1, 2 (D.C. Cir. 2000).

I. VERIZON'S AND BELLSOUTH'S THEORY THAT SECTION 251(B)(5) IS LIMITED TO "LOCAL" TERMINATION IS FORECLOSED BY THE COMMISSION'S *ISP REMAND ORDER* AND THE D.C. CIRCUIT'S *WORLDCOM* DECISION.

Verizon and BellSouth argue that "§ 251(b)(5) applies only to traffic that originates on the network of one local exchange carrier and terminates on the network of another local exchange carrier within the same local calling area."[7] That argument is foreclosed by the Commission's *ISP Remand Order* and the D.C. Circuit's decision in *WorldCom*.

A. Section 251(b)(5) Governs *All* Telecommunications Traffic Exchanged Between LECs and *All* Other Telecommunications Carriers, Not Just "Local" Traffic Exchanged Between LECs or Between a LEC and a CMRS Carrier.

1. Section 251(b)(5) is Not Limited to "Local" Traffic.

Verizon and BellSouth claim that the Commission, in the *ISP Remand Order*, "did not *repudiate* the analysis on which it had relied in the *Local Competition Order*"[8] to find that Section 251(b)(5) applies only to "local" traffic.[9] Verizon's and BellSouth's revisionist assertion is simply wrong, and is contradicted by the express terms of the *ISP Remand Order*.

In its 1996 *Local Competition Order*, the Commission found that Section 251(b)(5) applies only to local telecommunications traffic.[10] The Commission applied

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[7] Verizon/BellSouth *Ex Parte* at 26.

[8] Verizon/BellSouth *Ex Parte* at 25 (emphasis in original).

[9] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

[10] *See id.*, 11 FCC Rcd at 16013 (¶ 1034); *see also ISP Declaratory Ruling*, 14 FCC Rcd at 3693 (¶ 7).

that rule to ISP-bound traffic in its *ISP Declaratory Ruling*, which relied on the traditional "end-to-end" jurisdictional analysis to conclude that ISP-bound traffic is not "local" because "a substantial portion of Internet traffic involves accessing interstate or foreign websites."[11] The D.C. Circuit reversed and remanded that decision on the ground that the Commission had failed to "provide an explanation why this [end-to-end jurisdictional analysis] is relevant to discerning whether a call to an ISP" should, for intercarrier compensation purposes, "fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs."[12]

In the resulting *ISP Remand Order*, the Commission reconsidered whether Section 251(b)(5), by its terms, applies to ISP-bound communications.[13] The Commission repudiated its earlier ruling that the provision is limited to the termination of "local" telecommunications, finding that it had "*erred* in focusing on the nature of the service (*i.e.*, local or long distance) . . . for purposes of interpreting the relevant scope of section 251(b)(5)," rather than looking to the language of the statute itself.[14] Specifically, the Commission found that, "[o]n its face," Section 251(b)(5) requires "local exchange carriers . . . to establish reciprocal compensation arrangements for the transport and termination of *all* 'telecommunications' they exchange with another telecommunications carrier, without exception."[15] The Commission emphasized that, "[u]nless subject to

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[11] *See ISP Declaratory Ruling*, 14 FCC Rcd at 3701-02 (¶ 1); *Bell Atlantic*, 206 F.3d at 2.

[12] *Bell Atlantic*, 206 F.3d at 5.

[13] *See ISP Remand Order*, 16 FCC Rcd at 9152 (¶ 1).

[14] *Id.*, at 9164 (¶ 26) (emphasis added).

[15] *Id.*, at 9165-66 (¶ 31) (emphasis in original).

further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of *all* telecommunications traffic – *i.e.*, whenever a local exchange carrier exchanges telecommunications traffic with another carrier."[16]

Of course, the Commission went on to find that Section 251(b)(5) *is* "subject to further limitation" – specifically, that certain types of traffic enumerated in Section 251(g) are "carve[d]-out" of Section 251(b)(5).[17] That conclusion did not, however, affect the Commission's determination as to the scope of Section 251(b)(5) absent the "limitation" that the Commission believed to be imposed by Section 251(g).

As further discussed *infra* in Part I.B., the D.C. Circuit's *WorldCom* decision rejected the Commission's view that Section 251(g) contains a "limitation" on Section 251(b)(5).[18] Specifically, the court found that Section 251(g) permits only "continued enforcement" of pre-1996 Act requirements, rather than conferring independent authority on the Commission to adopt new intercarrier compensation rules inconsistent with Section 251(b)(5).[19] The D.C. Circuit did *not*, however, cast any doubt on the Commission's express finding that Section 251(b)(5) applies, "on its face," to *all* telecommunications traffic, whether local or otherwise.

In short, the *ISP Remand Order* reconciled Sections 251(b)(5) and 251(g): traffic that does *not* fall within Section 251(g) is governed by Section 251(b)(5).[20] And

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[16] *Id.*, at 9166 (¶ 32) (emphasis in original).

[17] *Id.*, at 9169 (¶ 38).

[18] *See WorldCom*, 288 F.3d at 433-34.

[19] *Id.*

[20] *See ISP Remand Order*, 16 FCC Rcd at 9169-70 (¶ 39). Moreover, in its *WorldCom* brief to the D.C. Circuit, the Commission itself acknowledged that any Section 251(g) "carve-out" of "the categories of service listed in that section" from the "'telecommunications' covered by section 251(b)(5)" could be effective only "*until*

WorldCom clarified that ISP-bound traffic does not fall within Section 251(g), because there are no relevant pre-1996 Act rules that Section 251(g) could possibly preserve. Accordingly, Verizon's and BellSouth's claim that the Commission has not repudiated its initial position that Section 251(b)(5) applies only to "local" traffic is inconsistent with the *ISP Remand Order*.

The changes adopted by the Commission in the *ISP Remand Order* further demonstrate that the *Order* rejected the Commission's earlier view that Section 251(b)(5) applies only to "local" termination of telecommunications. In the *ISP Remand Order*, the Commission amended its reciprocal compensation rules (47 C.F.R. Part 51, Subpart H) in two key respects. First, it eliminated the word "local" in each place it appeared. Second, the Commission expanded the scope of "telecommunications traffic" under the reciprocal compensation rules to cover *all* "telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider" except for traffic "that is interstate or intrastate exchange access, information access, or exchange services for such access"[21] – the specific categories of traffic enumerated in Section 251(g).

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superseding regulations that impose reciprocal compensation obligations are adopted." Brief for the FCC at 28 (emphasis added), *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (No. 01-1218) ("FCC Brief"). The Commission thereby underscored that Section 251(b)(5) does apply to traffic not within (or no longer within) Section 251(g), including traffic that is not terminated in the same local calling area from which it originated. Of course, as Level 3 explained in greater detail in its reply comments in support of its petition for forbearance, the Commission can also terminate the application of Section 251(g) through forbearance pursuant to Section 10. *See Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission's Rules from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b),* Reply Comments of Level 3 Communications LLC, WC Docket No. 03-266 at 4-5, 12-36 (filed March 31, 2004).

[21] 47 C.F.R. § 51.701(b)(1).

The Commission's expansion of the term "telecommunications traffic" following the *ISP Remand Order* to cover all but the specific categories of traffic enumerated in Section 251(g) cannot be squared with Verizon's and BellSouth's argument that "interstate" traffic falls outside Section 251(b)(5).[22] Had the Commission concluded – as the ILECs urge – that Section 251(i) somehow excludes interstate traffic not within Section 251(g) from Section 251(b)(5)'s reciprocal compensation regime, the Commission would have taken care to exclude such traffic from its amended definition of "telecommunications traffic" subject to reciprocal compensation. As noted above, however, the Commission did not do so, but instead excluded only the Section 251(g) categories.

Finally, contrary to Verizon's and BellSouth's claims,[23] the *ISP Remand Order*'s construction of Sections 251(b)(5) and 251(g) dovetails with the legislative history of the Telecommunications Act of 1996 ("1996 Act"). In particular, consistent with the language of the Conference Report describing the Senate version of the 1996 Act, the *ISP Remand Order*'s construction of Sections 251(b)(5) and 251(g) did *not* "affect the Commission's access charge rules" as they stood on the date of enactment of the 1996 Act.[24] Rather, that construction acknowledged – as expressly contemplated by the Joint

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[22] *See* Verizon/BellSouth *Ex Parte* at 31.

[23] *See* Verizon/BellSouth *Ex Parte* at 28.

[24] *See* H.R. Conf. Rep. No. 104-458, at 117 (1996) (Joint Explanatory Statement of the Committee of Conference)("Joint Statement"). Verizon and BellSouth also make much of the language in the Joint Statement, which described what was Section 251(a) of the Senate-passed version of S.652, stating, "[t]he obligations and procedures prescribed in this section do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under section 201 of the Communications Act for the purpose of providing interexchange service, and nothing in this section is intended to affect the Commissions [sic] access charge rules." However, the bill language was more precise, providing, "Nothing in this section shall affect the Commission's

Statement[25] – that Section 251(g)'s preservation of the existing access rules was temporary, lasting only until the Commission issued superseding regulations[26] (or until it forbore from enforcing the existing rules pursuant to Section 10).

2. The Terms "Originate" and "Terminate" in Sections 252(d)(2) and 251(b)(5) Do Not Exclude Traffic Delivered to Non-"Local" End Points.

In straining to argue that the Commission's explicit statement that it had "erred in focusing on the nature of the service (*i.e.*, local or long distance)" was not a repudiation of its earlier position,[27] Verizon and BellSouth contend that the phrases "*termination* of telecommunications" in Section 251(b)(5) and "*termination* on each carrier's network facilities of calls that *originate* on the network facilities of the other carrier" in Section 252(d)(2)(A)(i) could only apply "to traffic that originates on the facilities of one carrier and terminates on the facilities of a second carrier *within the same local calling area*."[28] No support exists for this argument in the language or legislative history of Sections 251(b)(5) and 252(d)(2)(A)(i).

Verizon and BellSouth add words that do not appear in Sections 251 or 252: "*within the same local calling area*." To the contrary, Sections 251 and 252 contain no

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interexchange-to-local exchange access charge rules for local exchange carriers or interexchange carriers in effect on the date of enactment." S.652, 104th Cong. § 251(k) (as passed by the Senate and engrossed, June 15, 1995). Notably, however, there was no rule governing the exchange of ISP-bound traffic between LECs that would have been preserved. This language later evolved into Section 251(g), as enacted.

[25] *See id*. at 123 ("When the Commission promulgates its new regulations, the conferees expect that the Commission will explicitly identify those parts of the interim restrictions and obligations that it is superseding.").

[26] *See supra* n.20.

[27] *ISP Remand Order*, 16 FCC Rcd at 9164 (¶ 26).

[28] Verizon/BellSouth *Ex Parte* at 26-27 (emphasis added).

limitation on the geographic scope of calls; they refer simply to the "transport and termination of telecommunications" and the "transport and termination . . . of calls."[29] Moreover, as AT&T pointed out in a recent *ex parte* filing, Congress chose the broad statutory term "telecommunications" and *not* the much narrower term "telephone exchange service" to describe the scope of LECs' termination obligations under Section 251(b)(5).[30] By taking the opposite approach, Congress could have limited Section 251(b)(5) to the transport and termination of communications originating within the same LEC local service area – but it did not.[31]

3. Section 251(b)(5) Applies to Telecommunications Exchanged Between All Telecommunications Carriers.

Verizon and BellSouth also argue that the Section 251(b)(5) reciprocal compensation regime applies only to telecommunications traffic exchanged "*between*

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[29] 47 U.S.C. §§ 251(b)(5), 252(d)(2)(A)(i).

[30] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Section 251(b)(5) Applies to ISP-Bound Traffic, at 2 (*ex parte* submission of AT&T Corp.) (filed May 28, 2004).

[31] Verizon's and BellSouth's claim that Section 251(b)(5) applies only to "local" traffic also ignores the interplay between Sections 251(b)(5) and 251(g). In areas where a pre-1996 rule existed and has not been superseded, that pre-existing rule applies and Section 251(b)(5) does not. *See ISP Remand Order*, 16 FCC Rcd at 9169 (¶ 39). So, for example, when a subscriber places a typical pre-subscribed "telephone toll service" call, as defined in Section 3(48), 47 U.S.C. § 153(48), the origination or termination of that call over a LEC network is "exchange access," as expressly defined in Section 3(16) of the Act. 47 U.S.C. § 153(16). "Exchange access" is a Section 251(g) category for which a pre-1996 rule existed. Accordingly, Section 251(b)(5) should not apply to such calls unless and until the Commission issues superseding regulations. Clearly, however, no comparable interplay between Sections 251(b)(5) and 251(g) exists for "interstate" calls, because they do not constitute a Section 251(g) category.

LECs."[32] That claim is inconsistent with both the plain language of the provision and the legislative history.

As discussed above, Section 251(b)(5) applies by its terms to the transport and termination of "telecommunications." As the Commission observed in the *ISP Remand Order*, on its face, the language covers the transport and termination of *all* telecommunications, not just telecommunications exchanged with a LEC.[33] Moreover, in the *Local Competition Order*, this Commission expressly held that LEC-CMRS arrangements fell within Section 251(b)(5) because all CMRS providers "offer telecommunications."[34] Under the Act's definitions, a CMRS provider is not a LEC, except when the FCC expressly finds that a CMRS provider should be considered a LEC – which the FCC has never done.[35]

Furthermore, the Joint Statement confirms that Section 251(b)(5), like the rest of Section 251(b), identifies duties that all LECs (incumbent or competitive) owe to *all* other telecommunications carriers, not just to other LECs. The Conferees stated that "the duties imposed under new section 251(b) make sense only in the context of a specific request *from another telecommunications carrier or any other person* who actually seeks to connect with or provide services using the LEC's network."[36] This sentence – with its references to connections with "another telecommunications carrier or any other person" – would be nonsensical if the obligations of Section 251(b)(5) applied only to other

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[32] Verizon/BellSouth *Ex Parte* at 26 (emphasis in original).

[33] *ISP Remand Order*, 16 FCC Rcd at 9165-66 (¶ 31).

[34] *Local Competition Order*, 11 FCC Rcd at 15997.

[35] 47 U.S.C. § 153(26)(definition of "local exchange carrier" excludes CMRS, unless included by the Commission).

[36] Joint Statement at 121 (emphasis added).

LECs. Congress clearly contemplated that Section 251(b)(5)'s duties, including reciprocal compensation, extended beyond LEC-to-LEC communications.

4. One-Way Traffic Flows Fall Within Section 251(b)(5).

Verizon and BellSouth maintain that ISP-bound calls are not subject to "*reciprocal* compensation arrangements" because the traffic flow occurs in one direction only.[37] Notably, Verizon and BellSouth ignore Commission rulings and court decisions with respect to reciprocal compensation for analogous one-way paging traffic, where calls originate on the PSTN and terminate via the paging carrier.[38] In the *Local Competition Order*, for instance, the Commission made clear that LECs "are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks."[39] The Commission addressed the issue again in *TSR Wireless.* In that proceeding, the defendants argued that "the reciprocal compensation rules should not apply to one-way paging carriers because only one of the carriers, in this case, the paging carrier, receives termination compensation."[40] The Commission found that its reciprocal compensation rules "draw[] no distinction between one-way and two-way carriers."[41]

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[37] Verizon/BellSouth *Ex Parte* at 41 (emphasis in original).

[38] *See, e.g., TSR Wireless, LLC v. U.S. West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 11166 (2000) ("*TSR Wireless*"); *Local Competition Order*, 11 FCC Rcd at 15517 (¶ 34); Letter from A. Richard Metzger, Jr., Chief, Common Carrier Bureau, to Keith Davis, Southwestern Bell Telephone, DA 97-2726 (Dec. 30, 1997).

[39] *Local Competition Order*, 11 FCC Rcd. at 15997 (¶ 1008).

[40] *TSR Wireless*, 15 FCC Rcd. at 11177 (¶ 20).

[41] *Id.*, 15 FCC Rcd at 11178 (¶ 21).

The United States Court of Appeals for the Ninth Circuit, in *Pacific Bell v. Cook Telecom Inc.*, similarly rejected arguments – identical to those raised by Verizon and BellSouth – that the Act precludes payment of reciprocal compensation when calls are terminated in one direction only.[42] These decisions cannot be distinguished. Just as a LEC must pay reciprocal compensation to a paging carrier, so must it compensate a carrier terminating a call to an ISP providing Internet access.

Remarkably, Verizon and BellSouth also argue that the direction of the net bit flow in an ISP-bound communication should somehow affect intercarrier compensation.[43] That makes no sense. It is equivalent to arguing that the Commission should base intercarrier compensation for voice traffic on the share of time the calling party spends listening rather than speaking. The Commission has never adopted rules that change the compensation regime for calls to audiotex services – or for calls to particularly chatty acquaintances. Nor should it. Notwithstanding Verizon's and BellSouth's suggestion to the contrary, Congress certainly did not intend for the FCC to base its intercarrier compensation rules on net bit flow or net minutes listening versus talking.

5. The Commission Cannot Simply Change Its Mind as to the Proper Interpretation of Sections 251(b)(5) and 251(g).

By urging the Commission to re-adopt its discarded distinction between local and long-distance traffic for purposes of applying Section 251(b)(5), Verizon and BellSouth ask the Commission to reverse course. But a decision to abandon the current view of Section 251(b)(5) and revert to an approach that failed in the past will lead to intense

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[42] *See Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1242-1244 (9th Cir. 1999).

[43] *See* Verizon/BellSouth *Ex Parte* at 42-43.

judicial scrutiny, particularly since the Commission itself deemed its past approach a "mistake" that "created unnecessary ambiguities."[44]

"It is well-established," according to a long line of Supreme Court and appellate decisions, "that an agency may not depart from established precedent without announcing a principled reason for such a reversal."[45] The Supreme Court confirmed this rule most forcefully in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*,[46] where it rejected a decision from the National Highway Traffic Safety Administration (NHTSA) to eliminate a standard that would have required manufacturers to install passive restraint systems in all new cars. The Court explained that federal agencies generally act with broad discretion and that an agency's discretion can include a decision not to act. The Court held, however, that revoking a prior decision "is substantially different than a failure to act [because] [r]evocation constitutes a reversal of the agency's former views as to the proper course."[47] Whenever an agency abandons its existing standards, the Court held, it "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[48] Concluding that the NHTSA had not adequately explained its departure from the passive restraint standard and that it had failed to

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44 *ISP Remand Order*, 16 FCC Rcd at 9173 (¶ 46).

45 *Fertilizer Inst. v. Browner*, 163 F.3d 774, 778 (3rd Cir. 1998).

46 463 U.S. 29 (1983).

47 *Id.* at 41; *see also Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 41 (1st Cir. 1989) ("Unless an agency either follows or consciously changes the rules developed in its precedent, those subject to the agency's authority cannot use its precedent as a guide for their conduct; nor will that precedent check arbitrary agency action.").

48 *State Farm*, 463 U.S. at 43 (internal quotations omitted).

consider alternative standards, the Court found that the agency's rescission of the standard was arbitrary and capricious.

Under the *State Farm* rule, the Commission is not free to discard its current approach to Sections 251(b)(5) and 251(g), as Verizon and BellSouth suggest. The Commission may rescind its current approach and re-adopt its past policy *only* if it could justify the rescission through a reasoned analysis supported by record evidence. Such a reasoned analysis is likely impossible in this case, however, as both the Commission and the D.C. Circuit have rejected past efforts to inject a "local"/"long-distance" distinction into interpretations of Section 251(b)(5).[49] Accordingly, *State Farm* bars the Commission from undertaking the wholesale policy switch that Verizon and BellSouth advocate.

B. Section 251(g) Establishes Only a Temporary Exclusion from Section 251(b)(5), and Only if There Was a Pre-1996 Act Rule Governing Intercarrier Compensation.

As briefly set forth in Part I.A.1., the D.C. Circuit's *WorldCom* decision squarely rejected the Commission's earlier view that Section 251(g) "carves out" certain traffic from Section 251(b)(5), and that the Commission retains authority to regulate that traffic pursuant to Sections 251(i) and Section 201.[50] The court held that because Section 251(g) "is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act, we find the Commission's reliance on § 251(g) precluded."[51] That

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[49] *See supra* Part I.A.1.

[50] *See ISP Remand Order*, 16 FCC Rcd at 9169, 9174-75 (¶¶ 38, 48-51) (emphasis added).

[51] *WorldCom*, 288 F.3d at 430.

holding – coupled with the Commission's earlier finding in the *ISP Declaratory Ruling* that there was no pre-1996 Act rule governing intercarrier compensation for ISP-bound traffic[52] – makes clear that the Commission has no authority to depart from Section 251(b)(5) and impose new intercarrier compensation regulations on ISP-bound traffic.

1. There Is No Pre-1996 Act Rule Governing Intercarrier Compensation for ISP-Bound Traffic.

In the *ISP Declaratory Ruling*, the Commission stated unambiguously that "[t]he Commission *has no rule* governing inter-carrier compensation for ISP-bound traffic."[53] In its *ISP Remand Order* and its briefs to the D.C. Circuit in *WorldCom,* the Commission never suggested anything to the contrary. And, in the *WorldCom* decision, the D.C. Circuit noted that "it seems uncontested – and the Commission declared in the [*ISP Declaratory Ruling*] – that there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic."[54] The court emphasized that the Commission did not "point to any pre-Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls."[55]

The *WorldCom* court also rebuffed the Commission's contention that "pre-existing LEC obligations to provide interstate access for ISPs" could justify removing ISP-bound traffic from the scope of Section 251(b)(5).[56] The court explained that Section 251(g) "speaks only of services provided 'to interexchange carriers and information

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52 *See ISP Declaratory Ruling*, 14 FCC Rcd at 3695 (¶ 9).

53 *Id.* (emphasis added); *see also id*., 14 FCC Rcd at 3690 (¶1) (discussing "the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic").

54 *WorldCom*, 288 F.3d at 433 (emphasis in original).

55 *Id*.

56 *Id*.

service providers'; LECs' services to other LECs, even if en route to an ISP, are not 'to' either an IXC or to an ISP."[57] In other words, pre-existing rules regarding services *to* ISPs cannot justify exempting the exchange of traffic *between* LECs from Section 251(b)(5). *WorldCom* thus forecloses the Commission from now claiming that rules governing compensation to be paid by ISPs as end users are rules governing *intercarrier* compensation for ISP-bound traffic.[58]

2. Absent a Pre-1996 Act Rule, The Commission Cannot Subject ISP-Bound Traffic to An Intercarrier Compensation Regime Outside the Scope of Section 251(b)(5).

As discussed above, the D.C. Circuit's decision in *WorldCom* can be distilled to a single core holding: absent a pre-1996 Act rule governing intercarrier compensation for ISP-bound traffic, Section 251(g) provides no basis for Commission rulemaking. Nor can the Commission turn to other provisions of the Act – such as Section 251(i) and, through that section, Section 201 – as sources of authority to promulgate new intercarrier compensation rules for ISP-bound traffic inconsistent with Section 251(b)(5).[59]

The Commission's *ISP Remand Order* cannot be read to establish Section 251(i) as a source of authority for its ISP-bound rules independent of Section 251(g). To the contrary, the Commission there did *not* rely on Section 251(i) at all, as it explained in its briefing to the D.C. Circuit in *WorldCom*:

> [S]ection 251(i) has no direct role in the Commission's interpretation of section 251(b)(5) – which rests instead upon a

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[57] *Id*. at 433-434.

[58] *Cf., e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.").

[59] 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." 47 U.S.C. § 251(i).

> reading of sections 251(b)(5) and 251(g) in light of statutory goals. The Commission relies on section 251(i) solely for its continued authority to regulate Internet-bound traffic (which *otherwise* is exempted from section 251(b)(5) pursuant to section 251(g)) under its general regulatory jurisdiction over interstate communications set forth in section 201.[60]

The Commission's brief acknowledged that Section 251(i) cannot *remove* any traffic from the scope of Section 251(b)(5); it merely provides "authority to regulate" traffic that is not covered by that provision.

In sum, in light of the D.C. Circuit's decision in *WorldCom* and the Commission's own prior decisions, neither Section 251(g) nor Section 201 (through Section 251(i)) establishes limits on Section 251(b)(5)'s applicability to non-local traffic or authorizes rules for intercarrier compensation for ISP-bound traffic outside of Section 251(b)(5).

II. READING SECTION 251(G) TO ESTABLISH PERMANENT EXEMPTIONS FROM SECTION 251(B)(5) COULD CRIPPLE UNIFIED INTERCARRIER COMPENSATION REFORM.

Accepting Verizon's and BellSouth's invitation to reverse course yet again and limit Section 251(b)(5) to "local" traffic could cripple the Commission's efforts to achieve unified intercarrier compensation reform. Under the Commission's current view, Section 251(b)(5) establishes the statutory intercarrier compensation mechanism applicable to all telecommunications traffic "without exception,"[61] pending Commission rulemaking pursuant to Section 251(g) to supersede pre-existing exchange access compensation mechanisms.[62] Section 251(b)(5)'s unitary approach provides the Commission authority to undertake unified intercarrier compensation reform.

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60 FCC Brief at 44.

61 *ISP Remand Order*, 16 FCC Rcd at 9166 (¶ 31).

62 The Commission's rulemaking authority under Section 251(g) has no bearing on its obligation to forbear under Section 10. Thus, the Commission can act on Level 3's

In the past, at least some ILECs have agreed with this interpretation of the manner in which Sections 251(b)(5) and 251(g) authorize the creation of a unified intercarrier compensation mechanism. As Qwest stated in its comments in response to the Commission's *Intercarrier Compensation NPRM*, for instance, "[o]ver time, as the FCC exercises its authority to 'supersede[] by regulation[]' the grandfathering provisions of section 251(g), the class of traffic subject to section 251(b)(5) may increase in size."[63] Likewise, in its comments in the same proceeding, SBC argued that "the Commission has authority under Section 251(b)(5) and 251(g)" to implement new intercarrier compensation mechanisms "for interstate and intrastate traffic."[64]

Verizon and BellSouth nonetheless argue that the Commission's current interpretation of Sections 251(b)(5) and 251(g) *threatens* unified intercarrier compensation reform because states adjudicate arbitrations pursuant to Section 252.[65] Verizon's and BellSouth's concerns are misplaced. Even when Section 251(b)(5)

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pending petition for forbearance from application of access charges to certain IP-enabled communications without opening a rulemaking proceeding. *See Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission's Rules from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b),* WC Docket No. 03-266 (filed Dec. 23 2003).

[63] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of Qwest Communications International, Inc., at 41 (filed Aug. 21, 1001).

[64] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of SBC Communications Inc., at 39 (filed Aug. 21, 2001). *See also Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Reply Comments of SBC Communications Inc., at 26-27 (filed Nov. 5, 2001) ("As the Commission recently concluded in the *ISP Intercarrier Compensation Order*, Section 251(b)(5) applies on its face to the transport and termination of *all* telecommunications traffic without exception. To the extent Section 251(g) exempts certain categories of telecommunications services from automatic application of the reciprocal compensation obligations of Section 251(b)(5), it merely gives the Commission flexibility to transition from existing access regimes to a new regulatory regime . . . .") (internal footnotes omitted).

[65] *See* Verizon/BellSouth *Ex Parte* at 31.

ultimately applies to all telecommunications traffic (*i.e.*, after the Commission, under Section 251(g), has superseded entirely its pre-existing access rules in favor of Section 251(b)(5)), the Commission will retain its authority to establish national rules governing the interpretation and implementation of Section 251(b)(5).[66] States are required to conduct all arbitrations pursuant to those rules. This is a coherent, unified intercarrier compensation system under which some responsibilities (including rulemaking) are discharged exclusively by the FCC, while other responsibilities (such as adjudication of the application of such rules) are discharged by the states. This is a perfectly rational system, and one consistent with the jurisdictional assignment of responsibilities with respect to all other parts of Section 251(a)-(c).

In fact, it is Verizon's and BellSouth's crabbed interpretation of Section 251(b)(5) – confining its scope to "local" telecommunications traffic – that would fracture the Commission's authority over intercarrier compensation and eliminate the mechanism providing for a smooth transition to a uniform regime. Under the Verizon and BellSouth approach, the exchange of interstate long distance traffic would be governed permanently by the FCC's access charge rules pursuant to Section 201, and the exchange of intrastate long distance traffic would be governed by state access charge rules. That fragmented system would frustrate the implementation of a single, unified approach to intercarrier compensation.

Even under Verizon's and BellSouth's view of the Act, the Commission could, of course, still adopt a uniform intercarrier compensation regime if it were to find it

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[66] *See AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 385 (1999) (noting that "the 1996 Act entrusts state commissions with the job of approving interconnection agreements," although it "do[es] not logically preclude the [FCC's] issuance of rules to guide the state-commission judgments") (original alterations omitted).

impossible to continue to separate traffic, including circuit-switched traffic, into interstate and intrastate components. As the Commission has recently reaffirmed, state regulators may only exercise jurisdiction over communications services that are either "purely intrastate" or that may be "practically and economically" separated into interstate and intrastate components.[67] Under this standard, the Commission clearly has sole jurisdiction over IP-enabled, IP-routed communications, which are inseparably interstate because of users' global mobility and the lack of any correlation between telephone numbers and geographic locations. But those same arguments do not hold true for all circuit-switched traffic. In the absence of evidence that the interstate and intrastate components of circuit-switched traffic are inseparable, Verizon and BellSouth invite the Commission to jettison a clear statutory path to unified intercarrier compensation reform under the Commission's interpretation of Sections 251(b)(5) and (g), for an uncertain path based on inseparability.

The Commission should decline Verizon's and BellSouth's invitation to tie its own hands simply to rectify Verizon's and BellSouth's long history of strategic mistakes with respect to reciprocal compensation.[68] The Commission and the D.C. Circuit have reasonably interpreted Section 251(b)(5) as applying to all telecommunications traffic not specifically carved out by Section 251(g). Likewise, the Commission and the court view Section 251(g) as a temporary transitional measure under which the Commission may

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[67] *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 (rel. Feb. 19, 2004).

[68] As the Commission is aware, the CLECs initially advocated "bill and keep" reciprocal compensation, which the ILECs opposed. The ILECs did not advocate "bill-and-keep" for any traffic until ISP-bound traffic terminated by CLECs increased. Many ILECs still do not advocate "bill and keep" for traffic for which they are net recipients of compensation, such as non-ISP-bound reciprocal compensation and exchange access.

supersede pre-existing rules and bring additional traffic within the scope of Section 251(b)(5). The Commission should maintain this interpretation.

CONCLUSION

The Commission must reject Verizon's and BellSouth's plea to resurrect the "local"/"long distance" distinction as a basis for determining the scope of Section 251(b)(5). As the Commission concluded in its *ISP Remand Order*, Section 251(b)(5) governs all telecommunications traffic, except where traffic is expressly governed by Section 251(g). The D.C. Circuit held in *WorldCom* that Section 251(g) does not govern the exchange of ISP-bound traffic in the absence of a pre-existing rule, and the Commission concluded in its *ISP Declaratory Ruling* that such a rule did not exist.

Verizon and BellSouth have provided no basis for revisiting those conclusions yet again. Were the Commission to do so all the same, it could cripple its own efforts to develop and implement a uniform intercarrier compensation mechanism to govern the exchange of all telecommunications traffic.

Respectfully submitted,

/s/

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