

Before the
Federal Communications Commission
Washington, D.C. 20554

Petition of Core Communications, Inc. for)
Forbearance Under 47 U.S.C. § 160(c) from) WC Docket No. 03-171
Application of the *ISP Remand Order*)

ORDER

Adopted: October 8, 2004

Released: October 18, 2004

By the Commission: Commissioner Adelstein approving in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. In this order, we address a petition filed by Core Communications, Inc. (Core)¹ requesting that the Commission forbear from enforcing the provisions of the *ISP Remand Order*.² For the reasons set forth below, we deny the petition with respect to rate caps and the mirroring rule, and grant forbearance with respect to the growth caps and new markets rule.³

II. BACKGROUND

a. Intercarrier Compensation NPRM

2. On April 27, 2001, the Commission released a Notice of Proposed Rulemaking beginning a fundamental re-examination of all currently regulated forms of intercarrier compensation.⁴

¹ See *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, *Petition of Core Communications, Inc.* (filed July 14, 2003) (Core Forbearance Petition). On June 22, 2004, the Commission extended by 90 days; to October 11, 2004, the date by which the petition requesting forbearance shall be deemed granted in the absence of a Commission decision. See *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, Order, DA 04-1764, at 2 (rel. June 23, 2004).

² *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*), remanded, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), cert. denied, 538 U.S. 1012 (2003). Although the court rejected the legal authority upon which the Commission based its rules, the court did not vacate the *ISP Remand Order*. Accordingly, the interim rules adopted in the *ISP Remand Order* remain in effect.

³ See *infra* paras. 6-9.

⁴ See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 16 FCC Rcd 9610 (2001) (*Intercarrier Compensation NPRM*).

The Commission recognized the need to re-evaluate the existing intercarrier compensation regimes in light of increasing competition and new technologies, such as Internet and Internet-based services.⁵ The Commission was particularly interested in identifying a unified approach to intercarrier compensation that would apply to all types of traffic and to interconnection arrangements between all types of carriers.⁶ It identified a number of problems with the current intercarrier compensation regimes which potentially could be solved by adopting a bill-and-keep regime or some other unified approach to intercarrier compensation.⁷

3. In response to the *Inter-carrier Compensation NPRM*, the Commission received extensive comment from individual carriers and economists, industry groups and associations, consumer advocates, and state regulatory commissions, among others.⁸ In addition, the Commission received numerous *ex parte* filings and detailed presentations from interested parties. In parallel with the Commission's consideration of these issues, industry-wide negotiations have taken place over the last year that have resulted in four separate proposals for comprehensive reform of the intercarrier compensation regime.⁹ The Commission plans to move forward expeditiously in consideration of these new proposals.

b. ISP Remand Order

4. Concurrent with the *Inter-carrier Compensation NPRM*, the Commission released the *ISP Remand Order*. In that order, it concluded that traffic bound for Internet Service Providers (ISPs) is not subject to the reciprocal compensation requirements of section 251(b)(5).¹⁰ The Commission concluded that ISP-bound traffic is "information access" and, therefore, is "carved out" of the scope of section 251(b)(5) by section 251(g), which preserves certain pre-Act equal access and interconnection arrangements, including compensation obligations.¹¹ It also affirmed its prior finding that ISP-bound

⁵ *Inter-carrier Compensation NPRM*, 16 FCC Rcd at 9611-12, para. 2.

⁶ *Inter-carrier Compensation NPRM*, 16 FCC Rcd at 9611-12, para. 2.

⁷ *Id.* at 9612, para. 2.

⁸ The Commission received more than 750 submissions, including more than 250 formal comments and reply comments.

⁹ For example, the Inter-carrier Compensation Forum, a coalition of nine local and long-distance phone companies including AT&T, MCI, Sprint, SBC, Level 3, Global Crossing, GCI, Iowa Telecom, and Valor, recently proposed a multiyear intercarrier compensation reform plan and universal service plan. See Letter from Gary Epstein, Counsel for the Inter-carrier Compensation Forum, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Aug. 16, 2004). See also Letter from Michael W. Young, Counsel for the Cost-Based Inter-carrier Compensation Coalition, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-92 (filed May 14, 2004) (proposing a single cost-based compensation rate based on the total element long-run incremental cost methodology); Letter from Ken Pfister, Great Plains Communications, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-92 and 04-28 (filed June 9, 2004) (proposing a unified rate plan based on embedded costs); and Letter from Glenn H. Brown, Expanded Portland Group, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-92 (filed May 12, 2004) (proposing a unified capacity-based compensation plan).

¹⁰ *ISP Remand Order*, 16 FCC Rcd at 9171-72, para. 44.

¹¹ *ISP Remand Order*, 16 FCC Rcd at 9175, para. 52; see also 47 U.S.C. § 251(g).

traffic is jurisdictionally interstate and thus subject to the Commission's section 201 jurisdiction.¹²

5. In the *ISP Remand Order*, the Commission discussed at length the market distortions and regulatory arbitrage opportunities created by the application of per-minute reciprocal compensation rates to ISP-bound traffic.¹³ The Commission found that the availability of reciprocal compensation for this type of traffic undermined the operation of competitive markets because competitive LECs were able to recover a disproportionate share of their costs from other carriers, thereby distorting the price signals sent to their ISP customers.¹⁴ It concluded that a bill-and-keep regime might eliminate incentives for arbitrage and force carriers to look to their own customers for cost recovery.¹⁵ To avoid a flash cut to bill-and-keep, however, the Commission adopted an interim compensation regime pending completion of the *Intercarrier Compensation NPRM* proceeding.¹⁶

6. *Rate Caps.* The interim regime adopted by the Commission consisted of a gradually declining cap on intercarrier compensation for ISP-bound traffic, beginning at \$.0015 per minute-of-use and declining to \$.0007 per minute-of-use.¹⁷ These rate caps reflected the downward trend in intercarrier compensation rates contained in recently negotiated interconnection agreements.¹⁸ The rate caps limited only what carriers could recover from other carriers; carriers remained free to recover any additional costs from their ISP customers. Because the interim rates were *caps* on intercarrier compensation, the Commission determined that, to the extent the states had already set rates below the caps or imposed bill-and-keep for ISP-bound traffic (or otherwise had not required payment of compensation for this traffic), the lower rates would continue to apply.

7. *Growth Caps.* In addition to reducing the intercarrier compensation rates, the Commission also imposed a cap on total ISP-bound minutes for which a LEC may receive this compensation equal to the total ISP-bound minutes for which the LEC was previously entitled to compensation, plus a 10 percent growth factor.¹⁹ These "growth caps" were based on projections of the growth of dial-up Internet access for the first two years of the transition and were considered necessary to ensure that such growth would not undermine the Commission's goal of addressing the market distortions attributable to the prevailing intercarrier compensation mechanism for ISP-bound traffic.²⁰

8. *Mirroring Rule.* The Commission also determined that the rate caps for ISP-bound

¹² *ISP Remand Order*, 16 FCC Rcd at 9175, para. 52.

¹³ *ISP Remand Order*, 16 FCC Rcd at 9181-86, paras. 67-76.

¹⁴ *ISP Remand Order*, 16 FCC Rcd at 9183, para. 71.

¹⁵ *ISP Remand Order*, 16 FCC Rcd at 9184-85, paras. 74-75.

¹⁶ This interim regime altered only intercarrier compensation rates; it did not alter carriers' other obligations under the Commission's Part 51 rules or existing interconnection agreements. *ISP Remand Order*, 16 FCC Rcd at 9187, para. 78, n.149.

¹⁷ *ISP Remand Order*, 16 FCC Rcd at 9187, para. 78.

¹⁸ *ISP Remand Order*, 16 FCC Rcd at 9190-91, para. 85.

¹⁹ *ISP Remand Order*, 16 FCC Rcd at 9191, para. 86.

²⁰ *ISP Remand Order*, 16 FCC Rcd at 9191, para. 86.

traffic (or such lower rates as had been imposed by state commissions for the exchange of ISP-bound traffic) should apply only if an incumbent LEC offered to exchange all traffic subject to section 251(b)(5) at the same rates.²¹ If a LEC did not offer to exchange section 251(b)(5) traffic at the rates set forth in the *ISP Remand Order*, it was required to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates. The Commission adopted this “mirroring” rule to ensure that incumbent LECs paid the same rates for ISP-bound traffic that they received for section 251(b)(5) traffic.

9. *New Markets Rule.* Finally, the Commission concluded that different interim intercarrier compensation rules should apply if two carriers were not exchanging traffic pursuant to an interconnection agreement prior to the adoption of the *ISP Remand Order*.²² In this situation, if an incumbent LEC has opted into the federal rate caps for ISP-bound traffic, the two carriers must exchange this traffic on a bill-and-keep basis during the interim period (the “new markets” rule).²³ This rule applies, for example, when a new carrier enters a market or an existing carrier expands into a market it previously had not served. The Commission implemented this rule in order to confine the opportunities for regulatory arbitrage to the maximum extent while seeking an appropriate long-term resolution for the problems associated with the existing intercarrier compensation regime.²⁴

10. On May 3, 2002, the United States Court of Appeals for the District of Columbia Circuit found that the Commission had not provided an adequate legal basis for the rules it adopted in the *ISP Remand Order*.²⁵ Although the court rejected the legal rationale for the interim compensation rules, the court remanded, but did not vacate, the *ISP Remand Order* to the Commission, observing that there may be other legal bases for adopting the rules.²⁶ Accordingly, the interim rules adopted in the *ISP Remand Order* remain in effect while the court remand is under review.

c. Core Forbearance Petition

11. Core filed a petition on July 14, 2003, requesting that the Commission forbear from enforcing the provisions of the *ISP Remand Order* with respect to the exchange of ISP-bound traffic between telecommunications carriers.²⁷ More specifically, Core asks the Commission to forbear from applying the rate caps, growth caps, new markets rule, and mirroring rule of the *ISP Remand Order*.²⁸

12. Core contends that the rules promulgated under the *ISP Remand Order* are

²¹ *ISP Remand Order*, 16 FCC Rcd at 9193-94, para. 89.

²² *ISP Remand Order*, 16 FCC Rcd at 9188-89, para. 81.

²³ *ISP Remand Order*, 16 FCC Rcd at 9188-89, para. 81.

²⁴ *ISP Remand Order*, 16 FCC Rcd at 9188-89, para. 81.

²⁵ *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). Specifically, the court stated that section 251(g) of the Act does not provide a basis for the Commission’s decision to create an exception to the reciprocal compensation requirements of the Act for calls made to ISPs located within the caller’s local calling area. *Id.* at 434.

²⁶ *WorldCom v. FCC*, 288 F.3d at 434.

²⁷ Core Forbearance Petition at 1.

²⁸ *Id.* at 6-7; Core Reply at 5.

unsustainable for several reasons. It claims that the D.C. Circuit remand decision calls into question the legality of the rules promulgated under the *ISP Remand Order*.²⁹ Core also claims that the rules discriminate against new entrants.³⁰ Core further contends that the *ISP Remand Order* has discouraged investment by telecommunications companies.³¹ Finally, Core argues that the Commission should forbear from applying the *ISP Remand Order*, because the rules are not necessary to prevent harm to consumers or to protect carriers from anticompetitive harm, and because forbearance is in the public interest.³²

13. A number of incumbent LECs oppose the petition.³³ In general, they argue that Core has not met the statutory criteria for forbearance, and they accuse Core of wanting to preserve a business plan dependent on regulatory arbitrage.³⁴ BellSouth states that Core offers no substantiated evidence to meet the statutory criteria for forbearance.³⁵ Qwest argues that consumers and the rest of the telecommunications industry should not be subject to harm simply because competitive LECs such as Core based their business plans on regulatory arbitrage.³⁶ SBC contends that Core's forbearance request would undermine the goals of a more rational cost recovery mechanism and reducing the market-distorting effects of reciprocal compensation for ISP-bound traffic.³⁷ Verizon argues that Core has no interest in being a "real local service provider," and that Core's assertions without any attempted proof are irrelevant to a forbearance analysis.³⁸

14. A variety of parties filed comments supporting the petition. The West Virginia PSC Consumer Advocate Division argues that the statutory criteria for forbearance have been met, and it complains that the intercarrier compensation mechanism in place is based on an invalid assertion of jurisdiction.³⁹ MCI and TelNet also argue that the current rules have no basis in law, and that a bill and keep compensation regime is discriminatory and unfair with respect to ISP-bound traffic.⁴⁰ Xspedius contends that the Bell Operating Companies (BOCs) have not lived up to their obligations under the *ISP*

²⁹ Core Forbearance Petition at 3-4.

³⁰ Core Forbearance Petition at 4-6.

³¹ Core Forbearance Petition at 6-9.

³² Core Forbearance Petition at 9-11.

³³ A list of parties filing comments or oppositions in this docket is attached as Appendix A.

³⁴ See BellSouth Opposition at 3-4, 9-13; Qwest Opposition at 11-14; SBC Opposition at 3-5; Verizon Opposition at 2-4.

³⁵ Bellsouth Opposition at 4.

³⁶ Qwest Opposition at 12.

³⁷ SBC Opposition at 3.

³⁸ Verizon Opposition at 2-4.

³⁹ West Virginia PSC Consumer Advocate Division Comments at 3-20.

⁴⁰ MCI Comments at 2-3; TelNet Comments at 1-2.

Remand Order.⁴¹

III. DISCUSSION

15. For the Commission to grant the forbearance requested by Core, we must determine that the three conditions set forth in section 10 of the Act are satisfied. In particular, section 10(a) provides that:

The Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that –

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁴²

We note that Core's petition would be denied if any one of these prongs is not met. For the reasons explained below, we find that none of the three prongs is satisfied with respect to the rate caps and mirroring rule, but that all three prongs are met with respect to the growth caps and new markets rule.

A. Public Interest

16. Core has provided only a cursory analysis of how each of the three criteria is satisfied. Core's primary argument is that the rules discriminate against competitive LECs in favor of BOCs. Core contends that the *ISP Remand Order* "has no basis in law and discriminates against and among competitive LECs in favor of the BOCs in a manner that is wholly inconsistent with the policy goals of the Act."⁴³ Core also asserts, without support, that these rules "have deterred investment in the telecommunications business, and have thereby substantially harmed the competitive telecommunications

⁴¹ *Xspedius Comments* at 1-3. *Xspedius* contends that the BOCs have refused to pay the proper amount of money due for intercarrier compensation, forcing *Xspedius* to engage in protracted negotiations. *Id.*

⁴² 47 U.S.C. § 160(a). With regard to the public interest determination required by section 10(a)(3), section 10(b) requires the Commission to "consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b). Furthermore, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." *Id.*

⁴³ Core Forbearance Petition at 2-3. According to Core, "the anticompetitive impact of the *ISP Remand Order* has dealt a crushing blow to CLECs, the telecommunications industry, and the broader national economy." *Id.* at 3.

industry and the broader national economy.”⁴⁴ Core complains that the mirroring rule is unfair, asserting that it allows BOCs to determine unilaterally the intercarrier compensation rates applicable to ISP-bound traffic.⁴⁵ We find that all of these arguments are properly considered under the third prong of the forbearance analysis, which requires the Commission to consider whether forbearance is consistent with the public interest, and whether forbearance would “promote competitive market conditions.”⁴⁶ For the reasons described below, we find that Core’s arguments do not satisfy the requirements of section 10(a)(3). As explained below, we do find, on other grounds, that section 10(a)(3) has been met with respect to the growth caps and the new markets rules.

17. As an initial matter, we reject Core’s argument that the *WorldCom* decision somehow compels us to grant the requested forbearance.⁴⁷ The court remanded but did not vacate the rules adopted in the *ISP Remand Order*.⁴⁸ The court specifically stated that there was a “non-trivial likelihood” that the Commission would be able to justify the regime it adopted.⁴⁹ Given this statement by the court, its decision to remand our order is not in itself a sufficient basis for forbearance.

18. We also reject Core’s broad, unsupported allegations that these rules “have brought about anticompetitive harm to CLECs, deterred investment in telecommunications businesses, limited the service options available to telecommunications consumers, and severely damaged the state of the telecommunications industry and the broader economy.”⁵⁰ Core provides no evidence to support these claims. Nor does it challenge the continuing validity of the public interest rationale provided by the Commission when it adopted these rules.⁵¹ The Commission implemented the rate caps because the application by state commissions of per-minute reciprocal compensation rates to ISP-bound traffic “created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access markets.”⁵² These caps, which apply to all

⁴⁴ Core Forbearance Petition at 6.

⁴⁵ Core Reply at 5. *See also* West Virginia PSC Consumer Advocate Division Comments at 6, 11-14.

⁴⁶ 47 U.S.C. §§ 160(a)(3), 160(b).

⁴⁷ *See* Core Forbearance Petition at 3-4. *See also* MCI Comments at 2; TelNet Comments at 2.

⁴⁸ *WorldCom, Inc. v. FCC*, 288 F.3d at 434.

⁴⁹ *WorldCom, Inc. v. FCC*, 288 F.3d at 434. We choose not to address the pending remand issues in this order. As explained above, and as we have explained to the D.C. Circuit in response to Core’s pending mandamus petition, the Commission is considering comprehensive reform of intercarrier compensation mechanisms for all traffic, including ISP-bound traffic. *See In re Core Communications, Inc.*, Response of Federal Communications Commission to Petition for Writ of Mandamus, File No. 04-1179, United States Court of Appeals for the District of Columbia Circuit (Aug. 19, 2004) at 8-9. We have been presented with four separate proposals from different industry groups. *See* note 8 above. These proposals represent the product of unprecedented industry-wide negotiations regarding this extremely complex subject matter. We hope to move forward expeditiously in our consideration of these proposals. We find that the benefit of considering these important issues in a comprehensive manner outweighs the consequences, if any, of a delay in responding to the *WorldCom* remand. For similar reasons, we choose not to address pending petitions for reconsideration, clarification, or waiver of the *ISP Remand Order* at this time.

⁵⁰ Core Forbearance Petition at 11.

⁵¹ *See* Core Forbearance Petition at 11; *see also* *ISP Remand Order*, 16 FCC Rcd at 9154-56, 9162, 9181-84, 9186-87, paras. 5, 7, 21, 67-71, 73, and 77.

⁵² *ISP Remand Order*, 16 FCC Rcd at 9153, para. 2.

carriers, were designed to send more accurate price signals and substantially reduce market distortions.⁵³ Core does not challenge the Commission's conclusion that rate caps help avoid arbitrage and market distortions that otherwise would result from the availability of reciprocal compensation for ISP-bound traffic.

19. Nor does Core address the Commission's concern that, without the mirroring rule, incumbent LECs would too easily be able to take advantage of the discrepancy between reduced rates for ISP-bound traffic and higher rates for section 251(b)(5) voice traffic. The mirroring rule was adopted to preclude incumbent LECs from paying reduced intercarrier compensation rates for ISP-bound traffic, which they send to competitive LECs, while collecting higher state reciprocal compensation rates for traffic that they receive. In addition, the mirroring rule promotes our goal of a more unified intercarrier compensation regime by requiring LECs to offer similar rates for like traffic. We find that the rate caps and mirroring rule remain necessary to prevent regulatory arbitrage and promote efficient investment in telecommunications services and facilities.

20. Growth Caps. We find that the growth caps are no longer in the public interest. Market developments since 2001 have eased the concerns about growth of dial-up ISP traffic that led the Commission to adopt these rules. The Commission imposed an overall cap on ISP-bound minutes for which compensation is due in order to ensure that growth in dial-up Internet access would not undermine the Commission's efforts to limit intercarrier compensation for this traffic, and to address intercarrier compensation in a comprehensive and unified manner.⁵⁴ At the time of the *ISP Remand Order*, the Commission sought to prevent continued expansion of the arbitrage opportunity presented by ISP-bound traffic.⁵⁵ Recent industry statistics indicate, however, that this expansion is not likely to occur given declining usage of dial-up ISP services. For example, one recent report suggests that the number of end users using conventional dial-up to connect to ISPs is declining as the number of end users using broadband services to access ISPs grows.⁵⁶ We do not anticipate, therefore, that the availability of compensation to carriers that serve ISPs will have any material impact on the migration of consumers from dial-up services to broadband services. Thus, we now conclude that the policies favoring a unified compensation regime outweigh any remaining concerns about the growth of dial-up Internet traffic.⁵⁷

21. New Markets Rule. We also find that the new markets rule is no longer in the public interest. This rule creates different rates for similar or identical functions. As explained above, although the Commission implemented this rule in order to confine the opportunities for regulatory arbitrage, we find that these arbitrage concerns have decreased, and that these concerns are now outweighed by the public interest in creating a uniform compensation regime. Accordingly, we find that forbearance from

⁵³ *ISP Remand Order*, 16 FCC Rcd at 9186, para. 77.

⁵⁴ *ISP Remand Order* 16 FCC Rcd at 9101, para. 86.

⁵⁵ *ISP Remand Order*, 16 FCC Rcd 9188-89, para. 81.

⁵⁶ See Letter from Charles D. Breckinridge, Counsel for Level 3, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-98, 99-68, 03-266, and 04-36, Attach at Ex. 1 (filed June 25, 2004 (attaching a report by Bernstein Research entitled "DSL Economics I: Continued Broadband Adoption to Drive 22 % DSL Revenue Growth Through 2008")); see also *Federal Communications Commission Releases Data on High-Speed Services For Internet Access*, News, at Table 1 (rel. June 8, 2004) (reporting only 2.7 million high-speed Internet access lines in December 1999 and 28 million high-speed Internet access lines in December 2003).

⁵⁷ See *infra* paras. 23-24.

this rule is consistent with the public interest.

B. Discrimination

22. Section 10(a)(1) requires us to determine whether application of rate caps, growth caps, the mirroring rule, and the new markets rule are still “necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.”⁵⁸ Core argues that the rules are “discriminatory” and unfairly distinguish among CLECs.⁵⁹ More specifically, Core argues that “the reduced rates for reciprocal compensation, new market bar, and growth cap” require “only certain CLECs to recoup their terminating switch costs for ISP-bound traffic from their end users,” thereby putting “those carriers at a competitive disadvantage as compared to the BOCs, and to other competitive carriers established within a specific local market prior to the Commission’s implementation of the *ISP Remand Order*.”⁶⁰ We find that Core has not met the statutory test with respect to the rate caps or mirroring rule. We do find, however, that the growth caps and new markets rule are no longer necessary to ensure that charges and practices are just and reasonable.

23. Rate Caps and Mirroring Rule. Core has not demonstrated that enforcement of the rate caps or mirroring rule is no longer necessary to ensure that charges and practices are “just and reasonable,” or to prevent rates that are “unjustly or unreasonably discriminatory.” We find that the potential for discrimination under the rate caps is limited because the caps apply to ISP-bound traffic only if an incumbent LEC offers to exchange all section 251(b)(5) traffic at the same rate.⁶¹ The mirroring rule was adopted based on our finding that the record lacked evidence of any material differences between the costs of delivering ISP-bound traffic and local voice traffic that would justify any difference in treatment between the two with respect to intercarrier compensation.⁶² Because the record still lacks any such evidence, we affirm our prior conclusion that the mirroring rule is necessary to prevent disparate treatment of the two types of traffic. Accordingly, Core has not demonstrated that the rules result in impermissible discrimination against or between CLECs, or that the Commission’s justifications for the interim rules are no longer valid.

24. Growth Caps and New Markets Rule. Both the growth caps and new markets rule require carriers to exchange ISP-bound traffic on a bill-and-keep basis under certain circumstances. Under the new markets rule, carriers must exchange ISP-bound traffic on a bill-and-keep basis if those carriers were not exchanging traffic pursuant to interconnection agreements prior to adoption of the *ISP Remand Order*.⁶³ Under the growth caps, carriers may not receive compensation for ISP-bound minutes

⁵⁸ 47 U.S.C. § 160(a)(1).

⁵⁹ Core Forbearance Petition at 2-3. Core contends that the *ISP Remand Order* “has no basis in law and discriminates against and among competitive LECs in favor of the BOCs in a manner that is wholly inconsistent with the policy goals of the Act.” *Id.*

⁶⁰ Core Forbearance Petition at 9-10.

⁶¹ *ISP Remand Order*, 16 FCC Rcd at 9193-94, para. 89.

⁶² *ISP Remand Order*, 16 FCC Rcd at 9196, para. 93.

⁶³ *ISP Remand Order*, 16 FCC Rcd at 9188-89, para. 81.

exceeding a particular growth factor.⁶⁴ Thus, the compensation rate for ISP-bound traffic in these circumstances is different than the rate that applies to ISP-bound traffic under the rate caps or to section 251(b)(5) traffic under the reciprocal compensation regime. These rules were adopted in order to prevent the expansion of the arbitrage opportunity associated with ISP-bound traffic. Given the market developments since that time,⁶⁵ however, we find that these rules are no longer necessary to ensure that charges and practices are just and reasonable, and not unjustly or unreasonably discriminatory. As the Commission observed in the *ISP Remand Order*, carriers likely incur the same costs when delivering a call to a local end user and a data call to an ISP.⁶⁶ In that order, the Commission declined to establish separate intercarrier compensation rates, terms, and conditions for local voice and ISP-bound traffic.⁶⁷ It concluded that the record failed to demonstrate different costs in delivering traffic that would justify disparate treatment of ISP-bound traffic and local voice traffic under section 251(b)(5). These conclusions suggest that similar rates should apply to both local voice traffic and ISP-bound traffic, absent compelling policy reasons to the contrary.⁶⁸ Accordingly, because we conclude that the policy rationale for those rules no longer outweighs policies favoring a unified compensation regime, we conclude that forbearance is warranted.

C. Protection of Consumers

25. Section 10(a)(2) requires us to determine whether application of these rules is still “necessary for the protection of consumers.”⁶⁹ Core makes no specific arguments to demonstrate that forbearance from the rules at issue would satisfy this standard. Instead, Core makes a general claim, without providing any support, that the rate cap, growth cap, and new markets rule have created “artificially high rates and reduced competitive choice,” and have “forced CLECs from the market and deterred investment in telecommunications business, thereby limiting the service options available to telecommunications consumers.”⁷⁰ Core’s speculation regarding the connection between the *ISP Remand Order*, reduced investment in telecommunications facilities, and reduced choices for consumers does not satisfy the second prong of the statutory criteria for forbearance. Indeed, the rate caps and mirroring rule were implemented to prevent the subsidization of dial-up Internet access customers at the expense of consumers of basic telephone service, and to avoid arbitrage and discrimination between services. Core has provided no evidence regarding reduced investment or reduced competitive choices for consumers, nor has it provided any evidence demonstrating that the *ISP Remand Order* is the cause of any such developments. Accordingly, we find that Core has not shown that rate caps or the mirroring rule are “not necessary for the protection of consumers.”

⁶⁴ *ISP Remand Order*, 16 FCC Rcd at 9187, para. 78.

⁶⁵ See *supra* para. 20.

⁶⁶ *ISP Remand Order*, 16 FCC Rcd at 9194, para. 90.

⁶⁷ *ISP Remand Order*, 16 FCC Rcd at 9194, para. 90.

⁶⁸ See *ISP Remand Order*, 16 FCC Rcd at 9197, para. 93 (concluding that there was no reason to distinguish between voice and ISP-bound traffic with respect to intercarrier compensation).

⁶⁹ 47 U.S.C. § 160(a)(2).

⁷⁰ Core Forbearance Petition at 10-11. See also Core Reply at 8 (discussing the growth cap and new markets rule). Core makes a related argument that these rules “have deterred investment in the telecommunications business, and have thereby substantially harmed the competitive telecommunications industry and the broader national economy.” Core Forbearance Petition at 6.

26. Growth Caps and New Markets Rule. We do find, on other grounds, that application of the growth caps and new markets rule is not "necessary for the protection of consumers."⁷¹ These rules are directly related to intercarrier compensation, and were not implemented specifically for the protection of consumers. As explained above, growth caps limit the total ISP-bound minutes for which a LEC may receive compensation.⁷² The new markets rule conditions the availability of compensation on whether two carriers were exchanging traffic pursuant to an interconnection agreement prior to the adoption of the *ISP Remand Order*.⁷³ Accordingly, we find that neither the growth caps nor the new markets rule is necessary for the protection of consumers, and that forbearance is therefore warranted under this prong.

D. Applicability

27. Our rationale for forbearance with respect to the growth caps and new markets rules applies with equal force to other telecommunications carriers. Accordingly, on our own motion, we extend the grant of forbearance with respect to those rules to all telecommunications carriers.

E. Effective Date

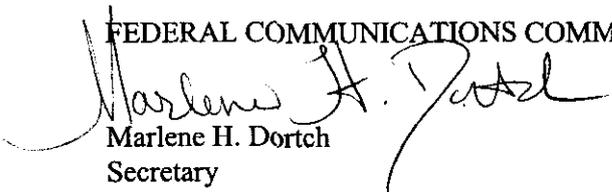
28. Consistent with section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Friday, October 8, 2004.⁷⁴ The time for appeal shall run from the release date of this order.⁷⁵

IV. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED that the petition for forbearance of Core Communications IS DENIED in part and GRANTED in part, as set forth herein.

30. IT IS FURTHER ORDERED, pursuant to section 10 of the Communications Act of 1934, 47 U.S.C. 160, and section 1.103(a), that the Commission's forbearance decision SHALL BE EFFECTIVE on October 8, 2004. Pursuant to sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. 1.4 and 1.13, the time for appeal shall run from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION


Marlene H. Dortch
Secretary

⁷¹ 47 U.S.C. § 160(a)(2).

⁷² *ISP Remand Order*, 16 FCC Rcd at 9191, para. 86.

⁷³ *ISP Remand Order*, 16 FCC Rcd at 9188-89, para. 81.

⁷⁴ See 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute), and 47 C.F.R. § 1.103(a).

⁷⁵ See 47 C.F.R. §§ 1.4 and 1.13.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, WC Docket No. 03-171, Order

I approve in part and dissent in part from this Order addressing our compensation rules for traffic destined to Internet Service Providers (ISPs). This Order largely retains our current rules for compensation for ISP-bound traffic based on a reasonable application of the statutory forbearance criteria. The Commission's existing rules were designed to limit opportunities for what the Commission had previously characterized as regulatory arbitrage.

I dissent in part from the Order, however, to the extent that it grants forbearance from two prongs of the Commission's rules concerning growth caps and new markets. While I appreciate competitive carriers' concern about the application of these rules to carriers late to serve the ISP market, the record before us does not persuasively suggest that the bases for the Commission's prior concerns about opportunities for regulatory arbitrage and disincentives to serve non-ISP end-user customers have dissipated. Though commenters argue that the number of dial-up subscribers has declined since the Commission last addressed this issue, the record before us suggests that dial-up minutes for ISP-bound traffic have held steady or are increasing in many areas of the country. More broadly, regulatory treatment of this traffic raises numerous complex issues for our policies regarding local competition, access to the Internet, and broadband deployment. These issues may be particularly pronounced for many rural areas, where broadband penetration rates may be lower than other areas of the country. Given the present record and these larger concerns, I would not have granted relief at this time.