Exhibit 6

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October 4, 2004

EX PARTE – Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92; *Core Communications, Inc. Petition for Forbearance*, WC Docket No. 03-171

Dear Ms. Dortch:

On October 1, 2004, Christopher Wright and John Nakahata, on behalf of Level 3 Communications, met with Austin Schlick, Deputy General Counsel, Jeff Dygert, Chris Killion and Nick Bourne, all of the Office of the General Counsel, and Tamara Preiss, Chief, Pricing Policy Division, Wireline Competition Bureau, with respect to the above captioned proceeding. This letter summarizes the points made during that discussion.

1. Traffic exchanged between a LEC and another telecommunications carrier bound for an Internet Service Provider falls within Section 201. When viewed on a traditional "end-to-end" basis, such traffic is jurisdictionally mixed and therefore falls within the Commission's jurisdiction over interstate services under Section 201(a), as the Commission has concluded on multiple occasions. *See Implementation of the Local Competition Provisions in the Telecommunciations Act of 1996; Intercarrrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, 3690 (1999) ("*ISP Declaratory Ruling*")("After reviewing the record developed in response to these requests, we conclude that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate."), *rev'd and remanded on other grounds, sub nom., Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) ("*Bell Atlantic*"); *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, 9181 (¶¶ 52-66)(2001)("*ISP Remand Order*"), *rev'd and remanded on other grounds, sub nom., WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002)("*WorldCom*"). This conclusion was not overturned by the Court in either *Bell Atlantic* or *WorldCom*. However, as discussed below in both of those cases the court rejected the Commission's conclusion that the exchange of ISP-bound traffic between a LEC and another telecommunications carrier falls outside Section 251(b)(5).

2. ISP-bound traffic exchanged between a LEC and another telecommunications carrier also falls within Section 251(b)(5), which places on all local exchange carriers "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Any conclusion to the contrary is highly likely to be overturned on appeal.

A. The Commission's own definition of "termination" under Section 251(b)(5) provides that ISP-bound traffic is terminated by the LEC serving the ISP. Rule 51.701(d) states, "For the purposes of this subpart, termination is the switching of telecommunications traffic at the terminating carrier's end office or equivalent facility and delivery of such traffic to the called party's premises." 47 C.F.R. 51.701(d). Rule 51.701(a) makes clear that "the provisions of this subpart apply to reciprocal compensation for the transport and termination of telecommunications traffic between LECs and other telecommunications carriers." 47C.F.R. 51.701(a). "Reciprocal compensation" is the title of Section 251(b)(5).

The application of these definitions in the context of the exchange of ISP-bound traffic is straightforward. The carrier serving the ISP, usually a state-certified Local Exchange Carrier, is clearly a "telecommunications carrier." Its customer is the ISP. Under longstanding Commission precedent, the ISP is an end user, not a carrier. *See e.g., Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16134-35 ¶ 348 (1997) ("We therefore conclude that ISPs should remain classified as end users for purposes of the access charge system.") The carrier serving the ISP provides the "switching of telecommunications traffic at the terminating carrier's end office or equivalent facility," which may include soft switches, and "deliver[s] . . . such traffic to the called party's premises." The D.C. Circuit recognized as much in *Bell Atlantic*: "Calls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'" 206 F.3d at 6.

No proponent of a theory that ISP-bound traffic is not "terminated" by the CLEC delivering traffic to the ISP has provided any explanation of why Rule 51.701(d) does not govern. Shockingly, in presenting its arguments in three separate ex partes that ISP-bound traffic does not "terminate" at the ISP, Verizon and BellSouth never analyze, discuss or even cite Rule 51.701(d) – even though that rule was specifically cited by the D.C. Circuit as part of its basis for overturning the Commission's 1999 conclusion that ISP-bound traffic did not terminate at the ISP. In so doing, Verizon and BellSouth commit the same mistake the Commission did in the *ISP Declaratory Ruling* – and for which the D.C. Circuit reversed in *Bell Atlantic*: equating jurisdiction with "termination" under Section 251(b)(5). Even if *Bell Atlantic* did not formally hold that "termination" occurs when the CLEC delivers traffic to its ISP customer (rather than remanding, *inter alia*, for failure to clearly explain why termination does not occur when the CLEC delivers traffic to its ISP customer, consistent with the Rule 51.701(d) definition), failure to address Rule 51.701(d) for a second time would be a clear ground for summary reversal.

In any event, Rule 51.701(d) cannot be distinguished by (erroneous) assertions that it defines only the elements for which compensation is to be paid, such as to limit reciprocal compensation for termination to the traffic-sensitive costs of the switch. In fact, that is not the purpose of Rule 51.701(d). Rule 51.701(d) was adopted in a portion of the 1996 *Local Competition Order* specifically entitled, "Definition of Transport and Termination." *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. 15449, 16009 (1996) ("*Local Competition* Order"). The purpose of that section was to define specifically which functions were encompassed with "transport" and which functions were encompassed within "termination," and how those functions would be distinguished from traditional access services provided to long distance carriers. *See id.* at 16012-16016 (¶¶ 1033-1040). Within that section, Paragraph 1040 of the *Local Competition* Order, virtually identical to Rule 51.701(d), specifically stated: "We define 'termination,' for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." The pricing rules that specifically limited compensation to the traffic-sensitive costs of the switch were adopted and discussed in a separate section of the order, entitled "Cost-Based Pricing Methodology," in which the Commission specifically discussed and applied the "additional costs" standard of Section 252(d)(2) of the Act, and did not analyze the definition of "termination" in Section 251(b)(5). *Id.* at 16024-5 (¶ 1057) (" We find that, once a call has been delivered to the incumbent LEC end office serving the called party, the 'additional cost' to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching.") Paragraph 1040 and Rule 51.701(d) do what they say they do: define "termination" under Section 251(b)(5).

Verizon's and BellSouth's actual arguments that ISP-bound traffic delivered by a CLEC to its ISP customer does not "terminate" at the ISP fail for the reasons set forth in the letter of David Lawson to Marlene Dortch, Secretary, FCC, dated September 8, 2004, on behalf of AT&T, MCI, Sprint and Level 3. We incorporate those arguments herein by reference.

We also explained that should the FCC adopt a "no termination" theory for ISP-bound traffic, it could dramatically curtail its ability to adopt a uniform intercarrier compensation regime that includes IP-network terminated VoIP. Take the example of a cable system that offers its subscribers cable-based IP-telephony, but only at their homes. Further assume that the cable operator is not itself a carrier, but has contracted with a CLEC (such as Level 3) to manage the "back office" functions and to interconnect its customers with the PSTN. In that case, under Verizon's and BellSouth's view of "termination," there would be no terminating carrier: although Level 3 would be providing the end office switching (or its functional equivalent) and delivery of the call to its end user customer – the non-carrier cable company – Level 3 would not be deemed to be providing termination because the traffic continued beyond Level 3 through the cable operator's CMTS to the cable operator's customer. In addition, however, there would also be a strong argument that, when the calling party was in the same state as the cable company's customer, the traffic was wholly intrastate, and thus outside of the FCC's jurisdiction under Section 201. *See California v. FCC*, 905 F.2d 1217 (9^{th} Cir. 1990) (holding that a wholly intrastate enhanced service remained within state jurisdiction pursuant to Section 2(b)). In that scenario, the FCC would be left with no statutory authority over such traffic.

Accordingly, there is no basis for concluding that ISP-bound traffic does not "terminate" for the purposes of Section 251(b)(5), when the CLEC delivers traffic to its ISP customer – precisely as stated in Rule 51.701(d) and paragraph 1040 of the *Local Competition Order*. The Commission can and must conclude that the delivery of such traffic to the ISP is "termination."

B. Verizon's and BellSouth's argument that Section 251(b)(5) should be limited to traffic exchanged between LECs proves nothing. See Verizon/BellSouth Further Supplemental White Paper, filed September 27, 2004, at 8. When ISP-bound traffic, originated by an ILEC from its end user customer, is delivered to a CLEC, which in turn delivers that traffic to its ISP customer, such traffic is traffic exchanged between two LECs, within the scope of Verizon's and BellSouth's purported limitation. In any event, Verizon and BellSouth are wrong. As the Commission recognized in its *Local Competition Order*, and codified in Rule 51.703(a), Section 251(b)(5) encompasses transport and termination of telecommunications between a LEC and any other telecommunications carrier. 47 C.F.R. 51.703(a). Verizon's argument would exclude transport and termination provided, *inter alia*, by CMRS carriers from the scope of Section 251(b)(5). Accordingly, this argument provides no legally sustainable basis for excluding ISP-bound traffic from the scope of Section 251(b)(5).

C. Verizon's and BellSouth's argument that Section 251(b)(5) is limited to the exchange of "local" traffic is wrong, and would repudiate the Commission's 2001 interpretation of Section 251(b)(5). As Level 3 described in further detail in its ex parte dated June 23, 2004, Sections 251(b)(5) and 252(d)(2) Govern ISP-Bound Traffic and Are Not Limited to Local Termination (attached hereto), the Commission would face substantial litigation risk should it now re-adopt an interpretation that Section 251(b)(5) was limited to "local" traffic. Moreover, as also discussed in that Level 3 ex parte, such a construction would unnecessarily tie the Commission's hands with respect to intercarrier compensation reform, particularly with respect to intrastate access charges. The Commission's 2001 interpretation – that Section 251(b)(5) applies to all telecommunications traffic, but that, nonetheless, exchange access compensation is temporarily preserved by Section 251(g) – is a legally sound reading of the Act. Accordingly, this argument likewise provides no legally sustainable basis for excluding ISP-bound traffic from the scope of Section 251(b)(5).

D. Verizon's and BellSouth's only remaining argument for excluding ISP-bound traffic from Section 251(b)(5) is that *any* traffic that falls within Section 201 must be excluded from Section 251 pursuant to Section 251(i). *See* Verizon/BellSouth Further Supplemental White Paper, filed September 27, 2004, at 8. This argument is fatally overbroad, and therefore incorrect.

In the first instance, Verizon and BellSouth are advancing an argument that Commission counsel disclaimed in its *WorldCom* brief – that Section 251(i) is a sufficient grant of authority to override the provisions of Section 251(b)(5) and 252(d)(2). In the Petitioners' brief in *WorldCom*, the CLEC petitioners had attacked the *ISP Remand Order* for, in their view, relying on Section 251(i) to exempt ISP-bound traffic from Section 251(b)(5). Brief of the Federal Communications Commission, *WorldCom Inc. v. FCC*, Docket No. 02-1218, at 44. In response, the FCC stated, "Contrary to the premise of the CLEC's argument, however, section 251(i) has no direct role in the Commission's interpretation of section 251(b)(5) . . . 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." *Id.* (emphasis in original). At oral argument, Mr. Rogovin further clarified, "I don't think that we're saying that 251(i) is a sufficient grant of authority to allow us to go forward and resolve this case in the face of 251(b)(5)." Oral Argument transcript at 37, attached to the Letter of Donna Epps, Vice President Federal Regulatory Affairs, Verizon, to Marlene Dortch, Secretary, FCC, dated May 26, 2004, CC Dockets No. 96-98 and 99-68 (filed May 26, 2004). Verizon and BellSouth are asking the Commission now to do exactly what the Commission's counsel said it wasn't doing in the *ISP Remand Order* -- to use Section 251(i) to override the otherwise applicable terms of Section 251(b)(5).

Furthermore, the overbreadth of Verizon's and BellSouth's argument is evident when examined outside of the narrow issue of intercarrier compensation for ISP-bound traffic. Under Verizon's and BellSouth's reasoning, any time that Section 201 and Section 251 address the same facilities or services, Section 251(i) would mandate that Section 201 applies and that Section 251 does not. This would lead to patently absurd results, such as:

- A state commission could not, in arbitration, order physical interconnection between an ILEC and a requesting telecommunications carrier pursuant to Section 251(a) or 251(c)(2) if the interconnection was for the purpose of interconnecting the networks to handle jurisdictionally interstate traffic. Instead, such interconnection could be ordered by the FCC only under Section 201(a).

- Because the FCC had jurisdiction over 25% of loop costs under Section 201 prior to the 1996 Act, Section 201 would apply to the rates for 25% of the loop costs and Sections 251 and 252 would apply to the rates for the intrastate 75% of loop costs.

- If a CLEC used an unbundled loop with its own DSLAMs to provide DSL service, solely because the CLEC was using that loop for Internet access, an interstate service, *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd. 22466 (1998), the unbundled loop would no longer be subject to Section 251, but would be subject only to Section 201.

- In any instance in which the Commission, in its ongoing Triennial Review proceeding, finds that a CLEC is impaired without access to unbundled switching, Section 201 would apply to all uses of unbundled switching to handle interstate traffic, while Section 251 would apply to all uses of unbundled switching to handle intrastate traffic.

Moreover, under Verizon's and BellSouth's theory of the scope of Section 251(i), the Commission's jurisdiction would not be optional, but mandatory. In other words, the Commission could not conclude – as it did in 1996 with respect to CMRS traffic – that although the traffic fell within the FCC's jurisdiction, states would, in the first instance, address such traffic under Sections 251 and 252. Verizon and BellSouth argue that the states have no jurisdiction under Sections 251 and 252 whenever the FCC has Section 201 jurisdiction. Under Verizon/BellSouth's interpretation of Section 251(i), the FCC, therefore, would be statutorily required to establish permanently a parallel system to set the rates, terms, and conditions for all interstate interconnection, unbundled network elements, and intercarrier compensation.

Verizon's and BellSouth's interpretation of Section 251(i) therefore reads Section 251(i) to wholly disrupt the statutory scheme for interconnection, unbundled network elements and reciprocal compensation set forth in Section 251 and 252. As such, it cannot be a legally sustainable construction of Section 251(i), nor a basis for excluding ISP-bound traffic from the scope of Section 251(b)(5).

E. Accordingly, the most legally sustainable conclusion is that ISP-bound traffic falls within *both* Section 201 and Section 251(b)(5). The D.C. Circuit suggested as much when it declined to vacate the *ISP Remand Order* because of a "non-trivial likelihood" that the Commission could reach similar results "under § 251(b)(5) and 252(d)(B)(i)." *WorldCom*, 288 F.3d at 434. If the Commission stubbornly persists in ruling that ISP-bound traffic is outside Section 251(b)(5), despite the language of Section 251(b)(5), the Commission's own definition of termination, and the lack of any legally sustainable basis in the record for excluding ISP-bound traffic, it will once again face reversal on appeal.

3. As set forth more fully in Level 3's ex parte letter dated September 13, 2004, when both Sections 201 and 251(b)(5) apply, the Commission, pursuant to Section 251(i), retains the authority to set prices for reciprocal compensation, but it is not required to do so. Such a reading harmonizes both Sections 251(b)(5)/252(d)(2) and Section 251(i). If Section 252(d)(2) is read to preclude the FCC, under any and all circumstances, from setting reciprocal compensation rates for traffic falling within Section 201 and 251(b)(5), that would appear to contradict Section 251(i)'s preservation of the Commission's pre-existing authority under Section 201: Section 252(d)(2) would be "limit[ing] or otherwise affect[ing] the Commission's authority under section 201 of the Act." 47 U.S.C. § 251(i). However, the Commission is not required to set such prices, and may defer to state rate setting in arbitration pursuant to Section 252(d)(2), or to voluntary agreements negotiated between carriers pursuant to Section 252(a)(1). To give meaning both to Sections 201 and 252, however, the Commission would be required to set prices in accordance with the substantive standards set forth in both sections.

A. When traffic falls within both Sections 201 and 251(b)(5), the approach most immune from legal challenge would be for the FCC to adopt rules governing the methodology for establishing reciprocal compensation rates under the additional cost standard in Section 252(d)(2)(A)(ii), and for the states to set those rates in arbitration when the parties cannot themselves agree on a rate. This is precisely the scheme that was adopted by the Commission in the *Local Competition Order*, with respect to CMRS traffic over which the Commission also had jurisdiction pursuant to Section 332. 11 FCC Rcd. at 16005 (¶ 1023). And this approach was upheld by the Supreme Court in *AT&T v. Iowa Utility Board*, 525 U.S. 366 (1999)("*AT&T*").

B. When the Commission, however, believes that it has important policy reasons to do so, it can set rates for traffic that falls within both Section 201 and 251(b)(5). Reading Section 251(i) to preserve the Commission's pre-1996 rate-setting authority under Section 201 gives meaning to both Section 251(i) and Section 252(d)(2). Under Section 252(d)(2), the states can set rates for interconnection, unbundled network elements, and reciprocal compensation, without respect to traditional jurisdictional boundaries, when presented with a dispute in arbitration, although the state must do so in accordance with any FCC-prescribed methodology. However, in the case in which the Commission chooses to exert its authority under Section 201, the Commission has parallel jurisdiction to set such rates with respect to interconnection, network elements, and reciprocal compensation that is also within its traditional Section 201 jurisdiction over interstate and foreign communications. The Commission recognized as much when it acknowledged that Sections 332 and 201 provided it with the basis for jurisdiction to set LEC-CMRS interconnection rates (including reciprocal compensation rates). *Local Competition Order*, 11 FCC Rcd. at 16005-6 (¶¶ 1023). But the Commission has no jurisdiction, other than its ability to establish pricing methodologies, with respect to interconnection, network elements, and reciprocal compensation for traffic that lies outside its Section 201 (or Section 332) jurisdiction over interstate and foreign (or CMRS) traffic.

Clearly, to avoid unnecessary legal issues and for reasons of comity, the Commission should not seek to displace state rate-setting under Section 252 in the absence of compelling public policy reasons to do so. The Commission followed that approach in the *Local Competition Order,* when it it declined to exercise its rate-setting jurisdiction over LEC-CMRS interconnection under Sections 201 and 332, in favor of allowing such rates to be set pursuant to Section 251 and 252. *Local Competition Order*, 11 FCC Rcd. at 16005-6 (¶¶ 1023-25).

Neither the Supreme Court's decision in *AT&T, AT&T v. Iowa Utils. Bd.,* 525 U.S. 366 (1999) ("*AT&T*") nor the Eighth Circuit's subsequent *Iowa II* decision, *Iowa Utils. Bd. v. FCC,* 219 F.3d 744 (8th Cir. 2000) ("*Iowa II*") considered the Commission's authority to step in to set prices with respect to those network elements or services that were under the Commission's jurisdiction pursuant to some section other than Sections 251 and 252. Indeed, what was at issue in both cases was the Commission's authority to establish a pricing methodology for network elements and services that the Eighth Circuit had held in *Iowa I* were not interstate or foreign within the FCC's section 201 jurisdiction, but instead were predominantly intrastate.

The Supreme Court's discussion of state rate-setting authority in *AT&T* is spare, and not on point here. In *AT&T,* the Court rejected respondents' arguments that the FCC's pricing standards constituted the "establishment of rates" in violation of Section 252(d). Instead, the Court reached the reasonable conclusion that the establishment of a pricing methodology did not constitute the establishment of rates. 525 U.S. at 384. The Court was not considering, nor was it asked to consider, whether the FCC could, under circumstances not specifically presented in that case, set rates for services or network elements that fell within Section 201 and Section 251.

Similarly, when the Eighth Circuit vacated the Commission's default proxies in *Iowa II* as impermissible FCC rate setting, *Iowa II,* 219 F.3d at 756-57, it was not considering whether such proxies fell within sources of Commission rate-setting authority outside of Sections 251 and

252. To the contrary, the default proxies applied to network elements that would have been considered intrastate under an end-to-end jurisdictional analysis. In that context, it is not at all surprising that the Eighth Circuit vacated what it viewed as FCC actions to set intrastate rates. Under Level 3's interpretation of Section 251(i), the Eighth Circuit would still have vacated the FCC's pricing proxies as applied to all interconnection, network elements and reciprocal compensation.

Accordingly, interpreting Section 251(i) to preserve the FCC's rate-setting jurisdiction with respect to reciprocal compensation arrangements within the scope of both Sections 201 and 251(b)(5) harmonizes all parts of the Act, and is not precluded by *AT&T* and *Iowa II*.

C. Although the Commission has jurisdiction to set rates for reciprocal compensation arrangements that fall within both Section 201 and 251(b)(5), it must do so (and, in any event, prudently should do so) in accordance with the substantive pricing standards in Section 252(d)(2).

Under Section 201, rates for interstate services must be "just and reasonable." "A basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost." *MCI Telecommunications Corp. v. FCC,* 675 F.2d 408, 410 (D.C. Cir. 1982). And while, under Section 201, the "FCC is not required to establish purely cost-base rates," "[t]he Commission must, however, specially justify any rate differential that does not reflect cost." *Competitive Telecom. Ass'n v. FCC*, 87 F.3d 522, 529 (D. C. Cir. 1996)("*CompTel*"). Indeed, in *CompTel*, the D.C. Circuit reversed the Commission's transport rules because the Commission had never justified why it retained the Residual Interconnection Charge, a non-cost-based element, as part of its transport rate structure. *Id.* at 532.

Section 252(d)(2)(A) likewise requires that charges for transport and termination pursuant to Section 251(b)(5) be "just and reasonable." 47 U.S.C. § 252(d)(2)(A). That section, however, further clarifies that "just and reasonable" in the context of services falling within Section 251(b)(5) means, *inter alia*, that such rates "provide for the mutual and reciprocal recovery of 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 "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." *Id.* Section 252(d)(2)'s substantive pricing standards elaborate what Congress considered to be "just and reasonable" rates in the context of reciprocal compensation.

The Commission cannot, therefore, simply ignore Section 252(d)(2)(A)'s substantive pricing standards in setting "just and reasonable" rates for reciprocal compensation under Section 201. To do so would suggest that the same service, covered by two statutory provisions, would be subject to different substantive pricing standards depending upon whether the state was exercising rate-setting authority under a "just and reasonable" standard pursuant to Section 252(d)(2)(A), or the Commission was setting a "just and reasonable" rate under Section 201. While the Act may be a "model of ambiguity or indeed even self-contradiction," *AT&T*, 526 U.S. at 860, this level of contradiction would be too much. There is simply no reason to believe that Congress intended its definition of "just and reasonable" for transport and termination rates to be limited to state-established transport and termination rates rather than FCC-established transport and termination rates.

In any event, it is imprudent for the Commission to set out to create a statutory conflict between the meaning of "just and reasonable" under Section 201 and "just and reasonable" under Section 252(d)(2). The Commission cannot go wrong legally if it uses the Section 252(d)(2) standards to guide its determination of "just and reasonable" rates for the same service under Section 201.

D. Because the Commission has not found that its $0.0007/minute rate cap on ISP-bound intercarrier compensation is related to costs, it can justify maintaining that cap under either Section 201 or Section 252(d)(2) only as a transitional or interim measure, while it completes its intercarrier compensation reform proceedings. However, in a variety of contexts, and particularly in matters of intercarrier compensation, the courts have long upheld the Commission's authority to take reasonable transition measures needed to protect the industry from sudden disruption. *See e.g., CompTel v. FCC*, 309 F.3d 8, 15 (D.C. Cir. 2002) ("Avoidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule," *citing*, *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984), and *ACS of Anchorage, Inc. v. FCC,* 290 F.3d 403, 410 (D.C. Cir. 2002)); *CompTel v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997)(upholding the FCC's transitional imposition of some access charges on interconnection and UNEs provided under Section 251(c)(2), (3)).

The $0.0007/minute rate cap has been in effect only since 2003, and by its terms was intended to continue until at least mid-2004. The extension of this transitional cap for another year while the Commission considers further the issues raised in its *Intercarrier Compensation NPRM, Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, 16 FCC Rcd. 9610 (2001) ("*Intercarrier Compensation NPRM*"), can hardly be considered an abuse of discretion. This is especially true because, according to trade press reports, the Commission has been working on a further Notice of Proposed Rulemaking, and the Commission is about to receive the Intercarrier Compensation Forum proposal for comprehensive reform, which will provide the Commission with a detailed, integrated intercarrier compensation reform plan on which it can seek comment.

Substantively, there is little difference between retaining the $0.0007 rate cap as an interim rule and forbearing from Section 252(d)(2)'s pricing standards on an interim basis, both pending completion of its intercarrier compensation proceeding. However, there is no record basis for the Commission to forbear *permanently* from Section 252(d)(2)'s pricing standards.

E. Furthermore, there is no basis in the record for the Commission to forbear from Section 251(b)(5) with respect to ISP-bound traffic. Among the factors to be considered under Section 10 is whether enforcement of a provision is necessary to ensure that the "charges, practices, classifications, or regulations" are "just and reasonable and are not unjustly or unreasonably discriminatory," and whether forbearance is in the public interest, including the effect of forbearance on competition. 47 U.S.C. § 160(a), (b). Forbearance from Section

251(b)(5) would potentially expose CLECs serving ISPs to ILEC abuses of market power, in violation of Section 10(a)(1) and (3).

In the *Local Competition Order*, the Commission concluded that Section 251(b)(5) prohibits ILECs from assessing origination charges on other telecommunications carriers. 11 FCC Rcd. at 16016 (¶ 1042)("We conclude that, pursuant to section 251(b)(5), a LEC may not charge a CMRS provider or other carrier for terminating LEC-originated traffic.") Forbearing from Section 251(b)(5) with respect to ISP-bound traffic might remove this crucial protection from CLECs serving ISPs. There is absolutely no basis for taking such action, which would harm competition, and allow ILECs to reestablish monopolies to serve ISPs. Such action cannot be reconciled with the *Local Competition Order*.

* * *

Accordingly, the Commission should conclude that ISP-bound traffic falls within both Sections 201 and 251(b)(5). To the extent that the Commission wishes to establish rates for the exchange of ISP-bound traffic between LECs, it should apply the pricing standards of Section 252(d)(2), except on a transitional basis to prevent sudden industry disruption. Alternatively, the Commission may defer to state rate-setting, subject to FCC pricing rules, under Section 252(d)(2).

Any other course of action carries substantial legal risks, and is likely to be overturned on appeal.

Sincerely,

Christopher J. Wright
John T. Nakahata

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