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ATTORNEYS AT LAW

August 3, 2005

EX PARTE – Via Electronic Filing

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

Re: *Developing an Unified Intercarrier Compensation Regime*, CC Docket 01-92;
Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68;
Core Communications Petition for Forbearance, WC Docket No. 03-171;

Dear Ms. Dortch:

On July 24-25, 2005, the NARUC Intercarrier Compensation Task Force met. FCC staff including Jane Jackson and Randy Clarke of the Wireline Competition Bureau were in attendance. I submit this letter and the attached exhibits to reflect my presentations and discussions on behalf of Level 3 Communications, LLC at that meeting as relevant to the above-mentioned dockets.

On Monday, July 25, 2005, Robert Blau, Vice President for Executive and Federal Regulatory Affairs for BellSouth Corp., presented components of BellSouth's proposed unified rate plan for intercarrier compensation. Mr. Blau also distributed the attached chart, *see* Tab A, entitled "The Continuing Problem With Reciprocal Compensation For One-Way Dial-Up Internet Access" ("BellSouth Chart").

I made the point that, although highly misleading in its graphical presentation, this chart confirms that notwithstanding any asserted increase in minutes of dial-up Internet access per user, the decline in dial-up Internet households is undisputed, as is the decline in ISP-bound compensation. Although somewhat obscured in the BellSouth Chart, the decline in dial-up Internet households cannot be missed in the revised chart, *see* Tab B, entitled "The Continuing Problem With Reciprocal Compensation For One-Way Dial-Up Internet Access???", which relied entirely on the data contained within the BellSouth Chart. Thus, BellSouth's information

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shows that the number of dial-up households is expected to be 44 million in 2005, falling to 23 million in 2009, a decline of nearly 50% percent over the five year period.

More importantly, however, the BellSouth Chart also shows that, beginning as early as 2005, this decline in dial-up subscribership *overtakes* any projected increases in dial-up minutes of use per subscriber. While BellSouth's data does estimate a slight increase in minutes of use per week per dial-up household for the 2005-2009 period, the actual amount of dial-up reciprocal compensation exposure – *which tracks overall dial-up minutes of use* – shows a continuous drop. At the dial-up ISP-bound rate cap for of \$0.0007/minute, for example, BellSouth projects its dial-up reciprocal compensation to decrease from \$677 million in 2005 to \$630 million in 2006, \$592 million in 2007, \$511 million in 2008 and \$435 million in 2009.

Thus, BellSouth now estimates that the number of overall dial-up minutes of use is falling as early as 2005. This stands in sharp contrast to BellSouth's October 2004 letter to the Commission, which supplied a chart projecting increases in dial-up minutes of use until 2007. *See Letter from Herschel L. Abbot, Jr., BellSouth, to FCC Secretary*, CC Docket Nos. 99-68 & 96-98 (filed October 1, 2004), *corrected, Letter from Bennett L. Ross, BellSouth, to FCC Secretary*, CC Docket Nos. 99-68 & 96-98 (filed December 17, 2004). SBC relied on BellSouth's 2004 statistics to seek reconsideration of the Commission's decision to forbear from the growth caps and new markets rule. *See SBC Communications Inc, Petition for Reconsideration*, WC Docket No. 03-171 at 7 (filed Nov. 17, 2004). BellSouth's own newest information removes any factual basis for those arguments.

In addition, attached at Tabs C and D are copies of slides and a written presentation provided to the Task Force regarding the scope of Section 251(b)(5). My oral presentation on these points is fully summarized by these materials.

In accordance with FCC rules, a copy of this letter is being filed electronically in the above-referenced dockets.

Respectfully submitted,

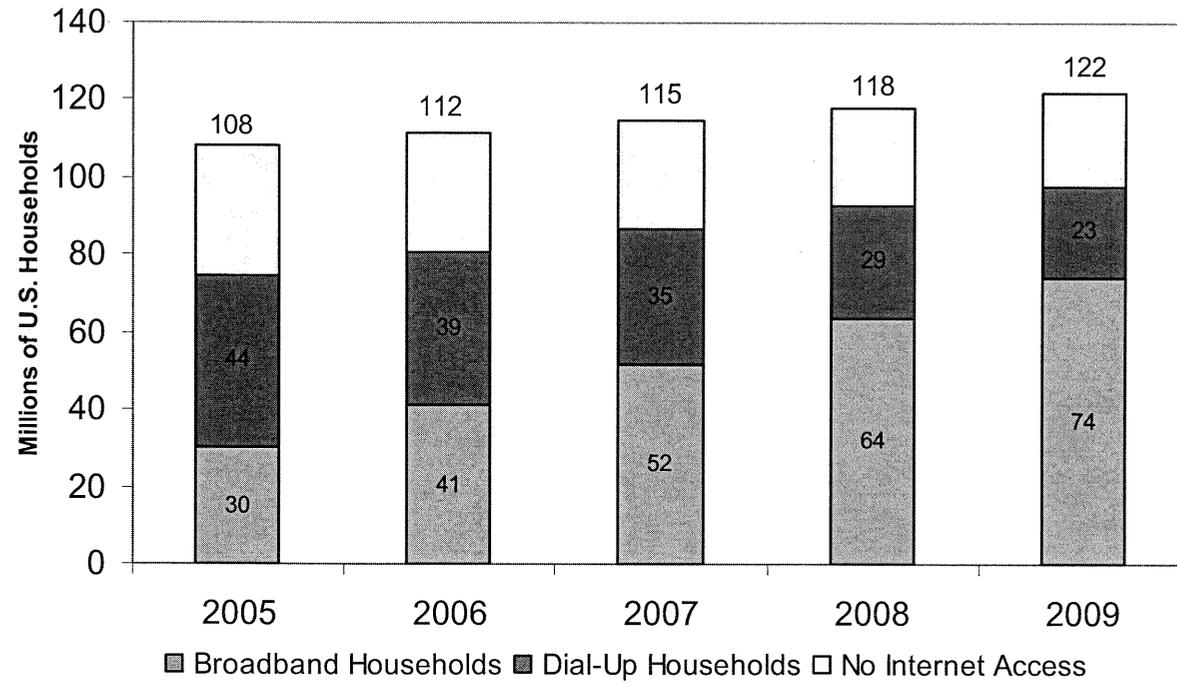
/s/

John T. Nakahata

Counsel for Level 3 Communications, LLC

Tab A

The Continuing Problem With Reciprocal Compensation For One-Way Dial-Up Internet Access

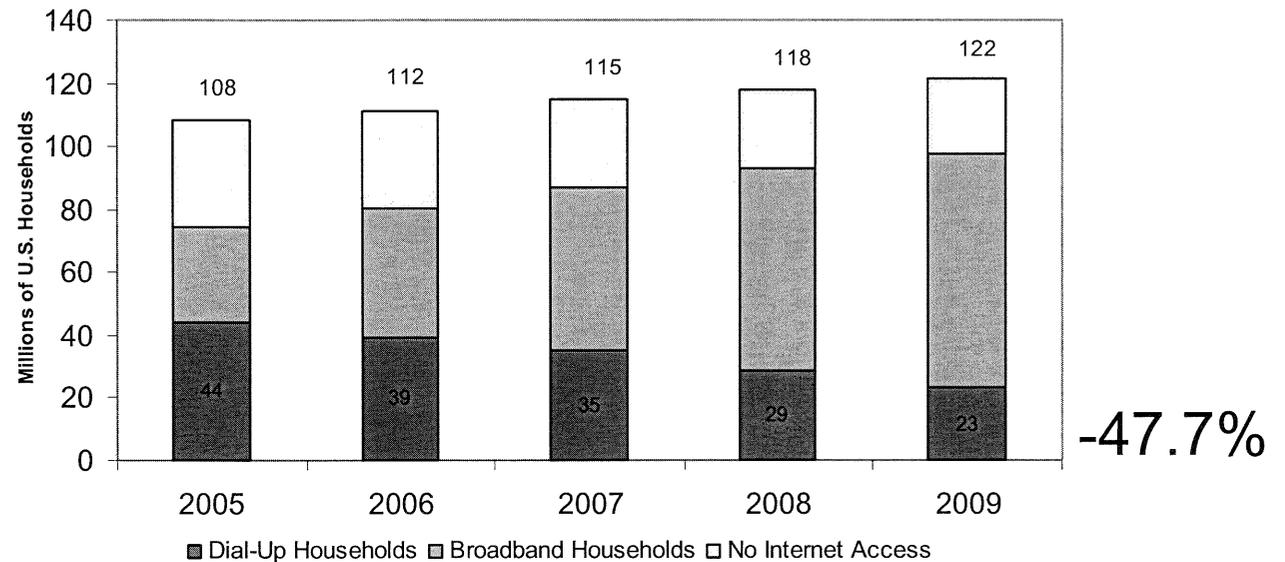


	2005	2006	2007	2008	2009
Minutes of Internet Use per Week per Dial-Up Household	420	441	463	486	511
Dial-Up Recip Comp Exposure (\$ Millions)					
@ \$0.0007/minute	\$677	\$630	\$592	\$511	\$435
@ \$0.003/minute	\$2,903	\$2,701	\$2,538	\$2,188	\$1,864

Source: IDC and Harris Nesbitt estimates

Tab B

The Continuing Problem With Reciprocal Compensation For One-Way Dial-Up Internet Access???



	2005	2006	2007	2008	2009	
Minutes of Internet Use per Week per Dial-Up Household	420	441	463	486	511	
Dial-Up Recip Comp Exposure (\$ Millions)						
@ \$0.0007/minute	\$677	\$630	\$592	\$511	\$435	-35.7%
@ \$0.003/minute	\$2,903	\$2,701	\$2,538	\$2,188	\$1,864	

Source: IDC and Harris Nesbitt estimates

Tab C

FCC's Legal Authority for Comprehensive Intercarrier Compensation Reform

Presentation to the NARUC
Intercarrier Compensation Task Force

John T. Nakahata
Harris, Wiltshire & Grannis, LLP

How a Court Reviews: *Chevron*

- Prong 1: Do the statute's "plain terms 'directly address[s] the precise question at issue'" (*Brand X*)?
- Prong 2: Is the agency's interpretation "a reasonable policy choice for the agency to make" (*Brand X*)?
- U.S. Supreme Court has repeatedly applied *Chevron*: *Brand X*, *Verizon*, *Gulf Power*, *AT&T v. IUB*

Section 251(b)(5)

- A LEC has the duty –
“(5) Reciprocal Compensation.—The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”
- FCC *ISP Remand Order* – “On its face, local exchange carriers are required to establish reciprocal compensation arrangements for the transport and termination of *all* ‘telecommunications’ traffic they exchange with another telecommunications carrier, without exception.” (¶ 31 emphasis in original)

What Section 251(b)(5) Doesn't Say

- Congress could have drafted 251(b)(5) to say, but didn't do so:
“(5) Reciprocal Compensation.—The duty to establish, *between local exchange carriers*, reciprocal compensation arrangements for the transport and termination of *telephone exchange service*.”
- Arguments that this is what Congress meant violate the plain meaning of the words Congress actually used.

§601 Doesn't Compel Ignoring §251(b)(5)'s Plain Meaning

- Plain meaning is express -- §251(b)(5) includes all telecommunications, without exception.
- §601 argument is the same as §2(b) argument rejected by Supreme Court in *AT&T v. Iowa Utility Board*.
 - Supreme Court expressly rejected argument that the “nothing...shall be construed” provision in §2(b) requires an “*explicit ‘application’ to intrastate service, and in addition an explicit conferral of ‘Commission jurisdiction’ over intrastate service, before Commission jurisdiction can be found to exist.*”
 - § 201(b) “explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.”
 - § 251(b)(5) applies to intrastate traffic.

§ 251(g) – Transitional Preservation of Access Charges

“On or after [February 8, 1996], each local exchange carrier, to the extent it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and non-discriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date preceding [February 8, 1999] under any court order, consent decree, or regulation, order or policy of the Commission, *until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment.*”

§ 251(g) Includes Intrastate Access

- *AT&T Consent Decree* required BOCs to offer tariffed access services, including intrastate.
- Conf. Report: Section 251(g) imposed on LECs (not just BOCs) “a statutory duty” that “in the interim” “shall be the equal access and nondiscrimination restrictions and obligations, *including receipt of compensation*, that applied to the local exchange carrier immediately prior to [February 8, 1996], *regardless of the source.*”

Bottom Line Framework

- § 251(b)(5) (and § 252(d)(2)) provides a unified regime to govern all traffic exchange involving LECs.
- § 251(g) transitionally preserves interstate and intrastate access charges pending FCC action.
- FCC can end the transition.
- D.C. Cir. *Worldcom* decision – “non-trivial likelihood” that § 251(b)(5) addresses ISP-bound traffic, consistent with this framework.

Section 251(d)(3)

Section 251(d) –

- (2) Access Standards. – In determining what network elements should be made available for purpose of subsection (c)(3) . . .
- (3) Preservation of State Access Regulations. – In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –
 - (A) establishes access and interconnection obligations of local exchange carriers;
 - (B) is consistent with the requirements of this section; and
 - (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

§ 251(d)(3) Does Not Separately Preserve Intrastate Access Charges

- “Access” referred to in § 251(d)(3) is the access to network elements in § 251(d)(2)(entitled “Access Standards”), not access charges.
- State access regulations are preserved only if “consistent with the requirements of this section,” which includes § 251(b)(5) and 251(g).
- State access regulations cannot “prevent implementation of the requirements of this section and the purposes of this part.”

Implications

- 251(b)(5) does not permit origination charges. *Local Competition Order*; 51.703(b).
- Act envisions a unified structure – not two different models for intercarrier compensation.
- Transition is permitted – no flash cuts are required.

Tab D

The Commission Has Full Jurisdiction Under the Communications Act, as Amended by the 1996 Act, to Establish Uniform Intercarrier Compensation Rules for All Classes of Traffic

Section 201(b) of the Communications Act authorizes the Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.” As the Supreme Court confirmed in *Iowa Utilities Board*, the Commission’s section 201(b) rulemaking jurisdiction is not limited to jurisdictionally interstate matters covered elsewhere in section 201. Instead, it extends to *all* provisions of the Communications Act, including the provisions added by the 1996 Act that encompass matters that, before 1996, fell within the exclusive jurisdiction of the states.¹ It is thus undisputed that the Commission may adopt rules implementing section 251(b)(5) and the other statutory provisions governing carrier interconnection with respect to all traffic—interstate and intrastate—within the scope of those provisions. This authority permits the Commission to implement the ICF Plan’s comprehensive approach to intercarrier compensation for any exchange of telecommunications traffic.

Congress drafted section 251(b)(5) expansively to bring national consistency to questions of intercarrier compensation. By its terms, this provision extends to all compensation issues relating to the transport and termination of “telecommunications” involving any local exchange carrier. The breadth of that language is significant in three principal respects. *First*, and perhaps most important, section 251(b)(5) makes no distinctions among traffic on the basis of jurisdiction (“local,” “toll,” “intrastate,” “interstate”) or service definition (*e.g.*, “exchange access,” “information access,” or “exchange service”). All such traffic is plainly

¹ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999).

“telecommunications.” In its *ISP Remand Order* in 2001, the Commission was thus entirely correct in concluding that “[w]e were mistaken [in the *Local Competition Order*] to have characterized” section 251(b)(5) as limited to local traffic, given that “‘local’ . . . is not a term used in section 251(b)(5) or section 251(g).”² The D.C. Circuit left this conclusion intact on review, although it took issue with other aspects of the *ISP Remand Order*.³

If it had wished, of course, Congress could have limited the scope of this provision to “local telecommunications,” to “telecommunications that originate and terminate within the same local calling area,” or to “telecommunications handed off from one LEC directly to another LEC.” But Congress included no such limitations on the scope of section 251(b)(5). Instead, it drafted section 251(b)(5) broadly to address all “telecommunications,” the most expansive of the statute’s defined terms.⁴

Despite the clarity of this statutory language, some continue to argue that the Commission’s jurisdiction to implement section 251(b)(5) extends only to “local” traffic and that the Commission thus lacks authority under that provision to address intercarrier compensation issues relating to any category of traffic that is deemed to be neither “local” nor “interstate.” This misguided effort to carve up the Commission’s rulemaking authority on the basis of such legacy jurisdictional categories is not just irreconcilable with the plain language of section 251(b)(5), but strikingly similar to the unavailing attacks in the 1990s on the Commission’s jurisdiction to implement sections

² See *In the matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151, 9167, 9172 ¶¶ 34, 45 (2001).

³ See *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

⁴ See 47 U.S.C. § 153(43).

251 and 252 more generally. Here, as in that context, the attempt to “produce[] a most chopped-up statute” along jurisdictional lines is flawed both because it violates the statutory text and because it is “most unlikely that Congress created such a strange hodgepodge.”⁵

Second, as the Commission has further found, section 251(b)(5) applies not just to the exchange of traffic between two LECs, but more broadly to the exchange of any traffic involving a LEC at one end.⁶ In other words, although the obligation to establish reciprocal compensation arrangements for the transport and termination of telecommunications falls on LECs, Congress did not limit to other LECs the class of potential *beneficiaries* of that obligation.

Third, as the Commission has further indicated, section 251(b)(5) covers intercarrier compensation issues on the originating end of a call as well as the terminating end, even though it explicitly addresses only the “transport and termination of telecommunications.” As the Commission recognized in the *Local Competition Order*, because section 251(b)(5) provides for intercarrier compensation only for termination of traffic and does not authorize charges for originating traffic, LECs could no longer charge

⁵ *Iowa Utils. Bd.*, 525 U.S. at 381 n.8.

⁶ *See In the matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499, 16016 ¶ 1041 (“*Local Competition Order*”) (“Although section 251(b)(5) does not explicitly state to whom the LEC’s obligation runs, we find that LECs have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to *any* telecommunications carriers,” including non-LEC CMRS providers) (emphasis added). Where Congress intended LECs’ 1996 Act obligations to run only to a limited class of carriers, it did so explicitly. *See, e.g.*, 47 U.S.C. § 251(b)(3) (“The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service. . .”).

CMRS providers or other carriers for LEC-originated traffic.⁷ Thus, with the exception of pre-1996 Act compensation rules temporarily grandfathered by section 251(g), section 251(b)(5) is properly read to bar carriers from imposing any charges, including access charges, for the costs of originating traffic.

Because the statutory language itself compels the conclusion that the Commission's section 251(b)(5) authority extends to *all* telecommunications involving a LEC, the Commission would face formidable litigation risks were it now to reverse course yet again on the scope of section 251(b)(5). Indeed, as the D.C. Circuit recently admonished, “[e]ven under the deferential *Chevron* standard of review, an agency cannot, absent strong structural or contextual evidence, exclude from coverage certain items that clearly fall within the plain meaning of a statutory term.”⁸ The statutory context in which the D.C. Circuit enforced that principle is closely analogous to the statutory context here. Just as the court applied that principle to reject the Commission's “argument that long distance services are not ‘telecommunications services’” for purposes of section 251(d)(2), so too is the Commission barred from finding that particular categories of “telecommunications” do not *count* as “telecommunications” for purposes of section 251(b)(5).

Were there any remaining question about the Commission's jurisdiction to address all telecommunications under section 251(b)(5), including access traffic, it would be resolved by section 251(g). That provision singles out access traffic for special treatment and temporarily grandfathers the pre-1996 rules applicable to such traffic,

⁷ *Local Competition Order* at 16016 ¶ 1042.

⁸ *USTA v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004).

including rules governing “receipt of compensation.”⁹ There would have been no need for Congress to have preserved those compensation rules against the effects of section 251 if section 251(b)(5) did not in fact address the “receipt of compensation” for the traffic covered by section 251(g)—*i.e.*, access traffic. Because Congress is presumed not to have wasted its breath, the only sensible interpretation of section 251(g) confirms what section 251(b)(5) already makes clear on its face: that intercarrier compensation for all access traffic falls within the broad scope of the Commission’s jurisdiction to implement section 251.

In comments, one party contended that it would not have been necessary for Congress to adopt section 251(g) if section 251(b)(5) encompassed exchange access traffic.¹⁰ According to that commenter, if section 251(b)(5) covered exchange access, the rules adopted by the Commission to implement that section “would have obviated the need to preserve existing exchange access arrangements.” Congress, however, recognized that reform of the complex existing system of interstate and intrastate access charges, and the inextricably related universal service mechanisms, could not be accomplished overnight without serious risk of severe consumer disruption. Congress, consequently, adopted section 251(g) precisely to permit the Commission to adopt initial rules implementing section 251(b)(5) within six months after enactment of the 1996 statutory amendments while preserving the existing system of access charges until the agency could undertake more comprehensive reform of intercarrier compensation.

In a footnote of the *ISP Remand Order*, the Commission obliquely suggested that “ambiguity” in the scope of “telecommunications” might support a

⁹ 47 U.S.C. § 251(g).

¹⁰ *See* BellSouth Comments at n. 66.

construction that *intrastate* access traffic falls outside of section 251(b)(5).¹¹ As noted, however, there is no such ambiguity: the statutory definition of “telecommunications” straightforwardly encompasses all access traffic. Moreover, there is no basis for the apparent policy concern that motivated the Commission to look for ambiguity in this unambiguous language—*i.e.*, a concern that (i) section 251(g) preserves only the *interstate* access charge regime (until the adoption of superseding Commission regulations) but not the parallel intrastate access regime and (ii) Congress should be presumed not to have intended to have undercut the latter regime immediately upon enacting the 1996 Act.¹² No less than its interstate counterpart, the intrastate access charge regime derives from the 1982 AT&T consent decree and the subsequent GTE decree.¹³ Contrary to the Commission’s apparent belief, therefore, the intrastate access

¹¹ See *ISP Remand Order* at 9168 ¶ 37 n.66.

¹² See *id.*

¹³ Before 1982, compensation for interexchange access was generally derived through an AT&T-administered system of settlements and division of revenues. Second Supplemental Notice of Inquiry and Proposed Rulemaking, *MTS and WATS Market Structure*, 77 F.C.C.2d 224, 227-28, 234 ¶¶ 15-19, 47 (1980). The AT&T consent decree replaced that system with a regime of federal *and* intrastate access charges. See *United States v. AT&T Co.*, 552 F. Supp. 131, 227, 233 (D.D.C. 1982); Third Report and Order, *MTS and WATS Market Structure*, 93 F.C.C.2d 241, 246 ¶ 11 (1983). The court order accompanying the consent decree made clear that the decree required access charges to be used in both the interstate and intrastate jurisdictions: “Under the proposed decree, state regulators will set access charges for intrastate interexchange service and the FCC will set access charges for interstate interexchange service.” *AT&T*, 552 F. Supp. at 169 n.161. Thus, both interstate and intrastate access charges were borne of the same “consent decree,” and both are preserved under section 251(g). There is also no evidence in the legislative history that Congress intended to treat intrastate access charges any differently, for grandfathering purposes, from interstate access charges. To the contrary, the House Conference Report broadly states that “the substance of this new statutory duty” under section 251(g) “shall be the equal access and nondiscrimination restrictions and obligations, including receipt of compensation, that applied to the local exchange carrier immediately prior to the date of enactment, *regardless of the source.*” H.R. CONF. REP. NO. 104-458, at 123 (1996) (emphasis added).

regime falls squarely within the ambit of section 251(g), which grandfathers “equal access and nondiscriminatory interconnection . . . obligations (including receipt of compensation) . . . under any court order, consent decree,” or FCC order. Indeed, it would have been perverse for Congress to have authorized the Commission to reform intercarrier compensation rules relating to “local” and “interstate” traffic but *not* the rules applicable to the one class of traffic—intrastate access—that is subject to the *highest* above-cost charges and that is generally thought to be most laden with unsustainable implicit support.

In any event, even if section 251(g) were read *not* to grandfather intrastate access charges, that reading would raise no pragmatic concerns about the broad scope of section 251(b)(5), for the Commission could still exercise its well-established authority to impose interim rules ensuring a smooth transition to a new regulatory regime. Indeed, in a variety of contexts, and particularly in matters of intercarrier compensation, the courts have long upheld the Commission’s expansive authority to take reasonable transitional measures needed to protect the industry from sudden disruptions.¹⁴ The Commission’s authority to adopt similar measures to manage the transition from access charges to a unified section 251(b)(5) regime forecloses any claim that Congress must have meant to exclude intrastate access charges permanently from the scope of section 251(b)(5). And this same authority permits the Commission to adopt the ICF Plan’s proposed transition from the present schemes of intercarrier compensation to a unified system based on bill-and-keep principles.

¹⁴ See, e.g., *CompTel v. FCC*, 309 F.3d 8, 15 (D.C. Cir. 2002); *CompTel v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997).

In its comments, NARUC argued that section 601 of the Telecommunications Act of 1996 bars the FCC from asserting jurisdiction over intrastate exchange access traffic. This argument is flawed. According to NARUC, that section prohibits the FCC from exercising such jurisdiction unless the statute expressly grants authority over intrastate access. This is essentially the same argument that NARUC raised and the Supreme Court squarely rejected in the *Iowa Utilities Board* decision. NARUC there argued that the phrase “nothing in this Act shall be construed to apply...” to intrastate communications in section 152(b) of the Act precluded the Commission from exercising jurisdiction under section 251 over intrastate communications because that section does not contain an explicit reference to intrastate communications. The Supreme Court, however, held that the NARUC argument “ignores the fact that § 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.”¹⁵ As shown above, section 251(b)(5) gives the FCC jurisdiction over intercarrier compensation arrangements involving all types of traffic, including intrastate exchange access. Together with the rulemaking authority granted in section 201(b), these provisions provide the Commission with express authority to adopt the rules proposed by the ICF.

One party in comments also sought to restrict the scope of the Commission’s section 251(b)(5) authority by suggesting that the statutory language is limited to “transport and termination” of telecommunications and, thus, does not extend to origination compensation.¹⁶ The Commission correctly rejected this reading of the statute in the *Local Competition Order*. The Commission concluded that Congress limited the compensation arrangements authorized under section 251(b)(5) to the

¹⁵ *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 380 (emphasis in original).

¹⁶ *See* Time Warner Telecom Comments at 2.

termination of traffic and, thus, had chosen not to authorize charges for originating traffic. Through section 251(g), Congress allowed pre-1996 Act compensation arrangements to remain in place until specifically superseded by the Commission by the exercise of its section 251(b)(5) authority.