

ATTACHMENT A

ORAL ARGUMENT NOT YET SCHEDULED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1446

In re: CORE COMMUNICATIONS, INC.

Petitioner.

On Petition for a Writ of Mandamus to the Federal Communications Commission

**BRIEF FOR PETITIONER
CORE COMMUNICATIONS, INC.**

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**PETITION FOR A WRIT OF MANDAMUS
TO THE FEDERAL COMMUNICATIONS COMMISSION**

Core Communications, Inc. (“Core”), through counsel and pursuant to 28 U.S.C. § 1651(a), Rule 21(c) of the Federal Rules of Appellate Procedure and Circuit Rule 21, respectfully petitions this Court for a writ of mandamus compelling the Federal Communications Commission (“FCC” or “Commission”) to enter an order resolving the Court’s remand in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). This is Core’s second mandamus petition on this issue; the Court denied Core’s first request for mandamus in May 2005 without prejudice to refile in the event of “significant additional delay.” After eight years since the FCC’s first flawed order on this telecommunications issue, five years since the Court’s remand in *WorldCom*, and nearly two-and-a-half years since this Court denied Core’s first mandamus petition upon receiving assurances from the FCC that a draft order responding to the *WorldCom* remand was under consideration, the FCC’s additional delay is now “significant.” Only an order of this Court can cure the Commission of its paralysis.

Core asks this Court to issue a writ of mandamus to the FCC ordering it to adopt an order within 60 days that establishes its statutory authority to regulate “reciprocal compensation” among telecommunications carriers for traffic bound for Internet Service Providers (“ISPs”), and, if no such order shall follow within the prescribed time period, vacating the FCC order at issue in *WorldCom*.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FCC has twice determined – once in 1999, and again in 2001 – that telecommunications carriers like Core are not entitled to Congress’ grant of “reciprocal compensation” for terminating “telecommunications” to its ISP customers. This Court found both of those orders fatally flawed; the first it vacated, but the second it remanded for further proceedings. Eight years after the first flawed order, and over five years after the *WorldCom* remand, the FCC still has not issued an order addressing the *WorldCom* remand. Having exhausted every administrative avenue available, Core has no choice but to seek a writ of mandamus from this Court.

Core is a telecommunications company of the so-called “CLEC” variety: a competitive local exchange carrier, as distinguished from the incumbent local exchange carrier (“ILEC”) variety. Core provides telecommunications services to, among others, ISPs. Given the nature of their business, ISPs receive substantially more calls than they make. The Telecommunications Act of 1996, Pub. L. No.

104-104, 110 Stat. 56, 47 U.S.C. §§ 151-714 (“1996 Act”), requires all local exchange carriers to “establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5). That is, when two local exchange carriers interact to complete a call, both the carrier initiating the call and the carrier completing the call must be compensated for their respective services. Core, then, understands Congress to have given it a right to compensation for calls that it terminates to its customers, including its ISP customers. Since 2001, however, Core has been receiving either no or substantially restricted “reciprocal compensation” from other carriers based on the FCC’s “interim” regime covering intercarrier compensation for ISP-bound traffic. This Court held in *WorldCom* that the FCC lacked the statutory authority to impose that regime (at least for the reason the Commission gave), and remanded the matter to the Commission for further proceedings. Since the *WorldCom* remand, however, the FCC has neither articulated a lawful basis for that interim regime, nor implemented a new reciprocal compensation regime for ISP-bound traffic to replace that now-six-year-old “interim” regime.

Core has not idly awaited FCC action since the *WorldCom* remand in 2002. It has actively participated in the FCC’s six-year-old rulemaking proceeding in which the FCC purports to be establishing a unified intercarrier compensation regime, which, in concept, would include compensation terms for ISP-bound

traffic. But the FCC is as far from achieving its unified intercarrier compensation regime today as it was when it initiated that docket over six years ago. Core also filed two forbearance petitions with the Commission seeking relief that, if granted, would have assuaged the injury that Core has suffered as a result of the FCC's unlawfully-imposed restrictions on compensation for ISP-bound traffic. With two exceptions on one petition, the FCC denied Core's forbearance petitions.

Additionally, Core sought a writ of mandamus from this Court, but in 2005 the Court held that the Commission's delay was not sufficiently egregious. Core returns to this Court confident that the FCC's delay is now egregious enough to warrant the remedy of mandamus. Specifically, the FCC should be allowed 60 days to issue a responsive order, which is more than ample time under the circumstances. If the Commission's silence extends beyond those 60 days, vacatur is appropriate because it restores the industry to the state-based rates that applied prior to the FCC's unlawful ruling and stops the perverse result of rewarding the loser and punishing the winners of the *WorldCom* case.

ISSUE PRESENTED

Does the FCC's five-and-a-half-year delay in responding to this Court's *WorldCom* remand warrant entry of a writ of mandamus compelling the agency to issue an order on remand within 60 days, on pain of vacatur if the Commission cannot meet that deadline?

PROCEDURAL HISTORY AND NECESSARY FACTS

II. The FCC's *Local Competition Order*

Section 251 of the 1996 Act requires, among other things, local exchange carriers (“LECs”) to compensate each other for terminating telecommunications that originate on another LEC’s network. 47 U.S.C. § 251(b)(5) (providing that LECs have the “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications”). In its first substantive decision implementing the 1996 Act, the Commission held that § 251(b)(5) required LECs to compensate each other for all local calls – including ISP-bound calls – by means of a “symmetric compensation rule.” *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16040, ¶ 1086 (1996) (“*Local Competition Order*”).

Thus, with the *Local Competition Order*, the FCC reached two key conclusions. First, payment of reciprocal rates for intercarrier compensation levels the playing field between CLECs and ILECs. 11 FCC Rcd at 16041, ¶ 1087. Second, despite § 251(b)(5)’s unqualified reference to reciprocal compensation for all “telecommunications,” the FCC limited LECs’ duty to pay reciprocal compensation to “local” traffic only. 11 FCC Rcd at 16012-13, ¶¶ 1033-34, 16015-16, ¶ 1040. (The Commission maintained a different intercarrier compensation system for long distance calls: the long distance carrier charges its

customer and then pays both the LEC that originated the call and the LEC that terminated it. *See* 11 FCC Rcd at 16013, ¶ 1034.) As a result, many state commissions concluded that ISP-bound traffic was just as entitled to reciprocal compensation as any other type of local traffic. Indeed, this issue was by and large settled prior to the *Declaratory Ruling*.

III. The FCC's *Declaratory Ruling* On Reciprocal Compensation For ISP-Bound Traffic

Despite finding in 1996 that all carriers were obligated to pay symmetrical rates as part of § 251(b)(5)'s reciprocal compensation requirement, since 1999 the FCC has sought to except ISP-bound traffic from § 251(b)(5). First, in its 1999 "*Declaratory Ruling*," the FCC ruled that calls to an ISP did not come within the ambit of § 251(b)(5) because they were not "local" (despite the fact that the call would have been "local" if the ISP's phone number was used by any other individual or non-ISP business).¹ In reaching this conclusion, the Commission relied on an "end-to-end" analysis, which the FCC had previously used to determine whether a call was *jurisdictionally* interstate or not. 14 FCC Rcd at 3689-90, ¶ 1, 3695-98, ¶¶ 10-12. Based on that test, the Commission concluded that ISP-bound calls "do not terminate at the ISP's local server ... but continue to

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("*Declaratory Ruling*").

the ultimate destination or destinations, specifically at an Internet website that is often located in another state.” 14 FCC Rcd at 3697. Despite finding that ISP-bound calls were not “local” for purposes of § 251(b)(5)’s reciprocal compensation requirement, the Commission nevertheless elected not to establish rates for ISP-bound calls, leaving that matter to the determination of the state commissions (many of which had already concluded that ISP-bound traffic was entitled to § 251(b)(5)-based reciprocal compensation). *Id.* at 3704-05, ¶¶ 24-26.

IV. The *Bell Atlantic* Decision

This Court vacated the *Declaratory Ruling*, holding that the FCC failed to “provide an explanation why this [end-to-end] inquiry is relevant to discerning whether a call to an ISP should fit within the local call model ... or the long distance model.” *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000). The Court aptly noted that the FCC’s use of the end-to-end analysis in its *Declaratory Ruling* yielded “intuitively backwards results,” particularly the notion that *intrastate* calls would be subject to the federal reciprocal compensation requirement, whereas the ISP-bound calls that the Commission denominated as *interstate* would be left to potential state regulation. *Id.* at 6.

The Court also agreed with WorldCom’s position that, contrary to the FCC’s conclusion, and under the FCC’s own existing regulations, ISP-bound calls appear to fit squarely within the agency’s definition of “local” calls. *Id.* at 6.

Under 47 C.F.R. § 51.701(b)(2), “telecommunications traffic” is deemed local if it “originates and terminates within a local service area.” As this Court noted, under the Commission’s own definition of “terminate,” “[c]alls to ISPs appear to fit [the] definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP” 206 F.3d at 6. In the end, the FCC failed to explain adequately why LECs, like Core, “that terminate calls to ISPs are not properly seen as ‘terminat[ing] ... local telecommunications traffic,’” and thus entitled to § 251(b)(5) reciprocal compensation. *Id.* at 9.

In addition to failing to provide a satisfactory explanation for why traffic that looks and acts local isn’t really local, the Court identified an independent ground requiring remand. The Court also rejected the FCC’s analysis of whether ISP-bound calls are “telephone exchange service” (*i.e.*, local) or “exchange access” (*i.e.*, long distance) under the 1996 Act. *Id.* at 9; *see* 47 U.S.C. § 251(c)(2). In the *Declaratory Ruling*, the Commission stated that ISP-bound calls constitute an “interstate access service,” a term nowhere found in the 1996 Act. 14 FCC Rcd at 3690. In addition to lacking statutory support, the Court criticized the Commission’s creation of this novel class of telecommunications traffic because the agency had previously held that ISPs do not use exchange access service, and because the agency had conceded on appeal that “exchange access” and “telephone exchange service” constituted the entire universe of possible types

of traffic. 206 F.3d at 8-9. The Court thus vacated the *Declaratory Ruling* and remanded the matter for the FCC to explain “why [ISP] traffic is ‘exchange access’ rather than ‘telephone exchange service.’” *Id.* at 9.

V. The FCC’s *Order on Remand*

On remand, the FCC did not answer the questions that this Court put to it in *Bell Atlantic*. Instead, the FCC repeated its conclusion that carriers that terminated phone calls to ISP customers were not entitled to reciprocal compensation under § 251(b)(5), and devised an alternative rate regime for ISP-bound traffic.² This time, the FCC did not find that ISP-bound calls were not “local” calls. Rather, it reasoned that § 251(g) of the 1996 Act entitled it to “carve out” ISP-bound calls from the reciprocal compensation requirements of § 251(b)(5). *Order on Remand*, 16 FCC Rcd at 9152-53, ¶ 1. That is, the FCC abandoned its reliance on the end-to-end jurisdictional analysis and crafted an entirely new jurisdictional hook to excise ISP-bound traffic from § 251(b)(5)’s reciprocal compensation obligations: it concluded that ISP-bound telephone traffic is an “information access” service under § 251(g) of the 1996 Act. 16 FCC Rcd at 9165, ¶ 30.

² *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 (2001) (“*Order on Remand*”) (subsequent history omitted).

The Commission had previously held, however, that “‘information access’ [service] is [not] a category of service that is mutually exclusive of ‘exchange access’ [long distance],” and that § 251(g) is merely a “transitional enforcement mechanism” to continue implementing the terms of the AT&T divestiture decree. *See* 16 FCC Rcd at 9167-68, ¶ 36 n.64 (citation omitted). Having denominated ISP-bound traffic as an “information access service,” the Commission abandoned its prior decision (47 C.F.R. § 51.701) that § 251(b)(5) reciprocal compensation applied only to “local” telecommunications service. It concluded that when Congress said “telecommunications,” it meant “all” telecommunications, except those temporarily subject to the 251(g) carve out.

Having carved ISP-bound traffic out of the scope of § 251(b)(5), the Commission proceeded to establish “an interim intercarrier compensation rule to govern the exchange of ISP-bound traffic.” 16 FCC Rcd at 9181, ¶ 66. The FCC denominated this ISP-bound intercarrier compensation regime as “interim” because those rates were meant to apply only until the FCC resolved its contemporaneously-initiated Notice of Proposed Rulemaking on “the desirability of adopting a uniform intercarrier compensation mechanism, applicable to all traffic exchanged among telecommunications carriers,” including ISP-bound traffic. *Id.* According to the Commission, this amounted to “a three-year interim intercarrier compensation mechanism for the exchange of ISP-bound traffic.” 16

FCC Rcd at 9199, ¶ 98. But, over six years and a remand order from this Court later, that “three-year interim” regime has no end in sight.

This allegedly interim rate regime provided for three different rates for ISP-bound traffic: (1) the rate provided for in any extant interconnection agreements between carriers; (2) “interim regime” rate caps to the extent those agreements were amended through change-of-law provisions; and (3) a “new market” rate of *zero* (so-called “bill-and-keep”) in jurisdictions where traffic was not being exchanged under an existing interconnection agreement prior to certain times. 16 FCC Rcd at 9186-89, ¶¶ 77-82. Under bill-and-keep, a LEC receives revenue only from its customers; the originating carrier no longer compensates the terminating carrier for completing its customers’ calls to an ISP. 16 FCC Rcd at 9154, ¶ 4.³

³ The FCC implemented this rule in spite of its long-standing view that bill-and-keep arrangements “are not economically efficient because they distort carriers’ incentives, encouraging them to overuse competing carriers’ termination facilities.” *Local Competition Order*, 11 FCC Rcd at 16055, ¶ 1112 (1996). Indeed, in connection with the Commission’s Further Notice of Proposed Rulemaking (“FNPRM”) relating to unifying intercarrier compensation, 20 FCC Rcd 4685 (2005), the Commissioners specifically disavowed the bill-and-keep pricing mechanism. In the separate statements accompanying the press release announcing the decision to adopt the FNPRM, the Commission relegated all discussion of bill-and-keep to a “staff report” appended to the FNPRM, which “is not the product of a Commission vote.” FNPRM, 20 FCC Rcd at 4796, Separate Statement of Commissioner Michael J. Copps; *see also id.* at 4799, Separate Statement of Jonathan S. Adelstein (“I cannot endorse today the separate staff analysis of intercarrier compensation proposals, which is not the product of Commission vote . . .”). For his part, Commissioner Copps expressed “deep concerns” regarding the “operational realities” of a system that prevents facilities-

VI. The *WorldCom* Remand

Because § 251(g) relates to the FCC's continued enforcement of certain pre-1996 Act obligations, and because there were no pre-1996 Act obligations relating to intercarrier compensation for ISP-bound traffic, this Court again held that the FCC's stated rationale for "carving out" ISP-bound traffic from § 251(b)(5)'s reciprocal compensation requirement was not legally defensible. *WorldCom*, 288 F.3d at 433-34. Reaching only the question of the FCC's authority to promulgate the new compensation rules, the Court held that § 251(g) "does not provide a basis for the Commission's action." *Id.* at 434. Indeed, it concluded that the FCC's construction of § 251(g) could enable the Commission to "override virtually any provision of the 1996 Act." *Id.* at 433. The Court did not, however, vacate the *Order on Remand*; it "simply remand[ed] the case to the Commission for further proceedings." *Id.* at 434. More than five years have passed since this Court's *WorldCom* remand without a responsive decision from the Commission.

VII. Core's Administrative Efforts To Secure Relief From The FCC

After more than a year had passed without any order from the Commission addressing the *WorldCom* remand, Core petitioned the Commission for

based carriers from recovering their network investment. *Id.* at 4796. Abandoning bill-and-keep as an ultimate goal is no surprise, as one of the fundamental purposes of intercarrier compensation is to ensure "full compensation for the costs of building and operating telecommunications networks." *Id.* at 4795, Separate Statement of Commissioner Kathleen Q. Abernathy.

forbearance from the continued application of the provisions of the *Order on Remand*. While Core sought forbearance from the application of the rate caps,⁴ growth caps,⁵ new markets rule,⁶ and mirroring rule⁷ that the FCC created in the *Order on Remand*, in October 2004 the Commission ultimately granted

⁴ The Commission's rate caps provided a declining cap on the amount of intercarrier compensation a LEC could receive for ISP-bound traffic, from an initial rate of \$0.0015 per minute down to \$0.0007 per minute. *See Order on Remand*, 16 FCC Rcd at 9187, ¶ 78.

⁵ In addition to capping (or eliminating) the rate of compensation for ISP-bound traffic, the Commission also ruled that LECs, like Core, could only increase the compensable volume of their ISP-bound business by 10% over their pre-*Order on Remand* level. *See Order on Remand*, 16 FCC Rcd at 9191, ¶ 86.

⁶ Under the FCC's "new markets rule," when competitors (like Core) expanded into new markets, they were required to exchange their ISP-bound traffic on a bill-and-keep basis. *See Order on Remand*, 16 FCC Rcd at 9188-89, ¶ 81. This rule particularly prejudiced Core because, despite requesting interconnection from Verizon well before the FCC's *Order on Remand*, Verizon discriminatorily delayed establishing interconnection with Core until after the *Order on Remand* was issued. *See Core Commc'ns, Inc. v. Verizon Maryland Inc.*, Case No. 8881, Order No. 78989, at 7 (Md. PSC, Feb. 27, 2004) (finding that Verizon "violat[ed] the standards of the [interconnection agreement, incorporating the 1996 Act] that require interconnection equal in quality; at a technically feasible point; and that is just, reasonable and nondiscriminatory; in addition to fail[ing] to meet a commercially reasonable standard of good faith"). Although this order relates to Maryland only, Verizon engaged in the same tactics in the Pennsylvania and New York and litigation is pending in Pennsylvania.

⁷ With the "mirroring rule," the Commission held that the rate-capped prices for ISP-bound traffic would apply only if an ILEC offered to exchange all its § 251(b)(5) traffic at the same rates; if it did not, then the rate for ISP-bound traffic would be the state-approved or state-arbitrated reciprocal compensation rates. 16 FCC Rcd at 9193-94, ¶ 89.

forbearance only from the “growth cap” and “new markets” rules.⁸ Thus, the rate caps (that result in rates 300-400% lower than other § 251(b)(5) intercarrier compensation rates) and mirroring rule continue to harm Core six years later, despite the flawed legal basis on which they were established.

After nearly four years had passed without any Commission response to the *WorldCom* remand, Core filed its second forbearance petition with the Commission, this time asking for forbearance from the rate regulation issued under § 251(g) and the rate averaging and rate integration rules of § 254(g) of the 1996 Act. With respect to the FCC’s § 251(g) regulations, Core asked the FCC to forbear from applying the “carve out” regulations that the FCC allegedly promulgated under that section, which would then put ISP-bound traffic back in § 251(b)(5)’s reciprocal compensation regime. Not so, ruled the Commission; the FCC rejected Core’s petition on the ground that forbearing from the § 251(g) carve out would not place ISP-bound calls back within the ambit of §251(b)(5), but rather would place them in unregulated limbo.⁹

⁸ See *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179, 20186-89, ¶¶ 20-26 (2004), appeal denied, *In re Core Commc’ns, Inc.*, 455 F.3d 267 (D.C. Cir. 2006).

⁹ See *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, 22 FCC Rcd 14118 (2007), appeal docketed, *Core Commc’ns, Inc. v. FCC*, No. 07-1381 (D.C. Cir.).

In addition to Core's direct requests for forbearance from the Commission rules most damaging to it, Core has also participated extensively in the Commission's *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, through which the Commission has been "hoping" to solve the entire set of intercarrier compensation riddles in one proceeding. That proceeding has been anchored around two Notices of Proposed Rulemaking. The first, which opened the proceeding, came in April 2001. *See In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001). After nothing came of that proposal, the Commission issued a Further Notice of Proposed Rulemaking in March 2005. *FNPRM*, 20 FCC Rcd 4685 (2005). That FNPRM included just one reference, in a footnote, to the *WorldCom* order: "In this proceeding, the Commission hopes to address the compensation regime for all types of traffic, including ISP-bound traffic." *FNPRM*, 20 FCC Rcd at 4694, n. 48. While a unified intercarrier compensation regime is indeed an ideal solution – and one supported by Core – the Commission's "hope" remains just that. Core is among the multitude of voices advocating its views in the *Unified Intercarrier Compensation Regime* docket.¹⁰

¹⁰ *See, e.g.*, Letters from Michael B. Hazzard, attorney for Core, to Marlene M. Dortch, Secretary of the Federal Communications Commission, CC Docket No.

But, again, to date the Commission has issued no ruling either responding to the *WorldCom* remand specifically or addressing it via an omnibus ruling on intercarrier compensation generally. In fact, the Commission recently issued an Order ruling on discrete intercarrier compensation issues, indicating that the Commission is willing to address outstanding intercarrier compensation issues outside the context of its *Unified Intercarrier Compensation Regime* docket. See *Qwest Commc'ns Corp. v. Farmers & Merch. Mut. Tel. Corp., Mem. Op. & Order*, FCC File No. EB-07-MD-001 (rel. Oct. 2, 2007) (order relating to intercarrier compensation for calls made to conference call companies; finding that conference calling companies are “end users,” that LECs provide “termination” service to those companies just like any other “end user,” and that a LEC’s payment of a “marketing fee” to calling card companies does not change the calling card companies’ status as customers, and thus end users).

VIII. Core’s First Mandamus Petition

After more than two years passed without an FCC order responding to the *WorldCom* remand, Core petitioned this Court for a writ of mandamus. See *Petition for Writ of Mandamus to the Federal Communications Commission, D.C.*

01-92, dated Sept. 14, 2004; Oct. 4, 2004; Aug. 19, 2005; ;Mar. 16, 2006; Oct. 25, 2006; Dec. 19, 2006; May 18, 2007; June 4, 2007; June 13, 2007; July 6, 2007; and July 20, 2007 (available at http://fjallfoss.fcc.gov/prod/ecfs/comsrch_v2.cgi).

Cir. No. 04-1179 (“*Core Mandamus I*”) (attached as Exh. A). In it, Core complained of the same thing: the FCC’s failure to issue an order in response to the Court’s *WorldCom* remand.

In response to *Core Mandamus I*, the Court ordered the FCC to respond, which it did on August 19, 2004. There, it argued that mandamus was inappropriate for two principal reasons. First, it argued that mandamus was premature because “Commission staff recently completed and forwarded to the Chairman of the FCC a draft order addressing the *WorldCom* remand.” *See* FCC Resp. to Petition for Writ of Mandamus, at 10 (attached as Exh. B). The FCC apparently never adopted that order. The FCC also argued that its delay was not long enough to warrant mandamus: “*When this Court has found the mandamus remedy to be appropriate, it generally has been confronted with delays of at least three years....*” *Id.* at 11 (emphasis added). The FCC no longer has the benefit of either of those arguments.

Then, through a Status Report that the Court required the FCC to file, the FCC advised the Court of its FNPRM, in which it articulated its “hopes” of resolving *all* intercarrier compensation issues. *See* Supplemental Status Report (Mar. 4, 2005) (attached as Exh. C). In essence, the FCC invited the Court to deny Core’s mandamus petition on the promise that it was about to build a whole new house of intercarrier compensation, which would include repairing the broken sink

of ISP-bound compensation. Like the draft order on then-Chairman Powell's desk, no response to the *WorldCom* remand (or anything, for that matter) has come from the Commission's March 2005 FNPRM.

As noted above, the Court denied the *Core Mandamus I* without prejudice to refiling "in the event of significant additional delay." The Commission's "significant additional delay" brings *Core* back before this Court. As explained below, now that another two-and-a-half years have passed without any FCC response, *Core* is further aggrieved by the agency's inaction and the resultant injury to its business in the form of millions of dollars of lost intercarrier compensation and the inability to formulate a business model that is not based on an unlawfully-founded, interminable "interim" regime.

ARGUMENT: MANDAMUS IS NECESSARY

Due to the FCC's inability to respond to the Court's *WorldCom* remand voluntarily, mandamus is necessary. In *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"), the Court articulated several factors for courts to consider in evaluating whether mandamus was appropriate to correct an agency's failure to take required action. *Id.* at 79-80. The factors are not "ironclad," but provide guidance for "whether the agency's

delay is so egregious as to warrant mandamus.” *Id.* at 79.¹¹ These factors strongly favor mandamus here.

I. The FCC’s Delay Is Unreasonable And Egregious

“Mandamus is an extraordinary remedy reserved for extraordinary circumstances. An administrative agency’s unreasonable delay presents such a circumstance because it signals the breakdown of regulatory processes.” *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (citations and quotations omitted). Here, the FCC has had more than five years since the *WorldCom* remand to address ISP-related reciprocal compensation, and in the aggregate over eight years to address ISP reciprocal compensation in a lawful fashion. The FCC, however, has failed unreasonably to respond to the *WorldCom* remand.

“There is no per se rule as to how long is too long to wait for agency action, but a reasonable time for agency action is typically counted in weeks or months,

¹¹ The factors are: “(1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.” *Id.* at 80 (citations and quotations omitted).

not years.” 372 F.3d at 419 (citations and quotations omitted). In *American Rivers*, the Court found the Federal Energy Regulatory Commission’s delay of six years in responding to a petition was “nothing less than egregious.” *Id.* at 419. The FCC’s quiescence in this case is comparably egregious. Further, the Court in *American Rivers* noted several cases where delays of three to six years were found to be unreasonable. *Id.* at 419 n. 12.¹² Ironically, in response to Core’s first petition for mandamus, the FCC argued that a delay of over two years was not long enough because “[w]hen this Court has found the mandamus remedy to be appropriate, it generally has been confronted with delays of at least three years” *See* FCC Response, at 11. By the FCC’s own admission, then, its delay of over five years is officially “egregious.”

And, even assuming the Commission genuinely believed that it would expeditiously resolve the *WorldCom* remand in 2003, 2004, or even 2005 – which Core does assume – this delay is now objectively egregious and thus warrants a writ of mandamus. *TRAC*, 750 F.2d at 80 (“the court need not ‘find any

¹² *American Rivers*, 372 F.3d at 419 n. 12 (“We have questioned a similar delay, *see Pub. Citizen Health Research Group v. Brock*, 823 F.2d 626, 628 (D.C. Cir. 1987) (six-year delay ‘tread[ed] at the very lip of the abyss of unreasonable delay’), and shorter ones too, *see, e.g., Air Line Pilots Ass’n, Int’l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (five-year delay unreasonable); *Pub. Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1157-59 (D.C. Cir. 1983) (per curiam) (three-year delay unreasonable); *MCI Telecomms. Corp. v. FCC*, 627 F.2d [322], 324-25, 338-42 [(D.C. Cir. 1980)] (four-year delay unreasonable”).

impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.”) (citation omitted).

II. Congress Intended Swift Resolution Of 1996 Act Matters

Congressional intent to require swift agency action also weighs in favor of mandamus. *See TRAC*, 750 F.2d at 80 (“where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason.”) (citation omitted); *see also Cutler v. Hayes*, 818 F.2d 879, 897-98 (D.C. Cir. 1987). The intent of Congress is a key consideration here because agency action unreasonably delayed may “undermin[e] the statutory scheme, either by frustrating the statutory goal or by creating a situation in which the agency is losing its ability to effectively regulate at all.” *Id.* at 898 (citation and footnotes omitted). Thus, mandamus is often warranted not only to vindicate the rights of the petitioner, but also to ensure the implementation of Congress’ goal and to preserve the agency’s legitimacy as a governing body. *See id.* at 896 (“Quite simply, excessive delay saps the public confidence in an agency’s ability to discharge its responsibilities and creates uncertainty for the parties”).

There is no question that Congress contemplated speedy agency action in implementing the terms of the 1996 Act that govern local competition. The express purpose of this landmark legislation was “to *shift monopoly markets to*

competition as quickly as possible.” H.R. Rep. 104-104, 1040 Cong., 2d Sess. at 89 (1995) (emphasis added).¹³ This concern with expeditious agency action pervades the 1996 Act. Most immediately, Section 251 of the Act, 47 U.S.C. § 251(d)(1), commanded the Commission to issue rules governing competitive entry into the local market within six months of enactment of the 1996 Act. On its face, the agency’s protracted vacillation on the reciprocal compensation issue directly contravenes this directive for rapid (and lawful) section 251 rulemaking.¹⁴

¹³ Congress had good reason to be concerned about the Commission’s inability to act in a timely manner. *See, e.g., Radio-Television News Dirs. Ass’n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (issuing writ of mandamus where the Commission “failed to act for nine months” after “acknowledg[ing] the need for a prompt decision,” which consisted only of “an order that further postpones a final decision without any assurance of a final decision”); *In re Monroe Commc’ns Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988) (noting that “an undesirably large amount of time has passed during the [FCC] proceeding: the three years of administrative limbo following the *Initial Decision* have benefited neither the parties nor the public.”); *Sierra Club v. Thomas*, 828 F.2d 783, 795 (D.C. Cir. 1987) (noting that “[t]he classic example of [delay depriving parties of rights granted by Congress] is the undue length of rate proceedings conducted by the Federal Communications Commission,” which “deprive[s] ratepayers of their statutory right to [just and reasonable] rates”); *Southern Pac. Commc’ns Co. v. Am. Tel. and Tel. Co.*, 740 F.2d 980, 1000 (D.C. Cir. 1984) (“At minimum, long regulatory delays often have preceded final FCC approval or disapproval of AT&T’s allegedly predatory rates, refusals to interconnect, or unreasonable and discriminatory terms and conditions of access to local distribution facilities.”); *Nader v. FCC*, 520 F.2d 182, 206-07 (D.C. Cir. 1975) (cautioning Commission, again, “in the strongest terms” about its “dilatory pace” because court “foresee[s] the breakdown of the regulatory process if the public and the regulated carriers must wait as long as ten years to have important issues decided”).

¹⁴ The 1996 Act is replete with other examples of Congress’ expectation of swift agency action. Section 254, 47 U.S.C. § 254(a)(2), required the Commission to

In light of this unmistakable Congressional intent for rapid agency action, the FCC's failure to adopt a lawfully-grounded reciprocal compensation policy since 1999 is facially egregious. The continued evolution of telecommunications competition requires a lawful and comprehensible reciprocal compensation regime, something that the FCC has still not established. Because the FCC has *never* articulated a defensible theory for why § 251(b)(5)'s plain language requiring reciprocal compensation for the "termination of telecommunications" does not apply to calls terminated to ISPs, the FCC's quiescence is more than enough to constitute "unreasonably" delayed action. *See* 5 U.S.C. § 706(1).

III. Expedition Of This Matter Will Assist The Commission In Resolving Pending And Future Complaints

The Court in *TRAC* also gave considerable weight to whether compelling agency action is reasonable given the agency's caseload and general practice. 750 F.2d at 80 ("the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority."). Far from improperly interfering with the agency's docket, a writ of mandamus that compels the FCC to

issue rules to create a Universal Service Fund contribution mechanism within 15 months of enactment. Other provisions impose similar deadlines. The Commission must resolve an application for interLATA authority within 90 days of submission (47 U.S.C. § 271(d)(3)), must grant or reject a petition for forbearance from regulation within 12 months (47 U.S.C. § 160(c)), and must act on petitions to preempt state jurisdiction over carrier arbitrations within 90 days of filing (47 U.S.C. § 252(e)(5)). Taken together, these provisions amply evidence a Congressional policy that the 1996 Act be implemented promptly.

settle these long-standing questions will in fact help the Commission handle the related, unresolved proceedings involving reciprocal compensation in an efficient – and, more importantly, consistent – manner.

Indeed, if the Court were to provide this necessary impetus to the agency, it would not just spur the Commission to action for action's sake, but would prompt a ruling that could, and should, resolve the fractured, dysfunctional ISP-bound compensation rulings that presently plague the telecommunications industry. The Commission's refusal to address the *Bell Atlantic* and *WorldCom* remands has deeply frustrated this Court and caused havoc in the industry. Indeed, during oral argument in *Global NAPs, Inc. v. FCC*, No. 02-1202, Judge Edwards expressed understandable frustration with the Commission's refusal to decide the appropriate statutory classification of ISP-bound traffic:

[T]he FCC's playing games [regarding section 251(b)(5)], from my vantage point, which don't make sense to me. You got to fish or cut bait. Where are we going with this? What is this about? How do we analyze this case? I mean, **it drives me crazy to try and prepare a case like this** where the agency's saying we're not going to tell you anything about anything.

Transcript of Oral Argument at 21 (Oct. 20, 2003) (emphasis added) (attached as Exh. D). Four years later, the FCC still has not told this Court, or anyone else, anything about anything on this issue.

Just as the Court cannot plan its cases due to the FCC's failure to act, Core and the rest of the industry cannot plan their businesses in the environment of doubt and confusion that the FCC's inaction has created. The FCC's silence has forced courts and state agencies to simply guess on issues that the Commission left open with its unlawful *Order on Remand*, where before the right to reciprocal compensation was largely established and settled by the various state commissions. For instance, in the wake of the *Order on Remand*, the Massachusetts Department of Telecommunications and Energy has held that certain CLEC carriers must pay for (instead of being compensated for) terminating ISP-bound traffic that crosses into a different (but still in-state) local calling area via a "VNXX" number; the opposite is true, however, in Maryland: Core receives the same (low) intercarrier compensation rate for all its ISP-bound traffic in Maryland, regardless of how the ISP's customers dial their in-state calls. *Compare Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006), with *Verizon Md, Inc. v. Global NAPs, Inc.*, 377 F.3d 355 (4th Cir. 2004). Thus, in Maryland Core is compensated for terminating ISP-bound traffic, but it cannot enter the market in Massachusetts because there Core would have to pay the ILEC for Core's provision of termination service to the ILEC.

The FCC has stood idly by as the telecommunications industry and courts have been trying to resolve these various disputes over the *Order on Remand*. In

the First Circuit's *Global NAPs* case, for instance, the court asked the FCC to file an amicus brief addressing, among other questions, whether "the Commission intended to preempt states from regulating intercarrier compensation for all calls placed to internet service providers, or whether it intended to preempt only with respect to calls bound for internet service providers in the same local calling area." *See Br. For Amicus Curiae FCC*, at 2, No. 05-2657 (filed Mar. 13, 2006) (attached as Exh. E). Although the First Circuit asked the "Commission" to respond, the "Commission's litigation staff" answered with the following, rather unilluminating, response: "the Commission's litigation staff is unable to advise how the Commission would answer [this question] posed by the Court." *Id.* at 11. The Commission's litigation staff did, however, concede that the "*ISP Remand Order* thus can be read to support the interpretation set forth by either party in this dispute." *Id.* at 13. If the Commission's litigation staff cannot discern the Commission's intent, imagine Core's and the rest of the industry's confusion.

Ironically, when the Fourth Circuit was first reviewing the issue of compensation for ISP-bound traffic after this Court's *Bell Atlantic* vacatur and before the unlawful *Order on Remand*, the court stated that "inevitably a uniform federal position will emerge, providing guidance to the various State commissions – and the courts that review them – for enforcing interconnection agreements and their provisions for reciprocal compensation." *Bell Atlantic, Inc. v. MCI*

WorldCom, Inc., 240 F.3d 279, 305 (4th Cir. 2001), *vacated sub nom. Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635 (2002). Six years later, all that the courts, state commissions, and telecommunications carriers have is a fractured, dysfunctional regime built on an unlawfully-issued “interim” regime that the FCC will not repair. Thus, compelling an expedited order from the Commission resolving the *WorldCom* remand will eliminate much of the confusion that has grown out of the Commission’s five-year silence. And, if the Commission cannot – legally or politically – issue a lawful order defining its right to regulate reciprocal compensation for ISP-bound traffic, then Core is perfectly willing to return to the days that preceded the *Order on Remand* when state commissions regulated the issue with clarity.

IV. The Commission’s Inaction Has Rendered It Effectively Immune From Judicial Review

After a point – and we are now well past that point – an ignored remand ossifies the flawed agency rule and renders the Commission the final arbiter of its own unlawful creation. Mandamus is the only remedy that can cure this cancer on the separation of powers established in the Constitution. This Court has held that the FCC “cannot, by its delay, substantially nullify rights which the Act confers, though it preserves them in form.” *Am. Broad. Co. v. FCC*, 191 F.2d 492, 501 (D.C. Cir. 1951). And, “when administrative inaction has precisely the same

impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief.” *Envtl. Def. Fund v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970). Thus, agency delay has the effect of “collid[ing] with the right to judicial review,” *Cutler*, 818 F.2d at 897, which may require a court to demand final agency resolution in order to preserve appellate jurisdiction. Unchecked delay robs the court of jurisdiction.

With no definitive resolution of reciprocal compensation for ISP-bound traffic, the Commission’s “three-year interim” rules have become *de facto* permanent rules. The foundation for these interim rules was expressly rejected in *WorldCom*. In a similar context, this Court has criticized the FCC for allowing unlawful tariffs to remain in effect indefinitely through FCC inaction. “[T]here must be some limit to the time tariffs unjustified under the law can remain in effect Otherwise, the regulatory scheme Congress has crafted becomes anarchic and whatever tariff rates the ‘regulated’ entity files become, for all practical purposes, the accepted rates.” *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 325 (D.C. Cir. 1980). Similarly, there must be some time limit to the “interim” rules for ISP-bound reciprocal compensation when the basis for the implementation of those rules is unlawful. The interim rules should not “for all practical purposes” become the default rules because of FCC inaction.

As Judge Randolph recently observed, “[a] remand-only disposition is, in effect, an indefinite stay of the effectiveness of the court’s decision and agencies naturally treat it as such.” *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring). More to the point, when “the case is simply remanded, and the agency drags its feet, the winning party’s only recourse is to bring a mandamus petition and clear all the hurdles such actions entail.” *Id.*

That is precisely what happened here. When the Court vacated the FCC’s *Declaratory Ruling*, the FCC responded in less than a year with the *Order on Remand*. In contrast, the FCC has done nothing in response to the Court’s *WorldCom* remand-only order, even though the Court only remanded because of the “non-trivial” likelihood that the Commission would reach the same result with a different statutory hook. But, as Judge Randolph recognized, this situation will persist until corrected. Consequently, the FCC has evaded review by virtue of its own inaction, and engrafted to itself this Court’s power of judicial review. Mandamus is therefore essential. *See Hardin*, 428 F.2d at 1099.

Additionally, given the FCC’s egregious delay in responding to the Court’s *WorldCom* remand, and the Court’s view in *WorldCom* that there was a “non-trivial likelihood” that the Commission would reach that same result if it could, the FCC should reasonably be expected to issue an order responding to the *WorldCom* remand in 60 days. If it cannot issue such a ruling, vacatur is

appropriate because it restores the industry to the previous regime, which was more predictable than the present regime, and had the salutary, democratic consequence of actually being lawful.

CONCLUSION

Because the FCC has failed, for over five years, to issue an order explaining why it can deprive Core and other telecommunications carriers of their right to “reciprocal compensation” for ISP-bound traffic under 47 U.S.C. § 251(b)(5), the Court should issue a writ of mandamus compelling the agency to issue such an order within 60 days, on pain of vacatur of the unlawfully-grounded FCC order at issue in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

Dated: March 7, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Edilma Carr, do hereby certify that on March 7, 2008, I caused true and correct copies of the foregoing BRIEF FOR PETITIONER CORE COMMUNICATIONS, INC. ON PETITION FOR A WRIT OF MANDAMUS TO THE FEDERAL COMMUNICATIONS COMMISSIONS and the accompanying CORPORATE DISCLOSURE STATEMENT and Rule 28 CERTIFICATE OF COUNSEL to be delivered by first class mail, postage pre-paid, to the following

Respondent:

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Sam Feder, General Counsel
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Edilma Carr

CORPORATE DISCLOSURE STATEMENT

Petitioner Core Communications, Inc. ("Core") submits this Corporate Disclosure Statement Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Cir. Rule 26.1. Core is wholly owned by its parent, CoreTel Communications, Inc. ("CoreTel"), 209 West Street, Suite 302, Annapolis, Maryland 21401. Neither Core nor CoreTel are publicly held corporations. No publicly held company holds 10% or more ownership interest in CoreTel.

**RULE 28 CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED
CASES**

(A) Parties and Amici

1. Parties to the Proceeding Below

This petition for a writ of mandamus to the Federal Communications Commission (“FCC”) is an original proceeding that seeks an order compelling the FCC to issue an order responding to the Court’s remand in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). As such, there was no proceeding below, and thus there were no parties below.

2. Parties Before the Court

Core is the petitioner in this case.

The Federal Communications Commission is the respondent in this case.

(B) Rulings Under Review

As noted above, Core’s petition complains of the fact that the FCC has issued no ruling in response to the Court’s remand in *WorldCom*. As such, the FCC’s failure to issue a ruling is under review. Core continues to suffer injury from the FCC’s *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier-Compensation for ISP-Bound Traffic*, Memorandum Opinion and Order, 16 FCC Rcd 9151 (2001)

(“*Order on Remand*”), which the Court remanded, but did not vacate, in *WorldCom*.

(C) Related Cases

This petition for a writ of mandamus arises out of the FCC’s failure to respond to the Court’s remand in *WorldCom*; thus, this case is related to the *WorldCom* case. *Core Communications, Inc. v. FCC*, D.C. Circuit Case No. 07-1381 (docketed Sept. 20, 2007) presents issues relating to the FCC’s denial of Core’s forbearance petition relative to certain FCC regulations of intercarrier compensation that were at issue in the FCC’s *Order on Remand*.

WCSR 3855933v1

**Appendix to Core Communications, Inc.'s
Petition for Writ of Mandamus
to the Federal Communications Commission**

- Exhibit A. Petition for Writ of Mandamus to the Federal Communications Commission filed June 10, 2004 (D.C. Cir. Case No. 04-1179)
- Exhibit B. Response of Federal Communications Commission to Petition for Writ of Mandamus filed August 19, 2004 (D.C. Cir. Case No. 04-1179)
- Exhibit C. FCC's Supplemental Status Report filed March 8, 2005
- Exhibit D. Excerpt of the transcript of Proceedings before Circuit Judges Edward and Garland and Senior Circuit Judge Williams, Oral Argument of October 20, 2003 in *Global NAPs, Inc. v. FCC* (D.C. Cir. Case No. 02-1202)
- Exhibit E. Brief for Amicus Curiae Federal Communications Commission, filed March 13, 2006 (1st Cir. Case No 05-2657)

TAB A

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UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

JUN 10 2004

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED

In re Core Communications, Inc.,

Petitioner.

No. 04-04-1179

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
JUN 10 2004
CLERK

**PETITION FOR WRIT OF MANDAMUS TO THE
FEDERAL COMMUNICATIONS COMMISSION**

ORIGINAL
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Core Communications, Inc.,

No. 04-_____

Petitioner.

PETITION FOR WRIT OF MANDAMUS
TO THE FEDERAL COMMUNICATIONS COMMISSION

Petitioner Core Communications, Inc. ("CoreTel"), by its attorneys and pursuant to Rule 21 of the Federal Rules of Appellate Procedure and Circuit Rule 21(a), hereby petitions the Court for a writ of mandamus to the Federal Communications Commission ("FCC" or "Commission") compelling the agency to adopt an order, by a date certain, establishing its statutory authority to regulate "reciprocal compensation" among telecommunications carriers.

The Commission's long-standing failure to articulate a defensible statutory basis for federal regulation of reciprocal compensation with respect to Internet Service Provider ("ISP") calls — a failure this Court has denounced twice¹ — seriously endangers the Commission's administrative legitimacy as well as the stability of local telecommunications competition under the Telecommunications Act of 1996.² Mandamus is appropriate, as the Commission has declined to respond to this Court's *WorldCom* decision, issued nearly two years ago, leaving the industry subject to an ostensibly "interim" regulatory scheme that has no end in sight and which this Court has never reviewed on the merits.³ Under the settled standards for

¹ *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), cert. denied sub nom. *Core Communications, Inc. v. FCC*, 538 U.S. 1012 (2003); *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

² 47 U.S.C. § 251; see Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 et seq. (West 2000)) ("1996 Act").

³ *WorldCom*, 288 F.3d at 434.

compelling agency action unreasonably delayed, the Commission's inaction in this case fully warrants the grant of extraordinary relief. Given the passage of more than four years since the Court first reversed the FCC on this very issue, Petitioner respectfully suggests that an appropriate remedy is to direct the agency to issue a remand decision with sixty (60) days, on pain of *vacatur* of the Commission's interim reciprocal compensation rules.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since the 1996 Act was passed, the Commission has maintained that local calls are subject to the reciprocal compensation provisions of the 1996 Act.⁴ As to calls to end users that are ISPs, however, the Commission has issued diametrically opposite decisions on the applicability of the statute's reciprocal compensation obligation, neither of which survived judicial review by this Court.

The first decision, known as the "*Declaratory Ruling*," rejected pleas for imposing a federal reciprocal compensation obligation for ISP-bound calls and delegated the issue to state commissions.⁵ On appeal, this Court vacated the *Declaratory Ruling* on the ground that the FCC had not established its authority to treat as interstate (and thus exempt from reciprocal compensation) calls to an end user that happens to be an ISP. In the second decision, known as the "*Order on Remand*," the Commission relied upon a different rationale, and different provisions of the 1996 Act, to assert federal authority over compensation for ISP-bound traffic and to impose certain interim rules that substantially restrict, if not eliminate altogether in many in-

⁴ 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.701; see *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15,499, 16,013 (1996) ("*Local Competition Order*").

⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Declaratory Ruling, 14 FCC Rcd. 3689 (1999) ("*Declaratory Ruling*"). *rev'd. Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

stances, payment of reciprocal compensation on calls to ISPs.⁶ The Court remanded, but did not vacate, the Commission's *Order on Remand*.

The Court has demanded that the agency explain why calls to an ISP located in the same exchange or local access and transport area ("LATA") are not local. More specifically, the Court instructed the FCC to revisit section 251(b)(5) of the 1996 Act — the reciprocal compensation provision — and explain why that or any other section of the Act authorizes federal regulation of ISP-bound traffic. The agency has yet to respond to this instruction, even as its purportedly "interim" regime, and numerous related cases, hang in the balance.

Mandamus is the appropriate response to the FCC's inaction. The Commission's refusal to respond to the decision in *WorldCom* has harmed the industry and left this Court in limbo. Indeed, during oral argument in *Global NAPs, Inc. v. FCC*, No. 02-1202, Judge Edwards expressed understandable frustration with the Commission's refusal to decide the appropriate statutory classification (and thus jurisdictional basis) of ISP-bound traffic:

[T]he FCC's playing games from my vantage point, which don't make sense to me. You got to fish or cut bait. Where are we going with this? What is this about? How do we analyze this case? I mean, it drives me crazy to try and prepare a case like this where the agency's saying we're not going to tell you anything about anything.

Tr. at 21 (Oct. 20, 2003) (emphasis added). Just as the Court cannot manage its calendar due to the FCC's failure to act, neither CoreTel nor the rest of the industry can plan their businesses in this environment.

Even worse, it is generally known in the industry that the FCC's Wireline Competition Bureau has completed a draft order in response to the *WorldCom* remand that has

⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd. 9151 (2001) ("Order on Remand"), *rev'd*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 538 U.S. 1012 (2003).

been awaiting formal approval in Chairman Powell's office since January 2004.⁷ Nonetheless, the Chairman reportedly will not circulate the draft order to the other Commissioners because that staff decision includes ISP-bound traffic within section 251(b)(5).⁸ Whether or not this is appropriate FCC procedure, it further supports the conclusion — facially apparent from the agency's long delay — that the FCC is sharply divided along political and policy lines and, more significantly, cannot or will not address the Court's *WorldCom* decision in a timely fashion.⁹

The Commission has yet to formulate a rational statutory basis for its reciprocal compensation decisions, and has failed for more than four years to establish a nexus in the 1996 Act for the incomplete regulatory scheme that presently exists. The Court unfortunately has seen this same story play out too often at this agency. The FCC's decisionmaking paralysis flouts the authority of the Court and continues to cause tremendous uncertainty in the telecommunications marketplace. Absent a direct order from this Court, it is by now altogether clear that, at best, the agency is highly unlikely to resolve the issue of reciprocal compensation in any sensible time frame.

The Court should therefore issue a writ of mandamus to the agency requiring it to adopt an order, within 60 days, that provides a sound basis in section 251 for federal regulatory authority over reciprocal compensation for calls to ISPs. In order to provide an incentive for the agency to comply, the Court should make clear that it will vacate the Commission's "interim"

⁷ See Declaration of Brett Mingo, ¶ 8 (June 10, 2004) (attached hereto as Exhibit A).

⁸ Mingo Declaration ¶ 9. Consistent with the general industry knowledge described in the text, BellSouth and Verizon recently filed with the Commission a joint, 64-page legal brief styled as a written "ex parte" explaining their view as to why ISP-bound traffic should be excluded from section 251(b)(5). See, e.g., Verizon Ex Parte, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, at 51, 55, 57 (filed May 17, 2004). Subsequently, BellSouth and Verizon representatives lobbied Chairman Powell and the Commission's Office of General Counsel on the merits of the jurisdictional issues. *Id.*

⁹ *Id.*

regime, which never has been subject to judicial review. If the FCC fails to issue a remand decision within that time period.

I. ISSUE PRESENTED

Whether the Commission's repeated and long-standing failure to articulate a legitimate statutory basis for federal reciprocal compensation regulation warrants entry of a writ of mandamus to compel agency action unreasonably delayed.

II. PROCEDURAL HISTORY

A. *The Local Competition Order*

Section 251 of the 1996 Act requires, among other things, that local exchange carriers ("LECs") compensate each other for terminating telephone calls that originate on another LEC's network. 47 U.S.C. § 251(b)(5). This requirement is known as "reciprocal compensation." In its first substantive decision implementing the 1996 Act, the Commission held that local telecommunications carriers must compensate each other, pursuant to section 251(b)(5), for all local calls — including ISP-bound traffic — by means of a "symmetric compensation rule." *Local Competition Order*, 11 FCC Rcd. at 16,040, ¶ 1086. The Commission reasoned that symmetrical rates would even the playing field between incumbent and competitive LECs because "symmetrical rates . . . require incumbent LECs, as well as competing carriers, to pay the same rate for reciprocal compensation." *Id.* 16,041, ¶ 1087.¹⁰

¹⁰ Verizon (then Bell Atlantic) supported this result, arguing that if reciprocal compensation rates "are set too high, the result will be that the new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound, such as credit card authorization centers and *internet access providers*." Reply Comments of Bell Atlantic, CC Docket No 96-98, at 21 (May 30, 1996) (emphasis added). Thus, it is undisputed that the *Local Competition Order* gave the ILECs precisely what they asked for by adopting reciprocal compensation, including for ISP calls, in lieu of the "bill and keep" alternative supported by AT&T, among others. Indeed, CoreTel entered the market only after the FCC resolved this issue in Verizon's favor by requiring symmetrical compensation for ISP-bound traffic.

B. The *Declaratory Ruling* on ISP Reciprocal Compensation

Three years later, the Commission specifically reconsidered reciprocal compensation for ISP-bound traffic in its *Declaratory Ruling*, holding that calls terminated to ISPs do not constitute local telecommunications. 14 FCC Rcd. at 3697. In reaching this conclusion, the Commission applied a so-called “end-to-end” analysis in an effort to subject this traffic to federal regulatory jurisdiction. This analysis describes “the jurisdictional nature of communications by the end points of the communication.” *Id.* at 3695. Analogizing to voicemail calls, the Commission found that the “communications at issue here do not terminate at the ISP’s local server . . . but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state.” 14 FCC Rcd. at 3697.

The FCC chose, however, not to disturb state commission decisions on ISP reciprocal compensation that predated the *Declaratory Ruling*. *Id.* at 3703. It held that in the absence of a federal rule, carriers could voluntarily negotiate reciprocal compensation arrangements, and that state commissions retained the authority to approve and enforce those agreements under the interconnection agreement provisions of the 1996 Act. *Id.*

C. The *Bell Atlantic* Decision

In *Bell Atlantic*, 206 F.3d 1 (D.C. Cir. 2000), this Court vacated and remanded the *Declaratory Ruling*, finding the Commission’s legal reasoning deficient in two key respects. First, the Court rejected application of end-to-end jurisdictional analysis to reciprocal compensation, holding that the FCC “ha[d] yet to . . . provide an explanation why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model . . . or the long distance model.” *Id.* at 5. The Court reasoned that calls to ISPs are “switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the ‘called party,’” *id.* at 6. and thus are local calls.

The Court recognized that the ISP in this scenario is "no different from many businesses, such as 'pizza delivery firms,'" that receive calls in the course of providing customer service. *Id.* at 7. The Court thus concluded that "however sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation." *Id.* Consequently, the Court vacated the agency's decision and remanded for explanation of "why LECs that terminate calls to ISPs are not properly seen as 'terminating ... local telecommunications traffic.'" *Id.* at 9 (citation omitted).

As an "independent ground requiring remand," the Court rejected the FCC's analysis of whether ISP-bound calls are "telephone exchange service" (local) or "exchange access" (long distance) under the 1996 Act. *Id.* at 9; *see* 47 U.S.C. § 251(c)(2). In the *Declaratory Ruling*, the Commission noted in passing that ISP-bound calls are "an interstate access service." *Declaratory Ruling*, 14 FCC Rcd. at 3609. The Court questioned the FCC's use of that term, emphasizing that it was not included in the 1996 Act. Moreover, the Court found the Commission's explanation unpersuasive because the agency had earlier found that the service used by ISPs is *not* exchange access. *See* 206 F.3d at 9. The Commission had thus placed itself in an untenable position, because it had stepped outside the bounds of "local telecommunications" in section 251 which, it conceded, was comprised only of telephone exchange service and exchange access service. The Court held that "[i]f the Commission meant to place ISP-traffic within a third category, not 'telephone exchange service' and not 'exchange access,' that would conflict with its concession on appeal that 'exchange access' and 'telephone exchange service' occupy the field." *Id.* at 8. Therefore, the Court vacated the *Declaratory Ruling* with instructions for the

agency to explain “why [ISP] traffic is ‘exchange access’ rather than ‘telephone exchange service.’” *Id.*

D. *The Order on Remand*

Although it acknowledged on remand that the *Bell Atlantic* decision posed a specific issue which the Commission was directed to resolve, *Order on Remand*, 16 FCC Rcd. at 9160-61, ¶ 16, the FCC did not address that question. Instead, the Commission established “an interim intercarrier compensation rule to govern the exchange of ISP-bound traffic, pending the outcome” of a companion Notice of Proposed Rulemaking concerning “the desirability of adopting a uniform intercarrier compensation mechanism, applicable to all traffic exchanged among telecommunications carriers,” including ISP-bound traffic. *Id.* at 9181, ¶ 66.

The Commission asserted its general section 201 authority (47 U.S.C. § 201) as a basis to impose a new reciprocal compensation obligation limited to ISP-bound traffic. The resulting rules establish three different rate prescription categories for such traffic: (i) the rate existing under individual existing interconnection agreements; (ii) “interim regime” rate caps to the extent such agreements are amended through change of law provisions; and (iii) a “new market” rate of zero (*i.e.*, bill and keep) in jurisdictions where traffic was not being exchanged under an existing interconnection agreement prior to certain timelines. *See* 16 FCC Rcd. at 9186-89, ¶¶ 77-82. Although the Commission stated that it intended to “establish[] a three-year interim intercarrier compensation mechanism for the exchange of ISP-bound traffic,” *id.* at 9199, ¶ 98, three years have come and gone without such action.

Rather than clarifying how end-to-end jurisdictional analysis traffic is implicated for purposes of reciprocal compensation, the Commission developed an entirely new theory to justify this regulatory scheme: that ISP-bound traffic is an “information access service.” 16 FCC Rcd. at 9165, ¶ 30. Recognizing that this term is not defined in the 1996 Act, the Commission

nonetheless concluded that Congress's use of that phrase in section 251(g) of the Act (47 U.S.C. § 251(g)) indicates that information access is "excepted from the scope of 'telecommunications' subject to reciprocal compensation under section 251(b)(5)." *Id.* The Commission had previously held, however, that "'information access service' is not a category of service that is mutually exclusive of exchange access" and that section 251(g) is merely a "transitional measure" preserving the terms of the *AT&T* divestiture decree.¹¹ The Commission also reversed its decision, codified at 47 C.F.R. § 51.701, that reciprocal compensation is limited to "local" telecommunications, holding with virtually no analysis that "all" telecommunications are subject to section 251. *Order on Remand*, 16 FCC Rcd. at 9173, ¶ 46.

E. *CoreTel's Waiver Petition*

Attempting to work within the framework of the Commission's *Order on Remand*, CoreTel petitioned the Commission on August 17, 2001 for a waiver of the growth cap and new market rules in Delaware, New York, and Pennsylvania.¹² In that petition, CoreTel explained that it requested interconnection from Verizon in these markets well prior to the Commission's adoption of the interim reciprocal compensation rules, but that Verizon's interconnection provisioning process was inherently discriminatory and led to unreasonable delays in establishing interconnection.¹³ As a result, Verizon's delay enabled it impermissibly to treat CoreTel as a "new" carrier in Delaware, New York, and Pennsylvania, such that Verizon has been able to

¹¹ See *Order on Remand*, 16 FCC Rcd. at 9167, ¶ 36 n.64.

¹² See Mingo Declaration ¶ 4.

¹³ In a state PUC complaint case raising these same interconnection issues, the Maryland Public Service Commission found Verizon "violat[ed] the standards of the [interconnection agreement, incorporating the 1996 Act,] that require interconnection equal in quality; at a technically feasible point; and that is just, reasonable and nondiscriminatory; in addition to fail[ing] to meet a commercially reasonable standard of good faith." *Core Communications, Inc. v. Verizon Maryland Inc.*, Case No 8881, Order No. 78989 at 7 (Md. PSC, Feb. 27, 2004).

refuse to pay CoreTel any reciprocal compensation for ISP-bound traffic in those markets.

Nearly three years after filing, the Commission has yet to rule on CoreTel's waiver petition.

F. The *WorldCom* Decision

In *WorldCom*, 288 F.3d 429 (D.C. Cir. 2002), this Court sent the ISP reciprocal compensation issue back to the agency for a third attempt to harmonize its decisions with the statutory framework of the 1996 Act. Reaching only the question of the FCC's authority to promulgate the new compensation rules, the Court held squarely that section 251(g) "does not provide a basis for the Commission's action." 288 F.3d at 434. Indeed, it concluded that the FCC's construction of that section could "override virtually any provision of the 1996 Act," a result that "nothing in [the Act]" would support. *Id.* at 433.

Having found that the *Order on Remand* was promulgated without authority, the Court did not reach the merits of petitioners' challenges to the interim rules. The Court declined, however, to vacate those rules, reasoning that "[m]any of the petitioners themselves favor bill-and-keep, and there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§ 251(b)(5) and 252(d)(B)(i))." *Id.* at 434. The Court subsequently denied petitions for rehearing filed by CoreTel and other carriers arguing that the interim reciprocal compensation should be deemed void *ab initio* or vacated on the basis of the Court's jurisdictional holding.¹⁴

¹⁴ Nos. 01-1218 and consolidated cases, *Petition for Rehearing and Petition for Rehearing En Banc of Intervenors Pac-West Telecomm, Inc. and Focal Communications Corporation (June 17, 2002)*, *National Association of Regulatory Utility Commissioners Petition for Rehearing and Rehearing En Banc (June 17, 2002)*, *Core Communications, Inc. Petition for Rehearing and Rehearing En Banc (June 17, 2002)*. The Court denied all petitions without opinion on September 24, 2002.

G. *CoreTel's Forbearance Petition*

Due to the Commission's refusal to address the *WorldCom* remand and CoreTel's waiver petition, CoreTel petitioned the Commission on July 14, 2003 under section 10(c) of the Act, 47 U.S.C. § 160(c), to forbear from continued application of the "growth cap" and "new market" provisions of the *Order on Remand*. CoreTel highlighted the Commission's finding that "there is no reason . . . to distinguish between voice and ISP traffic with respect to intercarrier compensation." *Order on Remand*, 16 FCC Rcd. at 9196, ¶ 93. CoreTel similarly reiterated the Commission's conclusion that:

It would be unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed.

Id., 16 FCC Rcd. at 9193-94, ¶ 89. In spite of the Commission's efforts to achieve a different result, however, this "patently unfair" result is exactly what has occurred. The incumbent LECs continue to collect billions of dollars in intercarrier compensation payments using their embedded, ratepayer-financed plant, while new entrants have been denied the similar ability to recover the cost of their investments. Nonetheless, the Commission as of yet has not addressed CoreTel's petition for forbearance.¹⁵

H. *The Global NAPs Decisions*

Global NAPs is a competitive LEC whose dispute with Verizon over the payment of reciprocal compensation for ISP calls has reached this Court three times. The dispute surrounds the validity of a tariff Global NAPs filed with the Massachusetts state commission setting

¹⁵ Under section 10, any forbearance request is deemed granted unless denied by the Commission within one year, although the Commission may extend the statute's one-year deadline by 90 days. 47 U.S.C. § 160(c).

forth its rates for terminating local calls, including ISP calls. In response to a Verizon complaint, the FCC held that the state tariff was “indeterminate,” or not “clear and explicit” as is required by the agency’s rules. This Court affirmed on April 27, 2001, the same day as the *Order on Remand. Global NAPs v. FCC*, 247 F.3d 252, 260 (D.C. Cir. 2001) (“*Global NAPs I*”).

The case returned in 2002, when the Court reviewed the FCC’s denial of Global NAPs’ petition for preemption of the Massachusetts commission’s dismissal of a complaint for reciprocal compensation under the Global NAPs-Verizon interconnection agreement. *Global NAPs v. FCC*, 291 F.3d 832 (D.C. Cir. 2002). The Court held that the FCC was correct in refusing to preempt, as the agency had adequately addressed Global NAPs’ complaint such that federal action was not warranted. *Id.* at 837. As a result, Global NAPs was denied the right to collect reciprocal compensation under either its interconnection agreement or its state tariff.

Global NAPs therefore amended its tariff to comport with the holding in *Global NAPs I*. That tariff was again rejected as indeterminate, and the FCC’s decision was brought before this Court again. *Global NAPs v. FCC*, 2003 WL 22595207 (Oct. 28, 2003) (“*Global NAPs III*”). In a brief decision released one week after oral argument, the Court upheld the FCC’s rejection of the tariff on the basis of indeterminacy. It noted, however, that the continued failure of the FCC to issue an order resolving the substantial statutory issues underlying reciprocal compensation precluded any further analysis of the core questions in Global NAPs’ dispute with Verizon. *Id.* at *1.

The Court’s opinion does not reflect the significant frustration expressed by the panel at oral argument. In questions directed at FCC counsel, Judge Edwards stated his inclination to affirm the agency’s decision, “because the indeterminacy piece of it I can understand.” Tr. at 21 (Oct. 17, 2003). Judge Edwards went on to admonish counsel, noting that the Court

"can't figure out what the agency's doing. Where are we on 251(b)(5)? Are you saying this is, the agency, that it's excluded or not? Because I really don't like for us to be issuing opinions when we don't know what we're talking about." Tr. at 21:9-15, 22:6-10. Judge Edwards concluded that the agency's failure to advance a valid position on ISP reciprocal compensation "is inexcusable." *Id.* at 24:23-24. The agency did not indicate whether such a decision would be forthcoming, suggesting only that "the FCC has been remiss in the area of its rulemaking in not having resolved the larger rulemaking issue in a more general context." *Id.* at 26:4-6.

III. REASONS FOR GRANTING THE PETITION

Mandamus should be granted in accordance with this Court's seminal decision in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). Mandamus will ensure that the FCC honors this Court's mandate by articulating a legitimate basis of statutory authority to regulate ISP reciprocal compensation. It is, moreover, necessary to resolve mounting confusion regarding application of the rules contained in the *Order on Remand*. The gravity of the unresolved jurisdictional issue in this matter, coupled with the tremendous competitive impact of the new compensation rules, renders the FCC's delay in addressing this Court's *Bell Atlantic* and *WorldCom* decisions plainly unreasonable, hence warranting the extraordinary remedy of mandamus.

A. Resolution of the Regulatory Regime for ISP Reciprocal Compensation Is Necessary to Restore Finality to the Market

The FCC's failure to resolve the *Bell Atlantic* and *WorldCom* mandates has created a vacuum in local telecommunications regulation, severely jeopardizing the continued viability of CLECs and of competition as a whole. Because the statutory validity of the new rules remains questionable, and in light of the three-year "interim" regime's apparent expiration by its own terms, CLECs' right to compensation for ISP calls is still unsettled, five years after the

Commission first specifically addressed the issue and four years after this Court first reversed the agency. This harm is particularly acute at this time, as many CLECs must renegotiate their interconnection agreements in the coming months without final guidance from the FCC or this Court as to their reciprocal compensation rights. Thus, not only petitioner, but this Court and the entire telecommunications industry, are adversely impacted by the FCC's inaction. *See TRAC*, 750 F.2d at 80.

Moreover, the FCC's authority to regulate in this area — to the extent it can be demonstrated — is being constrained through the agency's inaction as the claims of many CLECs are adjudicated by bankruptcy courts without definitive statutory interpretation from the Commission. In the WorldCom bankruptcy, for instance, among the debtor's assets was an outstanding claim against Verizon for reciprocal compensation. The bankruptcy court assumed jurisdiction, approving a settlement that awarded the WorldCom estate \$169 million. *In re WorldCom, Inc. et al.*, Chapter 11 Case No. 02-13533 (AJG), Order Pursuant to Rule 9019 (Bankr S.D.N.Y. Dec. 29, 2003). The Court approved the settlement without legal or policy analysis. Continued resolution of reciprocal compensation issues in the many other pending CLEC bankruptcy proceedings will necessarily impair the general applicability, and validity, of the FCC's interim reciprocal compensation rules.

Furthermore, numerous petitions for relief of various types remain pending at the agency, and their resolution depends on the Commission's proper application of the 1996 Act to ISP-bound traffic. In addition to the CoreTel petitions discussed above, Xspedius Communications filed a complaint against Verizon on October 7, 2003, contending that Verizon improperly refused to pay reciprocal compensation despite continuing to bill and expect payment for the

calls terminated on its own network.¹⁶ Verizon maintains that Xspedius, which purchased all relevant assets of e.spire Communications out of bankruptcy (e.g., interconnection agreements, telecommunications facilities, and end users), is precluded under the “new markets bar” provision of the FCC’s interim rules from collecting reciprocal compensation. Again, the outcome of this and other cases depends materially on whether the FCC has the authority to impose the growth cap and new market rules adopted in the *Order on Remand*.

B. Congress Clearly Intended Swift Resolution of Matters Related to the 1996 Act

Congressional intent to require swift agency action weighs in favor of mandamus. *TRAC*, 750 F.2d at 80. See *Cutler v. Hayes*, 818 F.2d 879, 897-98 (D.C. Cir. 1987); *Public Citizen Health Rsch. Grp. v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984). The intent of Congress is a key consideration, because agency action unreasonably delayed may “undermin[e] the statutory scheme, either by frustrating the statutory goal or by creating a situation in which the agency is ‘losing its ability to effectively regulate at all.’” *Cutler*, 818 F.2d at 898 (quoting *Nader v. FCC*, 520 F.2d 82, 107 (D.C. Cir. 1975)). Thus, mandamus is often warranted not only to vindicate the rights of the petitioner, but also to preserve the agency’s legitimacy as a governing body.¹⁷

There is no question that Congress contemplated speedy agency action in implementing the terms of the 1996 Act that govern local competition. The express purpose of this landmark legislation was “to shift monopoly markets to competition as quickly as possible.”¹⁸ This concern with expeditious agency action pervades the 1996 Act. For example, Section 251 of the Act, 47 U.S.C. § 251(d)(1), commanded the Commission to issue rules governing com-

¹⁶ *Xspedius Communications LLC v. Verizon-Florida Inc. and Verizon-Maryland Inc.*, File No. EB-03-MD-017 (Oct. 7, 2003).

¹⁷ E.g., *Cutler*, 818 F.2d at 896-97 (“Quite simply, excessive delay saps the public confidence in an agency’s ability to discharge its responsibilities and creates uncertainty for the parties.”).

¹⁸ H.R. Rep. 104-104, 104th Cong., 2d Sess. at 89 (1995).

petitive entry into the local market within six months of enactment. On its face, the agency's protracted vacillation on the reciprocal compensation issue directly contravenes this directive for rapid section 251 rulemaking.

The 1996 Act is replete with other examples of Congress's expectations. Section 254, 47 U.S.C. § 254(a)(2), required the Commission to issue rules to create a Universal Service Fund contribution mechanism within 15 months of enactment. Other provisions impose similar deadlines. The Commission must resolve an application for interLATA authority within 90 days of submission (47 U.S.C. § 271(d)(3)), must grant or reject a petition for forbearance from regulation within 12 months (47 U.S.C. § 160(c)), and must act on petitions to preempt state jurisdiction over carrier arbitrations within 90 days of filing (47 U.S.C. § 252(e)(5)). Taken together, these provisions amply evidence a congressional policy that the 1996 Act be implemented promptly.

In light of this indisputable intent for rapid agency decisions, the FCC's failure to adopt a rational reciprocal compensation policy since 1999 is facially egregious. And its promulgation of what remain legally unsupported rules almost three years ago is similarly improper. The continued evolution of telecommunications competition requires a lawful and comprehensible reciprocal compensation regime, something that the FCC has still not established; mandamus relief is thus fully consistent with the structure and purpose of the Act.

CoreTel recognizes that the agency delay in the most recent remand (slightly less than two years since this Court's *WorldCom* decision) is not as long as the delay addressed in *TRAC*. Viewed in the aggregate, however, the FCC's delay spans almost four years, which is commensurate with other cases in which mandamus was granted. *E.g.*, *MCI Telecom. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) (mandamus granted for four-year delay in ordering re-

visions to AT&T tariff). Because the FCC has never articulated a defensible theory regarding ISP reciprocal compensation, nor has it explained — despite the competitive importance of the issue — why federal regulation is permissible, the FCC's intransigence is more than enough to constitute agency action "unreasonably" delayed as a matter of law. *See* 5 U.S.C. § 706(1).

C. Expedition of This Matter Will Assist the Commission in Resolving Pending Complaints

The *TRAC* Court also gave considerable weight to whether compelling agency action is reasonable given the agency's caseload and general practice. 750 F.2d at 80. In this instance, mandamus will benefit the FCC, as resolution of the jurisdictional basis of the new reciprocal compensation rules will assist the agency in its consideration of the pending cases discussed above. Far from improperly interfering with the agency's docket, a writ of mandamus that compels the FCC to settle these long-standing questions will in fact help the Commission handle the myriad unresolved proceedings involving reciprocal compensation in an efficient — and, more importantly, consistent — manner.

D. Mandamus Is Necessary to Preserve This Court's Mandate

Also at stake in this case is the Court's continued role in judicial review of agency action. Mandamus relief is often employed to assure that lower courts adhere to the instructions of courts of appeal. It is the enforcement arm of the "law of the case" doctrine, which in part requires lower courts to implement the mandates of superior courts. *See* Moore's Federal Practice § 134.23[1][b]; *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948) ("this Court [has] consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court").

Under this "mandate rule," lower courts "generally may not deviate from a mandate issued by an appellate court." *In re Ivan F. Boesky Securities Litig.*, 957 F.2d 65, 69 (2d

Cir. 1992). The issuance of a mandate leaves the district court "with no discretion." *id.*, and requires the issuing appellate court to ensure that it "was scrupulously carried out." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 325 (1961). Accordingly, the lower court's "actions on remand should not be inconsistent with either the express terms or the spirit of the mandate." *In re Boesky*, 957 F.2d at 69.

The mandate rule should apply with equal force here. The FCC's unexplained failure to resolve crucial issues regarding its authority over ISP reciprocal compensation violates the "express terms or the spirit" of this Court's decisions in *Bell Atlantic* and *WorldCom*. The FCC must fulfill its obligation to articulate a valid statutory basis for the interim reciprocal compensation rules that this Court has never reviewed on the merits. Unless the Court receives an adequate and timely response from the agency, its role in overseeing Commission action pursuant to the Administrative Procedure Act will necessarily be diminished.

E. The Commission's Inaction Has Rendered It Effectively Immune from Judicial Review

Mandamus is warranted where an agency's refusal to act is tantamount to a decision to deny relief, yet provides no final decision capable of review. This Court has held that the FCC "cannot, by its delay, substantially nullify rights which the Act confers, though it preserves them in form." *American Broadcasting Co. v. FCC*, 191 F.2d 492, 501 (D.C. Cir. 1951). And "when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." *Environmental Def. Fund v. Hardin*, 428 F.2d 193, 199 (D.C. Cir. 1970).

Thus, agency delay has the effect of "collid[ing] with the right to judicial review," *Cutler*, 818 F.2d at 897, which may require a court to demand final agency resolution in order to

preserve appellate jurisdiction. Unchecked delay, however, will rob the court of jurisdiction altogether; yet “[j]udicial review of decisions not to regulate must be not frustrated by blind acceptance of an agency’s claim that a decision is still under study.” *Sierra Club v. Gorsuch*, 715 F.2d 653, 659 (D.C. Cir. 1983).

In this case, the FCC has imposed federal rules that, according to this Court, have no valid statutory basis, but have the effect of limiting, or barring altogether, carriers’ recovery of reciprocal compensation. *WorldCom*, 288 F.3d at 434. Yet because the rules were merely remanded, and not vacated, the agency has no incentive to respond to the remand and explicate its authority to promulgate this regulatory scheme. This anomaly will persist indefinitely. Consequently, the FCC has evaded review by virtue of plain inaction, and unlawfully robbed this Court of supervision over this matter. Mandamus is therefore essential. *Hardin*, 428 F.2d at 199.

F. The Court at the Least Should Require the Commission to Set a Prompt Date Certain For Adoption of an Order that Complies with the *WorldCom* and *Bell Atlantic* Mandates

Despite the foregoing reasons, if this Court determines that mandamus relief is not appropriate, CoreTel respectfully suggests that it should nonetheless manage the agency’s consideration of this issue, similar to its ultimate decision in *TRAC*. There, the Court did not grant mandamus relief, but rather retained jurisdiction while awaiting agency action. The reason was that the FCC had committed to the Court not only to resolve the underlying regulatory matter expeditiously, but also by a date certain in the near future. *See* 750 F.2d at 74. In contrast, here the Commission has provided no timeline for adopting an order that remedies the core statutory infirmities on which the Court has twice reversed the agency.

The FCC’s continued inaction in this regard unfortunately bears out what the petitions for rehearing of the *WorldCom* case portended. Petitioners, among them CoreTel, ex-

pressed concern that without *vacatur*, permitting the *Order on Remand* to remain in effect would provide the FCC with no incentive to comply with the Court's remand instructions. This concern now appears to have been well-founded. Petitioner therefore suggests that, if mandamus is deemed unavailable, the Court should instruct the Commission to provide a date certain by which it will adopt a reciprocal compensation order addressing the *WorldCom* mandate. On that basis, the Court would then be in a position to determine whether to grant mandamus relief or, as in *TRAC*, retain jurisdiction to ensure agency compliance with its scheduling commitment.

CONCLUSION

For all these reasons, the petition for a writ of mandamus should be granted. The Court should direct the FCC to issue a remand decision with 60 days and, if a timely decision is not forthcoming, vacate the Commission's interim reciprocal compensation rules for ISP-bound traffic.

Respectfully submitted,

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Dated: June 10, 2004

EXHIBIT A

Declaration of Bret L. Mingo

June 10, 2004

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Core Communications, Inc.,

No. 04- 04-1179

Petitioner.

DECLARATION OF
BRET L. MINGO

1. My name is Bret L. Mingo. I am the founder and president of Core Communications, Inc. ("CoreTel"). I have intimate knowledge of all aspects of my business, including those related to the various goings-on at the Federal Communications Commission ("FCC" or "Commission") and in the industry generally that impact my company, including the reciprocal compensation (sometimes referred to as intercarrier compensation) for calls to end users that are Internet Service Providers ("ISPs"). Just as the Court has found it difficult to make decisions in various pending cases due to FCC inaction, I find it extraordinarily difficult to make investment decisions for CoreTel.
2. Well before the inception of the FCC's *Order on Remand*¹ and its so-called "interim regime," I have participated in and paid careful attention to the legal and public policy debate surrounding, including those related to obtaining interconnection from Verizon.
3. The purpose of my affidavit is to support CoreTel's request that this Court issue a writ of mandamus to order the Commission to respond to the Court's decision in *WorldCom*.²

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd. 9151 (2001) ("*Order on Remand*"), *rev'd. WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 538 U.S. 1012 (2003).

² *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 538 U.S. 1012 (2003).

4. CoreTel has been harmed by the *Order on Remand* and the Commission's refusal to date to address the Court's decision in *WorldCom*. We have tried every means we know within the FCC's existing processes to get the FCC to act, but it has refused to do so. On August 17, 2001, we petitioned the FCC under its rules for a waiver of the *Order on Remand's* growth cap and new market rules in Delaware, New York, and Pennsylvania.³ In that petition, we explained that CoreTel requested interconnection from Verizon long before the Commission adopted the *Order on Remand*, but because of Verizon's success in slow rolling the interconnection process, CoreTel was foreclosed from exchanging traffic from Verizon in Delaware, New York, and Pennsylvania until after the effective date of the *Order on Remand*.

5. CoreTel demonstrated in a proceeding in Maryland that Verizon's interconnection procedures violate the Act and FCC regulations, which are incorporated into the CoreTel/Verizon interconnection agreement.⁴ The Maryland Public Service Commission also found that Verizon's conduct in providing interconnection to CoreTel in Baltimore, Maryland failed to satisfy Verizon's obligation of good faith and fair dealing.⁵

6. In any event, Verizon used in Delaware, New York, and Pennsylvania the same unlawful processes used in Maryland. Had Verizon interconnected with CoreTel on terms that were consistent with the Act, the FCC's rules, and the CoreTel/Verizon interconnection agreement, CoreTel would have entered the Delaware, New York, and Pennsylvania markets well before the FCC issued the *Order on Remand*, and thus CoreTel would not be precluded from recovering compensation from Verizon under the *Order on Remand*. Nearly three years have passed since CoreTel filed that petition, and the Commission has taken no action.

³ I have attached hereto a timeline of events.

⁴ Maryland Public Service Commission Order No. 78989, Case No 8881, *Core Communications, Inc. v. Verizon Maryland Inc.*, at 7 (Feb. 27, 2004).

⁵ *Id.*

7. Because the FCC has refused to act on CoreTel's waiver petition, we decided last July to submit a forbearance petition to the FCC under Section 10 of the Act. If granted, CoreTel would obtain relief similar to that sought in the waiver petition. Nearly a year has passed, and there is no indication from the FCC regarding what action it might take on that petition. In fact, I expect the FCC will grant itself the 90-day extension that is permissible under the Act before taking any action on CoreTel's forbearance petition.

8. What is particularly frustrating to CoreTel is the behind-the-scenes activities at the Commission. As a small carrier, CoreTel has been frozen out of this portion of the FCC ex parte "process." It is generally known in the industry that Judge Edwards comments from the bench directed at FCC counsel during oral argument in *Global NAPS, Inc. v. FCC*, 02-1202, precipitated the Commission's Wireline Competition Bureau to redouble its effort to respond to the Court's *WorldCom* remand. It also is widely known in the industry that the Wireline Competition Bureau provided a completed draft item to Chairman Powell's office, per Commission protocol, sometime during January 2004; however, Chairman Powell has not circulated this Wireline Competition Bureau recommendation to all of the other four Commissioner offices, at least in part because it finds that traffic to ISP end users is included in Section 251(b)(5) of the Act.

9. In response to this general industry knowledge, BellSouth and Verizon jointly filed a 64-page legal brief styled as a written "ex parte" explaining their view of why ISP-bound traffic should be excluded from section 251(b)(5). BellSouth and Verizon filed this legal brief outside of any procedural schedule established by the Commission. Subsequent to filing this legal brief, it is publicly known that BellSouth and Verizon representatives – including former U.S. Attorney General William P. Barr – lobbied Chairman Powell and the Commission's Office of

General Counsel on the merits of its legal brief, which was to guide "any decision" or "further order" adopted by the Commission on the subject of compensation for ISP-bound traffic.⁶

Apparently, then, rather than circulate the Wireline Competition Bureau's expert recommendation among the various Commissioners' office, Chairman Powell instead has been working with the Bell Operating Companies towards an apparently different result.

10. This concludes my declaration.

I hereby declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed: June 10, 2004.


Bret L. Mingo

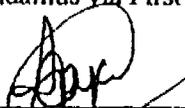
⁶ See, e.g., *Verizon Ex Parte, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; and *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, at 51, 55, 57 (filed May 17, 2004). Subsequently, BellSouth and Verizon representatives lobbied Chairman Powell and the Commission's Office of General Counsel on the merits the jurisdictional issues.

CORE-VERIZON INTERCONNECTION TIMELINE

- 1999** Core begins substantial investment for implementation of its business plan in Delaware, New York and Pennsylvania.
- February 2000** Core requests interconnection with Verizon in Philadelphia.
- June 2000** Core requests interconnection with Verizon in Pittsburgh and New York City.
- April 2001** FCC issues *JSP Remand Order* – growth cap and new market bar apply for all carriers that were not exchanging traffic pursuant to an interconnection agreement prior to April 18, 2001.
- April 2001** 14 months after Core’s request, Verizon completes interconnection with Core in Philadelphia. Core begins to offer service in Philadelphia.
- June 2001** 12 months after Core’s request, Verizon completes interconnection with Core in Pittsburgh and New York City. Core begins to offer service in Pittsburgh and New York City.
- February 2004** Maryland Public Service Commission finds Verizon “violat[ed] the standards of the [interconnection agreement, incorporating the 1996 Act,] that require interconnection equal in quality; at a technically feasible point; and that is just, reasonable and nondiscriminatory; in addition to fail[ing] to meet a commercially reasonable standard of good faith.”

CERTIFICATE OF SERVICE

I, Stephanie Joyce, hereby certify that on this 10th day of June, 2004, the following persons were served with the foregoing Petition for Writ of Mandamus via First Class Mail:


Stephanie Joyce

Theodore Olson
Solicitor General of the United States
Department of Justice
Room 5143
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

John A. Rogovin
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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MUMBAI, INDIA
TOKYO, JAPAN

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
JUN 10 2004
RECEIVED

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June 10, 2003

VIA COURIER

Clerk of the Court
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Core Communications, Inc Petition for Writ of Mandamus to the Federal
Communications Commission

Dear Clerk:

04-1179

Core Communications, Inc. ("CoreTel"), by its attorneys, hereby files the original plus four (4) copies of a Petition for Writ of Mandamus to the Federal Communications Commission, and the original plus four (4) copies of its Corporate Disclosure Statement. These documents have been served on the Commission and the United States.

Also enclosed please find one copy of these documents marked "Date Stamp & Return." Kindly stamp these documents and return them to me in the envelope provided.

Please do not hesitate to contact me with any questions or concerns regarding this matter: 202.955.9890.

Sincerely,



Stephanie A. Joyce
Counsel for Core Communications, Inc.

Enclosures

ORIGINAL

827548

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
JUN 10 2004
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JUN 10 2004

June 10, 2003

04-1179

VIA COURIER

Clerk of the Court
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: In re Core Communications, Inc., Case 04-1179, Filing Fee

Dear Clerk:

Core Communications, Inc. ("CoreTel") hereby remits a check in the amount of \$250.00, payable to the Clerk, to cover the required filing fee for its Petition for Mandamus.

Enclosed please find one copy of this letter marked "Date Stamp & Return."
Kindly stamp this document and return them to me in the envelope provided.

Please do not hesitate to contact me with any questions or concerns regarding this matter: 202.955.9890.

Sincerely,

Stephanie A. Joyce
Counsel for Core Communications, Inc.

Enclosures

TAB B

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Core Communications, Inc., Petitioner))))))	No. 04-1179
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**RESPONSE OF FEDERAL COMMUNICATIONS COMMISSION
TO PETITION FOR WRIT OF MANDAMUS**

In accordance with the Court's July 20, 2004, order, the Federal Communications Commission respectfully files this response in opposition to the petition of Core Communications, Inc. ("Core") for a writ of mandamus. Core asks the Court to compel the Commission to "issue a remand decision," within 60 days, that resolves the status of Internet-bound traffic under the reciprocal compensation provisions of the Telecommunications Act of 1996 (the "1996 Act") consistent with this Court's opinion in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003) ("*WorldCom*"). Petition at 20; *see also id.* at 1-4. As we show below, Core has not established entitlement to the extraordinary relief that it seeks because the Commission, given all the circumstances, has not unreasonably delayed responding to the *WorldCom* decision. Indeed, extraordinary relief is unwarranted because the Commission staff recently completed and forwarded to the Chairman of the FCC a draft order addressing the *WorldCom* remand.

BACKGROUND

The *Local Competition Order*. The 1996 Act imposes on local exchange carriers ("LECs") obligations including "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). The FCC first addressed the application of section 251(b)(5) in the *Local Competition Order*,¹ construing that provision to "apply only to traffic that originates and terminates within a local area..." *Local Competition Order*, para. 1034; see also 47 C.F.R. §§ 701(a) & (b) (1997). The Commission distinguished such "local" traffic from conventional long-distance calls carried by interexchange carriers ("IXCs"), which the Commission determined were not subject to the reciprocal compensation obligation of section 251(b)(5). *Local Competition Order*, para. 1034. The Commission did not directly address at that time whether traffic that is carried from a LEC to another LEC and then handed off by the second LEC to an Internet service provider ("ISP"), such as America Online, en route to distant locations on the Internet should (like conventional long-distance calls) be considered non-local and thus excluded from the coverage of section 251(b)(5). However, a number of state commissions, in arbitration proceedings conducted under 47 U.S.C. § 252, construed section 251(b)(5) and the Commission's implementing rules to reach such traffic, and thus determined that the reciprocal compensation obligation applies.

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket Nos. 96-98, et al.), 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), *aff'd in part and rev'd in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part and aff'd in part*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *on remand*, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd in part and aff'd in part*, *Verizon Communications Inc. v. FCC*, 122 S.Ct. 1546 (2002).

The *ISP Ruling*. In its 1999 *ISP Ruling*,² the FCC sought to clarify the status of Internet-bound traffic under section 251(b)(5) and the Commission's implementing rules. The Commission determined that such traffic was not "local" telecommunications traffic subject to section 251(b)(5) principally because such traffic, considered "end to end," is largely interstate and interexchange. *ISP Ruling*, para. 23; *see generally id.*, paras. 9-20. The FCC concluded that such traffic was instead subject to the Commission's traditional regulatory jurisdiction over interstate communications under 47 U.S.C. § 201. The FCC nevertheless permitted states to continue to impose reciprocal compensation obligations on such traffic on an interim basis until the Commission could complete a rulemaking proceeding addressed specifically to the compensation methodology that would apply when two LECs collaborate to provide end users access to the Internet via an ISP. *ISP Ruling*, paras. 24-27.

The *Bell Atlantic Decision*. In *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1, this Court vacated and remanded the *ISP Ruling*. Addressing the scope of section 251(b)(5), the *Bell Atlantic* Court accepted the dichotomy between local and non-local traffic that the Commission had drawn in the *Local Competition Order*. Indeed, the Court determined that "[t]he issue at the heart of this case is whether a call to an ISP is local or long-distance." 206 F.3d at 5. However, the Court held that the Commission had not adequately explained why Internet-bound calls should be treated like long-distance calls for purposes of section 251(b)(5). 206 F.3d at 7-8.

² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("*ISP Ruling*"), vacated and remanded, *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

The *ISP Remand Order*. On remand, in the *ISP Remand Order*,³ the Commission did not rely on the "local versus long-distance" dichotomy in section 251(b)(5) that it had discerned in the *Local Competition Order*. *ISP Remand Order*, paras. 26, 34, 54. Instead, the Commission looked to 47 U.S.C. § 251(g) as an independent interpretive tool regarding the scope of section 251(b)(5). Section 251(g) requires local exchange carriers, after enactment of the 1996 Act, to continue to provide "exchange access, information access, and exchange services for such access to interexchange carriers and information service providers" in accordance with the same restrictions and obligations "(including receipt of compensation) that appl[ied] to such carrier[s] on the date immediately preceding the date of enactment . . . until such restrictions and obligations are explicitly superseded by [Commission] regulations . . ."

The Commission stated that section 251(g) "carve[d] out" from § 251(b)(5) various categories of calls, including "calls made to internet service providers ... located within the caller's local calling area." *WorldCom*, 288 F.3d at 430; see *ISP Remand Order*, paras. 36, 42-47. Because the compensation for such traffic was thus "carved out" of section 251(b)(5) and such traffic was largely interstate in nature, the Commission determined that ISP-bound traffic is subject to the FCC's regulatory authority under section 201. *ISP Remand Order*, paras. 1, 30, 52-65.

Although the "local versus long-distance" dichotomy was no longer a controlling part of its statutory analysis, the Commission also provided further explanation for its

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Red 9151 (2001) ("*ISP Remand Order*"), remanded, *WorldCom*, 288 F.3d 429.

prior conclusion that Internet-bound traffic was like long-distance traffic rather than local traffic. *ISP Remand Order*, para. 54; *see id.*, paras. 55-65. The Commission supplied detailed descriptions of why communications with the Internet are best viewed as being directed to distant websites and parties, rather than to the ISP that acts as a conduit for such communications. *ISP Remand Order*, paras. 58-59. The Commission also explained how, from a technical standpoint, such traffic is like traditional long-distance telephone calls. *ISP Remand Order*, paras. 60-61. In a similar vein, the Commission distinguished Internet-bound traffic from traditional local exchange service calls, in particular because Internet-bound traffic does not terminate on the network of the local exchange carrier that serves the ISP. *ISP Remand Order*, para. 63.

Finally, the Commission detailed the competitive distortions – including regulatory arbitrage opportunities for competitive LECs and ISPs, and potentially subsidized prices for Internet-bound calls – that would be the practical consequence of applying a reciprocal compensation regime to high-volume, one-way Internet-bound traffic. *ISP Remand Order*, paras. 2, 4-6, 21, 67-76; *see WorldCom*, 288 F.3d at 431 (acknowledging “flaws in the prevailing intercarrier compensation mechanism for ISP calls”). The FCC explained that these distortions would be contrary to the competitive goals of the 1996 Act, and that the objective of avoiding such distortions buttressed the reasonableness of the Commission’s interpretation that section 251(b)(5) does not apply to Internet-bound traffic. Invoking its more flexible section 201 authority, *see, e.g., Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996) (“[t]he generality of [section 201(b)] . . . opens a rather large area for the free play of agency discretion”), the Commission fashioned interim cost-recovery rules that were designed to limit arbitrage

opportunities while leading eventually to a "bill-and-keep" solution whereby each carrier that participates in carrying Internet-bound traffic would recover its costs from its own end-user customers rather than from other carriers. See *WorldCom*, 288 F.3d at 431.

The WorldCom Decision. The Court in *WorldCom* addressed only one issue on the merits – the FCC's conclusion in the *ISP Remand Order* that section 251(g) supplies a basis to exclude Internet-bound traffic from the scope of section 251(b)(5). The Court held that "the Commission's reliance on § 251(g) [was] precluded" because "that section is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act" until the Commission "adopt[s] new rules pursuant to the Act."

WorldCom, 288 F.3d at 430. Having found that section 251(g) does not provide a basis for "carving out" Internet-bound calls from section 251(b)(5), the Court "ma[de] no further determinations." *Id.* at 434. The Court also did not state a view about the proper construction of section 251(b)(5) itself. The Court did not state a view about the applicability of section 201 as a source of authority for imposing the interim cost recovery regime adopted in the *ISP Remand Order*. The Court expressly declined to address a number of specific questions left open in *Bell Atlantic*. *WorldCom*, 288 F.3d at 434. The Court emphasized that "these are only samples of the issues we do not decide, which are in fact all issues other than whether § 251(g) provided the authority claimed by the Commission for not applying § 251(b)(5)." *Id.* Finding that "there is plainly a non-trivial likelihood that the Commission has authority to elect . . . [the bill-and-keep] system" reflected, in part, in the Commission's interim cost recovery regime, the Court declined to vacate the *ISP Remand Order* and instead "simply remand[ed] the case to the

Commission for further proceedings." *Id.* (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm.*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

The *Intercarrier Compensation* Proceedings. In 2001, the Commission tentatively concluded in the *ISP Remand Order* that the undesirable regulatory arbitrage opportunities associated with ISP-bound traffic were but a part of a broader, systemic problem associated with "any intercarrier compensation regime that allows a service provider to recover some of its costs from other carriers rather than from its end-users." *ISP Remand Order*, para. 2. Accordingly, contemporaneously with the release of the *ISP Remand Order*, the Commission commenced a separate proceeding to "fundamental[ly] reexamin[e] ... all currently regulated forms of intercarrier compensation" and to "test the concept of a unified regime for the flows of payments among telecommunications carriers." *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9619 (para. 1) (2001) ("*Intercarrier Compensation NPRM*"). The Commission stated its intent to replace the *ISP Remand Order*'s interim rules for Internet-bound traffic with permanent rules at the conclusion of the unified *Intercarrier Compensation* proceeding. *ISP Remand Order*, paras. 77-78.

In the *Intercarrier Compensation NPRM*, the Commission observed that "[i]nterconnection arrangements between carriers are currently governed by a complex system of intercarrier compensation regulations," which "treat different types of carriers and different types of services disparately, even though there may be no significant differences in the costs among carriers or services." *Intercarrier Compensation NPRM*, para. 5. The Commission pointed out, for example, that different compensation rules applied to the interstate and intrastate access services that LECs provide to interexchange

carriers, to the transport and termination of traditional local voice traffic among LECs, and to Internet-bound traffic that begins on the network of one LEC and is handed off to another LEC for delivery to an ISP en route to the Internet. *Id.*, paras. 6-10. The Commission posited that "any discrepancy in regulatory treatment between similar types of traffic or similar categories of parties is likely to create opportunities for regulatory arbitrage" in which "parties will revise or rearrange their transactions to exploit a more advantageous regulatory treatment, even though such actions, in the absence of regulation, would be viewed as costly or inefficient." *Id.*, para. 12. The Commission thus asked for comment on a wide array of general and specific issues designed to test the feasibility of adopting some form of unified bill-and-keep system of compensation that would limit such market-distorting regulatory arbitrage. *Id.*, paras. 2, 19-130; *see p. 6, above* (describing bill-and-keep).

The Commission has received approximately 750 submissions – including more than 250 formal comments and reply comments – in response to the NPRM. In addition, as a result of industry-wide negotiations that have taken place over the past year, the Commission recently received four separate proposals from industry groups for comprehensive reform of the intercarrier compensation regime.⁴ In preparing and

⁴ See Letter from Michael W. Young, Counsel for the Cost-Based Intercarrier Compensation Coalition, to FCC Secretary, CC Docket No. 01-92, and Attachment (filed May 14, 2004) (proposing a single cost-based compensation rate based on the total element long-run incremental cost ("TELRIC") methodology); Letter from Ken Pfister, Great Plains Communications, to FCC Secretary, CC Docket Nos. 01-92 & 04-28, and Attachment (filed June 9, 2004) (proposing a unified rate plan based on embedded costs); Letter from Glenn H. Brown, Expanded Portland Group, to FCC Secretary, CC Docket No. 01-92, and Attachment (filed May 12, 2004) (proposing a unified capacity-based compensation plan); Letter from Gary M. Epstein, Counsel for the Intercarrier Compensation Forum, to FCC Secretary, CC Docket No. 01-92, and Attachment (filed

forwarding to the Chairman its recent draft order, FCC staff have been cognizant of the need for a coordinated response to the unified *Intercarrier Compensation* proceeding and the *WorldCom* Court's remand of the *JSP Remand Order*.

ARGUMENT

1. "Mandamus is a 'drastic remedy,' to be invoked only in extraordinary situations." *In re Papandreou*, 136 F.3d 247, 250 (D.C. Cir. 1998) (quoting *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976)); accord *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Recognizing that the grant of mandamus "contributes to piecemeal litigation," *Allied Chem. Corp.*, 449 U.S. at 35, courts require the petitioner, at a minimum, to show that its right to the writ is "clear and indisputable," *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988), and that "no other adequate means to attain the relief exist," *In re Papandreou*, 136 F.3d at 250. Even then, "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. United States District Court*, 426 U.S. at 403.

In the case of mandamus petitions predicated upon allegations of unreasonable administrative delay, "a finding that delay is unreasonable does not, alone, justify judicial intervention." *In re Barr Lab.*, 930 F.2d 72, 74 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991); accord *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001); *In re United Mine Workers*, 190 F.3d 545, 551 (D.C. Cir. 1999). A court still must determine whether delay is so egregious that it warrants mandamus. That inquiry may involve such considerations as whether Congress has provided in the agency's enabling statute a time-

August 16, 2004) (proposing implementation of a unified intercarrier compensation and universal service plan).

table or other indication of the speed with which it expects the agency to proceed. Taking into account the nature and extent of the interests prejudiced by delay, courts also have indicated that delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake. And courts may consider the likely effect that expediting action may have on agency activities of a higher or competing priority. *See generally Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984); *see also Action on Smoking and Health v. Department of Labor*, 100 F.3d 991, 994-95 (D.C. Cir. 1996); *In re Monroe Communications Corp.*, 840 F.2d 942, 945-46 (D.C. Cir. 1988).

2. Under the standards governing issuance of the writ, mandamus relief is unwarranted in this case. First, as noted, Commission staff recently completed and forwarded to the Chairman of the FCC a draft order addressing the *WorldCom* remand. A “[m]ost important[.]” consideration in determining whether to issue a writ of mandamus is whether the agency itself has undertaken to move forward in the proceeding. *See In re Monroe*, 840 F.2d at 946. The Court should not exercise its extraordinary equitable powers to direct the Commission to act in a particular matter if the agency can be expected to proceed voluntarily. *Id.* Core acknowledges that the Commission’s staff have been active in addressing the remand issues, but vaguely suggests that the proceedings are tainted because the Commission itself has not voted on a draft order that Core says the staff previously prepared and delivered to the Chairman in January. Petition at 3-4. No principle of administrative law, however, requires Commissioners – duly appointed by the President and confirmed by Congress – to adopt uncritically the legal and policy recommendations of agency staff. Core has not shown that the

Commission will fail to act within a reasonable time on the remand currently before it. Core also has provided no basis to question the strong presumption of regularity that accompanies the Commission's processes. See, e.g., *International Brotherhood of Teamsters v. United States*, 735 F.2d 1525, 1534 (D.C. Cir. 1984); *Hraniff Airways, Inc. v. CAB*, 379 F.2d 453, 460 (D.C. Cir. 1967).

Core, moreover, acknowledges that the period of "slightly less than two years since this Court's *WorldCom* decision" is "not as long" as the egregious delays that historically have been found to warrant mandamus relief. Petition at 16. When this Court has found the mandamus remedy to be appropriate, it generally has been confronted with delays of at least three years,⁵ and courts often have found significantly longer administrative delays to be insufficient to warrant mandamus.⁶

Core nevertheless argues that, viewed "in the aggregate," the Commission's delay in resolving the ISP reciprocal compensation issue substantially exceeds two years, because the Commission's prior attempts to address the issue were set aside on judicial review. Petition at 16. If Core's grievance is that the Commission has not – over an extended period of time – adopted Core's preferred outcome on the reciprocal

⁵ See *In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 419 & n.12 (D.C. 2004) (finding mandamus appropriate after a six-year agency delay, and surveying other cases suggesting propriety of mandamus relief for delays ranging from three to six years). Such delays that have been found to be sufficiently egregious to warrant mandamus stand in contrast to this Court's general observation in *American Rivers* that "a reasonable time for an agency decision could encompass 'months, occasionally a year or two, but not several years or a decade.'" *Id.* at 419 (citations omitted).

⁶ See, e.g., *Harvey Radio Laboratories, Inc. v. United States*, 289 F.2d 458 (D.C. Cir. 1961) (10-year delay held not so egregious as to require mandamus); *In re Monroe Communications Corp.*, 840 F.2d 942 (5-year delay insufficient to warrant mandamus); *Independence Mining Co. v. Babbitt*, 105 F.3d 502 (9th Cir. 1996) (3-yr delay insufficient to require mandamus).

compensation question, Core fundamentally misperceives the nature of the mandamus remedy. Mandamus relief normally is "limited to enforcement of 'a specific, unequivocal command'" about which the agency has "no discretion whatever." *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373, 2379 (2004) (internal citations omitted). The "prompt issuance" of lawful regulations under section 251(d)(1) may constitute such a command, *id.* at 2380, but the Commission's repeated efforts in recent years to adopt rules addressing the reciprocal compensation question, *see generally Local Competition Order*, paras. 1027-1118; *ISP Ruling*; *ISP Remand Order*, demonstrate that it has, in fact, reasonably attempted to comply with that requirement. Nothing in the Act or in standard mandamus analysis, however, compels the Commission to have adopted "the content" of Core's preferred approach to the ISP reciprocal compensation issue. *Southern Utah Wilderness Alliance*, 124 S.Ct. at 2380; *see WorldCom*, 288 F.3d at 434 (declining to compel any particular outcome other than to set aside the specific reasoning adopted in the *ISP Remand Order*).

Furthermore, any assessment of the Commission's pace in responding to the *WorldCom* decision necessarily must account for competing demands on the agency's resources. The 1996 Act has strained the Commission's resources, requiring it to adopt on an expedited basis, and to enforce, numerous complex rules to implement many provisions of the new statute, including those dealing with unbundled network elements (47 U.S.C. §§ 251(c)(3) & 251(d)(2)), universal service (47 U.S.C. § 254), number portability (47 U.S.C. § 251(b)), rate and service integration (47 U.S.C. § 254), payphones (47 U.S.C. § 276(b)), open video (47 U.S.C. § 653(b)(1)), the availability of "public switched network infrastructure, technology, information, and

telecommunications facilities and functions" (47 U.S.C. § 259), unfair billing practices (Pub. L. No. 104-104, § 701, 110 Stat. 56 (1996)), pole attachment charges (47 U.S.C. § 224(e)(1)), and complaint procedures (e.g., 47 U.S.C. § 271(d)(6)(B)). The Commission also has devoted substantial resources to the biennial review of its regulations under strict time constraints, *see, e.g.*, 47 U.S.C. § 161, and to applications by the Bell operating companies for authorization to provide long distance services pursuant to 47 U.S.C. § 271(d).

The nature of the *WorldCom* remand proceedings also belies the need for, or propriety of, mandamus relief. The remand proceedings do not raise public health or safety concerns. They involve, instead, complex economic regulatory questions that require the FCC to reconcile the varying statutory ratemaking standards applicable to different carriers and services, and to adopt a pricing policy that will take into account regulatory arbitrage opportunities with respect to such carriers and services. *See pp. 7-8, above; see also Intercarrier Compensation NPRM*, paras. 1-130. The two-year period that has elapsed since the *WorldCom* decision is not egregious when one considers the Commission's task of assuring itself that the rules and accompanying rationale that it adopts with respect to compensation for Internet-bound traffic will be consistent with the treatment it seeks to accord other services and carriers, particularly in light of the industry-wide negotiations that have taken place over the past year and have now resulted in four separate proposals for comprehensive reform of the intercarrier compensation regime. *See page 8 & n.4, above.*

Nor is there merit to Core's claim that the absence of Commission action on remand from *WorldCom* "has created a vacuum in local telecommunications regulation."

Petition at 13. This Court in *WorldCom* expressly left in place, pending Commission action on remand, the FCC's interim compensation rules for Internet-bound traffic. See *WorldCom*, 288 F.3d at 434. Those rules establish clear requirements for carriers in the market situations that are of concern to Core, according to the petition. See *ISP Remand Order*, paras. 77-94. Moreover, contrary to Core's suggestion that the Commission's interim regime was prescribed for only three years and now has "expir[ed] by its own terms," petition at 13, that regime is effective "until further Commission action," *ISP Remand Order*, para. 78.⁷

Continuing to give the interim rules controlling effect pending action on remand imposes no unreasonable burden on the CLBC industry. Although this Court found that the Commission's analysis of compensation for Internet-bound traffic in the *ISP Remand Order* was inadequate, the Court left the Commission's interim rules in place because there "plainly" was "a non-trivial likelihood that the Commission has authority to elect" the bill-and-keep system that is reflected in those rules. *WorldCom*, 288 F.3d at 434. Thus, contrary to Core's misstatement (petition at 19), the rules do not present an

⁷ To the extent that the question of "whether the FCC has the authority to impose" the *ISP Remand Order's* interim rules is pertinent to certain complaints or other adjudicatory proceedings currently pending before the Commission, petition at 14-15, that question need not await Commission action (including the adoption of new rules) on remand from *WorldCom*, but rather can be addressed in those proceedings themselves. Cf. *AT&T v. FCC*, 978 F.2d 727, 731-33 (D.C. Cir. 1992) (holding that the FCC may not dismiss a complaint proceeding on the grounds that the issue is being addressed in a pending rulemaking), *cert. denied*, 509 U.S. 913 (1993). Accordingly, Core cannot establish that "no other adequate means to attain the relief exist" in those proceedings in the absence of action by the Commission on remand from *WorldCom*. *In re Papandreou*, 136 F.3d at 250. And Core's petition does not separately seek mandamus relief with respect to any such proceedings.

unreasonable risk of subjecting CLBCs to continuing *ultra vires* agency action.⁸

Moreover, notwithstanding Core's preference for a different regulatory regime, other members of the competitive local exchange carrier industry at various times have expressed support for bill-and-keep in administrative proceedings before the FCC. *See, e.g.*, MCI Reply Comments, CC Docket No. 96-98, filed May 30, 1996, at 36 (stating that "monetary charges for transport and termination can never be certain to cover the costs of each of the carriers" and, therefore, that bill-and-keep "is surely the best alternative for reciprocal compensation arrangements"); Comments of Sprint Corp., CC Docket No. 01-92, filed August 21, 2001, at 5-22 (supporting bill-and-keep); Comments of Level 3 Communications, LLC, CC Docket No. 01-92, filed August 21, 2001, at 19-26 (supporting bill-and-keep); *WorldCom*, 288 F.3d at 434 (noting that "[m]any of the petitioners themselves favor bill-and-keep"). Such support for bill-and-keep arrangements from the CLEC industry substantially belies the notion that retention of the current regime pending Commission action is unreasonably imposing serious economic hardship.

Finally, although Core has not established a basis for a writ requiring the Commission to resolve the remand proceedings – within 60 days or otherwise – Core's additional request that the Court vacate the Commission's interim rules if the Commission fails to act within that timeframe is particularly unwarranted. *See* petition at 2, 4-5, 20. Vacatur of the interim regime would create precisely the regulatory "vacuum" that Core otherwise decries. Petition at 13. In such a vacuum, state commissions might

⁸ Nor is there substance to Core's suggestion that the continued application of the interim rules pending action on remand violates this Court's mandate. *See* petition at 17-18.

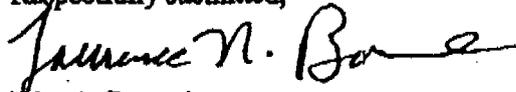
determine that section 251(b)(5) reciprocal compensation is owed for Internet-bound traffic – as most states did before the federal regime of the *ISP Remand Order*⁹ – thereby recreating the opportunities for regulatory arbitrage and accompanying market distortions that this Court acknowledged in *WorldCom*. See *ISP Remand Order*, paras. 2, 4-6, 21, 67-76; *WorldCom*, 288 F.3d at 431. Core has made no showing that the public interest or the jurisdiction of this Court would be served by imposing those distortions on the industry as a putative “incentive” for the FCC to act more swiftly. Petition at 4.

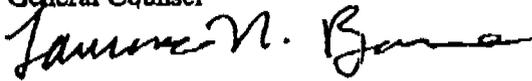
⁹ See *ISP Remand Order*, para. 68.

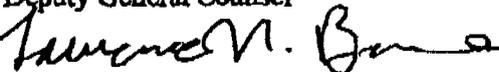
CONCLUSION

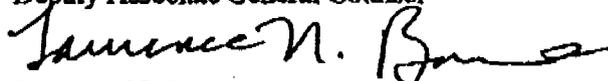
For the foregoing reasons, the Court should deny Core's request for mandamus relief.

Respectfully submitted,

for 
John A. Rogovin
General Counsel

for 
Austin C. Schlick
Deputy General Counsel

for 
John E. Ingle
Deputy Associate General Counsel


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Federal Communications Commission
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August 19, 2004

04-1179

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

In re Core Communications, Inc., Petitioner

v.

Certificate Of Service

I, Kamala D. Hart, hereby certify that the foregoing "Response of the Federal Communications Commission to Petition for Writ of Mandamus" was served this 19th day of August, 2004, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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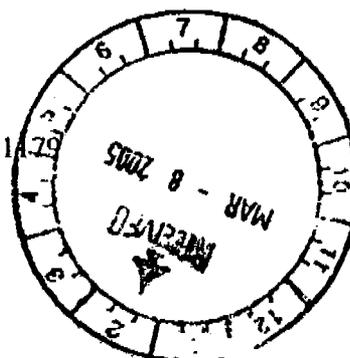
TAB C

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Core Communications, Inc.,)

Petitioner)

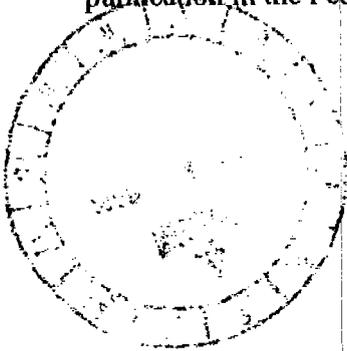
No. 04-1



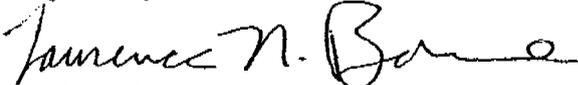
SUPPLEMENTAL STATUS REPORT

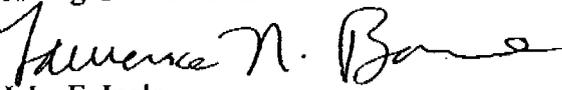
The Federal Communications Commission respectfully files this supplement to its February 22, 2005, status report in this case. In our February 22 status report, we stated that the Commission had recently adopted a Further Notice of Proposed Rulemaking in the *Intercarrier Compensation* docket in which it has been seeking, among other things, to adopt permanent rules to succeed the interim intercarrier compensation regime for Internet-bound traffic that this Court reviewed in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003). That Further Notice was released yesterday. In it, the Commission stresses the “need to replace the existing patchwork of intercarrier compensation rules with a unified approach.” *Developing a Unified Intercarrier Compensation Regime* (CC Docket No. 01-92), Further Notice of Proposed Rulemaking, FCC 05-33, para. 3 (March 3, 2005) (copy attached). The Commission also acknowledges that it “has struggled to determine the appropriate regulatory regime for Internet traffic,” and that it hopes in the *Intercarrier Compensation* docket “to address the compensation regime for all types of traffic, including ISP-bound traffic.” Further Notice, para. 15 n.48 (citing *WorldCom, Inc. v. FCC*). Comments and reply comments in

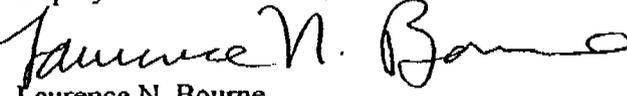
response to the Further Notice are due within 60 and 90 days, respectively, after publication in the Federal Register.



Respectfully submitted,

for 
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Acting General Counsel

for 
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March 4, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re:

v.

Core Communications, Inc., Petitioner,

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing "Supplemental Status Report" was served this 4th day of March, 2005, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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Sharon D. Freeman

TAB D

780994

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

TRANSCRIPT OF PROCEEDINGS

OCT 27 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED

U.S. COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
OCT 27 2003
CLERK
No. 02-1202

GLOBAL NAPS, INC.,

Appellees,

v.

FEDERAL COMMUNICATIONS
COMMISSION and
UNITED STATES OF AMERICA,

Appellants

4
ORIGINAL
3/6 MP

Pages 1 through 43

Washington, D.C.
Date: October 20, 2003

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 ----- x
4 GLOBAL NAPS, INC., :
5 Petitioner, :
6 v. : No. 02-1202
7 FEDERAL COMMUNICATIONS :
8 COMMISSION and :
9 UNITED STATES OF AMERICA, :
10 Respondents. :
11 ----- x

11 Monday, October 20, 2003
12 Washington, D.C.

13 The above-entitled matter came on for oral argument
14 pursuant to notice.

15 BEFORE:

16 CIRCUIT JUDGES EDWARDS AND GARLAND AND
17 SENIOR CIRCUIT JUDGE WILLIAMS

18 APPEARANCES:

19 ON BEHALF OF THE PETITIONER:

20 CHRISTOPHER W. SAVAGE, ESQ.

21 ON BEHALF OF THE RESPONDENTS:

22 LISA E. BOEHLEY, ESQ.

23 ON BEHALF OF THE INTERVENOR:

24 AARON M. PANNER, ESQ.
25



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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Christopher W. Savage, Esq. On Behalf of the Petitioner	3
Lisa E. Boehley, Esq. On Behalf of the Respondents	19
Aaron M Panner, Esq. On Behalf of the Intervenor	33
Christopher W. Savage, Esq. On Behalf of the Petitioner -- Rebuttal	40

P R O C E E D I N G S

1
2 THE CLERK: Case number 02-1202, Global NAPs, Inc.,
3 Petitioner, versus Federal Communications Commission, et al.
4 Mr. Savage for Petitioner, Ms. Boehley for Respondents, Mr.
5 Panner for the Intervenor.

6 JUDGE EDWARDS: Good morning, Mr. Savage.

7
8
9 ORAL ARGUMENT OF CHRISTOPHER W. SAVAGE, ESQ.

10 ON BEHALF OF THE PETITIONER

11 GLOBAL NAPs, INC.

12
13
14 Good morning, Your Honor. Chris Savage for Global NAPs, and I
15 hope to reserve five minutes for rebuttal.

16 The FCC's rulings below here are more than just wrong.
17 They're fundamentally intellectually dishonest. Consider the
18 claim that this tariff is unreasonable because it violates
19 some unspoken course of conduct understanding that no tariff
20 would be filed.

21 JUDGE WILLIAMS: Maybe you should take the other
22 part first. I know you don't want to, but, and explain why
23 this is different from our first pass at Global NAPs.

24 MR. SAVAGE: The actual language of the tariff is
25 different. The underlying record is --

1 MR. SAVAGE: It's entirely, absolutely. We said
2 that to the agency below. I mean, not to hide the ball here,
3 we're here because --

4 JUDGE EDWARDS: Well, your time is up. I
5 understand.

6 MR. SAVAGE: Okay, then I'll --

7 JUDGE EDWARDS: I'll give you time on rebuttal.

8 MR. SAVAGE: Hopefully I can have a minute or two
9 for rebuttal.

10 JUDGE EDWARDS: You will. All right. Good morning,
11 Ms. Boehley.

12

13

14

ORAL ARGUMENT OF LISA E. BOEHLEY, ESQ.

15

ON BEHALF OF THE RESPONDENTS

16

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

17

18

19 Good morning, Your Honors.

20

21

JUDGE EDWARDS: Now, what is the agency's most
recent position on 251(b)(5)? Is ISP-bound traffic excluded
or included in light of what we've been telling you?

22

23

MS. BOEHLEY: In this Court's WorldCom decision, the
24 Court left --

25

JUDGE EDWARDS: No, start with my question first,

1 then we can chat about what you think we've been saying. Does
2 the agency have a position now?

3 MS. BOEHLEY: It remains the FCC's position,
4 correct, that --

5 JUDGE EDWARDS: Yeah, does the FCC agree that --

6 MS. BOEHLEY: -- this traffic is --

7 JUDGE EDWARDS: -- ISP-bound traffic is --

8 MS. BOEHLEY: -- is not subject to 251(b)(5).

9 JUDGE EDWARDS: They're saying it's not subject?

10 MS. BOEHLEY: Correct. That Internet-bound traffic
11 is not subject.

12 JUDGE EDWARDS: Where are they saying that most, I
13 mean, every time that's come up, you've lost. Now, have they
14 said something more recently? I'm just curious.

15 MS. BOEHLEY: No, Your Honor, what, the basis for
16 the FCC's position is that in the WorldCom case, the Court did
17 not stay or reverse the FCC on the issue of the inter-carrier
18 compensation mechanism that it put in place as a transitional
19 mechanism. And that is based on the assumption that
20 compensation is not required under 251(b)(5). In fact,
21 however, though, that's not this case. The agency is --

22 JUDGE EDWARDS: It may or may not be required. I
23 know it's not this case, so we don't need to do that.

24 MS. BOEHLEY: Sure.

25 JUDGE EDWARDS: The question is does 251 cover it?

1 MS. BOEHLEY: The short answer to your question --

2 JUDGE EDWARDS: 251(b)(5) cover it. The FCC started
3 out at the box saying it's excluded. Now, you've had no
4 reception to that. Are they still sticking with that, that
5 this is excluded?

6 MS. BOEHLEY: The FCC has said --

7 JUDGE EDWARDS: And let me tell you why, because the
8 indeterminacy piece of it I can understand. There are real
9 problems the other side has. But I must say, the other side
10 here is the FCC's playing games, from my vantage point, which
11 don't make any sense to me. You got to fish or cut bait.
12 Where are we going with this? What is this about? How do we
13 analyze this case? I mean, it drives me crazy to try and
14 prepare a case like this where the agency's saying we're not
15 going to tell you anything about anything. You either have it
16 or you don't have it. Should they be trying to file? If it's
17 excluded, indeed, the state went with the FCC initially. They
18 didn't even try and analyze it. The state first said, well,
19 that's what the FCC said, it's not covered, so we're not going
20 to deal with it. Then the FCC says, well, no, that's not
21 quite it.

22 And one rationale you have here which makes no sense to
23 me is that Global NAPs agreed that it would receive
24 compensation under its interconnection agreement or not. I
25 don't find anything in the record there. I find a lot of

1 discussion about it and I know that's your second rationale.
2 You have a powerful case on indeterminacy, I think, in my own
3 view, so you understand where I'm coming from. You have no
4 case on that finding, because there's nothing to support that
5 agreement. Nothing. As far as I could find.

6 And I can't figure out what the agency's doing. Where
7 are we on 251(b)(5)? Are you saying this is, the agency, that
8 it's excluded or not? Because I really don't like for us to
9 be issuing opinions when we don't know what we're talking
10 about.

11 JUDGE WILLIAMS: Can I just add an amendment? I
12 mean, it's following the same line. Is there in fact an FCC
13 ruling following WorldCom on the WorldCom issues?

14 JUDGE EDWARDS: That's what I was meaning to ask.

15 JUDGE WILLIAMS: Or not?

16 MS. BOEHLEY: No, Your Honors. The FCC is --

17 JUDGE WILLIAMS: There's no new ruling?

18 MS. BOEHLEY: -- is working diligently to issue an
19 order. It has not yet done so to date.

20 JUDGE WILLIAMS: I think that answers Judge
21 Edwards's question.

22 JUDGE EDWARDS: Working diligently to issue an order
23 pursuant to 251(b)(5)? You see, if the bill-and-keep system
24 is adopted, as I understood the prior cases, that would be
25 issued pursuant to 251(b)(5), is that right?

1 MS. BOEHLEY: That's correct.

2 JUDGE EDWARDS: Well, then, that suggests that ISP-
3 bound traffic is covered by 251(b)(5).

4 MS. BOEHLEY: I guess the short answer is the FCC
5 has not finally resolved that issue, but that is not necessary
6 to determine whether what the FCC did was the correct result
7 in this case. And the reason why is that under 252(a)(1),
8 parties can agree without regard to the substantive
9 requirements of 251(b) or (c) to terms in their
10 interconnection agreements. And at the time of the tariff
11 that was filed in this case, state commissions were free to
12 require or not to require reciprocal compensation payments for
13 Internet traffic.

14 JUDGE EDWARDS: Well, no, they were misled by the
15 agency. They thought they were initially told by the agency
16 no, you can't go here, and that's what Massachusetts, I
17 thought, assumed. So they said, well, no, it's, I wrote one
18 of those cases, I said, well, they lose.

19 MS. BOEHLEY: The fact of the matter is that in this
20 case, the parties here chose to forego the certainty of
21 compensation through a negotiated agreement, and instead they
22 chose to submit the matter for state commission resolution.
23 In this case, Global NAPs did so with full knowledge of the
24 ambiguity in their agreement, the uncertain state of the law,
25 as you mentioned, and Verizon's position --

1 JUDGE EDWARDS: Well, we need to move past the
2 uncertain state of the law. I mean, that's part of what I'm
3 asking you. We've got to move past that. So I'm trying to
4 figure out, and the agency is supposed to help us. I don't
5 understand what's going on here. I don't understand what the
6 agency means to say, and the past history is a total muddle.
7 It's absurd. There's game-playing on both sides. The agency
8 initially says to the states no. So if they're in the states,
9 the states initially slapped them back and said no, go away.
10 Why? Because the FCC told us so. Now the FCC says what? I
11 don't know what. I'm not even going to characterize it. I
12 have no idea what the agency's saying.

13 MS. BOEHLEY: I understand the concern you raise,
14 and you can --

15 JUDGE EDWARDS: Can they file a determinate tariff?

16 MS. BOEHLEY: What the FCC found in this case --

17 JUDGE EDWARDS: Can they file a determinate tariff?

18 MS. BOEHLEY: Well, the short answer is the FCC has
19 not addressed itself to that question. We can ponder that
20 question.

21 JUDGE EDWARDS: It's really just --

22 MS. BOEHLEY: The FCC --

23 JUDGE EDWARDS: It's not your fault, but this is
24 inexcusable. I mean, this just makes no sense. This is just
25 a let's get on the cloud, joust, and we'll just kind of, the

1 courts are stupid, they won't figure it out, and we'll just
2 kind of dance around and, hey, throw that indeterminate
3 argument up there. We'll win that, but we're not going to
4 tell them anything else, and they won't figure out that they
5 don't know anything else. That's wrong. I happen to at
6 least, I think all three of us have figured out this is
7 nonsense. And I really don't want to write another opinion,
8 have another opinion coming for us that's in the middle of
9 y'all's nonsense.

10 MS. BOEHLEY: Having invoked --

11 JUDGE EDWARDS: Can they file a determinate, because
12 my instinct, if I were writing, would be to say, well, this
13 one isn't determinate, but the agency means to say that they
14 can file a determinate one. 251(b)(5), the agency says they
15 can't go there. They have no rights there, so they can do
16 this by tariff, and all they have to do is clean up the
17 tariff. Or not.

18 MS. BOEHLEY: I mean, the FCC assumed here without
19 deciding that Global NAPs could file a tariff for this
20 traffic. That was assumed in this decision.

21 JUDGE EDWARDS: Without deciding.

22 MS. BOEHLEY: And --

23 JUDGE EDWARDS: And I'm willing to bet lunch, I
24 don't want to bet too much, because if it was a big bet, you
25 would do it the other way. I'm willing to bet, you know,

TAB E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 05-2657

GLOBAL NAPS, INC.,

Plaintiff-Appellant,

v.

VERIZON NEW ENGLAND, INC., ET AL.,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR AMICUS CURIAE FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF INTEREST AND QUESTIONS PRESENTED

Amicus curiae Federal Communications Commission (FCC) is the federal regulatory agency charged by Congress with “regulating interstate and foreign commerce in communication by wire and radio.” 47 U.S.C. § 151. In particular, the FCC regulates many aspects of the compensation scheme among telecommunications carriers that collaborate to complete a telephone call. *See, e.g.,* 47 U.S.C. § 251(b)(5). This case involves the Court’s interpretation of an FCC order pertaining to compensation for telephone calls placed to internet service providers (ISPs). By order entered January 4, 2006, the Court requested that the FCC file a brief addressing the following questions:

1. Whether, in the *ISP Remand Order*, 16 FCC Rcd 9151 (2001), the Commission intended to preempt states from regulating intercarrier compensation for *all* calls placed to internet service providers, or whether it intended to preempt only with respect to calls bound for internet providers in the same local calling area?
2. Whether, if the FCC did not intend to preempt state regulation of all calls, a state regulator's decision to impose access charges on certain calls violates the Telecommunications Act of 1996?
3. What is the standard of review for a reviewing court assessing a state commission's interpretation of an FCC order?

BACKGROUND

I. Reciprocal Compensation and Access Charges.

This case concerns the compensation paid by or to the carriers of telephone calls when more than one carrier collaborates to complete a call. Congress has placed on all local exchange carriers "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). In implementing that provision, the FCC determined that the statutory obligation "appl[ies] only to traffic that originates and terminates within a local area," as defined by state regulatory authorities. *Local Competition Order*, 11 FCC Rcd 15499, 16013 ¶1034 (1996) (subsequent history omitted).¹ See 47 C.F.R. § 57.701 (2000) (requiring reciprocal

¹ Although the *Local Competition Order* was the subject of various appeals that ultimately resulted in its partial reversal, no party challenged that aspect of the Order.

compensation for “[t]elecommunications traffic ... that originates and terminates within a local service area established by the state commission”). Thus, when a customer of one carrier places a local, non-toll call to the customer of a competing carrier, the originating carrier must compensate the terminating carrier for completing the call.

In the *Local Competition Order*, the Commission also decided that “the reciprocal compensation provisions of section 251(b)(5) do not apply to the transport or termination of interstate or intrastate interexchange traffic.” *Local Competition Order* at 16013 ¶1034. Interexchange traffic is traffic that terminates beyond a local calling area, and it is governed by a different compensation regime. When a customer places a toll or long distance call, the long distance carrier, known as an interexchange carrier or EXC, pays “access charges” to both the originating and terminating local carriers. See *Access Charge Reform*, 12 FCC Rcd 15982, 15990-15992 (1997); *Local Competition Order* at 16013 ¶1034. The Commission decided that the states should “determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local services areas are not the same, should be governed by section 251(b)(5)’s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different.” *Local Competition Order* ¶1035.

II. Compensation For ISP Access.

In several recent orders, the FCC has addressed the intercarrier compensation regime that applies to calls placed to dial-up internet service

providers (ISPs). Dial-up access involves a customer who seeks to access the Internet via telephone. To do so, the customer dials a telephone number, usually but not always a local number, and is connected with the ISP's equipment. From there, the ISP connects the call to computers throughout the world. *See ISP Declaratory Ruling*, 14 FCC Rcd 3689, 3691 ¶4 (1999). In many cases, such as this one, the ISP is served by one telephone company, typically a competitive local exchange carrier (CLEC), and the dialing-in customer by a different company, typically the incumbent local exchange carrier (ILEC).

Disputes arose between ILECs and CLECs about the intercarrier payment mechanism that governs such calls. The CLECs argued that calls to ISPs are local calls, subject to reciprocal compensation payments, because the calls terminate at the ISP's equipment. The ILECs argued that such calls are not subject to the reciprocal compensation regime because they terminate only at the far-flung computer servers that constitute the world-wide-web.

The FCC first addressed the matter in the *ISP Declaratory Ruling*, 14 FCC Rcd 3689. The Commission noted that in the "typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area." *Id.* at 3691 ¶4. Even though the initial part of the call is local, however, the Commission found that the call, looked at "end-to-end," does not "terminate at the ISP's local server ... but continue[s] to the ultimate destination ... at a[n] Internet website that is often located in another state." *Id.* at 3697 ¶12. ISP-bound calls were not considered local calls subject to reciprocal compensation

under state regulatory auspices, but interstate calls subject to the regulatory authority of the FCC.

The Commission nevertheless acknowledged that at the time it “ha[d] no rule governing inter-carrier compensation for ISP-bound traffic.” *ISP Declaratory Ruling* at 3703 ¶22. In the absence of such a rule, the Commission found “no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic.” *Id.* at 3703 ¶21. In other words, the FCC left the existing state regulatory mechanisms in place for the time being. At the same time, the Commission began a rulemaking proceeding to formulate a federal rule that would govern ISP-bound calls. *Id.* at 3707-3710.

The D.C. Circuit vacated the *ISP Declaratory Ruling* in *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). It did not question the agency’s jurisdictional analysis, *id.* at 7, but found that inquiry not to be “controlling” on the question of whether a call is within the scope of § 251(b)(5), *id.* at 8. The Court also found that the FCC’s analysis seemed inconsistent with the Commission’s earlier ruling that ISPs were end users that could subscribe to telephone service pursuant to rates established for local service. *Id.* at 7-8. The Court also held that the Commission had failed to make its rules comport with the statute’s distinction between “telephone exchange service” and “exchange access.” *Id.* at 8-9.

On remand, the Commission issued the *ISP Remand Order*, 16 FCC Rcd 9151 (2001), the interpretation of which is before the Court in this case. The

Commission described the issue it had confronted in the *ISP Declaratory Ruling* as “whether reciprocal compensation obligations apply to the delivery of calls from one LEC’s end-user customer to an ISP in the same local calling area that is served by a competing LEC.” *ISP Remand Order*, 16 FCC Rcd at 9159 ¶13. The Commission determined that ISP-bound calls are not subject to reciprocal compensation payments pursuant to § 251(b)(5). Rather, the Commission found that ISP-bound calls are “information access” calls within the meaning of 47 U.S.C. § 251(g), which states that LECs shall provide information access “with the same equal access and non-discriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediate preceding the date of enactment of” the statute. *Ibid.* The Commission interpreted § 251(g) as a “carve-out” of the reciprocal compensation requirement of § 251(b)(5) for calls placed to ISPs. *Id.* at 9166-9167 ¶34.² The Commission found that § 251(g)’s exception to the reciprocal compensation requirement was intended to apply to “all access traffic that [is] routed by a LEC” to an ISP. *Id.* at 9171 ¶44.

The Commission next reiterated its earlier conclusion that calls to ISPs are interstate calls over which the Commission has regulatory authority. *ISP Remand*

² The Commission also changed 47 C.F.R. § 51.701 to reflect the terminology used in § 251(g) of the statute. Instead of referring to “local” calls, a term not used in the statute, the regulation now exempts from the reciprocal compensation requirement “telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access.” 47 C.F.R. § 51.701(b)(1) (2004). The Commission made the change because use of the term “local” “created unnecessary ambiguity ... because the statute does not define the term ‘local call,’ [which] ... could be interpreted as meaning either traffic subject to local rates or traffic that is jurisdictionally intrastate.” *ISP Remand Order* at 9172 ¶45.

Order at 9175 ¶52. The Commission analyzed the matter once again under an end-to-end analysis and found that ISP-bound calls are predominantly interstate. *Id.* at 9178 ¶58. As such, under the authority set forth in 47 U.S.C. § 201, the Commission set about developing a federal rule for compensation.

In developing a federal compensation rule, the Commission was particularly concerned about problems that had arisen with reciprocal compensation payments that had been ordered by State utility commissions under the *ISP Declaratory Ruling*. The Commission found that ISP dial-up access had distorted the market and “created the opportunity to serve customers with large volumes of exclusively incoming traffic.” *ISP Remand Order* at 9182-9183 ¶69 (emphasis in original). The record showed that CLECs terminated 18 times more calls than they originated, leading to their receipt of net reciprocal compensation payments amounting to nearly \$2 billion annually at the time of the Order. *Id.* at 9183 ¶70. The Commission thus found that, due to this type of regulatory arbitrage, reciprocal compensation had “undermine[d] the operation of competitive markets.” *Id.* at 9183 ¶71.

The Commission expressed the view that a “bill and keep” regime under which each carrier collected its costs from its customer and not another carrier would be a viable compensation approach to ISP-bound traffic. *ISP Remand Order* ¶74. The Commission did not, however, employ a “flash cut” – *i.e.*, an immediate transition – to such a regime because the absence of a transition period would “upset the legitimate business expectations of carriers and their customers.” *Id.* at 9186 ¶77. The Commission instead instituted an interim compensation

mechanism that placed a declining cap on the rate paid for termination of ISP-bound calls and limited the volume of calls eligible for compensation. *ISP Remand Order* at 9187 ¶78, 9191 ¶86. “This interim regime satisfies the twin goals of compensating LECs for the costs of delivering ISP-bound traffic while limiting regulatory arbitrage.” *Id.* at 9189 ¶83.

On review, the D.C. Circuit reversed and remanded, but did not vacate, the *ISP Remand Order*. *WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The Court held that the Commission’s “carve-out” analysis was not consistent with the language of § 251(g) and would allow the Commission to “override virtually any provision of the 1996 Act so long as the rule it adopted were in some way ... linked to LECs’ pre-Act obligations.” *Id.* at 433. In the meantime, the Commission began a rulemaking proceeding (which is still pending) to examine all aspects of intercarrier compensation, including compensation for ISP-bound calls. See *Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001); *Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4685 (2005).

III. The Present Dispute.

The dispute before the Court involves a variation on the typical ISP dial-up access scenario. The calls at issue are not delivered to an ISP that is located in the caller’s local calling area. Instead, the dialing-in customer, served by Verizon, an ILEC, is located in one exchange and the equipment of the ISP, served by Global Naps, a CLEC, is located in a different exchange. Ordinarily, such a call would be

subject to a toll paid by the caller to the IXC (in many cases, the originating LEC acts as the de facto IXC), which would carry the call to the facilities of the terminating LEC. In that way, the originating LEC, acting in the role of an IXC, would pay a terminating access charge to the terminating LEC. In order to allow the customer to reach the ISP without paying a toll, however, Global Naps has assigned a virtual or "VNXX" number to the ISP. A VNXX number is a telephone number that appears to be assigned to one exchange but actually is assigned to a customer in a different exchange. Thus, when the Verizon customer calls the ISP – a phone call ordinarily subject to toll charges – he does not incur any toll charges, because the switching equipment treats the call as a local call even though it is not.

That arrangement led to a dispute between Verizon and Global Naps over the applicable payment regime. Global Naps claimed that ISP-bound VNXX calls are entitled to compensation from Verizon under the federal regime established in the *ISP Remand Order*. Verizon claimed that the federal compensation plan applied only to calls delivered to an ISP in the same local calling area and that Verizon was entitled to state-ordered access charge compensation for VNXX calls to make up for the lost toll revenue that resulted from Global Naps' use of VNXX numbers. The parties submitted their dispute to the Massachusetts Department of Telecommunications and Energy (DTE) for arbitration pursuant to the process set forth in 47 U.S.C. § 252(b).

DTE ruled that "VNXX calls will be rated as local or toll based on the geographic end points of the call." DTE Order at 33 (App. 611). As such, DTE accepted language proposed by Verizon to govern compensation for VNXX calls.

Id. at 37-38 (App. 615-616). That language would require Global Naps to “pay Verizon’s originating access charges for all [VNXX] traffic originated by a Verizon Customer ...” App. 867. Thus, DTE effectively required Global Naps to pay access charges for ISP-bound calls made to VNXX numbers.

The district court affirmed the DTE order. The court took note of Global Naps’ argument that the *ISP Remand Order* preempted state regulation of compensation for ISP-bound calls, but rejected the claim on the ground that Global Naps had “impliedly consented to DTE’s jurisdiction” over the rates when it voluntarily sought arbitration.” *Memorandum of Decision* in Civil Action No. 02-12489 (Sept. 21, 2005) (App. 1164).

DISCUSSION

The Court has asked us to address whether the *ISP Remand Order* was intended to preempt states from establishing the compensation regime that governs a call placed by an ILEC customer in one exchange to a CLEC-served ISP located in a different exchange using a VNXX number assigned to the ISP by the CLEC. The *ISP Remand Order* does not provide a clear answer to this question. As set forth below, the *ISP Remand Order* deemed *all* ISP-bound calls to be interstate calls subject to the jurisdiction of the FCC, and the language of the *ISP Remand Order* is sufficiently broad to encompass all such calls within the payment regime established by that Order. Nevertheless, the order also indicates that, in establishing the new compensation scheme for ISP-bound calls, the Commission was considering only calls placed to ISPs located in the same local calling area as the caller. The Commission itself has not addressed application of the *ISP Remand*

Order to ISP-bound calls outside a local calling area. Nor has the Commission decided the implications of using VNXX numbers for intercarrier compensation more generally. In this situation, the Commission's litigation staff is unable to advise the Court how the Commission would answer the first question posed by the Court.

In the *ISP Remand Order* (as in the *ISP Declaratory Ruling*), the Commission found that calls to ISPs are interstate calls subject to federal regulatory jurisdiction. At the same time, Congress in § 252 gave the States significant authority over interconnection agreements between carriers. Thus, while "Congress has broadly extended its law into the field of intrastate telecommunications," in a few areas such as interconnection agreements Congress "has left the policy implications of that extension to be determined by state commissions." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 385 n.10 (1999).

In some respects, the *ISP Remand Order* appears to address all calls placed to ISPs. The Commission's ruling that calls to ISPs are interstate calls because they may terminate at web sites beyond state boundaries necessarily applies to all ISP-bound calls. The Commission's theory that ISP-bound calls are "information access" calls within the meaning of § 251(g) that are thus exempted from the requirements of § 251(b) likewise applies to all ISP-bound calls. The *ISP Remand Order* is also replete with references to "ISP-bound calls" that do not differentiate between calls placed to ISPs in the same local calling area and those placed to ISPs in non-local areas.

At the same time, however, the administrative history that led up to the *ISP Remand Order* indicates that in addressing compensation, the Commission was focused on calls between dial-up users and ISPs in a single local calling area. The *Local Competition Order* and the regulations promulgated pursuant to that order contemplated that reciprocal compensation would be paid only for calls that “originat[e] and terminat[e] within a local service area.” 47 C.F.R. § 51.701(b)(1) (2000); see *Local Competition Order* at 16013 ¶1034. Thus, when the Commission undertook in the *ISP Declaratory Ruling* to address the question “whether a local exchange carrier is entitled to receive reciprocal compensation for traffic that it delivers to ... an Internet service provider,” *id.* at 3689 ¶1, the proceeding focused on calls that were delivered to ISPs in the same local calling area. Indeed, the Commission described the “typical arrangement” (although not the exclusive arrangement) it had in mind as one where “an ISP customer dials a seven-digit number to reach the ISP service in the same local calling area.” *Id.* at 3691 ¶4.

The administrative history does not indicate that the Commission’s focus broadened on remand. The *ISP Remand Order* repeats the Commission’s understanding that “an ISP’s end-user customers typically access the Internet through an ISP service located in the same local calling area.” *Id.* at 9157 ¶10. The Order refers multiple times to the Commission’s understanding that it had earlier addressed – and on remand continued to address – the situation where “more than one LEC may be involved in the delivery of telecommunications

within a local service area." *Id.* at 9158 ¶12; *see also id.* at 9159 ¶13, 9163 ¶24, 9180 ¶63.

The *ISP Remand Order* thus can be read to support the interpretation set forth by either party in this dispute. The Commission itself, however, has not expressed a position on the matter. Moreover, the Commission has not addressed the more general effects on intercarrier compensation of the use of VNXX numbers. In the circumstances, it would not be possible for the Commission's litigation staff to provide an official position on a matter that the Commissioners themselves have not yet directly confronted and addressed in a rulemaking or adjudicatory proceeding. As this Court has recognized, post hoc rationalizations offered by agency counsel are not substitutes for an agency order issued in the appropriate manner. *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1289 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997); *see also Western Union Corp. v. FCC*, 856 F.3d 315, 318 (D.C. Cir. 1988) (agency rationale "must appear in the agency decision and the record; post hoc rationalizations by agency counsel will not suffice").

The Court also asked the FCC if any other provisions of the Telecommunications Act of 1996 would prohibit a State from imposing access charges on ISP-bound VNXX calls. As described above, the Commission did not directly address VNXX calls in either of its ISP orders and has not addressed VNXX calls more generally. In the circumstances, we are unable to advise the Court whether the Commission might in the future interpret any provision of the Communications Act to prohibit State-imposed access charges. For similar

reasons, we are unable to address the Court's third question regarding the standard of review of a state commission interpretation of FCC orders, another matter on which the Commission has not spoken.

Respectfully submitted,

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Handwritten signature of Joel Marcus in black ink, written over a circular stamp.

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March 13, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

GLOBAL NAPS, INC.,)

PLAINTIFF-APPELLANT,)

V.)

VERIZON NEW ENGLAND, INC., ET AL.,)

DEFENDANTS-APPELLEES.)

No. 05-2657

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Amicus Curiae Federal Communications Commission" in the captioned case contains 3432 words.



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ATTACHMENT B

proceeding has not been subject to any unreasonable delay. The Court should therefore deny Core's petition for a writ of mandamus.

If the Court does not deny Core's petition outright, it should defer consideration of it until it resolves Core's petition for review in No. 07-1381. In that case, Core is challenging the Commission's denial of its petition for forbearance from enforcement of certain intercarrier compensation rules. Core has told the Court that it intends to argue that its forbearance petition was "deemed granted" in its entirety by operation of law and, as a consequence, the interim regulations at issue in this case are no longer in effect. Thus, Core in its mandamus petition is asking the Court to order the Commission to explain its statutory authority for regulations that Core contends are no longer in effect, and, in the alternative, to vacate regulations that Core claims are no longer operative. Although we believe Core's arguments in the forbearance case lack merit and should be rejected, if Core were to prevail in No. 07-1381 on that theory, its present claim for mandamus relief would likely become moot. As a result, Core's mandamus petition is asking the Court to put the cart before the horse. The Court should decline such an invitation and instead should not adjudicate the merits of Core's mandamus petition until it determines whether Core, in light of its anticipated argument in No. 07-1381, has any grounds for pursuing a mandamus remedy.

BACKGROUND

Regulatory Treatment of Dial-Up Calls to ISPs. “Before high-speed broadband connections (such as cable modem and digital subscriber line (DSL) service) became widely available, consumers generally gained access to the Internet through ‘dial-up’ connections provided by local telephone companies.” *In re Core Communications, Inc.*, 455 F.3d 267, 270 (D.C. Cir. 2006). In a typical dial-up arrangement, the incumbent local exchange carrier (ILEC) serving the Internet user hands off the call to the competitive local exchange carrier (CLEC) serving the ISP. *Ibid.* After receiving the call from the CLEC, the ISP then connects the user to web sites and other distant locations on the Internet.

Soon after the passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), disputes began to arise between ILECs and CLECs as to how CLECs should be compensated for completing ISP-bound calls. Some CLECs argued that such calls were governed by 47 U.S.C. § 251(b)(5), which requires local exchange carriers (LECs) “to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” Under reciprocal compensation, “ILECs would be required to compensate CLECs for completing their customers’ calls to ISPs.” *In re Core Communications*, 455 F.3d at 270. And because ISPs receive large volumes of calls from dial-up Internet users, but tend not to make outgoing calls to end users, “traffic to ISPs flows one way”—from ILEC to CLEC—“as does money in a reciprocal compensation

regime.”¹ Thus, neither traffic nor money was “reciprocal”; to the extent that § 251(b)(5) applied in these circumstances, ILECs would be required to pay huge sums of money to CLECs—such as Core—that target ISPs as customers as a business model.

In 1999, the Commission issued a declaratory ruling concluding that § 251(b)(5) did not apply to ISP-bound traffic.² The Commission explained that, in its 1996 *Local Competition Order*, it had determined that the reciprocal compensation regime applied only to “local” (*i.e.*, not long distance) traffic.³ In the *Declaratory Ruling*, the Commission determined that, with respect to ISP-bound traffic, the ultimate destination was not the local ISP, but distant locations on the Internet. 14 FCC Rcd at 3697 ¶ 12. Because those communications often crossed state lines, the FCC concluded that such traffic was not governed by § 251(b)(5), but instead was subject to the Commission’s traditional regulatory authority over interstate (and international) communications. *Id.* at 3701 ¶ 18. Nonetheless, the

¹ *Id.* at 278 (bracket removed) (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, 9162 ¶ 21 (2001) (*ISP Remand Order*), remanded, *WorldCom*, 288 F.3d 429).

² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689 (1999) (*Declaratory Ruling*), vacated, *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

³ *Id.* at 3693 ¶ 7 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013 ¶¶ 1033-34 (1996) (*Local Competition Order*) (subsequent history omitted)).

Commission permitted LECs to negotiate (and state commissions in arbitration proceedings to impose) reciprocal compensation arrangements to cover ISP-bound traffic pending adoption of a federal rule to regulate compensation for such traffic. *Id.* at 3703-05 ¶¶ 24-25.

This Court vacated and remanded the *Declaratory Ruling* in *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). Although the Court accepted the Commission's determination that ISP-bound traffic was interstate in nature, it concluded that the Commission had not adequately explained the relationship between that jurisdictional determination and the issue of whether ISP-bound traffic was "local" for purposes of § 251(b)(5). 206 F.3d at 5.

In the *ISP Remand Order*, the Commission reaffirmed its conclusion that § 251(b)(5) did not apply to ISP-bound calls, although it did not rest its conclusion on a dichotomy between local and long distance traffic. 16 FCC Rcd at 9166-67 ¶ 34. Instead, the Commission read 47 U.S.C. § 251(g) to limit the reach of § 251(b)(5). Section 251(g) requires LECs, after enactment of the 1996 Act, to continue to provide "exchange access, information access, and exchange services for such access to interexchange carriers and information service providers" in accordance with the same restrictions and obligations "(including receipt of compensation) that appl[ied] to such carrier[s] on the date immediately preceding the date of enactment . . . until such restrictions and obligations are explicitly superseded by [Commission] regulations." The Commission explained that

this provision “‘carve[d] out’ from § 251(b)(5) calls made to [ISPs] located within the caller’s local calling area.” *WorldCom*, 288 F.3d at 430; *see ISP Remand Order*, 16 FCC Rcd at 9171 ¶ 44.

The Commission also explained that applying reciprocal compensation to high-volume, one-way Internet-bound traffic resulted in competitive distortions, in which local ratepayers were effectively subsidizing CLECs that were targeting ISPs as customers in order to obtain reciprocal compensation from ILECs. *See ISP Remand Order*, 16 FCC Rcd 9162 ¶ 21, 9181-83 ¶¶ 67-71. Indeed, the Commission cited record evidence suggesting that “CLECs target ISPs in large part” to obtain “the reciprocal compensation windfall” and that, for some, “this revenue stream provided an inducement to fraudulent schemes to generate dial-up minutes.” *Id.* at 9183 ¶ 70.

To ameliorate these problems pending more comprehensive reforms, the Commission adopted an interim federal regime governing compensation for ISP-bound traffic. *See ISP Remand Order*, 16 FCC Rcd at 9186 ¶ 77. The interim rules included: (1) rate caps on the payments that CLECs could receive for ISP-bound traffic (*id.* at 9187 ¶ 78); (2) a “mirroring rule” that required ILECs that sought to take advantage of the rate caps to agree to exchange all traffic at those rates (*id.* at 9193 ¶ 89);⁴ (3) growth caps on the

⁴ The mirroring rule benefits CLECs because it “imposes equivalent caps on the rates that an ILEC may charge.” *In re Core Communications*, 455 F.3d at 279.

amount of new ISP-bound traffic for which CLECs could receive compensation each year (*id.* at 9191 ¶ 86); and (4) a “new markets” rule that required CLECs serving ISP customers in new markets to adopt a “bill and keep” arrangement under which LECs do not compensate each other directly but instead recover their costs from their customers (*id.* at 9188 ¶ 81).

In *WorldCom*, this Court remanded the *ISP Remand Order* because it concluded that the Commission could not rely on § 251(g) to exclude ISP-bound traffic from the scope of § 251(b)(5). 288 F.3d at 430. The Court expressly “ma[de] no further determinations” in that case. *Id.* at 434. The Court also expressly declined to address a number of specific questions left open in *Bell Atlantic*, including “the scope of the ‘telecommunications’ covered by § 251(b)(5)” and “whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5).” *WorldCom*, 288 F.3d at 434. The Court emphasized that “these are only samples of the issues we do not decide, which are in fact all issues other than whether § 251(g) provided the authority claimed by the Commission for not applying § 251(b)(5).” *Ibid.* Finding that “there is plainly a non-trivial likelihood that the Commission has authority to elect . . . [the bill-and-keep] system” reflected, in part, in the Commission’s interim cost recovery regime, the Court declined to vacate the *ISP Remand Order* and instead “simply remand[ed] the case to the Commission for further proceedings.” *Id.* (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm.*, 988 F.2d 146, 150-151 (D.C. Cir. 1993)). The following year, the Supreme Court rejected

Core’s request that it review this Court’s decision not to vacate the *ISP Remand Order*. 538 U.S. 1012.

As mentioned, the *ISP Remand Order* adopted a set of interim rules—rate caps, the mirroring rule, growth caps, and the new markets rule—that regulate compensation for ISP-bound traffic. Currently, only the rate caps and the related mirroring rule remain in force. In 2004, the Commission granted Core’s request that it forbear from enforcing the growth caps and the new markets rule.⁵ The Commission explained that “[r]ecent industry statistics” showed 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.” 19 FCC Rcd at 20186 ¶ 20; *see also id.* at ¶ 21. That trend, the Commission determined, mitigated its concern that growth caps and the new markets rule were necessary “to prevent continued expansion of the arbitrage opportunity presented by ISP-bound traffic.” *Id.* at 20186 ¶ 20. At the same time, the Commission denied Core’s request that it forbear from enforcing the rate caps and the mirroring rule. The Commission explained that “Core [had] not challenge[d] 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.” *Id.* at 20186 ¶ 18. This Court affirmed the

⁵ *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179 (2004) (*2004 Core Forbearance Order*), *aff’d*, *In re Core Communications*, 455 F.3d 267.

Commission's forbearance order in all respects. *In re Core Communications*, 455 F.3d 267.

Comprehensive Intercarrier Compensation Reform. In the *ISP Remand Order*, the Commission observed that the “market distortions” produced by ISP-bound traffic “may result from any intercarrier compensation regime that allows a service provider to recover some of its costs from other carriers rather than from its end-users.” *ISP Remand Order*, 16 FCC Rcd at 9153 ¶ 2. Accordingly, on the same day the Commission released the *ISP Remand Order*, it initiated a rulemaking to conduct a “fundamental re-examination of all currently regulated forms of intercarrier compensation” in order to “test the concept of a unified regime for the flows of payments among telecommunications carriers.” *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9611 ¶ 1 (2001) (“*Intercarrier Compensation NPRM*”). The Commission sought comment “on the feasibility of a bill-and-keep approach for such a unified regime,” as well as “alternative comment on modifications to existing intercarrier compensation regimes.” *Ibid.* The Commission expressed its intent “to move forward from . . . transitional intercarrier compensation regimes”—such as the interim rules adopted in the *ISP Remand Order*—“to a more permanent regime.” *Ibid.*

The *Intercarrier Compensation NPRM* generated a great deal of industry interest and activity. According to the Commission's docket report for that proceeding, the Commission received more than 150 formal

comments and 100 reply comments, as well as approximately 750 informal or *ex parte* filings, in response to the *NPRM*.

Among these voluminous filings, the Commission in mid-to-late 2004 received nine different proposals or governing principles for comprehensive reforms from the Intercarrier Compensation Forum; Expanded Portland Group; Alliance for Rational Intercarrier Compensation; Cost-Based Intercarrier Compensation Coalition; Home Telephone Company and PBT Telecom; Western Wireless; National Association of State Utility Consumer Advocates; National Association of Regulatory Utility Commissioners (NARUC); and CTIA–The Wireless Association. In response to these proposals and other “extensive comment[s]” filed by various parties, the Commission in March 2005 released a *Further Notice of Proposed Rulemaking* in the *Intercarrier Compensation* proceeding. *See Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, 4686 ¶ 2 (2005) (“*Intercarrier Compensation FNPRM*”); *see also id.* at 4687 ¶ 4; 4705-15 ¶¶ 40-59 (describing industry proposals). The Commission explained that the record compiled to date had “confirm[ed] the need to replace the existing patchwork of intercarrier compensation rules with a unified approach” and that “the current rules make distinctions based on artificial regulatory classifications that cannot be sustained in today’s telecommunications marketplace.” *Id.* at 4687 ¶ 3. In particular, those rules “create both opportunities for regulatory arbitrage and incentives for inefficient investment and deployment decisions,” resulting in “distortions in

the marketplace at the expense of healthy competition.” *Ibid.* The Commission “confirm[ed] the urgent need to reform the current intercarrier compensation rules” to mitigate these competitive problems. *Ibid.*

As with the initial notice, the *Intercarrier Compensation FNPRM* generated significant interest and debate within the industry. According to the Commission’s docket report, the agency has received more than 1000 separate filings since it released the *Intercarrier Compensation FNPRM* in 2005. Those filings include not only comments and reply comments filed in response to the *FNPRM*, but also responses to three additional requests for comment that the agency issued in 2006 and 2007 relating to various aspects of another comprehensive reform proposal, known as the “Missoula Plan,” submitted by the NARUC Task Force on Intercarrier Compensation.⁶ The last of these formal comment cycles closed in April 2007.⁷

Core’s 2004 Mandamus Petition. In June 2004, Core filed a mandamus petition with this Court seeking (as it does now) an order directing the Commission to respond to the *WorldCom* remand or,

⁶ *Comments Sought on Missoula Intercarrier Compensation Reform Plan*, 21 FCC Rcd 8524 (2006); *Comment Sought on Missoula Plan Phantom Traffic Interim Process and Call Detail Records Proposal*, 21 FCC Rcd 13179 (2006); *Comment Sought on Amendments to the Missoula Plan Intercarrier Compensation Proposal to Incorporate a Federal Benchmark Mechanism*, 22 FCC Rcd 3362 (2007).

⁷ *Pleading Cycle Extended for Comment on Amendments to the Missoula Plan Intercarrier Compensation Proposal to Incorporate a Federal Benchmark Mechanism*, 22 FCC Rcd 5098 (2007).

alternatively, vacating the interim rules adopted in the *ISP Remand Order*.⁸ After the Commission responded that agency staff had provided then-FCC Chairman Powell with a draft order addressing the *WorldCom* remand,⁹ and that the Commission had granted Core relief from growth caps and the new markets rule in the *2004 Core Forbearance Order*,¹⁰ this Court issued an order deferring consideration of Core's mandamus petition and requiring the Commission to submit periodic status reports. Order, *In re Core Communications, Inc.*, No. 04-1179, filed Nov. 22, 2004.

As noted above, in the latter half of 2004, while the case involving Core's 2004 mandamus petition was pending before this Court, the Commission received numerous industry proposals for comprehensive intercarrier compensation reform. In view of these various competing proposals, the Commission did not adopt the staff's draft order referenced above, which was focused only on the narrow issue of ISP-bound traffic, but instead adopted the *Inter-carrier Compensation FNPRM*. In status reports, the Commission informed the Court of its "intent to use that [*Inter-carrier Compensation*] proceeding as the vehicle to replace the interim

⁸ Petition for a Writ of Mandamus to the Federal Communications Commission, *In re Core Communications, Inc.*, No. 04-1179 (D.C. Cir.), filed June 10, 2004 (Core Pet., Exh. A).

⁹ Response of the Federal Communications Commission to Petition for Writ of Mandamus, *In re Core Communications, Inc.*, No. 04-1179 (D.C. Cir.), filed June 10, 2004 (Core Pet. Exh. B).

¹⁰ Letter from Laurence N. Bourne, Counsel, FCC, to Mark J. Langer, Clerk, D.C. Circuit, No. 04-1179, filed Oct. 12, 2004.

compensation rules for ISP-bound traffic that this Court addressed in *WorldCom*.”¹¹ In response, Core filed a “supplemental” petition in which it argued that the agency’s decision to proceed by *FNPRM* rather than address ISP-bound traffic in a discrete order supported its claim for a writ of mandamus.¹² The Court rejected that argument and, in an unpublished order, denied Core’s mandamus petition without prejudice. Order, *In re Core Communications, Inc.*, No. 04-1179, filed May 24, 2005.

Core’s 2006 Forbearance Petition. In April 2006, two months before this Court issued its *In re Core Communications* opinion affirming the 2004 *Core Forbearance Order*, Core filed another forbearance petition in which it asked the Commission to forbear from enforcing 47 U.S.C. § 251(g) (as well as 47 U.S.C. § 254(g)) and related implementing rules.¹³ Petition for Forbearance of Core Communications, Inc., WC Docket No. 06-100, filed Apr. 27, 2006. Core argued that, if its forbearance petition were granted, the reciprocal compensation regime would automatically govern

¹¹ See Status Report, *In re Core Communications, Inc.*, No. 04-1179, filed Feb. 22, 2005, at 3; see also Supplemental Status Report, *In re Core Communications, Inc.*, No. 04-1179, filed Mar. 4, 2005; Status Report, *In re Core Communications, Inc.*, No. 04-1179, filed May 23, 2005.

¹² Supplemental Petition for a Writ of Mandamus to Enforce the Mandate of this Court, *In re Core Communications, Inc.*, No. 04-1179, filed Mar. 2, 2005.

¹³ As explained above, § 251(g) preserves certain pre-1996 obligations on LECs until the Commission adopts regulations superseding those obligations. Section 254(g), in effect, prohibits long distance carriers from charging customers who live in rural areas or high-cost states rates that are higher than those charged to customers in urban areas or low-cost states.

intercarrier compensation arrangements for all types of telecommunications traffic. *Id.* at 18. The Commission denied Core’s forbearance petition in July 2007.¹⁴

On September 20, 2007, Core filed a petition for review of the 2007 *Core Forbearance Order* in this Court. *Core Communications, Inc. v. FCC*, No. 07-1381 (D.C. Cir.). Among other things, Core intends to argue that, notwithstanding the Commission’s order denying its forbearance petition, the petition had been “deemed granted” because, in Core’s view, the agency failed to meet the statutory deadline set forth in 47 U.S.C. § 160(c). Statement of Issues to be Raised, No. 07-1381, filed Oct. 26, 2007. Core will also presumably argue that even if its petition was not deemed granted, the Commission erred by denying it. The Court has not yet established a briefing schedule in that case.

ARGUMENT

I. CORE HAS FAILED TO SHOW THAT A WRIT OF MANDAMUS IS WARRANTED

“Mandamus is a ‘drastic’ remedy, ‘to be invoked only in extraordinary situations.’” *In re Papandreou*, 139 F.3d 247, 250 (D.C. Cir. 1998) (quoting *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976)); accord *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Recognizing that the grant of mandamus “contributes to piecemeal appellate

¹⁴ *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, 22 FCC Rcd 14118 (2007) (*2007 Core Forbearance Order*).

litigation,” *Allied Chem. Corp.*, 449 U.S. at 35, courts require the petitioner, at a minimum, to show that its right to the writ is “clear and indisputable,” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (internal quotation marks omitted), and that “‘no other adequate means to attain the relief’ exist,” *In re Papandreou*, 139 F.3d at 250 (quoting *Allied Chem. Corp.*, 449 U.S. at 35. Even when that stringent showing has been made, “issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.” *Kerr*, 426 U.S. at 403.

The Commission is “entitled to considerable deference in establishing a timetable for completing its proceedings.” *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987). Accordingly, in the case of mandamus petitions predicated upon allegations of unreasonable administrative delay, “a finding that delay is unreasonable does not, alone, justify judicial intervention.” *In re Barr Labs.*, 930 F.2d 72, 75 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991); *accord Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001); *In re United Mine Workers of Am. Int’l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999). Rather, a court will intervene only where “the agency’s delay is so egregious as to warrant mandamus.” *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) (*TRAC*). In *TRAC*, the Court set forth a list of considerations for evaluating whether that high bar has been cleared:

- (1) the time agencies take to make decisions must be governed by a rule of reason;

- (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
- (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
- (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
- (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
- (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

750 F.2d at 80 (citations and internal quotation marks omitted). Considering all of the relevant factors, Core has failed to show that this case is “one of the exceptionally rare cases,” *In re Barr Labs.*, 930 F.2d at 76, that warrants a judicial decree directing agency action.

1. Core’s mandamus petition largely rests on the first *TRAC* factor. It suggests that any delay over three years is “objectively egregious” so as to warrant mandamus. Pet. 20. That argument conflicts with this Court’s precedent. “Resolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court.” *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003). Accordingly, the issue of unreasonable delay “cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part . . . upon the

complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency.” *Id.* at 1102. Consistent with this view, this Court has refused to issue writs of mandamus even when the complained-of delay was “objectively” longer than the period at issue here. *See Her Majesty the Queen of Right of Ontario v. EPA*, 912 F.2d 1525, 1534 (D.C. Cir. 1990) (nine-year delay not unreasonable in light of the “complexity of the factors facing the agency”); *Harvey Radio Labs., Inc. v. United States*, 289 F.2d 458 (D.C. Cir. 1961) (10-year delay held not so egregious to require mandamus); *cf. In re United Steelworkers of Am.*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (declining to conclude that a possible seven-year delay in completing rulemaking was unreasonable notwithstanding the “seriousness of the health risks” created by the absence of regulation).

As the agency informed the Court in Core’s 2004 mandamus litigation, the Commission is of the view that intercarrier compensation reform is best implemented in the context of a comprehensive rulemaking proceeding, rather than on a piecemeal basis. That policy decision is entitled to substantial deference. *See, e.g., Action on Smoking & Health v. Department of Labor*, 100 F.3d 991, 994 (D.C. Cir. 1996). In *Action on Smoking and Health*, for example, a public interest organization petitioned for mandamus compelling the Occupational Safety and Health Administration (OSHA) to issue a final rule regulating second-hand smoke in the workplace. This Court denied the petition, reasoning that OSHA had

decided to address the issue in “one massive rulemaking” that covered “not only tobacco smoke but many other indoor air quality contaminants.” *Id.* at 995. The Court explained that OSHA had “already given good, logical reasons for dealing broadly with the subject of indoor air pollutants,” and thus the petitioner’s “point raises a policy question for the agency, not the courts.” *Ibid.*

The Commission likewise has reasonably explained its policy reasons for addressing intercarrier compensation in a comprehensive manner, as opposed to taking up individual compensation mechanisms—such as reciprocal compensation under § 251(b)(5)—in isolation.¹⁵ The Commission explained that it is “particularly interested in identifying a unified approach to intercarrier compensation” in light of “increasing competition and new technologies, such as the Internet and Internet-based services,” which affect the entire industry. *Inter-carrier Compensation NPRM*, 16 FCC Rcd at 9612 ¶ 2. Similarly, in the *Inter-carrier Compensation FNPRM*, the Commission reiterated that the “record [in the

¹⁵ Citing a 2007 Commission adjudicatory order (Pet. 16), Core suggests that the Commission is willing to address intercarrier compensation issues outside the context of the *Inter-carrier Compensation* rulemaking proceeding. The order in question, however, addressed a complaint filed under 47 U.S.C. § 208, which imposes a statutory duty on the Commission to investigate and resolve such complaints. *See American Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 731-732 (D.C. Cir. 1992), *cert. denied*, 509 U.S. 913 (1993). In any event, the mere fact that there may be discrete intercarrier compensation issues that the Commission can resolve prior to implementing broader reforms does not diminish the deference to which the Commission is entitled in managing the conduct of its proceedings.

proceeding] confirms the need to replace the existing patchwork of intercarrier compensation rules with a unified approach.” 20 FCC Rcd at 4687 ¶ 3. That is partly because, as the Commission has explained, the problems exemplified by ISP-bound traffic—regulatory arbitrage and distorted economic incentives—“may result from any intercarrier compensation regime that allows a service provider to recover some of its costs from other carriers rather than from its end-users.” *ISP Remand Order*, 16 FCC Rcd at 9153 ¶ 2; *accord FNPRM*, 20 FCC Rcd at 4687 ¶ 3 (stating that current regulatory distinctions “create both opportunities for regulatory arbitrage and incentives for inefficient investment and deployment decisions”). These are “good, logical reasons for dealing broadly with the subject” of intercarrier compensation in a consolidated proceeding. *Action on Smoking and Health*, 100 F.3d at 995.

Indeed, recent market developments have confirmed the reasonableness of the Commission’s approach toward compensation reform. Increasingly, end users are *not* using dial-up connections to connect to the Internet, but, rather, cable modem, DSL, and other broadband platforms. These broadband services, which involve only one provider and therefore do not trigger reciprocal compensation obligations, have led to a significant decline in demand for dial-up ISP services since 2001. In fact, by 2004, the Commission found that there had been such a decline in “the usage of dial-up ISP services” that it granted Core’s request that the agency forbear from

enforcing the interim growth caps and new markets rules.¹⁶ In affirming the Commission's decision, this Court noted that the record before the Commission showed "a ten-fold increase in high-speed access lines between 1999 and 2003" and "forecasted a decline in the percentage of on-line subscribers using dial-up from 76% in 2002 to 25% in 2008." *In re Core Communications*, 455 F.3d at 280.

More recent data reinforces the nation's growing reliance on broadband technologies for Internet access. In 2006, high-speed lines in service increased by 61%, from 51,218,145 lines at the end of 2005 to 82,547,651 lines at the end of 2006.¹⁷ By way of contrast, there were fewer than 2.5 million high-speed lines in service in 1999 when the Commission issued the *Declaratory Ruling* and fewer than 12.4 million high-speed lines when it released the *ISP Remand Order* in 2001.¹⁸

In light of the diminishing importance of dial-up ISP traffic and the interrelated policy issues presented by all forms of intercarrier compensation, "it makes sense to treat them together" in a comprehensive manner, rather than in a piecemeal fashion. *Action on Smoking and Health*, 100 F.3d at 995. Although Core complains (Pet. 16) that the Commission

¹⁶ *2004 Core Forbearance Order*, 19 FCC Rcd at 20186 ¶ 20 & n.56.

¹⁷ *High-Speed Services for Internet Access: Status as of December 31, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau (Oct. 2007), at 1 & Table 1, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-277784A1.pdf.

¹⁸ *Id.* at Table 1.

has not yet adopted an “omnibus ruling on intercarrier compensation,” that proceeding remains extremely active, with the Commission issuing three requests for further comment (one of them earlier this year), and with parties submitting well over 1000 separate filings, since adoption of the *Inter-carrier Compensation FNPRM*. And Core itself recognizes that “a unified intercarrier compensation regime is indeed an ideal solution” to the questions it raises here. Pet. 15. Given the complexities associated with reforming compensation mechanisms spanning the whole of the telecommunications industry—as Core itself admits, it is just one of a “multitude of voices advocating its views” on compensation reform (Pet. 15)—“it is to be expected that consideration of such matters will take longer than might rulings on more routine items.” *In re Monroe Communications*, 840 F.2d 942, 946 (D.C. Cir. 1988); *see also Cutler*, 818 F.2d at 898 (“complexity of the task confronting the agency” is relevant to ascertaining reasonableness of delay).

2. Core attempts to invoke the second *TRAC* factor, which states that “where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason.” *TRAC*, 750 F.2d at 80. Core argues (Pet. 22) that the Commission has “directly contravene[d]” 47 U.S.C. § 251(d)(1), which require[d] the Commission to “complete all actions necessary to establish regulations to implement the requirements of this section” within “6 months after February 8, 1996,” the

date on which the 1996 Act was enacted. That argument is frivolous. The Commission complied with § 251(d)(1) when it issued the *Local Competition Order* on August 8, 1996. *See* 11 FCC Rcd 15499. Nothing in § 251(d)(1) suggests that the deadline it establishes has any continuing force beyond that date.

In the absence of a congressional timetable, this case is governed by the general principle that an agency has “broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing.” *Cutler*, 818 F.2d at 896. That principle, applicable to all agencies, should apply with even greater force to the Commission because of the unique impact of the forbearance provision in 47 U.S.C. § 160. That provision permits telecommunications carriers to petition the Commission for regulatory forbearance and sets a deadline of one year (which the agency can extend by an additional 90 days) for Commission action on the petition, after which, if the agency has not acted, the petition is “deemed granted.” 47 U.S.C. § 160(c); *see also Sprint Nextel v. FCC*, No. 06-1111, 2007 WL 4270579 (D.C. Cir. Dec. 7, 2007). The forbearance provision represents Congress’s view as to how the agency should “prioritize in the face of limited resources” when it comes to regulatory decisions involving telecommunications carriers. *Cutler*, 818 F.2d at 898. In fact, given the “deemed grant” remedy Congress included in the forbearance statute, the Commission must continually adjust its agenda and shift its priorities whenever a carrier elects to file a forbearance petition.

The Commission's forbearance docket has been particularly active in the period since June 2004, the date Core filed its 2004 mandamus petition with this Court. Since that time, the Commission has issued 17 forbearance orders,¹⁹ and its staff has had to undertake the process of evaluating the merits of 18 other forbearance petitions that were later withdrawn before the statutory deadline. In fact, Core itself is a repeat forbearance petitioner, having twice endeavored to use the forbearance remedy to press its views on intercarrier compensation. The Commission's focus on forbearance petitions filed by Core and other carriers (along with other pressing matters that have demanded the agency's attention) shows that the Commission has not

¹⁹ *Verizon Telephone Companies*, WC Docket No. 06-172, FCC 07-212 (rel. Dec. 5, 2007) (available at 2007 WL 4270630); *Embarq Local Operating Cos. et al.*, WC Docket No. 06-147, FCC 07-184 (rel. Oct. 24, 2007) (available at 2007 WL 3119515); *AT&T, Inc. et al.*, 22 FCC Rcd 18705 (2007); *Applications for License and Authority to Operate in the 2155-2175 MHz Band*, 22 FCC Rcd 16563 (2007), *pet. for review filed*, *M2Z Networks, Inc. v. FCC*, No. 07-1360 (D.C. Cir.); *AT&T, Inc.*, 22 FCC Rcd 16556 (2007); *ACS of Anchorage, Inc.*, 22 FCC Rcd 16304 (2007); *Iowa Telecom*, 22 FCC Rcd 15801 (2007); *Core Communications*, 22 FCC Rcd 14118, *pet. for review filed*, *Core Communications, Inc. v. FCC*, No. 07-1381 (D.C. Cir.); *Qwest Communications Int'l, Inc.*, 22 FCC Rcd 5207 (2007); *ACS of Anchorage, Inc.*, 22 FCC Rcd 1958 (2007); *Fones4All Corp.*, 21 FCC Rcd 11125 (2006), *pet. for review filed*, *Fones4All Corporation v. FCC*, No. 06-75388 (9th Cir.); *Qwest Corporation*, 20 FCC Rcd 19415 (2005), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007); *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 15095 (2005); *SBC Communications, Inc.*, 20 FCC Rcd 9361 (2005), *remanded*, *AT&T, Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006); *ACS Wireless, Inc.*, 20 FCC Rcd 3596 (2004); *Verizon Telephone Cos. et al.*, 19 FCC Rcd 21496 (2004), *aff'd*, *Earthlink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006); *Core Communications*, 19 FCC Rcd. 20179, *aff'd*, *In re Core Communications*, 455 F.3d 267.

engaged in unreasonable delay, but rather has reasonably used its “unique—and authoritative—position to view its projects as a whole [and] allocate its resources in the optimal way.” *In re Barr Labs.*, 930 F.2d at 76.

3. The fourth and fifth *TRAC* factors direct the Court to consider “the effect of expediting delayed agency action on agency activities of a higher or competing priority” and the “nature and extent of the interests prejudiced by delay.” 750 F.2d at 80.²⁰ In that regard, “the Commission is entitled to substantial deference ‘when it acts to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated’ including the objective of implementing large-scale revisions ‘in a manner that would cause the least upheaval in the industry.’” *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002) (internal citation reference omitted) (citing *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984)).

The importance of maintaining the interim rate caps (and the related mirroring rule designed to protect CLECs from non-reciprocal ILEC charges) pending comprehensive intercarrier compensation reform has been well documented. In *In re Core Communications*, this Court upheld as reasonable the Commission’s conclusion that “rate caps are necessary to prevent the subsidization of dial-up Internet access consumers by consumers

²⁰ Because compensation for ISP-bound traffic involves purely economic regulation, Core correctly does not claim any support from the third *TRAC* factor. Nor does Core claim (much less demonstrate) any agency impropriety under the sixth *TRAC* factor.

of basic telephone service.” 455 F.3d at 278. They also help deter “inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition” and limit CLECs’ ability to “pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels.” *Id.* at 279 (quoting *ISP Remand Order*, 16 FCC Rcd at 9162 ¶ 21); *see also WorldCom*, 288 F.3d at 431 (“Because ISPs typically generate large volumes of one-way traffic in their direction, the old system attracted LECs that entered the business simply to serve ISPs, making enough money from reciprocal compensation to pay their ISP customers for the privilege of completing the calls. The Commission saw this as leading, at least potentially, to ISPs’ charging *their* customers below cost.”). In fact, this Court cited the continued existence of rate caps as a basis for concluding that the Commission’s decision to forbear from growth caps and the new markets rule was a reasonable exercise of the agency’s forbearance authority. *In re Core Communications*, 455 F.3d at 282.

Moreover, there is no basis here for “interfer[ing] with the agency’s internal processes.” *In re United Mine Workers*, 190 F.3d at 553. Granting Core’s mandamus petition could substantially disrupt the ongoing, industry-wide dialogue that is taking place within the context of the *Intercarrier Compensation* rulemaking. Significantly, that dialog covers the full range of issues implicated by compensation reform—not just the narrow issue of how ever-diminishing ISP-bound traffic should be regulated.

Core alleges that a Commission ruling on ISP-bound traffic is necessary to “resolve the fractured, dysfunctional ISP-bound compensation rulings that presently plague the telecommunications industry.” Pet. 24. But Core has failed to identify any difficulties entitling it to extraordinary relief. Core’s only complaint is that state commissions in Maryland and Massachusetts have adopted different policies for so-called “VNXX” calls to ISPs, Pet. 25, but that is the outcome Core seeks: to return to the pre-*ISP Remand Order* days when “the right to reciprocal compensation was largely established and settled by the various state commissions,” *ibid.*²¹ Moreover, a writ of mandamus would not necessarily resolve any controversy concerning VNXX calls, *i.e.*, calls that appear to be to a local ISP but that are actually routed to an ISP in a different local calling area from the Internet user. *See Global NAPs, Inc. v. Verizon New England Inc.*, 444 F.3d 59, 64 (1st Cir. 2006). As this Court recognized in *WorldCom*, the *ISP Remand Order* addressed only those calls to ISPs “within the caller’s local calling area.” 288 F.3d at 430. VNXX-related issues, therefore, are not within the scope of the *WorldCom* remand.²²

²¹ Although Core contends (Pet. 25) that Maryland regulates VNXX calls differently from Massachusetts, the only authority Core cites for Maryland’s regulatory regime is *Verizon Md., Inc. v. Global NAPs, Inc.*, 377 F.3d 355 (4th Cir. 2004). *Verizon*, however, does not discuss VNXX and, in any event, dealt only with a state commission order that antedated the *ISP Remand Order*. *See id.* at 361, 367. That case, therefore, does not speak to the effect of the *ISP Remand Order* on state commissions or the industry.

²² Because the *ISP Remand Order* did not purport to address VNXX calls, it is not surprising that the FCC’s amicus brief in the First Circuit’s *Global*

II. THE COURT SHOULD NOT ADDRESS THE MERITS OF CORE'S MANDAMUS PETITION BEFORE RESOLVING CORE'S ALTERNATIVE ARGUMENT IN NO. 07-1381 THAT THE INTERIM RULES ADOPTED IN THE *ISP REMAND ORDER* ARE NO LONGER IN EFFECT

As explained above, the Court should deny Core's mandamus petition because it has failed to demonstrate that the Commission has engaged in unreasonable delay, much less egregious delay warranting extraordinary relief. If the Court does not deny Core's mandamus petition outright, however, it should not resolve the merits of the petition until the Court issues its decision in No. 07-1381. In that case, Core intends to argue that the *2007 Core Forbearance Order*, which denied Core's request that the Commission forbear from 47 U.S.C. § 251(g), is invalid because its petition allegedly had been "deemed granted" by operation of law. Further, Core's position in that case appears to be that, as a result of the purported "deemed grant," compensation for all telecommunications traffic—including ISP-bound traffic—is now governed by § 251(b)(5)'s reciprocal compensation regime.

Core's anticipated argument in No. 07-1381 is fundamentally inconsistent with its request for mandamus relief. In effect, Core is

NAPs case did not put forth a definitive agency position on that question. *See* Core Pet. 26. And although Core portrays *Global NAPs* as an example of "confusion" in the industry, *id.* at 25, the First Circuit had no difficulty recognizing that the *ISP Remand Order* did not address the regulatory treatment of VNXX calls—a position that the court noted was consistent with the Commission's amicus brief in that case. *See* 444 F.3d at 74.

simultaneously arguing to this Court that (1) the interim rules adopted in the *ISP Remand Order* no longer remain in force because Core's forbearance petition was "deemed granted" by operation of law and (2) a writ of mandamus is necessary because those very same interim rules "have become *de facto* permanent rules," Pet. 28. Core cannot have it both ways.

Although we believe Core's argument in No. 07-1381 lacks merit and should be rejected, it is nonetheless the case that, if the Court agrees with Core in No. 07-1381 that the interim compensation rules are no longer in effect, the mandamus petition in this case would likely become moot. In these circumstances, the Court should first resolve Core's argument in No. 07-1381, a case brought under statutory review procedures, before adjudicating Core's request for extraordinary relief. *See, e.g., In re Papandreou*, 139 F.3d at 250 (mandamus available only if "no other adequate means to attain the relief exist") (internal quotation marks omitted); *see also Power v. Barnhart*, 292 F.3d 781, 787 (D.C. Cir. 2002) (holding that, where there are "alternative means of vindicating a statutory right, a plaintiff's preference for one over another is insufficient to warrant a grant of the extraordinary writ").

CONCLUSION

For the foregoing reasons, the Court should deny Core's request for mandamus relief. In the alternative, the Court should defer consideration of Core's mandamus petition until the Court issues its decision in No. 07-1381.

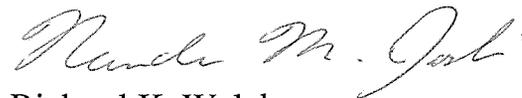
Respectfully submitted,



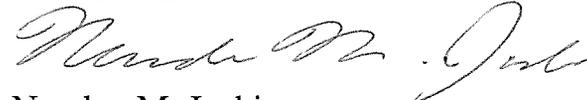
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December 27, 2007

ATTACHMENT C

ORAL ARGUMENT NOT YET SCHEDULED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1446

In re: CORE COMMUNICATIONS, INC.

Petitioner.

On Petition for a Writ of Mandamus to the Federal Communications Commission

**REPLY BRIEF FOR PETITIONER
CORE COMMUNICATIONS, INC.**

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Instead of addressing the *WorldCom* mandate – instead of coming forward with a legal basis for its compensation regime – the FCC abdicates altogether by focusing on alternative avenues of prospective “relief,” namely additionally rounds of rulemaking, and even the prospect of forbearance. These alternative avenues do not address the *WorldCom* mandate. They will not, even if they ever come to pass, furnish a legal basis, a statutory authorization, for the regime the FCC established many years ago that has been prejudicing Core since its unlawful birth. Only a writ of mandamus will compel a response from the FCC to this Court’s mandate. Only a writ of mandamus will enable the Court to know whether the FCC has enforced an *ultra vires* compensation regime since 2001.

II. MANDAMUS IS CORE’S ONLY AVAILABLE PATH TO RELIEF

Mandamus is warranted if an agency refuses to respond to the Court’s instructions on remand.¹ Mandamus also is warranted if other available remedies are “clearly inadequate.”² Both grounds exist here.

A. *The FCC has refused to address the WorldCom mandate.* The FCC refuses to respond to the *WorldCom* mandate. This refusal is “plainly inconsistent” with the analysis and ruling in *WorldCom* and “deliberately

¹ See *Radio-Television New Directors Ass’n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000); *MCI Telecomms. Corp. v. FCC*, 580 F.2d 590, 597 (D.C. Cir. 1978).

² *In re GTE Service Corp.*, 762 F.2d 1024, 1027 (D.C. Cir. 1985).

frustrate[s] ... the intended effect of [the Court's] decree.”³

In *WorldCom*, this Court held that the FCC (for the second time) asserted an invalid “legal basis” for the rules it promulgated. 288 F.3d at 434. The Court remanded the FCC’s order for an alternative (*i.e.*, legitimate) “legal basis” for carving out ISP-bound traffic for discriminatory treatment even though the FCC itself had recognized that no cost differences exist between terminating ISP-bound and other types of traffic. The Court declined to determine whether the FCC’s rules were “well reasoned,” *id.*, because it was impossible to address whether the rules were arbitrary or capricious without “meaningful context” for “the authority claimed by the Commission.” *Id.* Statutory authority is an antecedent issue.⁴

Indeed – and this is very important – the *WorldCom* Court specifically declined to vacate the purported “interim” rules (now nearly seven years old) to allow the FCC to identify a valid alternative legal basis for the rules, which would provide the Court the necessary “context” for judicial review. *WorldCom*, 288 F.3d at 434. The FCC has refused to do so. It thus has flouted this Court’s

³ *MCI Telecomms.*, 580 F.2d at 595, 597.

⁴ *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (“an administrative agency’s power to regulate ... must always be grounded in a valid grant of authority from Congress) (citation omitted); *Am. Library Ass’n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (“administrative agencies may issue regulations only pursuant to authority delegated to them by Congress”).

mandate. It has deprived the Court of an opportunity to review both an alternative legal basis and the policy rationale for the rules, as this Court contemplated.⁵

Had this Court known then, in 2002, that the FCC would refuse to *ever* come forward with an alternative statutory basis for the rules, surely the Court would have vacated the discriminatory compensation rules (and issued an reasonable stay order) rather than leaving them in place. After all, this is not a case where vacatur would have had adverse implications for public health or the environment; nor is it a case where vacatur would require years of rulemaking; all the FCC had to do was provide a statutory basis for the rules that could pass judicial review.⁶ Instead, having already twice failed to articulate an adequate

⁵ *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (the “primary purpose of the writ in circumstances like these is to ensure that an agency does not thwart [the Court’s] jurisdiction by withholding a reviewable decision”; six-year delay held to be “egregious”); *City of Cleveland v. FPC*, 561 F.2d 344, 347 (D.C. Cir. 1977) (“The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter is without power to do anything which is contrary to either the *letter or spirit of the mandate construed in light of the opinion of [the] court* deciding the case and the higher tribunal is amply armed to rectify any deviation through the process of mandamus.”) (quotation marks and citations omitted; emphasis added).

⁶ *Cf. NRDC v. EPA*, 489 F.3d 1250, 1262-64 (D.C. Cir. 2007) (Randolph, J., concurring) (explaining why generally vacating agency rule is the preferred course and observing: “When we simply remand the agency has no such incentive [to act in a reasonable time]. A remand-only disposition is, in effect, an indefinite stay of the effectiveness of the court’s decision and agencies naturally treat it as such.”); *id.* at 1265-66 (Rogers, J., concurring in part and dissenting in part) (in considering whether to remand rather than vacate, court should consider whether good reasons exist for not vacating, such as whether vacatur would have adverse

statutory basis for the rules, the FCC evidently decided to take advantage of this Court's decision not to vacate. Mandamus is thus particularly appropriate in this case because it will deter agencies from adopting a similar dilatory approach in response to a decision to remand rather than vacate.

B. *No adequate alternatives to mandamus exist.* The FCC is wrong when it asserts that Core can get the same relief either through (1) allegedly “broader” intercarrier compensation reform efforts or (2) through Core’s appeal of a separate forbearance denial by the FCC, now pending before this Court (No. 07-1381). The alternatives mentioned by the FCC are not substitutes for the mandamus relief Core requests.

Only mandamus will enable the Court to determine if the FCC’s current regime, in place since 2001, is *ultra vires*. Moving *prospectively* to a new compensation regime, by rulemaking or forbearance, does not address whether the existing regime is *ultra vires*. Without that determination, Core cannot obtain relief to make itself whole after being forced for years to have its intercarrier compensation capped at levels below those permitted by statute.

Thus, *nothing* but a writ of mandamus from this Court can give Core the relief it seeks: an actual, appealable order from the FCC articulating its *legal*

public health and environmental consequences; and the court should also consider the nature of the agency action required and the expected time to accomplish it).

basis, its statutory authority, for depriving Core (and others) of substantial intercarrier compensation revenues for many years in the past.

The Commission does not, nor could it, suggest that such relief could follow from its intercarrier compensation rulemaking proceeding or from a grant of Core's petition for review in case No. 07-1381. "Broader" intercarrier compensation reform through rulemaking might provide *prospective* relief at some indeterminate future date forward; and a finding that Core's forbearance petition was "deemed granted" as of April 27, 2007 (a year after filing) would provide relief only from that point forward.⁷ Neither event stands to provide any judicial review of the validity of the interim regime that has been in place since 2001.

In sum, if there is no statutory authority for the regime enacted in 2001, it is *ultra vires*. The Court left that regime in place with the understanding that the FCC would come back with an alternative, lawful basis for it— not for a new set of regulations that it has not developed yet. The other "paths" suggested by the FCC simply cannot provide Core the relief it seeks. Only mandamus can at this point.

⁷ The Commission fails to acknowledge that grant of Core's petition (underlying No. 07-1381) would have resulted in the very rate unification goal the Commission purports to seek. Core has *always* advocated for equal treatment of all telecommunications traffic, and its efforts have been persistently met with discriminatory regulations sponsored by industry giants. The FCC has maintained piecemeal regulation to preserve discriminatory treatment in spite of Core's efforts to obtain equal treatment for all telecommunications traffic.

III. THE FCC'S JUSTIFICATION FOR ITS "SIGNIFICANT ADDITIONAL DELAY" FAILS

As noted above, there is a silence in the Commission's brief that says far more than anything written in those 29 pages: nowhere – not once – does the FCC assure this Court that it will ever respond to the *WorldCom* Court's directive that the Commission articulate the *legal basis* for its authority to promulgate the ossifying "interim" regime. But even if the FCC had stated that it intends to comply with the *WorldCom* mandate at some point, the FCC's nearly six years of delay is unreasonable, as are the excuses proffered.

A. *The six-year delay.* The FCC cites inapposite cases to claim a nine- or even ten-year delay of agency action is reasonable. Opp. 16-18. None of these cases is remotely analogous to this situation: a remand delay by an agency that has been directed to articulate a valid legal basis for existing rules.⁸ What we have

⁸ See Opp. 16-18. In *Her Majesty the Queen of Right of Ontario v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990), addressed a rulemaking proceeding regarding the scientific effects of acid rain, not the agency's statutory authority for promulgating regulations. *Harvey Radio Labs., Inc. v. U.S.*, 289 F.2d 458 (D.C. Cir. 1961), addressed an FCC delay of 10-years in processing a new application to operate on a certain radio frequency; no remand was at issue. *Action on Smoking and Health v. Department of Labor*, 100 F.3d 991 (D.C. Cir. 1996), involved an agency's fully articulated policy reasons to justify "one massive rulemaking" as an original matter when no remand or unsupported interim regulations were at issue. Here, the FCC *never* has committed to resolving *all intercarrier compensation* issues in a "massive rulemaking." At most, the FCC has expressed a vague "hope" that it would resolve the *WorldCom* mandate prospectively. Indeed, in its brief, the FCC

here is a nearly six-year delay *in complying with this Court's mandate*, a delay that has permitted the FCC *for years* to maintain rules for which the asserted legal basis this Court twice *repudiated*.

Potomac Energy Power Co. v. ICC, 702 F.2d 1026, 1035 (D.C. Cir. 1983) is instructive, as it involved a remand delay (of less than five years) following the issuance of this Court's mandate. Rather than complete its remand, the ICC initiated an entirely new proceeding – as the FCC here proposes. The Court granted mandamus “to effectuate or prevent the frustration of orders previously issued” by the Court. *Id.* at 1032; *see also id.* at 1035 (“Again and again the Commission has promised to expedite this matter, but without delivering.”). The Court issued a writ of mandamus to compel the ICC's response to a remand within sixty days (the primary remedy Core requests here).

Furthermore, the FCC has little credibility to claim that a delay of six years for agency action is not unreasonable. In response to Core's 2004 mandamus petition on this matter, which was filed on the basis of a delay of less than three years, the FCC explicitly adopted the position that “[w]hen this Court has found the mandamus remedy to be appropriate, it generally has been confronted with delays of at least three years...” Core Pet. 17, 20 (citing FCC Resp. 11)

explicitly hedges: “there may be discrete intercarrier compensation issues that the Commission can resolve prior to implementing broader reforms.” Opp. n.15.

(emphasis added). The FCC original position was correct: a delay of at least three years generally has prompted this Court to issue a writ. (*See* Core’s Pet. at n.12, citing cases with delays of three to six years.)

Also of note, in light of the FCC’s response to Core’s 2004 mandamus petition – wherein the FCC itself invoked a three-year timetable – this Court dismissed Core’s petition without prejudice, and explicitly invited Core to refile “in the event of significant additional delay.” *Id.* at 18. Plainly, the Court intended the FCC to resolve *WorldCom* and its attendant mandate *without* “significant additional delay.” It is implausible to maintain that an additional delay of several more years is not “significant” – particularly since the FCC’s opposition to the current mandamus petition shows that the FCC has no present intention of complying with the *WorldCom* mandate by providing an alternative statutory basis to that preferred in 2001 and which the Court rejected squarely.

B. *The FCC’s baseless excuses for “additional significant delay.”* The FCC advances two main excuses in support of its significant additional delay in responding to the *WorldCom* mandate. First, the FCC argues that “intercarrier compensation reform is best implemented in the context of a comprehensive rulemaking proceeding, rather than on a piecemeal basis.” Opp. 17. Second, it argues that “market developments” have led to the “diminishing importance of dial-up ISP traffic,” relegating this matter to the back burner. Opp. 19-20.

1. The problems associated with the Commission's first approach – dealing with ISP-bound traffic lumped together with every other intercarrier compensation issue – have been highlighted above. Less clear, however, is whether the Commission's litigation staff has accurately described how the Commission intends to address intercarrier compensation for ISP-bound traffic.

Recall that in response to Core's first mandamus petition, the FCC first tried to repel that petition based on a draft order addressing the *WorldCom* remand that was pending before then-FCC Chairman Powell. Opp. 12. That draft order never issued. Then, in a February 2005 report, the FCC told the Court of its "intent to use that ['broader'] proceeding as the vehicle to replace the interim compensation rules for ISP-bound traffic that this Court addressed in *WorldCom*." Opp. 12-13.⁹ The FCC's litigation counsel claims that same intent here.

But the FCC has failed to disclose to this Court what it has subtly revealed to Congress: that, since March of 2007 and at least as of December 4, 2007, there has been a *new* draft order circulating among the Commissioners in the very

⁹ Notably, neither now nor ever has the FCC provided citation for that claimed "intent." The apparent (but uncited) source for what the Commission's litigation counsel has labeled "intent," is footnote 48 of the Commission's 2005 *FNPRM*, where the Commission articulated a "hope" of dealing with the "compensation regime for all types of traffic, including ISP-bound traffic." *FNPRM*, 20 FCC Rcd at 4694 n. 48 (2005). The *WorldCom* mandate goes unmentioned. Nearly three years after articulating its "hope" and almost seven years after initiating the panacea rulemaking proceeding, that "hope" remains unrealized.

docket that deals *only* with intercarrier compensation for ISP-bound traffic, namely “CC Docket No. 99-68, Intercarrier Compensation for ISP-Bound Traffic.”¹⁰ Thus, while the FCC’s counsel asserts that the Commission’s “intent” is to address the *WorldCom* remand in the *Intercarrier Compensation* proceeding (prospectively), the FCC has announced publicly that it is deliberating on a new draft order in the docket that addresses compensation for ISP-bound traffic.

The Commission’s present consideration of another order addressing ISP-bound traffic demonstrates that something *other than* the agency’s workload is the source of delay. Opp. 22-25. Its own public statements demonstrate that its Commissioners have had no fewer than two draft orders – pending before two different FCC Chairmen – to vote on to address ISP-bound traffic. The FCC staff is getting its job done. The Commission, however, is “withholding a reviewable decision,” *In re Am. Rivers*, 372 F.3d at 418, and mandamus is thus necessary to preserve this Court’s jurisdiction.

2. The Commission also inappropriately argues that it should be allowed further delay because intervening “market developments” – *i.e.*, the shift from

¹⁰ See Attachment A. On November 7, 2007, the FCC’s Office of General Counsel filed a notice in this docket – and not the separate, “broader” docket – to advise the Wireline Competition Bureau of Core’s petition for a writ of mandamus “to require the FCC to issue an order resolving the D.C. Circuit’s remand in *WorldCom v. FCC*, 299 F.3d 429 (D.C. Cir. 2002) (regarding inter-carrier compensation for ISP-bound traffic).” See Attachment B.

dial-up to broadband-based internet service – have rendered this a “narrow issue” of “ever-diminishing” importance (to the Commission, at any rate). Opp. 19-21. This ignores Core’s stated injury. From 2001 forward, Core has not been able to bill other carriers the full rate of reciprocal compensation because of rate caps that this Court has held lacked the statutory authority to be imposed in the first instance.

The Commission’s statement also shows a misunderstanding of its order. Under the regime’s “3-to-1” ratio, if a carrier terminates more than three times the traffic it originates, then all of that traffic is *presumptively* ISP-bound, and thus subject to the rate cap. Accordingly, even if dial-up ISP traffic disappeared today, traffic over the ratio is still presumptively ISP-bound, and thus rate capped.

IV. THE FCC’S REGIME SHOULD NOT EVADE JUDICIAL REVIEW

The FCC at 24-25 makes much of this Court’s comments on the interim regime in *In re: Core*, 455 F.3d. 267 (2006). The Court, however, has never had an opportunity to consider whether that interim regime rests on a permissible construction of the FCC’s authority, as noted at length above.

The *WorldCom* Court suggested in *dicta* that the FCC might find a legal basis for its actions in 47 U.S.C. §§ 251(b)(5) and 252(d)(B)(1). 288 F.3d at 434. Were that the case, the FCC would have, or certainly should have, come forward and asserted that authority in response to the *WorldCom* Court’s mandate. The

reason it has not done so is that those provisions will not support its arbitrary regulations. For example, while ostensibly designed to limit “regulatory arbitrage,” the interim rules have only compounded existing problems and created new ones. Section 251(b)(5) speaks in terms of all “telecommunications,” and provides no hook for subdividing that statutorily-defined term into distinct baskets for discriminatory treatment. Thus, a straightforward application of § 251(b)(5) to all “telecommunications” would obviate the need for any “interim regime.”

Similarly, although the seductively named “mirroring rule” may have surface appeal, it does not in reality ensure parity of rates. Each incumbent is authorized to choose whether or not to “offer” the mirroring rates on a state-by-state basis. The incumbent (based on an unsupported delegation of authority by the FCC) is thus enabled to dictate whether the Communications Act or the “interim” rules apply. Each incumbent, of course, makes this election based on the incoming and outgoing traffic flows on its network – precisely the “regulatory arbitrage” the FCC claims to abhor. Moreover, the incumbent merely needs to “offer” this option; it is not forced to exchange traffic at the rate cap.

The related 3-to-1 ratio separates section 251(b)(5) telecommunications traffic into “voice” and “ISP-bound” baskets, even though the statute provides for no such distinction, and (as noted above) regardless of whether the traffic is actually ISP-bound. All traffic over the ratio is “presumed” ISP, and all such

traffic is subjected to the rate caps, whether actually ISP or not. Thus, even if ISP traffic were to disappear tomorrow, the interworkings of this order allow the incumbent carrier unilaterally to determine whether section 251(b)(5) of the Act applies to certain “telecommunications,” and on-going application of the rate cap would apply to other forms of traffic, such as VoIP traffic.

In any event, the “mirroring rates” are not mirrors at all. The rate caps apply only to traffic above the 3-to-1 ratio, even though the FCC found that voice and ISP-bound traffic incur the same termination costs. This rule arbitrarily rewards providers that handle roughly equal volumes of inbound and outbound traffic, and punishes specialists. As an example, if a carrier exchanges 1 billion minutes each direction, it now has a 2-billion-minute quota under which it can terminate at the state-based reciprocal compensation rate. By contrast, a specialist competing primarily for inbound traffic (ISP or not) is forced into the rate cap. Ultimately, the specialist may charge only the capped rate, while the generalist may charge the state-based reciprocal compensation rate, typically three to four times higher than the capped rate. Nothing in the statute, however, suggests that the rate for terminating “telecommunications” traffic should vary based on relative inbound and outbound traffic flows. Indeed, the whole purpose of intercarrier compensation is for one carrier to pay another for use of its network for traffic

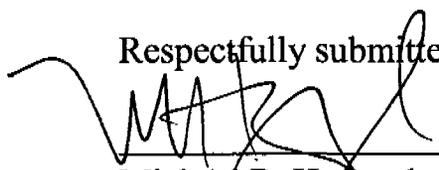
termination. The FCC has explicitly and repeatedly found that termination costs do not vary based on the type of “telecommunications” traffic terminated.

Similarly, nothing in section 252(d)(B)(i) of the Act suggests that the Commission may treat 251(b)(5) telecommunications traffic disparately. Rather, like 251(b)(5), any reading of 252(d)(B)(i) demonstrates a congressional desire to treat all telecommunications (excluding 251(g)) the same. Thus, the mirroring rule’s only possible purpose is to allow for the disparate treatment of traffic otherwise subject to equal treatment under 252(d)(B)(i) – *at the incumbent’s election*. The purpose here is not to litigate the merits of the interim regime, but to underscore *WorldCom’s* holding that the Court cannot test the validity of the “the authority claimed by the Commission” until the FCC states its “legal basis.”¹¹

V. CONCLUSION

The Court should grant Core’s petition and a writ should issue directing the FCC to resolve the *WorldCom* mandate within sixty days on pain of vacatur.

Respectfully submitted,



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Dated: March 7, 2008

¹¹ *WorldCom*, 282 F.3d at 434; *see also* n.4, *supra*.

CERTIFICATE OF SERVICE

I, Edilma Carr, do hereby certify that on March 7th, 2008, I caused true and correct copies of the foregoing REPLY BRIEF OF CORE COMMUNICATIONS, INC. ON PETITION FOR A WRIT OF MANDAMUS TO THE FEDERAL COMMUNICATIONS COMMISSIONS to be delivered by first-class mail, postage pre-paid, to the following Respondent:

FEDERAL COMMUNICATIONS COMMISSION
Sam Feder, General Counsel
Office of General Counsel
Federal Communications Commission
445 12th Street, SW, Room 8-A741
Washington, D.C. 20554

Nandan M. Joshi
Richard K. Welch
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554



Edilma Carr

TAB A



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See MCI v. FCC, 515 F 2d 385 (D.C. Cir. 1974).

FOR IMMEDIATE RELEASE
December 4, 2007

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FCC PUBLISHES LIST OF ITEMS ON CIRCULATION

Washington, DC – The Federal Communications Commission (FCC) announced that beginning today, it would publish on its public website a list of FCC Items on Circulation. On Friday, November 30, FCC Chairman Kevin Martin informed Congress of his intent to take steps to ensure equal access to information, particularly in regard to the disclosure of information about proposed rules that are scheduled to be considered by the Commission. This correspondence, sent to Congress in response to an October 2007 report from the Government Accountability Office, is intended to make the FCC's rulemaking process as fair and transparent as possible.

-FCC-

For further information, contact Clyde Ensslin at 202-418-0506.



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FCC Items on Circulation

The following list of FCC Items on Circulation provides a compilation of the Commission level items that have been circulated and are pending action by the full Commission. This list is updated on a weekly basis.

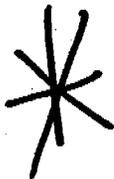
Items on Circulation

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Date Circulated	Bureau Office	Docket Number	Title
03/07/2005	MB		New AM, Mesquite, Nevada and Johnstown, Colorado
03/15/2006	EB		Enforcement Bureau, Notice of Apparent Liability for Forfeiture
06/13/2006	MB	98-120	Carriage of Digital Television Broadcast Signals 2nd Order on Recon
09/12/2006	MB		Amendment to Broadcast Carriage Rules for Cable Operators and Satellite Carriers; 47 C.F.R. §§ 76.56, 65.59 and 76.66
11/21/2006	CGB	02-278	Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Order on Reconsideration
01/29/2007	MB		Appls. for Review-Christian TV Corp., Telemundo Group et al.
01/31/2007	MB		Revision of the Licensing Procedures for FM Translator Stations MO&O and NPRM.
02/05/2007	MB		Silent Station DKVEZ, Parker, Arizona FIN 35119
02/12/2007	MB		2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MO&O (Arso Radio Corp)
02/14/2007	MB		Little Dixie Radio, Inc., et al., KESC(FM), et al., Wilburton and McAlester, OK.
02/28/2007	EB		Center for Communications Management Information v. AT&T, Memorandum Opinion and Order
03/05/2007	WCB	96-262	Petitions filed by Prairie Wave Telecommunications, Inc., SouthEast Telephone, Inc. and Cox Communications

03/06/2007	IB	97-95	Facilitating Sharing Among Various Services Within the 37.5-43.5 GHz Bands, Second Further Notice of Proposed Rulemaking and Order
03/07/2007	MB		Reconsideration of Order Granting Applications for Transfer of Control of Fox Television Stations, Inc.
03/08/2007	MB	95-31	Reexamination of the Comparative Standards for NCE
03/08/2007	MB	03-124	GM, Hughes Electronics Corp. and News Corp. Order on Recon.
03/09/2007	MB		A-O Broadcasting Corp., CLOUDCROFT, NM DKTMN(FM), FIN 89049
03/09/2007	CGB	03-84	Petition for Declaratory Ruling on Issues Contained in Thorpe v. GTE On Referral by the United States District Court for the Middle District of Florida
03/12/2007	MB		Johnson Broadcasting (CSR 5742-M); DBS Must Carry Complaint
03/12/2007	MB		KXLA(TV), Rancho Palos Verdes Broadcasters, Inc.
03/12/2007	MB		Gateway Christian School, Inc. & East KY U, MIDDLESBORO, KY FIN 87091
03/12/2007	MB	01-65	Emmetsburg, Sanborn and Sibley, Iowa, and Brandon, South Dakota, MO&O in MM Docket No. 01-65.
03/12/2007	MB		WEHM(FM) (formerly WCSO(FM)), Southampton, New York
03/12/2007	MB		KDIS-FM (formerly KYFX(FM)), Little Rock, AR
03/12/2007	MB		New AM, Las Vegas and Spring Valley, NV and Cheyenne, WY FIN 122509
03/12/2007	IB	04-112	Reporting Requirements for U.S. Providers of International Telecommunications Services, Amendment of Part 43 of the Commission's Rules, IB Docket 04-112, Report and Order
03/12/2007	MB		Cusseta Bcstg Corp., CUSSETA, GA FIN 14761
03/12/2007	MB	02-212	FM Allocation, Vinton, Louisiana, Crystal Beach, Lumberton
03/12/2007	MB		Pamplin Broadcasting-Oregon, Inc. JACKSONVILLE, OR FIN 122581
03/12/2007	WCB	93-193	Annual Access Tariff Filings from '93 through '96.
03/12/2007	MB	01-7	Distribution of Interactive Television Services Over Cable Report
03/12/2007	MB		KSDG(AM), Julian, California
03/12/2007	MB	99-322	Amendment to FM Table of Allotments, Chillicothe and Ashville, Ohio
03/12/2007	MB		Iglesia Pentecostal Cristo Missionera, for application for a New Low Power FM Broadcast station in Lorain, Ohio
03/12/2007	MB		Application of Anderson Broadcasting Company ("Anderson") for Minor Modification of Licensed Station KIBG(FM) at Bigfork, Montana.
03/12/2007	WCB	94-97	Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection through

			Virtual Collocation for Special Access and Switched Access Transport
03/12/2007	MB		WHDT-DT, Channel 59, Stuart, Florida, Petition for Declaratory Ruling that Digital Broadcast Stations Have Mandatory Carriage Rights, Petition for Partial Reconsideration, CSR-5562-Z
03/12/2007	MB		Cram Communications, LLC, DeWitt, NY FIN 135358
03/12/2007	MB		In the matter of Network Affiliates Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling.
03/12/2007	OGC	94-147	James A. Kay, Los Angeles, California (WT Docket Nos. 94-147, 97-56)
03/13/2007	WCB	96-45	Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Order on Reconsideration.
03/13/2007	MB		ALBEMARLE/INDIAN TRAIL, NC FID 52553
03/13/2007	MB		JBN, Inc. HENDERSONVILLE, NC New LPFM FIN 135228
03/13/2007	MB		St. George, Utah and Winchester, Nevada BNP-20000128ACK
03/13/2007	MB	01-105	FM ALLOCATION, SHINER, TX; Application for Review
03/13/2007	MB		BIXBY, OK New AM (Auc 32) FIN 122557 Sharon Berlin Ingles
03/13/2007	MB		Water of Life Radio, MISSOULA, MO, New LPFM FIN 135554
03/13/2007	MB		Calvary Chapel of Southern Ocean County, WEST CREEK, NJ New LPFM FIN 134675
03/13/2007	MB		Anchorage Christian Life, ANCHORAGE, AK New LPFM FIN 124523
03/13/2007	MB		Calvary Chapel Lake City, LAKE CITY, ID New LPFM FIN 132369
03/13/2007	MB		WTL Communications, Inc. GRANTS PASS, OR New LPFM FIN 135682
03/13/2007	MB		Casa de Oracion Getsemani, PROVIDENCE, RI, New LPFM FIN 124214
03/13/2007	MB		Public Radio of Camp Dennison, INDIAN HILL/CINCINNATI, OH New LPFM FIN 131453
03/13/2007	EB		Cumulus Licensing Corporation, Memorandum Opinion and Order
03/13/2007	MB		Sonido International Cristiano, Inc., NAPLES FL New LPFM FIN132718
03/13/2007	MB		American Cable Systems of California, Inc. and American Cablesystems of South Central Los Angeles, Inc. MO&O
03/13/2007	WCB	03-166	Valor Petition for Waiver of 2003 X-Factor Reductions Under Section 61.45.
03/13/2007	MB		RENO, NV, New AM, FIN 129251 Pamplin Bcstg. Two Applications for Review & 1 Petition for Reconsideration
03/13/2007	MB	03-130	Definition of Radio Markets for Areas Not Located



				in an Arbitron Survey Area
03/13/2007	WCB	99-68		Implementation of Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation
03/13/2007	WCB	05-53		Thrifty Call, Inc. Petition for Declaratory Ruling Concerning BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1
03/13/2007	MB	00-30		Texas.Net Complaint
03/13/2007	MB			WCAV(TV), Charlottesville, VA. Application for Review alleging excessive RF exposure from grant of modification application.
03/14/2007	WCB	96-45		Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order on Reconsideration of CTIA - The Wireless Association's Petition for Reconsideration.
03/15/2007	WCB	96-45		Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45, 96-262, 06-122, Order on Reconsideration.
03/29/2007	WCB	96-115		CPNI Order on Reconsideration and Fourth Report and Order
03/30/2007	EB			SM Radio, Inc., Order on Review
03/30/2007	EB			Twenty-One Sound Communications, Inc., Order on Review
04/20/2007	MB			Turquoise Bcstg Co. SEWARD, AK K276FF, FIN142638 & 5 other applications
05/02/2007	MB			KSBN Radio, Inc., DKZTY(AM) Winchester, Nevada
05/02/2007	MB			LANSING, NY New AM (Auction 32) FIN 89232 Romar Communications
05/08/2007	MB			BERLIN, NH, Shaw Communications, W251BD, FIN 141693
05/08/2007	MB			WALKERSVILLE, MD FIN 19235, Application for Review
05/09/2007	MB			Mutually Exclusive Applications for CP for new NCE TV Station on Channel 43, Sacramento, CA
05/10/2007	MB			GARDEN CITY, MO; Application for Review; FIN 87565
05/23/2007	WCB	02-6		Schools and Libraries Universal Service Support Mechanism
06/01/2007	OET	06-94		Measurement standards for Digital Television signals pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 (ET Docket No. 06-94)
06/29/2007	OGC			In the Matter of Jane Doe on Request for Inspection of Records, FOIA Control No. 2006-194.
07/09/2007	MB	05-192		Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors, to Time Warner Cable Inc., Assignees
07/19/2007	MB			The Proper Treatment of FCC Regulatory Fees Under 47 U.C.C. Section 542(g)
07/20/2007	EB			Enforcement Bureau, Notice of Apparent Liability



				for Forfeiture
07/20/2007	EB			Enforcement Bureau, Notice of Apparent Liability for Forfeiture
07/20/2007	EB			Enforcement Bureau, Notice of Apparent Liability for Forfeiture
07/20/2007	EB			Enforcement Bureau, Notice of Apparent Liability for Forfeiture
07/20/2007	EB			Enforcement Bureau, Notice of Apparent Liability for Forfeiture
07/20/2007	EB			Enforcement Bureau, Notice of Apparent Liability for Forfeiture
07/20/2007	EB			Enforcement Bureau, Notice of Apparent Liability for Forfeiture
07/23/2007	EB			Enforcement Bureau, Notice of Apparent Liability for Forfeiture
07/23/2007	WTB	00-230		Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets
07/23/2007	WTB			Morris Communications, Inc., Request for Waiver of the Installment Payment Rules and Reinstatement of 900 MHz SMR Licenses
07/23/2007	IB	00-248		Streamlining of Part 25 Rules for the Licensing of Earth Stations and Space Station Satellite Networks, IB Docket No. 00-248, Eighth Report and Order.
07/30/2007	EB			Enforcement Bureau, Notice of Apparent Liability for Forfeiture
08/02/2007	WTB			In the Matter of Application of Oklahoma Western Telephone Company, Inc. for Renewal of Broadband Radio Service Stations WLK382, WNTC500, WNTC664, and WNTD797, Clayton, Oklahoma.
08/08/2007	MB			R B Schools and Health Radio, Inc., Applications for New Noncommercial Educational FM Stations.
08/09/2007	OGC			In the Matter of Teletruth on Request for Inspection of Records, FOIA Control No. 2006-263
08/14/2007	MB			Marcus Cable Associates, LLC d/b/a Charter Communications, Petition for Determination of Effective Competition
08/22/2007	OGC			In the Matter of MSNBC Interactive News LLC, on Request for Inspection of Records.
08/23/2007	MB	01-33		FM Allocation, Caro and Cass City, Michigan; Application for Review
08/31/2007	WCB			In the matter of Deployment of Fiber Optic Cable to End-User Customer Premises, WC Docket No. 07-XXX, Notice of Proposed Rulemaking.
09/06/2007	MB			Sponsorship Identification Rules and Embedded Advertising
09/21/2007	WTB	06-150		Service Rules for the 698-746, 777-792 MHz Bands, WT Docket No. 06-150
09/25/2007	OGC			In the Matter of Solomon Oden Battle on Request for Inspection of Records, FOIA Control No. 2007-243.

09/26/2007	WTB	01-309	In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones; Petitions for Waiver of Section 20.19 of the Commission's Rules.
10/01/2007	MB	02-70	Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee
10/03/2007	WCB	02-60	Rural Health Care Support Mechanism.
10/05/2007	MB	06-121	Commission Announces Process for Completion of Media Ownership Proceeding (MB Docket No. 06-121) Public Notice.
10/11/2007	WCB	06-159	In the Matter of Petition for Interconnection of Neutral Tandem, Inc. Pursuant to 47 U.S.C. Sections 201(a) and 332(c)(1)(B), WCB Docket No. 06-159, Memorandum Opinion and Order
10/16/2007	MB	07-148	DTV Consumer Education Initiative, Report & Order
10/16/2007	EB		Enforcement Bureau, Notice of Apparent Liability for Forfeiture
10/16/2007	EB		Enforcement Bureau, Notice of Apparent Liability for Forfeiture
10/16/2007	EB		Enforcement Bureau, Notice of Apparent Liability for Forfeiture
10/16/2007	EB		Enforcement Bureau, Notice of Apparent Liability for Forfeiture
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10/16/2007	EB		Enforcement Bureau, Notice of Apparent Liability for Forfeiture
10/16/2007	MB		New FM Broadcast Stations, Pocatello, Idaho and Twin Falls, Idaho, FIN 87656
10/16/2007	MB		Mutually exclusive applications for a construction permit for a new noncommercial educational DTV television station to operate on Channel *26, Tulsa, OK.
10/16/2007	WCB	07-45	Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such deployment Pursuant to Section 706 of the Telecommunications Act of 1996.
10/17/2007	EB		Enforcement Bureau, Notice of Apparent Liability for Forfeiture
10/17/2007	EB		Enforcement Bureau, Notice of Apparent Liability for Forfeiture
10/19/2007	WCB	04-440	Petitions of Verizon and Qwest for Forbearance under 47 U.S.C. section 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services.
10/29/2007	WCB	05-337	High-Cost Universal Service Support et al.
10/29/2007	WCB	05-337	High-Cost Universal Service Support et al.

10/29/2007	WCB	05-337	High-Cost Universal Service Support et al.
11/01/2007	WCB	07-38	Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected VoIP Subscribership
11/08/2007	MB		Existing Shareholders of Clear Channel Comms., Inc. and Thomas H. Lee et al. for Consent to Transfer of Control of Ackerley B/C Fresno, LLC, et al. & Clear Channel and Aloha Station Trust for Consent to Assignment of Licenses of Jacor B/C Corp. et al.
11/16/2007	PSHSB		In the Matter of Amendment of Part 0 of the Commission's Rules to Delegate Administration of Part 4 of the Commission's Rules to the Public Safety and Homeland Security Bureau
11/19/2007	WTB	04-344	Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems.
11/20/2007	WTB	07-71	In the Matter of Implementation of Section 6002 (b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services
11/26/2007	WTB	03-66	Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational, and Other Advanced Services in the 2150-2162 and 2500-2690 MHz bands, et al.
12/05/2007	OGC		In the Matter of KEITH RUSSELL JUDD On Request for Inspection of Records.
12/05/2007	CGB	03-123	Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers
12/06/2007	OGC		In the Matter of Gulf Coast Wireless Partnership on Request for Inspection of Records, FOIA Control No. 2006-406
12/10/2007	IB		EchoStar Satellite Corporation application for Direct Broadcast Satellite service at 86.5 W.L. and Spectrum 5 Petition for Rulemaking for service at 114.5 W.L.
12/21/2007	WCB	99-217	Promotion of Competitive Networks in Local Telecommunications Markets
12/27/2007	PSHSB	02-55	FCC Provides Guidance for Submission of Requests for Waiver of June 26, 2008 Deadline for Completion of 800 MHz Rebanding, WT Docket No. 02-55
01/03/2008	OET	02-55	Improving Public Safety Communications in the 800 MHz Band, WT Doc. No. 02-55, ET Doc. No. 00-258; ET Doc. No. 95-18, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking.

last reviewed/updated on January 04, 2008

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TAB B



Federal Communications Commission

890 Record(s) Found For Proceeding:99-68

Record 1 through 20 displayed

Proceeding: 99-68 Date Received/Adopted: 11/07/07 Document Type: LETTER File Number/Community: Case No. 07-1446 Filed on Behalf of: Office of General Counsel Filed By: FCC Attorney/Author Name: Daniel M. Armstrong Complete Mailing Address: 445 12th Street SW Washington, DC 20554 View	Type Code: LT Date Released/Denied: Total Pages: 1 DA/FCC Number: Date Posted Online: 11/16/07
Proceeding: 99-68 Date Received/Adopted: 09/08/06 Document Type: NOTICE File Number/Community: Filed on Behalf of: Level 3 Communications, LLC Filed By: Harris, Wiltshire and Grannis Attorney/Author Name: John T. Nakahata Complete Mailing Address: 1200 18th Street, NW Suite 1200 Washington, DC 20036 LETTER	Type Code: NO Date Released/Denied: Total Pages: 16 DA/FCC Number: Date Posted Online: 09/11/06 LETTER
Proceeding: 99-68 Date Received/Adopted: 12/23/05 Document Type: WITHDRAW File Number/Community: Filed on Behalf of: Lawler, Metzger, Milkman & Keeney, LLC Filed By: Attorney/Author Name: Ruth Milkman Complete Mailing Address: 2001 K Street NW, Suite 802 Washington, DC 20006 WITHDRAWAL OF COUNSEL	Type Code: WD Date Released/Denied: Total Pages: 1 DA/FCC Number: Date Posted Online: 12/23/05
Proceeding: 99-68 Date Received/Adopted: 08/29/05 Document Type: NOTICE File Number/Community: Filed on Behalf of: BellSouth Corporation Filed By: Attorney/Author Name: Bennett L. Ross Complete Mailing Address: 1133 21st Street, NW Suite 900 Washington, DC 20036 NOTICE	Type Code: NO Date Released/Denied: Total Pages: 21 DA/FCC Number: Date Posted Online: 08/30/05
Proceeding: 99-68 Date Received/Adopted: 08/03/05	Type Code: NO Date Released/Denied:

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF GENERAL COUNSEL

Memorandum

TO: Director, Reference Information Center
Chief, Wireline Competition Bureau

FROM: *DMA* Daniel M. Armstrong
Associate General Counsel

SUBJECT: *In re Core Communications, Inc.*, No. 07-1446. Filing of a Petition for a Writ of Mandamus in the United States Court of Appeals for the District of Columbia Circuit.

DATE: November 7, 2007

This is to advise you that, on October 31, 2007, Core Communications, Inc. ("Core") filed a Petition for a Writ of Mandamus in the U.S. Court of Appeals for the District of Columbia Circuit.

Core seeks a writ of mandamus to require the FCC to issue an order resolving the D.C. Circuit's remand in *WorldCom v. FCC*, 299 F.3d 429 (D.C. Cir. 2002) (regarding inter-carrier compensation for ISP-bound traffic).

The Court has docketed this case as No. 07-1446. The attorney assigned to handle the litigation of this case is Laurence N. Bourne.