WOMBLE
CARLYLE
SANDRIDGE
& RICE
A PROFESSIONAL LIMITED
LIABILITY COMPANY

Seventh Floor
1401 Eye Street, N.W.
Washington, DC 20005

Telephone: (202) 467-6900
Fax: (202) 467-6910
Web site: www.wcsr.com

Michael B. Hazzard
Direct Dial: (202) 857-4540
Direct Fax: (202) 261-0035
E-mail: mhazzard@wcsr.com

May 14, 2008

FILED/ACCEPTED
MAY 14 2008
Federal Communications Commission
Office of the Secretary

VIA HAND DELIVERY

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

Re: CC Docket Nos. 01-92 and 99-68: Response of Core Communications, Inc. to Wireline Competition Bureau Press Release

Dear Ms. Dortch:

On behalf of Core Communications, Inc. ("Core"), we enclose for filing an original and four copies of Core's Response to Wireline Competition Bureau Press Release. Per Rule 1.419(c), an additional two copies are included per the filing in the additional docket.

Also enclosed is a duplicate copy of this filing. Kindly date-stamp the duplicate copy and return it to the courier. If you have any questions regarding this filing, please do not hesitate to contact me.

Sincerely,

Michael B. Hazzard
Counsel for Core Communications, Inc.

Attachments

cc: **Via Hand Delivery**

Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Matthew Berry, General Counsel

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

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MAY 14 2008
Federal Communications Commission
Office of the Secretary

In the Matter of:	)	
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

RESPONSE OF CORE COMMUNICATIONS, INC.
TO WIRELINE COMPETITION BUREAU PRESS RELEASE

Michael B. Hazzard
Danielle M. Benoit
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
1401 Eye Street, N.W., Seventh Floor
Washington, DC 20005
Tel: (202) 857-4540
Fax: (202) 261-0035
Email: mhazzard@wcsr.com

Dated: May 14, 2008

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

In the Matter of:	)	
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

RESPONSE OF CORE COMMUNICATIONS, INC.
TO WIRELINE COMPETITION BUREAU PRESS RELEASE

Core Communications, Inc. ("Core"), by its undersigned counsel, submits this written ex parte presentation in the above-captioned proceedings in response to the May 2, 2008 Press Release issued by the Wireline Competition Bureau ("WCB") of the Federal Communications Commission ("Commission" or "FCC") to "refresh the record." Core reiterates the legal and policy reasons why the Commission is compelled to conclude that ISP-bound traffic is "telecommunications" traffic subject to section 251(b)(5) of the Act, 47 U.S.C. § 251(b)(5), and the Commission's cost-based pricing methodology under section 252(d)(2) of the Act and its subparts, 47 U.S.C. § 251(d)(2).[1] As a result, the Commission should respond to the

[1] Core notes that, due to the statutory grant of its forbearance petition in WC Docket No. 06-100 at the conclusion of April 27, 2007, ISP-bound traffic (and other traffic formerly subject to section 251(g) of the Act) is governed by section 251(b)(5) for rate setting purposes. Core preserves and does not waive its arguments in WC Docket No. 06-100 and in *Core Communications, Inc. v. FCC*, No. 07-1381 (D.C. Cir.). Core further notes that because Congress granted Core's relief through operation of the forbearance statute, 47 U.S.C. § 160, the Commission may not take away that relief either through a subsequent order, including any order resolving the D.C. Circuit's remand in *WorldCom v. FCC*, 288 F.3d. 429 (D.C. Cir. 2002) (subsequent history omitted). *See also Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) (noting that on the 365th day after a forbearance petition is filed, the grant becomes "Congress's decision — not the agency's"). Upon that result, the FCC cannot issue any order on the matter. *See Kickapoo Tribe of Indians. v. Babbit*, 827 F. Supp. 37, 44 (D.D.C. 1993). Any attempt by the Commission to reverse or undo the "deemed granted" congressional action is subject to *vacatur*. *Tri-State Bancorporation, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 524

remand in *WorldCom v. FCC*, 288 F.3d. 429 (D.C. Cir.) by vacating the Commission's decision in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-98, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd. 9151 (2001) (subsequent history omitted) ("*ISP Remand Order*") and by reforming intercarrier compensation in accordance with the principles set forth in *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685 (2005) ("*FNPRM*").

I. INTRODUCTION AND SUMMARY

A Commission order resolving the D.C. Circuit's *WorldCom* remand presents the Commission with an opportunity to abide by the principles articulated by the Commission over three years ago in its 2005 *FNPRM*. Core submits that the Commission should use this opportunity to further the Commission's stated unification goals, rather than to preserve "regulatory arbitrage [which] arises from different rates that different types of providers must pay for essentially the same functions." *FNPRM* at 4693-94, ¶15.

At the outset, the Commission's construction of the 1934 Communications Act, as amended by the 1996 Telecommunications Act ("Act"), compels a finding that ISP-bound calls are telecommunications as defined by section 153(43) of the Act and thus subject to section 251(b)(5) of the Act. In *WorldCom,* the D.C. Circuit rejected the view that telecommunications to ISPs could be carved out of section 251(b)(5) into section 251(g). Accordingly, section 251(b)(5) applies to telecommunications to ISPs. Any other result would require the Commission to abandon without notice and comment its interpretation of section 153(43) and its

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F.2d 562, 568 (7th Cir. 1975) (vacating order of Board of Governors issued after 91-day statutory deadline). To the extent the Commission takes a different view here than in *Sprint*, the Commission should explain its departure in detail so that all may know the Commission's view.

construction of section 251(g) as a temporary limit on section 251(b)(5). Such a result would further: (i) contradict 12 years of Commission precedent and (ii) frustrate the Commission's stated goals for "comprehensive" intercarrier compensation reform pursuant to the 2005 *FNPRM*.

Although all parties concede – and no party disputes – that a Commission holding that telecommunications to ISPs fall within sections 251(b)(5) and 252(d)(2) would lawfully respond to the *WorldCom* mandate (although the *ISP Remand Order* regime itself could not survive such a construction), some incumbent local exchange carriers ("ILECs") claim that the Commission should ignore a natural construction of the statute, and attempt to contort section 251(b)(5) to somehow exclude telecommunications to ISPs. Each of these efforts fails. First, resurrecting the "local-long distance" dichotomy for section 251(b)(5) would conflict with the Commission's past findings that it: (i) "erred" in previously adopting that construction and (ii) would "refrain from generically describing traffic as 'local' traffic because the term 'local'...is particularly susceptible to varying meanings, and significantly, is not a term used in section 251(b)(5) or section 251(g)." *ISP Remand Order* at 9164, ¶26 and 9166-67, ¶34. Second, section 251(i) merely empowers the Commission to use its general rulemaking authority in section 201 to implement provisions of the 1996 Act (in addition to provisions of the 1934 Act), including section 251, for both interstate and intrastate matters. Nothing in section 251(i) – or in section 201, for that matter – empowers the Commission to eliminate the applicability of section 251(b)(5) to "telecommunications" not otherwise subject to regulation under section 251(g), as some claim. Third, any finding that telecommunications to ISPs do not terminate upon delivery of traffic from the carrier to the ISP customer would violate the Commission's 12-year-old definition of "termination." 47 C.F.R. § 51.701(d). Fourth, any effort to call ISP-bound traffic

"interstate," and subject to section 201, under an "end-to-end" jurisdictional analysis (or otherwise), would require the Commission to convert information service providers, like ISPs, from end user customers into IXCs (long distance interexchange common carriers), thus subjecting the Internet to Title II regulation contrary to over a decade of Commission conclusions that ISPs (and other information service providers) are end users, not common carriers or long distance carriers.

The regime established in the *ISP Remand Order* is arbitrary and capricious and not based on record evidence, and the Commission should vacate it. In addition to being diametrically contrary to the Commission's policies and goals articulated in the *FNPRM*, the *ISP Remand Order*: (i) unlawfully delegates to ILECs the decision of whether the *ISP Remand Order* applies at all (*ISP Remand Order* at 9193-94, ¶89); (ii) sets an arbitrary rate of $0.0007 even though the typical cost-based section 251(b)(5)/252(d)(2) rate for telecommunications termination is 300-400% higher, as is the $0.0020-$0.0040 "zone of reasonableness" established by the Commission (*ISP Remand Order* at 9194-95, ¶90; *FNPRM* at 4693-94, ¶15); (iii) plucked from thin air a "3:1 ratio" to identify telecommunications to ISPs and to penalize new entrants by subjecting them to a lower compensation rate based on the amount of outbound traffic generated; (iv) violates section 251(b)(5) by subdividing the definition of "telecommunications," which is separately defined by statute in section 153(43), to penalize carriers that generate more incoming telecommunications traffic than outgoing telecommunications traffic. Fundamentally, the *ISP Remand Order* fails to acknowledge that the whole notion of intercarrier compensation presumes *a priori* an imbalance in telecommunications traffic – otherwise there would be no need for compensation at all.

Any Commission effort to *sua sponte* forbear from section 251(b)(5) or the section 252(d)(2) pricing standard would fail.[2] Foremost, if the Commission were to forbear from section 251(b)(5), it would have to do so for all subject telecommunications. Nothing in section 251(b)(5) or the statutory definition of telecommunications suggests that the Commission may define sub-species of "telecommunications" against which the Commission may take unilateral action. Moreover, forbearance from sections 251(b)(5) or 252(d)(2) (or any of its subparts) would leave telecommunications subject to no intercarrier compensation scheme under recent Commission precedent. The Commission already has found that such an intercarrier compensation "regulatory void" fails each of the three prongs of the section 10(a) forbearance test, 47 U.S.C. § 160(a), and a contrary finding here would thus be arbitrary and capricious.

Further, no policy rationale exists for contorting the statute in an attempt to exclude telecommunications to ISP from section 251(b)(5) or 252(d)(2). Foremost, the Commission repeatedly has concluded that telecommunications to ISPs are economically and technically indistinguishable from other telecommunications. Moreover, in its 2004 Order forbearing from the *ISP Remand Order's* growth cap and new market rules, the Commission correctly determined that dial–up telecommunications to ISPs was on the decline, and would continue to decline even upon grant of forbearance. Every piece of data on the record demonstrates this point, and there simply is no evidence to the contrary. The Commission's litigation staff confirmed the accuracy of this view as recently as May 5, 2008, when FCC counsel told a panel of the United States Court of Appeals for the District of Columbia Circuit that dial-up calls to the Internet were of diminishing importance. *See, e.g., In re Core*

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[2] In any event, forbearance applies only prospectively, not retroactively, and accordingly could not satisfy the *WorldCom* remand.

Communications, Inc., D.C. Cir. No. 07-1446, May 5, 2008 Transcript at 14 (noting that dial-up Internet "is a small and diminishing question").

At bottom, as Commissioner Furchtgott-Roth stated over seven years ago:

> Reciprocal compensation is an obscure and tedious topic. It is not, however, one that Congress overlooked. To the contrary, in describing the reciprocal compensation arrangements under sections 251 and 252, Congress went into greater detail than it did for any other commercial relationship between carriers covered under the 1996 Telecommunications Act.

ISP Remand Order at 9214 (Commission Furchtgott-Roth, dissenting). The Commission should abide by Congress's statute, and not seek to "reallocate" that authority, which only Congress can do. Any effort by the Commission to rewrite the congressionally-established statutory scheme would be would be arbitrary and capricious. Accordingly, the Commission, the courts, and the industry would best be served by Commission vacatur of its unsupported and unsupportable *ISP Remand Order*.

II. TELECOMMUNICATIONS TO ISPs ARE SUBJECT TO SECTION 251(b)(5)

Section 251(b)(5) places a statutory duty on all local exchange carriers ("LECs") "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). As the Commission has concluded, this provision applies on its face to all telecommunications traffic. The Commission's construction of the statute thus compels a finding that telecommunications to ISPs are subject to section 251(b)(5).

In the *ISP Remand Order* and elsewhere, the Commission has interpreted section 251(b)(5) as applying to all "telecommunications" not otherwise subject to section 251(g). The Commission also held that "***all such*** telecommunications not excluded by section 251(g)" are "governed by sections 251(b)(5) and 251(d)(2)." *ISP Remand Order* at 9173, ¶47 (emphasis

added). "Unless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of *all* telecommunications traffic...." *Id.* at 9166, ¶32. "[S]ection 251(g)," however, "serves as a limitation on the scope of 'telecommunications' embraced by section 251(b)(5)...."[3] *Id.* at 9170-71, ¶42. "Central" to the Commission's construction of the interplay of these statutory provisions "is the recognition that 251(g) is properly viewed as a limitation on the scope of section 251(b)(5)...." *Id.* at 9167, ¶35.

In *WorldCom*, the Court explicitly rejected the Commission's finding that section 251(g) applied to telecommunications to ISPs because: (i) no "pre-Act" obligation relating to intercarrier compensation for ISP-bound traffic exists and (ii) section 251(g) applies to calls between interexchange carriers ("IXCs") and LECs, not between LECs, as is the case for ISP-bound traffic. *WorldCom* at 433. The *WorldCom* court did nothing to disrupt the Commission's interpretation of section 251(g) as a limit on sections 251(b)(5) and 252(d)(2), or its related finding that all "telecommunications" not carved out by section 251(g) is subject to 251(b)(5). Indeed, the Commission has maintained that analysis since at least 1999, and any departure from it could serve to radically upset a myriad of Commission determinations:

- In 1999, the Commission noted that section 251(g) "is merely a continuation of the equal access and nondiscrimination requirements and nondiscrimination provisions of the [AT&T] Consent Degree until superseded by subsequent regulations of the Commission." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 407, ¶47 (1999).

- In the 2001 *ISP Remand Order*, the Commission declared that section 251(b)(5)'s reciprocal compensation regime was subject to a temporary "carve-out" in 251(g). *ISP Remand Order* at 9166, ¶32. "Unless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of *all*

[3] The categories of telecommunications carved out from section 251(b)(5) by application of section 251(g) include "exchange access," "information access," and "exchange services for such access." 47 U.S.C. §251(g).

telecommunications traffic, – *i.e.*, whenever a local exchange carrier exchanges telecommunications traffic with another carrier. Farther down in section 251, however, Congress explicitly exempts certain telecommunications services from the reciprocal compensation obligations." *Id.* Thus, "section 251(g) serves as a limitation on the scope of 'telecommunications' embraced by section 251(b)(5)…." *Id.* at 9170, ¶40.

- In a 2002 Notice of Inquiry, the Commission reaffirmed that "section 251(g) maintains the receipt of compensation requirements that apply to 'information access' services, and thus, … excepts those services from the requirements of section 251(b)(5) …." *Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, Notice of Inquiry, 17 FCC Rcd 4015, ¶9 (2002)).

- In 2004, the Commission again recognized 251(g) as a "carve out" of "the scope of section 251(b)(5) by section 251(g), which preserves certain pre-Act equal access and interconnection arrangements, including compensation arrangements." *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, 20181, ¶4 (2004) ("*Core Forbearance I Order*").

- In 2005, the Commission reiterated that section 251(g) "carved out access traffic from the scope of section 251(b)(5)." *FNPRM* at 4722, ¶79.

Thus, the *WorldCom* mandate and the Commission's construction of the Act compels a finding that ISP-bound traffic falls within sections 251(b)(5) and 252(d)(2) under the Commission's precedent.

Even if the Commission were to determine that telecommunications to an ISP is interstate, ISP calls still would be subject to section 251(b)(5) under the Commission's precedent. As noted above, the D.C. Circuit concluded in *WorldCom* that section 251(g) does not apply to ISP-bound traffic sent between LECs because: (i) no pre-1996 Act regime applied to such calls and (ii) 251(g) applies only to calls between IXCs and LECs (not just between LECs). In addition, the Commission already has held that telecommunications not subject to

251(g) are subject to 251(b)(5), regardless as to whether they constitute "interstate" or "intrastate" telecommunications. *See, e.g., ISP Remand Order* at 9172, ¶45 (recognizing that the issue does not rest on whether a call is "local" but rather on "telecommunications" under section 251(b)(5) and the narrow limitations set forth in section 251(g)). [4]

Finally, the FCC has never sought notice or comment on how to respond to the *WorldCom* mandate. At best, the Commission has expressed a vague hope that it might resolve prospective issues associated with the *WorldCom* mandate through the FCC "global" intercarrier compensation proceeding. *FNPRM* at 4694, n.48 ("In this proceeding the Commission hopes to address the compensation regime for all types of traffic, including ISP-bound traffic"). "The APA requires an agency to publish 'notice' of 'either the terms or substance of the proposed rule or a description of the subject and issues involved,' in order to 'give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments,' and '[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise statement of their basis and purpose.'" *American Radio Relay League, Inc. v. FCC*, 2008 WL 1838387, at *4 (D.C. Cir. 2008). With regard to the *WorldCom* remand, the Commission has not published anything giving any notice of what action

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[4] Section 251(b)(5) has applied to interstate telecommunications between wireless carriers and LECs for years. Although never subjected to judicial review, the Commission has determined that wirless-wireline calls that originate and terminate in the same Major Trading Area ("MTA") fall within section 251(b)(5) of the Act. *TSR Wireless, LLC v. U S West Communications, Inc.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, 15 FCC Rcd. 11166, 11184-85, ¶31 (2000). MTAs, however, routinely cross state lines, and many calls that originate and terminate within the same MTA are interstate. As just one of many possible examples, MTA 1 covers Connecticut and large swaths of New Jersey, New York, Pennsylvania, and Vermont. Under the Commission's rules, an interstate call from a wireless customer in Vermont to a wireline customer in New Jersey is both interstate and subject to section 251(b)(5). Thus, even were the Commission to conclude that ISP-bound traffic is "interstate," such a finding would not support a conclusion that telecommunications to ISPs fall outside of the ambit of section 251(b)(5).

it is considering, let alone what action it might take. As a result, parties have no idea how to participate in the WCB-initiated "refresh" of the record.

For all of these reasons and as explained elsewhere herein, the Commission should vacate the *ISP Remand Order* and complete its global intercarrier compensation proceeding.

III. ANY DECISION ATTEMPTING TO SUBJECT ISP-BOUND CALLS TO SEPARATE RATE REGULATION PURSUANT TO SECTION 201 FAILS

In an effort to avoid straightforward application of the Commission findings under section 251(b)(5) and the D.C. Circuit's mandate that ISP-bound calls do not fall within section 251(g), some have suggested the Commission can subject telecommunications to ISPs to rate regulation under section 201 by virtue of the savings clause found at section 251(i) of the Act.[5] In addition to contradicting the Commission's holding in the *ISP Remand Order*, any such finding would: (i) contradict the Supreme Court's interpretation of section 251(i); (ii) result in the Commission's violation of its own rules; and (iii) require the Commission to subject end users to common carrier regulation under Title II of the Act.

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[5] This may be Verizon's position, although it is difficult to discern as Verizon fails to disclose its actual position in its ex parte notifications. Verizon vociferously, but without analysis, claims that telecommunications to ISP end users are not subject to section 251(b)(5), but Verizon never explains why this is the case, or what position it advocates for, other than naked references to four-year-old ex parte filings. *See* Verizon Ex Parte, CC. Docket Nos. 96-98 and 99-68 (May 9, 2008). This strikes to the heart of the problem the Commission has created due to its failure to put the regime adopted (or anything remotely resembling the regime adopted) in the *ISP Remand Order* out for public comment, either before or after the *WorldCom* remand. The public lacks the ability to meaningfully comment on action the Commission is considering because neither the Commission nor the Wireline Competition Bureau has made known with any degree of specificity what actually is under consideration. These notice failures "undermine[] the court's ability to perform the review function APA section 706 demands. That provision requires [courts] to set aside arbitrary and capricious agency decisions after reviewing 'the whole record.'" *American Radio Relay League v. FCC*, 20008 WL 153837, *12 (D.C. Cir. 2008) (Tatel, J., concurring). Parties, like Verizon, that refuse to make known the positions that they advocate in private ex parte meetings with Commission staff create material gaps in the record, and thereby place any Commission order adopted at risk upon judicial review.

A. Telecommunications To ISPs Fall Within Section 251(b)(5), Not Section 201

Telecommunications to ISPs fall within section 251(b)(5), not section 201 because, among other reasons, ISPs are not common carriers. Section 201 of the Act applies only to the actions of common carriers related to their provision of interstate telecommunications services. 47 U.S.C. § 201. "Telecommunications services" are defined as "the offering of telecommunications for a fee directly to the public or such classes of users as to be effectively available to the public." 47 U.S.C. § 153(46). ISPs simply do not provide telecommunications services; rather, they provide information services, which are outside of the parameters of section 201.

When Congress enacted the 1996 Act, it amended the definition of "common carrier" and provided that "[a] telecommunications carrier shall be treated as a common carrier under this chapter ***only to the extent*** that it is engaged in providing telecommunications services." 47 U.S.C. § 153(44) (emphasis added). Thus, for telecommunications to ISPs to fit within the framework established by Congress in section 201, telecommunications to ISPs would need to be interstate, ***and*** any such interstate transmission would have to meet the definition of a telecommunications service provided by a common carrier. ISP-bound traffic satisfies none of these prerequisites, and therefore ISP-bound traffic lawfully cannot be placed under section 201.

First, "[a]lthough ISPs ***use*** telecommunications to provide information service, they are not themselves telecommunications providers" (as are long distance carriers). *Bell Atlantic v. FCC*, 206 F.3d 1, 7 (D.C. Cir. 2000) (emphasis added). ISPs are end users that purchase telephone exchange service, not exchange access service, in order to make and receive calls. As defined by the Act:

> TELEPHONE EXCHANGE SERVICE. – The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(47). ISPs subscribe to LEC services typically pursuant to LEC telephone exchange tariffs. Accordingly, to the extent that ISPs purchase telephone exchange service, there can be no doubt they are customers, not carriers, and therefore outside of section 201.

Second, even if it could be said that the underlying "transmission" between one end user and an ISP end user is interstate (even though ISPs purchase telephone exchange service), ISP-bound calls still would not properly fall within section 201 because any ostensibly interstate portion of the transmission does not constitute a "telecommunication service" provided by a "common carrier." Section 201 of the Act applies only to common carriers in activities related to their provision of interstate telecommunications services. *See, e.g. Federal Trade Commission v. Verity Int'l, LTD*, 124 F. Supp. 2d 193, 201-02 (S.D.N.Y. 2000); *Global NAPS Bell Atlantic-New Jersey, Inc.*, 287 F. Supp. 2d 532, 546 (D.N.J. 2003). ISPs are neither common carriers nor do they provide interstate telecommunications services. As the *Verity* court noted:

> The FCC long has distinguished between basic telecommunications carriage – principally ordinary telephone and long distance service – and enhanced services…." [Indeed,] the FCC declined to institute comprehensive regulation for enhanced services and found that vendors of enhanced services, defined as anything more than basic transmission service, were not engaged in common carrier activity. The Telecommunications Act of 1996 likewise distinguishes between telecommunications services and information services, stating that "a telecommunications carrier shall be treated as a common carrier under this

> chapter only to the extent that it is engaged in providing telecommunications services."

124 F. Supp. 2d at 201-02 (citations omitted). The *GNAPS* court likewise noted that the "statute is unambiguous, 'a telecommunications carrier shall be treated as a common carrier under this chapter *only* to the *extent that it is engaged in providing telecommunications services*." 287 F. Supp. 2d at 547 (emphasis original). Because ISPs are not common carriers and do not provide interstate telecommunications services, calls to ISPs simply cannot fall within the ambit of section 201.

B. Section 251(i) Does Not Enable The Commission To Selectively Overwrite Substantive Provisions Of The Act

Section 251(i) of the Act provides as follows: "Nothing in this section shall be construed to limit or otherwise affect the Commission's rulemaking authority under section 201." 47 U.S.C. § 251(i). As interpreted by the Commission and affirmed by the Supreme Court, section 251(i) merely empowers the Commission to use its general rulemaking authority in section 201 to implement provisions of the 1996 Act (in addition to provisions of the 1934 Act), including section 251, for both interstate and intrastate matters. Nothing in section 251(i) – or in section 201, for that matter – empowers the Commission to eliminate the applicability of section 251(b)(5) to "telecommunications" not otherwise subject to regulation under section 251(g), as some have supposed. As repeatedly noted herein, the term "telecommunications" is statutorily defined in section 153(43), and applies to calls to ISPs. Indeed, as is the case for section 251(g), the Commission cannot use section 251(i) to "override virtually any provision of the 1996 Act so long as the rule [the Commission] adopted is in some way, however remote, linked to LECs' pre-Act obligations." *WorldCom*, 288 F.3d at 433. Rather, section 251(i) merely enables the Commission to implement these provisions through section 201.

In 1996, the Commission determined that nothing in "the savings clause of section 251(i) require[s]" the Commission "to conclude that sections 251 and 252 address only intrastate issues." *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶91 ("*Local Competition Order*") (subsequent history omitted). Rather, the Commission held that section 251(i) "merely affirms that the Commission's preexisting authority continues to apply" and "does not act as a limitation on the agency's authority under section 251." *Id.* The Commission went even further and noted that the ties set forth in the Act linking sections 201 and 251 demonstrate that section 251 – including section 251(b)(5) – "govern[s] interstate matters" and "contradicts the argument that section 251 addresses intrastate matters exclusively." *Id.* at ¶90.[6]

The Supreme Court affirmed the Commission's view in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). There, "the incumbent LECS ... argue[d] ... that" section 201(b) "rulemaking authority is limited to those provisions dealing with purely ***interstate and foreign*** matters, because the first sentence of [section] 201(a) makes it 'the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor ....'" *Id.* at 378 (emphasis in original). Rejecting this view, the Court found it "is impossible to understand how this use of the qualifier "interstate or foreign" in [section] 201(a), which limits the class of common carriers with the duty of providing communication service, reaches forward into the last sentence of [section]

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[6] Indeed, a "savings" provision cannot preserve rights that would be inconsistent with the provisions of the Act itself. *AT&T Corp. v. Central Office Tel.*, 524 U.S. 214, 226 (1998); *see also Texas & Pac. Ry. v. Abilene Cotton Oil, Co.*, 204 U.S. 426, 446 (1907). Section 251(i) clarifies that section 251 does not divest the Commission of jurisdiction over interstate traffic. Section 251(i) does not mean, however, that the Commission's authority to regulate interstate traffic is unaffected by the 1996 Act. As the Commission previously found, section 251(i) "grants discretion to the FCC to preserve [its] existing rules and tariffing requirements to the extent that they are consistent with the [1996 Act]." *Local Competition Order* at 15808, ¶610.

201(b) to limit the class of provisions that the Commission has authority to implement." *Id.* Thus, the Court concluded, "the grant in [section] 201(b) means what it says: the Commission has rulemaking authority to carry out the 'provisions of this Act,' which include section 251 and 252, added by the Telecommunications Act of 1996," *id.*, and sections 251 and 252 – including section 251(b)(5) and 252(d) – do not apply to intrastate services only. The Commission may not use its authority to implement the Act to eliminate or otherwise "overwrite" substantive provisions of the Act.

C. To Classify Telecommunications To ISPs Under Section 201, The Commission Would Have To Violate Its Own Precedent

Any effort by the Commission to classify telecommunications to ISP end users under section 201 would independently violate the Commission's precedent with regard to the definition of termination and contradict the dichotomy maintained by the Commission between "telecommunications services" and "information services." Any such a result would not survive judicial review.

"Termination" for purposes of reciprocal compensation under section 251(b)(5) means the "delivery of that traffic from [the terminating carrier's] switch to the called party's premises." 47 U.S.C. § 51.701(d). There can be no doubt that a call to an ISP satisfies this definition, as ISP are end users, and in the case of a dial-up call, the "called party." Indeed, ISPs buy telecommunications services from LECs so that they can receive telephone calls from other end users, and part of the service that a LEC provides is the delivery of traffic from the LEC's switch to the called party, which may happen to be an ISP.

Any conclusion that a call does not terminate upon receipt by the end user (here, the ISP) but at some other point contradicts the Commission's rules and precedent. Whether the end user provides an information service (be it Internet access, voicemail, conference bridging,

or some other service) has nothing to do with termination. For these reasons, the *Bell Atlantic* court specifically disputed the Commission's conclusion that a call to an ISP does not "terminate" at the ISP. As the court stated, "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP." *Bell Atlantic*, 206 F.3d at 7. The Commission has never changed its definition of "termination." Any change of this 12-year-old definition could only be made after notice and comment. The Commission never has sought such notice and comment, nor has it ever offered any alternative definition or concept. Without question, a LEC's delivery of a call to any end user – even an ISP end user – results in termination under the Commission's rules and orders.

Since the inception of the 1996 amendments to the Act (and before), the Commission has maintained a bright line between regulation of telecommunications services and information services.[7] The Commission's definition of "termination" has supported the separate regulatory treatment of telecommunications services and information services by focusing on the LEC's delivery of telecommunications services to the end user, even in cases where the end user is an information services provider, such as an ISP.

Re-adoption of the discredited "end-to-end" theory would eviscerate the Commission's longstanding definition of "termination" and intertwine telecommunications services and information services. There can be no doubt that a LEC's provision of

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[7] In its landmark *Universal Service Report*, the Commission concluded that the Act's "information service" and "telecommunications service" definitions establish mutually exclusive categories of service: "when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it offers an 'information service' even though it uses telecommunications to do so." Report to Congress, 13 FCC Rcd 11501, 11520, ¶39 (1998). "When an entity offers subscribers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications,' it does not provide telecommunications; it is using telecommunications." *Id.* at ¶41.

telecommunications services to an ISP goes no further than the ISP's premises. From there on out, the ISP provides various types of information services to its customers. The end-to-end analysis would thus require the Commission to combine the telecommunications service and the information service in order to identify the ostensible "end points" of a call. To the extent these "end points" are in different states (or are largely presumed, without analysis, to be in different states), the Commission would have to exercise its section 201 authority and regulate the call end-to-end under Title II of the Act. This would result in the Commission's placement of information services within the ambit of section 201 as "telecommunications services" provided by "common carriers" for the first time.

As Commissioner Furchtgott-Roth noted over seven years ago: "The Commission would act far more responsibly if it simply recognized that ISP-bound traffic comes within section 251(b)(5). To be sure, this conclusion would mean that the Commission could not impose on these communications any rule that it makes up, as the agency believes it is permitted to do under section 201(b)," but it would result in a judicially sustainable order. *ISP Remand Order* at 9215-16 (Commissioner Furchtgott-Roth, dissenting). For all of these reasons, the Commission should rely on section 251(b)(5) to regulate telecommunications to ISPs and vacate the *ISP Remand Order* as contrary to Congress's directives in the Act.

IV. SECTION 251(b)(5) CANNOT BE CONSTRUED TO PERMIT THE APPLICATION OF DIFFERENT TYPES OF REGULATIONS TO TELECOMMUNICATIONS TRAFFIC

The Commission has repeatedly found that section 251(b)(5) applies to all "telecommunications," and nothing in the statute suggests that the Commission may subdivide "telecommunications" for rate discrimination purposes, nor may the Commission delegate its rate setting obligations to bodies wholly separate and apart from the Commission. Furthermore,

even if such a construction of section 251(b)(5) were possible, a Commission order maintaining such discrimination would be arbitrary and capricious because the Commission has repeatedly found that no economic or technical basis exists to support such discrimination, and moreover, the Commission's stated goal is to unify intercarrier compensation rates, not to preserve disparate rates, which results in regulatory arbitrage. *See, e.g.*, *FNPRM* at ¶¶1-4. As the D.C. Circuit has held, however, "an agency does not act rationally when it chooses and implements one policy and decides to consider the merits of a potentially inconsistent policy in the very near future." *ITT World Communications v. FCC*, 725 F.2d 732, 754-755 (D.C. Cir. 1984). The FCC may only "defer the resolution of other issues when the issues decided were not inextricably related to the issues deferred." *Id.* at 754. Preserving piecemeal regulation that creates an arcane scheme applicable only to telecommunications that are "ISP-bound" is antithetical to the Commission's *FNPRM* goals, and therefore unsustainable. Any order resolving the *WorldCom* remand must accordingly vacate the *ISP Remand Order* or otherwise square it with on-going unification efforts pursuant to the *FNPRM*. On the merits, the Commission must address its notice and comment shortcomings and provide a rational justification – along with supporting data – for the *ISP Remand Order* regime, including but not limited to: (i) the delegation of authority to the ILECs to determine whether the regime applies at all; (ii) the growth caps and new market rules; (iii) the rate cap; and (iv) the "3:1 ratio" and "mirroring rule."[8] Because,

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[8] The Commission must also recognize that it has never offered any technical studies or data to support the regime it promulgated in the *ISP Remand Order*. Under the Administrative Procedure Act's notice and comment requirements, "[a]mong the information that must be revealed for public evaluation are the 'technical studies and data' upon which the agency relies." *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006). "In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decision to propose particular rules." *Conn. Light & Power v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982). Here, the Commission never sought comment on the "interim regime" established seven years ago in the

however, the *ISP Remand Order* cannot be squared with either the Communications Act or the policy goals set forth in the *FNPRM*, the Commission should vacate the *ISP Remand Order*. In the alternative, the Commission must at least justify the *ISP Remand Order* in accordance with the Act and the Commission's findings in related proceedings, including the *FNPRM*.

A. The Commission Cannot Delegate The Authority To Establish Rates To ILECs

A congressional delegation is a necessary antecedent to FCC action, and administrative agencies may issue regulations only pursuant to authority delegated to them by Congress. *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005). Nothing in the Act or otherwise allows the FCC to delegate to private companies – here, the ILECs – to determine whether the *ISP Remand Order* rate regime applies.

"[W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 556 (D.C. Cir. 2004). Indeed, "subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization." *Id.*, 565. Here, nothing in the Act or its amendments suggests that the Commission may subdelegate ratemaking decisions to ILECs, and absent such a congressional authorization, the *ISP Remand Order's* subdelegation to ILECs violates the Commission's statutory authority.

Under the *ISP Remand Order*, neither the Commission nor the state commissions (that actually have rate setting responsibilities under the Act, *see e.g.*, 47 U.S.C. § 252 (d)(1)-(2))

ISP Remand Order. Moreover, the *ISP Remand Order* identifies no technical studies or data upon which it relied in devising the "interim regime."

make a determination on the rate that telecommunications carriers must pay for telecommunications presumed to be terminated to ISPs. Rather, the FCC delegated without authority this ability to the ILECs. Specifically, the *ISP Remand Order* allows ILECs to determine (unlawfully) whether the regime applies on a state-by-state basis. In so doing, ILECs became imbued with the authority to set rates outside of the pricing standards established under section 252. Under the "new market" rule, ILECs were able to set a rate of zero ($0.00) for new entrants, and under the "growth cap" rule ILECs were able effectively to reduce the average per minute rate by enforcing a cap on compensable minutes. Similarly, through the "3:1" ratio, ILECs were further given the ability to manipulate the per minute rates competitors ultimately could receive for telecommunications traffic termination. Nowhere in the Act has Congress empowered the Commission to delegate a to a private enterprise or commercial entity any rate setting ability, and accordingly, the *ISP Remand Order's* delegation to ILECs is unlawful.

B. Any Order Resolving The *WorldCom* Remand Must Adequately Justify The *ISP Remand Order's* Discriminatory Growth Cap And New Market Rules

In the *ISP Remand Order*, the Commission established without notice and comment: (i) a growth cap that limited the amount of intercarrier compensation a carrier could receive for terminating telecommunications to ISPs and (ii) a new market rule that set an intercarrier compensation rate of $0.00 for carriers terminating telecommunications to ISPs in "new markets." *ISP Remand Order* at 9188-89, ¶81 and 9191-92, ¶86. In 2004, the Commission forbore from on-going application of the "growth cap" and "new market" rules, noting in part that these rules "create[] different rates for similar or identical functions." *Core Forbearance I Order* at 20186, ¶21 (2004). That finding alone compels Commission vacatur of the *ISP Remand Order*.

Notwithstanding the Commission's forbearance from the growth cap and new market rules, the industry was subject to these regulations for well over three years, and those regulations never have received judicial review on the merits. *WorldCom,* 288 F.3d at 434. Because these rules established a "different rate for similar or identical functions," they are not justifiable under the Commission's existing precedent the section 252(d) pricing standard, or the unification principles established in the *FNPRM.*[9] Moreover, the Commission has never offered a reasoned explanation for their issuance, nor did the Commission ever provide an opportunity for notice and comment on the growth cap and new market rule. As a result, those regulations were arbitrary and capricious upon issuance in form as well as in substance.

C. Any Order Resolving The *WorldCom* Remand Must Adequately Justify The *ISP Remand Order's* Discriminatory Rate Caps

The Commission in the *ISP Remand Order* also established a traffic termination rate of $0.0007 per minute, even though the section 251(b)(5)/252(d)(2) "zone of reasonableness" for that function ranges from approximately $0.0020 to $0.0040 per minute under the Commission's proxies, and section 251(g) exchange access rates for that identical functionality often are in excess of $0.01 per minute and in some instances reach as high as $0.13 per minute. The Commission repeatedly has found that there is no economic or technical

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[9] To sustain the discriminatory treatment that results among LECs under the *ISP Remand Oder*, the Commission must "articulate with reasonable clarity its reason for decision" and demonstrate that they were "applied without unreasonable discrimination." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970); *accord Fresno Mobile Radio v. FCC*, 165, F.3d 965, 970 (D.C. Cir. 1999); *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 80-81 (1st Cir. 1993). A Commission determination is not just and reasonable if it "treat[s] similar situations in dissimilar ways." *Garret v. FCC*, 513 F.2d 361, 366 (D.C. Cir. 1987); *Southwestern Bell Tel. Co. v. FCC*, 781 F.3d 209, 216 (D.C. Cir. 1986). The *ISP Remand Order* regime treats telecommunications to ISPs disparately without any rationale basis, treats ILECs and CLECs differently without any rationale basis, and, in its original form, contained a "new market" rule and "growth cap" that impermissibly rewarded existing market participants while inhibiting new and recent entrants with no or small bases of traffic in the market.