Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of	
Developing a Unified Intercarrier Compensation Regime	CC Docket No. 01-92
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

SUPPLEMENTAL COMMENTS OF VERIZON AND VERIZON WIRELESS ON INTERCARRIER PAYMENTS FOR ISP-BOUND TRAFFIC AND THE *WORLDCOM* REMAND

Michael Glover
Of Counsel

Scott H. Angstreich
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

John T. Scott, III
VERIZON WIRELESS
1300 I Street, NW
Suite 400 West
Washington, DC 20005
(202) 589-3740

Karen Zacharia
Amy P. Rosenthal
VERIZON
1515 North Court House Road
Suite 500
Arlington, Virginia 22201
(703) 351-3175

Counsel for Verizon and Verizon Wireless

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Developing a Unified Intercarrier Compensation Regime	CC Docket No. 01-92
IP-Enabled Services	WC Docket No. 04-36
Establishing Just and Reasonable Rates for Local Exchange Carriers	WC Docket No. 07-35

SUPPLEMENTAL COMMENTS OF VERIZON[1] AND VERIZON WIRELESS ON INTERCARRIER PAYMENTS FOR ISP-BOUND TRAFFIC AND THE *WORLDCOM* REMAND

INTRODUCTION AND SUMMARY

A coalition of providers from all corners of the communications industry, including Verizon, has urged the Commission to adopt comprehensive intercarrier compensation reform in the immediate term.[2] Verizon has also recently put forward its own, comprehensive proposal for intercarrier compensation reform, which builds upon the "dial" framework AT&T introduced in July and the coalition's proposal, as well as other plans already filed with the Commission.[3]

In pursuing comprehensive compensation reform, however, the Commission must not lose sight of its obligation to respond to the D.C. Circuit's remand in *WorldCom, Inc. v. FCC*,

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[1] In addition to Verizon Wireless, the Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

[2] *See* Letter from AT&T, CompTIA, CTIA, Global Crossing, ITIC, NAM, New Global Telecom, PointOne, Sprint Nextel Corp., TIA, T-Mobile, Verizon, and the VON Coalition to Chairman Martin and Commissioners Copps, McDowell, Adelstein, and Tate, CC Docket No. 01-92 (Aug. 6, 2008).

[3] *See* Letter from Susanne Guyer, Verizon, to Chairman Martin and Commissioners Copps, McDowell, Adelstein, and Tate *et al.*, CC Docket No. 01-92, CC Docket No. 96-45 (Sept. 12, 2008).

288 F.3d 429 (D.C. Cir. 2002), by issuing — no later than November 5, 2008 — "a final, appealable order that explains the legal authority" for the Commission's reaffirmation of earlier rulings that "exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5)."[4] The D.C. Circuit has held that the *ISP Remand Order*[5] will be "vacated on November 6, 2008, unless the court is notified that the Commission" has responded to the remand "before that date."[6] Therefore, any order released before November 6, 2008 that adopts comprehensive, prospective reform should also contain the Commission's response to the D.C. Circuit's *WorldCom* remand. If the Commission does not release an order comprehensively reforming intercarrier compensation by that date, the Commission should issue a stand-alone order responding to the D.C. Circuit's *WorldCom* remand.

If the *ISP Remand Order* were vacated as a result of the D.C. Circuit's mandamus order, it would throw the industry into disarray, as carriers attempt to determine the effect of the vacatur on their existing contractual arrangements governing intercarrier payments for ISP-bound traffic, as well as for wireless calls and other calls that had been subject to the Commission's mirroring rule. In addition to this uncertainty going forward, Core Communications has already stated its intent to pursue "retroactive relief" against carriers that have exchanged ISP-bound traffic with it over the past seven years under the *ISP Remand Order* payment regime.[7] Others would likely follow suit, potentially forcing the industry to revisit — and, likely, to relitigate — their billing and payments over the past seven years for all of the calls

[4] *In re Core Communications, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) ("*2008 Core Mandamus*").

[5] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") (subsequent history omitted).

[6] *2008 Core Mandamus* at 862.

[7] *Id.* at 860.

that had been exchanged under the rate caps. Although Verizon believes that claims such as Core's will prove meritless, the last thing the industry needs is years of additional litigation over both future and past payments for ISP-bound traffic and for calls that had been subject to the mirroring rule.

In responding to the D.C. Circuit's directive, the Commission should provide that court with the legal analysis it has found lacking in the Commission's prior orders. As shown below, the Commission can amply support its consistent conclusion that the § 251(b)(5) reciprocal compensation regime does not extend to ISP-bound traffic. As the Commission has repeatedly held, ISP-bound traffic is *inter*state, *inter*exchange traffic, while § 251(b)(5) applies to *intra*exchange (or local) traffic. That interpretation of § 251(b)(5) is the most reasonable reading of that provision, in light of the text, structure, and history of the Telecommunications Act of 1996 ("1996 Act").

The alternative reading of § 251(b)(5) that some commenters support — that it covers *all* "telecommunications" exchanged between *all* carriers — cannot be squared with the text, structure, and history of the 1996 Act. Moreover, interpreting § 251(b)(5) so broadly will not aid the Commission in its pursuit of comprehensive intercarrier compensation reform, but instead puts at risk the Commission's plenary authority under § 201 over jurisdictionally interstate traffic, including all forms of Internet and IP-based traffic. That is because Congress tasked the "State commission[s]" — not this Commission — with the duty to "establish any rates" for reciprocal compensation. 47 U.S.C. § 252(c)(2). Although the Commission has authority to establish rules to implement the pricing standard for reciprocal compensation, it is far from clear that the Commission — if it were to seek to regulate *all* telecommunications through § 251(b)(5) — could do more than establish a statutory pricing "standard" or "methodology" that "the States

[] will apply," "determining the concrete result in particular circumstances."[8] Consequently, such an approach could shift to the states similar authority over IP and other interstate services – contrary to the Commission's policy objectives and § 251(i). The Commission, therefore, could find its efforts at intercarrier compensation reform thwarted, with more than 50 state commissions engaged in independent rate-setting for *all* telecommunications, including VoIP and other IP traffic. On the other hand, as Verizon has explained elsewhere, continuing to interpret § 251(b)(5) as limited to *intra*exchange (and intraMTA) traffic will bolster — not thwart — the Commission's legal authority to adopt the type of comprehensive reform of intercarrier compensation for all traffic that Verizon and providers from all corners of the communications industry support.[9]

In addition, as the Commission has long found, ISP-bound traffic is both *inter*state and *inter*exchange traffic and, therefore, is subject to the Commission's authority under § 201 over jurisdictionally interstate traffic. The Commission has previously justified the ISP payment regime it adopted in the *ISP Remand Order* as a valid exercise of its § 201 authority, and no court has called those justifications into question; on the contrary, in 2006, the D.C. Circuit expressly upheld the Commission's rate caps and mirroring rule. The Commission, therefore, can retain the ISP payment regime, either as part of a new, comprehensive intercarrier compensation regime, or — in a stand-alone order — pending the Commission's adoption of such comprehensive reform.

As the D.C. Circuit has made clear, a reviewing court will give considerable deference to such a reasoned interpretation of ambiguous provisions of the 1996 Act. There is no dispute that

[8] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 384 (1999).

[9] *See* Letter from Donna Epps, Verizon, to Marlene H. Dortch, FCC, CC Dockets No. 01-92, WC Docket No. 04-36, WC Docket No. 06-122, *attachment at* 26-30 (Sept. 19, 2008).

ISP-bound traffic is interstate, and therefore subject to this Commission's exclusive jurisdiction if it does not fall within the scope of § 251(b)(5). And the particular manner in which the Commission exercised its authority in crafting the ISP-bound traffic rules in 2001 is both eminently reasonable and entitled to deference. Moreover, interpreting § 251(b)(5) to exclude ISP-bound traffic for the reasons set forth below is reasonable and is likely to be affirmed. Accordingly, there is every reason to believe the Commission will be upheld if it simply provides the explanation that the D.C. Circuit found lacking in the Commission's prior orders.

Nonetheless, the Commission need not stop there, and should find further that it would reach the same result even if § 251(b)(5) were interpreted to include ISP-bound traffic. Specifically, the Commission should find that, even if ISP-bound traffic *were* covered by § 251(b)(5) — notwithstanding that it is interexchange traffic — the Commission would forbear from § 251(b)(5) insofar as it covered such traffic, and would regulate such jurisdictionally interstate traffic instead under its § 201 authority. The Commission should find further that — even if ISP-bound traffic *were* included in § 251(b)(5) and the Commission did *not* forbear — it would use its authority to implement § 252(d)(2) to establish a separate pricing rule for ISP-bound traffic, namely, the ISP payment regime it established in the *ISP Remand Order*. Providing such a comprehensive view of the Commission's authority under the 1996 Act will make doubly sure that the Commission will not have to revisit this issue on remand for a fourth time.

BACKGROUND

The history of the 1996 Act's reciprocal compensation provision, the Commission's prior decisions interpreting that provision, and its prior rulings regarding ISP-bound traffic provide an important backdrop against which any order on remand from *WorldCom* will be measured. Therefore, Verizon discusses that history at some length, here.

A. Federal and State Intercarrier Compensation Regimes Prior to the 1996 Act

Following the breakup of the Bell System into separate long-distance and local telephone companies, the Commission and state commissions established access charges, which long-distance carriers (including AT&T) paid to local telephone companies for the use of their local network facilities to complete interexchange calls. Under the Commission's initial access-charge regulations, Enhanced Service Providers ("ESPs") — a category that includes ISPs — were to pay the same access charges that applied to interexchange carriers ("IXCs").[10] The Commission found that ESPs are "[a]mong a variety of users of access service," and that an ESP "obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location."[11] In imposing access charges on both IXCs and ESPs, the Commission was following the terms of the Modification of Final Judgment ("MFJ"), in which Judge Greene held that BOCs "will carry traffic between the information service providers and their subscribers" and "*will earn access charges* for providing this service."[12]

The Commission subsequently decided for policy reasons — namely, to reduce the cost of access for ESPs — to permit ESPs to purchase their access service at the rates set forth in local exchange carriers' ("LECs") state tariffs for local business lines, in which case ESPs would not pay per-minute interstate access charges for traffic carried over those local business lines.

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[10] *See* Third Report and Order, *MTS and WATS Market Structure (Phase I)*, 93 F.C.C.2d 241, 344 (1983); *see also* Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 76 (1983) ("*MTS and WATS Market Structure*"); Notice of Proposed Rulemaking, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305, ¶ 2 (1987).

[11] *MTS and WATS Market Structure* ¶ 78.

[12] *United States v. AT&T*, 552 F. Supp. 131, 190 (D.D.C. 1982) (emphasis added).

The Commission thereby effectively set a per-minute access charge of $0, while adopting the rate in state tariffs as the new *federal* rate ESPs would pay.[13]

Under the access charge regimes, there were often situations in which two carriers cooperated either to originate or to terminate an interexchange call, such as where an independent telephone company or a competitive access provider was not connected directly to an interexchange carrier, but instead connected indirectly to that interexchange carrier through one of the local telephone carriers. In these arrangements, the two local telephone companies would jointly originate or terminate access traffic. The Commission established rules requiring the two local telephone companies to share the access charges.[14]

Finally, shortly before the 1996 Act, some states began opening their local telephone markets to competition. State commissions adopted new intercarrier compensation regimes for the exchange of local traffic between competing local telephone companies, while maintaining their existing access-charge regimes for situations in which the two carriers handled interexchange calls. The Illinois commission, for example, adopted "one compensation structure for the termination of 'local' traffic and the existing switched access charges for the termination

[13] Although the Commission later suggested, in a 1997 decision retaining this "ESP exemption," that "it is not clear that ISPs use the public switched [access] network in a manner analogous to IXCs," the Commission did *not* accept the argument that ESPs are — in fact — end users that never should have been subject to access charges in the first place and, therefore, that no exemption was required. First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982, ¶¶ 344-348 (1997), *petitions for review denied*, 153 F.3d 523 (8th Cir. 1998); *see id.* App. B, ¶ 193; *see also* Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 4524, ¶ 56 (1991).

[14] *See, e.g.*, Memorandum Opinion and Order, *Access Billing Requirements for Joint Service Provision*, 4 FCC Rcd 7183, ¶¶ 21-26 (1989); Memorandum Opinion and Order and Request for Supplemental Comments, *Amendment of Part 69 of the Commission's Rules To Ensure Application of Access Charges to All Interstate Toll Traffic*, 102 F.C.C.2d 1243 (1985).

of all other traffic."[15] Similarly, while the California commission established "bill and keep for *local* calls," it also held with respect to *interexchange* traffic that "CL[E]Cs will pay terminating access charges based on the LEC's existing switched access tariffs."[16] These state commissions referred to the new intercarrier compensation regime to apply to the exchange of local traffic as "reciprocal compensation."[17]

B. Reciprocal Compensation in the 1996 Act

Congress enacted the 1996 Act against this background of existing federal and state access-charge regimes applicable to interexchange traffic, and the then-recently adopted state "reciprocal compensation" regimes applicable to the exchange of local traffic. Like the state commissions, Congress established a new compensation regime for local traffic, but left the existing access-charge regimes intact. Indeed, the legislative history is clear that "nothing in th[e] section [of the Senate bill that became 47 U.S.C. § 251] is intended to affect the

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[15] *Illinois Bell Tel. Co.*, No. 94-0096, 1995 Ill. PUC LEXIS 230, at *208 (Ill. PUC Apr. 7, 1995).

[16] *Order Instituting Rulemaking*, No. 95-12-056, 1995 Cal. PUC LEXIS 966, at *48, *49 (Cal. PUC Dec. 20, 1995) (emphasis added); *see also, e.g.*, *Petition of MCI Telecommunications Corp.*, 1995 Ind. PUC LEXIS 399, at *34 (Ind. PUC Nov. 21, 1995) (establishing "the form and amount of compensation to be paid for completion of local calls between MCI's and Ameritech Indiana's respective networks"); *Application of City Signal, Inc.*, No. U-10647, 1995 Mich. PSC LEXIS 32, at *43 (Mich. PSC Feb. 23, 1995) (establishing compensation rules "for local calls"); *Washington Utils. & Transp. Comm'n v. U S West Communications, Inc.*, No. UT-941464, 1995 Wash. UTC LEXIS 47, at *38 (Wash. UTC Oct. 31, 1995) (establishing "inter-company compensation for the termination of local calls"); *Application for Electric Lightwave*, No. 96-021, 1996 Ore. PUC LEXIS 7, *11-*12 (Ore. PUC Jan. 12, 1996) ("compensation arrangements for the exchange of local and Extended Area Service (EAS) traffic"); *Application of MFS Intelenet of Pennsylvania*, No. A-310203F0002, 1995 Pa. PUC LEXIS 89, at *4 (Pa. PUC Dec. 13, 1995) (expressing "desire that the parties would agree to an interim compensation rate for the termination of local calls").

[17] *E.g.*, *Illinois Bell Tel. Co.*, 1995 Ill. PUC LEXIS 230, at *205-*209; *Petition of MCI Telecommunications Corp.*, 1995 Ind. PUC LEXIS 399, at *38; *Application of MFS Intelenet of Pennsylvania*, 1995 Pa. PUC LEXIS 89, at *2-*5.

Commission's access charge rules." H.R. Conf. Rep. No. 104-458, at 117 (1996); *see* S. Rep. No. 104-23, at 22 (1995) (same).

First, as the state commissions had already done, Congress adopted a new "reciprocal compensation" mechanism for local traffic exchanged by competing local exchange carriers.[18] Unlike other provisions that apply to all telecommunications carriers (*e.g.*, § 251(a)), Congress included the provision creating this new mechanism in a section of the Act that, by its terms, applies only to interconnecting "local exchange carrier[s]." 47 U.S.C. § 251(b). Congress required these LECs to establish "compensation arrangements for the transport and termination of telecommunications [traffic]" that were to be "reciprocal" — that is, each LEC was obligated to enter into such arrangements with other LECs, which unlike IXCs would both "transport *and terminat[e]*" the traffic received from the originating LEC. *Id.* § 251(b)(5) (emphasis added). The inclusion of reciprocal compensation on the § 271 competitive checklist for *local* competition, *see id.* § 271(c)(2)(B)(xiii), further demonstrates that Congress was creating a new compensation regime applicable only to local calls, just as state commissions, prior to the 1996 Act, had adopted "reciprocal compensation" obligations for local calls.

Second, in the accompanying pricing provision, Congress shed further light on the intended scope of the reciprocal-compensation obligation, providing that the obligation was intended "for the mutual and reciprocal" recovery of costs for telephone "calls" that "originate" on one carrier's network and "terminat[e]" on the interconnecting carrier's network. *Id.* § 252(d)(2)(A)(i) ("recovery by each carrier of costs associated with the transport and termination on [its] network facilities of calls that originate on the network facilities of the other carrier"); *id.* § 252(d)(2)(A)(ii) ("such terms and conditions determine such costs on the basis of

[18] As explained below, the Commission also adopted rules governing the compensation due for wireless intraMTA traffic.

a reasonable approximation of the additional costs of *terminating* such calls") (emphasis added). These terms collectively confirm that the scenario envisioned by Congress involved the "mutual and reciprocal" exchange of traditional telephone "calls," rather than the very different (and unique) technical configuration in which an ISP and its customer lock up what is essentially a temporary dedicated connection, which may be kept in place for a long period of time and over which virtually all of the traffic flows from the ISP to the customer. They also confirm that Congress necessarily excluded interexchange calls transferred to an IXC and traffic routed through an ISP, because those calls do not terminate on the IXC's network or the network of the carrier with the ISP customer.

Third, § 251 contains a savings clause that makes clear that, in enacting provisions to create local competition, Congress did not modify the FCC's authority over rates for interstate traffic. Section 251(i) provides that "[n]othing in this section shall be construed to limit *or otherwise affect* the Commission's authority under section 201," which includes its *pre-existing* authority over interstate access traffic, whether voice calls or information services, such as Internet access traffic. *Id.* § 251(i) (emphasis added). Congress also enacted § 251(g), which preserves existing "interconnection restrictions and obligations (including receipt of compensation)" for the provision by LECs of "exchange access[and] information access . . . to interexchange carriers and information service providers," as well as the Commission's authority to "supersede[] by regulation[]" those existing obligations. *Id.* § 251(g).

C. The Commission Interprets § 251(b)(5) in the *Local Competition Order*

The Commission first promulgated rules implementing § 251(b)(5) in its *Local Competition Order*.[19] Virtually all commenters to address the issue agreed with the Commission's tentative conclusion that "Congress intended to confine [§ 251(b)(5)] to local traffic." *Local Competition Order* ¶ 1032. The Commission accordingly held that "section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area." *Id.* ¶ 1034; *see id.* ("reciprocal compensation . . . is intended for a situation in which two carriers collaborate to complete a local call" and "do[es] not apply to the transport or termination of interstate or intrastate interexchange traffic"); *id.* ¶ 1037 ("section 251(b)(5) obligations apply to all LECs in the same state-defined local exchange service areas").[20] The Commission found that this "reading of the statute is confirmed by section 252(d)(2)(A)(i)," which "provides for recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." *Id.* ¶ 1034 (internal quotation marks omitted).

The Commission also expressly rejected a commenter's claim that § 251(b)(5) was not limited to *intra*exchange and required "mutual compensation between a local exchange carrier and *any other entity*," including long-distance carriers.[21] In response to that claim, the

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[19] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

[20] These determinations were reflected in the rules the Commission adopted. *See, e.g.*, 47 C.F.R. §§ 51.701, 51.703 (1996) (requiring LECs to "establish reciprocal compensation arrangements for transport and termination of *local telecommunications traffic*," defined as traffic "that originates and *terminates within a local service area*," and with termination defined as "delivery of [local] traffic to the called party's premises") (emphases added).

[21] Reply Comments of Frontier Corp. at 19, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (May 30, 1996) (emphasis added).

Commission held that the 1996 Act "preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic." *Local Competition Order* ¶ 1033. The Commission also rejected attempts by IXCs to use the interconnection obligation in § 251(c)(2) to achieve the same result — replacing access charges with reciprocal compensation charges. *See id.* ¶¶ 175, 189. The Commission held that "interconnection" in § 251(c)(2) "refers only to the physical linking of two networks" and does not establish compensation requirements for the "transport and termination of traffic." *Id.* ¶ 176. Therefore, the Commission concluded, IXCs remained subject to the "access charge[]" regime, which was "not affected by [the Commission's] rules implementing section 251(c)(2)." *Id.* ¶ 176.

With respect to wireless providers, the Commission concluded that, although wireless providers should not be treated as local exchange carriers generally subject to § 251(b), *see id.* ¶ 1004, LECs would be obligated, pursuant to § 251(b)(5) and § 252(d)(2), "to enter into reciprocal compensation arrangements with all CMRS providers . . . for the transport *and termination* of traffic on each other's networks," *id.* ¶ 1008 (emphasis added); *see also id.* ¶ 1041 (interpreting § 251(b)(5) to create a "duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to any telecommunications carriers," which includes "local traffic transmitted between LECs and CMRS providers"). However, for wireless carriers, the Commission concluded that the local calling area is not the state-commission-defined local calling areas for wireline calls, but instead the Major Trading Areas ("MTA") that are "CMRS providers' license areas . . . established under federal rules." *Id.* ¶ 1043.

Although numerous parties sought review of the *Local Competition Order*, no party took issue with the Commission's interpretation of § 251(b)(5) and § 252(d)(2), which limited those sections to local (or intraMTA) calls that originate and terminate on the networks of two interconnected carriers. CompTel, however, sought review of the Commission's interpretation of § 251(c)(2), which the Eighth Circuit upheld. *See Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1073 (8th Cir. 1997). Finally, although the Eighth Circuit concluded that the Commission lacked authority to establish pricing rules, including reciprocal compensation rules, for wireline traffic — a determination the Supreme Court would reverse — the court concluded that 47 U.S.C. § 332(c)(1)(B) provided the Commission with additional rulemaking authority for wireless traffic. The court therefore upheld the Commission's reciprocal compensation rules "as those provisions apply to CMRS providers," and concluded that those rules remained valid regardless of the scope of the Commission's authority over wireline traffic under § 251(b)(5). *Iowa Utils Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997).

D. ISP-bound Traffic and the *ISP Declaratory Ruling*

Although Congress sought through the 1996 Act to encourage companies to offer competing local telephone service to individuals and businesses, *see ISP Remand Order* ¶ 21, numerous competitive LECs ("CLECs") decided instead to provide service to ISPs exclusively (or nearly so). These CLECs saw, in ISPs, the opportunity to claim entitlement to tens (or hundreds) of millions of dollars in reciprocal compensation payments, if they could convince state regulators to require the payment of reciprocal compensation on this unique type of traffic. These CLECs sought reciprocal compensation for this traffic, despite the fact that it is very different from a traditional telephone "call" and instead involves what is essentially a dedicated connection that is set up by the dial-up ISP, that is kept in place for a long period of time, and where virtually all of the information traversing that connection flows back to the dial-up

customer. Indeed, if such traffic were subject to reciprocal compensation at per minute rates established for voice calls, the compensation would flow solely in one direction, and incumbent LECs ("ILECs") would owe these CLECs significant sums: so much that CLECs could provide service to ISPs for free or pay the ISPs to be their "customers."

Although ILECs disputed these CLECs' efforts, numerous state commissions initially held that ISP-bound traffic is "local traffic" and is therefore subject to reciprocal compensation. Almost uniformly, these state commissions determined that traffic delivered to an ISP is composed of two separate communications, one of which is a local call that terminates at the ISP's modem banks, the other of which is an interstate information service from the modem bank to the Internet. These conclusions were flatly inconsistent with the Commission's precedent, as (pre-merger) AT&T — one of the biggest recipients of payments for ISP-bound traffic — and others had acknowledged in filings with the Commission in 1997. As they explained — correctly — the Commission had made clear "as early as 1983" that traffic delivered to an ISP is *not* local, because such traffic "*do[es] not terminate* at the [I]SP's" modems, but instead continues on to "a distant data center or Internet site."[22]

In February 1999, the Commission issued its first order expressly addressing the question whether, under § 251(b)(5) and the Commission's 1996 regulations implementing that section, payment of reciprocal compensation is required for traffic delivered to an "ISP server in the

[22] Comments of AT&T Corp. at 29-30, *Usage of the Public Switched Network by Information Service and Internet Service Providers*, CC Docket Nos. 96-263, *et al.* (Mar. 24, 1997) ("*AT&T PSTN Usage Comments*") (emphasis added); Reply Comments of AT&T Corp. at 17, *Usage of the Public Switched Network by Information Service and Internet Service Providers*, CC Docket Nos. 96-263, *et al.* (Apr. 23, 1997) ("*AT&T PSTN Usage Reply Comments*").

same local calling area" as the calling party.[23] Based on its "traditional[]," end-to-end jurisdictional analysis, the Commission held that ISP-bound traffic is interexchange and "do[es] not terminate at the ISP's local server," but instead "continue[s] to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." *Id.* ¶¶ 10, 12. Therefore, the Commission concluded that ISP-bound traffic is "non-local interstate traffic" and that "the reciprocal compensation requirements of section 251(b)(5) . . . and . . . of the Commission's rules do not govern inter-carrier compensation for this traffic." *Id.* ¶ 26 n.87.

The Commission did not explain, however, why its jurisdictional analysis was dispositive of the question whether ISP-bound traffic is subject to reciprocal compensation under federal law. The conclusion was likely sufficiently self-evident to the Commission, given its long history of applying the same end-to-end analysis to determine both the jurisdiction and the compensation regime applicable to traffic, that the Commission simply noted in footnotes, without extended discussion, that it had interpreted § 251(b)(5) to apply to local traffic only. *See id.* ¶¶ 7 n.18, 26 n.86. The Commission, however, did not cite, or quote, its reciprocal-compensation regulations; nor did it address the express terms of § 252(d)(2)(A), which provides that the reciprocal-compensation obligation extends only to traffic that "originates" on one carrier's network and "terminat[es]" on an interconnecting carrier's network; nor did it rule on CLECs' claims that ISP-bound traffic is "telephone exchange service" as defined in § 153(47). Moreover, even though the harmful effects on local competition of state-commission decisions requiring reciprocal compensation for ISP-bound traffic were evident at that time, the Commission offered no policy rationale for its interpretation of the Act and those regulations.

[23] Declaratory Ruling and Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689, ¶ 4 (1999) ("*ISP Declaratory Ruling*") (subsequent history omitted).

The Commission went on to confuse matters by resolving a second issue in a contradictory manner. Even though it had just held that federal law does *not* require reciprocal compensation, the Commission held further that "state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation *should* be paid for this [ISP-bound] traffic." *Id.* ¶ 25 (emphasis added). Congress, however, provided that, in arbitration proceedings, state commissions must abide by "the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251." 47 U.S.C. § 252(c)(1). The Commission did not explain how its conclusion that state commissions may require payment of reciprocal compensation for ISP-bound traffic could be squared with its simultaneous determination that neither § 251(b)(5) nor the Commission's regulations required payment of compensation for such traffic.

E. The D.C. Circuit's Review of the *ISP Declaratory Ruling*

ILECs and CLECs filed petitions for review of the *ISP Declaratory Ruling*. Confronted with an internally contradictory order, the D.C. Circuit held that the Commission "ha[d] not provided a satisfactory explanation" for its conclusion that its traditional jurisdictional analysis determines whether ISP-bound traffic is local traffic subject to § 251(b)(5). *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 8 (D.C. Cir. 2000). The court also questioned whether ISP-bound traffic is "telephone exchange service" or "exchange access," although it noted that any Commission interpretation of these ambiguous terms with respect to ISP-bound traffic "would be subject to judicial deference." *Id.* at 8-9. The court therefore vacated and remanded the *ISP Declaratory Ruling* to the Commission to provide the missing explanation. *See id.* at 9.

The D.C. Circuit did *not* take issue, however, with the Commission's end-to-end analysis of ISP-bound traffic, which had led the Commission to conclude that ISP-bound traffic is jurisdictionally interstate. On the contrary, the court found that there is "*no dispute* that the

Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate." *Id.* at 5 (emphasis added). Nor did the court intimate, let alone hold, that ISP-bound traffic *is* "local traffic." Indeed, two judges on the *Bell Atlantic* panel subsequently rebuked the CLECs for claiming that the court had reached such a determination: during oral argument on appeal of the *ISP Remand Order*, those two judges pointedly noted that the *Bell Atlantic* court was "rigorously agnostic" on the question whether § 251(b)(5) requires payment of reciprocal compensation for ISP-bound traffic. Transcript of Oral Argument at 10-11, *WorldCom, Inc. v. FCC*, Nos. 01-1218, *et al.* (D.C. Cir. argued Feb. 12, 2002) ("I'm at a loss as to how you can pass the straight face test with the notion that we've given some strong signal that this is a local call.") ("*WorldCom* 2002 Oral Arg. Tr."); *see also* Transcript of Oral Argument at 14, *WorldCom, Inc. v. FCC*, No. 00-1002 (D.C. Cir. argued Feb. 21, 2001) (*Bell Atlantic* held only that FCC's decision "w[as] not adequately supported") ("*WorldCom* 2001 Oral Arg. Tr.").

F. The Commission Revisits § 251(b)(5) and ISP-bound Traffic in the *ISP Remand Order*

In 2001, the Commission issued its order on remand from the D.C. Circuit's *Bell Atlantic* decision. In the *ISP Remand Order*, the Commission again held that ISP-bound traffic is not subject to reciprocal compensation under § 251(b)(5). *See ISP Remand Order* ¶¶ 34, 42. Despite the fact that no party had challenged the Commission's earlier determination that § 251(b)(5) is limited to local traffic, the Commission concluded, based only on the term "telecommunications" in § 251(b)(5) that, *"[u]nless subject to further limitation,"* § 251(b)(5) "would require reciprocal compensation for transport and termination of *all* telecommunications traffic" a LEC "exchanges . . . with another carrier." *Id.* ¶¶ 31-32, 46 (first emphasis added)). The Commission held that § 251(g) provided one such "further limitation," *id.* ¶ 32, carving out

ISP-bound traffic, among other types of traffic. *See id.* ¶¶ 34, 37, 44. The Commission, therefore, had no need to determine whether other terms or provisions limited the scope of § 251(b)(5), so it did not address key statutory terms that must be analyzed to determine the scope of § 251(b)(5).

The Commission also reaffirmed that, on an "end-to-end basis," ISP-bound traffic is "indisputably interstate in nature," because "[t]he 'communication' taking place is between the dial-up customer and the global computer network of web content," not "with ISP modems." *Id.* ¶ 59; *see id.* ¶¶ 58, 63-64. The Commission reaffirmed that, "[f]or jurisdictional purposes, [it] views LEC-provided access to enhanced service providers, including ISPs, on the basis of the end points of the communication, rather than intermediate points of switching." *Id.* ¶ 57. Because the "end-to-end communication[] involving" the ISP continues on to the Internet and "cross[es] state lines" — the "'communication' taking place is between the dial-up customer and the global [Internet]" — the link that connects the ILEC's end-user customer to the CLEC's ISP customer "is properly characterized as *interstate* access." *Id.* ¶¶ 57, 59. In sum, "ISP traffic is properly classified as interstate, and it falls under the Commission's section 201 jurisdiction," which the Commission found that Congress, in § 251(i), had expressly preserved. *Id.* ¶ 52 (footnote omitted); *see id.* ¶¶ 48-51.

Exercising its § 201 jurisdiction over this interstate ISP-bound traffic, the Commission found that "convincing evidence in the record" showed that state commission decisions requiring the payment of reciprocal compensation for ISP-bound traffic had "distort[ed] the development of competitive markets" and had led to "classic regulatory arbitrage" of nearly $2 billion annually — enabling competitors to provide free service to ISPs and to pay ISPs to be their customers, as well as inducing outright fraud. *Id.* ¶¶ 2, 5, 21, 29, 70 n.134, 76. The Commission

further found that this regulatory arbitrage opportunity had affirmatively discouraged competitors from providing local voice service, which was incompatible with Congress's goals. *See id.* ¶¶ 21, 70-71, 87 n.171.

To "limit the regulatory arbitrage opportunity presented by ISP-bound traffic," the Commission adopted an interim payment regime, which established declining caps on the rates for such ISP-bound traffic. *Id.* ¶ 2; *see id.* ¶¶ 78, 80-81. The Commission based the rate caps on "intercarrier compensation rates in [then-]recently negotiated agreements," as well as the ability of "CLECs . . . to recover more of their costs from their ISP customers." *Id.* ¶¶ 85, 87. Indeed, the Commission expressly found that, to the extent a carrier's costs of delivering ISP-bound traffic exceeded the rate caps, that carrier could "recover those amounts from its own end-users." *Id.* ¶ 80 n.151. The Commission also adopted a "mirroring rule," which required an incumbent seeking to cap its payments to competitors with ISP customers to accept payment for voice traffic subject to § 251(b)(5) from *all* competitors (including wireless carriers) under the same § 201 rate caps for ISP-bound traffic. *See id.* ¶ 89 n.179. The Commission also adopted two rules limiting the number of minutes of ISP-bound traffic for which a competitor could seek payment under the new federal regime. *See id.* ¶¶ 78, 81 (describing growth cap and new markets rule).

G. The D.C. Circuit's Review of the *ISP Remand Order*

On review, the D.C. Circuit rejected the Commission's reliance on § 251(g), but "ma[d]e no further determinations." *WorldCom*, 288 F.3d at 432, 434. The court carefully noted that it was *not* deciding a host of other issues, including "the scope of the 'telecommunications' covered by § 251(b)(5)," "whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access' . . . or neither," or "whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5)." *Id.* at 434. Although the judges, during oral

argument, recognized that "[§] 251(b)(5) is bristling with ambiguity," the Court did not address the key statutory terms necessary to "resolve the ambiguity of [§] 251(b)(5)," leaving it to the Commission to do so in the first instance. *WorldCom* 2002 Oral Arg. Tr. at 37-38. Nonetheless, the judges did recognize one well-accepted limit on the scope of that provision, noting that "everyone agrees" that "[§] 251(b)(5) doesn't apply" to "a regular interexchange carrier phone call." *Id.* at 9-10. The court also made clear it was sympathetic to the Commission's policy determinations and emphasized that "there may well be other legal bases" for the Commission's rules, which it therefore declined to vacate. *WorldCom*, 288 F.3d at 430, 434; *WorldCom* 2002 Oral Arg. Tr. at 9 ("[T]here are other escape hatches from 251(b)(5), other than 251(g).").

H. The Commission Revises its ISP Payment Regime in the *Core Forbearance Order*

In 2004, the Commission modified its ISP payment regime, by granting (in part) a forbearance petition.[24] Specifically, the Commission eliminated the growth cap and new markets rule, each of which had limited the number of minutes of ISP-bound traffic for which a competitor could seek payment. *See Core Forbearance Order* ¶¶ 7, 9, 15. The Commission, however, retained the rate caps and the mirroring rule, finding that "the rate caps and mirroring rule remain necessary to prevent regulatory arbitrage and promote efficient investment in telecommunications services and facilities." *Id.* ¶ 19. The Commission noted that the rate caps "send more accurate price signals and substantially reduce market distortions," which "otherwise would result from the availability of reciprocal compensation for ISP-bound traffic." *Id.* ¶ 18. And the Commission found that the mirroring rule "promotes [its] goal of a more unified intercarrier compensation regime." *Id.* ¶ 19.

[24] Order, *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) ("*Core Forbearance Order*") (subsequent history omitted).

The D.C. Circuit upheld the Commission's decision to eliminate the growth cap and new markets rule, while retaining the rate caps and mirroring rule. The court "quoted . . . at length" — and with approval — the Commission's determination that, "because ISP-related traffic flows overwhelmingly in one direction, a reciprocal compensation regime creates an opportunity for CLECs 'to sign up ISPs as customers and collect [compensation from], rather than pay [] compensation' to, other carriers," leading to "'classic regulatory arbitrage' that had . . . negative effects" on the development of "'viable local telephone competition.'" *In re Core Communications, Inc.*, 455 F.3d 267, 279 (D.C. Cir. 2006) ("*2006 Core Mandamus*") (quoting *ISP Remand Order* ¶ 21).

I. The D.C. Circuit Gives the Commission a Date Certain By Which To Respond to Its *WorldCom* Remand

On July 8, 2008, the D.C. Circuit granted a petition for a writ of mandamus, directing the Commission to issue "a final, appealable order" by November 5, 2008, responding to the court's 2002 decision in *WorldCom* remanding the *ISP Remand Order*. *2008 Core Mandamus* at 862. The court made clear that, in granting mandamus, it was *not* directing the Commission "to promulgate any particular rule or policy" in its response to the *WorldCom* remand. *Id.* at 859. Instead, the court required the Commission to "*explain[]* the legal authority" for its consistent conclusion that ISP-bound traffic is "exclude[d] . . . from the reciprocal compensation requirement of § 251(b)(5)" and instead remain subject to the Commission's established authority over interstate services under § 201, pursuant to which it adopted "interim intercarrier compensation rules" for such traffic. *Id.* at 862. In other words, the court's order requires the Commission only to provide the legal explanation — based on the key statutory terms in the 1996 Act, as well as its structure and history — that was absent from the prior Commission orders.

In granting the mandamus petition, the D.C. Circuit was clear that it did "not second-guess the FCC's policy judgment to pursue a comprehensive solution to the problem of intercarrier compensation." *Id.* at 859. Nor did the court preclude the Commission from responding to the *WorldCom* remand "in a more comprehensive" order that also addresses other issues. *Id.*

DISCUSSION

I. THE COMMISSION SHOULD REAFFIRM THAT ISP-BOUND TRAFFIC IS INTEREXCHANGE TRAFFIC THAT IS NOT SUBJECT TO § 251(B)(5) AND, INSTEAD, IS SUBJECT TO THE COMMISSION'S § 201 AUTHORITY

A. It Is Well-Established that ISP-Bound Traffic Is Jurisdictionally Interstate

In 2001, the Commission correctly reaffirmed that ISP-bound traffic is jurisdictionally interstate. *See ISP Remand Order* ¶¶ 57-65. As explained above, even companies with ISP customers that sought to — and did — collect tens or hundreds of millions of dollars in reciprocal compensation for ISP-bound traffic have long recognized that the Commission had made clear "as early as 1983" that traffic delivered to an ISP is *not* local, but instead "involve *interstate* transmission," because such traffic "*do[es] not terminate* at the [I]SP's" modems, but instead continue on to "a distant data center or Internet site."[25]

ISP-bound traffic is, in fact, a form of access service; in particular, Internet access. *See ISP Remand Order* ¶ 57 (explaining that the "Commission has categorized the link" that connects an end-user to an ISP as an "interstate access service"). The Commission has repeatedly found that Internet access is a jurisdictionally interstate service. In 1998, the Commission found that ADSL service is jurisdictionally interstate. *See GTE Tariff Order* ¶ 28 ("finding that GTE's ADSL service is subject to federal jurisdiction" and is "an interstate

[25] *AT&T PSTN Usage Comments*. at 29-30; *AT&T PSTN Usage Reply Comments* at 17.

service").[26] More recently, the Commission has confirmed this ruling for a variety of broadband Internet access services. *See Cable Modem Declaratory Ruling* ¶ 59 (finding that, "on an end-to-end analysis," "cable modem service is an interstate information service");[27] *Wireline Broadband Order* ¶ 110[28]; *Wireless Broadband Declaratory Ruling* ¶ 28[29]; *Broadband over Powerline Order* ¶ 11.[30] In the *Vonage Order*, the Commission likewise found that VoIP services are jurisdictionally interstate, employing the same end-to-end analysis reflected in those other orders.[31]

Consistent with its rulings regarding Internet access and VoIP services, the Commission has, without exception, applied its end-to-end analysis in concluding that ISP-bound traffic is jurisdictionally interstate. That finding dates back to at least 1983, when the Commission found that ESPs — a category that includes providers of dial-up Internet access — use "local exchange services or facilities . . . for the purpose of completing interstate calls which *transit* its location."

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[26] Memorandum Opinion and Order, *GTE Tel. Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd 22466 (1998) ("*GTE Tariff Order*").

[27] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"), *aff'd*, *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[28] Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*"), *aff'd*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

[29] Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007) ("*Wireless Broadband Declaratory Ruling*").

[30] Memorandum Opinion and Order, *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (2006).

[31] Memorandum Opinion and Order, *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, ¶¶ 17-18. (2004) ("*Vonage Order*"), *petitions for review denied*, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

MTS/WATS Market Structure ¶ 78 (emphases added). The Commission reaffirmed in 1998 that ISP-bound traffic "do[es] not terminate at the ISP[] . . . but continue to the ultimate destination or destinations." *GTE Tariff Order* ¶ 19. In 1999, the Commission reached the same conclusion, applying its end-to-end analysis to conclude that "ISP-bound traffic is non-local interstate traffic." *ISP Declaratory Ruling* ¶¶ 18, 27 n.87; *see also Advanced Services Remand Order* ("ISP-bound traffic does not originate and terminate within an exchange.").[32]

The D.C. Circuit, in reviewing the *ISP Declaratory Ruling*, recognized that "[t]here is no dispute" that the Commission was "justified in relying on" its end-to-end analysis in concluding that ISP-bound traffic is "jurisdictionally interstate." *Bell Atlantic*, 206 F.3d at 5. The Commission should continue to rely on that analysis and should reaffirm that ISP-bound traffic is jurisdictionally interstate.

B. The Commission Should Reaffirm that the § 251(b)(5) Reciprocal Compensation Duty Does Not Extend to ISP-Bound Traffic

1. The best interpretation of § 251(b)(5) — read in light of the text, structure, and history of the 1996 Act — is that the reciprocal compensation obligation applies only to intraexchange (or "local") voice calls that originate on the network of one LEC (or wireless provider) and terminate on the network of another LEC (or wireless provider) operating in the same exchange (or, in the case of wireless providers, the same MTA).

First, § 251(b)(5) cannot be interpreted by looking to the single word, "telecommunications," "considered in isolation." *Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006). Instead, the "cardinal rule" of statutory construction is that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context."

[32] Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, ¶ 16 (1999) ("*Advanced Services Remand Order*"), *vacated in part, WorldCom, Inc. v. FCC*, 246 F.3d 690 (D.C. Cir. 2001).

King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991). Therefore, "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis" *Dolan*, 546 U.S. at 486. "The meaning . . . of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). In sum, any interpretation that begins — and ends — by taking the word "telecommunications" to the "outer limits of its definitional possibilities" violates basic tenets of statutory interpretation. *Dolan*, 546 U.S. at 486.

Moreover, a focus on the word "telecommunications" ignores that § 251(b)(5) applies not to "telecommunications," but to the "transport and termination of telecommunications." *Id.* § 251(b)(5). At a bare minimum, therefore, the interpretation of § 251(b)(5) begins with this limitation, found in the text of the provision. Indeed, the Commission relied on this limitation in the *Local Competition Order*, in finding that "transport and termination of local traffic" is distinct from "access service for long distance communications," and so rejected claims that § 251(b)(5) governs the exchange of traffic between a LEC and an IXC. *Local Competition Order* ¶¶ 1033-1034. As the Commission noted, it is the LEC — not the IXC — that terminates the traffic.[33] As a D.C. Circuit judge in *WorldCom* recognized, "*everyone agrees*" that "[§] 251(b)(5) doesn't apply" to long-distance calls, "although you might think that" if you were just to read the word "telecommunications" in isolation. *WorldCom* 2002 Oral Arg. Tr. at 9-10 (emphasis added).

[33] *See id.* ¶ 1034. Although the Commission found that "transport and termination should be treated as two distinct functions" for purposes of § 251(b)(5), it "define[d] 'transport,' for purposes of section 251(b)(5), as the transmission of *terminating traffic that is subject to section 251(b)(5)*." *Id.* ¶ 1039 (emphasis added). Therefore, it is termination that defines the scope of § 251(b)(5) traffic.

The location of the reciprocal compensation duty within the 1996 Act provides further evidence of the limitations on the scope of that duty. Like the entirety of § 251(b), the reciprocal compensation obligation in § 251(b)(5) applies by its terms *only* to LECs. *See* 47 U.S.C. § 251(b) ("Each *local exchange carrier* has the following duties.") (emphasis added). The placement of the reciprocal compensation duty in § 251(b) — as well as the reference to reciprocal compensation in the competitive checklist in § 271, which was designed to ensure that *local* markets are open to competition[34] — supports the conclusion that the "telecommunications" that would be subject to reciprocal compensation is limited in scope, and does not extend to all traffic that a LEC exchanges with any other carrier or provider, but only to traffic that *terminates* in the same local calling area (exchange or MTA) where it originates.

Moreover, Congress referred in § 251(b)(5) to "*reciprocal* compensation arrangements." 47 U.S.C. § 251(b)(5) (emphasis added). Arrangements that are "reciprocal" by definition involve some shared or mutual responsibility on both sides. By contrast, by treating ISP-bound traffic as though it were the same as local telephone calls, compensation "flows overwhelmingly in one direction" so that companies with ISPs as customers "collect [compensation from], rather than pay [] compensation' to, other carriers." *2006 Core Mandamus* at 279. And this is true despite the fact that the information flows almost entirely in the opposite direction, *from* the ISP *to* the customer. There is thus nothing "reciprocal" about applying § 251(b)(5) to this unique type of traffic, which provides still further evidence that it was not the type of traffic that Congress had in mind when it adopted the reciprocal compensation provision.

Second, as the Commission correctly recognized in the *Local Competition Order*, the terms of the pricing standard for reciprocal compensation that Congress set out in § 252 provide

[34] *See* 47 U.S.C. § 271(c)(2)(B)(xiii); *AT&T Corp. v. FCC*, 220 F.3d 607, 612 (D.C. Cir. 2000).

further evidence of the limitations on the scope of the traffic subject to § 251(b)(5). Indeed, the Commission found that § 252(d)(2) "confirm[s]" its "reading of" § 251(b)(5) as limited to *intra*exchange (i.e., local) traffic. *Local Competition Order* ¶ 1034. That conclusion was correct.

As an initial matter, § 252(d)(2) makes clear that the scope of the reciprocal compensation provision extends only to arrangements that involve the "transport and termination on [one] carrier's network . . . of calls that originate on . . . the other carrier['s]" network. 47 U.S.C. § 252(d)(2)(A)(i). Thus, as in § 251(b)(5), Congress again made clear that the reciprocal compensation provision applies only to traffic that "originate[s]" on the network of one interconnecting carrier and that "terminat[es]" on the network of another interconnecting carrier. This is further confirmation that § 251(b)(5) does not extend to arrangements involving the exchange of traffic with long-distance carriers or with carriers who pass on ISP-bound traffic to their ISP customers (and, ultimately to websites across the country and around the world).

In addition, § 252(d)(2) provides still further evidence that Congress never contemplated that the reciprocal compensation obligation would apply to the type of traffic at issue here. For example, Congress provided that any compensation arrangement should provide for the "mutual and reciprocal recovery" of the costs to terminate traffic. 47 U.S.C. § 252(d)(2)(A)(i); *see id.* § 252(d)(2)(B)(i) (referring to "mutual recovery" of costs). By its terms, this again contemplates an exchange of traffic, such that compensation flows in both directions. Moreover, Congress provided that the obligation extended to "calls" that originate on one carrier's network and terminate on an interconnecting carrier's network. Congress' use of the term "calls" further suggests that Congress had traditional voice telephone calls in mind when crafting its reciprocal compensation provisions. But from a technical standpoint, voice telephone calls are

fundamentally different from ISP-bound traffic. As noted above, in the case of ISP-bound traffic, the customer and ISP establish what is essentially a dedicated connection that, while temporary, may remain connected for long periods of time. Once the connection is established, the traffic traversing the connection flows almost entirely *from* the ISP *to* the customer. Because of this unique technical configuration, treating this traffic in the same way as voice telephone calls guarantees *both* that the flow of compensation will be neither "mutual" nor "reciprocal", *and* that the compensation will flow in the opposite direction from the flow of traffic.[35] As a result, the carrier that serves the customer not only recovers none of the costs to terminate the voluminous traffic that flows from the ISP, such as the cost of the switching resources that are tied up for long periods of time, but also has to pay compensation to the carrier who delivers that traffic to it for termination. This anomalous result provides strong evidence that the reciprocal compensation obligation in § 251(b)(5) does not extend to this unique form of traffic.

Third, the text of § 251(i) provides further support for a limited reading of § 251(b)(5). That section provides that "[n]othing in" § 251 "shall be construed to limit or otherwise affect the Commission's authority under section 201." As the Commission recognized in the *ISP Remand Order*, § 251(i) does not only preserve the Commission's long-standing § 201 authority "to regulate the *interstate* access services that LECs provide to connect end-users with IXCs or information service providers." *ISP Remand Order* ¶ 48. That section is also a "'forward-looking' provision" that "expressly affirms the Commission's role in an evolving telecommunications marketplace, in which Congress anticipate[d] that the Commission [would]

[35] These factors also distinguish ISP-bound traffic from paging traffic, where the connection is kept in place for a short period of time, where the traffic involves only a small burst of limited information, and where the traffic flows in the same direction as the compensation. Paging traffic has also largely disappeared with advances in cell phone technology and penetration.

continue to develop appropriate pricing and compensation mechanisms for traffic that falls within the purview of section 201." *Id.* ¶ 50. An interpretation of § 251(b)(5) that limits it to intraexchange (and intraMTA) traffic is consistent with the rule of construction in § 251(i), as it ensures that § 251(b)(5) is not read "to limit or otherwise affect the Commission's authority under section 201."

In contrast, an interpretation of § 251(b)(5) expansive enough to encompass ISP-bound traffic would conflict with § 251(i), because it would give state commissions — under the § 252 arbitration process — authority over jurisdictionally interstate traffic. If ISP-bound traffic falls under § 251(b)(5), moreover, states and carriers may claim that § 251(b)(5) covers other Internet traffic, which would jeopardize the Commission's authority over other forms of Internet access services. For example, the Commission has found that broadband Internet access services include a "telecommunications" component. *See, e.g.*, *Cable Modem Declaratory Ruling* ¶ 39; *Wireline Broadband Order* ¶ 104. States or carriers might claim that, because "telecommunications" in § 251(b)(5) includes dial-up Internet access, states also have authority under § 251(b)(5) over the telecommunications component of broadband Internet access when more than one carrier is involved in providing broadband transmission to the ISP. Similarly, the Commission has concluded that VoIP and other IP-based services include "telecommunications" components — irrespective of whether those services are ultimately classified as telecommunications services or information services.[36] This again raises the specter that the "telecommunications" component might then be subject to state pricing authority under § 251(b)(5) when carriers exchange IP packets. These potential consequences — with more than 50 state commissions applying a patchwork of different rates and rules to inherently interstate IP

[36] Report and Order and Notice of Proposed Rulemaking, *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, ¶ 35 (2006).

traffic — provide additional reasons for the Commission to adopt an interpretation of § 251(b)(5) that limits the scope of the reciprocal compensation duty to intraexchange (or intraMTA) calls.

Finally, the historical background and the legislative history of the 1996 Act provide still further support for reading § 251(b)(5) as limited to intraexchange (and intraMTA) traffic. As explained above, immediately prior to the enactment of the 1996 Act, there were well-established compensation rules for interexchange calls, and distinct, new "reciprocal compensation" rules that state commissions were developing for local (i.e., intraexchange) calls exchanged between competing local telephone companies. Congress, in the 1996 Act, mirrored the approach of those state commissions, with § 251(b)(5) designed to address the new competitive arrangements that the 1996 Act was intended to bring about and to fill a gap that existed at that time in intercarrier compensation regimes. But Congress also made clear that, in filling that gap, it was not altering pre-existing federal authority. In §§ 251(i) and 251(g), respectively, Congress preserved the Commission's authority over interstate traffic and the pre-existing regime for exchange access traffic. *See also* H.R. Conf. Rep. No. 104-458, at 117 (1996) ("nothing in [§ 251] is intended to affect the Commission's access charge rules").

In sum, the most reasonable interpretation of § 251(b)(5) is the one the Commission has repeatedly adopted: § 251(b)(5) applies only to intraexchange and intraMTA calls, that is, to calls that originate and terminate in the same exchange (or local calling area) or the same MTA. That is exactly what the Commission's 1996 regulations provided, limiting the reciprocal compensation duty to calls that "originate[] and terminate[] within" a single "local service area" or, in the case of wireless calls, "the same Major Trading Area" — in other words, to intraexchange or intraMTA calls. 47 C.F.R. § 51.701(b) (2000). In the *ISP Remand Order*, the Commission retained its rule for wireless calls — only wireless calls that "originate[] and

terminate[] within the same Major Trading Area" are subject to reciprocal compensation. 47 C.F.R. § 51.701(b)(2). Although the Commission revised its rules for wireline calls, that rule continues to exclude all "interstate or intrastate exchange access, information access, or exchange services for such access," *id.* § 51.701(b)(1), in other words, all traffic that "travel[s] to points — both interstate and intrastate — beyond the local exchange," *ISP Remand Order* ¶ 37. Only wireline calls that remain within a single local exchange — that is, intraexchange (or local) calls — are subject to reciprocal compensation. The Commission should retain its long-standing interpretation of § 251(b)(5).

2. Nothing in the Commission's prior orders or the prior D.C. Circuit decisions reviewing those orders precludes the Commission from continuing to interpret § 251(b)(5) as limited to intraexchange and intraMTA traffic.

First, in the *ISP Remand Order*, the Commission did not reject its earlier conclusion that § 251(b)(5) applies only to intraexchange wireline calls (and, as noted above, it did not modify its rule limiting § 251(b)(5) to intraMTA wireless calls). Although the Commission stated that its "use of the phrase 'local traffic'" in its 1996 regulations implementing § 251(b)(5) had "created unnecessary ambiguities," *ISP Remand Order* ¶ 46, the Commission continued to hold that reciprocal compensation does not apply to traffic that "travel[s] to points — both interstate and intrastate — beyond the local exchange." *Id.* ¶ 37. Indeed, the rule the Commission promulgated in the *ISP Remand Order* continued to exclude from the scope of the reciprocal compensation obligation all interexchange traffic — "interstate or intrastate exchange access, information access, or exchange services for such access," 47 C.F.R. § 51.701(b)(1) — leaving only intraexchange (or, in colloquial terms, "local") traffic subject to § 251(b)(5), as was the case

with the regulations the Commission adopted in 1996. *Compare* 47 C.F.R. § 51.701(b)(1) (1996).

In addition, in revising § 51.701(b)(1) in the *ISP Remand Order*, the Commission addressed only § 251(g), which it found dispositive. Therefore, the Commission had no reason to go on to determine what "further limitations" in the Act confine "the universe of traffic that falls within subsection (b)(5)." *ISP Remand Order* ¶ 34. As shown above, the placement of reciprocal compensation within § 251(b) and § 271, the text of § 251(b)(5), § 252(d)(2), and § 251(i), and the history of the 1996 Act all provide a basis for finding such a "further limitation" on the "telecommunications" included in § 251(b)(5) that excludes ISP-bound traffic. The D.C. Circuit, in reviewing the *ISP Remand Order*, expressly recognized that the Commission could find other statutory sources for such a limitation and declined to "decide the scope of 'telecommunications' covered by § 251(b)(5)," leaving that question — and many others — to the Commission on remand. *WorldCom*, 288 F.3d at 434. Indeed, the judges themselves recognized one well-accepted limit on the scope of that provision, noting that "everyone agrees" that "[§] 251(b)(5) doesn't apply" to "a regular interexchange carrier phone call." *WorldCom* 2002 Oral Arg. Tr. at 9-10.

Second, the D.C. Circuit has also made clear that *Bell Atlantic* did not hold or suggest that the Commission had reached the wrong substantive result in the *ISP Declaratory Ruling*, when it concluded that payment of reciprocal compensation is not required for ISP-bound traffic. For example, during oral argument on the *ISP Remand Order*, the panel — which included two of the judges who decided *Bell Atlantic* — insisted that the *Bell Atlantic* court was "rigorously agnostic" on the question whether ISP-bound traffic is subject to § 251(b)(5). *WorldCom* 2002 Oral Arg. Tr. at 10-11. Similarly, during the oral argument on the *Advanced Services Remand*

Order, the panel — which also included two of the judges who decided *Bell Atlantic* — noted that *Bell Atlantic* held only that the Commission's decision "w[as] not adequately supported." *WorldCom* 2001 Oral Arg. Tr. at 14.

C. The Commission Should Reaffirm that ISP-Bound Traffic Does Not Terminate in the Exchange or MTA Where It Originates and, Therefore, Is Not Subject to § 251(b)(5)

The Commission should reaffirm its conclusion from the *ISP Declaratory Ruling* — which, as shown above, is consistent with decades of precedent before and after regarding Internet access services — that ISP-bound traffic does *not* terminate on the network of the LEC that serves the ISP customer. *See ISP Declaratory Ruling* ¶ 12 (holding that ISP-bound traffic "do[es] not terminate at the ISP's local server"). Instead, ISP-bound traffic "transit[s] [the ISP's] location," *MTS/WATS Market Structure* ¶ 78, and, thereby, "permit[s] the dial-up Internet user to communicate directly with some distant site or party (other than the ISP) that the caller has specified." *ISP Remand Order* ¶ 59.

The fact that ISP-bound traffic "travel[s] to points . . . beyond the local exchange," *id.* ¶ 37, means *not only* that such traffic is jurisdictionally interstate and subject to the Commission's § 201 authority — as explained above — *but also* that such traffic is *inter*exchange and, therefore, outside of the reciprocal compensation duty on the best reading of § 251(b)(5). Although the D.C. Circuit in *Bell Atlantic* found that the Commission "ha[d] yet to provide an explanation why this [jurisdictional] inquiry is relevant to discerning whether a call to an ISP" is subject to reciprocal compensation, 206 F.3d at 5, the Commission can readily provide that explanation.

The Commission has repeatedly used its "end-to-end analysis" to determine *both* jurisdiction *and* intercarrier compensation. Here, it simply used that analysis to determine that, on an end-to-end basis, ISP-bound traffic continues on beyond the local exchange (or MTA) and

is, therefore interexchange traffic that is not subject to § 251(b)(5). The Commission need only explain that it applied its end-to-end analysis in this manner to address the D.C. Circuit's question.

For example, the Commission has found that, on an end-to-end basis, a Feature Group A call to an end-user in another state — which is initiated by dialing a "local" telephone number — both is jurisdictionally interstate *and* is interstate, *inter*exchange traffic that is subject to interstate access charges.[37] Similarly, in addressing credit card calls, the Commission found that there was no "legal significance" in a party's "attempt to distinguish the so-called 'jurisdictional' nature of a call from its status for 'billing' purposes."[38] In short, the same end-to-end analysis that indisputably proves that ISP-bound traffic is jurisdictionally interstate *also* demonstrates that ISP-bound traffic does not terminate within the same exchange (or MTA) in which it originates and such *inter*exchange traffic is not subject to § 251(b)(5).

The fact that ISP-bound traffic "travel[s] to points . . . beyond the local exchange," *ISP Remand Order* ¶ 37, also demonstrates that ISP-bound traffic is not "telephone exchange service" as defined in the Act. *See* 47 U.S.C. § 153(47). Because ISP-bound traffic continues past the local exchange area boundaries and on to websites worldwide, carriers serving ISPs are not providing service "*within* a telephone exchange, or . . . the same exchange area", nor are they providing a "comparable" *intra*exchange service. *Id.* (emphases added). Nor are these

[37] *See* Memorandum Opinion and Order, *Access Billing Requirements for Joint Service Provision*, 4 FCC Rcd 7183, ¶¶ 21-26 (1989) ("*Access Charge Order*"). The Commission reached the same conclusion in the context of interstate, interLATA foreign exchange service, which allows a customer to dial a "local" number to reach a business actually located in another state, finding that such calls are jurisdictionally interstate and, therefore, subject to interstate access charges. *See* Memorandum Opinion and Order, *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, ¶¶ 71, 80 (1998), *recon. denied*, 15 FCC Rcd 7467 (2000).

[38] Memorandum Opinion and Order, *Teleconnect Co. v. Bell Tel. Co.*, 10 FCC Rcd 1626, ¶ 12 (1995).

communications typically "covered by the exchange service charge," *id.* — ISPs generally charge customers a separate charge for access to the Internet, which is not included within the carrier's rate for "local" service. That ISP-bound traffic does not fit within the confines of "telephone exchange service" is consistent with the Commission's long-standing view that ISP-bound traffic does not terminate at the carrier serving the ISP and is not *intra*exchange (i.e., "local") traffic.[39]

In addition, it is important to recognize that the D.C. Circuit's confusion about the relevance of the Commission's end-to-end analysis stemmed from the Commission's simultaneous — and, indeed, inconsistent — assertion that state commissions could require the payment of reciprocal compensation for such traffic even where "parties . . . do not voluntarily agree" to such payments on interstate ISP-bound traffic and even though federal law does not require them. *See ISP Declaratory Ruling* ¶ 25. As the D.C. Circuit explained, that meant that traffic "that [is] *inter*state" for jurisdictional purposes is "left to potential state regulation" and mandates — a result that struck the court as "intuitively backwards." *Bell Atlantic*, 206 F.3d at 6. But there is no reason for the Commission to repeat the inconsistency in the *ISP Declaratory Ruling*. And, indeed, the Commission did not do so in the *ISP Remand Order*, recognizing that

[39] If anything, ISP-bound traffic is a form of "exchange access." *See* 47 U.S.C. § 153 (16). Under the MFJ, which led to the establishment of the access charge regime, "information access" — that is, access services that LECs provide to information service providers — was a subset (or specialized type) of "exchange access." *See, e.g.*, *United States v. AT&T*, 552 F. Supp. 131, 196 & n.268 (D.D.C. 1982). Congress did not disturb this classification in the 1996 Act. The D.C. Circuit, moreover, has already held that the 1996 Act is "ambiguous as to whether traffic delivered to ISPs fits within 'exchange access' or 'telephone exchange service'" or neither, so that "any agency interpretation would be subject to judicial deference." *Bell Atlantic*, 206 F.3d at 9; *see also WorldCom*, 288 F.3d at 434 ("we do not decide whether handling calls to ISPs constitutes 'telephone exchange service' or 'exchange access'"). And simply explaining that this traffic does not fit within the Act's definition of "telephone exchange service" will address the D.C. Circuit's concern that, if the traffic were telephone exchange service, that could contradict the Commission's consistent conclusion that it is not local (i.e., intraexchange) traffic. *See Bell Atlantic*, 206 F.3d at 8-9.

its conclusion that ISP-bound traffic is not subject to § 251(b)(5) and, instead, is subject to the Commission's § 201 authority over jurisdictionally interstate traffic means that "state commissions . . . no longer have authority to address" the "appropriate intercarrier compensation for ISP-bound traffic" in § 252 arbitrations. *ISP Remand Order* ¶ 82. Instead, the Commission adopted a federal compensation regime for this interstate traffic, eliminating the fundamental inconsistency in its prior order.

In the *ISP Declaratory Ruling*, the Commission also recognized that some carriers prior to 1999 might have "voluntarily include[d] [ISP-bound] traffic within the scope" of their reciprocal compensation arrangements, noted that they would be "bound by those agreements," and left it to the "state commissions" to "interpret[] and enforce[]" those agreements. *ISP Declaratory Ruling* ¶ 22. The Commission's willingness to leave it to the states to interpret those pre-existing agreements — entered into before the Commission ruled and without the benefit of that ruling — likely reflected the Commission's practical inability to interpret the disparate terms of thousands of contracts nationwide. But such practical concerns did not reflect a determination that ISP-bound traffic is subject to § 251(b)(5), but rather the underlying federal policy of enforcing interconnection agreements according to their terms.[40] Nor do such practical concerns persist today, as pre-1999 interconnection agreements have been replaced by newer agreements or amended to reflect the Commission's decisions in the *ISP Declaratory Ruling* and *ISP Remand Order*.

[40] *See, e.g.*, Memorandum Opinion and Order, *Broadview Networks, Inc. v. Verizon Tel. Cos.*, 19 FCC Rcd 22216, ¶ 15 (2004) (noting that the "Commission has emphasized the importance of abiding by the terms of interconnection agreements").

D. Exercising Its § 201 Authority, the Commission Should Reaffirm Its ISP Intercarrier Compensation Regime

Because ISP-bound traffic, as explained above, is jurisdictionally interstate on an end-to-end basis, it falls within the Commission's § 201 authority. In exercising that § 201 authority — and on the same considerations regarding anti-competitive regulatory arbitrage that the Commission stressed in the *ISP Remand Order* and the *Core Forbearance Order*, and that the D.C. Circuit upheld in reviewing the latter order — the Commission can and should retain the ISP payment regime adopted in the *ISP Remand Order*.

In 2001, based on "convincing evidence in the record" that carriers had "targeted ISPs as customers merely to take advantage of . . . intercarrier payments" — offering free service to ISPs, paying ISPs to be their customers, and sometimes engaging in outright fraud — the Commission adopted an interim ISP payment regime aimed at "limit[ing], if not end[ing], the opportunity for regulatory arbitrage." *ISP Remand Order* ¶¶ 2, 70 n.134, 77, 86. Although the D.C. Circuit rejected the Commission's conclusion that it is § 251(g) that excludes interstate ISP-bound traffic from the scope of the § 251(b)(5) reciprocal compensation obligation, the court did not reach "claims [about] the interim pricing limits" the Commission adopted. *WorldCom*, 288 F.3d at 434.

Accordingly, it is wrong to assert, as one party does, that the Commission, in responding to the D.C. Circuit's remand in *WorldCom*, must offer new justifications for the four features of the ISP intercarrier payment regime: the rate caps, the mirroring rule, the growth cap, and the new markets rule.[41] No court has ever questioned the Commission's justification for those rules, and the Commission has defended them vigorously. Indeed, even Level 3 — one of the largest

[41] *See* Letter from Michael B. Hazzard, Core Communications, to Marlene H. Dortch, FCC, CC Docket Nos. 99-68, 01-92 attachment at 20-26, (May 14, 2008).

carriers with ISP customers — now "support[s] the continuation of the $0.0007 per minute cap on ISP-bound compensation, together with the mirroring rule" that requires incumbents benefiting from the rate cap to offer to exchange local voice traffic subject to that same cap.[42]

Moreover, in *Core Communications*, the D.C. Circuit expressly *upheld* the Commission's rationale for the rate caps and the mirroring rule, against the same kinds of arguments that Core again raises here. Quoting "at length" from the *ISP Remand Order*, the court accepted the Commission's conclusions that the "rate caps are necessary to prevent discrimination *between* dial-up Internet access customers and basic telephone service customers," that those caps "protect consumers of basic telephone service" from being forced to subsidize dial-up Internet access service, and that the rate caps minimize the "classic regulatory arbitrage" that reciprocal compensation for ISP-bound traffic had made possible. *2006 Core Mandamus* at 277-80 (internal quotation marks omitted). The Commission, therefore, can continue to rely on the same reasoning set forth in the *ISP Remand Order* and the *Core Forbearance Order* with regard to all four aspects of the ISP payment regime it established in 2001.

In all events, the rate caps and mirroring rule remain necessary and eminently defensible today. In 2001, the Commission drew its rate caps from then-"recently negotiated interconnection agreements," which showed a "downward trend in intercarrier compensation rates." *ISP Remand Order* ¶ 85. The final, $0.0007 per minute rate cap is consistent with Verizon's more recent experience in negotiating agreements with competing LECs. In the past several years, Verizon has entered into negotiated, and publicly filed, interconnection agreements with a number of carriers, including (pre-merger) AT&T and Level 3, that set a rate at *or below*

[42] *E.g.*, Letter from John T. Nakahata, Level 3 Communications, to Marlene H. Dortch, FCC, CC Docket Nos. 99-68, 01-92 at 1 (May 7, 2008).

$0.0007 per minute for § 251(b)(5) traffic and ISP-bound traffic, showing a continued "trend toward substantially lower [intercarrier compensation] rates." *Id.* ¶ 83.

Not only is a rate cap of $0.0007 per minute consistent with such commercial agreements — which recognize that interconnection can provide the interconnecting networks with an equal *or an unequal* exchange of value — but it also continues to make arbitrage efforts centered around ISP-bound traffic unprofitable. To generate $1 million in revenues in a month at a rate of $0.0007 per minute, a company with ISP customers would need those customers to generate more than 1.4 *billion* minutes of ISP-bound traffic — or more than 33,000 lines filled with such traffic 24 hours a day, every day, for a full month. In comparison, at the pre-2001 rate of $0.004 per minute, a company seeking to take advantage of the arbitrage opportunities could generate $1 million in a month with only 250 million minutes of ISP-bound traffic — or fewer than 5,800 lines filled 24 hours a day, each day of the month.

Indeed, it remains the case that the "rate caps help avoid arbitrage and market distortions that otherwise would result from the availability of reciprocal compensation for ISP-bound traffic," *Core Forbearance Order* ¶ 18, which — despite the widespread adoption of broadband — still exists in sufficient volumes to translate into hundreds of millions of dollars annually for incumbents nationwide. Indeed, Verizon estimates that, in 2007, incumbent LECs originated more than 300 billion minutes of ISP-bound traffic. At a pre-2001 rate of $0.004 per minute, that would translate to $1.2 billion annually in intercarrier payments — a nearly $1 billion increase over the amount due for that same volume of ISP-bound traffic under the rate cap. And that number would likely increase as the availability of higher rates would recreate CLECs' pre-2001 incentives to target ISPs as customers and engage in schemes (including kickbacks and fraud) to generate dial-up ISP minutes. Such uneconomic payments would divert funds from

investment in new and innovative products, instead enriching a handful of companies and subsidizing dial-up ISP service.

The mirroring rule has also succeeded in "promot[ing] [the Commission's] goal of a more unified intercarrier compensation regime by requiring LECs to offer similar rates for like traffic." *Core Forbearance Order* ¶ 19. Verizon Wireless's experience is that most intraMTA traffic is now exchanged pursuant to the rate caps, and Verizon's experience is that a substantial portion of wireline intraexchange traffic is being exchanged at rates at or below the rate caps as well. Eliminating the mirroring rule and returning to pre-2001 reciprocal compensation rates for traffic currently subject to the mirroring rule would significantly increase the cost carriers incur in exchanging that traffic. For example, Verizon Wireless estimates that, without the mirroring rule and at the pre-2001 rate of $0.004 per minute, wireless carriers' annual intercarrier payments for intraMTA traffic would increase by hundreds of millions of dollars. Those increased costs would divert funds from investment in next generation wireless networks and likely would be borne by consumers, through increases in the costs of wireless offerings.[43]

For all of these reasons, the rate caps and mirroring rule — justified when adopted — remain justified today.

II. THE COMMISSION SHOULD FURTHER CONCLUDE THAT EVEN IF ISP-BOUND TRAFFIC WERE SUBJECT TO § 251(B)(5), THE COMMISSION WOULD STILL HAVE ADOPTED AND WOULD STILL RETAIN ITS ISP PAYMENT REGIME

Although a reviewing court would be highly likely to uphold the Commission's reasonable interpretation of § 251(b)(5) to exclude ISP-bound traffic for the reasons set forth above, the Commission should not limit itself to a single rationale in issuing its third decision on

[43] The mirroring rule did not alter the rate at which wireless carriers exchange intraMTA traffic with each other.

§ 251(b)(5) and ISP-bound traffic. Providing a comprehensive view of the Commission's authority to retain its ISP payment regime will ensure that the Commission will not have to revisit this issue on remand a fourth time.

A. The Commission Should Conclude That It Would Have Granted Forbearance from § 251(b)(5) Even If That Section Were Interpreted to Apply to ISP-Bound Traffic

The Commission should hold, in the alternative, that it would have granted forbearance under § 10 from applying § 251(b)(5) even if that section were interpreted to require payment of reciprocal compensation for ISP-bound traffic. Because the D.C. Circuit has ordered the Commission to "explain its legal authority for the interim rules" that it adopted in 2001, *2008 Core Mandamus* at 861, the Commission has the authority to provide the court with one or more rationales that would have supported the substantive decision the Commission reached in 2001. *Cf. Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 858 (D.C. Cir. 2003) (explaining that, where the court "remand[s] the proceedings for further explanation," but does not vacate, the agency has "authority to provide further explanation on remand, supporting the original result"). Here, the Commission can find that the record compiled in support of the *ISP Remand Order* and the Commission's prior reasoning and conclusions in that order regarding the need to impose and retain the rate caps confirmed that each of the forbearance criteria was satisfied at that time. Although the Commission's reliance on § 251(g) to exclude ISP-bound traffic from § 251(b)(5) meant that it did not have to reach those questions — after all, forbearance "obviously comes into play only for requirements that exist"[44] — it would have been open to the Commission to forbear in April 2001, and the Commission can provide that alternative explanation to the D.C. Circuit on remand now.

[44] *USTA v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004).

With respect to § 10(a)(1), the Commission can explain that it would have found that requiring carriers to pay reciprocal compensation for ISP-bound traffic is not necessary to ensure that rates are just and reasonable. *See* 47 U.S.C. § 160(a)(1). In fact, the Commission's findings in its earlier orders confirm that subjecting ISP-bound traffic to the reciprocal compensation obligation results in regulatory arbitrage and therefore rates for such traffic that are unjust and unreasonable. For example, in the *ISP Remand Order*, the Commission recognized that the fact that CLECs had "target[ed] customers[] such as ISPs" and were not "indifferent between serving ISPs and other customers" strongly suggested that there is "a considerable margin between . . . reciprocal compensation rates and the actual costs" of delivering traffic to ISPs. *ISP Remand Order* ¶ 87 n.168. That conclusion led the Commission to reject CLECs' claims that the rate caps "will result in a windfall for the incumbent LECs." *Id.* ¶ 88. The rate caps, moreover, are "fully consistent with the manner in which th[e] Commission has directed ILECs to recover the costs of serving ISPs" — namely, from the ISPs themselves and not from other carriers. *Id.* ¶ 87. The Commission reaffirmed these conclusions in the *Core Forbearance Order*, finding that the rate caps remain "necessary to ensure that charges and practices are 'just and reasonable.'" *Core Forbearance Order* ¶ 23. The D.C. Circuit affirmed that conclusion. *See 2006 Core Mandamus* at 277-78.

Turning to § 10(a)(2), the Commission can explain that it would have found that subjecting ISP-bound traffic to the reciprocal compensation obligation in § 251(b)(5) is not necessary for the protection of consumers. *See* 47 U.S.C. § 160(a)(2). As the Commission has recognized, subjecting ISP-bound traffic to reciprocal compensation harms consumers by "subsidiz[ing] . . . dial-up Internet access customers at the expense of consumers of basic telephone service." *Core Forbearance Order* ¶ 25. And, in the *ISP Remand Order*, the

Commission found that there "is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access." *ISP Remand Order* ¶ 87. Again, the D.C. Circuit affirmed the Commission's conclusions. *See 2006 Core Mandamus* at 278.

With respect to § 10(a)(3), the Commission can explain that it would have found that forbearance from § 251(b)(5) insofar as it requires payment of reciprocal compensation for ISP-bound traffic is in the public interest. *See* 47 U.S.C. § 160(a)(3). Indeed, that conclusion would have been compelled by the Commission's determinations in the *ISP Remand Order* — which it reaffirmed in the *Core Forbearance Order* and which the D.C. Circuit upheld — regarding the anti-competitive effects and regulatory arbitrage resulting from subjecting ISP-bound traffic to reciprocal compensation, including enticing CLECs to "serv[e] ISPs exclusively and not offer[] viable local telephone competition, as Congress had intended." *ISP Remand Order* ¶ 21. In the *Core Forbearance Order*, the Commission reaffirmed its "conclusion that rate caps help avoid arbitrage and market distortions that otherwise would result from the availability of reciprocal compensation for ISP-bound traffic." *Core Forbearance Order* ¶ 18. And, again, the D.C. Circuit upheld the Commission's determination. *See 2006 Core Mandamus* at 279.[45]

[45] Section 10(d) would have posed no bar to such a grant of forbearance. That section provides that the "Commission may not forbear from applying the requirements of section . . . 271 . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). The Commission has concluded that § 271 was fully implemented for purposes of § 10(d) "once section 271 authority is obtained in a particular state," and authority was granted in many states after April 2001. Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, ¶ 15 (2004), *petitions for review denied, EarthLink, Inc. v. FCC*, 462 F.3d 1 (2006). However, the § 271 competitive checklist does not incorporate § 251(b)(5) — as it incorporates § 251(b)(3) and § 251(c)(2), (3), and (4) — but instead requires "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)." *Compare* 47 U.S.C. § 271(c)(2)(B)(i)-(ii), (xii), (xiv) *with id.* § 271(c)(2)(B)(xiii). Therefore, the Commission could have granted forbearance from § 251(b)(5) without altering Bell companies' obligations under Checklist Item

Furthermore, forbearance from § 251(b)(5), insofar as it applies to ISP-bound traffic and not simply intraexchange calls exchanged between competing LECs (or intraMTA calls exchanged between LECs and wireless carriers), would not have left a regulatory void, but instead would have left in place the Commission's § 201 authority over jurisdictionally interstate traffic, such as ISP-bound traffic. That is because, if ISP-bound traffic were subject to § 251(b)(5), it would be *in spite of* the fact that such traffic is jurisdictionally interstate. Section 251(b)(5) thus would operate as an "overlay" on § 201; following forbearance, the Commission's residual authority over such jurisdictionally interstate traffic under § 201 would reassert itself. Therefore, had the Commission forborne, it could have ensured that rates for ISP-bound traffic remain just and reasonable by using its § 201 authority to adopt the *ISP Remand Order* payment regime's rate caps and mirroring rule.

Finally, forbearance not only would have been warranted in April 2001, but it remains warranted today, even if ISP-bound traffic were encompassed within § 251(b)(5). A number of CLECs continue to serve ISPs exclusively or nearly exclusively today; more would return to doing so — and to engaging is some of the scams and frauds that occurred prior to 2001 — if ISP-bound traffic were subject to reciprocal compensation. Although broadband is much more extensive today than in 2001, the volume of dial-up ISP traffic remains sufficiently high to create a significant arbitrage opportunity. As explained above, Verizon estimates that ILECs delivered more than 300 billion minutes of dial-up ISP traffic in 2007 to CLECs. At the Commission's $0.0007 per minute rate cap, that is about $210 million in payments annually for dial-up ISP

13, as all remaining "[r]eciprocal compensation arrangements" (that excluded ISP-bound traffic) would continue to comply with "section 252(d)(2)." *Cf.* Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(A)(2) of the Commission's Rules*, 18 FCC Rcd 23525, ¶ 6 (2003) (finding that provisions that "are not incorporated into section 271 . . . are not included in the section 10(d) limitation").

traffic. At the $0.004 per minute reciprocal compensation rate that was common prior to the *ISP Remand Order*, that is more than $1.2 *billion* annually for such traffic. Such huge arbitrage payments — which divert resources away from investing in new products and services — are plainly contrary to the public interest.

Moreover, if the per minute rate were to increase, the Commission could expect to see an increase in the number of dial-up ISP minutes and such arbitrage payments. In 2005, following the Commission's elimination of the minute caps in the *Core Forbearance Order*, Verizon estimates that the number of dial-up ISP minutes it delivered to CLECs increased by almost 15 percent. A significant increase in the per minute rate could be expected similarly to increase the number of dial-up ISP minutes, whether through lower dial-up prices (that make dial-up more attractive despite its much slower speeds than broadband) or through the types of minute-pumping schemes that occurred prior to 2001 and that become far more lucrative at higher per minute rates.

Forbearance also remains in the public interest today because it would permit the Commission to retain the mirroring rule, which has had the effect of substantially reducing reciprocal compensation payments by wireless carriers and increasing competition by and among those carriers. *See ISP Remand Order* ¶ 89 n.176 (noting that "[m]ore calls are made from wireless phones to wireline phones than vice-versa," so that ILECs have been "net recipients of reciprocal compensation from wireless carriers"). As explained above, Verizon estimates that, without the mirroring rule and at the pre-2001 rate of $0.004 per minute, wireless carriers' annual intercarrier payments would increase by hundreds of millions of dollars, diverting funds from investment in next generation wireless networks and likely increasing the costs to consumers of wireless offerings. In addition, the combination of the ISP rate caps and the

mirroring rule has been one of the few ways in which the Commission has achieved some uniformity among intercarrier rates, consistent with the "public interest in creating a uniform compensation regime." *Core Forbearance Order* ¶ 21.

B. The Commission Should Conclude That It Would Have Adopted Its Rate Caps for ISP-Bound Traffic Even If § 251(b)(5) Were Interpreted to Apply to ISP-Bound Traffic and the Commission Did Not Forbear

The Commission should also hold that, even if § 251(b)(5) were interpreted to apply to ISP-bound traffic and it did not forbear, its ISP payment regime is an appropriate implementation of the pricing standard in § 252(d)(2) with respect to the unique type of traffic here. The Commission's authority to adopt rules to implement pricing standards in the 1996 Act is beyond question. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999). The D.C. Circuit, moreover, has already recognized that § 252(d)(2) provides one possible alternative ground on which the Commission could reach the same result it reached in the *ISP Remand Order*. *See WorldCom*, 288 F.3d at 434. The Commission, therefore, could interpret § 252(d)(2) in the context of ISP-bound traffic to require use of its ISP payment regime, and state commissions would be compelled to comply with that determination in exercising their subordinate authority under § 252.

The Commission's findings in the *ISP Remand Order* support a conclusion that a special rule is warranted implementing § 252(d)(2) in the context of ISP-bound traffic — specifically, as an interpretation of the "additional costs" language in § 252(d)(2)(A)(ii) and the "mutual and reciprocal recovery" language in § 252(d)(2)(A)(i).

With respect to the "additional costs" language, the Commission concluded in the *ISP Remand Order* that the "fundamental problem with application of reciprocal compensation to ISP-bound traffic is that the intercarrier payments fail altogether to account for a carrier's opportunity to recover costs from its ISP customers." *ISP Remand Order* ¶ 76. Indeed, the

Commission expressly recognized the ability of "CLECs . . . to recover more of their costs from their ISP customers." *Id.* ¶ 87.

Moreover, the Commission drew its rate caps from then-"recently negotiated interconnection agreements." *Id.* ¶ 85. The Commission has repetatedly recognized that evidence that "carriers have agreed to rates" — through voluntary, arms-length negotiations — constitutes substantial evidence that rates are just and reasonable. *Id.*; *see, e.g.*, *ACS Forbearance Order* (finding that "commercially negotiated rates" provide "just and reasonable prices");[46] *Triennial Review Order*, ¶ 664 (finding that "arms-length agreements . . . to provide [an] element at [a] rate" "demonstrate[s]" that the rate is "just and reasonable").[47] The Supreme Court, moreover, has recently reaffirmed that the *Mobile-Sierra* doctrine — initially developed under the Federal Power Act and Natural Gas Act, but also applicable under the Communications Act[48] — requires an agency to "presume that the rate set out in a freely negotiated . . . contract meets the 'just and reasonable' requirement imposed by law." *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008).[49]

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[46] Memorandum Opinion and Order, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958, ¶¶ 39, 40 n.136 (2007) ("*ACS Forbearance Order*"), *petitions for review dismissed, Covad Communications Group, Inc. v. FCC*, Nos. 07-70898 *et al.* (9th Cir. June 14, 2007).

[47] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 664 (2003) ("*Triennial Review Order*"), *aff'd in pertinent part, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004).

[48] *See, e.g.*, *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

[49] The same factors would have also supported the Commission's adoption of the $0.0007 rate as a just and reasonable rate for intraMTA LEC-to-CMRS traffic, pursuant to the Commission's authority under §§ 201 and 332.

Therefore, in applying the standard in § 252(d)(2)(A)(ii) — a "reasonable approximation of the additional costs" — in the context of ISP-bound traffic, the Commission must account for both opportunities to recover the costs of delivering ISP-bound calls from the ISPs themselves and evidence of carriers' voluntary agreements. Both of these considerations would have supported the Commission's adoption of its rate caps for ISP-bound traffic under § 252(d)(2)(A)(ii).

With respect to the "mutual and reciprocal recovery" language, the Commission found in the *ISP Remand Order* that, if ISP-bound traffic is treated as though it were traditional telephone calls, ISPs "generate extremely high traffic volumes that are entirely one-directional." *ISP Remand Order* ¶ 5; *see 2006 Core Mandamus* at 272 ("'Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime.'") (quoting *ISP Remand Order* ¶ 21); *WorldCom*, 288 F.3d at 431 ("ISPs typically generate large volumes of one-way traffic in their direction."). As explained above, the 1996 Act was enacted against the backdrop of state commission decisions establishing new payment regimes for the local telephone calls that competing and incumbent telephone companies would mutually exchange between their end-user customers. Those regimes — which Congress mirrored in the 1996 Act — were called "reciprocal" compensation regimes, precisely because the calls would be traveling in *both* directions.

By contrast, ISP-bound traffic is outside the paradigm case for which Congress and the states enacted reciprocal compensation provisions. From a technological perspective, dial-up ISP traffic is distinct from the kind of traffic exchanged between competing local telephone companies that Congress had in mind when it passed the 1996 Act. Rather than enabling two-way communications between neighbors, dial-up ISP traffic creates a dedicated circuit from the

end-user, through the ISP, and on to the Internet. In addition, and unlike traditional voice calls, these dedicated circuits are kept in place for extended periods of time while the vast majority of the information transmitted goes from various sites on the Internet (of the dial-up customer's, not the ISP's, choosing) to the customer. These features of ISP-bound traffic further warrant a special rule implementing § 252(d)(2)(A) for ISP-bound traffic — were such traffic subject to § 251(b)(5) in the first place — because applying a rule for voice calls to ISP-bound traffic results in a one-sided flow of compensation, not the "mutual and reciprocal" compensation that § 252(d)(2)(A)(i) requires. Indeed, the carrier serving the customer receives no compensation for the significant costs of terminating large volumes of Internet traffic to the customer.

CONCLUSION

For the foregoing reasons, the Commission should respond to the *WorldCom* remand by retaining its ISP intercarrier payment regime, based on the legal rationales set forth above.

Respectfully submitted,

/s/ Scott H. Angstreich

Scott H. Angstreich
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Michael Glover
Of Counsel

John T. Scott, III
VERIZON WIRELESS
1300 I Street, NW
Suite 400 West
Washington, DC 20005
(202) 589-3740

Karen Zacharia
Amy P. Rosenthal
VERIZON
1515 North Court House Road
Suite 500
Arlington, Virginia 22201
(703) 351-3175

Counsel for Verizon and Verizon Wireless

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