Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of the Pennsylvania Public Utility Commission for Declaratory Order On Whether State Public Utility Commissions Are Entitled to Adjudicate Intercarrier Compensation Disputes Involving the Exchange of Local Dial-Up Internet Traffic Between Carriers with Indirect Interconnection	)	**WC Docket No. 14-70**

COMMENTS OF AT&T SERVICES, INC. ON THE PENNSYLVANIA PUBLIC UTILITY COMMISSION'S PETITION FOR DECLARATORY ORDER

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I. INTRODUCTION AND SUMMARY

As requested in the Wireline Competition Bureau's May 16, 2014 Public Notice ("Public Notice"),[1] AT&T Services, Inc., on behalf of itself and its affiliates ("AT&T"), responds to the Petition filed with the Federal Communications Commission (the "FCC") by the Pennsylvania Public Utility Commission (the "PUC") on April 30, 2014 (the "PUC Petition").[2]

As explained below, the PUC Petition is an improper attempt to re-litigate issues that were already decided by a federal district court and currently are pending on appeal before the Third Circuit Court of Appeals. The relief requested in the Petition is thus barred on *res judicata* grounds. To the extent the PUC requests further clarification regarding its purported authority to set rates for locally dialed ISP-bound traffic exchanged between two indirectly interconnected competitive local exchange carriers ("CLECs"), which are not parties to any contract governing the exchange of such traffic, the Commission's past orders definitively establish that such traffic is "jurisdictionally interstate." Therefore, if the FCC is inclined to issue a declaratory order, it should take this opportunity to once again reaffirm that locally dialed ISP-bound traffic is jurisdictionally interstate and outside of the PUC's rate-making and regulatory jurisdiction.

The PUC Petition challenges a recent decision by the U.S. District Court for the Eastern District of Pennsylvania (the "District Court"), which permanently enjoined the enforcement of two Orders issued by the PUC on December 5, 2012 and August 15, 2013, respectively (the "PUC Orders").[3] The PUC Orders had required two of AT&T's CLEC affiliates[4] to pay another

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[1] Public Notice, WC Docket No. 14-70 (filed May 16, 2014) ("Public Notice"), http://apps.fcc.gov/ecfs/document/view?id=7521138773.

[2] Petition for Declaratory Order of the Pennsylvania Public Utility Commission, WC Docket No. 14-70 (filed Apr. 30, 2014) ("PUC Petition"), http://apps.fcc.gov/ecfs/document/view?id=7521124305.

[3] Copies of the PUC Orders are attached as App. C to the PUC Petition.

[4] AT&T Services, Inc. was not a party to the proceedings before the PUC. Rather, AT&T's affiliate, AT&T Communications of Pennsylvania, LLC ("AT&T Communications"), was a party. On

CLEC, Core Communications, Inc. ("Core"), for terminating telephone calls originated when an AT&T customer dialed the local number of one of Core's Internet Service Provider ("ISP") customers. The PUC Orders required AT&T to pay Core for such calls dating back to 2005 at a rate of $0.0007 per minute of use ("MOU").

AT&T brought an original action in the District Court challenging the PUC Orders and moved the Court to permanently enjoin the enforcement of those Orders. In a January 31, 2014 Memorandum Decision and Order ("Dist. Ct. Mem."), the District Court permanently enjoined the PUC Orders, entered judgment for AT&T, and ordered that the case be closed.[5] Contrary to the assertions in the PUC Petition, the District Court's decision did not "create regulatory and financial uncertainty" (PUC Petition at 3), "markedly depart[] from existing practice" (*id.*), or "create[] a division between the categories of intercarrier compensation disputes" (*id.* at 4). Rather, the District Court relied on two well-established and undisputed premises:

1. Both the FCC and the federal courts repeatedly have held and reaffirmed that ISP-bound traffic is "jurisdictionally interstate," even if the calls are placed by dialing a local number.

2. The FCC has exclusive jurisdiction to regulate rates for interstate calls, except to the extent that authority over interstate rates has been delegated to state commissions. The sole instance in which Congress delegated authority to regulate interstate rates to state commissions is in the context of a proceeding involving interconnection between a CLEC and an incumbent local exchange carrier ("ILEC"), pursuant to 47 U.S.C. § 252. This case involves two CLECs and thus does not arise under § 252.

Applying these premises, the District Court held that the PUC lacked jurisdiction over the ISP-bound traffic at issue because the traffic is jurisdictionally interstate and within the FCC's

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October 31, 2012, AT&T Communications was merged into AT&T Corp. AT&T-affiliate TCG Pittsburgh ("TCG") was also a party in the PUC proceedings. In December 2012, TCG merged into Teleport Communications of America, LLC ("TCA"). Accordingly, the parties before the District Court and the Third Circuit are AT&T Corp. and TCA.

[5] Copies of the Dist. Ct. Memo. and relevant orders are attached as App. A to the PUC Petition.

exclusive jurisdiction. The PUC appealed the District Court's decision to the Third Circuit. Under the current schedule, the briefing of that appeal will be completed by August 14, 2014.

Thus, the issues raised in the PUC Petition have already been adjudicated in federal district court and are now being briefed before the Third Circuit. Nevertheless, in the Petition, the PUC asks the FCC to effectively "overrule" the District Court and hold that the PUC had authority to issue the PUC Orders. This request is improper. The District Court's ruling is *res judicata* as against the PUC and may not be challenged in a collateral administrative proceeding.

In any event, to the extent the PUC seeks additional "guidance" from the FCC, its request is redundant and unnecessary. The FCC has repeatedly held and reaffirmed that: (1) locally dialed ISP-bound traffic is jurisdictionally interstate, and (2) the FCC has exclusive authority over interstate traffic except where such authority is otherwise delegated to state commissions. There has been no delegation of authority to state commissions in this area.

The PUC also tries to create the false impression that the District Court's decisions will lead to the FCC being inundated with cases between indirectly interconnected CLECs that exchange ISP-bound traffic without a governing tariff or contract. There is no collection of such cases waiting to inundate the FCC. Indeed, the FCC is requiring that terminating traffic to LECs (including ISP-bound traffic) transition to a mandatory bill-and-keep regime. In addition, dial-up Internet access has largely disappeared in recent years, and virtually all CLECs historically have voluntarily exchanged locally dialed traffic (including dial-up traffic) on a bill-and-keep basis.

For these reasons, the Commission should deny the PUC's request for a declaratory order or, in the alternative, should issue an order reaffirming that locally dialed ISP-bound calls are jurisdictionally interstate and thus outside of the PUC's rate-making and regulatory jurisdiction.

II. STATUTORY AND REGULATORY BACKGROUND

A. The Communications Act Of 1934 And The Telecommunications Act Of 1996 Give The FCC Exclusive Jurisdiction Over Interstate Traffic.

The Communications Act of 1934 (the "Communications Act") created the FCC and gave it exclusive jurisdiction over interstate communications (47 U.S.C. § 152(a)), while preserving state authority to regulate "intrastate communication service" (47 U.S.C. § 152(b)).

Through the Telecommunications Act of 1996 (the "1996 Act"), Congress sought to encourage competition in local telephone markets. Section 252 of the Act, 47 U.S.C. § 252, requires ILECs to enter into interconnection agreements ("ICAs") with requesting telecommunications carriers. Section 252 authorizes state commissions (like the PUC) to arbitrate the terms of an ICA if the ILEC and CLEC cannot voluntarily agree on those terms. *Id.* Section 252 does not require a CLEC to negotiate or arbitrate an ICA with another CLEC.

The 1996 Act also requires LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). These arrangements govern the amount paid by one carrier to another carrier for terminating locally dialed traffic (including ISP-bound calls). It is called "reciprocal compensation" because it is most commonly a two-way street – carrier A completes calls for carrier B and vice versa.

B. The *ISP Remand Order* Designated Locally Dialed ISP-Bound Traffic As Jurisdictionally Interstate And Capped State Commission Authority To Set Rates For ISP-Bound Traffic In Arbitrating Or Enforcing ICAs Under § 252.

After the passage of the 1996 Act, the FCC received requests to clarify whether ISP-bound traffic is subject to the reciprocal compensation obligations in Section 251(b). *Implementation of the Local Competition Provisions*, 14 FCC Rcd. 3689, at ¶ 1, n.1 (1999) ("*Declaratory Ruling*"). The FCC's landmark 2001 *ISP Remand Order* addressed compensation for ISP-bound traffic. *Implementation of the Local Competition Provisions*, 16 FCC Rcd. 9151

(2001) ("*ISP Remand Order*"). In the *ISP Remand Order*, the FCC affirmed that ISP-bound traffic is "properly classified as interstate," because the calls are analyzed for jurisdictional purposes as a continuous transmission from the ISP's customer to the websites visited by the customer. *Id.* at 9175, ¶ 52.[6] And because ISP-bound traffic is jurisdictionally interstate, the FCC held that it had authority under 47 U.S.C. § 201(b) to establish intercarrier pricing rules for this traffic. *Id.*

In the *ISP Remand Order*, the FCC also recognized that the application of reciprocal compensation to ISP-bound traffic gives rise to substantial market distortions "creating an opportunity for regulatory arbitrage and leading to uneconomical results." *Id.* at 9162, ¶ 21. Specifically, ISP-bound communications create large numbers of calls that flow almost exclusively in one direction – from the ISP's customer to the ISP. *Id.* at 9162, ¶¶ 20-21. Thus, reciprocal compensation for ISP-bound traffic also is overwhelmingly, if not exclusively, in one direction – from the originating LEC to the LEC serving the ISP. *Id.* The FCC determined that the opportunity to be on the receiving end of these payments encourages the "inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local competition, as Congress had intended to facilitate with the 1996 Act." *Id.* It also allows LECs to offer ISPs "below cost retail rates subsidized by intercarrier compensation." *Id.* at 9182, ¶ 68.

The FCC also identified other market distortions associated with applying reciprocal compensation to ISP-bound traffic. For instance, "because the originating LEC typically charges its customers averaged rates, the originating end-user receives inaccurate price signals as the costs associated with the intercarrier payments are recovered through rates averaged across all of the originating carrier's end-users." *Id.* at 9182, ¶ 68. As a result, a customer "with extensive

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[6] *See also Implementation of the Local Competition Provisions*, 24 FCC Rcd. 6475, 6485, n.69 (2008) ("*2008 ISP Remand Order*") ("ISP-bound traffic is jurisdictionally interstate.").

Internet usage" may cause the originating LEC to incur substantial reciprocal compensation obligations but "receives no price signals reflecting those costs because they are spread over all [of the originating LEC's customers]." *Id.* The reciprocal compensation regime for ISP-bound traffic thus "disconnect[s] costs from end-user market decisions" and "distorts competition by subsidizing one type of service at the expense of others." *Id.* at 9155, ¶ 5; 9162, ¶ 21.

In order to address these rate distortions and regulatory arbitrage issues, the FCC created a new compensation scheme for ISP-bound traffic. *Id.* at 9186-93, ¶¶ 77-88. The FCC first concluded that ISP-bound traffic "is not subject to the reciprocal compensation obligations of section 251(b)(5)." *Id.* at 9181, ¶ 66. Rather, the FCC found that the best method for cost allocation of ISP-bound traffic is probably a "bill-and-keep" system, "whereby each carrier recovers costs from its own end-users." *Id.* at 9154, ¶ 4. The FCC thus established an "interim" compensation scheme in the form of a declining rate cap on "the amount that carriers may recover from other carriers for delivering ISP-bound traffic." *Id.* at 9156, ¶ 7. The FCC based its compensation scheme on existing ICAs. *Id.* at 9190-91, ¶ 85.

Under the FCC's scheme, the cap on rates declined to $0.0007/MOU after twenty-five months—a cap which remains in place today. *Id.* at 9187, ¶ 78; *see also* Dist. Ct. Memo. at 13. The FCC emphasized that its cap on intercarrier compensation had "no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps … or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic." *Id.* at 9188, ¶ 80. Finally, the FCC declared its intent to preempt state regulation going forward. Although the FCC did not intend to "alter existing contractual obligations … or preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to" the *ISP Remand Order*, the FCC declared that, "[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic . . . state commissions will no longer have authority to address this issue." *Id.* at 9189, ¶ 82.

In addition to the rate cap, the FCC also created a "new markets rule" which required LECs that were not already party to an ICA to exchange ISP-bound traffic on a "bill and keep" basis. *Id.* at 9188-89, ¶ 81. The FCC also established "growth caps" that limited the total number of minutes for which a LEC could be compensated for ISP-bound traffic. *Id.* at 9187, ¶ 79. Finally, the FCC created a "mirroring rule," which required an ILEC to terminate its own traffic according to the rate caps if the ILEC benefited from the rate caps. *Id.* at 9193-94, ¶ 89.

In a subsequent proceeding, the FCC granted a petition by Core to forbear from enforcing the new markets and growth cap rules. *Petition of Core Commc'ns, Inc. for Forbearance*, 19 FCC Rcd. 20179, 20182 (2004) ("*Core Forbearance Order*"). However, the rate caps and mirroring rule remained in effect. *Id.* The rate cap eventually was upheld by the D.C. Circuit Court of Appeals. *Core Commc'ns, Inc. v. FCC* ("*Core Commc'ns*"), 592 F.3d 139, 144-45 (D.C. Cir.), *cert. denied*, 131 S.Ct. 597 (2010).

C. The *ISP Remand Order* Applies To ISP-Bound Traffic Exchanged Between Two CLECs.

Initially there was controversy as to whether the *ISP Remand Order* applied to ISP-bound traffic exchanged between two CLECs, as opposed to traffic between an ILEC and a CLEC. In 2011, the Ninth Circuit held that the order applies to all ISP-bound traffic, including CLEC-to-CLEC traffic. *AT&T Commc'ns of Cal., Inc. v. Pac-West Telecomm, Inc.* ("*AT&T Commc'ns of Cal.*"), 651 F.3d 980, 998 (9th Cir. 2011). In the case, AT&T Communications and Pac-West were both CLECs licensed in California that did not have an ICA with each other but exchanged ISP-bound traffic. *Id.* at 988. Pac-West requested to negotiate an ICA with AT&T Communications for that traffic. *Id.* at 989. AT&T Communications refused, asserting that it had no obligation to enter into an ICA, and that it would prefer to continue to exchange traffic on a bill-and-keep basis, pursuant to the "new markets rule." *Id.*

Pac-West then filed a complaint with the California Public Utilities Commission (the "CPUC"), alleging that AT&T Communications owed it millions in reciprocal compensation for the ISP-bound traffic. *Id.* The CPUC held that the "new markets rule" did not apply in an exchange of traffic between two CLECs, and ordered AT&T Communications to pay Pac-West at the rate in Pac-West's intrastate long distance tariff, which exceeded the rate cap in the *ISP Remand Order*. *Id.* AT&T Communications filed suit in the district court, which affirmed the CPUC. *Id.* at 990. AT&T Communications then appealed to the Ninth Circuit.

As an initial matter, the Ninth Circuit noted that, "for jurisdictional purposes, ISP-bound traffic is interstate in nature. ISP-bound traffic is therefore subject to the FCC's congressionally-delegated jurisdiction. Within this ambit, the FCC's actions can preempt state regulation to the contrary." *Id.* at 990-91 (internal citations omitted). The Court also found that "the *ISP Remand Order* has preemptive effect with regard to the ISP-related issues it encompasses." *Id.* at 991.

The Court examined the language in the *ISP Remand Order*, along with an *Amicus Brief* filed by the FCC (the "FCC *Amicus Brief*," attached as Ex. A). *Id.* at 993-95, 998. Ultimately, the Court held that the *ISP Remand Order* applies to CLEC-CLEC traffic. *Id.* at 996. The Court's independent conclusion on this issue was supported by an *Amicus Brief* filed by the FCC, which also interpreted the *ISP Remand Order* as applying to CLEC-CLEC traffic. *Id.* at 998.

AT&T Communications had also argued that the CPUC had lacked jurisdiction to resolve the dispute because the FCC has exclusive jurisdiction over ISP-bound traffic. *Id.* at 989, 991. However, because the CPUC's orders were invalid for the independent reason that they were inconsistent with the *ISP Remand Order*, neither the Ninth Circuit nor the FCC in its *Amicus Brief* addressed whether the CPUC had jurisdiction over the dispute. *Id.* at 993-99.

D. The FCC Transitions Reciprocal Compensation For A LEC's Termination Of Locally Dialed Traffic To A Bill-And-Keep Regime.

In November 2011, the FCC issued its *Connect America Fund Order*, which required intercarrier compensation between price cap LECs (including compensation paid to a LEC for terminating ISP-bound traffic) to transition to a bill-and-keep model over a period of seven years, from 2011 to 2018.[7] The FCC "adopt[ed] a uniform national bill-and-keep framework as the ultimate end state for all telecommunications traffic exchanged with a LEC." *Id.* at 17669, ¶ 9, 17676 ¶ 34. On May 23, 2014, the Tenth Circuit upheld the *Connect America Fund Order* and specifically upheld the FCC's decision to transition intercarrier compensation to bill-and-keep. *In re FCC 11-161*, --- F.3d ---, 2014 WL 2142106, at *78-94 (10th Cir. May 23, 2014).

III. FACTUAL BACKGROUND AND THE TRAFFIC AT ISSUE

A. Core Terminated Locally Dialed ISP-Bound Traffic Without Any Applicable Contract Or Tariff For Years Without Billing AT&T.

At all relevant times, both AT&T and Core have been certificated by the PUC to operate as CLECs in Pennsylvania. Dist. Ct. Memo. at 4. During the time at issue, Core's only customers were ISPs, which provided "dial-up" Internet connections to Internet users. *Id.* Beginning in at least June 2004, AT&T's customers placed calls to Core's ISP customers to obtain dial-up access to the Internet. *Id.* at 4-5. All of the calls at issue were "locally dialed," meaning that the calls originated and terminated in the same local exchange area. *Id.* at 5.

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7 *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- Mobility Fund*, 26 FCC Rcd. 17663 ¶¶ 9 & 33-42 (2011) ("*Connect America Fund Order*").

AT&T and Core were not directly connected; instead, both were interconnected with the ILEC, Verizon Pennsylvania, Inc. ("Verizon"). *Id.* Thus, each call at issue was: (i) originated by an AT&T customer; (ii) delivered by AT&T to Verizon with signaling information telling Verizon to deliver the call to Core; and (iii) delivered by Verizon to Core, which terminated the call to its ISP customer. *Id.* The signaling message accompanying each of the calls contained information identifying the originating carrier (AT&T) and where (in what local exchange) the call originated. *See* Dec. 5, 2012 PUC Order at 68 ("Core admits that, as far back as 2000, it had all the information it needed to bill AT&T for the termination of locally dialed, ISP-bound traffic but that it failed to act on that information until nearly eight years later.").

Core has never filed a tariff that provides for compensation for completing locally dialed calls, including ISP-bound calls. Dist. Ct. Memo. at 5. In addition, there has never been a contract or agreement between AT&T and Core establishing a rate for Core's completion of locally dialed calls that were originated on AT&T's network. *Id.*

Since 2004, AT&T originated, Verizon delivered, and Core terminated the locally dialed ISP-bound calls at issue. *Id.* Nonetheless, Core did not bill AT&T for any of the calls at issue until January 2008. *Id.* At that time, Core billed AT&T for calls dating back to 2005 at the rate in Core's intrastate long distance tariff. *Id.* AT&T refused to pay Core's bill because, among other reasons, none of the calls at issue were "long distance," the parties had no contract or agreement providing for compensation for locally dialed calls, and Core had no tariff in place that purported to set rates or conditions for terminating the calls at issue. *Id.*

AT&T also exchanges locally dialed calls with CLECs other than Core. *Id.* at 6. AT&T exchanges locally dialed traffic on a bill-and-keep basis with every other CLEC in Pennsylvania.

Id. AT&T has not received complaints from any CLEC other than Core that a bill-and-keep arrangement is unacceptable.

B. Core Files Complaints Against AT&T With the PUC.

On May 19, 2009, Core filed two complaints against AT&T with the PUC, seeking to be paid for the locally dialed ISP-bound traffic at issue under the rate contained in Core's intrastate long distance tariff. Dist. Ct. Memo. at 6. AT&T moved to dismiss the complaints, arguing that the PUC had no jurisdiction over the traffic at issue. *Id.* On May 11, 2011, an Administrative Law Judge ("ALJ") for the PUC issued an initial decision finding that federal law governed the dispute, but that the PUC purportedly could resolve the dispute "by applying federal law." *Id.*

On December 5, 2012, the PUC issued an Order holding that federal law applied and that the PUC had jurisdiction. *Id.* The PUC then purported to resolve the matter by setting a rate of $0.0007/MOU for all locally dialed ISP-bound calls from AT&T customers that Core terminated dating back to May 19, 2005, pursuant to Pennsylvania's four-year statute of limitations. *Id.* The PUC chose the $0.0007/MOU rate because the FCC, in its *ISP Remand Order*, had set a maximum cap of $0.0007/MOU on the rate that state commissions could apply to ISP-bound traffic when those commissions were arbitrating or enforcing interconnection agreements between ILECs and CLECs under 47 U.S.C. § 252. Dec. 5, 2012 PUC Order at 81-82.

Both parties petitioned the PUC for reconsideration. Dist. Ct. Memo. at 7. On August 15, 2013, the PUC issued its Order on Reconsideration, which denied AT&T's petition in its entirety and required AT&T to pay a total of $254,029.89 to Core. *Id.*

C. The District Court Enjoins The PUC Orders.

On August 27, 2013, AT&T moved the District Court for a preliminary injunction, enjoining the enforcement of the PUC Orders. Dist. Ct. Memo. at 21. AT&T set forth five independent arguments in support of its claim that the PUC Orders violated federal law:

(1) The PUC did not have jurisdiction to resolve the dispute.

(2) The PUC Orders violated 47 U.S.C. § 203 by awarding charges at a rate not contained in any tariff or contract and, therefore, the rate also was "unjust or unreasonable" in violation of 47 U.S.C. § 201.

(3) The PUC Orders violated 47 U.S.C. § 251(b)(5) by allowing Core to recover compensation without a reciprocal compensation arrangement.

(4) The PUC Orders impermissibly engaged in retroactive ratemaking by ordering AT&T to pay a rate not set forth in any contract or tariff for a period extending back to 2005.

(5) Assuming, *arguendo*, that the PUC did not otherwise violate federal law, it erroneously applied a four-year state law statute of limitations, rather than the two-year federal statute of limitations at 47 U.S.C. § 415.

Id. at 22-23. Once AT&T's motion was fully briefed, the District Court heard oral arguments from AT&T, Core, and the PUC. *Id.* at 21. At the hearing, which lasted several hours, the parties agreed that no further evidence would be necessary to resolve the case and that the parties had no objection to the Court deciding the merits of the case on the filed briefs. *Id.* at 21-22.

On January 31, 2014, the District Court issued its Memorandum and Order, in which it held in AT&T's favor and permanently enjoined the enforcement of the PUC Orders. *Id.* at 33. The District Court found that "because the FCC has classified ISP-bound traffic as interstate communication, the FCC has exclusive jurisdiction" over such traffic. *Id.* at 23. The Court also explained that "ISP-bound traffic is characterized by the FCC as 'jurisdictionally interstate'" and "that determination has been affirmed by the D.C. Circuit and the Ninth Circuit." *Id.* at 23-24 (citing, *inter alia*, *ISP Remand Order*, 16 FCC Rcd. 9151; *Core Commc'ns*, 592 F.3d at 144; *AT&T Commc'ns of Cal.*, 651 F.3d at 990).

The District Court further noted that "courts have characterized the FCC's jurisdiction over interstate traffic, under the Communications Act, as exclusive." *Id.* at 24-25.[8] In addition, the Court explained that "the FCC has declared its exclusive jurisdiction over interstate communication generally in several FCC Orders." *Id.* at 26 (citing, *e.g.*, *In re Vonage Holdings Corp.*, 19 FCC Rcd. 22404, 22412-13, ¶ 16-18 (2004)). The District Court noted that "[t]he *ISP Remand Order* also expresses the intention to limit state commissions' jurisdiction over compensation for ISP-bound traffic specifically." *Id.* at 25 (citing *ISP Remand Order*, 16 FCC Rcd. at 9189, ¶ 82). The District Court thus rejected the argument of the PUC and Core "that ISP-bound traffic is not exclusively interstate traffic, and thus not subject to the FCC's exclusive jurisdiction" *Id.* at 28.

The District Court explained that the 1996 Act "gave state commissions jurisdiction over interstate traffic in the context of sections 251 and 252 only." *Id.* at 29. Accordingly, the Court stated, the PUC "has jurisdiction to establish intercarrier compensation rates for ISP-bound traffic, subject to the rate caps in the *ISP Remand Order*, through its powers in § 252 to approve, mediate, and arbitrate agreements between ILECs and CLECs." *Id.* However, the District Court found, § 252 "does not give the []PUC authority to establish a rate for ISP-bound traffic between CLECs as it did here." *Id.* Indeed, the 1996 Act "did not give state commissions any general rulemaking authority over interstate traffic." *Id.* at 29-30 (citing *MCI Tele. Corp*, 271 F.3d at 516; *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1125-26 (9th Cir. 2003)).

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[8] Citing *Crockett Tel. Co. v. F.C.C.*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) ("The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates."); *Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) ("Interstate communications are totally entrusted to the FCC . . . ."); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968) ("[Q]uestions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and the states are precluded from acting in this area.").

The District Court also rejected Core's argument that the *ISP Remand Order* gave state commissions authority to set rates according to the compensation scheme in the Order. *Id.* at 30-31. Instead, the Court found, "[t]he only state authority that the *ISP Remand Order* references is the authority to arbitrate interconnection agreement disputes under § 252." *Id.* at 31.

Thus, the District Court concluded that the PUC and Core:

> …have not pointed to any authority for the []PUC's exercise of jurisdiction. The []PUC's enabling statute provides that [the] []PUC only has jurisdiction over interstate communication where federal law or the Constitution allows. 66 Pa. C.S.A. § 104. The defendants have not cited any federal statutes, regulations, or Constitutional provisions that give the []PUC jurisdiction over ISP-bound traffic, outside of § 252 which does not apply here.
>
> The Court finds, therefore, that the []PUC lacked jurisdiction. The FCC has exclusive jurisdiction over interstate communication. ISP-bound traffic, including such traffic exchanged between two CLECs, is categorized as interstate communication for jurisdictional purposes. The FCC has exclusive jurisdiction to regulate ISP-bound traffic. Specifically, the FCC has asserted its intention to preclude the states from regulating rates for the exchange of ISP-traffic in the *ISP Remand Order*.

Id. at 32. Because the District Court found that the PUC "did not have jurisdiction," it held that "the []PUC's orders are invalid" and declined to reach AT&T's additional arguments. *Id.* at 23.

D. The District Court And The Third Circuit Deny The PUC's Motions To Stay.

After the District Court issued its Memorandum resolving the substantive issues in the case, the PUC, for the first time in the case, asked the District Court to stay the effect of its ruling for at least 120 days, so that the PUC could file a petition with the FCC seeking a declaratory order regarding the PUC's jurisdiction over locally dialed ISP-bound calls. On March 11, 2014, the District Court denied the PUC's motion to stay. Order [Dkt. # 56], at 1-2, *AT&T Corp. v. Core Communications, Inc.*, No. 1:12-cv-7157 (E.D. Pa.), filed Mar. 11, 2014 (attached as Ex. B). The District Court stated that the jurisdictional issues it had decided "were within the ordinary competence of the Court," that its "decision was based on longstanding federal law regarding the FCC's exclusive jurisdiction over interstate traffic," and that, "[e]ven if the Court were to grant the motion, an order from the FCC may have no impact on the Court's prior decision." *Id.* In addition, the District Court held that the PUC had waived its stay request by fully litigating the matter to a final judgment before asking for a stay:

> To the extent the PPUC's argument is based on the doctrine of "primary jurisdiction," it was waived. *See CSK Transportation Co. v. Novolog Buck County*, 502 F.3d 247, 253 (3d Cir. 2007). The []PUC could have sought guidance from the FCC at any point during the litigation of this case but failed to do so. During oral argument, the []PUC told the Court that the Court had everything necessary to make a final decision on the issues in this case. Tr. Hr'g 10/1/13 120:1-15. Staying the effects of the Court's decision at this stage will not promote judicial economy.

Id. at 1-2.

The PUC also appealed the District Court's ruling to the Third Circuit. Subsequently, on April 29, 2014, the PUC filed the instant PUC Petition with the FCC and, on the same day, filed a motion asking the Third Circuit to stay its appeal pending the FCC's resolution of the PUC Petition. On May 19, 2014, the Third Circuit denied the PUC's motion to stay and set a briefing scheduling for the appeal. Denial of Mot. to Stay, *AT&T Corp. v. Core Communications, Inc.*, Nos. 14-1499 & 14-1664 (3d Cir.), filed May 22, 2014 (attached as Ex. C). Under that schedule, briefing of the appeal will be completed by August 14, 2014.

IV. ARGUMENT

The PUC Petition repeatedly challenges the decision of the District Court that the PUC Orders are invalid because the PUC lacks jurisdiction over the rates of locally dialed ISP-bound traffic exchanged between two CLECs. However, the PUC was a party in the District Court and fully participated in the proceedings before the court. The court reached a final decision on the merits of the parties' claims, and the PUC is now fully bound by that decision. It may not collaterally attack the decision by asking the FCC to effectively "overrule" the District Court.

Because the District Court's ruling is *res judicata* as against the PUC, the FCC should deny the PUC Petition and decline to issue a declaratory order.

In the alternative, if the FCC issues a declaratory order, it should reaffirm that ISP-bound traffic is "jurisdictionally interstate," and thus within the exclusive jurisdiction of the FCC. Accordingly, state commissions have no jurisdiction over such traffic except in the context of arbitrating and enforcing ICAs under 47 U.S.C. § 252. Thus, the PUC has no authority to set rates for ISP-bound traffic exchanged between two CLECs, as it purported to do in the PUC Orders. As the District Court found, this reasoning comports with longstanding statutory, judicial, and regulatory authority.

A. The FCC Should Deny The PUC Petition Because The Petition's Challenge To The District Court's Orders Is Barred By *Res Judicata*.

The doctrine of *res judicata* operates to bar subsequent litigation of claims that were actually decided in an earlier action. *See Teleservices Industry Ass'n v. AT&T Corp.*, 15 FCC Rcd. 21454, 21457 (Enf. Bur. 2000). The FCC has repeatedly applied the doctrine to bar and dismiss administrative challenges to prior judicial decisions that were resolved on the merits. *See Teleservices Industry*, 15 FCC Rcd. at 21457 (dismissing with prejudice complaint brought before the FCC because the same claims had previously been adjudicated in federal district court); *see also COMSAT Corp. v. IDB Mobile Communications, Inc.*, 15 FCC Rcd. 7906, 7918 (Enf. Bur. 2000) (same).

The United States Supreme Court set forth the classic formulation of *res judicata*, or claim preclusion, more than a century ago:

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Teleservices Industry, 15 FCC Rcd. at 21457 (quoting *Cromwell v. Sac County*, 94 U.S. 351, 352 (1876)); *see also Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action"). Accordingly, "[t]hree elements must be present before a claim will be barred by a judgment in a prior action. The prior action must have: (1) shared a common nucleus of operative facts with the subsequent action; (2) resulted in a final judgment on the merits; and (3) involved the same parties or their privies." *Teleservices Industry*, 15 FCC Rcd. at 21457. Here, all three of the elements are present, and the doctrine of *res judicata* thus bars the PUC Petition's challenge to the prior, fully litigated District Court decision.

1. The PUC Petition directly challenges the legal conclusions and findings in the prior District Court decision.

"To determine whether the substance of two actions is the same for claim preclusion purposes, courts have asked: Is the same right allegedly being infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?" *Teleservices Industry*, 15 FCC Rcd. at 21457-58.

Here, the PUC Petition asks the FCC to examine the exact same issues that were already decided and resolved by the District Court in the prior action. The District Court's legal findings were summarized in its January 31, 2014 Memorandum:

> The Court finds, therefore, that the []PUC lacked jurisdiction. The FCC has exclusive jurisdiction over interstate communication. ISP-bound traffic, including such traffic exchanged between two CLECs, is categorized as interstate communication for jurisdictional purposes. The FCC has exclusive jurisdiction to regulate ISP-bound traffic. Specifically, the FCC has asserted its intention to preclude the states from regulating rates for the exchange of ISP-bound traffic in the *ISP Remand Order*.
>
> The authority given to state commissions under sections 251 and 252 in the TCA does not impact the FCC's jurisdiction. Although the []PUC may have

> jurisdiction to set rates for the exchange of ISP-bound traffic pursuant to an interconnection agreement under its § 252 arbitration powers, that authority does not apply here. Congress and the FCC have not delegated jurisdiction to state commissions over interstate communication outside the context of sections 251 and 252. The []PUC, therefore, did not have jurisdiction and its Orders of December 5, 2012 and August 15, 2013 are invalid.

Dist. Ct. Memo. at 32-33. The PUC Petition directly challenges these findings and asks the FCC to issue a declaratory order holding that the PUC has jurisdiction to adjudicate disputes regarding locally dialed ISP-bound traffic "when they arise between [CLECs] outside Sections 251 and 252." PUC Petition at 1.

Indeed, the Petition is mainly styled as a challenge to the District Court's rulings and begins with a list of those rulings' alleged deficiencies, including that the District Court's rulings allegedly: (1) "block[] the Pa. PUC, and possibly other states, from timely concluding similar local dial-up ISP-bound traffic intercarrier compensation disputes"; (2) "may place at risk Pa. PUC rulings and their results on previously adjudicated intercarrier compensation disputes"; (3) create[] regulatory and financial uncertainty"; (4) "markedly depart[] from existing practice"; (5) appear[] to conflict with applicable federal and Pennsylvania law"; (6) "create[] a division between intercarrier compensation disputes that can be litigated before the Pa. PUC and those that must be litigated before the Commission"; and (7) jeopardize[] the ability of an aggrieved carrier that is interconnected indirectly with another carrier to seek appropriate relief from a state commission." PUC Petition at 2-4.

As shown in detail below, the PUC's alleged deficiencies are baseless. Nonetheless, these allegations by the PUC definitively establish that the PUC Petition is a challenge to the District Court's final decisions regarding the PUC's jurisdiction to issue the PUC Orders. Accordingly, the first element of *res judicata* is satisfied here.

2. The District Court's decisions resulted in a final judgment on the merits of the arguments asserted in the PUC Petition.

There is no question that the District Court's decisions resulted in a final judgment on the merits. As noted above, AT&T initially moved the District Court to enter a preliminary injunction, enjoining the enforcement of the PUC Orders. Dist. Ct. Memo. at 21. However, at oral arguments, the parties all agreed that no further evidence would be necessary to resolve the case and that the parties had no objection to the Court deciding the merits of the case, rather than ruling on AT&T's request for a preliminary injunction. *Id.* at 21-22. The Court then entered a final decision on the merits of AT&T's complaint, permanently enjoining the enforcement of the PUC Orders. *Id.* at 33; *see also* March 10, 2014 Order (entering final judgment for AT&T on the merits). That final decision is now on appeal before the Third Circuit. Ex. C. However, "[a] pending appeal does not 'detract from ... decisiveness and finality' of judgment for purposes of claim preclusion." *Teleservices Industry*, 15 FCC Rcd. at 21458, ¶ 12 (citing *Huron Holding Co. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941)).

The PUC does not deny that the District Court's decision was a final judgment on the merits. Instead, the PUC cites the *Kansas/Nebraska Contribution Order*[9] in support of its argument that the Commission may reexamine the District Court's ruling. PUC Petition at 22-23. However, that decision is inapposite. In that case, the Nebraska Public Service Commission ("NPSC") entered an order requiring interconnected VoIP service providers to contribute to Nebraska's universal service fund based on their intrastate revenues (the "NPSC USF Order"). *Id.* at 15654, ¶ 8. Vonage challenged the NPSC USF Order in the U.S. District Court for the

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[9] *In re Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, 25 FCC Rcd. 15651 (2010) (*Kansas/Nebraska Contribution Order*).

District of Nebraska, which granted Vonage's request for a preliminary injunction against enforcement of the NPSC USF Order, concluding that Vonage was likely to succeed on the merits of its argument that the NPSC USF Order was preempted by the FCC's prior rulings. *Id.* at 15655, ¶ 9. The NPSC appealed to the Eighth Circuit, which affirmed the preliminary injunction. *Id.*

The NPSC then petitioned the FCC for a declaratory ruling "*solely with prospective effect*, that states are not preempted from imposing universal service contribution requirements on future intrastate revenues of nomadic interconnected VoIP providers." *Id.* at 15655, ¶ 10 (emphasis added). The FCC then issued a declaratory ruling holding that state USF contribution requirements on nomadic interconnected VoIP providers were not preempted so long as (1) the state's contribution rules are consistent with the Commission's contribution rules and (2) the state does not apply its contribution rules to intrastate interconnected VoIP revenues that are attributable to services provided in another state. *Id.* at 15656, ¶ 11.

The *Kansas/Nebraska Contribution Order* is inapposite for several reasons. First, there was no "final decision on the merits" from a federal court in that case. Rather, the district court and the Eighth Circuit merely issued and affirmed a *preliminary injunction* against existing state contribution rules. *Id.* at 15654, ¶ 8. Here, in contrast, the District Court entered a final judgment on the merits, granting a *permanent injunction* against the PUC Orders.

Second, the issue in the *Kansas/Nebraska Contribution Order* was uniquely within the FCC's expertise because it involved the preemptive effect of an FCC order. *See Kansas/Nebraska Contribution Order*, 25 FCC Rcd. at 15655, ¶ 9 (noting the Eighth Circuit's finding that "[the FCC], not the state commissions, has the responsibility and obligation to decide" the preemptive effect of its orders). This case does not involve preemption; it involves merely the application of Congress's jurisdictional mandates to well-settled law (i.e., the *ISP Remand Order*). Dist. Ct. Order at 32-33. This is not an issue that is uniquely within the FCC's expertise and the District Court was competent and well-suited to decide the proper allocation of jurisdiction. *See, e.g.*, Ex. B (noting the District Court's competence to decide the relevant issues in denying the PUC's motion to stay the effect of the District Court's rulings).

Third and finally, unlike in the *Kansas/Nebraska Contribution Order*, the PUC here does not request a declaration that is "*solely with prospective effect*." *Kansas/Nebraska Contribution Order*, 25 FCC Rcd. at 15655, ¶ 10 (emphasis added). Rather, the PUC directly challenges the prior final decisions of the District Court. *See* PUC Petition at 2-4. The proper arena for the PUC to bring its challenge is the Third Circuit Court of Appeals, where the PUC's appeal is currently pending and will be fully briefed in August 2014. Ex. C.

Accordingly, the *Kansas/Nebraska Contribution Order* is inapposite, the District Court issued a final decision on the merits, and the second element of *res judicata* is satisfied.

3. The PUC was a party to the District Court action.

"The final portion of the above *res judicata* inquiry asks whether the party to be barred in the subsequent litigation is either the same party as in the prior action, or is in privity with the party to the prior action." *Teleservices Industry*, 15 FCC Rcd. at 21459, ¶ 14. Here, the PUC was a party to the District Court action because the individual commissioners of the PUC were named in their official capacity as defendants in that action. Dist. Ct. Memo. at 21-22. The PUC fully participated in all proceedings before the District Court. Accordingly, the third and final element of *res judicata* is satisfied and the relief sought in the PUC Petition is thus barred. For this reason, the FCC should deny the PUC Petition.

B. In The Alternative To Denying The PUC Petition, The FCC Should Reaffirm That Locally Dialed ISP-Bound Traffic Is Jurisdictionally Interstate And That The PUC Lacks Jurisdiction Over Such Traffic Outside Of An ICA Arbitration Or Enforcement Proceeding Under 47 U.S.C. § 252.

As demonstrated above, the declaratory relief requested by the PUC is barred by the doctrine of *res judicata* and the FCC should therefore deny the PUC Petition. In the alternative, if the FCC elects to issue a declaratory order, it should reaffirm that locally dialed ISP-bound traffic is jurisdictionally interstate and that the PUC thus lacks jurisdiction over such traffic outside of an action brought under 47 U.S.C. § 252 to arbitrate or enforce an ICA.

As explained in detail in the District Court's January 31, 2014 Memorandum, locally dialed ISP-bound traffic is "jurisdictionally interstate," under well-established FCC and judicial authority. *See* Dist. Ct. Memo. at 23-24 (citing *ISP Remand Order*, 16 FCC Rcd. at 9175, ¶ 52; *Core Forbearance Order*, 19 FCC Rcd. at 20180-81, ¶ 4; *2008 ISP Remand Order*, 24 FCC Rcd. at 6485, n.69; *Core Commc'ns*, 592 F.3d at 144; *AT&T Commc'ns of Cal.*, 651 F.3d at 990).

The District Court further explained that the FCC has exclusive jurisdiction over interstate communications. *Id.* at 24-25. The District Court also noted that the 1996 Act "gave state commissions jurisdiction over interstate traffic in the context of sections 251 and 252 only" and that the Act "did not give state commissions any general rulemaking authority over interstate traffic." *Id.* at 29 (citing *Pac. Bell*, 325 F.3d at 1126 ("[i]t is clear from the structure of the [1996 Act] … that the authority granted to state regulatory commissions is confined to the role described in § 252 – that of arbitrating, approving, and enforcing interconnection agreements")); *see also MCI Telecomm. Corp. v. Bell-Atl. Pa.*, 271 F.3d 491, 516 (3d Cir. 2001) ("Under the [1996] Act, there has been no delegation to state commissions of the power to fill gaps in the statute through binding rulemaking… State commissions have been given only the power to resolve issues in arbitration and to approve or reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement.”).

The District Court further rejected arguments that the *ISP Remand Order* gave state commissions authority to set rates “according to the Order’s compensation scheme.” Dist. Ct. Memo. at 30. As the Court noted, “[t]he only state authority that the *ISP Remand Order* references is the authority to arbitrate interconnection agreement disputes under § 252.” *Id.* at 31. This finding comports with the FCC’s own subsequent acknowledgement that it had “not delegate[d] its authority in the *ISP Remand Order*, but rather provided options that were not mandatory” (i.e., it constrained state commissions’ previously existing authority over Section 252 proceedings). *2008 ISP Remand Order*, 24 FCC Rcd. at 6489, ¶ 27 n.103.

Thus, the Court found that the PUC had “not pointed to any authority for [its] exercise of jurisdiction” and had not “cited any federal statutes, regulations, or Constitutional provisions that give the []PUC jurisdiction over ISP-bound traffic, outside of § 252 which does not apply here.” *Id.* at 32.

The District Court’s well-reasoned and thorough opinion thus demonstrates that any declaratory order from the FCC should reaffirm the well-established principles that underlie the conclusion that the PUC lacks jurisdiction over locally dialed ISP-bound traffic outside of a § 252 proceeding. Nonetheless, the PUC Petition purports to attack a number of alleged deficiencies in the District Court’s decision and argues that the FCC should issue a declaration stating that the PUC has jurisdiction over locally dialed ISP-bound traffic even outside the context of a proceeding under § 252. For the reasons set forth below, the PUC’s arguments are meritless and should be rejected.

1. The District Court did not create a new "division" in jurisdictional authority over ISP-bound traffic.

The PUC initially argues that the District Court's decisions allegedly are invalid because they supposedly "create[d] a division between the types of intercarrier compensation disputes adjudicated before the Pa. PUC, and probably other state commissions, under applicable federal and state law based on technology or the nature of the traffic." PUC Petition at 11. The PUC is mistaken. The District Court did not create a new "division" in jurisdictional authority, but merely applied preexisting and well-established precedent to determine the proper allocation between state and federal jurisdiction. The distinction between interstate traffic – which is subject to exclusive FCC jurisdiction – and intrastate traffic – which is subject to state commission jurisdiction – dates back to the Communications Act of 1934 and, since that time, has been set forth in the statute. 47 U.S.C. § 152(a).

The PUC also argues that the District Court's ruling allegedly "divides local ISP-bound traffic – and associated intercarrier compensation disputes – between traffic that is covered under Sections 251 and 252 interconnection agreements (typically ILEC-CLEC agreements approved by the Pa. PUC and other state commissions), and traffic that is exchanged indirectly between CLECs that have neither an interconnection agreement nor an explicit intercarrier compensation arrangement." PUC Petition at 11. However, the 1996 Act itself distinguishes between traffic exchanged between an ILEC and a CLEC – an arrangement which is subject to mandatory negotiation and arbitration under § 252 – and traffic exchanged between two CLECs – an arrangement which is *not* subject to § 252's mandatory negotiation and arbitration provisions. *See* 47 U.S.C. § 252 (limiting required negotiation and arbitration obligations to "incumbent local exchange carriers").

In interpreting the 1996 Act, the FCC delegated some of its regulatory authority to state commissions, but courts have repeatedly and consistently interpreted this delegation as limited to the arbitration and enforcement of ICAs properly negotiated or arbitrated under § 252. *See, e.g.*, *MCI Telecomm.*, 271 F.3d at 516 ("State commissions have been given only the power to resolve issues in arbitration and to approve or reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement."); *Pac. Bell*, 325 F.3d at 1126 ("[i]t is clear from the structure of the [1996 Act] … that the authority granted to state regulatory commissions is confined to the role described in § 252 – that of arbitrating, approving, and enforcing interconnection agreements"). Thus, rather than creating a new "division" of authority between state and federal regulators, the District Court instead applied the established, existing jurisdictional authorities and recognized that state commissions like the PUC have no jurisdiction over traffic that is "jurisdictionally interstate" outside the context of a § 252 proceeding.

The PUC also argues that Sections 251(a)(1) and 251(d)(3) of the 1996 Act, which require local exchange carriers – both incumbents and competitive carriers – to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers" and preserve state regulations, orders, or policies that "establish access and interconnection obligations of local exchange carriers." 47 U.S.C. §§ 251(a)(1), (d)(3). However, the District Court's decisions do not "obstruct[]" the indirect interconnection of CLECs or other local carriers. Indeed, the CLECs in this case – AT&T and Core – have been indirectly interconnected through the ILEC – Verizon – since at least 2004. There is no threat that such interconnection will be interrupted or prevented. Rather, this case involves a tardy request by Core for payments arising out of that indirect interconnection. However, as AT&T argued before the District Court, Core has no contract or tariff providing for such payments, so its request is wholly improper. *See, e.g.*, 47 U.S.C. §§ 201, 203 (prohibiting "unjust or unreasonable" charges and prohibiting charges at rates not set forth in a tariff); and 47 U.S.C. § 251(b)(5) (requiring a "reciprocal compensation arrangement" before a LEC may recover intercarrier compensation).

In any event, AT&T operates on a bill-and-keep system with every other CLEC in Pennsylvania and the FCC has mandated that all such compensation must transition to bill-and-keep by 2018. *Connect America Fund Order*, 26 FCC Rcd, at 17663 ¶¶ 9 & 33-4; *In re FCC 11-161*, 2014 WL 2142106, at *78-94. Thus, there is no threat to the indirect interconnection of CLECs and the District Court's decisions do not "obstruct" such interconnection.[10]

2. The District Court's decisions do not conflict with the Ninth Circuit's decision in *AT&T Commc'ns of Cal.* or the FCC's *Amicus Brief*.

The PUC next argues that the District Court's decisions somehow "appear to conflict with the Commission's view in *AT&T Commc'ns of Cal.* that state commissions have jurisdiction to adjudicate CLEC-CLEC intercarrier compensation disputes involving local ISP-bound traffic." PUC Petition at 14. However, the FCC never expressed such a view, whether in its Ninth Circuit *Amicus Brief* or anywhere else.

In *AT&T Commc'ns of Cal.*, the CPUC ordered AT&T Communications to pay Pac-West at the rate in Pac-West's intrastate long distance tariff, which exceeded the FCC's rate cap from the *ISP Remand Order*. *AT&T Commc'ns of Cal.*, 651 F.3d at 989-90. In its *Amicus Brief*, the

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[10] The PUC cites its own opinion in *Palmerton Tel. Co. v. Global NAPs South, Inc., et al.*, No. C-2009-209336 (Pa. PUC Mar. 16, 2011) and claims that the "Commission refrained from limiting Pa. PUC jurisdiction to adjudicate intercarrier compensation disputes that arose between an ILEC and a CLEC that were indirectly interconnected without a relevant agreement or a formal compensation arrangement, and exchanged long-distance VoIP call traffic that terminated at the ILEC's public switched telecommunications network (PSTN)." However, *Palmerton* dealt with the PUC's own decision, which provides no support for its extra-jurisdictional actions in the PUC Orders. In addition, there was a tariff in *Palmerton* that covered the traffic in question, unlike here. Moreover, this case involves two CLECs, not an ILEC, and involves locally dialed ISP-bound traffic, which is jurisdictionally interstate, not the VoIP traffic at issue in *Palmerton*. Thus, *Palmerton* provides no support for the PUC's arguments.

FCC advised the Ninth Circuit that state commissions "lawfully could not apply and enforce state-tariffed rates that conflict with federal law." Ex. A, at 29. Accordingly, the FCC explained that the Ninth Circuit could "reverse the district court's affirmance of the CPUC's resolution of the dispute under state law on the grounds of federal pre-emption" and that the Ninth Circuit "need not decide whether the CPUC has jurisdiction to adjudicate the dispute in this case applying federal law." *Id.* The FCC declined to "take a position on this issue" itself because it "has not directly spoken to the broader jurisdictional issue in its rules and orders." *Id.*

However, the fact that the FCC did not "take a position" on the issue in the *Amicus Brief* and has not yet "directly spoken" to the issue in its "rules and orders" does not mean that the issue has somehow been left "open." Nor does it alter the long-standing FCC authority classifying ISP-bound traffic as jurisdictionally interstate. *See ISP Remand Order*, 16 FCC Rcd at 9175, ¶ 52; *2008 ISP Remand Order*, 24 FCC Rcd. at 6483, ¶ 17. The necessary result of this authority is that ISP-bound traffic falls within the exclusive jurisdiction of the FCC and that state commissions have no jurisdiction to set and apply rates for such traffic outside of a § 252 proceeding, as the PUC purported to do in its Orders.

3. The District Court's decisions do not conflict with the *ISP Remand Order*.

The PUC also suggests that the District Court's decisions violated the *ISP Remand Order* by holding that the PUC had no jurisdiction to regulate locally dialed ISP-bound traffic outside the context of a § 252 proceeding. PUC Petition at 15-16. The PUC argues that the FCC, in the *ISP Remand Order* preempted "inconsistent state regulation," and thus left a role for the state's to regulate ISP-bound traffic as long as they did so "consistent" with the compensation scheme in the *ISP Remand Order*. *Id.* at 15. As the District Court recognized, though, the role of the state commissions envisioned by the *ISP Remand Order* is limited to "the authority to arbitrate interconnection agreement disputes under § 252." Dist. Ct. Memo. at 31. Indeed, the "only state authority" referenced in the *ISP Remand Order* arises under § 252. *Id.*

In any event, the PUC's argument rests on the mistaken understanding that the District Court held that the PUC had been "preempted" from regulating locally dialed ISP-bound traffic. That is wrong. The District Court did not find that the PUC's authority had been "preempted"; rather, it found that the PUC had no authority over locally dialed ISP-bound traffic in the first place. Dist. Ct. Memo. at 32 ("The defendants [including the PUC] have not pointed to any authority for the []PUC's exercise of jurisdiction.").

The PUC also argues that the District Court allegedly erred because the PUC allegedly "never asserted authority to '*establish* a rate for ISP-bound traffic between CLECs,' as the District Court concluded." PUC Petition at 16. Instead, the PUC argues that it merely sought to "*enforce* a federally-established rate" of $0.0007/MOU, which was the rate cap set forth in the *ISP Remand Order*. *Id.* The PUC is wrong. The *ISP Remand Order* did not "establish" or "impose" a federal rate of $0.0007/MOU for ISP-bound traffic. Rather, in the *ISP Remand Order*, the FCC capped the rates for ISP-bound traffic that state commissions could impose in § 252 proceedings. *ISP Remand Order*, 16 FCC Rcd. at 9187, ¶ 78. The FCC specifically emphasized that this cap had "no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps … or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic." *Id.* at 9188, ¶ 80.

Thus, under the FCC's cap, state commissions remained free to impose any lower rate, including bill-and-keep, on ISP-bound traffic through a § 252 proceeding. *Id.* Nonetheless, in this case, the PUC established a rate of $0.0007/MOU for the traffic at issue. Dist. Ct. Memo. at

6. Accordingly, the District Court did not err when it found that the PUC had attempted to establish a rate for the ISP-bound traffic at issue.

4. The District Court's decisions do not conflict with Pennsylvania state law.

The PUC next argues that the District Court's decisions allegedly conflict with the PUC's purported "jurisdiction under state law to adjudicate this intercarrier compensation dispute between Core and AT&T and others like it." PUC Petition at 16. The PUC notes that AT&T and Core are certificated as CLECs in Pennsylvania and that Verizon operates network facilities as an ILEC in the state. *Id.* at 16-17. However, neither of these facts give the PUC authority over jurisdictionally interstate traffic exchanged between the parties. *ISP Remand Order*, 16 FCC Rcd. at 9175, ¶ 52. Indeed, the PUC's own state-law enabling statute gives the PUC jurisdiction over interstate communications only where "federal law or the Constitution allows." Dist. Ct. Memo. at 32 (citing 66 Pa. C.S.A. § 104). As the District Court observed, the PUC has "not cited any federal statutes, regulations, or Constitutional provisions that give the []PUC jurisdiction over ISP-bound traffic, outside of § 252 which does not apply here." *Id.*

The PUC also notes that it adjudicates various disputes and arbitrations in other contexts, including with respect to "VOIP-PSTN" traffic, "intrastate switched carrier access tariffs," and "amendments to existing interconnection agreements." PUC Petition at 17-18. However, in none of these other contexts, has the PUC attempted to assert jurisdiction over traffic that is jurisdictionally interstate outside the context of a § 252 proceeding. In any event, the PUC cannot bootstrap its own actions to support the extra-jurisdictional exercise of authority that it attempted in the PUC Orders, which was properly enjoined by the District Court. Therefore, these disputes and arbitrations provide no support for the PUC's request in this matter.

5. The District Court's decisions do not create a "new paradigm" or require the referral of any PUC cases to the FCC.

Finally, the PUC raises a number of arguments suggesting that the District Court's decisions have created "uncertainty" or will require the PUC to refer various pending matters to the FCC. PUC Petition at 18-22. These concerns are baseless. As noted above, the District Court applied well-established and long-standing precedent in ruling that the PUC does not have authority over jurisdictionally interstate traffic outside a § 252 proceeding. *See* Dist. Ct. Memo. at 23-33. Accordingly, the District Court's decisions have not created a "new paradigm" or caused any uncertainty in the PUC's jurisdiction over interstate traffic.

Nonetheless, the PUC argues that it "increasingly encounters carriers exchanging Internet Protocol-based (IP) traffic both directly (e.g., under Sections 251 and 252 interconnection agreements) and indirectly without formal intercarrier compensation arrangements" and states that, unless the FCC essentially overturns the District Court's decisions, the PUC "is prepared to forward all current and future unresolved disputes to the FCC for resolution beyond those subject to Sections 251 and 252." PUC Petition at 18-19. The PUC's threat is misguided.

As an initial matter, the PUC does not identify any pending or future disputes – other than the underlying dispute between AT&T and Core and a potentially similar dispute between Core and XO Communications (PUC Petition at 22, n.40) – that will be affected by the District Court's ruling.[11] Aside from this case, the XO Communications matter, and the *AT&T Commc'ns of Cal.* case, AT&T is aware of no other such cases. In any event, the FCC's transition to a bill-and-keep system assures that any such disputes will be short-lived and will disappear altogether by 2018. *Connect America Fund Order*, 26 FCC Rcd. 17663 ¶¶ 9 & 33-42;

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[11] The PUC identifies the *Palmerton* matter (PUC Petition at 18 n.36), but as noted *supra*, that case involves VoIP traffic exchanged between an ILEC and a CLEC, not locally dialed ISP-bound traffic between two CLECs, which is at issue here.

In re FCC 11-161, 2014 WL 2142106, at *78-94. This conclusion is supported by the disappearance of any significant scale of dial-up Internet access over recent years and the fact that CLECs historically have voluntarily exchanged all locally dialed traffic (including dial-up) on a bill-and-keep basis. In any event, if a carrier in Core's position wants to be paid for terminating such traffic, they could have filed a tariff at the FCC – which could be enforced in federal court – or could have entered into a TEA – which could be enforced in state court. There is no risk of a deluge of new cases being sent to the Commission.

Moreover, to the extent that a carrier asks the PUC to resolve a dispute regarding interstate traffic outside of the context of § 252, the proper course of action is for the PUC to dismiss the claim for a lack of jurisdiction, not "refer" the claim to the FCC. *See, e.g.*, Dist. Ct. Memo. at 32-33 (recognizing the PUC's lack of jurisdiction over such traffic). Indeed, without the ability to take jurisdiction over the underlying dispute, the PUC would lack jurisdiction to "refer" the matter to the FCC in any event.

The PUC also argues that the District Court's decisions allegedly affect the PUC's role under the *Connect America Fund Order*. PUC Petition at 20. The *Connect America Fund Order* requires states to implement and enforce the FCC's intercarrier compensation reforms by ensuring that carriers comply with the transition timing and intrastate access charge reductions mandated by the FCC. *Connect America Fund Order*, 26 FCC Rcd. at 17940 ¶ 813. However, this role is limited to oversight of traffic that falls within the PUC's existing jurisdiction. *Id.* The *Connect America Fund Order* did not delegate additional authority to state commissions to regulate interstate traffic, and the PUC points to nothing to support such an interpretation.

Accordingly, for the reasons noted above, if the FCC is inclined to issue a declaratory order in response to the PUC Petition, it should reaffirm that locally dialed ISP-bound traffic is jurisdictionally interstate and reaffirm that state commissions like the PUC have no jurisdiction over interstate traffic outside of a proceeding under § 252.

V. CONCLUSION

As explained in detail above, the FCC should deny the PUC Petition because the relief requested in the Petition is barred by *res judicata*. In the alternative, the FCC should issue a declaratory order reaffirming that the PUC has no jurisdiction over locally dialed ISP-bound traffic outside of a proceeding under § 252.

Dated: June 30, 2014

Respectfully Submitted,

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EXHIBIT A

AMICUS BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION
IN PARTIAL SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 08-17030

AT&T COMMUNICATIONS OF CALIFORNIA, INC., ET AL.,

PLAINTIFF-APPELLANT,

v.

PAC-WEST TELECOMM, INC., ET AL.,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 08-17030

AT&T COMMUNICATIONS OF CALIFORNIA, INC., ET AL.,

PLAINTIFF-APPELLANT,

v.

PAC-WEST TELECOMM, INC., ET AL.,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMICUS BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION
IN PARTIAL SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

In response to this Court's November 4, 2010 invitation, the Federal Communications Commission ("FCC") respectfully files this brief as *amicus curiae*.

STATEMENT OF INTEREST

The FCC has primary responsibility for implementing and enforcing the Communications Act of 1934, 47 U.S.C. § 151, *et seq*. ("Communications Act" or "Act"). The dispute in this case turns largely on the proper interpretation of FCC rules and orders governing intercarrier compensation for telecommunications traffic to Internet Service Providers ("ISPs"). The FCC has an interest in ensuring that its rules and its precedents, including those governing intercarrier compensation, are interpreted correctly.

STATEMENT OF THE CASE

I. Introduction

This case presents regulatory issues related to one method – "dial-up" access – that consumers use to access the Internet. Under a typical dial-up arrangement, a customer of an ISP uses the telephone network to reach the ISP by programming his or her computer to dial a seven-digit number. When the ISP's customer subscribes to one local telephone company (known as a "Local Exchange Carrier" or "LEC") and the ISP subscribes to a different LEC, the customer's calls are conveyed over the facilities of multiple LECs. Typically, the LEC serving the ISP's customer transports the calls to the LEC serving the ISP, which then transports the calls to the ISP. The ISP, in turn, enables that customer to access the particular Internet website (or websites) that he or she has selected.[1] The Internet website (or websites) selected by the customer are often located in another state.[2]

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, 14 FCC Rcd 3689, 3691 (¶ 4) (1999) ("*Declaratory Ruling*"), *vacated and remanded Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (subsequent history omitted).

[2] *Declaratory Ruling*, at 3697 (¶ 12).

II. Background

The Communications Act gives the FCC "broad authority to regulate interstate telephone communications."[3] Section 201(b) of the Act, for example, gives the FCC responsibility to ensure that the charges "for and in connection with" interstate communications services are "just and reasonable." 47 U.S.C. § 201(b). Any such charge that the FCC finds to be "unjust or unreasonable is . . . declared to be unlawful." *Id.*

Congress in the Telecommunications Act of 1996 ("1996 Act")[4] amended the Communications Act to establish a regulatory framework designed to encourage competition in all telecommunications markets, including local telephone markets. To this end, the 1996 Act distinguishes between incumbent LECs ("ILECs"), which are the local telephone companies (including those of the Bell System) that generally enjoyed a state-sanctioned monopoly prior to passage of the statute, and competitive LECs ("CLECs") seeking to enter the market to compete with the ILECs.[5]

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[3] *Global Crossing Telecomms. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 48 (2007). *See* 47 U.S.C. § 152(a) (assigning to the FCC jurisdiction over all "interstate and foreign communication by wire . . . which originates and/or is received within the United States.").

[4] Pub. L. No. 104-104, 110 Stat. 56 (codified in various sections of Title 47 of the United States Code).

[5] *New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1107 (9th Cir. 2006). *See* 47 U.S.C. § 251(h).

To facilitate the rise of competition in local telephone markets, 47 U.S.C. § 251(b) imposes a number of duties on all LECs.[6] Among these obligations is the duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). When the customer of one LEC calls a customer of another LEC, reciprocal compensation arrangements require the LEC originating the call to compensate the LEC terminating (or completing) the call for the use of its facilities.[7]

The 1996 Act gives both the FCC and the state commissions a role in implementing the reciprocal compensation obligations of section 251. The statute, for example, authorizes the FCC to establish regulations governing both interstate and intrastate aspects of section 251.[8] The state commissions have a complementary responsibility in certain circumstances to arbitrate disputed issues (such as reciprocal compensation arrangements) between ILECs and other carriers and to ensure that the resulting interconnection agreements address arbitrated issues in compliance with the 1996 Act's local competition provisions and the FCC's implementing regulations. *See* 47 U.S.C. § 252. However, "[n]othing in

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[6] ILECs have "[a]dditional obligations" under 47 U.S.C. § 251(c) to provide to requesting carriers interconnection, unbundled access to network elements, and resale of retail services, as well as the duty to negotiate in good faith contracts or "interconnection agreements" with requesting carriers to fulfill their various statutory duties. Those duties are not at issue in this case.

[7] *Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 141 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 597 (2010).

[8] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999). *See* 47 U.S.C. §§ 201(b), 251(d)(1).

[section 251] limit[s] or otherwise affect[s] the Commission's authority [over interstate services] under section 201." 47 U.S.C. § 251(i).

III. FCC's ISP-Bound Traffic Compensation Proceeding.

***Nature and Scope of Proceeding*.** After the passage of the 1996 Act, the FCC received a number of requests to clarify whether traffic that an interconnecting LEC delivers to an ISP is subject to the reciprocal compensation obligations of section 251(b). *Declaratory Ruling*, 14 FCC Rcd at 3689 n.1. Some parties had posed the inquiry to the FCC "more narrowly," *i.e.*, whether an ILEC must pay reciprocal compensation to a CLEC for the delivery of ILEC-originated traffic to ISPs. *Id*. The FCC rejected that narrow formulation. Because reciprocal compensation obligations "pertain[] to all LECs," the FCC decided instead to "examine this issue in the broader context" of all LEC ISP-bound traffic. *Id.*

The FCC's examination of reciprocal compensation as it relates to ISP-bound traffic has extended over ten years and has involved multiple agency orders and appellate proceedings.[9] The FCC's rulings and regulations ultimately were upheld on judicial review.[10]

Need for Regulatory Intervention. The FCC determined that the application of reciprocal compensation to ISP-bound traffic generates substantial market distortions "creating an opportunity for regulatory arbitrage and leading to uneconomical results." *ISP Remand Order*, 16 FCC Rcd at 9162 (¶ 21). ISP-bound communications produce large numbers of calls that flow almost exclusively in one direction. *Id.* at 9162 (¶¶ 20-21). As a result, reciprocal compensation payments for ISP-bound traffic also are overwhelmingly in one direction – from the originating LEC to the LEC serving the ISP. The FCC determined that the opportunity to be on the receiving end of reciprocal compensation payments in this context encourages the "inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local competition, as

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[9] *See Declaratory Ruling*, 14 FCC Rcd 3689; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), *remanded WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *on remand*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime*, *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 (2008) ("*2008 ISP Remand Order*"), *petition for review denied Core Commc'ns*, 592 F.3d 139 (D.C. Cir.), *cert. denied*, 131 S.Ct. 597 (2010). *See also 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*"), *petition for review denied*, *In re Core Commc'ns*, *Inc.*, 455 F.3d 267 (D.C. Cir. 2006).

[10] *Core Commc'ns*, 592 F.3d 139; *In re Core Commc'ns*, 455 F.3d 267.

Congress had intended to facilitate with the 1996 Act." *Id.* It also allows LECs serving ISPs to offer their customers "below cost retail rates subsidized by intercarrier compensation." *Id.* at 9182 (¶ 68). Indeed, the FCC explained, the one-way nature of reciprocal compensation payments for ISP-bound traffic actually makes "it possible for LECs serving ISPs to afford to pay their own customers to use their services." *Id.* at 9162 (¶ 21).

The FCC found other market distortions associated with the applicability of reciprocal compensation to ISP-bound traffic. "[B]ecause the originating LEC typically charges its customers averaged rates," the FCC explained, the ISP's customer "receives inaccurate price signals as the costs associated with the intercarrier payments are recovered through rates averaged across all of the originating carrier's end-users." *Id.* at 9182 (¶ 68).

As a result, the FCC found that a customer "with extensive Internet usage" may cause the originating LEC to incur substantial reciprocal compensation obligations but "receives no price signals reflecting those costs because they are spread over all [the originating] LEC's customers." *Id.* The reciprocal compensation regime for ISP-bound traffic thus "disconnect[s] costs from end-user market decisions" and "distorts competition by subsidizing one type of service at the expense of others." *Id.* at 9155, 9162 (¶¶ 5, 21).

The Interstate Nature of ISP-Bound Traffic. The FCC also has consistently held that ISP-bound communications are jurisdictionally interstate. Based upon its "traditional" end-to-end analysis to determine whether a particular call falls within the FCC's jurisdiction over interstate communications, the FCC explained that ISP-bound traffic should be analyzed "for jurisdictional purposes as a continuous transmission" from the ISP's customer who initiates transmission to the Internet website (or websites) "often located in another state."[11] Although recognizing that a small amount of ISP-bound traffic "may be intrastate," *i.e.*, communications to a website located in the same state as the ISP's customer, the FCC reasoned that the "interstate and intrastate components cannot reliably be separated," and thus the "ISP traffic is properly classified as interstate" for jurisdictional purposes.[12] And because ISP-bound traffic is jurisdictionally interstate, the FCC held that it had authority under section 201(b) to establish intercarrier pricing rules governing this traffic. *ISP Remand Order*, 16 FCC Rcd at 9175 (¶ 52).

The FCC ultimately determined that ISP-bound traffic falls within the scope of the reciprocal compensation provisions of section 251(b)(5). *2008 ISP Remand Order*, 24 FCC Rcd at 6479-83 (¶¶ 7-16). In making that determination, however, the FCC affirmed that it has authority under section 201(b) to establish pricing rules governing this interstate traffic. *Id.* at 6484-85 (¶ 21). *See* 47 U.S.C. § 251(i).

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[11] *Declaratory Ruling*, 14 FCC Rcd at 3697, 3698 (¶ ¶ 12, 13). *See ISP Remand Order*, 16 FCC Rcd at 9175 (¶ 52).

[12] *ISP Remand Order*, 16 FCC Rcd at 9175 (¶ 52). *See 2008 ISP Remand Order*, 24 FCC Rcd at 6485 n.69 (The FCC has "consistently found that ISP-bound traffic is jurisdictionally interstate."). *See Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1153 (9th Cir. 2006) (The "FCC had defined ISP traffic as 'interstate' for jurisdictional purposes in the *ISP Remand Order*"). *See generally Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 n.4 (1986).

Compensation Regime. The FCC posited that one possible solution to the rate distortions and regulatory arbitrage associated with intercarrier compensation in the context of ISP-bound traffic would be a bill-and-keep regime under which there are no payments among carriers, but rather each carrier recovers its costs from its own end user customers. The FCC accordingly instituted a rulemaking to consider whether it should replace the existing intercarrier compensation mechanisms with a bill-and-keep regime.[13] Finding a "need for immediate action with respect to ISP-bound traffic,"[14] however, the FCC in its *ISP Remand Order* adopted intercarrier compensation rules under its section 201(b) authority designed to limit the opportunity for regulatory arbitrage and rate distortions for ISP-bound traffic pending the completion of the more comprehensive rulemaking.[15] *Id.* at 9186-93 (¶¶ 77-88).

The compensation rules adopted in the *ISP Remand Order* had four components — rate caps, a new markets rule, a growth cap and a mirroring rule. The rate caps consisted of gradually declining limits on the rates that "carriers may recover from other carriers for delivering ISP-bound traffic." *Id.* at 9156 (¶ 7).

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[13] *ISP Remand Order*, 16 FCC Rcd at 9153 (¶ 2). *See Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("*Unified Regime NPRM*").

[14] *ISP Remand Order*, 16 FCC Rcd at 9155 (¶ 7). Recognizing some LECs might not be able to identify ISP-bound traffic, the FCC adopted a rebuttable presumption that traffic between LECs "that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic" is subject to the intercarrier compensation rules. *Id*. at 9187 (¶ 79).

[15] The compensation rules relevant to this case became effective on June 15, 2001. *Id.* at 9204 (¶ 112). *See* 66 FR 26800-01 (May 15, 2001).

The initial cap was set at $.0015/ minute of use (“mou”) and declined in increments to $.0007/mou. *Id.* at 9187 (¶ 78). The new markets rule denied any intercarrier compensation for ISP-bound traffic (and thus mandated a bill-and-keep regime) in markets where the ISP’s LEC was “not exchanging traffic pursuant to [an] interconnection agreement[] prior to adoption” of the *ISP Remand Order*. *Id.* at 9188 (¶ 81). The growth cap limited the total minutes for which a LEC could receive intercarrier compensation for ISP-bound traffic. *Id.* at 9191 (¶ 86). Lastly, the mirroring rule, which applies only to ILECs, provides that an ILEC can avail itself of the rate caps and new markets rule only if it charges other carriers the same rate to terminate traffic subject to section 251(b)(5) originating on those carriers’ networks. *Id.* at 9193 (¶ 89). The mirroring rule addresses the FCC’s “concern[] about the superior bargaining power of incumbent LECs” when negotiating an interconnection agreement with a new competitor by ensuring that ILECs “pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic.” *Id.* at 9193, 9194 (¶ 89).

Exercising authority delegated to it by Congress in 47 U.S.C. § 160, the FCC subsequently issued an order granting a petition requesting forbearance from the growth cap rule and the new markets rule.[16] That order rendered those two rules no longer enforceable as of October 18, 2004.

Pre-emption. With several exceptions not relevant to this case, the FCC expressly declared that its intercarrier compensation regime for ISP-bound traffic

[16] *Core Forbearance Order*, 19 FCC Rcd 20179.

pre-empted inconsistent state regulation. *ISP Remand Order*, 16 FCC Rcd at 9189 (¶ 82).[17] The FCC explained that it has "exercise[d] [its] authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic," which is jurisdictionally interstate, and thus "state commissions will no longer have authority to address this issue." *Id.*

IV. This Proceeding

AT&T Communications, Inc. ("AT&T"), a CLEC, originates traffic that is routed through the networks of two ILECs, Pacific Bell Telephone Company ("Pacific Bell") and Verizon California Inc. ("Verizon"), and then is terminated by Pac-West Telecomm, Inc., ("Pac-West"), another CLEC. Decision at 2 (ER 3). "The volume of local exchange traffic terminated by Pac-West for AT&T is many times greater than the volume of local exchange traffic terminated by AT&T for Pac-West." CPUC Decision at 42 (AER 416).[18]

Pac-West and AT&T do not have an interconnection agreement. Decision at 2 (ER 3). Beginning in July 2001, Pac-West billed AT&T for its termination of AT&T-originated traffic based upon the rates for the completion of "local calls and intraLATA toll calls" contained in its state tariff on file with the California Public

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[17] The FCC noted that its rate regime for ISP-bound traffic "does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change of law provisions." *ISP Remand Order*, 16 FCC Rcd at 9189 (¶ 82). The FCC also did "not pre-empt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date" of the compensation rules. *Id.*

[18] Record evidence shows that Pac-West terminated more than 115 times more traffic for AT&T than AT&T terminated for Pac-West. ER 260.

Utility Commission ("CPUC"). Pac-West Tariffs, ER 311-17. *See* Decision at 2 (ER 3).[19] AT&T refused to pay these charges, claiming that Pac-West was not entitled to charge AT&T state-tariffed termination rates for the traffic at issue because the federal new markets rule prescribed a bill-and-keep compensation regime for the traffic terminated by Pac-West. ER 337-38.

In October 2004, Pac-West complained to the CPUC, challenging AT&T's refusal to pay the state-tariffed termination charges. Complaint (ER 289-301). Pac-West asked the CPUC , *inter alia*, to order AT&T to pay the termination charges invoiced by Pac-West, plus all future amounts accruing during the pendency of the complaint. *Id.* at 12 (ER 300). For the purpose of addressing the legal issues, Pac-West stipulated that the traffic at issue was "all ISP-bound." CPUC Reconsideration at 5-6 (AER 368-69).

In an order dated June 29, 2006, the CPUC granted Pac-West's complaint. CPUC Decision (AER 374-420). The CPUC acknowledged that the language of the new markets rule "seems to support AT&T's argument that it is entitled to exchange ISP bound traffic with Pac-West on a bill-and-keep basis." *Id.* at 24 (AER 398). The CPUC nonetheless held that the FCC's compensation rules, including the new markets rule, apply only to ISP-bound traffic that was originated by a subclass of ILECs, *i.e.*, those ILECs that satisfied the mirroring rule by

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[19] Prior to the adoption of the 1996 Act, a single ILEC "provided all telephone service in a geographically confined area known as a Local Access and Transport Area ("LATA")." *Global NAPs Cal., Inc. v. Pub. Util. Comm'n of the State of Cal.*, 624 F.3d 1225, 1228 (9th Cir. 2010). An intraLATA call is a call originating and terminating within a single LATA.

offering to exchange all traffic subject to section 251(b)(5) at the same rate. The CPUC construed the "*ISP Remand Order* [as] silent on the issue of what compensation should be paid when one CLEC exchanges ISP-bound traffic with another CLEC and no interconnection agreement is in effect between them." *Id*. at 33 (AER 407).

Given what it perceived as "the absence of any controlling federal authority," the CPUC held that it had "discretion" to determine the amount of compensation, if any, that AT&T should pay Pac-West for terminating ISP-bound traffic that originated on its network. *Id.* at 45 (AER 419). The CPUC exercised that "discretion" by requiring AT&T to pay the termination charges contained in Pac-West's state tariff. *Id.* at 34 (AER 408).

AT&T filed a complaint against Pac-West and the CPUC in federal district court seeking a declaration that the CPUC lacks jurisdiction to order AT&T to compensate Pac-West for terminating its ISP-bound traffic pursuant to Pac-West's intrastate tariff. Complaint (ER 188-204). The district court granted summary judgment to Pac-West and the CPUC. *Id.* at 18 (ER 19).

The district court recognized that "the FCC use[d] the terms 'LEC' and 'carrier' without modifiers throughout the *ISP Remand Order*." *Id.* at 14 (ER 015). The court nevertheless construed the *ISP Remand Order* to apply only to ILEC-to-CLEC ISP-bound traffic because, it held, the FCC in its *ISP Remand Order* had not shown a clear intent to pre-empt the states from regulating the compensation of ISP-bound traffic between two CLECs. *Id.* at 3 (ER 004).

AT&T filed an appeal with this Court. After oral argument, the Court invited the FCC to file an *amicus* brief on the following questions:

> 1. Does the interim compensation regime established by the FCC's order *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (*Order on Remand*), 16 F.C.C.R. 9151 (2001), apply so as to govern the compensation due one competitive local exchange carrier ("CLEC") for the termination of presumptively ISP-bound traffic originating with another CLEC, where the traffic is indirectly exchanged and the two CLECs do not have an interconnection agreement? If yes, how do the rate caps and "mirroring" rules apply to this situation after the FCC decided to forbear from enforcing the "new market[s]" rule in October of 2004?
>
> 2. In the absence of an interconnection agreement, does the California Public Utilities Commission ("CPUC") have jurisdiction to hear a dispute over compensation due one CLEC for the termination of indirectly-exchanged, presumptively ISP-bound traffic originating with another CLEC?[20]

ARGUMENT

As shown below, the FCC's intercarrier compensation rules apply to the CLEC-to-CLEC ISP-bound traffic at issue in this case and have pre-emptive effect. The CPUC thus erred when it adjudicated the dispute between AT&T and Pac-West under state law. The FCC in its rules and orders has not directly spoken to the issue whether the CPUC would have jurisdiction to resolve this dispute applying federal law and accordingly the FCC in this *amicus* brief takes no position on that issue.

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[20] Order of the Court, filed Nov. 4, 2010 at 2.

I. THE FCC's INTERCARRIER COMPENSATION REGIME APPLIES TO ISP-BOUND TRAFFIC EXCHANGED BETWEEN CLECS.

Under well-established law, an "agency's reading of its own rule[s] is entitled to substantial deference."[21] Indeed, an agency's construction of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'"[22] This deference applies to an interpretation that is contained in an *amicus* brief where, as here, that interpretation "'reflect[s] the agency's fair and considered judgment on the matter in question.'"[23]

The *ISP Remand Order* established an intercarrier compensation regime that applies to ISP-bound traffic exchanged between CLECs. As shown below, the regulatory language, the FCC's description of the scope of its compensation regime, and the regulatory purpose demonstrate that the new markets rule (until forborne from on October 18, 2004) and the rate caps — the two elements of the compensation regime relevant to the dispute in this case — apply to CLEC-to-CLEC ISP-bound traffic.

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[21] *Riegel v. Medtronic*, 552 U.S. 312, 328 (2008). *See Chase Bank, N.A. v. McCoy*, No. 09-329, 2011 WL 197641, slip op. at 8-11 (U.S. Jan. 24, 2011).

[22] *Auer v. Robbins,* 519 U.S. 452, 461 (1999) (internal quotations omitted). *Accord Chase Bank*, slip op. at 8; *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008); *Akiak Native Cmty. v. EPA*, 625 F.3d 1162, 1167 (9th Cir. 2010).

[23] *Chase Bank*, slip op. at 8 (*quoting Auer*, 519 U.S. at 462). *See Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 129 S. Ct. 865, 872 n.7 (2009); *Dreiling v. Am. Express Co.*, 458 F.3d 942, 953 n.11 (9th Cir. 2006).

The starting point in the interpretation of a statute or agency rule is its language.[24] "Absent a clearly expressed . . . intention to the contrary, that language must ordinarily be regarded as conclusive."[25] The FCC in adopting the new markets and rate cap rules repeatedly used the word "carriers," a broad term that includes both ILECs (incumbent local exchange *carriers*) and CLECs (competing local exchange *carriers*).[26] For example, the new markets rule requires "*carriers*" to "exchange ISP-bound traffic on a bill-and-keep basis" if those "*carriers* [were] not exchanging traffic pursuant to interconnection agreements" before the *ISP Remand Order* was adopted.[27] Similarly, the rate cap rule restricts "the amount that *carriers* may recover from other *carriers* for delivering ISP-bound traffic."[28] Not once does the FCC in the passages of the *ISP Remand Order* adopting the rate cap or new markets rules use the term "ILEC," "incumbent carrier," or similar restrictive language.

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[24] *E.g.*, *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *U.S. v. Able Time, Inc.*, 545 F.3d 824, 828 (9th Cir. 2008). *See Boeing Co. v. U. S.*, 258 F.3d 958, 967 (9th Cir. 2001) ("tenets of statutory construction apply with equal force to the interpretation of regulations.")

[25] *Consumer Product*, 447 U.S. at 108. *See, e.g.*, *Chase Bank*, slip op. at 8-11.

[26] With an exception not relevant to this case, the Communications Act broadly defines "carrier" as "*any* person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy." 47 U.S.C. § 153(10) (emphasis added).

[27] *ISP Remand Order*, 16 FCC Rcd at 9188 (¶ 81) (emphasis added).

[28] *Id.* at 9156 (¶ 7) (emphasis added). *See id.* at 9190 (¶ 84) (rate caps "limit *carriers*' ability to draw revenue from other *carriers*, rather than from their own end-users.") (emphasis added).

The FCC's language choice is "a decision that is imbued with legal significance."[29] In contrast to the broad term "carrier" used in the rate cap and new markets rules, the FCC used the more restrictive terms "incumbent LEC[s]," "ILEC[s]," or "incumbent[s]" at least 14 times in adopting or describing the mirroring rule,[30] a rule that applies only to ISP-bound traffic originated by ILECs.[31] Under the "well-established canon" of interpretation,[32] the use of "different words in connection with the same subject"[33] "demonstrates that [the drafter] intended to convey a different meaning for those words."[34] The unmodified word "carrier" the FCC used in adopting the rate cap and the new markets rules has a different meaning than the narrower term "ILEC" (and its synonyms) that it used in adopting the mirroring rule. The use of the broad term "carrier" shows that the rate cap and new markets rules apply to exchanges of ISP-bound traffic between two CLECs.[35]

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[29] *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003).

[30] *ISP Remand Order*, 16 FCC Rcd at 9157, 9193 (¶¶ 7, 89) & nn. 178, 179.

[31] *See* 47 U.S.C. § 251(h) (defining "incumbent local exchange carrier[s]" as a subset of LECs).

[32] *McCarthy*, 322 F.3d at 656.

[33] *Arizona Health Care Cost Containment Sys. v. McCellan*, 508 F.3d 1243, 1250 (9th Cir. 2007).

[34] *Warre v. Comm'r of the SSA*, 439 F.3d 1001, 1005 (9th Cir. 2006) (*quoting McCarthy*, 322 F.3d at 656).

[35] *See Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 775 (9th Cir. 2008).

The FCC's statements delineating both the scope of its proceeding and its rules confirm that the FCC's compensation regime applies to CLEC-to-CLEC ISP-bound traffic. The FCC stated at the outset of its intercarrier compensation proceeding that it would broadly examine ISP-bound traffic exchanged between LECs,[36] a term of art broadly defined in the Communications Act as "*any* person that is engaged in the provision of telephone exchange service or exchange access."[37] The FCC explicitly decided *not* to conduct a "more narrow[]" inquiry limited to ILEC-to-CLEC exchanges, explaining that "the pertinent provision of the 1996 Act pertains to all LECs."[38]

In the *ISP Remand Order*, the FCC made it clear that its compensation regime applies "when *carriers* collaborate to deliver calls to ISPs."[39] Indeed, as the district court acknowledged, the FCC in describing the scope of its compensation regime "use[d] the terms 'LEC' and 'carrier' without modifiers throughout the *ISP Remand Order*."[40] The FCC, for example, described its compensation regime as "limiting *carriers'* opportunity to recover costs from other

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[36] *Declaratory Ruling*, 14 FCC Rcd at 3689 n.1.

[37] 47 U.S.C. § 153(26) (emphasis added).

[38] *Declaratory Ruling*, 14 FCC Rcd at 3689 n.1. *See* 47 U.S.C. § 251(b)(5).

[39] *ISP Remand Order*, 16 FCC Rcd at 9181 (¶ 66) (emphasis added).

[40] Decision at 14 (ER 15). Pac-West's counterintuitive assertion that the FCC's repeated use of the unmodified term "LECs" in the *ISP Remand Order* signifies a specific subset of LECs, *i.e.*, "ILECs interconnected with CLECs," is without merit. *See* Pac-West Brief at 40. As noted above, the term "LEC," is a term of art in federal telecommunications regulation that includes "*any* person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(32) (emphasis added).

carriers."[41] The FCC explained that its regime initiated "a more rational cost recovery mechanism under which *LECs* recover more of their costs from their own customers."[42] The FCC established a "rebuttable presumption that *traffic exchanged between LECs* that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic subject to [FCC's] compensation mechanism."[43] The FCC would not have used repeatedly the inclusive terms "carriers" and "LECs" had it intended its compensation rules to apply only to ILEC-to-CLEC ISP-bound traffic.[44]

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[41] *ISP Remand Order*, 16 FCC Rcd at 9181 (¶ 67) (emphasis added).

[42] *Id.* at 9189 (¶ 83) (emphasis added).

[43] *Id.* at 9157 (¶ 8) (emphasis added).

[44] The district court and appellees rely upon a single statement in the *Core Forbearance Order* to support their contention that the new markets rule applies only to ILEC-to-CLEC ISP-bound traffic. *Decision* at 15 (ER 16); Pac-West Brief at 44-45; CPUC Brief at 43. That reliance is unavailing. The *Core Forbearance Order*, like the *ISP Remand Order*, repeatedly describes the scope of the new markets rule in terms of exchanges between two "carriers." *See Core Forbearance Order*, 19 FCC Rcd at 20182 (¶ 9) (emphasis added) (new markets rule applies where "two *carriers* were not exchanging traffic pursuant to an interconnection agreement . . . ."); *id.* at 20187 (¶ 24) (emphasis added) ("new markets rule require[s] *carriers* to exchange ISP-bound traffic on a bill-and-keep basis"); *id.* (emphasis added) ("Under the new markets rule, *carriers* must exchange ISP-bound traffic on a bill-and keep basis if those *carriers* were not exchanging traffic pursuant to interconnection agreements . . . ."). To be sure, the FCC in the *Core Forbearance Order* also stated that "if an incumbent LEC has opted into the federal rate caps for ISP-bound traffic, the two carriers must exchange this traffic on a bill-and-keep basis during the interim period." *Id.* at 20182 (¶ 9). That statement, however, simply describes the application of the new markets and mirroring rules where the originating carrier is an ILEC. It does not demonstrate, as the district court and appellees claim, that the intercarrier compensation regime adopted in the *ISP Remand Order* applies only to ILEC-to-CLEC traffic. Nor did

Moreover, the inclusion of CLEC-to-CLEC traffic within the compensation regime furthers the regulatory purpose underlying the enactment of the FCC's rules, *i.e.*, to diminish the substantial economic distortions and opportunities for regulatory arbitrage arising from the operation of the reciprocal compensation regime for ISP-bound traffic.[45] Because ISP-bound communications produce large volumes of one-way traffic, reciprocal compensation payments for ISP-bound traffic flow overwhelmingly from the originating LEC to the LEC serving the ISP.[46] As the FCC explained in its *ISP Remand Order*, these potentially massive one-way payments gave LECs an incentive to target ISP customers with little regard to the costs of serving them — in some cases enabling LECs to provide free service or even to pay ISPs to be their customers.[47] By encouraging the inefficient entry of LECs targeting ISP customers, the compensation mechanism for ISP-bound traffic had "distort[ed] the development of competitive markets" by driving

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the FCC, in making that statement, intend to limit retroactively the new markets rule to ILEC-to-CLEC traffic.

[45] *See Crown Pacific v. Occupational Safety & Health Review Comm'n*, 197 F.3d 1036, 1040 (9th Cir. 1999) (the "regulatory purpose" is considered in interpreting an agency regulation). Under the well-established canon of statutory and regulatory interpretation, an enactment is construed in light of its "object and policy." *U.S. Nat'l. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). See, *e.g.*, *Dada v. Mukasey*, 554 U.S. 1, 16 (2008); *Holloway v. U.S.*, 526 U.S. 1, 9 (1999).

[46] *ISP Remand Order*. at 9162 (¶¶ 20-21).

[47] *Id.* at 9154-55, 9162, 9183 (¶¶ 5, 21, 69).

ISP rates to uneconomic levels, which in turn had "disconnect[ed] costs from end-user market decisions."[48]

The opportunities for regulatory arbitrage and distortions of economic signals occur under a reciprocal compensation system regardless of the identity of the originating carrier as an ILEC or a CLEC. Interpreting the compensation rules to apply only to ILEC-to-CLEC ISP-bound traffic would create a loophole in the FCC's regulatory regime for CLEC-originated ISP-bound calls. As to that traffic, it would thwart full achievement of the regulatory purpose by leaving unabated the very regulatory arbitrage opportunities and economic distortions that the FCC sought to alleviate by the adoption of its intercarrier compensation rules.

In holding that the compensation rules are limited to ILEC-to-CLEC traffic, the district court and appellees rely upon the FCC's statement in its *ISP Remand Order* that the compensation regime "applies as carriers renegotiate expired or expiring interconnection agreements."[49] Because 47 U.S.C. § 252 requires only ILECs to negotiate interconnection agreements upon a CLEC's request, the district court and appellees argue that the FCC's statement "suggests that the FCC focused on the relationship between ILECs and CLECs when it crafted the *ISP Remand Order*."[50] The district court and the appellees are mistaken.

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[48] *Id.* at 9155, 9165 (¶¶ 5, 29).

[49] *ISP Remand Order*, 16 FCC Rcd at 9189 (¶ 82). *See* Decision at 14 (ER 15), *See* Pac-West Brief at 41; CPUC Brief at 44.

[50] Decision at 15 (ER 16). *See* 47 U.S.C. § 252.

The FCC did not intend its adoption of intercarrier compensation rules to "alter existing contractual obligations," and thus it deferred the effective date of the rate caps and growth cap for the "carriers" that were exchanging traffic pursuant to interconnection agreements so that their existing contracts would remain in effect.[51] Because CLECs can enter into interconnection agreements with each other voluntarily,[52] the sentence relied upon by the district court and appellees does not suggest that the FCC limited the compensation regime to ILEC-to-CLEC traffic. The FCC in that sentence does not refer to section 252, and there is no basis otherwise for the counterintuitive claim that the unmodified phrase "interconnection agreements" connotes the subset of interconnection agreements between ILECs and CLECs governed by section 252. To the contrary, the sentence broadly refers to interconnection agreements between "carriers," which on its face includes CLEC-to-CLEC interconnection agreements.[53]

Contrary to the understanding of the district court and the appellees, the mirroring rule does not establish that the compensation regime as a whole is

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[51] *ISP Remand Order*, 16 FCC Rcd at 9189 (¶ 82).

[52] *See* Decision at 2, 17 (ER 003, 018).

[53] Relying upon the passage referenced above, Pac-West argues that the intercarrier compensation regime adopted in the *ISP Remand Order* "is an integrated plan that does not make sense" unless applied only to ILEC-to-CLEC exchanges of ISP-bound traffic pursuant to section 252 interconnection agreements. Pac-West Brief at 40-41. That restrictive view cannot be squared with the fact that one of the rules adopted in the *ISP Remand Order* — the new markets rule — applied only "where carriers [were] *not* exchanging traffic pursuant to interconnection agreements." *ISP Remand Order*, 16 FCC Rcd at 9188 (¶ 81) (emphasis added).

limited to ILEC-to-CLEC traffic.[54] In the case of ILEC-to-CLEC ISP-bound traffic, the mirroring rule conditioned the applicability of the rate cap rule and the new markets rule (until the FCC's forbearance from enforcing the new markets rule as of October 18, 2004) upon the originating ILEC's "offer[] to exchange all traffic subject to section 251(b)(5) at the same rate." *ISP Remand* Order, 16 FCC Rcd at 9193 (¶ 89). The FCC imposed this special "mirroring" requirement only upon ILECs because of its "concern[] about the superior bargaining power of incumbent LECs." *Id.* CLECs, in contrast, were not thought to have superior bargaining power and hence there was no reason to apply the mirroring rule to them. Therefore, the FCC's decision to limit a mirroring requirement to ILEC-to-CLEC traffic does not signify that the compensation regime in its entirety is limited to ILEC-to-CLEC traffic.

Equally without merit is Pac-West's contention that statements in the *Unified Regime NPRM*, 16 FCC Rcd 9610, show the FCC's intent to limit its existing intercarrier compensation regime to ILEC-to-CLEC traffic. The FCC in the *Unified Regime NPRM* instituted a rulemaking to consider what amendments, if any, the FCC should make to "the broad universe of existing intercarrier compensation arrangements." *Id.* at 9612 (¶ 2). The FCC stated that it did not expect to adopt rules for interconnection arrangements that "do not exhibit symptoms of market failure." *Id.* The FCC in a footnote opined that it did "not contemplate a need to adopt new rules governing CLEC-to-CLEC arrangements."

[54] *Decision* at 16 (ER 017); CPUC Brief at 41-44; Pac-West Brief at 43.

Id. at 9612 n.2. The FCC in these statements expressed its tentative views on possible future rule revisions. The FCC in those statements did not mention the existing ISP-bound compensation rules, let alone purport to interpret their scope.

Finally, Pac-West attempts to support its claim that the compensation rules are limited to ILEC-to-CLEC traffic by arguing that a carrier can rebut the presumption that traffic above a 3:1 ratio of terminating to originating traffic is ISP-bound traffic "only in a [section] 252 proceeding." Pac-West Brief at 43. Pac-West is mistaken. Although the FCC identified a state commission section 252 proceeding as one way in which a carrier could rebut the presumption, it did not hold that a rebuttal could occur "only" in a section 252 proceeding. *See ISP Remand Order*, 16 FCC Rcd at 9187 (¶ 79) ("A carrier may rebut the presumption, *for example*, by demonstrating to the appropriate state commission that the traffic above the 3:1 ratio is in fact local traffic delivered to non-ISP customers.") (emphasis added).[55]

II. THE FCC'S *ISP REMAND ORDER* PRE-EMPTED THE CPUC FROM SETTING INTERCARRIER COMPENSATION RATES FOR ISP-BOUND TRAFFIC UNDER CALIFORNIA LAW.

As demonstrated above, contrary to the understanding of the CPUC and the district court, the FCC's rules cover CLEC-to-CLEC ISP-bound calls and thus govern the resolution of the dispute between AT&T and Pac-West in this case. The question thus becomes whether those rules preempt the CPUC from relying on state law to set the rate in question. As explained below, they do.[56] The CPUC

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[55] Pac-West's reliance on a statement in the FCC's Final Regulatory Flexibility Analysis ("FRFA") to support its claim that the compensation rules apply only to ILEC-to-CLEC traffic is unpersuasive. *See* Pac-West Brief at 40, *citing ISP Remand Order*, 16 FCC Rcd at 9203 (¶ 109). First, the FCC's compensation rules are defined by the substantive sections of the order, not by the FRFA. *See ISP Remand Order*, 16 FCC Rcd at 9198 (¶ 96) ("To the extent that any statement contained in th[e] FRFA is perceived as creating ambiguity with respect to our rules, or statements made in preceding sections . . . , the rules and statements set forth in those preceding sections shall be controlling."). In any event, the meaning of the statement relied upon by Pac-West in the FRFA, *i.e.*, that the *ISP Remand Order* places requirements on "interconnected incumbent and competitive LECs, including small LECs," is that the compensation rules apply to LECs (incumbent and competitive LECs), including small LECs that interconnect with each other. *Id.* at 9203 (¶ 109). That construction best comports not only with the *ISP Remand Order* as a whole, but also with the FCC's broadly worded statement, elsewhere in the FRFA, that its compensation rules "apply to local exchange carriers," *id.* at 9200 (¶ 103).

[56] It bears emphasis that the parties stipulated that the traffic in this case is "all ISP-bound" for the purpose of analyzing federal preemption. *See* CPUC Reconsideration at 5-6 (AER 368-69).

lacked "discretion" to determine, under state law, the compensation, if any, that AT&T should pay to Pac-West for terminating ISP-bound traffic originating on AT&T's network.[57]

It is well-established that "'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.'"[58] In determining whether administrative pre-emption has taken place, a "court asks 'whether [the federal agency] meant to pre-empt [the state law], and, if so, whether that action is within the scope of the 'federal agency's delegated authority.''"[59] Both criteria are easily satisfied in this case.

First, the FCC meant to pre-empt state reciprocal compensation regulation of ISP-bound traffic. The FCC in the *ISP Remand Order* expressly declared that it had "exercise[d] [its] authority . . . to determine the appropriate intercarrier compensation for ISP-bound traffic" and consequently "state commissions will no longer have authority to address this issue."[60] Thus, contrary to the CPUC's contention, the FCC's expression of its intent to pre-empt state authority is "quite clear."[61]

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[57] CPUC Decision at 45 (AER 419).

[58] *Barrientos v. Morton, LLC*, 583 F.3d 1197, 1208 (9th Cir. 2009) (*quoting City of New York v. FCC*, 486 U.S. 57, 63-64 (1988)); *Fid. Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

[59] *Barrientos*, 583 F.3d at 1208 (*quoting de la Cuesta*, 458 U.S. at 154 (brackets in original).

[60] *ISP Remand Order*, 16 FCC Rcd at 9189 (¶ 82).

[61] CPUC Brief at 39. This Court has held that the presumption against pre-emption does not apply in cases where there is a "long history of federal presence in

Second, the FCC's adoption of intercarrier compensation rules for ISP-bound traffic is within the scope of its congressionally delegated authority. Section 201(b) gives the FCC express authority to regulate interstate communications services, including ISP-bound telephone service, and to adopt rules implementing the Act, including section 251.[62] Indeed, the FCC's rules at issue in this case recently were upheld on direct review as a lawful exercise of the FCC's section 201(b) authority.[63]

Even if the FCC had not expressly declared its intent to preempt, principles of conflict preemption would apply to preclude a state from setting a rate for ISP-bound traffic under state law that exceeded the prescribed federal rate. It is well-settled that "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations."[64] Such a conflict is present in this case. Until October 18, 2004, the federal new markets rule required a bill-and-keep compensation mechanism, *i.e.*, a termination charge of $0.00, for ISP-bound traffic exchanged between LECs, such as AT&T and Pac-West, that had not

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regulating long-distance telecommunications." *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003). Any possible presumption against pre-emption would be overcome, in any event, by the FCC's explicit declaration of its intent to pre-empt state law.

[62] 47 U.S.C. § 201(b). *See AT&T Corp.*, 525 U.S. at 378.

[63] *Core Commc'ns*, 592 F.3d 139.

[64] *City of New York*, 486 U.S. at 64.

entered into an interconnection agreement.[65] After that date, when the FCC exercised its authority to forbear from enforcing the new markets rule, the federal rate cap, which remained in place, prohibited termination charges for this ISP-bound traffic in excess of $.0007/mou.[66]

The state-tariffed termination charges awarded by the CPUC and upheld by the district court in this case conflict with these federal requirements. The CPUC did not apply a bill-and-keep regime in the period before October 18, 2004 as required by the new markets rule, and the state termination charges it enforced against AT&T exceeded the maximum amount that the FCC, acting pursuant to its section 201(b) authority, had found to be just and reasonable.[67] The CPUC thus

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[65] Pac-West claims that the new markets rule never applied because both AT&T and Pac-West "had separate interconnection agreements with the major ILECs in California." Pac-West Brief at 52-53. That argument is without merit. The new markets rules applied where LECs were "*not exchanging traffic* pursuant to interconnection agreements prior to the adoption of [the *ISP Remand Order*]." *ISP Remand Order*, 16 FCC Rcd at 9189 (¶ 81) (emphasis added). And at that date, AT&T and Pac-West were not "exchanging traffic" pursuant to an interconnection agreement.

[66] *Id.* at 9187 (¶ 78).

[67] CPUC Decision at 45 (AER 419). During the time period covered by the complaint, Pac-West's state-tariffed termination rates, which were periodically revised, consisted of a set up charge plus a charge based upon the duration of the call. Pac-West Tariffs (ER 311-316). The set-up charges ranged between $.002 and $.0075 and the charges based upon the length of the call ranged between $.001/mou and $.006/mou *Id.* As the CPUC acknowledges, the element of the intrastate charge based upon call length alone is higher than the applicable federal rate cap. CPUC Brief at 7 n.10.

lawfully could not apply and enforce state-tariffed rates that conflict with federal law when it adjudicated the complaint.[68]

III. THE COURT NEED NOT DECIDE WHETHER THE CPUC HAS JURISDICTION TO ADJUDICATE THE DISPUTE IN THIS CASE APPLYING FEDERAL LAW.

The Court has invited the FCC to address the question whether the CPUC has jurisdiction to adjudicate the dispute between AT&T and Pac-West. As shown above, the FCC has enacted intercarrier compensation rules with pre-emptive effect that govern the dispute between AT&T and Pac-West. Thus, the Court can reverse the district court's affirmance of the CPUC's resolution of the dispute under state law on the grounds of federal pre-emption without addressing the broader issue whether the CPUC would have jurisdiction, acting outside the context of a section 252 arbitration, to adjudicate the dispute applying federal legal standards. The FCC to date has not directly spoken to the broader jurisdictional issue in its rules and orders and therefore does not take a position on this issue in this *amicus* brief.

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[68] *See* 47 U.S.C.§ 201(b) (declaring "unlawful" rates determined to be "unjust or unreasonable).

CONCLUSION

The Court should reverse the judgment of the district court.

Respectfully submitted,

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February 2, 2011

IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

AT&T COMMUNICATIONS OF CALIFORNIA, Inc., et al., PLAINTIFF-APPELLANT, V. PAC-WEST TELECOMM, INC., ET AL., DEFENDANTS-APPELLEES.	))))))))))	NO. 08-17030

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief of the Federal Communications Commission as Amicus Curiae is proportionally spaced, has a typeface of 14 points or more, and does not exceed 30 pages in length.

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February 2, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AT&T COMMUNICATIONS OF CALIFORNIA, Inc., et al., PLAINTIFF-APPELLANT, V. PAC-WEST TELECOMM, INC., ET AL., DEFENDANTS-APPELLEES.	))))))))))	NO. 08-17030

CERTIFICATE OF SERVICE

I, Laurel Bergold, hereby certify that on February 2, 2011, I electronically filed the foregoing Amicus Brief for the Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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/s/ LAUREL R. BERGOLD
Laurel R. Bergold

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T CORP., et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
CORE COMMUNICATIONS, INC.,	:	
et al.	:	NO. 12-7157

ORDER

AND NOW, this 10th day of March, 2014, upon consideration of Pennsylvania Public Utility Commission ("PPUC") Response to Show Cause Order and Motion to Stay Orders and Defer Final Judgment (Doc. No. 52), and the opposition thereto (Doc. No. 55), IT IS HEREBY ORDERED that the motion is DENIED.

The Court sees no reason for delay of the appeal in order for the PPUC to seek a declaratory order from the FCC, and the PPUC does not cite any legal authority for doing so. The issues decided by the Court were within the ordinary competence of the Court. The Court's decision was based on longstanding federal law regarding the FCC's exclusive jurisdiction over interstate traffic. Even if the Court were to grant the motion, an order from the FCC may have no impact on the Court's prior decision.

Additionally, the PPUC's request is untimely. To the extent the PPUC's argument is based on the doctrine of "primary jurisdiction," it was waived. See CSK Transportation Co. v.

Novolog Buck County, 502 F.3d 247, 253 (3d Cir. 2007). The PPUC could have sought guidance from the FCC at any point during the litigation of this case but failed to do so. During oral argument, the PPUC told the Court that the Court had everything necessary to make a final decision on the issues in this case. Tr. Hr'g 10/1/13 120:1-15. Staying the effects of the Court's decision at this stage will not promote judicial economy.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

EXHIBIT C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

May 19,2 014
CCO-084

Nos. 14-1499 & 14-1664

AT&T Corp, Teleport Communications
of America, LLC.
v.

Core Communications Inc., Robert F. Powelson, John F. Coleman, Jr.
Wayne E. Gardner, James H. Cawley, Pamela A. Witmer

Robert F. Powelson, John F. Coleman, Jr.
Wayne E. Gardner, James H. Cawley, Pamela A. Witmer,
Appellants

(E.D. Pa. No.2-12-cv-07157)

Present: FUENTES and JORDAN, Circuit Judges

1. Motion by Appellants to Stay Proceedings Pending FCC Response to the Pa. PUC's for Declaratory Order.

2. Response by Appellees

3. Reply Response by Appellants

Respectfully,
Clerk/clw

ORDER

The foregoing Motion by Appellants to Stay Proceedings is hereby DENIED.

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: May 22, 2014
CLW/cc: ALL COUNSEL OF RECORD

STANDING ORDER REGARDING MOTIONS TO EXCEED THE PAGE LIMITATIONS OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Effective Immediately

PRESENT: McKEE, **Chief Judge**, and SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR, VANASKIE, ALDISERT, WEIS, GARTH, STAPLETON, GREENBERG, COWEN, NYGAARD, ROTH, BARRY, and VAN ANTWERPEN, **Circuit Judges**

AND NOW, it being noted that motions to exceed the page/word limitations for briefs are filed in approximately twenty-five percent of cases on appeal, and that seventy-one percent of those motions seek to exceed the page/word limitations by more than twenty percent;

Notice is hereby given that motions to exceed the page or word limitations for briefs are strongly disfavored and will be granted only upon demonstration of extraordinary circumstances. Such circumstances may include multi-appellant consolidated appeals in which the appellee seeks to file a single responsive brief or complex/consolidated proceedings in which the parties are seeking to file jointly or the subject matter clearly requires expansion of the page or word limitations.

Accordingly, it is **ORDERED** that a three-judge Standing Motions Panel is hereby appointed to rule on all motions to exceed the page/word limitations for briefs since the page/word limitations, prescribed by Fed. R. App. P. 32(a)(7), should be sufficient to address all issues in an appeal.

It is further **ORDERED** that Counsel are advised to seek advance approval of requests to exceed the page/word limitations whenever possible or run the risk of rewriting and refiling a compliant brief. Any request to exceed page/word limitations submitted in the absence of such an advance request shall include an explanation of why counsel could not have foreseen any difficulty in complying with the limitations in time to seek advance approval from the panel.

This order shall not apply to capital habeas cases.

By the Court,

/s/ Theodore A. McKee
Chief Judge

Date: January 9, 2012

A True Copy:

Marcia M. Waldron

Marcia M. Waldron, Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 14-1499 & 14-1664

AT&T Corp, et al v. Core Communications Inc, et al

(District Court No. 2-12-cv-07157)

BRIEFING AND SCHEDULING ORDER

Attorneys are required to file all documents electronically. See 3d Cir. L.A.R. 113 (2008) and the Court's CM/ECF website at www.ca3.uscourts.gov/ecfwebsite.

It is **ORDERED** that the brief for Appellants and the joint appendix shall be filed and served on or before **07/01/2014**.

It is **FURTHER ORDERED** that the brief(s) for Appellee(s) shall be filed and served within thirty (30) days of service of Last Appellant's (Appellants') brief.

It is **FURTHER ORDERED** that a reply brief, if any, shall be filed and served within fourteen (14) days of service of Appellee's (Appellees') brief(s).

It is **FURTHER ORDERED** that in the event of default by Appellant in filing the brief and appendix as directed, the appeal may be dismissed without further notice.

It is **FURTHER ORDERED** that if Appellee fails to file a brief within the time directed, the matter will be listed on Appellant's brief only and Appellee may be subject to such sanctions as the Court deems appropriate.

It is noted that, where applicable, parties must comply with 3rd Cir. LAR 31.2 which provides: A local, state or federal entity or agency, which was served in the district court and which is the appellee, must file a brief in all cases in which a briefing schedule is issued unless the court has granted a motion seeking permission to be excused from filing a brief. The rule does not apply to entities or agencies that are respondents to a petition for review unless the entity or agency is the sole respondent or to entities or agencies which acted solely as an adjudicatory tribunal.

This Court requires the filing of briefs by counsel in both electronic and paper format. 3rd Cir. LAR 31 .1(b) . Pro Se litigants are exempt from the electronic filing requirement. **Parties must file 7 copies of the briefs; pro se parties who are proceeding in forma pauperis may file only 4 copies. Costs for additional copies will be permitted only if the Court directs that additional copies be filed.** Pursuant to 3rd Cir. LAR 30.1(a), counsel must electronically file the appendix in accordance with LAR Misc. 113.

Checklists regarding the requirements for filing a brief and appendix are available on the Court's website at www.ca3.uscourts.gov.

For the Court,

Marcia M. Waldron

Marcia M. Waldron, Clerk
Date: 5/22/2014

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