

2006

Level 3 Communications, LLC v. Utah Public Service Commission, Qwest Corporation : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEVEL 3 COMMUNICATIONS, LLC,

Petitioner and Appellant,

vs.

UTAH PUBLIC SERVICE COMMISSION
and QWEST CORPORATION,

Respondents and Appellees.

Supreme Court No. 20060042

Agency Decision No. 05-2266-01

(ORAL ARGUMENT
REQUESTED)

BRIEF OF THE APPELLANT

Petition for Review of the Ruling of the Utah Public Service Commission

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PARTIES

The Petitioner before the Utah Public Service Commission (“Commission” or “PSC”) and the Appellant in the immediate appeal is Level 3 Communications, LLC (“Level 3”). Qwest Corporation (“Qwest”) was Respondent before the Commission and is one of the Appellees in the immediate appeal. The Commission is also an Appellee in the immediate appeal.

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JURISDICTION

The Supreme Court has jurisdiction in this matter pursuant to Utah Code Annotated § 78-2-2(3)(e)(i) (2005).

STATEMENT OF THE ISSUES

1. Whether the Commission erred in applying a just and reasonable standard under the Telecommunications Act of 1996, 47 U.S.C.A. § 251, *et seq.* to interpret the Parties' Old Agreement.

Whether a statute was correctly interpreted is a question of law reviewed for correctness. State v. MacGuire, 84 P.3d 1171, 1173 (Utah 2004). This issue was preserved in the Commission proceeding by the Motion for Reconsideration and Rehearing, Record at 63; and Reply Brief of Level 3, Record at 79; and in the Removal Action filed by Qwest and remanded to this Court, Order Remanding Action to Utah Supreme Court, Case No. 2:096CV132K (May 30, 2006).

2. Whether state law applies to the interpretation of the relative use factor ("RUF") clause in the parties' Old Agreement.

Whether state or federal law applies to interpret a contract is a question of law reviewed *de novo*. Bourke v. Dun & Bradstreet Corp., 159 F.3d 1032, 1036 (7th Cir. 1998); Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999). This issue was preserved in the Commission proceeding by the Position Statement of Level 3 Communications, LLC, Record at 28; Motion for Reconsideration and Rehearing, Record at 63; and Reply Brief of Level 3, Record at 79; and in the

Removal Action filed by Qwest and remanded to this Court, Order Remanding Action to Utah Supreme Court, Case No. 2:096CV132K (May 30, 2006).

3. Whether the Utah Commission erred in relying on the Federal Communications Commission's *ISP Remand Order* and the Utah Commission's own 2004 Order in the arbitration of the New Agreement to interpret the RUF clause.

Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law reviewed for correctness. Fairbourn Commercial, Inc. v. American Housing Partners, Inc., 94 P.3d 292, 295 (Utah 2004). Factual findings are reviewed under a clearly erroneous standard. R&R Energies v. Mother Earth Indus., Inc., 936 P.2d 1068, 1074 (Utah 1997). This issue was preserved in the Commission proceeding by the Motion for Reconsideration and Rehearing, Record at 63; and Reply Brief of Level 3, Record at 79.

4. Whether the Commission erred in failing to interpret the RUF clause by the plain meaning of the Old Agreement.

Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law reviewed for correctness. Fairbourn Commercial, Inc. v. American Housing Partners, Inc., 94 P.3d 292, 295 (Utah 2004). Factual findings are reviewed under a clearly erroneous standard. R&R Energies v. Mother Earth Indus., Inc., 936 P.2d 1068, 1074 (Utah 1997). This issue was preserved in the Commission proceeding by Level 3's Motion for Reconsideration and Rehearing, Record at 63, and by the Reply Brief of Level 3, Record at 79.

PROVISIONS OF CENTRAL IMPORTANCE

47 U.S.C.A. § 251 (2005) (See addendum for statute)

47 U.S.C.A. § 252 (2005) (See addendum for statute)

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case arises from a Petition filed by Level 3 on June 23, 2005, seeking to enjoin Qwest from disconnecting service to Level 3, and seeking a declaratory order from the Commission that Level 3 was current on its payments to Qwest for the facilities in question.

On June, 13, 2005, Qwest served demand upon Level 3 for payment of \$563,616.99 for charges that Qwest claimed were in default, threatening to disconnect Level 3's service by June 28, 2005, unless payment was received. Record at 4. Level 3 contended that all undisputed charges had been paid and that Qwest's attempt to impose additional charges was in contravention of the unambiguous language of the applicable contract between Level 3 and Qwest. Record at 2, p. 7. In response, Qwest brought a counterclaim against Level 3, seeking an order from the Commission declaring that payment was due based upon the Commission's 2004 Order in a previous docket (Docket 02-2266-02) in which the Commission arbitrated similar language in a subsequent contract between the parties. Record at 24, p 8-11.

The matter was heard by the Commission on July 26, 2005. Record at 55. In its Report and Order, issued August 18, 2005, the Commission concluded that it need not rely on the unambiguous language of the parties' Old Agreement (as defined below), but

rather could rely on the reasoning of its 2004 Order in docket No. 02-2266-02 (arbitrating their New Agreement (as defined below)), and could instead apply federal standards (both past and current) to resolve the dispute. Record at 58, pp. 8–10. Thus, the Commission refused to enforce the Old Agreement by its plain terms.

Level 3 moved the Commission for reconsideration of its Report and Order, contending that the Commission failed to correctly apply federal law, failed to apply state law, incorrectly relied on the reasoning of its order in Docket No. 02-2266-02, improperly ignored its own ruling that its findings in Docket No. 02-2266-02 would be applied prospectively only, and failed to give effect to the intention of the parties at the time they entered into the Old Agreement by enforcing the plain language of the Old Agreement. Record at 63. Level 3's request for reconsideration was subsequently deemed denied. Record at 74, p. 2 ¶ 2.

II. COURSE OF PROCEEDINGS

On June 23, 2005, Level 3 filed its Petition for Enforcement of the Interconnection Agreement between Qwest and Level 3 and Motion for Expedited Relief. Record at 1, 2. Level 3 requested that the Commission enjoin Qwest from taking any actions with respect to Level 3's accounts with Qwest, including, but not limited to, the suspension of service order activity and disconnection of services. Record at 2, p. 3.

Level 3 also requested that the Commission issue an order declaring that Level 3's payments to Qwest were current and that Qwest could not bill or collect from Level 3 for direct-trunked transport ("DTT") charges based on the exclusion of ISP-bound (as

defined below) traffic from Qwest's share of originating minutes of use during the disputed period. Record at 2, p. 8.

The Commission issued a Notice of Prehearing Conference on June 24, 2005, setting the conference for June 30. Record at 8. In that Notice, the Commission noted that Qwest had given assurances that it would not take any action regarding Level 3's accounts until resolution of the matter. *Id.* A schedule for the expedited proceedings was set pursuant to the Commission's Scheduling Order issued June 30, 2005. Record at 16.

On July 6, 2005, Qwest filed its Response and Counterclaim to Level 3's motion for enforcement, Record at 24, and on July 14, Level 3 filed its Reply to Qwest's Counterclaim, Record at 25, 26. Pursuant to the Commission's Scheduling Order, on July 15, 2005, both parties filed their Position Statements. Record at 27–53.

Hearing was held on the matter on July 26, 2005, before administrative law judge ("ALJ") Steven F. Goodwill. Record at 55. On August 18, 2005, the Commission approved and confirmed the ALJ's Report and Order, denying Level 3's Petition for Enforcement and granting in part Qwest's Counterclaim. Record at 58, p. 11 ¶ 1.

On September 19, 2005, Level 3 filed its timely Motion for Reconsideration and Rehearing. Record at 62, 63. Pursuant to an agreement between the parties, the Commission issued an Order Granting Limited Reconsideration on October 4, 2005, to allow the parties' time to conclude settlement discussions. Record at 66, 70. The Commission also set new time limits for Qwest's substantive response to Level 3's Request for Rehearing and Reconsideration and for the "deemed denied" date. Record at 66, ¶ 2.

The parties were unable to reach agreement, and therefore, Qwest filed its Opposition to Level 3's Request for Reconsideration and Rehearing on November 18, 2005. Record at 71. Because the Order Granting Limited Reconsideration issued by the Commission did not allow time for Level 3 to file a reply brief or for the Commission to consider any such reply, on November 21, Level 3 filed a Request for Leave to File a Reply Brief, and a Motion for Extension of Schedule. Record at 72, 73. Level 3's request was granted, Record at 74, and on December 5, 2005, Level 3 filed its reply. Record at 78, 79.

In its Order Granting Limited Reconsideration, the Commission had ordered that, in the absence of any further action on the Commission's part, Level 3's Motion for Reconsideration and Rehearing would be deemed denied as of December 16, 2005. Record at 74, p. 2 ¶ 2. The Commission took no further action and therefore, on January 13, 2006, Level 3 filed its timely Petition for Review with this Court.¹ See Petition for Review.

Thereafter, on February 13, 2006, Qwest filed with this Court its Notice of Filing Notice of Removal in the United States District Court for the District of Utah, Central Division. See Notice of Filing Notice of Removal in the United States District Court for the District of Utah, Central Division. After briefing and a hearing on the matter, the Federal District Court remanded the case to this Court, finding that there was no federal

¹ This document and all subsequent documents filed with this Court are not included in the Commission's record for transmittal to this Court. Nevertheless, they have been filed with this Court and are a part of the record on appeal of this matter.

question involved and the matter was one of state contract law. See Order Remanding Action to Utah Supreme Court, at 2, Case No. 2:06CV132K (May 30, 2006), a certified copy of which was forwarded to this Court by the Federal District Court on May 30, 2006.

III. DISPOSITION BELOW

On August 18, 2005, the Commission denied Level 3's Petition for Enforcement of the Interconnection Agreement between Qwest and Level 3. Record at 58, p. 11 ¶ 1. The Commission did not take any action on Level 3's Motion for Reconsideration and Rehearing and it was deemed denied as of December 16, 2005. Record at 74, p. 2 ¶ 2.

IV. STATEMENT OF FACTS

1. Level 3 is a local exchange carrier providing service in Utah. An important part of Level 3's service offerings are services to Internet service providers ("ISP"). Record at 2, p. 3; Record at 42 pp. 2-3. Qwest is an incumbent local exchange carrier in Utah. Record at 6, p. 1.

2. Qwest and Level 3 interconnect at a single point of interconnection ("POI") located in Salt Lake City. Record at 6, p. 1; Record at 58, p. 3. Telecommunication traffic originating with Qwest's customers in the Utah local access and transport area ("LATA") that is destined for Level 3 customers is carried by Qwest to the POI where it is handed off to Level 3. Record at 6, p. 1; Record at 42, p. 3. For example, if a Qwest customer in Cedar City calls a Level 3 customer in Cedar City, the call is carried by Qwest to the POI in Salt Lake City where it is transferred to Level 3, who then delivers the call to its customer. Record at 6, p.1.

3. On or about September 7, 2000, Level 3 and Qwest entered into an interconnection agreement (“Old Agreement”) pursuant to the Telecommunications Act of 1996 (“FTA” or “Act”),² 47 U.S.C.A. § 251, *et seq.*, and Utah Code Annotated § 54-8b-2.2. The terms and conditions of the Old Agreement were not originally negotiated by Level 3 and Qwest, but by AT&T and U S West (the predecessor of Qwest). Record at 55, p. 40, ln. 9–22. Level 3, as permitted by federal law, adopted the same terms and conditions as had been negotiated between U S West and AT&T. 47 U.S.C.A. § 252(i); Record at 55, p. 40, ln. 9–22. While portions of the AT&T - U S West Agreement were the subject of arbitration before a state public utilities commission, the Old Agreement itself, as between Level 3 and Qwest, is considered for the purposes of this proceeding to be a negotiated agreement. Record at 55, p. 40, ln. 23–25, p. 41, ln. 1–2; Record at 71, p. 13.

4. The Old Agreement was approved by the Commission in a Report and Order dated January 10, 2001 (“2001 Order”). Record at 30. In the 2001 Order, the Commission determined that the Old Agreement was nondiscriminatory, and that it comported with Section 251 of the Act and then current Federal Communications Commission (“FCC”) regulations. Record at 30, p. 2–¶¶ 1–4. The Commission also concluded that the Old Agreement complied with Utah laws and the Commission’s rules, and was in the public interest. Id.

² References to sections of the Act are to the section numbers as codified in Title 47 of the United States Code.

5. Under the Old Agreement, Qwest and Level 3 agreed that when the traffic between the two carriers reached a certain level, DTT facilities would be used to carry the traffic to the POI. Record at 6, p. 1; Record at 58, p. 4. Accordingly, when the traffic reached the requisite level, Level 3 requested that Qwest establish DTT facilities to carry this Qwest originated traffic to the POI with Level 3. *Id.* at pp. 2–3. The Old Agreement provides that the cost of those facilities would be shared according to the relative use of the facilities by each carrier. *Id.* It states:

If the Parties' elect to establish two-way direct trunks, the compensation for such jointly used 'shared' facilities shall be adjusted as follows. The nominal compensation shall be pursuant to the rates for direct trunk transport in Appendix A. The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider's use of that facility. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider's *relative use (i.e. originating minutes of use)* of the facility in the busy hour.

Old Agreement, Section 5.1.2.4 (emphasis added). Record at 44, p. 4; Record at 58, pp. 3–4. Under this provision, the relative use factor (“RUF”), which is based on originating minutes of use, dictates the percentage of the cost that each party will pay for the DTT facilities. There is no other provision in the Old Agreement that addresses cost sharing for such facilities, or that mentions “relative use.” Record at 58, p. 4.

6. Because Level 3's customers that exchange traffic with Qwest's customers were ISPs during the period at issue in this dispute, and because ISPs do not ordinarily originate calls, Qwest was the responsible carrier for all of the originating traffic to be carried over the DTTs. Record at 6, p. 1. Qwest has alleged that Level 3 “was at all times relevant to this dispute . . . providing services exclusively to [ISPs],” and knew that

virtually all of the traffic that was exchanged on those facilities originated with Qwest. Record at 42, p. 3. The Old Agreement required Qwest to bear the cost of bringing its traffic to the POI. Record at 6, p. 2, n.1. This was consistent with long-standing FCC Rules and orders that established the originating carrier is responsible for the cost of carriage of traffic originated by their end users.³

7. The parties amended the Old Agreement twice. On November 14, 2002, they jointly filed an amendment to the Old Agreement pursuant to the change-in-law provision, to implement the FCC's recent *ISP Remand Order*, which amendment was approved January 8, 2003. Record at 42, p. 2 n.2. The *ISP Remand Order*, issued in April 2001 by the FCC, determined that ISP-bound traffic was not to be included in the calculation of reciprocal compensation for the exchange of traffic for local area calls ("LAC").⁴ Because the DTT facilities at issue here are not related to reciprocal compensation for LAC, the Parties and the Commission acknowledge that the *ISP Remand Order* is not directly applicable to this case. Qwest stated:

The FCC's ISP Remand Order dealt with the proper treatment of local ISP-bound traffic for reciprocal compensation purposes. It did not deal directly with the application of the RUF to the assignment of financial responsibility for facilities on the ILEC's side of the POI.

³ 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 ¶ 20 (2001) ("*ISP Remand Order*"), remanded *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).; The Internet Service Provider Bound Traffic Amendment to the Interconnection Agreement between Qwest Corporation and Level 3 Communications, LLC, for the State of Utah, was filed with the Utah Commission on November 14, 2002.

⁴ *ISP Remand Order* at ¶¶ 1, 14, 46, 52.

Record at 42, p. 18. The parties' amendment, therefore, did nothing to affect the RUF calculation for determining shared costs of DTT facilities.

8. On or about June 28, 2002, the parties amended the Old Agreement a second time, again invoking the change-in-law provision to add terms and conditions for the establishment of a Single Point of Presence ("SPOP") in the Utah LATA. Record at 42, p. 2, n.2; Record at 45. ("SPOP Amendment") Although the SPOP Amendment generally deals with Level 3's point of presence in Utah, nothing in the SPOP Amendment addressed or affected the manner in which the RUF calculation would be applied for determining the shared cost of DTTs. Record at 34–39; Record at 45–50.

9. Despite the plain language of the Old Agreement, Qwest billed Level 3 for DTTs, applying the RUF, but excluding Qwest's minutes of originating use from the calculation because the traffic was bound for Level 3's ISP customers. Rather than bearing the cost of the facilities that carried their originating minutes themselves. Qwest billed Level 3 for the full amount of the trunks. Record at 58, pp. 7–8. In October 2002, the parties settled a past dispute about Qwest's invoices for amounts in dispute through June 30, 2002. Record at 58, p. 6, n.3.

10. The Old Agreement expired on June 26, 2001. Record at 58, p. 4. But, the effective expiration date was governed by the following provision:

This Agreement shall be effective upon Commission approval and shall remain in effect until June 26, 2001 and thereafter shall continue in force and effect unless and until a new agreement addressing all of the terms of this Agreement, becomes effective between the Parties. Either Party may request resolution of open issues in accordance with the provisions of Section 27 of this Part A of this Agreement,

Dispute Resolution, beginning nine (9) months prior to the expiration of this Agreement. Any disputes regarding the terms and conditions of the new interconnection agreement shall be resolved in accordance with said Section 27 and the resulting agreement shall be submitted to the Commission. This Agreement shall remain in effect until a new interconnection agreement approved by the Commission has become effective.

Old Agreement, Part A, Section 20.1 (emphasis added). Record at 58, p. 4. Thus, the terms of the Old Agreement were to apply until a new interconnection agreement could be approved by the Commission. Id.

11. In anticipation of the expiration of the Old Agreement, Level 3 and Qwest began negotiations for a new interconnection agreement (“New Agreement”). Record at 58, p. 4. The Parties were able to agree to all of the terms except the issue of whether ISP-bound traffic should be excluded from the RUF calculation. Record at 6; Record at 58, p.4. Qwest proposed that ISP-bound traffic should be excluded from the relative use calculation. Record at 6; Record at 58, p.4. Level 3, consistent with the relative use treatment under the Old Agreement, proposed that the relative use calculation should include all of the originating minutes of use on the trunks without exception. Record at 6, p. 2; Record at 58, p. 5. To resolve that single issue in the New Agreement, on August 7, 2002, Level 3 filed a Petition for Arbitration with the Public Service Commission. Record at 58, p. 4.

12. The parties also arbitrated a related sub-issue concerning whether the new RUF should be applied prospectively only, or whether there should be a retroactive “true-up” to the beginning of the then-current billing quarter using the calculation adopted in

the New Agreement. Record at 6, p. 4. Qwest proposed that the new RUF should be used to apply retroactively to the beginning of the billing quarter. Id. Level 3 argued that any new RUF should be used prospectively only from the effective date of the Commission's Order. Id.

13. On December 10, 2002, a hearing was held and testimony was received in the Arbitration proceeding in connection with the New Agreement. Record at 6. Qwest argued that adoption of an RUF calculation that included ISP-bound traffic would “violate the same policy considerations” that caused the FCC in its *ISP Remand Order* to exclude ISP-bound traffic from payment of reciprocal compensation for LAC traffic. Record at 6, p. 2. Level 3, on the other hand, argued that the obligation to inter-connect through DTT facilities, as in this case, is entirely different from the obligation to pay reciprocal compensation for LAC traffic. Id. at p. 3. It contended that the *ISP Remand Order* only modified reciprocal compensation obligations, not interconnection obligations. Id.

14. The Commission issued its Report and Order in the Arbitration proceeding, Docket No. 02-2266-02, on February 20, 2004 (“2004 Order”). Record at 6. The Commission considered language proposed by the Parties and ultimately adopted Qwest's version, which excluded ISP-bound traffic from the minutes-of-use calculation in the RUF. Record at 6, p.4; Record at 58, p. 5.⁵

⁵ The precise language of the RUF clause from the New Agreement is not in the record.

14. In its 2004 Order, the Commission noted that an RUF calculation that included ISP-bound traffic would result in Qwest bearing all the cost of the interconnection facilities. It stated:

We agree with Qwest's assertion that such a result would violate the requirements under the act; that ILECs receive just and reasonable compensation for interconnection. Level 3 paying nothing toward the interconnection facilities is not a just and reasonable rate.

Record at 6, p. 4. The Commission further noted that, although the *ISP Remand Order* was not directly applicable to the RUF calculation, "many of the same policy considerations" were applicable in arbitrating the party's dispute over the RUF calculation. Id. The Commission stated:

Just as these considerations caused the FCC to declare that Internet traffic is not subject to reciprocal compensation payments, they strongly favor the exclusion of ISP traffic from the relative use calculations at issue in this matter.

Id. The Commission thus ordered that Qwest's proposed language regarding the relative use calculation be adopted. Id. at p. 5.

15. The Commission set the effective date of the new relative use calculation to be the end of the first billing quarter. It stated:

Qwest proposes that when a new factor is established that bills should be retroactively adjusted for the initial billing quarter. Level 3 argues that any new relative use factor should be used prospectively only. We will adopt Level 3's position and order that the contract language be modified so that *no true up will be made and new relative use factors will apply prospectively only.*

Record at 6, p. 4 (emphasis added). No appeal was taken from the 2004 Order.

16. The New Agreement became effective on the same date as the Commission's 2004 Order, February 10, 2004. Record at 58, p.6, n.3.

17. During the time that the parties were negotiating and arbitrating the New Agreement they continued to exchange traffic under the terms of the Old Agreement. While operating under the Old Agreement, Qwest billed Level 3 for DTT charges, including the dispute period from June 30, 2002, the effective date of the Parties' previous settlement, until February 10, 2004 ("Dispute Period"). Record at 58, p. 6, n.3. Level 3 continued to withhold payment of the disputed amount as there was no basis for the charges under the Old Agreement. Record at 2, p.7 ¶ 11; Record at 4.

18. On June 13, 2005, Qwest made demand upon Level 3 for payment in the amount of \$563,616.99 for charges allegedly accrued during the Dispute Period, threatening to discontinue Level 3's service if payment was not made by June 28, 2005. Record at 4; Record at 58, pp. 1-2.

19. On June 23, 2005, Level 3 commenced the present action by filing its Petition for Enforcement of the [Old] Interconnection Agreement Between Qwest and Level 3 and Motion for Expedited Relief ("Petition"). Record at 1, 2; Record at 58, p. 1. In its Petition, Level 3 sought an order enjoining Qwest from disconnecting its service, and a declaration from the Commission that, during the Dispute Period, Qwest could not bill or collect charges for DTT facilities provided to Level 3 based on the RUF clause in the New Agreement, but must apply the RUF from the Old Agreement. Record at 2, p. 8.

20. After briefing by the parties and a hearing on the merits, the Commission issued its Report and Order on August 18, 2005 ("2005 Order"). Record at 58. The

Commission declined to enforce the plain language of the Old Agreement (which the Commission had previously approved (Record at 30)), or to apply accepted principles of contract interpretation to determine the meaning of the relative use clause of the Old Agreement. Record at 58, pp. 8–11. Instead, the Commission stated:

We do not agree with Level 3’s characterization that it would be improper for this Commission to “add language” to the Old Agreement by excluding ISP-bound traffic from the RUF [Relative Use Factor] calculation. This Commission is routinely asked to interpret disputed terms between parties in order to produce a just and reasonable result in accordance with applicable law and regulation. This case is no different.

Record at 58, pp. 8-9.

21. The Commission further concluded:

[A]ny interpretation of Section 5.1.2.4 of Attachment 1, whether in the New Agreement or the Old Agreement, must accord with Section 251(d)(1) [sic]⁶ requirement of the Act that rates for interconnection of facilities be just and reasonable.

Record at 58, p. 10.

22. The Commission also ignored its 2004 Order that the new RUF would apply prospectively only and concluded that, although the 2004 Order was not “controlling precedent,”

[We] recognize that the rationale behind our 2004 Order [arbitrating the New Agreement] is equally applicable to the parties’ current dispute both because the issue now before us is identical to the issue in docket No. 02-2266-02 [New Agreement Arbitration] and because the release of the ISP

⁶ This citation is a typographical error. The correct section is 252(d)(1).

Remand Order predates the start of the Dispute Period by more than a year.

Record at 58, p. 9. Thus, the Commission interpreted Section 5.1.2.4 to exclude ISP-bound traffic from the RUF calculation. Record at 58, p. 10.

23. On September 19, 2005, Level 3 filed its Motion for Reconsideration and Rehearing. Record at 62, 63. The Commission did not take any action on Level 3's Motion for Reconsideration and Rehearing, and thus, it was deemed denied as of December 16, 2005. Record at 74.

24. On January 13, 2006, Level 3 filed its timely Petition for Review with this Court. See Petition for Review, S. Ct. No. 20060042, Agency Decision No. 05-2266-01 (Jan. 13, 2006).

25. On February 13, 2006, Qwest removed this appeal to Federal District Court, alleging that the Commission was acting pursuant to federal law in interpreting the Old Agreement, that it expressly relied on federal law in making its determination, and that any claims by Level 3 necessarily arise under federal law. See Exhibit A, p. 2 ¶ 3 of Notice of Filing Notice of Removal in the United States District Court for the District of Utah, Central Division, S. Ct. No. 20060042, Agency Decision No. 05-2266-01 (Feb. 13, 2006).

26. After briefing by the parties and oral argument before the court, the Federal District Court remanded the matter to this Court, finding:

[T]here is no federal question on the face of Level 3's Petition, its claims were not created by federal law, and also that Level 3's *right to relief does not depend on resolution of a substantial question of federal law*. Rather, *the resolution*

of this dispute depends upon state contract law. For the reasons stated in Level 3’s memorandum in support and in its reply memorandum,¹⁷ the court agrees that it does not have subject matter jurisdiction over this action.

See Order Remanding Action to Utah Supreme Court, at 2, Case No. 2:06CV132K (May 30, 2006) (emphasis added), a certified copy of which has been forwarded to this Court.

SUMMARY OF ARGUMENTS

1. The Commission Erred in Applying a “Just and Reasonable” Standard to Interpret the Old Agreement.

The “just and reasonable” standard applies to provisions in interconnection agreements (“ICAs”) that are brought to state commissions for arbitration and approval. For provisions that are negotiated, the standard for state commission approval is whether the provision is non-discriminatory and in the public interest, convenience and necessity. The Commission approved the Old Agreement in 2001, finding it to be non-discriminatory, in the public interest and in compliance with the FTA. Because the Old Agreement was negotiated, rather than arbitrated, this was the correct standard. However, in the instant action, the Commission “interpreted” the RUF clause of the Old Agreement to produce what it believed was a just and reasonable result—that is, to exclude ISP-bound traffic from the RUF calculation. The Commission thus erred in applying the standard for approving arbitrated ICA terms to the interpretation of the negotiated Old Agreement.

⁷ The briefs of both parties submitted to federal court are included in the Addendum.

2. The Commission Erred in Applying Federal Law of Any Kind to the Interpretation of the RUF Clause.

The issue presented in this case required the interpretation and enforcement, not approval, of the RUF clause of the Old Agreement. While the interpretation and enforcement of provisions addressing federally mandated or essential duties under the FTA, such as the duty to pay reciprocal compensation, may be subject to the FTA, the interpretation of other contract terms is a matter of state contract law.

The cost mechanism for DTT facilities, unlike the reciprocal compensation mechanism, is not required by or subject to the FTA. Consistent with the standard for approval of negotiated terms in an ICA, parties may agree about whether or not to share the cost of DTT facilities, and if they are shared, how they should be priced. The interpretation and enforcement of the RUF is thus governed by state contract law.

The federal district court remanded this case to the Utah Supreme Court because it concluded, among other things, that the resolution of this case does not raise a question of federal law, but “depends upon state contract law.” Remand Order at 2.

3. The Commission Erred in Relying on the *ISP Remand Order* and the Commission’s 2004 Order.

The *ISP Remand Order* established a separate intercarrier compensation regime for the exchange of ISP-bound traffic, ruling that ISP-bound traffic should not be given the same reciprocal compensation treatment as traditional LAC. The parties and the Commission acknowledge that the *ISP Remand Order* is not directly applicable because the facilities at issue in this case were not contemplated by the FCC when it established a

new intercarrier compensation structure, on a per-minute-of-use basis, for ISP-bound traffic in the *ISP Remand Order*.

Further, even if the *ISP Remand Order* were somehow considered relevant to the issues in this case, the *ISP Remand Order* itself states that it does not apply to ICAs entered into before the effective date of the *ISP Remand Order*. Unless parties invoke a change-of-law provision under their ICA, any contractual term relating to reciprocal compensation was to remain undisturbed for the term of the ICA. Because the Old Agreement pre-dates the *ISP Remand Order*, and because neither party invoked the change-of-law provision to amend the RUF clause, the RUF clause as written controls for the term of the Old Agreement. The Commission thus erred in applying the “rationale” of the *ISP Remand Order* to the DTT facilities.

The Commission also erred in applying the rationale behind its 2004 Order arbitrating the RUF clause in the parties’ New Agreement. As discussed above, the standard for the Commission to approve the RUF in the New Agreement was a “just and reasonable” standard. That standard does not apply to interpreting the RUF in the Old Agreement because it was a negotiated agreement and because in interpreting (as opposed to approving) ICAs, state law generally applies.

In addition, the Commission’s own 2004 Order provided that the RUF in the New Agreement, which excluded ISP-bound traffic from the RUF calculation, was to apply prospectively only. Thus, the application of the 2004 Order to the Old Agreement is directly contrary to the 2004 Order.

4. The Commission Erred by Failing to Enforce the Plain Meaning of the Old Agreement.

For the reasons discussed above, principles of Utah state contract law govern the interpretation of the RUF clause in the Old Agreement. Under Utah law, a contract must be interpreted giving effect to the intention of the parties and applying the law that was in effect at the time they entered into the agreement. If contract language is unambiguous, it must be given its plain meaning. A court may not reform a contract simply because it believes the contract is not fair to one of the parties. The Commission erred by failing to enforce the clear, unambiguous language of the RUF.

ARGUMENT

I. THE COMMISSION ERRED IN APPLYING A “JUST AND REASONABLE” STANDARD TO THE RELATIVE USE FACTOR CLAUSE OF THE OLD AGREEMENT.

In its 2005 Order, the Commission stated that it would not be improper to effectively add language to the Old Agreement by imposing an interpretation of the contract that excludes Qwest originated ISP-bound traffic from the RUF calculation to produce what it characterized as a just and reasonable result. Record at 58, pp. 8-9. Drawing an analogy between the relative use of DTT facilities and the reciprocal compensation obligation of carriers under the Act, the Commission relied on the reasoning of the *ISP Remand Order* to “illuminat[e] the proper meaning of Section 5.1.2.4” of the Old Agreement. *Id.* at 9–10. The Commission incorrectly concluded that “any interpretation of Section 5.1.2.4 ... must accord with the Section 251(d)(1) [sic]^[8]

⁸ This citation is a typographical error. The correct section is Section 252(d)(1).

requirement of the Act that rates for interconnection of facilities be just and reasonable.”

Id. Because the calculation of relative use as written in the Old Agreement would require Qwest to bear the cost of the DDT facilities, the Commission ruled that it “could not conclude that such a result would equate to just and reasonable compensation for Qwest,” and instead imposed the entire cost on Level 3. Id. at p. 10. The Commission thus concluded that Section 5.1.2.4 must be interpreted to exclude ISP-bound traffic from the RUF calculation. Id.

The Commission’s conclusion is error. The Act does not require that every provision of an interconnection agreement (“ICA”) produce a “just and reasonable” result. In fact, it specifically provides that carriers may agree otherwise. 47 U.S.C. § 252(a)(1).

A. The Federal Act Allows Parties to Agree to the RUF Calculation Without Regard to Whether It Is “Just and Reasonable.”

The Act requires incumbent local exchange carriers to interconnect with a requesting competitive carrier’s facilities and equipment and to exchange traffic with competitive carriers. 47 U.S.C. § 251(c). The specific duties of telecommunications carriers are enumerated in Sections 251(b) and (c). Among other things, all telecommunications carriers must “establish reciprocal compensation arrangements for the transport and termination of telecommunications.” Id. § 251(b)(5). Incumbent

carriers, but not others, must offer access to network elements “on rates terms and conditions that are just, reasonable and non-discriminatory.” *Id.* § 251(c)(3).⁹

To achieve interconnection and fulfill their duties under the Act, the incumbent and the requesting carrier must enter into an ICA. *Id.* § 251(c). ICAs may be arrived at through negotiation or mediation or, if the parties are unable to agree, through arbitration conducted by a state commission. *Id.* § 252(a)-(b). In practice, most agreements are a combination of provisions reached through negotiation and a few provisions taken to state commissions for arbitration (*e.g.*, the New Agreement). Once a local exchange carrier has agreed through negotiation, or is compelled by an order after arbitration to make available any interconnection service or network element, it must make the same service or element available to any requesting carrier on the same terms and conditions as those stated in the ICA. *Id.* § 252(i).

All ICAs must receive approval from state commissions.¹⁰ However, the standards for approving the terms of ICAs are different depending on whether the terms

⁹Incumbent local exchange carriers have the duty:

to provide ... interconnection with the local exchange carrier's network ... on rates, terms and conditions that are just, reasonable, and non-discriminatory, in accordance with the terms and conditions of the [interconnection] agreement and the requirements of this section and section 252 of this title.

⁴⁷ U.S.C. § 251(c)(2).

¹⁰ The Act provides:

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission, A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

are negotiated or the result of a state commission order following arbitration. For ICAs that are arbitrated by state commissions, the Act provides:

In resolving by arbitration ... any open issues and imposing conditions upon the parties to the agreement, a State commission shall:

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251 of this title.

Id. § 252(c). Section 251 provides, among other things, that the rates, terms and conditions for interconnection be “just, reasonable and non-discriminatory.” Id. § 251(c)(2)(D). A state commission may reject an arbitrated agreement (or portion thereof), “if it finds that the agreement does not meet the requirements of section 251.” Id. § 252(e)(2)(B).

For negotiated agreements, however, the Act prescribes different standards:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers *without regard to the standards set forth in subsections (b) and (c) of section 251 of this title.*

Id. § 252(a)(1) (emphasis added). Thus, the parties to a negotiated ICA can voluntarily agree to terms and conditions different from those required under Section 251, including the requirement in Section 251(c)(2)(D) that rates for interconnection facilities such as DTTs be “just and reasonable.” They are free to make their own

47 U.S.C. § 252(e)(1).

bargain. For negotiated provisions, there are only two grounds on which a commission may reject the parties' adopted language:

The State commission may only reject

an agreement (or portion thereof) adopted by negotiation ... if it finds that: (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience and necessity.

Id. § 252(e)(2)(A).

B. The Old Agreement Was Approved by the Utah Commission in Accordance with the Standards of the Act.

The Old Agreement between Level 3 and Qwest was not arbitrated before the Commission. Level 3 and Qwest (as successor to U S West) entered into the Old Agreement by adopting the same terms and conditions as had been negotiated between U.S. West and AT&T. Record at 55, p. 40, ln. 9–22. While some of the terms of that agreement, in turn, had been arrived at through arbitration between U S West and AT&T, there is no evidence that the relative use clause in the Old Agreement was ever the subject of arbitration. Record at 55, p. 40, ln. 23-25, p. 41, ln. 1-2. For the purposes of this proceeding, Qwest has acknowledged that the Old Agreement was a negotiated agreement. See Record at 71, p. 13 (“since the docket was not an arbitration proceeding, the ICA was a negotiated agreement”).

Qwest and Level 3 presented their Old Agreement to the Commission in October, 2000 for review and approval in accordance with Section 252(e)(1). Record at 30, p. 1. The Utah Commission approved and confirmed the findings and conclusions of the

Administrative Law Judge who, “having reviewed said agreement and having been fully advised in the matter,” found that it did “not discriminate against any telecommunications carrier not a party to it,” and that it was “in the public interest.” Id. at pp. 1-2. At the same time, the Commission concluded that “the Agreement comports with the Act’s § 251, and with currently effective [FCC] regulations.” Id. at p. 2.¹¹

Therefore, the 2001 Order concluded that the Old Agreement, including the RUF clause, did not discriminate against any third party carrier and was in the public interest. Also, because the clause was not arbitrated, the parties were free to agree upon the RUF without regard to whether that specific clause necessarily produced a result the Commission might consider just and reasonable. 47 U.S.C. § 252(a)(1).

In the present petition to interpret and enforce the Old Agreement, the Commission reached the opposite conclusion, in essence reversing its earlier approval. Contrary to the provisions of the Act, and contrary to its previous findings, the Commission stated that any interpretation of Section 5.1.2.4 must accord with the Section 252(d)(1) requirement of the Act that rates for interconnection of facilities be just and reasonable. Record at 58, p. 10. This conclusion is error. It retroactively imposes on the Old Agreement the standard for approving arbitrated terms and conditions, instead of recognizing its prior approval and following the standard for negotiated terms and

¹¹ While the Commission stated that the Old Agreement was approved in conformance with Section 252(e)(1) of the Act, it did not state whether it relied on Section 252(e)(2)(A) for negotiated agreements, or Section 252(e)(2)(B) for arbitrated agreements. Instead, the Commission recited the requirements of both subsections (A) and (B), and found that they had been met. Record at 30, p. 1-2.

conditions. As the Commission had previously noted in its 2001 Order approving the Old Agreement, that standard had been met because the Old Agreement did not discriminate against other carriers, and because it was in the public interest. Further, by reversing its previous ruling, the Commission not only applied the wrong standard, it violated the correct standard by discriminating against Level 3 relative to other providers, like AT&T, who were allowed to operate pursuant to ICA terms like those in the Old Agreement without improper Commission interference.

The Commission's 2005 Order is error because it imposes upon the RUF clause in the Old Agreement a just and reasonable standard that is not required under the FTA for approving ICAs, and because the Commission had already approved the Old Agreement as being in accordance with the FTA and state law.

II. THE COMMISSION ERRED IN APPLYING FEDERAL LAW OF ANY KIND TO THE INTERPRETATION OF THE RUF CLAUSE.

Even if the Commission had used the correct standard for approving the Old Agreement, it still would have erred, because this is a petition to interpret and enforce, not to approve an ICA. The interpretation of the RUF clause is governed by state law, not federal law.

A state commission's authority to interpret and enforce ICAs is not express in Section 252. The leading case that considered whether the authority to enforce and interpret ICAs arises under federal law, declined to hold that it does. In Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002), the United States Supreme Court considered the argument that Section 252 implicitly

encompassed the authority for state commissions to interpret and enforce ICAs. The case arose in the context of whether the federal district court had jurisdiction to hear an appeal from a state commission's decision interpreting and enforcing a reciprocal compensation provision in the parties' ICA. The court declined to find that Section 252 provided a basis for federal jurisdiction. Id. at 642.

In the same case, on remand from the Supreme Court, the Fourth Circuit found that federal jurisdiction existed to interpret and enforce the ICA under 28 U.S.C. § 1331 (federal question jurisdiction), in part because of "how important reciprocal compensation is to the Act's central purpose of promoting competition in local telephone markets." Verizon Maryland, Inc. v. Global Naps, Inc., 377 F.3d 355, 365 (4th Cir. 2004). It noted that "[b]ecause the [interconnection] agreement and the *specific duty* it incorporates (reciprocal compensation) have a direct connection to the Act, the purpose of the Act is best served by subjecting the PSC's contract interpretation decision to federal review in the district court." Id. (emphasis added). "The fulfillment of this duty [reciprocal compensation] is essential to the Act's pro-competitive design." Id. The court hastened to add, however, that not every term in an ICA raises issues essential to the purposes of the Act. It stated:

[F]ederally mandated duties, including the duty to pay reciprocal compensation, are the backbone of the new [regulatory] program. As a result, when there is a claim that a state utility commission has misinterpreted an interconnection agreement provision that implements a duty imposed by the Act, review should be available under § 1331 in district court. *We are not saying that every dispute about a term in an interconnection agreement belongs in federal court, but when*

the contractual dispute (like the one here) involves one of the 1996 Act's *essential duties*, there is a federal question.

Id. at 366 (emphasis added).

When the contractual provision is not one of the essential duties mandated by the Act, courts have found that the interpretation is not a question of federal law, but one of state law. In Nuvox Communications, Inc. v. North Carolina Utilities Commission, 409 F. Supp. 2d 660 (E.D.N.C 2006), for example, the federal court considered whether a dispute involving an audit provision in an ICA raised an issue of federal law sufficient to confer jurisdiction on the court. The court stated:

The Act expressly provides for carriers to negotiate terms different from those set forth in the Act. See *Global Naps*, 377 F.3d at 391 (Niemeyer, J., dissenting) (“given [carriers’] ... authority to negotiate terms without regard to federal law, the terms [at issue] do not raise an issue of federal law in any meaningful way.”)

409 F. Supp. 2d at 665. Similarly, the United States Court of Appeals for the Seventh Circuit has stated:

A decision “interpreting” an agreement contrary to its own terms creates a different kind of problem – one under the law of contracts, and therefore one for which a state forum can supply a remedy.

Illinois Bell Tele. Co. v. Worldcom Techs., Inc., 179 F.3d 566, 574 (7th Cir. 2000). The application of state law to the interpretation and enforcement of non-essential duties is consistent with the declaration in Section 252 that the parties may agree to terms of an ICA “without regard to the standards set forth in subsections (b) and (c) of section 251.” 47 U.S.C. § 252(a)(1).

When Level 3 appealed the Commission's decision in the present case, Qwest removed the case to federal court, claiming that the Commission's application of Section 252 to interpret the meaning of the RUF clause must be decided through the application of federal law and that it turned on an interpretation of the Act. See Order Remanding Action to Utah Supreme Court, Case No, 2:06CV132K (May 30, 2006) (summarizing positions of parties). The federal court, however, after considering the briefs and argument of the parties, rejected Qwest's argument. It found that there was no federal question on the face of Level 3's Petition, its claims were not created by federal law, and also that "Level 3's *right to relief ... depends upon state contract law.*" Id. at 2 (emphasis added). The federal court, finding no federal question here, concluded that state contract law should apply. Id.

The DTT facilities at issue are not the kind of facilities to which reciprocal compensation duties apply. The duty of all carriers to pay reciprocal compensation is express in the Act. 47 U.S.C. § 252(b)(5). When a customer of local carrier A places a call to a customer of local carrier B, A must pay B for terminating the call on B's network. When the direction of the call is reversed, carrier B must pay carrier A. See Global Naps, 377 F.3d at 359 (explaining the duty to pay reciprocal compensation). The duty to pay reciprocal compensation applies only to the exchange of traffic between end users in the same local calling area ("LCA"). It would, for example, apply to customers of different carriers calling each other in Salt Lake Valley, but it would not apply to calls made between the Salt Lake and Utah valley because those are "long distance," not LCA calls. When calls are made within a LCA from a customer of A to an ISP who is a

customer of B, under the reciprocal compensation requirement, A must pay B to complete the call. However, if all of the customers of B are ISPs, there will never be an instance in which B must pay A because ISPs do not make calls, they only receive them.

The DTT facilities at issue in the present case are not the same as facilities that are subject to the Act's reciprocal compensation requirements.¹² Instead, they are connections on Qwest's side of the POI used for the parties to exchange traffic throughout the Utah LATA. Payment for the trunks is not required by, pursuant to, nor subject to the reciprocal compensation requirement of Section 251(b)(5).

The Commission thus erred by applying federal law instead of state contract law. As the federal district court held in its order remanding this case to the Utah Supreme Court, "Level 3's right to relief does not depend on resolution of a substantial question of federal law. Rather, the resolution of this dispute depends upon state contract law." Order Remanding Action to Utah Supreme Court, at 2, Case No. 2:06CV132K (May 30, 2006).

III. THE COMMISSION ERRED IN RELYING ON THE *ISP REMAND ORDER* AND THE COMMISSION'S 2004 ORDER.

In its 2005 Order, the Commission stated:

[We] recognize that the rationale behind our 2004 Order [arbitrating the New Agreement] is equally applicable to the parties' current dispute both because the issue now before us is identical to the issue in docket No. 02-2266-02 [New Agreement Arbitration] and because the release of the ISP Remand Order predates the start of the Dispute Period by more than a year.

¹² The DTT facilities at issue here were provided under Section 251(c)(2) of the Act.

Record at 58, p. 9. The Commission erred in applying the “rationale” of the 2004 Order and the *ISP Remand Order* to its interpretation of the plain, unambiguous language of Section 5.1.2.4. Under both state and federal law, and by the terms of the *ISP Remand Order* itself, that section should have been interpreted in light of the law that existed when the parties entered into their contract.

A. The Commission’s Reliance on the Rationale of the *ISP Remand Order* to Interpret the RUF Provision Was Error.

In April 2001, the FCC issued its *ISP Remand Order*, one of a series of orders addressing the issue of reciprocal compensation payments between carriers exchanging ISP-bound traffic. Generally speaking, the *ISP Remand Order* was the FCC’s attempt to correct perceived distortions to the traditional reciprocal compensation structure from locally dialed calls to ISPs. See *ISP Remand Order* at ¶ 2. The solution to the perceived problem was to establish a new intercarrier compensation rate structure specifically for the exchange of ISP-bound traffic. Id. at ¶¶ 1, 14, 46, 52. As discussed above, the *ISP Remand Order* is not applicable to the RUF clause because it deals only with reciprocal compensation, not with cost sharing for DTT facilities. Qwest acknowledged as much in its initial Position Statement. Record at 42, p. 18. But, assuming for the sake of argument that it did apply to DTT facilities, it would not have had any effect on the parties’ Old Agreement because the Old Agreement pre-dated the *ISP Remand Order*.¹³

¹³ The Old Agreement was signed by the parties on September 7, 2000, and approved by the Utah Commission on January 10, 2001. Record at 30; Record at 42, p. 2 n.2. It included the RUF clause. Thus, the Old Agreement, containing the RUF clause, was signed and approved before the *ISP Remand Order* was issued.

In order to avoid potential confusion about how the *ISP Remand Order* would affect carriers' current ICAs, the FCC stated:

The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements. *It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions.*

ISP Remand Order at ¶ 82 (emphasis added).¹⁴ Thus, ICAs that included terms dealing with reciprocal compensation for ISP-bound traffic were to remain in place until their expiration or renegotiation.

The Old Agreement between Level 3 and Qwest was approved on January 10, 2001. Record at 30. It contained a change-of-law provision, which the parties invoked twice. Record at 42, p. 2 n.2. The first was on June 28, 2002, which put the SPOP Amendment in place. *Id.*; Record at 34. The second was on November 14, 2002, to conform the reciprocal compensation obligations of the Old Agreement to the interim rules set out in the *ISP Remand Order*. Record at 42, p. 2 n.2; Record at 71, p. 16. In response to the *ISP Remand Order*, Level 3 and Qwest negotiated and filed an amendment to the Old Agreement under to the change-in-law provision in the Old Agreement (“ISP Remand Order Amendment”). The Commission approved the ISP Remand Order Amendment on January 8, 2003. Record at 42, p. 2, n.2; Record at 44, p. 3. Nothing in either the SPOP Amendment or the ISP Remand Order Amendment

¹⁴ The “interim compensation regime” referred to a “bill and keep” arrangement where end user customers of each carrier would be billed for reciprocal compensation charges, but the revenue from such billings would be kept by the collecting carrier instead of paid over to the other. *ISP Remand Order* at ¶ 2, n.6.

changed the RUF clause in any way. The Commission's decision to effectively insert an exception for ISP-bound traffic in the RUF clause in the parties' negotiated agreement, therefore, was contrary not only to state contract law, the plain meaning of Section 5.1.2.4, and the FCC's *ISP Remand Order*, but it also ignored the parties' agreement that changes to the contract would only be accomplished by following the agreed upon change-of-law process.

While both of these amendments confronted issues dealing with the parties' cost responsibilities for ISP traffic exchanged under the Old Agreement, neither amendment changed Section 5.1.2.4 containing the RUF calculation, and neither party ever sought to invoke the change-of-law provision to amend Section 5.1.2.4. Qwest claims two reasons for not seeking an amendment. First, it claims it did not understand that the RUF calculation ever included ISP-bound traffic. This assertion, of course, is not supported by the unambiguous language in the RUF clause or any evidence in the record. Record at 71, p. 16. Second, it claims that the *ISP Remand Order* "did not address the subject of RUF calculations for DTT facilities." *Id.* at p. 15. Thus, Qwest contends, while it is "conceivable" that Qwest could have sought an amendment to Section 5.1.2.4, it did not believe it was "necessary and worthwhile." *Id.* at 16. Hence, the language of Section 5.1.2.4 was never amended—not by the effect of the *ISP Remand Order* or by invocation of the change-of-law provision of the Old Agreement.

The Commission's reliance on the rationale of the *ISP Remand Order* was misplaced. It was not in effect when the Old Agreement was signed or when approved by the Commission. Even if it were relevant to the issue of relative use of DTT facilities,

the *ISP Remand Order* could only have been applied to the RUF clause in the Old Agreement if the parties had amended it under the change-of-law provision, and that was not done in this case.

B. The Commission's Reliance on the 2004 Order Was Error.

The Commission applied the reasoning of its 2004 Order from the arbitration proceeding of the New Agreement to “interpret” the RUF clause of the Old Agreement. This was error for at least two reasons. First, as discussed above, the Commission confused the standards for *approving* interconnection agreements with the law that must be applied in the *interpretation* of those agreements. It failed to recognize that it must enforce the parties’ negotiated terms “without regard to the standards set forth in subsections (b) and (c) of section 251.” 47 U.S.C. § 252(a)(1). Second, it applied the rationale for its approval of the new RUF language in the 2004 Order retroactively to interpret the RUF in the Old Agreement. The 2004 Order specifically states that the new RUF clause shall not be applied retroactively.

5. The Commission Erred in Applying the “Just and Reasonable” Rationale from the 2004 Order.

In its 2004 Order from the Arbitration proceeding, noting the result that might obtain if the RUF were interpreted according to its plain language, the Commission stated:

We agree with Qwest’s assertion that such a result would violate the requirements under the act; that ILECs receive just and reasonable compensation for interconnection.

Record at 6, p. 4 (emphasis added). In the instant case, the Commission concluded that, although its 2004 Order was not “controlling precedent,” the “rationale behind our 2004 Order is equally applicable to the parties’ current dispute” because the “issue now before us is identical to the issue in [that] docket.” Record at 58, p. 9. The Commission stated in its 2005 Order:

No one disputes that including ISP-bound traffic in the RUF calculation under the Old Agreement would result in Qwest bearing all of the cost of the DTT facilities. We cannot conclude that such a result would equate to just and reasonable compensation for Qwest.

Record at 58, p. 10. The rationale of the 2004 Order, which was the result of arbitration, was that the Commission could not interpret the RUF clause in a way that did not result in “just and reasonable compensation for Qwest.” *Id.*; Record at 6, p. 4. Thus, in applying the rationale of the 2004 Order to the Old Agreement, the Commission applied the just and reasonable arbitration standard to the interpretation of the negotiated RUF clause of the Old Agreement.

As discussed above, for the Commission to approve the arbitrated RUF in the New Agreement it had to find it to be “just and reasonable.” The negotiated Old Agreement could be approved as long as it was non-discriminatory and in the public interest. Because the reciprocal compensation mechanism is expressly required under Section 251(b)(5), the FCC has been diligent in investigating and regulating the manner in which that statutory rate mechanism should be applied *vis-à-vis* ISP-bound traffic to achieve a just and reasonable rate. The RUF mechanism, on the other hand, is a device adopted by the parties as one of many of other negotiated, non-regulated terms that Congress left to

the discretion of the contracting carriers. While the negotiated contracts must be non-discriminatory, the statute assumes that sophisticated carriers like Qwest and Level 3 would be able to negotiate for themselves fair contracts. Otherwise, state commission arbitration is available to ensure “just and reasonable” terms.

The record does not indicate how the negotiations between Qwest and AT&T for the RUF occurred, such negotiations often involve incentives, trade-offs, or compromises that each party believes will ultimately be in its best interest. Qwest is an incumbent provider in fourteen states and has a multi-billion dollar enterprise that it has operated for a century, it must be assumed to be commercially capable to negotiate contractual terms to which it will be held. Certainly, there is a benefit to Qwest’s customers in being able to connect to ISPs using a local dial-up number, especially in areas of Utah where there may be few choices for accessing locally-situated ISPs. In any event, the rate mechanism employed for DTTs was not a matter of regulation, but one of voluntary negotiation, approved by the Commission.

The Old Agreement was jointly submitted to the Commission as a negotiated contract for approval. Record at 30. Shortly after the Old Agreement became effective, Level 3, pursuant to the Old Agreement, the parties established DTT facilities to carry Qwest’s originated traffic. If Qwest had thought at that time that the RUF would have operated unfairly, it could have taken the issue to the Commission. It did not. Twice the parties amended the Old Agreement, but Qwest never raised an objection to the RUF. Even when the Old Agreement was amended to comply with the *ISP Remand Order*, which Qwest contends raised an identical issue, Qwest did not seek to amend the RUF

clause. In light of Qwest's failure to take advantage of the contractual opportunities to amend, the claim that the RUF does not result in "just and reasonable compensation for Qwest" rings hollow. Moreover, in light of the distinction between regulated rate mechanisms and negotiated ICA terms, it is easy to understand why the Commission should not reform the parties' contract to make it "more fair" to Qwest.

The Old Agreement, approved by the Commission, allowed the parties a reasonable opportunity to negotiate cost recovery for DTTs and to amend the RUF. Qwest, having failed to avail itself of its negotiated contractual benefits, should not be the beneficiary of the Commission's misplaced benevolence in reforming the Old Agreement to be fair to Qwest. The rationale of the 2004 Order is inapplicable, and indeed inimical to the policy of the FTA that allows parties to negotiate their own contracts.

6. The Commission Erred in Applying the Rationale of the 2004 Order Retroactively, in Contravention of the 2004 Order Itself.

The Commission erred in applying the rationale of the 2004 Order to interpret the RUF in the Old Agreement because the 2004 Order expressly states that the new RUF was to apply prospectively only. The 2004 Order approving the New Agreement adopted Qwest's newly proposed language that expressly excludes ISP-bound traffic from calculation of the RUF. Record at 6, p. 2. The issue of when the new RUF should be deemed effective only arose because it was a *new* provision. If the cost of the DTT facilities had always been Level 3's sole responsibility, as Qwest contended, there would have been no point in even arguing this issue during the Arbitration. The Arbitration occurred because Qwest's proposed method for dealing with the shared costs for DTTs

was entirely different from that agreed to in the Old Agreement. Record at 58, pp. 4–6. Thus, the New Agreement gave rise to a new RUF that the Commission specifically ruled should be applied “prospectively only.” Record at 6, p.4. Yet, in relying on the 2004 Order to interpret the RUF in the Old Agreement, the Commission applied the new RUF retroactively, in direct contravention of its ruling in the 2004 Order.

IV. THE COMMISSION ERRED BY FAILING TO ENFORCE THE PLAIN MEANING OF THE OLD AGREEMENT.

In interpreting contracts, the adjudicator must apply the law that was in effect at the time the contract was signed. Cache County v. Property Tax Div. of Utah State Tax Comm’n, 922, P.2d 758, 766 (Utah 1996); Washington Nat’l Ins. Co. v. Sherwood Assocs., 795 P.2d 665, 669 (Utah Ct. App. 1990). This is true not just under principles of state contract law, but under federal law as well. Giustina v. United States, 190 F. Supp. 303, 308 (D. Ore. 1960) (citing Connecticut Mut. Life Ins. Co. v. Cushman, 108 U.S. 51 (1883)).

Under Utah law, a contract must also be interpreted to give effect to the intention of the parties at the time they entered into the agreement. Yeargin, Inc. v. Auditing Div. of Utah State Tax Comm’n, 20 P.3d 287, 297 (Utah 2001). “If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language.” Wagner v. Clifton, 62 P.3d 440, 442 (Utah 2002) (quoting WebBank v. American Gen. Annuity Serv. Corp., 54 P.3d 1139 (Utah 2002)). Only when the language is determined to be ambiguous is there need to consider extrinsic evidence. Yeargin, 20 P.3d at 297. “The plain meaning rule preserves

the intent of the parties and protects the contract against judicial revisions.” Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990).

Furthermore, “[i]t is a long-standing rule in Utah that persons dealing at arm’s length are entitled to contract on their own terms without the intervention of the courts to relieve either party from the effects of a bad bargain . . . [and the] Court will not rewrite a contract to supply terms which the parties omitted.” Hal Taylor Assocs. v. UnionAmerica, Inc., 657 P.2d 743, 749 (Utah 1982); see also Bakowski v. Mountain States Steel, Inc., 52 P.3d 1179, (Utah 2002) (refusing to imply an intent not present in the contract and noting “We will not make a better contract for the parties than they have made for themselves. . . . Nor will we avoid the contract’s plain language to achieve an ‘equitable’ result”); Dalton v. Jerico Const. Co., 642 P.2d 748, 750 (Utah 1982) (refusing to imply an intent not present in the terms of the contract and noting “it is not for a court to rewrite a contract improvidently entered into at arm’s length or to change the bargain indirectly on the basis of supposed equitable principles”); U.P.C., Inc. v. R.O.A. Gen., Inc., 990 P.2d 945, 954 (Utah Ct. App. 1999) (ruling that “a court may not make a better contract for the parties than they have made for themselves . . . [and] . . . may not enforce asserted rights not supported by the contract itself”).

The only language in the entire Old Agreement relevant to relative use is Section 5.2.1.4, which provides, in relevant part:

If the Parties’ elect to establish two-way direct trunks, the compensation for such jointly used ‘shared’ facilities shall be adjusted as follows. . . . The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider’s use of that facility. The adjustment in the direct

trunk transport rate shall be a percentage that reflects the provider's relative use (i.e. originating minutes of use) of the facility in the busy hour.

Record at 28, p. 4 ¶ 9; Record at 58, pp. 3–4 (emphasis added). The plain meaning of this language is that the relative use of DTT facilities must reflect all of the originating minutes of use on the trunks, without exception. This term was to continue in force and effect until the New Agreement was made effective, which did not occur until February 20, 2004. Record at 28, p. 2 ¶ 4; Record at 58, p. 4; Record at 32.

In contrast, under the New Agreement, Level 3 is to be billed for all the cost of the interconnection facilities at issue, and Qwest is to issue a credit for Level 3's portion of the relative use of the facilities. Therefore, if Internet-bound traffic is excluded from the calculation of relative use, Level 3 will receive no credit and will be responsible for the full cost of the facilities. Record at 6, n.1. Thus, the New Agreement specifically excludes ISP-bound traffic from the calculation of the RUF for DTT billing, whereas the Old Agreement did not. Record at 58, p. 6.

Section 5.1.2.4 is unambiguous. It does not include any exception for ISP-bound traffic, and cannot reasonably be read to impose one. There is no language in any other part of the Old Agreement that allows Qwest to ignore the plain language of Section 5.1.2.4. Therefore, the Commission erred when it failed to enforce the plain language of the contract and allowed Qwest to except ISP-bound traffic from the relative use calculation for the dispute period during which the Old Agreement was still in force and effect.

The law is well established in Utah that neither Qwest nor the Commission can simply rewrite a contract to supply terms that the parties omitted, not even on the basis of supposed equitable principles. The contract must be interpreted based on the intentions of the parties and the state of the law at the time the parties executed the Old Agreement.

Therefore, the Court should remand the case to the Commission and order that it apply Utah state contract law to the interpretation of Section 5.1.2.4 of the Old Agreement in resolving this dispute.

CONCLUSION

Level 3 filed its Petition with the Commission, seeking enforcement of the plain language of the RUF clause in the Old Agreement to prevent Qwest from disconnecting its service and from billing and collecting improper charges for DTT facilities during the Dispute Period. The Petition required only that the Commission review and enforce the plain language of the RUF clause, which does not provide any exception for ISP-bound traffic.

At the time the Petition was filed, the Commission had relatively recently issued its 2004 Order in arbitration, determining that the RUF in the New Agreement would only be fair to Qwest if ISP-bound traffic were excluded from the calculation. The Commission incorrectly assumed that Level 3's Petition in the present case raised the same questions it had previously decided. Its attention was thus diverted from the simple task of enforcing the plain language of the Old Agreement, to the impossible task of lawfully conforming its decision in the present case with the rationale of its 2004 Order.

For the reasons discussed above, the Commission need not interpret the Old Agreement in a way that produces “just and reasonable compensation for Qwest.” Record at 58, p. 10. The FTA statute, Section 252(d)(1), relied on by the Commission as support for its proposition that it must help Qwest achieve a “just and reasonable” result, is simply not applicable. Indeed, apart from the analysis necessary to determine that enforcement of the RUF falls outside federal law, federal law itself does not apply to the resolution of this dispute. The federal district court, which examined the issue closely, expressly held that state contract law applies. Likewise, because the 2004 Order arose under and was governed by the federal arbitration statute, the 2004 Order was entirely inapplicable to the resolution of the present case.

Under Utah law, the language of the RUF clause in the Commission-approved Old Agreement should be given its plain meaning, honoring the intention of the parties and applying the law at the time the contract was agreed upon. While this may result in Qwest having to bear the cost of the DTT facilities, the law does not allow the Commission to reform the Old Agreement to make a better bargain for Qwest than it made for itself. To do so would be contrary to state law, and would undermine the stated goal of the FTA to allow parties to negotiate the terms of their own ICAs to the greatest degree possible.

For the foregoing reasons, Level 3 respectfully requests that the Court vacate the Report and Order of the Utah Public Service Commission, and remand this case to the Commission with instructions to enter new findings and conclusions based upon the

application of Utah state contract law to the interpretation of the unambiguous RUF clause.

Level 3 requests the Court grant oral argument in this matter.

DATED this 18th day of July, 2006.

A handwritten signature in black ink, appearing to read 'William J. Evans', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2006, I caused to be hand-delivered,

a true and correct copy of the foregoing **BRIEF OF THE APPELLANT**, to:

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EXHIBIT A

representatives of the general public to testify.

Additional rules.—The Commission may adopt other rules as necessary to carry out this section.

Gifts, bequests, and devises.—The Commission may accept, use, and dispose of gifts, bequests, or devises of services or property, both real (including the use of facilities) and personal, for the purpose of aiding or facilitating the work of the Commission. Gifts or grants not used

at the termination of the Commission shall be returned to the donor or grantee.

“(l)[sic] Termination.—The Commission shall terminate 30 days after the submission of the report under subsection (d) or November 30, 2000, whichever occurs earlier.

“(m)[sic] Inapplicability of Federal Advisory Committee Act.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission.”

WESTLAW ELECTRONIC RESEARCH

WESTLAW guide following the Explanation pages of this volume.

PART II—DEVELOPMENT OF COMPETITIVE MARKETS

LIBRARY REFERENCES

Review and Journal Commentaries

Models of cooperative federalism for telecommunications. Raymond W. Lawton & Bob Burns, 6 Alb.L.J.Sci. & Tech. 71 (1996).

Bringing together: Suggestions for federal and state cooperation in telecommunications. Ruth Milkman, 6 Alb.L.J.Sci. & Tech. 141 (1996).

1. Interconnection

General duty of telecommunications carriers

A telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

Obligations of all local exchange carriers

A local exchange carrier has the following duties:

(a) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(b) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, non-discriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation**(1) In general**

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration**(1) Commission authority and jurisdiction**

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on or after October 26, 1999.

Options, suspensions, and modifications**Exemption for certain rural telephone companies****(A) Exemption**

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C). Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section,

from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

) Continued enforcement of exchange access and interconnection requirements

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

ruary 8, 1996 and until such restrictions and obligations are so
erseded, such restrictions and obligations shall be enforceable in
same manner as regulations of the Commission.

Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term ‘incumbent local ex-
change carrier’ means, with respect to an area, the local ex-
change carrier that—

(A) on February 8, 1996, provided telephone exchange
service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member
of the exchange carrier association pursuant to section
69.601(b) of the Commission’s regulations (47 C.F.R.
69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996,
became a successor or assign of a member described in
clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a
local exchange carrier (or class or category thereof) as an incum-
bent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for
telephone exchange service within an area that is compara-
ble to the position occupied by a carrier described in para-
graph (1);

(B) such carrier has substantially replaced an incumbent
local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest,
convenience, and necessity and the purposes of this section.

Savings provision

Nothing in this section shall be construed to limit or otherwise
affect the Commission’s authority under section 201 of this title:

§ 19, 1934, c. 652, Title II, § 251, as added Feb. 8, 1996, Pub.L.
104, Title I, § 101(a), 110 Stat. 61; Oct. 26, 1999, Pub.L. 106–81, § 3(a),
Stat. 1287.)

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6 Acts. House Report No. 104–204
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58, see 1996 U.S. Code Cong. and
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1999 Acts. Statement by President, see
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242.

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1999 Amendments. Subsec. (e)(3).
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 Good faith negotiation clause of the Telecommunications Act of 1996: An analysis. Thomas B. Romer, 69 Colorado L.R. 257 (1998).
 Telecommunications Act of 1996: The challenge of competition. Deonne L. Bruning, 30 Creighton L.R. 1255 (1997).

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See WESTLAW guide following the Explanation pages of this volume.

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Yellow pages listings 18**1. Purpose**

The Telecommunications Act of 1996 is intended to introduce competition into the market and does not guarantee all local telephone service providers a sufficient return on investment. *Alenco Communications, Inc. v. F.C.C.*, C.A.5 2000, 201 F.3d 608.

Congress intended Telecommunications Act of 1996 to be national in scope. *TCG Detroit v. City of Dearborn*, E.D.Mich. 1997, 977 F.Supp. 836, affirmed 206 F.3d 618, rehearing and suggestion for rehearing en banc denied.

Congress enacted Telecommunications Act to foster competition in local telephone service. *GTE Northwest Inc. v. Hamilton*, D.Or.1997, 971 F.Supp. 1350.

Telecommunications Act was designed to foster rapid development of telecommunications competition in local markets served by incumbent providers. *GTE Northwest, Inc. v. Nelson*, W.D.Wash. 1997, 969 F.Supp. 654.

Telecommunications Act of 1996 is intended to foster competition in local tele-

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intellectual property or constitutional rights. Iowa Utilities Bd. v. A.A. 1997, 120 F.3d 753, amended by hearing, certiorari granted 118 S.Ct. 9, 522 U.S. 1089, 139 L.Ed.2d

867, affirmed in part, reversed in part 119 S.Ct. 721, 525 U.S. 366, 142 L.Ed.2d 835, opinion after remand, on remand 219 F.3d 744.

2. Procedures for negotiation, arbitration, and approval of agreements

Agreements arrived at through negotiation

) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

Agreements arrived at through compulsory arbitration

) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

) Duty of petitioner

A) A party that petitions a State commission under paragraph 1 shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

- (i)** the unresolved issues;
- (ii)** the position of each of the parties with respect to those issues; and
- (iii)** any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

5) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal

obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

2) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

Preservation of authority

notwithstanding paragraph (2), but subject to section 253 of title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

Requirements of generally available terms

In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the

requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a state commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and

ying within 10 days after the agreement or statement is approved. State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the agreement to cover the costs of approving and filing such agreement statement.

Availability to other telecommunications carriers

local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as are provided in the agreement.

Definition of incumbent local exchange carrier

For purposes of this section, the term “incumbent local exchange carrier” has the meaning provided in section 251(h) of this title. (June 19, 1934, c. 652, Title II, § 252, as added Feb. 8, 1996, Pub.L. 104, Title I, § 101(a), 110 Stat. 66.)

HISTORICAL AND STATUTORY NOTES

Source Notes and Legislative Reports
1936 Acts. House Report No. 104-204
House Conference Report No. 158, see 1996 U.S. Code Cong. and News, p. 10.

Changes in Text
This chapter, referred to in subsec. (g), in the original “this Act”, meaning

Act June 19, 1934, c. 652, 48 Stat. 1064, as amended, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

LIBRARY REFERENCES

American Digest System
Telecommunications ¶46, 267.
Key Number System Topic No. 372.

Corpus Juris Secundum
Telegraph, Telephone, Radio, and Television, see C.J.S. §§ 31 to 32.

Books and Treatises
Business and Commercial Litigation in Federal Courts §§ 62.2, 62.5, 62.6, 62.7 (Robert L. Haig ed.) (West Group & ABA 1998).

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

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EXHIBIT C

RATES and CHARGES

1. General Principles

- 1.1 All rates provided under this Agreement shall remain in effect for the term of this Agreement unless they are not in accordance with all applicable provisions of the Act, the rules and regulations of the FCC, or the Commission's rules and regulations.
- 1.2 Except as otherwise specified in this Agreement, as approved or ordered by the Commission, or as agreed to by the Parties through good faith negotiations, nothing in this Agreement shall prevent a Party through the dispute resolution process described in this Agreement from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission, and (b) the development, modification, technical installation and maintenance of any systems or other infrastructure which it requires to comply with and to continue complying with its responsibilities and obligations under this Agreement.

2. Resale Rates and Charges

U S WEST shall make its retail Telecommunications Services available to CO-PROVIDER for resale at the interim wholesale rates specified in Appendix A to this Attachment 1.¹

- 2.2 [Intentionally left blank for numbering consistency]
- 2.3 If the resold services are purchased pursuant to tariffs and the tariff rates change, charges billed to CO-PROVIDER for such services will be based upon the new tariff rates less the applicable wholesale discount as agreed to herein. The new rate will be effective upon the tariff effective date.
- 2.4 A Subscriber Line Charge (SLC) will continue to be paid by CO-PROVIDER without discount for each local exchange line resold under this Agreement. All federal and state rules and regulations associated with SLC or as found in the applicable tariffs also apply.
- 2.5 CO-PROVIDER will pay to U S WEST the PIC change charge without discount associated with CO-PROVIDER end user changes of inter-exchange or intraLATA carriers.
- 2.6 CO-PROVIDER agrees to pay U S WEST at the wholesale discount rate when its end user activates any services or features that are billed on a per use or per activation basis (e.g., continuous redial, last call return, call back calling, call trace, etc.). U S WEST shall provide CO-PROVIDER with detailed billing information per applicable OBF standards unless otherwise agreed to by the Parties as necessary to permit CO-PROVIDER to bill its end users such charges.
- 2.7 [Intentionally left blank for numbering consistency]
- 2.8 Nonrecurring charges will be billed as approved by the Commission.
- 2.9 [Intentionally left blank for numbering consistency]

¹ At&t Order, pg 2, "Resale Restrictions" paragraph 1

- 2.10 [Intentionally left blank for numbering consistency]
- 2.11 Resale prices shall be wholesale rates determined on the basis of retail rates charged to subscribers for the Telecommunications Service requested, excluding the portion thereof attributable to any marketing, billing, collection and other costs that will be avoided by U S WEST, as specified in the Act, by the FCC and/or the Commission. **U S WEST shall be obligated to offer its volume and term discount service plans to CO-PROVIDER provided that CO-PROVIDER complies with the volume and term requirements contained therein. If selected by CO-PROVIDER, an appropriate wholesale discount shall also be applied to such plans. With the exception of the preceding, CO-PROVIDER shall not be required to agree to volume or term commitments as a condition for obtaining Local Service.**²
- 2.12 U S WEST shall bill CO-PROVIDER and CO-PROVIDER is responsible for all applicable charges for Resale Services. CO-PROVIDER shall be responsible for all charges associated with services that CO-PROVIDER resells to an end user.

3. Construction and Implementation Costs

- 3.1 **U S WEST shall perform construction for CO-PROVIDER for the services provided hereunder pursuant to and in accordance with the terms of U S WEST's retail and wholesale construction charge tariffs, as appropriate for the type of service provided. Such construction charge tariffs shall be imposed only if U S WEST assesses its own end users such charges for similar construction and also demonstrates to the Commission that it is customary industry practice to charge end users for similar costs. If another CLEC or U S WEST receives a benefit from the construction or other activity for which CO-PROVIDER is charged, CO-PROVIDER is entitled to recover contribution from the CLEC, or, if applicable, U S WEST as a beneficiary, for a share of the costs.**³
- 3.2 [Intentionally left blank for numbering consistency]
- 3.3 [Intentionally left blank for numbering consistency]
- 3.4 A quote for the CO-PROVIDER portion of a specific job will be provided to CO-PROVIDER. The quote will be in writing and will be binding for ninety (90) days after the issue date. When accepted, CO-PROVIDER will be billed the quoted price and construction will commence after receipt of payment. If CO-PROVIDER chooses not to have U S WEST construct the facilities, U S WEST reserves the right to bill CO-PROVIDER for the expense incurred for producing the engineered job design.
- 3.5 CO-PROVIDER shall make payment of fifty percent (50%) of the nonrecurring charges and fees upon acceptance of the quotation with the remainder due upon completion of the construction. In the event that CO-PROVIDER disputes the amount of U S WEST's proposed construction costs, CO-PROVIDER shall deposit fifty percent (50%) of the quoted construction costs into an interest bearing escrow account prior to the commencement of construction. The remainder of the quoted construction costs shall be deposited into the escrow account upon completion of the construction. Upon resolution of the dispute, the escrow agent shall distribute amounts in the account in accordance

² Final Arbitration Order at pg 30

³ Final Arbitration Order at pg 34

with the resolution of such dispute, and any interest that has accrued with respect to amounts in the account shall be distributed proportionately to the Parties. The pendency of any such dispute shall not affect the obligation of U S WEST to complete the requested construction.

4. Unbundled Loops - Conditioning Charge

4.1 To the extent CO-PROVIDER requires an Unbundled Loop to provide ISDN, HDSL, ADSL or D-S1 service, such requirements will be identified on the order for Unbundled Loop Service. Conditioning charges to condition such loops to ensure the necessary transmission standard will be accrued at actual cost by U S WEST for each such loop. U S WEST's actual out-of-pocket costs to condition loops of varying lengths will be examined in Docket No. 94-999-01 (Phase II).

5. Transport and Termination - Interim Prices and Methodology⁵

5.1 Rate Structure

5.1.1 Local Traffic

5.1.1.1 Call Termination

5.1.1.1.1 The Parties agree that call termination rates as described in Appendix A to this Attachment 1 will apply reciprocally for the termination of EAS/Local traffic per minute of use. If the exchange of EAS/Local traffic between the Parties is within +/- 5% of balance (as measured monthly), the Parties agree that their respective call termination charges will offset one another, and no compensation will be paid. The Parties agree to perform monthly joint traffic audits, based upon mutually agreeable measurement criteria and auditing standards. In the event that the exchange of traffic is not in balance as described above, the call termination charges in Appendix A will apply.

5.1.1.1.2 For traffic terminated at an U S WEST or CO-PROVIDER end office, the end office call termination rate in Appendix A shall apply.

5.1.1.1.3 For traffic terminated at a U S WEST or CO-PROVIDER tandem switch, the tandem switched rate and the tandem transport rate in Appendix A shall apply in addition to the end office call termination rate described above.

⁴ Final Arbitration Order at pg. 35

⁵ Final Arbitration Order at pg. 40

5.1.1.4 Switching shall be purchased on a per line basis with all functionality and features of such switch including, but not limited to call routing.

5.1.1.5 All other unbundled network elements may be purchased separately or in combination on the basis outlined in Appendix A.

5.1.2 Transport

5.1.2.1 If the Parties elect to each provision their own one-way trunks to the other Party's end office for the termination of local traffic, each Party will be responsible for its own expenses associated with the trunks and no transport charges will apply.

5.1.2.2 If one Party desires to purchase direct trunk transport from the other Party, the following rate elements will apply. Transport rate elements include the direct trunk transport facilities between the POI and the terminating party's tandem or end office switches. The applicable rates are described in Appendix A.

5.1.2.3 Direct-trunked transport facilities are provided as dedicated DS3 or DS1 facilities without the tandem switching functions, for the use of either Party between the Point of Interconnection and the terminating end office or tandem switch.

5.1.2.4 If the Parties elect to establish two-way direct trunks, the compensation for such jointly used 'shared' facilities shall be adjusted as follows. The nominal compensation shall be pursuant to the rates for direct trunk transport in Appendix A. The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider's use of that facility. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider's relative use (i.e., originating minutes of use) of the facility in the busy hour.

5.1.2.5 Multiplexing options are available at rates described in Appendix A.

5.1.3 Toll Traffic.

Applicable Switched Access Tariff rates, terms, and conditions apply to toll traffic routed to an access tandem, or directly to an end office.

5.1.4 Transit Traffic.

Applicable switched access, Type 2 or LIS transport rates apply for the use of U S WEST's network to transport transit traffic. For transiting local traffic, the applicable local transit rate applies to the originating Party per

Appendix A. For transiting toll traffic, the Parties will charge the applicable Switched Access rates to the responsible carrier. For terminating transiting wireless traffic, the Parties will charge their applicable rates to the wireless provider. For transiting wireless traffic, the Parties will charge each other the applicable local transit rate.

6. Number Portability

- 6.1 CO-PROVIDER may request U S WEST to provide CO-PROVIDER call detail records identifying each IXC which are sufficient to allow CO-PROVIDER to render bills to IXCs for calls IXCs place to ported numbers in the U S WEST network which U S WEST forwards to CO-PROVIDER for termination. To the extent U S WEST is unable to provide billing detail information within a reasonable time frame, the Parties may agree on an interim method to share access revenues pursuant to a mutually agreed upon surrogate approach.

7. Rate Structure

The prices set forth in ~~Appendix A~~ to this Attachment 1 which are designated as interim in nature are subject to true-up upon establishment of permanent rates by the Commission in Docket 94-999-01. The prices set forth in Appendices A and B to this Attachment 1 which are designated as final in nature are subject to change if the Commission so orders in its pricing dockets

EXHIBIT D

6/23

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Attorneys for
Level 3 Communications, LLC

BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Level 3
Communications, LLC for Enforcement of the
Interconnection Agreement Between Qwest and
Level 3

PETITION OF LEVEL 3
COMMUNICATIONS, LLC FOR
ENFORCEMENT OF THE
INTERCONNECTION AGREEMENT
BETWEEN QWEST AND LEVEL 3

AND

MOTION FOR EXPEDITED RELIEF

Docket No. 05-2266-__

Level 3 Communications, LLC ("Level 3") through its undersigned counsel and pursuant to the provisions at Utah Code Annotated §§ 63-46b-3, 54-4-1, 54-8b-2.2(1)(e) and 54-8b-16 and R746-100-3 of the Utah Administrative Code, moves the Public Service Commission of Utah ("Commission") for expedited and emergency relief and petitions for resolution of a dispute between Level 3 and Qwest Corporation ("Qwest") over the terms and conditions of the Interconnection Agreement between them.

MOTION

The Commission issued its Report and Order in Docket 02-2266-02 ("Order") on February 20, 2004. That Order resolved certain disputed matters that were litigated in front of the Commission in the replacement Interconnection Agreement between Qwest and Level 3. However, at approximately the same time that they commenced their arbitration proceeding, Qwest and Level 3 encountered a recurring billing dispute and Qwest has attempted to retroactively enforce the terms of the new Interconnection Agreement to resolve the billing dispute that arose under the Old Agreement. Qwest is attempting to collect from Level 3 for direct-trunked facilities that carried ISP-bound traffic from Qwest to Level 3 during a period of time before the Commission's Order was issued and before the new Interconnection Agreement that allowed the collection of such charges became effective.

Level 3 has paid Qwest all undisputed charges. It has fully complied with the Commission's Order in that regard and is current on its accounts with Qwest under the new Interconnection Agreement. It has also engaged in discussions with Qwest to resolve the dispute, and although it remains unresolved, Qwest has never claimed that Level 3 is delinquent on the payment of any charges authorized under the current Interconnection Agreement or the Commission's Order.

Despite Level 3's numerous attempts to informally resolve this matter that arose under the terms of the now-expired agreement, Qwest has now threatened to suspend all of Level 3's service order activity and to disconnect Level 3's services by June 28, 2005. (A copy of Qwest's letter is attached as Exhibit "A.") Level 3 is principally a wholesale provider of communications services. Disconnection of its interconnection with Qwest in Utah would leave Level 3's customers and their end users throughout Utah without Internet access and the ability

to complete voice communications as well. Such a result would adversely affect the health, safety and welfare of Level 3's Utah customers and their end users who rely on the services that Level 3 provides in Utah. The Commission has authority under its general statutes to protect against such harm to Utah residents. The Commission also has authority under Section 54-8b-2.2(1)(e) to expedite resolution of disputes over the interconnection of essential facilities.

Level 3, therefore, requests that the Commission consider this matter on an expedited basis and order that Qwest not disconnect or discontinue service to Level 3. Level 3 further requests that the Commission order that now and in the future, Qwest must follow the applicable terms of its Interconnection Agreement and may not terminate or disturb service to Level 3 until and unless the matter has been heard and resolved in favor of Qwest in accordance with those procedures. Further grounds for Level 3's Motion and for its Petition for Relief are set forth below.

PETITION FOR RELIEF

PARTIES

1. Petitioner's full name and its official business address are as follows:

Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021

Level 3 is a Delaware limited liability company, and it is authorized by the Commission to provide local exchange service in Utah.¹ Level 3 is, and at all relevant times has been a "local exchange carrier" ("LEC") under the Act.

¹ *In the Matter of the Application of LEVEL 3 COMMUNICATIONS, LLC for Authority to Operate as a Competitive Local Exchange Carrier Providing Resold Local Exchange Service, Docket No. 98-2266-01 (March 8, 1999).*

2. Qwest is a corporation organized and formed under the laws of the State of Colorado, having an office at 1801 California Street, Denver, Colorado, 80202. Qwest provides local exchange and other services within its franchised areas in Utah. Qwest (in current name or as U S WEST Communications, Inc.) is, and at all relevant times has been, a “Bell Operating Company” and an “incumbent local exchange carrier” (“ILEC”) under the terms of the Telecommunications Act of 1996 (“Act”).

JURISDICTION

3. The Commission has jurisdiction over Level 3’s Petition pursuant to the provisions of the Act and Utah Code Ann. §§ 54-4-1, 54-8b-2.2 and 54-8b-16.

STATEMENT OF FACTS

4. On or about September 7, 2000, Level 3 and Qwest entered into an interconnection agreement (“Old Agreement”) pursuant to the Act and Utah Code Annotated § 54-8b-2.2, which was subsequently approved by the Commission on January 10, 2001. Before the Old Agreement expired, Level 3 and Qwest began negotiations for a new interconnection agreement (“New Agreement”). The parties were unable to reach agreement on all issues of the New Agreement before the Old Agreement expired on June 26, 2001 and ultimately needed to arbitrate outstanding issues before the Commission.

5. The agreed upon Term of the Old Agreement was described as follows:

This Agreement shall be effective upon Commission approval and shall remain in effect until June 26, 2001 and thereafter shall continue in force and effect unless and until a new agreement addressing all of the terms of this Agreement, becomes effective between the Parties. Either Party may request resolution of open issues in accordance with the provisions of Section 27 of this Part A of this Agreement, Dispute Resolution, beginning nine (9) months prior to the expiration of this Agreement. Any disputes regarding the terms and conditions of the new interconnection agreement shall be resolved in accordance with said Section 27 and the resulting agreement shall be submitted to the Commission.

This Agreement shall remain in effect until a new interconnection agreement approved by the Commission has become effective.

Part A, Section 20.1 (emphasis added). Thus, the terms of the Old Agreement were to apply until the New Agreement was approved by the Commission.

6. The parties were able to agree to all the terms of the New Agreement except for one general issue. On August 6, 2002, Level 3 filed its Petition for Arbitration to resolve that one outstanding issue in the New Agreement. The arbitrated issue was whether or not ISP-bound traffic should count as Qwest originating minutes of use for the calculation of “relative use” of direct-trunked transport on Qwest’s side of the point of interconnection (“POI”). Docket No. 02-2266-02.

7. The only mention of a relative use factor in the Old Agreement was found in Section 5.1.2.4 of Attachment 1.² The relative use treatment in the Old Agreement was consistent with what Level 3 advocated be adopted in the New Agreement – that is, that the relative use of direct-trunked facilities reflect the originating minutes of use on the trunks. Because Qwest end-users originated all the traffic that was exchanged on the facilities in question and there was no exclusion of ISP-bound minutes, the Old Agreement does not provide any basis for Qwest to charge Level 3 for direct-trunked facilities deployed by the parties. None of the amendments that were made to the Old Agreement during its term, including the

² Section 5.1.2.4 of Attachment 1 states:

If the Parties’ elect to establish two-way direct trunks, the compensation for such jointly used ‘shared’ facilities shall be adjusted as follows. The nominal compensation shall be pursuant to the rates for direct trunk transport in Appendix A. The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider’s use of that facility. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider’s *relative use* (i.e. *originating minutes of use*) of the facility in the busy hour.

amendment implementing the FCC's *ISP Remand Order*,³ changed the manner in which relative use would be determined.

8. One of the sub-issues that arose during the course of the Arbitration proceeding was, once a relative use factor was determined pursuant to the terms of the New Agreement, should it be used on a prospective basis only or should there be a true-up that applied retroactively. Qwest proposed that the relative use factor should be used to retroactively adjust the initial billing quarter under the New Agreement. Level 3 argued that any new relative use factor should be used prospectively only.

9. On December 10, 2002, a hearing was held and testimony was received in the Arbitration proceeding.

10. On February 20, 2004, the Commission issued its Order, approving the New Agreement (a copy of the Order is attached hereto as Exhibit "B"). Although the Commission adopted Qwest's new proposed language that excludes ISP-bound traffic from the calculation of a relative use factor, it adopted Level 3's position prohibiting the retroactive application of the new factor that would be established by studying the traffic exchanged between the parties in the first three months of the term of the New Agreement. The Commission ordered that "the contract language be modified so that no true-up will be made and *the new relative use factors will apply prospectively only.*" (Emphasis added.)

11. From July 2002 to February 2004 ("Dispute Period"), roughly the same period of time that the parties arbitrated the question of whether the New Agreement should introduce language that excluded ISP-bound traffic from the calculation of originating minutes, Qwest

³ *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 v. FCC*, 288 F.3d 429 (D.C. Cir. 2002); *Internet Service Provider Bound Traffic Amendment to the Interconnection Agreement between Qwest Corporation and Level 3 Communications, LLC, for the State of Utah*, filed November 14, 2002.

billed Level 3 approximately \$563,616.99 in charges for interconnection trunks in Utah. Level 3 has consistently disputed such charges because there was no basis for them according to the terms of the Old Agreement. Although the parties have held multiple discussions in an attempt to resolve the dispute, they have been unable to reach any agreement as a result of those discussions.

12. On June 13, 2005, Qwest sent to Level 3 its demand letter denying Level 3's dispute, demanding payment of \$563,616.99, and threatening suspension of all service order activity and disconnection of services, effective June 28, 2005. See Exhibit "A".

13. Level 3 has paid Qwest all undisputed charges during the Dispute Period and after the effective date of the New Agreement.

14. In violation of the terms of the Old Agreement, which were in effect during the Dispute Period, and in violation of the Commission's Order, which prohibited retroactive application of the new relative use calculations, Qwest is attempting to exclude ISP-bound traffic from its originating minutes of use and impose direct-trunked transport charges on Level 3 during the Dispute Period. As a result, Qwest claims that Level 3 is in default by \$563,616.99.

15. Also in violation of both the Old and the New Agreements, Qwest is threatening to disconnect services to Level 3, effective June 28, 2005. Level 3 and its customers would be irreparably harmed by such action. Disconnection of Level 3's interconnection with Qwest would result in the elimination of Internet access and voice telephony for Level 3's customers and for many Utah end users for whom Level 3 provides underlying services. The result would be to jeopardize the health, safety and welfare of a group of customers without just cause and without giving those customers a chance to make other arrangements for their communications services. Moreover, by disrupting Level 3's service, Qwest would cause

damage to Level 3's reputation among its customers as a reliable service provider, with accompanying economic harm to Level 3 that would be incalculable and irremediable.

REQUEST FOR RELIEF

WHEREFORE, Level 3 respectfully requests that the Commission grant the following relief:

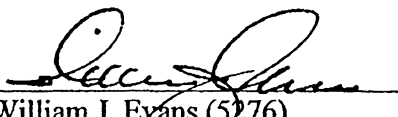
A. That on or before June 28, 2005, the Commission enjoin Qwest from taking any actions with respect to Level 3's accounts with Qwest, including, but not limited to, the suspension of service order activity and disconnection of services, and that the Commission rule that Qwest may not in the future disconnect or terminate service to Level 3 without first complying with the procedures set forth in the applicable Interconnection Agreements.

B. That the Commission issue an order declaring that Level 3's payments are current for the Disputed Period and that Qwest cannot bill or collect from Level direct-trunked transport charges based on the exclusion of ISP-bound traffic from Qwest originating minutes of use during the Disputed Period.

C. That the Commission retain jurisdiction of this matter and the parties hereto until Qwest has complied with all relevant Commission orders.

D. That the Commission take such other and further actions as it deems necessary and appropriate.

DATED this 23rd day of June, 2005.


William J. Eyans (5276)
Vicki M. Baldwin (8532)
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111
Attorneys for
Level 3 Communications, LLC

and

Gregory L. Rogers
LEVEL 3 COMMUNICATIONS, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
(720) 888-2512 (Tel)
(720) 888-5134 (Fax)
Attorneys for
Level 3 Communications, LLC

CERTIFICATE OF SERVICE

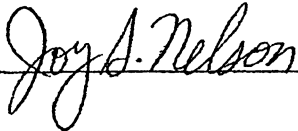
I hereby certify that on this 23rd day of June, 2005, I caused a true and correct copy of the foregoing **PETITION OF LEVEL 3 COMMUNICATIONS, LLC FOR ENFORCEMENT OF THE INTERCONNECTION AGREEMENT BETWEEN QWEST AND LEVEL 3 AND MOTION FOR EXPEDITED RELIEF** to be sent in the following manner:

Via Hand Delivery

Ted D. Smith
Stoel Rives
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111

Via Hand Delivery

Michael Ginsberg
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, Utah 84111



PETITION OF LEVEL 3 COMMUNICATIONS, LLC

EXHIBIT A



June 13, 2005

Level 3 Communications

Director-Interconnection Services

1025 Eldorado Blvd

Broomfield, CO 80021

Re: Dispute denied, balance due and payable

Dear Level 3,

This letter is to inform you that Level 3 is in default of payments on its Qwest accounts(s) 801 L08-0008 008 \$563,616.99 as per the letter dated March 21, 2005. The dispute you have filed against these charges has been denied and Qwest deems the charges due and payable. This letter constitutes further written notice of non-payment as may be required under applicable contract, tariff and/or state utility commission rules and regulations. Failure to respond to this letter or submit payment may result in additional collection actions (described below) being initiated ten (10) business days after the date of this letter.

Therefore, if Qwest does not receive payment of \$563,616.99 on or before June 27, 2005 it will take action with respect to your accounts, without further notice, including but not limited to the suspension of all service order activity and eventual disconnection of services, effective June 28, 2005. Furthermore, in accordance with applicable contract, and/or tariffs, during this 10 day period or thereafter Qwest may demand a security deposit as a condition of its continuing provision of services to Level 3.

Please send payment to the following address:

Qwest Corporation

Attn: Anne Duin

900 Keo 4 South

Des Moines, Iowa 50309

Please be advised that if service order processing is interrupted or service is disconnected, all outstanding charges will be due prior to restoration. If service disconnection occurs, other charges may also apply to re-establish the account(s). Late payment charges will be assessed to all past due balances in accordance with applicable contracts and/or tariffs.

If you have paid in full, please disregard this notice. If you have any questions regarding this notice or the status of your accounts, please contact me at 515 246-2125.

Sincerely,

Anne Duin

Qwest Billing

900 Keo 4 South

Des Moines, Iowa 50309

Cc: Marni Feters, Keiko Pettey, Dan Hult, Steve Hanson, Doug Hsiao, Deb Quinby,

Level 3-Ann Dixon

PETITION OF LEVEL 3 COMMUNICATIONS, LLC

EXHIBIT B

**EXHIBIT B TO THE PETITION APPEARS AS EXHIBIT F TO
THIS ADDENDUM**

EXHIBIT E

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Negotiated)	<u>DOCKET NO. 00-049-88</u>
Resale/Interconnection Agreement)	
between QWEST CORPORATION and)	
LEVEL 3 COMMUNICATIONS, LLC)	<u>REPORT AND ORDER</u>

ISSUED: January 10, 2001

SYNOPSIS

The parties to the agreement which is the subject of this proceeding having submitted the same for Commission Approval; and the agreement appearing to conform to the requirements of § 252(e)(1) of the Federal Telecommunications Act of 1996 and applicable Federal Communications Commission regulations; and the agreement appearing to conform to applicable Utah law and Commission Regulations; and approval of the agreement appearing to be in the public interest, the Commission approved the agreement.

By The Commission:

PROCEDURAL HISTORY

QWEST CORPORATION and LEVEL 3 COMMUNICATIONS, LLC, entered into a resale agreement (hereafter "the Agreement") dated September 7, 2000. The parties filed the Agreement with the Commission October 4, 2000, for review and approval in accordance with 47 USC 229 § 252(e)(1), a part of the Federal Telecommunications Act of 1996 (hereafter "the Act"). The Administrative Law Judge, having reviewed said agreement and having been fully advised in the matter, now enters the following Report, containing proposed findings of fact, conclusions of law, and the Order based thereon.

FINDINGS OF FACT

1. The Agreement does not discriminate against any telecommunication carrier not a party to it.
2. The Agreement comports with the Act's § 251, and with currently effective Federal Communications Commission (FCC) regulations.
3. The Agreement comports with applicable Utah law and this Commission's rules.
4. The United States Congress and the Utah Legislature having established the fostering of competition in the telecommunications industry as sound public policy, the Agreement is in the public interest, since it comports with such policy.
5. The Division of Public Utilities, Utah Department of Commerce, recommends approval of the agreement.

CONCLUSIONS OF LAW

The Agreement should be approved now as meeting the requirements of 47 USC § 252(e)(1).

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

- The Interconnection agreement between QWEST CORPORATION and LEVEL 3 COMMUNICATIONS, LLC, dated September 7, 2000, be and it hereby is, approved in conformance with 47 USC § 252(e)(1).
- Any person aggrieved by this Order may petition the Commission for review within 30 days of the date of this Order. Failure to do so will forfeit the right to appeal to the

DOCKET NO. 00-049-88

-3-

Utah Supreme Court.

Dated at Salt Lake City, Utah, this 10th day of January, 2001.

/s/ A. Robert Thurman
Administrative Law Judge

Approved and Confirmed this 10th day of January, 2001, as the Report and Order
of the Public Service Commission of Utah.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

EXHIBIT F

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

the Matter of Level 3 Communications,)
Petition for Arbitration Pursuant to Section 252)
of the Telecommunications Act of 1996)
In re: Qwest Corporation Regarding Rates,)
Fees, and Conditions for Interconnection)

DOCKET NO. 02-2266-02

REPORT AND ORDER

ISSUED: February 20, 2004

The Commission:

BACKGROUND

This matter was commenced by a petition of Level 3 Communications, LLC ("Level 3") for arbitration under §251(b)(1) of the Telecommunications Act of 1996, 47 U.S.C. §151 *et seq.* (the "Act"). This petition presents one major issue for decision that the parties could not reach agreement on with respect to an interconnection agreement between Level 3 and Qwest Corporation ("Qwest"). The parties presented, and we find, that they have made good faith efforts to reach agreement on the terms of interconnection. Hearings were held, and both parties fully briefed the issue. In addition, subsequent to the hearing both parties have submitted numerous motions for leave to file additional authority, with citations from other jurisdictions attached.

The facts are undisputed. Level 3 is a Competitive Local Exchange Carrier that provides service exclusively, at this time, to Internet Service Providers. Qwest is an incumbent local exchange carrier. The interconnection agreement provision at issue in this matter deals with the financial responsibility of each party for direct trunk transport facilities ("DTTs") and related entrance facilities used to transport local exchange traffic between the companies. Level 3 and Qwest have agreed that when traffic reaches a certain level, DTTs will be used to carry the traffic. They have further agreed that the cost of those facilities will be based on the "relative use" of the facilities. The parties disagree, however, on whether long-haul traffic should be excluded from the relative use calculations.

As stated, Level 3's current business in Utah consists exclusively of servicing ISPs. Level 3 has a single point of interconnection ("POI") with Qwest servicing the entire state. The interconnection facilities in question are all on Qwest's side of the POI. Level 3 provides its ISP customers with local telephone numbers in various parts of the state. For example, a Qwest customer in Cedar City may call a local Cedar City number to reach an ISP serviced by Level 3. That call is then transported to the point of interconnection in Salt Lake and there delivered to Level 3. Unlike if this were a voice call to a Level 3 customer, there is no return traffic to Cedar City, in this example. The call is terminated at the ISP's facilities in Salt Lake or elsewhere and no return traffic to Cedar City will occur.

Since at the current time all traffic to Level 3 is ISP traffic, a decision on the issue of how relative use of facilities should be calculated will determine who pays all of the costs of the interconnection facilities. If ISP traffic is included in the calculation of relative use, Qwest will pay 100% of the costs because its customers originate all of the traffic to the ISP's served by Level 3. If ISP traffic is not

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included in relative use, Level 3 will pay all of the costs of these interconnection facilities.⁽¹⁾ Accordingly, Qwest proposes language that excludes ISP traffic from the calculation, and Level 3's proposes language including ISP traffic.

PARTY POSITIONS

Qwest argues that its language and position should be adopted for five reasons:

1. Adopting Level 3's position would result in Level 3 obtaining interconnection trunks for free. Such a result would violate requirements of the Telecommunications Act that Qwest receive just and reasonable compensation for providing interconnection to CLECs.
2. The *ISP Remand Order*⁽²⁾ determined that ISP traffic is interstate and not subject to reciprocal compensation under section 251(b)(5) of the Act. Level 3's argument that it should obtain interconnection trunks without cost rests on reciprocal compensation rules. Qwest argues that for the same reason Internet traffic is excluded from reciprocal compensation, it should be excluded from relative use calculations for interconnection facilities.
3. The *ISP Remand Order* determined that since Internet traffic is interstate, treatment of Internet traffic is exclusively within the jurisdiction of section 201 of the Act. Qwest therefore argues that this Commission is without authority to order the parties to include Internet traffic in relative use calculations.
4. Qwest argues that including Internet traffic in relative use calculations would violate the same policy considerations that caused the FCC to reject payment of reciprocal compensation for Internet traffic. Qwest argues that including Internet traffic would (a) lead to improper subsidies and uneconomic pricing signals; (b) give Level 3 and other CLECs distorted incentives to serve ISP customers to the exclusion of other customers, and (c) improperly ignore the ability of Level 3 and other CLECs to collect the interconnection costs from their ISP customers.
5. Qwest argues that this issue has already been addressed in the Statement of Generally Available Terms and Conditions, or SGAT, proceeding in which its proposed language was adopted, nothing has changed since that time, and the language should therefore be adopted here.

In favor of the adoption of its language Level 3 argues:

1. The ISP Remand Order did not address the issue in dispute here.
2. FCC "rules of the road" permit Level 3 to interconnect with Qwest at a single point per LATA and require Qwest to deliver its traffic to that interconnection point. Qwest is therefore obligated to deliver all traffic, voice and Internet, to the POI at no cost to Level 3. Terminating compensation issues are separate, and Qwest's position attempts to confuse the issues of interconnection rights and obligations with terminating compensation issues. Qwest also ignores the plain language of FCC rules.
3. Qwest's argument that the adoption in the SGAT proceeding of the language Qwest proposes in this action should be rejected. Level 3 argues that no party challenged Qwest's SGAT language, and therefore this is the first opportunity for the Commission to address this issue.

DISCUSSION

is issue has been addressed in many other states, with conflicting results. Both parties have submitted positions from various jurisdictions supporting their positions. The best that can be said is that this is not settled issue. There is no definite FCC pronouncement on this issue at this time. We are left to determine which arguments are more persuasive and which outcome better promotes the public interest in Utah.

SGAT language: Qwest argues at some length that in the SGAT proceeding this Commission has already accepted the language proposed by Qwest in this docket. Qwest argues that nothing has changed since approval of the SGAT language, and therefore the Commission should adopt the same language here.

Level 3 states that this argument is meritless. Level 3 argues that the negotiation and arbitration process is distinguishable from the SGAT process, and that this Commission has the jurisdiction to arbitrate interconnection disputes. Level 3 argues that the SGAT is like a tariff that it or other carriers may adopt, but that it is still entitled to negotiate and arbitrate its own interconnection agreement based on its individual situation and priorities. Level 3 also argues that the Commission has not considered the sufficiency of Qwest's proposed language because in the SGAT proceeding no CLEC advocated that the language be changed.

We agree that the presence of Qwest's proposed language in its SGAT is not determinative. As Level 3 states, such a result "would make the negotiation and arbitration provisions superfluous." The issue is properly before the Commission for resolution at this time and based on the record in this proceeding, that is how it will be decided.

FCC Jurisdiction: Qwest argues that in the *ISP Remand Order* the FCC ruled Internet traffic is within its exclusive jurisdiction. As a result, Qwest argues, state commissions are without authority to include Internet traffic in relative use calculations, including in this matter.

Level 3 makes a related, but more involved argument. Level 3 argues that there are two different obligations under the Telecommunications Act: the obligation to interconnect under Section 251(c)(2), and the obligation to pay terminating compensation under Section 251(b)(5). Level 3 argues that Qwest's interconnection obligation is to route and deliver traffic from Qwest customers to the POI, and absorb all costs in doing so. Level 3 further argues that the *ISP Remand Order* only modified compensation obligations, and not "other obligation[s]" such as interconnection. Level 3 therefore argues that unless the Commission decides that the costs at issue are an "interconnection" obligation not changed by the *P Remand Order* then this Commission lacks jurisdiction to resolve this dispute. In other words, Level 3 states that if this Commission does not agree with Level 3's position, it does not have jurisdiction to render any other decision.

The issue presented in this arbitration is the calculation of "relative use" for transportation facilities. We do not read the FCC's pronouncements about its jurisdiction over Internet traffic as barring this Commission from addressing that issue. The issue here is the calculation of charges for transportation facilities based on relative use, an issue that has not been addressed by the FCC. We will proceed to address that issue.

Obligations under the Telecommunications Act: Having dealt with the parties' jurisdictional and precedential arguments, we now turn to the merits. Section 251(d)(1) of the Act requires that rates for interconnection facilities be "just and reasonable" and based on the cost of providing the interconnection. An incumbent LEC is to recoup the interconnection costs from the competing carriers making the request. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997), *aff'd in part, rev'd*

in part, remanded AT&T Corp. V. Iowa Utils. Bd., 525 U.S. 366 (1999).

Level 3's proposed language would result in Qwest bearing all of the costs of the interconnection facilities. We agree with Qwest's assertion that such a result would violate the requirements under the Act; that ILECs receive just and reasonable compensation for interconnection. Level 3 paying nothing toward the interconnection facilities is not a just and reasonable rate.

In the *ISP Remand Order* decision, Internet-bound traffic was determined to be interstate access. As a result, the FCC has excluded Internet traffic from the reciprocal compensation requirements of section 251(b)(5). Level 3's argument relies on Rule 51.703(b), adopted pursuant to section 251(b)(5) and dealing with reciprocal compensation, and the *TSR Wireless*⁽³⁾ decision applying that rule. That reliance is misplaced. The FCC has clearly stated on numerous occasions that the reciprocal compensation obligations of section 251(b)(5) do not apply to Internet traffic. The *TSR Wireless* decision, likewise, is not applicable. That decision dealt with local calls to one-way paging providers and the costs of facilities to carry those calls. The claims of *TSR Wireless* only dealt with local calls. The decision is not applicable to Internet-bound traffic. We agree with the reasoning of the U.S. District court in *Level 3 Communications, LLC vs. Public Utilities Commission of Colorado*, Civil Action No. 01-N-2455 (CBS), Colorado District, U.S. District Court, December 11, 2003, that 47 C.F.R. § 51.703(b) does not apply.

Many of the same policy considerations used in the reciprocal compensation are applicable to the issue presented here. In the *ISP Remand Order* the FCC found that the payment of reciprocal compensation for Internet traffic caused uneconomic subsidies and improperly created incentives for CLECs to specialize in serving ISPs to the exclusion of other customers.⁽⁴⁾ The FCC noted that these improper incentives and market distortions are most apparent in Internet traffic because of the one-way nature of the traffic. The same considerations apply to the issue at hand. If Internet-bound traffic is not excluded from the relative use calculations, Level 3 would be allowed to shift all of the costs of the interconnection trunks to Qwest. Level 3 would then have strong incentive to continue to focus on serving ISPs to the exclusion of other customers. Just as these considerations caused the FCC to declare that Internet traffic is not subject to reciprocal compensation payments, they strongly favor the exclusion of ISP traffic from the relative use calculations at issue in this matter.

We will order the use of the language proposed by Qwest for the calculation of the relative use of the interconnection facilities.

Sub-issues: There are two related sub-issues raised by Level 3 in this arbitration. The first is the relative use factor to be used for the initial quarterly billing period. The contract provides for a relative use factor of 50% to be used until a new factor is agreed upon by the parties. Qwest proposes that when a new factor is established that bills should be retroactively adjusted for the initial billing quarter. Level 3 argues that any new relative use factor should be used prospectively only. We will adopt Level 3's position and order that the contract language be modified so that no true up will be made and new relative use factors will apply prospectively only.

The second sub-issue is whether the relative use factor should be used to apportion the nonrecurring installation charges for the transportation and interconnection facilities at issue. Qwest's proposal would cause Level 3 to pay all of the installation charges. Level 3 proposes that the charges be apportioned according to relative use. Qwest did not address this issue in its brief. As a matter of policy, however, the just and reasonable approach to these costs would be to apportion them using the relative use factor. We will therefore require that the contract language be modified accordingly.

ORDER

W, THEREFORE, IT IS HEREBY ORDERED, that

All motions for leave to file additional authority are granted.

Qwest's proposed language regarding the calculation of relative use is adopted. The contract language regarding the two sub-issues shall be modified as set forth above.

The interconnection agreement, as modified herein, between Qwest Corporation and Level 3 Communications, LLC, is approved.

The parties shall submit an interconnection agreement reflecting the determinations in this order within 30 days.

Done at Salt Lake City, Utah, this 20th day of February, 2004.

Doug Tingey
Administrative Law Judge

Approved and Confirmed this 20th day of February, 2004, as the Report and Order of the Public Service Commission of Utah.

Ric Campbell, Chairman

Constance B. White, Commissioner

Ted Boyer, Commissioner

Test:

Julie Orchard
Commission Secretary

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The contract terms call for Level 3 to be billed for all of the cost of the interconnection facilities at issue, and for Qwest to issue Level 3 a credit for its portion of the relative use of the facilities. Therefore, if Internet-bound traffic is excluded from the calculation of relative use, Level 3 will receive credit and will be responsible for the full cost of the facilities.

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, CC Dkt. Nos. 96-98 & 99-68, FCC 01-131, 2001 FCC LEXIS 2340 (rel. Apr. 27, 2001), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

USR Wireless, L.L.C., v. US West Communications, Inc., 15 FCC Rcd 11166, ¶ 3.

ISP Remand Order, ¶¶ 67-76.

EXHIBIT G

DOCKETED

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Petition of Level 3)	<u>DOCKET NO. 05-2266-01</u>
Communications, LLC for Enforcement of)	
the Interconnection Agreement Between)	<u>REPORT AND ORDER</u>
Qwest and Level 3)	

ISSUED: August 18, 2005

SYNOPSIS

The Commission concludes the method of calculation of the relative use factor for direct trunk transport facilities under the parties' previous interconnection agreement for the period in dispute properly excludes Internet Service Provider-bound traffic. The Commission denies the Petition of Level 3 Communications, LLC, and grants Qwest Corporation's counterclaim while making no finding regarding the amount owed by Level 3 to Qwest.

By The Commission:

PROCEDURAL HISTORY

On June 23, 2005, Level 3 Communications, LLC ("Level 3"), filed a Petition for Enforcement of the Interconnection Agreement Between Qwest and Level 3 and Motion for Expedited Relief seeking Commission order finding that Level 3 is current in all payments owed to Qwest Corporation ("Qwest") for the period July 2002 through February 2004 (the "Dispute Period") and enjoining Qwest from taking various actions concerning Level 3's accounts. This petition was generated by Level 3's receipt of a letter from Qwest dated June 13, 2005, in which Qwest claimed Level 3 was in default of \$563,616.79 in payments on its account and demanded payment on or before June 27, 2005. If payment was not received by this date, Qwest would take certain action with respect to Level 3's accounts, without further notice, including but not limited

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to the suspension of all service order activity and eventual disconnection of services.

On June 24, 2004, pursuant to *Utah Code Annotated* ' 54-8b-17, the Commission issued a Notice of Prehearing Conference setting said conference for June 30, 2005. However, by agreement of the parties, the Commission canceled this conference by Notice issued on June 29, 2005, and issued a Scheduling Order on June 30, 2005, setting a hearing date of July 26, 2005.

On July 6, 2005, Qwest filed its Response to Level 3's Petition for Enforcement of Interconnection Agreement and Motion for Expedited Relief and Counterclaim Against Level 3 for Enforcement of Interconnection Agreement. By its Counterclaim, Qwest seeks Commission order declaring that, pursuant to the terms of the previous interconnection agreement between the parties, Level 3 owes Qwest the sum of \$563,616.79, plus interest, for the provision of direct trunk transport ("DTT") facilities during the Dispute Period.

On July 14, 2005, Level 3 filed its Reply to Qwest Corporation's Counterclaim in which Level 3 denied Qwest's claim that the principal amount Level 3 might owe to Qwest for the use of DTT facilities during the Dispute Period is \$563,616.99.

On July 15, 2005, Level 3 and Qwest submitted Position Statements in support of their competing claims. In its Position Statement, Qwest indicated that Level 3's Reply of July 14, 2005, was the first time that Level 3 had challenged the rate in Qwest's DTT facility billings as improper.

This matter was heard by the Administrative Law Judge on July 26, 2005. At hearing, Level 3 was represented by Gregory L. Rogers and William J. Evans. Qwest was

represented by Ted Smith and Robert Brown. Due to the nature of the parties' dispute, hearing was limited to oral argument, no evidence or testimony being offered by either party.

BACKGROUND

Level 3 is a certificated competitive local exchange carrier providing service primarily to Internet Service Providers ("ISPs") in Utah. Qwest is an incumbent local exchange carrier. On September 7, 2000, Level 3 and Qwest, pursuant to the Telecommunications Act of 1996 (the "Act"), entered into an interconnection agreement ("Old Agreement") which was approved by the Commission in Docket No. 00-049-88 on January 10, 2001. The record in that docket indicates the parties entered into this Old Agreement by virtue of Level 3 opting into an interconnection agreement between Qwest predecessor U.S. West Communications, Inc., and AT&T Communications of the Mountain States, Inc., approved by the Commission in Docket No. 96-087-03 on March 25, 1997.

To provide its services, Level 3 established a single Point of Interconnection ("POI") with Qwest in Salt Lake City, obtained local telephone numbers throughout the State of Utah through the North American Numbering Plan Administrator, and provided these numbers to its ISP customers. The ISP customers then provided these numbers to their dial-up customers (who were also Qwest local exchange service customers) so those customers could access the Internet. These locally dialed calls were then routed over Qwest's DTT facilities to Level 3's POI for delivery to Level 3's ISP customers.

Section 5.1.2.4 of Attachment 1 to the Old Agreement states:

If the Parties' elect to establish two-way direct trunks, the compensation for such jointly used 'shared' facilities shall be

adjusted as follows. The nominal compensation shall be pursuant to the rates for direct trunk transport in Appendix A. The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider's use of that facility. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider's relative use (i.e. originating minutes of use) of the facility in the busy hour.

This section contains the Old Agreement's only mention of a relative use factor ("RUF") respecting the rates to be paid for direct trunk transport. The term of the Old Agreement was as follows:

This Agreement shall be effective upon Commission approval and shall remain in effect until June 26, 2001 and thereafter shall continue in force and effect unless and until a new agreement addressing all of the terms of this Agreement, becomes effective between the Parties. Either Party may request resolution of open issues in accordance with the provisions of Section 27 of this Part A of this Agreement, Dispute Resolution, beginning nine (9) months prior to the expiration of this Agreement. Any disputes regarding the terms and conditions of the new interconnection agreement shall be resolved in accordance with said Section 27 and the resulting agreement shall be submitted to the Commission. This Agreement shall remain in effect until a new interconnection agreement approved by the Commission has become effective.

When the Old Agreement expired on June 26, 2001, Level 3 and Qwest had not yet finalized negotiations on a new agreement ("New Agreement") so the parties' relationship continued to be governed by the terms of the Old Agreement. On August 7, 2002, in Docket No. 02-2266-02, Level 3 petitioned the Commission for arbitration of the New Agreement.

The sole provision at issue in that arbitration was Section 5.1.2.4 of Attachment 1, the same provision in the Old Agreement referred to *supra*. Level 3 and Qwest agreed that when traffic reached a certain level, DTTs would be used to carry the traffic. They further agreed that

the cost of those facilities would be based on the “relative use” of the facilities, with Level 3 being billed for all of the cost of the interconnection facilities at issue but Qwest issuing Level 3 a credit for its portion of the relative use of the facilities. The parties disagreed, however, on whether ISP-bound traffic should be excluded from the relative use calculations. In its Order in Docket No. 02-2266-02 (“2004 Order”), the Commission noted:

Level 3's current business in Utah consists exclusively of servicing ISPs. Level 3 has a single point of interconnection (“POI”) with Qwest servicing the entire state. The interconnection facilities in question are all on Qwest’s side of the POI. Level 3 provides its ISP customers with local telephone numbers in various parts of the state. For example, a Qwest customer in Cedar City may call a local Cedar City number to reach an ISP serviced by Level 3. That call is then transported to the point of interconnection in Salt Lake and there delivered to Level 3. Unlike if this were a voice call to a Level 3 customer, there is no return traffic to Cedar City, in this example. The call is terminated at the ISP’s facilities in Salt Lake or elsewhere and no return traffic to Cedar City will occur.

Since at the current time all traffic to Level 3 is ISP traffic, a decision on the issue of how relative use of the facilities should be calculated will determine who pays all of the costs of the interconnection facilities. If ISP traffic is included in the calculation of relative use, Qwest will pay 100% of the costs because its customers originate all of the traffic to the ISP’s served by Level 3. If ISP traffic is not included in relative use, Level 3 will pay all of the costs of these interconnection facilities. Accordingly, Qwest proposes language that excludes ISP traffic from the calculation, and Level 3's [sic] proposes language including ISP traffic.¹

The Commission ultimately resolved this issue in Qwest’s favor, noting:

¹2004 Order at 2-3 (footnote omitted).

Level 3's proposed language would result in Qwest bearing all of the costs of the interconnection facilities. We agree with Qwest's assertion that such a result would violate the requirements under the [Telecommunications Act of 1996, 47 U.S.C. '151 *et seq.*] that ILECs receive just and reasonable compensation for interconnection. Level 3 paying nothing toward the interconnection facilities is not a just and reasonable rate.²

Thus, while the Old Agreement was silent on the issue of whether ISP-bound traffic was included in the calculation of the relative use factor for DTT billing, the New Agreement specifically excludes such traffic from this calculation. Qwest, citing the 2004 Order, now seeks to exclude ISP-bound traffic from relative use calculations during the Dispute Period.³

DISCUSSION

A. Level 3's Position

Level 3 argues that the Commission's decision in Docket No. 02-2266-02 may not be applied retroactively to modify the relative use calculations provided for under the Old

²*Id.* at 7. A sub-issue in Docket No. 02-2266-02 which Level 3 cites in support of its current position concerned which RUF should be used for the initial quarterly billing period under the New Agreement. Qwest proposed that when a new factor was established bills should be retroactively adjusted for the initial billing quarter. Level 3 argued that any new RUF should be used prospectively only. The Commission adopted Level 3's position, ordering language prohibiting true up and mandating that new relative use factors apply prospectively only.

³In October 2002, the parties reached a global settlement of a number of past billing issues for all amounts in dispute between the parties through June 30, 2002. Hence, the Dispute Period begins on July 1, 2002, and continues through February 2004 to the effective date of the New Agreement.

DOCKET NOS. 05-2266-01

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Agreement. In support of this position, Level 3 notes the Commission determined in Docket No. 02-2266-02 that the new RUF calculated following the first quarter of activity under the New Agreement would not be applied retroactively to that quarter. Level 3 reads this decision as a determination that the method of calculating the RUF adopted in the New Agreement should only be applied prospectively.

Level 3 also argues that the Old Agreement is a contract, that the plain language of Section 5.1.2.4 of Attachment 1 to that contract makes no mention of excluding ISP-bound traffic from RUF calculations, and that it would now be improper for the Commission to add such exclusionary terms to this provision. In Level 3's view, the plain meaning of this section is that the calculation of relative use under the Old Agreement was to reflect all of the originating minutes of use on the trunks without exception. Because Qwest end-users originated all of the traffic in question and because the Old Agreement provided for no exclusion of ISP-bound traffic, Qwest has no basis under the Old Agreement to charge Level 3 for DTT facilities.

B. Qwest's Position

Qwest, on the other hand, relies on the Commission's conclusion in Docket No. 02-2266-02 that including ISP-bound traffic in RUF calculations would violate the requirements of the Act by precluding Qwest from receiving just and reasonable compensation for interconnection. Qwest argues the Commission must apply this same reasoning to the provision of DTT facilities during the Dispute Period; that to do otherwise would contradict the Commission's own conclusions in Docket No. 02-2266-02 and violate the Act by requiring Qwest to provide DTT facilities to Level 3 at its own expense.

In the alternative, Qwest attempts to redefine the traffic it carries on its DTT facilities for Level 3 by arguing that Qwest customers who place local calls on Qwest's network in order to connect to their ISP are not placing those calls as Qwest customers but as ISP customers and, by extension, Level 3 customers. Viewed in this light, the traffic on the DTT facility is attributable to Level 3 for purposes of relative use factor calculation, resulting in the payments Qwest seeks in its counterclaim.

Finally, Qwest notes the parties amended the Old Agreement several times, including the Single Point of Presence ("SPOP") Amendment approved August 21, 2002, which allowed Level 3 to connect to Qwest as a single POI in Salt Lake City, and the Internet Service Provider Amendment approved January 8, 2003, which was intended to deal with reciprocal compensation for ISP traffic after the FCC issued its *ISP Remand Order*⁴ on that issue. Paragraph 1.3.1 of the SPOP Amendment required Level 3 to order one or more direct trunk groups from Qwest when traffic volume reached a certain level. Level 3, having placed such orders, Qwest began billing Level 3 on a monthly basis for the cost of these DTT facilities, resulting in the disputed bills at issue in this docket.

FINDINGS AND CONCLUSIONS OF LAW

We do not agree with Level 3's characterization that it would be improper for this Commission to "add language" to the Old Agreement by excluding ISP-bound traffic from the RUF calculation. This Commission is routinely asked to interpret disputed terms between parties

⁴Order on Remand, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP Bound Traffic*, 16 FCCR 9151 (2001)

in order to produce a just and reasonable result in accordance with applicable law and regulation.

This case is no different.

In Docket No. 02-2266-02, we recognized the applicability to the issue of relative use of the FCC's reasoning in its *ISP Remand Order* regarding reciprocal compensation:

Many of the same policy considerations used in the reciprocal compensation [sic] are applicable to the issue presented here. In the *ISP Remand Order* the FCC found that the payment of reciprocal compensation for Internet traffic caused uneconomic subsidies and improperly created incentives for CLECs to specialize in serving ISPs to the exclusion of other customers. The FCC noted that these improper incentives and market distortions are most apparent in Internet traffic because of the one-way nature of the traffic. The same considerations apply to the issue at hand. If Internet-bound traffic is not excluded from the relative use calculations, Level 3 would be allowed to shift all of the costs of the interconnection trunks to Qwest. Level 3 would then have strong incentive to continue to focus on serving ISPs to the exclusion of other customers. Just as these considerations caused the FCC to declare that Internet traffic is not subject to reciprocal compensation payments, they strongly favor the exclusion of ISP traffic from the relative use calculations at issue in this matter.⁵

We do not look to Docket No. 02-2266-02 as controlling precedent in deciding the matter now before us, but we do recognize that the rationale behind our 2004 Order is equally applicable to the parties' current dispute both because the issue now before us is identical to the issue in Docket No. 02-2266-02 and because the release of the *ISP Remand Order* predates the start of the Dispute Period by more than a year. We view the *ISP Remand Order* as illuminating the

⁵ 2004 Order at p. 8 (citing *ISP Remand Order*, && 67-76).

proper meaning of Section 5.1.2.4 of Attachment 1 to the Old Agreement. It would therefore be unreasonable for this Commission to ignore such guidance in rendering a decision.

As we recognized in Docket No. 02-2266-02, any interpretation of Section 5.1.2.4 of Attachment 1, whether in the New Agreement or in the Old Agreement, must accord with the Section 251(d)(1) requirement of the Act that rates for interconnection of facilities be just and reasonable. No one disputes that including ISP-bound traffic in the RUF calculation under the Old Agreement would result in Qwest bearing all of the cost of the DTT facilities. We cannot conclude that such a result would equate to just and reasonable compensation for Qwest. We therefore conclude that the only proper reading of Section 5.1.2.4 of Attachment 1 to the Old Agreement excludes ISP-bound traffic from the RUF calculation in determining the parties' respective payment obligations for DTT facilities provided during the Dispute Period.

We note, however, that the issue of how much Level 3 might owe Qwest if ISP-bound traffic is excluded from relative use calculations was raised relatively late in these proceedings. Qwest appears to stand by the figure of \$563,616.99 contained in its Counterclaim. Level 3 disputes this amount but offered no evidence concerning what it believes the correct amount to be. The Commission therefore makes no finding on this issue.

Therefore, based upon the foregoing information, and for good cause appearing, the Administrative Law Judge enters the following proposed:

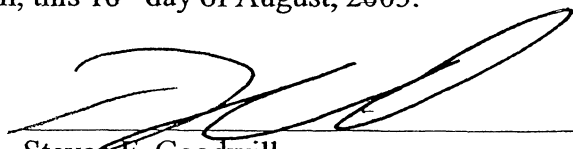
ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The Petition of LEVEL 3 COMMUNICATIONS, LLC, is denied. QWEST CORPORATION'S Counterclaim is granted in part to the extent that the Commission concludes ISP-bound traffic is properly excluded from calculation of the relative use factor for direct trunk transport facilities during the Dispute Period. The Commission enters no order respecting the amount owed to Qwest by Level 3 for direct trunk transport facilities provided by Qwest during the Dispute Period.

2. Pursuant to *Utah Code Annotated* " 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of *Utah Code Annotated* " 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

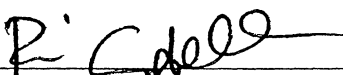
Dated at Salt Lake City, Utah, this 18th day of August, 2005.


Steven F. Goodwill
Administrative Law Judge

DOCKET NOS. 05-2266-01

-12-

Approved and Confirmed this 18th day of August, 2005, as the Report and Order
of the Public Service Commission of Utah.



Ric Campbell, Chairman




Ted Boyer, Commissioner



Ron Allen, Commissioner

Attest:



Julie Orchard
Commission Secretary
G#45483

EXHIBIT H

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

In the Matter of)	
)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications Act)	
of 1996)	
)	
Intercarrier Compensation)	CC Docket No. 99-68
for ISP-Bound Traffic)	

ORDER ON REMAND AND REPORT AND ORDER

Adopted: April 18, 2001

Released: April 27, 2001

By the Commission: Chairman Powell issuing a statement; Commissioner Furchtgott-Roth dissenting and issuing a statement.

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I. INTRODUCTION

1. In this Order, we reconsider the proper treatment for purposes of inter-carrier compensation of telecommunications traffic delivered to Internet service providers (ISPs). We previously found in the *Declaratory Ruling*¹ that such traffic is interstate traffic subject to the jurisdiction of the Commission under section 201 of the Act² and is not, therefore, subject to the reciprocal compensation provisions of section 251(b)(5).³ The Court of Appeals for the District of Columbia Circuit held on appeal, however, that the *Declaratory Ruling* failed adequately to explain why our jurisdictional conclusion was relevant to the applicability of section 251(b)(5) and

¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) (*Declaratory Ruling or Inter-carrier Compensation NPRM*).

² See 47 U.S.C. § 201, Communications Act of 1934 (the Act), as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act). Hereinafter, all citations to the Act and to the 1996 Act will be to the relevant section of the United States Code unless otherwise noted.

³ 47 U.S.C. § 251(b)(5).

remanded the issue for further consideration.⁴ As explained in more detail below, we modify the analysis that led to our determination that ISP-bound traffic falls outside the scope of section 251(b)(5) and conclude that Congress excluded from the “telecommunications” traffic subject to reciprocal compensation the traffic identified in section 251(g), including traffic destined for ISPs. Having found, although for different reasons than before, that the provisions of section 251(b)(5) do not extend to ISP-bound traffic, we reaffirm our previous conclusion that traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, and we establish an appropriate cost recovery mechanism for the exchange of such traffic.

2. We recognize that the existing intercarrier compensation mechanism for the delivery of this traffic, in which the originating carrier pays the carrier that serves the ISP, has created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access markets. As we discuss in the *Unified Intercarrier Compensation NPRM*,⁵ released in tandem with this Order, such market distortions relate not only to ISP-bound traffic, but may result from any intercarrier compensation regime that allows a service provider to recover some of its costs from other carriers rather than from its end-users. Thus, the *NPRM* initiates a proceeding to consider, among other things, whether the Commission should replace existing intercarrier compensation schemes with some form of what has come to be known as “bill and keep.”⁶ The *NPRM* also considers modifications to existing payment regimes, in which the calling party’s network pays the terminating network, that might limit the potential for market distortion. The regulatory arbitrage opportunities associated with intercarrier payments are particularly apparent with respect to ISP-bound traffic, however, because ISPs typically generate large volumes of traffic that is virtually all one-way -- that is, delivered to the ISP. Indeed, there is convincing evidence in the record that at least some carriers have targeted ISPs as customers merely to take advantage of these intercarrier payments. Accordingly, in this Order we also take interim steps to limit the regulatory arbitrage opportunity presented by ISP-bound traffic while we consider the broader issues of intercarrier compensation in the *NPRM* proceeding.

⁴ See *Bell Atl Tel Cos v FCC*, 206 F 3d 1 (D C. Cir. 2000) (*Bell Atlantic*).

⁵ Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. April 27, 2001) (“*Unified Intercarrier Compensation NPRM*” or “*NPRM*”).

⁶ “Bill and keep” refers to an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end-users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16045 (1996) (*Local Competition Order*), *aff’d in part and vacated in part sub nom. Competitive Telecommunications Ass’n v FCC*, 117 F 3d 1068 (8th Cir. 1997) (*CompTel*), *aff’d in part and vacated in part sub nom. Iowa Utils Bd v FCC*, 120 F 3d 753 (8th Cir. 1997) (*Iowa Utils Bd*), *aff’d in part and rev’d in part sub nom. AT&T Corp v Iowa Utils Bd*, 525 U.S. 366 (1999), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997); *further reconsideration pending*. Bill and keep does not, however, preclude intercarrier charges for transport of traffic between carriers’ networks. *Id.*

II. EXECUTIVE SUMMARY

3. As presaged above, we must wrestle with two difficult issues in this Order: first, whether intercarrier compensation for ISP-bound traffic is governed by section 251 or section 201; and, if the latter, what sort of compensation mechanism should apply. The first question is difficult because we do not believe it is resolved by the plain language of section 251(b)(5) but, instead, requires us to consider the relationship of that section to other provisions of the statute. Moreover, we recognize the legitimate questions raised by the court with respect to the rationales underlying our regulatory treatment of ISPs and ISP traffic. We seek to respond to those questions in this Order. Ultimately, however, we conclude that Congress, through section 251(g),⁷ expressly limited the reach of section 251(b)(5) to exclude ISP-bound traffic. Accordingly, we affirm our conclusion in the *Declaratory Ruling* that ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5).

4. Because we determine that intercarrier compensation for ISP-bound traffic is within the jurisdiction of this Commission under section 201 of the Act, it is incumbent upon us to establish an appropriate cost recovery mechanism for delivery of this traffic. Based upon the record before us, it appears that the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users. As we recognize in the *NPRM*, intercarrier compensation regimes that require carrier-to-carrier payments are likely to distort the development of competitive markets by divorcing cost recovery from the ultimate consumer of services. In a monopoly environment, permitting carriers to recover some of their costs from interconnecting carriers might serve certain public policy goals. In order to promote universal service, for example, this Commission historically has capped end-user common line charges and required local exchange carriers to recover any shortfall through per-minute charges assessed on interexchange carriers.⁸ These sorts of implicit subsidies cannot be sustained, however, in the competitive markets for telecommunications services envisioned by the 1996 Act. In the *NPRM*, we suggest that, given the opportunity, carriers always will prefer to recover their costs from other carriers rather than their own end-users in order to gain competitive advantage. Thus carriers have every incentive to compete, not on basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers, a troubling distortion that prevents market forces from distributing limited investment resources to their most efficient uses.

5. We believe that this situation is particularly acute in the case of carriers delivering traffic to ISPs because these customers generate extremely high traffic volumes that are entirely one-directional. Indeed, the weight of the evidence in the current record indicates that precisely the types of market distortions identified above are taking place with respect to this traffic. For example, comments in the record indicate that competitive local exchange carriers (CLECs), on average, terminate eighteen times more traffic than they originate, resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, ninety percent of which is

⁷ 47 U.S.C. § 251(g).

⁸ Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 15998-99 (1997) (*Access Charge Reform Order*), *aff'd*, *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

for ISP-bound traffic.⁹ Moreover, the traffic imbalances for some competitive carriers are in fact much greater, with several carriers terminating more than forty times more traffic than they originate.¹⁰ There is nothing inherently wrong with carriers having substantial traffic imbalances arising from a business decision to target specific types of customers. In this case, however, we believe that such decisions are driven by regulatory opportunities that disconnect costs from end-user market decisions. Thus, under the current carrier-to-carrier recovery mechanism, it is conceivable that a carrier could serve an ISP free of charge and recover all of its costs from originating carriers. This result distorts competition by subsidizing one type of service at the expense of others.

6. Although we believe this arbitrage opportunity is particularly manifest with respect to ISP-bound traffic, we suggest in the *NPRM* that any compensation regime based on carrier-to-carrier payments may create similar market distortions. Accordingly, we initiate an inquiry as to whether bill and keep is a more economically efficient compensation scheme than the existing carrier-to-carrier payment mechanisms. Alternatively, the record developed in that proceeding may suggest modifications to carrier-to-carrier cost recovery mechanisms that address the competitive concerns identified above. Based upon the current record, however, bill and keep appears the preferable cost recovery mechanism for ISP-bound traffic because it eliminates a substantial opportunity for regulatory arbitrage. We do not fully adopt a bill and keep regime in this Order, however, because there are specific questions regarding bill and keep that require further inquiry, and we believe that a more complete record on these issues is desirable before requiring carriers to recover most of their costs from end-users. Because these questions are equally relevant to our evaluation of a bill and keep approach for other types of traffic, we will consider them in the context of the *NPRM*. Moreover, we believe that there are significant advantages to a global evaluation of the intercarrier compensation mechanisms applicable to different types of traffic to ensure a more systematic, symmetrical treatment of these issues.

7. Because the record indicates a need for immediate action with respect to ISP-bound traffic, however, in this Order we will implement an interim recovery scheme that: (i) moves aggressively to eliminate arbitrage opportunities presented by the existing recovery mechanism for ISP-bound by lowering payments and capping growth; and (ii) initiates a 36-month transition towards a complete bill and keep recovery mechanism while retaining the ability to adopt an alternative mechanism based upon a more extensive evaluation in the *NPRM* proceeding. Specifically, we adopt a gradually declining cap on the amount that carriers may recover from

⁹ See, e.g., Letter from Robert T. Blau, BellSouth, to Magalie Roman Salas, Secretary, FCC (November 6, 2000); see also Verizon Remand Comments at 2 (Verizon will be billed more than one billion dollars in 2000 for Internet-bound calls); Letter from Richard J. Metzger, Focal, to Deena Shetler, Legal Advisor to Commissioner Gloria Tristani, FCC (Jan. 11, 2001)(ILECs owed \$1.98 billion in reciprocal compensation to CLECs in 2000). On June 23, 2000, the Commission released a Public Notice seeking comment on the issues raised by the court's remand. See Comment Sought on Remand of the Commission's Reciprocal Compensation Declaratory Ruling by the U.S. Court of Appeals for the D.C. Circuit, CC Docket Nos. 96-98, 99-68, Public Notice, 15 FCC Rcd 11311 (2000) (*Public Notice*). Comments and reply comments filed in response to the *Public Notice* are identified herein as "Remand Comments" and "Remand Reply Comments," respectively. Comments and replies filed in response the 1999 *Inter-carrier Compensation NPRM* are identified as "Comments" and "Reply Comments," respectively.

¹⁰ See, e.g., Verizon Remand Comments at 11, 21.

other carriers for delivering ISP-bound traffic. We also cap the amount of traffic for which any such compensation is owed, in order to eliminate incentives to pursue new arbitrage opportunities. In sum, our goal in this Order is decreased reliance by carriers upon carrier-to-carrier payments and an increased reliance upon recovery of costs from end-users, consistent with the tentative conclusion in the *NPRM* that bill and keep is the appropriate intercarrier compensation mechanism for ISP-bound traffic. In this regard, we emphasize that the rate caps we impose are not intended to reflect the costs incurred by each carrier that delivers ISP traffic. Some carriers' costs may be higher; some are probably lower. Rather, we conclude, based upon all of the evidence in this record, that these rates are appropriate limits on the amounts recovered from other carriers and provide a reasonable transition from rates that have (at least until recently) typically been much higher. Carriers whose costs exceed these rates are (and will continue to be) able to collect additional amounts from their ISP customers. As we note above, and explain in more detail below, we believe that such end-user recovery likely is the most efficient mechanism.

8. The basic structure of this transition is as follows:

* Beginning on the effective date of this Order, and continuing for six months, intercarrier compensation for ISP-bound traffic will be capped at a rate of \$.0015/minute-of-use (mou). Starting in the seventh month, and continuing for eighteen months, the rate will be capped at \$.0010/mou. Starting in the twenty-fifth month, and continuing through the thirty-sixth month or until further Commission action (whichever is later), the rate will be capped at \$.0007/mou. Any additional costs incurred must be recovered from end-users. These rates reflect the downward trend in intercarrier compensation rates contained in recently negotiated interconnection agreements, suggesting that they are sufficient to provide a reasonable transition from dependence on intercarrier payments while ensuring cost recovery.

* We also impose a cap on total ISP-bound minutes for which a local exchange carrier (LEC) may receive this compensation. For the year 2001, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to compensation under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation in 2001, plus another ten percent growth factor. In 2003, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the 2002 ceiling. These caps are consistent with projections of the growth of dial-up Internet access for the first two years of the transition and are necessary to ensure that such growth does not undermine our goal of limiting intercarrier compensation and beginning a transition toward bill and keep. Growth above these caps should be based on a carrier's ability to provide efficient service, not on any incentive to collect intercarrier payments.

* Because the transitional rates are *caps* on intercarrier compensation, they have 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). The rate caps are designed to provide a transition toward bill and keep, and no transition is necessary for carriers already exchanging traffic at rates below the caps.

* In order to limit disputes and costly measures to identify ISP-bound traffic, we adopt 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 the compensation mechanism set forth in this Order. This ratio is consistent with those adopted by state commissions to identify ISP or other convergent traffic that is subject to lower intercarrier compensation rates.

Carriers that seek to rebut this presumption, by showing that traffic above the ratio is not ISP-bound traffic or, conversely, that traffic below the ratio is ISP-bound traffic, may seek appropriate relief from their state commissions pursuant to section 252 of the Act.

* Finally, the rate caps for ISP-bound traffic (or such lower rates as have been imposed by states commissions for the exchange of ISP-bound traffic) apply only if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same rate. An incumbent LEC that does not offer to exchange section 251(b)(5) traffic at these rates must exchange ISP-bound traffic at the state-approved or state-negotiated reciprocal compensation rates reflected in their contracts. The record fails to demonstrate that there are inherent differences between the costs of delivering a voice call to a local end-user and a data call to an ISP, thus the “mirroring” rule we adopt here requires that incumbent LECs pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic.

III. BACKGROUND

9. In the *Declaratory Ruling* released on February 26, 1999, we addressed the regulatory treatment of ISP-bound traffic. In that order, we reached several conclusions regarding the jurisdictional nature of this traffic, and we proposed several approaches to intercarrier compensation for ISP-bound traffic in an accompanying *Inter-carrier Compensation NPRM*. The order, however, was vacated and remanded on appeal.¹¹ This Order, therefore, again focuses on the regulatory treatment of ISP-bound traffic and the appropriate intercarrier compensation regime for carriers that collaborate to deliver traffic to ISPs.

10. As we noted in the *Declaratory Ruling*, an ISP’s end-user customers typically access the Internet through an ISP server located in the same local calling area.¹² Customers generally pay their LEC a flat monthly fee for use of the local exchange network, including connections to their local ISP.¹³ They also generally pay their ISP a flat monthly fee for access to the Internet.¹⁴ ISPs then combine “computer processing, information storage, protocol

¹¹ See *Bell Atlantic*, 206 F.3d 1.

¹² *Declaratory Ruling*, 14 FCC Rcd at 3691.

¹³ *Declaratory Ruling*, 14 FCC Rcd at 3691.

¹⁴ *Declaratory Ruling*, 14 FCC Rcd at 3691.

conversion, and routing with transmission to enable users to access Internet content and services.”¹⁵

11. ISPs, one class of enhanced service providers (ESPs),¹⁶ also may utilize LEC services to provide their customers with access to the Internet. In the *MTS/WATS Market Structure Order*, the Commission acknowledged that ESPs were among a variety of users of LEC interstate access services.¹⁷ Since 1983, however, the Commission has exempted ESPs from the payment of certain interstate access charges.¹⁸ Consequently ESPs, including ISPs, are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network (PSTN).¹⁹ Thus, despite the Commission’s understanding that ISPs use *interstate* access services, pursuant to the ESP exemption, the Commission has permitted ISPs to take service under *local* tariffs.

12. The 1996 Act set standards for the introduction of competition into the market for local telephone service, including requirements for interconnection of competing telecommunications carriers.²⁰ As a result of interconnection and growing local competition, more than one LEC may be involved in the delivery of telecommunications within a local service

¹⁵ *Declaratory Ruling*, 14 FCC Rcd at 3691 (citing Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11531 (1998) (*Universal Service Report to Congress*)).

¹⁶ The Commission defines “enhanced services” as “services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.” 47 C.F.R.

§ 64.702(a). The 1996 Act describes these services as “information services.” See 47 U.S.C. § 153(20) (“information service” refers to the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”). See also *Universal Service Report to Congress*, 13 FCC Rcd at 11516 (the “1996 Act’s definitions of telecommunications service and information service essentially correspond to the pre-existing categories of basic and enhanced services”).

¹⁷ *MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983) (*MTS/WATS Market Structure Order*) (ESPs are “[a]mong the variety of users of access service” and “obtain[] local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit [their] location and, commonly, another location.”).

¹⁸ This policy is known as the “ESP exemption.” See *MTS/WATS Market Structure Order*, 97 FCC 2d at 715 (ESPs have been paying local business service rates for their interstate access and would experience rate shock that could affect their viability if full access charges were instead applied); see also Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) (*ESP Exemption Order*) (“the imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired”); *Access Charge Reform Order*, 12 FCC Rcd at 16133 (“[m]aintaining the existing pricing structure ... avoids disrupting the still-evolving information services industry”).

¹⁹ *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53. See also *Access Charge Reform Order*, 12 FCC Rcd at 16133-35.

²⁰ 47 U.S.C. §§ 251-252.

area. Section 251(b)(5) of the Act addresses the need for LECs to agree to terms for the mutual exchange of traffic over their interconnecting networks. It specifically provides that LECs have the duty to “establish reciprocal compensation arrangements for the transport and termination of telecommunications.”²¹ The Commission determined, in the *Local Competition Order*, that section 251(b)(5) reciprocal compensation obligations “apply only to traffic that originates and terminates within a local area,” as defined by state commissions.²²

13. As a result of this determination, the question arose whether reciprocal compensation obligations apply to the delivery of calls from one LEC’s end-user customer to an ISP in the same local calling area that is served by a competing LEC.²³ The Commission determined at that time that resolution of this question turned on whether ISP-bound traffic “originates and terminates within a local area,” as set forth in our rule.²⁴ Many competitive LECs argued that ISP-bound traffic is local traffic that terminates at the ISP’s local server, where a second, packet-switched “call” then begins.²⁵ Thus, they argued, the reciprocal compensation obligations of section 251(b)(5) apply to this traffic. Incumbent LECs, on the other hand, argued that no reciprocal compensation is due because ISP-bound traffic is interstate telecommunications traffic that continues through the ISP server and terminates at the remote Internet sites accessed by ISP customers.²⁶

14. The Commission concluded in the *Declaratory Ruling* that the jurisdictional nature of ISP-bound traffic should be determined, consistent with Commission precedent, by the end

²¹ 47 U.S.C. § 251(b)(5).

²² See *Local Competition Order*, 11 FCC Rcd at 16013 (“With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered ‘local areas’ for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions’ historical practice of defining local service areas for wireline LECs.”); see also 47 C.F.R.

§ 51.701(b)(1-2). For CMRS traffic, the Commission determined that reciprocal compensation applies to traffic that originates and terminates within the same Major Trading Area (MTA). See 47 C.F.R. § 51.701(b)(2).

²³ See, e.g., Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 61 Fed. Reg. 53922 (1996); Petition for Partial Reconsideration and Clarification of MFS Communications Co., Inc. at 28; Letter from Richard J. Metzger, ALTS, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC (June 20, 1997); Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission’s Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CPD 97-30, DA 97-1399 (rel. July 2, 1997); Letter from Edward D. Young and Thomas J. Tauke, Bell Atlantic, to William E. Kennard, Chairman, FCC (July 1, 1998). The Commission later directed parties wishing to make *ex parte* presentations regarding the applicability of reciprocal compensation to ISP-bound traffic to make such filings in CC Docket No. 96-98, the local competition proceeding. See *Ex Parte* Procedures Regarding Requests for Clarification of the Commission’s Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CC Docket No. 96-98, Public Notice, 13 FCC Rcd. 15568 (1998).

²⁴ *Declaratory Ruling*, 14 FCC Rcd at 3693-94.

²⁵ *Declaratory Ruling*, 14 FCC Rcd at 3694.

²⁶ *Declaratory Ruling*, 14 FCC Rcd at 3695.

points of the communication.²⁷ Applying this “end-to-end” analysis, the Commission determined that Internet communications originate with the ISP’s end-user customer and continue beyond the local ISP server to websites or other servers and routers that are often located outside of the state.²⁸ The Commission found, therefore, that ISP-bound traffic is not local because it does not “originate[] and terminate[] within a local area.”²⁹ Instead, it is jurisdictionally mixed and largely interstate, and, for that reason, the Commission found that the reciprocal compensation obligations of section 251(b)(5) do not apply to this traffic.³⁰

15. Despite finding that ISP-bound traffic is largely interstate, the Commission concluded that it had not yet established a federal rule to govern intercarrier compensation for this traffic.³¹ The Commission found that, in the absence of conflicting federal law, parties could voluntarily include ISP-bound traffic in their interconnection agreements under sections 251 and 252 of the Act.³² It also found that, even though section 251(b)(5) does not *require* reciprocal compensation for ISP-bound traffic, nothing in the statute or our rules prohibits state commissions from determining in their arbitrations that reciprocal compensation for this traffic is appropriate, so long as there is no conflict with governing federal law.³³ Pending adoption of a federal rule, therefore, state commissions exercising their authority under section 252 to arbitrate, interpret, and enforce interconnection agreements would determine whether and how interconnecting carriers should be compensated for carrying ISP-bound traffic.³⁴ In the *Inter-carrier Compensation NPRM* accompanying the *Declaratory Ruling*, the Commission requested comment on the most appropriate intercarrier compensation mechanism for ISP-bound traffic.³⁵

16. On March 24, 2000, prior to release of a decision addressing these issues, the court of appeals vacated certain provisions of the *Declaratory Ruling* and remanded the matter to the

²⁷ *Declaratory Ruling*, 14 FCC Rcd at 3695-3701; *see also* Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, Memorandum Opinion and Order, 7 FCC Rcd 1619 (1992) (*BellSouth MemoryCall*), *aff’d*, *Georgia Pub. Serv. Comm’n v. FCC*, 5 F.3d 1499 (11th Cir. 1993)(table); *Teleconnect Co. v. Bell Telephone Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995) (*Teleconnect*), *aff’d sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997).

²⁸ *Declaratory Ruling*, 14 FCC Rcd at 3695-97.

²⁹ *Declaratory Ruling*, 14 FCC Rcd at 3697.

³⁰ *Declaratory Ruling*, 14 FCC Rcd at 3690, 3695-3703.

³¹ *Declaratory Ruling*, 14 FCC Rcd at 3703.

³² *Declaratory Ruling*, 14 FCC Rcd at 3703.

³³ *Declaratory Ruling*, 14 FCC Rcd at 3706.

³⁴ *Declaratory Ruling*, 14 FCC Rcd at 3703-06. The Commission did recognize, however, that its conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusions that reciprocal compensation is due to the extent that those conclusions were based on a finding that this traffic terminates at the ISP’s server. *Id.* at 3706.

³⁵ *Declaratory Ruling*, 14 FCC Rcd at 3707-09.

Commission.³⁶ The court observed that, although “[t]here is no dispute that the Commission has historically been justified in relying on this [end-to-end] method when determining whether a particular communication is jurisdictionally interstate,”³⁷ the Commission had not adequately explained why the jurisdictional analysis was dispositive of, or indeed relevant to, the question whether a call to an ISP is subject to the reciprocal compensation requirements of section 251(b)(5).³⁸ The court noted that the Commission had not applied its definition of “termination” to its analysis of the scope of section 251(b)(5),³⁹ and the court distinguished cases upon which the Commission relied in its end-to-end analysis because they involve continuous communications switched by interexchange carriers (IXCs), as opposed to ISPs, the latter of which are not telecommunications providers.⁴⁰ As an “independent reason” to vacate, the court also held that the Commission had failed to address how its conclusions “fit . . . within the governing statute.”⁴¹ In particular, the court found that the Commission had failed to explain why ISP-bound traffic was not “telephone exchange service,” as defined in the Act.⁴²

17. In a public notice released June 23, 2000, the Commission sought comment on the issues raised by the court’s remand.⁴³ The *Public Notice* specifically requested that parties comment on the jurisdictional nature of ISP-bound traffic, the scope of the reciprocal compensation requirement of section 251(b)(5), and the relevance of the concepts of “termination,” “telephone exchange service,” “exchange access service,” and “information access.”⁴⁴ It invited parties to update the record by responding to any *ex parte* presentations filed after the close of the reply period on April 27, 1999. It also sought comment on any new or innovative intercarrier compensation arrangements for ISP-bound traffic that parties may have considered or entered into during the pendency of the proceeding.

IV. DISCUSSION

A. Background

18. The nature and character of communications change over time. Over the last decade communications services have been radically altered by the advent of the Internet and the

³⁶ See *Bell Atlantic*, 206 F.3d 1.

³⁷ *Bell Atlantic*, 206 F.3d at 5.

³⁸ *Bell Atlantic*, 206 F.3d at 5; see also *id.* at 8 (the Commission had not “supplied a real explanation for its decision to treat end-to-end analysis as controlling” with respect to the application of section 251(b)(5)).

³⁹ See *Bell Atlantic*, 206 F.3d at 6-7.

⁴⁰ See *Bell Atlantic*, 206 F.3d at 6-7.

⁴¹ *Bell Atlantic*, 206 F.3d at 8.

⁴² *Bell Atlantic*, 206 F.3d at 8-9; 47 U.S.C. § 153(47) (defining “telephone exchange service”).

⁴³ *Public Notice*, 15 FCC Rcd 11311.

⁴⁴ *Id.*; see also 47 U.S.C. § 251(g); 47 U.S.C. § 153(20).

nature of Internet communications. Indeed, the Internet has given rise to new forms of communications such as e-mail, instant messaging, and other forms of digital, IP-based services. Many of these new services and formats have been layered over and integrated with the existing public telephone systems. Most notably, Internet service providers have come into existence in order to facilitate mass market access to the Internet. A consumer with access to a standard phone line is able to communicate with the Internet, because an ISP converts the analog signal to digital and converts the communication to the IP protocol. This allows the user to access the global Internet infrastructure and communicate with users and websites throughout the world. In a narrowband context, the ISP facilitates access to this global network.

19. The Commission has struggled with how to treat Internet traffic for regulatory purposes, given the bevy of its rules premised on the architecture and characteristics of the mature public switched telephone network. For example, Internet consumers may stay on the network much longer than the design expectations of a network engineered primarily for voice communications. Additionally, the “bursty” nature of packet-switched communications skews the traditional assumptions of per minute pricing to which we are all accustomed. The regulatory challenges have become more acute as Internet usage has exploded.⁴⁵

20. The issue of intercarrier compensation for Internet-bound traffic with which we are presently wrestling is a manifestation of this growing challenge. Traditionally, telephone carriers would interconnect with each other to deliver calls to each other’s customers. It was generally assumed that traffic back and forth on these interconnected networks would be relatively balanced. Consequently, to compensate interconnecting carriers, mechanisms like reciprocal compensation were employed, whereby the carrier whose customer initiated the call would pay the other carrier the costs of using its network.

21. Internet usage has distorted the traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results. Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime. It was not long before some LECs saw the opportunity to sign up ISPs as customers and collect, rather than pay, compensation because ISP modems do not generally call anyone in the exchange. In some instances, this led to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels. These effects prompted the Commission to consider the nature of ISP-bound traffic and to examine whether there was any flexibility under the statute to modify and address the pricing mechanisms for this traffic, given that there is a federal statutory provision authorizing reciprocal compensation.⁴⁶ In the *Declaratory Ruling*, the Commission

⁴⁵ See Digital Economy 2000, U.S. Department of Commerce (June 2000) (“Three hundred million people now use the Internet, compared to three million in 1994.”)

⁴⁶ 47 U.S.C. § 251(b)(5).

concluded that Internet-bound traffic was jurisdictionally interstate and, thus, not subject to section 251(b)(5).

22. In *Bell Atlantic*, the court of appeals vacated the *Declaratory Ruling* and remanded the case to the Commission to determine whether ISP-bound traffic is subject to statutory reciprocal compensation requirements. The court held that the Commission failed to explain adequately why LECs did not have a duty to pay reciprocal compensation under section 251(b)(5) of the Act and remanded the case to the Commission.

B. Statutory Analysis

23. In this section, we reexamine our findings in the *Declaratory Ruling* and conclude that ISP-bound traffic is not subject to the reciprocal compensation requirement in section 251(b) because of the carve-out provision in section 251(g), which excludes several enumerated categories of traffic from the universe of “telecommunications” referred to in section 251(b)(5). We explain our rationale and the interrelationship between these two statutory provisions in more detail below. We further conclude that section 251(i) affirms the Commission’s role in continuing to develop appropriate pricing and compensation mechanisms for traffic -- such as Internet-bound traffic -- that travels over convergent, mixed, and new types of network architectures.

1. Introduction

24. In the *Local Competition Order*, the Commission determined that the reciprocal compensation provisions of section 251(b)(5) applied only to what it termed “local” traffic rather than to the transport and termination of interexchange traffic.⁴⁷ In the subsequent *Declaratory Ruling*, the Commission focused its discussion on whether ISP-bound traffic terminated within a local calling area such as to be properly considered “local” traffic. To resolve that issue, the Commission focused predominantly on an end-to-end jurisdictional analysis.

25. On review, the court accepted (without necessarily endorsing) the Commission’s view that traffic was either “local” or “long distance” but faulted the Commission for failing to explain adequately why ISP-bound traffic was more properly categorized as long distance, rather than local. The Commission had attempted to do so by employing an end-to-end jurisdictional analysis of ISP traffic, rather than by evaluating the traffic under the statutory definitions of “telephone exchange service” and “exchange access.” After acknowledging that the Commission “has historically been justified in relying on” end-to-end analysis for determining whether a communication is jurisdictionally interstate, the court stated: “But [the Commission] has yet to provide an explanation of why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.”⁴⁸ After reviewing the manner in which the Commission analyzed the parameters of section 251(b)(5) traffic in the *Declaratory Ruling*, the

⁴⁷ *Local Competition Order*, 11 FCC Rcd at 16012.

⁴⁸ *Bell Atlantic*, 206 F.3d at 5.

court found that the central issue was “whether a call to an ISP is local or long distance.”⁴⁹ The court noted further that “[n]either category fits clearly.”⁵⁰

26. Upon further review, we find that the Commission erred in focusing on the nature of the service (*i.e.*, local or long distance) and in stating that there were only two forms of telecommunications services -- telephone exchange service and exchange access -- for purposes of interpreting the relevant scope of section 251(b)(5).⁵¹ Those services are the only two expressly defined by the statute. The court found fault in the Commission’s failure to analyze communications delivered by a LEC to an ISP in terms of these definitions.⁵² Moreover, it cited the Commission’s own confusing treatment of ISP-bound traffic as local under the ESP exemption and interstate for jurisdictional purposes.⁵³

27. Part of the ambiguity identified by the court appears to arise from the ESP exemption, a long-standing Commission policy that affords one class of entities using interstate access -- information service providers -- *the option* of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs, rather than from interstate access tariffs used by IXC’s. Typically, information service providers have used this exemption to their advantage by choosing to pay local business rates, rather than the tariffed interstate access charges that other users of interstate access are required to pay.⁵⁴ In fending off challenges from those who argued that information service providers must be subject to access charges because they provide interexchange service, the Commission has often tried to walk the subtle line of arguing that the service provided by the LEC to the information service provider is an access service, but can justifiably be treated as akin to local telephone exchange service for purposes of the rates the LEC may charge. This balancing act reflected the historical view that there were only two kinds of intercarrier compensation: one for local telephone exchange service, and a second (access charges) for long distance services. Attempting to describe a hybrid service (the nature being an access service, but subject to a compensation mechanism historically limited to local service) was always a bit of mental gymnastics.

28. The court opinion underscores a tension between the jurisdictional nature of ISP-bound traffic, which the Commission has long held to be interstate, and the alternative compensation mechanism that the ESP exemption has permitted for this traffic. The court seems to recognize that, if an end-to-end analysis were properly applied to this traffic, this traffic would be predominantly interstate, and consequently “long distance.” Yet it also questions whether this

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 8.

⁵² *Id.* at 8-9.

⁵³ *Id.*

⁵⁴ Significantly, however, the compensation mechanism effected for this predominantly interstate access traffic is the result of a federal mandate, which requires states to treat ISP-bound traffic for compensation purposes in a manner similar to local traffic if ISPs so request. *See infra* note 105.

traffic should be considered “local” for purposes of section 251(b)(5) in light of the ESP exemption, by which the Commission has allowed information service providers at their option to be treated for compensation purposes (but *not* for jurisdictional purposes) as end-users.

29. The court also expresses consternation over what it perceives as an inconsistency in the Commission’s reasoning. On the one hand, the court observes, the Commission has argued that calls to ISPs are predominantly interstate for jurisdictional purposes because they terminate at the ultimate destination of the traffic in a distant website or e-mail server (*i.e.*, the “one call theory”). On the other hand, the court notes, the Commission has defended the ESP exemption by analogizing an ISP to a high-volume business user, such as a pizza parlor or travel agent, that has different usage patterns and longer call holding times than the average customer.⁵⁵ The court questioned whether any such differences should not, as some commenters argued, lend support to treating this traffic as “local” for purposes of section 251(b)(5). As discussed in further detail below, while we continue to believe that retaining the ESP exemption is important in order to facilitate growth of Internet services, we conclude in section IV.C.1, *infra*, that reciprocal compensation for ISP-bound traffic distorts the development of competitive markets.

30. We respond to the court’s concerns, and seek to resolve these tensions, by reexamining the grounds for our conclusion that ISP-bound traffic falls outside the scope of section 251(b)(5). A more comprehensive review of the statute reveals that Congress intended to exempt certain enumerated categories of service from section 251(b)(5) when the service was provided to interexchange carriers or information service providers. The exemption focuses not only on the nature of the service, but on to whom the service is provided. For services that qualify, compensation is based on rules, regulations, and policies that preceded the 1996 Act and not on section 251(b)(5), which was minted by the Act. As we explain more fully below, the service provided by LECs to deliver traffic to an ISP constitutes, at a minimum, “information access” under section 251(g) and, thus, compensation for this service is not governed by section 251(b)(5), but instead by the Commission’s policies for this traffic and the rules adopted under its section 201 authority.⁵⁶

⁵⁵ *Access Charge Reform Order*, 12 FCC Rcd at 16134 (“Internet access does generate different usage patterns and longer call holding times than average voice usage.”).

⁵⁶ Some critics of the Commission’s order may contend that we rely here on the same reasoning that the court rejected in *Bell Atlantic*. We acknowledge that there is a superficial resemblance between the Commission’s previous order and this one: Here, as before, the Commission finds that ISP-bound traffic falls outside the scope of section 251(b)(5)’s reciprocal compensation requirement and within the Commission’s access charge jurisdiction under section 201(b). The rationale underlying the two orders, however, differs substantially. Here the Commission bases its conclusion that ISP-bound traffic falls outside section 251(b)(5) on its construction of sections 251(g) and (i) -- not, as in the previous order, on the theory that section 251(b)(5) applies only to “local” telecommunications traffic and that ISP-bound traffic is interstate. Furthermore, to the extent the Commission continues to characterize ISP-bound traffic as interstate for purposes of its section 201 authority, it has sought in this Order to address in detail the *Bell Atlantic* court’s concerns.

2. Section 251(g) Excludes Certain Categories of Traffic from the Scope of “Telecommunications” Subject to Section 251(b)(5)

a. Background

31. Section 251(b)(5) imposes a duty on all local exchange carriers to “establish reciprocal compensation arrangements for the transport and termination of telecommunications.”⁵⁷ On its face, local exchange carriers are required to establish reciprocal compensation arrangements for the transport and termination of *all* “telecommunications” they exchange with another telecommunications carrier, without exception. The Act separately defines “telecommunications” as the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁵⁸

32. Unless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of *all* telecommunications traffic, -- *i.e.*, whenever a local exchange carrier exchanges telecommunications traffic with another carrier. Farther down in section 251, however, Congress explicitly exempts certain telecommunications services from the reciprocal compensation obligations. Section 251(g) provides:

On or after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier . . . shall provide exchange access, *information access*, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the [Federal Communications] Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment.⁵⁹

33. The meaning of section 251(g) is admittedly not transparent. Indeed, section 251(g) clouds any plain reading of section 251(b)(5). Nevertheless, the Commission believes the two provisions can be read together consistently and in a manner faithful to Congress’s intent.⁶⁰

⁵⁷ 47 U.S.C. § 251(b)(5).

⁵⁸ 47 U.S.C. § 153(43).

⁵⁹ 47 U.S.C. § 251(g) (emphasis added).

⁶⁰ See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) (“It would be a gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. . . . But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency. . . . We can only enforce the clear limits that the 1996 Act contains.”).

b. Discussion

34. We conclude that a reasonable reading of the statute is that Congress intended to exclude the traffic listed in subsection (g) from the reciprocal compensation requirements of subsection (b)(5).⁶¹ Thus, the statute does not mandate reciprocal compensation for “exchange access, information access, and exchange services for such access” provided to IXC and information service providers. Because we interpret subsection (g) as a carve-out provision, the focus of our inquiry is on the universe of traffic that falls within subsection (g) and *not* the universe of traffic that falls within subsection (b)(5). This analysis differs from our analysis in the *Local Competition Order*, in which we attempted to describe the universe of traffic that falls within subsection (b)(5) as all “local” traffic. We also refrain from generically describing traffic as “local” traffic because the term “local,” not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g).

35. We agree with the court that the issue before us requires more than just a jurisdictional analysis. Indeed, as the court recognized, the 1996 Act changed the historic relationship between the states and the federal government with respect to pricing matters.⁶² Instead, we focus upon the statutory language of section 251(b) as limited by 251(g). We believe this approach is not only consistent with the statute, but that it resolves the concerns expressed by the court in reviewing our previous analysis. Central to our modified analysis is the recognition that 251(g) is properly viewed as a limitation on the scope of section 251(b)(5) and that ISP-bound traffic falls under one or more of the categories set forth in section 251(g). For that reason, we conclude that ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5). We reach that conclusion regardless of the compensation mechanism that may be in place for such traffic under the ESP exemption.

36. We believe that the specific provisions of section 251(g) demonstrate that Congress did not intend to interfere with the Commission’s pre-Act authority over “nondiscriminatory interconnection . . . obligations (including receipt of compensation)”⁶³ with respect to “exchange access, information access, and exchange services for such access” provided to IXCs or information service providers. We conclude that Congress specifically exempted the

⁶¹ In the *Declaratory Ruling*, the Commission did not explain the relevance of section 251(g) nor discuss the categories of traffic exempted from reciprocal compensation by that provision, at least until the Commission should act otherwise. Reflecting this omission in the underlying order, the *Bell Atlantic* court does not mention the relationship of sections 251(g) and 251(b)(5), nor the enumerated categories of services referenced by subsection (g). Rather, the court focuses its review on the possible categorization of ISP-bound traffic as “local,” terminology we now find inappropriate in light of the more express statutory language set forth in section 251(g).

⁶² *Bell Atlantic*, 206 F.3d at 6; see also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 377-87.

⁶³ Authority over rates (or “receipt of compensation”) is a core feature of “equal access and nondiscriminatory interconnection” obligations. Indeed, one of the Commission’s primary goals when designing an access charge regime was to ensure that access users were treated in a nondiscriminatory manner when interconnecting with LEC networks in order to transport interstate communications. See *National Ass’n of Regulatory Util. Comm’nrs v. FCC*, 737 F.2d 1095, 1101-1108, 1130-34 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985) (*NARUC v. FCC*).

services enumerated under section 251(g) from the newly imposed reciprocal compensation requirement in order to ensure that section 251(b)(5) is not interpreted to override either existing or future regulations prescribed by the Commission.⁶⁴ We also find that ISP-bound traffic falls within at least one of the three enumerated categories in subsection (g).

37. This limitation in section 251(g) makes sense when viewed in the overall context of the statute. All of the services specified in section 251(g) have one thing in common: they are all access services or services associated with access.⁶⁵ Before Congress enacted the 1996 Act, LECs provided access services to IXC and to information service providers in order to connect calls that travel to points – both interstate and intrastate – beyond the local exchange. In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time. It makes sense that Congress did not intend to disrupt these pre-existing relationships.⁶⁶ Accordingly, Congress excluded all such access traffic from the purview of section 251(b)(5).

⁶⁴ This view is consistent with previous Commission orders construing section 251(g). The Commission recognized in the *Advanced Services Remand Order*, for example, that section 251(g) preserves the requirements of the AT&T Consent Decree (see *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982)) (hereinafter AT&T Consent Decree or Modification of Final Judgment (“MFJ”)), but that order does not conclude that section 251(g) preserves *only* MFJ requirements. Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 et al., Order on Remand, 15 FCC Rcd 385, 407 (1999) (*Advanced Services Remand Order*). Indeed, the ultimate issue addressed in that part of the order was *not* the status or scope of section 251(g) as a carve-out provision at all, but rather the question -- irrelevant for our purposes here -- whether “information access” is a category of service that is mutually exclusive of “exchange access,” as the latter term is defined in section 3(16) of the Act. See *id.* at 407-08; see also *infra* para. 42 & note 76. By contrast, when the Commission first addressed the scope of the reciprocal compensation obligations of section 251(b)(5) in the *Local Competition Order*, it expressly cited section 251(g) in support of the decision to exempt from those obligations the tariffed interstate access services provided by all LECs (not just Bell companies subject to the MFJ) to interexchange carriers. 11 FCC Rcd at 16013. The *Bell Atlantic* court did not take issue with the Commission’s earlier conclusion that section 251(b)(5) is so limited. 206 F.3d at 4. The interpretation we adopt here -- that section 251(g) exempts from section 251(b)(5) information access services provided to information service providers, as well as access provided to IXCs -- thus is fully consistent with the Commission’s initial construction of section 251(g), in the *Local Competition Order*, as extending beyond the MFJ to *our own* access rules and policies.

⁶⁵ The term “exchange service” as used in section 251(g) is not defined in the Act or in the MFJ. Rather, the term “exchange service” is used in the MFJ as part of the definition of the term “exchange access,” which the MFJ defines as “the provision of exchange services for the purpose of originating or terminating interexchange telecommunications.” *United States v. AT&T*, 552 F. Supp. at 228. Thus, the term “exchange service” appears to mean, in context, the provision of services in connection with *interexchange* communications. Consistent with that, in section 251(g), the term is used as part of the longer phrase “exchange services for such [exchange] access to interexchange carriers and information service providers.” The phrasing in section 251(g) thus parallels the MFJ. All of this indicates that the term “exchange service” is closely related to the provision of exchange access and information access.

⁶⁶ Although section 251(g) does not itself compel this outcome with respect to *intrastate* access regimes (because it expressly preserves only *the Commission’s* traditional policies and authority over *interstate* access services), it nevertheless highlights an ambiguity in the scope of “telecommunications” subject to section 251(b)(5) -- demonstrating that the term must be construed in light of other provisions in the statute. In this regard, we again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access (continued....)

38. At least one court has already affirmed the principle that the standards and obligations set forth in section 251 are not intended automatically to supersede the Commission's authority over the services enumerated under section 251(g). This question arose in the Eighth Circuit Court of Appeals with respect to the access that LECs provide to IXC to originate and terminate interstate long-distance calls. Citing section 251(g), the court concluded that the Act contemplates that "LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the *pre-Act* regulations and rates."⁶⁷ In *CompTel*, the IXCs had argued that the interstate access services that LECs provide properly fell within the scope of "interconnection" under section 251(c)(2), and that, notwithstanding the carve-out of section 251(g), access charges therefore should be governed by the cost-based standard of section 252(d)(1), rather than determined under the Commission's section 201 authority. The Eighth Circuit rejected that argument, holding that access service does not fall within the scope of section 251(c)(2), and observing that "it is clear from the Act that Congress did *not* intend all access charges to move to cost-based pricing, at least not immediately."⁶⁸ Neither the court nor the parties in *CompTel* distinguished between the situation in which *one* LEC provides access service (directly linking the end-user to the IXC) and the situation here in which *two* LECs collaborate to provide access to either an information service provider or IXC. In both circumstances, by its underlying rationale, *CompTel* serves as precedent for establishing that pre-existing regulatory treatment of the services enumerated under section 251(g) are carved out from the purview of section 251(b).

39. Accordingly, unless and until the Commission by regulation should determine otherwise, Congress preserved the pre-Act regulatory treatment of all the access services enumerated under section 251(g). These services thus remain subject to Commission jurisdiction under section 201 (or, to the extent they are *intrastate* services, they remain subject to the jurisdiction of state commissions), whether those obligations implicate pricing policies as in *CompTel* or reciprocal compensation.⁶⁹ This analysis properly applies to the access services that incumbent LECs provide (either individually or jointly with other local carriers) to connect subscribers with ISPs for Internet-bound traffic. Section 251(g) expressly preserves the Commission's rules and policies governing "access . . . to information service providers" in the same manner as rules and policies governing access to IXCs.⁷⁰ As we discuss in more detail

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regulations, because "it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms." *Local Competition Order*, 11 FCC Rcd at 15869.

⁶⁷ *CompTel*, 117 F.3d at 1073 (emphasis added). The court continued that the Commission would be free under section 201 to alter its traditional regulatory treatment of interstate access service in the future, but that the standards set out in sections 251 and 252 would *not* be controlling. *Id*

⁶⁸ *CompTel*, 117 F.3d at 1072 (emphasis added).

⁶⁹ For further discussion of the jurisdictionally interstate nature of ISP-bound traffic, see *infra* paras. 55-64. See also *NARUC v. FCC*, 737 F.2d at 1136 (determining that traffic to ESPs may properly constitute interstate access traffic); Access Billing Requirements for Joint Service Provision, CC Docket 87-579, Memorandum Opinion and Order, 4 FCC Rcd 7183 (1989).

⁷⁰ The Commission has historically dictated the pricing policies applicable to services provided by LECs to information service providers, although those policies differ from those applicable to LEC provision of access (continued....)

below, ISP-bound traffic falls under the rubric of “information access,” a legacy term carried over from the MFJ.⁷¹

40. By its express terms, of course, section 251(g) permits the Commission to supersede pre-Act requirements for interstate access services. Therefore the Commission may make an affirmative determination to adopt rules that subject such traffic to obligations different than those that existed pre-Act. For example, consistent with that authority, the Commission has previously made the affirmative determination that certain categories of interstate access traffic should be subject to section 251(c)(4).⁷² Similarly, in implementing section 251(c)(3), the Commission has required incumbent LECs to unbundle certain network elements used in the provision of xDSL-based services.⁷³ In this instance, however, for the reasons set forth below,⁷⁴ we decline to modify the restraints imposed by section 251(g) and instead continue to regulate ISP-bound traffic under section 201.

41. Some may argue that, although the Commission did not analyze subsection (g) in the *Declaratory Ruling*, a passing reference to section 251(g) in one paragraph of the Commission’s brief filed with the court in that proceeding suggests that the argument we make here has been specifically rejected by the court. We disagree. Because our analysis of subsection (g) was not raised in the order, the court, under established precedent, probably did not consider

(Continued from previous page)

services to IXC. Prior to the 1996 Act, it was the Commission that determined that ESPs either may purchase their interstate access services from interstate tariffs or (at their discretion) pay a combination of local business line rates, the *federal* subscriber line charges associated with those business lines, and, where appropriate, the *federal* special access surcharge. See note 105, *infra*. We conclude that section 251(g) preserves our ability to continue to dictate the pricing policies applicable to this category of traffic. We do not believe, moreover, that section 251(g) extends only to those specific carriers providing service on February 7, 1996. At the very least, subsection (g) is ambiguous on this point. On the one hand, the first sentence of this provision states that its terms apply to “each local exchange carrier, to the extent that it provides wireline services,” without regard to whether it may be a BOC or a competitive LEC. 47 U.S.C. § 251(g). On the other hand, that same sentence refers to restrictions and obligations applicable to “such carrier” prior to February 8, 1996. *Id.* We believe that the most reasonable interpretation of that sentence, in this context, is that subsection (g) was intended to preserve pre-existing regulatory treatment for the enumerated *categories* of carriers, rather than requiring disparate treatment depending upon whether the LEC involved came into existence before or after February 1996.

⁷¹ See *United States v. AT&T*, 552 F. Supp. at 229; *Advanced Services Remand Order*, 15 FCC Rcd at 406-08.

⁷² See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, 14 FCC Rcd 19237 (1997), *petition for review pending*, *Ass’n of Communications Enterprises v. FCC*, D.C. Circuit No. 00-1144. In effect, we have provided for concurrent authority under that provision and section 201 by permitting a party to purchase the same service under filed tariffs or to proceed under interconnection arrangements to secure resale services.

⁷³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3775 (1999). See also *Advanced Services Remand Order*, 15 FCC Rcd at 385, 386. We emphasize that these two examples are illustrative and may not be the only instances where the Commission chooses to supersede pre-Act requirements for interstate access services.

⁷⁴ See *infra* paras. 67-71.

the argument when rendering its decision.⁷⁵ Indeed, subsection (g) is not mentioned in the court's opinion.

3. ISP-Bound Traffic Falls within the Categories Enumerated in Section 251(g)

42. Having determined that section 251(g) serves as a limitation on the scope of "telecommunications" embraced by section 251(b)(5), the next step in our inquiry is to determine whether ISP-bound traffic falls within one or more of the categories specified in section 251(g): exchange access, information access, and exchange services for such access provided to IXC's and information service providers. Regardless of whether this traffic falls under the category of "exchange access" -- an issue pending before the D.C. Circuit in a separate proceeding⁷⁶ -- we conclude that this traffic, at a minimum, falls under the rubric of "information access," a legacy term imported into the 1996 Act from the MFJ, but not expressly defined in the Communications Act.

a. Background

43. Section 251(g) by its terms indicates that, in the provision of exchange access, information access, and exchange services for such access to IXC's and information service providers, various pre-existing requirements and obligations "including receipt of compensation" are preserved, whether these obligations stem from "any court order, *consent decree*, or regulation, order or policy of the Commission." (Emphasis added.) Similarly, in discussing this provision, the Joint Explanatory Statement of the Committee of Conference explicitly refers to preserving the obligations under the "AT&T Consent Decree."⁷⁷

b. Discussion

44. We conclude that Congress's reference to "information access" in section 251(g) was intended to incorporate the meaning of the phrase "information access" as used in the AT&T Consent Decree.⁷⁸ The ISP-bound traffic at issue here falls within that category because it is

⁷⁵ See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

⁷⁶ See *Worldcom, Inc. v. FCC*, No. 00-1022 et al. (D.C. Cir.). In that proceeding, the Commission has argued that the category previously labeled "information access" under the MFJ is a subset of those services now falling under the category "exchange access" as set forth in section 3(16) of the Act, 47 U.S.C. 153(16), while incumbent LECs and others have argued that the two categories are mutually exclusive. We need not reargue here whether "information access" is a subset of "exchange access" or whether instead they are mutually exclusive categories. The only issue relevant to our section 251(g) inquiry in this case is whether ISP-bound traffic falls, at a minimum, within the legacy category of "information access." Both the Commission and incumbent LECs have agreed that the access provided to ISPs satisfies the definition of information access.

⁷⁷ *Joint Explanatory Statement of the Committee of Conference*, S. Conf. Rep. No. 230, 104th Cong., 2d Session at 123 (February 1, 1996).

⁷⁸ *United States v. AT&T*, 552 F. Supp. at 196, 229.

traffic destined for an information service provider.⁷⁹ Under the consent decree, “information access” was purchased by “information service providers” and was defined as “the provision of specialized exchange telecommunications services . . . in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services.”⁸⁰ We conclude that this definition of “information access” was meant to include all access traffic that was routed by a LEC “to or from” providers of information services, of which ISPs are a subset.⁸¹ The record in this proceeding also supports our interpretation.⁸² When Congress passed the 1996 Act, it adopted new terminology. The term “information access” is not, therefore, part of the new statutory framework. Because the legacy term “information access” in section 251(g) encompasses ISP-bound traffic, however, this traffic is excepted from the scope of the “telecommunications” subject to reciprocal compensation under section 251(b)(5).

45. We recognize, as noted earlier, that based on the rationale of the *Declaratory Ruling*, the court indicated that the question whether this traffic was “local or interstate” was critical to a determination of whether ISP-bound traffic should be subject to reciprocal compensation.⁸³ We believe that the court’s assessment was a result of our statement in

⁷⁹ See Letter from Gary L. Phillips, SBC, to Jon Nuechterlein, Deputy General Counsel, FCC, at 9 (Dec. 14, 2000)(stating that section 251(g) applies by its very terms to “information access”).

⁸⁰ *United States v. AT&T*, 552 F. Supp. at 196, 229.

⁸¹ This finding is consistent with our past statements on the issue. In the *Non-Accounting Safeguards Order*, we found that the access that LECs provide to enhanced service providers, including ISPs, constitutes “information access” as the MFJ defines that term. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22024 & n.621 (1996). Although we subsequently overruled our statement in that order that ISPs do not also purchase “exchange access” under section 3(16), we have not altered our finding that the access provided to enhanced service providers (including ISPs) is “information access.” *Advanced Services Remand Order*, 15 FCC Rcd at 404-05.

⁸² See, e.g., Letter from Gary L. Phillips, SBC, to Jon Nuechterlein, Deputy General Counsel, FCC, at 9 (Dec. 14, 2000). Some have argued that “information access” includes only certain specialized functions unique to the needs of enhanced service providers and does not include basic telecommunications links used to provide enhanced service providers with access to the LEC network. See, e.g., Brief of WorldCom, Inc., D.C. Circuit No. 00-1002, *et al.*, filed Oct. 3, 2000, at 16 n.12. The MFJ definition of information access, however, includes the telecommunications links used for the “origination, termination, [and] transmission” of information services, and “where necessary, the provision of network signalling” and other functions. *United States v. AT&T*, 552 F. Supp. at 229 (emphasis added). Others have argued that the “information access” definition engrafts a geographic limitation that renders this service category a subset of telephone exchange service. See Letter from Richard Rindler, Swindler, Berlin, to Magalie Roman Salas, Secretary, FCC, at 3 (Apr. 12, 2001). We reject that strained interpretation. Although it is true that “information access” is necessarily initiated “in an exchange area,” the MFJ definition states that the service is provided “in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services” *United States v. AT&T*, 552 F. Supp. at 229 (emphasis added). Significantly, the definition does not further require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic.

⁸³ *Bell Atlantic*, 206 F.3d at 5.

paragraph nine of the *Declaratory Ruling* that “when two carriers collaborate to complete a *local call*, the originating carrier is compensated by its end user and the terminating carrier is entitled to reciprocal compensation pursuant to section 251(b)(5) of the Act.”⁸⁴ We were mistaken to have characterized the issue in that manner, rather than properly (and more naturally) interpreting the scope of “telecommunications” within section 251(b)(5) as being limited by section 251(g). By indicating that all “local calls,” however defined, would be subject to reciprocal compensation obligations under the Act, we overlooked the interplay between these two inter-related provisions of section 251 -- subsections (b) and (g). Further, we created unnecessary ambiguity for ourselves, and the court, because the statute does not define the term “local call,” and thus that term could be interpreted as meaning either traffic subject to local *rates* or traffic that is *jurisdictionally* intrastate. In the context of ISP-bound traffic, as the court observed, our use of the term “local” created a tension that undermined the prior order because the ESP exemption permitted ISPs to purchase access through local business tariffs,⁸⁵ yet the jurisdictional nature of this traffic has long been recognized as interstate.

46. For similar reasons, we modify our analysis and conclusion in the *Local Competition Order*.⁸⁶ There we held that “[t]ransport and termination of *local* traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 251(d)(2).” We now hold that the telecommunications subject to those provisions are all such telecommunications not excluded by section 251(g). In the *Local Competition Order*, as in the subsequent *Declaratory Ruling*, use of the phrase “local traffic” created unnecessary ambiguities, and we correct that mistake here.

47. We note that the exchange of traffic between LECs and commercial mobile radio service (CMRS) providers is subject to a slightly different analysis. In the *Local Competition Order*, the Commission noted its jurisdiction to regulate LEC-CMRS interconnection under section 332 of the Act⁸⁷ but decided, at its option, to apply sections 251 and 252 to LEC-CMRS interconnection.⁸⁸ At that time, the Commission declined to delineate the precise contours of or the relationship between its jurisdiction over LEC-CMRS interconnection under sections 251 and 332,⁸⁹ but it made clear that it was not rejecting section 332 as an independent basis for jurisdiction.⁹⁰ The Commission went on to conclude that section 251(b)(5) obligations extend to traffic transmitted between LECs and CMRS providers, because the latter are telecommunications

⁸⁴ *Declaratory Ruling*, 14 FCC Rcd at 3695 (emphasis added).

⁸⁵ This is the compensation mechanism chosen by the ISPs. *See* note 105, *infra*.

⁸⁶ *Local Competition Order*, 11 FCC Rcd at 1033-34.

⁸⁷ 47 U.S.C. § 332; *Local Competition Order*, 11 FCC Rcd at 16005-06.

⁸⁸ *Local Competition Order*, 11 FCC Rcd at 16005-06; *see also Iowa Utils. Bd. v FCC*, 120 F.3d at 800 n. 21 (finding that the Commission had jurisdiction under section 332 to issue rules regarding LEC-CMRS interconnection, including reciprocal compensation rules).

⁸⁹ We seek comment on these issues in the *NPRM*.

⁹⁰ *Local Competition Order*, 11 FCC Rcd at 16005.

carriers.⁹¹ The Commission also held that reciprocal compensation, rather than interstate or intrastate access charges, applies to LEC-CMRS traffic that originates and terminates within the same Major Trading Area (MTA).⁹² In so holding, the Commission expressly relied on its “authority under section 251(g) to preserve the current interstate access charge regime” to ensure that interstate access charges would be assessed only for traffic “currently subject to interstate access charges,”⁹³ although the Commission’s section 332 jurisdiction could serve as an alternative basis to reach this result. Thus the analysis we adopt in this Order, that section 251(g) limits the scope of section 251(b)(5), does not affect either the application of the latter section to LEC-CMRS interconnection or our jurisdiction over LEC-CMRS interconnection under section 332.

4. Section 251(i) Preserves the Commission’s Authority to Regulate Interstate Access Services

48. Congress also included a “savings provision” – subpart (i) – in section 251, which provides that “[n]othing in this section shall be construed to limit or otherwise affect the Commission’s authority under section 201.”⁹⁴ Under section 201, the Commission has the authority to regulate the *interstate* access services that LECs provide to connect end-users with IXC’s or information service providers to originate and terminate calls that travel across state lines.

49. We conclude that subpart (i) provides additional support for our finding that Congress has granted us the authority on a going-forward basis to establish a compensation regime for ISP-bound traffic.⁹⁵ When read as a whole, the most natural reading of section 251 is as follows: subsection (b) sets forth reciprocal compensation requirements for the transport and termination of “telecommunications”; subsection (g) excludes certain access services (including ISP-bound traffic) from that requirement; and subsection (i) ensures that, on a going-forward basis, the Commission has the authority to establish pricing for, and otherwise to regulate, interstate access services.

50. When viewed in the overall context of section 251, subsections (g) and (i) serve compatible, but different, purposes. Subsection (g) preserves rules and regulations that existed at the time Congress passed the 1996 Act, and thus functions primarily as a “backward-looking” provision (although it does grant the Commission the authority to supersede existing regulations). In contrast, we interpret section 251(i) to be a “forward-looking” provision. Thus, subsection (i) expressly affirms the Commission’s role in an evolving telecommunications marketplace, in which Congress anticipates that the Commission will continue to develop appropriate pricing and

⁹¹ *Id.* at 16016.

⁹² *Id.* at 16016-17.

⁹³ *Id.* at 16017.

⁹⁴ 47 U.S.C. § 251(i).

⁹⁵ See also Letter from Gary L. Phillips, SBC, to Jon Nuechterlein, Deputy General Counsel, FCC, at 8 (Dec. 14, 2000).

compensation mechanisms for traffic that falls within the purview of section 201. This reading of section 251 is consistent with the notion that section 251 generally broadens the Commission's duties, particularly in the pricing context.⁹⁶

51. We expect that, as new network architectures emerge, the nature of telecommunications traffic will continue to evolve. As we have already observed, since Congress passed the 1996 Act, customer usage patterns have changed dramatically; carriers are sending traffic over networks in new and different formats; and manufacturers are adding creative features and developing innovative network architectures. Although we cannot anticipate the direction that new technology will take us, we do expect the dramatic pace of change to continue. Congress clearly did not expect the dynamic, digital broadband driven telecommunications marketplace to be hindered by rules premised on legacy networks and technological assumptions that are no longer valid. Section 251(i), together with section 201, equips the Commission with the tools to ensure that the regulatory environment keeps pace with innovation.

5. ISP-Bound Traffic Falls Within the Purview of the Commission's Section 201 Authority

52. Having found that ISP-bound traffic is excluded from section 251(b)(5) by section 251(g), we find that the Commission has the authority pursuant to section 201 to establish rules governing intercarrier compensation for such traffic. Under section 201, the Commission has long exercised its *jurisdictional* authority to regulate the interstate access services that LECs provide to connect callers with IXCs or ISPs to originate or terminate calls that travel across state lines. Access services to ISPs for Internet-bound traffic are no exception. The Commission has held, and the Eighth Circuit has recently concurred, that traffic bound for information service providers (including Internet access traffic) often has an interstate component.⁹⁷ Indeed, that court observed that, although some traffic destined for information service providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be reliably separated.⁹⁸ Thus, ISP traffic is properly classified as interstate,⁹⁹ and it falls under the Commission's section 201 jurisdiction.¹⁰⁰

53. In its opinion remanding this proceeding, the court appeared to acknowledge that the end-to-end analysis was appropriate for determining the scope of the Commission's jurisdiction under section 201, stating that "[t]here is no dispute that the Commission has

⁹⁶ For example, section 251 has expanded upon our historic functions by providing us with the authority to set the framework for pricing rules applicable to unbundled network elements, purchased under interconnection agreements.

⁹⁷ *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (affirming the jurisdictionally mixed nature of ISP-bound traffic).

⁹⁸ *Id.*

⁹⁹ See, e.g., *Louisiana PSC v. FCC*, 476 U.S. 355, 375 n.4.

¹⁰⁰ See Letter from John W. Kure, Qwest, to Magalie Roman Salas, Secretary, FCC (Dec. 8, 2000)(attaching *A Legal Roadmap for Implementing a Bill and Keep Rule for All Wireline Traffic*, at 10-11)(*Qwest Roadmap*).

historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate.”¹⁰¹ The court nevertheless found that we had not supplied a logical nexus between the jurisdictional end-to-end analysis (which delineates the contours of our section 201 authority) and our interpretation of the scope of section 251(b)(5). In that regard, the court appeared not to question the Commission’s longstanding assertion of jurisdiction over ESP traffic, of which Internet-bound traffic is a subset.¹⁰² It did, however, unambiguously question whether, for purposes of interpreting section 251(b)(5), the jurisdictional end-to-end analysis was dispositive. Accordingly, the court explained its basis for remand as follows: “Because the Commission has not supplied a real explanation for its decision to treat end-to-end analysis as controlling [in interpreting the scope of section 251(b)(5)] . . . we must vacate the ruling and remand the case.”¹⁰³

54. As explained above, we no longer construe section 251(b)(5) using the dichotomy set forth in the *Declaratory Ruling* between “local” traffic and interstate traffic. Rather, we have clarified that the proper analysis hinges on section 251(g), which limits the reach of the reciprocal compensation regime mandated in section 251(b). Thus our discussion no longer centers on the jurisdictional inquiry set forth in the underlying order. Nonetheless, we take this opportunity to respond to questions raised by the court regarding the differences between ISP-bound traffic (which we have always held to be predominantly interstate for jurisdictional purposes) and intrastate calls to “communications-intensive business end user[s],”¹⁰⁴ such as travel agencies and pizza parlors.

55. Contrary to the arguments made by some IXC’s, the Commission has been consistent in its jurisdictional treatment of ISP-bound traffic. For compensation purposes, in order to create a regulatory environment that will allow new and innovative services to flourish, the Commission has exempted enhanced service providers (including ISPs) from paying for interstate access service at the usage-based rates charged to IXC’s.¹⁰⁵ The ESP exemption was and remains an affirmative *exercise* of federal regulatory authority over interstate access service under section 201, and, in affirming pricing under that exemption, the D.C. Circuit expressly

¹⁰¹ *Bell Atlantic*, 206 F.3d at 5; see *Qwest Roadmap* at 4.

¹⁰² The D.C. Circuit itself has long recognized that ESPs use interstate access. See, e.g., *NARUC v. FCC*, 737 F.2d at 1136.

¹⁰³ *Bell Atlantic*, 206 F.3d. at 8.

¹⁰⁴ *Bell Atlantic*, 206 F.3d at 7.

¹⁰⁵ As noted, the Commission has permitted ESPs to pay local business line rates from intrastate tariffs for ILEC-provided access service, in lieu of interstate carrier access charges. See, e.g., *MTS/WATS Market Structure Order*, 97 FCC 2d at 715; *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53. ESPs also pay the *federal* subscriber lines charges associated with those business lines and, where appropriate, the *federal* special access surcharge. The subscriber line charge (SLC) recovers a portion of the cost of a subscriber’s line that is allocated, pursuant to jurisdictional separations, to the interstate jurisdiction. See 47 C.F.R. § 69.152 (defining SLC); 47 C.F.R. Part 36 (jurisdictional separations). The special access surcharge recovers for use of the local exchange when private line/PBX owners “circumvent the conventional long-distance network and yet achieve interstate connections beyond those envisioned by the private line service.” *NARUC v. FCC*, 737 F.2d at 1138. See 47 C.F.R. § 69.115.

recognized that ESPs use *interstate* access service.¹⁰⁶ Moreover, notwithstanding the ESP exemption, the Commission has always *permitted* enhanced service providers, including ISPs, to purchase their interstate access out of interstate tariffs -- thus underscoring the Commission's consistent view that the link LECs provide to connect subscribers with ESPs is an interstate access service.¹⁰⁷

56. We do not believe that the court's decision to remand the *Declaratory Ruling* reflects a finding that such traffic constitutes two calls, rather than a single end-to-end call, for jurisdictional purposes. The court expressly acknowledged that "the end-to-end analysis applied by the Commission here is one that it has traditionally used to determine whether a call is within its interstate jurisdiction."¹⁰⁸ The court also said that "[t]here is no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate."¹⁰⁹ And the court appeared to suggest, at least for the sake of argument, that the Commission had not misapplied that analysis *as a jurisdictional matter* in finding that ISP-bound traffic was interstate.¹¹⁰ We do recognize, however, that the court was concerned by how one would categorize this traffic under our *prior* interpretation of section 251(b)(5), which focused on whether or not ISP-bound calls were "local." That inquiry arguably implicated the compensation mechanism for the traffic (which included a local component), as well as the meaning of the term "termination" in the specific context of section 251(b); but neither of these issues is germane to our assertion of jurisdiction here under our section 201 authority.

57. For jurisdictional purposes, the Commission views LEC-provided access to enhanced services providers, including ISPs, on the basis of the end points of the communication, rather than intermediate points of switching or exchanges between carriers (or other providers).¹¹¹

¹⁰⁶ With judicial approval, the Commission initially adopted this access service pricing policy in order to avoid rate shock to a fledgling enhanced services industry. *NARUC v FCC*, 737 F.2d at 1136-37. In the decision affirming this pricing policy, the court expressly recognized that ESPs use interstate access service. *Id.* at 1136 (enhanced service providers "may, at times, heavily use exchange access"). The Commission recently decided to retain this policy, largely because it found that it made little sense to mandate, for the first time, the application of existing non-cost-based interstate access rates to enhanced services just as the Commission was reforming the access charge regime to eliminate implicit subsidies and to move such charges toward competitive levels. *Access Charge Reform Order*, 12 FCC Rcd at 16133, *aff'd*, *Southwestern Bell Telephone Co.*, 153 F.3d at 541-42.

¹⁰⁷ See, e.g., *MTS/WATS Market Structure Order*, 97 FCC 2d at 711-12, 722; Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Memorandum Opinion and Order, 4 FCC Rd 1, 141 (1988), *aff'd*, *California v FCC*, 4 F.3d 1505 (9th Cir. 1993) (*ONA Plans Order*); *GTE Telephone Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998).

¹⁰⁸ *Bell Atlantic*, 206 F.3d at 3.

¹⁰⁹ *Id.* at 5

¹¹⁰ See, e.g., *id.* at 6, 7 (accepting, *arguendo*, that ISP-bound traffic is like IXC-bound traffic for jurisdictional purposes).

¹¹¹ See, e.g., *BellSouth MemoryCall*, 7 FCC Rcd at 1620 (voicemail is interstate because "there is a continuous path of communications across state line between the caller and the voice mail service"); *ONA Plans Order*, 4 FCC (continued. ...)

Thus, in the *ONA Plans Order*, the Commission emphasized that “when an enhanced service is interstate (that is, when it involves communications or transmissions between points in different states on an end-to-end basis), the underlying basic services are subject to [our jurisdiction].”¹¹² Consistent with that view, when end-to-end communications involving enhanced service providers cross state lines, the Commission has categorized the link that the LEC provides to connect the end-user with an enhanced service provider as interstate access service.¹¹³ Internet service providers are a class of ESPs. Accordingly, the LEC-provided link between an end-user and an ISP is properly characterized as *interstate* access.¹¹⁴

58. Most Internet-bound traffic traveling between a LEC’s subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis. Users on the Internet are interacting with a global network of connected computers. The consumer contracts with an ISP to provide access to the Internet. Typically, when the customer wishes to interact with a person, content, or computer, the customer’s computer calls a number provided by the ISP that is assigned to an ISP modem bank. The ISP modem answers the call (the familiar squelch of computers handshaking). The user initiates a communication over the Internet by transmitting a command. In the case of the web, the user requests a webpage. This request may be sent to the computer that hosts the webpage. In real time, the web host may request that different pieces of that webpage, which can be stored on different servers across the Internet, be sent, also in real time, to the user. For example, on a sports page, only the format of the webpage may be stored at the host computer in Chicago. The advertisement may come from a computer in California (and it may be a different advertisement each time the page is requested), the sports scores may come from a computer in New York City, and a part of the webpage that measures Internet traffic and records the user’s visit may involve a computer in Virginia. If the user decides to buy something from this webpage, say a sports jersey, the user clicks on the purchase page and may be transferred to a secure web server in Maryland for the transaction. A single web address frequently results in the return of information from multiple computers in various locations

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Rcd at 141 (an enhanced service is subject to FCC authority if it is interstate, “that is, when it involves communications or transmissions between points in different states on an end-to-end basis”).

¹¹² *ONA Plans Order*, 4 FCC Rcd at 141; see also *id.*, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 3084, 3088-89 (1990), *aff’d*, *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (rejecting claim that basic service elements, consisting of features and functions provided by telephone company’s local switch for benefit of enhanced service providers and others, are separate *intrastate* offerings even when used in connection with end-to-end transmissions).

¹¹³ See, e.g., *MTS/WATS Market Structure Order*, 97 FCC 2d at 711 (“[a]mong the variety of users of access service are ... enhanced service providers”); Amendment of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd 4305, 4306 (1987) (noting that enhanced service providers use “exchange access service”); *ESP Exemption Order*, 3 FCC Rcd at 2631 (referring to “certain classes of exchange access users, including enhanced service providers”).

¹¹⁴ See, e.g., *Access Charge Reform Order*, 12 FCC Rcd at 16131-32; *GTE Telephone Operating Cos.*, 13 FCC Rcd at 22478. Cf. *Bell Atlantic*, 206 F.3d at 4, 6-7.

globally. These different pieces of the webpage will be sent to the user over different network paths and assembled on the user's display.¹¹⁵

59. The "communication" taking place is between the dial-up customer and the global computer network of web content, e-mail authors, game room participants, databases, or bulletin board contributors. Consumers would be perplexed to learn regulators believe they are communicating with ISP modems, rather than the buddies on their e-mail lists. The proper focus for identifying a communication needs to be the user interacting with a desired webpage, friend, game, or chat room, not on the increasingly mystifying technical and mechanical activity in the middle that makes the communication possible.¹¹⁶ ISPs, in most cases, provide services that permit the dial-up Internet user to communicate directly with some distant site or party (other than the ISP) that the caller has specified.

60. ISP service is analogous, though not identical, to long distance calling service. An AT&T long distance customer contracts with AT&T to facilitate communications to out-of-state locations. The customer uses the local network to reach AT&T's facilities (its point of presence). By dialing "1" and an area code, the customer is in essence addressing his call to an out of state party and is instructing his LEC to deliver the call to his long distance carrier, and instructing the long distance carrier to pick up and carry that call to his intended destination. The caller on the other end will pick up the phone and respond to the caller. The communication will be between these two end-users. This analogy is not meant to prove that ISP service is identical to long distance service, but is used merely to bolster, by analogy, the reasonableness of not characterizing an ISP as the destination of a call, but as a facilitator of communication.

61. Moreover, as the local exchange carriers have correctly observed, the technical configurations for establishing dial-up Internet connections are quite similar to certain network configurations employed to initiate more traditional long-distance calls.¹¹⁷ In most cases, an ISP's customer first dials a seven-digit number to connect to the ISP server before connecting to a website. Long-distance service in some network configurations is initiated in a substantially similar manner. In particular, under "Feature Group A" access, the caller first dials a seven-digit number to reach the EXC, and then dials a password and the called party's area code and number to complete the call. Notwithstanding this dialing sequence, the service the LEC provides is considered *interstate* access service, not a separate local call.¹¹⁸ Internet calls operate in a similar manner: after reaching the ISP's server by dialing a seven-digit number, the caller selects a website (which is identified by a 12-digit Internet address, but which often is, in effect, "speed dialed" by clicking an icon) and the ISP connects the caller to the selected website. Such calling

¹¹⁵ Of course, the Internet provides applications other than the World Wide Web, such as e-mail, games, chat sites, or streaming media, which have different technical characteristics but all of which involve computers in multiple locations, often across state and national boundaries.

¹¹⁶ See *Qwest Roadmap* at 4-5, 9-10.

¹¹⁷ See, e.g., Verizon Remand Reply at 9 (Internet traffic is indistinguishable from Feature Group A access service).

¹¹⁸ See *Local Competition Order*, 11 FCC Rcd at 15935 n. 2091 (describing "Feature Group A" access service); see also *MCI Telecomm Corp v FCC*, 566 F.2d 365, 367 n.3 (D.C. Cir. 1977), *cert denied*, 434 U.S. 1040 (1978).

should yield the same jurisdictional result as the analogous calls to IXCs using "Feature Group A" access.

62. Commission precedent also rejects the two-call theory in the context of calls involving enhanced services. In *BellSouth MemoryCall*, the Commission preempted a state commission order that had prohibited BellSouth from expanding its voice mail service -- an enhanced service -- beyond its existing customers.¹¹⁹ In doing so, it rejected claims by the state that the Commission lacked jurisdiction to preempt because, allegedly, out-of-state calls to the voice mail service really constituted two calls: an *interstate* call from the out-of-state caller to the telephone company switch that routes the call to the intended recipient's location, and a separate *intrastate* call that forwards the communication from the switch to the voice mail apparatus in the event that the called party did not answer.¹²⁰ The Commission explained that, whether a basic telecommunications service is at issue, or whether an enhanced service rides on the telephone company's telecommunications service, the Commission's jurisdiction does not end at the local switchboard, but continues to the ultimate destination of the call.¹²¹

63. The Internet communication is not analogous to traditional telephone exchange services. Local calls set up communication between two parties that reside in the same local calling area. Prior to the introduction of local competition, that call would never leave the network of the incumbent LEC. As other carriers were permitted to enter the local market, a call might cross two or more carriers' networks simply because the two parties to the communication subscribed to two different local carriers. The two parties intending to communicate, however, remained squarely in the same local calling area. An Internet communication is not simply a local call from a consumer to a machine that is lopsided, that is, a local call where one party does most of the calling, or most of the talking. ISPs are service providers that technically modify and translate communication, so that their customers will be able to interact with computers across the global Internet.¹²²

64. The court in *Bell Atlantic* noted that FCC litigation counsel had differentiated ISP-bound traffic from ordinary long-distance calls by stating that the former "is really like a call to a local business" -- such as a pizza-delivery firm, a travel reservation agency, a credit card verification firm, or a taxicab company -- "that then uses the telephone to order wares to meet the need."¹²³ We find, however, that this citation to a former litigation position does not require us to alter our analysis. First, the Commission itself has never analogized ISP-bound traffic in the manner cited in the agency's brief in *Southwestern Bell*. Indeed, in the particular order that the

¹¹⁹ *BellSouth MemoryCall*, 7 FCC Rcd at 1619.

¹²⁰ *Id.* at 1620.

¹²¹ *Id.* at 1621.

¹²² It is important to note that a dial-up call to an ISP will not even be required when broadband services arrive. Those connections will be always on and there will be no phone call in any traditional sense. Indeed, the only initiating event will be the end-user interacting with other Internet content or users. Thus, increasingly, notions of two calls become meaningless.

¹²³ *Bell Atlantic*, 206 F.3d at 8 (citing FCC Brief at 76, *Southwestern Bell v. FCC*, 153 F.3d 523).

Commission was defending in *Southwestern Bell*, the Commission distinguished ISP-bound traffic from other access traffic on *other* grounds -- e.g., call direction and call holding times¹²⁴ -- which have no arguable bearing on whether the traffic is one interstate call (as the Commission has always held) or two separate calls (one of which allegedly is intrastate) as some parties have contended. Second, the cited portion of the Commission's brief was not addressing jurisdiction at all. Rather, the brief was responding to a claim that the ESP exemption *discriminated* against IXC's and in favor of ISPs.¹²⁵ Finally, in the very case in which litigation counsel made the cited analogy, the Eighth Circuit affirmed the Commission's consistent view that ISP-bound traffic is, as a *jurisdictional* matter, predominantly interstate.¹²⁶ In any event, to the extent that our prior briefs could be read to conceptualize the nature of ISP service as local, akin to intense users of local service, we now embrace a different conceptualization that we believe more accurately reflects the nature of ISP service.

65. For the foregoing reasons, consistent with our longstanding precedent, we find that we continue to have jurisdiction under section 201, as preserved by section 251(i), to provide a compensation mechanism for ISP-bound traffic.

C. Efficient Intercarrier Compensation Rates and Rate Structures

66. Carriers currently recover the costs of call transport and termination through some combination of carrier access charges, reciprocal compensation, and end-user charges, depending upon the applicable regulatory regime. Having concluded that ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5), we must now determine, pursuant to our section 201 authority, what compensation mechanism is appropriate when carriers collaborate to deliver calls to ISPs. In the companion *NPRM*, we consider the desirability of adopting a uniform intercarrier compensation mechanism, applicable to all traffic exchanged among telecommunications carriers, and, in that context, we intend to examine the merits of a bill and keep regime for all types of traffic, including ISP-bound traffic. In the meantime, however, we must adopt an interim intercarrier compensation rule to govern the exchange of ISP-bound traffic, pending the outcome of the *NPRM*. In particular, we must decide whether to impose (i) a "calling-party's-network-pays" (CPNP) regime, like reciprocal compensation, in which the calling party's network pays the network serving the ISP; (ii) a bill and keep regime in which all networks recover costs from their end-user customers and are obligated to deliver calls that originate on the networks of interconnecting carriers; or (iii) some other cost recovery mechanism. As set forth more fully below, our immediate goal in adopting an interim compensation mechanism is to address the market distortions created by the prevailing intercarrier compensation regime, even as we evaluate in a parallel proceeding what longer-term intercarrier compensation mechanisms are appropriate for this and other types of traffic.

¹²⁴ *Access Charge Reform Order*, 12 FCC Rcd at 16133-34.

¹²⁵ See FCC Brief at 75-76, *Southwestern Bell v. FCC*, 153 F.3d 523.

¹²⁶ *Southwestern Bell v. FCC*, 153 F.3d at 534.

1. CPNP Regimes Have Distorted the Development of Competitive Markets

67. For the reasons detailed below, we believe that a bill and keep approach to recovering the costs of delivering ISP-bound traffic is likely to be more economically efficient than recovering these costs from originating carriers. In particular, requiring carriers to recover the costs of delivering traffic to ISP customers directly from those customers is likely to send appropriate market signals and substantially eliminate existing opportunities for regulatory arbitrage. As noted above, we consider issues related to the broader application of bill and keep as an intercarrier compensation regime in conjunction with the *NPRM* that we are adopting concurrently with this Order. In this Order, however, we adopt an interim compensation mechanism for the delivery of ISP-bound traffic that addresses the regulatory arbitrage opportunities present in the existing carrier-to-carrier payments by limiting carriers' opportunity to recover costs from other carriers and requiring them to recover a greater share of their costs from their ISP customers.

68. In most states, reciprocal compensation governs the exchange of ISP-bound traffic between local carriers.¹²⁷ Reciprocal compensation is a CPNP regime in which the originating carrier pays an interconnecting carrier for "transport and termination," *i.e.*, for transport from the networks' point of interconnection and for any tandem and end-office switching.¹²⁸ The central problem with any CPNP regime is that carriers recover their costs not only from their end-user customers, but also from *other carriers*.¹²⁹ Because intercarrier compensation rates do not reflect the degree to which the carrier can recover costs from its end-users, payments from other carriers may enable a carrier to offer service to its customers at rates that bear little relationship to its actual costs, thereby gaining an advantage over its competitors. Carriers thus have the incentive to seek out customers, including but not limited to ISPs, with high volumes of incoming traffic that will generate high reciprocal compensation payments.¹³⁰ To the extent that carriers offer these customers below cost retail rates subsidized by intercarrier compensation, these customers do not receive accurate price signals. Moreover, 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. Thus no subscriber faces a price that fully reflects the intercarrier

¹²⁷ In the *Declaratory Ruling*, we stated that, pending adoption of a federal rule governing intercarrier compensation for ISP-bound traffic, state commissions would determine whether reciprocal compensation was due for such traffic. *Declaratory Ruling*, 14 FCC Rcd at 3706. Since that time, most, though not all, states have ordered the payment of reciprocal compensation for ISP-bound traffic.

¹²⁸ 47 C.F.R. § 51.703(a).

¹²⁹ Recovery from other carriers is premised on the economic assumption that the carrier whose customer originates the call has "caused" the transport and termination costs associated with that call, and the originating carrier should, therefore, reimburse the interconnecting carrier for "transport and termination." The companion *NPRM* evaluates the validity of that assumption and tentatively concludes that it is an incorrect premise.

¹³⁰ *Cf. Local Competition Order*, 11 FCC Rcd at 16043 (symmetrical termination payments to paging providers based on ILECs' costs "might create uneconomic incentives for paging providers to generate traffic simply in order to receive termination compensation").

payments. An ISP subscriber with extensive Internet usage may, for example, cause her LEC to incur substantial reciprocal compensation obligations to the LEC that serves her ISP, but that subscriber receives no price signals reflecting those costs because they are spread over all of her LEC's customers.

69. The resulting market distortions are most apparent in the case of ISP-bound traffic due primarily to the one-way nature of this traffic, and to the tremendous growth in dial-up Internet access since passage of the 1996 Act. Competitive carriers, regardless of the nature of their customer base, exchange traffic with the incumbent LECs at rates based on the incumbents' costs.¹³¹ To the extent the traffic exchange is roughly balanced, as is typically the case when LECs exchange voice traffic, it matters little if rates reflect costs because payments in one direction are largely offset by payments in the other direction. The rapid growth in dial-up Internet use, however, created the opportunity to serve customers with large volumes of exclusively *incoming* traffic. And, for the reasons discussed above, the reciprocal compensation regime created an incentive to target those customers with little regard to the costs of serving them – because a carrier would be able to collect some or all of those costs from *other* carriers that would themselves be unable to flow these costs through to their own customers in a cost-causative manner.

70. The record is replete with evidence that reciprocal compensation provides enormous incentive for CLECs to target ISP customers. The four largest ILECs indicate that CLECs, on average, terminate eighteen times more traffic than they originate, resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, ninety percent of which is for ISP-bound traffic.¹³² Verizon states that it sends CLECs, on average, twenty-one times more traffic than it receives, and some CLECs receive more than forty times more traffic than they originate.¹³³ Although there may be sound business reasons for a CLEC's decision to serve a particular niche market, the record strongly suggests that CLECs target ISPs in large part because of the availability of reciprocal compensation payments.¹³⁴ Indeed, some ISPs even seek to become CLECs in order to share in the reciprocal compensation windfall, and, for a small

¹³¹ 47 C.F.R. § 51.705 (an incumbent LEC's rates for transport and termination shall be established on the basis of the forward-looking economic costs of such offerings); 47 C.F.R. § 51.711 (subject to certain exceptions, rates for transport and termination shall be symmetrical and equal to those that the incumbent LEC assesses upon other carriers for the same services).

¹³² Letter from Robert T. Blau, BellSouth, to Magalie Roman Salas, Secretary, FCC (November 6, 2000); *see also* Verizon Remand Comments at 2 (Verizon will be billed more than one billion dollars in 2000 for Internet-bound calls); Letter from Richard J. Metzger, Focal, to Deena Shetler, Legal Advisor to Commissioner Gloria Tristani, FCC (Jan. 11, 2001)(ILECs owed \$1.98 billion in reciprocal compensation to CLECs in 2000).

¹³³ Verizon Remand Comments at 11, 21. Verizon also cites extreme cases of CLECs that terminate in excess of *eight thousand* times more traffic than they originate. *Id.* at 21. *See also* Letter from Robert T. Blau, BellSouth; Melissa Newman, Qwest; Priscilla Hill-Ardoin, SBC; and Susanne Guyer, Verizon, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC (Nov. 9, 2000).

¹³⁴ *See, e.g.*, Verizon Remand Comments at 15 (citing case of CLEC offer of free long distance service to dial-up Internet customers, an offer it did not extend to its customers that accessed the Internet via cable modem or DSL service); SBC Remand Comments at 45 (citing examples of CLEC offering free service to ISPs that collocated in its switching centers and CLECs offering to share reciprocal compensation revenues with ISPs).

number of entities, this revenue stream provided an inducement to fraudulent schemes to generate dial-up minutes.¹³⁵

71. For these reasons, we believe that the application of a CPNP regime, such as reciprocal compensation, to ISP-bound traffic undermines the operation of competitive markets.¹³⁶ ISPs do not receive accurate price signals from carriers that compete, not on the basis of the quality and efficiency of the services they provide, but on the basis of their ability to shift costs to other carriers. Efficient prices result when carriers offer the lowest possible rates based on the costs of the service they provide to ISPs, not when they can price their services without regard to cost. We are concerned that viable, long-term competition among efficient providers of local exchange and exchange access services cannot be sustained where the intercarrier compensation regime does not reward efficiency and may produce retail rates that do not reflect the costs of the services provided. As we explain in greater detail in the companion *NPRM*, we believe that a compensation regime, such as bill and keep, that requires carriers to recover more of their costs from end-users may avoid these problems.

72. We acknowledge that we did not always hold this view. In the *Local Competition Order*, the Commission concluded that state commissions may impose bill and keep arrangements for traffic subject to section 251(b)(5) *only* when the flow of traffic between interconnected carriers is roughly balanced and is expected to remain so.¹³⁷ The Commission reasoned that “bill-and-keep arrangements are not economically efficient because they distort carriers’ incentives, encouraging them to overuse competing carriers’ *termination* facilities by seeking customers that primarily *originate* traffic.”¹³⁸ The concerns about the opportunity for cost recovery and economic efficiency are not present, however, to the extent that traffic between carriers is balanced and payments from one carrier will be offset by payments from the other carrier. In these circumstances, the Commission found that bill and keep arrangements may minimize administrative burdens and transaction costs.¹³⁹

73. Since that time, we have observed the development of competition in the local exchange market, and we now believe that the Commission’s concerns about economic inefficiencies associated with bill and keep missed the mark, particularly as applied to ISP-bound traffic. The Commission appears to have assumed, at least implicitly, that the calling party was the sole cost causer of the call, and it may have overstated any incentives that a bill and keep regime creates to target customers that primarily originate traffic. A carrier must provide originating switching functions and must recover the costs of those functions from the originating end-user, not from other carriers. Originating traffic thus lacks the same opportunity for cost-shifting that reciprocal compensation provides with respect to serving customers with

¹³⁵ See, e.g., Verizon Remand Comments at 17-18.

¹³⁶ The *NPRM* that we adopt in conjunction with this Order seeks comment on the degree to which a modified CPNP regime might address these concerns.

¹³⁷ *Local Competition Order*, 11 FCC Rcd at 16054-55; see also 47 C.F.R. § 51.713(b).

¹³⁸ *Local Competition Order*, 11 FCC Rcd at 16055 (emphases added).

¹³⁹ *Id.* at 16055.

disproportionately incoming traffic. Indeed, it has become apparent that the obligation to pay reciprocal compensation to interconnecting carriers may give rise to uneconomic incentives. As the current controversy about ISP-bound traffic demonstrates, reciprocal compensation encourages carriers to overuse competing carriers' *origination* facilities by seeking customers that receive high volumes of traffic.

74. We believe that a bill and keep regime for ISP-bound traffic may eliminate these incentives and concomitant opportunity for regulatory arbitrage by forcing carriers to look only to their ISP customers, rather than to other carriers, for cost recovery. As a result, the rates paid by ISPs and, consequently, their customers should better reflect the costs of services to which they subscribe. Potential subscribers should receive more accurate price signals, and the market should reward efficient providers.¹⁴⁰ Although we do not reach any firm conclusions about bill and keep as a permanent mechanism for this or any other traffic, our evaluation of the record evidence to date strongly suggests that bill and keep is likely to provide a viable solution to the market distortions caused by the application of reciprocal compensation to ISP-bound traffic. We take that observation into account, below, as we fashion an interim compensation mechanism for this traffic.

75. Bill and keep also may address the problem regulators face in setting intercarrier compensation rates that correlate to the costs carriers incur to carry traffic that originates on other networks. The record suggests that market distortions appear to have been exacerbated by the prevalence of excessively high reciprocal compensation rates. Many CLECs argue that the current traffic imbalances between CLECs and ILECs are the product of greediness on the part of ILECs that insisted on above-cost reciprocal compensation rates in the course of negotiating or arbitrating initial interconnection agreements.¹⁴¹ CLECs argue that, because these rates were artificially high, they naturally responded by seeking customers with large volumes of incoming traffic. If the parties or regulatory bodies merely set cost-based rates and rate structures, they argue, arbitrage opportunities and the resulting windfalls would disappear.¹⁴² They note that reciprocal compensation rates have fallen dramatically as initial agreements expire and the parties negotiate new agreements.¹⁴³

76. We do not believe that the solution to the current problem is as simple as the CLECs suggest.¹⁴⁴ We seek comment in the accompanying *NPRM* on the potential for a modified

¹⁴⁰ We also note that bill and keep arrangements are common among entities providing Internet backbone services, where the larger carriers engage in so-called "peering" arrangements.

¹⁴¹ Time Warner Remand Comments at 15-16.

¹⁴² Time Warner Remand Comments at 16. Some parties suggest that a bifurcated rate structure (a call set-up charge and a minute of use charge) would ensure appropriate cost recovery. See Sprint Remand Comments at 2-4. We seek comment on this approach in the *NPRM*.

¹⁴³ See *infra* note 158.

¹⁴⁴ We note that many CLECs expressed the same view following adoption of the *Declaratory Ruling* in 1999, yet the problems persist. See, e.g., Cox Reply Comments at 6 (If termination "rates are too high, this is entirely at the ILEC's behest, and should be remedied in the next round of negotiations.").

CPNP regime, such as the CLECs advocate, to solve some of the problems we identify here. We are convinced, however, that intercarrier payments for ISP-bound traffic have created severe market distortions. Although it would be premature to institute a full bill and keep regime before resolving the questions presented in the *NPRM*,¹⁴⁵ in seeking to remedy an exigent market problem, we cannot ignore the evidence we have accumulated to date that suggests that a bill and keep regime has very fundamental advantages over a CPNP regime for ISP-bound traffic. Contrary to the view espoused by CLECs, we are concerned that the market distortions caused by applying a CPNP regime to ISP-bound traffic cannot be cured by regulators or carriers simply attempting to “get the rate right.” A few examples may illustrate the vexing problems regulators face. Reciprocal compensation rates have been determined on the basis of the ILEC’s average costs of transport and termination. These rates do not, therefore, reflect the costs incurred by any particular carrier for providing service to a particular customer. This encourages carriers to target customers that are, on average, less costly to serve, and reap a reciprocal compensation windfall. Conversely, new entrants lack incentive to serve customers that are, on average, more costly to serve, even if the new entrant is the most efficient provider. It is not evident that this problem can be remedied by setting reciprocal compensation rates on the basis of the costs of carrier serving the called party (or, in the case of ISP-bound traffic, the CLEC that serves the ISP).¹⁴⁶ Apart from our reluctance to require new entrants to perform cost studies, it is entirely impracticable, if not impossible, for regulators to set different intercarrier compensation rates for each individual carrier, and those rates still might fail to reflect a carrier’s costs as, for example, the nature of its customer base evolves. Furthermore, most states have adopted per minute reciprocal compensation rate structures. It is unlikely that any minute-of-use rate that is based on average costs and depends upon demand projections will reflect the costs of any given carrier to serve any particular customer. To the extent that transport and termination costs are capacity-driven, moreover, virtually any minute-of-use rate will overestimate the cost of handling an additional call whenever a carrier is operating below peak capacity.¹⁴⁷ Regulators and carriers have long struggled with problems associated with peak-load pricing.¹⁴⁸ Finally, and most important, the fundamental problem with application of reciprocal compensation to ISP-bound traffic is that the intercarrier payments fail altogether to account for a carrier’s opportunity to recover costs from its ISP customers. Modifications to intercarrier rate levels or rate structures suggested by CLECs do not address carriers’ ability to shift costs from their own customers onto other carriers and their customers.

¹⁴⁵ A number of questions must be resolved before we are prepared to implement fully a bill and keep regime where most costs are recovered from end-users. (We say most, not all, costs are recovered from end-users because a bill and keep regime may include intercarrier charges for transport between networks.) These questions include, for example, the allocation of transport costs between interconnecting carriers and the effect on retail prices of adopting a bill and keep regime that is not limited to ISP-bound traffic. We seek comment on these and other issues in the accompanying intercarrier *NPRM*.

¹⁴⁶ *Cf.* Verizon Remand Reply Comments at 14-15.

¹⁴⁷ The problem of putting a per minute price tag, in the form of intercarrier payments, where no per minute cost exists is exacerbated in the case of local exchange carriers that, in most cases, recover costs from their end-users on a flat-rated basis.

¹⁴⁸ See, e.g., *Local Competition Order*, 11 FCC Rcd at 16028-29.

2. Intercarrier Compensation for ISP-bound Traffic

77. We believe that a hybrid mechanism that establishes relatively low per minute rates, with a cap on the total volume of traffic entitled to such compensation, is the most appropriate interim approach over the near term to resolve the problems associated with the current intercarrier compensation regime for ISP-bound traffic. Our primary goal at this time is to address the market distortions under the current intercarrier compensation regimes for ISP-bound traffic. At the same time, we believe it prudent to avoid a “flash cut” to a new compensation regime that would upset the legitimate business expectations of carriers and their customers. Subsequent to the Commission’s *Declaratory Ruling*, many states have required the payment of reciprocal compensation for ISP-bound traffic, and CLECs may have entered into contracts with vendors or with their ISP customers that reflect the expectation that the CLECs would continue to receive reciprocal compensation revenue. We believe it appropriate, in tailoring an interim compensation mechanism, to take those expectations into account while simultaneously establishing rates that will produce more accurate price signals and substantially reduce current market distortions. Therefore, pending our consideration of broader intercarrier compensation issues in the *NPRM*, we impose an interim intercarrier compensation regime for ISP-bound traffic that serves to limit, if not end, the opportunity for regulatory arbitrage, while avoiding a market-disruptive “flash cut” to a pure bill and keep regime. The interim regime we establish here will govern intercarrier compensation for ISP-bound traffic until we have resolved the issues raised in the intercarrier compensation *NPRM*.

78. Beginning on the effective date of this Order, and continuing for six months, intercarrier compensation for ISP-bound traffic will be capped at a rate of \$.0015/minute-of-use (mou). Starting in the seventh month, and continuing for eighteen months, the rate will be capped at \$.0010/mou. Starting in the twenty-fifth month, and continuing through the thirty-sixth month or until further Commission action (whichever is later), the rate will be capped at \$.0007/mou. In addition to the rate caps, we will impose a cap on total ISP-bound minutes for which a LEC may receive this compensation. For the year 2001, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to compensation under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation under that agreement in 2001, plus another ten percent growth factor. In 2003, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to the 2002 ceiling applicable to that agreement.¹⁴⁹

79. We understand that some carriers are unable to identify ISP-bound traffic. In order to limit disputes and avoid costly efforts to identify this traffic, we adopt a rebuttable presumption that traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic that is subject to the compensation

¹⁴⁹ This interim regime affects only the intercarrier *compensation* (i.e., the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers’ other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection.

mechanism set forth in this Order. Using a rebuttable presumption in this context is consistent with the approach that numerous states have adopted to identify ISP-bound traffic or “convergent” traffic (including ISP traffic) that is subject to a lower reciprocal compensation rate.

¹⁵⁰ A carrier may rebut the presumption, for example, by demonstrating to the appropriate state commission that traffic above the 3:1 ratio is in fact local traffic delivered to non-ISP customers. In that case, the state commission will order payment of the state-approved or state-arbitrated reciprocal compensation rates for that traffic. Conversely, if a carrier can demonstrate to the state commission that traffic it delivers to another carrier is ISP-bound traffic, even though it does not exceed the 3:1 ratio, the state commission will relieve the originating carrier of reciprocal compensation payments for that traffic, which is subject instead to the compensation regime set forth in this Order. During the pendency of any such proceedings, LECs remain obligated to pay the presumptive rates (reciprocal compensation rates for traffic below a 3:1 ratio, the rates set forth in this Order for traffic above the ratio), subject to true-up upon the conclusion of state commission proceedings.

80. We acknowledge that carriers incur costs in delivering traffic to ISPs, and it may be that in some instances those costs exceed the rate caps we adopt here. To the extent a LEC’s costs of transporting and terminating this traffic exceed the applicable rate caps, however, it may recover those amounts from its own end-users.¹⁵¹ We also clarify that, because the rates set forth above are *caps* on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a

¹⁵⁰ See Texas Public Utility Commission, Docket No. 21982, Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996, at 36 (July 12, 2000)(applying a blended tandem switching rate to traffic up to a 3:1 (terminating to originating) ratio; traffic above that ratio is presumed to be convergent traffic and is compensated at the end office rate unless the terminating carrier can prove tandem functionality); New York Public Service Commission, Op. No. 99-10, Proceeding on Motion of the Commission to Reexamine Reciprocal compensation, Opinion and Order, at 59-60 (Aug. 26, 1999) (traffic above a 3:1 ratio is presumed to be convergent traffic and is compensated at the end office rate unless the terminating carrier can demonstrate “that [the terminating] network and service are such as to warrant tandem-rate compensation”); Massachusetts Dept. of Telecommunications and Energy, D.T.E. 97-116-C, at 28-29 n.31 (May 19, 1999) (requiring reciprocal compensation for traffic that does not exceed a 2:1 (terminating to originating) ratio as a proxy to distinguish ISP-bound traffic from voice traffic; carriers may rebut that presumption).

¹⁵¹ We note that CLEC end-user recovery is generally not regulated. As non-dominant carriers, CLECs can charge their end-users what the market will bear. Access Charge Reform, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962, 13005 (2000) (*CALLS Order*) (“Competitive LECs are not regulated by the Commission and are not restricted in the same manner as price caps LECs in how they recover their costs.”). Accordingly, we permit CLECs to recover any additional costs of serving ISPs from their ISP customers. ILEC end-user charges, however, are generally regulated by the Commission, in the case of interstate charges, or by state commissions, for intrastate charges. Pursuant to the ESP exemption, ILECs will continue to serve their ISP customers out of intrastate-business tariffs that are subject to state regulation. As the Commission said in 1997, if ILECs feel that these rates are so low as to preclude cost recovery, they should seek relief from their state commissions. *Access Charge Reform Order*, 12 FCC Rcd at 16134 (“To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with *high volumes of incoming calls*, incumbent LECs may address their concerns to state regulators.” (emphasis added)).

bill and keep basis (or otherwise have not required payment of compensation for this traffic).¹⁵² The rate caps are designed to provide a transition toward bill and keep or such other cost recovery mechanism that the Commission may adopt to minimize uneconomic incentives, and no such transition is necessary for carriers already exchanging traffic at rates below the caps. Moreover, those state commissions have concluded that, at least in their states, LECs receive adequate compensation from their own end-users for the transport and termination of ISP-bound traffic and need not rely on intercarrier compensation.

81. Finally, a different rule applies in the case where carriers are not exchanging traffic pursuant to interconnection agreements prior to adoption of this Order (where, for example, a new carrier enters the market or an existing carrier expands into a market it previously had not served). In such a case, as of the effective date of this Order, carriers shall exchange ISP-bound traffic on a bill-and-keep basis during this interim period. We adopt this rule for several reasons. First, our goal here is to address and curtail a pressing problem that has created opportunities for regulatory arbitrage and distorted the operation of competitive markets. In so doing, we seek to confine these market problems to the maximum extent while seeking an appropriate long-term resolution in the proceeding initiated by the companion *NPRM*. Allowing carriers in the interim to expand into new markets using the very intercarrier compensation mechanisms that have led to the existing problems would exacerbate the market problems we seek to ameliorate. For this reason, we believe that a standstill on any expansion of the old compensation regime into new markets is the more appropriate interim answer.¹⁵³ Second, unlike those carriers that are presently serving ISP customers under existing interconnection agreements, carriers entering new markets to serve ISPs have not acted in reliance on reciprocal compensation revenues and thus have no need of a transition during which to make adjustments to their prior business plans.

82. The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here. Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue. For this same reason, as of the date this Order is published in the Federal Register, carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic.¹⁵⁴ Section 252(i)

¹⁵² Thus, if a state has ordered all LECs to exchange ISP-bound traffic on a bill and keep basis, or if a state has ordered bill and keep for ISP-bound traffic in a particular arbitration, those LECs subject to the state order would continue to exchange ISP-bound traffic on a bill and keep basis.

¹⁵³ See *American Public Communications Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000) (“Where existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information.”).

¹⁵⁴ 47 U.S.C. § 252(i) (requiring LECs to “make available any interconnection, service, or network element provided under an agreement approved under this section” to “any other requesting telecommunications carrier”). This Order will become effective 30 days after publication in the Federal Register. We find there is good cause under 5 U.S.C. § 553(d)(3), however, to prohibit carriers from invoking section 252(i) with respect to rates paid for (continued....)

applies only to agreements arbitrated or approved by state commissions pursuant to section 252; it has no application in the context of an intercarrier compensation regime set by this Commission pursuant to section 201.¹⁵⁵

83. This interim regime satisfies the twin goals of compensating LECs for the costs of delivering ISP-bound traffic while limiting regulatory arbitrage. The interim compensation regime, as a whole, begins a transition toward what we have tentatively concluded, in the companion *NPRM*, to be a more rational cost recovery mechanism under which LECs recover more of their costs from their own customers. This compensation mechanism is fully consistent with the manner in which the Commission has directed incumbent LECs to recover the costs of serving ESPs, including ISPs.¹⁵⁶ The three-year transition we adopt here ensures that carriers have sufficient time to re-order their business plans and customer relationships, should they so choose, in light of our tentative conclusions in the companion *NPRM* that bill and keep is the appropriate long-term intercarrier compensation regime. It also affords the Commission adequate time to consider comprehensive reform of all intercarrier compensation regimes in the *NPRM* and any resulting rulemaking proceedings. Both the rate caps and the volume limitations reflect our view that LECs should begin to formulate business plans that reflect decreased reliance on revenues from intercarrier compensation, given the trend toward substantially lower rates and the strong possibility that the *NPRM* may result in the adoption of a full bill and keep regime for ISP-bound traffic.

84. We acknowledge that there is no exact science to setting rate caps to limit carriers' ability to draw revenue from other carriers, rather than from their own end-users. Our adoption of the caps here is based on a number of considerations. First, rates that produce meaningful reductions in intercarrier payments for ISP-bound traffic must be at least as low as rates in existing interconnection agreements. Second, although we make no finding here regarding the actual costs incurred in the delivery of ISP-bound traffic, there is evidence in the record to suggest that technological developments are reducing the costs incurred by carriers in handling all sorts of traffic, including ISP-bound traffic.¹⁵⁷ Third, although the process has proceeded too

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the exchange of ISP-bound traffic upon publication of this Order in the Federal Register, in order to prevent carriers from exercising opt in rights during the thirty days after Federal Register publication. To permit a carrier to opt into a reciprocal compensation rate higher than the caps we impose here during that window would seriously undermine our effort to curtail regulatory arbitrage and to begin a transition from dependence on intercarrier compensation and toward greater reliance on end-user recovery.

¹⁵⁵ In any event, our rule implementing section 252(i) requires incumbent LECs to make available "[i]ndividual interconnection, service, or network element arrangements" to requesting telecommunications carriers only "for a reasonable period of time." 47 C.F.R. § 51.809(c). We conclude that any "reasonable period of time" for making available rates applicable to the exchange of ISP-bound traffic expires upon the Commission's adoption in this Order of an intercarrier compensation mechanism for ISP-bound traffic.

¹⁵⁶ *Access Charge Reform Order*, 12 FCC Red at 16133-34.

¹⁵⁷ See, e.g., Letter from David J. Hostetter, SBC, to Magalie Roman Salas, Secretary, FCC (Feb. 14, 2001), Attachment (citing September 2000 Morgan Stanley Dean Witter report that discusses utilization of lower cost switch technology); Donny Jackson, "One Giant Leap for Telecom Kind?," *Telephony*, Feb. 12, 2001, at 38 (discussing cost savings associated with replacing circuit switches with packet switches); Letter from Gary L. Phillips, SBC, to Magalie Roman Salas, Secretary, FCC (Feb. 16, 2001) (attaching press release from Focal (continued....))

slowly to address the market distortions discussed above, we note that negotiated reciprocal compensation rates continue to decline as ILECs and CLECs negotiate new interconnection agreements. Finally, CLECs have been on notice since the 1999 *Declaratory Ruling* that it might be unwise to rely on the continued receipt of reciprocal compensation for ISP-bound traffic, thus many have begun the process of weaning themselves from these revenues.

85. The rate caps adopted herein reflect all these considerations. The caps we have selected approximate the downward trend in intercarrier compensation rates reflected in recently negotiated interconnection agreements. In these agreements, carriers have agreed to rates, like those we adopt here, that decline each year of a three-year contract term, and at least one agreement reflects different rates for balanced and unbalanced traffic.¹⁵⁸ For example, the initial rate cap of \$.0015/mou approximates the rates applicable this year in agreements Level 3 has negotiated with Verizon and SBC.¹⁵⁹ The \$.0010/mou rate that applies during most of the three-year interim period reflects a proposal by ALTS, the trade association representing CLECs, for a transition plan pursuant to which intercarrier compensation payments for ISP-bound traffic would decline to \$.0010/mou.¹⁶⁰ Similarly, the \$.0007/mou rate reflects the average rate applicable in 2002 under Level 3's agreement with SBC.¹⁶¹ We conclude, therefore, that the rate caps constitute a reasonable transition toward the recovery of costs from end-users.

86. We impose an overall cap on ISP-bound minutes for which compensation is due in order to ensure that growth in dial-up Internet access does not undermine our efforts to limit

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Communications announcing planned deployment of next-generation switching technology "at a fraction of the cost of traditional equipment"); see also *infra* para. 93.

¹⁵⁸ The Commission takes notice of the following interconnection agreements: (1) Level 3 Communications and SBC Communications (effective through May 2003): This 13-state agreement has two sets of rates. For balanced traffic, the rate is \$.0032/mou. For traffic that is out of balance by a ratio exceeding 3:1, the rate starts at \$.0018/mou, declining to a weighted average rate of \$.0007/mou by June 1, 2002. See PR Newswire, WL PRWIRE 07:00:00 (Jan. 17, 2001); Letter from John T. Nakahata, Harris, Wiltshire & Grannis, to Magalie Roman Salas, Secretary, FCC, Attachment (Jan. 19, 2001). (2) ICG Communications and BellSouth (retroactively effective to Jan. 1, 2000): This agreement provides for rates to decline over three years, from \$.002/mou to \$.00175/mou to \$.0015/mou. See Communications Daily, 2000 WL 4694709 (Mar. 15, 2000). (3) KMC Telecom and BellSouth: This agreement provides for a rate of \$.002/mou in 2000, \$.00175/mou in 2001, \$.0015/mou in 2002. See Business Wire, WL 5/18/00 BWIRE 12:50:000 (May 18, 2000). (4) Level 3 Communications and Verizon (formerly Bell Atlantic) (effective Oct. 14, 1999): This agreement governs all of the former Bell Atlantic/NYNEX states. The applicable rate declines over the term of the agreement from \$.003/mou in 1999 to rates in 2001 of \$.0015/mou for balanced traffic and \$.0012/mou where the traffic imbalance exceeds a 10:1 ratio. See Letter from Joseph J. Mulieri, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC (Nov. 22, 1999)(attaching agreement); see also Letter from John T. Nakahata, Harris, Wiltshire & Grannis, to Magalie Roman Salas, Secretary, FCC, at 2 (Jan. 4, 2001)(reciprocal compensation rate in most recent Level 3 – Verizon agreement is now \$.0012/mou in all states except New York, where the rate is \$.0015/mou).

¹⁵⁹ In the Level 3 – SBC agreement, the applicable rate is \$.0018/mou for traffic that exceeds a 3:1 ratio; in the Level 3 – Verizon agreement, the applicable rate is \$.0015/mou for balanced traffic and \$.0012/mou for traffic that exceeds a 10:1 ratio. See *supra* note 158.

¹⁶⁰ See Letter from Jonathan Askin, ALTS, to Magalie Roman Salas, Secretary, FCC, at 3 (Dec. 19, 2000).

¹⁶¹ See *supra* note 158.

intercarrier compensation for this traffic and to begin, subject to the conclusion of the *NPRM* proceedings, a smooth transition toward a bill and keep regime. A ten percent growth cap, for the first two years, seems reasonable in light of CLEC projections that the growth of dial-up Internet minutes will fall in the range of seven to ten percent per year.¹⁶² We are unpersuaded by the ILECs' projections that dial-up minutes will grow in the range of forty percent per year,¹⁶³ but adoption of a cap on growth largely moots this debate. If CLECs have projected growth in the range of ten percent, then limiting intercarrier compensation at that level should not disrupt their customer relationships or their business planning. Nothing in this Order prevents any carrier from serving or indeed expanding service to ISPs, so long as they recover the costs of additional minutes from their ISP customers. The caps merely ensure that growth in minutes above the caps is based on a given carrier's ability to provide efficient and quality service to ISPs, rather than on a carrier's desire to reap an intercarrier compensation windfall.

87. We are not persuaded by arguments proffered by CLECs that requiring them to recover more of their costs from their ISP customers will render it impossible for CLECs profitably to serve ISPs or will lead to higher rates for Internet access.¹⁶⁴ First, as noted above, this compensation mechanism is fully consistent with the manner in which this Commission has directed ILECs to recover the costs of serving ISPs.¹⁶⁵ Moreover, the evidence in the record does not demonstrate that CLECs cannot compete for ISP customers in the growing number of states that have adopted bill and keep for ISP-bound traffic or that the cost of Internet access has increased in those states. Second, next-generation switching and other technological developments appear to be contributing to a decline in the costs of serving ISPs (and other customers).¹⁶⁶ Third, if reciprocal compensation merely enabled CLECs to recover the costs of serving ISPs, CLECs should be indifferent between serving ISPs and other customers. Instead, CLECs have not contradicted ILEC assertions that more than ninety percent of CLEC reciprocal compensation billings are for ISP-bound traffic,¹⁶⁷ suggesting that there may be a considerable margin between current reciprocal compensation rates and the actual costs of transport and

¹⁶² See, e.g., Letter from Jonathan Askin, ALTS, to Magalie Roman Salas, Secretary, FCC (Dec. 18, 2000) (offering evidence that dial-up traffic per household will grow only 7%/year from 1998 to 2003 and that dial-up household penetration will decline between 2000 and 2003); Letter from Jonathan Askin, ALTS, to Magalie Roman Salas, Secretary, FCC (Jan. 9, 2001)(citing, *inter alia*, Merrill Lynch estimate of 7% annual increased Internet usage per user between 1999 and 2003, and PricewaterhouseCoopers' study suggesting that Internet usage per user declined from 1999 to 2000).

¹⁶³ See, e.g., Letter from Robert T. Blau, BellSouth, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC (Dec. 22, 2000) (forecasting 42% annual growth in total Internet access minutes between 2000 and 2003); *but see* Dan Beyers, "Internet Use Slipped Late Last Year," *Washingtonpost.com*, Feb. 22, 2001, at E10 (noting decline in average time spent online in 2000).

¹⁶⁴ See, e.g., Time Warner Remand Comments at 4-5; Centennial Remand Comments at 2, 6-7.

¹⁶⁵ *Access Charge Reform Order*, 12 FCC Rcd at 16134; *MTS/WATS Market Structure Order*, 97 FCC 2d at 720-721.

¹⁶⁶ See *infra* para. 93.

¹⁶⁷ See Letter from Robert T. Blau, BellSouth, *et al*, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, at 4 (Nov. 3, 2000); SBC Remand Comments at 42, 51, 57.

termination.¹⁶⁸ Finally, there is reason to believe that our failure to act, rather than the actions we take here, would lead to higher rates for Internet access, as ILECs seek to recover their reciprocal compensation liability, which they incur on a minute-of-use basis, from their customers who call ISPs.¹⁶⁹ Alternatively, ILECs might recover these costs from all of their local customers, including those who do not call ISPs.¹⁷⁰ There is no public policy rationale to support a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access.¹⁷¹

88. We also are not convinced by the claim of CLECs that limiting intercarrier compensation for ISP-bound traffic will result in a windfall for the incumbent LECs.¹⁷² The CLECs argue that the incumbents' local rates are set to recover the costs of originating and terminating calls and that the ILECs avoid termination costs when their end-users call ISP customers served by CLECs. The record does not establish that ILECs necessarily avoid costs when they deliver calls to CLECs,¹⁷³ and CLECs have not demonstrated that ILEC end-user rates are designed to recover from the originating end-user the costs of delivering calls to ISPs. The ILECs point out that, in response to their complaints about the costs associated with delivering traffic to ISPs, the Commission has directed them to seek permission from state regulators to raise the rates they charge *the ISPs*, an implicit acknowledgement that ILECs may not recover all of their costs from the originating end-user.¹⁷⁴

¹⁶⁸ We do not suggest that it costs CLECs less to serve ISPs than other types of customers. New switching technologies make it less costly to serve *all* customers. If, however, costs are lower than prevailing reciprocal compensation rates, then CLECs are likely to target customers, such as ISPs, with predominantly incoming traffic, in order to maximize the resulting profit.

¹⁶⁹ See, e.g., Verizon Remand Comments at 16.

¹⁷⁰ *Id.*

¹⁷¹ Most CLECs assert that they compete with ILECs on service, not price, and that the rates they charge to ISPs are comparable to the ILEC rates for the same services. See, e.g., Time Warner Remand Comments at 5. We acknowledge, however, that any CLECs that use reciprocal compensation payments to offer below cost service to ISPs may be unable to continue that practice under the compensation regime we adopt here. We reiterate that we see no public policy reason to maintain a subsidy running from ILEC end-users to ISPs and their customers.

¹⁷² See, e.g., Letter from Robert W. McCausland, Allegiance Telecom; Kelsi Reeves, Time Warner Telecom; Richard J. Metzger, Focal, R. Gerard Salemme, XO Communications; and Heather B. Gold, Intermedia; to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, at 6 (Oct. 20, 2000).

¹⁷³ See, e.g., SBC Remand Reply Comments at 31-32 (explaining how an ILEC may incur additional switching and transport costs when its end-user customer calls an ISP served by a CLEC).

¹⁷⁴ See *Access Charge Reform Order*, 12 FCC Rcd at 16134; see also *MTS/WATS Market Structure Order*, 97 FCC 2d at 721 (the local business-line rate paid by ISPs subsumes switching costs). Moreover, most states have adopted price cap regulation of local rates, in which case rates do not necessarily correlate to cost in the manner the CLECs suggest. See "Price Caps Standard Form of Telco Regulation in 70% of States," *Communications Daily*, 1999 WL 7580319 (Sept. 8, 1999).

3. Relationship to Section 251(b)(5)

89. It would be unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors,¹⁷⁵ while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed.¹⁷⁶ Because we are concerned about the superior bargaining power of incumbent LECs, we will not allow them to “pick and choose” intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, *only* if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5)¹⁷⁷ at the same rate. Thus, if the applicable rate cap is \$.0010/mou, the ILEC must offer to exchange section 251(b)(5) traffic at that same rate. Similarly, if an ILEC wishes to continue to exchange ISP-bound traffic on a bill and keep basis in a state that has ordered bill and keep, it must offer to exchange all section 251(b)(5) traffic on a bill and keep basis.¹⁷⁸ For those incumbent LECs that choose *not* to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts.¹⁷⁹ This “mirroring” rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic.

90. This is the correct policy result because we see no reason to impose different rates for ISP-bound and voice traffic. The record developed in response to the *Inter-carrier Compensation NPRM* and the *Public Notice* fails to establish any inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP.¹⁸⁰

¹⁷⁵ The four largest incumbent LECs – SBC, BellSouth, Verizon, and Qwest – estimate that they owed over \$2 billion in reciprocal compensation for ISP-bound traffic in 2000. See, e.g., Letter from Robert T. Blau, BellSouth, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC (Jan. 16, 2001).

¹⁷⁶ More calls are made from wireless phones to wireline phones than vice-versa. The ILECs, therefore, are net recipients of reciprocal compensation from wireless carriers.

¹⁷⁷ Pursuant to the analysis we adopt above, section 251(b)(5) applies to telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that is not interstate or intrastate access traffic delivered to an IXC or an information service provider, and to telecommunications traffic between a LEC and a CMRS provider that originates and terminates within the same MTA. See *supra* § IV.B.

¹⁷⁸ If, however, a state has ordered bill and keep for ISP-bound traffic only with respect to a particular interconnection agreement, as opposed to state-wide, we do not require the incumbent LEC to offer to exchange all section 251(b)(5) traffic on a bill and keep basis. This limitation is necessary so that an incumbent is not required to deliver all section 251(b)(5) in a state on a bill and keep basis even though it continues to pay compensation for most ISP-bound traffic in that state. See, e.g., Letter from John W. Kure, Qwest, to Magalie Roman Salas, Secretary, FCC (April 2, 2001)(citing, for example, Washington state, where 16% of ISP-bound traffic is subject to bill and keep). In those states, the rate caps we adopt here will apply to ISP-bound traffic that is not subject to bill and keep under the particular interconnection agreement if the incumbent LEC offers to exchange all section 251(b)(5) traffic subject to those rate caps.

¹⁷⁹ ILECs may make this election on a state-by-state basis.

¹⁸⁰ Many commenters argue that there is, in fact, no difference between the cost and network functions involved in terminating ISP-bound calls and the cost and functions involved in terminating other calls to users of the public (continued....)

Assuming the two calls have otherwise identical characteristics (e.g., duration and time of day), a LEC generally will incur the same costs when delivering a call to a local end-user as it does delivering a call to an ISP.¹⁸¹ We therefore are unwilling to take any action that results in the establishment of separate intercarrier compensation rates, terms, and conditions for local voice and ISP-bound traffic.¹⁸² To the extent that the record indicates that per minute reciprocal compensation rate levels and rate structures produce inefficient results, we conclude that the problems lie with this recovery mechanism in general and are not limited to any particular type of traffic.

91. We are not persuaded by commenters' claims that the rates for delivery of ISP-bound traffic and local voice traffic should differ because delivering a data call to an ISP is inherently less costly than delivering a voice call to a local end-user. In an attached declaration to Verizon's comments, William Taylor argues that reciprocal compensation rates may reflect switching costs associated with both originating and terminating functions, despite the fact that ISP traffic generally flows in only one direction.¹⁸³ If correct, however, this observation suggests a need to develop rates or rate structures for the transport and termination of *all* traffic that exclude costs associated solely with originating switching.¹⁸⁴ Mr. Taylor similarly argues that ISP-bound calls generally are longer in duration than voice calls, and that a per-minute rate structure applied to calls of longer duration will spread the fixed costs of these calls over more minutes, resulting in lower per-minute costs, and possible over recovery of the fixed costs incurred.¹⁸⁵ Any possibility of over recovery associated with calls (to ISPs or otherwise) of longer than average duration can be eliminated through adoption of rate structures that provide

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switched telephone network. *See, e.g.*, AOL Comments at 10-12 ("there is absolutely no technical distinction, and therefore no cost differences, between the way an incumbent LEC network handles ISP-destined traffic and the way it handles other traffic within the reciprocal compensation framework."); AT&T Comments at 10-11 ("[T]here is no economic justification for subjecting voice and data traffic to different compensation rules." "ILECs have not demonstrated, and cannot demonstrate, that the costs of transporting and terminating data traffic differ categorically from the costs of transporting and terminating ordinary voice traffic."); Choice One Comments at 8 ("[C]osts do not vary significantly based on whether data or voice traffic is being transmitted."); Corecomm Reply at 2 (network functions are identical whether a carrier is providing service to an ISP or any other end-user); Cox Comments at 7 & Exhibit 2, Statement of Gerald W. Brock at 2 ("None of the distinctions between ISP calls and average calls relate to a cost difference for handling the calls."); MediaOne Comments at 4 (LECs incur the same costs for terminating calls to an ISP as they do for terminating any other local calls); Time Warner Comments at 9 ("[A]ll LECs perform the same functions when transporting and delivering calls to ISP end-users as they do when transporting and delivering calls to other end-users. When LECs perform the same functions, they incur the same costs."); Letter from Donald F. Shepherd, Time Warner Telecom, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC (Feb. 28, 2001)(disputing claim that CLEC switching costs are as low as the ILECs argue).

¹⁸¹ *See, e.g.*, Cox Comments at Exhibit 2, Statement of Gerald W. Brock at 2.

¹⁸² *See, e.g.*, Intermedia Comments at 3-4 (arguing that the rates for transport and termination of ISP-bound traffic must be identical to the rates established for the transport and termination of local traffic).

¹⁸³ *See* Verizon Remand Comments, Declaration of William E. Taylor at 14, 17.

¹⁸⁴ *See* Time Warner Remand Reply Comments, Exhibit 1, Declaration of Don J. Wood at 14. *See also* Letter from John W. Kure, Qwest, to Magalie Roman Salas, Secretary, FCC, Attachment at 7-8 (Oct. 26, 2000).

¹⁸⁵ *See* Verizon Remand Comments, Declaration of William E. Taylor at 14-15.

for recovery of per-call costs on a per-call basis, and minute-of-use costs on a minute-of-use basis.¹⁸⁶ We also are not convinced that ISP-bound calls have a lower load distribution (*i.e.*, number and duration of calls in the busy hour as a percent of total traffic), and that these calls therefore impose lower additional costs on a network.¹⁸⁷ It is not clear from the record that there is any “basis to speculate that the busy hour for calls to ISPs will be different than the CLEC switch busy hour,”¹⁸⁸ especially when the busy hour is determined by the flow of both voice and data traffic.

92. Nor does the record demonstrate that CLECs and ILECs incur different costs in delivering traffic that would justify disparate treatment of ISP-bound traffic and local voice traffic under section 251(b)(5). Ameritech maintains that it costs CLECs less to deliver ISP-bound traffic than it costs incumbent LECs to deliver local traffic because CLECs can reduce transmission costs by locating their switches close to ISPs.¹⁸⁹ The proximity of the ISP or other end-user to the delivering carrier’s switch, however, is irrelevant to reciprocal compensation rates.¹⁹⁰ The Commission concluded in the *Local Competition Order* that the non-traffic sensitive cost of the local loop is not an “additional” cost of terminating traffic that a LEC is entitled to recover through reciprocal compensation.¹⁹¹

93. SBC argues that CLECs should not be entitled to symmetrical reciprocal compensation rates for the delivery of ISP-bound traffic, because CLECs do not provide end office switching functionality to their ISP customers and therefore do not incur the same costs that ILECs incur when delivering local voice traffic. Specifically, SBC claims that the switching functionality that CLECs provide to ISPs is more like a trunk-to-trunk connection than the switching functionality normally provided at end offices.¹⁹² SBC also claims that CLECs are able to reduce the costs of delivering ISP-bound traffic by using new, less expensive switches that do not perform the functions necessary for both the origination and delivery of two-way voice traffic.¹⁹³ Similarly, GTE asserts that new technologies and system architectures make it possible for some CLECs to reduce costs by entirely avoiding circuit-switching on calls “to selected

¹⁸⁶ See Time Warner Remand Reply Comments, Exhibit 1, Declaration of Don J. Wood at 10-11. Time Warner also disputes that the “average duration of calls to ISPs has been accurately measured to date.” *Id.* at 11.

¹⁸⁷ See Verizon Remand Comments, Declaration of William E. Taylor at 17-18.

¹⁸⁸ See Time Warner Remand Reply Comments, Exhibit 1, Declaration of Don J. Wood at 14-15.

¹⁸⁹ See Letter from Gary L. Phillips, Ameritech, to Magalie Roman Salas, Secretary, FCC, Attachment at 5 (Sept. 14, 1999). See also SBC Remand Comments at 32-33 (referring to Global NAPS Comments, Exhibit 1, Statement of Fred Goldstein at 6, which describes CLEC reduction of loop costs through collocation); Letter from Melissa Newman, U S West, to Magalie Roman Salas, Secretary, FCC, Attachment at 8 (Dec. 2, 1999).

¹⁹⁰ See Time Warner Remand Reply Comments, Exhibit 1, Declaration of Don J. Wood at 25.

¹⁹¹ See *Local Competition Order*, 11 FCC Rcd at 16025.

¹⁹² SBC Remand Comments at 33.

¹⁹³ SBC Remand Comments at 33-34 (referring, *inter alia*, to “managed modem” switches).

telephone numbers.”¹⁹⁴ CLECs respond, however, that they are in fact using the same circuit switching technology used by ILECs to terminate the vast portion of Internet traffic.¹⁹⁵ In any event, it is not evident from any of the comments in the record that the apparent efficiencies associated with new system architectures apply exclusively to data traffic, and not to voice traffic as well. ILECs and CLECs alike are free to deploy new technologies that provide more efficient solutions to the delivery of certain types of traffic,¹⁹⁶ and these more efficient technologies will, over time, be reflected in cost-based reciprocal compensation rates. The overall record in this proceeding does not lead us to conclude that any system architectures or technologies widely used by LECs result in material differences between the cost of delivering ISP-bound traffic and the cost of delivering local voice traffic, and we see no reason, therefore, to distinguish between voice and ISP traffic with respect to intercarrier compensation.

94. Some CLECs take this argument one step further. Whatever the merits of bill and keep or other reforms to intercarrier compensation, they say, any such reform should be undertaken only in the context of a comprehensive review of *all* intercarrier compensation regimes, including the interstate access charge regime.¹⁹⁷ First, we reject the notion that it is inappropriate to remedy some troubling aspects of intercarrier compensation until we are ready to solve all such problems. In the most recent of our access charge reform orders, we recognized that it is “preferable and more reasonable to take several steps in the right direction, even if incomplete, than to remain frozen” pending “a perfect, ultimate solution.”¹⁹⁸ Moreover, it may

¹⁹⁴ GTE Comments at 7-8 (noting the existence of SS7 bypass devices that can avoid circuit switching and arguing that competitive LEC networks are far less complex and utilize fewer switches than incumbent LEC networks); GTE Reply Comments at 16 (compensating competitive LECs based on an incumbent LEC’s costs inflates the revenue that competitive LECs receive); Letter from W. Scott Randolph, GTE, to Magalie Roman Salas, Secretary, FCC, Attachment (Dec. 8, 1999 (new generation traffic architectures may use SS7 Gateways instead of more expensive circuit-switched technology)).

¹⁹⁵ See, e.g., Letter from John D. Windhausen, Jr., ALTS, and H. Russell Frisby, Jr., CompTel, to Kyle Dixon, Legal Advisor, Chairman Michael Powell, FCC, at 4-5 (March 16, 2001)(Focal is testing two softswitches, but as of now all ISP-bound traffic terminated by Focal uses traditional circuit switches; Allegiance Telecom has a single softswitch in its network; Advanced Telecom Group, Inc. is in the testing phase of softswitch deployment; Pac-West Telecomm, Inc., does not have any softswitches in its network; e.spire uses only circuit switches to terminate ISP-bound traffic); Time Warner Remand Reply Comments, Exhibit 1, Declaration of Don J. Wood at 27 (Time Warner is “deploying fully functional end office switches”); Letter from Donald F. Shephard, Time Warner, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, at 3 (February 28, 2001)(Time Warner “does not provide managed modem services.” Like the ILECs, Time Warner “has an extensive network of circuit switched technology” and has only just begun to deploy softswitches); Letter from Teresa Marrero, AT&T, to Magalie Roman Salas, Secretary, FCC, at 1 (April 11, 2001)(“Virtually all of AT&T’s ISP-bound traffic is today terminated using full circuit switches.”).

¹⁹⁶ See Time Warner Remand Reply Comments, Exhibit 1, Declaration of Don J. Wood at 28; see also Letter from Donald F. Shephard, Time Warner, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, at 3 (Feb. 28, 2001)(“if softswitch technology will lower carriers’ costs, then all carriers, including the ILECs[,] will have incentive to deploy them”); Letter from John D. Windhausen, Jr., ALTS, and H. Russell Frisby, Jr., CompTel, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, at 4 (February 16, 2001)(same).

¹⁹⁷ See, e.g., Letter from Karen L. Gulick, Harris, Wiltshire & Grannis, to Magalie Roman Salas, Secretary, FCC, at 1 (Dec. 22, 2000).

¹⁹⁸ See *CALLS Order*, 15 FCC Rcd at 12974.

make sense to begin reform by rationalizing intercarrier compensation between competing providers of telecommunications services, to encourage efficient entry and the development of robust competition, rather than waiting to complete reform of the interstate access charge regime that applies to incumbent LECs, which was created in a monopoly environment for quite different purposes. Second, the interim compensation scheme we adopt here is fully consistent with the course the Commission has pursued with respect to access charge reform. A primary feature of the *CALLS Order* is the phased elimination of the PICC and CCL,¹⁹⁹ two intercarrier payments we found to be inefficient, in favor of greater recovery from end-users through an increased SLC, an end-user charge.²⁰⁰ Finally, like the *CALLS Order*, the interim regime we adopt here “provides relative certainty in the marketplace” pending further Commission action, thereby allowing carriers to develop business plans, attract capital, and make intelligent investments.²⁰¹

D. Conclusion

95. In this Order, we strive to balance the need to rationalize an intercarrier compensation scheme that has hindered the development of efficient competition in the local exchange and exchange access markets with the need to provide a fair and reasonable transition for CLECs that have come to depend on intercarrier compensation revenues. We believe that the interim compensation regime we adopt herein responds to both concerns. The regime should reduce carriers’ reliance on carrier-to-carrier payments as they recover more of their costs from end-users, while avoiding a “flash cut” to bill and keep which might upset legitimate business expectations. The interim regime also provides certainty to the industry during the time that the Commission considers broader reform of intercarrier compensation mechanisms in the *NPRM* proceeding. Finally, we hope this Order brings an end to the legal confusion resulting from the Commission’s historical treatment of ISP-bound traffic, for purposes of jurisdiction and compensation, and the statutory obligations and classifications adopted by Congress in 1996 to promote the development of competition for all telecommunications services. We believe the analysis set forth above amply responds to the court’s mandate that we explain how our conclusions regarding ISP-bound traffic fit within the governing statute.²⁰²

¹⁹⁹ The PICC, or presubscribed interexchange carrier charge, and the CCLC, carrier common line charge, are charges levied by incumbent LECs upon IXCs to recover portions of the interstate-allocated cost of subscriber loops. See 47 C.F.R. §§ 69.153, 69.154.

²⁰⁰ *CALLS Order*, 15 FCC Rcd at 12975 (permitting a greater proportion of the local loop costs of primary residential and single-line business customers to be recovered through the SLC).

²⁰¹ *CALLS Order*, 15 FCC Rcd at 12977 (The *CALLS* proposal is aimed to “bring lower rates and less confusion to consumers; and create a more rational interstate rate structure. This, in turn, will support more efficient competition, more certainty for the industry, and permit more rational investment decisions.”).

²⁰² *Bell Atlantic*, 206 F.3d at 8.

V. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

96. As required by the Regulatory Flexibility Act (RFA),²⁰³ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Declaratory Ruling and NPRM*.²⁰⁴ The Commission sought and received written comments on the IRFA. The Final Regulatory Flexibility Analysis (FRFA) in this Order on Remand and Report and Order conforms to the RFA, as amended.²⁰⁵ To the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to our rules, or statements made in preceding sections of this Order on Remand and Report and Order, the rules and statements set forth in those preceding sections shall be controlling.

1. Need for, and Objectives of, this Order on Remand and Report and Order

97. In the *Declaratory Ruling*, we found that we did not have an adequate record upon which to adopt a rule regarding intercarrier compensation for ISP-bound traffic, but we indicated that adoption of a rule would serve the public interest.²⁰⁶ We sought comment on two alternative proposals, and stated that we might issue new rules or alter existing rules in light of the comments received.²⁰⁷ Prior to the release of a decision, the Court of Appeals for the District of Columbia Circuit vacated certain provisions of the *Declaratory Ruling* and remanded the matter to the Commission.²⁰⁸

98. This Order on Remand and Report and Order addresses the concerns of various parties to this proceeding and responds to the court's remand. The Commission exercises jurisdiction over ISP-bound traffic pursuant to section 201, and establishes a three-year interim intercarrier compensation mechanism for the exchange of ISP-bound traffic that applies if incumbent LECs offer to exchange section 251(b)(5) traffic at the same rates. During this interim period, intercarrier compensation for ISP-bound traffic is subject to a rate cap that declines over the three-year period, from \$.0015/mou to \$.0007/mou. The Commission also imposes a cap on the total ISP-bound minutes for which a LEC may receive this compensation under a particular interconnection agreement equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to receive compensation during the first quarter of 2001, increased

²⁰³ See 5 U.S.C. § 603.

²⁰⁴ *Declaratory Ruling*, 14 FCC Red at 3710-13.

²⁰⁵ See 5 U.S.C. § 604. The Regulatory Flexibility Act, 5 U.S.C. § 601 *et. seq.*, was amended by the "Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), which was enacted as Title II of the Contract With America Advancement Act of 1996, Pub.L. No. 104-121, 110 Stat. 847 (1996) (CWAAA).

²⁰⁶ *Declaratory Ruling and Intercarrier Compensation NPRM*, 14 FCC Red at 3707.

²⁰⁷ *Declaratory Ruling and Intercarrier Compensation NPRM*, 14 FCC Red at 3711.

²⁰⁸ See *Bell Atlantic*, 206 F.3d 1.

by ten percent in each of the first two years of the transition. If an incumbent LEC does not offer to exchange all section 251(b)(5) traffic subject to the rate caps set forth herein, the exchange of ISP-bound traffic will be governed by the reciprocal compensation rates approved or arbitrated by state commissions.

2. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA

99. The Office of Advocacy, U.S. Small Business Administration (Office of Advocacy) submitted two filings in response to the IRFA.²⁰⁹ In these filings, the Office of Advocacy raises significant issues regarding our description, in the IRFA, of small entities to which our rules will apply, and the discussion of significant alternatives considered and rejected. Specifically, the Office of Advocacy argues that the Commission has failed accurately to identify all small entities affected by the rulemaking by refusing to characterize small incumbent local exchange carriers (LECs), and failing to identify small ISPs, as small entities.²¹⁰ We note that, in the IRFA, we stated that we excluded small incumbent LECs from the definitions of “small entity” and “small business concern” because such companies are either dominant in their field of operations or are not independently owned and operated.²¹¹ We also stated, however, that we would nonetheless, out of an abundance of caution, include small incumbent LECs in the IRFA, and did so.²¹² Small incumbent LECs and other relevant small entities are included in our present analysis as described below.

100. The Office of Advocacy also states that Internet service providers (ISPs) are directly affected by our actions, and therefore should be included in our regulatory flexibility analysis. We find, however, that rates charged to ISPs are only indirectly affected by our actions. We have, nonetheless, briefly discussed the effect on ISPs in the primary text of this Order.²¹³

101. Last, the Office of Advocacy also argues that the Commission has failed to adequately address significant alternatives that accomplish our stated objective and minimize any significant economic impact on small entities.²¹⁴ We note that, in the IRFA, we described the nature and effect of our proposed actions, and encouraged small entities to comment (including giving comment on possible alternatives). We also specifically sought comment on the two alternative proposals for implementing intercarrier compensation – one that resolved intercarrier compensation pursuant to the negotiation and arbitration process set forth in Section 252, and

²⁰⁹ Office of Advocacy, U.S. Small Business Administration *ex parte*, May 27, 1999; Office of Advocacy, U.S. Small Business Administration *ex parte*, June 14, 1999.

²¹⁰ Office of Advocacy, U.S. Small Business Administration *ex parte*, May 27, 1999, at 1-3; Office of Advocacy, U.S. Small Business Administration *ex parte*, June 14, 1999, at 2-3.

²¹¹ *Declaratory Ruling and Intercarrier Compensation NPRM*, 14 FCC Rcd at 3711.

²¹² *Declaratory Ruling and Intercarrier Compensation NPRM*, 14 FCC Rcd at 3711.

²¹³ See *supra* paras. 87-88.

²¹⁴ Office of Advocacy, U.S. Small Business Administration *ex parte*, June 14, 1999, at 3.

another that would have had us adopt a set of federal rules to govern such intercarrier compensation.²¹⁵ We believe, therefore, that small entities had a sufficient opportunity to comment on alternative proposals.

102. NTCA also filed comments, not directly in response to the IRFA, **urging the** Commission to fulfill its obligation to consider small telephone companies.²¹⁶ Some commenters also raised the issue of small entity concerns over increasing Internet traffic and the use of Extended Area Service (EAS) arrangements.²¹⁷ We are especially sensitive to the needs of rural **and** small LECs that handle ISP-bound traffic, but we find that the costs that LECs incur in *originating* this traffic extends beyond the scope of the present proceeding and should not dictate the appropriate approach to compensation for *delivery* of ISP-bound traffic.

3. **Description and Estimate of the Number of Small Entities to Which Rules Will Apply**

103. The rules we are adopting apply to local exchange carriers. To estimate the number of small entities that would be affected by this economic impact, we first consider the statutory definition of "small entity" under the RFA. The RFA generally defines "small entity" as having the same meaning as the term "small business," "small organization," and "small governmental jurisdiction."²¹⁸ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities.²¹⁹ Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) **is not dominant in its field of operation;** and (3) meets any additional criteria established by the SBA.²²⁰ The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.²²¹

104. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its Carrier Locator report, derived from filings made in connection with the Telecommunications Relay Service (TRS).²²²

²¹⁵ *Declaratory Ruling [IRFA]*, 14 FCC Red at 3711 (para. 39); see also *Declaratory Ruling*, 14 FCC Red at 3707-08 (paras. 30-31).

²¹⁶ NTCA Comments at vi, 15.

²¹⁷ See, e.g., ICORE Comments at 1-7; IURC Comments at 7; Richmond Telephone Company Comments at 1-8.

²¹⁸ 5 U.S.C. § 601(6).

²¹⁹ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

²²⁰ 15 U.S.C. § 632.

²²¹ 13 C.F.R. § 121.201.

²²² FCC, Carrier Locator: Interstate Service Providers, Figure 1 (Jan. 2000) (*Carrier Locator*).

According to data in the most recent report, there are 4,144 interstate carriers.²²³ These carriers include, *inter alia*, incumbent local exchange carriers, competitive local exchange carriers, competitive access providers, interexchange carriers, other wireline carriers and service providers (including shared-tenant service providers and private carriers), operator service providers, pay telephone operators, providers of telephone toll service, wireless carriers and services providers, and resellers.

105. We have included small incumbent local exchange carriers (LECs) in this regulatory flexibility analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."²²⁴ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.²²⁵ We have therefore included small incumbent LECs in this regulatory flexibility analysis, although we emphasize that this action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

106. Total Number of Telephone Companies Affected. The United States Bureau of the Census (the Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.²²⁶ This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."²²⁷ For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by the decisions and rule changes adopted in this proceeding.

²²³ *Carrier Locator* at Fig. 1.

²²⁴ 5 U.S.C. § 601(3).

²²⁵ Office of Advocacy, U.S. Small Business Administration *ex parte*, May 27, 1999, at 1-3; Office of Advocacy, U.S. Small Business Administration *ex parte*, June 14, 1999, at 2-3. The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. See, *e.g.*, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket, 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

²²⁶ United States Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (1992 Census).

²²⁷ 15 U.S.C. § 632(a)(1).

107. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.²²⁸ According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.²²⁹ All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rule changes adopted in this proceeding.

108. *Local Exchange Carriers, Interexchange Carriers, Competitive Access Providers, Operator Service Providers, and Resellers.* Neither the Commission nor the SBA has developed a definition particular to small LECs, interexchange carriers (IXCs), competitive access providers (CAPs), operator service providers (OSPs), or resellers. The closest applicable definition for these carrier-types under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.²³⁰ According to our most recent TRS data, there are 1,348 incumbent LECs and 212 CAPs and competitive LECs.²³¹ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 1,348 incumbent LECs and fewer than 212 CAPs and competitive LECs that may be affected by the decisions and rule changes adopted in this proceeding.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

109. The rule we are adopting imposes direct compliance requirements on interconnected incumbent and competitive LECs, including small LECs. In order to comply with this rule, these entities will be required to exchange their ISP-bound traffic subject to the rules we are adopting above.

²²⁸ 1992 Census at Firm Size 1-123.

²²⁹ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4813.

²³⁰ 13 C.F.R. § 121.201, SIC Code 4813.

²³¹ Carrier Locator at Fig. 1.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

110. In the *Declaratory Ruling and Intercarrier Compensation NPRM* the Commission proposed various approaches to intercarrier compensation for ISP-bound traffic.²³² During the course of this proceeding the Commission considered and rejected several alternatives.²³³ None of the significant alternatives considered would appear to succeed as much as our present rule in balancing our desire to minimize any significant economic impact on relevant small entities, with our desire to deal with the undesirable incentives created under the current reciprocal compensation regime that governs the exchange of ISP-bound traffic in most instances. We also find that for small ILECs and CLECs the administrative burdens and transaction costs of intercarrier compensation will be minimized to the extent that LECs begin a transition toward recovery of costs from end-users, rather than other carriers.

111. Although a longer transition period was considered by the Commission, it was rejected because a three-year period was considered sufficient to accomplish our policy objectives with respect to all LECs.²³⁴ Differing compliance requirements for small LECs or exemption from all or part of this rule is inconsistent with our policy goal of addressing the market distortions attributable to the prevailing intercarrier compensation mechanism for ISP-bound traffic and beginning a smooth transition to bill-and-keep.

Report to Congress: The Commission will send a copy of this Order on Remand and Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.²³⁵ In addition, the Commission will send a copy of this Order on Remand and Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this Order on Remand and Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.²³⁶

VI. ORDERING CLAUSES

112. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i) and (j), 201-209, 251, 252, 332, and 403 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-209, 251, 252, 332, and 403, and Section 553 of Title 5, United States Code, 5 U.S.C. § 553, that this Order on Remand and Report and Order and revisions to Part 51 of the Commission's rules, 47 C.F.R. Part 51, ARE ADOPTED. This Order on Remand and Report and Order and the rule revisions adopted herein will be effective 30 days after publication in the Federal Register except that, for good cause shown, as set forth in paragraph 82 of this Order, the

²³² *Declaratory Ruling*, 14 FCC Rcd at 3707-10.

²³³ See *supra* paras. 67-76 (rejecting application of a reciprocal compensation mechanism to ISP-bound traffic).

²³⁴ We note, however, that the interim regime we adopt here governs for 36 months or until further action by the Commission, *whichever is longer*.

²³⁵ 5 U.S.C. § 801(a)(1)(A).

²³⁶ See 5 U.S.C. § 604(b).

provision of this Order prohibiting carriers from invoking section 252(i) of the Act to opt into an existing interconnection agreement as it applies to rates paid for the exchange of ISP-bound traffic will be effective immediately upon publication of this Order in the Federal Register.

113. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Order on Remand and Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A
List of Commenters in CC Docket Nos. 96-98, 99-68

Comments Filed in Response to the June 23, 2000 Public Notice

Advanced TelCom Group, Inc.; e.spire Communications, Inc.; Intermedia Communications, Inc.;
KMC Telecom, Inc.; Nextlink Communications, Inc.; The Competitive Telecommunications
Association
Alliance for Public Technology
Association of Communications Enterprises
Association for Local Telecommunications Services
AT&T Corp. (AT&T)
BellSouth Corporation
Cablevision Lightpath, Inc.
California State and California Public Utilities Commission
Centennial Communications Corp. (Centennial)
Florida Public Service Commission
Focal Communications Corporation, Allegiance Telecom, Inc., and Adelphia Business Solutions,
Inc.
General Services Administration
Global NAPs, Inc.
ICG Telecom Group, Inc.
Keep America Connected; National Association of the Deaf; National Association of
Development Organizations; National Black Chamber of Commerce; New York Institute of
Technology; Ocean of Know; Telecommunications for the Deaf, Inc.; United States Hispanic
Chamber of Commerce
Massachusetts Department of Telecommunications & Energy
Missouri Public Service Commission
National Consumers League
National Exchange Carrier Association, Inc.
New York Department of Public Service
Pac-West Telecomm, Inc.
Pennsylvania Office of Consumer Advocate
Prism Communications Services, Inc.
Qwest Corporation
RCN Telecom Services, Inc. and Connect Communications Corporation
RNK, Inc.
Rural Independent Competitive Alliance
SBC Communications, Inc. (SBC)
Sprint Corporation (Sprint)
Texas Public Utility Commission
Time Warner Telecom Inc. (Time Warner)
-United States Telecom Association
Verizon Communications (Verizon)
Western Telephone Integrated Communications, Inc.
WorldCom, Inc.

Reply Comments Filed in Response to the June 23, 2000 Public Notice

Adelphia Business Solutions, Inc.; Allegiance TeleCom, Inc., Focal Communications Corporation,
and RCN Telcom Services, Inc.

AT&T Corp.

BellSouth Corporation

Cablevision Lightpath, Inc.

Cincinnati Bell Telephone Company

Commercial Internet Exchange Association

Converscent Communications, LLC

Covad Communication Company

Duckenfield, Pace

e.spire Communications, Inc., Intermedia Communications Inc., KMC Telecom, Inc.,

NEXTLINK Communications, Inc., The Association for Local Telecommunications Services,
and The Competitive Telecommunications Association

General Services Administration

Global NAPs, Inc.

ICG Telecom Group, Inc.

Keep America Connected; National Association of Development Organizations; National Black
Chamber of Commerce; New York Institute of Technology; United States Hispanic Chamber
of Commerce

Pac-West Telecomm, Inc.

Prism Communications Services, Inc.

Qwest Corporation

Riter, Josephine

SBC Communications, Inc. (SBC)

Sprint Corporation

Time Warner Telecom Inc. (Time Warner)

US Internet Industry Association

United States Telecom Association

Verizon Communications (Verizon)

Western Telephone Integrated Communications, Inc.

WorldCom, Inc.

Comments Filed in Response to the February 26, 1999 Notice of Proposed Rulemaking

Airtouch Paging
America Online, Inc. (AOL)
Ameritech
Association for Local Telecommunications Services
AT&T Corp. (AT&T)
Baldwin, Jesse
Bardsley, June
Bell Atlantic Corporation
BellSouth Corporation
Cablevision Lightpath, Inc.
California Public Utilities Commission
Choice One Communications (Choice One)
Cincinnati Bell Telephone Company
Commercial Internet eXchange Association
Competitive Telecommunications Association)
Corecomm Limited
Cox Communications, Inc. (Cox)
CT Cube, Inc. & Leaco Rural Telephone Cooperative, Inc.
CTSI, Inc.
Florida Public Service Commission
Focal Communications Corporation
Frontier Corporation
General Communication, Inc.
General Services Administration
Global NAPs Inc.
GST Telecom, Inc.
GTE Services Corporation (GTE)
GVNW Consulting, Inc.
Hamilton, Dwight
ICG Communications
ICORE, Inc.
Indiana Utility Regulatory Commission
Information Technology Association of America
Intermedia Communications Inc. (Intermedia)
Keep America Connected; Federation of Hispanic Organizations of the Baltimore Metropolitan Area, Inc; Latin American Women and Supporters; League of United Latin American Citizens; Massachusetts Assistive Technology Partnership; National Association of Commissions for Women; National Association of Development Organizations; National Hispanic Council on Aging; New York Institute of Technology; Resources for Independent Living; Telecommunications Advocacy Project; The Child Health Foundation; The National Trust for the Development of African American Men; United Homeowners Association; United Seniors Health Cooperative
KMC Telecom Inc.
Lewis, Shawn
Lloyd, Kimberly, D.

MCI WorldCom, Inc.
MediaOne Group (Media One)
Miner, George
Missouri Public Service Commission
National Telephone Cooperative Association
New York State Department of Public Service
Pennsylvania Public Utility Commission
Personal Communications Industry Assoc.
Public Utility Commission of Texas
Prism Communications Services, Inc.
RCN Telecom Services, Inc.
Reinking, Jerome C.
Richmond Telephone Company
RNK Inc.
SBC Communications
Schaefer, Karl W.
Sefton, Tim
Shook, Ofelia E.
Sprint Corporation
John Staurulakis, Inc.
Telecommunications Resellers Association
Telephone Association of New England
Thomas, William J.
Time Warner Telecom Inc. (Time Warner)
United States Telephone Association
Verio Inc.
Vermont Public Service Board
Virgin Islands Telephone Corporation
Wisconsin State Telecommunications Association

Reply Comments Filed in Response to the February 26, 1999 Notice of Proposed Rulemaking

Airtouch Paging
Ameritech
Association for Local Telecommunications Services
AT&T Corp.
Bell Atlantic Corporation
BellSouth Corporation and BellSouth Telecommunications, Inc.
Competitive Telecommunications Association
Corecomm Limited (CoreComm)
Cox Communications, Inc. (Cox)
Focal Communications Corporation
General Services Administration
Global NAPs Inc.
GST Telecom Inc.
GTE Services Corporation (GTE)
GVNW Consulting, Inc.

ICG Communications, Inc
Illinois Commerce Commission
Intermedia Communications Inc.
KMC Telecom Inc.
MCI WorldCom, Inc.
National Exchange Carrier Association, Inc.
National Telephone Cooperative Association
Network Plus, Inc.
New York State Department of Public Services
Pac-West Telecomm., Inc.
Pennsylvania Public Utility Commission
Personal Communications Industry Association
Prism Communications Services, Inc.
Public Service Commission of Wisconsin
RCN Telecom Services
RNK Telecom
SBC Communications, Inc.
Sprint Corporation
Supra Telecommunications & Information Systems, Inc.
TDS Telecommunications Corporation
Time Warner Telecom
United States Telephone Association
US West Communications, Inc.
Verio Inc.
Virgin Islands Telephone Corporation
Wyoming Public Service Commission

Appendix B – Final Rules**AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS**

Part 51, Subpart H, of Title 47 of the Code of Federal Regulations (C.F.R.) is amended as follows:

1. The title of part 51, Subpart H, is revised to read as follows:

Subpart H--Reciprocal Compensation for Transport and Termination of Telecommunications Traffic

2. Section 51.701(b) is revised to read as follows:

- (a) § 51.701 Scope of transport and termination pricing rules.

- (b) *Telecommunications traffic*. For purposes of this subpart, telecommunications traffic means:

- (1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (*see* FCC 01-131, paras. 34, 36, 39, 42-43); or
 - (2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

3. Sections 51.701(a), 51.701(c) through (e), 51.703, 51.705, 51.707, 51.709, 51.711, 51.713, 51.715, and 51.717 are each amended by striking "local" before "telecommunications traffic" each place such word appears.

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic (CC Docket Nos. 96-98, 99-68)

In this *Order*, we re-affirm our prior conclusion that telecommunications traffic delivered to Internet service providers (ISPs) is subject to our jurisdiction under section 201 of the Act. Thus, we reject arguments that section 251(b)(5) applies to this traffic. I firmly believe that this *Order* is supported by reasonable interpretations of statutory provisions that read together are ambiguous and, absent a reconciling interpretation, conflicting.

I also support the fact that this *Order*, for the first time, establishes a transition mechanism that will gradually wean competitive carriers from heavy reliance on the excessive reciprocal compensation charges that incumbents have been forced to pay these competitors for carrying traffic from the incumbent to the ISP. This transition mechanism was carefully crafted to balance the competing interests of incumbent and competitive telephone companies and other parties, so as not to undermine the Act's goal of promoting efficient local telephone competition.

I write separately only to emphasize a few points:

As an initial matter, I respectfully disagree with the objections to our conclusion that section 251(g) "carves out" certain categories of services that, in the absence of that provision, would likely be subject to the requirements of section 251(b)(5).¹ Section 251(b)(5)'s language first appears to be far-reaching, in that it would seem to apply, by its express terms, to all "telecommunications."² There is apparently no dispute, however, that at least one category of the LEC-provided telecommunications services enumerated in section 251(g) (namely, "exchange access") is not subject to section 251(b)(5), despite the broad language of this provision. Indeed, the *Bell Atlantic* Court appears to have endorsed that conclusion.³ The question then arises whether the other categories of traffic that are enumerated in section 251(g) (including, "information access") should also be exempted from the application of section 251(b)(5). We answer this question in the affirmative, and no justification (compelling or otherwise) has been offered for why only one service – exchange access – should be afforded disparate treatment in the construction of section 251(g). I would note, moreover, that on the only other occasion in

¹ To be more precise, section 251(g) refers to certain categories of service *provided by LECs to ISPs and interexchange carriers*. 47 U.S.C. § 251(g). In this statement, I use a short-hand reference to the "categories of services" enumerated in section 251(g).

² 47 U.S.C. § 251(b)(5).

³ See *cf. Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 4 (D.C. Cir. 2000) ("Although [section] 251(b)(5) purports to extend reciprocal compensation to all 'telecommunications,' the Commission has construed the reciprocal compensation requirement as limited to local traffic."). The Court then went on to conclude that the Commission had not provided an adequate explanation of why LECs that carry traffic to ISPs are providing "'exchange access,' rather than 'telephone exchange service.'" *Id.* at 9. The Court does not appear to have questioned anywhere in its opinion the notion that the scope of the reciprocal compensation requirement does not extend to certain categories of LEC-provided services, including "exchange access."

which the Commission directly addressed the question whether section 251(g) serves as such a “carve-out,” the Commission concluded, as we do here, that it does perform that function.⁴

Nor do I find the position we adopt here irreconcilable with our decision in the *Advanced Services Remand Order*.⁵ In discussing the term “information access” in that *Order*, we were not addressing the question whether section 251(g) exempts certain categories of traffic provided by LECs to ISPs and interexchange carriers from the other requirements of section 251. Rather, we addressed only the relationship between “information access” and the categories of “exchange access” and “telephone exchange service.” Specifically, we “decline[d] to find that information access services are a separate category of services, distinct from, and mutually exclusive with, telephone exchange and exchange access services.”⁶ But under the reading of section 251(g) put forth in this *Order*, the question whether information access is distinct from these other services is irrelevant. Because information access is specifically enumerated in section 251(g), it is not subject to the requirements of section 251(b)(5), whether or not that category of service overlaps with, or is distinct from, telephone exchange service or exchange access.

Similarly, I reject the suggestion that section 251(g) *only* preserves the MFJ requirements. The language of section 251(g) specifically refers to “each local exchange carrier,” not just to the Bell Operating Companies.⁷ Section 251(g) also expressly refers to any “regulation, order, or policy of the Commission.”⁸ Such clauses support the reading of section 251(g) that we adopt today.⁹

Finally, I disagree that section 251(g) cannot be construed to exempt certain categories of traffic from the requirements of section 251(b)(5), simply because the former provision does not include the words “exclude” or “reciprocal compensation” or “telecommunications.”¹⁰ As I have said, our reading that the categories of LEC-provided services enumerated in subsection (g) are exempted from reciprocal compensation arises from our duty to give effect to both section 251(g)

⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Dkt. Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499 (1996), ¶ 1034.

⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. Nos. 98-147 et al., Order on Remand, 15 FCC Rcd 385 (1999) (*Advanced Services Remand Order*); see also *WorldCom, Inc. v. FCC*, No. 00-1002 (D.C. Cir. filed Apr. 20, 2001) (affirming *Advanced Services Remand Order* on one of the alternative grounds proffered by the Commission).

⁶ *Advanced Services Remand Order*, 15 FCC Rcd at 406, ¶ 46.

⁷ 47 U.S.C. § 251(g).

⁸ *Id.*

⁹ Had the language of section 251(g) been limited to the Bell Companies or to court orders and consent decrees, for example, perhaps one could construct an argument that Congress meant to limit the scope of section 251(g) to the MFJ requirements.

¹⁰ Section 251(b)(5) states that all LECs must “establish *reciprocal compensation* arrangements for the transport and termination of *telecommunications*” 47 U.S.C. § 251(g) (emphasis added).

and section 251(b)(5). I also would point out that section 251(g) does include a specific reference to "receipt of compensation," just as the services enumerated in that section (e.g., exchange access, information access) undeniably involve telecommunications.¹¹

In closing, I would only reiterate that the statutory provisions at issue here are ambiguous and, absent a reconciling interpretation, conflicting. Thus, the Commission has struggled long and hard in an effort to give as full a meaning as possible to each of the provisions in a manner we conclude is consistent with the statutory purpose. It would not be overstating matters to acknowledge that these issues are highly complex, disputed and elusive, and that what we decide here will have enormous impact on the development of new technologies and the economy more broadly. It is for their relentless efforts to wrestle with (and now resolve) these issues that I am deeply grateful to my colleagues and our able staff.

¹¹ As the *Order* suggests, Section 251(g) enumerates "exchange access," "information access" and "exchange services for such access." 47 U.S.C. § 251(g). For purposes of subsection (g), all of these services are provided by LECs to "interexchange carriers and information service providers." These three categories undeniably involve telecommunications. "Information access" was defined in the MFJ as "the provision of specialized exchange telecommunications services" to information service providers. *United States v. AT&T*, 552 F. Supp. 131, 196, 229 (D.D.C. 1982). The term "exchange service" as used in section 251(g) is not defined in the Act or in the MFJ. Rather, the term "exchange service" is used in the MFJ as part of the definition of the term "exchange access," which the MFJ defines as "the provision of exchange services for the purposes of originating or terminating interexchange telecommunications." *United States v. AT&T*, F. Supp. at 228. Thus, the term "exchange service" appears to mean, in context, the provision of services in connection with *interexchange* communications. Consistent with that, in section 251(g), the term is used as part of the longer phrase "exchange services for such [exchange] access to interexchange carriers and information service providers." All of this indicates that the term "exchange service" is closely related to the provision of exchange access and information access, and that all three involve telecommunications.

**DISSENTING STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT ROTH**

Re: *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68

To some observers, the Telecommunications Act of 1996 ("1996 Act"), in general, and sections 251 and 252 (47 U.S.C. §§ 251 and 252), in particular, have become unnecessary inconveniences. The poster child for those who proclaim the 1996 Act's failure is reciprocal compensation. It has led to large billings – some paid, some unpaid – among telecommunications carriers. These billings have not shrunk, in large part because the Commission's interpretation of the pick-and-choose provision of the Act (47 U.S.C. § 252(i)) has led to unstable contracts, with perverse incentives for renegotiation.

Reciprocal compensation is an obscure and tedious topic. It is not, however, a topic that Congress overlooked. To the contrary, in describing reciprocal compensation arrangements in sections 251 and 252, Congress went into greater detail than it did for almost any other commercial relationship between carriers covered in the 1996 Act. Among other things, Congress mandated that reciprocal compensation arrangements would be (1) made by contract; (2) under State supervision; (3) at rates to be negotiated or arbitrated; and (4) would utilize a bill-and-keep plan only on a case-by-case basis under specific statutory conditions. See 47 U.S.C. §§ 251(b)(5), 252(a), 252(b), 252(d)(2).

Faced with these statutory mandates, how should the large billings for reciprocal compensation be addressed? Renegotiating contracts would be the simple market solution, only made precarious by our pick-and-choose rules. Another solution would be to seek review of reciprocal compensation agreements by State commissions. Other solutions would be for this Commission to change its pick-and-choose rules or to issue guidelines for State commission decisions (see *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 385 (1999)).

Each of these solutions, of course, would reflect at least a modicum of respect for States, their lawmakers, their regulators, federal law, and the Congress that enacted the 1996 Act. Each would also be consistent with, and respectful of, the prior ruling on reciprocal compensation by the Court of Appeals for the D.C. Circuit. See *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

There is, however, one solution that is not respectful of other governmental institutions. It is a solution that places under exclusive federal jurisdiction broad expanses of telecommunications. It is a solution that does not directly solve the problem at hand. It is a solution that can be reached only through a twisted interpretation of the law and a vitiation of economic reasoning and general common sense. That solution is nationwide price regulation. That is the regrettable solution the Commission has adopted.

The Commission's decision has broad consequences for the future of telecommunications regulation. In holding that essentially all packetized communications fall within federal jurisdiction, the Commission has dramatically diminished the States' role going forward, as such

communications are fast becoming the dominant mode. Whatever the merits of this reallocation of authority, it is a reallocation that properly should be made only by Congress. It certainly should not be made, as here, by a self-serving federal agency acting unilaterally.

There is doubtlessly underway a publicity campaign by the proponents of today's action. It will spin nationwide mandatory price regulation as "deregulation." It will spin the abandonment of States and contracts as "good government."

The media might be spun by this campaign. The public might be spun. But it will be far more difficult to convince the courts that the current action is lawful.

A Flawed Order From Flawed Decisionmaking

Today's order is the product of a flawed decisionmaking process that occurs all too frequently in this agency. It goes like this. First, the Commission settles on a desired outcome, based on what it thinks is good "policy" and without giving a thought to whether that outcome is legally supportable. It then slaps together a statutory analysis. The result is an order like this one, inconsistent with the Commission's precedent and fraught with legal difficulties.

In March 2000, the Court of Appeals for the D.C. Circuit vacated the Commission's conclusion that section 251(b)(5) does not apply to calls made to Internet service providers ("ISPs"). See *Bell Atlantic*, 206 F.3d at 9. The court ruled that, among other things, the Commission had not provided a "satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as 'terminating . . . local telecommunications traffic,' and why such traffic is 'exchange access' rather than 'telephone exchange service.'" *Id.*

The Commission has taken more than a year to respond to the court's remand decision. My colleagues some time ago decided on their general objective – asserting section 201(b) jurisdiction over ISP-bound traffic and permitting incumbent carriers to ramp down the payments that they make to competitive ones. The delay in producing an order is attributable to the difficulty the Commission has had in putting together a legal analysis to support this result, which is at odds with the agency's own precedent as well as the plain language of the statute.

Today, the Commission rules, once again, that section 251(b)(5) does not apply to ISP-bound traffic. In a set of convoluted arguments that sidestep the court's objections to its previous order, the Commission now says that ISP-bound traffic is "information access," which, the Commission asserts, is excluded "from the universe of 'telecommunications' referred to in section 251(b)(5)" (Order ¶¶ 23, 30) – despite the Commission's recent conclusion in another context that "information access" is not a separate category of service exempt from the requirements of section 251. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd 385, ¶¶ 46-49 (1999) ("*Advanced Services Remand-Order*").

The result will be another round of litigation, and, in all likelihood, this issue will be back at the agency in another couple of years. In the meantime, the uncertainty that has clouded the issue of compensation for ISP-bound traffic for the last five years will continue. The Commission would act far more responsibly if it simply recognized that ISP-bound traffic comes within section

251(b)(5). To be sure, this conclusion would mean that the Commission could not impose on these communications any rule that it makes up, as the agency believes it is permitted to do under section 201(b). Rather, the Commission would be forced to work within the confines of sections 251(b)(5) and 252(d)(2), which, among other things, grant authority to State commissions to decide on “just and reasonable” rates for reciprocal compensation. 47 U.S.C. § 252(d)(2). But the Commission surely could issue “rules to guide the state-commission judgments” regarding reciprocal compensation (*Iowa Utilities Bd.*, 525 U.S. at 385) and perhaps could even put in place the same compensation scheme it orders here. At the same time, the confusion that this order will add to the agency’s already bewildering precedent on Internet-related issues would be avoided.

The Commission’s Previous Order and the Court’s Remand Decision

To see how far the Commission has come in its attempt to assert section 201(b) jurisdiction over ISP-bound traffic, let us briefly review the court’s decision on the Commission’s previous order, which receives little attention in the order released today. In its previous order, issued in February 1999, the Commission focused on the jurisdictional nature of ISP-bound traffic. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689 (1999) (“*Reciprocal Compensation Declaratory Ruling*”). Applying an “end-to-end” analysis, the agency concluded that calls to ISPs do not terminate at the ISP’s local server, but instead continue to the “ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state.” *Id.* ¶ 12. Based on this jurisdictional analysis, the Commission ruled that a substantial portion of calls to ISPs are jurisdictionally interstate, and it described ISP-bound traffic as interstate “access service.” *Id.* ¶¶ 17, 18. The Commission reasoned that, since reciprocal compensation is required only for the transport and termination of local traffic, section 251(b)(5)’s obligations did not apply to ISP-bound calls. *See id.* ¶¶ 7, 26.

1. The Court Asked the Commission Why ISPs Are Not Like Other Local Businesses

The court vacated the Commission’s decision. It held that, regardless of the jurisdictional issue, the Commission had not persuasively distinguished ISPs from other businesses that use communications services to provide goods or services to their customers. *See Bell Atlantic*, 206 F.3d at 7. In the court’s view, the Commission had failed to explain why “an ISP is not, for purposes of reciprocal compensation, ‘simply a communications-intensive business end user selling a product to other consumer and business end-users.’” *Id.* (citation omitted).

2. The Court Asked the Commission Why Calls Do Not Terminate at ISPs

The court also questioned the Commission’s conclusion that a call to an ISP did not “terminate” at the ISP. “[T]he mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not ‘terminate’ at the ISP.” *Id.* The court concluded that, “[h]owever sound the end-to-end analysis may be for jurisdictional purposes,” the Commission had failed to explain why treating these “linked telecommunications as continuous works for purposes of reciprocal compensation.” *Id.*

3. The Court Asked the Commission How Its Treatment of ISP-Bound Traffic Is Consistent with Its Treatment of Enhanced Service Providers

The court also wondered whether the Commission's treatment of ISP-bound traffic was consistent with the approach it applies to enhanced service providers ("ESPs"), which include ISPs. *See id.* at 7-8. The Commission has long exempted ESPs from the access charge system, effectively treating them as end-users of local service rather than long-distance carriers. The court observed that this agency, in the Eighth Circuit access charge litigation, had taken the position "that a call to an information service provider is really like a call to a local business that then uses the telephone to order wares to meet the need." *Id.* at 8. The court rejected as "not very compelling" the Commission's argument that the ESP exemption is consistent with the understanding that ESPs use interstate access services. *Id.*

4. The Court Asked the Commission Whether ISP-Bound Traffic is "Exchange Access" or "Telephone Exchange Service"

Finally, the court rejected the Commission's suggestion that ISPs are "users of access service." *Id.* The court noted that the statute creates two statutory categories – "telephone exchange service" and "exchange access" – and observed that on appeal, the Commission had conceded that these categories occupied the field. *Id.* If the Commission had meant to say that ISPs are users of "exchange access," wrote the court, it had "not provided a satisfactory explanation why this is the case." *Id.*

The Commission's Latest Order

Today, the Commission fails to answer any of the court's questions. Recognizing that it could not reach the desired result within the framework it used previously, the Commission offers up a completely new analysis, under which it is irrelevant whether ISP-bound traffic is "local" rather than "long-distance" or "telephone exchange service" rather than "exchange access."

In today's order, the Commission concludes that section 251(b)(5) is not limited to local traffic as it had previously maintained, but instead applies to all "telecommunications" traffic except the categories specifically enumerated in section 251(g). *See Order* ¶¶ 32, 34. The Commission concludes that ISP-bound traffic falls within one of these categories – "information access" – and is therefore exempt from section 251(b)(5). *See id.* ¶ 42. The agency wraps up with a determination that ISP-bound traffic is interstate, and it thus has jurisdiction under section 201(b) to regulate compensation for the exchange of ISP-bound traffic. *See id.* ¶¶ 52-65.

The Commission's latest attempt to solve the reciprocal compensation puzzle is no more successful than were its earlier efforts. As discussed below, its determination that ISP-bound traffic is "information access" and, hence, exempt from section 251(b)(5) is inconsistent with still-warm Commission precedent. Moreover, its interpretation of section 251(g) cannot be reconciled with the statute's plain language.

1. Today's decision is a complete reversal of the Commission's recent decision in the *Advanced Services Remand Order*. In that order, the Commission rejected an argument that xDSL traffic is exempt from the unbundling obligations of section 251(c)(3) as "information

access.” Among other things, the Commission found meritless the argument that section 251(g) exempts “information access” traffic from other requirements of section 251. *Id.* ¶ 47. Rather, the Commission explained, “this provision is merely a continuation of the equal access and nondiscrimination provisions of the Consent Decree until superseded by subsequent regulations of the Commission.” *Id.* According to the Commission, section 251(g) “is a transitional enforcement mechanism that obligates the incumbent LECs to continue to abide by equal access and nondiscriminatory interconnection requirements of the MFJ.” *Id.* The Commission thus concluded that section 251(g) was not intended to exempt xDSL traffic from section 251’s other provisions. *See id.* ¶¶ 47-49.

In addition, the Commission rejected the contention that “information access” is a statutory category distinct from “telephone exchange service” and “exchange access.” *See id.* ¶ 46.¹ It pointed out that “‘information access’ is not a defined term under the Act, and is cross-referenced in only two transitional provisions.” *Id.* ¶ 47. It ultimately concluded that nothing in the Act suggests that “information access” is a category of services mutually exclusive with exchange access or telephone exchange service. *See id.* ¶ 48.

The Commission further determined that ISP-bound traffic is properly classified as “exchange access.” *See id.* ¶ 35. It noted that exchange access refers to “access to telephone exchange services or facilities for the purpose of originating or terminating communications that travel outside an exchange.” *Id.* ¶ 15. Applying this definition, and citing the *Reciprocal Compensation Declaratory Ruling*, the Commission reasoned that the service provided by the local exchange carrier to an ISP is ordinarily exchange access service, “because it enables the ISP to transport the communication initiated by the end-user subscriber located in one exchange to its ultimate destination in another exchange, using both the services of the local exchange carrier and in the typical case the telephone toll service of the telecommunications carrier responsible for the interexchange transport.” *Id.* ¶ 35.

The *Advanced Services Remand Order* was appealed to the D.C. Circuit. *See WorldCom*, 2001 WL 395344. The Commission argued to the court in February that the term “information access” is merely “a holdover term from the MFJ, which the 1996 Act supersedes.” *WorldCom, Inc. v. FCC*, Brief for Respondents at 50 (D.C. Cir. No. 00-1002). Its brief also emphasized that section 251(g) was “designed simply to establish a transition from the MFJ’s equal access and nondiscrimination provisions . . . to the new obligations set out in the statute.” *Id.*

Today, just two months after it made those arguments to the D.C. Circuit, the Commission reverses itself. It now says that section 251(g) exempts certain categories of traffic, including “information access,” entirely from the requirements of section 251(b)(5) and that ISP-bound traffic is “information access.” *See Order* ¶¶ 32, 34, 42. The Commission provides many a word to explain this reversal.

Of course, the Commission’s conclusions in the *Advanced Services Remand Order* that

¹ This aspect of the *Advanced Services Remand Order* was remanded to the Commission by the D.C. Circuit because of its reliance on the vacated *Reciprocal Compensation Declaratory Ruling*. *See WorldCom, Inc. v. FCC*, No. 00-1062, 2001 WL 395344, *5-*6 (D.C. Cir. Apr 20, 2001).

ISP-bound traffic is “exchange access” and that the term “information access” has no relevance under the 1996 Act were themselves reversals of earlier Commission positions. In the *Non-Accounting Safeguards Order*,² the Commission concluded, relying in part on a purported distinction between “exchange access” and “information access,” that ISPs “do not use exchange access as it is defined by the Act.” *Id.* ¶ 248. In that order, the Commission was faced with determining the scope of section 272(e)(2), which states that a Bell operating company [“BOC”] “shall not provide any facilities, services, or information regarding its provision of exchange access to [a BOC affiliate] unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions.” 47 U.S.C. § 272(e)(2). The Commission rejected the argument that BOCs are required to provide exchange access to ISPs, reasoning that ISPs do not use exchange access. *See Non-Accounting Safeguards Order* ¶ 248. In making that decision, the Commission relied on the language of the statute as well as the MFJ’s use of the term “information access.” *See id.* ¶ 248 & n. 621. As the Commission explained, its “conclusion that ISPs do not use exchange access is consistent with the MFJ, which recognized a difference between ‘exchange access’ and ‘information access.’” *Id.* ¶ 248 n.621.

Thus, in reversing itself yet again, the Commission here follows a time-honored tradition. When it is expedient to say that ISPs use “exchange access” and that there is no such thing as “information access,” that is what the Commission says. *See Advanced Service Remand Order* ¶¶ 46-48. When it is convenient to say that ISPs use the local network like local businesses, then the Commission adopts that approach. *See Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 345 (1997). And, today, when it helps to write that ISPs use “information access,” then that is what the Commission writes. The only conclusion that one can soundly draw from these decisions is that the Commission is willing to make up whatever law it can dream up to suit the situation at hand.

Nevertheless, there is one legal proposition that the Commission has, until now, consistently followed – a fact that is particularly noteworthy given the churn in the Commission’s other legal principles. The Commission has consistently held that section 251(g) serves only to “preserve[] the LECs’ existing equal access obligations, originally imposed by the MFJ.” *Operator Communications, Inc., D/B/A Oncor Communications*, Memorandum Opinion and Order, 14 FCC Rcd 12506, ¶ 2 n.5 (1999).³ Today’s order ignores this precedent and transforms

² *Implementation of the Non-Accounting Safeguards Of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (“*Non-Accounting Safeguards Order*”).

³ *See also, e.g., Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions To Consolidate Latas in Minnesota and Arizona*, Memorandum Opinion and Order, 14 FCC Rcd 14392, ¶ 17 (1999) (“In section 251(g), Congress delegated to the Commission sole authority to administer the ‘equal access and nondiscriminatory interconnection restrictions and obligations’ that applied under the AT&T Consent Decree.”); *AT&T Corporation, et al., Complainants*, Memorandum Opinion and Order, 13 FCC Rcd 21438, ¶ 5 (1998) (“Separately, section 251(g) requires the BOCs, both pre- and post-entry, to treat all interexchange carriers in accordance with their preexisting equal access and nondiscrimination obligations, and thereby neutralize the potential anticompetitive impact they could have on the long distance market until such time as the Commission finds it reasonable to revise or eliminate those obligations.”).

section 251(g) into a categorical exemption for certain traffic from section 251(b)(5). It is this transformation – much more than the shell game played with “information access” and “exchange access” – that is most offensive in today’s decision.

2. The Commission’s claim that section 251(g) “excludes several enumerated categories of traffic from the universe of ‘telecommunications’ referred to in section 251(b)(5)” (Order ¶ 23) stretches the meaning of section 251(g) past the breaking point. Among other things, that provision does not even mention “exclud[ing],” “telecommunications,” “section 251(b)(5),” or “reciprocal compensation.”

Section 251(g), which is entitled, “Continued enforcement of exchange access and interconnection requirements,” states in relevant part:

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

47 U.S.C. § 251(g).

As an initial matter, it is plain from reading this language that section 251(g) has absolutely no application to the vast majority of local exchange carriers, including those most affected by today’s order. The provision states that “each local exchange carrier . . . shall provide [the enumerated services] . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations . . . *that apply to such carrier on the date immediately preceding February 8, 1996.*” *Id.* (emphasis added). If a carrier was not providing service on February 7, 1996, no restrictions or obligations applied to “such carrier” on that date, and section 251(g) would appear to have no impact on that carrier. The Commission has thus repeatedly stated that section 251(g) applies to “Bell Operating Companies” and is intended to incorporate aspects of the MFJ. *Applications For Consent To The Transfer Of Control Of Licenses And Section 214 Authorizations From Tele-Communications, Inc., Transferor To AT&T Corp., Transferee.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, ¶ 53 (1999); *see also* cases cited *supra* note 3. Accordingly, by its express terms, section 251(g) says nothing about the obligations of most CLECs serving ISPs, which are the primary focus of the Commission’s order.

Moreover, it is inconceivable that section 251(g)’s preservation of pre-1996 Act “equal access and nondiscriminatory interconnection restrictions and obligations” is intended to displace section 251(b)(5)’s explicit compensation scheme for local carriers transporting and terminating each other’s traffic. Prior to passage of the 1996 Act, there were no rules governing compensation for such services, whether or not an ISP was involved. It seems unlikely, at best,

that Congress intended the absence of a compensation scheme to preempt a provision explicitly providing for such compensation.⁴ At the very least, one would think Congress would use language more explicit than that seized upon by the Commission in section 251(g).

Finally, if, as the Commission maintains, section 251(g) “excludes several enumerated categories of traffic from the universe of ‘telecommunications’ referred to in section 251(b)(5)” (Order ¶ 23), why does section 251(g) not also exclude this traffic from the “universe of ‘telecommunications’” referred to in the rest of section 251, or, indeed, in the entire 1996 Act? As noted, section 251(g) nowhere mentions “reciprocal compensation” or even “section 251.” In fact, there appears to be no limiting principle. It would thus seem that, under the Commission’s interpretation, the traffic referred to in section 251(g) is exempt from far more than reciprocal compensation – a consequence the Commission is sure to regret. *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order 11 FCC Rcd 15499, ¶ 356 (1996) (concluding that “exchange access” provided to IXC is subject to the unbundling requirements of section 251(c)(3)).

* * *

The end result of today’s decision is clear. There will be continued litigation over the status of ISP-bound traffic, prolonging the uncertainty that has plagued this issue for years. At the same time, the Commission will be forced to reverse itself yet again, as soon as it dislikes the implication of treating ISP-bound traffic as “information access” or reading section 251(g) as a categorical exemption from other requirements of the 1996 Act. The Commission could, and should, have avoided these consequences by applying its original analysis in the manner sought by the court.

⁴ The case of IXC traffic is thus completely different. There was a compensation scheme in effect for such traffic prior to enactment of the 1996 Act – the access charge regime. Because reciprocal compensation and the access charge regime could not both apply to the same traffic, the Commission could reasonably conclude that the access charge regime should trump the reciprocal compensation provision of section 251(b)(5). *See Competitive Telecommunications Ass’n v FCC*, 117 F.3d 1068, 1072-73 (8th Cir. 1997). Here, there is no pre-1996 Act compensation scheme to conflict with reciprocal compensation. As the Commission has stated, “the Commission has never applied either the ESP exemption or its rules regarding the joint provision of access to the situation where two carriers collaborate to deliver traffic to an ISP.” *Reciprocal Compensation Declaratory Ruling* ¶ 26.

EXHIBIT I

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

LEVEL 3 COMMUNICATIONS, LLC

Plaintiff

v.

PUBLIC SERVICE COMMISSION OF UTAH,

and

QWEST CORPORATION,

Defendants

MEMORANDUM IN SUPPORT OF
MOTION TO REMAND

(Oral Argument Requested)

Hon. Dale A. Kimball
2:06cv00132 DAK

Level 3 Communications, LLC ("Level 3"), through its counsel, and pursuant to the provisions at 28 U.S.C. § 1447(c) and Rule 7-1 of the Rules of Practice of the United States District Court for the District of Utah, hereby submits this Memorandum in Support of its Motion to Remand this case to the Supreme Court of Utah. This Motion is based on the grounds that the Court lacks subject matter jurisdiction to hear this controversy.

I. STATEMENT OF FACTS

1. On January 10, 2001, Level 3 entered into an interconnection agreement with U.S. West, Qwest's predecessor. ("Old Agreement"). The Old Agreement provided among other things:

If the Parties' elect to establish two-way direct trunks, the compensation for such jointly used 'shared' facilities shall be adjusted as follows: The nominal compensation shall be pursuant to the rates for direct trunk transport in Appendix A. *The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider's use of that facility. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider's relative use (i.e. originating minutes of use) of the facility in the busy hour.*

Old Agreement, Attachment 1 § 5.1.2.4 (emphasis added).

2. The Old Agreement was approved by the Utah Public Service Commission ("Commission") pursuant to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Telecommunications Act" or "Act") and Utah Code Ann § 58-8b-2.2. Report and Order, Docket No. 00-049-88, Findings of Fact (Jan. 10, 2001) ("Original Order").

3. One of the agreed upon terms of the Old Agreement was an "Evergreen clause" which read:

This Agreement shall be effective upon Commission approval and shall remain in effect until June 26, 2001 and thereafter shall continue in force and effect unless and until a new agreement addressing all of the terms of this Agreement, becomes effective between the Parties. ... This Agreement shall remain in effect until a new interconnection agreement approved by the Commission has become effective.

Old Agreement, Part A, § 20.1 (emphasis added). Thus, the terms of the Old Agreement were to apply until a new agreement was approved by the Commission.

4. The parties undertook negotiations and were able to agree to all the terms of a new agreement except for one general issue. On August 6, 2002, Level 3 filed its Petition for

Arbitration to resolve that one outstanding issue. The arbitrated issue was whether ISP-bound traffic should count as Qwest originating minutes for the calculation of "relative use" of direct-trunked transport on Qwest's side of the point of interconnection ("POP"). Utah Public Serv. Comm'n, Docket No. 02-2266-02 (Feb. 20, 2004).

5. On February 20, 2004, the Commission issued its Order in the arbitration proceeding ("Arbitration Order"), approving the parties' new agreement ("New Agreement") (a copy of the Arbitration Order is attached hereto as Attachment 1). Although the Commission adopted Qwest's proposed language excluding ISP-bound traffic from the calculation of a relative use factor, it adopted Level 3's position prohibiting the retroactive application of the new factor that would be established by studying the traffic exchanged between the parties in the first three months of the term of the New Agreement. The Commission's Arbitration Order stated:

Qwest proposes that when a new factor is established that bills should be retroactively adjusted for the initial billing quarter. Level 3 argues that any new relative use factor should be used prospectively only. We will adopt Level 3's position and order that the contract language be modified so that no true up will be made and *new relative use factors will apply prospectively only.*

Docket No. 02-2266-02, at p. 4 (emphasis added).

From July 2002 to February 2004 ("Dispute Period"), roughly the same period of time that the parties were in arbitration over the question of whether the New Agreement should introduce language that excluded ISP-bound traffic from the calculation of originating minutes, Qwest billed Level 3 approximately \$563,616.99 in charges for interconnection trunks in Utah. Level 3 has consistently disputed those charges because there was no basis for them under the terms of the Old Agreement. Although the parties held multiple discussions in an attempt to resolve the billing dispute, they were unable to reach any agreement as a result of those discussions. On June 13, 2005, Qwest sent to Level 3 a demand letter rejecting Level 3's

position, demanding payment of \$563,616.99, and threatening suspension of all service order activity and disconnection of services, effective June 28, 2005.

6. From the time the New Agreement was approved by the Commission, Level 3 has paid the relative use charges for direct trunk transport facilities pursuant to the language in the New Agreement and the Commission's Arbitration Order. However, on June 23, 2005, Level 3 petitioned the Commission for an order enjoining Qwest from disconnecting Level 3's service, and for a declaratory judgment that Level 3 was current in its payment to Qwest for direct-trunk transport services that Qwest agreed to provide pursuant to the terms of the Old Agreement. See Petition of Level 3 Communications, LLC for Enforcement of the Interconnection Agreement Between Qwest and Level 3 ("Petition"), filed with the Commission June 23, 2005 (attached hereto as Attachment 2).

7. Level 3's Petition invoked the jurisdiction of the Commission under Title 54 and Title 63 Chapter 46b of the Utah Code. It requested that the Commission prevent Qwest from terminating Level 3's services. It also requested enforcement of the straightforward, unambiguous language of the relative use clause of the Old Agreement, which dictates that Qwest bear its own costs for carrying its originated traffic to Level 3 for termination. Level 3 also sought to invoke the Commission's Arbitration Order which prohibited Qwest from applying the new relative use language from the New Agreement retroactively to the Old Agreement. Level 3 did not state any claim under the Act, did not claim that Qwest or the New or Old Agreement violated the Act, and did not assert that any provision of the Act controlled the outcome. Level 3 only invoked state contract law concerning contract interpretation to determine the plain meaning of the Old Agreement.

8. On August 18, 2005, the Commission issued its Report and Order ruling that regardless of the absence of language requiring it, Qwest should be allowed to exclude ISP-bound traffic from the relative use calculation in the pricing provision for shared trunks in the Old Agreement.

9. Level 3 filed a Motion for Reconsideration and Rehearing of the Commission's decision on or about September 19, 2005 (attached hereto as Attachment 3). The basis for that Motion was that the Commission's interpretation of the Old Agreement had failed to give effect to the unambiguous intention of the parties as expressed in the relative use calculation set out in the pricing provision of the Old Agreement.

10. On or about October 4, 2003, Qwest submitted an Unopposed Motion for Limited Reconsideration. On the same day, the Commission issued an Order Granting Limited Reconsideration so that the parties could have a chance to conclude settlement discussions that were occurring at the time. Upon the unsuccessful conclusion of settlement discussions, the Commission allowed the period of time to run for deciding Level 3's Motion for Reconsideration and Rehearing, thus resulting in a deemed denial of that Motion.

11. On January 13, 2006, Level 3 filed a timely Notice of Appeal with the Utah Supreme Court pursuant to Utah Code Ann. 63-46b-16, seeking review of the Commission's August 18, 2005 Report and Order.

12. On February 13, 2006, Qwest and the Commission filed a Notice of Removal. By the present Motion, and based on the grounds set forth below, Level 3 requests that the Court find that it lacks subject matter jurisdiction and remand this appeal to the Utah Supreme Court.

II. LEGAL STANDARD

A party may remove a civil action only if the plaintiff could have originally brought the action in federal court. 28 U.S.C. § 1441(a). A court must remand "if at any time before final

judgment it appears that the district court lacks subject matter jurisdiction.” 28 U.S.C. § 1447(c). Because a federal court is a court of limited jurisdiction, “there is a presumption against removal jurisdiction.” Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) (remand to state court for failure to meet amount in controversy requirement). Thus, the party requesting removal bears the burden to demonstrate jurisdiction exists. Laughlin, 50 F.3d at 873 (quoting Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992)); Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974). Accordingly, “[r]emoval statutes are to be strictly construed [citation omitted] and all doubts are to be resolved against removal.” Fajen v. Foundation Reserve Ins. Co., Inc., 683 F.2d 331, 333 (10th Cir. 1982) (reversing district court’s decision to remove because the district court failed to apply this strict standard).

III. THE FEDERAL COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THIS MATTER

The Utah Supreme Court has jurisdiction to hear all appeals from decisions of the Utah Public Service Commission. Utah Code Ann. § 63-46b-16. Level 3 properly and timely filed its appeal from the Commission’s Report and Order with the Utah Supreme Court.

Qwest seeks to invoke federal jurisdiction of the Level 3 Petition for Review pursuant to Section 1331 of the United States Code. Section 1331 provides “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. A case is deemed to “arise under” federal law if “its well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.” Morris v. City of Hobart, 39 F.3d 1105, 1111 (10th Cir. 1994) (quoting Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 27-28 (1983)).

Under the law of the Tenth Circuit, two conditions must be met before jurisdiction can be found. First, the plaintiff's complaint must, on its face, raise a question of federal law. Nicodemus v. Union Pac. Corp., 318 F.3d 1231, 1235 (10th Cir. 2003) (citing Rice v. Office of Servicemembers' Group Life Ins., 260 F.3d 1240, 1245 (10th Cir. 2001)). Second, the plaintiff's cause of action must "either be (1) created by federal law, or (2) if it is a state-created cause of action, 'its resolution must necessarily turn on a substantial question of federal law.'" Id. (quoting Rice, 260 F.3d at 1245).

A. Level 3's Petition for Relief Does Not Raise a Question of Federal Law

This case is not one where a plaintiff is seeking relief in a complaint. Instead it is an appeal from the Report and Order of the Utah Public Service Commission. The Commission already has taken evidence and heard argument. Determination of the proper jurisdiction for this matter nevertheless requires consideration of the causes of action alleged by Level 3. Jurisdiction under Section 1331 may be found only if Qwest demonstrates that Level 3's Petition raises a federal question on its face. A response from Qwest or a "defense that raises a federal question is inadequate to confer federal jurisdiction." Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 808 (1986).

Level 3's Petition sought an order from the Commission enjoining Qwest from disconnecting service to Level 3, and for a declaration that Level 3 was current on its payments to Qwest for shared trunks. Petition at 8 (Attachment 2 to this Memorandum). On its face, the Petition does not allege that the Commission has jurisdiction pursuant to federal law, or that Level 3 is asserting any claim under federal law. It does not raise any issues that are to be determined under federal law or suggest that federal law provides any basis for granting the relief requested in the Petition. Instead, the Petition alleges that state law provides the basis for the Commission's jurisdiction and for the requested relief. Petition at 1.

Level 3's Petition to the Commission also sought to enforce the Commission's Arbitration Order adopting Qwest's new version of the relative use calculation in the New Agreement on a prospective basis only. It asked the Commission to bar Qwest's attempts to retroactively impose relative use charges on Level 3 for the period the parties were operating under the Old Agreement terms requiring Qwest to bear its own costs. Those issues do not raise any question of federal law. The Commission's Arbitration Order approving the New Agreement clearly stated that the new provision in the New Agreement allocating costs for shared trunks would be applied *prospectively only* beginning with the second billing quarter after the New Agreement had been approved and became effective. Report and Order at 4. Level 3's Petition sought a declaration by the Commission enforcing that part of its Order. Petition at ¶¶ 8-11.

Level 3 also pleaded that relative use payment obligations could not be imposed by retroactive application of the Report and Order or otherwise because the unambiguous language in the Old Agreement provided no basis for such charges. Level 3 pleaded this as a request to the Commission to enforce the plain, Commission-approved language of the Old Agreement. Petition at ¶¶ 5, 14.

Finally, the Petition sought an order from the Commission enjoining Qwest from disconnecting service to Level 3 in violation of the Old and New Interconnection Agreements. The Commission's authority to issue injunctions and the basis for doing so in a case of a billing dispute is derived from state law. See e.g., Utah Code Ann. §§ 54-4-1; 54-8b-2.2(1)(e).

Federal law is not implicated in Level 3's Petition. The only reference to federal law in the Petition involves the Federal Communications Commission's ("FCC") treatment of reciprocal compensation for telecommunications traffic bound for Internet service providers

(“ISPs”). The reference to federal law in that instance merely demonstrated that the parties amended the Old Agreement after the FCC’s “ISP Remand Order,” and that subsequent to such amendment there was still no language anywhere in the contract that provided a basis for Qwest to impose charges on Level 3 for direct trunk transport. Level 3 did not assert, and never has contended that the ISP Remand Order controls or is even applicable to the parties’ negotiated terms of payment for direct trunks.

The Petition, therefore, does not allege a violation of federal law, does not invoke federal law to state its causes of action or to invoke the Commission’s jurisdiction, and does not contend that the resolution of any of the issues raised in the Petition depends on the interpretation of any federal law.

B. Level 3’s Cause of Action Was Not Created by Federal Law.

The Telecommunications Act, 47 U.S.C § 151 *et seq.*, requires incumbent local exchange carriers to interconnect with a requesting competitive carrier’s facilities and equipment, and to exchange traffic with competitive carriers. 47 U.S.C. § 251(c). The specific duties of telecommunications carriers are enumerated in Sections 251(b) and (c). Among other things, carriers must “establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5). Incumbent carriers must offer access to network elements “on rates terms and conditions that are just, reasonable and non-discriminatory.” 47 U.S.C. § 251(c)(3). To achieve interconnection and fulfill their duties under the Act, the incumbent and the requesting carrier must enter into an interconnection agreement. Interconnection agreements may be arrived at through negotiation or mediation or, if the parties are unable to agree, through arbitration conducted by a state commission. 47 U.S.C. § 252(a)-(b). Once a local exchange carrier has agreed, through an interconnection agreement, to make available any interconnection service or network element, it must make the same service or

element available to any requesting carrier on the same terms and conditions as those stated in the interconnection agreement. 47 U.S.C. § 252(i). In the present case, Level 3 and Qwest (as successor to U.S. West) entered into the Old Agreement through Level 3's adoption of the same terms and conditions as had been negotiated between U.S. West and AT&T, which agreement, in turn, had been arrived at through a process of negotiation and arbitration by the state commission. The Utah Commission approved the Old Agreement, finding that it met all of the necessary requirements of the Act. Report and Order, Docket No. 00-049-88 (Jan. 10, 2001).

The Act provides that a party aggrieved by a determination of the state commission in either approving a negotiated agreement or in arbitrating a disputed agreement, may "bring an action in an appropriate Federal district court to determine whether the agreement ... meets the requirements of § 251." 47 U.S.C. § 252(e)(6). The federal courts' jurisdiction to hear appeals from state commission determinations regarding interconnection agreements is set forth in Section 252(e)(6). The present matter however, is not an appeal of the Utah Commission's determination in an arbitration proceeding, but is strictly an appeal of the Commission's decision on a question of contractual interpretation of undisputed language in an agreement already approved by the Commission.

State commission authority to interpret and enforce interconnection agreements is not express in Section 252. In Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002), the United States Supreme Court considered the argument that Section 252 implicitly encompassed the authority for state commissions to interpret and enforce interconnection agreements, and that Section 252, for that reason, could serve as a basis for federal jurisdiction in interpretation or enforcement cases. *Id.* at 641-42. The Supreme Court declined to decide the issue, relying instead on Section 1331 to find that jurisdiction existed in

that case. Id. at 642. The Court stated: “Even if § 252(e)(6) does not *confer* jurisdiction, it at least does not *divest* the district courts of their authority under 28 U.S.C. §1331 to review the Commission’s order for compliance with federal law.” Id. (emphasis in original). Analyzing the case under Section 1331, the Court noted that Verizon had alleged in its complaint that the state commission “violated the Act and the FCC ruling when it ordered payment of reciprocal compensation for the ISP-bound calls,” and that the state commission’s regulation was preempted by federal statute. Id. Under those facts, the Court had “no doubt” that the federal court could hear the case under Section 1331. Id.

Unlike Verizon, Level 3 did not plead a cause of action under, or raise issues covered by Section 252. In requesting that the Utah Public Service Commission interpret the relative use formula for direct-trunk transport, Level 3 was not seeking to impose any federal standard, or alleging that federal law should dictate the Commission’s interpretation of the pricing provision. Further, because there is no expression under Section 252(e)(6) that a state commission is authorized to interpret or enforce interconnection agreements, the causes of action alleged by Level 3, which involve only interpretation and enforcement, do not “arise” under Section 252. While the Court in Verizon Maryland concluded that Section 252 does not strip the federal courts of jurisdiction that would otherwise lie under Section 1331, the Court was not willing to hold that Section 252 conferred jurisdiction upon federal courts to hear appeals from state commissions on issues of interpretation or enforcement.

The present case is not an appeal from the Commission’s decision in an arbitration proceeding, but a request for interpretation and enforcement of a Commission approved interconnection agreement and enforcement of a Commission Order. The basis for Level 3’s petition to the Commission, and the basis for this appeal of the Commission’s decision, was and

remains that the plain meaning of the direct trunk pricing provision in the Old Agreement controls, and that one party cannot unilaterally modify the parties' contractual relationship simply by claiming changes in federal law. The fact that a relative use pricing provision may be contained in an interconnection agreement is not enough to confer federal jurisdiction under Section 1331.

C. The Resolution of this Case Does Not Turn on a Substantial Question of Federal Law.

Federal jurisdiction may be found when a plaintiff's right to relief "turns on the construction of a federal law." Morris v. City of Hobart, 39 F.3d 1105, 1111 (10th Cir. 1994) (citing Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199-200 (1921)). However, the "mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." Id. (quoting Merrell Dow Pharms., 478 U.S. at 813). A resolution "turns" on a substantial question of federal law if:

"the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

Verizon Maryland, 535 U.S. at 643 (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 89 (1998)).¹ When deciding whether a case turns on a substantial question of federal law, "courts should exercise 'prudence and restraint'" because such determinations "'require sensitive

¹ An earlier articulation of the rule states as follows:

The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction.

Merrell Dow Pharms., 478 U.S. at 819-20 (quoting Smith, 255 U.S. at 199).

judgments about congressional intent, judicial power, and the federal system.” Morris, 39 F.3d at 1111 (quoting Merrell Dow Pharms., 478 U.S. at 810). Thus, the court “must focus on whether Congress evidenced an intent to provide a federal forum.” Id.

The fact that the interconnection agreement may be required under federal law, or that the incumbent carrier has a duty to make network elements available does not mean that the interpretation or enforcement of an interconnection agreement always turns on a question of federal law. See, e.g., Verizon Maryland, Inc. v. Global Naps, 377 F.3d 355, 366 (4th Cir. 2004) (“We are not saying that every dispute about a term in an interconnection agreement belongs in federal court”);² Nuvox Commc’ns, Inc. v. North Carolina Utils. Comm’n, 409 F. Supp. 2d 660, 664–65 (E.D.N.C 2006) (no federal jurisdiction under § 1331 for interpretation of audit provision in federal interconnection agreement). Not every term of an interconnection agreement is required by the Act. Indeed, Section 252 contemplates that the parties may agree to terms “without regard to the standards set forth in subsections (b) and (c) of section 251.” 47 U.S.C. § 252(a)(1). Thus, while the existence of interconnection agreements may be essential to the federal interest in promoting competition, Congress did not consider all specific terms of the agreements to be essential to that goal. The federal interest is to further the goal of promoting competition, not to ensure absolute uniformity of terms within all contractual relationships between telecommunications carriers.

The obligation to establish reciprocal compensation is not only express in the federal Act, but it has been the subject of FCC Orders and of litigation in the federal courts as to what that obligation might entail with respect to ISP-bound traffic. The Supreme Court in Verizon

² Unlike the dispute in Global Naps, the dispute in the instant case does not involve a federally mandated essential duty under the Act to establish reciprocal compensation arrangements, but instead involves a purely consensual agreement regarding pricing of shared transport. There is nothing in the Act that requires parties to establish two-way direct trunks.

Maryland and the Fourth Circuit on remand, therefore, were dealing with the construction of a federal statute which would have dictated the outcome of the dispute. In the present case, although the treatment of ISP-bound traffic may be a somewhat relevant factual consideration, the federal statute, the FCC's orders, and the precedent established in the federal courts are irrelevant to the legal resolution of this matter.

Thus, while this dispute involves an interconnection agreement, there is no foundation for a conclusion that the provision in the Old Agreement allocating costs for direct trunk transport was compelled by federal law. Rather, the controlling language is a product of negotiation between the parties, and is subject to general principles of contract interpretation that have evolved under state law. It is state contract law that dictates that one party to a contract cannot unilaterally change the controlling language of a contract or act in a way that violates the express terms of the contract. Likewise, there is no provision in federal law upon which the outcome may turn. The issue of whether the parties intended to share the cost of trunks according to the minutes of each party's originating use, requires only a garden-variety interpretation of the contract language.

IV. CONCLUSION

The Federal Court does not have subject matter jurisdiction over this appeal from the Commission's Report and Order. Level 3's Petition before the Commission did not raise a question of federal law. Its causes of action were not created by federal law, and there is no issue in this case that turns on a substantial question of federal law. Instead, the resolution of this matter requires only the application of state law principles of contract interpretation. Qwest has failed to demonstrate why the straightforward interpretation of the contract between the parties should be determined by a Federal court. Therefore, Level 3 respectfully requests that this matter be remanded back to the Utah State Supreme Court for resolution as originally filed.

DATED this 15th day of March, 2006.

/s/ William J. Evans

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INDEX OF ATTACHMENTS

<u>No.</u>	<u>Title</u>
1	Report and Order
2	Petition of Level 3 Communications, LLC for Enforcement of the Interconnection Agreement Between Qwest and Level 3
3	Motion for Reconsideration and Rehearing

Attachment 1

**ATTACHMENT 1 TO MEMORANDUM IN SUPPORT OF
MOTION TO DEMAND APPEARS AS EXHIBIT F TO THIS
ADDENDUM**

**ATTACHMENT 2 TO MEMORANDUM IN SUPPORT OF
MOTION TO DEMAND APPEARS AS EXHIBIT D TO THIS
ADDENDUM**

Attachment 3

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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Level 3 Communications, LLC for Enforcement of the Interconnection Agreement Between Qwest and Level 3	MOTION FOR RECONSIDERATION AND REHEARING Docket No. 05-2266-01
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Level 3 Communications, LLC ("Level 3"), through its counsel, and pursuant to the provisions at Utah Code Annotated § 63-46b-12 and 54-7-15, hereby requests reconsideration and rehearing of the Order of Administrative Law Judge Steven F. Goodwill, as approved and confirmed by the Utah Public Service Commission ("Commission") on August 18, 2005, and in support of its motion, hereby submits the following:

For the purposes of this Motion for Reconsideration ("Motion"), Level 3 does not dispute the Procedural History or Background recited in the Order. The Commission's Findings and Conclusions of Law, however, contain errors that have led the Commission to reach the wrong result.

When the parties brought the present dispute to the Commission, Level 3 requested that the Commission enforce the straightforward, unambiguous language of the operative interconnection contract between Level 3 and Qwest Corporation ("Qwest") ("Old Agreement") to prevent Qwest from collecting on charges that were never contemplated by the parties when

the Old Agreement was executed. Qwest requested that the Commission “interpret” the clause in a way which Qwest argued was the only just and reasonable way: to, regardless of the explicit language in the contract, exclude ISP-bound traffic from the relative use calculation to which the parties had otherwise agreed. Report and Order, Discussion, B. Qwest’s Position (Aug. 18, 2005). Qwest’s position is contrary to well-established contract law, in Utah and the rest of the country, as is the Commission’s decision accepting Qwest’s position.

A. The Relative Use Provision in the Old Agreement Was Determined by the Commission to be Just and Reasonable.

On January 10, 2001, the Commission approved the agreement between Level 3 and Qwest, which is referred to in these proceedings as the Old Agreement. In approving the Old Agreement, the Commission specifically found that it “does not discriminate against any telecommunication carrier not a party to it” and that it “*comports with the [Telecommunications Act of 1996’s (the “Act”)] § 251*”. Report and Order, Docket No. 00-049-88, Findings of Fact (January 10, 2001) (emphasis added) (“Original Order”).

The Old Agreement contained the following language:

If the Parties’ elect to establish two-way direct trunks, the compensation for such jointly used ‘shared’ facilities shall be adjusted as follows. The nominal compensation shall be pursuant to the rates for direct trunk transport in Appendix A. The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider’s use of that facility. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider’s *relative use (i.e. originating minutes of use)* of the facility in the busy hour.

Old Agreement, Attachment 1 § 5.1.2.4 (emphasis added).¹

¹ As noted in Level 3’s Position Statement, the Old Agreement provided that the terms of the Old Agreement were to apply until the New Agreement was approved by the Commission.

This Agreement shall be effective upon Commission approval and shall remain in effect until June 26, 2001 and thereafter shall continue in force and effect unless and until a new agreement addressing all of the terms of this Agreement, becomes effective between the Parties. Either Party

Section 251 of the Act states, in part, that an incumbent local exchange carrier must interconnect with the competitive carrier's network "on rates, terms and conditions that are just, reasonable, and non discriminatory." 47 U.S.C. § 251(c)(2)(d). Thus, in finding that the Old Agreement complied with Section 251 of the Act, the Commission necessarily found that Section 5.1.2.4, the Relative Use clause of the Old Agreement, was just and reasonable.

The Original Order whereby the Commission approved the Old Agreement also ordered that the Old Agreement met the requirements of Section 252(e)(1) of the Act. Report and Order, Docket No. 00-049-88, Conclusions of Law (January 10, 2001). That section of the Act provides that a state commission may only reject an interconnection agreement adopted by negotiation or arbitration² when it finds, among other things, that:

the agreement does not meet the requirements of section 251 of this title, ... or the standards set forth in subsection (d) of this section.

47 U.S.C. § 252(e)(2). Subsection (d) of Section 252 requires state commissions to set "just and reasonable" rates for interconnection, network elements and the reciprocal exchange of traffic.

47 U.S.C. § 252(d). Necessarily implicit in the Commission's Original Order, therefore, was a determination that the relative use clause, as stated, was just and reasonable.

may request resolution of open issues in accordance with the provisions of Section 27 of this Part A of this Agreement, Dispute Resolution, beginning nine (9) months prior to the expiration of this Agreement. Any disputes regarding the terms and conditions of the new interconnection agreement shall be resolved in accordance with said Section 27 and the resulting agreement shall be submitted to the Commission. This Agreement shall remain in effect until a new interconnection agreement approved by the Commission has become effective.

Old Agreement, Part A, Section 20.1 (emphasis added).

² The Old Agreement was an "opt in" by Level 3 of the AT&T/US West Agreement that had been the subject of arbitration before this Commission. (See *In re Petition of Level 3 Comm'cns, LLC for Enforcement of the Interconnection Agreement between Qwest and Level 3*, TR at 40 (July 26, 2005)) (Counsel for Qwest: "I assure you that the AT&T agreements, I believe, have been arbitrated in every case.")

B. Contrary to Established Utah Contract Law, the Commission Failed to Give Effect to the Intention of the Parties.

Instead of enforcing the unambiguous language of the Old Agreement, which the Commission found to be just and reasonable, or applying acceptable principles of contract interpretation to determine the meaning of the relative use clause of the Old Agreement, the Commission ignored its explicit finding that the 2004 Arbitration Order should be applied *prospectively only*³ and instead applied retroactively the rationale of its 2004 Arbitration Order along with a new and selective interpretation of the FCC *ISP Remand Order*. See Report and Order, Findings and Conclusions of Law. It is also critically important to note that prior to the Arbitration Order and the implementation of the new Agreement, Qwest and Level 3 negotiated, agreed to and filed an amendment to reflect the affect of the FCC *ISP Remand Order* on the Old Agreement (“ISP Remand Amendment”). The Relative Use clause is unambiguous. It does not include any exception for ISP-bound traffic, and cannot reasonably be read to impose one. See Level 3 Position Statement at ¶ 17.

While it is true that the Commission may interpret contracts between parties, as demonstrated in Yeargin, Inc. v. Utah State Tax Comm’n, 20 P.3d 287, 297 (Utah 2001) and Cache County v. Property Tax Div. of Utah State Tax Comm’n, 922 P.2d 758, 766–67 (Utah 1996), the Commission must abide by the principles of contract interpretation in doing so. Principles of contract interpretation require that the meaning of contractual terms must be determined by the *intent of the parties at the time they entered into the agreement*. Uintah Basin Med. Ctr. v. Hardy, 110 P.3d 168, 172 (Utah Ct. App. 2005) (citing Central Fla. Invs., Inc. v. Parkwest Assocs., 40 P.3d 599 (Utah 2002)). Only if the plain language of the contract itself is ambiguous, may the language be interpreted to determine the intent of the parties. Id. “The

³ See 2004 Arbitration Order, Discussion, Subissues.

plain meaning rule preserves the intent of the parties and protects the contract against judicial revision.” Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990). Only if interpretation is required because of an ambiguity may extrinsic evidence be considered, but then only to ascertain the intent of the parties at the time they entered into the agreement. Id. However, “[t]he *only evidence relevant* to that inquiry is evidence of the *facts known to the parties at the time they entered the [agreement]*.” Peterson v. The Sunrider Corp., 48 P.3d 918, 925 (Utah 2002) (quoting Yeargin, 20 P.3d 287) (emphasis added). Not only must the Commission determine the intent of the parties at the time they contracted, it must apply the law that was in effect at the time the contract was signed. Cache County, 922 P.2d at 765–67; Washington Nat’l Ins. Co. v. Sherwood Assocs., 795 P.2d 665, 669 (Utah Ct. App. 1990).

The parties to the Old Agreement could have included language allowing an exception for ISP-bound traffic, but they did not. Qwest knew full well from doing business and exchanging traffic with Level 3 in other states that Level 3 served only ISPs at that time, and Qwest could have sought to have ISP-bound traffic excluded from relative use calculations during any one of the three times the commission was considering the Old Agreement. However, while Qwest likely drafted and arbitrated the agreement that Level 3 agreed to, it did not seek to exclude ISP-bound traffic from the relative use calculation and it did not seek to change the language of the contract through the change-in-law clause of the Old Agreement after the FCC’s *ISP Remand Order*. Rather, Qwest acted unilaterally and billed Level 3 for fees not contained in the contract, threatening to shut down Level 3’s services if it did not pay the unjustified amounts. The contract must control and this kind of unilateral behavior must be

prevented or it will result in the inability of parties to rely on fairly negotiated and approved contracts.

Even though Level 3 believes that the law in Utah governing direct trunk transport (“DTT”) billing was in Level 3’s favor at the time Level 3 and Qwest entered into the Old Agreement, the parties were free to negotiate and determine their rights by contract before presenting the Old Agreement to the Commission for its determination that the contract was “just and reasonable.” As this Commission itself noted in the 2004 Arbitration Order, this exact issue had been addressed with conflicting results in various states, and the issue was unsettled in Utah. 2004 Arbitration Order, Discussion. The parties, therefore, would have no reason to believe that anything other than the plain language of the contract would govern their conduct. Any other interpretation would have to have been specifically delineated by language in the agreement. The Commission is not free to “re-interpret” what it had already found to be a “just and reasonable” provision in light of the law as it existed at that time.

As noted above, after the FCC’s *ISP Remand Order*, the parties amended the Old Agreement in accordance with the change-in-law provision of the Old Agreement, but still, they did not include any exception to the relative use calculation for ISP-bound traffic, though they certainly could have if that had been their intent, and presumably, it would have been an appropriate time to do so. Instead, the parties chose to continue to abide by the relative use language of the Old Agreement, which the Commission had previously determined was just and reasonable and in compliance with Sections 251 and 252 of the Act.

While the Commission stated that it did not view the 2004 Order as precedent in this case, it stated:

The rationale behind the 2004 Order is equally applicable to the parties’ current dispute both because the issue now before us is

identical to the issue in Docket No. 02-2266-02 and because the release of the *ISP Remand Order* predates the start of the Dispute Period by more than a year.

Report and Order, Docket No. 05-2266-01, Findings and Conclusions of Law. This quoted section apparently states two reasons, for the Commission's decision: (1) the rationale of the 2004 Order is applicable; and (2) the *ISP Remand Order* predates the Dispute Period. However, neither reason allows the Commission to impose an interpretation other than what was intended by the parties *at the time they entered the Old Agreement, based on facts known to the parties at the time they entered the Old Agreement, and under existing law at the time they entered the Old Agreement*. Peterson, 48 P.3d at 925; Cache County, 922 P.2d at 765–67.

The rationale in the 2004 Order was that the FCC had determined in the *ISP Remand Order* that payment of reciprocal compensation for internet traffic could cause uneconomic subsidies and create incentives for CLECs to specialize in serving ISPs to the exclusion of other customers. 2004 Order, Discussion, Obligations under the Telecommunications Act. The Commission's 2004 Order decision was made in the context of the parties arbitrating the relative use clause in the New Agreement in light of the FCC *ISP Remand Order*, with the Commission adopting the FCC's reciprocal compensation rationale for relative use payments. However, this rationale cannot be retroactively imposed as the factual basis for the parties' intent regarding relative use payments at the time they entered the Old Agreement.

C. The Commission Failed to Give Effect to the Parties Agreement on How to Address a Change in the Law.

Level 3 is not requesting in this Docket that the Commission find that its rationale for the 2004 Arbitration Order is not applicable on a going forward basis in light of the FCC's *ISP Remand Order*.⁴ Rather, Level 3 submits that the fundamentals of contract law dictate that if

⁴ In fact, since the Commission's 2004 Order, there has been no dispute about charges for the ISP-bound traffic.

Qwest never availed themselves of the contractual provision that established the process for amending the Old Agreement for a change in the law, the Commission has no authority to ignore the terms of the Old Agreement and amend it.

The Old Agreement provided a procedure that the parties were to follow in the event of a change in the law. In fact, Qwest and Level 3 agreed to an ISP Remand Amendment to the Old Agreement. See Level 3 Position Statement at ¶ 17. Because the *ISP Remand Order* only spoke to intercarrier compensation, that amendment only established new terminating intercarrier compensation rates. Id. If the parties had understood the *ISP Remand Order* to also affect the Relative Use clause of the Old Agreement, the parties could have included language at that time that would have excluded ISP-bound traffic from relative use calculations. They chose not to and Section 5.1.2.4 of the Old Agreement was never amended.

The same is true with respect to the SPOP Amendment that the parties executed in June 2002. There is no language in the SPOP Amendment that changes the “relative use” treatment that is set forth in Section 5.1.2.4 concerning the exchange of ISP-bound traffic or the fact that all such traffic was Qwest originated during the Dispute Period. Instead, the SPOP Amendment confirms the well-established rule that competitive providers are allowed to interconnect at one point of interconnection in each LATA. The parties thus dealt with the change-of-law clause on more than one occasion yet the Old Agreement consistently dictated relative use treatment in accordance with the Commission’s finding that it was just and reasonable.

The Commission stated in its Report and Order in the present case that the *ISP remand Order* “illuminat[es] the proper meaning of Section 5.1.2.4 of Attachment 1 to the Old Agreement.” Report and Order, Findings and Conclusions of Law. But, the Commission in fact made no real attempt to ascertain the “proper meaning,” or it would have looked to the intent of

the parties as set forth in the plain language of Section 5.1.2.4 of the Old Agreement. The Commission imposed its own amendment to the contract based on its own reading of the *ISP Remand Order* in the 2004 docket. The Commission stated:

No one disputes that including ISP-bound traffic in the RUF calculation of the Old Agreement would result in Qwest bearing all of the costs of the DTT Facilities. We cannot conclude that such a result would equate to just and reasonable compensation for Qwest.

Report and Order, Findings and Conclusions of Law. Yet the Commission did conclude precisely that in its initial Original Order in Docket No. 00-049-88 approving the Old Agreement. Thus, while the Commission characterizes its current decision as ascertaining the proper meaning of Section 5.1.2.4, in fact the Commission has imposed a new obligation on the contract that never existed before, based on the rationale used in the 2004 Arbitration Order interpreting the *ISP Remand Order*, neither of which existed as “facts known to the parties at the time they entered the [Old Agreement].” Peterson, 48 P.3d at 925.

D. The Commission’s Action Is in the Nature of a Rulemaking and Results in Discriminatory Treatment of Level 3.

The Commission’s interpretation amounts to a rulemaking and the state has thus imposed upon Level 3 a rule without Level 3 having the benefit of engaging in the required rulemaking proceedings of the Utah Administrative Rulemaking Act (“ARA”). Pursuant to the ARA a rulemaking is *required by law* “when agency action: (a) authorizes, requires, or prohibits an action; (b) provides or prohibits a material benefit; (c) applies to a class of persons . . .; and (d) is explicitly or implicitly authorized by statute.” Utah Code Ann. § 63-46a-3(2). “Rulemaking is also required when an agency issues a written interpretation of a state or federal legal mandate.” Id. § 63-461-3(3). A rule should generally be given prospective, not retroactive, application. See, generally, id. § 63-46a-4; 73 C.J.S. Pub. Admin. Law & Proc. § 179. See also Williams v.

Public Serv. Comm'n of Utah, 720 P.2d 773, (Utah 1986) (noting that rulemaking is proper when an agency overrules its own decisions on which private parties have acted in reliance).

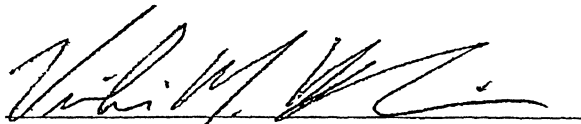
Applying the requirements for rulemaking set forth in the ARA to the instant case: (a) the Commission's decision authorizes or requires an action because it requires Level 3 to pay Qwest based on a formula excluding ISP-bound traffic from the relative use calculation for the Dispute Period even though no such condition was provided in the controlling agreement; (b) the Commission's decision provides a material benefit in that the Commission's decision authorizes Qwest to collect from Level 3 the approximately \$560,000 Qwest claims Level 3 owes to Qwest; see Tr. at p. 21, lines 9-13; (c) the conclusion of the Commission in this case applies to a class of persons as it is likely that the Commission would apply this new policy to any parties in similar positions with respect to payment obligations for DTT facilities; and (d) the Commission's decision is explicitly authorized by statute because the Commission based its decision on the Act.

More importantly, rulemaking is required because the Commission's decision is a written interpretation of a federal mandate in that the Commission ruled that it has determined a change in policy of what is just and reasonable under the Act in light of the FCC *ISP Remand Order*. Report and Order, Findings and Conclusions of Law (Aug. 18, 2005). Despite the fact that Level 3 relied on the Commission's ruling in its Original Order that the language of the Old Agreement, including Section 5.1.2.4 of Attachment 1, was just and reasonable as written, the Commission arbitrarily overruled this precedent and imposed a new interpretation of what is just and reasonable under the Act. Thus, pursuant to the ARA this action by the Commission would require a rulemaking, and even then, the results would not apply retroactively to the Old Agreement. The Commission's Order in this case is discriminatory in that it has been applied

retroactively to Level 3, and to no other carrier. Accordingly, the Commission's decision cannot stand.

WHEREFORE, based on the foregoing, Level 3 respectfully requests that the Commission (1) reverse the Report and Order issued August 18, 2005, in this matter; (2) determine that the Old Agreement does not require that ISP-bound traffic be excluded from the relative use charge; and (3) order that Level 3 is not obligated to pay the amounts billed by Qwest.

DATED this 19th day of September, 2005.



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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2005, I caused a true and correct copy of the foregoing **MOTION FOR RECONSIDERATION AND REHEARING** to be sent in the following manner:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

LEVEL 3 COMMUNICATIONS, LLC.,

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF
UTAH, and QWEST CORPORATION,

Defendants.

**OPPOSITION TO
MOTION TO REMAND**

Case No. 2:06cv00132 DAK

The Honorable Dale A. Kimball

Pursuant to Fed R. Civ. P. 6 and DUCivR 7-1, defendant Qwest Corporation (“Qwest”) hereby responds in opposition to the Motion to Remand and Memorandum in Support of Motion to Remand (“Motion”) filed by Level 3 Communications, LLC (“Level 3”) in this matter on March 15, 2006. For the reasons set forth below, the Motion should be denied.

I. INTRODUCTION

As Level 3 acknowledges in the Motion,¹ this matter comes before the Court as an appeal of a determination of the Public Service Commission of Utah (“Commission”) interpreting and enforcing an interconnection agreement previously entered into by Qwest and Level 3 under the Telecommunications Act of 1996 (“Act”).² The only question now before the Court is whether it has subject-matter jurisdiction over Level 3’s appeal. That question was largely resolved by the Supreme Court in *Verizon Maryland, Inc. v. Public Service Comm’n of Maryland*, 535 U.S. 635 (2002), where the Court found federal court jurisdiction under 28 U.S.C. § 1331 to review state commission determinations interpreting and enforcing interconnection agreements as long as “the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another”³ Just as in *Verizon*,⁴ in this case the state commission interpreted and enforced an interconnection agreement previously entered into by the parties under the Act. Likewise, just as in *Verizon*,⁵ in this case the right of the dissatisfied appellant to reverse the commission determination hinges on the construction of federal law.

The federal nature of Level 3’s claim is readily apparent upon review of the August 18, 2005 Report and Order (“Order”) to which Level 3 seeks to ascribe error.⁶ Although the

¹ See Motion at 7.

² P.L. 104-104, 110 Stat. 56 (1996). Hereinafter, sections of Title 47 of the United States Code enacted by the Act will be referred to as sections of the Act using their section numbers codified in Title 47.

³ 535 U.S. at 643 (quotation omitted).

⁴ See *id.* at 640.

⁵ See *id.* at 642-43.

⁶ See Report and Order, *In the Matter of the Petition of Level 3 Communications, LLC for Enforcement of the Interconnection Agreement Between Qwest and Level 3*, Docket No. 05-2266-01 (Utah PSC Aug. 18, 2005), a true and correct copy of which is attached as Attachment 1.

Motion's single, brief characterization of the Order fails to state the basis upon which the Commission made its determination,⁷ a brief review of the Order leaves no doubt that the question of whether the Commission was correct or erroneous in its interpretation of the interconnection agreement (and therefore whether Level 3 has a legitimate claim on appeal) is first and foremost a question of federal law. As the Commission stated in the Order, the reason it found for Qwest in this matter was that:

As we recognized in Docket No. 02-2266-02, **any interpretation of Section 5.1.2.4 of Attachment 1, whether in the New Agreement or in the Old Agreement, must accord with the Section 251(d)(1) requirement of the Act that rates for interconnection of facilities be just and reasonable. No one disputes that including ISP-bound traffic in the RUF calculation under the Old Agreement would result in Qwest bearing all of the cost of the DTT facilities. We cannot conclude that such a result would equate to just and reasonable compensation for Qwest.** We therefore conclude that the only proper reading of Section 5.1.2.4 of Attachment 1 to the Old Agreement excludes ISP-bound traffic from the RUF calculation in determining the parties' respective payment obligations for DTT facilities provided during the Dispute Period.⁸

This reasoning, manifestly based on federal law, buttressed by the Commission's accurate reading of the Federal Communications Commission's *ISP Remand Order*,⁹ is the only basis identified in the Order for the Commission's interpretation of the interconnection agreement. There was no separate state law analysis. Thus, whatever Level 3 thinks about what the Commission **should** have done under state contract law, to obtain a reversal Level 3 will

⁷ Notwithstanding the fact that Level 3 apparently found it necessary to file an over-length memorandum to present its argument, it only managed a single, misleading characterization of the very Commission action it seeks to appeal. See Motion at 5 ("On August 18, 2005, the Commission issued its Report and Order ruling that regardless of the absence of language requiring it, Qwest should be allowed to exclude ISP-bound traffic from the relative use calculation in the pricing provision for shared trunks in the Old Agreement.").

⁸ Order at 10 (emphasis added).

⁹ See *id.* at 9 (citing Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

have to demonstrate that what the Commission **did** was in error. And what the Commission did was based entirely on federal law—determining that “any interpretation of [the agreement] . . . must accord with . . . Section 251(d)(1) . . . of the Act . . .” No matter how much it seeks to avoid the issue there is simply no way for Level 3 to obtain relief without establishing that the Commission’s understanding of federal law was erroneous. Here, “the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.” Accordingly, this Court has federal question jurisdiction under 28 U.S.C. § 1331. The Motion lacks merit and should be denied.

II. ARGUMENT

A. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1331 AND SECTION 252 OF THE ACT.

In *Verizon*, the Supreme Court conclusively established that federal-question jurisdiction will lie for federal court review of state commission determinations interpreting and enforcing previously-approved interconnection agreements, as long as “the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.”¹⁰ The Supreme Court did not decide the separate question of whether section 252 of the Act provides an additional basis for jurisdiction because “even if § 252(e)(6) does not *confer* jurisdiction, it at least does not *divest* the district courts of their authority under 28 U.S.C. § 1331 to review the Commission’s order for compliance with federal law.”¹¹

¹⁰ See *supra* note 3.

¹¹ See 535 U.S. at 642 (emphasis in original).

The Tenth Circuit has considered the issue of jurisdiction specifically under section 252, however. The Tenth Circuit has found that federal court jurisdiction lies under section 252 to review state commission determinations interpreting and enforcing interconnection agreements because:

We agree with the Fifth Circuit that § 252(e)(6) should not be construed so narrowly as to limit federal jurisdiction to only those decisions that either approve or reject interconnection agreements. Section 252(e)(6) grants federal courts jurisdiction in “any case” in which a state commission makes a “determination” under this section. **When a state commission, after approving an agreement pursuant to the authority granted by the Act, subsequently issues another decision interpreting the terms of the agreement, this is also a “determination” pursuant to its authority under § 252.**¹²

While Level 3 may be generally correct to state that federal jurisdiction is only appropriate when a complainant’s right of relief “turns on the construction of a federal law,”¹³ that standard is satisfied (again, per *Verizon*) as long as “the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.”¹⁴ Moreover, the Tenth Circuit’s language in *Southwestern Bell* quoted immediately above supports the view that **any** state commission determination interpreting and enforcing an agreement approved under the Act is

¹² *Southwestern Bell Tel. Co. v. Brooks Fiber Comm. of Oklahoma*, 235 F.3d 493, 497 (10th Cir. 2000) (citation omitted; emphasis added).

¹³ See Motion at 12 (quoting *Morris v. City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994)); but see *Morris*, 39 F.3d at 1111-12 (noting federal court jurisdiction where a state cause of action “turns on a substantial question of federal law” and that a “court examining whether a case turns on a question of federal law should focus on whether Congress evidenced an intent to provide a federal forum.”) (citations omitted). In the case of the Act, Congress not only provided a federal forum for review of state commission determinations under section 252, but also made that jurisdiction exclusive. See 47 U.S.C. § 252(e)(4), (6).

¹⁴ See *supra* note 3.

itself a determination under the Act subject to federal court review.¹⁵ Thus, the *Southwestern Bell* Court went on to state: “having decided that the state commissions have the authority to interpret and enforce interconnection agreements **and that the appropriate forum for review of these decisions is federal court**, it would be a waste of judicial resources to limit the court’s consideration to federal issues only.”¹⁶ The Court found, therefore, that supplemental jurisdiction allowed federal court review of any state-law issues.¹⁷

Whether or not **every** state commission determination interpreting or enforcing an interconnection agreement under the Act necessarily involves a determination of federal law, the Commission Order here was most certainly, indeed exclusively, a federal law determination. As noted in the introduction above, the Commission relied on an interpretation of the requirements of section 251, buttressed by its interpretation of the Federal Communications Commission’s *ISP Remand Order*, to reach its determination.¹⁸ There was no separate state law analysis provided in support of the determination, but rather an express conclusion that the requirements of the Act dictated the outcome. Although Level 3 argues that the Commission should have further considered state contract law issues and accepted Level 3’s analysis under state contract law (a contention Qwest disputes), Level 3 cannot demonstrate Commission error and show sufficient

¹⁵ See also, e.g., *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 2000) (holding that in the Seventh Circuit federal courts are limited to the consideration of whether state commission determinations comply with the Act, but as a necessary corollary: “Thus every time a carrier complains about a state agency’s action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer ‘no.’”).

¹⁶ See 235 F.3d at 498 (emphasis added).

¹⁷ See *id.* (citing with approval the approach taken by the Fourth, Fifth, and Ninth Circuits: “We find [the approach of considering both federal and state issues] to be preferable. Although the circuits that have included the state law determinations in their review have not been explicit as to their reasons for doing so, we believe they were, at least implicitly, exercising supplemental jurisdiction over these issues under 28 U.S.C. § 1367(a).”).

¹⁸ See Order at 10.

cause for reversal or remand unless it demonstrates that the Commission misinterpreted the Act. Level 3 must show that the Commission erred in finding section 251 and the *ISP Remand Order* to be controlling.

Level 3's appeal can be sustained only if its claims under the "laws of the United States are given one construction" (i.e., that the Commission erred in finding section 251 and the *ISP Remand Order* to be controlling) and will be defeated "if they are given another." Both under 28 U.S.C. § 1331 (per the Supreme Court) and under section 252 (per the Court of Appeals), federal courts have jurisdiction to review state commission determinations such as the Order, which interpret and enforce interconnection agreements entered under the Act.

B. THE LACK OF A CLEAR FEDERAL CLAIM ON THE FACE OF LEVEL 3'S APPEAL IS NO BAR TO JURISDICTION.

Finally, the absence of a clear federal claim on the face of Level 3's appeal does not act as a bar to jurisdiction in this case. This is so because "[a] plaintiff may not defeat removal by failing to plead federal questions that are essential elements of the plaintiff's claim. Similarly, removal is permitted when the plaintiff's right to relief requires resolution of a substantial question of federal law."¹⁹

Removal jurisdiction is typically determined by a review of the contents of a well-pled complaint, and the mere presence of a federal defense will not alone support jurisdiction.²⁰ However, under the artful-pleading doctrine, a plaintiff may not defeat removal "by framing in terms of state law a complaint the real nature of [which] is federal, regardless of plaintiff's

¹⁹ See *Schmeling v. NORDAM*, 97 F.3d 1336, 1339 (10th Cir. 1996) (citing *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983)).

²⁰ See, e.g., *Schmeling*, 97 F.3d at 1339.

characterization, or by omitting to plead necessary federal questions in a complaint.”²¹ The artful omission of a necessary federal question is precisely what Level 3 seeks to accomplish in this case.

While the Motion fails to include an accurate description of the exclusively federal basis for the determination Level 3 seeks to appeal, and while it fails to claim the Commission erred in relying on section 251 and the *ISP Remand Order*, Level 3 will not be able to establish Commission error (even in state court) without demonstrating that the Commission misinterpreted or misapplied the Act. Level 3’s complaint (its Petition for Review) implicitly acknowledges the need for review of the Commission’s reliance on federal law, in stating that Level 3 “seeks review of the entire [Commission] decision”²² and in complaining that the Commission “imposed new terms to the contract.”²³ The “entire decision” at issue is the Commission determination that section 251 and the *ISP Remand Order* required the Commission to interpret the interconnection agreement as it did and the supposed “new terms” “imposed” were these same federal requirements.

Thus, even assuming that Level 3 can properly assert state law claims in arguing Commission error, the true nature of the Order, the necessary resolution of substantial federal issues, and Level 3’s request for a review of the “entire decision,” supports “the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience,

²¹ *Marcus v. AT&T Corp.*, 138 F.3d 46, 55 (2nd Cir. 1998) (quoting *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 27 (2d Cir.1988)) (emphasis added).

²² See Petition for Review (attached as Exhibit A to the Notice of Removal) at 2.

²³ See *id.*

solicitude, and hope of uniformity that a federal forum offers on federal issues.”²⁴ While Level 3 may believe that “the federal statute, the FCC’s orders, and the precedent established in the federal courts are irrelevant to the legal resolution of this matter,”²⁵ obviously, the Commission thought otherwise. For Level 3 to have any hope of convincing a court that the Commission erred, Level 3 must persuade the Court that the Commission’s interpretation of federal law was incorrect.

This is clearly a case where the complainant’s “right to relief requires resolution of a substantial question of federal law”²⁶ and where the appeal “will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.”²⁷ In such circumstances the Court has subject matter jurisdiction, removal was appropriate, and the Motion should be denied.

III. CONCLUSION

For the foregoing reasons, defendant Qwest respectfully requests that Level 3’s Motion be denied and that the Court retain jurisdiction over Level 3’s appeal.

²⁴ See *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, ___ U.S. ___, 125 S.Ct. 2363, 2367 (2005); see also, e.g., *Pinney v. Nokia, Inc.*, 402 F.3d 430, 442 (4th Cir. 2005) (“Under the substantial federal question doctrine, a defendant seeking to remove a case in which state law creates the plaintiff’s cause of action must establish two elements: (1) that the plaintiff’s right to relief necessarily depends on a question of federal law, and (2) that the question of federal law is substantial. . . . If a plaintiff can establish, without the resolution of an issue of federal law, all of the essential elements of his state law claim, then the claim does not necessarily depend on a question of federal law.”) (citations and quotation omitted).

²⁵ See Motion at 14.

²⁶ See *supra* note 19.

²⁷ See *supra* note 3.

RESPECTFULLY SUBMITTED: April 3, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2006 I served the enclosed **OPPOSITION**

TO MOTION TO REMAND by electronic filing to:

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EXHIBIT 1

**EXHIBIT 1 TO THE OPPOSITION TO MOTION TO REMAND
APPEARS AS EXHIBIT G TO THIS ADDENDUM**

EXHIBIT K

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

LEVEL 3 COMMUNICATIONS, LLC

Plaintiff

v.

PUBLIC SERVICE COMMISSION OF UTAH,

and

QWEST CORPORATION,

Defendants.

**REPLY MEMORANDUM IN SUPPORT
OF MOTION TO REMAND**

(Oral Argument Requested)

Hon. Dale A. Kimball
2:06cv00132 DAK

Level 3 Communications, LLC ("Level 3"), through its counsel, hereby submits this Reply Memorandum in Support of its Motion to Remand this case to the Supreme Court of Utah.

I. STATEMENT OF FACTS

In reply to Qwest's Opposition to Motion to Remand ("Opposition"), Level 3 sets forth the following statement of additional facts:

1. On or about September 7, 2000, Level 3 and Qwest Corporation ("Qwest") entered into an interconnection agreement ("Old Agreement") pursuant to the Communications

Act of 1934, as amended by the Telecommunications Act of 1996 (the “Telecommunications Act” or the “Act”) and Utah Code Annotated § 54-8b-2.2.

2. The Old Agreement provided among other things:

If the Parties’ elect to establish two-way direct trunks, the compensation for such jointly used ‘shared’ facilities shall be adjusted as follows: The nominal compensation shall be pursuant to the rates for direct trunk transport in Appendix A. *The actual rate paid to the provider of the direct trunk facility shall be reduced to reflect the provider’s use of that facility. The adjustment in the direct trunk transport rate shall be a percentage that reflects the provider’s relative use (i.e. originating minutes of use) of the facility in the busy hour.*

Old Agreement, Attachment 1 § 5.1.2.4 (emphasis added) (hereinafter “Relative Use” clause).

3. The Utah Public Service Commission (“PSC” or “Commission”) approved the Old Agreement on January 10, 2001, finding that it “does not discriminate against any telecommunication carrier not a party to it” and that it “*comports with the [Telecommunications Act] § 251.*” Report and Order, Docket No. 00-049-88 (Jan. 10, 2001) (emphasis added).

4. On April 27, 2001, the Federal Communications Commission (“FCC”) issued its ISP Remand Order. See 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, CC Docket No. 99-68 16 FCC Rcd. 9151 (rel. April 27, 2001) (ISP Remand Order). The ISP Remand Order determined that telecommunications traffic bound for an Internet Service Provider (“ISP”) is interstate rather than local traffic and, for that reason, the reciprocal compensation requirements of Section 251(b)(5) do not apply to Internet-bound traffic. There is no dispute that the shared trunks in the present case are provided pursuant to

Qwest's obligation to interconnect with Level 3 under Section 251(c)(2), not pursuant to the reciprocal compensation provision of Section 251(b)(5).

5. The Old Agreement expired on June 26, 2001, yet continued in force under its "evergreen clause" until a new agreement was approved by the Commission.

6. Pursuant to a change-in-law provision of the Old Agreement, on June 28, 2002, Level 3 and Qwest (collectively, the "Parties") entered into a Single Point of Presence ("SPOP") Amendment to the Old Agreement, which added terms and conditions for SPOP in Utah.

7. On November 14, 2002, pursuant to the change-in-law provision of the Old Agreement, Level 3 and Qwest filed another amendment to the Old Agreement implementing the FCC's ISP Remand Order. Although they amended the Old Agreement with respect to reciprocal compensation for ISP-bound traffic, the Parties never amended the Relative Use clause.

8. In 2001, the Parties began negotiations for a New Agreement. Because they were unable to agree on language for the new Relative Use clause, they petitioned the PSC for arbitration of that issue. On December 10, 2002, a hearing was held and testimony received in the Arbitration Proceeding for the New Agreement.

9. The Commission issued its Report and Order in the Arbitration Proceeding ("Arbitration Order") approving the New Agreement on February 20, 2004 (Report and Order, PSC Docket No. 02-2266-02). Thus, it was on this date that the New Agreement replaced the Old Agreement. The Arbitration Order determined that the new relative use language that excludes ISP-bound traffic from the Relative Use calculation would be applied on a prospective basis only. The Arbitration Order states:

The contract provides for a relative use factor of 50% to be used until a new factor is agreed upon by the parties. Qwest proposes that when a new factor is established that bills should be retroactively adjusted for the initial billing quarter. Level 3 argues that any new relative use factor should be used prospectively only. We will adopt Level 3's position and order that *the contract language be modified so that no true up will be made and new relative use factors will apply prospectively only.*

Arbitration Order at 4 (emphasis added).

II. THE FEDERAL COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION.

In Level 3's Memorandum in Support of this Motion to Remand, Level 3 explained that the federal court does not have subject matter jurisdiction because (1) Level 3's Petition for Relief did not raise a question of federal law; (2) Level 3's cause of action was not created by federal law; and (3) the resolution of the substantive issues in this case does not turn on a substantial question of federal law. Level 3's Memorandum in Support of Motion to Remand ("Memo in Support").

Qwest's Opposition does not directly respond to the arguments that Level 3 discussed in its Memo in Support. Instead, Qwest offers three broad arguments: (1) the Court must take jurisdiction to determine whether the PSC misapplied federal law; (2) the case law supports a finding that the Court has jurisdiction; and (3) Level 3 has used artful pleading to frame its claim in terms of state law. Level 3 responds as follows:

A. The Resolution of this Case Does Not Turn on a Question of Federal Law.

In its Opposition, Qwest argues that the Commission's decision relied on the Act and the FCC's Remand Order. It contends Level 3, therefore, cannot demonstrate error unless it demonstrates the Commission misinterpreted the Act. Opposition at 6-7. Thus, Qwest

concludes that the issue in this case turns on a question of federal law. Id. Qwest's argument misses the point. The Commission's error was that it applied federal law at all instead of simply enforcing the plain, unambiguous terms of the contract.

Qwest's argument fails to recognize the distinction between the court's review of federal law for the purpose of determining jurisdiction, and its review of federal law for the purpose of determining the merits of the case. As discussed in Level 3's Memo in Support, not every term in an interconnection agreement is subject to federal law, and not every case interpreting an interconnection agreement raises a question of federal law that can serve as a basis for federal jurisdiction. See Nuvox Commc'ns, Inc. v. North Carolina Utils. Comm'n, 409 F. Supp. 2d 660, 664-65 (E.D.N.C. 2006) (no federal jurisdiction under § 1331 for interpretation of audit provision in federal interconnection agreement). Yet, every determination of whether jurisdiction lies under Section 1331 necessarily requires a review of the applicability of federal law to the case. Federal courts are thus routinely required to assess the applicability of federal law in determining whether subject matter jurisdiction exists. See e.g., Superior Oil Co. v. Merritt, 619 F. Supp. 526 (D. Utah 1985) (reviewing federal law to determine that federal question jurisdiction did not exist). Analyzing federal law for the purpose of determining jurisdiction does not itself confer federal jurisdiction.

Qwest argues that because the Commission relied on Section 252¹ and the ISP Remand Order to reach its determination, "Level 3 will not be able to establish Commission error . . . without demonstrating that the Commission misinterpreted or misapplied the Act." Opposition at 6-7. Thus, it argues, Level 3's "right to relief requires a resolution of federal law." (citations

¹ Even though the Commission's Order cites Section 251, a check of the cited provision shows that the Commission obviously meant Section 252.

omitted). This is incorrect. Level 3's right to relief does not turn on a question of federal law, because the Commission's decision to invoke Section 252 was an error of *state* law.

Under Utah law, a contract must be interpreted in light of the law that was in effect at the time the contract was signed. Cache County v. Property Tax Div. of Utah State Tax Comm'n, 922 P.2d at 765–67 (Utah 1996). State principles of contract interpretation also require that the meaning of contractual terms must be determined consistent with the intent of the parties at the time they entered into the agreement. Uintah Basin Med. Ctr. v. Hardy, 110 P.3d 168, 172 (Utah Ct. App. 2005) (citing Central Fla. Invs., Inc. v. Parkwest Assocs., 40 P.3d 599 (Utah 2002)).

The Old Agreement was “adopted” by Level 3 pursuant to Section 252(i) of the Act. It was the same agreement that Qwest had entered into with AT&T, and it contained the Relative Use clause at issue in the present case.² The Commission arbitrated and approved the Old Agreement, as between both Qwest and AT&T, and Qwest and Level 3, finding that it complied with Section 251 of the Act. (Report and Order, Docket No. 00-049-88 (Jan. 10, 2001)). Thus, the Commission deemed the Relative Use clause to have met the Act's requirement that rates for interconnection must be just, reasonable and non-discriminatory. *Id.*

At the time that Qwest and Level 3 entered into the Commission-approved Old Agreement, the ISP Remand Order had not yet issued. As discussed in Level 3's Memo in Support, the ISP Remand Order deals with reciprocal compensation, not with sharing the costs of direct trunks. Even if it did address such shared costs (which it did not), the ISP Remand Order would not have been automatically applicable to the Old Agreement. The Old Agreement

² The text of the Relative Use clause is found at Attachment 1 § 5.1.2.4 of the Old Agreement. It is reproduced in Level 3's Memorandum in Support of Motion to Remand at 2, and in this Reply Memorandum at Paragraph 2 of the Statement of Facts.

included a provision governing the procedures to be followed in the event of a change of law. Along with the rest of the Old Agreement, this change-in-law provision was found by the Commission to comply with the Act.

After the FCC issued the ISP Remand Order, the Parties invoked the change-in-law provision to reform the reciprocal compensation clause, amending it in response to the ISP Remand Order. Yet, the Parties never attempted to revise the language of the Relative Use clause of the Old Agreement. The Relative Use clause remained in effect for the duration of the Old Agreement, which was until the Commission issued its order approving the New Agreement on February 20, 2004. (Report and Order, Docket No. 02-2266-02, February 20, 2004).

Level 3 filed its petition with the Commission in the present case on June 23, 2005, seeking an interpretation of the language of the Relative Use clause of the Old Agreement to resolve a long-standing billing dispute with Qwest about payment for interconnection facilities. It sought an interpretation from the Commission according to the intention of the parties, and according to the law that existed at the time they entered into the Old Agreement. Instead, even though the Commission had previously found the Old Agreement in compliance with the Act, and even though the Parties never amended the Relative Use clause, the Commission invoked Section 252 and found that the Relative Use clause of the Old Agreement now did not comply with the Act. In reaching this decision, the Commission ignored the change-in-law provision and relied instead on the ISP Remand Order and its own decision in the Arbitration of the New Agreement. Report and Order at 9-10 (Aug. 18, 2005).

The Commission erred by ignoring its original approval of the Old Agreement, by ignoring its Arbitration Order that stated the *new* relative use calculation would be applied

prospectively only, and in interpreting the Relative Use clause of the Old Agreement in context of the law that was in effect in 2005, rather than the law in effect at the time the contract was signed. Cache County, 922 P.2d at 765–67. The Commission also should have interpreted the Relative Use clause consistent with the intent of the parties at the time it was executed. Uintah Basin Med. Ctr., 110 P.3d at 172. There was nothing in the Act, the ISP Remand Order or the Commission’s recent Arbitration Order that would allow the Commission to abrogate the change-in-law provision that it had previously approved or that would support the Commission’s application of federal law. Whether the Commission erred in failing to give effect to the language in the contract does not depend on federal law, but upon state law principles of contract interpretation. Illinois Bell Telephone Co. v. Worldcom Technologies, Inc., 179 F.3d 566, 574 (7th Cir. 2000).

B. The Case Law Cited by Qwest Does Not Provide Precedent for Finding that Federal Jurisdiction Exists under Section 1331.

The cases relied on by Qwest in its Opposition, are inapplicable because, without exception, these cases involved disputes about the obligation to pay reciprocal compensation under Section 251(b)(5).

Like Level 3, Qwest has cited Verizon Maryland.³ However, Qwest uses excerpts from the case to support an assertion for which the case does not stand. Qwest states, “just as in Verizon,” a determination of a state commission interpreting or enforcing an interconnection agreement “hinges on the construction of federal law.” Opposition at 2. In fact, the Court in Verizon Maryland explicitly declined to hold that the interpretation or enforcement of

³ Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002).

interconnection agreements was a determination under Section 252.⁴ Qwest's mischaracterization of the holding in Verizon Maryland is likely due to the fact that, unlike the present case, the question before the Court involved the interpretation of a reciprocal compensation provision subject to Section 251(b)(5). See id. 535 U.S. at 643 ("Here, the resolution of Verizon's claim turns on whether the Act, or an FCC ruling issued thereunder, precludes the Commission from ordering payment of reciprocal compensation"). The Relative Use clause in the Old Agreement, which allocated Qwest and Level 3's costs for direct truck transport arrangements, is not required under the Act and does not implicate Section 251(b)(5). Qwest also ignores that the plaintiffs in Verizon Maryland specifically alleged a violation of the Act. 535 U.S. 642. For those reasons, Verizon Maryland is not precedent, as Qwest urges, for the proposition that the issues in the present case turn on the construction of federal law.

Qwest also cites Southwestern Bell Tel. Co. v. Brooks Fiber Comm. Of Oklahoma, 235 F.3d 493, 497 (10th Cir. 2000), taking out of context the court's statement that "any state commission determination interpreting and enforcing an agreement approved under that Act is itself a determination under the Act, subject to federal court review." Opposition at 5-6. As in Verizon Maryland, the court in Southwestern Bell was considering reciprocal compensation under Section 251(b)(5), not shared cost of trunks. 235 F.3d at 496. Moreover, the Tenth Circuit

⁴ The Court stated:

[Petitioners] argue ... that a state commission's authority under § 252 implicitly encompasses the authority to interpret and enforce an interconnection agreement that the commission has approved, and that an interpretation enforcement decision is therefore a "determination under § 252" subject to federal review. Whether the text of § 252(e)(6) can be so construed is a question we need not decide. For we agree with the parties' alternative contention, that even if § 252(e)(6) does not confer jurisdiction, it at least does not divest the district court's of their authority under 28 U.S.C. § 1331 to review the commission's order for compliance with federal law.

535 U.S. at 641-42 (emphasis added).

Court's opinion in Southwestern Bell should be narrowly applied to avoid extending federal jurisdiction farther than the United States Supreme Court was willing to do in Verizon Maryland. In Southwestern Bell, neither party contended that the federal courts lacked subject matter jurisdiction to hear the appeal from the Oklahoma Commission. Id. at 496. Indeed, Southwestern Bell appealed the commission's decision specifically on the grounds that the decision conflicted with not only the plain language of the agreement, but also with state and federal precedent, and "the reciprocal compensation provisions of the Act." Id. Under those circumstances, the Tenth Circuit Court found that federal jurisdiction was conferred pursuant to Section 252. Two years later, however, the United States Supreme Court in Verizon Maryland, faced with virtually the same issue, declined to hold that Section 252 conferred jurisdiction to review decisions of state commissions interpreting or enforcing interconnection agreements. Instead, because the parties in the Verizon Maryland case had also alleged a violation of the Act, the Court relied on Section 1331 to find that subject matter jurisdiction existed. 535 U.S. at 641-42. Because the present case is not a dispute involving reciprocal compensation, and because Level 3 has not alleged a violation of the Act, Qwest's reliance on Southwestern Bell is misplaced.

Qwest also cited Illinois Bell, 179 F.3d 566 (dispute about reciprocal compensation) to support Qwest's general contention that every dispute about an interconnection agreement arises under federal law. Opposition at 5-6, n.15. Yet, the court in that case expressly stated otherwise:

Lest there be any misunderstanding ... we add that *any issues of state law remain open for determination in the proper forum*. Section 252(c)(6) authorizes a federal court to determine whether the agency's decision departs from federal law. *A decision "interpreting" an agreement contrary to its terms creates a*

different kind of problem—one under the law of contracts, and therefore one for which a state forum can supply a remedy.

Illinois Bell, 179 F.3d at 574 (emphasis added). The Court's statement in Illinois Bell, rather than serving as precedent for a finding of federal subject matter jurisdiction, supports an order remanding this case to the Utah Supreme Court.

The authority cited by Qwest does not support a conclusion that Section 252 provides an independent basis for federal jurisdiction to review a state commission decision interpreting or enforcing a provision in an interconnection agreement. Likewise, the authority cited by Qwest does not suggest that jurisdiction exists under Section 1331. The present case is not a dispute about reciprocal compensation. Level 3 did not allege a violation of the Act. It did not appeal the Commission's decision to federal court. Thus, none of the cases cited by Qwest provides any precedent for a conclusion that federal subject matter jurisdiction exists in this case.

C. Level 3's Complaint Alleging State Law Causes of Action Satisfies the Well-Pleaded Complaint Rule.

In order for a court to find jurisdiction under Section 1331, the plaintiff's complaint must raise a question of federal law. Nicodemus v. Union Pac. Corp., 318 F.3d 1231, 1235 (10th Cir. 2003). A pleading of a defendant that raises a federal question "is inadequate to confer federal jurisdiction." Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 808 (1986). Although this case comes to the court as an appeal from the Commission's decision, the Court should still look to the plaintiff's complaint rather than the Commission's Order to see whether plaintiff has raised a question of federal law. A review of the background of this case and of the issues presented shows that the Commission's error was that it incorrectly relied upon federal law

rather than applying Utah law. For that reason, Level 3's Petition for Review is soundly grounded in state law.

In its Memo in Support, Level 3 explained that its initial petition to the Commission sought an order enjoining Qwest from disconnecting service to Level 3, and a declaration under the Old Agreement. There was no claim that Qwest had violated federal law, that any provision of federal law applied, that the Commission's jurisdiction to hear the Petition derived from federal law, or that Level 3 was entitled to any remedy under federal law. Likewise, in Level 3's Request for Reconsideration of the Commission's Order, Level 3 argued that the Commission had failed to correctly apply state law, and failed to give effect to the intention of the parties as expressed in the Old Agreement. Level 3 does not, and has never viewed this dispute as anything more than a question of common law interpretation of the words of the Old Agreement.

In its Opposition, Qwest points out that a plaintiff may not defeat jurisdiction of the federal courts by "artful pleading," framing a federal cause of action in terms of a state law, or omitting to plead essential federal questions. Opposition at 7-8 (citations omitted). Level 3 does not suggest that the Court should ignore substantial questions of federal law when a plaintiff's right to relief requires resolution of a federal question. Qwest, however, bears the burden to demonstrate that a substantial federal question exists. Laughlin v. K-Mart Corp., 50 F.3d 871, 873 (10th Cir. 1995).

Other than general references to the Commission's reliance on both Section 252 and the ISP Remand Order, Qwest has not identified any federal statute, rule or order that it claims is essential to determining the issues raised in either Level 3's petition to the Commission, or its appeal of the Commission's decision. While it insists that "the right of petitioners to recover

under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,” it never identifies or discusses the law upon which this case might turn. Opposition at 4. Qwest also asserts that Level 3 seeks to accomplish “the artful omission of a necessary federal question,” yet fails to identify what that federal question might be. Instead, it simply asserts that “Level 3 will not be able to establish Commission error . . . without demonstrating that the Commission misinterpreted or misapplied the Act.” Opposition at 8.

Whether the Commission incorrectly relied on federal law turns upon state contract law. The only federal questions in this case are those that the Court must ask before it determines whether it has jurisdiction under Section 1331. There is no other question of federal law that Qwest has identified upon which this case would turn. For that reason, Level 3 submits that based on state law, the Commission erred in applying federal law, and that the Court, therefore, does not have subject matter jurisdiction.

III. CONCLUSION

For the foregoing reasons, and the reasons discussed in Verizon Maryland, Section 252 does not provide a basis for finding federal subject matter jurisdiction in the present case. Moreover, because this case involves the interpretation and enforcement of a provision in an interconnection agreement that, unlike reciprocal compensation, is not required under Section 251, there is no federal question involved at all. The sole issue in this case is the interpretation of the Relative Use clause. That issue must be examined under the law existing, and according to the parties’ intentions expressed, at the time the contract was formed. The Commission erred in failing to do so and in misapplying inapplicable federal law governing reciprocal

compensation. For those reasons, Level 3 respectfully requests this Court find that it does not have subject matter jurisdiction and remand this case to the Utah Supreme Court.

DATED this 17th day of April, 2006.

/s/ William J. Evans

William J. Evans (5276)

Vicki M. Baldwin (8532)

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EXHIBIT L

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

LEVEL 3 COMMUNICATIONS, LLC

Plaintiff,

vs.

**PUBLIC SERVICE COMMISSION OF
UTAH and QWEST CORPORATION**

Defendants.

**ORDER REMANDING ACTION TO
UTAH SUPREME COURT**

Case No. 2:06CV132K

This matter is before the court on Level 3 Communications, LLC's ("Level 3") Motion to Remand. A hearing on the motion was held on May 17, 2006. At the hearing, Level 3 was represented by Gregory L. Rogers and William J. Evans. Defendant Qwest Corporation ("Qwest") was represented by David L. Elmont. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the motion under advisement, the court has further considered the law and facts relating to this motion. Now being fully advised, the court renders the following Order.

Level 3 has requested that this court remand this case back to the Utah Supreme Court. Level 3 had previously appealed to the Utah Supreme Court the Public Service Commission's decision regarding an agreement Level 3 had with Qwest. Qwest removed that appeal to this court. Level 3 argues that this court does not have subject matter jurisdiction over this appeal from the Commission's Report and Order because Level 3's Petition before the Commission did not raise a question of federal law, its causes of action were not created by federal law, and there

is no issue in this case that turns on a substantial question of federal law. Instead, Level 3 argues, the resolution of this matter requires only the application of state law principles of contract interpretation. Qwest, on the other hand, claims that this court has jurisdiction because the appeal involves the interpretation of federal law.

District courts have “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. “A case arises under federal law if its well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law. *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227, 1232 (10th Cir. 2006) (internal quotations and citations omitted). Thus, “even though a plaintiff asserts only claims under state law, federal-question jurisdiction may be appropriate if the state-law claims implicate significant federal issues.” *Id.*

The court finds that there is no federal question on the face of Level 3's Petition, its claims were not created by federal law, and also that Level 3's right to relief does not depend on resolution of a substantial question of federal law. Rather, the resolution of this dispute depends upon state contract law. For the reasons stated in Level 3's memorandum in support and in its reply memorandum, the court agrees that it does not have subject matter jurisdiction over this action.

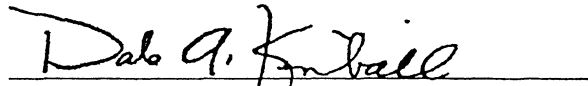
CONCLUSION

For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED that Level 3's Motions to Remand [Docket No. 4] is GRANTED. The Clerk of the Court is directed

to remand this action back to the Utah Supreme Court.

DATED this 26th day of May, 2006.

BY THE COURT:

A handwritten signature in black ink, reading "Dale A. Kimball", written over a horizontal line.

DALE A. KIMBALL
United States District Judge