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AZ CORP COMMISSION
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IN THE MATTER OF
PAC-WEST TELECOMM, INC.,

Complainant,

vs.

QWEST CORPORATION,

Respondent.

DOCKET NO. T-01051B-05-0495
DOCKET NO. T-03693A-05-0495

**QWEST CORPORATION'S NOTICE
OF SUPPLEMENTAL AUTHORITY IN
SUPPORT OF RESPONSE TO MOTION
FOR SUMMARY DETERMINATION**

Qwest Corporation ("Qwest") hereby files as supplemental authority two briefs submitted by the Federal Communications Commission ("FCC") to the United States Court of Appeals for the District of Columbia in two separate appeals. These briefs support Qwest's position that the FCC's *ISP Remand Order* and *ISP Mandamus Order* did not hold that VNXX ISP traffic is subject to reciprocal compensation under Section 251(b)(5) of the Act.

First, in a brief filed in *In re Core Communications, Inc.*, No. 07-1446 (Exhibit 1), the FCC stated that VNXX was not addressed in the *ISP Remand Order* and was not considered in the remand underlying the *ISP Mandamus Order*: "VNXX-related issues, therefore, are not within the scope of the *WorldCom* remand," and "the *ISP Remand Order* did not purport to address VNXX calls...."¹

¹ Exhibit 1 at 26 & n.22.

Arizona Corporation Commission
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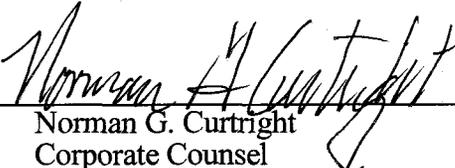
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1 Second, in a brief filed subsequent to the *ISP Mandamus Order in Core Communications,*
2 *Inc. v. FCC*, Nos. 08-1365 (Exhibit 2), the FCC described the interim pricing rules established in
3 the *ISP Remand Order* as applying only to traffic involving “two LECs [that] collaborate to
4 deliver calls to an ISP within a local calling area...”² The FCC then explains that the *ISP*
5 *Mandamus Order* is limited to the traffic at issue in that proceeding (calls to an ISP in the same
6 local calling area), stating that arguments relating to other types of traffic “may have
7 implications in *other* cases involving *other* types of traffic, but the Commission has not applied
8 its interpretation [of §251(b)(5)] to those other cases.”³

9 RESPECTFULLY SUBMITTED this 1st day of June, 2009.

10
11 QWEST CORPORATION

12
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26 ² Exhibit 2 at 21.

³ Exhibit 2 at 45.

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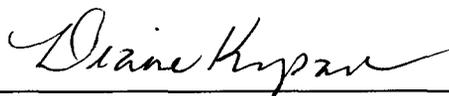


EXHIBIT 1

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As mentioned, the *ISP Remand Order* adopted a set of interim rules—rate caps, the mirroring rule, growth caps, and the new markets rule—that regulate compensation for ISP-bound traffic. Currently, only the rate caps and the related mirroring rule remain in force. In 2004, the Commission granted Core's request that it forbear from enforcing the growth caps and the new markets rule.⁵ The Commission explained that “[r]ecent industry statistics” showed that “the number of end users using conventional dial-up to connect to ISPs is declining as the number of end users using broadband services to access ISPs grows.” 19 FCC Rcd at 20186 ¶ 20; *see also id.* at ¶ 21. That trend, the Commission determined, mitigated its concern that growth caps and the new markets rule were necessary “to prevent continued expansion of the arbitrage opportunity presented by ISP-bound traffic.” *Id.* at 20186 ¶ 20. At the same time, the Commission denied Core's request that it forbear from enforcing the rate caps and the mirroring rule. The Commission explained that “Core [had] not challenge[d] the Commission's conclusion that rate caps help avoid arbitrage and market distortions that otherwise would result from the availability of reciprocal compensation for ISP-bound traffic.” *Id.* at 20186 ¶ 18. This Court affirmed the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸ *Id.* at Table 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

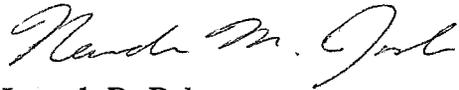
CONCLUSION

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

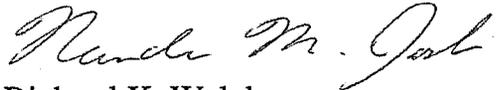
Respectfully submitted,



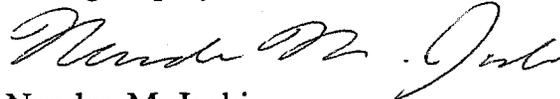
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December 27, 2007

EXHIBIT 2

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

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

Nos. 08-1365, *ET AL.*

CORE COMMUNICATIONS, INC., *ET AL.*,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE
UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

1. All parties that participated in the agency proceedings below are identified in Addendum A to the brief for petitioner Core Communications, Inc.

2. All parties, intervenors, and amici appearing in this Court are listed in the brief for petitioner Core Communications, Inc., and in the joint brief for petitioners Public Service Commission of the State of New York and National Association of Regulatory Utility Commissioners.

B. Rulings Under Review

The rulings under review are:

-- *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; *summarized at*, 66 Fed. Reg. 26800 (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

-- *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic* (CC Docket Nos. 96-98, 99-68 (among others)), FCC 08-262, __ FCC Rcd __ (released Nov. 5, 2008), *summarized at* 73 Fed. Reg. 72732 (Dec. 1, 2008) ("*Order*") (J.A.).

C. Related Cases

The *ISP Remand Order* was previously before this Court in *WorldCom, Inc. v. FCC*, 288 F.3d 429, which resulted in a remand to the agency. This Court issued a writ of mandamus directing the Commission to act on remand in *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008).

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GLOSSARY

1996 Act	Telecommunications Act of 1996
APA	Administrative Procedure Act
Br.	Brief
CLEC	competitive local exchange carrier
Core	Core Communications, Inc.
DSL	digital subscriber line
FCC	Federal Communications Commission
ILEC	incumbent local exchange carrier
ISP	Internet Service Provider
J.A.	Joint Appendix
LEC	local exchange carrier

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

Nos. 08-1365, ET AL.

CORE COMMUNICATIONS, INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE
UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF ISSUES PRESENTED

In the *Order* on review, the Commission – as directed by a writ of mandamus that this Court issued in *In re Core Commc'ns, Inc.*, 531 F.3d 849 (D.C. Cir. 2008) – provided a revised explanation of the legal authority underlying intercarrier compensation rules for Internet-bound traffic that the Court had remanded without vacating in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir.

2002).¹ The Commission concluded that its authority over interstate communications under 47 U.S.C. § 201(b), which had been expressly preserved in 47 U.S.C. § 251(i), provided a basis for maintaining those rules pending more comprehensive reform. *Order* ¶¶ 6, 29 (J.A.).

Petitioner Core Communications, Inc. (“Core”), as well as the Public Service Commission of the State of New York and the National Association of Regulatory Utility Commissioners (collectively, the “state petitioners”), challenge the Commission’s decision. The case presents the following issues for the Court’s review.

1. Whether 47 U.S.C. § 201(b), which grants the Commission broad power over interstate communications and which Congress explicitly preserved in 1996 in 47 U.S.C. § 251(i), authorizes the Commission to maintain its intercarrier compensation rules for interstate traffic that is delivered to Internet Service Providers (“ISPs”) en route to destinations on the Internet.

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic* (CC Docket Nos. 96-98, 99-68 (among others)), FCC 08-262, __ FCC Rcd __ (released Nov. 5, 2008), summarized at 73 Fed. Reg. 72732 (Dec. 1, 2008) (“*Order*”) (J.A.).

2. Whether the Commission's decision to maintain those rules pending more comprehensive reform was the product of reasoned decisionmaking.
3. Whether the Commission's decision complied with the Court's writ of mandamus in *In re Core Commc'ns*.

STATEMENT OF JURISDICTION

The *Order* on review, which was released on November 5, 2008, and summarized in the Federal Register on December 1, 2008, provides the legal justification for four interim intercarrier compensation rules that this Court previously remanded to the Commission in *WorldCom*. Each of the relevant Commission documents in the proceedings leading to the issuance of the *Order* was duly published in the Federal Register. See *Reciprocal Compensation, Inter-Carrier Compensation for ISP-Bound Traffic* (CC Docket Nos. 96-98 & 99-68), Notice, 65 Fed. Reg. 43331 (July 13, 2000); Order on Remand and Report and Order, summarized at 66 Fed. Reg. 26800 (May 15, 2001); Order, summarized at 73 Fed. Reg. 72732 (December 1, 2008). The *Order* on review is an order issued "in notice and comment * * * rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. §§ 552, 553, to be published in the Federal Register," within the meaning of the Commission's timing rule. 47 C.F.R. § 1.4(b). Pursuant to that timing rule, the date from which the 60-day period for

seeking judicial review of the *Order* under 28 U.S.C. § 2344 ran from the December 1, 2008, date of “publication in the Federal Register.” *Ibid.*

Petitioner Core timely filed its petition for review of the *Order* in consolidated Case No. 08-1393 on December 23, 2008, within the 60-day filing window prescribed by 28 U.S.C. § 2344.² State petitioners Public Service Commission of the State of New York (consolidated Case No. 09-1044) and the National Association of Regulatory Utility Commissioners (consolidated Case No. 09-1046) likewise timely filed their petitions for review of the *Order* on January 30, 2009, within the statutory 60-day time limit. This Court has jurisdiction to

² Core’s November 21, 2008, petition for review in consolidated Case No. 08-1365 was premature because it was filed prior to Federal Register publication of the *Order*. However, Core corrected that jurisdictional defect with its December 23, 2008, filing. The Court should dismiss Core’s premature petition filed in Case No. 08-1365 and assert jurisdiction over Core’s petition in Case No. 08-1393.

consider these petitions for review of the *Order* under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344.³

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to petitioners' opening briefs.

COUNTERSTATEMENT

I. INTERNET-BOUND COMMUNICATIONS

A. Introduction

The Internet is “an international network of interconnected computers that enables millions of people to communicate with one another in “cyberspace” and to access vast amounts of information from around the world.” *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 4 (D.C. Cir. 2000) (quoting *Reno v. ACLU*, 521 U.S. 844,

³ Core and the state petitioners also nominally seek direct review of the 2001 rulemaking order in which the Commission first adopted the intercarrier compensation rules that are the subject of the *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, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”) (subsequent history omitted). The Court lacks jurisdiction to consider those direct challenges, since the 60-day period for filing petitions for review of the *ISP Remand Order* has long since passed. See 28 U.S.C. § 2344. This jurisdictional defect has no practical effect, however, since the petitions for review of the *ISP Remand Order* are superfluous. Petitioners’ timely challenges to the 2008 *Order* provide the Court with jurisdiction to review the statutory underpinnings and substantive reasonableness of the Commission’s pricing rules for ISP-bound traffic.

844 (1997)). Subscribers can gain access to the Internet either through “dial-up” or broadband (e.g., cable modem or digital subscriber line (“DSL”)) connections.

Under a typical dial-up arrangement, a customer of an Internet Service Provider, by programming his or her computer to dial a seven-digit number, uses the circuit-switched telephone network(s) of one or more local exchange carriers (“LECs”) to reach an ISP. The ISP, in turn, combines “computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services” from distant websites.

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic (CC Docket Nos. 96-98 & 99-68), Declaratory Ruling, 14 FCC Rcd 3689 (¶ 4) (1999) (“*ISP Declaratory Ruling*”) (internal citation omitted), *vacated and remanded*, *Bell Atlantic*, 206 F.3d 1. Because dial-up Internet access “maintains an end-to-end channel of communication for the entire duration of the call” and permits the transmission of “only a relatively modest stream of information,” it is not the most efficient method of enabling Internet communication. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, 13 FCC Rcd 24012, 24026 (¶ 28) (1998) (“*Advanced Services Order*”), *voluntary remand granted*, *US WEST Communications, Inc. v. FCC*, 1999 WL 728555 (D.C. Cir. 1999) (not reported in F.3d).

In contrast with dial-up Internet access, broadband access largely bypasses the conventional circuit-switched telephone network and offers consumers the capability to transmit and receive vastly greater quantities of data at greater speeds – enabling the efficient provision of video communications and other new services. *See Advanced Services Order* ¶ 7. Not surprisingly given their greater capabilities, broadband Internet access services have been growing rapidly in recent years, resulting in a sharp decline in dial-up usage. *See In re Core Commc'ns, Inc.*, 455 F.3d 267, 280 (D.C. Cir. 2006).

This case involves compensation for traffic in connection with the shrinking market for dial-up Internet access.

B. Past Regulatory Treatment of Dial-Up Calls to ISPs

In the Telecommunications Act of 1996 (the “1996 Act”),⁴ Congress imposed a number of duties on local exchange carriers to open local telephone markets to competition. *See, e.g.*, 47 U.S.C. § 251(b). Among those obligations is the “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” *Id.* § 251(b)(5). While state commissions play an important role in implementing local exchange carriers’ section 251

⁴ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at various sections of Title 47 of the United States Code).

obligations, *see id.* § 252, section 251 contains a savings clause that makes clear that, in enacting section 251, Congress did not modify the Commission's pre-existing authority under 47 U.S.C. § 201 over rates for jurisdictionally interstate traffic. *See id.* § 251(i) (“[n]othing in [section 251] shall be construed to limit or otherwise affect the Commission’s authority under section 201”).

The *Local Competition Order*. The Commission first promulgated rules implementing section 251(b)(5) in its *Local Competition Order*, holding that section 251(b)(5) applies only to local telecommunications traffic.⁵ On review of the *Local Competition Order*, the Eighth Circuit held that the Commission lacked authority under the 1996 Act to establish pricing rules (including reciprocal compensation rules) for wireline traffic,⁶ but held further that 47 U.S.C. § 332(c)(1)(B) provided the Commission with additional (and independent) rulemaking authority for *wireless* traffic. The court thus upheld the Commission’s reciprocal compensation rules “as those provisions apply to [wireless] providers,” concluding that those rules remained valid, regardless of the scope of the Commission’s authority over wireline traffic under section 251(b)(5). *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997).

⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1034 (1996) (“*Local Competition Order*”) (subsequent history omitted).

⁶ The Supreme Court would later reverse this holding. *See AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366, 384-86 (1999).

The *ISP Declaratory Ruling*. Exploiting ambiguities in the reach of the reciprocal compensation rules adopted in the *Local Competition Order*, numerous competitive LECs (“CLECs”) began to focus primarily (if not exclusively) on signing up ISPs as customers. ISP customers offered these CLECs the opportunity to claim millions of dollars in reciprocal compensation payments from other LECs – arising from the unique one-way nature of ISP-bound traffic – if the CLECs could convince regulators to require reciprocal compensation payments under sections 251(b)(5) and 252(d)(2) for ISP-bound traffic.

In February 1999, the Commission issued its first order expressly addressing that issue. The Commission’s analysis involved two separate steps. First, based on its “traditional[,]” end-to-end analysis to determine whether a particular call falls within the FCC’s jurisdiction over *interstate* communications or the states’ jurisdiction over *intrastate* traffic, the Commission concluded that ISP-bound traffic should be analyzed “for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site.” *ISP Declaratory Ruling* ¶ 13. Second, the Commission concluded that, because ISP-bound traffic is jurisdictionally “non-local interstate traffic,” “the reciprocal compensation requirements of section 251(b)(5) * * * and * * * of the Commission’s rules do not govern inter-carrier compensation for this traffic.” *Id.* ¶ 26 n.87.

Incumbent LECs (“ILECs”) and CLECs filed petitions for review of the *ISP Declaratory Ruling*. On review, the Court did not take issue with the Commission’s end-to-end analysis of ISP-bound traffic for purposes of determining jurisdiction. On the contrary, the Court found there is “no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate.” *Bell Atlantic*, 206 F.3d at 5. However, the Court held that the Commission “ha[d] not provided a satisfactory explanation” for its conclusion that its jurisdictional analysis was dispositive of whether ISP-bound traffic is local traffic subject to section 251(b)(5). *Id.* at 8. The Court vacated and remanded the *ISP Declaratory Ruling* to the Commission to provide the missing explanation. *Id.* at 9.

The *ISP Remand Order*. In 2001, the Commission issued an order on remand from the Court’s *Bell Atlantic* decision. In the *ISP Remand Order*, the Commission again held that ISP-bound traffic is not subject to reciprocal compensation under section 251(b)(5). *ISP Remand Order* ¶¶ 34, 42. The Commission held that, “[u]nless subject to further limitation,” section 251(b)(5) “would require reciprocal compensation for transport and termination of *all* telecommunications traffic” that a LEC “exchanges * * * with another carrier.” *Id.* ¶¶ 31-32, 46. The Commission held, however, that 47 U.S.C. § 251(g) provided

one such “further limitation,” *id.* ¶ 32, which excluded ISP-bound traffic, among other types of traffic, from section 251(b)(5). *Id.* ¶¶ 34, 37, 44.⁷

The Commission also reaffirmed that, on an “end-to-end basis,” ISP-bound traffic is “indisputably interstate in nature” for jurisdictional purposes, because “[t]he ‘communication’ taking place is between the dial-up customer and the global computer network of web content,” not “with ISP modems.” *Id.* ¶ 59; *see id.* ¶¶ 58, 63-64. Because most “end-to-end communications involving” the ISP continue on to the global Internet and thus “cross state lines,” the link that connects the ILEC’s end-user customer to the CLEC’s ISP customer “is properly characterized as *interstate* access.” *Id.* ¶¶ 57, 59.

Exercising its section 201 jurisdiction over this interstate traffic, the Commission found that “convincing evidence in the record” showed that state commission decisions requiring payment of reciprocal compensation for ISP-

⁷ Section 251(g) provides:

On or after February 8, 1996 [the date of enactment of the 1996 Act], 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 February 8, 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 February 8, 1996.

47 U.S.C. § 251(g).

bound traffic had “distort[ed] the development of competitive markets” and had led to “classic regulatory arbitrage” of nearly \$2 billion annually – in some cases, enabling competitors to provide free service to ISPs and to pay ISPs to be their “customers,” as well as inducing outright fraud. *Id.* ¶¶ 2, 5, 21, 29, 70 n.134, 76.

To “limit the regulatory arbitrage opportunity presented by ISP-bound traffic,” the Commission adopted an interim four-part payment regime. *Id.* ¶ 2. The first component of that regime consisted of a series of declining caps on the rates for ISP-bound traffic. *See id.* ¶¶ 78, 80-81. The Commission also adopted a “mirroring rule,” which required an incumbent seeking to cap its payments to competitors with ISP customers to accept payment for *all* voice traffic subject to section 251(b)(5) under the same rate caps applicable to ISP-bound traffic. *See id.* ¶ 89 n.179. In addition, the Commission adopted two rules limiting the number of minutes of ISP-bound traffic for which a competitor could seek payment under the new regime. *See id.* ¶¶ 78, 81 (describing “growth cap” and “new markets” rules). The Commission concluded that, although rate caps – set on the basis of contemporaneous voluntarily negotiated interconnection agreements – appeared to be fair, CLECs also reasonably could recover cost shortfalls, if any, from their ISP customers. *Id.* ¶¶ 24, 80, 87.

On review, this Court rejected the Commission’s reliance on section 251(g). *See WorldCom*, 288 F.3d at 432, 434. Apart from deciding that section 251(g) did

“not provide a basis for the Commission’s action,” the Court was clear that it did *not* decide any other issue, including “petitioners’ claims that the interim pricing limits * * * are inadequately reasoned.” *Id.* at 434. Because there was a “non-trivial likelihood” that the Commission had authority to adopt its pricing rules for ISP-bound traffic on other grounds, the Court “d[id] not vacate the order.” *Id.*

The *Core Forbearance Order*. In 2004, the Commission modified its ISP payment regime by granting (in part) a forbearance petition that Core had filed.⁸ In doing so, the Commission eliminated enforcement of the “growth cap” and “new markets” rules limiting the number of minutes of ISP-bound traffic for which a competitor could seek payment. *See Core Forbearance Order* ¶¶ 7, 9, 15. However, the Commission retained the rate cap and the mirroring rules, finding that these rules “remain necessary to prevent regulatory arbitrage and promote efficient investment in telecommunications services and facilities.” *Id.* ¶ 19.

This Court upheld the Commission’s forbearance decision. The Court “quoted * * * at length” – and with approval – the Commission’s determination that, “because ISP-related traffic flows overwhelmingly in one direction, a reciprocal compensation regime creates an opportunity for CLECs ‘to sign up ISPs as customers and collect [compensation from], rather than pay[] compensation’ to,

⁸ *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, 19 FCC Rcd 20179 (2004) (“*Core Forbearance Order*”) (subsequent history omitted).

other carriers,” leading to “‘classic regulatory arbitrage’ that had * * * negative effects” on the development of “‘viable local telephone competition.’” *In re Core Commc’ns, Inc.*, 455 F.3d at 279 (quoting *ISP Remand Order* ¶ 21).

The Mandamus Decision. On July 8, 2008, this Court granted a petition for a writ of mandamus that Core had filed to compel the Commission, on remand from the Court’s earlier *WorldCom* decision, “to explain the legal authority upon which [the Commission’s interim pricing] rules [for ISP-bound traffic] are based.” *In re Core Commc’ns*, 531 F.3d at 850. The Court directed the Commission to issue “a final, appealable order,” by November 5, 2008, that responded to the *WorldCom* remand. *In re Core Commc’ns*, 531 F.3d at 862. The Court made clear that, in granting mandamus, it was not directing the Commission “to promulgate any particular rule or policy.” *Id.* at 859.

II. THE ORDER ON REVIEW

On November 5, 2008, the Commission issued the *Order* on review “respond[ing] to [this Court’s] remand order in *WorldCom*.” *Order* ¶ 6 (J.A.). The Commission first held that section 251(b)(5) “is not limited to local traffic” and is “broad enough to encompass ISP-bound traffic.” *Id.* ¶ 7 (J.A.). Specifically, the Commission held that ISP-bound traffic is subject to section 251(b)(5) because such traffic satisfies the Commission’s rule defining “termination” as the “switching of traffic * * * at the terminating carrier’s end

office switch * * * and delivery of that traffic to the called party's premises.”

Order ¶ 13 (J.A.) (internal quotation marks omitted). The Commission stated that, in the case of ISP-bound traffic, the “traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the ‘called party.’” *Ibid.*

The Commission's conclusion that ISP-bound traffic is within section 251(b)(5), however, “d[id] not end [the Commission's] legal analysis.” *Id.* ¶ 17 (J.A.). The Commission “re-affirm[ed]” its conclusion that such traffic is jurisdictionally “interstate” and, therefore, remains subject to the Commission's authority under section 201(b) to ensure “just and reasonable” charges and practices “for and in connection with” interstate traffic. *Id.* ¶ 21 (J.A.). The Commission explained that this conclusion was reinforced by section 251(i), which directs that “[n]othing in [section 251] shall be construed to limit or otherwise affect the Commission's authority” under section 201. 47 U.S.C. § 251(i); *see Order* ¶ 21 (J.A.). The Commission also noted that it similarly retains independent authority over interstate wireless traffic, which is subject to both section 251(b)(5) and section 332. *See Order* ¶¶ 19-20, 22 n.76 (J.A.).

Therefore, the fact that ISP-bound traffic is subject to section 251(b)(5) does not eliminate the Commission's section 201 authority to establish rules for ISP-bound traffic. *See Order* ¶ 21 (J.A.).

The FCC next reaffirmed the pricing rules for ISP-bound traffic that it had adopted in the 2001 *ISP Remand Order* – again finding that such rules could and should be maintained pursuant to its section 201 authority. *Order* ¶ 27 (J.A.). The Commission explained that the “policy justifications” it had provided in 2001 for adopting the rules – particularly, the need to curb the “significant arbitrage opportunities” created by the “one-way nature of ISP-bound traffic” (*id.* ¶ 24 (J.A.)) – had “not been questioned by any court” and, in fact, had been affirmed by this Court in 2006 when it denied Core’s petition for review of the *Core Forbearance Order*. *Id.* ¶ 27 (J.A.). The Commission explained that it would keep in place those pricing rules as to which it had not granted forbearance – including the \$0.0007 per minute rate cap – until it “adopt[s] more comprehensive intercarrier compensation reform.” *Id.* ¶ 29 (J.A.).

SUMMARY OF ARGUMENT

1. The Commission reasonably concluded that it had authority under section 201(b) to adopt its interim intercarrier compensation rules for ISP-bound traffic. It is well-settled that ISP-bound traffic is jurisdictionally interstate traffic. Indeed, this Court in *Bell Atlantic*, 206 F.3d at 5, acknowledged as much. It is equally well-settled that the Commission has jurisdiction to regulate the rates of interstate services under section 201(b). *Global Crossing Telecomms. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 49 (2007). In the 1996 Act, Congress

expressly preserved this authority over interstate telecommunications traffic when it enacted section 251(i) – providing that “[n]othing in [section 251] shall be construed to limit or otherwise affect the Commission’s authority under section 201.”

Petitioners’ contention that sections 251(b) and section 252(d)(2) establish a comprehensive and exclusive regulatory regime for traffic falling within the scope of section 251(b)(5) ignores clear gaps in the coverage of those two provisions, as well as judicial recognition that the Commission may regulate traffic between LECs and wireless carriers under pre-1996 Act authority, notwithstanding the fact that such traffic falls within the scope of sections 251 and 252. *See Iowa Utils. Board v. FCC*, 120 F.3d at 800 n.21. More fundamentally, however, petitioners’ theory conflicts with section 251(i), which precludes a reading of section 251 and 252 that would divest the Commission of its section 201 authority over ISP-bound traffic.

2. Having concluded that it had authority under section 201(b) to promulgate pricing rules for ISP-bound traffic, the Commission reasonably decided to retain the \$.0007 cap and mirroring rule that it had adopted in the *ISP Remand Order*. The cap had been predicated in 2001 upon rates contained in contemporaneous interconnection agreements into which carriers voluntarily had entered, and the Commission credited evidence of a continuing decline in

negotiated reciprocal compensation rates. *Order* ¶ 24 (J.A.). The mirroring rule, moreover, ensured that the cap would have no discriminatory effect on competitive carriers relative to incumbents. *Id.* ¶ 25 (J.A.).

The Commission sensibly concluded that the policy rationale underlying the pricing rules, which this Court had acknowledged as reasonable in *In re Core Commc'ns*, 455 F.3d at 278-79, remained valid. The rules were needed “to prevent the subsidization of dial-up Internet access consumers by consumers of basic telephone service’ and to avoid regulatory arbitrage and discrimination between services.” *Order* ¶ 25 (J.A.).

Petitioners’ complaints to the contrary, the record before the Commission provided ample evidence that the prescribed cap level remained justified. And, as the Commission has stressed, if the costs to a CLEC of terminating ISP-bound traffic exceed the cap, that CLEC reasonably can recover such costs from its end-user customers, as incumbent LECs have always done with respect to their ISP customers. *ISP Remand Order* ¶¶ 80, 87. Petitioners’ remaining claims under the Administrative Procedure Act (“APA”) are insubstantial.

3. Core’s contention that the Commission violated the Court’s writ of mandamus in *In re Core Commc'ns* is without merit. First, Core’s suggestion (Br. 42-43) that the mandamus Court directed the Commission to construe section 251(b)(5) to *exclude* ISP-bound traffic is absurd – particularly given that Core

itself agrees with the Commission's construction of that provision to *include* such traffic. The mandamus Court simply directed the Commission to provide a new legal justification (if it could) for the compensation rules it had adopted in the *ISP Remand Order*. The Commission did so in the *Order* on review.

Core also errs in contending (Br. 43-44) that the *Order* violated the Court's writ of mandamus by failing to provide a legal basis for the growth cap and new markets rules from which the Commission had forborne in the *Core Forbearance Order*. After analyzing its authority under sections 251(b)(5), 201(b), and 251(i), the Commission concluded that *all* of the *ISP Remand Order*'s "pricing rules governing the payment of compensation between carriers for ISP-bound traffic" were within its authority. *Order* ¶ 21 & n.72 (J.A.). That finding fully satisfied the writ of mandamus.

STANDARD OF REVIEW

Petitioners' challenge to the FCC's interpretation of the Communications Act is governed by *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the

implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires this Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *Nat'l Cable & Telecomms Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). This deference applies not only to the Commission's implementation of ambiguous statutory terms regarding matters that clearly are within its delegated authority, but also to the agency's threshold "interpretation of the scope of its [regulatory] jurisdiction" under the governing statute. *Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 479 (D.C. Cir. 2008); *accord Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007). *See also Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 844-45 (1986).

Petitioners also challenge the reasonableness of the FCC's *Order* under the APA. The Court must reject such a challenge unless the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "[h]ighly deferential" standard of review "presumes the validity of agency action;" the Court "may reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal quotations omitted); *see also Bell Atlantic Tel. Cos. v. FCC*, 79

F.3d 1195, 1202 (D.C. Cir. 1996). Ultimately, the Court should affirm the Commission's decision if the agency examined the relevant data and articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

ARGUMENT

I. THE COMMISSION'S CONCLUSION THAT IT HAD AUTHORITY UNDER SECTION 201(b) TO ADOPT THE INTERIM INTERCARRIER COMPENSATION RULES FOR ISP-BOUND TRAFFIC WAS BASED UPON A REASONABLE READING OF THE COMMUNICATIONS ACT

Core and the state petitioners agree with the FCC's conclusion in the *Order* that the telecommunications traffic covered by the Commission's interim pricing rules – *i.e.*, that which occurs when two LECs collaborate to deliver calls to an ISP within a local calling area – falls within the scope of section 251(b)(5). Core Br. 25 & n.3; State Br. 27 n.18.⁹ They contend, however, that this conclusion necessarily: (a) subjects the pertinent traffic to the pricing standard set out in section 252(d)(2); and (b) assigns to the relevant state commissions the exclusive

⁹ The state petitioners dispute the Commission's reasonable conclusion that section 251(b)(5) extends beyond the pertinent ISP-bound traffic to all "telecommunications" that are not exempted by section 251(g). State Br. 21-26. As we discuss in section I.C., below, that argument is not justiciable in this case and, in any event, is insubstantial.

authority to establish rates under that standard. Core Br. 25-33; State Br. 20-23. They argue, accordingly, that the Commission lacked authority in the *Order* to justify the agency's interim pricing rules under section 201(b) of the Communications Act. The Court should reject petitioners' claims.

A. ISP-Bound Traffic Is Jurisdictionally Interstate Traffic, Over Which The FCC Has Jurisdiction Under Section 201

It is well-settled – as a matter of Commission precedent and court decisions – that ISP-bound traffic is jurisdictionally interstate traffic. The Commission first addressed the jurisdictional status of ISP-bound traffic in the *ISP Declaratory Ruling*, and found that, on an end-to-end basis, dial-up calls to access the Internet are a single communication. See *ISP Declaratory Ruling* ¶¶ 10-17. The Commission further found that “a substantial portion of Internet traffic involves accessing interstate or foreign websites.” *Id.* ¶ 18. And this Court, in reviewing the *ISP Declaratory Ruling*, recognized that “[t]here is no dispute” that the Commission was “justified in relying on” its end-to-end analysis in concluding that ISP-bound traffic is “jurisdictionally interstate.” *Bell Atlantic*, 206 F.3d at 5.

In 2001, the Commission returned to this issue and reaffirmed its jurisdictional findings. The Commission stressed that, “[f]or jurisdictional purposes,” ISP traffic is viewed without regard to “intermediate points of switching or exchanges between carriers.” *ISP Remand Order* ¶ 57. And the

Commission concluded, once again, that “[m]ost” ISP-bound traffic is “indisputably interstate” on an end-to-end basis. *Id.* ¶ 58. The agency also noted that the Eighth Circuit recently had “affirmed the Commission’s consistent view that ISP-bound traffic is, as a *jurisdictional* matter, predominantly interstate.” *Id.* ¶ 64.¹⁰ The Commission concluded that, in light of the predominantly interstate nature of ISP-bound traffic and the Eighth Circuit’s decision that interstate and intrastate components were inseparable, ISP-bound traffic is interstate and subject to the Commission’s authority under § 201(b). *Id.* ¶ 52. This conclusion was undisturbed by this Court’s remand in *WorldCom*.

This uniform understanding that dial-up calls to ISPs are jurisdictionally interstate is consistent with, and supported by, the Commission’s numerous decisions regarding other forms of Internet access. In 1998, the Commission found that digital subscriber line (“DSL”) service is jurisdictionally interstate. *See GTE Tariff Order* ¶ 28 (“finding that GTE’s [DSL] service is subject to federal jurisdiction” and is “an interstate service”).¹¹ More recently, the Commission has

¹⁰ The Eighth Circuit had recognized that, under the Commission’s jurisdictional analysis, “services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements,” and that “the FCC cannot reliably separate the two components involved in completing a particular call.” *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998).

¹¹ *GTE Tel. Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998) (“*GTE Tariff Order*”).

built upon this ruling – finding that it has jurisdiction over a variety of broadband Internet access services because they are jurisdictionally mixed and inseverable.

See Cable Modem Declaratory Ruling ¶ 59 (finding that, “on an end-to-end analysis,” “cable modem service is an interstate information service”);¹² *Wireline Broadband Order* ¶ 110¹³; *Wireless Broadband Declaratory Ruling* ¶ 28¹⁴; *Broadband over Powerline Order* ¶ 11.¹⁵

In light of this substantial precedent, the Commission correctly reaffirmed in the *Order* its consistent finding “that ISP-bound traffic is jurisdictionally interstate” because it is jurisdictionally mixed and inseverable. *Order* ¶ 21 n.69 (J.A.) (citing precedent); *see also ISP Remand Order* ¶ 52. In making this finding, the Commission noted that this traffic “melds a traditional circuit-switched

¹² *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (“*Cable Modem Declaratory Ruling*”), *aff’d*, *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

¹³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (“*Wireline Broadband Order*”), *aff’d*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

¹⁴ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (“*Wireless Broadband Declaratory Ruling*”).

¹⁵ *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (“*Broadband Over Powerline Order*”).

local telephone call over the [public switched telephone network] to packet switched IP-based Internet communication to Web sites.” *Order* ¶ 21 n.69 (J.A.).

Because ISP-bound traffic involves jurisdictionally interstate communications, the Commission has well-established authority to regulate it. “When Congress enacted the Communications Act of 1934, it granted the FCC broad authority to regulate interstate telephone communications.” *Global Crossing Telecomms. v. Metrophones Telecomms., Inc.*, 550 U.S. at 48. Specifically, the Communications Act assigns the task of regulating the rates, terms, and conditions of interstate communications to the Commission. *See* 47 U.S.C. § 152(a) (assigning to the Commission jurisdiction over all “interstate and foreign communication by wire * * * which originates and/or is received within the United States”); *see also, e.g., Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) (“The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates.”).

Indeed, the Communications Act grants authority over the reasonableness of charges, practices, and classifications in interstate communications to the Commission. The Act specifically requires that regulated carriers’ “charges, practices, classifications, and regulations for and in connection with” interstate telecommunications services be “just and reasonable.” 47 U.S.C. § 201(b); *see also Global Crossing*, 550 U.S. at 49 (noting section 201(b) “authorize[s] the

commission to declare any carrier ‘charge,’ ‘regulation,’ or ‘practice’ in connection with the carrier’s services to be ‘unjust or unreasonable’”); *id.* at 53 (noting the Commission has “long implemented § 201(b)” and its prohibition of unjust and unreasonable rates and practices “through the issuance of rules and regulations”).¹⁶ ISP-bound traffic is no different from any other interstate traffic or services in this regard, which the FCC also regulates under § 201.

Petitioners and their intervenors do not dispute that the Commission has authority over jurisdictionally interstate traffic under 47 U.S.C. § 201(b) and raise few challenges to the Commission’s long-standing and repeatedly affirmed determination that ISP-bound traffic is jurisdictionally interstate. The claims they do raise lack merit.

Their primary challenge to the Commission’s conclusion that ISP-bound calls are jurisdictionally interstate rests on the alleged inconsistency of that finding with the Commission’s separate conclusion that such calls “terminate” at an ISP within the meaning of the Commission’s rules implementing section 251(b)(5).

¹⁶ The authority over *rates* for interstate traffic granted in the first sentence of § 201(b) is *distinct from* section 201(b)’s general grant of rulemaking authority, which is found in the final sentence of section 201(b) and which gives the Commission the authority to promulgate rules to enforce the Communications Act *as a whole*. See 47 U.S.C. § 201(b) (“The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Communications Act.]”).

See Core Br. 35-36; State Br. 30-34. But the Commission's long-standing view that ISP-bound traffic is interstate for *jurisdictional* purposes is entirely consistent with the Commission's conclusion that, for purposes of Commission rules implementing *section 251(b)(5)*, CLECs "terminat[e]" traffic to ISPs. In particular, this Court has already held that the jurisdictional status of ISP-bound traffic does *not* answer the question whether ISP-bound traffic is subject to *section 251(b)(5)*. See *Bell Atlantic*, 206 F.3d at 5; see also *Order* ¶ 22 (J.A.) ("[T]he D.C. Circuit[] * * * concluded that the jurisdictional nature of traffic is not dispositive of whether reciprocal compensation is owed under *section 251(b)(5)*."). The state petitioners' own brief acknowledges this. See *State Br.* 31 ("as this Court correctly recognized in *Bell Atlantic*, the FCC's traditional 'end-to-end' jurisdictional analysis is not necessarily determinative as to the scope of traffic covered under § 251(b)(5)").

Consistent with *Bell Atlantic* and the Commission's rules, the Commission determined in the *Order* that a CLEC delivering ISP-bound traffic performs "termination" – as defined in the Commission's rules implementing *section 251(b)(5)*, see 47 C.F.R. § 51.701(d) – for purposes of *section 251(b)(5)*, while the ISP is not an "end" point of the communication for purposes of the Commission's jurisdictional analysis under *section 201*. See *Order* ¶ 13 & n.47 (J.A.). The Commission's rules implementing *section 251(b)(5)* define "termination" for the

purposes of section 251(b)(5) only as “the switching of telecommunications traffic at the terminating carrier’s end office switch * * * and delivery of such traffic to the called party’s premises.” 47 C.F.R. § 51.701(d); *see also id.* (definition applies only “[f]or purposes of this subpart,” *i.e.*, the Commission’s regulations governing reciprocal compensation). The definition is thus functional, and focuses on the conduct of the CLEC as the basis for determining when termination occurs.¹⁷

Moreover, for *jurisdictional* purposes, the Commission has explained that it does *not* focus on “intermediate points of switching or exchanges between carriers (or other providers),” *ISP Remand Order* ¶ 57, yet the definition of termination adopted to implement section 251(b)(5) rests on those very factors: the “switching of telecommunications traffic” and the exchange between carriers as relevant to defining “termination” for purposes of section 251(b)(5). Accordingly, the jurisdictional question and the question of construing the Commission’s regulations interpreting section 251(b)(5) are not the same.¹⁸

¹⁷ This conclusion is consistent with this Court’s previous statements that “[c]alls to ISPs appear to fit ‘this definition,’” *Bell Atlantic*, 206 F.3d at 6 – *i.e.*, the unique definition of termination adopted by the Commission to implement section 251(b)(5). *See* 47 C.F.R. § 51.701(d).

¹⁸ The cases Core cites (Br. 37 n.5) do not support the conclusion that a call terminates at the ISP for *jurisdictional* purposes. Rather, they merely upheld state commission decisions interpreting existing contracts as reflecting voluntary agreements among the parties to pay reciprocal compensation for ISP-bound traffic. *See Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 496 (10th Cir. 2000) (noting that the “subject of

Nor is Core correct that this analysis is changed by the Commission's recognition that end users sometimes dial seven digits to connect to an ISP. *See* Br. 37 (citing *ISP Remand Order* ¶ 61). Jurisdictional analysis focuses on the overall communication – not the dialing pattern – and the Commission has repeatedly found that Internet communications are interstate. *See ISP Remand Order* ¶ 58; *ISP Declaratory Ruling* ¶ 13 (noting “the Commission analyzes the totality of the communication when determining the jurisdictional nature of a

t[he] lawsuit” is the “reciprocal compensation provision[] of the Agreement between Southwestern Bell and Brooks Fiber”); *id.* at 499 (“The OCC required reciprocal compensation for calls to ISPs not because federal law requires such compensation, but because the Agreement, as construed under Oklahoma state law, requires it.”); *Southwestern Bell Telephone Co. v. Public Utility Comm’n of Texas*, 208 F.3d 475, 477 (5th Cir. 2000) (affirming judgment of district court, which like the Texas PUC, “held that the carriers’ contracts require such calls to be treated as local calls and as such, to be compensated for reciprocally”); *id.* at 484-85; *Michigan Bell Telephone Co. v. MFS Intelnet of Michigan, Inc.*, 339 F.3d 428, 435-36 (6th Cir. 2003) (noting Commission statements that parties could voluntarily agree to reciprocal compensation and interpreting agreement to that effect).

communication”). Therefore, the fact that end users sometimes dial seven digits does not mean that the communication is intrastate.¹⁹

Finally, Core sets up and knocks down a straw man in arguing (Br. 38) that “calls to ISPs are not ‘purely interstate.’” In the *ISP Declaratory Ruling*, the Commission found, “[a]fter reviewing the record, * * * that, although *some* Internet traffic is intrastate, a substantial portion of Internet traffic involves accessing interstate or foreign websites” and thus the traffic is “jurisdictionally mixed.” *ISP Declaratory Ruling* ¶ 19 (emphasis added). In the *ISP Remand Order*, the Commission concluded that the interstate and intrastate components are inseparable and thus that the Commission has jurisdiction over such traffic under section 201. *See ISP Remand Order* ¶¶ 52-53.

The Commission need not demonstrate that such traffic is “purely interstate” to have jurisdiction over it. The Commission’s authority to find interstate and

¹⁹ Indeed, the sentences following the sentence Core quotes from the *ISP Remand Order* make this clear: “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 IXC, 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.” *ISP Remand Order* ¶ 61; *see Local Competition Order* ¶ 873 n.2091; *AT&T Corp. v. Bell Atlantic-PA*, Memorandum Opinion and Order, 14 FCC Rcd 556, ¶¶ 71, 80 (1998) *recon. denied*, 15 FCC Rcd 7467 (2000) (holding – in the context of a service that allows a customer to dial a “local” number to reach a business actually located in another state – that such calls are subject to interstate access charges).

intrastate components inseparable is well-established. The “‘impossibility exception’ of 47 U.S.C. § 152(b) * * * allows the FCC to preempt state regulation of a service which would otherwise be subject to dual federal and state regulation where it is impossible or impractical to separate the service’s intrastate and interstate components, and the state regulation interferes with valid federal rules or policies.” *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 576 (8th Cir. 2007); see *California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 112-13 & n.7 (D.C. Cir. 1989); *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 215-16 (D.C. Cir. 1982); *North Carolina Utils. Comm’n v. FCC*, 537 F.2d 787, 791 (4th Cir. 1976). See generally *Louisiana Public Serv. Comm’n v. FCC*, 476 U.S. 355, 375 n.4 (1986).

The state petitioners focus on the fact that part of the communication – between the incumbent and competitor – occurs in a single state. See State Br. 32-33. But it is not the law that the intrastate segment of end-to-end interstate traffic falls outside the Commission’s section 201(b) ratemaking authority. See *Verizon New England, Inc. v. Maine Public Utils. Comm’n*, 509 F.3d 1, 8 (1st Cir. 2007) (facilities “located in individual communities * * * have been used for decades to provide both interstate and intrastate service as part of a unified network” and such facilities are regulated by the FCC); *North Carolina Utils. Comm’n v. FCC*, 552

F.2d 1036, 1045-46 (4th Cir. 1977) (the Communications Act “commit[s] jurisdiction over facilities utilized in interstate communication to the FCC”).

Indeed, the whole point of end-to-end analysis is that the jurisdictional nature of the overall communications is determined by the ultimate pathway, not any discrete local component – at least where those components are inseparable. *See ISP Remand Order* ¶ 52 (concluding, based on the Eighth Circuit’s decision in *Southwestern Bell Telephone Co. v. FCC*, that the interstate and intrastate component are jurisdictionally inseparable); *id.* ¶ 57 (“[f]or jurisdictional purposes, the Commission views LEC-provided access to enhanced services providers * * * on the basis of the end points of the communication, rather than intermediate points of switching or exchanges between carriers (or other providers)”); *see also GTE Tariff Order* ¶ 17 (“the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers”); *id.* ¶ 20 (“the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication”).

The Court should reject petitioners’ claims that ISP-bound traffic is not jurisdictionally interstate.

**B. The FCC Retains Its Section 201 Authority
Over ISP-Bound Traffic That Is Also Subject To
Section 251(b)(5)**

The Commission properly found that it retains its independent section 201(b) authority to ensure just-and-reasonable rates and practices with respect to jurisdictionally interstate ISP-bound traffic, even though that traffic also falls within the scope of section 251(b)(5). *Order ¶¶ 17-22 (J.A.)*.

Petitioners contend that even if ISP-bound traffic is jurisdictionally interstate, the language and structure of sections 251 and 252 make clear that Congress established a comprehensive pricing regime for *all* section 251(b)(5) traffic – a regime under which such traffic is subject only to the substantive pricing standard of section 252(d)(2), and under which the rates may be established only by state commissions. *Core Br. 27-29, 33-34; State Br. 22, 26-27*. This claim fails, as an initial matter, under the plain terms of sections 251(b)(5) and 252(d)(2) themselves.

There is no provision in the statute that gives state commissions exclusive jurisdiction over reciprocal compensation matters, or that strips the Commission of authority in the area. By its terms, the pricing standard in section 252(d)(2)(A) speaks only to what a “State commission” may do and does not purport to limit the FCC’s authority. At the same time, section 252(d)(2)(B) precludes *both* “the Commission [and] any State commission” from engaging in a “proceeding to

establish with particularity” “costs” for purposes of setting rates under section 252(d)(2). This contrast suggests that Congress contemplated that, even where section 252(d)(2) applies, there *will be* circumstances under which the Commission may be the entity determining rates as well as ratemaking methodologies.

Similarly, petitioners’ contention that sections 251(b)(5) and 252(d)(2) are coextensive in scope ignores the fact that section 252(d)(2), by its terms, speaks explicitly only to state commission review of an *incumbent* local exchange carrier’s compliance with section 251(b)(5). *See* 47 U.S.C. § 252(d)(2)(A) (“[f]or the purposes of compliance by an incumbent local exchange carrier . . .”). Section 251(b)(5), by contrast, imposes duties on *all* local exchange carriers (including competitors) and, as the Commission has held, applies as well to traffic those local exchange carriers exchange with wireless carriers.

Moreover, petitioners’ claim that section 252(d)(2) provide the exclusive regime for regulating section 251(b)(5) traffic conflicts with the judicially approved treatment of wireless traffic. *See Order* ¶¶ 19-20 (J.A.). Like its authority over interstate communications under section 201(b), the Commission has authority over wireless traffic under 47 U.S.C. § 332(c)(1)(B). In the *Local Competition Order*, the Commission concluded that – notwithstanding sections 251 and 252 – it retained the authority to set interconnection rates between local exchange carriers and wireless carriers under section 332(c)(1)(B), although it

elected not to exercise that authority and, instead, allowed intercarrier payments for certain wireless traffic (including traffic subject to section 251(b)(5)) to be governed under the section 251/252 framework. *See Local Competition Order ¶¶ 1008, 1023.*

The Commission's conclusion that it retains independent authority under section 332 to set rates for wireless traffic that is also within the section 251/252 framework was affirmed on review. In *Iowa Utils. Board v. FCC*, 120 F.3d 753, the Eighth Circuit vacated the Commission's pricing rules (later reinstated by the Supreme Court) under sections 251 and 252, including its reciprocal compensation rules. In doing so, however, the court held that "section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with [wireless] carriers" and thus that the "Commission has the authority to issue the rules of special concern to [wireless] providers" under section 332. *Id.* at 800 n.21. The court's vacatur of the Commission's rules accordingly did not extend to the application of those rules – including reciprocal compensation rules – to wireless providers. *See id.*²⁰

The state petitioners attempt to distinguish the wireless context on the ground that section 332 "establishes special requirements" for interconnection with

²⁰ This Court has applied the Eighth Circuit's holding on this point. *See Qwest Corp. v. FCC*, 252 F.3d 462, 463 (D.C. Cir. 2001) (noting that the Eighth Circuit had "rejected the LEC's claim" that a pricing rule was "wholly *ultra vires*," and had held that, as applied to wireless providers, "the regulation was validly grounded in 47 U.S.C. § 332, a provision adopted well before the 1996 Act").

wireless providers and, they claim, “the FCC cannot and does not cite any analogous statutory text pertaining to ISP-bound traffic.” State Br. 30. But section 201(b) is that authority: it grants the Commission ratemaking authority over *interstate* traffic, of which ISP-bound traffic is a subset. And, as discussed below, section 251(i) expressly preserves that interstate authority.

The CLEC intervenors attempt to distinguish the wireless context by noting that, there, the Commission brought additional (wireless) traffic within the rules it had promulgated to implement sections 251(b)(5) and 252(d)(2), while here it is seeking to withdraw (ISP-bound) traffic from the section 251/252 regulatory framework. *See* CLEC Br. 12. But nothing in the Eighth Circuit’s decision to affirm the Commission’s retained authority under section 332 turned on that question. Instead, just as section 332 provides special authority over wireless providers, section 201(b) gives the Commission special authority over interstate traffic (of which ISP-bound traffic is a subset).²¹

Most fundamentally, petitioners’ arguments that the Commission lacked authority to adopt its interim intercarrier compensation rules for ISP-bound traffic largely ignore the fact that Congress expressly preserved the agency’s section 201

²¹ Nor are the CLEC intervenors correct (Br. 13) that section 332’s preemption provision has any bearing on this analysis. The issue here is not one of preemption: the question is the role that state commissions have in implementing federal law. *See Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

authority over jurisdictionally interstate traffic, notwithstanding the enactment of the local competition provisions of section 251 and 252. Section 251(i) states that “[n]othing in this section shall be construed to limit or otherwise affect the Commission’s authority under section 201 of this title.” 47 U.S.C. § 251(i). That section 201 authority includes the Commission’s historical authority over jurisdictionally interstate traffic. Reading section 251(b)(5) – alone or in combination with section 252(d) – to divest the Commission of that authority with respect to ISP-bound traffic would directly countermand section 251(i), as the Commission correctly concluded in the *Order*. See *Order* ¶¶ 17-22 (J.A.).²²

This reading of section 251(i) not only follows from its plain text; it also is consistent with the general structure of the 1996 Act, which the Supreme Court has recognized reveals no intent to abandon section 201(b). *Cf. Global Crossing*, 550 U.S. at 50 (in enacting the 1996 Act and promulgating regulations under the Act, “[n]either Congress nor the Commission * * * totally abandoned traditional regulatory requirements” and “[t]he new statutes and amendments left many traditional requirements and related statutory provisions” in place, including “[section] 201(b)”). But even if there were ambiguity regarding the meaning of section 251(i), the Commission’s interpretation of that provision is subject to

²² See also *Local Competition Order* ¶ 91 (section 251(i) “affirms that the Commission’s preexisting authority under section 201 continues to apply for purely interstate activities”); *ISP Remand Order* ¶¶ 50-51.

Chevron deference and is plainly reasonable. *See Maine Public Utils. Comm'n v. FERC*, 520 F.3d at 479 (agency “interpretation of the scope of its jurisdiction is entitled to *Chevron* deference”).

Core mentions section 251(i) only in passing in the background section of its brief, asserting that “section 251(i) preserved the Commission’s rulemaking authority” to allow the Commission to carry out the directions set forth in section 251(d). *See also* CLEC Br. 19 (asserting that “section 251(i) merely preserves the Commission’s general section 201 authority to promulgate rules”). But nothing in the text of section 251(i) suggests that the authority preserved by that section was limited to the rulemaking power contained in the last sentence of section 201(b) (but not section 201(a) or any other sentence of section 201(b)); instead, the text refers broadly to “section 201.” *See* 47 U.S.C. § 251(i) (“Nothing in this section shall be construed to limit or otherwise affect the Commission’s authority under section 201 of this title.”).

The state petitioners, as well, are dismissive of section 251(i), although in a manner inconsistent with Core’s reading. In a single sentence – based on an elliptical reference to a House Report and with no explanation – the states assert that section 251(i) “was meant to preserve the FCC’s pre-*Telecom Act* § 201 authority over interconnection.” State Br. 29. But just as nothing in section 251(i) is limited to the rulemaking power conferred by the last sentence in section 201(b),

nothing in that savings provision is confined to the power over interconnection identified in section 201(a). Rather, the text of section 251(i) broadly preserves Commission authority under *all* of section 201. There is no basis for imposing a restriction on the text of section 251(i) that is not there (especially when Congress easily could have made such an intent clear). *See Moskal v. United States*, 498 U.S. 103, 111 (1990) (there is no “require[ment] that every permissible application of a statute be expressly referred to in its legislative history”).²³

The CLEC intervenors (Br. 15-18) attempt to dismiss the applicability of section 251(i), because it refers only to section 201 and not also to 47 U.S.C. § 205, which authorizes the Commission to prescribe rates after a formal hearing or investigation. This argument is not properly before the Court because no petitioner raised it. *See Competitive Telecomms. Ass’n v. FCC*, 309 F.3d 8, 18 (D.C. Cir. 2002) (intervenor may not raise a claim that petitioner did not make). The claim fails on the merits, in any event, as the intervenors misinterpret section 205. That provision sets out remedies that obtain when the Commission conducts a section

²³ *See also Brogan v. United States*, 522 U.S. 398, 403 (1998) (“[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy – even assuming that it is possible to identify that evil from something other than the text of the statute itself* * * * [T]he reach of a statute often exceeds the precise evil to be eliminated.”); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (courts should not “not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply”).

204 adjudicatory investigation of individual tariffed charges filed under section 203. *See* 47 U.S.C. §§ 203, 204. Section 205 does not limit the Commission's authority to adopt pricing methodologies using its section 201 ratemaking and rulemaking authority. Indeed, the Commission on multiple occasions has prescribed rate levels through general notice and comment rulemaking proceedings, rather than through hearings on specific tariffs under sections 204 and 205.²⁴

Core contends (Br. 27) that, under the Supreme Court's decision in *AT&T Corp. v. Iowa Utils. Board*, the Commission's "rulemaking authority" under "section 201" allows it to establish rules to implement sections 251 and 252, but "section 252(d)" nonetheless confines that authority by requiring that "states set the actual rates." But the Supreme Court, in the cited discussion, was not purporting to address the Commission's authority over rates in section 201(b) – the issue here. Rather, the Court was assessing the constraints on the Commission in establishing rules to implement the pricing standards in section 252(d). *See* 525 U.S. at 377-78 (quoting and discussing the general rulemaking provision in

²⁴ *See, e.g., Access Charge Reform* (CC Docket Nos. 96-262, et al.), First Report and Order, 12 FCC Rcd 15982 (¶¶ 75-87) (1997), *aff'd*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (prescribing new limits on subscriber line charges for non-primary residential and multi-line business lines); *Access Charge Reform* (CC Docket Nos. 96-262, et al.), Sixth Report and Order, 15 FCC Rcd 12962 (¶¶ 58, 70-75) (2000), *aff'd in pertinent part*, *Texas Office of Pub. Util. Counsel*, 265 F.3d 313 (5th Cir. 2001) (prescribing revised ceilings on subscriber line charges).

section 201(b)). That case, accordingly, stands for the principle that rules *implementing* section 252(d) must accord with the terms of that section. Here, by contrast, the Commission was not implementing section 252(d). It was exercising its separate – and protected -- *ratemaking* authority over interstate traffic that otherwise falls within section 251(b)(5).²⁵

Core also contends (Br. 28-29) that the Eighth Circuit's vacatur of the Commission's proxy prices for reciprocal compensation confirms that the Commission may not set actual rates for section 251(b)(5) traffic. But the Eighth Circuit did not address the independent (and longstanding) authority of the Commission to ensure just and reasonable rates for *interstate* traffic under section 201(b). The issue before the court of appeals with respect to reciprocal compensation proxy rates was the authority of the Commission over local *intrastate* traffic. *See Iowa Utils. Board v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000). Indeed, as noted above, the Eighth Circuit had previously held that the

²⁵ Core's reliance (Br. 27, 29) on the Supreme Court's decision in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002), is misplaced for similar reasons. That case involved the proper interpretation of 47 U.S.C. § 252(d)(1), and the passages cited by Core are plainly discussing the scheme established to *implement* that section. The opinion does not discuss section 252(d)(2), nor does it cite the rate regulation provision of section 201(b), let alone address the question here of whether the Commission retains its independent, interstate ratemaking authority under section 201(b) over interstate traffic that is also within section 251(b)(5).

Commission *could* set rates for wireless traffic pursuant to the Commission's independent authority under section 332, despite the Commission's conclusion that this wireless traffic is within section 251(b)(5). *See Iowa Utils. Board v. FCC*, 120 F.3d at 800 n.21; *see also Order* ¶ 22 n.76 (J.A.). The Commission's analysis of this issue was thus entirely correct. *See Order* ¶ 22 (J.A.) (noting that the Eighth Circuit "did not address the Commission's authority to set reciprocal compensation rates for interstate traffic").

Finally, the state petitioners argue that section 201(b) ratemaking authority cannot override state authority under sections 251 and 252 with respect to ISP-bound traffic, because "where both a specific and general provision cover the same subject, the specific provision controls." State Br. 28. But that canon applies in the absence of other statutory evidence of how to reconcile a general and specific provision. *See, e.g., Varsity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (rejecting application of "the specific governs the general" canon, noting that "[c]anons of construction * * * are simply rules of thumb which will sometimes help courts determine the meaning of legislation") (internal quotation marks omitted). Here, in section 251(i), Congress *expressly* told courts how to reconcile the relationship between sections 201 and 251. There is accordingly no role for an interpretive rule of thumb. *See Gallenstein v. United States*, 975 F.2d 286, 290 (6th Cir. 1992) (specific-versus-general "canon of construction does not apply when the plain

language of the two subsections can be reconciled without the need for the application of a general rule”).

The Commission reasonably concluded that it had authority under section 201(b) to adopt the pricing rules for ISP-bound traffic.

C. The State Petitioners’ Claim That The Commission Erred In Concluding That Section 251(b) Applies To All Telecommunications Is Not Ripe

The state petitioners devote much of their brief to the claim that the Commission erred in finding that section 251(b)(5) applies to all telecommunications, rather than solely to local telecommunications traffic. That argument is not ripe, because it is pertinent, if at all, only to the potential precedential effect of the Commission’s analysis to traffic that is beyond the scope of ISP-bound traffic addressed in the *Order*.

Consistent with the Court’s *WorldCom* remand and its mandamus order, the *Order* provides the rationale only for the Commission’s promulgation in 2001 of its ISP-bound traffic pricing rules. *See Order* ¶ 1 (J.A.) (“we have authority to impose ISP-bound traffic rules”); *id.* ¶ 5 (J.A.) (“we conclude that the scope of section 251(b)(5) is broad enough to encompass ISP-bound traffic”); *id.* ¶ 6 (J.A.) (holding that “ISP-bound traffic falls within the scope of section 251(b)(5)”). All parties (including the state petitioners) *agree* that the dial-up calls to ISPs subject

to those pricing rules fall within the scope of section 251(b)(5). *See, e.g.*, State Br. 27 n.18 (“[s]tate petitioners agree that ISP-bound calls are subject to reciprocal compensation obligations under Section 251(b)(5) of the *Telecom Act*”); Core Br. 25 n.3 (“agree[ing]” with the Commission’s conclusion that ISP-bound traffic falls within section 251(b)(5)). Thus, no one disputes that section 251(b)(5) is at least broad enough to encompass the only traffic at issue in this proceeding.

The states’ only disagreement is with respect to *why* such ISP-bound traffic is subject to section 251(b)(5) – *i.e.*, the Commission held that section 251(b)(5) includes ISP-bound traffic because it is “telecommunications,” whereas the states contend that section 251(b)(5) applies to ISP-bound traffic because it is “local.” But the pertinent question of the lawfulness of the Commission’s view that it retains section 201(b) ratemaking authority to adopt the ISP-bound traffic pricing rules does not depend upon reasons *why* such ISP-bound traffic also falls within section 251(b)(5). As shown above, Core and the state petitioners make effectively the *same* claims about the legal consequences of the determination that this ISP-bound traffic fits within the scope of section 251(b)(5), *compare* Core Br. 25-33 *with* State Br. 26-30, even though they disagree on why ISP-bound traffic comes within section 251(b)(5).

This Court has repeatedly held that petitioners must challenge the holding of an agency order, not merely the reasoning in that order. *US West, Inc. v. FCC*, 778

F.2d 23, 27-28 (D.C. Cir. 1985) (a petition that did “not challenge any substantive act of the Commission” but “[o]nly the Commission’s reasoning” was not ripe); *Texas v. United States*, 523 U.S. 296, 300 (1998) (“A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”).²⁶ As pertinent here, the difference between the state petitioners’ interpretation of the scope of section 251(b)(5) and that of the Commission may have implications in *other* cases involving *other* types of traffic, but the Commission has not applied its interpretation to those other cases. It is simply guesswork if and how the Commission will regulate other traffic – *e.g.*, whether it will promulgate rules governing that traffic at all and/or whether it will determine that such traffic falls within section 251(b)(5). The states would be free to challenge any future determination that section 251(b)(5) applies to non-local traffic at that time. The Court should not consider the states’ purely theoretical challenge here.

The states’ challenge to the Commission’s reasoning is insubstantial, in any event. As the Commission reasonably found, section 251(b)(5), by its plain terms,

²⁶ See also *City of Cleveland v. Nuclear Regulatory Comm’n*, 17 F.3d 1515, 1515-16, 1518 (D.C. Cir. 1994) (challenges to the precedential effect of a ruling are not justiciable). Accord *Alabama Mun. Distributors Group v. FERC*, 312 F.3d 470, 473 (D.C. Cir. 2002); *Sea-Land Service, Inc. v. Dept. of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998); *American Family Life Assurance Co. v. FCC*, 129 F.3d 625, 629 (D.C. Cir. 1997).

“imposes on all LECs the ‘duty to establish reciprocal compensation arrangements for the transport and termination of *telecommunications*.’” *Order* ¶ 8 (J.A.) (quoting section 251(b)(5)) (emphasis added). Moreover, the Commission explained, the statutory term “telecommunications” is “not limited geographically (‘local,’ ‘intrastate,’ or ‘interstate’) or to particular services.” *Order* ¶ 8 (J.A.).²⁷ The Commission observed that, “had Congress intended to preclude the Commission” from bringing certain types of traffic within section 251(b)(5), “it could have easily done so by incorporating restrictive terms in section 251(b)(5).” *Ibid.* Instead, Congress “used the term ‘telecommunications,’ the broadest of the statute’s defined terms.” *Ibid.* Thus, although acknowledging that it had once interpreted section 251(b)(5) to be limited to “local” traffic, the Commission concluded that the “better view” is that that provision is not so limited. *Order* ¶ 7 (J.A.). This reasonable analysis is entitled to *Chevron* deference. *See Smiley v. Citibank (S.D.) N.A.*, 517 U.S. 735, 742 (1996) (An agency’s “change [in interpretation] is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”).

²⁷ *See* 47 U.S.C. § 153(43) (defining “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”).

II. THE COMMISSION'S PRICING RULES ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE OTHERWISE REASONABLE

Having concluded that it had statutory authority under section 201(b) to adopt pricing rules for ISP-bound traffic, the Commission reasonably decided to “maintain the \$.0007 cap and mirroring rule” that it had adopted in the *ISP Remand Order* pending the adoption of “more comprehensive intercarrier reform.” *Order* ¶ 29 (J.A.). The Commission explained that the rate cap had been adopted at that time on the basis of “contemporaneous interconnection agreements” into which carriers had voluntarily entered and that there had been a continuing decline in such “negotiated reciprocal compensation rates.” *Order* ¶ 24 (J.A.) (citing *ISP Remand Order* ¶¶ 84-85). Moreover, the mirroring rule – under which the cap would apply “only to the extent that an incumbent carrier offered to exchange all traffic at the same rate” – ensured that the cap would have no discriminatory impact on competitive carriers. *Order* ¶ 25 (J.A.). The Commission further explained that the policy rationale underlying the pricing rules – “prevent[ing] the subsidization of dial-up Internet access customers at the expense of consumers of basic telephone service and * * * avoid[ing] regulatory arbitrage and discrimination between services” – had been affirmed by this Court and remained valid. *Order* ¶¶ 25-26 (J.A.) (citing *In re Core Commc'ns*, 455 F.3d at 278-79).

These findings render baseless Core's general contention (Br. 35) that "[t]here is no rational basis for preserving" the \$ 0.0007 termination rate for traffic bound to ISPs, as well as the CLEC intervenors' more detailed contention that the cap was inconsistent with the record. Although both parties contend that predicated the rate cap on interconnection agreements rather than a determination of the cost of terminating ISP-bound traffic is unreasonable, as this Court has recognized, under section 201 "[t]he FCC is not required to establish purely cost-based rates" as long as the Commission clearly explains the reasons for a departure from cost-based ratemaking. *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996). Here, the Commission adopted a rate designed to limit arbitrage opportunities that arose from "excessively high reciprocal compensation rates." *Order* ¶ 24 (J.A.) (citing *ISP Remand Order* ¶ 75). Indeed, "[m]ost commenters urge[d] the Commission to maintain the compensation rules governing ISP-bound traffic," contending that "a higher compensation rate would create new opportunities for arbitrage" and impose other economic burdens. *Order* ¶ 23 (J.A.). Thus, regardless of whether the \$ 0.0007 termination rate precisely reflects a particular carrier's costs, the Commission adequately justified its approach under section 201.

This conclusion is not altered by the CLEC intervenors' contention that the Commission ignored evidence in the record – including some interconnection

agreements – that suggested that termination costs were higher than higher than \$.0007. CLEC Br. 21-24. The record also contained substantial evidence that most calls to ISPs were now being terminated at rates well *under* the \$.0007 cap pursuant to voluntary agreements.²⁸ It was entirely reasonable in these circumstances to retain the cap level that the Commission had adopted in 2001.

Moreover, even if, in individual instances, the cost to a CLEC of terminating ISP-bound traffic exceeds the cap, the Commission has found that the CLEC reasonably can recover such costs from its end-user customers, as incumbent carriers have always done with respect to ISP customers. *ISP Remand Order* ¶¶ 80, 87. Given the documented risk of regulatory arbitrage associated with one-way ISP-bound traffic, there is nothing unreasonable about requiring competitors serving ISPs to look to their customers for cost recovery of transport and termination.

Core argues (Br. 40-42) that the Commission’s rules create, rather than prevent, arbitrage. Not so. The Commission adopted a payment regime aimed at “limit[ing], if not end[ing], the opportunity for regulatory arbitrage” in 2001 based on its detailed findings. *ISP Remand Order* ¶¶ 2, 70 n.134, 77, 86. Core challenged these arbitrage findings (raising the same arguments it raises here) in

²⁸ See, e.g., Letter, dated August 18, 2008, from John Nakahata to FCC Secretary, CC Docket Nos. 99-68 and 01-92, at 5-6 (J.A.) (describing interconnection agreement setting rates as low as \$.00035 and \$.00004 per minute).

seeking review of the Commission's refusal in 2004 to forbear from enforcing the rate caps. *See* Brief of Petitioner Core Communications, Inc., *In re Core Commc'ns*, Nos. 04-1368 et al., at 40-43 (D.C. Cir. filed June 21, 2005). This Court nonetheless had no trouble finding that the Commission's arbitration findings were entirely reasonable. In fact, the Court credited the Commission's determination that the relevant rules were necessary to counter the "'classic regulatory arbitrage' that had * * * negative effects" on the development of "'viable local telephone competition.'" *Core Commc'ns*, 455 F.3d at 279 (quoting *ISP Remand Order* ¶ 21). The Commission's decision to reaffirm those findings was thus well-supported. *See Order* ¶ 24 (J.A.).²⁹

Core incorrectly contends that the Commission's rules are an "interim" rate to "nowhere" (Br. 39-40). Although the Commission's rules were initially adopted as the first step toward broader reform (a process that remains underway, *see Order* ¶¶ 38-41 (J.A.) (further notice of proposed rulemaking on intercarrier compensation)), those rules can stand on their own as a just and reasonable response to the unique features and arbitrage problems of ISP-bound traffic. In

²⁹ The CLECs argue that the Commission ignored "the fundamental economic fact that the cost of terminating traffic to ISP customers is the same as terminating traffic to any other type of customer." CLECs Br. 26. But that is no answer to the Commission's recognition that carriers are not the only source for recovering those costs; instead, as the Commission found, ISP-bound traffic is unique not only because of the potential for arbitrage but because CLECs can recover their costs from those ISP customers. *ISP Remand Order* ¶¶ 69-71, 80, 87.

any event, Core bases its claims on two proposals that the *Order* makes clear are “Draft Proposal[s]” of a single Commissioner (the former Chairman). The Commission, as a collective body, has taken no action with respect to either of the proposals, other than to solicit comments, and has not, as Core claims, “abandoned its rationale” for adopting the ISP pricing rules. In addition, even the two proposals on which Core relies ultimately call for the establishment of rates that are at or below the \$0.0007 rate cap that currently applies to ISP-bound traffic. See *Order* App. A. ¶ 205 (J.A.); *id.* App. C ¶ 200 (J.A.).

Finally, the CLEC intervenors’ argument that the Commission “never issue[d] any type of notice describing what it was considering in response to the Court’s mandamus” can be rejected quickly. CLEC Br. 30. To begin with, petitioners do not raise this argument, and it is therefore procedurally barred. *Competitive Telecomms. Ass’n v. FCC*, 309 F.3d at 18. In any event, the Commission issued the *Order* on remand from the Court’s *WorldCom* decision in response to the Court’s mandamus order, directing the Commission to provide a legal rationale for its ISP-bound pricing rules. It is not unusual for the Commission, on remand of a rulemaking order, to act without seeking additional comment. See, e.g., *Time Warner Entertainment Co. v. FCC*, 144 F.3d 75, 78 (D.C. Cir. 1998) (noting that the Commission had “issued an order in response to our remand” “without issuing a proposed rule or seeking public comment on how

to proceed”). Where, as here, the remanded issue was a narrow and purely legal one, the Commission’s decision to proceed without issuing a new notice of proposed rulemaking was entirely reasonable. The CLECs cite no authority for the counterintuitive principle that the Commission was under an obligation to tell the parties in which direction it was leaning in responding to the Court’s decisions in *WorldCom* and the mandamus order. *See, e.g., Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 790 (D.C. Cir. 2000) (although “[a]gencies are free to grant additional procedural rights in the exercise of their discretion,’ ‘reviewing courts are generally not free to impose them if the agencies have not chosen to grant them”) (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978)).

The Commission’s decision to maintain its existing intercarrier compensation rules for ISP-bound traffic was reasonable.

III. THE ORDER FULLY COMPLIES WITH THE COURT’S WRIT OF MANDAMUS IN *IN RE CORE COMMC’NS*

Core’s two cursory assertions (*see* Br. 42-44) that the Commission violated the Court’s writ of mandamus in *In re Core Commc’ns* are baseless.

Core states, first, that although the Court’s mandamus order required the Commission to issue an order that “explains the legal authority for the Commission’s interim intercarrier compensation rules that *exclude* ISP-bound

traffic from the reciprocal compensation requirement of § 251(b)(5),” the *Order* on review “does the opposite” by finding that calls to ISPs are “telecommunications” that “fall within the reciprocal compensation framework of sections 251(b)(5) and 252(d)(2).” Br. 42-43. In other words, although Core says elsewhere that it “agrees” with the Commission’s view that “telecommunications” traffic to ISPs “falls within the scope of section 251(b)(5),” Core Br. 25 n.3 (emphasis added), it argues that this Court’s mandate prohibited the Commission from adopting that position. This claim, however, is little more than an effort to play word games with the language quoted from the Court’s mandamus decision. In stating that the Commission must explain the legal authority for interim rules that “exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5),” the Court quite clearly was directing the Commission to provide a new legal justification (if it could) for the differing treatment the interim rules accorded ISP-bound traffic vis-a-vis certain other types of traffic. Other formulations used by the Court make this clear. *See In re Core Commc’ns*, 531 F.3d at 850 (“direct[ing] the FCC to explain the legal basis for its ISP-bound compensation rules”); *id.* at 860 (FCC must “explain its legal basis for [the interim] rules” or have them vacated).³⁰

³⁰ This Court in *WorldCom* likewise had directed the Commission generally to explain the “legal basis for adopting the rules chosen by the Commission.” *WorldCom*, 288 F.3d at 434.

The Court was not dictating the legal theory that the Commission was required to adopt in doing so, and made clear that it was not directing the Commission “to promulgate any particular rule or policy.” *Id.* at 859. The Court certainly did not forbid the Commission from attempting to sustain the interim rules on a revised legal theory in which ISP-bound traffic is found to “fall[] within the scope of section 251(b)(5).” *Order* ¶ 16 (J.A.); *see also id.* ¶¶ 17-22 (J.A.) (stating that the “section 251(b)(5) finding * * * does not end our legal analysis” and sustaining the interim rules with reference to sections 201(b) and 251(i), as well as section 251(b)(5)).

Equally insubstantial is Core’s contention that the *Order* violates the Court’s mandamus decision by offering “no legal basis” for the growth cap and new market rules that the Commission had adopted in 2001. Br. 43. In fact, the Commission concluded, after analyzing its authority under sections 251(b)(5), 201(b), and 251(i), that *all* of the interim “pricing rules governing the payment of compensation between carriers for ISP-bound traffic” – including the growth cap and new market rules – were within its authority. *Order* ¶ 21 (J.A.). *See also id.* ¶ 21 n.72 (J.A.) (finding that “the Commission had the authority to adopt the [interim] pricing regime [for ISP-bound traffic] pursuant to our broad authority under section 201(b) to issue rules governing interstate traffic”). Core’s argument to the contrary is predicated entirely on the Commission’s statement (*Order* ¶ 27

n.103 (J.A.)) that Core’s separate Administrative Procedure Act claim that the growth cap and new market rules lacked a reasonable explanation was moot in light of the Commission’s previous decision to forbear from applying those rules. Br. 43-44. As discussed above, however, the *Order* addressed the Commission’s statutory authority to adopt *all* of the components of the interim rules – including the growth cap and new market rules. And, in any event, a renewed Commission decision on the reasonableness of the interim rules under the APA – as opposed to the Commission’s statutory authority to adopt those rules – was never part of the *WorldCom* mandate with which the Commission was required to comply. See *WorldCom*, 288 F.3d at 434 (noting that, “[h]aving found that § 251(g) does not provide a basis for the Commission’s [interim rules], we make no further determinations” and, in particular, that “we do not decide petitioners’ claims that the interim pricing limits imposed by the Commission are inadequately reasoned”).

In granting the writ of mandamus in *In re Core Commc’ns*, the Court directed the Commission “to respond to our 2002 *WorldCom* remand by November 5, 2008” by issuing an order “that explains the legal authority for the Commission’s interim intercarrier compensation rules * * * *” 531 F.3d at 861-62. The Commission did precisely that when it timely issued the *Order*. That *Order* (¶¶ 6-29 (J.A.)) sets forth in detail a revised legal basis for the ISP-bound

compensation rules that the Court had remanded in *WorldCom*. That is all the mandamus order required.

Finally, the CLEC intervenors' contention (Br. 36) that the *Order* did not comply with this Court's mandamus decision directing the Commission to act by November 5, 2008 because Federal Register publication occurred later is barred and, in any event, meritless. First, no petitioner makes this argument (Core asserts it only in its role as an intervenor), so it is not properly before the Court. *See Competitive Telecomms. Ass'n*, 309 F.3d at 18. Moreover, we are not aware of any party arguing – prior to issuance of the *Order* – that the Commission had to not only release an order in response to this Court's mandamus decision by November 5, but also have it published in the Federal Register by that date. This is accordingly a “question[] of * * * law upon which the Commission * * * has been afforded no opportunity to pass” and is not properly before the Court for this reason as well. 47 U.S.C. § 405(a).

In any event, we respectfully submit that the panel's reference to a “final and appealable” order (*see In re Core Commc'ns*, 531 F.3d at 861-62) is best understood as reflecting a concern about the possibility that the Commission's response to the mandamus order would take the form of a staff-level decision (which could not be challenged immediately in court, but only after further review by the full Commission) or the issuance of a press release, with the order to follow

at some (unspecified) later date. Intervenors offer little reason to believe that the mandamus panel instead intended for the Commission to ensure that a separate agency – the National Archives and Record Administration – had published the Commission’s response in the Federal Register.

CONCLUSION

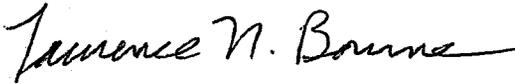
For the foregoing reasons, the Court should deny the petitions for review insofar as they present justiciable claims and should otherwise dismiss them.

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May 1, 2009

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

Core Communications, Inc., et al., Petitioners,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

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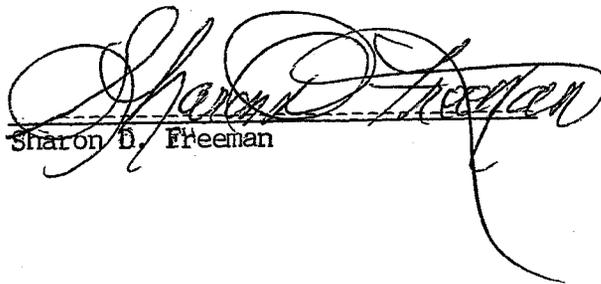
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