ORAL ARGUMENT NOT YET SCHEDULED

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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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

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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.

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[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).

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[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 *inter*state communications or the states' jurisdiction over *intra*state 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-

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[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,

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[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

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[10] The Eight 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* ¶ 110[13]; *Wireless Broadband Declaratory Ruling* ¶ 28[14]; *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

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[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).

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[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]

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[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

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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

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[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

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[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

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[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

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[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

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[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

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[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 *intra*state 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

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[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.*, *Varity 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,

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[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.").

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[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 predicating 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

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[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 arbitrage 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.

Respectfully submitted,

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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 THE UNITED STATES OF America, RESPONDENTS.	)	NOS. 08-1365, ET AL.

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Federal Communications Commission" in the captioned case contains 13195 words.

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