**Suzan DeBusk Paiva**
Assistant General Counsel

verizon

1717 Arch Street, 3 East
Philadelphia, PA 19103

Tel: (215) 466-4755
Fax: (215) 563-2658
Suzan.D.Paiva@Verizon.com

November 30, 2015

**Via Electronic Filing**
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Core Communications, Inc. v. Verizon Pennsylvania Inc. and Verizon North LLC;
Docket Nos. C-2011-2253750 and C-2011-2253787

Dear Secretary Chiavetta:

Enclosed please find Verizon's Reply Brief on Remand, filed on behalf of Verizon Pennsylvania LLC and Verizon North LLC (collectively, "Verizon") in the above captioned matters.

If you have any questions, please feel free to contact me.

Very truly yours,

Suzan D. Paiva

SDP/slb

**Via E-Mail and Federal Express**
cc: The Honorable Susan D. Colwell
Attached Certificate of Service

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of Verizon's Reply Brief on Remand, upon the parties listed below, in accordance with the requirements of §1.54 (relating to service by a party) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 30th day or November, 2015.

**Via E-Mail and Federal Express**

Michael A Gruin, Esquire
Stevens & Lee
17 North Second St., 16th Fl.
Harrisburg, PA 17101

Suzan D. Paiva
Pennsylvania Bar ID No. 53853
1717 Arch Street, 3rd Floor
Philadelphia, PA 19103
(215) 466-4755

Attorney for Verizon

**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| **CORE COMMUNICATIONS, INC.,** | : | |
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| **Complainant,** | : | |
| | : | |
| **v.** | : | **Docket No. C-2011-2253750 and** |
| | : | **Docket No. C-2011-2253787** |
| **VERIZON PENNSYLVANIA INC. and VERIZON NORTH LLC,** | : | |
| | : | |
| **Respondents.** | : | |

## VERIZON'S REPLY BRIEF ON REMAND

Core's[1] wide-ranging arguments on remand have little to do with the *VoIP Symmetry Order*.[2] Rather than adhere to the limited scope of this remand, Core instead resurrects arguments that fall well outside it – and which the July 11, 2013 Initial Decision ("ID") already rejected. Core also relies on other invalid assumptions to blur the distinctions between the types of traffic at issue and the rates, if any, applicable thereto. Putting aside Core's improper attempt to re-litigate an array of issues that the *Remand Order* concluded were already "ripe for disposition,"[3] the conclusion is simple: the *VoIP Symmetry Order* has no impact on the ID's correct decision to reject Core's switched access charges.

Core does not – and cannot – dispute three fundamental points that are fatal to its switched access claims: (1) the ID rejected Core's switched access bills for independent reasons unaffected by the *VoIP Symmetry Order* and thus not eligible for re-argument here; (2) Core did not and cannot quantify what portion of the back-billed (and subsequently-billed) traffic is VoIP;

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1 Core Communications, Inc. ("Core").

2 *In the Matter of Connect America Fund – Developing a Unified Intercarrier Compensation Regime*, WC Docket 10-90 (Rel. February 11, 2015) ("*VoIP Symmetry Order*"). A copy of the *VoIP Symmetry Order* is included in the Appendix to Verizon's Main Brief on Remand ("VZ Br.").

3 Opinion and Order (May 28, 2015) ("*Remand Order*") at 10.

and (3) the FCC's *VoIP Symmetry Order* confirms that carriers may not collect switched access charges if they do not provide the service described in their tariffs (which must be strictly construed against them), precluding Core's switched access billing here.

## I. THE ID ALREADY REJECTED CORE'S ARGUMENTS, WHICH ADDRESS ISSUES OUTSIDE THE SCOPE OF THE LIMITED REMAND.

Core reargues various points upon which the *VoIP Symmetry Order* has no bearing, including whether: the terms of the parties' interconnection agreements permitted Core to bill switched access charges for any of the traffic at issue; the traffic for which Core billed Verizon[4] switched access was "entirely non-local, toll traffic"; Core's methodology and "matching algorithm" for billing (and back-billing) switched access was reliable; Core may bill switched access charges on ISP-bound traffic; and so on.[5] Core even attempts to resurrect an argument over switched access charges for traffic carried over Core's now-defunct MF trunks[6] – traffic for which Core never even rendered a bill[7] and took no exception to the ID's denial of its claim therefor.

Core effectively admits that the traffic it now claims is "toll" traffic billable to Verizon is third party traffic originated by other providers and transited to Core by Verizon's tandem switches, not traffic originated by Verizon.[8] But the ID already rejected Core's argument that it

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4 Verizon Pennsylvania LLC ("Verizon PA") and Verizon North LLC ("Verizon North") (together, "Verizon").

5 *See* Core's "Supplemental Main Brief" (November 9, 2015) ("Core Br.") at 1-6. Core also appears improperly to attempt to shift the burden of proof on its switched access claims to Verizon. *Id*. at 6.

6 Core Br. at 5-6.

7 Hearing Transcript ("Tr.") at 337-38; *see also* Verizon's January 23, 2013 Initial Brief ("VZ Initial Br.") at 56-58; ID at 44. All citations to Verizon's earlier briefs incorporate by reference the legal and record citations therein.

8 *See, e.g.*, Core Br. at 6 (criticizing Verizon's argument that "as a tandem provider" it is "entitled to send Core traffic without having any responsibility to pay intercarrier compensation"). Core says that the traffic at issue was "for toll traffic that Verizon sent to Core's network for termination" and is "traffic that Verizon transmitted to Core for termination," but carefully avoids saying that it is traffic originated by Verizon, since it is actually originated by third parties. Core Br. at 1.

is entitled to bill Verizon for traffic originated by interexchange carriers ("IXCs"), concluding that "Core is not entitled to charge Verizon for terminating third-party traffic that transits Verizon's network," and that "Core has billed Verizon switched access for traffic originated by IXCs, which is billable to the IXCs, not Verizon."[9] The ID also found as a matter of fact that the traffic for which Core attempts to bill Verizon here was originated by IXCs, not Verizon.[10] Just last week, in a case arising from this Commission in which Core sought to collect from AT&T switched access charges on traffic originated by AT&T and transited to Core through Verizon's tandem switches, the Third Circuit affirmed the "originator pays" rule.[11] The *VoIP Symmetry Order* says nothing about billing for traffic originated by third parties and Core cannot use this limited remand as an opportunity to reargue the ID's decision against it on that issue.

Core also concedes (as it must) that it failed to prove what portion of the traffic at issue was VoIP.[12] Core thus advances what it admits is the same position it has argued unsuccessfully "throughout this proceeding" – that switched access applies to all of its traffic equally "regardless of whether the traffic was ISP-bound traffic or VOIP traffic."[13] But the ID already concluded that ordinary ISP-bound traffic is subject to the FCC's $0.0007/MOU rate, not

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9 ID at 12, Finding of Fact ("FOF") 46 ("Core's process of estimating the billable minutes to Verizon for all calls regardless of trunks or carriers failed to exclude third party traffic, including interexchange minutes that should have been billed to IXCs, and resulted in overstating the minutes billable to Verizon. "); ID at 14, FOF 56 ("Core has billed Verizon switched access for traffic originated by IXCs, which is billable to the IXCs, not Verizon."): ID at 56, Conclusion of Law ("COL") 17 ("Core is not entitled to charge Verizon for terminating third-party traffic that transits Verizon's network.").

10 ID at 14, FOF 56 (quoting Core Stmt. 1.0 at Ex. BLM-6, which states that "[t]hese CDRs will conclusively demonstrate what you already know (since you already have the call data from your own tandem records), which is that this is all IXC traffic delivered by Verizon to CoreTel over the interconnection arrangements.").

11 *See AT&T Corp. v. Core Communs., Inc.*, 2015 U.S. App. LEXIS 20499, ** 3-4 (3rd Cir., November 25, 2015), a copy of which is attached hereto. This decision upholds this Commission's order permitting Core to collect at the $0.0007/MOU rate (a total of $254,029.89) from AT&T for terminating ISP-bound traffic transited through Verizon (*id*. at **14-15; 38), meaning that any decision here that would permit Core to bill Verizon for this third-party originated transit traffic would result in Core reaping an unwarranted windfall from its double-billing practices.

12 Core Br. at 2-3.

13 Core Br. at 2.

switched access rates.[14] The Third Circuit last week confirmed that an ISP-bound traffic rate that exceeds the FCC's $0.0007 cap would be preempted due to conflict with federal law.[15] The *VoIP Symmetry Order* does not apply to non-VoIP traffic and says nothing about the applicable compensation for ordinary ISP-bound traffic. Core cannot use this limited remand to reargue the ID's decision against it on that issue either.

And Core again tries to justify the flawed methodology it used to generate switched access back-bills for traffic that it already billed (and Verizon already paid for) at the FCC's $0.0007 rate for terminating ISP-bound traffic.[16] Core ignores that the ID found that Core failed to sustain its burden of proving its switched access bills were valid because its methodology to rerate the traffic was flawed and its bills were riddled with calculation and rate errors.[17] Those conclusions also have nothing to do with the *VoIP Symmetry Order* and are not subject to re-argument here.

As the *Remand Order* made clear, these issues were already "ripe for disposition" by the Commission prior to this limited remand, the sole purpose of which is to address the impact of the *VoIP Symmetry Order*, if any, on Core's claim for approximately $2.5 million in switched

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[14] ID at 17, FOF 78 (citing FCC's *ISP Remand Order* and finding that "Verizon pays Core at the FCC's rate for ISP-bound traffic (currently $0.0007 per MOU …"); ID at 51 ("The correct rate for Core to bill Verizon for ISP-bound traffic is $0.0007/MOU."); ID at 57, COL 23 ("In 2001, the FCC lowered the rate for terminating ISP-bound traffic from reciprocal compensation ($0.002814/MOU for Verizon PA) to a uniform rate that today is $0.0007/MOU."); ID at 60, COL 34 ("Verizon is entitled to continue to pay Core $0.0007/MOU for ISP-bound traffic."); ID at 60, COL 35 ("Pursuant to the *ISP Remand Order*'s $0.0007/MOU rate for ISP-bound traffic, switched access charges do not apply to ISP-bound traffic."); ID at 62, Ordering Paragraph 14 ("Core is directed to cease billing Verizon reciprocal compensation or switched access on ISP-bound and VNXX traffic.").

[15] *AT&T Corp., supra*, 2015 U.S. App. LEXIS 20499 at *27. The Third Circuit affirmed the Commission's rejection of Core's attempt to bill AT&T switched access charges on ISP-bound traffic and reduction of the amount due from AT&T for the termination of that traffic to the FCC cap of $0.0007/MOU.

[16] Core Br. at 5.

[17] ID at 11-15 (FOF 41-46; 52-63); 16-17 (FOF 70-75); 56 (COL 17-19).

access charges.[18] As discussed at Section II.A of Verizon's Main Brief on Remand, the ID rejected Core's switched access charges for an array of reasons wholly unaffected by the *VoIP Symmetry Order*, including those Core attempts to reargue now.[19] Those arguments should be disregarded.

## II. CORE CONCEDES THAT IT CANNOT IDENTIFY THE AMOUNT OF ALLEGED VOIP TRAFFIC ON WHICH IT CLAIMS TO BE ENTITLED TO SWITCHED ACCESS CHARGES.

Core admits that it never presented evidence quantifying which portion of the traffic it billed Verizon for switched access was VoIP traffic, versus ISP-bound.[20] Core failed to enter such evidence into the record even though the parties filed their first round of testimony on August 23, 2012, close to a year after FCC issued its 2011 intercarrier compensation order[21] adopting the "VoIP symmetry rule" (47 C.F.R. § 51.913(b)), and six and five months (respectively) after Core amended its Pennsylvania and FCC tariffs to reference it.[22]

As detailed in Verizon's Main Brief on Remand, the record confirms that Core can offer nothing better than a "guess" at any hypothetical amount of such VoIP traffic, made on the basis of admittedly unreliable and ever-changing information.[23] The record further reflects that the earlier the time period – particularly the period covered by Core's improper back-billing – the

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18 *Remand Order* at 10.

19 "Verizon's Main Brief on Remand" (November 9, 2015) at 5-7 ("VZ Br.).

20 Core Br. at 2-3.

21 *See Connect America Fund; a National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers; Developing a Unified Intercarrier Compensation Regime, etc.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) ("*2011 Transformation Order*").

22 Core Br. at Tabs D (Core Communications, Inc. Supplement No. 2, PA P.U.C. Tariff No. 4, Original Sheet No. 52.37, eff. February 11, 2012) and G (Core Communications, Inc., *et al*. FCC Tariff No. 3, 4th Revised Page No. 79, eff. March 27, 2012).

23 VZ Br. at 7-8 and citations therein.

more traffic was ISP-bound dial-up, not VoIP.[24] This admitted lack of record evidence is fatal to Core's claim.

Core attempts to paper over its failure by rearguing its position – soundly rejected by the ID[25] – that access charges are due on ISP-bound traffic. Core then asserts that this means that it makes no difference whether any particular call was VoIP, since Verizon owes switched access on all ISP-bound traffic.[26] But the ID already properly concluded (and the Third Circuit confirmed last week) that ISP-bound traffic is not subject to access charges; that issue is not up for re-argument here. Core itself argued in a prior Commission proceeding that there is "never" a situation in which access charges are due on ISP-bound traffic.[27] The Commission should not accept Core's self-serving flip-flop on the issue here.

Core bears the burden of proof on its claim for switched access charges on alleged VoIP traffic. Core admits that it has failed to (and cannot) quantify *any* amount of back-billed (or subsequent) VoIP traffic for which it claims the VoIP symmetry rule entitles it to switched access charges, and as a result, has failed to meet its burden of proof. As noted in Verizon's Main Brief on Remand, under analogous circumstances, the Commission held that Core's failure to meet its burden of proof as to the ISP-bound/VoIP distinction made it appropriate to treat all of the traffic at issue as all ISP-bound.[28]

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24 VZ Br. at 5-7; Tr. at 341.

25 ID at 17, FOF 78; 51; 57, COL 23; 60, COL 34-35; 62, Ordering Paragraph 14; *see also* VZ Initial Br. at 48-58; Verizon's March 18, 2013 Reply Brief ("VZ Reply Br.") at 39-44; Verizon's September 16, 2013 Reply Exceptions ("VZ Reply Ex.") at 10-11.

26 Core Br. at 4.

27 Tr. 342-43; Verizon Cross Ex. 9 at 6.

28 *See* Opinion and Order, *Core Communications, Inc. v. AT&T Communications of Pennsylvania, LLC and TCG Pittsburgh, Inc.*, Pa. PUC Dockets C-2009-2108186 and C-2009-2108239 (Dec. 5, 2012) at 55 ("Having failed to meet its burden of proof, Core cannot be heard to complain that, in the absence of record evidence, the ALJ treated all of the traffic in question as ISP-bound.").

To the extent Core now attempts to argue that even its ordinary ISP-bound traffic is also "VoIP-PSTN" traffic subject to the VoIP symmetry rule[29] (and it is unclear whether this is Core's position since VoIP requires a broadband connection at the customer's location,[30] calling into question why a VoIP customer would use dial-up to reach an ISP), the record shows that this is not the case. By its terms, the FCC's VoIP symmetry rule applies only to "telecommunications traffic [that] originates and/or terminates in IP format," defined as traffic that "originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment."[31]

Under this standard, Core's ordinary ISP-bound traffic is not VoIP-PSTN traffic subject to the VoIP symmetry rule. Mr. Mingo testified at hearing that Core's service to ISPs is a "managed modem" service through which Core's own equipment within Core's wire center is the media gateway where the signals enter the Internet.[32] No "Internet protocol-compatible customer premises equipment" is required for Core to provide this managed modem service.[33] In any event, Core concedes that the vast majority of its back-bills predate the January 1, 2012 effective date of the VoIP symmetry rule, which set new rules for VoIP compensation only *prospectively* from that date.[34] The VoIP symmetry rule thus provides no basis to disregard binding Third Circuit precedent and alter the ID's holding that this ordinary dial-up ISP-bound

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29 Core Br. at 15.

30 *See* 47 C.F.R. § 9.3.

31 47 C.F.R. § 51.913(a)(3).

32 Tr. at 410-12.

33 The unreported South Dakota federal district court order attached as Tab J to Core's brief to "prove" certain "facts" about how conference calling services work is extra-record "evidence" that is barred at this stage of the proceeding. Moreover, not only is the decision not binding on this Commission, it is also inapposite. It found that traffic routed by the carrier at issue fit under the FCC's definition of VoIP-PSTN traffic, but that conclusion was based on very specific evidence about the call flows and equipment used. Here, the Commission has its own evidence about Core's different call flows and equipment that shows that Core's ordinary ISP-bound traffic is not VoIP-PSTN.

34 Core Br. at 1.

traffic was subject only to the *ISP Remand Order*'s[35] $0.0007 rate that Verizon already paid. Nor does the *VoIP Symmetry Order* absolve Core of the burden of distinguishing what portion of the traffic was actually VoIP traffic.

## III. THE *VOIP SYMMETRY ORDER* CONFIRMS THAT THE SPECIFIC TERMS OF A CARRIER'S TARIFFS TRUMP THE GENERAL "VOIP SYMMETRY RULE."

### A. The VoIP Symmetry Rule Was Not in the Core Tariffs in Effect at the Time of Core's Switched Access Back-Billing.

The VoIP symmetry rule was not even in the tariffs upon which Core back-billed Verizon millions of dollars in intra- and interstate switched access charges. While Core claims that it "duly incorporated" the VoIP symmetry rule into its tariffs,[36] it glosses over the fact that the tariff amendments it cites were effective February 11, 2012 for Pennsylvania, and March 27, 2012 for its FCC tariff.[37] Without conceding that Core properly implemented the VoIP symmetry rule at those times, Verizon notes that the February 2009-December 2011 switched access back-billings for which Core seeks payment[38] pursuant to the *VoIP Symmetry Order* predate those tariff amendments (as well as the rule itself, which applied only *prospectively,* beginning January 1, 2012). And although the FCC applied the *VoIP Symmetry Order*'s clarification of the rule's "functional equivalence" standard retroactively to the effective date of the rule, that order does not make Core's 2012 tariff revisions retroactive to 2009, as Core appears to insinuate. Those tariff changes are inapplicable prior to their effective date, and offer no support for Core's attempt to back-bill switched access charges on VoIP traffic for the 2009-2011 period covered by Core's back-billing (or for the several months of 2012 monthly switched

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35 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic,* 16 F.C.C.R. 9151, ¶ ¶ 2, 77 (2001*)* ("*ISP Remand Order*").

36 Core Br. at 7.

37 Core Br. at Tabs D and G.

38 Core Br. at 1.

access billings that predated them).

Core's "VoIP symmetry" tariffs also do not support its attempt to bill switched access charges on VoIP traffic for the period February/March through June 2012 (the remainder of Core's $2.5 million claim) or thereafter. Throughout every relevant time period and continuing to the present, Core's tariffs contained a definition of "end office switching" that requires "terminations in the end office of end user lines,"[39] a service that Core does not provide and for which it may not bill Verizon.[40] The *VoIP Symmetry Order* did not hold that its new interpretation of "functional equivalence" would "amend" tariffs that by their terms, describe only traditional Time-Division Multiplexing ("TDM") functions, which is what Core really argues. To the contrary, as discussed below, the *VoIP Symmetry Order* did not disturb prior decisions holding that the specific terms of a carrier's tariff – which must be strictly construed against the carrier – ultimately govern whether it may bill switched access charges on VoIP traffic.

### B. *The VoIP Symmetry Order* Did Not Disturb the Findings in *YMax* and the *VA Fourth Circuit Decision* That the Terms of a Carrier's Access Tariffs Ultimately Govern Its Entitlement to Switched Access Charges.

Core devotes more than a quarter of its brief to quoting large passages of the VoIP symmetry rule and *VoIP Symmetry Order*,[41] but fails to reckon with the most relevant

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39 Core Br. at Tab B (Core Communications, Inc. PA P.U.C. Tariff No. 4, Original Sheet No. 48, eff. July 2, 2008 at § 5.2.1); Tab C (Core Communications, Inc. PA P.U.C. Tariff No. 4, 1st Revised Sheet No. 48, eff. July 21, 2009 at § 5.2.1; Tab D (*id*.); Tab E (Core Communications, Inc., *et al.* FCC Tariff No. 2, Original Page No. 43, eff. Oct. 3, 2009 at § 3.3.2); Tab F (Core Communications, Inc., *et al.* FCC Tariff No. 3, Original Page No. 43, eff. January 1, 2011 at § 3.3.2).

40 *See CoreTel Virginia, LLC v. Verizon Virginia LLC et al.*, 752 F.3d 364, 374 (4th Cir. 2014) ("*VA Fourth Circuit Decision*"). A copy of this decision is included in the Appendix to the VZ Br. As noted in Verizon's Main Brief on Remand, the facts are the same here in Pennsylvania. VZ Br. at 9-10; *see also* Tr. 405-06; 411-13 (Core witness Mr. Mingo confirming that Core routes the traffic it terminates for customers to the Internet); VZ Initial Br. at 53 (proprietary details of how Core terminates traffic).

41 Core Br. at 6-12.

impediment to its claims thereunder: the order's reiteration of the holdings in both the *YMax*[42] proceeding and the Fourth Circuit's CoreTel Virginia case[43] that the terms of a carrier's tariffs determine whether it may bill for switched access charges on VoIP traffic, and that any ambiguity in that tariff language must be construed against the carrier.[44]

Core appears to argue that the *VoIP Symmetry Order*'s clarification of the proper scope of "functional equivalence" for purposes of interpreting 47 C.F.R. 51.913(b) operates to "amend" any tariff that continues to rely on language that describes traditional TDM technology, but Core reads far too much into the FCC's decision. The *VoIP Symmetry Order* does not "fix" tariff language that describes services that a carrier was not actually providing. To the contrary, the order confirmed that "[b]ecause such [switched access] charges ultimately are governed by applicable tariffs, however, we cannot conclude that access charges for end office switching are due in every circumstance."[45]

The *VoIP Symmetry Order* thus did not overrule *YMax*'s finding that the terms of a carrier's tariff ultimately govern its claim for switched access on VoIP traffic[46] – it instead reiterated that conclusion:

> In [*YMax*], the Commission carefully restricted its findings to the "particular language in YMax's tariff and the specific configuration of YMax's network architecture." YMax's tariff contained definitions and descriptions based on TDM-based functions and networks. At the time the *YMax Complaint* was adopted, YMax … was not providing exchange access service using the technology described in its tariff…. Noting that "it is well established" that "any ambiguity in a tariff is construed against the party who filed the tariff, in this case YMax," the Commission ultimately determined that it was "bound to resolve the [tariff term] ambiguities against YMax as the drafting party." … **<u>While the</u>**

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42 *AT&T v. YMax*, 26 FCC Rcd 5742 (2011).

43 *VA Fourth Circuit Decision*, 752 F.3d at 374.

44 *VoIP Symmetry Order*, ¶¶ 19, FN 64; 34; 39-40.

45 *VoIP Symmetry Order*, ¶ 19, FN 64.

46 *VoIP Symmetry Order*, ¶ 35.

> **Commission rule still exists that carriers must accurately describe services offered in their tariffs**, carriers are now allowed to charge for services that either they or their retail VoIP partners provide, as long as one of them provides the service and no double billing occurs.[47]

Core claims that Verizon argues that *YMax* applies "generally to bar CLEC switched access charges,"[48] but misrepresents Verizon's position, which is that Core has failed to provide the "end office switching" service described in its tariffs, and thus may not bill switched access charges for some unidentified quantity of alleged VoIP traffic thereunder. Core's diatribe regarding Verizon's and the ID's citation to the *YMax* decision[49] is thus irrelevant because although the *VoIP Symmetry Order* superseded certain of *YMax*'s findings as to the proper scope of "functional equivalence" for purposes of interpreting 47 C.F.R. 51.913(b), it did not alter or reject *YMax*'s underlying predicate that a carrier may not collect switched access charges on VoIP traffic when it does not offer the services described in the tariff upon which it relies to do so, which must be strictly construed against the carrier.

The FCC likewise confirmed that the Fourth Circuit's rejection of CoreTel Virginia, LLC's ("CoreTel") attempt to bill Verizon's Virginia affiliates switched access charges on VoIP traffic, due to CoreTel's particular tariff language, did not conflict with the *VoIP Symmetry Order*:

> Verizon alleged that CoreTel, a competitive LEC, improperly billed for "end office switched access" because the service CoreTel provided did not match the service described in CoreTel's tariff. The court agreed, noting that CoreTel's state and federal tariffs provided that end office switching would include "terminations in the end office of end user lines." … **We find that this case does not impact the clarification provided here. Similar to the Commission's decision in the *YMax Complaint*, the CoreTel decision rests primarily on tariff language describing traditional TDM architecture and functionality**.[50]

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47 *VoIP Symmetry Order*, ¶¶ 34-35 (emphasis added).

48 Core Br. at 18.

49 Core Br. at 3-4; 18-19.

50 *VoIP Symmetry Order*, ¶¶ 39-40.

The Fourth Circuit's decision is thus not "inconsistent with the *VoIP Symmetry Order*," as Core claims.[51] Likewise, the FCC's observation that many CLECs amended their tariffs to incorporate the VoIP symmetry rule is not "inconsistent" with the Fourth Circuit's conclusion that CoreTel did not provide "end office switching" matching the definition thereof in its tariff (the same definition in Core's tariffs here). As the Fourth Circuit noted, CoreTel's specific tariffed definition of "end office switching" governed, not CoreTel's more general tariff language regarding when it could "charge for 'switched-access service' provided using IP technology."[52] Nothing in Core's 2012 tariff language purporting to implement the VoIP symmetry rule redefines "end office switching" under that tariff.[53] Instead, it contains the same definition that the Forth Circuit found fatal to CoreTel's switched access claims.

For the reasons more fully detailed in Verizon's Main Brief on Remand,[54] not only did the ID reject Core's switched access bills as unreliable and invalid for a number of reasons completely unrelated to the *VoIP Symmetry Order*, Core's Pennsylvania and FCC tariffs do not authorize it to bill Verizon switched access charges on VoIP traffic because Core does not provide "end office switching" as defined in its tariffs, which ultimately govern.

## IV. THE *VOIP SYMMETRY ORDER* DOES NOT SUPPORT CORE'S ATTEMPT TO BACK-BILL INTRASTATE SWITCHED ACCESS RATES.

Even if the *VoIP Symmetry Order* allowed Core to bill switched access charges for VoIP traffic *prospectively* (which it does not, for the many reasons discussed), the order does not support Core's claim for *back-billed* intrastate switched access charges that pre-date, and are not

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51 Core Br. at 20.

52 *VA Fourth Circuit Decision*, 752 F.3d at 374-75.

53 Core Br. at 18.

54 VZ Br. at 5-12.

supported by, the VoIP symmetry rule.

Core concedes that the bulk of its claims are for intrastate switched access charges ($1.8 million of the $2.5 million claimed).[55] But if Core is relying on the VoIP symmetry rule as authority to bill those switched access charges, it fails to explain how it could be entitled to ***intra***state switched access charges on terminating VoIP traffic. Core itself cites 47 C.F.R. 51.913(a)(1) for the proposition that "the applicable ***inter***state rate" applies "both for interstate and intrastate VoIP."[56] As detailed in Verizon's Main Brief on Remand, 47 C.F.R. 51.913(a)(1) makes clear that the only switched access charges that apply to terminating intrastate VoIP traffic are ***inter***state switched access charges.[57] Core's 2012 Pennsylvania switched access tariff amendments referencing the VoIP symmetry rule likewise explicitly limit the charges that theoretically apply to intrastate traffic to the "***inter***state switched access rates for the state of Pennsylvania as set forth in section 5.6 of this tariff."[58] Core not is entitled to bill intrastate switched access charges on terminating VoIP traffic for *any* time period.

Core's attempt to back-bill intrastate switched access charges for periods before the VoIP symmetry rule and *VoIP Symmetry Order* took effect are also invalid under the terms of Core's own intrastate tariff, which prohibits back-billing,[59] as the ID agreed in rejecting Core's arguments.[60] But even if Core's intrastate switched access tariff permitted back-billing (and it does not), ISP-bound traffic is jurisdictionally *inter*state, and therefore not subject to *intra*state

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55 Core Br. at 5.

56 Core Br. at 7 *(emphasis added; unitalicized underlining in original)*.

57 VZ Br. at 11-12; *see also* 47 C.F.R. 51.913(a)(1).

58 Core Br. at Tab D (Core Communications, Inc. Supplement No. 2, PA P.U.C. Tariff No. 4, Original Sheet 52.37 (eff. February 11, 2012) at § 5.5) (emphasis added).

59 VZ Br. at 7.

60 ID at 43 (noting Verizon's argument that Core's intrastate tariff precludes back-billing and rejecting Core's switched access bills); 61-62 (Ordering Paragraph 9).

access charges in excess of the FCC's $0.0007 rate cap.[61] And as Core itself agrees,[62] this Commission lacks jurisdiction over claims brought pursuant to Core's interstate access tariff. It is well-settled that "this Commission has no jurisdiction over services provided pursuant to an FCC-approved tariff."[63] The Commonwealth Court observed as much in affirming the Commission's *MilleniaNet* decision:

> … [T]he Pennsylvania General Assembly set forth in Section 104 of the Code, 66 Pa. C.S. § 104, that the Code's provisions "shall not apply, or be construed to apply, to commerce . . . among the several states, except insofar as the same may be permitted under the provision of the Constitution of the United States and the acts of Congress." Further, Congress set forth in Section 151 of the Act, n1 47 U.S.C. § 151 (b), that the FCC was created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio. . . .[64]

The law prohibits Core's attempt to collect intrastate switched access charges on VoIP traffic, and the Commission has no jurisdiction to award Core amounts purportedly billed under its federal switched access tariff. The Commission must reject Core's switched access claims.

## V. CORE'S EXPANSIVE READING OF THE "FUNCTIONAL EQUIVALENCY" STANDARD IS UNSUPPORTED.

Core argues that it provides the "functional equivalent" of the switched access services it attempts to bill. That is wrong. Core deliberately blurs the lines between the rules for VoIP-PSTN traffic under the FCC's VoIP symmetry rule and the rules for all other traffic. It suggests that because the FCC held that CLECs partnering with a retail VoIP provider could bill for

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61 *ISP Remand Order*, ¶ 52; *AT&T Corp., supra*, 2015 U.S. App. LEXIS 20499 at **23-28.

62 *See* "Main Brief of Core Communications, Inc." (January 23, 2013) at 23 ("The Commission only has jurisdiction over intrastate traffic and tariffs.").

63 *MilleniaNet Corporation v. Verizon Pennsylvania Inc*., Docket No. C-20055173, 2008 Pa. PUC LEXIS 75 (Opinion and Order entered May 2, 2008).

64 *MilleniaNet Corporation v. PUC*, 2009 Pa. Commw. Unpub. LEXIS 786 (2009). *See also Daskalakis v. Verizon Pennsylvania Inc*., Docket No. C-2010-2172222, 2011 Pa. PUC LEXIS 2042 (Opinion and Order entered April 4, 2011) (granting preliminary objections because the complaint relating to interstate DSL service "was legally insufficient in that it fails to state a claim upon which the Commission can grant relief").

"functionally equivalent" end office switching functionality for VoIP traffic, this more liberal functional equivalency standard allows it to bill switched access charges for all types of traffic, at all times, and for all rates, even where it does not provide the service being billed. Core takes its arguments too far.

As Core notes, the VoIP symmetry rule took effect January 1, 2012 and "clarif[ies] compensation for VOIP traffic moving forward."[65] The FCC explained that "[h]istorically, the Commission's policy generally had been that carriers could assess charges only for services they themselves provided," a "longstanding policy" that was extended to competitive LECs in 2004.[66] The VoIP symmetry rule "was a departure from prior Commission policy that providers were allowed to charge for services that only they themselves provided," but changed the rule prospectively and for VoIP-PSTN traffic only.[67] As the FCC explained:

> The *USF/ICC Transformation Order* ***changed the law*** with respect to the propriety of assessing access charges, and, as explained above, ***prospectively*** allowed competitive LECs to collect access charges for services that are functionally equivalent to TDM network functions and for functions performed in conjunction with their VoIP provider partners. While the Commission rule still exists that carriers must accurately describe services offered in their tariffs, carriers are now allowed to charge for services that either they or their retail VoIP partners provide, as long as one of them provides the service and no double billing occurs.[68]

To the extent the VoIP symmetry rule broadened the functional equivalence standard, this was a change in law that did not apply for periods before January 1, 2012.[69] Moreover, the rule

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65 Core Br. at 6.

66 *VoIP Symmetry Order*, ¶ 6 and FN 21 (citing *Access Charge Reform*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9118-19, para. 21 (2004)).

67 *VoIP Symmetry Order*, ¶ 6. After the VoIP symmetry rule took effect, the FCC "allowed, on a prospective basis, competitive LECs to charge the same intercarrier compensation as incumbent LECs under comparable circumstances for functions performed by them and/or their retail VoIP partners."

68 *VoIP Symmetry Order*, ¶ 35 (emphasis added).

69 As discussed above, Core admits that its switched access back bills cover the period from February 9, 2009 to December 2011 (Core Br. at 1), which is before the VoIP symmetry rule took effect.

applies only to VoIP traffic, and the FCC discussed functional equivalence only for the interstate end office switching rate element. The order does not support Core's expansive argument that it may bill for allegedly functionally equivalent services for periods that predate the change in law, and for intrastate rate elements not subject to the rule, regardless of the type of traffic at issue.

In particular, the *VoIP Symmetry Order* lends no support to Core's attempt to justify its hefty carrier common line ("CCL") charges (which purportedly mirror very high rural ILEC charges).[70] That rate element is an ***intra***state charge that would not apply to terminating VoIP traffic in any event (since even if switched access rates apply, VoIP traffic may only be billed at ***inter***state rates), and much of Core's back billing for this rate element predates the January 1, 2012 effective date of the VoIP symmetry rule. There is therefore no basis for Core improperly to reargue the ID's correct conclusion that "Core provides no local loops or carrier common lines"[71] and therefore cannot bill for a switched access service it does not provide.

As Verizon explained in post-hearing briefing, the purpose of the unique intrastate CCL rate element is to recover the cost of local loops, which are the aerial or underground wires connecting the serving wire center and the customer's home or business.[72] The record shows that Core does not serve any homes or businesses or provide any outside plant facilities such as local loops; it instead terminates traffic to pieces of equipment (in the same building) that are *not* local loops – they are instead basically computers that send the traffic into the Internet cloud, without the outside plant wires that, for ordinary telephone service, would connect a local voice customer to the switched network.[73] The record also shows that Core failed to substantiate its

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70 Core Br. at 18.

71 ID at 15, FOF 62.

72 VZ Initial Br. at 54-55.

73 Core's only function is to receive the traffic from Verizon, convert it to Internet Protocol, and point it in the direction of the appropriate ISP or conference calling services provider. VZ Initial Br. at 53.

calculation of the CCL charges it billed Verizon, which totaled over half of the switched access charges in the period examined.[74] The CCL charge was a unique state rate element (now being phased out under the FCC's new intercarrier compensation regime) intended to support local exchange carriers' cost of providing extensive outside plant to serve real local voice customers. It was not intended as a vehicle to allow Core to assess huge access charges for services it does not provide and costs it does not incur.

## VI. CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Verizon's Main Brief on Remand, nothing in the *VoIP Symmetry Order* supports Core's case or otherwise alters the ID's correct conclusion that Core's switched access claims must be rejected.

Respectfully submitted,

Suzan D. Paiva, I.D. No. 53853
Verizon
1717 Arch Street, 3rd Floor
Philadelphia, PA 19103
Phone: (215) 466-4755
Suzan.D.Paiva@verizon.com

Deborah L. Kuhn, *Pro Hac Vice*
Verizon
205 N. Michigan Avenue, 7th Floor
Chicago, IL 60601
Phone: (312) 894-2354
Deborah.Kuhn@verizon.com

*Counsel for Verizon Pennsylvania LLC and Verizon North LLC*

Dated: November 30, 2015

[74] VZ Initial Br. at 54-55.

# *ATTACHMENT TO VERIZON'S REPLY BRIEF ON REMAND*

***AT&T Corp. v. Core Communs., Inc.,* 2015 U.S. App. LEXIS 20499**

**(3rd Cir., November 25, 2015).**

# *AT&T Corp. v. Core Communs., Inc.*

United States Court of Appeals for the Third Circuit

November 19, 2014, Argued; November 25, 2015, Opinion Filed

Nos. 14-1499 & 14-1664

**Reporter**
2015 U.S. App. LEXIS 20499

AT&T CORP.; TELEPORT COMMUNICATIONS OF AMERICA, LLC v. CORE COMMUNICATIONS, INC.; ROBERT F. POWELSON, Chairman of the Pennsylvania Public Utility Commission in his official capacity; JOHN F. COLEMAN, JR., Vice Chairman of the Pennsylvania Public Utility Commission in his official capacity; WAYNE E. GARDNER; JAMES H. CAWLEY; PAMELA A. WITMER, Commissioners of the Pennsylvania Public Utility Commission in their official capacity Robert F. Powelson, John F. Coleman, Jr., James H. Cawley, Wayne E. Gardner and Pamela A. Witmer, Appellants in No. 14-1499 Core Communications, Inc., Appellant in No. 14-1664

**Prior History:** [*1] On Appeal from the United States District Court for the Eastern District of Pennsylvania. (D. C. No. 2-12-cv-07157). District Judge: Honorable Mary A. McLaughlin.

## Core Terms

traffic, interstate, cap, Telecommunications, reciprocal, interconnection, terminating, customers, carrier, rates, communications, services, regulation, state commission, intrastate, federal law, jurisdictional, tariff, mixed, negotiate, preempted, applies, bill-and-keep, preemption, exclusive jurisdiction, district court, local traffic, intercarrier, federalism, Mandamus

**Counsel:** Shaun A. Sparks, Esquire (Argued), Colin W. Scott, Esquire, Kathryn G. Sophy, Esquire, Pennsylvania Public Utility Commission, Harrisburg, PA, Counsel for Appellants Robert F. Powelson, John F. Coleman, Jr., James H. Cawley, Wayne E. Gardner and Pamela A. Witmer.

Christopher F. Van de Verge, Esquire (Argued), Core Communications, Inc., Annapolis, MD; Mark D. Bradshaw, Esquire, Stevens & Lee, Harrisburg, PA, Counsel for Appellant Core Communications, Inc.

Christopher S. Comstock, Esquire (Argued), Theodore A. Livingston, Esquire, Mayer Brown Chicago, IL, Counsel for Appellees.

Scott H. Angstreich, Esquire, Kellogg Huber Hansen Todd Evans & Figel, Washington, DC, Counsel for Amicus Curiae Verizon.

**Judges:** Before: AMBRO, SCIRICA and ROTH, Circuit Judges.

**Opinion by:** ROTH

## Opinion

**ROTH**, Circuit Judge:

The members of the Pennsylvania Public Utility Commission (PPUC) and Core Communications, Inc., appeal the District Court's ruling granting summary judgment in favor of AT&T Corp. Core billed AT&T for terminating phone calls from AT&T's customers to Core's Internet [*2] Service Provider (ISP) customers from 2004 to 2009. When AT&T refused to pay, Core filed a complaint with the PPUC, which ruled in Core's favor. AT&T then filed suit in federal court seeking an injunction on the ground that the PPUC lacked jurisdiction over ISP-bound traffic because such traffic is the exclusive province of the Federal Communications Commission. Because we find that the FCC's jurisdiction over local ISP-bound traffic is not exclusive and the PPUC orders did not conflict with federal law, we will vacate the judgment of the District Court and remand this case for entry of

judgment in favor of Core and the members of the PPUC.

**I**.

**A**.

Congress passed the Telecommunications Act of 1996[1] (TCA) to ″fundamentally restructure[] local telephone markets.″[2] Before the TCA, local telephone service companies operated as government-regulated monopolies. ″States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC).″[3] One of the TCA's principal aims ″was to end local telephone monopolies and develop a national telecommunications policy that strongly favored local telephone market competition.″[4] The TCA thus created two classes of LECs: the new [*3] market entrants are considered ″competitive″ LECs (CLECs) and the former state-regulated monopolies are designated ″incumbent″ LECs (ILECs).[5]

Recognizing the considerable barriers to entry associated with building out a network, the TCA required ILECs to allow CLECs to connect to their preexisting networks.[6] ″Interconnection allows customers of one LEC to call the customers of another, with the calling party's LEC (the 'originating' carrier) transporting the call to the connection point, where the called party's LEC (the 'terminating' carrier) takes over and transports the call to its end point.″[7] Without mandatory interconnection, a CLEC's customers would not be able to connect with friends or family who are customers of other phone companies—whether ILEC or CLEC.

Interconnection, of course, costs money. The TCA aimed to solve the problem of cost allocation by requiring reciprocal payment arrangements, best understood as an ″originator pays″ rule. ″In basic terms, when a customer of Carrier A places a local [*4] call to a customer of Carrier B, Carrier A must pay Carrier B for terminating the call, and vice versa.″[8] ″The logic behind this system was that, over time, the number of calls going each way would be essentially the same, and no LEC would pay more than its fair share of the costs associated with terminating other LECs' traffic.″[9] Thus, all LECs have ″[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.″[10] But because the incumbents' established market power gave them a potentially overwhelming advantage in negotiations, ILECs have a duty to negotiate

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[1] 47 U.S.C. § 151 *et seq.*

[2] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999).

[3] *Id.*

[4] *Global NAPs, Inc. v. Verizon New England, Inc. (Global NAPs II)*, 454 F.3d 91, 93 (2d Cir. 2006) (citations omitted).

[5] *See* 47 U.S.C. § 251. The term ″competitive local exchange carrier″ does not appear in the statute, but is commonly used to describe the non-incumbent LECs. *See, e.g., MCI Telecomm. Corp. v. Bell Atl. Pa.*, 271 F.3d 491, 498 (3d Cir. 2001).

[6] *See* 47 U.S.C. § 251(c)(2).

[7] *Global NAPs Cal., Inc. v. Pub. Utils. Comm'n of Cal.*, 624 F.3d 1225, 1228 (9th Cir. 2010).

[8] Peter W. Huber, *et al.*, Federal Telecommunications Law § 5.11.2 (2d ed. 1999). The FCC clarified the compensation rules shortly after the TCA came into effect. It determined that reciprocal compensation rules ″apply only to traffic that originates and terminates within a local area″—that is, local traffic. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499, 16013 ¶ 1034 (1996) (*Local Competition Order*). Long distance calls, in contrast, are subject to ″access **[*5]** charges,″ 47 C.F.R. § 69.2(a), which ″long distance companies are required to pay local-exchange carriers for the use of local network facilities.″ *Global NAPs II*, 454 F.3d at 95.

[9] *AT&T Commc'ns of Cal. v. Pac-West Telecomm, Inc.*, 651 F.3d 980, 984 (9th Cir. 2011).

[10] 47 U.S.C § 251(b)(5).

interconnection agreements in good faith (as does the requesting telecommunications carrier).[11]

Congress also provided an enforcement mechanism to ensure the formation of interconnection agreements. Under *47 U.S.C. § 252*, either party to an interconnection agreement may request that the relevant state commission participate in contract negotiations and mediate any differences.[12] If that fails, either LEC may petition the same state commission to arbitrate unresolved issues.[13] But because *§ 252* proceedings govern only ILEC-CLEC disputes, it ″leaves something of an enforcement gap: CLECs have statutory duties to interconnect with other LECs . . ., but there is no procedure specified for one CLEC to require another CLEC to enter into an interconnection agreement that would govern the terms of those duties.″[14] Accordingly, CLECs sometimes transmit traffic to each other without interconnection agreements.

**B**.

The advent of dial-up Internet invalidated the assumptions behind reciprocal arrangements. Suddenly, many customers called ISPs with longer-duration calls that, unlike calls to friends and family, were never returned. The FCC soon realized that this situation [*6] ″creat[ed] an opportunity for regulatory arbitrage.″[15] ″Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime,″[16] and if a carrier could create a customer base entirely out of ISPs, it could be paid to terminate calls, without ever reciprocating. Indeed, ″[b]efore long, reciprocal compensation on ISP-bound traffic was costing ILECs billions.″[17]

The FCC sought to address the problem in its 1999 *Declaratory Ruling*.[18] Because the FCC generally has jurisdiction over interstate communications and not purely intrastate communications,[19] the FCC first considered its own jurisdiction using its traditional end-to-end jurisdictional analysis.[20] The FCC found that although calls to the ISP itself were local, ″the ultimate destination″ is an ″Internet website that is often located in another state,″ so it asserted jurisdiction

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[11] *Id.* § 251(c)(1).

[12] *Id.* § 252(a)(2).

[13] *Id.* § 252(b)(1).

[14] *Pac-West*, 651 F.3d at 983 n.3.

[15] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd. 9151, 9187 ¶ 21 (2001) (*ISP Remand Order*).

[16] *Id.*

[17] Huber, *et al.*, Federal Telecommunications Law § 5.11.2 (emphasis omitted).

[18] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd. 3689 (1999) **[*7]** (*Declaratory Ruling*).

[19] *See* 47 U.S.C. § 152.

[20] *Declaratory Ruling*, 14 FCC Rcd. at 3690 ¶ 1. In a later order, the FCC provided a useful breakdown of its end-to-end jurisdictional approach:

> Using an end-to-end approach, when the end points of a carrier's service are within the boundaries of a single state the service is deemed a purely intrastate service, subject to state jurisdiction for determining appropriate regulations to govern such service. When a service's end points are in different states or between a state and a point outside the United States, the service is deemed a purely interstate service subject to the Commission's exclusive jurisdiction. Services that are capable of communications both between intrastate end points and between interstate end points are deemed to be ″mixed-use″ or ″jurisdictionally mixed″ services.

*In re Vonage Holdings Corp.*, 19 FCC Rcd. 22404, 22413 ¶ 17 (2004) (footnotes omitted).

over ISP-bound traffic.[21] More specifically, the FCC found that local ISP-bound traffic was ″jurisdictionally mixed″ because it ″appears to be largely interstate.″[22]

Following the same reasoning, the FCC found that the reciprocal compensation scheme of § 251, which applies to local traffic,[23] does not apply to ISP-bound traffic.[24] The FCC noted that, until it adopted a rule creating a new compensation structure, parties could voluntarily, but were not required to, include [*8] ISP-bound traffic in their otherwise mandatory interconnection agreements under §§ 251 and 252.[25] Despite the non-local nature of the traffic, the FCC still saw a role for state commissions to decide, as part of the § 252 arbitrations, whether reciprocal compensation should be required in a specific case.[26]

After the FCC issued the *Declaratory Ruling*, ILECs petitioned for review in the Court of Appeals for the District of Columbia Circuit.[27] The court vacated the ruling reasoning that, because the FCC considered the traffic local for some purposes, the FCC had failed to justify why § 251 did not apply to the admittedly local traffic despite its ″largely interstate″ character.[28] Although the standard end-to-end jurisdictional analysis was valid on its own terms, the FCC had extended the reasoning to determine that the traffic was non-local for substantive rules. The court held that the FCC provided no rationale for that inferential leap.[29] Notably, the court did not question or alter the jurisdictional analysis; it merely noted that the FCC had not demonstrated that the analysis was appropriate for any *other* use.

In 2001, the FCC responded with the *ISP Remand Order*, reaching the same substantive conclusion—that local ISP-bound traffic is not subject to reciprocal compensation—but on different legal grounds. The FCC found that it had previously erred by trying to rigidly classify ISP-bound traffic as either local or long-distance for the purposes of § 251(b)(5), and the Commission should instead have recognized that such traffic is a hybrid.[30] Accordingly, the FCC ceased construing § 251(b)(5) using that dichotomy, instead reading § 251(g) to ″limit[] the reach of the reciprocal compensation regime mandated in section 251(b).″[31] Thus, all local traffic would be governed by the reciprocal compensation scheme unless it fell into one of the three categories outlined in § 251(g): ″exchange access, information access, and exchange services.″[32] The FCC found that ISP-bound traffic is indeed

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[21] *Declaratory Ruling*, 14 FCC Rcd. at 3697 ¶ 12.

[22] *Id.*

[23] *See* *Local Competition Order*, 11 FCC Rcd. at 16013 ¶ 1034.

[24] *See generally* *Declaratory Ruling*, 14 FCC Rcd. at 3703-06 ¶¶ 21-27.

[25] *Id.* at 3703 ¶ 22.

[26] *Id.* at 3704-05 ¶ 25.

[27] *Bell Atl. Tel. Companies v. FCC*, 206 F.3d 1, 340 U.S. App. D.C. 328 (D.C. Cir. 2000).

[28] *Id.* at 8 (noting a prior FCC litigation position ″that a call **[*9]** to an information service provider is really like a call to a local business that then uses the telephone to order wares to meet the need″).

[29] *Id.* at 5.

[30] *ISP Remand Order*, 16 FCC Rcd. at 9164 ¶ 26-27 (″Upon further review, we find that the Commission erred in focusing on the nature of the service (i.e., local or long distance) and in stating that there were only two **[*10]** forms of telecommunications services — telephone exchange service and exchange access — for purposes of interpreting the relevant scope of section 251(b)(5) . . .. This balancing act reflected the historical view that there were only two kinds of intercarrier compensation: one for local telephone exchange service, and a second (access charges) for long distance services. Attempting to describe a hybrid service (the nature being an access service, but subject to a compensation mechanism historically limited to local service) was always a bit of mental gymnastics.″); *id.* at 9172 ¶ 45.

[31] *Id.* at 9166-67 ¶ 34 (citing 47 U.S.C. § 251(g)).

[32] *Id.* at 9170 ¶ 42.

″information access,″ and is therefore exempt from § 251(b)(5).

Having established a new rationale for exempting ISP-bound traffic from reciprocal compensation, the FCC invoked its general powers under § 201(b) ″to address the market distortions under the current intercarrier compensation regimes for ISP-bound traffic.″[33] The Commission set forth a new ″interim″ compensation including four specific rules, the most important of which is the rate cap: an upper bound to the prices LECs could charge for ISP-bound traffic. This cap would, over time, move from $0.0015 per minute of use (MOU) to $0.0007/MOU, where it now continues to reside.[34] The FCC made clear that these caps are *caps*, not [*11] rates, and as such they ″have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic).″[35]

In addition, the interim compensation scheme created a growth cap, limiting the overall number of minutes a LEC could be compensated for ISP traffic;[36] the ″new markets rule,″ under which LECs that were not already party to interconnection agreements would exchange ISP-bound [*12] traffic on a bill-and-keep basis;[37] and the ″mirroring rule,″ under which ILECs that seek to benefit from the rate caps must also terminate their own traffic at the same rate.[38] In 2004, the FCC granted a petition from Core requesting forbearance from enforcement of the new markets and growth cap rules, finding that they were no longer in the public interest.[39]

The *ISP Remand Order* was also challenged in the Court of Appeals for the D.C. Circuit.[40] The court again rejected the FCC's basis for exempting ISP-bound traffic from §251(b), but determined that there were probably ″other legal bases for adopting the rules chosen by″ the FCC.[41] The court remanded to the FCC for better reasoning, but left the rules in place.[42]

In 2008, after WorldCom successfully petitioned the Court of Appeals for the D.C. Circuit for a writ of mandamus, the FCC released the *ISP Mandamus Order*, in which the FCC concluded that ISP-bound traffic is subject to § 251(b)(5),[43] but reasoned that the traffic could be treated differently due to the FCC's broad § 201 authority to regulate and the savings

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[33] *Id.*. at 9186 ¶ 77; *see also* 47 U.S.C. § 201(b) (″All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . .. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.″).

[34] *Id.* at 9190-91 ¶ 85.

[35] *Id.* at 9188 ¶ 80. In a ″bill-and-keep″ compensation regime, each carrier bills its own customers for ″the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network.″ *Id.* at 9154 ¶ 2 n.6.

[36] *Id.* at 9187 ¶ 78, 9191 ¶ 86.

[37] *Id.* at 9188-89 ¶ 81.

[38] *Id.* at 9193-94 ¶ 89.

[39] *Petition of Core Comm., Inc. for Forbearance under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179, 20186 (2004) (*Core Forbearance Order*), *aff'd, In re Core Commc'ns, Inc.*, 455 F.3d 267, 372 U.S. App. D.C. 182 (D.C. Cir. 2006).

[40] *Worldcom v. FCC*, 288 F.3d 429, 430, 351 U.S. App. D.C. 176 (D.C. Cir. 2002).

[41] *Id.*

[42] *Id.*

[43] *In re High-Cost Universal Serv. Support Fed.-State Joint Bd. on Universal Serv. Lifeline & Link Up Universal Serv. Contribution Methodology Numbering Res. Optimization Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Developing A Unified Intercarrier Comp. Regime Intercarrier Comp. for ISP-Bound Traffic IP-Enabled Servs.*, 24 FCC Rcd. 6475, 6478 ¶ 6, 6480 ¶ 8 (2008) (*ISP Mandamus Order*).

clause in § 251(i).[44] The effect of [*13] the order was to "maintain the $.0007 cap and the mirroring rule pursuant to [the FCC's] section 201 authority," as a placeholder until the Commission develops a more comprehensive compensation regime.[45] Of the "interim" rules set out by the *ISP Remand Order*, the rate caps and mirroring rule are still in force today.

**C.**

Core and AT&T are both CLECs operating in Pennsylvania. Between 2004 and 2009, AT&T provided local and long distance telephone service to its customers. Over the same time period, Core's only customers were ISPs that provided dial-up internet connections to at-home internet users. AT&T's customers placed calls to Core's customers in order to gain dial-up access to the internet. All of the calls at issue were local, originating and terminating in the [*14] same local exchange area. Each AT&T customer's call was delivered by AT&T to Verizon (the local ILEC), which then sent the call to Core, and Core terminated the call to the ISP.

Core did not bill AT&T for these calls immediately. During the time period at issue, Core had an "intrastate switched access tariff" on file with the PPUC that specified Core's rate for terminating long-distance calls but did not relate to local calls. In January 2008, Core billed AT&T for calls dating back to June 2004 at the long-distance rate specified in its state tariff, $0.014/MOU. AT&T refused to pay, claiming that it believed the traffic had been exchanged on a bill-and-keep basis.[46]

On May 19, 2009, Core filed a complaint with the PPUC against AT&T, seeking payment at its long-distance rate for terminating the calls. AT&T moved to dismiss the complaint on the ground that the PPUC lacked jurisdiction to hear the dispute because the calls were subject to the exclusive jurisdiction of the FCC. On December 5, 2012, the PPUC issued a final order holding that it had [*15] jurisdiction to hear the dispute, and that federal law, including the *ISP Remand Order*, applied. The PPUC found that its ability to set rates for ISP-bound traffic was preempted by the *ISP Remand Order*, and because the rate charged by Core was greater than the federal cap, the federal cap of $0.0007/MOU should be applied as the new rate. Accordingly, the PPUC ordered that AT&T pay Core for terminating calls at the lower rate. Additionally, pursuant to a four-year state statute of limitations,[47] the PPUC limited Core's recovery to calls terminated on or after May 19, 2005. The PPUC ultimately ordered AT&T to pay a total of $254,029.89 to Core by September 18, 2013.

AT&T then filed suit in the U.S. District Court for the Eastern District of Pennsylvania, seeking to enjoin enforcement of the PPUC's order. Soon after, AT&T moved for a preliminary injunction. Because the suit involved only legal issues, the District Court converted AT&T's motion to a motion for summary judgment. In the District Court, as here, AT&T argued that the PPUC violated federal law because it 1) lacked jurisdiction; 2) awarded charges at a rate not contained in any federal tariff or contract, violating 47 U.S.C. §§ 201 and 203; [*16] 3) allowed Core to recover reciprocal compensation without a reciprocal compensation arrangement, violating 47 U.S.C. § 251(b)(5); 4) impermissibly engaged in retroactive ratemaking; and 5) applied the incorrect statute of limitations. The District Court agreed that the PPUC lacked jurisdiction, and accordingly, did not address the remaining four issues. Core and the members of the PPUC appealed.

After lodging the appeal, the PPUC filed a separate Petition for Declaratory Order with the FCC asking whether "state commissions have the authority to apply federal telecommunications law to adjudicate intercarrier compensation disputes" between two

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[44] *Id.* at 6483 ¶ 18; *see also* 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.").

[45] *ISP Mandamus Order*, 24 FCC Rcd. at 6489 ¶ 29.

[46] AT&T similarly exchanges local traffic on a bill-and-keep basis with other CLECs in the area. For a definition of "bill-and-keep," see *supra* n. 35.

[47] *See* 66 Pa. Cons. Stat. § 1312.

CLECs that indirectly exchanged ISP-bound calls without an interconnection agreement. The formal public comment cycle on the PPUC's petition closed July 30, 2014. Before oral argument on November 19, 2014, we asked the FCC to comment on this case. On November 4, 2014, the FCC sent a letter to the Court declining to do so, reasoning that it could not comment because there was an open FCC administrative proceeding presenting the same question between the same parties. Accordingly, after oral argument, we held the case *c.a.v.* until June 30, 2015, to give the FCC time [*17] to make a determination. As the FCC has yet to rule on the PPUC's petition, we now proceed without its input.

**II**.[48]

The Communications Act of 1934 created the FCC and gave it the power to regulate interstate communications.[49] The Act originally designated all communications as either interstate or intrastate, giving the FCC jurisdiction over solely interstate communications and leaving the states with jurisdiction over intrastate communications.[50] In 1996, however, the TCA significantly altered the clean lines of jurisdiction established in the 1934 Act.[51] ″[T]he [TCA] provides that various responsibilities are to be divided between the state and federal governments, making it an exercise in what has been termed cooperative federalism.″[52] ″That is, 'Congress enlisted the aid of state public utility commissions to ensure that local competition was implemented fairly and with due regard to the local [*18] conditions and the particular historical circumstances of local regulation under the prior regime.'″[53]

The parties ask us to determine whether [*19] ISP-bound traffic is interstate or ″jurisdictionally mixed,″ with the supposed attendant implications that, in the former case, the FCC has exclusive jurisdiction, and, in the latter, state and federal jurisdiction exist concurrently. The picture, however, is more complicated.

**A**.

Whether a particular type of communications is interstate or intrastate is a technical question. To determine the answer to that question, we look to the Telecommunications Act of 1996 and the FCC's regulations interpreting that statute. We ″defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on

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[48] The district court had jurisdiction pursuant to ***28 U.S.C. § 1331*** to review a decision by a state public utility commission to ensure compliance with federal law. *See* *MCI*, 271 F.3d at 498. We have appellate jurisdiction pursuant to ***28 U.S.C. § 1291***. Because the only issues presented are issues of law and there are no facts in dispute, our review is *de novo*.

[49] *See* 47 U.S.C. § 151.

[50] *See id.* § 152.

[51] Huber, *et al.*, Federal Telecommunications Law § 3.3.4; *see also* Phillip J. Weiser, *Federal Common Law, Cooperative Federalism, and Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1743 (2001) (noting that although several of the 1996 Act's ″provisions clearly anticipated that state agencies would play an important role and exercise considerable discretion in its implementation,″ the Act nevertheless ″failed to articulate a clear vision of federal-state relations″).

[52] *Core Commc'ns, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333, 335 (3d Cir. 2007) (quoting *P.R. Tel. Co. v. Telecomms. Regulatory Bd. of P.R.*, 189 F.3d 1, 8 (1st Cir. 1999)); *see also* *Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.*, 323 F.3d 348, 351 (6th Cir. 2003) (″The Act has been called one of the most ambitious regulatory programs operating under 'cooperative federalism,' and creates a regulatory framework that gives authority to state and federal entities in fostering competition in local telephone markets.″); *Sw. Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 480 (5th Cir. 2000) (″The Supreme Court has recognized that the Act cannot divide the world of domestic telephone service 'neatly into two hemispheres,' one consisting of interstate service, over which the FCC has plenary authority, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction.″ (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986))).

[53] *Id.* (quoting *Global NAPs, Inc. v. Mass. Dep't of Telecomm. and Energy*, 427 F.3d 34, 46 (1st Cir. 2005)).

the matter in question."[54] This deference applies whether or not the question at issue is jurisdictional.[55].

As described above, the FCC employs end-to-end jurisdictional [*20] analysis to determine whether communications are intrastate or interstate.[56] While the parties in this case ask us to determine whether the traffic is interstate or jurisdictionally mixed, the FCC has not always been so precise, often using the terms interchangeably. Thus, while we read the FCC's rulings to mean that the traffic is interstate, the inquiry will not end there.

The FCC's first pass at the question came in the *Declaratory Ruling*, where the Commission found that local ISP-bound traffic was "jurisdictionally mixed" because it "appears to be largely interstate."[57] Three more times throughout the order, the FCC used the phrase "largely interstate" to describe the traffic.[58] After the D.C. Circuit vacated the *Declaratory Ruling*, the FCC revisited its original finding in the *ISP Remand Order*. There the FCC used the terms "jurisdictionally mixed" and "interstate" interchangeably to describe both the original ruling and the traffic itself.[59] In other places, the *ISP Remand Order* referred to ISP-bound traffic as being "predominantly interstate"[60] or having an "interstate component."[61] In one of the same paragraphs in which the order refers to the traffic as "predominantly interstate," the [*21] FCC also noted that it has "long held" ISP-bound traffic "to be interstate."[62] Thus, the *ISP Remand Order* treats the traffic as interstate, but treats "jurisdictionally mixed" as a synonym.

The FCC has addressed this question elsewhere as well. In 2011, the Ninth Circuit decided *AT&T Communications of California v. Pac-West Telecommunications*.[63] That case was factually similar to the one at hand, stemming from an AT&T subsidiary's refusal to pay for traffic [*22] exchanged with a CLEC with which it did not have an interconnection agreement. Indeed, the California Public Utilities Commission (CPUC) ruled against AT&T, just as the PPUC did here, and AT&T subsequently sued the CPUC and Pac-West in federal court, challenging, among other things, CPUC's jurisdiction to hear the dispute. When the Ninth Circuit asked the FCC for its view, the Commission filed an amicus brief, stating that it "has consistently held that ISP-bound communications are jurisdictionally interstate" based on its end-to-end jurisdictional

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[54] *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261, 180 L. Ed. 2d 96 (2011) (internal formatting removed); *accord Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166, 183 L. Ed. 2d 153 (2012).

[55] *See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1871, 185 L. Ed. 2d 941 (2013) ("[W]e have consistently held that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers." (quotation marks omitted)).

[56] *Bell Atl.*, 206 F.3d at 3.

[57] 14 FCC Rcd. at 3690 ¶ 1.

[58] *See id.* at 3703-06 ¶¶ 23, 25, 27.

[59] *Compare ISP Remand Order*, 16 FCC Rcd at 9152 ¶ 1 ("We previously found in the *Declaratory Ruling* that such traffic is interstate traffic subject to the jurisdiction of the Commission under section 201 of the Act and is not, therefore, subject to the reciprocal compensation provisions of section 251(b)(5)." (footnotes omitted)), *and id* at 9162 ¶ 21 ("In the *Declaratory Ruling*, the Commission concluded that Internet-bound traffic was jurisdictionally interstate and, thus, not subject to section 251(b)(5)."), *with id.* at 9160 ¶ 14 ("The Commission found, therefore, that ISP-bound traffic . . . is jurisdictionally mixed and largely interstate, and, for that reason, the Commission found that the reciprocal compensation obligations of section 251(b)(5) do not apply to this traffic.").

[60] *Id.* at 9152 ¶ 1, 9164 ¶ 28, 9165 ¶ 29, 9176 ¶ 54.

[61] *Id.* at 9175 ¶ 52.

[62] *Id.* at 9164 ¶ 28.

[63] 651 F.3d 980 (9th Cir. 2011).

analysis.[64] But the same brief also asked the court to refrain from deciding whether the CPUC had jurisdiction.[65] The CPUC had applied a state tariff that exceeded the federal rate cap, and the FCC argued—and the court agreed—that the court did not need to decide the jurisdictional question because the *ISP Remand Order* applied even between two CLECs and the CPUC's application of the higher rate was preempted by the federal rate caps.[66] Thus, while we are left to address the question of a *state* commission's jurisdiction for the first time, the FCC's amicus brief states its position on *its own* jurisdiction clearly, and it accords with the statements [*23] in the *ISP Remand Order*.

Deferring to the FCC's determination, we find that local ISP-bound traffic is interstate for jurisdictional purposes.[67] Nevertheless, as a factual matter, the mixed nature of the traffic is not irrelevant.

**B**.

We draw two further lessons from the FCC's treatment of the jurisdictional question. First, the jurisdictional determination reflects only a finding about the Commission's power to regulate under *Section 201*, not a view that its jurisdiction is exclusive. ″A matter may be *subject* to FCC jurisdiction, without the FCC having exercised that jurisdiction and preempted state regulation.″[68] This makes sense here because the thrust of the *ISP Remand Order*'s analysis focused on how the FCC's broad *§ 201* authority allows it to create the interim rules under the savings clause in *§ 251(i)*. The analysis established the FCC's power, but did not restrict or even address competing power from the states.

Several points further support this conclusion. By using the terms ″interstate″ and ″jurisdictionally mixed″ interchangeably in the *ISP* Remand *Order*, the FCC demonstrated that it could not have been ruling about exclusive jurisdiction. Based on the traditional understanding of the terms, purely interstate traffic is exclusively committed to the FCC,[69] and jurisdictionally mixed traffic is subject to ″dual federal/state jurisdiction.″[70] If the FCC believed the TCA committed ISP-bound traffic to its exclusive jurisdiction, it would have distinguished between the two. Elsewhere in the text, ″the Order also explicitly reserves state commission authority in certain relevant matters.″[71] Finally, in the *Pac-West* amicus brief, the FCC both called ISP-bound traffic interstate and declined to take a position on whether the jurisdiction is exclusive.[72] This would make no sense if interstate traffic necessarily implies exclusive jurisdiction.

Second, according to the FCC, ″'mixed-use' or 'jurisdictionally-mixed' services are generally subject

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[64] Amicus Br. of FCC, *Pac-West*, 651 F.3d 980 (No. 08-17030), at 7-8, 29 (*Pac-West* Amicus Br.).

[65] *Id.* at 29.

[66] *Pac-West*, 651 F.3d at 994.

[67] *Accord* *Pac-West*, 651 F.3d at 990 (″[T]here is no question that, for jurisdictional purposes, ISP-bound traffic is interstate in nature. ISP-bound traffic is therefore subject to the FCC's congressionally-delegated jurisdiction.″ (citation omitted)).

[68] *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71 (1st Cir. 2006) (*Global NAPs* **[*24]** *I*); *see also* *Pac-West*, 651 F.3d at 991 (″[I]t is also well settled that, with the *ISP Remand Order* and related pronouncements, the FCC has *not* exercised its jurisdiction over all manifestations of ISP-bound traffic.″).

[69] *See, e.g.*, *In re Vonage*, 19 FCC Rcd. at 22413 ¶ 17 (″When a service's end points are in different states or between **[*25]** a state and a point outside the United States, the service is deemed a purely interstate service subject to the Commission's exclusive jurisdiction.″); *In re Am. Tel. & Tel. Co. and the Assoc. Bell Sys. Cos.*, 56 FCC. 2d 14, 20 ¶ 21 (1975) (″[T]he States do not have jurisdiction over interstate communications.″), *aff'd*, *California v. FCC*, 567 F.2d 84, 185 U.S. App. D.C. 217 (D.C. Cir. 1977) (per curiam).

[70] *In re Vonage*, 19 FCC Rcd. at 22413 ¶ 17.

[71] *Global NAPs II*, 454 F.3d at 100 (citing *ISP Remand Order* at 9187 ¶ 79 (A carrier may rebut presumptions regarding the amount of traffic that is ISP-bound by providing evidence ″to the appropriate state commission.″)).

[72] *Pac-West* Amicus Br. at 8, 29.

to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service's intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies."[73] That is to say, where—as here—the interstate and intrastate components are inseparable,[74] state jurisdiction over mixed use services such as ISP-bound local traffic is tied to conflict preemption. This view recognizes the "realities of technology and economics that belie such a clean parceling of responsibility" between the state and federal governments.[75] A state is therefore [*26] both preempted and lacking jurisdiction to regulate ISP-bound local traffic if and only if the state regulation conflicts with federal law. Thus, "the question before us is whether the FCC intended in the *ISP Remand Order* to exercise its jurisdiction over the precise issue here, to the exclusion of state regulation."[76]

Discussing its implementation of the new rate caps in the *ISP Remand Order*, the FCC was clear that state rates were preempted and state commissions no longer had authority to set rates higher than the cap.[77] Because the FCC "exercise[d] [its] authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic . . . state commissions [] no longer have authority to address this issue."[78] Read in isolation, AT&T's interpretation—that the FCC meant to effect field preemption—is plausible. But just two paragraphs prior, the FCC was equally explicit that the rate caps are indeed *caps* and do not apply to rates lower than those federally mandated.[79] If there remain state rates to which the rate caps do not apply, the FCC cannot have intended field preemption.[80] This reading is further confirmed by the *ISP Mandamus Order*, in which the FCC "conclude[d] that it is appropriate [*27] to retain [the rate cap and mirroring rule], but only on a transitional basis until a state commission . . . has established reciprocal compensation rates that are at or below $.0007 per minute-of-use."[81] The FCC clearly contemplated states' continued involvement in ratesetting, and therefore we must conclude that the FCC meant only to preempt rates that *conflict* with its own regulation; that is, rates that exceed the cap.[82]

When faced with the possibility of applying rates that exceed the federal cap, the PPUC recognized the

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[73] *Id.*

[74] *See* Sw. Bell Tel. Co. v. FCC, 153 F.3d 523, 543 (8th Cir. 1998).

[75] La. Pub. Serv. Comm'n, 476 U.S. at 360.

[76] Global NAPs I, 444 F.3d at 71.

[77] ISP Remand Order, 16 FCC Rcd. at 9189 ¶ 82.

[78] *Id.*

[79] *See id.* at 9188 ¶ 80.

[80] *See* Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1595, 191 L. Ed. 2d 511 (2015) (field preemption "foreclose[s] any state regulation in the *area*" while conflict preemption "exists where compliance with both state and federal law is impossible" (internal quotations omitted)).

[81] ISP Mandamus Order, 24 FCC Rcd. at 6584 ¶ 198.

[82] The *Pac-West* Amicus Brief argued that the FCC "meant to pre-empt state reciprocal compensation regulation of ISP-bound traffic," and in the alternative that states cannot set a "rate for ISP-bound traffic under state law that exceeded the prescribed federal rate." *Pac-West* Amicus Br. at 26-27. Unlike a determination of its jurisdiction, however, we do not defer to an agency's legal determination regarding preemption, instead accepting it as influential, "depending on its thoroughness, consistency, and persuasiveness." Wyeth v. Levine, 555 U.S. 555, 577, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009); *see also* Pac-West, 651 F.3d at 998 ("Although we do not defer **[*28]** to 'an agency's *conclusion* that state law is preempted,' we do defer to the FCC's interpretation of the compensation regime it created, barring some 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" (quoting Wyeth, 555 U.S. at 576 and Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 131 S. Ct. 871, 881, 178 L. Ed. 2d 716 (2011))). As explained above, when read in full, the *ISP Remand Order* implies not field preemption but conflict preemption, and a mere litigation position that argues for the former first and the latter in the alternative (submitted in a separate case, no less) is neither thorough, consistent, nor persuasive enough to merit deference here.

primacy of federal law and reduced the applicable rates to match the federal limit. This is where this case diverges from the facts of *Pac-West*. By lowering the state rates it applied, the PPUC avoided a conflict with federal law. Because there was no conflict, the PPUC's actions were not preempted.

AT&T argues, however, and the District Court concluded, that state commissions may only act pursuant to their role in mediating and arbitrating interconnection agreements [*29] under § 252 of the TCA.[83] But the TCA itself invites state involvement in more than § 252.[84] AT&T's argument ignores both the FCC's statements regarding state commissions' involvement in ratesetting and the cooperative federalism principles inherent in the TCA by presuming that the statute stripped states of all authority to act unless delegated back to them.[85] The picture is simply not that clear-cut.[86]

AT&T's reliance on *MCI Telecommunications Corp. v. Bell Atlantic Pennsylvania*[87] is similarly misplaced. *MCI* concerned sovereign immunity for states arbitrating interconnection agreements under § 252. Under the Eleventh Amendment, we held that the states were granted a "gratuity" and were "voluntarily regulating on behalf of Congress" because Congress could have withdrawn all power from states, but instead allowed the states to keep some.[88] Accordingly, such states waived sovereign immunity and could be sued.[89] But we also reasoned that although "Congress could have made that preemption complete," it did not.[90] Rather, we stated that Congress "federalized the regulation *of competition for local telecommunications service*."[91] Based on the integrated system of cooperative federalism that we have previously endorsed,[92] and which we reiterate today, we hold that although ISP-bound traffic is interstate, states retain jurisdiction to regulate ISP-bound traffic where the state regulations do not conflict with federal law.

## III.

Having established that the PPUC had jurisdiction to hear the dispute, we turn to AT&T's additional arguments that the PPUC's Orders violate federal law in four other ways.

### A.

AT&T contends that the PPUC Orders violate 47 U.S.C. §§ 201 and 203 because Core neither filed a federal tariff that would apply to billing for interstate services nor negotiated a contract with AT&T; thus, in

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[83] Section 252 clearly does not apply here because there is no interconnection agreement and both parties are CLECs, meaning neither party has a duty to negotiate an agreement. *See* 47 U.S.C. § 251(c).

[84] *See* 47 U.S.C. § 251(d)(3) ("In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--(A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.").

[85] *See* AT&T Br. at 27 ("Neither the Communications Act, the 1996 Act, nor the FCC have delegated jurisdiction to the PUC to set rates or otherwise regulate interstate traffic outside of a Section 252 proceeding."). **[*30]**

[86] *Accord Iowa Utils. Bd.*, 525 U.S. at 397 ("It would be gross understatement to say that the 1996 Act is not a model of clarity.").

[87] 271 F.3d 491

[88] *Id.* at 510 (quotation omitted).

[89] *Id.* at 498 (citing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)).

[90] *Id.* at 510.

[91] *Id.* at 509 (emphasis added); *see also id.* at 510 (noting that "[t]he Act . . . validly preempted state **[*31]** regulation *over competition to provide local telecommunications service*" and that "*[r]egulating local telecommunications competition* under the 1996 Act no longer is . . . an 'otherwise lawful' or 'otherwise permissible' activity for a state . . . [but] is an activity in which states and state commissions are not entitled to engage except by the express leave of Congress" (emphases added)).

[92] *Verizon Pa.*, 493 F.3d at 335.

light of that fact billing at any rate is "unreasonable."[93] For support, AT&T looks to a number of FCC adjudications where the "FCC rejected the idea that a CLEC could bill for interstate services without a federal tariff or contract covering the services."[94] But the cases AT&T cites all involve interstate switched-access services—that is, intercarrier compensation for long-distance calls between states.[95] As we point out above, although ISP-bound local [*32] traffic is *jurisdictionally* interstate, it is still subject to state control unless otherwise preempted by the FCC. Nothing in the *ISP Remand Order* requires federal tariffing; had the FCC intended that ISP-bound traffic rates be governed by federal tariffs, it would have set rates to be tariffed, not *rate caps* that set upper limits to state tariffs. ISP-bound traffic is therefore fundamentally different from interstate switched-access services, and there is no federal tariffing requirement.

**B**.

AT&T next contends that the PPUC Orders violate *47 U.S.C. § 251(b)(5)*, which requires all LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." According [*33] to AT&T, the statutory language explicitly requires an "arrangement," *i.e.*, a contract, before a LEC can recover *§ 251(b)(5)* charges. This argument is unpersuasive for several reasons. First, while *§ 251(b)(5)* applies to ISP-bound traffic, the reciprocal arrangements for that traffic are governed by the *ISP Remand Order*. This is the holding of the *ISP Mandamus Order*,[96] and as the Ninth Circuit held in *Pac-West*, the *ISP Remand Order* applies as much between two CLECs as between and an ILEC and a CLEC.[97] Thus, because the PPUC complied with the *ISP Remand Order*, it also complied with *§ 251(b)(5)*.

AT&T's argument also invites an odd result. Core is required by statute to terminate AT&T's traffic irrespective of a billing arrangement being put in place. Thus, if AT&T refuses to pay, Core is left no recourse because it followed the law and terminated all the calls it received even though it did not first arrange for payment. This view amounts to a default bill-and-keep arrangement, whereby neither side must pay unless each side [*34] comes to a voluntary agreement. But that was precisely the "new markets rule" that the FCC deemed no longer in the public interest in the *Core Forbearance Order*.[98] If that were the meaning of the *ISP Remand Order* and *§ 251(b)(5)*, the new markets rule never would have been necessary. And if we were to interpret *§ 251(b)(5)* this way, we would render null the FCC's finding that such a rule is no longer in the public interest.

**C**.

AT&T next argues that because no tariff was established, any rate above $0/MOU is impermissible retroactive ratemaking. Because these calls were local calls, the intrastate long distance tariff Core had filed with the PPUC filed did not directly apply; it applied only between two *different* local exchange areas within the state. To accept AT&T's position, we would again be required to find that the default rate is $0/MOU, which is once again the new markets rule. But that is not the primary reason this argument fails.

"The purpose of the rule against retroactivity, and the closely related filed rate doctrine, is to ensure

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[93] Considering that AT&T observes multiple times in its brief that it, as a CLEC, has no duty to negotiate in good faith, AT&T Br. at 11, 13, 35, and the PPUC observed in its initial decision that AT&T refused to negotiate in fact, *PPUC Initial Decision*, ¶¶ 42-44, J.A. 196-97, the latter accusation here that Core "failed to negotiate" a contract rings hollow.

[94] AT&T Br. 49.

[95] *See, e.g.*, *AT&T Corp. v. All Am. Tel. Co.*, 28 FCC Rcd. 3477, 3494 ¶ 37 (2013) (confirming that LECs must file "file and maintain tariffs with the Commission for interstate switched access services").

[96] *ISP Mandamus Order*, 24 FCC Rcd. 6478 ¶ 6 ("[A]lthough ISP-bound traffic falls within the scope of section 251(b)(5), this interstate, interexchange traffic is to be afforded different treatment from other section 251(b)(5) traffic pursuant to our authority under section 201 and 251(i) of the Act.").

[97] *Pac-West*, 651 F.3d at 994.

[98] 19 FCC Rcd. at 20186 ¶ 21.

predictability."[99] The question is therefore whether, absent an agreement, it was predictable that the state commission would apply a rate equal to the federal rate cap. AT&T was on notice [*35] since 2001 that it could be subject to payment for the exchange of ISP-bound traffic and on notice since 2004 that a $0/MOU rate would not be the general default. While AT&T assumed this traffic was being transmitted on a bill-and-keep basis and it had bill-and-keep arrangements with other CLECs, Core charges other CLECs it interconnects with,[100] so there is no reason to think AT&T's assumption is the industry norm.

Though it may have been unclear precisely which rate the PPUC would apply, the federal cap was not only foreseeable, but the most likely rate. Four logical possibilities existed: Core's intrastate switched access tariff of $0.014/MOU, the TELRIC rate—a state commission rate calculated to defray costs[101]—of $0.002439/MOU, the federal cap of $0.0007/MOU, or $0/MOU. The first two were clearly not permissible not only because they conflict with the *ISP Remand Order*, but also because the rates are so much higher than the federal cap that AT&T should have known that whatever eventual rate the PPUC thought was fair would be capped by federal law. Of the two remaining choices, applying the cap as a rate was much more likely than allowing no compensation [*36] at all. Therefore, the PPUC Orders did not violate the rule against retroactive ratemaking.

**D**.

Finally, AT&T argues that the PPUC Orders violate federal law by applying a four-year state statute of limitations to Core's claims instead of *47 U.S.C. § 415*, which applies to "[a]ll actions at law by carriers for recovery of their lawful charges." But AT&T concedes that *§ 415(a)* applies only to charges that are subject to federal tariffing requirements.[102] We also need not address whether the federal or state statute of limitations applies because, as the PPUC noted in its order, the proper federal statute of limitations is the four-year catch-all found at *28 U.S.C. § 1658*. The catch-all applies to any federal civil action enacted after 1990 without a specific associated cause of action.[103] This includes *§ 251(b)(5)*, which became law in 1996, and under which this case arose.[104] Thus, the PPUC's application of a four-year statute of limitations is proper.

**IV**.

AT&T had every reason to believe it could be charged for its customers' ISP-bound traffic that Core terminated. Rather than voluntarily negotiating an interconnection agreement with Core, AT&T waited, putting the onus on Core to come forward and negotiate. In reality, the PPUC found that Core was entitled to compensation for the traffic, and if AT&T wanted to negotiate a bill-and-keep arrangement, it should have done so.

Federal law does not require that Core be compensated for the traffic. The TCA's system of cooperative federalism exists specifically so that state public utility commissions can determine these kinds of questions for themselves, "with due regard to the local conditions and the particular historical circumstances of local regulation."[105] The FCC established the boundary of the PPUC's jurisdiction by implementing rate caps. When the PPUC chose to apply a rate equal to the

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[99] *Qwest Corp. v. Koppendrayer*, 436 F.3d 859, 864 (8th Cir. 2006).

[100] *PPUC Initial Decision* ¶ 73, J.A. 200.

[101] "Total Element Long-Run Incremental Cost ('TELRIC') is used to figure the cost of phone service based on incremental cost of new equipment and new labor, or costs that would apply in a fully competitive environment." *PPUC Initial Decision* at 21 n.12, J.A. 200.

[102] *See Castro v. Collecto, Inc.*, 634 F.3d 779, 786 (5th Cir. 2011).

[103] 28 U.S.C. § 1658.

[104] *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 381, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004) (maintaining that § 1658 applies not only "to entirely new sections of **[*37]** the United States Code[,]" but also to "amendment[s] to an existing statute").

[105] Huber, et al., Federal Telecommunications Law § 3.3.4, *quoted in Core Commc'ns, Inc.*, 493 F.3d at 335.

federal rate cap, it respected that boundary, and furthered the very purpose of the TCA's scheme.

We will therefore vacate the judgment of the District Court and remand this case [*38] with instructions to grant summary judgment in favor of Core and the members of the PPUC.