FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 51, 54, 61, and 69

[WC Docket Nos. 06–122, 05–337, 04–36, 03–109; CC Docket Nos. 01–92, 99–200, 99–68, 96–98, 96–45; FCC 08–262]

Universal Service Contribution Methodology; High-Cost Universal Service Support; IP-Enabled Services; Lifeline and Link Up; Developing a Unified Intercarrier Compensation Regime; Numbering Resource Optimization; Intercarrier Compensation for ISP-Bound Traffic; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Federal-State Joint Board on Universal Service

AGENCY: Federal Communications Commission.

ACTION: Clarification.

SUMMARY: In this document, the Federal Communications Commission (Commission) took two actions. First, the Commission responded to a writ of mandamus that would have vacated the Commission's rules governing compensation for ISP-bound traffic had the Commission not acted by November 5, 2008. Specifically, the Commission held that although ISP-bound traffic falls within the scope of section 251(b)(5) of the Communications Act, 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. The Commission thus maintained the $.0007 cap and the mirroring rule. Second, the Commission responded to the Comprehensive Reform Recommended Decision of the Federal-State Joint Board on Universal Service (Joint Board). The Commission is statutorily obligated to complete any proceeding regarding subsequent recommendations from the Joint Board within one year. The Commission thanked the Joint Board and its staff for their hard work in studying these difficult issues and in developing their recommendations, but chose not to implement these recommendations at this time.

DATES: Effective Date: November 5, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer McKee, Telecommunications Access Policy Division, Wireline Competition Bureau, 202–418–7400 or TTY: 202–418–0484 (universal service), or Victoria Goldberg, Pricing Policy Division, Wireline Competition Bureau, 202–418–1520 or TTY 202–418–0484 (intercarrier compensation).

SUPPLEMENTARY INFORMATION: This is the Commission's Order on Remand and Report and Order in WC Docket Nos. 06–122, 05–337, 04–36, 03–109; CC Docket Nos. 01–92, 99–200, 99–68, 96–98, 96–45, adopted on November 5, 2008 and released on November 5, 2008. Copies of the Order on Remand and Report and Order and Further Notice of Proposed Rulemaking and any subsequently filed documents in this matter are or will be available on the Commission's Internet site at *http://www.fcc.gov* and for public inspection Monday through Thursday from 8 a.m. to 4:30 p.m. and Friday from 8 a.m. to 11:30 a.m. at the FCC Reference Information Center, Portals II, 445 12th St., SW., Room CY–A257, Washington, DC 20554. Copies of any such documents may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th St., SW., Room CY–B402, Washington, DC 20554, telephone (202) 488–5300, facsimile (202) 488–5563, TTY (202) 488–5672, e-mail *fcc@bcpiweb.com.* Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting the Consumer & Governmental Affairs Bureau, at (202) 418–0531, TTY (202) 418–7365, or at f*cc504@fcc.gov.*

Order on Remand and Report and Order

1. The actions we take in this order respond to the writ of mandamus granted by the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) directing the Commission to respond to its prior remand of the Commission's intercarrier compensation rules for Internet Service Provider (ISP)-bound traffic. As discussed below, we conclude that we have authority to impose ISP-bound traffic rules.

A. Background

2. On February 26, 1999, the Commission issued a Declaratory Ruling and Notice of Proposed Rulemaking in which it held that ISP-bound traffic is jurisdictionally interstate because end users access websites across state lines. Because the *Local Competition First Report and Order* concluded that the reciprocal compensation obligation in section 251(b)(5) applied only to local traffic, the Commission found in the Declaratory Ruling that ISP-bound traffic is not subject to section 251(b)(5). On March 24, 2000, in the Bell Atlantic decision, the D.C. Circuit vacated certain provisions of the Declaratory Ruling. The court did not question the Commission's finding that ISP-bound traffic is interstate. Rather, the court held that the Commission had not adequately explained how its end-to-end jurisdictional analysis was relevant to determining whether a call to an ISP is subject to reciprocal compensation under section 251(b)(5). In particular, the court noted that a LEC serving an ISP appears to perform the function of ''termination'' because the LEC delivers traffic from the calling party through its end office switch to the called party, the ISP.

3. On April 27, 2001, the Commission released the *ISP Remand Order,* which concluded that section 251(g) excludes ISP-bound traffic from the scope of Section 251(b)(5). The Commission explained that section 251(g) maintains the pre-1996 Act compensation requirements for ''exchange access, information access, and exchange services for such access,'' thereby excluding such traffic from the reciprocal compensation requirements that the 1996 Act imposed. The Commission concluded that ISP-bound traffic was ''information access'' and, therefore, was subject instead to the Commission's section 201 jurisdiction over interstate communications. The Commission also found ''convincing evidence in the record'' that carriers had ''targeted ISPs as customers merely to take advantage of * * * intercarrier payments'' (including offering free service to ISPs, paying ISPs to be their customers, and sometimes engaging in outright fraud). It therefore adopted an ISP payment regime in order to ''limit, if not end, the opportunity for regulatory arbitrage.'' The Commission concluded that a bill-and-keep regime might eliminate incentives for arbitrage and force carriers to look to their own customers for cost recovery. To avoid a flash cut to bill-and-keep, however, the Commission adopted a compensation regime pending completion of the Intercarrier Compensation proceeding. Specifically, the regime adopted by the Commission consisted of: (1) A gradually declining cap on intercarrier compensation for ISP-bound traffic, beginning at $.0015 per minute-of-use and declining to $.0007 per minute-of-use; (2) a growth cap on total ISP-bound minutes for which a LEC may receive this compensation; (3) a ''new markets rule'' requiring bill-and-keep for the exchange of this traffic if two carriers were not exchanging traffic pursuant to an interconnection agreement prior to the adoption of the regime; and (4) a ''mirroring rule'' that gave incumbent LECs the benefit of the rate cap only if

they offered to exchange all traffic subject to Section 251(b)(5) at the same rates. These rate caps reflected the downward trend in intercarrier compensation rates contained in then-recently negotiated interconnection agreements.

4. On May 3, 2002, the DC Circuit found that the Commission had not provided an adequate legal basis for the rules it adopted in the *ISP Remand Order*. Once again, the court did not question the Commission's finding that ISP-bound traffic is jurisdictionally interstate. Rather, the court held that section 251(g) of the Act did not provide a basis for the Commission's decision. The court held that section 251(g) is simply a transitional device that preserved obligations that predated the 1996 Act until the Commission adopts superseding rules, and that there was no pre-1996 Act obligation with respect to intercarrier compensation for ISP-bound traffic. Although the court rejected the legal rationale for the compensation rules, the court remanded, but did not vacate, the *ISP Remand Order* to the Commission, and it observed that ''there is plainly a non-trivial likelihood that the Commission has authority'' to adopt the rules. Accordingly, the rules adopted in the *ISP Remand Order* have remained in effect.

5. On November 5, 2007, Core filed a petition for writ of mandamus with the DC Circuit seeking to compel the Commission to enter an order resolving the court's remand in the *WorldCom* decision. On July 8, 2008, the court granted a writ of mandamus and directed the Commission to respond to the *WorldCom* remand in the form of a final, appealable order which explains its legal authority to issue the pricing rules for ISP-bound traffic adopted in the ISP Remand Order . The court directed the Commission to respond to the writ of mandamus by November 5, 2008.

B. Discussion

6. In this order, we respond to the DC Circuit's remand order in *WorldCom* v. *FCC*, and the court's writ of mandamus in *Core Communications Inc.* Specifically, we hold that although 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.

1. Scope of Section 251(b)(5)

7. As an initial matter, we conclude that the scope of Section 251(b)(5) is broad enough to encompass ISP-bound traffic. To be sure, we acknowledge that, in the *Local Competition First Report and Order*, the Commission found that section 251(b)(5) applies only to local traffic, and some commenters continue to press for such an interpretation. As other commenters recognize, however, the Commission, in the ISP Remand Order, reconsidered that judgment and concluded that it was a mistake to read section 251(b)(5) as limited to local traffic, given that ''local'' is not a term used in section 251(b)(5). We recognize, as the Supreme Court noted in *AT&T Corp.* v. *Iowa Utilities Board*, that ''[i]t would be a gross understatement to say that the 1996 Act is not a model of clarity.'' Nevertheless, we find that the better view is that section 251(b)(5) is not limited to local traffic.

8. We begin by looking at the text of the statute. Section 251(b)(5) imposes on all LECs the ''duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.'' The Act broadly defines ''telecommunications'' as ''the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.'' Its scope is not limited geographically (''local,'' ''intrastate,'' or ''interstate'') or to particular services (''telephone exchange service,'' telephone toll service,'' or ''exchange access''). We find that the traffic we elect to bring within this framework fits squarely within the meaning of ''telecommunications.'' We also observe that had Congress intended to preclude the Commission from bringing certain types of telecommunications traffic within the section 251(b)(5) framework, it could have easily done so by incorporating restrictive terms in section 251(b)(5). Because Congress used the term ''telecommunications,'' the broadest of the statute's defined terms, we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic.

9. In the *Local Competition First Report and Order* the Commission concluded that Section 251(b)(5) applies only to local traffic, but recognized that ''[u]ltimately * * * the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge.'' In the *ISP Remand Order*, the Commission reversed course on the scope of section 251(b)(5), finding that ''the phrase 'local traffic' created unnecessary ambiguities, and we correct that mistake here.'' The *ISP Remand Order* noted that ''the term 'local,' not being a statutorily defined category, * * * is not a term used in section 251(b)(5).'' The Commission found that the scope of section 251(b)(5) is limited only by section 251(g), which temporarily grandfathered the pre-1996 Act rules governing ''exchange access, information access, and exchange services for such access'' provided to interexchange carriers and information service providers until ''explicitly superseded by regulations prescribed by the Commission.'' On appeal, the DC Circuit left intact the Commission's findings concerning the scope of section 251(b)(5), although it took issue with other aspects of the *ISP Remand Order*.

10. We disagree with commenters who argue that section 251(b)(5) only can be applied to traffic exchanged between LECs, and not traffic exchanged between a LEC and another carrier. The Commission rejected that argument in the *Local Competition Order*, finding that section 251(b)(5) applies to traffic exchanged by a LEC and any other telecommunications carrier, and adopted rules implementing that finding. In a specific application of that principle, the Commission concluded that ''CMRS providers will not be classified as LECs,'' but nevertheless found that ''LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation agreements with all CMRS providers.'' No one challenged that finding on appeal, and it has been settled law for the past 12 years. We see no reason to revisit that conclusion now. While section 251(b)(5) indisputably imposes the duty to establish reciprocal compensation arrangements on LECs alone, Congress did not limit the class of potential beneficiaries of that obligation to LECs.

11. We also disagree with commenters who argue that section 252(d)(2)(A)(i) limits the scope of section 251(b)(5). Section 252(d)(2)(A)(i) provides that a state commission ''shall not consider the terms and conditions for reciprocal compensation to be just and reasonable'' unless ''such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier.'' Verizon and others argue that this provision necessarily excludes interexchange traffic from the scope of section 251(b)(5), because at the time the 1996 Act was passed calls neither originated nor terminated on an interexchange carrier's network. We reject this reasoning because it

erroneously assumes that Congress intended the pricing standards in section 252(d)(2) to limit the otherwise broad scope of section 251(b)(5). We do not believe that Congress intended the tail to wag the dog.

12. Section 251(b)(5) defines the scope of traffic that is subject to reciprocal compensation. Section 252(d)(2)(A)(i), in turn, deals with the mechanics of who owes what to whom, it does not define the scope of traffic to which Section 251(b)(5) applies. Section 252(d)(2)(A)(i) provides that, at a minimum, a reciprocal compensation arrangement must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network of calls that originate on the network of the other carrier. Section 252(d)(2)(A)(i) does not address what happens when carriers exchange traffic that originates or terminates on a third carrier's network. This does not mean, as Verizon suggests, that Section 251(b)(5) must be read as limited to traffic involving only two carriers. Rather, it means that there is a gap in the pricing rules in Section 252(d)(2), and the Commission has authority under section 201(b) to adopt rules to fill that gap.

13. We also reject Verizon's argument that a telecommunications carrier that delivers traffic to an ISP is not eligible for reciprocal compensation because the carrier does not ''terminate'' telecommunications traffic at the ISP. In the *Local Competition Order*, the Commission defined ''termination'' as ''the switching of traffic that is subject to Section 251(b)(5) at the terminating carrier's end office switch * * * and delivery of that traffic to the called party's premises.'' As the DC Circuit suggested in the *Bell Atlantic* decision, ''Calls to ISPs appear to fit this definition: The traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.' '' We agree.

14. Verizon also argues that the reference to reciprocal compensation in the competitive checklist in section 271, which was designed to ensure that local markets are open to competition, somehow shows that Congress intended to limit the scope of section 251(b)(5) to local traffic. We do not see how this argument sheds any light on the scope of section 251(b)(5). Congress no doubt included the reference to reciprocal compensation in section 271 because section 251(b)(5) applies to local traffic, a point that no one disputes. That does not suggest, however, that section 251(b)(5) applies only to local traffic.

15. We need not respond to every other variation of the argument that the history and structure of the Act somehow demonstrate that section 251(b)(5) is limited to local traffic. At best, these arguments show that one plausible interpretation of the statute is that section 251(b)(5) applies only to local traffic, a view that the Commission embraced in the *Local Competition First Report and Order*. These arguments do not persuade us, however, that this is the only plausible reading of the statute. Moreover, many of the same arguments based on the history and context of the adoption of section 251 to limit its scope to local traffic were rejected by the DC Circuit in the context of section 251(c). We find that the better reading of the Act as a whole, in particular the broad language of section 251(b)(5) and the grandfather clause in section 251(g), supports our view that the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).

16. Notwithstanding section 251(b)(5)'s broad scope, we agree with the finding in the *ISP Remand Order* that traffic encompassed by section 251(g) is excluded from Section 251(b)(5) except to the extent that the Commission acts to bring that traffic within its scope. Section 251(g) preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing ''receipt of compensation.'' Here, however, the DC Circuit has held that ISP-bound traffic did not fall within the section 251(g) carve out from Section 251(b)(5) as ''there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.'' As a result, we find that ISP-bound traffic falls within the scope of section 251(b)(5).

2. Authority Under Section 201

17. The section 251(b)(5) finding above, however, does not end our legal analysis here. That is because the ISP-bound traffic at issue here is clearly interstate in nature and thus also subject to our section 201 authority. The Commission unquestionably has authority to regulate intercarrier compensation with respect to interstate access services, rates charged by CMRS providers, and other traffic subject to Commission authority such as ISP-bound traffic. Section 2(a) of the Act establishes the Commission's jurisdiction over interstate services, for which the Commission ensures just, reasonable, and not unjustly and unreasonably discriminatory rates under section 201 and 202. Likewise, the Commission has authority over the rates of CMRS providers pursuant to section 332 of the Act.

18. In sections 251 and 252 of the Act, Congress altered the traditional regulatory framework based on jurisdiction by expanding the applicability of national rules to historically intrastate issues and state rules to historically interstate issues. In the *Local Competition First Report and Order*, the Commission found that the 1996 Act created parallel jurisdiction for the Commission and the states over interstate and intrastate matters under sections 251 and 252. The Commission and the states ''are to address the same matters through their parallel jurisdiction over both interstate and intrastate matters under Sections 251 and 252.'' Moreover, section 251(i) provides that ''[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.'' In the *Local Competition First Report and Order*, the Commission concluded that section 251(i) ''affirms that the Commission's preexisting authority under section 201 continues to apply for purely interstate activities.''

19. In implementing sections 251 and 252 in the *Local Competition First Report and Order*, the Commission's treatment of LEC–CMRS traffic provides an instructive example. Prior to the 1996 Act, the Commission expressly preempted ''state and local regulations of the kind of interconnection to which CMRS providers are entitled'' based on its authority under sections 201 and 332 of the Act. Nevertheless, in the *Local Competition First Report and Order*, the Commission brought LEC–CMRS interconnection within the section 251 framework as it relates to intraMTA (including interstate intraMTA) traffic. The Commission recognized, however, that it continued to retain separate authority over CMRS traffic.

20. Courts confirmed that, in permitting LEC–CMRS interconnection to be addressed through the section 251 framework, the Commission did not in any way lose its independent jurisdiction or authority to regulate that traffic under other provisions of the Act. Thus, although the Eighth Circuit invalidated the Commission's TELRIC pricing rules in general, it recognized that ''because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers, [including the reciprocal compensation rules] but only as these provisions apply to CMRS providers. Thus, [the pricing] rules * * * remain in full force and effect with respect to the CMRS providers, and our order of vacation does not apply to them in the CMRS

context.'' Subsequently, the DC Circuit held that CMRS providers were entitled to pursue formal complaints under section 208 of the Act for violations of the Commission's reciprocal compensation rules.

21. We build upon our actions in the *Local Competition First Report and Order* and find here that addressing ISP-bound traffic through the section 251 framework does not diminish the Commission's independent jurisdiction or authority to regulate traffic under other provisions of the Act. Specifically, we retain our authority under section 201 to regulate ISP-bound traffic, despite acknowledging that such traffic is section 251(b)(5) traffic. With respect to interstate services, the Act has long provided us with the authority to establish just and reasonable ''charges, practices, classifications, and regulations.'' The Commission thus retains full authority to regulate charges for traffic and services subject to federal jurisdiction, even when it is within the sections 251(b)(5) and 252(d)(2) framework. Because we re-affirm our findings concerning the interstate nature of ISP-bound traffic, which have not been vacated by any court, it follows that such traffic falls under the Commission's section 201 authority preserved by the Act and that we therefore have the authority to issue pricing rules pursuant to that section. This conclusion is reinforced by section 251(i) of the Act. As the Commission explained in the *ISP Remand Order*, section 251(i) ''expressly affirms the Commission's role in an evolving telecommunications marketplace, in which Congress anticipates that the Commission will continue to develop appropriate pricing and compensation mechanisms for traffic that falls within the purview of section 201.'' It concluded that section 251(i), together with section 201, equips the Commission with the tools necessary to keep pace with regulatory developments and new technologies. When read together, these statutory sections preserve the Commission's authority to address new issues that fall within its section 201 authority over interstate traffic, including compensation for the exchange of ISP-bound traffic. Consequently, in the *ISP Remand Order*, the Commission properly exercised its authority under section 201(b) to issue pricing rules governing the payment of compensation between carriers for ISP-bound traffic.

22. Our result today is consistent with the DC Circuit's opinion in *Bell Atlantic*, which concluded that the jurisdictional nature of traffic is not dispositive of whether reciprocal compensation is owed under section 251(b)(5). It is also consistent with the DC Circuit's *WorldCom* decision, in which the court rejected the Commission's view that section 251(g) excluded ISP-bound traffic from the scope of section 251(b)(5), but made no other findings. Finally, this result does not run afoul of the Eighth Circuit's decision on remand from the Supreme Court in the *Iowa Utilities Board* litigation, which held that ''the FCC does not have the authority to set the actual prices for the state commissions to use'' under section 251(b)(5). At the time of that decision, under the *Local Competition First Report and Order*, section 251(b)(5) applied only to local traffic. Thus, the Eighth Circuit merely held that the Commission could not set reciprocal compensation rates for local traffic. The court did not address the Commission's authority to set reciprocal compensation rates for interstate traffic. In sum, the Commission plainly has authority to establish pricing rules for interstate traffic, including ISP-bound traffic, under section 201(b), and that authority was preserved by section 251(i).

3. Other Issues

23. Most commenters urge the Commission to maintain the compensation rules governing ISP-bound traffic until the Commission is able to complete comprehensive intercarrier compensation reform. These parties contend that a higher compensation rate would create new opportunities for arbitrage and impose substantial financial burdens on wireless companies, incumbent LECs and state public utility commissions. They further claim that the existing regime has simplified interconnection negotiations.

24. In the *ISP Remand Order*, the Commission found that the one-way nature of ISP-bound traffic creates significant arbitrage opportunities. Due to the unbalanced nature of ISP-bound traffic, the Commission observed that reciprocal compensation arrangements created enormous incentives for competitive LECs to sign up ISPs as customers. The Commission cited evidence that competitive LECs, on average, terminated eighteen times more traffic than they originated, resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, 90 percent of which was for ISP-bound traffic. The Commission concluded that ''the record strongly suggests that CLECs target ISPs in large part because of the availability of reciprocal compensation payments.'' This undermined the operation of competitive markets because competitive LECs were able to recover a disproportionate share of their costs from other carriers. To limit arbitrage opportunities that arose from ''excessively high reciprocal compensation rates,'' the Commission adopted a gradually declining cap on intercarrier compensation for ISP-bound traffic, beginning at \$.0015 per minute of use and declining to \$.0007 per minute of use, the current cap. The Commission derived the rate caps from contemporaneous interconnection agreements, in which carriers voluntarily agreed to rates comparable to the rate caps adopted by the Commission. The interconnection agreements included lower rates for unbalanced traffic than for balanced traffic, and the rates declined over time, like the rate caps. Although the Commission made no specific findings with regard to the actual costs associated with delivering traffic to ISPs, it noted evidence in the record that technological advances were reducing the costs incurred by carriers when handling all forms of traffic. The Commission also noted that ''negotiated reciprocal compensation rates continue to decline as ILECs and CLECs negotiate new agreements.''

25. On July 14, 2003, Core Communications, Inc. (''Core'') filed a petition pursuant to Section 10 of the Communications Act requesting that the Commission forbear from enforcing the rate caps and certain other provisions set forth in the *ISP Remand Order* with respect to the exchange of ISP-bound traffic between telecommunications carriers. In 2004, the Commission denied the petition with respect to rate caps and the mirroring rule, determining that Core had satisfied none of the three prongs of the statutory test for forbearance. First, the Commission found that forbearance from enforcement of the rate caps was not consistent with the public interest. To the contrary, the Commission concluded that rate caps remained necessary to prevent regulatory arbitrage and to promote efficient investment in telecommunications services and facilities. Second, the Commission found limited potential for discrimination under the rate caps. The caps applied to ISP-bound traffic only to the extent that an incumbent carrier offered to exchange all traffic at the same rate under section 251(b)(5). Accordingly, the Commission concluded that Core had not proven that the rate caps resulted in impermissible discrimination against or between competitive carriers or services. Finally,

the Commission found that Core had not demonstrated that enforcement of the rate caps was not necessary for the protection of consumers. Core advanced speculative general claims that the caps caused artificially high rates, had forced competitive carriers from the market, and had deterred investment in telecommunications services, all to consumers' detriment. The Commission rejected these unsupported claims, explaining that the rate caps were designed to prevent the subsidization of dial-up Internet access customers at the expense of consumers of basic telephone service and to avoid regulatory arbitrage and discrimination between services. For these reasons, the Commission denied Core's petition for forbearance insofar as rate caps were concerned.

26. In 2006, the DC Circuit affirmed our decision not to forbear from the rate cap (and the mirroring rule). The Court found reasonable the Commission's ''view that the rate caps are necessary to prevent the subsidization of dial-up Internet access consumers by consumers of basic telephone service'' that would occur if reciprocal compensation rates applied to one-way ISP-bound traffic. The Court likewise rejected Core's contention that the rate cap was ''unreasonably discriminatory,'' both because one-way ISP-bound calls were fundamentally different from other forms of traffic and because the mirroring rule ensures that '''the caps apply to ISP-bound traffic only if an incumbent LEC offers to exchange all section 251(b)(5) traffic at the same rate.''' Finally, the Court concluded that the Commission's concern that the rate cap was necessary to prevent '''regulatory arbitrage' and 'distorted economic incentives''' was reasonable.

27. The policy justifications provided by the Commission in 2001 for the rules at issue here have not been questioned by any court. In addition, the policy justifications provided by the Commission for refusing to forbear from enforcement of these rules were upheld by the DC Circuit in 2006. We therefore disagree with parties who suggest that the Commission, in responding to the DC Circuit's remand in *WorldCom*, must offer detailed new justifications for the ISP intercarrier payment regime; we have already offered our justifications for that regime. Moreover, both the *WorldCom* remand and *Core* writ of mandamus focused on the issue of legal authority. We also reject arguments that the Commission unlawfully delegated its authority in the *ISP Remand Order* and arguments that the Commission addressed previously in the *Core Forbearance Order*.

28. The Commission long has stated its intention to move to a more unified intercarrier compensation regime. Progress is difficult due to competing priorities, such as competition, innovation, universal service, and other goals. The Commission recognized in 2001 that ISP-bound traffic represented a unique arbitrage problem that required immediate attention, based on the policy concerns discussed above. The Commission remains committed to moving towards a more unified intercarrier compensation regime, as evidenced by the Further Notice issued in conjunction with this order.

29. In sum, we maintain the $.0007 cap and the mirroring rule pursuant to our Section 201 authority. These rules shall remain in place until we adopt more comprehensive intercarrier compensation reform.

II. Report and Order—Reform of High-Cost Universal Service Support

30. In this report and order, we address the ''Recommended Decision'' of the Federal-State Joint Board on Universal Service (Joint Board), which was released on November 20, 2007. As discussed below, we appreciate the great efforts expended by the Joint Board and its staff in considering how best to reform the current high-cost support mechanism and in developing its recommendations. We choose not to implement the recommendations contained in the *Comprehensive Reform Recommended Decision* at this time, however.

A. Background

31. The 1996 Act amended the Communications Act of 1934 with respect to the provision of universal service. In the 1996 Act, Congress sought to preserve and advance universal service, while at the same time opening all telecommunications markets to competition. Section 254(b) of the Act directs the Joint Board and the Commission to base policies for the preservation and advancement of universal service on several general principles, plus other principles that the Commission may establish. Among other things, section 254(b) directs that there should be specific, predictable, and sufficient federal and state universal service support mechanisms; quality services should be available at just, reasonable, and affordable rates; and access to advanced telecommunications and information services should be provided in all regions of the nation.

32. The Commission implemented the universal service provisions of the 1996 Act in the 1997 *Universal Service First Report and Order*. Among other things, the Commission adopted rules to create explicit universal service support mechanisms for customers living in rural and high-cost areas. Pursuant to section 254(e) of the Act, an entity must be designated as an eligible telecommunications carrier (ETC) to receive high-cost universal service support. ETCs may be incumbent LECs, or non-incumbent LECs, which are referred to as ''competitive ETCs.'' Under the existing high-cost support distribution mechanism, incumbent LEC ETCs receive high-cost support for their intrastate services based on their costs. Competitive ETCs receive support for each line based on the support the incumbent LEC would receive for that line in the service area. This support to competitive ETCs is known as ''identical support.'' The Commission's universal service high-cost support rules do not distinguish between primary and secondary lines; therefore, high-cost support may go to a single end user for multiple connections. Further, the Commission's rules result in subsidizing multiple competitors in the same high-cost area.

33. High-cost support for competitive ETCs has grown rapidly over the last several years, placing extraordinary pressure on the federal universal service fund. In 2001, high-cost universal service support totaled approximately $2.6 billion. By 2007, the amount of high-cost support had grown to approximately $4.3 billion per year. In recent years, this growth has been due mostly to increased support provided to competitive ETCs, which receive high-cost support based on the per-line support that the incumbent LECs receive pursuant to the identical support rule. Competitive ETC support, in the six years from 2001 through 2007, has grown from under $17 million to $1.18 billion—an annual growth rate of over 100 percent. This ''funded competition'' has grown significantly in a large number of rural, insular, or high-cost areas; in some study areas more than 20 competitive ETCs currently receive support.

34. To address the growth in competitive ETC support, the Joint Board recommended an interim cap on the amount of high-cost support available to competitive ETCs, pending comprehensive high-cost universal service reform. The Commission adopted this recommendation on May 1, 2008.

35. For the past several years, the Joint Board and the Commission have been exploring ways to reform the Commission's high-cost program. In the most recent high-cost support

comprehensive reform efforts, the Joint Board issued a recommended decision on November 20, 2007. The Universal Service Joint Board's recommended decision included several recommendations to address the growth in high-cost support and to reform the high-cost mechanisms. Specifically, the Universal Service Joint Board recommended that the Commission should: (1) Deliver high-cost support through a provider of last resort fund, a mobility fund, and a broadband fund; (2) cap the high-cost fund at $4.5 billion, the approximate level of 2007 high-cost support; (3) reduce the existing funding mechanisms during a transition period; (4) add broadband and mobility to the list of services eligible for support under section 254 of the Act; (5) eliminate the identical support rule; and (6) ''explore the most appropriate auction mechanisms to determine high-cost universal service support.''

36. On January 29, 2008, the Commission released the *Joint Board Comprehensive Reform NPRM*, seeking comment on the *Joint Board's Comprehensive Reform Recommended Decision*. Pursuant to section 254(a)(2), the Commission ''shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.''

B. Discussion

37. We have carefully reviewed the Joint Board's *Comprehensive Reform Recommended Decision* and the comments that were filed in response to the Commission's *Joint Board Comprehensive Reform NPRM*. We thank the Joint Board and its staff for their hard work in studying these difficult issues and in developing their recommendations. We choose not to implement these recommendations at this time, however.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 192

[Docket No. PHMSA–2005–23447]

RIN 2137–AE25

Pipeline Safety: Standards for Increasing the Maximum Allowable Operating Pressure for Gas Transmission Pipelines

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT)

ACTION: Stay of final rule.

SUMMARY: This Notice stays the effective date of a final rule published October 17, 2008 (73 FR 62148). In accordance with the Congressional Review Act, the final rule will be effective on December 22, 2008, 60 days after the final rule was transmitted to Congress .

DATES: Effective December 1, 2008 §§ 192.112, 192.328, 192.611(a)(1); 192.611(a)(3)(i), (ii) and (iii); 192.619(a) and (d); and 192.620 are stayed until December 22, 2008.

FOR FURTHER INFORMATION CONTACT: Alan Mayberry by phone at (202) 366–5124, or by e-mail at *alan.mayberry@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Supplementary Background

On October 17, 2008 PHMSA issued a final rule under Docket No. PHMSA–2005–23447 amending the Pipeline Safety Regulations (PSR; 49 CFR parts 190–199) to increase the regulatory maximum allowable operating pressure (MAOP) for certain gas transmission pipelines. The October 17, 2008 **Federal Resister** notice announced that the final rule would be effective November 17, 2008, thirty days after its publication. Because the final rule is a major rule within the meaning of the Congressional Review Act, however, its effective date must be delayed until 60 days after publication in the **Federal Register** or transmission to Congress, whichever is later. The final rule was transmitted to Congress on October 22, 2008. Accordingly, we are staying its effective date until December 22, 2008.

Issued in Washington, DC, on November 24, 2008 under authority delegated in 49 CFR part 1.

Carl T. Johnson,

Administrator.

[FR Doc. E8–28435 Filed 11–28–08; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 071203794–81464–02]

RIN 0648–AW36

Pacific Halibut Fisheries; Subsistence Fishing

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to amend the subsistence fishery rules for members of an Alaska Native tribe eligible to harvest Pacific halibut in waters in and off Alaska for customary and traditional use. The action correctly defines the location of Village of Kanatak tribal headquarters and International Pacific Halibut Commission (IPHC) halibut regulatory area (Area) in which the tribe's members may subsistence fish. The action would change the tribe's headquarters from Egegik to Wasilla and the corresponding Area from 4E to Area 3A. The intent of this action is to remove restrictions on participation of Village of Kanatak tribal members in traditional subsistence fisheries for Pacific halibut by correcting the tribe's headquarters to its actual location in Wasilla.

DATES: Effective December 31, 2008.

ADDRESSES: Copies of the Categorical Exclusion and Regulatory Impact Review prepared for this action, as well as the environmental assessment prepared for the original subsistence halibut action are available by mail from NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Ellen Sebastian, Records Officer; in person at NMFS, Alaska Region, 709 West 9th Street, Room 420A, Juneau, Alaska; and via the Internet at the NMFS Alaska Region website at *http://alaskafisheries.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Peggy Murphy, 907–586–7843.

SUPPLEMENTARY INFORMATION: The United States and Canada participate in the International Pacific Halibut Commission (IPHC) and promulgate regulations governing the Pacific halibut (*Hippoglossus stenolepis*) fishery under the authority of the Northern Pacific Halibut Act of 1982 (Halibut Act). Regulations governing the allocation and catch of halibut in U.S. convention waters that are in agreement with the