

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Pacific Bell Telephone Company d/b/a AT&T
California (U 1001 C),

Complainant

v.

O1 Communications, Inc. (U 6065 C),

Defendant

Case No. C.08-03-001
(Filed March 4, 2008)

**REPLY BRIEF OF
PACIFIC BELL TELEPHONE COMPANY
D/B/A AT&T CALIFORNIA (U 1001 C)**

[PUBLIC VERSION]

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Pursuant to the briefing schedule established by Presiding Administrative Law Judge A. Kirk McKenzie, Pacific Bell Telephone Company d/b/a AT&T California (hereinafter, “AT&T California” or “AT&T”) hereby files this reply brief.

I. INTRODUCTION

As AT&T California demonstrated in its opening brief, AT&T carefully developed and implemented its ISP study to identify with a high level of accuracy the percentage of AT&T’s ISP-bound traffic.¹ This procedure is one that has been agreed to by numerous other Competitive Local Exchange Carriers (“CLECs”),² and in fact several carriers have agreed to the exact same methodology that AT&T employed here.³ Most recently, Pac-West Telecomm, Inc. agreed to an interconnection agreement (“ICA”) amendment that quantifies ISP-bound traffic based on the very same methodology that AT&T has proposed here, and that amendment was deemed approved by the Commission.⁴ Approval of AT&T’s ISP study in this proceeding would bring O1’s compensation into line with much of the industry.⁵

In this case, AT&T also undertook additional steps, beyond its normal process, to analyze the top 100 telephone numbers, and a random selection of another 100 numbers, that AT&T

¹ See AT&T Op. Br. at 10-18.

² See Sections III.F, G, *infra*.

³ See, e.g., Amendment to Interconnection Agreement between Michigan Bell Tel. Co. and TDS Metrocom, LLC, § 2.3.2.1, dated Nov. 2, 2006 (available at: <http://www.att.com/Large-Files/RIMS/Interconnection_Agreements/Michigan/TDS_Metrocom_LLC/i_TDSMetrocomEighthAmendment.pdf>) (“In order to determine presumed ISP-Bound Traffic Terminating Telephone Numbers, all terminating telephone numbers will be screened to identify all terminating telephone numbers that receive a minimum of five (5) calls within any sixty (60) minute period with a duration of twenty (20) minutes or longer.”); Wisconsin Bell, Inc. and TDS Metrocom, § 2.3.2.1, dated October 31, 2006 (available at: <<http://psc.wi.gov/apps/via/document/5ti1622/TDS%20Metrocom%20ISP%20Bound%20Traffic%20Amendment%20-%20Filed.pdf>>).

⁴ Exh. 9-C, Layman Opening Testimony, at 29. See also AT&T California Advice Letter No. 35983, submitted Sept. 4, 2009

⁵ O1 argues that approving AT&T’s rebuttal of the ISP presumption “would discriminate against O1 vis-à-vis similarly situated competitive carriers in California,” but cites no support for this proposition. (O1 Opening Brief at 43.) In fact, the opposite is true. As described above, many other carriers have already agreed to AT&T’s methodology.

identified as belonging to ISP customers of O1 for August 2009.⁶ This verification further confirmed the soundness of AT&T's approach. AT&T's evidence is more than sufficient to meet its burden of proof, and it certainly outweighs any evidence in support of maintaining the 3:1 presumption, especially since O1's own testimony confirms the inaccuracy of the ratio.⁷

Although O1 attempts mightily to discredit the results of AT&T's studies, its arguments all miss the mark, as explained in detail below. AT&T's ISP-bound identification process ultimately results in a list of telephone numbers used by ISPs. Then, each month, AT&T calculates the number of minutes of use ("MOUs") to those telephone numbers. These MOUs are considered "ISP-bound."⁸

AT&T California provided O1 the telephone numbers that AT&T's studies identified as belonging to ISPs, and AT&T has always stood ready to remove from its analysis any telephone numbers not associated with ISP-bound traffic. O1 plainly has the capability (and certainly the incentive) to determine, if it chose to do so, which of its customers are ISPs and the telephone numbers O1 provides those ISP customers to receive ISP-bound calls.⁹ O1 has billed AT&T California *****BEGIN PROPRIETARY [REDACTED] END PROPRIETARY***** reciprocal compensation, and bears an obligation under the ICA "for the accuracy and quality" of its invoices.¹⁰ In the end, though, O1 has failed to identify any telephone numbers that were erroneously included in AT&T's ISP study. In addition, even though O1 has information about the identities of its customers (which AT&T lacks), it has not offered any evidence of its own to

⁶ AT&T Op. Br. at 15

⁷ *See id.* at 15-16.

⁸ Exh. 9-C, Layman Opening Testimony, at 12.

⁹ *See* section III.C, *infra*.

¹⁰ Appendix Reciprocal Compensation § 4.1.

disprove the fact that the 3:1 presumption is a grossly inaccurate reflection of ISP-bound traffic volumes from AT&T to O1.¹¹

The Commission may consider the “public policy grounds” behind the *2001 ISP Remand Order* in determining whether AT&T has met its burden.¹² The FCC adopted the 3:1 presumption simply as a proxy for traffic volumes, and recognized that a party to an ICA may choose to develop a more accurate compensation mechanism based on actual traffic flows.¹³ In this proceeding, AT&T has demonstrated that it can accurately measure ISP-bound traffic levels, and this measurement shows that the 3:1 presumption is a grossly inaccurate reflection of AT&T’s actual ISP-bound traffic volumes as applied to O1.¹⁴ The *2001 ISP Remand Order* was designed to prevent regulatory arbitrage,¹⁵ and thus the Commission should take into account that O1 has manipulated the 3:1 presumption by terminating non-local traffic over local trunk groups, in direct violation of the parties’ ICA.¹⁶ Weighing all of these factors, the Commission should conclude that AT&T has demonstrated by far more than a preponderance of the evidence that the 3:1 presumption must be discarded in favor of AT&T’s more precise quantification of ISP-bound traffic.

AT&T California also explains below that the justification O1 presents in its opening brief for its “VNXX” counterclaim runs counter to the plain language of the ICA, and the pre-dispute conduct of the parties. As a result, O1’s “VNXX” counterclaim is entirely meritless. AT&T also responds to O1’s claim in its opening brief that it has accurately quantified the

¹¹ See section III.C, D, *infra*.

¹² O1 Op. Br. at 38-42.

¹³ See AT&T Op. Br. at 7.

¹⁴ See AT&T Op. Br. at 10-18.

¹⁵ See *2001 ISP Remand Order*, ¶ 2.

¹⁶ See AT&T Op. Br. at 16-17.

amount of “VNXX” traffic. To the contrary, O1’s approach vastly overstates the volume of “VNXX” traffic.

II. DISCUSSION OF O1’S “VNXX” COUNTERCLAIM

Below, AT&T California responds separately to the arguments in O1’s opening brief regarding its “VNXX” counterclaim and AT&T’s ISP study. For the sake of consistency with the structure of O1’s brief, AT&T California first addresses O1’s “VNXX” counterclaim.

A. O1’s “VNXX” Counterclaim Seeks Relief Contrary To The ICA.

O1 explains at great length that the *ISP Remand Order* issued by the FCC does not apply to what it refers to as “VNXX” traffic. AT&T California agrees that the *ISP Remand Order* did not, in and of itself, impose requirements on calls made to ISPs located outside the caller’s local calling area. However, that is not the end of the inquiry. The Telecommunications Act of 1996,

mandate[s] that interconnection agreements have the binding force of law. *See* 47 U.S.C. § 252(a)(1). Indeed, the point of § 252 [of the Act] is to replace the comprehensive state and federal regulatory scheme with a more market-driven system that is self-regulated through negotiated interconnection agreements. *See, e.g.,* Bell Atl.-Pa., 271 F.3d at 499 (“The Act’s clear preference is for [] negotiated agreements.”).¹⁷

Where, as here, the parties entered into a voluntary interconnection agreement,¹⁸ “that agreement [is] binding on the parties regardless of the ISP Remand Order.”¹⁹

1. The ICA Plainly Provides That ISP-Bound VNXX Calls Are To Be Compensated At The \$0.0007 Rate Applicable To ISP-Bound Calls

Interpretation of ICAs is governed by “the agreements themselves and state law principles.”²⁰ Under California law,²¹ “[a] contract must be so interpreted as to give effect to the

¹⁷ *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003).

¹⁸ *See* AT&T Opening Brief at 21, fn. 95.

¹⁹ *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1151 (9th Cir. 2006).

²⁰ *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003) (“To suggest that the CPUC could interpret an agreement without reference to the agreement at issue is inconsistent with the CPUC’s weighty responsibilities of contract interpretation under § 252. As noted by one court, ‘the agreements themselves

mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.”²² “When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of [Title 3 of Part 2 of the Civil Code].”²³

The language of the ICA at issue here, and more specifically the negotiated Appendix Reciprocal Compensation to that agreement, precludes O1 from obtaining the “relief” it seeks. O1 claims that *all* “VNXX” calls, *including those to ISPs*, are to be compensated at the “reciprocal compensation” rates (approximately \$0.0034 per MOU in the aggregate) set forth in Section 6.1 of the Appendix.²⁴ However, that claim is contrary to the plain and express terms of the Appendix Reciprocal Compensation. Section 6.1.2 of the Appendix, a subsection of section 6.1, provides that “*the rates in Section 6.1 above do not apply to ISP Traffic....*” Thus, O1’s attempt to apply the rates of Section 6.1 to ISP traffic expressly is precluded by the plain language of the ICA.

Numerous additional provisions of the Appendix Reciprocal Compensation explain how the parties did agree to be compensated for ISP calls. First, O1 and AT&T California agreed in

and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions.’ *Southwestern Bell v. Pub. Util. Comm’n*, 208 F.3d at 485.”)

²¹ O1 and AT&T California have specified that “this Agreement shall be governed by the domestic laws of the State of California without reference to conflict of law provisions.” General Terms & Conditions § 30.7.

²² Civ. Code § 1636.

²³ Civ. Code § 1639.

²⁴ O1 Opening Brief at 7 (“[T]he record fully supports a finding by the Commission of the amount of VNXX traffic O1 has terminated during 2007 and 2008 and the compensation due to O1 for such traffic *pursuant to Section 6.1 of Appendix Reciprocal Compensation....*”), 22 (“The VNXX traffic portion of this 251(b)(5) traffic is identified and *subject to compensation under Sec. 6.1* of Appendix Reciprocal Compensation of the ICA, since VNXX traffic is not subject to the *ISP Remand Order*.”), 22 fn.55 (“The result is the same; *all VNXX traffic is compensated at the rates set forth in Section 6.1* of Appendix Reciprocal Compensation.”), 27 (“AT&T should be ordered to pay O1 for this amount of VNXX traffic for the years 2007 and 2008, *at the rates set forth in Section 6.1* of Appendix Reciprocal Compensation and also for all VNXX traffic it has sent since January 1, 2009 and will send to O1 for termination.”), 104 (“Order AT&T to compensate O1 for all VNXX traffic originated by AT&T subsequent to 2008 *at the rate specified in Section 6.1* of Appendix Reciprocal Compensation of the ICA[.]”)

Section 1.6 that the Appendix Reciprocal Compensation was intended to be comprehensive (emphasis added):

The Parties agree that this Appendix governs the exchange, routing and rating of *all* intercarrier traffic to Internet Service Providers (ISPs) and other Internet-bound traffic between SBC California and CLEC in this state.

Again, Section 6.1.2 makes clear that “the rates in Section 6.1...do not apply to ISP traffic.”

Instead, as explained in AT&T California’s opening brief, ISP calls are subject either to the \$0.0007 rate in Section 6.4, if they are local, or to the tariff rates referenced in Section 7, if they are non-local.

The \$0.0007 rate in Section 6.4 applies to ISP-bound calls “within Local Calling Areas,” which Section 6.4.1 explains is “as defined in section 3.2.” Section 3.2 defines local calls to include those where the NPA-NXX of the originating and terminating end user are both assigned to the same local exchange area.²⁵ (Section 3.2(a).) As explained in AT&T’s opening brief, O1’s definition of “VNXX” includes such calls,²⁶ thus O1’s “VNXX” calls are considered local calls and, if bound for an ISP, are subject to the \$0.0007 ISP-bound rate.²⁷

In its opening brief, O1 initially argues that Section 3.2 is historical,²⁸ then concedes it has “potential relevance” because it is referenced by Section 6.4.1.²⁹ Casting aside this reference without explanation, O1 then proceeds to argue that Section 6.4.1 limits local calls to only those that begin and end in the same local calling area.³⁰ Beyond the fact that Section 6.4.1 contains no

²⁵ Section 3.7 also confirms that “[c]alls shall be rated in reference to the rate center of the assigned NXX prefix of the calling and called parties’ numbers.”

²⁶ See AT&T Opening Brief at 22; Exh. 38-C, Sprague Reply Testimony, at 3:25-27 (VNXX “calls are actually delivered to a receiving party outside of the local calling area of the calling party even though *the called number is assigned to the local calling area of the calling party...*”).

²⁷ The result that VNXX and non-VNXX ISP bound local calls are compensated at the same rate is consistent with logic employed by O1 witness Dr. Selwyn to support charging the same rate for regular (non-ISP) VNXX and non-VNXX local calls. Tr. 356:5-357:14.

²⁸ O1 Opening Brief at 16-18.

²⁹ O1 Opening Brief at 18.

³⁰ O1 Opening Brief at 18.

such limitation,³¹ this argument completely ignores Section 6.4.1's reference to Section 3.2—the very reference that O1 originally noted: “calls within Local Calling areas *as defined in section 3.2.*” (Emphasis added.) As explained above, Section 3.2 defines calls as “within a Local Calling Area” with reference to the NPA-NXX of the originating and terminating end user, not their geographic location. An interpretation such as O1's, which renders Section 6.4.1's reference to Section 3.2 to be surplusage, “should be avoided.”³²

The degree to which O1 must twist the language of the ICA belies the unreasonableness of its position. In order to avoid the plain meaning of Section 3.7, which provides that calls shall be rated by NXX (not geographic endpoints), O1 concocts the justification that the term “rated” in Section 3.7 does not refer to how O1 and AT&T will charge each other, but instead refers to how O1 and AT&T will bill their subscribers.³³ Again, O1 ignores the plain terms of the Appendix. The purpose and scope of the Appendix Reciprocal Compensation, including Section 3.7, are express and clear: “This Appendix sets forth the terms and conditions for Reciprocal Compensation of intercarrier telecommunications traffic between [AT&T] California and O1 Communications, Inc.” (Section 1.1.) Thus, in the Appendix, the parties have agreed on how they will compensate each other for the exchange of traffic. The parties have not, in the Appendix, agreed with each other on how they will bill their end-user retail subscribers. Section 3.3 confirms this: “The Parties agree that, notwithstanding the classification of traffic under this

³¹ The language in section 6.4.1 that the “rates, terms, conditions in this section apply only to the termination” of ISP calls simply specifies that the provisions in section 6.4 relate to call “termination” rather than “origination.” In other words, AT&T California cannot impose origination charges for any such calls that originate on AT&T California's network.

³² *National City Police Officers' Ass'n v. City of National City*, 87 Cal.App.4th 1274, 1279 (2001) (“An interpretation which renders part of the instrument to be surplusage should be avoided.”); *see also* Civ. Code § 1641 (“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”)

³³ O1 Opening Brief at 19.

Appendix, either Party is free to define its own retail local calling area(s) for purposes of its provision of telecommunications services to its end users.”

Indeed, its argument is so convoluted that even O1 loses sight of it. Immediately after arguing that the term “rates” in Section 3.7 refers to the rates to be charged subscribers, not “intercarrier compensation,” O1 does a complete about-face, arguing “VNXX traffic is subject to the *rates* that apply to *reciprocal compensation* traffic (local rates) because it is *rated* as local.”³⁴

Further ignoring the ICA, O1 argues that AT&T’s interpretation is based on a “logical” error.³⁵ In its brief, O1 claims that traffic from AT&T and terminated by O1 is first to be separated into two categories: “251(b)(5) Reciprocal Compensation Traffic” and “251(g) Access Traffic – Access Charges.”³⁶ The 251(b)(5) traffic is then to be split into two subcategories “VNXX Traffic at Telric” and “Reciprocal Compensation Traffic Subject to ISP Remand Order Calculation.”³⁷ However, none of these categories appear anywhere in the Appendix Reciprocal Compensation. Indeed, the Appendix contains no references at all to section “251(g)” or “VNXX.” Instead, in Section 3.1 the Appendix sets forth entirely different categories:

Telecommunications traffic exchanged between CLEC and SBC California will be classified as either Local Calls, Transit Traffic, Optional Calling Area Traffic, IntraLATA Toll Traffic, or InterLATA Toll Traffic. For purposes of this Appendix, calls to ISPs will be rated and routed according to these same classifications, depending on definition of Local toll and transit Calls by the California Public Utilities Commission (“CPUC” or “Commission”).

O1’s position, once again, is expressly contradicted by the terms of the ICA.

2. Extrinsic Evidence, Which Need Not Be Considered, Supports Application Of The \$0.0007 Rate.

In the Appendix Reciprocal Compensation, O1 and AT&T California agreed,

³⁴ *Id.* at 19-20 (emphasis added).

³⁵ *Id.* at 21.

³⁶ *Id.*

³⁷ *Id.*

that as to the Reciprocal Compensation terms and conditions, this Appendix constitutes the entire agreement between the Parties on these issues, and there are no other oral agreements or understandings between them on Reciprocal Compensation that are not incorporated into this Appendix.”³⁸

Where, as here, the contract is integrated, “[t]he parol evidence rule prohibits the introduction of oral or written evidence to vary or contradict the terms of an integrated written contract.”³⁹

As discussed above, the ICA is clear. There is no reason to consider extrinsic evidence; no ambiguity to clear up. However, should the Commission decide to consider extrinsic evidence, it must place the greatest weight on the parties’ course of performance prior to the dispute:

The rationale for the admission of course of performance evidence is a practical one. “[W]hen a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court. [Citation.] The reason underlying the rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention.” (*Universal Sales Corp. v. Cal. etc. Mfg. Co.* (1942) 20 Cal.2d 751, 761-762, 128 P.2d 665.) “The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties’ intentions.” (*Kennecott Corp. v. Union Oil Co.* (1987) 196 Cal.App.3d 1179, 1189, 242 Cal.Rptr. 403.) “This rule of practical construction is predicated on the common sense concept that ‘actions speak louder than words.’ Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent.” (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754, 8 Cal.Rptr. 427, 356 P.2d 171.) “The principle of ‘practical construction’ applies only to acts performed under the contract before any dispute has arisen.” (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 296, 85 Cal.Rptr. 444, 466 P.2d 996.)⁴⁰

³⁸ Appendix Reciprocal Compensation § 14.2.

³⁹ *Traumann v. Southland Corp.*, 842 F.Supp. 386, 390 (N.D.Cal. 1993).

⁴⁰ *Employers Reinsurance Co. v. Superior Court*, 161 Cal.App.4th 906, 921 (2008).

O1 and AT&T entered into the Appendix Reciprocal Compensation in 2005.⁴¹ Prior to this dispute, O1 never billed AT&T for “VNXX” traffic—even though O1 now claims it is entitled to more than *****BEGIN PROPRIETARY [REDACTED] END PROPRIETARY***** for such traffic.⁴² It was not until September of 2009 that O1 presented AT&T with an invoice for VNXX traffic.⁴³ O1’s conduct over those four years, during which it did not bill AT&T for “VNXX” traffic, is powerful evidence that O1 did not believe it was entitled to bill in that manner. This is especially true in light of the fact that O1 now claims such billing would have been worth more than *****BEGIN PROPRIETARY [REDACTED] END PROPRIETARY*****. O1’s pre-dispute actions speak louder than its post-dispute words, and those actions are entitled to great weight.⁴⁴

B. O1 Has Greatly Overestimated Its “VNXX” Traffic.

In its opening brief, O1 disputes a number of the flaws in O1’s “VNXX” quantification that AT&T California witness William Cole identified in his reply testimony. AT&T California agrees that O1 has corrected the error in its data showing AT&T tandems as “Customer Delivery Locations,”⁴⁵ but the other errors identified by Mr. Cole remain.

⁴¹ Exh. 1-C, McPhee Opening Testimony, at 10, Attachment JSM-2; Exh. 2, McPhee Reply Testimony, at 4.

⁴² O1’s first precise identification of the amount of “VNXX” traffic was in Mr. Mitchell’s opening testimony. Tr. 300:4-8. As of the date of hearing, O1 was still in the process of building an in-house system to allow it to bill for “VNXX” on an ongoing basis. Tr. 311:7-11. Even O1’s September 2009 “VNXX” invoice only purported to identify traffic from 2007 and 2008, and did not include 2009. Beausoleil Opening Testimony, Attachment A.

⁴³ Exh. 40, Beausoleil Opening Testimony, Attachment A. O1’s most recent invoice to AT&T still does not include charges for “VNXX” traffic.

⁴⁴ Conversely, the claims of O1’s hired consultants are entitled to little weight. This is especially true because those consultants were not part of the negotiations (Tr. 271:3-5), and they fundamentally disagree with the *ISP Remand Order* (2 Tr. 278:13-20 (Sprague); 3 Tr. 357:15-20 (Dr. Selwyn (*ISP Remand Order* “seriously misguided”))).

⁴⁵ See Exh. 4-C, Cole Reply Testimony, at 7-8.

1. O1 Incorrectly Included InterLATA Calls In Its “VNXX” Data.

O1 does not dispute Mr. Cole’s quantification of the interLATA traffic included in O1’s “VNXX” data, but instead claims there is no factual or legal basis for discounting such traffic from O1’s total “VNXX” minutes. To the contrary, neither the Commission’s decisions nor the ICA authorize interLATA “VNXX.” Even one of O1’s witnesses acknowledged this limitation in his testimony.⁴⁶

a) The Commission’s Decisions Do Not Authorize InterLATA “VNXX”

Several factors confirm that D.99-09-029, the Commission decision authorizing the use of different rating and routing points, was concerned only with intraLATA calling. *First*, the decision was issued in a docket addressing competition for local exchange service. Local exchange service is provided within a LATA, and since the historic breakup of AT&T in the early 1980’s, the regulatory regimes applicable to intraLATA and interLATA traffic have been fundamentally different.

In 1982, the Modified Final Judgment (“MFJ”) made “significant structural changes” to AT&T and the telecommunications industry by divesting AT&T of its local operating companies.⁴⁷ After divestiture, the local operating companies provided “local telephone service” within an “exchange area,” which was “large enough to comprehend contiguous areas having common social and economic characteristics but not so large as to defeat the intent of the decree to separate the provision of intercity services from the provision of local exchange service.”

The Operating Companies would provide telephone service from one point in an exchange area to other points in the same exchange area – “exchange telecommunications” – and they would originate and terminate calls from one exchange area to another exchange area – “exchange access.” The interexchange

⁴⁶ See Exh. 52, Selwyn Direct Testimony, at 8.

⁴⁷ *U.S. v. Western Elect. Co., Inc.*, 552 F.Supp. 131, 141 (Dist. Ct., D.C. 1982).

portion of calls from one exchange area to another exchange area would, however, be carried by AT&T and the other interexchange carriers, such as MCI and Southern Pacific Co.⁴⁸

“Exchange area,” as used in the MFJ, was later renamed “Local Access and Transport Area” (“LATA”) to distinguish the concept from the local calling areas, or “local exchanges,” defined by state public utilities commissions.⁴⁹

Most simply, a LATA marks the boundaries beyond which a Bell Operating Company may not carry telephone calls. What the Operating Companies will do in the services field after divestiture is (1) to engage in exchange telecommunications, that is, to transport traffic between telephones located within a LATA, and (2) to provide exchange access within a LATA, that is, to link a subscriber’s telephone to the nearest transmission facility of AT&T or one of AT&T’s long-haul competitors.⁵⁰

Thus, the MFJ resulted in interLATA traffic being subject to a different regulatory regime, and even handled by different carriers, than intraLATA traffic.

The Telecommunications Act of 1996 (“1996 Act”) did not eliminate the structural distinctions between local and interLATA calling,⁵¹ though it did allow Bell Operating Companies to obtain approval to provide interLATA services. The 1996 Act, however, “fundamentally restructured” the local telecommunications market,⁵² and required incumbent and competitive local exchange carriers “to negotiate in good faith the terms of their network

⁴⁸ *Id.* (footnotes omitted).

⁴⁹ *U.S. v. Western Electric Co., Inc.*, 569 F.Supp. 990, 993 fn. 9 (Dist. Ct., D.C. 1983).

⁵⁰ *Id.* at 994 (emphasis omitted).

⁵¹ See 47 U.S.C. § 251(g) (“On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.”)

⁵² *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999) (the Telecommunications Act of 1996 “fundamentally restructures local telephone markets.” (emphasis added)); *Verizon Comm. Inc. v. FCC*, 535 U.S. 467, 475-76 (2002).

sharing, including rates of reciprocal compensation,” such as those at issue here.⁵³ It was within this context of facilitating local competition that D.99-09-029 authorized the use of different rating and routing points, and addressed the appropriate compensation for such calls, within a LATA.

Second, in D.99-09-029 the positions of the parties focused on intraLATA concerns: the loss of *intraLATA* toll revenues, “LATA-wide local calling,” “*intraLATA* toll-free calling,” and the possibility that “more and more carriers will be encouraged to establish local calling areas for incoming calls to their customers that *may be as large as the LATA*.” For its part, Pac-West argued that costs were “the same whether a call is routed over a local 12-mile distance or a longer distance *within a LATA*,” and argued that it “shouldn’t have to compensate more for a call routed over the longer distance....”⁵⁴

Third, the disparate rating and routing at issue was deemed “equivalent to foreign exchange service” offered by Pacific Bell Telephone Company.⁵⁵ At the time Pacific Bell (now d/b/a AT&T California) did not offer any interLATA service, and was precluded from doing so. D.99-09-029 also extensively discussed whether differently rated and routed calls should be rated as “local” or “toll”—and the “toll” at issue was *intraLATA* toll.⁵⁶

Fourth, the Commission did not consider any effects on interLATA calling, but instead concluded that interLATA calling was not implicated by D.99-09-029. The Commission noted

⁵³ *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1146 (9th Cir. 2006).

⁵⁴ *Re Competition for Local Exchange Service*, Decision No. 99-09-029, Interim Opinion, 1999 WL 1127635 (Cal.P.U.C. Sept. 2, 1999), slip op., at 29.

⁵⁵ *See id.* at 41 (CoL 8).

⁵⁶ At a time when Pacific Bell Telephone Company was not authorized to provide interLATA services, the Commission considered the Pacific Bell toll tariff. Moreover, the Commission concluded that “[i]t would not promote the most economically efficient outcome simply to require the CLCs to pay currently existing tariffed switched access rates to the ILEC on the same basis as would be required for a traditional *intraLATA* toll call.” *Re Competition for Local Exchange Service*, Decision No. 99-09-029, *Interim Opinion*, 1999 WL 1127635 (Cal.P.U.C. Sept. 2, 1999).

that existing interconnection agreements “typically limit the distance that a call may be routed within the boundaries of a single LATA. Therefore, any routing of a call with a local rating point beyond the LATA boundaries would generally not be permissible under the agreement.”

Moreover, a number of interconnection agreements already executed between ILECs and CLCs explicitly provide that the rating and routing points for calls need not match, *although they must be in the same LATA as the rate center of the called party's NXX prefix*. AT&T provides examples of such agreements in its reply comments.

Allowing VNXX arrangements to cross LATA boundaries would facilitate the avoidance of interLATA access charges. If that is what the Commission intended, D.09-09-029 would have discussed the implications to interLATA calling, and the possibility of interLATA access avoidance.

The Commission later confirmed that its “VNXX” policy is limited to intraLATA calls in D.03-05-031, which approved the underlying Pac-West ICA.⁵⁷ There, the Commission noted that “VNXX calls would be *intraLATA* calls, not local calls, if tied to the rate center that serves the customer.”⁵⁸ Moreover, the Commission observed that its VNXX policy “promotes local competition and improves the opportunity for CLECs to utilize one point of interconnection to serve each of the rate centers *within the LATA*.”⁵⁹

b) The ICA Precludes InterLATA “VNXX.”

The Commission’s intraLATA limitation was incorporated into the ICA. As O1 concedes, the ICA requires that the “routing point” be located in the same LATA.⁶⁰ In standard “VNXX” terminology, “routing point” refers to the customer’s geographic location (a location

⁵⁷ See O1 Opening Brief at 20.

⁵⁸ Re Pacific Bell Telephone Co., Decision No. 03-05-031, Decision Approving Arbitrated Agreement Pursuant to Section 252, Subsection (e), of the Telecommunications Act of 1996 (Act), 2003 WL 21212003 (Cal.P.U.C. May 8, 2003), slip op., at 8 (quoting D.02-06-076 at 28) (emphasis added).

⁵⁹ *Id.* at 8 (emphasis added).

⁶⁰ O1 Opening Brief at 31.

that does not correspond with the “rating point”). However, O1 now claims that the “routing point” instead is just another term for the “point of interconnection.”⁶¹ O1’s interpretation is incorrect because it is inconsistent with both the ICA and Commission precedent authorizing different “rating and routing points.”

O1’s definition of “routing point” violates a fundamental rule of contractual interpretation. The ICA separately defines both the term “routing point” and the term “point of interconnection.”⁶² To interpret the terms to be synonymous renders one of them surplusage—an interpretation to be avoided.⁶³ Indeed, O1 witness Mitchell acknowledged the correct meaning of “point of interconnection” when he testified that O1 has a “point of interconnection,” not a “routing point,” in every LATA.

We have a POI at every tandem in the LATA. Whereas when AT&T makes a call to the O1 network, it is delivered locally, either to the end office or the tandem that serves the AT&T customer. It then hits O1’s network from that tandem, and then O1 hauls that call to where it hands traffic off to its customer. POI is point of interconnection.⁶⁴

The claim in O1’s opening brief that “routing point” is the same as “point of interconnection” is also contrary to the Commission decision that initially authorized different “rating and routing points.” In D.99-09-029, the Commission “address[ed] the policy relating to the use of central office (NXX) codes to provide locally-rated calling to *customers which physically reside beyond the local calling area* of the designated NXX code.”⁶⁵ Thus, it was the customers’ location which fell outside the designated NXX code, and D.99-09-029 considered

⁶¹ *Id.* at 31-33.

⁶² General Terms and Conditions §§ 1.40, 1.42.

⁶³ *National City Police Officers' Ass'n v. City of National City*, 87 Cal.App.4th 1274, 1279 (2001) (“An interpretation which renders part of the instrument to be surplusage should be avoided.”); *see also* Civ. Code § 1641 (“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”)

⁶⁴ 3 Tr. 331:4-11 (Mitchell for O1).

⁶⁵ D.99-09-029, slip op., at 2 (emphasis added).

the scenario where *the customer location* (not the point of interconnection) did not match the NXX code “rating point.” The Commission referred to this practice as the “use of different rating and routing points.”⁶⁶ The “rating point” was the rate for the call based on the NXX of the called number. The “routing point” that was “different” than the NXX was the location of the customer. Thus, in Commission-established “VNXX” parlance, “routing point” refers to the customer location. As O1 admits, this rating and routing point terminology was incorporated into the ICA in Section 3.7 of the Appendix Reciprocal Compensation.⁶⁷

2. O1 Incorrectly Included Transit and EAS Calls In Its “VNXX” Data

In its opening brief, O1 does not seriously dispute that transit calls should have been excluded,⁶⁸ or that calls rated as local based on extended area service (“EAS”) designations are not “VNXX,”⁶⁹ as Mr. Cole testified.⁷⁰ While O1 claims that certain of the calls identified by Mr. Cole did not fall within EAS areas, it has not offered a specific adjustment to correct this defect. Consequently, these discrepancies continue to confirm the inaccuracy of O1’s analysis.

C. If The ICA Does Not Govern ISP-Bound VNXX Traffic, AT&T Should Collect Originating Access Charges For Such Traffic.

If ISP-bound VNXX traffic is not subject to the \$0.0007 rate set forth in the ICA, such traffic should be compensated as interstate, interexchange traffic subject to originating access charges.⁷¹ Although O1 claims the proper compensation for ISP-bound VNXX traffic is “beyond dispute,” the Commission does not agree. In response to a recent Blue Casa petition seeking an FCC ruling that “originating interstate switched access charges, not reciprocal compensation

⁶⁶ *See id.* at 38 (FoF 8).

⁶⁷ Exh. 38-C, Sprague Reply Testimony, at 9-11.

⁶⁸ O1 Opening Brief at 35.

⁶⁹ O1 Opening Brief at 35.

⁷⁰ Exh. 4-C, Cole Reply Testimony, at 8-10.

⁷¹ As discussed above, ISP-bound traffic expressly cannot be subject to the reciprocal compensation rates set forth in Section 6.1 of the Appendix Reciprocal Compensation. *See* Appendix Reciprocal Compensation § 6.1.2.

charges, apply to calls bound for Internet service providers (“ISPs”) that are delivered via ‘virtual NXX’ (VNXX)-type foreign exchange arrangements,” the Commission took no position in that docket on the “narrow legal position presented.”⁷² The Commission had this to say, though, about certain claims made in that proceeding:

The CPUC does not completely agree with Pac-West’s characterization that these [CPUC] Decisions “repeatedly upheld the enforceability of [Pac-West’s local] tariff to ISP-Bound VNXX traffic.” [Citation omitted.] Except for the Telscape case cited above, a more accurate statement is that the CPUC, in adjudicating disputes between Pac-West *and other CLECs* relating to ISP-bound traffic *where there was no interconnection agreement in place*, has looked to or “applied” Pac-West’s intrastate tariff as a possible benchmark for determining reasonable compensation. Some of that traffic has been alleged to be VNXX. *See, e.g.*, D.08-12-002, attached to O1 comments, Slip Op. at 15.⁷³

As the Commission itself noted, each of the Commission Decisions cited by Pac-West resolved disputes between Pac-West *and another CLEC*. Those decisions were based in part on the Commission’s determination that the *2001 ISP Remand Order* does not apply to CLEC to CLEC traffic.

The *2001 ISP Remand Order* plainly *does* apply to traffic exchanged between an ILEC, such as AT&T California, and a CLEC, such as O1. In that order the FCC explained,

The Commission has held, and the Eighth Circuit has recently concurred, that traffic bound for information service providers (including Internet access traffic) often has an interstate component. Indeed, that court observed that, although some traffic destined for information service providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be reliably separated. Thus, *ISP traffic is properly classified as interstate*, and it falls under the Commission’s section 201 jurisdiction.⁷⁴

⁷² Before the Federal Communications Commission, *In the Matter of Petition for Declaratory Ruling That, Pursuant to the Carve-Out Provisions of 47 U.S.C. § 251 (g), Interstate Originating Switched Access Charges, Not Reciprocal Compensation Charges, Apply to ISP-Bound Calls That Are Terminated via VNXX-type Foreign Exchange Arrangements*, WC Docket No. 09-8, CPUC Reply Comments, at 1-2 (Apr. 3, 2009).

⁷³ *Id.* at 4, fn. 8.

⁷⁴ *2001 ISP Remand Order*, ¶ 52 (emphasis added).

In November of 2008, the FCC confirmed its prior finding that ISP-bound traffic is “interstate, interexchange traffic.”⁷⁵ Just this week, that determination was upheld by the D.C. Circuit Court of Appeals.⁷⁶

Thus, to the extent the Commission concludes that ISP-bound VNXX traffic is not subject to the \$0.0007 rate set forth in the ICA, such traffic should be classified as “interstate, interexchange traffic.” The FCC has determined that ISP-bound traffic that originates and terminates in the same local calling area is interstate, interexchange traffic. There is no basis for concluding that ISP-bound traffic that leaves the local calling area is any less interstate or interexchange in nature. Accordingly, originating access charges should apply, as AT&T pointed out in its testimony,⁷⁷ and as federal courts have found permissible.⁷⁸

III. DISCUSSION OF AT&T CALIFORNIA’S REBUTTAL OF 3:1 PRESUMPTION

As discussed in more detail below, AT&T California has demonstrated that the 3:1 presumption, as applied to O1, wildly underestimates the amount of ISP-bound traffic sent from AT&T to O1. Moreover, O1’s criticisms of AT&T’s ISP study miss the point: O1 has failed to identify even a single telephone number in AT&T’s study that is not used by an ISP.

⁷⁵ *In the Matter of Provisions in the Telecommunications Act of 1996, Developing a Unified Inter-carrier Compensation Regime, Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92), *Order on Remand and Report and Order and Further Notice of Proposed Rulemaking*, FCC 08-262, 24 FCC Rcd. 6475 (rel. Nov. 5, 2008) (“2008 ISP Remand Order”), ¶ 6. See also *id.* at ¶ 21 (“we re-affirm our findings concerning the interstate nature of ISP-bound traffic, which have not been vacated by any court”).

⁷⁶ *Core Communications, Inc. v. F.C.C.*, ___ F.3d ___, 2010 WL 86672 (D.C. Cir. Jan. 12, 2010). For the convenience of the Commission, a copy of the Court of Appeals ruling is appended hereto as Exhibit A.

⁷⁷ Exh. AT&T-2, McPhee Reply Testimony, at 5.

⁷⁸ See, e.g., *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006); *Global NAPs North Carolina, Inc., et al. v. BellSouth Telecomms., Inc.*, No. 5:04-cv-96-FL (E.D. N.C. Sept. 20, 2007).

A. The “Preponderance of Evidence” Standard of Proof Applies To Both Parties.

While noting that it need only prove its “VNXX” counterclaim by a preponderance of evidence,⁷⁹ O1 argues that AT&T California should be subjected to “a heavier burden than the preponderance of evidence standard.”⁸⁰ O1’s lopsided argument is meritless; the preponderance of evidence standard should apply to both parties.

O1’s primary argument for imposing the higher “clear and convincing” standard on AT&T California is that the 3:1 presumption reflects a “strong” public policy determination.⁸¹ However, in its *2001 ISP Remand Order* the FCC indicated just the opposite: the 3:1 presumption was created as an administrative convenience. Based on its understanding that “some carriers are unable to identify ISP-bound traffic,” the FCC created the 3:1 presumption “to limit disputes and avoid costly efforts to identify [ISP-bound] traffic.”⁸² To rebut the presumption, all the FCC requires is that a carrier “demonstrate to the state commission that traffic it delivers to another carrier is ISP-bound traffic....”⁸³ The ICA similarly indicates that rebuttal can be made “by any means mutually agreed by the Parties, or by any method approved by the applicable regulatory agency, including the Commission.”⁸⁴

Where, as here, no specific standard is “provided by law, the burden of proof requires proof by a preponderance of the evidence.”⁸⁵ As applied to AT&T California’s complaint, proof

⁷⁹ O1 Opening Brief at 24.

⁸⁰ *Id.* at 37.

⁸¹ *Id.* at 38.

⁸² *2001 ISP Remand Order*, ¶ 79.

⁸³ *Id.*

⁸⁴ Appendix Reciprocal Compensation § 6.5.2. O1’s implication that a higher standard of proof is required to protect CLECs (O1 Opening Brief at 39) is inconsistent with the very nature of the rebuttable presumption, which allows *both* CLECs and ILECs to rebut the presumption (*2001 ISP Remand Order*, ¶ 79). Moreover, O1’s claim that “in this proceeding, the presumption applies against AT&T” (O1 Opening Brief at 41) is an admission that the 3:1 presumption is undercounting ISP-bound traffic, not a reason to deter AT&T’s ability to prove ISP-bound traffic.

⁸⁵ *Re Application of San Diego Gas & Electric Company for a Certificate of Public Convenience and*

by “a preponderance of the evidence” means that “the evidence supporting” AT&T’s position that its traffic above the 3:1 ratio is ISP-bound must “outweigh[] the evidence” for continuing to rely on the presumption as the measure of ISP-bound traffic exchanged between the parties.⁸⁶

AT&T has more than met that standard, as explained below.

B. AT&T Is Not Required To Demonstrate That Each ISP-Bound Minute Is Also Interstate Traffic “Connected To The Internet.”

O1’s primary complaint about AT&T’s study is that it does not identify a discrete amount of traffic that is “connected to the Internet.”⁸⁷ However, no such showing is required by the ICA or the *ISP Remand Order*.

1. The ICA Does Not Require Quantification Of The Portion Of ISP-bound Calls That Are “Connected To The Internet.”

Contrary to O1’s claim, the ICA does not require AT&T California to quantify the discrete portion of an ISP-bound call that is “connected to the Internet.”⁸⁸ Nowhere does the parties’ ICA define “ISP-bound” to mean “ISP and Internet-bound,” and O1 does not identify any ICA provision containing such a definition – because there is none.

It is true, as O1 points out, that the Appendix Reciprocal Compensation in places uses the phrase “ISP and Internet-bound” traffic or calls. But, taken in context, it is plain that this phrase means that ISP calls *and* any Internet-bound calls (that are not ISP calls) are subject to the ISP-bound traffic compensation terms of the ICA. This is clear from the very first place ISP-bound traffic is mentioned in the Appendix – in Section 1.6, which states: “The Parties agree that this

Necessity for the Sunrise Powerlink Transmission Project, Decision No. 08-12-058, *Decision Granting a Certificate of Public Convenience and Necessity For the Sunrise Powerlink Transmission Project*, 2008 WL 5426908 (Cal.P.U.C. Dec. 18, 2008), § 4.1. See also *Re Assessing and Revising the Regulation of Telecommunications Utilities*, Decision No. 08-04-057, *Opinion Approving Pacific Bell Telephone Company Advice Letters 28800 and 28982 with Modification*, 2008 WL 1994419, at *17 n.73 (Apr. 24, 2008) (noting that the “standard of proof for complaint case[s] is ‘preponderance of the evidence’”).

⁸⁶ D.08-04-057, *supra*, at *17.

⁸⁷ O1 Opening Brief at 46.

⁸⁸ *Id.* at 45.

Appendix governs the exchange, routing and rating of all intercarrier traffic to Internet Service Providers (ISPs) *and other Internet-bound traffic* between [AT&T California] and O1 in this state.” (Emphasis added.) Thus, under the Appendix, ISP-bound traffic is just one type, a subset, of Internet-bound traffic. In his testimony Mr. McPhee outlined some of the possible “*other* Internet-bound traffic” that this provision references.⁸⁹

While the Appendix thereafter uses the phrase “ISP and Internet-bound” traffic, that plainly is shorthand for the traffic described in Section 1.6 (which is part of Section 1, “Appendix Scope”) – *i.e.*, “intercarrier traffic to Internet Service Providers” *and* “other Internet-bound traffic.” Nowhere does the ICA state that the traffic must be *both* traffic to an ISP and actual Internet-bound traffic.⁹⁰

O1’s argument is also inconsistent with the language of the Appendix Reciprocal Compensation, which defines compensation for telecommunications *calls*. This is reflected throughout section 6.4, which three times (in 6.4, 6.4.1, and 6.4.2) states that the \$0.0007 rate applies to ISP-bound “*calls*,” evidencing the parties’ intent to apply the \$0.0007 rate to the entirety of the ISP-bound telecommunications call. O1’s President and Chief Executive Officer, Mr. Jenkins, conceded at hearing that a call typically is rated at a particular rate per MOU for the entirety of the call.⁹¹

Mr. Jenkins also explained that “a typical connect” to an ISP could switch between “idle time” and “sending and receiving packets” millions of times, and “the actual exchange of data

⁸⁹ Exh. 2, McPhee Reply Testimony, at 13.

⁹⁰ *See also People v. Wright*, 131 Cal.App.2d Supp. 853, 861-62 (1955) (holding that the phrase “steel frame and concrete buildings” means “steel frame buildings and concrete buildings,” not buildings that are both steel frame and concrete, because sometimes “the word ‘and’ may be read as ‘or’ and conversely” (Citations omitted.)).

⁹¹ 2 Tr. 235:24-26.

could be milliseconds long.”⁹² The parties plainly did not intend the \$0.0007 rate “*per minute*”⁹³ to apply to only to the “*milliseconds*” of actual data exchange. Indeed, Mr. Jenkins admitted that he is “not sure that it’s possible,” under O1’s interpretation, for AT&T to identify the time during which the \$0.0007 rate should apply.⁹⁴ The rules of contractual interpretation counsel against this absurd interpretation.⁹⁵ O1’s attempt to save its untenable position by proposing that a factor be used to approximate the amount of time “connected to the Internet” fares no better.⁹⁶ Such an “Internet connection” factor is inconsistent with the ICA, which nowhere contemplates or allows the use of such a factor.

2. The *ISP Remand Order* Does Not Require Quantification Of The Portion Of ISP-bound Calls That Are “Connected To The Internet.”

O1 next argues that the *ISP Remand Order* is “[c]onsistent”⁹⁷ with its claim that AT&T must precisely identify the discrete portion (potentially in milliseconds) of each call that is actually connected to the internet. To the contrary, the *ISP Remand Order* supports AT&T’s approach of measuring in MOUs the time a call is connected to an ISP.

In the *2001 ISP Remand Order*, the FCC made clear that “[i]n this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs).”⁹⁸ Thus, “traffic delivered to” an ISP is ISP-bound traffic under the FCC’s ISP-bound traffic compensation plan, regardless of whether, or to what extent, a particular user spends time “connected” to the Internet. Similarly, the FCC explained

⁹² 2 Tr. 233:11-25.

⁹³ Appendix Reciprocal Compensation § 6.4.2.

⁹⁴ 2 Tr. 234:20-23.

⁹⁵ *Wright v. Coberly-West Co.*, 250 Cal.App.2d 31, 35-36 (1967) (court “should avoid an interpretation which will make the contract unusual, extraordinary, harsh, unjust or inequitable (citations), or which would result in an absurdity (citations)”).

⁹⁶ O1 Opening Brief at 63-64.

⁹⁷ *Id.* at 48.

⁹⁸ *2001 ISP Remand Order* ¶ 1.

that its order “focuses on the regulatory treatment of ISP-bound traffic and the appropriate intercarrier compensation regime for carriers that collaborate to *deliver traffic to ISPs*.”⁹⁹ In other words, the touchstone is whether the traffic is delivered to an ISP by the local exchange carriers, not whether particular milliseconds of a call are “connected” to the Internet.

The FCC did not limit its exercise of authority to only those particular ISP-bound calls that go on to access the Internet, or only that portion of the calls that actually “connect to the Internet.” To the contrary, the FCC concluded that all ISP-bound traffic is jurisdictionally interstate. As the FCC recently explained, “ISP-bound traffic *melds* a traditional circuit-switched local telephone call over the PSTN to packet switched IP-based Internet communication to Web sites.”¹⁰⁰ In asserting jurisdiction, the FCC made clear that “ISP-bound” traffic includes all traffic bound for an ISP, regardless of whether the entirety of every ISP-bound call crosses a state border:

Under section 201, the Commission has long exercised its jurisdictional authority to regulate the interstate access services that LECs provide to connect callers with IXCs or ISPs to originate or terminate calls that travel across state lines. Access services to ISPs for Internet-bound traffic are no exception. The Commission has held, and the Eighth Circuit has recently concurred, that traffic bound for information service providers (including Internet access traffic) often has an interstate component. Indeed, that court observed that, *although some traffic destined for information service providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be reliably separated*. Thus, ISP traffic is properly classified as interstate, and it falls under the Commission’s section 201 jurisdiction.¹⁰¹

The FCC has recently reiterated this very point: “The Commission need not demonstrate that [ISP-bound] traffic is ‘purely interstate’ to have jurisdiction over it. The Commission’s authority

⁹⁹ *Id.* at ¶ 9 (emphasis added).

¹⁰⁰ *2008 ISP Remand Order*, fn. 69 (emphasis added).

¹⁰¹ *2001 ISP Remand Order*, ¶ 52 (emphases added).

to find interstate and intrastate components inseparable is well-established.”¹⁰² O1’s claim that AT&T must separate the interstate and intrastate components of an ISP-bound call completely ignores the FCC’s determination that those components are *inseparable*.

Just this week, the FCC’s position was upheld by the United States Court of Appeals for the District of Columbia Circuit.¹⁰³ The Court of Appeals first noted that, in its *ISP Remand Orders*, the FCC had,

applied its so-called “end-to-end” analysis (as it does in the order under review), under which the classification of a communication as local or interstate turns on whether its origin and destination are in the same state. Because a customer’s venture into the web characteristically reaches servers out of state (and often out of the country), the Commission concluded that under the end-to-end principle *dial-up internet traffic was interstate*. [Citation.] As such traffic was “jurisdictionally mixed,” [citation], however, the Commission chose not to disturb state commissions’ application of interconnection agreements to that traffic “pending adoption of a rule establishing an appropriate interstate compensation mechanism,” [citation].¹⁰⁴

The Court of Appeals then rejected petitioners’ argument that the FCC lacked interstate jurisdiction over ISP-bound calls because the telecommunications terminate locally:

This argument fails because it implicitly assumes inapplicability of the end-to-end analysis, which petitioners have not challenged. And the FCC has consistently applied that analysis to determine whether communications are interstate for purposes of § 201. Petitioners do not dispute that dial-up internet traffic extends from the ISP subscriber to the internet, or that the communications, viewed in that light, are interstate.¹⁰⁵

Finally, application of the ISP-bound rate to the entirety of an ISP-bound call is consistent with the regulatory purpose of the *ISP Remand Order*. As explained in AT&T California’s opening brief, the FCC imposed the \$0.0007 rate cap to address regulatory arbitrage

¹⁰² Brief of the FCC, *Core Comms., Inc. v. FCC*, Nos. 08-1365 *et al.* (D.C. Cir. filed May 1, 2009), at 30-31.

¹⁰³ *Core Communications, Inc. v. F.C.C.*, *supra*.

¹⁰⁴ *Id.*, Slip Op., at 6 (emphasis added).

¹⁰⁵ *Id.* at 10.

resulting from the imbalance in telecommunications traffic to dial-up ISPs.¹⁰⁶ The imbalance, and thus the regulatory arbitrage opportunity, continues regardless of whether the ISP customer is actually searching the Internet, or simply getting a cup of coffee—O1 will continue to bill AT&T for each of those minutes. Thus, if the FCC \$0.0007 cap is to address the arbitrage, it must apply to each of those minutes.¹⁰⁷

3. All ISP Calls Are “Connected To The Internet.”

Finally, even if O1’s tortured interpretation of the ICA and *ISP Remand Order* were correct (though they are not), it would make no difference, because ISP-bound calls are also “connected to the Internet.” O1 argues that a dial-up customer may partake of many services offered by an ISP—such as customer service, billing, antivirus, remote backup storage, and email—without “connecting to the Internet.”¹⁰⁸ O1 is incorrect.

The “Internet” is “collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio”; and “Internet access service” is “a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also includes access to proprietary content, information, and other services as part of a package of services offered to consumers.”¹⁰⁹ The ISP’s own computers, which offer the services O1 describes, are

¹⁰⁶ AT&T Opening Brief at 4-6.

¹⁰⁷ Contrary to O1’s assertion, AT&T California does not contend that an entity becomes an ISP merely by offering a data connection via modem. *See* O1 Opening Brief at 65. As it has explained, AT&T stands ready to remove from its study any telephone numbers used to receive calls that are neither to ISPs nor otherwise Internet-bound. O1 so far has failed to identify a single telephone number in AT&T’s study that might fall into this category.

¹⁰⁸ O1 Opening Brief at 60.

¹⁰⁹ 47 U.S.C. § 151(note).

part of the “myriad of computer and telecommunications facilities, including equipment and operating software” that comprise the Internet, and a customer’s Internet access service includes any “proprietary content, information, and other services” offered by the ISP as part of its Internet service package. Thus, connection to an ISP is connection to the Internet.

C. The Results Of AT&T California’s ISP Study Were Fully Supported By Its Witnesses.

O1 next argues that AT&T California’s ISP study should be rejected because Mr. Layman was not intimately familiar with each and every database and process that contributed information to the ISP study.¹¹⁰ This argument is simply a distraction from the core of AT&T’s study.

As AT&T California has explained, the result of AT&T’s ISP study is a list of telephone numbers used by ISPs. Each MOU to those telephone numbers is counted as an ISP-bound MOU. AT&T has placed the identified telephone numbers and the MOUs to those numbers in the record,¹¹¹ and in discovery AT&T provided O1 with extensive access to the data underlying its ISP study.¹¹² In addition, O1 has independent access to the telephone numbers its customers use,¹¹³ and concedes there are ways it could determine whether those numbers are used by ISPs.¹¹⁴ Obviously, O1 also records the MOUs to each of those telephone numbers.¹¹⁵ Thus, O1 has the ability to point out any telephone numbers that are not used by ISPs and/or any MOUs that should not be attributed to those telephone numbers. O1 further has the incentive, and even the obligation, to investigate whether the ISP numbers AT&T identified are actually used by

¹¹⁰ O1 Opening Brief at 66.

¹¹¹ Exh. 9-C, Opening Testimony of Layman, Attachment LDL-6.

¹¹² See Exh. 45-C, Mitchell Reply Testimony, at 11-14; see also Exh. 49, Weir Reply Testimony.

¹¹³ 3 Tr. 322:28-323:3 (Mr. Mitchell for O1); see also Exh. 43, Mitchell Opening Testimony, at 4 ((detailing certain MOUs received by O1).

¹¹⁴ 3 Tr. 322:18-20; 325:27-326:2 (Mr. Mitchell for O1).

¹¹⁵

ISPs. O1 has billed AT&T California *****BEGIN PROPRIETARY** [REDACTED] **END PROPRIETARY***** reciprocal compensation, and is responsible under the ICA for “the accuracy and quality” of its invoices.¹¹⁶ Certainly, O1 has spared no expense in attacking AT&T’s study.

Given all this, the fact that O1 has failed to identify a single telephone number from AT&T’s study that is not actually used by an ISP is perhaps the most compelling evidence that AT&T’s methodology is reliable.¹¹⁷ O1’s resort to nit-picking Mr. Layman’s database knowledge only reveals that it has been unable to identify any meaningful flaws in AT&T’s study.

D. The Results Of AT&T’s ISP Study Prove The Validity Of The Criteria And Process Used To Identify ISP-Bound Traffic.

Again ignoring the results of AT&T’s ISP study, O1 proceeds to claim that the criteria used by AT&T California are “unsupported” and “discriminatory.”¹¹⁸ They are neither.¹¹⁹

In its opening brief, AT&T explained the basis for the criteria, which are used in conjunction with the P.A.T. testing to identify ISP telephone numbers.¹²⁰ However, the most compelling evidence of the criteria’s accuracy is that in the 100+ pages of its opening brief O1 has failed to identify a single telephone number in AT&T’s study that was not actually used by

¹¹⁶ Appendix Reciprocal Compensation § 4.1.

¹¹⁷ It is O1 – not AT&T – that used the wrong denominator in calculating the ISP-bound traffic percentages. O1 is inappropriately including transit traffic in its denominator. Under the parties’ interconnection agreement transit traffic is excluded from reciprocal compensation and ISP-bound traffic compensation, because it is not traffic from AT&T’s end-users. Appendix Reciprocal Compensation § 8.3. As a result, O1’s inclusion of transit traffic in its own calculations plainly is erroneous, and artificially depresses its recalculated percentages.

¹¹⁸ See, e.g., O1 Opening Brief at 72.

¹¹⁹ Separately, O1 identifies certain inconsistencies in some of the data reported with AT&T’s ISP study. See O1 Opening Brief at 85-88. AT&T has corrected these inconsistencies, and will continue to correct any legitimate issues identified by O1. Correction of these inconsistencies does not materially affect the results of AT&T’s ISP study. Contrary to its claim (O1 Opening Brief at 87-88), AT&T has not underpaid O1.

¹²⁰ AT&T Opening Brief at 11-15.

an ISP. In other words, AT&T's criteria, and the P.A.T. testing, have very accurately identified the ISP-bound telephone numbers.¹²¹

O1's obsession with statistical sampling and various alternative criteria¹²² misses the point, which is to identify the telephone numbers used by ISPs. If AT&T's ISP study has done that, it works. O1 has not introduced a shred of evidence indicating that any of the telephone numbers identified by AT&T's ISP study are not, in fact, used by an ISP.¹²³ One of O1's hired witnesses admitted he was not even asked to determine whether any of the telephone numbers were used by ISPs.¹²⁴

O1's criticisms of AT&T's study are entirely hypothetical, if not misleading. AT&T did not, as O1 claims, "cherry pick" a single hour per month for sampling.¹²⁵ As Mr. Layman explained, AT&T reviewed every hour in the month for calling patterns that met the 5/20/1 criteria.¹²⁶ Hypothetically, O1 claims that the identified telephone numbers could be used by VPN, fax service, or data service providers.¹²⁷ But its witnesses conceded it either did not have such customers, or did not offer such products.¹²⁸

¹²¹ If anything, AT&T's ISP study has likely under-identified those telephone numbers. Exh. 10-C, Layman Reply Testimony, at 5.

¹²² See O1 Opening Brief at 77-78.

¹²³ Although he heartily criticizes AT&T's ISP study, Mr. Mitchell concedes that he did not attempt to determine whether any of the telephone numbers he claims failed certain criteria were, in fact, used by ISPs (3 Tr. 320:17-321:25; 328:4-7), and concedes that some demonstrably were (3 Tr. 326:28-327:12). Similarly, Mr. Weir admits that his analysis of AT&T's ISP study was not intended to identify non-ISP numbers (3 Tr. 348:23-25), and that some of the telephone numbers he identified as failing certain tests may, in fact, be ISP telephone numbers (3 Tr. 350:1-10).

¹²⁴ 3 Tr. 346:2-5 (Weir).

¹²⁵ O1 Opening Brief at 74.

¹²⁶ Exh. 9-C, Opening Testimony of Layman, at 11.

¹²⁷ O1 Opening Brief at 75-76.

¹²⁸ 2 Tr. 227:11-12 (Mr. Jenkins for O1; TiVo is not an O1 customer); 2 Tr. 260:13-14 (Mr. Jenkins for O1; LEXIS is not an O1 customer); 3 Tr. 346:11-15 (Mr. Weir for O1; O1 does not have a VPN product "per se").

O1's complaint that identified telephone numbers may not meet the criteria in each subsequent month¹²⁹ is similarly meaningless. If the telephone number is used by an ISP, the MOUs to the number remain ISP-bound even if the usage drops in subsequent months. Not all ISPs experience consistently heavy usage to each and every one of their dial-up numbers in each and every month, particularly when dial-up Internet service is on the decline. While not every ISP number may meet the 5/20/1 criteria in every single hour, day, or month, it is unlikely that other types of numbers would meet these criteria *even once*. For example, a typical end-user using standard telephone equipment is unlikely to *ever* receive 5 calls of 20 minutes or more, of at least 100 minutes, in a single hour.

It should not be surprising that an ISP number does not satisfy the 5/20/1 criteria in every consecutive month or on a more regular basis. O1 itself has emphasized that dial-up Internet service has been on the decline, so one would expect some ISP numbers to experience declining usage, to the point that they may not satisfy the criteria in every month. Moreover, as Mr. Layman testified,¹³⁰ it is unlikely that O1 would quickly re-assign a high-volume ISP number to other end-users, because those end-users would continually receive calls that were just modem tones from end-users dialing the prior ISP number. As a result, any traffic that continued to be delivered to the same number over the five month period would likely continue to be ISP-bound traffic, even if the volumes were lower and no longer satisfied the criteria.

In fact, as Mr. Layman testified,¹³¹ AT&T's approach is, if anything, conservative. In the months after the initial identification of ISP numbers, AT&T does not add any new numbers, so it would miss any new ISP telephone numbers added in that period. And because ISP numbers

¹²⁹ O1 Opening Brief at 76, 81-83.

¹³⁰ Exh. 9-C, Layman Opening Testimony, at 13.

¹³¹ *Id.*

are generally high volume numbers, this could have a large impact. On the other hand, even if an ISP number were reassigned to a different end user, it would likely have much lower usage, and any incorrectly identified usage would pale in comparison to the ISP usage missed by the study.¹³² Finally, as O1's analysis demonstrates, AT&T's criteria will not identify ISP numbers if those numbers happen to have low volumes during the study month.

E. AT&T's Criteria Are Not Discriminatory

O1 next compares AT&T's ISP criteria to 1) criteria contained in an interconnection agreement between AT&T California and Verizon-affiliated CLECs, and 2) criteria applied by the Kansas Corporation Commission in a proceeding involving Southwestern Bell Telephone Company.¹³³ O1's argument boils down to an assertion that because different criteria were used in a different ICA (Verizon's) and a different Commission proceeding (the Kansas Commission's), the ISP criteria used by AT&T in this case must discriminate against O1. O1's claim of discrimination is entirely without merit.

As a preliminary matter, O1's own ICA with AT&T recognizes that there may be various methods of determining the volume of ISP-bound traffic, and that the parties may either agree to a method or use "any method approved by" the Commission.¹³⁴ AT&T is not required to show that its method will produce results as favorable to O1 as other potential methods. Instead, it simply must show, by a preponderance of the evidence, that the traffic it delivers to O1 is ISP-bound even though it does not exceed the 3:1 ratio.¹³⁵ In addition, as explained below in detail, there is absolutely nothing in the record suggesting that use of Verizon's or the Kansas

¹³² *Id.*

¹³³ O1 Opening Brief at 78-81.

¹³⁴ Appendix Reciprocal Compensation, § 6.9.2 (emphasis added).

¹³⁵ See D.08-04-057, *supra*, 2008 WL 1994419, at *17 (citing Pub. Util. Code § 1702 for the proposition that the burden of proof in a complaint case is proof by a "preponderance of the evidence").

Commission's methodologies would have produced results that are more accurate or more favorable to O1 than those obtained by applying AT&T's ISP criteria.

1. The Verizon Interconnection Agreement

AT&T's ISP criteria identified those telephone numbers that, during the test period, received five or more calls, each lasting a minimum of twenty minutes, within a single 60-minute time period.¹³⁶ The criteria that AT&T and Verizon agreed to, by contrast, classify as ISP-bound traffic calls to telephone numbers that receive 200 or more calls per month with an average hold time of 20 or more minutes.¹³⁷ O1 asserts that "[i]t is clear that these two sets of criteria differ materially."¹³⁸

Even if the Verizon criteria would produce different results, there is nothing discriminatory about that. The Telecommunications Act of 1996 permits carriers to negotiate and enter into different interconnection agreement provisions, and thus expressly permits different interconnection agreement terms. Here, while O1 has been billing AT&T far in excess of the parties' actual traffic patterns, the Verizon companies voluntarily agreed to a different compensation mechanism and agreed to calling criteria to identify ISP-bound traffic. O1, on the other hand, agreed that AT&T could rebut the 3:1 presumption using "any method" approved by the Commission. There is nothing discriminatory about holding O1 to its agreement, even if O1 now believes that a different interconnection agreement would be more favorable to it.

2. The Kansas Commission's Criteria

O1 next compares this case to a 2001 Kansas Commission decision approving Southwestern Bell's use of an automated dialing procedure to identify ISP-bound traffic. The

¹³⁶ Exh. 9-C, Layman Opening Testimony, at 11.

¹³⁷ See O1 Opening Brief at 79-80.

¹³⁸ *Id.* at 79.

Kansas Commission accepted Southwestern Bell's proposal to use criteria that are entirely different than AT&T California's: 900 calls *per month* with an average duration of 15 minutes or more, versus AT&T California's 5 calls *per hour* with an average duration of 20 minutes or more. The Kansas Commission did not even consider – and it certainly did not reject – the criteria that AT&T used in its traffic studies in this case. But O1 nevertheless asserts that the Kansas order means that AT&T's criteria are “discriminatory.”

The Kansas Commission's criteria do not make the criteria AT&T used here “discriminatory.” Under the *2001 ISP Remand Order*, each state commission is free to approve its own method for rebutting the 3:1 presumption, and O1's suggestion that every state commission must now adopt the Kansas Commission's approach to avoid “discrimination” is baseless. The Kansas order does not bind this Commission, and does not apply to AT&T California, O1, or any other carriers in California.

* * * * *

Finally, it is important to recognize that other CLECs have agreed to the same exact ISP criteria that AT&T uses in this proceeding, and the relevant state commissions have not objected to use of those criteria. For instance, Pac-West agreed to the use of these same criteria in an ICA Amendment recently deemed approved by this Commission.¹³⁹ Additionally, the interconnection agreement between Michigan Bell Telephone Company and TDS Metrocom, and the interconnection agreement between Wisconsin Bell, Inc. and TDS Metrocom, both provide: “In order to determine presumed ISP-Bound Traffic Terminating Telephone Numbers, all terminating telephone numbers will be screened to identify all terminating telephone numbers that receive a minimum of five (5) calls within any sixty (60) minute period with a duration of

¹³⁹ See AT&T California Advice Letter No. 35983, submitted Sept. 4, 2009.

twenty (20) minutes or longer.”¹⁴⁰ These agreements demonstrate that O1 is not being singled out or discriminated against in relation to other carriers.

More importantly, these agreements, as well as the Kansas Commission decision discussed above, demonstrate that other CLECs and other commissions have recognized that the billing verification process used by AT&T (using certain criteria to identify ISP-bound traffic and then performing test calls to verify those results) *is*, in fact, a valid means of identifying ISP-bound traffic. This belies O1’s attempts to discredit AT&T’s study and demonstrates that AT&T has met its burden of proof in this proceeding.

F. AT&T California Provided Compelling Verification Of The Results Of Its ISP Study.

Contrary to O1’s assertions,¹⁴¹ the verification process performed by AT&T confirms the results of its study. In response to O1’s suggestion that AT&T’s studies did not accurately identify ISP telephone numbers, AT&T undertook further work to verify the top 100 ISP telephone numbers, which accounted for about *****BEGIN PROPRIETARY [REDACTED] END PROPRIETARY***** of the ISP-bound traffic identified by AT&T for August 2009. In particular, AT&T manually dialed these numbers to confirm that a modem tone was received (it was); attempted to send faxes to these numbers (which faxes failed);¹⁴² and conducted Internet searches to see if these numbers were publicly identified as dial-up Internet access numbers (they were in 84 of 100 cases).¹⁴³ AT&T performed a similar verification using 100 randomly selected telephone numbers, with similar results. A modem tone answered and the fax attempt failed for

¹⁴⁰ See, e.g., Amendment to Interconnection Agreement between Michigan Bell Telephone Co. and TDS Metrocom, LLC, § 2.3.2.1, dated Nov. 2, 2006 (*see* fn. 3, *supra*); Wisconsin Bell, Inc. and TDS Metrocom, § 2.3.2.1, dated October 31, 2006 (*id.*).

¹⁴¹ O1 Opening Brief at 84-88.

¹⁴² At hearing, O1 witness Mr. Weir testified that faxes to electronic fax services would go through (3 Tr. 346:21-347:3), thus this test also confirms that the numbers were not used by electronic fax services.

¹⁴³ See Exh. 10-C, Layman Reply Testimony, at 8-9.

all 100; 59 of the 100 were positively identified on ISP provider websites.¹⁴⁴ The fact that some telephone numbers were not positively identified on websites does not mean that they are not ISP numbers. ISP providers may list their access numbers on websites that are accessible only by subscribers with passwords, and AT&T's search may have missed some public numbers.

AT&T's manual testing conclusively proves that *at least* *****BEGIN PROPRIETARY** [REDACTED] **END PROPRIETARY***** of the traffic in question is ISP-bound, and demonstrates, beyond any doubt, that O1's current 3:1 billing of *****BEGIN PROPRIETARY** [REDACTED] **END PROPRIETARY***** ISP-bound is grossly inaccurate. In addition, AT&T's manual testing shows how straightforward it would be for O1 to actually test the results of AT&T's study for inaccuracies, by examining the telephone numbers AT&T identified as ISP numbers. O1's decision not to present any such analysis speaks volumes.

G. The Automatic Dialing-Announcing Device Statute Has No Application To This Case.

According to O1, the Commission should not even consider the results of AT&T's carefully performed and verified traffic studies, because AT&T allegedly did not comply with California's "automatic dialing-announcing device" statute.¹⁴⁵ A similar argument was made by O1's counsel on behalf of Pac-West in a motion to strike it filed on May 13, 2009 in C.08-09-017, just three business days before the evidentiary hearings in that case began. The ALJ heard both parties' arguments on the first morning of the evidentiary hearing, *denied* Pac-West's motion to strike, and determined that AT&T was allowed to introduce the results of its P.A.T. tests into the record.

¹⁴⁴ *See id.* at 10.

¹⁴⁵ Pub. Util. Code §§ 2871-2876.

Like Pac-West, O1's reliance on the automatic dialing-announcing device statute is a diversionary tactic to distract the Commission from the undisputed fact that the 3:1 rebuttable presumption does not accurately reflect the amount of ISP-bound traffic AT&T delivers to O1. As discussed in AT&T California's opening brief, application of the 3:1 presumption cannot accurately reflect the percentage of ISP-bound traffic terminated by O1 because the calculation results in *****BEGIN PROPRIETARY [REDACTED] END PROPRIETARY***** ISP-bound traffic, and O1 concedes that *****BEGIN PROPRIETARY [REDACTED] END PROPRIETARY*****.¹⁴⁶ O1 seeks to exclude the results of AT&T's test calls so that it may continue collecting this undeserved windfall.

O1's "auto-dialer" argument is especially disingenuous in light of the fact that use of the P.A.T. system and similar systems has been standard, accepted practice for many years. The P.A.T. system itself has been used for billing verification since 1991, and "is currently standard operating environment in thousands of switches nationwide."¹⁴⁷ As AT&T's witness Mr. Layman testified, this is part of the standard bill verification procedure used by AT&T for all CLECs it exchanges traffic with in California.¹⁴⁸ In its opening brief, O1 acknowledges that the "technology was well-established at the time of the *ISP Remand Order*,"¹⁴⁹ and O1's witness Mr.

¹⁴⁶ See AT&T Opening Brief at 3.

¹⁴⁷ See <<http://www.boardroom.biz/>>. AT&T inadvertently omitted this particular webpage from Layman Reply Testimony Attachment LDL-REP-3, and requests that the Commission take official notice of this information pursuant to Commission Rule of Practice and Procedure 13.9 and Evidence Code §§ 451(f) and 452(g) and (h). Mr. Layman's Reply Testimony attached a portion of this documentation and O1 did not object to its admission. O1's counsel has had this publicly-available documentation in its possession pursuant to C.08-09-017. Official notice of this additional information will facilitate a more complete record regarding the P.A.T. system used by AT&T. (For convenience, the page is Exhibit B hereto.)

¹⁴⁸ See Exh. 9-C, Layman Opening Testimony, at 14-18 (describing AT&T's standard process).

¹⁴⁹ O1 Opening Brief at 64.

Beausoleil testified that he was aware of the “auto-dialer” dispute raised by Pac-West in C.08-09-017.¹⁵⁰

Even Pac-West ultimately agreed to use of AT&T’s ISP study, including the P.A.T. system, to quantify ISP-bound traffic, and an ICA amendment adopting this approach was deemed approved by this Commission last year.¹⁵¹ When that ICA amendment was filed, no one claimed that the amendment, or use of the P.A.T. system, were against the public interest. This Commission also allowed approval of amendments to the interconnection agreements between MCI and AT&T California,¹⁵² and between Astound Broadband, LLC and AT&T California that adopt this dialing method.¹⁵³ The approval of these ICA amendments, which rely on use of the P.A.T. system, also confirms the appropriateness of the system’s use in California. Beyond California, the MCI-AT&T amendment covers twelve additional states.¹⁵⁴ In addition, several other CLECs expressly have agreed that the use of devices such as the P.A.T. system is a valid means of identifying ISP-bound calls, and various commissions have approved those agreements.¹⁵⁵

¹⁵⁰ 3 Tr. 304:2-10.

¹⁵¹ See AT&T California Advice Letter No. 35983, submitted Sept. 4, 2009.

¹⁵² California Advice Letter 31333, dated Nov. 14, 2007, at Ex. C (providing that ISP-bound traffic will be identified in the following manner: “each Party shall further validate that the calls are ISP-bound by dialing the numbers individually to determine if answered by an ISP modem. Calls that do not reach an ISP modem shall be presumed to be Section 251(b)(5) Traffic.”).

¹⁵³ California Advice Letter 32438, dated April 16, 2008, at Ex. C (providing that ISP-bound traffic will be identified in the following manner: “each Party shall further validate that the calls are ISP-bound by dialing the numbers individually to determine if answered by an ISP modem. Calls that do not reach an ISP modem shall be presumed to be Section 251(b)(5) Traffic.”).

¹⁵⁴ California Advice Letter 31333, dated Nov. 14, 2007, at Ex. C (providing that ISP-bound traffic will be identified in the following manner: “each Party shall further validate that the calls are ISP-bound by dialing the numbers individually to determine if answered by an ISP modem. Calls that do not reach an ISP modem shall be presumed to be Section 251(b)(5) Traffic.”).

¹⁵⁵ See, e.g., O1 Opening Brief at 36-38 (discussing the Kansas Corporation Commission’s approval of use of an automated dialing process to identify ISP-bound traffic); Amendment to Interconnection Agreement between Wisconsin Bell, Inc. and US XChange of Wisconsin, LLC, § 5.5 & Ex. dated Jan. 8, 2009 (available at: <<http://psc.wi.gov/apps/via/document/5ti1903/ICA%20filed.pdf>>) (amendment approved by the Public Service Commission of Wisconsin stating that “each Party shall further validate that the calls are ISP-bound by dialing the numbers individually to determine if answered by an ISP modem”); Amendment to Interconnection Agreement

For these reasons and the reasons explained in detail below, O1's arguments should be rejected.

1. The Commission Cannot Exclude The Results Of AT&T's Test Calls Based On An Allegation That Those Calls Did Not Comply With The Automatic Dialing-Announcing Device Statute.

Ignoring the basic principle that the Commission must consider all relevant evidence,¹⁵⁶ O1 argues that the Commission somehow has a duty to ignore AT&T's test calls because, according to O1, they did not meet the requirements of the automatic dialing-announcing device statute. Even if there was a violation of the statute – which there was not, for the reasons explained in detail below – ignoring relevant evidence is not a proper or available remedy.

Instead, the statute sets out the specific, exclusive remedies that are available when the statute is violated. Section 2876 of the Public Utilities Code provides that “[a]ny person” who is found to have violated the dialing-announcing device statute “is subject to either or both of the following penalties: (a) a fine of not to exceed five hundred dollars (\$500) for each violation, levied and enforced by the commission, on complaint or on its own motion, pursuant to Chapter 11 (commencing with Section 2100) of Part 1,” or “(b) Disconnection of telephone service to the automatic dialing-announcing device for a period of time which shall be specified by the commission.” These are the only two remedies that the statute provides and the only two

between Wisconsin Bell, Inc. and TDS Metrocom, dated October 31, 2006 (*supra* at fn. 3) (amendment approved by the Public Service Commission of Wisconsin which provides that ISP-traffic will be identified using the following process: “[A] software program that distinguishes modem tones from other types of answers will dial each of the presumed ISP-Bound Traffic Terminating Telephone Numbers. If a modem tone is received, the terminating telephone number will continue to be considered an ISP-Bound Traffic Terminating Telephone Number and will be placed on a list of numbers (“the List”) for review and verification of the terminating Party pursuant to Section 2.3.2.3. Telephone numbers that are not answered by a modem tone will be excluded from the List.”); Amendment to Interconnection Agreement between Michigan Bell Telephone Co. and TDS Metrocom, LLC, § 2.3.2.2, dated Nov. 2, 2006 (*id.*) (same).

¹⁵⁶ See *City and County of San Francisco v. Public Utilities Comm'n*, 6 Cal.3d 119, 129 (1971); see also *Apte v. Regents of Univ. of California*, 198 Cal.App.3d 1084, 1099 (1st Dist. 1988) (explaining that when an administrative body's decision is made “without reference to relevant information” and “adopted without reference to the data before the” body, the decision can constitute “arbitrary, capricious, or unreasonable action”).

remedies the Commission can impose. Under California law, “[w]here a new right is created by statute” – such as the right not to receive certain “auto-dialed” calls unless specific conditions are met – “the party aggrieved by its violation is confined to the statutory remedy if one is provided.”¹⁵⁷ Put another way, “[w]here a right is given and a remedy provided by statute, . . . the remedy so provided *must* be pursued.”¹⁵⁸ O1’s opening brief fails to recognize this basic principle of law.

2. AT&T Did Not Violate the Automatic Dialing-Announcing Device Statute.

The automatic dialing-announcing device statute was enacted in 1978 “in response to concerns over telemarketing abuses and to public safety concerns due to automatic dialing-announcing devices with automated messages being capable of preventing disconnection by the called party.”¹⁵⁹ In the thirty-one years since the statute went into effect, it has never been interpreted to prohibit a phone company from using a system like AT&T’s P.A.T. system to dial telephone numbers in order to verify another phone company’s billings. But it has been used to prohibit other, far different, activities, like the unsolicited distribution of commercial and political messages.¹⁶⁰ This history simply illustrates what the statute itself makes clear: the automatic dialing-announcing device statute does not apply to test calls made by a telecommunications carrier to verify another carrier’s billings.

¹⁵⁷ *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.*, 65 Cal.App.3d 121, 131 (1st Dist. 1976).

¹⁵⁸ *Monterey County v. Abbott*, 77 Cal. 541, 543 (1888) (emphasis added).

¹⁵⁹ *See Re Rulemaking to Establish an Appropriate Error Rate for Connections Made*, Rulemaking No. 02-02-020, *Order Instituting Rulemaking*, 2002 WL 500877, at *1 (Cal. P.U.C. Feb. 21, 2002).

¹⁶⁰ *See, e.g., Bland v. Fessler*, 88 F.3d 729, 739 (9th Cir. 1996); *Bailey v. Pacific Bell Tel. Co.*, Decision No. 04-10-027, *Opinion Granting Complaint in Part and Denying Complaint in Part*, 2004 WL 2533675 (Cal.P.U.C. Oct. 28, 2004).

a) **The P.A.T. System Is Not An Automatic Dialing-Announcing Device.**

The dialing-announcing device statute defines “automatic dialing-announcing device” as “any automatic equipment which incorporates a storage capability of telephone numbers to be called or a random or sequential number generator capable of producing numbers to be called and the capability, working alone or in conjunction with other equipment, *to disseminate a prerecorded message* to the telephone number called.”¹⁶¹ The definition of “automatic dialing-announcing device” is inapplicable to AT&T’s P.A.T. system, for several reasons.

First, AT&T made its test calls to identify telephone numbers used by ISPs – *not* “to disseminate a prerecorded message.” Instead of an “automatic dialing-announcing device,” the P.A.T. system is a Revenue Assurance System designed “to verify the accuracy of [Call Detail Records].”¹⁶² The promotional materials for the P.A.T. system explain that P.A.T. “is an intelligent call generation system that creates and executes real world calls for the purpose of verifying that all calls are recorded and billed correctly.”¹⁶³ It “is currently standard operating environment in thousands of switches nationwide.”¹⁶⁴

¹⁶¹ Pub. Util. Code § 2871 (emphasis added).

¹⁶² Layman Reply Testimony at 6. *See also* <<http://www.boardroom.biz/>>. AT&T inadvertently omitted this particular webpage from Layman Reply Testimony Attachment LDL-REP-3, and requests that the Commission take official notice of this information pursuant to Commission Rule of Practice and Procedure 13.9 and Evidence Code §§ 451(f) and 452(g) and (h). Mr. Layman’s Reply Testimony attached a portion of this documentation and O1 did not object to its admission. O1’s counsel has had this publicly-available documentation in its possession pursuant to C.08-09-017. Official notice of this additional information will facilitate a more complete record regarding the P.A.T. system used by AT&T. (For convenience, the page is Exhibit B hereto.)

¹⁶³ Exh. 10-C, Layman Reply Testimony, Attachment LDL-REP-3, at ATTO 000006-07.

¹⁶⁴ *See* <<http://www.boardroom.biz/>>. AT&T inadvertently omitted this particular webpage from Layman Reply Testimony Attachment LDL-REP-3, and requests that the Commission take official notice of this information pursuant to Commission Rule of Practice and Procedure 13.9 and Evidence Code §§ 451(f) and 452(g) and (h). Mr. Layman’s Reply Testimony attached a portion of this documentation and O1 did not object to its admission. O1’s counsel has had this publicly-available documentation in its possession pursuant to C.08-09-017. Official notice of this additional information will facilitate a more complete record regarding the P.A.T. system used by AT&T. (For convenience, the page is Exhibit B hereto.)

The P.A.T. system is *not* a system designed to disseminate a pre-recorded message. Instead, AT&T used the P.A.T. system to identify the percentage of ISP-bound traffic AT&T sends O1 and determine whether the 3:1 presumption adequately approximates the amount of such traffic, as applied to O1. AT&T did not randomly or sequentially select O1 customers to call, but instead used the P.A.T. system to call only numbers that met the carefully designed “ISP criteria.” As AT&T’s witness Lynn Layman explained, those criteria identify telephone lines on which “five (5) or more calls of twenty (20) minutes or more duration are made to the same terminating telephone number in an hour (60 minutes).”¹⁶⁵ Only telephone numbers that can receive more than one call at the same time could meet these criteria. These telephone numbers are generally ISPs, “chat” lines, prepaid calling card companies, or other businesses that are specially-equipped to handle large volumes of simultaneous calls. They certainly are not residential numbers, because no residential phone could handle such large volumes of simultaneous calls and O1 admits that it has no residential customers.¹⁶⁶ AT&T plays a 2-3 second message simply as a courtesy in the unlikely event that a live person answers a test call.

Second, AT&T’s P.A.T. system does not call numbers to disseminate a prerecorded message to all numbers dialed, but instead plays such a message *only* when certain conditions trigger the message. In order to verify calls, the P.A.T. system uses “hardware tone detection”¹⁶⁷ to determine the type of telephone number that the system has reached. The P.A.T. system records information about the tone that it receives when the call is connected. In the rare

¹⁶⁵ Exh. 9-C, Layman Opening Testimony, at 11.

¹⁶⁶ 2 Tr. 260:11-12 (Mr. Jenkins for O1). O1’s concern about the “tranquility and privacy of the home” (O1 Opening Brief at 91) is, thus, misplaced.

¹⁶⁷ Exh. 10-C, Layman Reply Testimony, Attachment LDL-REP-3, at ATTO 000006-07.

instance in which the P.A.T. system “detect[s] the presence of speech,”¹⁶⁸ then – and only then – does the P.A.T. system have the capability to play a message.

b) O1’s Overly Expansive Reading Of The Automatic Dialing-Announcing Device Statute Violates Fundamental Principles Of Statutory Construction.

O1’s overly-broad reading of the automatic dialing-announcing device statute to apply to test calls made by the P.A.T. system ignores why the California Legislature enacted the statute and the problems the Legislature was attempting to remedy. As the California courts have repeatedly explained, “[w]here the language of a statute or initiative is unclear and subject to different plausible interpretations,” the Commission “must consider in interpreting the language the object to be achieved and the evil to be prevented by the legislation.”¹⁶⁹ The Commission should “consider the statutory language in the context of the entire statute and the statutory scheme of which it is a part,” “keeping in mind the nature and obvious purpose of the statute.”¹⁷⁰

The purpose of California’s dialing-announcing device statute is to regulate pre-recorded telemarketing calls and other types of solicitations. As this Commission has explained, “[a]utomatic dialing devices are used extensively for telemarketing purposes and also by various commercial and non-commercial organizations to communicate with employees, students, customers or others[.]”¹⁷¹ By passing the dialing-announcing device statute, “the California legislature intended . . . to protect the people of California from ‘intrusive telephone marketing

¹⁶⁸ See <<http://www.boardroom.biz/PAT%20hardware.htm>>. AT&T inadvertently omitted this particular webpage from Layman Reply Testimony Attachment LDL-REP-3, and requests that the Commission take official notice of this information pursuant to Commission Rule of Practice and Procedure 13.9 and Evidence Code §§ 451(f) and 452(g) and (h). Mr. Layman’s Reply Testimony attached a portion of this documentation and O1 did not object to its admission. O1’s counsel has had this publicly-available documentation in its possession pursuant to C.08-09-017. Official notice of this additional information will facilitate a more complete record regarding the P.A.T. system used by AT&T. (For convenience, the page is Exhibit B hereto.)

¹⁶⁹ *Ieremia v. Hilmar Unified School Dist.*, 166 Cal.App.4th 324, 331 n.4 (3d Dist. 2008) (internal quotation marks and citation omitted).

¹⁷⁰ *Molenda v. Department of Motor Vehicles*, 172 Cal.App.4th 974, 992 (6th Dist. 2009).

¹⁷¹ See *Re Rulemaking to Establish an Appropriate Error Rate for Connections Made, Order Instituting Rulemaking 02-02-020*, 2002 WL 500877, at *1 (Cal. P.U.C. Feb. 21, 2002).

schemes” and the “additional evils [of] ‘unfair methods of competition’ and ‘deceptive acts’ in the commercial context.”¹⁷² The statute was also designed to stop telemarketing calls that fill the entire tape of an answering machine (preventing other callers from leaving messages) and calls that do not disconnect the line for a long time after the called party hangs up the phone (preventing the called party from placing his or her own calls).¹⁷³

AT&T’s targeted test calls simply are not the type of calls the Legislature intended the dialing-announcing device statute to regulate. AT&T is not marketing anything to O1’s customers, it is just verifying O1’s billings. AT&T is not involved in any “deceptive acts” or “unfair competition.” Nor is AT&T tying up customer lines by using automatic dialing rather than a live operator. In the unlikely event that an AT&T test call receives a voice response, it plays a short, courtesy message that simply says “This is the telephone company testing,” “Sorry for the inconvenience,” “Thank you,” and then hangs up. AT&T is on the customer’s line for a few seconds at most.¹⁷⁴ Obviously, no one is harmed by these calls, and O1 has presented no evidence that anyone has complained about these calls.

According to O1, AT&T’s decision to play this courtesy message in the rare case that a voice is detected by the P.A.T. system violates the statute because a live operator is not on the line and “the [L]egislature intended and implemented in Sec. 2875.5 a ‘complete prohibition’ on the use of such devices without making a live operator available.”¹⁷⁵ But applying the “live operator” requirement to P.A.T. test calls would be an absurd reading of the statute. That is because if AT&T’s test calls actually were covered by the dialing-announcing device statute –

¹⁷² *Bland*, 88 F.3d at 739; see also, e.g., *Bailey v. Pacific Bell Tel. Co.*, Decision 04-10-027, 2004 WL 2533675 (C.P.U.C. Oct. 28, 2004) (explaining that “[a]s is the case for any telemarketing use, political campaigns should conform to” the dialing-announcing device statute’s requirements (emphasis add)).

¹⁷³ See *Bland*, 88 F.3d at 731.

¹⁷⁴ Exh. 10-C, Layman Reply Testimony, at 6-7.

¹⁷⁵ O1 Op. Br. at 91.

which they are not – then they would be *required* to be exponentially more intrusive than they are now. Applying the statutory requirements to AT&T’s test calls, AT&T would have to (1) state “the nature of its call,” *i.e.* that AT&T is calling to perform a test on the line; (2) give AT&T’s name, address, and telephone number; (3) ask the person on the end of the line whether he or she “consents to hear [AT&T’s] prerecorded message”; (4) play the recording telling the customer “This is the telephone company testing,” “Sorry for the inconvenience,” “Thank you”; and (5) hang up.¹⁷⁶

Making AT&T go through this process, just to let the customer know the telephone company is testing, would be absurd. The purpose of a live operator under the dialing-announcing device statute is to ask for the customer’s permission to play the pre-recorded message. It would make no sense to require AT&T to have a live operator on the line to tell the customer “the nature of the call” – *i.e.*, that the telephone company is conducting a test – simply to get the customer’s permission to play a message saying that the telephone company is conducting a test.

In addition, adopting O1’s view of the statute would simply encourage carriers performing test calls to use calling systems that do not have any capability to play a recorded message, under any circumstances. Even under O1’s erroneous interpretation, such a system would not be an “automatic dialing-announcing device” as defined in the statute, because it would not have the capability to play a prerecorded message. Since carriers like AT&T who use the P.A.T. system to verify their bills are interested only in testing the tones associated with the

¹⁷⁶ Cal. Pub. Util. Code § 2874. O1 claims that AT&T’s message is misleading because it leaves the “impression” that the caller was O1. O1 Op. Br. at 92. This accusation has no basis in the record or in fact. AT&T’s message is simple, straightforward, and never suggests that it is from O1. Moreover, there would be no reason for any customers to complain about the test calls – they take only a few seconds, do not contain solicitations, and are much less intrusive than a live operator would be.

numbers they dial – and have absolutely no interest beyond common courtesy in playing a prerecorded message when the presence of a voice is detected – these carriers would have every incentive to simply eliminate the courtesy message-playing capability.

Given these realities, the Commission should not apply the statute in the way urged by O1. Instead, the Commission should read the statute “in accord with common sense and justice, and to avoid an absurd result,” and reject O1’s argument that the dialing-announcing device statute applies to AT&T’s test calls.¹⁷⁷

c) AT&T Has A Right To Use The P.A.T. System To Verify O1’s Bills, And The Commission Should Approve AT&T’s ISP Study, Including Use Of The P.A.T. System, As A Method Of Rebutting The 3:1 Presumption.

O1 asserts that AT&T was required to receive its consent before making test calls.¹⁷⁸ In fact, however, AT&T did not need to seek out special permission. This is not only because AT&T’s test calls are not governed by the dialing-announcing device statute, but also because AT&T already has permission to verify O1’s bills. Unlike the telemarketers the statute was designed to regulate, AT&T has an existing, contractual relationship with O1, which is memorialized in the parties’ ICA. The ICA allows AT&T to take steps necessary to verify the accuracy of O1’s bills.

First, in Section 30.11.1 of the General Terms and Conditions of the ICA, O1 promises to provide AT&T “with reasonable access to such information as is necessary to determine amounts receivable or payable under this Agreement.”¹⁷⁹ The only way that AT&T can access the information necessary to rebut the 3:1 presumption is to actually call O1 customers that AT&T

¹⁷⁷ *Molenda v. Department of Motor Vehicles*, 172 Cal.App.4th 974, 992 (6th Dist. 2009).

¹⁷⁸ O1 Opening Brief at 94-95.

¹⁷⁹ General Terms & Conditions § 30.11.1.

has reason to believe are ISPs, to verify the presence of a modem. Under the ICA, O1 has a duty to allow AT&T to make its investigation.

Second, AT&T has a specific right under the ICA to gather information necessary to rebut the 3:1 ISP presumption. Section 6.9.2 of the Appendix Reciprocal Compensation provides that “[e]ither party has the right to rebut the 3:1 ISP presumption and determine the actual ISP and Internet-bound traffic by any means mutually agreed by the Parties, or by any method approved by the applicable regulatory agency.” In order to enforce its “right to rebut the 3:1 ISP presumption,” AT&T needs to investigate whether its traffic is, in fact, bound for ISPs. AT&T’s use of the P.A.T. device or similar devices to identify ISP-bound traffic was no secret when O1 agreed to the two contractual provisions set out above. In its opening brief, O1 acknowledges that the “technology was well-established at the time of the *ISP Remand Order*.”¹⁸⁰

The Commission can and should approve AT&T’s ISP study, including use of the P.A.T. system, to verify O1’s bills.¹⁸¹ As explained above, the parties’ ICA expressly recognizes that the Commission can approve a method for rebutting the 3:1 presumption. AT&T’s method, which includes the application of criteria and test calls to verify a modem tone, accurately and appropriately identifies the level of ISP traffic sent by AT&T, as several approved California ICA amendments already recognize.¹⁸²

¹⁸⁰ O1 Opening Brief at 64.

¹⁸¹ Contrary to O1’s prediction, approval of AT&T’s use of the P.A.T. system under the limited and specific circumstances described here is highly unlikely to cause telemarketers to “be elated.” O1 Opening Brief at 96.

¹⁸² See discussion at 35-36, *supra*.

H. AT&T California Is Entitled To True-Up To The Date Of The Complaint

As explained in its opening brief, AT&T has continued to pay O1 pursuant to the 3:1 presumption during the pendency of this proceeding, as required by the *2001 ISP Remand Order*.

The *2001 ISP Remand Order* provides that,

During the pendency of any such [rebuttal] proceedings, LECs remain obligated to pay the presumptive rates (reciprocal compensation rates for traffic below a 3:1 ratio, the rates set forth in this Order for traffic above the ratio), *subject to true-up upon the conclusion of state commission proceedings*.¹⁸³

This provision establishes a balanced obligation: the presumptive rates must be paid pending resolution, but they are subject to true-up.

O1 has insisted that this provision has required AT&T to continue to pay pursuant to the 3:1 presumption during the pendency of this proceeding.¹⁸⁴ For example, in an October 8, 2008 email, O1 expressed concern that AT&T might withhold a payment,

You might remember that paragraph 79 of the ISP Remand Order stipulates that during the pendency of proceedings, LECs remain obligated to pay the presumptive rates, subject to true-up upon the conclusion of state commission proceedings. [¶] We expect AT&T to pay these amounts without delay, as required by the current law.¹⁸⁵

Believing this provision to be applicable, AT&T has made *****BEGIN PROPRIETARY**

*****END PROPRIETARY** payments to O1 during the pendency of this rebuttal proceeding.¹⁸⁶

However, now that it has reaped the benefits of this provision and may have to live up to the provision's true-up obligation, O1 claims in its opening brief that the provision does not apply.¹⁸⁷ O1 should be estopped from making this assertion:

¹⁸³ *2001 ISP Remand Order*, ¶ 79 (emphasis added).

¹⁸⁴ Exh. 9-C, Layman Opening Testimony at 34, Attachment LDL-9 at ATTO000178-79; *see also* Exh. 32, Jenkins Opening Testimony, at 9-10; Exh. 40, Beausoleil Opening Testimony at 4-5; 2 Tr. 245:14-21 (Mr. Jenkins for O1).

¹⁸⁵ Exh. 9-C, Layman Opening Testimony, Attachment LDL-9, at ATTO 000178-79.

¹⁸⁶ Exh. 9-C, Layman Opening Testimony, at 5-7.

While the statutory formulation might suggest that equitable estoppel is limited to situations amounting to fraud (intentionally and deliberately misleading another), estoppel “has not been so narrowly applied.” (*City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 487-488, 81 Cal.Rptr.3d 72 (City of Hollister); accord **349 *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384, 2 Cal.Rptr.3d 655, 73 P.3d 517 [estoppel may arise without fraud].) Equitable estoppel has been applied in a broader context, *where the party to be estopped has engaged in inequitable conduct, induced another party to suffer a disadvantage, and then sought to exploit the disadvantage.* (*City of Hollister, supra*, at p. 488, 81 Cal.Rptr.3d 72.) “Broadly speaking, ‘estoppel’ refers less to a doctrine than to a conceptual pattern, first articulated in the courts of equity, which has come to pervade our law. When it is successfully invoked, the court in effect closes its ears to a point-a fact, argument, claim, or defense-on the ground that to permit its assertion would be intolerably unfair. *It is commonly said that the party to be estopped, having conducted himself in manner X, will ‘not be heard’ to assert Y.*” (*Id.* at p. 486, 81 Cal.Rptr.3d 72, fn. omitted.)¹⁸⁸

Here, O1 has secured *****BEGIN PROPRIETARY** [REDACTED] *****END**

PROPRIETARY payments from AT&T California based on its assertion that the above provision of paragraph 79 applies. O1 should not be heard now to claim the opposite.

I. Evidence of O1’s Misrouting of InterLATA Traffic Onto Local Trunk Groups Is Relevant to the Issues In Dispute.

Finally, O1 requests that the Commission not rule on the proper calculation of the 1 in the 3:1 ratio.¹⁸⁹ O1 wants the Commission to ignore this issue for obvious reasons: it shows that O1 has been drastically ramping up the volumes of interLATA traffic it terminates on the local trunk groups, in violation of the parties’ ICA.¹⁹⁰ Perhaps more importantly, a ruling in the Pac-West proceeding (C.08-09-017) based on substantively identical ICA provisions, concluded that this practice likely was a violation of the ICA.¹⁹¹

Background information about how O1 has drastically increased the volume of interLATA traffic it routes over the local trunk groups – in turn artificially pumping up the

¹⁸⁷ O1 Opening Brief at 98-100.

¹⁸⁸ *Hoopes v. Dolan*, 168 Cal.App.4th 146, 162 (2008) (emphasis added).

¹⁸⁹ O1 Opening Brief at 100-104.

¹⁹⁰ See AT&T Opening Brief at 16-17.

¹⁹¹ See C.08-09-017, ALJ Ruling Denying Emergency Motion, at 2-3 (May 6, 2009).

volume of traffic included in the “1” base in the 3:1 ratio – helps the Commission understand why the 3:1 ratio has become a grossly inaccurate proxy for O1’s ISP-bound traffic volumes. This evidence also demonstrates to the Commission just how important it is that AT&T be allowed to use some other method of calculating ISP-bound compensation. As of the October 2009 invoice, AT&T had overpaid O1 a total of *****BEGIN PROPRIETARY [REDACTED] END PROPRIETARY*****, including interest.¹⁹² This number increases each month.

AT&T California is not limited to introducing only that evidence that *directly* supports its position on the ultimate legal issue. If that were true, then the parties’ witnesses would not be allowed to provide information about their educational backgrounds and work experience, because such information is only peripherally related to the ultimate issues before the Commission. Clearly, that is not what the Commission’s rules require, and O1 does not have the right to have evidence that it does not like ignored by the Commission.

IV. CONCLUSION

For the reasons explained above, AT&T California requests that the Commission (a) conclude that AT&T California has rebutted the 3:1 presumption, (b) direct O1 on a going-forward basis to bill AT&T California in a manner consistent with AT&T’s ISP-bound traffic studies, to be updated regularly, and (c) order O1 to refund amounts it overbilled AT&T California since the filing of this complaint by billing ISP-bound traffic at the local reciprocal compensation rate rather than the rate (~ \$0.0034) for ISP-bound traffic (~ \$0.0007), including interest. AT&T also requests that O1’s VNXX claims be denied.

¹⁹² Exh. 10-C, Layman Reply Testimony, at 19.

DATED: January 15, 2010

Respectfully submitted,

/s/

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Exhibit A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 16, 2009

Decided January 12, 2010

No. 08-1365

CORE COMMUNICATIONS, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA,
RESPONDENTS

EARTHLINK, INC., ET AL.,
INTERVENORS

Consolidated with 08-1393, 09-1044, 09-1046

On Petitions for Review of Orders
of the Federal Communications Commission

Michael B. Hazzard argued the cause for petitioner Core Communications, Inc. and supporting intervenors. With him on the briefs were *Joseph P. Bowser*, *Adam D. Bowser*, *Joshua M. Bobeck*, and *Ross A. Buntrock*.

Jonathan D. Feinberg argued the cause for petitioners People of the State of New York and Public Service Commission of the State of New York, intervenors Pennsylvania Public Utilities Commission and the National Association of State Utility Consumer Advocates, and *amicus curiae* Arizona Corporation Commission. On the briefs were *John C. Graham, James Bradford Ramsay, Robin K. Lunt, David Cleveland Bergmann, Joseph Kevin Witmer, and Maureen A. Scott.*

Joshua M. Bobeck, Ross A. Buntrock, and Michael B. Hazzard were on the brief for intervenors in support of petitioners. *Adam D. Bowser* and *Joseph P. Bowser* entered appearances.

Joseph R. Palmore, Deputy General Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *Richard K. Welch*, Deputy Associate General Counsel, and *Laurence N. Bourne*, Counsel. *Nancy C. Garrison* and *Catherine G. O'Sullivan*, Attorneys, U.S. Department of Justice, and *Daniel M. Armstrong III*, Associate General Counsel, Federal Communications Commission, entered appearances.

Scott H. Angstreich argued the cause for intervenors in support of respondents. With him on the brief were *Michael K. Kellogg, Kelly P. Dunbar, Michael E. Glover, Karen Zacharia, Christopher M. Miller, Gary L. Phillips, John T. Nakahata, Carl W. Northrop, Stephen B. Kinnaird, Timothy J. Simeone, Joseph C. Cavender, and John E. Benedict.* *Robert B. McKenna Jr.* entered an appearance.

Before: SENTELLE, *Chief Judge*, WILLIAMS AND RANDOLPH, *Senior Circuit Judges.*

Opinion for the Court filed by *Senior Circuit Judge*
WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: When a customer accesses the internet via “dial-up,” his or her call goes to a local exchange carrier (“LEC”), which commonly hands the call off to another LEC, which in turn connects the customer to an internet service provider (“ISP”).¹ The ISP links the customer to the web. At least as early as 1999 the Federal Communications Commission was concerned that the regulatory procedures under which the sending LEC compensated the recipient LEC were leading to the imposition of excessive rates, and that these rates in turn were distorting the markets for internet and telephone services. The Commission in due course responded with an alternative regulatory regime, principally taking the form of rate caps set well below the rates that had prevailed before.

In the order under review here, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic* (CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92), FCC 08-262, __ FCC Rcd __ (Nov. 5, 2008) (the “*Order*”), the Commission has set forth the basis of its authority to institute the rate cap system, namely, 47 U.S.C. § 201. That section (excerpted in an appendix to this opinion) requires that the charges of “every common carrier engaged in interstate or foreign

¹ Data in the record suggest that dial-up, though being rapidly replaced by various forms of higher-speed service, still accounts for a non-trivial share of internet access: about 20.4% in 2007, 10.5% in 2009, and (a prediction, obviously) 4.6% in 2014. Joint Appendix 102.

communication by wire” for “such communication service” be “just and reasonable,” and authorizes the Commission to “prescribe such rules and regulations as may be necessary . . . to carry out the provisions of this chapter.” *Id.* Petitioners assail the Commission’s analysis on a variety of grounds, most powerfully on the theory that §§ 251-252 of Title 47, added by the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, 47 U.S.C. §§ 151-714 (the “1996 Act”), withdraw from the Commission whatever support § 201 might have afforded its rate cap decision. Finding no legal error in the Commission’s analysis, we affirm its order.

* * *

Before the FCC imposed a rate cap system, rates for the transfer of calls from an originating LEC to the ISP’s LEC were governed, in practice, by the “reciprocal compensation” provisions of the 1996 Act. That act, in the interest of opening the telephone market to competition, had imposed a number of obligations on all local exchange carriers, including a duty to “establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5). Reciprocal compensation arrangements require that when a customer of one carrier makes a local call to a customer of another carrier (which uses its facilities to connect, or “terminate,” that call), the originating carrier must compensate the terminating carrier for the use of its facilities. See *In re Core Communications, Inc.*, 455 F.3d 267, 270 (D.C. Cir. 2006) (“*Core 2006*”). Subsection 251(c) imposes extra duties on “incumbent local exchange carriers” (“ILECs”). (ILECs are a subset of LECs, comprising mainly the Bell Operating Companies that succeeded to the local operations of AT&T on the occasion of the latter’s dissolution as a result of an antitrust settlement. See *United States v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982). “Competitive local

exchange carriers” (“CLECs”) constitute the remainder of the LEC universe.) Among the § 251(c) obligations is a “duty to negotiate in good faith in accordance with [§ 252] the particular terms and conditions of agreements to fulfill the duties described in” § 251(b), including the reciprocal compensation obligations, and to provide interconnection with its own “network” for requesting telecommunications carriers. 47 U.S.C. § 251(c). Section 252 allows ILECs to satisfy their § 251 obligations by privately negotiating terms with CLECs, but also grants parties the right to refer the negotiations to state commissions for mediation or arbitration.

The *Order* arises out of the Commission’s concern with the results of applying the reciprocal compensation system to ISP-bound traffic, a concern perhaps most clearly expressed in an order responding to our initial remand of the matter:

Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime It was not long before some LECs saw the opportunity to sign up ISPs as customers and collect, rather than pay, compensation because ISP modems do not generally call anyone. . . . In some instances, this led to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels.

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 (2001) (the “*ISP Remand Order*”) ¶ 21.

The Commission's first step into this arena was its issuance of *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("Declaratory Ruling"). There it applied its so-called "end-to-end" analysis (as it does in the order under review), under which the classification of a communication as local or interstate turns on whether its origin and destination are in the same state. Because a customer's venture into the web characteristically reaches servers out of state (and often out of the country), the Commission concluded that under the end-to-end principle dial-up internet traffic was interstate. *Id.* ¶ 18. As such traffic was "jurisdictionally mixed," *id.* ¶ 19, however, the Commission chose not to disturb state commissions' application of interconnection agreements to that traffic "pending adoption of a rule establishing an appropriate interstate compensation mechanism," *id.* at ¶ 21. In review of the order in *Bell Atlantic Tel[.]. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), we found the Commission's conclusions in apparent conflict with various prior statements, and possibly with the statute; we vacated the order and remanded the matter for its further analysis. *Id.* at 9.

On remand the Commission instituted substantially the same rate cap system that it defends here. See *ISP Remand Order* ¶ 8. But it claimed as supporting authority 47 U.S.C. § 251(g), which required LECs to comply with certain FCC regulations promulgated prior to the enactment of the 1996 Act. In *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), we rejected that claim, finding that § 251(g) was "worded simply as a transitional device" and thus could not be relied on for authority to promulgate new regulations. *Id.* at 430. Recognizing that the Commission's rules might well have other legal bases, however, we did not vacate the order. *Id.* at 430, 434.

Between the *ISP Remand Order* and the present *Order* there have been several additional visits to our court. In July 2003 Core Communications, Inc. (“Core”) petitioned the FCC to forbear from enforcing its rate caps and associated provisions, a petition that the FCC partly granted. *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179, ¶¶ 23-24, ¶ 27 (2004). We upheld the order against challenges by both CLECs and ILECs. *Core 2006*, 455 F.3d 267.

In June 2004 Core filed a petition seeking mandamus requiring the FCC to respond to the *WorldCom* remand. Based on the FCC’s representations about its efforts to meet the remand, we denied Core’s petition “without prejudice to refiling in the event of significant additional delay.” *In re: Core Communications, Inc.*, No. 04-1179 (D.C. Cir. May 24, 2005). In October 2007 Core filed a second petition, which we granted, “direct[ing] the FCC to explain the legal basis for its ISP-bound compensation rules within six months of” May 5, 2008. *In re Core Communications, Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008) (“*Core 2008*”).

On the last permissible day, November 5, 2008, the FCC released the current *Order*. Petitions for review followed, filed by Core and by Public Service Commission of the State of New York and National Association of Regulatory Utility Commissioners (the “state petitioners”); we consolidated the petitions.

* * *

As we noted at the outset, the Commission relies primarily on § 201 for its authority to regulate ISP-bound traffic. See *Order* ¶ 21. That section prohibits carriers

engaged in the delivery of interstate communications from charging rates that are not “just and reasonable,” and grants the FCC authority to prescribe regulations to implement the 1934 Act, which include all provisions of the 1996 Act. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999) (observing that “Congress expressly directed that the 1996 Act . . . be inserted into the Communications Act of 1934” and holding that “the grant in § 201(b) means . . . [that] [t]he FCC has rulemaking authority to carry out the ‘provisions of this Act,’ which include §§ 251 and 252”). A savings clause attached to § 251, namely § 251(i), fortifies the Commission’s position, providing: “Nothing in this section shall be construed to limit or otherwise affect the Commission’s authority under section 201.” Further, all parties agree that the familiar principles of *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), apply to the FCC’s construction of the Communications Act. State Pet’rs Br. 8; Core Pet’r Br. 27-28; Resp. Br. 19-20. Finally, except as discussed below, the petitioners accept the end-to-end analysis and its application to ISP-bound calls, as announced by the Commission in the *Declaratory Ruling* in 1999 (described above) and restated in the *Order*, ¶ 21 & n.69.

Against the Commission’s reliance on § 201, petitioners claim that “Congress’s specific choice” on the matter of inter-LEC compensation, manifested in §§ 251-252, must trump the FCC’s “general rulemaking authority under section 201.” Core Interv. Br. 18. They cite *Norwest Bank Minnesota National Association v. FDIC*, 312 F.3d 447, 451 (D.C. Cir. 2002), for the “cardinal rule of statutory construction . . . that where both a specific and a general provision cover the same subject, the specific provision controls.” State Pet’r Br. 27.

But it is inaccurate to characterize § 201 as a general grant of authority and §§ 251-252 as a specific one. “When . . . two statutes apply to intersecting sets . . . , neither is more

specific.” *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 264 (7th Cir. 1998). That is the case here. Not all inter-LEC connections are used to deliver interstate communications, just as not all interstate communications involve an inter-LEC connection. A local call to chat with a schoolmate about the evening’s homework would not—at least under conditions typical today—involve interstate communications; and a conventional interstate long distance call, while it will usually involve interconnection between the long distance provider and a LEC, will often not involve two LECs connecting directly with each other. And, as to a LEC’s provision of access for completion of a long-distance call, the parties agree that the link between the LEC and the interexchange carrier is *not* governed by the reciprocal compensation regime of § 251(b)(5). See State Pet’rs Br. 25-26 (citing *Global NAPS, Inc. v. Verizon New England*, 444 F.3d 59, 62-63 (1st Cir. 2006), in turn quoting the FCC’s *Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996).

Dial-up internet traffic is special because it involves interstate communications that are delivered through local calls; it thus simultaneously implicates the regimes of both § 201 and of §§ 251-252. Neither regime is a subset of the other. They intersect, and dial-up internet traffic falls within that intersection. Given this overlap, § 251(i)’s specific saving of the Commission’s authority under § 201 against any negative implications from § 251 renders the Commission’s reading of the provisions at least reasonable.

Petitioners next argue that because the call to the ISP terminates locally, the FCC’s authority over interstate communications is inapplicable. State Pet’r Br. 30-33. Section 251(b)(5) applies to “reciprocal compensation arrangements for the transport and termination of telecommunications.” Petitioners point to the FCC’s

definition (in the *Order*) of “terminat[ion]” 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.” See *Order* ¶ 13; see also 47 C.F.R. § 51.701(d). State Pet’rs Br. 31-32. Because the “called party” in the case of dial-up Internet traffic is the ISP, petitioners say, the § 251(b)(5) telecommunications “terminat[e]” locally and thus the FCC cannot apply its § 201 authority over these communications.

This argument fails because it implicitly assumes inapplicability of the end-to-end analysis, which petitioners have not challenged. And the FCC has consistently applied that analysis to determine whether communications are interstate for purposes of § 201. Petitioners do not dispute that dial-up internet traffic extends from the ISP subscriber to the internet, or that the communications, viewed in that light, are interstate. Given that ISP-bound traffic lies at the intersection of the § 201 and §§ 251-252 regime, it has no significance for the FCC’s § 201 jurisdiction over interstate communications that these telecommunications might be deemed to “terminat[e]” at a LEC for purposes of § 251(b)(5).

Petitioners also appear indirectly to invoke the 8th Circuit’s conclusion that while the FCC has authority to impose a *methodology* on state commissions’ exercise of power under § 252 (they specifically note “total element long-run incremental cost” (“TELRIC”)), it has (for certain purposes) no power to set actual prices. See State Pet’rs Br. 33, citing *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000). We take no position on the issue before the 8th Circuit. It reached its finding for purposes quite different from the present subject (FCC ratesetting authority for a leg of an interstate communication), and it did not address the FCC’s power to implement “just and reasonable” rates under § 201 or how that power was affected by §§ 251-252.

Petitioners further argue that it was “arbitrary and capricious” for the FCC to “discriminate” against dial-up internet traffic by requiring that LECs be compensated pursuant to the rate cap regime when terminating such traffic, but otherwise in accordance with state commissions’ application of the FCC’s TELRIC methodology. Core Pet’r Br. 43-47; Core Interv. Br. 22-23. See 5 U.S.C. § 706(2)(A). Our review under the arbitrary and capricious standard is narrow. See *Core 2006*, 455 F.3d at 277. Here the agency action passes handily.

The Commission has provided a solid grounding for the differences between the treatment of inter-LEC compensation for delivery of dial-up internet traffic and the regime generally applicable to inter-LEC compensation under § 251(b)(5). (We assume *arguendo* that the concept of discrimination is relevant to regimes created under entirely different statutory provisions.) In the context to which reciprocal compensation is ordinarily applied, it noted, outgoing calls are generally balanced by incoming ones, so that it matters relatively little how accurately rates reflect costs. *ISP Remand Order* ¶ 69. Such balance is utterly absent from ISP-bound traffic. Moreover, it found that in fact the rates for such traffic were so distorted that CLECs were in effect paying ISPs to become their customers. *Id.* ¶ 70 & n.134; see also *id.* ¶ 21. To the extent that ILECs simply passed the costs on to their customers generally (rather than having a separate charge for those making ISP-bound calls), they would force their non-internet customers to subsidize those making ISP-bound calls, and the system would send inaccurate price signals to those using their facilities for internet access (in effect the ISPs and their customers) and to those not doing so. *Id.* ¶¶ 68, 87. On the other hand, the Commission believed that its “failure to act . . . would lead to higher rates for Internet access, as ILECs seek to recover their reciprocal compensation liability . . . from their customers to call ISPs,” *id.* ¶ 87, presumably

meaning rates “higher” than cost, correctly computed. Thus the continued application of the reciprocal compensation regime to ISP-bound traffic would “undermine[] the operation of competitive markets.” *Id.* ¶ 71.

Core purports to find a discrepancy between our mandamus order and the Commission’s response. Our order required the FCC to “explain[] the legal authority for the Commission’s interim intercarrier compensation rules that exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5).” *Core 2008*, 531 F.3d at 862. The *Order*, en route to finding that § 201 authorized the Commission to impose its rate cap system on the communications in question, also expressed its view that they *were* “subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).” *Order* ¶15; see also *id.* ¶ 16. Core claims that in so finding the Commission violated our mandate.

In context it is perfectly plain that our order sought simply to have the FCC explain the reasoning underlying its exercise of authority, not to preempt its analytical route. The sort of argument made by Core here gives pettifoggery a bad name.

Finally, we note the presence of a number of arguments introduced outside of the petitioners’ opening briefs. Core intervened in the appeal filed by the state petitioners before we consolidated its separate appeal with the latter. Together with other intervenors, Core filed a brief raising a number of arguments that it did not raise as petitioner. As we explained in *Illinois Bell Telephone Company v. FCC*, 911 F.2d 776 (D.C. Cir. 1990), “An intervening party may join issue only on a matter that has been brought before the court by another party.” *Id.* at 786 (emphasis added). While we acknowledged in *Synovus Financial Corporation v. Board of Governors*, 952

F.2d 426 (D.C. Cir. 1991), that this rule is prudential and “should not be applied categorically,” the grounds that *Synovus* mentioned for making exceptions are absent here. *Id.* at 434. *Synovus* allowed an intervenor who lacked incentive to petition for review of the administrative action to present an additional issue that was “an essential predicate to [a] question” raised by petitioners. *Id.* at 434 (internal quotes omitted). But Core not only had an incentive to petition for review itself but did so. See *United States Telephone Association v. FCC*, 188 F.3d 521, 531 (D.C. Cir. 1999) (noting that intervenors not only failed to qualify for the *Synovus* exception but “present[ed] no reason why it could not have petitioned in its own right”). And the issues Core raises as intervenor bear “no substantive connection” to the challenges petitioners raise in their initial briefs. *Synovus*, 952 F.2d at 434; Cir. Rule 28(d)(2). Accordingly, we do not consider the new arguments Core raises as intervenor. Similarly, we do not consider arguments that first appear in petitioners’ reply briefs. See, e.g., *Bd. of Regents of the Univ. of Washington v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (“By failing to make any specific objection until their reply brief, petitioners deprived the [respondents] of the opportunity to respond. To prevent this . . . , we have generally held that issues not raised until the reply brief are waived.”).

* * *

The petitions for review are

Denied.

Appendix: Text of 47 U.S.C. § 201

§ 201. Services and Charges.

(a) It shall be the duty of every *common carrier engaged in interstate or foreign communication by wire or radio* to furnish such communication service upon reasonable request therefore; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(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: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications *The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.*

47 U.S.C. § 201 (emphasis added).

Exhibit B

Revenue Assurance Starts Here

Revenue Assurance Starts at the Switch

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Providing Telecom Companies with Revenue Assurance Products Since 1991

Telecom Analysts estimate that between 2% and 10% of potential revenue is lost every year due to revenue leakage. One area of concern that is often overlooked is the Switch in the Central Office. Since all billing starts with Call Detail Records (CDR) created at the switch, a company must never underestimate the importance it has to its bottom line.

PAT Starts at Under \$11,000

In response to industry demand, The Board Room has designed a Revenue Assurance System called PAT (Proactive AMA Test) to verify the accuracy of CDRs. The PAT Revenue Assurance system can identify missing or inaccurate AMA as well as problems with call routing. It is designed for use by small and large telecommunications companies worldwide.

PAT is so effective at finding revenue leakage that it is currently standard operating environment in thousands of switches nationwide.

Revenue Assurance Starts Here

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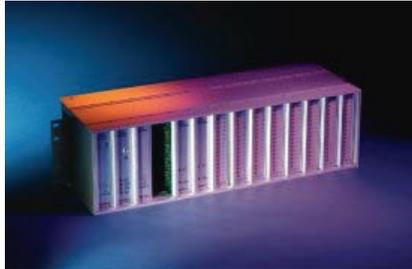
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FACTS128



The Pacts 128 is the standard for CDR switch testing. With 16 to 128 lines available for testing it is flexible enough to meet the needs of most switches.

The basic PACTS128 contains all the equipment necessary to call from 16 originating lines and eight incoming 1004 Hz lines. Modules can be added as needed to increase capacity to 128 outgoing and 16 incoming lines. The unit consists of a CPU-Speech-Modem module, power supply module, line monitor module, up to two 8-line milliwatt termination modules, and up to eight 16-line switch modules. The PACTS128 is accessible through the CPU-Modem-Speech module from a PC running PAT System software and equipped with a modem. The unit also is equipped with an RS232C interface for connection to an external computer.

The 14-slot Rack-Mount Chassis is fully wired. The chassis occupies six vertical inches and fits in a standard 23-inch bay; adapters are supplied for 26-inch bays. The chassis is designed with an open slot wired for future use so the unit can easily keep pace with advances in technology.

The CPU-Modem-Speech module is equipped with DSP technology to detect SIT, call-progress, and various other test-circuit tones. The unit also can detect the presence of speech and play back a digitally recorded message. Each connected line is checked for tip and ring reversals.

Features:

- Detects call progress tones
- Detects standard milliwatt tone
- Detects error tones
- Detects fax/modem & voice
- Detects a variety of other tones
- All test data are uploaded to PAT for off-line testing
- Firmware is upgraded automatically
- Test calls can be monitored on a secure line

The 8-line Milliwatt Termination Module generates the 1004 Hz tone commonly used for testing. This module is required to verify routing and billing on intra-office codes, since most switches normally do not bill for intra-office calls to tone trunks. Fixed- and unlimited-length versions are available.

The Power Supply module converts the -48vdc central office supply to the 12vdc needed by the PACTS128. Other power supplies also are available.

The 16-line Telephone Interface module connects one of 16 individual telephone lines via solid state relays to the common line circuit on the CPU-Modem-Speech module.

The Line Monitor module allows the user making calls from the remote location to "listen in" on the calls as they are placed. The monitor line is secure and cannot be used for two-way communication.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **REPLY BRIEF OF PACIFIC BELL TELEPHONE COMPANY D/B/A AT&T CALIFORNIA (U 1001 C)**, on all known parties to **C.08-03-001** as indicated in the attached Service List by electronic mail, U.S. Mail, and/or hand-delivery.

Executed this 19th day of January 2010, at San Francisco, California.

AT&T SERVICES, INC.
525 Market Street, Room 2023
San Francisco, CA 94105

/s/

Thomas J. Selhorst

CALIFORNIA PUBLIC UTILITIES COMMISSION

Service Lists

Proceeding: C0803001 - PAC BELL VS. O1 COMM

Filer: Pacific Bell Telephone Company

List Name: LIST

Last changed: December 31, 2009

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