Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
	)	
TSR WIRELESS, LLC, *et al.*,	)	
	)	
Complainants,	)	
	)	File Nos. E-98-13, E-98-15
v.	)	E-98-16, E-98-17, E-98-18
	)	
U S WEST COMMUNICATIONS, INC., *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 2000; Released June 21, 2000

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement; Commissioner Powell concurring and issuing a statement.

1. In this Order, we address five separate formal complaints filed by paging carriers TSR Wireless, LLC (TSR) and Metrocall, Inc. (Metrocall) (hereinafter "Complainants" or "paging carriers") against local exchange carriers (LECs) Pacific Bell Telephone Company (Pacific Bell), U S West Communications, Inc. (U S West), GTE Telephone Operations (GTE), and Southwestern Bell Telephone Company (SWBT) (collectively "Defendants"). The paging carriers allege that the LECs improperly imposed charges for facilities used to deliver LEC-originated traffic and for Direct Inward Dialing (DID) numbers in violation of sections 201(b) and 251(b)(5) of the Communications Act of 1934, as amended,[1] and the Commission's rules promulgated thereunder. We find that, pursuant to the Commission's rules and orders, LECs may not charge paging carriers for delivery of LEC-originated traffic. Consequently, Defendants may not impose upon Complainants charges for facilities used to deliver LEC-originated traffic to Complainants. In addition, we conclude that Defendants may not impose non-cost-based charges upon Complainants solely for the use of numbers. We further conclude that section 51.703(b) of the Commission's rules does not prohibit LECs from charging, in certain instances, for "wide area calling" or similar services where a terminating carrier agrees to compensate the LEC for toll charges that would otherwise have been paid by the originating carrier's customer. Accordingly,

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); 47 U.S.C. §§ 201(b), 251 (1991 & West Supp. 1999).

for the reasons set forth below, we grant in part and deny in part Complainants' claims. We note that the Complainants in this proceeding did not seek compensation for the transport and termination of LEC-originated traffic. Consequently, this order does not address the question of whether or under what circumstances paging carriers are entitled to such compensation.

I. BACKGROUND

2. Complainants are Commercial Mobile Radio Service (CMRS) carriers that provide telecommunications services, including one-way paging services. They assert that section 51.703(b) of the Commission's rules,[2] the Commission's *Local Competition Order*,[3] and Common Carrier Bureau letters[4] interpreting these provisions, prohibit incumbent LECs from charging paging carriers for telecommunications traffic that originates on a LEC's network.[5] Complainants seek an order prohibiting Defendants from charging for dedicated and shared transmission facilities used to deliver LEC-originated traffic, DID numbers, and "wide area calling service."[6] Defendants assert that the Commission lacks authority under the Act to adjudicate Complainants' claims.[7] They further argue that because the Complainants are one-way paging

[2] 47 C.F.R. § 51.703(b).

[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC, 120 F.3d 753* (8th Cir. 1997), *aff'd in part and remanded, AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *further recons. pending*.

[4] Letter from Regina M. Keeney, Chief, Common Carrier Bureau to Cathleen A. Massey, AT&T Wireless Services, Inc. (March 3, 1997) (Keeney Letter); Letter from A. Richard Metzger, Jr., Chief, Common Carrier Bureau to Keith Davis, Southwestern Bell Telephone, DA 97-2726 (Dec. 30, 1997) (Metzger Letter).

[5] Metrocall, Inc.'s Brief on the Merits, at 5-6; Initial Brief of TSR Wireless LLC at 8-10, 14-15.

[6] "Wide area calling," also known as "reverse billing" or "reverse toll," is a service in which a LEC agrees with an interconnector not to assess toll charges on calls from the LEC's end users to the interconnector's end users, in exchange for which the interconnector pays the LEC a per-minute fee to recover the LEC's toll carriage costs. *See, e.g.*, Letter from Gary A. Evenson, Assistant Administrator, Telecommunications Division, Wisconsin Public Service Commission, to James D. Schlichting, Chief, Competitive Pricing Division, Common Carrier Bureau, FCC, February 16, 1998.

[7] Initial Brief of Defendants BellSouth, GTE, Pacific Bell, Southwestern Bell Telephone Company, and U S West, Sept. 11, 1998 (Metrocall Defendants' Brief) at 4-5. The Metrocall Defendants filed joint briefs and pleadings (Metrocall Defendants' Brief and Metrocall Defendants' Reply) to respond to Metrocall's allegations. Metrocall had also filed a complaint on January 20, 1998 against BellSouth Corporation and BellSouth Telecommunications, Inc. alleging the same causes of action as the instant matters (E-98-14). The BellSouth entities had participated in these proceedings until the Commission dismissed Metrocall's case against them on December 13, 1999.

carriers, they are not entitled to the benefit of the Commission's reciprocal compensation regime set forth in the Commission's rules, and therefore must pay for facilities used to deliver LEC-originated traffic.

3. In the *Local Competition Order*, the Commission promulgated section 51.703(b), which provides that: "A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network."[8] In adopting this rule, the Commission stated that "[a]s of the effective date of [the *Local Competition Order*], a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge."[9] The Order further provided that carriers operating under arrangements that do not comport with the Commission's mutual compensation principles "shall be entitled to convert such arrangements so that each carrier is only paying for the transport of traffic it originates, as of the effective date of [the *Local Competition Order*]."[10] When the *Local Competition Order* was appealed to the Eighth Circuit, the court specifically held that sections 2(b) and 332(c) of the Act granted the Commission authority to issue rules of special concern to CMRS providers. Consequently, the court permitted section 51.703 to remain in full force and effect as it applied to CMRS providers.[11] Defendants in this proceeding also participated in the appeal of the Eighth Circuit's holding to the Supreme Court, but did not seek review of the Commission's rules relating to CMRS carriers.

4. Section 251(b)(5) of the 1996 Act requires all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[12] The Commission in promulgating regulations to implement that section determined that CMRS providers such as paging carriers offer "telecommunications" as defined in the Act,[13] and that LECs therefore "are obligated, pursuant to section 251(b)(5) … to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks."[14] The Commission went on to

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8 47 C.F.R. § 51.703(b).

9 *Local Competition Order*, 11 FCC Rcd at 16016.

10 *Local Competition Order*, 11 FCC Rcd at 16028. The Order took effect on November 1, 1996. The Commission's conclusions regarding reciprocal compensation were codified as Sections 51.701-17 of the Commission's rules. 47 C.F.R. §§ 51.701-17.

11 *Iowa Utils. Bd. v. FCC*, 120 F.3d at 800 n.21, 820 n.39.

12 47 U.S.C. § 251(b)(5).

13 *See* 47 U.S.C. § 153(43) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received").

14 *Local Competition Order*, 11 FCC Rcd at 15997.

state that because section 251(b)(5) "does not address charges payable to a carrier that originates traffic," section 251(b)(5) "prohibits charges such as those some incumbent LECs currently impose on CMRS carriers for LEC-originated traffic."[15]

5. On January 30, 1997, concerned that LECs would disconnect their interconnection service for failure to pay for LEC-originated traffic notwithstanding the FCC's regulations, several paging carriers requested that the Bureau "affirm" that section 51.703(b) of the Commission's rules prohibited LECs from charging CMRS providers, including paging providers, for local telecommunications traffic that originated on the LECs' networks.[16] On March 3, 1997, then-Chief of the Common Carrier Bureau Regina Keeney issued a letter responding to these carriers' concerns.[17] The Keeney Letter restated the Commission's conclusions from the *Local Competition Order*, and concluded that because the Act defines the term "telecommunications carrier" to include CMRS providers, "a LEC is prohibited by section 51.703(b) from assessing charges on CMRS providers for local telecommunications traffic that originates on the LEC's network."[18]

6. On December 30, 1997, A. Richard Metzger, Jr., then-Chief of the Common Carrier Bureau issued another letter in response to a request by several carriers for clarification of section 51.703(b) and the *Local Competition Order*.[19] The Metzger Letter stated that the Commission's rules do not allow a LEC to charge a provider of paging services for the cost of "LEC transmission facilities that are used on a dedicated basis to deliver to paging service providers local telecommunications traffic that originates on the LEC's network."[20] In January of 1998, Defendants SWBT, Pacific Bell, and U S West filed Applications for Review of the Metzger Letter.[21] Shortly before and soon after the release of the Metzger Letter, TSR and Metrocall filed the instant complaints seeking the cessation of unlawful conduction and recovery

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15 *Local Competition Order*, 11 FCC Rcd at 16016.

16 Letter from Cathleen A. Massey, AT&T Wireless Services, Inc. to Regina M. Keeney, Chief, Common Carrier Bureau, January 30, 1997.

17 Keeney Letter, *supra* note 4.

18 *Id.* at 2.

19 Metzger Letter, *supra* note 4, at 2.

20 *Id.* at 3.

21 U S West bases its Application for Review on Section 1.115(b)(2)(i) of the Commission's rules, which requires applicants to demonstrate that the action taken pursuant to delegated authority "is in conflict with statute, regulation, case precedent, or established Commission policy." 47 C.F.R. § 1.115(b)(2)(i). U S West Application for Review, at 2, n.2. This Application for Review is pending at the time of this order. On January 30, 1998, SBC also filed a petition for stay of the Metzger Letter pending review of the letter by the Commission.

of the allegedly unlawful charges imposed by Defendants in violation of sections 201(b) and 251 of the Act and section 51.703(b) of the Commission's rules.

II. FACTS

A. TSR v. U S West

7. Complainant TSR provides CMRS one-way paging service to its subscribers in Arizona.[22] Defendant U S West is a LEC that provides facilities and services necessary for TSR to connect its CMRS one-way paging systems in Arizona to the public switched telecommunications network.[23] The parties agree that, because TSR currently provides exclusively one-way paging service in Arizona, no calls are conveyed from TSR's paging terminals to U S West's network.[24] A TSR subscriber therefore cannot originate a call to the U S West landline network over TSR's system.

8. U S West had billed and continues to bill TSR for the following types of charges under U S West's Arizona tariff, which TSR contests: 1) monthly recurring charges for DID numbers; 2) monthly recurring charges associated with dedicated Type 1 DID trunks; 3) charges for dedicated T-1 circuits necessary to connect U S West offices to the TSR network for delivery of LEC-originated traffic to TSR's network; 4) installation charges for DID numbers, DID trunks and T-1 circuits; and 5) usage charges described as "transport land to mobile and end office switching" associated with wide area calling service provided by U S West.[25]

9. Beginning in November, 1996, TSR refused to pay the contested charges imposed by U S West based on TSR's position that Commission regulations and decisions prohibit U S West's imposition of these charges against CMRS one-way paging carriers.[26] U S West also informed TSR on more than one occasion that it would "waive" charges for DID numbers retroactive to October 7, 1996, although to date, it has not done so.[27] On June 26, 1997, TSR submitted to U S West a letter requesting a T-1 circuit to handle TSR's Yuma, Arizona, to Flagstaff, Arizona, paging traffic (the Yuma-Flagstaff T-1).[28] The next day, U S West responded

22 TSR and U S West Joint Stipulation of Facts, June 2, 1998, at ¶ 1.

23 *Id.* at ¶ 2.

24 *Id.* at ¶ 5.

25 *Id.* at ¶ 6.

26 *Id.* at ¶ 8.

27 *Id.* at ¶ 10.

28 *Id.* at ¶ 11.

that it would not provide the Yuma-Flagstaff T-1 and that U S West had imposed a "Stop Provisioning Order" against TSR based on TSR's refusal to pay the contested charges, which amounted to $231,927.08 in TSR's May 1997 invoice.[29]

10. TSR filed its complaint with the Commission against U S West on December 24, 1997. TSR also filed a supplemental motion alleging that U S West violated the Commission's *ex parte* rules when representatives of U S West and Commission staff met without inviting TSR on May 26, 1999.[30]

B. Metrocall v. GTE, Pacific Bell, SWBT, and U S West

11. Shortly after the Commission's *Local Competition Order* took effect on November 1, 1996, Metrocall sent letters to Defendants GTE and Pacific Bell (along with SWBT and U S West hereinafter collectively "Metrocall Defendants") requesting that these carriers cease charging Metrocall for local transport, DID numbers, and facilities used for local transport based on its view that section 51.703(b) of the Commission's rules prohibited such charges.[31] Typical of these letters is Metrocall's November 19, 1996 letter to Jamie Miller of GTE Corporation. In that letter, Metrocall requests that GTE "immediately revise its paging interconnection terms and rates … in light of Section 252(a) of the Telecommunications Act of 1996 … and the [Commission's] rules and Orders."[32] The letter stated that "the FCC concluded that a 'LEC may not charge a CMRS provider or other carrier for terminating LEC-originated traffic,' and, as of the 'effective date' of that FCC Order (August 30, 1996), the LEC 'must provide that [LEC-originated] traffic to the CMRS provider or other carrier without charge."[33] The letter also referenced the Commission's conclusion in the *Local Competition Order* that "local" traffic includes CMRS-LEC traffic that originates and terminates within the same Major Trading Area ("MTA") pursuant to rule 51.701(b)(2), and language from the *Second Local Competition Order*[34] concerning nondiscriminatory access to numbers.[35] The letter concluded with a statement that, if GTE

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29 *Id.* at ¶ 12.

30 TSR Motion to Impose Sanctions at 4-9.

31 *See* Letter from Frederick M. Joyce, Counsel to Metrocall, Inc. to GTE Corporation, Attention of Jamie Miller (Nov. 19, 1996), Metrocall Complaint Exh. 9 (Miller Letter); and Letter from Frederick M. Joyce, Counsel to Metrocall, Inc. to Pacific Bell Corporation, Attention of Robert Butland (Nov. 19, 1996), Metrocall Complaint Exh. 11.

32 Miller Letter at 1.

33 *Id.* at 1-2.

34 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 19392, 19538 (1996) (*Second Local Competition Order*).

35 Miller Letter at 2.

wished to continue assessing the charges, Metrocall "expect[ed] a written explanation, within 30 days of the date of this letter, as to how those charges would not be in violation of the Telecom Act and the FCC's rules."[36]

12. The Metrocall Defendants rejected Complainant's requests, averring that the Commission lacked jurisdiction to enforce section 51.703(b), and that, in any event, section 51.703(b) could only be applied by a state commission during the section 252 arbitration process.[37] Metrocall filed its complaints with the Commission on January 20, 1998.

III. DISCUSSION

A. Jurisdiction

13. As an initial matter, we reject Defendants' arguments that the Commission lacks jurisdiction to resolve the issues raised in these formal complaints.[38] Section 208 permits "any person … complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof" to file a complaint with the Commission.[39] Defendants are common carriers. Complainants allege that Defendants have imposed certain charges upon them in violation of sections 201, and 251-252 of the Act and of the Commission's rules implementing those sections.[40] The Commission stated in the *Local Competition Order* that "[a]n aggrieved party could file a section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of sections 251 and 252, including Commission rules thereunder … ."[41] Therefore, our authority to decide the complaints arises from sections 201, 208, 251 and 252 of the Act.[42]

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36 *Id.*

37 Metrocall Defendants Brief at 6-10, 22-23.

38 Metrocall Defendants' Brief at 4-5; U S West Brief at 6-9.

39 47 U.S.C. § 208.

40 47 U.S.C. §§ 201, 251-252; TSR Complaint at 18 ¶ 30 (§§ 201, 251-252 of the Act); Metrocall Brief at 2, 5 (§§ 201(b) & 251(b) of the Act).

41 *Local Competition Order* at 15564, ¶ 127. Defendants relied on the Eighth Circuit's opinion in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), to argue that the Commission lacks jurisdiction to adjudicate this complaint. *See, e.g.*, Metrocall Defendants' Brief at 11-12. Because the Supreme Court vacated the Eighth Circuit's decision on that point on ripeness grounds in *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999), the Commission's jurisdictional decision in the *Local Competition Order* controls.

42 We note that section 1, 47 U.S.C. §151, also provides us with authority "to execute and enforce the

B. Res Judicata and Collateral Estoppel

14. Metrocall contends that the doctrines of res judicata and collateral estoppel prohibit Defendants from challenging Sections 51.701-17 of the Commission's rules in this proceeding.[43] Defendants counter that they may mount a challenge to the rules as applied to them in an enforcement proceeding pursuant to *Functional Music, Inc. v. FCC*,[44] and *Geller v. FCC*,[45] and that the Eighth Circuit Court of Appeals did not address the precise issues raised in this complaint proceeding.[46] In *Iowa Utils. Bd.*, the Eighth Circuit struck down the majority of the Commission's local competition rules on jurisdictional grounds, but upheld the rules at issue here as a valid exercise of the Commission's authority under section 332(c) of the Act.[47] Defendants herein filed comments in the *Local Competition* proceeding, and participated in the appeals of that order to the Eighth Circuit Court of Appeals and Supreme Court. TSR and Metrocall did not directly file comments in the *Local Competition* proceeding before the Commission, although Personal Communications Industry Association (PCIA), which represents the paging industry, did file comments.[48] The Court of Appeals considered the merits of section 51.703(b) and its application to paging carriers, and the Commission's other reciprocal compensation rules adopted by the *Local Competition Order*.[49] Defendants vigorously litigated the issue of the Commission's jurisdiction, but chose not to appeal the Court of Appeals' conclusions concerning reciprocal compensation for paging carriers.

15. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a

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provisions" of the Act. An additional basis for authority for the action we take here exists under section 332 of the Act, 47 U.S.C. §332. *See supra* note 11.

[43] Metrocall Brief at 4 n.4. Although it does not label its argument as res judicata or collateral estoppel, TSR makes a related argument that, because the Court of Appeals upheld the Commission's LEC-CMRS interconnection rules, the rules are binding upon Defendants and must be followed. TSR Brief at 17-18.

[44] 274 F.2d 543 (D.C. Cir. 1958).

[45] 610 F.2d 973 (D.C. Cir. 1979).

[46] *See, e.g.*, Metrocall Defendants' Brief at 7 n.8.

[47] *See Iowa Utils. Bd.*, 120 F.3d at 800 n.21, 820 n.39; *see also supra* note 11.

[48] *Local Competition Order*, 11 FCC Rcd at 16185, 16189.

[49] *See* Brief for Intervenors CMRS Providers in Support of Respondents, filed December 23, 1996, in No. 96-3321, *Iowa Utils. Bd. v. FCC*, at 4-6 (arguing in favor of validity of §§ 51.701(b), 51.703, 51.709(b), 51.711(a), 51.715(d), and 51.717 of the Commission's rules); *see also* Reply Brief of the Mid-sized Local Exchange Carriers, filed January 6, 1997, in No. 96-3321, *Iowa Utils. Bd. v. FCC*, at 34 (arguing against LEC-CMRS interconnection regime adopted in the *Local Competition Order*).

second suit involving the same parties or their privies based on the same cause of action.[50] Under the doctrine of collateral estoppel, a judgment in a prior suit precludes relitigation by the same parties of issues actually litigated and necessary to the outcome of the first action.[51] The record does not indicate whether TSR and Metrocall are PCIA members, and Complainants do not assert that they are "privies" of PCIA for purposes of res judicata. Although Complainants were neither parties nor privies to the *Local Competition Order* and its appeals, they may still estop the Defendants from challenging the validity of the Commission's rules by invoking the doctrine of collateral estoppel, as recognized by the Supreme Court in *Parklane Hosiery Co. v. Shore*.[52] *Parklane Hosiery Co.* provides courts with discretion to allow a non-party to a particular proceeding to prevent a party to that proceeding from re-litigating issues adversely decided against that party based primarily on fairness concerns.[53] Thus, once an issue is raised and determined, the doctrine of collateral estoppel precludes the entire issue, not just the particular arguments raised in support of it in the first case.[54] Accordingly, a litigant may not raise a new argument in a second proceeding regardless of whether it was made in the first proceeding; so long as the argument could have been made, it is precluded.[55] And, even when an opinion is silent on a particular issue, issue preclusion is applicable if resolution of that issue was necessary to the judgment.[56]

16. We find that it is fair for Complainants to invoke collateral estoppel against Defendants here, given that the Defendants were parties to the appeal of the *Local Competition Order* and possessed strong incentives to litigate these issues in that appeal.[57] In the *Local Competition Order* the Commission considered issues identical to those Defendants raise here: namely, whether CMRS carriers, and specifically, paging carriers should be included within the Commission's reciprocal compensation framework.[58] The Court of Appeals upheld the LEC-CMRS interconnection rules in a proceeding in which Defendants herein participated. Defendants

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50 1B J. Moore, Federal Practice ¶ 0.405[1], pp. 622-24 (2d ed. 1974)(quoted in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979)).

51 *Id.*

52 439 U.S. 322 (1979).

53 *Parklane Hosiery Co. v. Shore*, 439 U.S. at 331.

54 *Yamaha Corp. v. U.S.*, 961 F.2d 245, 254 (D.C. Cir. 1992).

55 *See Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364 (D.C. Cir. 1990).

56 *American Iron & Steel Ass'n v. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989).

57 *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21, 820 n.39 (8th Cir. 1997), *rev'd in part sub. nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); *see also supra* note 11.

58 *See Local Competition Order*, 11 FCC Rcd at 15993-16058.

possessed ample opportunity to argue to the Supreme Court that the Commission acted arbitrarily and capriciously in adopting these rules, but chose not to do so.[59] Accordingly, we find Defendants to be estopped from relitigating these issues that the Commission considered in the *Local Competition Order* and that were subsequently affirmed by the Eighth Circuit. This estoppel precludes Defendants from asserting that the Commission acted arbitrarily and capriciously in extending application of its reciprocal compensation rules to CMRS carriers, including paging carriers, and from challenging the decision to apply section 51.703(b) even in the absence of an interconnection agreement.[60] Moreover, under relevant precedent, the Eighth Circuit's judgement upholding the rules retains its preclusive effect even though the decision contains no detailed discussion of the merits of the rules.[61] The parties litigated the merits of the rules before this Commission[62] and, as the briefs submitted in that proceeding indicate, before the Eighth Circuit as well.[63] Defendants attempt to raise new arguments as to why the rules may be invalid, and the doctrine of collateral estoppel does not permit such tactics.[64] We conclude, however, that this estoppel does not bar Defendants from litigating issues that the *Local Competition Order* did not address, such as whether section 51.703(b) prohibits LECs from charging Complainants for wide area calling service, or for DID numbers.

17. We further find Defendants' reliance on *Functional Music* and *Geller* to be

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[59] At the same time, Defendants retain the opportunity in the various petitions for reconsideration of the *Local Competition Order* and applications for review of the Metzger Letter to argue their position. The reconsideration petitions and applications for review of the Metzger Letter provide a forum for defendants to argue, for instance, that paging carriers should be excluded from the Commission's reciprocal compensation framework, or that they should not be considered to be telecommunications carriers. We expect to rule in these pending proceedings in the near future and our action here is without prejudice to action in such proceedings.

[60] The *Local Competition Order* made the Commission's reciprocal compensation policy requiring carriers to deliver LEC-originated traffic at no charge effective "as of the date of this [*Local Competition*] order." *See Local Competition Order*, 11 FCC Rcd at 16027-16028. The Order further provided that carriers operating under arrangements that do not comport with the Commission's mutual compensation principles "shall be entitled to convert such arrangements so that each carrier is only paying for the transport of traffic it originates, as of the effective date of this [*Local Competition Order*]." *Id.* at 16028. We therefore find that Defendants were on notice that the Commission intended that the rules should apply immediately, and that the rules could be invoked even before a carrier made a formal request for interconnection negotiations pursuant to §§ 251 and 252 of the Act.

[61] *Yamaha Corp.*, 961 F.2d at 254; *Securities Indus. Ass'n*, 900 F.2d at 364; *American Iron & Steel Ass'n*, 886 F.2d at 397.

[62] *See Local Competition Order*, 11 FCC Rcd at 16008-16058.

[63] *See* Brief for Intervenors CMRS Providers in Support of Respondents, filed December 23, 1996 at 22 (arguing that the Commission properly applied section 251(b)(5)'s reciprocity requirement to paging companies); *see also* Reply Brief of the Mid-Sized Incumbent Local Exchange Carriers, filed January 6, 1997 at 34 (arguing against symmetrical pricing for LEC-CMRS interconnection).

[64] *Securities Indus. Ass'n*, 900 F.2d at 364.

misplaced. *Functional Music* and *Geller* enable a party in an enforcement proceeding to file a challenge to an administrative rule after the limitations period for challenging the rule otherwise would have expired.[65] For instance, the rule of these decisions would permit a party that did not participate in the litigation concerning the validity of the rules before the Court of Appeals to challenge those rules in an enforcement proceeding, notwithstanding that the limitations period for challenging the *Local Competition Order* otherwise would have run. *Functional Music* and *Geller* do not, however, award a "second bite of the apple" to parties, such as Defendants that participated in the litigation but failed to raise these arguments in that appeal.[66] Consequently, we find that the Defendants' opportunity to challenge the validity of the Commission's rules at issue here has expired.

C. May Defendants charge one-way paging carriers for delivery of LEC-originated traffic to the paging carrier's point of interconnection?

18. The gravamen of many of the Defendants' arguments is that the reciprocal compensation regime established by section 51.703(b) and the Commission's other reciprocal compensation rules do not apply to the Complainants.[67] For the reasons stated below, we reject those arguments and find that the Commission's reciprocal compensation rules, including section 51.703(b), are applicable and that the Defendants cannot charge Complainants for the delivery of LEC-originated, intraMTA traffic to the paging carrier's point of interconnection.

1. Applicability of the Commission's Reciprocal Compensation Rules to One-Way Paging Carriers

19. The *Local Competition Order* provides that LECs must establish reciprocal compensation arrangements with paging carriers:

> Under section 251(b)(5), LECs have a duty to establish reciprocal compensation arrangements for the transport and termination of "telecommunications." Under section 3(43), "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." All CMRS providers offer telecommunications. Accordingly, LECs are obligated, pursuant to section 251(b)(5) … to enter into reciprocal compensation arrangements with all CMRS

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65 *See Functional Music*, 274 F.2d at 546; *see also Geller*, 610 F.2d at 978.

66 *See Public Citizen v. Nuclear Regulatory Commission*, 901 F.2d 147, 153 n.3 (D.C. Cir. 1990); *Western Coal Traffic League v. Interstate Commerce Commission*, 735 F.2d 1408, 1411 (D.C. Cir. 1984).

67 *See, e.g.*, Metrocall Defendants Brief at 18-23; U S West Brief at 13-16.

> providers, *including paging providers*, for the transport and termination of traffic on each other's networks, pursuant to the [Commission's rules governing reciprocal compensation.][68]

There is no ambiguity in the Commission's language concerning the applicability of section 251(b)(5) and the rules promulgated thereunder to paging carriers. As stated in the *Local Competition Order*, and re-stated in both the Keeney and Metzger letters, paging carriers, as carriers of "telecommunications," are entitled to the benefit of the Commission's reciprocal compensation rules,[69] including section 51.703(b) of the rules.[70]

20. Defendants make no effort to distinguish the *Local Competition Order*'s multiple, clear statements that the Commission intended to permit paging carriers to benefit from its reciprocal compensation framework. Instead, they argue that a conflict exists between the *Local Competition Order* and the rules that it adopted.[71] According to Defendants, section 51.701(e) of the Commission's rules, which contains the definition of reciprocal compensation, presupposes that both carriers receive compensation, and therefore, "by definition" a one-way carrier is not entitled to reciprocal compensation.[72] They further argue that the reciprocal compensation rules should not apply to one-way paging carriers because only one of the carriers, in this case, the paging carrier, receives termination compensation, and that section 51.701(e) must govern over any contrary language contained in the *Local Competition Order*.[73]

21. We disagree that any conflict exists here between the Order and the rules. Section 51.701(e) must be read in conjunction with the rest of the Order and section 51.703(a). Section 51.703(a) states that "[e]ach LEC shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting

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[68] *Local Competition Order*, 11 FCC Rcd at 15997 (emphasis supplied).

[69] 47 C.F.R. § 51.701, *et seq.*

[70] Section 51.703(b) of the rules affords carriers the right not to pay for delivery of local traffic originated by the other carrier. However, Complainants are required to pay for "transiting traffic," that is, traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the paging carrier's network. *See Local Competition Order*, 11 FCC Rcd at 16016-17. In addition, the paging carrier would be responsible for paying charges for facilities ordered from the LEC to connect points on the paging carrier's side of the point of interconnection, such as facilities ordered to connect the paging terminal with its antennas.

[71] *See* Metrocall Defendants' Brief at 22.

[72] *Id*. at 19. Rule 51.701(e) provides that "a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier."

[73] Metrocall Defendants' Brief at 19, 21-22.

telecommunications carrier."[74] Like the text of the Order, which states that "paging carriers" shall be entitled to request reciprocal compensation arrangements, section 51.703(e) draws no distinction between one-way and two-way carriers. Indeed, section 51.703(a) specifically states that "*any* … telecommunications carrier" may request a reciprocal compensation arrangement with a LEC.[75] As stated previously, paging carriers, including those that provide only one-way service, are "telecommunications carriers" under the Act. Absent a specific *exclusion* in the rules, there is no basis upon which to presume that such carriers should not be included within the scope of these provisions. Section 51.701(e) does not, as Defendants argue, require that compensation actually flow in both directions between carriers. It requires only that, to the extent that local telecommunications traffic originates on the network facilities of one carrier and terminates on the facilities of another, compensation shall be paid to the terminating carrier.[76] In fact, the Commission's regulation defining reciprocal compensation and its interpretation of those regulations was recently upheld in *Pacific Bell v. Cook Telecom, Inc*.[77] The Ninth Circuit concluded that the Commission's "interpretation of 'reciprocal' [was] a plausible and permissible interpretation of an ambiguous statutory term" and that our interpretation was entitled to deference.[78] Accordingly, we reject Defendants' arguments that section 51.703(b) of the Commission's rules does not apply to one-way carriers.

2. Whether one-way paging carriers "switch" traffic within the meaning of the Commission's rules

22. The *Local Competition Order* states that paging providers "transport," "switch," and "terminate" traffic.[79] Moreover, our rules do not require that a carrier possess a particular switching technology as a prerequisite for obtaining reciprocal compensation. Section 51.701(d) defines termination as "the switching of local telecommunications traffic at the terminating carrier's end office switch, *or equivalent facility*, and delivery of such traffic to the called party's premise."[80] By using the phrase "switch or equivalent facility," the rules contemplate that a

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74 47 C.F.R. § 51.703(a).

75 *See* 47 C.F.R. § 51.703(a) (emphasis added).

76 Indeed, Defendants' argument, if adopted, would lead to the peculiar result that a carrier that delivered a single call to the incumbents' network would pay essentially nothing for the interconnection facilities (*i.e.*, where 99.9 percent of the traffic originates on the incumbent's network) while a carrier that does not deliver any calls to the incumbent's network would pay for the entire interconnection facilities.

77 197 F.3d 1236 (9th Cir. 1999).

78 *Id.* at 1245.

79 *See, e.g., Local Competition Order*, 11 FCC Rcd at 16043 ("[U]sing LEC costs for termination of voice calls thus may not be a reasonable proxy for paging costs as the types of switching and transport that paging carriers perform are different from those of LECs and other voice carriers.").

80 47 C.F.R. § 51.701(d) (emphasis supplied).

carrier may employ a switching mechanism other than a traditional LEC switch to terminate calls. A paging terminal performs a termination function because it receives calls that originate on the LEC's network and transmits the calls from its terminal to the pager of the called party. This is the equivalent of what an end office switch does when it transmits a call to the telephone of the called party. To perform this function, the terminal first directs the page to an appropriate transmitter in the paging network, and then that transmitter delivers the page to the recipient's paging unit. The terminal and the network thus perform routing or switching and termination. Because a paging terminal performs switching functions akin to an end office switch, we find unpersuasive Defendants' argument that a paging terminal does not qualify as a "switch or equivalent facility" as defined by the Commission's rules. Consequently, we reject Defendants' argument that Complainants fall outside of our reciprocal compensation framework because paging terminals allegedly do not perform a switching function, and, therefore, do not constitute a "switch or equivalent facility" as defined in the Commission's rules.

23. We similarly reject Defendants argument that paging carriers do not truly provide a call termination function because the paging terminal does not establish a direct communication path between the originating caller and the paging customer.[81] As authority for this proposition Defendants cite Newton's Telecom Dictionary, which defines switching as "[c]onnecting the calling party to the called party."[82] We find Defendants reliance on Newton's Telecom Dictionary's definition of switching to be misplaced. There is no requirement in the statute or the Commission's rules that a two-way communications path must be established in order for switching to occur. In fact, a number of packet switching protocols, including internet protocols, make use of "connectionless" switching.[83] With these protocols, a sender sends the network one or more packets with a destination address, and the network delivers one packet at a time to the destination. We conclude that there are two reasons why the Commission chose to include "equivalent facilit[ies]" in addition to switches in section 51.701(d)'s definition of termination. First, by including equivalent facilities as well as switches, the rule ensures that CMRS carriers that employ Mobile Transport and Switching Offices or paging terminals to perform functions

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81 Metrocall Defendants' Brief at 20-21.

82 Metrocall Defendants' Brief at 20 (citing *Newton's Telecom Dictionary*, 578 (11th ed. 1996). Complainant TSR obtains both Type 1 and Type 2 interconnection from U S West. TSR Joint Stipulation of Facts at 4.

83 *Newton's Telecom Dictionary* defines "connectionless network" as:

> A type of communications network in which no logical connection (*i.e.*, no leased line or dialed-up channel) is required between sending and receiving stations. Each data unit … is sent and addressed independently, and, thereby, is independently survivable … . Connectionless networks are becoming more common in broadband city networks now increasingly offered by phone companies.

Newton's Telecom Dictionary, 178 (14th ed. 1998).

equivalent to end office switching will fall within the definition. The second is to ensure that the definition of termination will remain relevant as technology changes. To adopt Defendants' view would improperly exclude these networks from the Commission's reciprocal compensation framework based on the technology they employ to channel their traffic to their end users, in contravention of the Act's goals of promoting the development of new technologies and compensating network owners for traffic termination that does not originate on their network.

24. Finally, we reject Defendants' argument that carriers such as Complainants that employ Type 1 interconnection do not perform call termination functions and should therefore be excluded from our reciprocal compensation framework.[84] Citing the *Third Radio Common Carrier Order*, a pre-1996 Act case, Defendants argue that for Type 1 interconnection, the LEC switch actually "terminates" the call.[85] As Defendants point out, prior to enactment of the 1996 Act, the Commission described Type 1 as an interconnection option whereby the LEC switch performs, in the case of two-way communications, both call origination and termination functions. The same order describes Type 2 as the interconnection option where the CMRS provider owns the switch and provides call origination and termination functions. We find, however, that section 51.701(d)'s definition of termination is broad enough to encompass Type 1 interconnection. Simply put, for the LEC's customers' calls to reach the paging carrier's customers, more is required than mere delivery by the LEC of traffic to the paging terminal. For Type 1 interconnection, the paging terminal must still route these calls and distribute them over the paging carrier's network so that they reach the called party.[86] Because paging carriers receiving

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[84] The Commission has previously described Type 1 and Type 2 interconnection as follows:

> Type 1 service involves interconnection to a telephone company end office similar to that provided to a private branch exchange (PBX). Under Type 1 interconnection, the telephone company owns the switch serving the [CMRS] network and, therefore, performs the origination and termination of both incoming and outgoing calls. Under Type 2, the [CMRS provider] owns the switch, enabling it to originate outgoing calls and to terminate incoming calls.

Third Radio Common Carrier Order, 4 FCC Rcd at 2372, n. 16. TSR currently obtains both Type 1 and Type 2 service from U S West. TSR and U S West Joint Statement of Uncontested Facts at ¶ 4.

[85] *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services* (*Third Radio Common Carrier Order*), Memorandum Opinion and Order on Reconsideration, FCC 89-60, 4 FCC Rcd. 2369 (1989). *See* Metrocall Defendants' Brief at 21.

[86] A PBX trunk is a connection between and end user premise and the LEC switch. A Type 1 connection, in contrast, links the LEC to the Mobile Telephone Switching Office, or its equivalent facility, in this case the paging terminal, which is not an end user premise. *Bell Atlantic Telephone Companies*, 6 FCC Rcd 4794, 4795 (1991). Although Type 1 interconnection is somewhat analogous to that provided to a PBX, the paging carrier performs a significant switching function by broadcasting the call over its network to enable its customer to receive messages. In addition, as a carrier of "telecommunications," the paging carrier is responsible for obtaining necessary regulatory authorizations and building a network sufficient to serve its customers. In contrast, the PBX owner is an end user customer of the LEC who has purchased a PBX and, accordingly, would not be entitled to co-carrier status. *See id.* (noting that treating Type 1 connections like a PBX would not conform to the Commission's LEC-CMRS interconnection policies).

Type 1 interconnection carry calls from their "switch, or equivalent facility," and deliver them to the called party's premises, these carriers terminate calls within the meaning of section 51.701(d). This same rationale applies to paging carriers that utilize the more sophisticated Type 2 interconnection to interconnect with LEC networks, as such carriers also must route and distribute the LEC customer's calls to enable them to reach the called party.

3. Does section 51.703(b) contemplate a distinction between "traffic" and "facilities"?

25. Defendants argue that section 51.703(b) governs only the charges for "traffic" between carriers and does not prevent LECs from charging for the "facilities" used to transport that traffic.[87] We find that argument unpersuasive given the clear mandate of the *Local Competition Order*. The Metzger Letter correctly stated that the Commission's rules prohibit LECs from charging for facilities used to deliver LEC-originated traffic, in addition to prohibiting charges for the traffic itself. Since the traffic must be delivered over facilities, charging carriers for facilities used to deliver traffic results in those carriers paying for LEC-originated traffic and would be inconsistent with the rules. Moreover, the Order requires a carrier to pay for dedicated facilities only to the extent it uses those facilities to deliver traffic that it originates.[88] Indeed, the distinction urged by Defendants is nonsensical, because LECs could continue to charge carriers for the delivery of originating traffic by merely re-designating the "traffic" charges as "facilities" charges.[89] Such a result would be inconsistent with the language and intent of the Order and the Commission's rules.

26. Nor are we persuaded by the LEC arguments that the reference to "transmission facilities" in section 51.709(b) compels the conclusion that 51.703(b) is limited to "traffic charges."[90] Section 51.709(b) applies the general principle of section 51.703(b) – that a LEC may

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87 Metrocall Defendants Brief at 17.

88 *Local Competition Order*, 11 FCC Rcd at 16027-28.

89 GTE argues that the Metzger Letter does not apply to it, asserting that the literal terms of that letter only prohibit charges for dedicated facilities. GTE states that it only uses shared facilities to deliver its traffic to Complainants. Metrocall Defendants Brief at 18. We reject this argument because section 51.703(b) prohibits charges for LEC-originated traffic, regardless of whether the facilities used to deliver such traffic are dedicated or shared.

90 *See, e.g.*, Metrocall Defendants' Brief at 17. Section 51.709(b) provides that:

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

not impose on a paging carrier any costs the LEC incurs to deliver LEC-originated, intraMTA traffic, regardless of how the LEC chooses to characterize those costs – to the specific case of dedicated facilities. Thus, the promulgation of the more specific rule in section 51.709(b) supports, rather than undercuts, our conclusion regarding the effect of section 51.703(b).

4. Are Complainants entitled to the benefits of section 51.703(b) absent a section 252 interconnection agreement?

27. Defendants assert that, even if section 51.703(b) requires LECs to deliver LEC-originated traffic to complainants without charge, CMRS providers may only obtain that benefit by engaging in the section 252 agreement process. According to Defendants, Complainants possess two options when seeking to terminate LEC-originated traffic: they may either purchase service from Defendants' state tariffs and thereby forgo their rights under section 51.703(b) of the rules, or they may formally request interconnection under sections 251 and 252 and obtain those rights either through negotiation or arbitration. Defendants assert that, because Complainants did not make a formal request for interconnection negotiations under section 252, they are not entitled to the benefits available under section 251(b)(5) of the Act and section 51.703(b) of the Commission's rules.[91] The Defendants argue that the Act "does not authorize the Commission to impose the reciprocal compensation duties of section 251(b)(5) – one of the statutory bases for section 51.703(b) – outside the context of negotiations undertaken pursuant to the procedures established in section 252 of the Act."[92] They offer as support for this proposition the Eighth Circuit's decision, which they describe as holding that the "sole avenue for enforcement and review of the provisions of sections 251 and 252 is the negotiation and arbitration procedures established in section 252."[93] The Supreme Court, however, vacated the Eighth Circuit's decision limiting the Commission's section 208 authority by concluding that the issue was not ripe for adjudication. It also explicitly held that the Commission has "jurisdiction to make rules governing matters to which the 1996 Act applies."[94] Given Defendant's argument relies on a vacated holding, the Commission will afford it no weight. Rather, the Defendants' obligations in this matter are governed by the Commission's *Local Competition Order*.

28. The *Local Competition Order* states that, "*[a]s of the effective date of this order*, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge."[95]

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47 C.F.R. § 51.709(b).

91 Metrocall Defendants' Brief at 4.

92 Metrocall Defendants' Brief at 11.

93 *Id.* at 12.

94 *AT&T v. Iowa Utilities*, 119 S. Ct. at 730.

95 *See Local Competition Order*, 11 FCC Rcd at 16016 (emphasis supplied). The reference to "terminating

The Keeney and Metzger letters re-iterated this position.[96] Consequently, Defendants' argument that the benefits of section 51.703(b) of the Commission's rules are available only through a section 252 interconnection agreement process is incorrect.[97]

29. The Commission's *Local Competition Order* clearly calls for LECs immediately to cease charging CMRS providers for terminating LEC-originated traffic; the order does not require a section 252 agreement before imposing such an obligation on the LEC.[98] Defendants claim further that ceasing to charge for LEC-originated traffic would violate their pricing obligations under state tariffs by compelling them to provide certain state tariffed interconnection services free of charge. The *Local Competition Order* made clear, however, that as of the order's effective date, LECs had to provide LEC-originated traffic to CMRS carriers without charge.[99] Accordingly, any LEC efforts to continue charging CMRS or other carriers for delivery of such traffic would be unjust and unreasonable and violate the Commission's rules, regardless of whether the charges were contained in a federal or a state tariff. On its effective date, given the clear language of the *Local Competition Order*, Defendants should not have doubted their obligation to cease charging Complainants for the facilities at issue here, regardless of whether Complainants subsequently requested interconnection negotiations pursuant to sections 251 and 252 of the Act.

D. Does section 51.703(b)'s prohibition against charges for LEC-originated traffic prohibit LECs from charging paging carriers for wide area calling services?

30. TSR asserts that rule 51.703(b) prohibits U S West from charging for "wide area

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LEC-originated traffic" refers to the fact that, among other things, LECs also had imposed charges on CMRS carriers for facilities used solely to deliver the LEC-originated traffic to the CMRS carrier's point of interconnection.

96 *See* Keeney Letter at 1-2 (citing *Local Competition Order*, ¶ 1042); Metzger Letter at 2 (same).

97 While not required to be addressed by this order, to the extent that other Commission rules promulgated under the *Local Competition Order* were not made "effective immediately," we would expect that requesting carriers would utilize the interconnection agreement process of sections 251 and 252 to obtain services under section 251. Moreover, it is clear that requesting carriers may negotiate and agree to terms other than those established by sections 251(b) and (c) and the Commission's implementing rules. *See* 47 U.S.C. § 252(a). In particular, requesting carriers, including CMRS carriers, may agree to forgo rights established by section 251 and the Commission's rules, for instance, in return for other consideration from the ILEC. Thus, we anticipate that the sections 251 and 252 interconnection agreement process will utilize the sections 251(b) and (c) obligations and the Commission's implementing rules as a starting point for negotiations and that requesting carriers may negotiate different terms through that process.

98 *See Local Competition Order*, 11 FCC Rcd at 16016.

99 *Id.*

calling" service.[100] We disagree. We find persuasive U S West's argument that "wide area calling" services are not necessary for interconnection or for the provision of TSR's service to its customers.[101] We conclude, therefore, that Section 51.703(b) does not compel a LEC to offer wide area calling or similar services without charge. Indeed, LECs are not obligated under our rules to provide such services at all; accordingly, it would seem incongruous for LECs who choose to offer these services not to be able to charge for them.

31. Section 51.703(b) concerns how carriers must compensate each other for the transport and termination of calls. It does not address the charges that carriers may impose upon their end users. Section 51.703(b), when read in conjunction with Section 51.701(b)(2),[102] requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated, with the exception of RBOCs, which are generally prohibited from delivering traffic across LATA boundaries.[103] MTAs typically are large areas that may encompass multiple LATAs, and often cross state boundaries. Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules.[104] Such traffic falls under our reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier.[105] This may result in the same call being viewed as a local call by the carriers and a toll call by the end-user. For example, to the extent the Yuma-Flagstaff T-1 is situated entirely within an MTA,[106] does not cross a LATA boundary, and is used solely to carry U S West-originated traffic, U S West must deliver the traffic to TSR's network without charge. However, nothing prevents U S West from charging its end users for toll calls completed over the Yuma-Flagstaff T-1.[107] Similarly, section 51.703(b) does not preclude TSR and U S West from entering into wide area calling or reverse billing arrangements whereby TSR can "buy down" the cost of such toll calls to make it appear to end users that they

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100 TSR Brief at 10-11.

101 U S West Brief at 16.

102 Section 51.701(b)(2) defines "local telecommunications traffic" as "[t]elecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in §24.202(a) of this chapter." MTA service areas are based on the Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39, with several exceptions and additions set forth in Section §24.202(a). 47 C.F.R. §24.202(a).

103 *See* 47 C.F.R. § 51.703(b); *see also* 47 C.F.R. § 51.701(b)(2).

104 *See* 47 C.F.R. § 51.701(b)(2); *see also Local Competition Order*, 11 FCC Rcd at 16016-17.

105 *Local Competition Order*, 11 FCC Rcd at 16016-17.

106 *See* TSR Brief at 5.

107 We assume for the sake of this argument that a call from Yuma, Arizona to Flagstaff, Arizona would be billed as a toll call to the caller placing the call.

have made a local call rather than a toll call. Should paging providers and LECs decide to enter into wide area calling or reverse billing arrangements, nothing in the Commission's rules prohibits a LEC from charging the paging carrier for those services.[108]

E. DID Number and Code Opening Charges

32. Metrocall contends that section 51.703(b) prohibits Defendants from charging it for DID numbers.[109] TSR asserts that the *Second Local Competition Order*[110] and the *1986 Interconnection Order*[111] prohibit imposition of recurring charges for numbers or for central office (CO) "code opening."[112] In its reply brief in the TSR case, U S West asserts no controversy exists, as U S West has stated it would provide a credit to TSR for such charges, effective retroactively to October 7, 1996.[113]

33. The *1986 Interconnection Order* permits telephone companies to impose "a reasonable initial connection charge to compensate the costs of software and other changes associated with new numbers."[114] The order also provides, however, that telephone companies "may not impose recurring charges solely for the use of numbers."[115] The *Second Local Competition Order* "explicitly forbid[s] incumbent LECs from assessing unjust, discriminatory, or unreasonable charges for activating [central office] codes" and re-iterates that telephone companies may not impose recurring charges solely for the use of numbers.[116] Metrocall has submitted evidence purporting to show that Pacific Bell and GTE have imposed recurring charges solely for the use of numbers.[117] The Commission's previous orders make clear that such

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[108] U S West asserts that TSR's allegations extend to the provision of FX services. U S West Brief at 16. However, TSR's complaint does not refer to FX service and there is no indication in its pleadings that such service is encompassed by its complaint. Therefore, we need not address in this proceeding whether TSR or U S West must pay for such service.

[109] Metrocall Brief at 4.

[110] *Second Local Competition Order*, 11 FCC Rcd at 19538.

[111] *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order, 59 RR2d 1275, 1284 (1986) (*1986 Interconnection Order*).

[112] Code opening charges are charges imposed by a LEC for activating numbers associated with a particular a particular central office.

[113] U S West Reply at 7-8.

[114] *Id.*

[115] *Id.*

[116] *Second Local Competition Order*, 11 FCC Rcd at 19538.

recurring charges may not be assessed by incumbent LECs, and accordingly, Complainants are entitled to refunds of any recurring charges assessed solely for the use of numbers. U S West has agreed to refund its recurring DID number charges retroactive to October 7, 1996. If the parties are unable to agree upon the amount to which Complainants are entitled, we will consider this during the damages phase of this bifurcated proceeding.

F. Takings

34. According to Defendants, the *Local Competition Order*'s regulatory regime, which requires carriers to pay for facilities used to deliver their originating traffic to their co-carriers, represents a physical occupation of Defendants property without just compensation, in violation of the Takings Clause of the Constitution.[118] We disagree. The *Local Competition Order* requires a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of its co-carrier, who then terminates that traffic and bills the originating carrier for termination compensation. In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call. Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.

35. The instant dispute arose because Defendants believe that Complainants, as one-way paging carriers, should not be entitled to the benefits of the Commission's reciprocal compensation regime. In sum, Complainants argue that Defendants seek to deny them status as telecommunications carriers, and instead to treat them as customers who must pay for the facilities that the LECs use to deliver LEC-originated traffic. Defendants basically argue that they should be permitted to charge Complainants for facilities that, since they are used solely to deliver Defendants' originating traffic, are part of Defendants' own network. Defendants possess other options for recovering these costs, such as recovering these costs from the end users that originates the calls. We disagree that prohibiting Defendants from charging Complainants for

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117 *See* Metrocall Complaint Exhibit 10, p. 2, GTE invoice for service from December 16, 1997 to January 16, 1998 ("direct-in-dial 20 numbers 125 at 10.00 … $1250.00"). *See* Metrocall Complaint Exhibit 15, p. 1, Pacific Bell invoice ("'Paging Service Connection Arrangement 1st 100 numbers' for $ .41, 'add'l block of 100 #s' for $7.79").

118 Metrocall Defendants Brief at 24 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). In *Loretto* the Supreme Court struck down a New York law requiring landlords to permit cable television providers to install cable television wires on the landlords' property upon the payment of a modest fee. The court found the New York law constituted a taking because it caused a permanent, physical occupation of landlords' property without just compensation.

Defendants' portion of the network resembles in any way the physical occupation of property that the Supreme Court found violative of the Constitution in *Loretto*.

G. Sanctions

36. TSR seeks the imposition of fines and forfeitures upon U S West for its "willful and repeated violations of the Act and the Commission's Rules."[119] Metrocall requests the Commission determine the appropriate amount of "damages and sanctions" for the Metrocall Defendants' unreasonable, unjust and discriminatory practices in violation of the Communications Act and Commission rules and orders.[120] Section 208 of the Act provides for private remedies for individuals aggrieved by carriers, while section 503 gives the Commission the discretion to assess forfeitures. If the Commission determines that Defendants' violations warrant the issuance of a Notice of Apparent Liability for Forfeiture under section 503, the Commission will do so in a separate proceeding.[121] To the extent requested, we will address Complainant's request for punitive damages in the damages phase of this bifurcated proceeding.

H. TSR's *Ex Parte* Allegation

37. Under the Commission's *ex parte* rules, formal complaint proceedings are "restricted" proceedings, in which *ex parte* presentations to Commission decision-making personnel are prohibited.[122] However, because TSR's and Metrocall's formal complaints raised the issue of the applicability of reciprocal compensation to paging carriers, a matter that is also the subject of pending petitions for reconsideration filed in the *Local Competition* proceeding, the Common Carrier Bureau issued a public notice modifying the *ex parte* rules for this proceeding. The Bureau's *Public Notice* provided that presentations on policy questions concerning reciprocal compensation to paging carriers would be subject to the permit-but-disclose procedures under section 1.1206.[123]

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119 TSR Complaint ¶ 32.

120 Metrocall Complaint pp. 13-14.

121 *See Halprin v. MCI Telecommunications Corp.*, 13 FCC Rcd. 22568, ¶ 31 (rel. Nov. 10, 1998); *see also* 47 U.S.C. §§ 208, 503((b); *see also* 47 C.F.R. § 1.80(e).

122 *See* 47 C.F.R. § 1.1208; *see also* 47 C.F.R. § 1.1202(a) (defining in relevant part a "presentation" as "[a] communication directed to the merits or outcome of a proceeding … ."); 47 C.F.R. § 1.1202(b) (a written *ex parte* presentation is one that "is not served on the parties to the proceeding"; an oral *ex parte* presentation is one that is "made without advance notice to the parties and without opportunity for them to be present").

123 Public Notice, *Ex Parte* Procedures Established for Formal Complaints Filed by TSR Paging against U S West (File No. E-98-13) and by Metrocall, Inc. against Various LECs (File Nos. E-98-14-18), and for Petitions for Reconsideration of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 13 FCC Rcd 2866 (1998) (*Public Notice*). Under the permit-but-disclose procedures, ex parte presentations to Commission decision-making personnel are permissible provided they are properly disclosed under section 1.1206.

38. TSR alleges that U S West violated the *ex parte* rules with respect to TSR's formal complaint proceeding in connection with a May 26, 1999 meeting and a September 27, 1999 meeting (to which it was not invited) between representatives of U S West and Commission staff.[124] Specifically, TSR claims that U S West made oral and written presentations to Commission staff that discussed "all aspects of LEC-paging interconnection – not just the issue of the 'applicability of reciprocal compensation to paging carriers[,]'" in violation of section 1.1208.[125] TSR also contends that U S West's June 1, 1999 letter notifying the Commission of the *ex parte* presentations concerning the May 26 meeting was filed late and failed to reference TSR's formal complaint proceeding.[126] U S West maintains that its *ex parte* presentations were permissible under the *ex parte* rules.[127]

39. We conclude that U S West's presentations concerning general paging interconnection issues raised in the *Local Competition* proceeding, as well as the specific issue of the applicability of reciprocal compensation to paging carriers were permissible.[128] As U S West observes, although the *Public Notice* expands the ability of the parties in the complaint proceedings to address the reciprocal compensation issue by making them subject to permit-but-disclose procedures, the *Public Notice* made no change in the rights of the parties to make presentations on all other issues within the scope of the rulemaking proceeding on a permit-but-

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[124] TSR Motion to Impose Sanctions (filed July 7, 1999) at 4-9; TSR Second Motion to Impose Sanctions (filed Oct. 28, 1999) at 3-7. At the May 26 meeting were Jeffry A. Brueggeman and Kenneth T. Cartmell from U S West, and the following members of the Commission's staff: Jim Schlichting (Deputy Chief of the Wireless Telecommunications Bureau (WTB)), Nancy Boocker (Deputy Chief of the WTB's Policy Division), Jeanine Poltronieri (the WTB's Senior Counsel), and Peter Wolfe (Senior Attorney of the WTB's Policy Division). At the September 27 meeting were Mr. Brueggeman, Sheryl Fraser, and Melissa Newman from U S West, and the following members of the Commission's staff: Sarah Whitesell (Legal Advisor to Commissioner Gloria Tristani), Adam Krinsky (Acting Legal Advisor to Commissioner Tristani), and Rebecca Beynon (Legal Advisor to Commissioner Harold Furchtgott-Roth).

[125] TSR Motion to Impose Sanctions at 4 and TSR Second Motion to Impose Sanctions at 5. At the May 26 meeting, U S West provided the Commission with a written outline of its oral presentation and a "white paper" entitled "LEC/Paging Interconnection: The FCC's Role and Rules" and "Paging/LEC Interconnection: The FCC's Role and Rules", respectively. At the September 27 meeting, U S West provided the Commission with a written outline of its oral presentation and a white paper, both of which are entitled "LEC/Paging Interconnection: The FCC's Role and Rules". The white papers submitted in connection with the May 26 and September 27 meetings are substantively identical.

[126] Letter from Kenneth T. Cartmell, Esq., U S West, Inc., to Magalie Roman Salas, Secretary, FCC (dated and date-stamped June 1, 1999) (June 1, 1999 letter).

[127] Opposition of U S West Communications, Inc. to Motion to Impose Sanctions (filed July 14, 1999); Opposition of U S West Communications, Inc. to Second Motion to Impose Sanctions (filed Nov. 4, 1999).

[128] *See* U S West's written outline and "white paper" filed in connection with the May 26 and September 27 presentations.

disclose basis. We find, however, that U S West failed to disclose its May 26 presentation in accordance with the requirements of section 1.1206 for purposes of the *Local Competition* proceeding and the formal complaint proceedings.[129] U S West states that it was not obvious to it that it had to make disclosure of its May 26 presentation in the complaint proceedings, but that it has done so out of an abundance of caution. The *Public Notice*, however, clearly states that any presentation concerning the issue of reciprocal compensation to paging carriers should be disclosed in *both* the rulemaking proceeding and the complaint proceedings.[130] Moreover, U S West's *ex parte* submissions filed in connection with the May 26 presentation were not filed on a timely basis. Although U S West now asserts that it will provide timely *ex parte* notices in the complaint proceedings if it has further meetings with Commission staff regarding the rulemaking proceeding, U S West is admonished to exercise particular care to insure that all appropriate steps are indeed timely taken to comply with the provisions of our *ex parte* rules in the future. We note that U S West disclosed its September 27 presentation on a timely basis and in accordance with the requirements of section 1.1206 for purposes of the Local Competition proceeding and the formal complaint proceedings.[131] In light of this fact and our determination on this issue, it appears that no further action is warranted at this time with respect to TSR's *ex parte* contentions.

IV. CONCLUSION

40. Based on our analysis above, we conclude that: 1) Defendants may not impose upon Complainants charges for the facilities used to deliver LEC-originated traffic to Complainants; 2) Defendants may not impose non-cost-based charges upon Complainants solely for the use of numbers; 3) section 51.703(b) of the Commission's rules does not prohibit LECs from charging, in certain instances, for "wide area calling" or similar services where a terminating carrier agrees to compensate the LEC for toll charges that would otherwise have been paid by the originating carrier's customer; and 4) to the extent TSR's Yuma-Flagstaff T-1 is situated entirely within an MTA, defendant U S West must provide this facility at its own expense.

V. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED, pursuant to §§ 1, 4(i), 201, 251, 252, and 332 of the

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[129] *See* June 1, 1999 letter (referencing the *Local Competition* proceeding) and June 23, 1999 letter from Kenneth T. Cartmell, Esq., U S West, Inc., to Magalie Roman Salas, Secretary, FCC (referencing TSR's and Metrocall's formal complaint proceedings). Under the permit-but-disclose rules, a person who makes an ex parte presentation should file a summary of the presentation one business day after the presentation. 47 C.F.R. § 1.1206(b).

[130] *Public Notice* ("[i]f such a presentation is made in the *Local Competition Order* proceeding, the required disclosure of such presentation under section 1.1206 should be made in that rulemaking proceeding and both formal complaint proceedings").

[131] *See* September 28, 1999 letter from Melissa Newman to Magalie Roman Salas, Secretary, FCC.

Act, 47 U.S.C. §§ 1, 4(i), 201, 251, 252, 332, that the formal complaints filed by complainant Metrocall, Inc. against defendants Pacific Bell, U S West, GTE, and SWBT ARE GRANTED IN PART and DENIED IN PART, as provided in this Order;

42. IT IS FURTHER ORDERED, pursuant to §§ 1, 4(i), 201, 251, 252, and 332 of the Act, 47 U.S.C. §§ 1, 4(i), 201, 251, 252, 332, that the formal complaint filed by complainant TSR defendant U S West IS GRANTED IN PART and DENIED IN PART, as provided in this Order;

44. IT IS FURTHER ORDERED, pursuant to § 1.722 of the Commission's rules, 47 C.F.R. § 1.722, that Complainants MAY FILE within 60 days any supplemental complaint for damages.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

In the Matters of TSR Wireless, LLC, *et al.*, Complainants, v. U S West Communications, Inc., *et al.*, Defendants

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth

I dissent from this Memorandum Opinion and Order. I do so on the ground that the application and enforcement of regulations promulgated under section 251, absent the existence of any interconnection agreement, guts the reticulated procedures for the creation and review of such agreements in section 252. Accordingly, I would read section 51.703 of our rules to govern the conduct of local exchange carriers (LECs) only in the context of a negotiated and arbitrated interconnection agreement. I would not understand that regulation to impose a free-standing federal duty upon all LECs, as the majority does.

* * *

This case presents the question whether the statutory duties of section 251 apply generally to all LECs, even where the complaining party has not sought to secure the performance of those duties in an interconnection agreement as provided in section 252.[1] In light of the entire statutory scheme concerning interconnection established by the Telecommunications Act of 1996, I think the answer is no. Accordingly, the soundest construction of the instant regulation is that it does not apply outside the context of an approved interconnection agreement.

As I explained in a recent proceeding involving an application to provide long distance service, the statutory plan for interconnection agreements makes clear that

> not all section 252 contracts need comply with [section 251] in order to be valid under the Act. In particular, section 252 contracts may be voluntarily entered into "*without regard* to the standards set forth in subsections (b) and (c) of section 251," [47 U.S.C.] 252(a)(1), which impose the major substantive duties under the Act, such as resale, interconnection, unbundling, and collocation, on [LECs].

Concurring Statement of Commissioner Harold W. Furchtgott-Roth, *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295 (rel. Dec. 22, 1999) (emphasis added).

Similarly, if voluntary agreements approved pursuant to section 252 are exempt from the requirements of section 251, then so too must be entirely private arrangements such as traditional tariffed provisioning. For section 252 shows, as I have said, that "Congress clearly meant to allow noncompulsory agreements on interconnection, recognizing the advantages of allowing parties to contract around [federal] rules and tailor

[1] Here, there is no dispute that TRS takes service from US West exclusively out of Arizona tariffs, and that it has rejected the suggestions of US West to pursue interconnection agreements.

their contracts to individualized needs." *Id.*

Clearly, then, the duties of LECs under section 251 are not universal ones. They apply not to all such carriers, but only to those who are party to arbitrated and approved interconnection agreements. Conversely, section 251 does not automatically vest in all telecommunications carriers the full panoply of rights described therein, but guarantees carriers the ability to include those rights in interconnection agreements with LECs. Indeed, the language of section 251 specifically ties interconnection duties to the existence of statutory interconnection agreements: it refers to an incumbent LEC's "negotia[tion]. . . in accordance with section 252 [of] the particular terms and conditions of agreements to fulfill the duties described [in section 251(b) and (c)]." 47 U.S.C. section 251(c)(1).

But if interconnection can occur outside the requirements of section 251, as the foregoing statutory language indicates, then section 251(b)(5) and its implementing regulations *cannot* be self-effectuating. For if the regulations created free-standing federal duties on the part of all LECs, then those carriers would violate federal law every time they provided interconnection pursuant to contracts or any other commercial arrangements that fall short of section 251. That result, however, would contradict the provisions of the Act clearly establishing the ability of parties to contract for less than what section 251 might provide. [2]

Moreover, if section 251 regulations created LEC duties independent of the existence of any interconnection agreements, there would be little reason for telecommunications carriers ever to enter into an agreement with a LEC. Nor would there be any point in having State Commissions and federal courts review the agreements for compliance with section 251. *See* section 252(e). The telecommunications carriers would *already* – solely by operation of our regulations promulgated under section 251 – be entitled to everything that section 251 provides. No proper contract would be necessary to establish or enforce the rights made available by section 251. Thus, instead of going through negotiation, arbitration, and review under section 252, parties could sidestep that process by coming, as has TRS, directly to the Commission. Section 252 and its carefully delineated procedures for creation and approval of interconnection agreements would be drastically undermined, if not obliterated. Whether or not section 252's implementation plan is convenient, it is the plan that Congress adopted, and we should not disable that plan by creating a different one that bypasses it entirely. [3]

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[2] Even the Commission Order adopting the regulations under section 251 implied that they have no such general effect. The Order declined to announce the unlawfulness of existing CMRS-LEC contracts that did not go to the outer limits of section 251; instead, the Order pointed out the availability of negotiation and arbitration procedures for future contracts as a means for securing section 251 guarantees. *See Local Interconnection Order*, 11 FCC Rcd 15499 at paras. 170, 1024 (1996).

[3] None of this is to say that the Commission lacked jurisdiction to adopt section 51.703(b) in the first place; clearly, the statute directed the Commission to make rules pursuant to section 251 to flesh out the meaning of the statutory duties. Rather, my argument is that the purpose of the regulation was to set out the rights available to telecom carriers in the arbitration process, not to create generally applicable duties for LECs regardless of the existence of an interconnection agreement.

Given the undisputed lack of an interconnection agreement between the parties, the ultimate effect of this Order is to preempt the Arizona tariffs pursuant to which TRS took its service from US West. I do not believe that Congress intended to require all state tariffs, which set the prices for customers generally, to comply with the minimum requirements of section 251. Rather, as described above, that section seems to have been enacted for the much more limited purpose of giving individual carriers the option of securing certain terms in contracts pursued according to section 252. As interpreted by the Commission, however, our section 251 regulations seem to set a federal floor to which all state tariffs must now arise.

* * *

In sum, the Commission's understanding of the scope of section 51.703(b) is inconsistent with the statutory scheme for the creation and enforcement of interconnection rights. Specifically, by creating a federal regulatory process that is wholly outside of, and apart from, the carefully defined plan of section 252, this Order makes that provision a redundant afterthought. In order to avoid undermining section 252 in this manner, we should read 51.703(b) to create rights in telecommunications carriers, as against LECs, that are enforceable in the context of a negotiated and arbitrated interconnection agreements. We should not understand it to create independent federal duties on the part of LECs absent any such agreement. Because I would not interpret the rule to operate outside the context an interconnection agreement, I see no duty to enforce it under section 208 in this case, where there is no such agreement. Accordingly, I would dismiss the instant complaint.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL, CONCURRING

In the Matters of TSR Wireless, LLC, *et al.* v. U.S. WEST Communications, Inc., File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, *Memorandum Opinion and Order*

Although I support this enforcement action, I do so reluctantly. Section 51.703(b) of the Commission's rules is a current, enforceable rule, duly promulgated by the Commission and upheld in court. We have jurisdiction to enforce it and we should enforce it. However, I write separately to raise a concern that the Commission has set up, through this rule and ones like it, a scheme that tends to undermine the interconnection regime established by Congress in the Telecommunications Act of 1996. Our rules should be reexamined so that, in the future, all telecommunications carriers clearly understand their respective duties and obligations under the key interconnection provisions of the 1996 Act.

Specifically, under section 251(a) of the Communications Act, 47 U.S.C. § 251(a), interconnection is a duty of all telecommunications carriers, including paging carriers like the complainants in this case. Under section 251(b)(5), all local exchange carriers (LECs) have the duty to establish reciprocal compensation "arrangements" for transport and termination. These provisions are not by their terms simply discretionary or suggested conditions. Moreover, when dealing with incumbent local exchange carriers, like the defendants in this case, Congress imposed additional obligations, including the duty to negotiate in good faith interconnection terms and conditions in accordance with section 252 of the Communications Act. *See* 47 U.S.C. § 251(c)(1). Interestingly, the statute also places a duty on the requesting telecommunications carrier to negotiate in good faith the terms and conditions of interconnection agreements. Section 252 sets forth in some detail the negotiation process and the points in the process where negotiating carriers may request government intervention.

The rule we enforce by this Order allows certain telecommunications carriers to bypass this process. Section 51.703(b) was adopted "pursuant to section 251(b)(5)."[1] Undoubtedly, after *Iowa Utilities*, the Commission can establish rules to carry out the provisions of the Communications Act, including sections 251 and 252, at least for purposes of "guid[ing] the state-commission judgments."[2] In this case, LECs, by rule, were required to cease charging CMRS providers or other carriers for terminating LEC-originated traffic and must provide that traffic to CMRS providers or other carriers without charge. No negotiation or even a request to the LEC is necessary under the rule.

However, in their proper context, a better reading of section 251 and the negotiation provisions is that Congress wanted there to be a fair opportunity for parties, through negotiation, to work out the terms and conditions of their interconnection relationship in the market, rather than by regulatory mandate -- the section is entitled "Development of Competitive Markets." I

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1 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16016 (1996).

2 *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721, 733 (1999).

see the specific duties in 251(b) and (c) as general backstops should negotiations fail. Indeed, the preference for the "market" is revealed by the fact that the contract can supercede any and all these obligations.[3]

Therefore, the quandary in my mind is that, if the Commission, over time, develops its own rules and regulations about interconnection, why should a party have to slog through the statutory process to get what it is entitled to under the rule? If the rule is favorable to a requesting party, why would it ever concede that term to an ILEC in negotiation and, thus, isn't the process a waste? I think the answer is that ILECs have a right under the statute to try to bargain away those duties by offering something of greater value to the requesting carrier. Moreover, it is entirely conceivable that a requestor would forgo some "regulatory rights" in exchange for other things. Thus, it is at least plausible that the terms of the rule would not ultimately prevail in negotiation. In light of this, while section 51.703 of our rules should be enforced, we should expeditiously reexamine its effects on the market-based negotiation process and, based on the interconnection negotiations that *have* taken place and other circumstances, determine whether or not it should be modified to fit better within the statutory scheme.[4]

As a related matter, the complainants in this case have invoked Section 208 to complain *to this Commission* that ILECs have, *inter alia*, violated sections 251 and 252, and the rules promulgated thereunder. While this item properly applies the enforcement policy embodied in the *Local Competition Order*, I am concerned this approach all but swallows the carefully crafted mechanisms for dispute resolution set forth in the 1996 Act. I would suggest that the issue of our authority under section 208 to enforce the general provisions of sections 251 and 252 are now ripe for judicial review.[5]

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[3] *See* 47 U.S.C. 252(a)(1).

[4] I note that there are several long-pending reconsideration petitions and applications for review that address this and other reciprocal compensation rules. It would behoove us to act on these quickly.

[5] *See Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 803 (8th Cir. 1997), *rev'd AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct 721, 733 (1999).