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Speaker (00:00):

Case number 08-1365 et al. *Core Communications, Inc. Petitioner v. Federal Communications Commission et al.* Mr. Hazzard for petitioner Core Communications, Inc. Mr. Feinberg for petitioner PSC of New York. Mr. Palmore for the respondent and Mr. Angstreich for the interveners.

Judge Sentelle (01:04):

You will hear from the first petitioner.

Michael B. Hazzard (01:23):

Good morning, and may it please the court. Michael B. Hazzard on behalf of petitioner Core Communications, Inc. The key to this case is the FCC's holding "the transport and termination of all telecommunications exchange with the last is subject to the compensation regime" in sections 251(b)(5) and 250(d)(2). And with that finding in place—yes, Judge Williams.

Judge Williams (02:12):

No, go ahead. I mean finish the sentence. It was hard for me to tell what the sentence was doing. Okay. Go ahead.

Michael B. Hazzard (02:19):

With that finding in place that followed a myriad of judicial findings on the construction of the 1996 amendments to the Telecommunications Act, the FCC exceeded its statutory authority in three ways. First, the FCC ignored Congress's directive that the state commissions set the rate for the transport and termination of telecommunications traffic between LECs under the (b)(5)-(d)(2) framework.

Judge Williams (02:48):

Now, your brief, although it mentioned on page 10-251(i) never discussed it. And you regard 251(i) is irrelevant?

Michael B. Hazzard (03:00):

No, Your Honor. I don't believe it's irrelevant. 251(i) directs back to the FCC's preexisting section 201 authority, which was a source of authority that the commission used to overwrite the section 251(b)(5) and (d)(2) framework.

Judge Williams (03:16):

But you didn't find it worthwhile to discuss that in your brief, either? Right?

Michael B. Hazzard (03:22):

Which brief? We filed two briefs, which I—

Judge Williams (03:25):
Well, I'm, he's up here as petitioner.

Michael B. Hazzard (03:30):
I'm sorry, Your Honor. Anyway, Judge Williams, 251(i) is a savings clause, which directs back to section 201.

Judge Williams (03:39):
Right.

Michael B. Hazzard (03:39):
And it preserves the commission's rule making authority under 251.

Judge Williams (03:42):
I, oh—not to say that. I mean 251(i) preserves all of 201.

Michael B. Hazzard (03:47):
Correct.

Judge Williams (03:47):
Not just the last sentence of 201(b).

Michael B. Hazzard (03:51):
Your Honor, it does indeed preserve section 201 authority.

Judge Williams (03:56):
But you didn't discuss that, either. Right?

Michael B. Hazzard (03:58):
Well, I agree with that finding. I don't dispute that. The 251(i) preserves 201, but only insofar as it addresses section 251, which is 251(i) says nothing in the sub—nothing in this section shall be perceived to override the commission's two—

Judge Williams (04:17):
The commission has reserved power under the 251(i) to apply 201 to things which are within the scope of 251, but then it loses that authority by virtue of 252, which itself piggybacks on 251.

Michael B. Hazzard (04:38):
Well, I think of the question a little bit differently. Well, the 201 authority is the rule making authority that the Supreme Court found that was preserved. And that's not controversial in my point, but what is controversial is the FCC in the 1996 amendments to the act created what the Supreme Court also found was a hybrid jurisdictional framework where the FFC and the state commissions act under federal law to carry out the duties, and Congress chose to have the state commissions under 252 manage interconnection agreement negotiations, arbitrations, set prices, review those agreements to ensure that they're in accordance with the act, and we even—

Judge Williams (05:23):
So a transaction legitimately classified as interstate by the FCC. It lost its regulatory authority, despite 251(i), which you don't cite. Is that correct?

Michael B. Hazzard (05:38):

There was no preexisting authority for let collect transfer and termination of telecommunications.

Judge Williams (05:45):

Yes, there was.

Michael B. Hazzard (05:46):

That didn't exist.

Judge Williams (05:47):

Your brief doesn't talk about either Telecommuter, I think it is, or—no *Teleconnect* or *MemoryCall*. Those two applications of end to end, which antedate the 1996 Act.

Michael B. Hazzard (06:05):

Well.

Judge Williams (06:06):

Hard to see why those don't continue.

Michael B. Hazzard (06:08):

Well, those both involved long distance calls.

Judge Williams (06:11):

Involved the combination of an interstate leg and an intrastate leg, which the commission, under the end-to-end principle, treated as subject to its jurisdiction all the way.

Michael B. Hazzard (06:27):

Well, let's go back to just that, Judge Williams. If we go back to 1999, when the FCC issued its declaratory ruling, which kicked off this whole decade long of cases, the FCC said it very explicitly, if these calls terminate at the ISP servers, then this traffic is subject to 251(b)(5), and 252(d)(2) says explicitly—

Judge Williams (06:49):

You're talking about the application of the proposition of what is a termination, but there appears to be nothing to say that something can't be a termination for purposes of 51701. And also be a leg of an interstate communication.

Michael B. Hazzard (07:11):

Well, I'll respond to that in two ways. Pre-1996 Act, the jurisdictional analysis was if we know the origination and termination points, and they're in the same state, it's intrastate. If the origination and termination points are in two different states, it's interstate—

Judge Williams (07:26):

I don't know if you're using termination as if it were a blanket-established word. I don't think that the end-to-end cases actually use the word termination.

Michael B. Hazzard (07:38):

Well, the difficulty with the end-to-end cases is the termination point is unknown. In this case, we now know that the termination point is known. The transport and termination between LECs to, in this case,

CORS customer, the ISP occurs within the scope of 251(b)(5).

Judge Williams (07:54):

That's maybe a termination within the meaning of a particular regulation. That does not make it an end for purposes of the end-to-end principle.

Michael B. Hazzard (08:06):

But, Judge Williams, that that's not what the case—

Judge Williams (08:08):

None of this was raised in your brief!

Michael B. Hazzard (08:10):

Judge Williams, no, it was raised in my—our briefs. What the FCC found is that this traffic is subject to 251(b)(5).

Judge Williams (08:17):

Yes.

Michael B. Hazzard (08:17):

Right. And that means under the declaratory ruling, under the court's decision in the first court forbearance case, under the mandamus case from last year, if the traffic falls under 251(b)(5), then reciprocal compensation is owed. The panels of this court's opinion state that explicitly in both of those cases. And we know further that 252(d)(2) talks about setting rates for reciprocal compensation. And we're talking as if 201 is some form of pro-counsel imperium where they can just kind of go around and override any provision of the 1996 Act at once. And the Supreme Court has found—

Judge Williams (08:56):

Let me ask you this, is there any context in which 251(i) and 201, which is as brought back into—as brought into the picture or kept in the picture by 251(i) have any application within the domain of 251-252?

Michael B. Hazzard (09:16):

Yes.

Judge Williams (09:16):

What?

Michael B. Hazzard (09:17):

And that application is the prescription of regulations and methodologies, and that's what—

Judge Williams (09:23):

That doesn't need 201 for that, does it?

Michael B. Hazzard (09:26):

That the source of rule-making authority that the commission has and it's repeatedly reliable.

Judge Randolph (09:29):

It's *Iowa Utilities*.

Michael B. Hazzard (09:31):

Excuse me.

Judge Randolph (09:31):

It's *Iowa Utilities*.

Michael B. Hazzard (09:33):

That is *Iowa Utilities*. And it's been—was reaffirmed on the eighth circuit on remand. And it was also discussed success—

Judge Williams (09:39):

There's nothing in *Iowa Utilities* says that that power is exclusive. Right?

Michael B. Hazzard (09:44):

Well, let's put it this way. 251 outlines a whole raft of obligation, unbundled network elements, network, interconnection, colocation. It's a whole variety of things. All the terms of trade are set in 252 under state commission supervision at Congress's deliberate choice. Congress made that choice that the state commissions would carry out those functions and would set the rates in accordance with the FCCs methodology. The only time the FCC acts under 252 is if the state commission refuses to act, and we don't have that situation here. But furthermore, what we're talking—

Judge Randolph (10:20):

I just want to be clear about your position here before you go further explaining it. You're arguing that these are purely intrastate. This is purely intrastate traffic?

Michael B. Hazzard (10:36):

A under the commission's traditional jurisdictional analysis—

Judge Randolph (10:39):

Well, the commission reached a different decision here, but.

Michael B. Hazzard (10:42):

Well, I'm sorry if I may.

Judge Randolph (10:44):

Is that your argument that this is purely intrastate traffic when it goes to an ISP?

Michael B. Hazzard (10:51):

There are two parts of the answer. The first part is pre 1996 Act, before the hybrid jurisdictional framework came in, that kind of really changed the whole interstate domain. Yes. These would be purely intrastate calls because you have two LECs, the call originates with one LEC, terminates with the other LEC. What the LEC customer does afterwards—

Judge Randolph (11:14):

Yeah. What's the second point?

Michael B. Hazzard (11:15):

The second point is, as the FCC found in the 1996 local competition order, and as we went through our

briefs extensively, the 1996 Act turned that jurisdictional notion on its head and greatly kind of expanded the scope of Congress's authority. But what Congress did was it allocated certain power to the FCC, rulemaking, and methodologies, and our certain power to the state commissions acting under federal law. So even so—

Judge Randolph (11:43):

Back to the point.

Michael B. Hazzard (11:44):

Here's the point, Judge Randolph, seriously.

Judge Randolph (11:46):

Hang on a minute. All I want to know is—and I guess your answer is yes, that these—that your position is that these are purely intrastate. And you're relying on 1996 rulings by the FCC, which the order we have does not agree with that proposition, but here's my question. If we disagree with you and say, "no, well, it's partly intrastate, and it's partly interstate because the communication goes beyond simply the ISP" does that mean you lose?

Michael B. Hazzard (12:21):

No.

Judge Randolph (12:22):

And why not?

Michael B. Hazzard (12:23):

Because whether it's interstate or intrastate goes to what law applies, and there's no debate that we're talking about what the federal communications act applies to. And if you look at the language of 251(b)(5) the transport—

Judge Randolph (12:37):

If it's partly interstate and it's partly intrastate and you can't separate out the different parts, then 201 applies. The first sentence of 201 applies.

Michael B. Hazzard (12:49):

I disagree, Your Honor, respectfully, and sincerely. Let's look at what the statute says. The 251(b)(5) talks about the transport and termination of telecommunications between LECs. There's no debate about that. It doesn't talk about whether those telecommunications are interstate or intrastate or local or long distance. It's talking about two kinds of companies LECs, and there's a transport function and a termination function that we provide. If you go to 252, 252 sets forth the compensation mechanism for reciprocal compensation under (b)(5). It doesn't talk at all about whether the 251(b)(5) traffic is put in one category or another. In fact, what the FCC found was Congress used the term telecommunications. And our whole point is that all telecommunications are treated the same, and that's Congress's choice. And that was a big word that they used. And even the FCC acknowledges that it's not subject to differentiation, and that that Congress could have put restrictions on it if it chose to, but it did not it. And I got to none of my argument, but I'm well past my time, but—

Judge Sentelle (14:01):

Yeah, you are well past your time. So if my colleagues have no further questions, we'll hear from the other—

Michael B. Hazzard (14:09):

Thank you.

Jonathan Feinberg (14:20):

Good morning, Your Honors. I'm Jonathan Feinberg from the New York Public Service Commission. I'm appearing behalf of the New York Commission and also the National Association of Regulatory Utility Commissioners, the National Association of State Utility Consumer Advocates, and the Pennsylvania Public Utility Commission. The issue in this case is whether the states set the prices for reciprocal compensation pursuant to 251(b)(5) and 252(d). And the answer is a plain manner of statutory construction is that they do. 251(b)(5) provides for the obligation for reciprocal compensation at a reciprocal exchange of traffic between local exchange carriers. 252(d)(2) specifically refers to 251(b)(5) and says the state commissions shall set terms and conditions providing for the reciprocal recovery of the costs of that exchange of traffic. We're talking you're—

Judge Williams (15:22):

You do address 251(i).

Jonathan Feinberg (15:25):

In our reply brief, Your Honor.

Judge Williams (15:25):

Basically one sentence in your brief, and then you go on to distinguish the commission's attempted use of CMRS. But it doesn't seem to me, you don't exactly offer a construction of 251(i).

Jonathan Feinberg (15:42):

We adjust the FCC's argument with respect to 251(i) in our reply brief, pages 10 to 13.

Judge Williams (15:48):

Well sometimes we—you do have a principle on that. Don't we?

Jonathan Feinberg (15:50):

Well, the—

Judge Williams (15:52):

Arguments raised in our reply brief essentially don't count.

Jonathan Feinberg (15:57):

I believe, Your Honor, that we were—the FCC in its decision makes a passing reference to 251(i), and—

Judge Williams (16:04):

Quite a lot more than passing reference.

Jonathan Feinberg (16:05):

But 251(i) basically just incorporates the power of under 201. If 201 does not reach—

Judge Williams (16:14):

So how does 201 not reach an interstate, a transaction legitimately classified by the FCC is interstate?

Jonathan Feinberg (16:22):

Because we're not talking about the interstate piece of the transaction. We're not talking about—

Judge Williams (16:26):

I understand that, but I don't think your brief, either, makes any attack on the preexisting end-to-end doctrine or the commission's application of it.

Jonathan Feinberg (16:37):

We regard the end-to-end issue is irrelevant for purposes of the 251(b)(5). 251(b)(5) talks about the local exchange of traffic between two carriers. And it's concerned with a cost recovery, particularly by the terminating carrier of the termination of the call. And that piece of cost recovery is independent of and severable from the rest of the traffic. I mean, it can be argued that the call—

Judge Williams (17:02):

That would've been true if the former applications to the end-to-end principle, wouldn't it? Let's say the segments would've been severable and the commission didn't sever them.

Jonathan Feinberg (17:14):

But the commission—Congress severed them, Congress said—

Judge Williams (17:18):

But it also included 251(i), which you didn't regard as worth construing.

Jonathan Feinberg (17:25):

We—the FCC is saying 251(i) on its face only preserves the FCCs preexisting authority under 201. This court in the Bell Atlantic case—

Judge Williams (17:35):

Stop there.

Jonathan Feinberg (17:36):

Okay.

Judge Williams (17:36):

Stop there. If the sort of transaction involved here had come up in 1995, would the commission not have had power to regulate it under 201?

Jonathan Feinberg (17:53):

No, because this.

Judge Williams (17:54):

Why not?

Jonathan Feinberg (17:54):

These sorts of transactions would not have existed in 1995. If, in fact, there was any sort of transaction like this, it would've been treated as a local call because there would've been—the IEC would've carried the incumbent local exchange company, would've carried the call to the ISP, and the end-user making that call would've paid the paid for that cost. It's only with the development of the 1996 Act that we have the

development of these reciprocal compensation regimes that we have an obligation under 252, that the terminating local exchange company be paid by the originating carrier for the costs of that termination. And we're only talking about a piece, a unique and specific piece of the call that Congress addressed in 252(d). That obligation in 251(b)(5) to take the traffic did not exist before the 1996 Act. The obligation created by 252(d) for recovery of costs did not exist before the 1996 Act. And the state commission's role to implement federal statutes—

Judge Williams (19:07):

There was a broad interconnection due date of the 1996 Act, right?

Jonathan Feinberg (19:12):

Under 201, yes. But the Congress specifically carved out this particular transaction and gave it special treatment, including this—

Judge Williams (19:22):

Sort of standard pattern was a local monopoly franchise monopoly.

Jonathan Feinberg (19:29):

Yes, Your Honor.

Judge Williams (19:29):

So that was standard. Was that invariable?

Jonathan Feinberg (19:33):

Generally across the country—

Judge Williams (19:35):

Generally.

Jonathan Feinberg (19:35):

There was general, there was—

Judge Williams (19:36):

General.

Judge Sentelle (19:36):

Generally is a good word, but it was not invariable. Was it?

Jonathan Feinberg (19:41):

The only exception I know is the New York Commission and some other commissions had been opening up local exchange access to other provide competing care.

Judge Sentelle (19:49):

So the only exception establishes that there was at least exception.

Jonathan Feinberg (19:54):

There was state-created exceptions, but in terms of the federal law, there was no federal obligation for interconnection on the local level.

Judge Williams (20:06):

Even with respect to an interstate call?

Jonathan Feinberg (20:09):

An interstate a call would've been handled as a matter of exchange access. That's a different matter than reciprocal conversation. We're not—that doesn't involve calls transferred between carriers on a local level. That talks about the access to the local areas via—

Judge Williams (20:30):

I understand.

Jonathan Feinberg (20:30):

An exchange tariff, which is a very different thing from reciprocal compensation than the transport and termination of local traffic pursuant to 251(b)(5).

Judge Randolph (20:41):

So for your position is that under 252, the state commission has the authority to set rates for the reciprocal conversation for interstate calls?

Jonathan Feinberg (20:54):

No. We're setting this. We're setting the local piece; we're setting the piece that deals with the exchange of traffic on a local basis. And one of the problems with the FCC's position in this case is it's trying to read out the language of transport and termination from 251(b)(5) and we're—and it's also ignoring that we're talking about a two-party transaction that is local exchange of traffic between the an originating, a local exchange carrier, and a terminating carrier. Once you—that that is the unique, special, local transaction that's being addressed by the state commission in this case.

Judge Sentelle (21:32):

Wouldn't that go back to Judge Randolph's earlier question, and frankly, I've forgotten, which of you he asked, I think it was you, that you are treating this as an intrastate call?

Jonathan Feinberg (21:42):

We're treating a piece of the call as intrastate, and that's pursuant the federal law

Judge Sentelle (21:49):

[Inaudible].

Jonathan Feinberg (21:49):

And as Judge Randolph pointed out in the Iowa case, the Supreme Court provided for FCC method-setting of a methodology, but the states implement that regime pursuant to federal law. That is the regime that Congress intended. And that it's the one specifically—

Judge Williams (22:07):

But it not utility certainly didn't say that was exclusive. Right?

Jonathan Feinberg (22:11):

But there's no other basis.

Judge Williams (22:14):

The problem before us wasn't present in *Iowa Utilities*, right?

Jonathan Feinberg (22:16):

Yes. But there's nothing that would suggest that 201 gives the state—gives the FCC power to set a rate for these calls.

Judge Williams (22:26):

Except that the call as a whole under established FCC rulings is taken as a whole interstate. That's the only thing.

Jonathan Feinberg (22:36):

Yes. But Congress specifically carved out this particular transaction, Your Honor. I'd like to reserve the remainder of my time for rebuttal. Thank you.

Judge Sentelle (22:44):

Thank you, counsel. We'll hear from the commission.

Joseph Palmore (22:55):

Good morning. May it please the court. I'm Joseph Palmore here on behalf of the FCC. I think the exchange between Judge Williams and Mr. Hazzard really gets to the nub of this case, which is what does section 251(i) say and what per does it serve in this regulatory scheme? Section 251(i), on its plain terms, says that nothing in section 251 shall be read to limit or otherwise affect the commission's authority under section 201. Now we've heard two, a couple different glosses that—yes, Your Honor?

Judge Sentelle (23:27):

The commission's taking seems to approach the 251(i) just overrides everything else in 251. The 201 governs everything anyway, and the 251 is really the reason for being there.

Joseph Palmore (23:41):

I think that, Your Honor, I don't think that's our position. I think rule 251(i) is a rule of construction. It says nothing shall be construed to limit our otherwise effect. It doesn't negate anything. And it says it would've been very easy for Congress if the states were right, that all Congress was concerned about preserving was pre-ACT interconnection authority under section 201A. Congress very easily could have said 201A there in 251(i). Congress didn't do that. Mr. Hazzard says—has a different theory about 251(i), saying that it's limited to the rule making sentence in the last sentence of 201(b). Again, Congress could have said that if it had wanted to, but it didn't; it said 201 generally. And any event, I would put point out that even if Mr. Hazzard is right, that rule-making sentence says the commission shall have authority to issue rules to implement the act. Section 201 itself, including the language above that in section 201(b), is part of the act. So I'm not sure exactly where that argument gets him. So I think that petitioners, both petitioners position, really, crumbles at the outset because they fail to offer any substantive meaning behind this provision, which Congress—

Judge Randolph (24:51):

Your position is dependent upon, is it not, that the traffic to ISPs is interstate, at least in part?

Joseph Palmore (25:00):

Yes, Your Honor.

Judge Randolph (25:02):

Why is that?

Joseph Palmore (25:03):

Why is our position?

Judge Randolph (25:05):

No. No. Why is it—

Joseph Palmore (25:05):

Oh why is it.

Judge Randolph (25:05):

Why is it didn't understand.

Joseph Palmore (25:06):

That piece of the commission's analysis has been absolutely consistent through all three of the orders that have come before the court, and it's consistent with a long line of commission authority applying an end-to-end analysis for purposes of determining jurisdiction. This goes back to the 1980s, the enhanced services provider exemption.

Judge Randolph (25:27):

If it's an area code 202 call to somebody that's area code 202, that's an intrastate call. Is that right?

Joseph Palmore (25:36):

Well, in the colloquial sense, yes. It depends on what happens after that call, after that first leg of the call, happens because the commission has always applied an end-to-end analysis.

Judge Randolph (25:46):

It's the only leg.

Joseph Palmore (25:48):

Oh, if that's the only leg, and there's no further communication, then yes, that would be an intrastate call.

Judge Randolph (25:54):

But if at the end of that call, it's an internet service provider. The commission says, no, no, no, that's partly interstate. And that's because the call doesn't go. It's because the—after it to the ISP, then the ISP has dedicated lines that go to wherever the router is or whatever they do. And is that right?

Joseph Palmore (26:16):

Well, the communication continues. You're right, Your Honor. And it continues beyond the state and beyond the country, often.

Judge Randolph (26:22):

It doesn't—but it doesn't continue through by telephone companies. Right?

Joseph Palmore (26:25):

Well, it continues in the sense that these communications always continue. And the commission's analysis

here is exactly consistent with its analysis for every form of internet access. So these orders are cited in footnotes 69 of the order on review. We also have talked about the GTE tariff order in our brief. In case after case, the commission has looked at internet access of all kinds, where you have an initial communication from a user to a point of connection within a state. And then you have an additional communication from that point of presence onto the internet. And consistently the commission has that that is an end to end interstate communication. And Judge Williams also brought up a *Teleconnect* case, the *MemoryCall* case—these are pre 1996 Act cases. And they're completely consistent with the idea of the end-to-end analysis. I think the—

Judge Williams (27:17):

In this case, is it starting—we're talking dial-up when it goes from the caller to the LEC, it's analog, and then when it reaches the ISP, the further communications or digital packets, is that correct? Or—

Joseph Palmore (27:40):

That may be correct, Your Honor. I don't know that's not an issue. That's been briefed in this—

Judge Williams (27:44):

Does anybody use dial-up anymore?

Joseph Palmore (27:45):

Your Honor, actually, surprisingly, yes. There's evidence in the record here that I think that level three put in, and this is in the joint appendix that that currently 10% of American households are dial-up internet users. That number was 20% as recently as 2007. So it's a diminishing group, but it's still a large a large number of people, and it's a highly significant issue. But going back to the *MemoryCall* issue—*MemoryCall* case that Judge Williams brought up there, there was an interstate call to someone's house who wasn't home. And then a second communication from that house to a voicemail server that was intrastate. And what the commission said there was we are going to view this as an end-to-end analysis, even though there was a logical breakpoint in the middle, the commission applied as end-to-end analysis and said that entire communication is one interstate communication.

Judge Williams (28:38):

In that case where there are two—I assume there were two separate firms, but there were also two,—I'm not sure what they're called, but places where the, I mean, spots on the city map where the call was coming into one and then moving to another, is that not right?

Joseph Palmore (29:01):

Yes, Your Honor.

Judge Williams (29:02):

So you have—

Joseph Palmore (29:04):

There was a natural—

Judge Williams (29:06):

Right.

Joseph Palmore (29:07):

End point or intermediate point where the two networks were connected—

Judge Williams (29:11):

It could have been broken.

Joseph Palmore (29:12):

Right. Logically could it could have been broken, but the commission consistent with its end-to-end analysis, didn't break it. And as I said, it supplied that end-to-end analysis across all manner of internet access. So in the cable modem order that resulted in the Supreme Court's decision in Brandex, the commission said this is an end-to-end interstate communication, even though the cable point of presence where the user connects to the internet might be within the state. The commission did the same with DSL access, which DSL actually runs along the same copper line that the voice call runs over that was in the GTE tariff order that we cite. Mr. Hazzard—

Judge Randolph (29:49):

Could there be any danger of conflicting state commission rulings if the commission bowed out of this and had a state commission set the rates?

Joseph Palmore (29:58):

Well, I don't know that the concern exactly would be conflicting rulings, but we have a—that's not a hypothetical question because we had that regime for a few years. So in 1999, the commission said, for the first time with respect to this specific dial-up internet traffic, this is interstate traffic, but the commission then let the state-run arbitration system proceed with respect to that traffic. And it didn't—the record was pretty poor there. That's—

Judge Williams (30:25):

I thought specifically the claim was that the internet traffic subsidized the local traffic, right?

Joseph Palmore (30:36):

That's the, well, the local—the broad mass of local phone users ended up subsidizing dial-up internet access because the—what happened was there were competitors who entered the market only to serve ISP—dial-up ISPs as customers. They were able to earn all of their revenue or nearly all of their revenue from.

Judge Williams (30:58):

The reverse thing.

Joseph Palmore (30:58):

Right from the—

Judge Williams (30:59):

Direction of cross subsidy.

Joseph Palmore (31:00):

Right. No, but the point is accurate though that there is a—

Judge Sentelle (31:03):

[**Inaudible**]

Joseph Palmore (31:03):

There was a compelled subsidy there because the ISP—dial-up ISP didn't have to pay anything for the telecommunications it was consuming. Instead, that was paid for by the broad mass of phone users from the Ingen. In most cases, it was the ILEC. Mr. Hazzard says that the key to the case is that the commission found that this traffic terminated for purposes of 251(b)(5).

Joseph Palmore (31:29):

But I think that his point obscures that there are two separate questions here, and the court recognized this in *Bell Atlantic*. Termination for purposes of the commission's rule 51701, and I would point out that that definition says for purposes of this subpart, which deals only with reciprocal compensation, looks at the kind of functional relationship between two carriers. But what the court said in *Bell Atlantic* was that the question of jurisdiction—the jurisdictional end-to-end analysis, which the court said there was no dispute was properly applied, didn't dictate the answer to that termination question under (b)(5). The converse is it has to be true also as a logical matter, which is that the question of termination under 251(b)(5) doesn't and cannot dictate the jurisdictional analysis. It's the jurisdictional analysis that is key and deposited for purposes of section 201, which is preserved by section 251(i). And finally, I would point out that another point that Mr. Hazzard makes is that—and it's related to what I just talked about, was that if it's in 251(b)(5), that's the end of the story here, but that's—he's reading section 251(b)(5) to limit or otherwise affect the commission's section 201 authority. And that's exactly what 251(i) says that we're not permitted to do.

Judge Randolph (32:53):

On to—with respect to 201. I have two questions. The first question is does the commission—it's the commission's position that this is a rate?

Joseph Palmore (33:07):

I think so. Yes, Your Honor. I think it is a rate, and I think we had authority under section 201 to issue just and reasonable rates—

Judge Randolph (33:14):

Well, that's the second. In your brief, you cited two CEG, and you gave us two examples of when the commission has set rates under the first sentence of 201(b). Right?

Joseph Palmore (33:26):

Correct.

Judge Randolph (33:28):

I haven't looked at those exam—but are there any other examples?

Joseph Palmore (33:36):

Your Honor, I believe there are other examples. I can't name them for you right now, but I would point out that I think Your Honor's getting at the question that the interveners or that my—Mr. Hazzard in his capacity as an intervener has made that that section 205 is the exclusive authority to set rates, and we can't do this under section 201, even if 201 applied here.

Judge Randolph (33:56):

Before you get to that, you're familiar. In these cases where you have two separate entities and they both file petitions for review, and they both get separate numbers, have we allowed before both of them to intervene in the others petition and then have the opportunity to file a 50 page brief on top of the 50 page

brief they've already filed?

Joseph Palmore (34:20):

I don't, I—

Judge Randolph (34:21):

I don't think believe I've seen that.

Joseph Palmore (34:22):

Before Your Honor, but I don't know what the court's policy is with respect to that issue. No, but I think it's significant here that this argument that we had to proceed under section 205, because that's the sole rate making provision. That's an argument that was raised only by an intervener. It wasn't raised by either petitioner in this case. So it's not properly before it was—

Judge Randolph (34:40):

Well, it was raised by core.

Joseph Palmore (34:42):

Core as an in its interveners brief. So I don't think it can use its interveners brief to expand the scope of the arguments made by core as petitioner. So I don't think that argument is properly before the court but—

Judge Randolph (34:55):

I know you say that in your brief, but the fact of the matter is the reply briefs are properly addressed arguments that you make in support of your position. So I don't know that that really matters, but anyway, I cut you off.

Joseph Palmore (35:12):

Right. Well, I think if you do go to the merits though, I think it's clear that you look at those access charge reform orders, that the commission does have general rule-making authority to issue rules to staff was just and reasonable rates. Section 205 addresses a completely separate issue in a separate process, which is review of tariffs. So if you look at section 203, which is about the filing and suspension of tariffs, section 204, which is about the investigation and hearings on tariffs, section 205 then governs what happens when the commission wants to essentially pull out an unjust and unreasonable rate from a tariff and replace it with a just and reasonable rate.

Judge Sentelle (35:47):

Going back to the simplest part of the question, you are relying on the authority of the commission to make rates. You're not contending that this is a methodology.

Joseph Palmore (35:56):

We are not contending that. Now, I know our interveners have made that argument, but that's not part of the order that's on review here. Your Honor, I would just—there wasn't much time spent on the merits when the petitioners were up and the arbitrary capricious claims. I would just suggest that that the court's decision in 2006, in the forbearance case, while off to one side a little bit, it actually really gets to the nub of those merits claims. And what the commission—what the court there said was that the commission was entirely reasonable keeping the rate cap and the mirroring rule in effect because of the severe market distortions that the absence of those rules had led to. And the court explained that there was no discrimination here because the operation of the mirroring rule ensures that any CLEC that is going to receive the 0007 rate would also have the ability to pay only 0007 when it terminates traffic at the LEC to,

and to the extent that there are CLECs that don't actually terminate—

Judge Randolph (36:57):

Why would any company consent to or agree to less than that rate?

Joseph Palmore (37:03):

Your Honor, I think there there's substantial evidence in the record that many petitioner companies have actually reached reciprocal compensation rates.

Judge Randolph (37:12):

Yeah. But why?

Joseph Palmore (37:12):

For less than. I think it may be—I'm not sure, Your Honor. I think it may be a matter of simplifying and reducing costs and allowing them to—

Judge Randolph (37:24):

Is it a bargaining—we'll drop this if you agree to, I mean, is that the way it?

Joseph Palmore (37:28):

Well, these rates are often reciprocal rights, so a party may say, we'll pay you only 00035. And that was one of the level three figures that was put in the record. In exchange, we will only have to pay you 00035. It would be reciprocal. Mr. Angstreich may have more perspective on from the industry on why parties would want do that, but there was substantial evidence in the record here that parties were doing that. And we're actually reaching agreements at below 0007.

Judge Williams (37:56):

I'm sorry, just to make sure, which is the 2006 forbearance case?

Joseph Palmore (38:02):

I—Your Honor, I'm sorry. I don't have the citation. This was core asking, I think, I believe in 2004, asked the commission to forbear from application of the rate cap and the marrying rule. We do cite this in our brief; it's one of the many *Core* decisions. I think it was *In re Core* and it has a 2006 date. The commission did actually forbear from a couple of the other rules we haven't talked about, but didn't forbear from the rate cap or the mirroring rule in this court.

Judge Williams (38:28):

I was looking for it under C and I.

Joseph Palmore (38:31):

Oh, okay. Yes. And the court found that the commission's decision to retain those rules was entirely reasonable. If there no further questions, Your Honor.

Judge Sentelle (38:39):

If not, then we'll—I believe the first petitioner council was out of time.

Speaker (38:46):

No. We have the intervener.

Judge Sentelle (38:47):

I'm sorry. We forgot the—I forgot the intervener.

Speaker (38:50):

[**Laughs**]

Judge Sentelle (38:56):

Okay. You have five minutes.

Scott Angstreich (38:58):

Thank you, Your Honor, Scott Angstreich. I'm here representing AT&T and Verizon. And I'm also here on behalf of a broader group of interveners, which include other incumbent telephone companies, competitors with ISP customers and wireless carriers. And as I think the questioning here has revealed today that the central—the core question really, is whether Congress in enacting the 1996 Act took away the commission's star of authority under 201 over interstate traffic. And that the answer to that question is found in section 251(i), where Congress did instruct that the—

Judge Williams (39:30):

The claim now is that the kind of authority exercised under 201 and pursuant to the end-to-end doctrine was entirely different then, because the intrastate leg was not a LEC-to-LEC leg.

Scott Angstreich (39:50):

That that is just not true, Your Honor.

Judge Williams (39:52):

That's not true?

Scott Angstreich (39:52):

I mean, to the extent that there were, and going back to 1994, 1995, I think you had sort of CompuServe in its early stages. And some of the really early enhanced service providers that maybe they weren't accessing the internet but were providing stored information services. And you could very easily have a neighboring local exchange carrier. I could be a Bell South customer in North Carolina. I could place a local call to a GTE number, which was right next door. Their areas overlapped quite a bit, and that GTE customer might be an early internet service provider or one of these enhanced service providers. And so it's not as though these calls didn't exist previously, and the FCC has been addressing them since 1983, which is the first time the commission explained that calls to one of these companies.

Scott Angstreich (40:39):

They were referred to more broadly as enhanced service providers, because I don't think the internet was in anybody's mind back then, but that these kinds of companies transit calls on route to their destination. Dialing up to the internet, you're not really trying to talk to BITNET or whoever is your internet service by. You're going to look on a newspaper website, find a sports score, send an email. You're communicating with the broader world. And that's why the commission is long recognized that for jurisdictional purposes, these calls don't end where it gets handed off to the ISP or the ESP, but rather end for jurisdictional purposes in the broader internet.

Judge Williams (41:19):

Is there some place in what we have before us where applications of end-to-end embracing the LEC to LEC sort of transaction, or at least as part of them are collected? Or—

Scott Angstreich (41:31):

I don't—I know the 1999 order cites a number of these end-to-end decisions. I don't know that the specific issues came up. I think what you find is that issues tend to need to have a lot of traffic volume, therefore, a lot of dollars behind them before they percolate up through the litigation.

Judge Williams (41:50):

No, I meant just FCC orders that made it clear that they were applying end-to-end in a context where some of the superficially intrastate legs were LEC to LEC.

Scott Angstreich (42:02):

I can't think of a specific one, although it looks very similar to what's called feature group A. It's mentioned in around paragraph 60 of the ISP remand order where you would have a local call to access a long distance dialing platform. And this was how MCI initially got into long distance business, and you would get a second dial tone and you'd enter a passcode. And it's very similar to the way you access the internet through a dial-up ISP. And those were always recognized in as interstate, rather than a local call to the platform followed by a second long distance call. I'd note in the voicemail context, Your Honor, Judge Williams had mentioned, voicemail is treated as an information service because it involves the storing and processing of information. And even though you had a call followed by this information service, that too was treated on an end-to-end basis. I see I only have a minute left and to the extent the court has questions, I'm happy to answer them, but.

Judge Sentelle (43:03):

Seeing none. Thank you counsel.

Scott Angstreich (43:04):

Thank you, Your Honor.

Judge Sentelle (43:08):

Mr. Hazzard was out of time. We'll give you a minute and then hear from Mr. Feinberg for one minute.

Michael B. Hazzard (43:16):

Thank you, Your Honor. With a minute, I would just like to have the court recall that its *Bell Atlantic* decision found that the jurisdictional nature of the traffic did not go to whether reciprocal compensation applied. I would also just like to correct what maybe a misunderstanding from Mr. Palmore of our position, that he said that (b)(5) is the end of it. The finding that the commission made was that this traffic is subject to the (b)(5)-(d)(2) framework, which puts the authority to the state commission. Finally, I want to talk about the mirroring role, because it's important.

Judge Sentelle (43:47):

Thank you.

Michael B. Hazzard (43:47):

Congress intended under the (b)(5)-(d)(2) framework that the cost basis, the additional cost of transporting and terminating these calls would be received by the terminating carrier, in this case Core. What the commission has done under 201 is its prescribed a fixed rate that's far below the incremental cost standard established by the FCC under TELRIC, and then not only did it do that, because the record evidence is that the TELRIC rates are three to four percent higher than the 0007 rate. Now, what the mirroring rule does is it empowers the ILEC on a state-by-state basis to make a determination of which way they're better off. And that turns this cost based standard under (d)(2), which was Congress' choice, to an election by the

incumbent of what is—how it's better off. And the way that works out in the marketplace is if you're a net traffic originator—that you send out more traffic than you receive, you're going to be better off under the 0007 rate. If you receive more traffic than and you terminate, then you're going to stick with a (b)(5)- (d)(2) rate. Now the ILEC get that choice. We do not get that choice, and to answer Judge Randolph's question regarding why people would enter these even lower agreements. The answer in our experience is it's when people have these high imbalances of traffic outbound, as opposed to inbound, which is the claim again, score.

Judge Sentelle (45:31):

Okay. Thank you, counsel.

Michael B. Hazzard (45:35):

Thank you.

Judge Sentelle (45:36):

Hear from the other petitioner on rebuttal.

Jonathan Feinberg (45:44):

Thank you, Your Honor. Three points if I might, first, in this court's decision in the *Bell Atlantic* case, it found that the FCC end-to-end analysis did not defeat the application of 251(b)(5) to these calls that these are several calls. And similarly, the FCC's 201 analysis, whether under 251(i) or under just under 201, doesn't defeat the state power created by Congress to set the determinant terms and conditions for these calls pursuant to the authorization created by Congress in 252(d)(2). Second point, with respect to the argument that there were alleged subsidies. Well, if the FCC believed there was a problem in the rates that the state commission set for the— set for these calls, then it could have adjusted the pricing methodology. If the cost, if the price is too high, they can lower—

Judge Williams (46:35):

That's a very interesting part of the brief, but it is still the case that the existence of a remedy under one section does not abso-facto preclude remedies under other sections.

Jonathan Feinberg (46:46):

Right. But the FCC's argument that this is a problem in need of a solution and therefore we must step in fails because there's another solution.

Judge Williams (46:54):

No, you're no, the—you're saying there's another way to step in. And you don't like the way they did step in.

Jonathan Feinberg (47:01):

Well, the—

Judge Williams (47:02):

Right.

Jonathan Feinberg (47:02):

Our view—

Judge Williams (47:03):

But the presence of one route does not preclude the existence of the other.

Jonathan Feinberg (47:06):

But Congress created the route they have.

Judge Williams (47:09):

That's the question for before us.

Jonathan Feinberg (47:10):

Yes, yes. And they can't say, "because we don't like the route that Congress created, we can impose our own." They had to do what Congress required.

Judge Randolph (47:19):

Doesn't 252 itself recognize that the commission can, will, can set the rates, set rates for transport and termination?

Jonathan Feinberg (47:30):

No, 252(d)(2) specifically refers the state commissions.

Judge Randolph (47:34):

Well, what do you, yeah, but what do you do with 252(c) or two, or yeah, 252(d) – 2(b)?

Judge Randolph (47:56):

Which says that nothing in this paragraph, whatever that means, authorizes the commission or any state commission to engage in any rate regulation proceeding to establish with particular additional costs. Addition—in addition to reciprocal, I guess of transporting or terminating calls. So on the face of it, it contemplates that the commission can, in some instances, and that's the question here, set rates for transport and termination.

Jonathan Feinberg (48:25):

No, that precludes the commission from doing something additional. It's the—

Judge Randolph (48:32):

Well, I know. If the commission doesn't have any authority to act, then you don't need to preclude them from doing anything in addition to no authority.

Jonathan Feinberg (48:40):

Okay, but the—the state commission's power to act is created by 252(d)(2)(a) and particularly (i), which refers to state committing commission setting prices for transport and termination. The that's the 252(d)(2)(b)(ii) is an additional restriction on both the state commissions and the FCC. But the—

Judge Randolph (49:05):

I understand that.

Jonathan Feinberg (49:07):

But the—so it's saying for instance, that the FCC pursuant rule making power under 201, can't have an additional proceeding to impose additional costs.

Judge Randolph (49:17):

But it contemplates that the FCC can for transport and termination set rates.

Jonathan Feinberg (49:23):

As part of its general. No, it's talking about an exercise of the FCC's general rule-making authority with respect to it, with the methodologies the states can use. I believe that provision has to be read in concert with the AT&T case. Finally, Your Honor, there was a reference to the arrangements that would've been made between local exchange companies pre-1996 with respect to carriage of calls, to ISP numbers. I believe those would've been exchange access arrangements and covered by exchange.

Judge Sentelle (49:52)

It would've been what?

Jonathan Feinberg (49:54)

They would've been exchange access arrangements covered by exchange access there. Thank you very much, Your Honors.

Judge Sentelle (50:00):

Case is submitted. Give us recess.

Bailiff (50:02):

Recess please.

[White noise from 50:03-54:05]