



Pac-West

**What's wrong with Missoula?
The city's great, the plan misses the mark**

- Understand the “Principles” behind a plan
- Understand the Assumptions behind a plan
- Assess how the plan complies with the law

- FCC Principles:
 - Competitive and Technical Neutrality
 - Regulatory Certainty
 - Preservation of Universal Service
 - Promote Economic Efficiency
 - Promote the Efficient Use of and Investment in Networks
 - Promote efficient Competition

- If “Regulatory Arbitrage” means the same service with different prices, and the differences are not cost based, then eliminate such differences

- Plan must comply with current law
 - 251(b)(5), and

 - 251(g)

- Does not eliminate disparate rates for same service
- Does not eliminate arbitrage incentives
- Introduces new arbitrage incentives
- In every discernable instance favors ILECs over other carriers
- Introduces new costs for other carriers
- Shifts existing cost responsibility away from ILECs

What does the 96 Act say?

What does the FCC and the courts say?

`SEC. 251. INTERCONNECTION.

`(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS- Each telecommunications carrier has the duty--

`(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

`(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS- Each local exchange carrier has the following duties:

`(1) RESALE-

`(2) NUMBER PORTABILITY-

`(3) DIALING PARITY-

`(4) ACCESS TO RIGHTS-OF-WAY-

`(5) RECIPROCAL COMPENSATION- The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

`(g) CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS- On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

251(g) annotated:

On and after the date of enactment of the Telecommunications Act of 1996,

each **local exchange carrier**,

to the extent that it provides **wireline services**,

shall provide **exchange access**, **information access**, and **exchange services** for such access

to **interexchange carriers** and **information service providers**

in accordance with the same **equal access** and **nondiscriminatory interconnection** restrictions and obligations (including receipt of compensation)

that apply to such carrier **on the date immediately preceding the date of enactment** of the Telecommunications Act of 1996

under any court order, consent decree, or regulation, order, or policy of the Commission,

until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment.

During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

26. Upon further review, we find that the Commission erred in focusing on the nature of the service (*i.e.*, local or long distance) and in stating that there were only two forms of telecommunications services -- telephone exchange service and exchange access -- for purposes of interpreting the relevant scope of section 251(b)(5). Those services are the only two expressly defined by the statute. The court found fault in the Commission's failure to analyze communications delivered by a LEC to an ISP in terms of these definitions. Moreover, it cited the Commission's own confusing treatment of ISP-bound traffic as local under the ESP exemption and interstate for jurisdictional purposes.

30. We respond to the court's concerns, and seek to resolve these tensions, by reexamining the grounds for our conclusion that ISP-bound traffic falls outside the scope of section 251(b)(5). **A more comprehensive review of the statute reveals that Congress intended to exempt certain enumerated categories of service from section 251(b)(5) when the service was provided to interexchange carriers or information service providers.** The exemption focuses not only on the nature of the service, but on to whom the service is provided. For services that qualify, compensation is based on rules, regulations, and policies that preceded the 1996 Act and not on section 251(b)(5), which was minted by the Act. As we explain more fully below, the service provided by LECs to deliver traffic to an ISP constitutes, at a minimum, "information access" under section 251(g) and, thus, compensation for this service is not governed by section 251(b)(5), but instead by the Commission's policies for this traffic and the rules adopted under its section 201 authority.

32. **Unless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of *all* telecommunications traffic, -- *i.e.*, whenever a local exchange carrier exchanges telecommunications traffic with another carrier. Farther down in section 251, however, Congress explicitly exempts certain telecommunications services from the reciprocal compensation obligations.** Section 251(g) provides:

(Rest of paragraph quotes from Section 251(g) of the 1996 Telecommunications Act)

"In the order before us the Federal Communications Commission held that under s 251(g) of the Act it was authorized to "carve out" from s 251(b)(5) calls made to internet service providers ("ISPs") located within the caller's local calling area. It relied entirely on s 251(g). Because that section is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act, we find the Commission's reliance on s 251(g) precluded. Thus we remand the case. Because there may well be other legal bases for adopting the rules chosen by the Commission for compensation between the originating and the terminating LECs in calls to ISPs, we neither vacate the order nor address petitioners' attacks on various interim provisions devised by the Commission. "

"On its face, s 251(g) appears to provide simply for the "continued enforcement" of certain pre-Act regulatory "interconnection restrictions and obligations," including the ones contained in the consent decree that broke up the Bell System, until they are explicitly superceded by Commission action implementing the Act. As the Conference Report explained, "[b]ecause the [Act] completely eliminates the prospective effect of the AT&T Consent Decree, some provision is necessary to keep these requirements in place.... Accordingly, the conference agreement includes a new section 251(g)." H.R. Rep. 104-458, at 122-23 (1996)."

"...there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under ss 251(b)(5) and 252(d)(B)(i))"

How it all goes together

