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Federal Appeals Court Applies ISP Order to CLEC to CLEC Traffic

On June 21, 2011, the United States Court of Appeals for the Ninth Circuit ("Appeals Court") issued an order finding that internet service provider ("ISP") bound traffic that is exchanged between two competitive local exchange carriers ("CLECs") is subject to the ISP Remand Order issued in 2001 by the Federal Communication Commission ("FCC"). The lower court and the California Public Utilities Commission ("CPUC") had found that the FCC's ISP Remand Order was only applicable to traffic exchanged between an incumbent local exchange carrier ("ILEC") and a CLEC.

In addressing the question of whether the ISP Remand Order "evidences the FCC's intent to exercise its jurisdiction over local ISP-bound traffic exchanged between two CLECs", the Appeals Court found that the ISP Remand Order "has preemptive effect with regard to the ISP-related issues it encompasses." In finding that the ISP Remand Order was applicable to CLEC-to-CLEC traffic the Appeals Court found that "the rules implemented by the ISP Remand Order addressed a particular problem: the opportunity for regulatory arbitrage created by application of the prevailing reciprocal compensation scheme to local ISP-bound traffic. As discussed, ISP-bound traffic is uniquely unidirectional, and for that reason, incompatible with a compensation regime that assumes relative traffic parity. The defining feature of the problem the FCC sought to remedy is thus the type of traffic being exchanged—ISP-bound traffic."

The Appeals Court recognized that although the original issues being addressed by the FCC with respect to ISP bound traffic were related to arbitrage between ILECs and

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CLECs, the ISP Remand Order addressed ISP traffic and not just traffic exchanged between ILECs and CLECs. However, the Appeals Court stated that "the dominance of that CLEC–ILEC arrangement, as this case demonstrates, was both transient and in no way essential to the market distortions the FCC was trying to remedy."

As reflected in this decision, carriers should be mindful that FCC orders addressing one set of carriers may be applied to all types of carriers. Further, as the competitive market continues to mature, the decision shows that disputes that originally involved an ILEC are now arising in the context of CLEC v. CLEC disputes.

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