

traffic imbalances are offset by allegedly higher CMRS costs. Yet there is no proof offered that the net effect of these “offsetting imbalances” is an equal balance of each carrier’s costs.

Shifting bases, it is argued that LEC costs are negligible and can be largely disregarded. This has been shown to be a false premise, resting when first offered on low-cost “off-peak” traffic assumptions which have been debunked,¹²¹ and now on unvalidated notions of de minimus “incremental costs.” To keep the record straight, the “federalization” of these LEC-CMRS minutes for NYNEX alone equates to at least \$29 million (2.36¢/MOU) in new interstate costs requiring compensation, while leaving approximately \$20 million to be recovered from other intrastate LEC customers -- before growth and arbitrage are considered.¹²²

Finally, it is argued that “Bill-and-Keep” would be administratively simple for CMRS providers. Of course, this provides no basis to deny LECs their right to cost recovery. In any event, this issue is a classic “red herring” in that LECs can record and report traffic volumes (as NYNEX does) for CMRS providers that are unable to perform this function. Obviously, none of these arguments support the need for mandated Bill-and-Keep, either here or in Docket 95-185.

Wireline competitors make many of the same arguments, although they do not argue that Section 251 does not apply.¹²³ However, they uniquely argue that their expectations of traffic and cost balances between themselves and LECs make the adoption of “Bill-and-Keep” arrangements “equitable” to LECs.¹²⁴ Although there may be some acceptance of these views in

¹²¹ See, e.g., Time Warner reliance on Brock “off-peak” costs (p. 98).

¹²² Reply, CC Docket No. 95-185, at p. 17. Therein, USTA estimated an industry-wide \$600 million annual cost.

¹²³ For example, Jones Intercable (pp. 28-29) argues that the relative cost burden of measuring traffic minutes exchanged is too great for a small CLEC. In that case, it can have the LEC provide the measurement, as above. There is no need for Commission involvement in “start-up period” regulations, as Jones requests.

¹²⁴ See, e.g., TCI, pp. 34-37.

specific negotiations, LECs should not be directed to accept them a priori. There is simply no basis for such a mandate. Under the statutory scheme, the CLEC may negotiate for acceptance of its views; however, it is not entitled to have those views imposed on the other negotiating party.¹²⁵ Accordingly, Section 252(d)(2) allows for “Bill-and-Keep” arrangements only on a voluntary basis, assuming the waiver of the parties to their respective rights to mutual compensation (NYNEX, pp. 88-90).¹²⁶ The statute recognizes that such compelled arrangement would be confiscatory absent such agreement.

C. Interim Or Permanent Reciprocity Rate Guidelines Would Be Unlawful And Poor Policy

The NPRM inquires whether “interim” price guidelines would be “desirable” (NPRM ¶ 244). NYNEX responded that such an “interim” approach would distort the negotiating process, and that the establishment of tight timetables to expedite negotiations (without such guidelines) was both the statutory approach and better policy (NYNEX, p. 90).¹²⁷ In fact, NYNEX is involved in many such negotiations currently with both wireline and wireless companies. The Commission should not interrupt this process. All that is needed--if anything--

¹²⁵ Some commenters create a complicated argument by implication that the statute must mean that “Bill-and-Keep” arrangements can be mandated (Jones, p. 27). If so, Congress could have plainly said so. Instead, the provision should be read to permit a voluntary agreement of the parties otherwise contrary to its “mutual compensation” requirement.

¹²⁶ Several commenters point to the Conference Committee Report for support (see, e.g. Continental p. 11). They must be exceedingly careful in argument, however, not to state that the Report authorizes mandated “Bill-and-Keep” because it does not. Instead, it indicates only that “Bill-and-Keep” is a permissible arrangement, while the statute itself says that such arrangements must be reached by an agreement incorporating waiver of each carrier’s right to its cost recovery. Accordingly, there is also no merit to Sprint’s argument (p. 88) that it is the “arrangement,” not the “carrier,” that “waives” the carrier’s rights. The arrangement is each carrier’s waiver.

¹²⁷ For example, the adoption of NCTA’s “default” approach (p. 56) would cause the negotiating carrier to reject reasonable, alternative offers in favor of the “default” result.

is to advise those LECs and interconnecting companies that Section 251(b)(5) duties apply to “the transport and termination of telecommunications” within the LEC’s exchange area, whether the requesting carrier provides service via wireless or wireline technologies.

Commenters ask that the “additional cost” criteria of Section 252(d)(2) be read as “incremental costs,” usually TSLRIC.¹²⁸ It would have been simple for Congress to say exactly that, but it did not. Commenters offer no legislative history establishing such standard. Instead, commenters proffer various economic theories for their argument, but in each case they seek to discard real operational costs in the process. For example, the most common approach is to discard joint and common costs, as well as supporting overhead expenses (e.g., the cost of regulatory processes or capital generation), from “economic” consideration.¹²⁹ However, each of these costs are used by the LECs in the production of multiple products, including local exchange transport and termination. They are simply not the direct cost of any product.¹³⁰ Accordingly, Congress left it to the carriers involved to negotiate reciprocal compensation rates from the perspective of “each carrier’s” “additional costs” of terminating calls, to recover at least the floor of the incremental costs preferred by commenters.¹³¹

Some commenters go farther. They ask for the Commission to set a specific price “ceiling” on such negotiations.¹³² Absent either a negotiated agreement or State arbitration

¹²⁸ See, e.g., AT&T p. 69.

¹²⁹ See, e.g., NCTA p. 49.

¹³⁰ Rather, and quite to the benefit of interconnecting carriers, they are “production costs” commonly provided to all LEC products to realize economies of scale and scope. Indeed, the uneconomic direction of these arguments is to reward the single-product firm which does not pursue “common” economies.

¹³¹ This is a different approach than the more directory “cost-based” language of Section 252(d)(1).

¹³² For example, TCI argues for a 0.4¢ rate based on the alleged experience of selected States (TCI, pp. 41-43). Even assuming arguendo that TCI properly represents the outcomes of

process, a fixed rate imposition would be arbitrary and capricious and, in any event, contrary to the statutory negotiation scheme specified by Congress. Similarly, Air Touch's three-step proposal that the Commission suspend current rates, provide for LEC cost recovery via a subsequent "true-up," and set a 1¢ price ceiling, is contrary to law and sound policy.¹³³ Leaving aside the absence of Commission authority here to abrogate current agreements under the Mobile-Sierra criteria, the statute requires that the carriers involved negotiate in good faith, seek to reach a mutual agreement, and then present their agreement for State approval or present their differences for State arbitration (Section 252). This process allows reasonable latitude for carrier and locality variations. AirTouch's heavy-handed, "one-size-fits-all" proposal does not.

As above, the Commission should not seek to set a specific reciprocal rate or "ceiling" in this proceeding, especially for those States (like those in the NYNEX region) actively promoting competition. However, if it nonetheless feels compelled to set a ceiling on local interconnection rates, it should consider using existing access charges (less the Carrier Common Line element) as a carrier-specific ceiling which will help to provide for both cost recovery and a timely "reasonable" upper bound, without incenting rate arbitrage or unduly prejudicing State and carrier and consumer interests in the prospective Access Charge reform proceeding or in the ongoing Universal Service proceeding.

these "studies" in those states (Illinois, Maryland and Michigan), the Commission should not impose these results on other States and other carriers. See, e.g., Mass. DPUC, pp. 13-14.

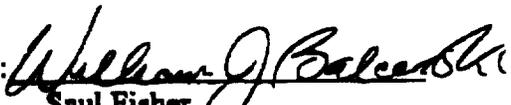
¹³³ AirTouch, pp. 10-16.

X. CONCLUSION

The Commission's interconnection rules must create an environment which both permits and promotes facilities-based competition. The Commission must therefore guard against adopting interconnection and pricing rules that disincite the construction of local exchange networks. The Commission should also consider adopting the "two-tiered rules" approach espoused by several State commissions. Such an approach gives States the flexibility to enact or retain local competition rules that reflect each State's own unique policies, while at the same time ensuring that local exchange competition is permitted to flourish in all States. Finally, the Commission must not allow its rules in this proceeding to serve as a vehicle for interexchange carriers to avoid access charges. Access and universal service reform must be accomplished explicitly and correctly, not as a side effect of interconnection rules.

Respectfully submitted,

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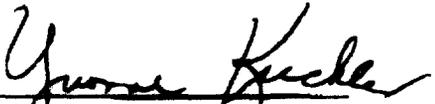
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