EXHIBIT A

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

OPINION NO. 99-10

CASE 99-C-0529 - Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation.

OPINION AND ORDER CONCERNING RECIPROCAL COMPENSATION

Issued and Effective: August 26, 1999

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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(Issued and Effective August 26, 1999)

BY THE COMMISSION:

INTRODUCTION AND BACKGROUND

By order issued April 15, 1999, we instituted this proceeding "to reexamine reciprocal compensation, particularly costs and rate structures applicable to large-volume call termination to single customers."[1] "Reciprocal compensation" refers to an arrangement between two local exchange carriers in which each carrier compensates the other for the transport and termination on the second carrier's network facilities of calls originating on the first carrier's facilities. These arrangements, introduced in New York in 1995, are now governed by the federal Telecommunications Act of 1996 (the 1996 Act) and various rules and decisions of the Federal Communications Commission (FCC).

The present inquiry grows out of an unanticipated development: a substantial imbalance in traffic flows (and, in consequence, revenue streams) between incumbent local exchange carriers (ILECs) and some competing local exchange carriers (CLECs) having a preponderance of customers, such as

[1] Case 99-C-0529, Order Instituting Proceeding to Reexamine Reciprocal Compensation (issued April 15, 1999)(the Instituting Order), p. 4.

Internet service providers (ISPs), that receive far more calls than they make. To put the matter in context, it is necessary to describe in some detail the history and legal framework of reciprocal compensation in general.

Early New York Decisions

In our 1995 "Framework Order,"[2] we adopted a reciprocal compensation plan under which local exchange carriers (LECs) were to compensate one another for calls terminated on one another's networks. The compensation mechanism was to be cost-based (i.e., was to exclude the contribution to universal service costs included in the access charges paid by inter-exchange carriers to LECs completing calls on their behalf), mutual, and symmetrical. These cost-based arrangements were to be available only to facilities-based full-service providers (FSPs), who, by the nature of their operations, directly supported universal service; other carriers would be required to pay the higher carrier access charges for call termination.

In adopting the reciprocal compensation regime, we considered and rejected an alternative, termed "bill-and-keep," under which carriers would not pay one another for completing calls but would simply bill their own end-users and retain the resulting revenues. (In general, CLECs had favored bill-and-keep, fearing that they would send more calls to the incumbent's network for completion than they would receive and therefore be net losers under a reciprocal compensation arrangement; ILECs, sharing the same assumptions, had favored reciprocal compensation.) We rejected bill-and-keep as less cost-based, inasmuch as it would reflect actual costs only if traffic flows between carriers were at least roughly in balance. Finally, we noted that carriers could negotiate terms differing from those we adopted, as those terms were

[2] Case 94-C-0095, Competition II Proceeding, Order Instituting Framework for Directory Listings, Carrier Interconnection and Intercarrier Compensation (issued September 27, 1995).

made available to other carriers on a non-discriminatory basis.

The 1996 Act as Interpreted by the FCC

To state the matter most generally, the federal reciprocal compensation provisions, like those we had adopted earlier, call for mutual reimbursement of termination costs measured by reference to the incremental costs of the ILEC, which are to serve as a proxy for the CLEC's costs unless the CLEC proves its costs are, in fact, higher. More specifically, the 1996 Act imposes on all local exchange carriers "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[3] The terms for reciprocal compensation are to be set forth in inter-carrier interconnection agreements, reviewed or arbitrated by the state commissions, pursuant to the general scheme of the 1996 Act. In addition, the competitive checklist that must be met under the 1996 Act by a Bell Operating Company seeking authority to provide long-distance service includes reciprocal compensation arrangements that meet the 1996 Act's pricing standards.[4]

Those pricing standards specify that terms and conditions for reciprocal compensation may be considered just and reasonable only if they "(i) . . . provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination of calls that originate on the network facilities of the other carrier; and (ii) . . . determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[5] These requirements, however, do not preclude "the mutual recovery of costs through the offsetting of reciprocal

[3] 47 U.S.C. §251(b)(5).

[4] 47 U.S.C. §271 (c)(2)(B)(xiii).

[5] 47 U.S.C. §252(d)(2)(A).

obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)"[6]; but the FCC has determined that bill-and-keep may be imposed by a state commission only "if traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates."[7] In addition, the statutory requirements do not "authorize the [FCC] or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls."[8]

The FCC has determined as well that reciprocal compensation rates, like those for unbundled network elements generally, must be set on the basis of forward-looking economic costs, estimated in accordance with the Total Element Long-Run Incremental Cost (TELRIC) method.[9] In most cases, however, payments to a CLEC for terminating calls originating on an ILEC network are not to be set on basis of the CLECs own costs; instead, they are to be set symmetrically, on the basis of the ILEC's costs unless a CLEC presents a cost study showing its own costs to be higher and thereby rebutting the

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[6] 47 U.S.C. §252(d)(2)(B)(i).

[7] CC Docket No. 96-98, et al., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, et al., First Report and Order (released August 8, 1996)(Local Competition Order), ¶1112.

[8] 47 U.S.C. §252(d)(2)(B)(ii).

[9] Local Competition Order, ¶1056. We have done so; existing reciprocal compensation rates are based on the TELRIC costs of the underlying network elements as determined in the First Network Elements Proceeding (Cases 95-C-0657 et al.) and subject to reexamination in the Second Network Elements Proceeding (Case 98-C-1357). For that reason, the present proceeding considers what equipment may be used to terminate particular types of traffic but does not attempt to determine unit costs of any such equipment. States may also use a default proxy set by the FCC, not pertinent here, or, in appropriate situations, bill-and-keep arrangements.

presumption of symmetry. In reaching that decision, the FCC reasoned, among other things, that the ILEC's costs would be a reasonable presumptive proxy for those of the CLEC inasmuch as both would be serving in the same geographic area; that symmetric compensation might reduce an ILEC's ability to use its bargaining strength to negotiate termination charges that were seriously asymmetric in its favor; and that symmetrical rates would be administratively easier to manage and would avoid requiring CLECs to perform costly forward-looking economic cost studies (unless they undertook to do so in an effort to rebut the presumption of symmetry and show their costs exceeded the ILEC's).[10]

The FCC further noted that the "additional costs" referred to in the statute as recoverable are primarily the traffic-sensitive component of local switching, together with a reasonable allocation of common costs.[11] Costs will vary, however, depending on the type of switching involved, and states may establish rates that differ on that basis.[12] In traditional ILEC network architecture, customers are connected to end office switches, groups of which are connected to each other through tandem switches. The tandems reduce the need for inter-office transport facilities and make the system correspondingly more efficient. CLECs, however, may use different technologies to perform functions equivalent to those performed by an ILEC through the use of tandem switches; a CLEC with a particular number and dispersion of customers, for example, may find it efficient to substitute transmission facilities for tandem switching in a manner that would be inefficient for an ILEC. The FCC therefore concluded that

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[10] Local Competition Order, ¶¶1085-1090.

[11] Ibid., ¶¶1057-1057.

[12] Ibid., ¶1090. Bell Atlantic-New York takes the position that while the FCC spoke explicitly only of separate rates for tandem and end-office termination (next defined), it did not preclude disparate rates for other categories, as long as they are applied symmetrically.

"where the [CLEC's] switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the [CLEC's] additional costs is the [incumbent's] tandem interconnection rate,"[13] which will be higher than its end-office interconnection rate. These two rates--the tandem switching rate and the end-office switching rate--along with the concept of "functional equivalence" between an ILEC's tandem switch and a CLEC's differently configured network capable of serving the same geographic area, figure prominently in the proposals under consideration in this case.

The FCC also determined that reciprocal compensation arrangements apply only to local traffic, and that long-distance traffic remains subject to the carrier access charge regime. It allowed the states to determine the areas to be considered local for these purposes.[14]

More recently, in February 1999, the FCC determined that traffic directed to an ISP was, in fact, largely interstate (in that it did not terminate at the ISP's local server but continued to Internet websites often in other states) and therefore not subject to its reciprocal compensation rule. It instituted proposed rulemaking on the subject but determined, at least for the time being, that carriers remained bound by their existing interconnection agreements, as interpreted by state commissions, and that states remained free to apply reciprocal compensation to ISP traffic.[15] (Nearly all states that have considered the matter

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[13] Id.

[14] Ibid., ¶¶1034-1035.

[15] CC Docket No. 96-98, Local Competition Provisions of the Telecommunications Act of 1996, and CC Docket No. 99-68, Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling and Notice of Proposed Rulemaking (released February 26, 1999)(FCC ISP Ruling). Bell Atlantic-New York and its affiliates have brought suit against this aspect of the FCC's decision, contending that state commissions lack authority to impose reciprocal

have continued to apply reciprocal compensation to this traffic. The sole exceptions to date are Massachusetts, which, having initially applied reciprocal compensation on the premise that the traffic was intrastate, reversed itself in light of the contrary FCC decision,[16] and New Jersey.)

The Current Situation

Consistent with these legal requirements, the tariffs of New York Telephone Company d/b/a Bell Atlantic-New York (Bell Atlantic-New York) provide for reciprocal compensation at the higher tandem or lower end-office rate (termed, respectively, "Meet Point B" and "Meet Point A"), depending on the nature and location of the interconnection. A Meet Point A interconnection (at an end-office switch) will permit a CLEC to hand off traffic for delivery to any customer served by the end-office switch. A Meet Point B interconnection (at a tandem switch) will permit the handing off of traffic for delivery to any customer served by any of the end offices subtending the tandem. The Meet Point A (end-office) rate is equal to the sum of the rates for switch usage and a common trunk port. The Meet Point B (tandem) rate is equal to the sum of the rates for a tandem trunk port, end-office-to-tandem common trunking and associated trunk port costs, tandem switch usage, and end-office switch usage.

The rates for both types of connection are based on costs as determined in the First Network Elements Proceeding, and are subject to modification in light of the conclusions to be reached in the Second Network Elements Proceeding. Most (but not all) interconnection agreements between Bell Atlantic-New York and CLECs defer to the tariffed rates, some

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compensation plans for Internet-bound traffic. Bell Atlantic-New York's Initial Brief, p. 14, n. 32.

[16] MCI WorldCom Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Mass. D.T.E. 97-116. The Massachusetts case was decided by a 3-2 vote.

of them providing for a "blended" rate lying between those parameters and, in some cases, subject to change as the CLEC's network evolves; any change in the tariffed rates resulting from this proceeding would flow through to the rates charged under those agreements. Reciprocal compensation for Frontier Telephone of Rochester (Frontier) is governed by its 1994 Open Market Plan (OMP), which incorporates a negotiated, above-cost rate that will remain in place (except where otherwise provided in particular interconnection agreements) until the OMP expires, or unless we decide in this proceeding to modify it.[17]

The effects of reciprocal compensation as now structured have been greatly affected by the unexpectedly rapid growth of the Internet and of other services (such as "chatlines") that generate very large volumes of traffic inbound to individual customers who produce far smaller volumes of outbound traffic. (This type of traffic is sometimes referred to as "convergent.") Many Internet service providers and chatlines are served by CLECs; as a result, ILECs, whose own customers direct many calls to ISPs and chatlines but receive very few in return, may end up paying out much more in reciprocal compensation than they take in. In the most extreme situations, discussed below, it is alleged that some CLECs are nothing more than ISPs that have adopted the trappings of CLECs solely to receive a reciprocal compensation revenue stream. Even in less extreme situations, it is argued that some CLECs are serving a niche market that is made lucrative by a perverse regulatory anomaly rather than by the underlying economics of the situation.

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[17] Cases 95-C-0657 et al. and 93-C-0033 et al., First Network Elements Proceeding and Rochester Telephone Corp. - Rate Stability Agreement, Opinion No. 99-8 (issued July 22, 1999), mimeo pp. 25-27. To avoid terminological confusion, it should be noted that Frontier, in contrast to other parties, generally associates "tandem switching" with the lower of the two reciprocal compensation rates; it characterizes the higher rate as recovering the costs of tandem switching plus end office switching and termination.

These developments, and efforts by Bell Atlantic-New York and Frontier to discontinue reciprocal compensation payments associated with Internet traffic, led us to institute an inquiry in July 1997 (the ISP Case). Bell Atlantic-New York contended, among other things, that because calls to ISPs did not in fact terminate at the ISP but were ultimately delivered to host computers, many of which were out-of-state, the calls should be seen as interstate and, accordingly, not subject to reciprocal compensation. We rejected that view, determining that a call to an ISP, like a call to a radio call-in program or any other large volume call recipient, was a local call,[18] billed at local rates, and therefore subject to reciprocal compensation. We went on to reject various other arguments, based on cost characteristics or network congestion, for treating calls to ISPs differently from other calls, and we simply closed the proceeding.[19]

The issue arose again in the contest of chatlines. In an order directed primarily to chatline blocking, we noted the existence of compensation arrangements under which carriers shared their reciprocal compensation revenues with information providers (IPs). We inferred on that basis that the reciprocal compensation revenues exceeded the termination costs they were supposed to cover, and we cited as well the traffic imbalances already noted. We invited carriers to file cost and rate information that might warrant a different compensation system for the calling at issue, though we noted we would examine only tariffed rates and would leave existing interconnection agreements intact.[20]

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[18] As noted, the FCC has recently taken a different view; its decision is discussed below.

[19] Case 97-C-1275, Reciprocal Compensation Related to Internet Traffic, Order Closing Proceeding (issued March 19, 1998).

[20] Case 98-C-1273 et al., Blocking Obligations for Chatline Services (Chatline Proceeding), Order Directing Carriers to File Tariffs for Chatline Services and Related Actions (issued February 4, 1999).

Bell Atlantic-New York responded to that invitation and petitioned for a reopening of the ISP Case, reconsideration of the decision reached there, and interim relief. After considering responsive comments and the recent FCC action, we found a basis for reexamining "whether existing reciprocal compensation arrangements are affected by the termination of large-volume call termination traffic to single customers."[21] We declined to reopen the ISP case; denied interim relief as, in effect, a distraction from the more important process of setting permanent rates; and instituted this proceeding for that purpose, directing that it be conducted on an expedited basis.

PROCEDURAL HISTORY

Following a prehearing conference on April 21, 1999, Administrative Law Judge Joel Linsider issued a ruling defining the scope of the proceeding and adopting procedures and a schedule for the hearings.[22] Among other things, he identified various issues properly within the proceeding (including the relationship between the rates that may be set here and those included in interconnection agreements), and he noted that costing of the components of the various network configurations had been or will be handled in the First or Second Network Element Proceeding and should not be repeated or anticipated here. He reserved judgment on whether the burden of proof rested entirely on the ILECs, in the traditional manner, or was shared with CLECs; but he asked all parties, CLECs included, to submit threshold testimony describing the facilities they use to serve ISPs and chatlines and setting forth specified data on their traffic patterns.[23]

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[21] Instituting Order, p. 3.

[22] Case 99-C-0529, Ruling on Procedure and Schedule (issued April 27, 1999).

[23] The Judge later ruled that parties not submitting threshold testimony would not be permitted to submit later rounds of testimony or to cross-examine, though they would be

Numerous parties submitted testimony; they are identified (by full name and short description used in this opinion) in Appendix B. Hearings before Judge Linsider were held in Albany on June 21-22, 1999; cross-examination was waived as to all witnesses except those sponsored by Bell Atlantic-New York and Frontier. The record comprises 793 pages of stenographic transcript and 64 exhibits; portions of that record have been designated as proprietary.[24]

Briefs and reply briefs were invited; parties submitting them also are identified in Appendix B. Following the conclusion of the hearings, parties were asked, in a letter from Dan Martin of the Office of Communications dated June 24, 1999, to include with their briefs their replies to a series of questions; several parties responded to those questions instead of submitting briefs.

OVERVIEW OF PARTIES' POSITIONS AND THIS OPINION

The ILECs (primarily Bell Atlantic-New York and Frontier) and CPB propose substantial changes to the existing reciprocal compensation arrangements. Among the CLECs, Time Warner proposes a substantial change, and MCIW offers a modest change as a less favored alternative to maintenance of the status quo. All other CLECs would maintain the status quo, though they differ in their arguments for doing so.

Putting the matter in its most general terms, Bell Atlantic-New York begins its brief by announcing "the current reciprocal compensation regime is broken, and needs to be fixed," and Frontier refers to the ILECs' "hemorrhage of cash

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permitted to file briefs. He also clarified that parties who, by their nature, had no threshold data to submit (such as industry organizations and the State Consumer Protection Board) were not subject to this requirement. Case 99-C-0529, Ruling Concerning Parties Not Filing Threshold Testimony (issued May 20, 1999).

[24] Consistent with usual practice, this material has been designated proprietary on a provisional basis. The Judge's ruling determining the final status of each item is pending.

in the form of reciprocal compensation."[25] In stark contrast, CTSI et al. state unequivocally that "this proceeding is about [Bell Atlantic-New York's] great distaste for paying its competitors to provide termination services for local telecommunications traffic initiated by [Bell Atlantic-New York's] customers"[26]; and Global NAPs sees this case as the latest battle in the ILECs' ongoing war to frustrate the competitive evolution contemplated by the Telecommunications Act of 1996. With "resale moribund" and "[unbundled network element]/collocation hobbled," Global NAPs charges, Bell Atlantic-New York is now

> seeking protection from the meager interconnection-based competition that has thus far developed. Bell Atlantic[-New York] complains that its competitors are niche-based, ignore the residential market, and are "abusing" the system by exercising their rights under the [1996] Act and expecting the ILECs to comply with their duties. As Bell Atlantic[-New York] sees it, this outrageous behavior must be ended, and quickly, by jiggering the rules to eliminate even the niche competition that has been able to develop. This, of course, is anticompetitive nonsense.[27]

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[25] Bell Atlantic-New York's Initial Brief, p. 1; Frontier's Initial Brief, p. 1.

[26] CTSI et al.'s Initial Brief, p. 1.

[27] Global NAPs' Reply Brief, pp. 3-4.

As is apparent, Time Warner is not far off the mark when it refers, in its reply brief, to the heavily rhetorical nature of the initial briefs.[28]

For purposes of this overview, parties are grouped on the basis of whether they propose changes (even modest changes as a less favored alternative) or fully endorse the status quo.

Parties Proposing Changes

Bell Atlantic-New York contends that CLECs serving a preponderance of customers with convergent traffic flows avoid many of the costs that are incurred by full-service providers (CLECs and ILECs alike) and therefore should not receive reciprocal compensation at rates that reflect those costs. Providing such above-cost compensation to CLECs, in its view, requires ILECs to finance their competitors; beyond that, it encourages CLECs to seek out niche markets rather than becoming full-service providers, thereby harming customers by denying them the benefits of true competition, and creates disincentives to introducing more efficient arrangements for Internet access.

Bell Atlantic New York offers four proposed remedies:

> remove from intercarrier compensation rates all costs associated with vertical switching features[29]
>
> deny a CLEC reciprocal compensation at tandem (Meet Point B) rates for the delivery of convergent traffic if the CLEC does not offer

[28] This is not to say, as Time Warner goes on to worry, that "the Commission has been left to its own devices to reconcile a difficult and often conflicting record, providing a poor basis upon which to reach a reasoned decision." Time Warner's Reply Brief, p. 1. The results we have reached are reasonable and are supported by substantial evidence.

[29] "Vertical" features are all switching functions other than those used in the simple routing and delivery of traffic.

a tandem interconnection option

deny all reciprocal compensation for the delivery of Internet-bound traffic; or, if compensation is provided, limit it to "direct variable cost"[30]

require all local exchange carriers to provide "geographically relevant interconnection points" (GRIPs) when they assign customers numbers outside the rate centers in which the customers are located.[31]

Frontier describes what it considers to be the current regime's disastrous effects on ILECs and undesirable results for society as a whole. It goes on to propose that Internet traffic be excluded from reciprocal compensation and treated on a bill-and-keep basis, as the Commission is legally permitted to do. Termination of non-Internet convergent traffic should be compensated on the basis of the CLEC's own costs rather than the ILEC's, which Frontier believes to be legally permissible; if the ILEC's costs are to be used, they should be limited to the ILEC's "tandem switching cost, not [including] its local switching and termination costs."[32]

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[30] Direct variable cost excludes (in addition to vertical features) depreciation, return, and any allocation of joint and common costs.

[31] Users, such as ISPs, may request such service in order to establish a presence outside their geographic areas, making it possible for their own customers to call them without incurring toll charges.

[32] Frontier's Initial Brief, p. 10. As noted, Frontier uses "tandem costs" to refer to the lower of the alternatives.

Time Warner stresses the variation among CLECs with respect to business plans, network configuration, and traffic patterns. Asserting that its own traffic imbalance is less extreme and less relevant than that of some other CLECs, it argues that what it terms "responsible CLECs"[33] design their networks to carry originating as well as terminating traffic and build those networks to serve a broad range of customers. In its view, the optimal reciprocal compensation rate is a negotiated blended rate (such as those in Time Warner's own interconnection agreements) falling between the ILEC's tandem and end-office rate; the blend takes account of both carriers' network design, customer types, and traffic patterns. Time Warner urges us to avoid disturbing blended rate arrangements; but where these arrangements are inappropriate (because the CLEC does not build out its network and serve two-way traffic), it would establish a sliding scale framework that ties the reciprocal compensation rate to the CLEC's traffic patterns and number of interconnection points.

MCIW favors maintenance of the status quo and denies that traffic patterns are a proper indicator of costs. It suggests, however, that an extreme traffic imbalance (an incoming to outgoing ratio of 100:1 or more) could trigger an audit of the CLEC's network configuration to determine whether it in fact met the functional equivalence test for receiving reciprocal compensation at the tandem rather than the end-office rate.

CPB regards traffic patterns as a fair indicator of functional equivalence (or its absence) and suggests a below-tandem rate where the incoming to outgoing ratio is 5:1 or more. But it would apply that remedy only after it had been shown that the local market was, in fact, open to competition, to avoid the risk that the CLEC's traffic pattern (or, more fundamentally, its serving only the convergent traffic niche market) may have been caused by the ILEC's failure to open the

[33] Time Warner's Initial Brief, p. 4.

market in a manner that permits CLECs to become full-service providers.

Parties Favoring the Status Quo

CLECs other than those identified in the foregoing section generally urge maintenance of the status quo, offering a variety of arguments in its support. They contend, among other things, that no showing has been made of pertinent differences between how traffic is handled by ILECs and by CLECs, and that traffic imbalances say nothing about a carrier's costs or about whether a CLEC's network is functionally equivalent to an ILEC's. Indeed, some say, reciprocal compensation contemplates a traffic imbalance; and ILECs, which initially sought reciprocal compensation rather than bill-and-keep because they thought the imbalance would favor them, should not be heard to change their position simply because the imbalance in fact turned out to work against them. They note that ILECs benefit, through avoided costs, when CLECs deliver calls; and they warn against denying CLECs the opportunity to recover their costs and, where those costs are, in fact, less than the CLEC's, to enjoy the benefits of their innovations and efficiencies.

Some CLECs warn against depriving carriers of legitimate opportunities to pursue niche markets as a means of entry or growth, and some suggest that barriers to broader entry leave them no choice but to seek out convergent traffic. They note in particular the unfairness that would result from taking away those opportunities after they had acted in reliance on them. Some CLECs deny that traffic imbalances imply any abuse of the system; others, as already noted, distance themselves from putative abusers, and urge that any remedy be properly targeted.

With regard to non-Internet traffic, some CLECs contend any change from the existing arrangements would violate applicable legal constraints, including the FCC's commitments to functional equivalence as the measure of

whether the tandem rate should be allowed and to TELRIC as the measure of costs. With regard to Internet traffic, CLECs recognize the FCC ISP Ruling has provided the states more discretion (though some raise legal concerns about deaveraging by type of customer) but urge maintenance of the status quo on policy grounds.

Finally, CLECs object to specific aspects of the various proposals for change, raising both legal and policy issues.

The Attorney General, whose office filed only a reply brief, asks us to "consider[,] as [our] first order of concern, how or if any . . . changes [to the existing reciprocal compensation regime] would adversely affect availability of affordable internet access for New York consumers." He therefore urges us to "move with extreme caution" in considering whether to make any such changes.[34]

This Opinion

We begin with the question of burden of proof, unusual in this case because the rates at issue are the CLECs' but the costs on which they are based are the ILECs'. We then consider the parties' views on the broad question of whether the existing system is broken and in need of repair. We next present, one by one, the specific proposals for change and the arguments for and against them. Finally, we evaluate the record and describe the remedies we are adopting.

In view of the large number of CLECs filing briefs, it is not surprising that many cover the same ground and present the same arguments. We present the pertinent arguments that have been offered, but we make no attempt to summarize each individual brief or to attribute each argument to each party making it.

BURDEN OF PROOF

[34] Attorney General's Reply Brief, p. 3.

The issue of burden of proof arose at the prehearing conference, where the CLECs generally saw the burden as resting with the ILECs, as in a traditional rate case, while the ILECs saw the burden as shared. In his ensuing ruling, the Administrative Law Judge declined to resolve conclusively questions that might require further briefing but, as already discussed, required the CLECs to provide threshold information.[35]

In its brief, Bell Atlantic-New York contends that the rates at issue here are the CLECs' and that, accordingly, they bear the burden of proof, even with respect to proposals made by ILECs. It cites the Public Service Law's (PSL's) provision that

> at any hearing involving a change or a proposed change of rates, the burden of proof to show that the change or proposed change if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be upon the utility.[36]

It adds that it makes sense for the CLEC to bear the burden of proof inasmuch as it has the best information related to its rates, including how it serves its customers and how it realizes efficiencies by specializing in convergent traffic. Asserting that the CLECs have offered no analysis in support of their slogan that "a minute is a minute," i.e., that all types of traffic impose the same switching and transport costs, Bell Atlantic-New York contends that the proposition must be rejected on burden of proof grounds alone. Frontier,

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[35] Case 99-C-0529, Ruling on Procedure and Schedule (issued April 27, 1999), p. 3.

[36] PSL §92(2)(f). Bell Atlantic-New York notes that in 1921, the statute was amended to impose on the utility the burden of proof with respect to all proposed rate changes, not merely rate increases proposed by the utility itself. It observes as well that CLECs come within the statute's definition of a utility.

meanwhile, sees the CLECs' failure to provide information on their actual costs as warranting an inference that those costs are over-recovered by reciprocal compensation rates based on the ILEC's TELRIC.

In response, CTSI et al. argue that the purpose of the proceeding is not necessarily to reduce rates but, quoting from the Instituting Order, "to reexamine whether existing reciprocal compensation rates are affected" by convergent traffic. The first step in that reexamination is to determine whether there are differences in network costs that warrant a different rate, and the burden of that showing is on Bell Atlantic-New York, as the party that instituted the proceeding and that advocates a change in the existing regulatory regime. The CLECs' own costs, they continue, are not at issue, given that the ILECs's costs are used as a proxy. CTSI et al. add that Bell Atlantic-New York has not borne its burden, in view of, among other things, the CLECs' "uncontroverted evidence that they utilize the same facilities to terminate all types of traffic and that their costs to terminate traffic are the same regardless of the nature of their traffic."[37]

The PSL's imposition of the burden of proof on the utility defending its existing rate or proposing a higher one does not resolve the matter here, for it contemplates a very different kind of proceeding, in which the utility's costs, concerning which it has by far the greatest access to pertinent information, come under scrutiny in an attempt to determine their reasonableness and prudence. Here, in contrast, the configurations of the CLECs' systems are pertinent, which is why the CLECs were directed to provide system descriptions, but the reasonableness of the actual costs incurred by CLECs in constructing their networks are not at issue. Moreover, what is at issue is less the CLECs' rates than the proper way to understand and apply the regulatory structure pursuant to which those rates are set. The parties

[37] CTSI et al.'s Reply Brief, p. 15.