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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

ORIGINAL

CC Docket No. 96-98; 99-68

Dear Ms. Salas:

On Wednesday December 13, 2000, Dave Porter, Rick Whitt and I of WorldCom, along with Darrell Bradford of Jenner and Block, met with Chris Wright, General Counsel and Paula Silberthau, Debra Weiner, Jon Nuechterlein, and Nick Bourne from the Office of General Counsel regarding the above referenced matter.

The meeting focused on the legal and policy issues associated with a policy of mandatory "bill and keep" for ISP bound local traffic. WorldCom focused on its views regarding the plain meaning of Section 251(b)(5) of the Telecommunications Act of 1996 and various court decisions across the country where this issue has been litigated. The attached *ex parte* presentation was left with the attendees.

In accordance with section 1.1206(b)(2) of the Commission's rules, 47 C.F.R. § 1.1206(b)(2), an original and one copy of this memorandum are being filed with your office.

Sincerely,

Bradley Stillman

cc: Chris Wright
Paula Silberthau
Debra Weiner
Jon Neuchterlein
Nick Bourne

Summary

Mandatory bill and keep for ISP-bound traffic would be inconsistent with:

- The Telecom Act
- The FCC's rules
- The Local Competition Order
- The first ISP Recip Comp Order
- The D.C. Circuit remand decision
- Most state commissions
- The ILECs' own prior positions and admissions
- The UNE rates for switching and transport
- Incentives to adopt lower, cost-based UNE rates
- Cost causation principle
- Just compensation principles
- Market-based solutions
- Avoiding regulatory arbitrage
- The FCC's stated policy goals
- The FCC's forbearance authority
- The APA's requirement for sufficient notice
- Nondiscrimination requirements of the Communications Act
- Local competition incentives
- ILEC deployment incentives
- Treatment of ISPs as end users
- ILEC terminating access charges
- Local retail rate structures
- Sound policymaking

Mandatory "bill and keep" is forbidden by the Telecommunications Act

The Telecommunications Act of 1996 plainly requires that carriers be allowed to recover the costs of transporting and terminating telecommunications.

Section 251(b)(5) directs that each local exchange carrier "establish reciprocal compensation arrangements for the transport and termination of telecommunications."

Section 252(d)(2)(A) states that state commissions "shall not consider the terms and conditions for reciprocal compensation to be just and reasonable" unless they:

(1) "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier...", and

(2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."

The Telecommunications Act only contemplates that carriers will adopt "bill and keep" arrangements after each carrier expressly waives its statutory right to recover costs incurred in transporting and terminating telecommunications.

Section 252(d)(2)(B)(i) states that the Act does not "preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)...."

Mandatory "bill and keep" would be contrary to the FCC's rules

The FCC rules implementing Section 251 of the Telecom Act require that carriers pay each other reciprocal compensation for transporting and terminating local telecommunications

Sections 51.701-51.717 establish the rules for the payment of reciprocal compensation.

The only exception to the general reciprocal compensation requirement is a provision that allows adoption of a "bill and keep" arrangement where a state commission concludes that traffic between the two local networks is roughly in balance.

Section 51.713 only allows a state commission to impose a bill-and-keep arrangement "if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so. . . ."

Mandatory "bill and keep" would be inconsistent with the Commission's Local Competition Order

In the Local Competition Order, the FCC concluded that:

"reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a call." (para. 1034), and all LECs have a duty to establish reciprocal compensation arrangements with "any telecommunications carriers." (para. 1041).

reciprocal compensation should include cost-based rates to recover the costs incurred by carriers in transporting and terminating calls (paras. 1056-1068).

"In general, we find that carriers incur costs in terminating traffic that are not *de minimis*, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs." (para. 1112).

"In addition, as long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient because they distort carriers' incentives, encouraging them to overuse competing carriers' termination facilities by seeking customers that primarily originate traffic." (para. 1112).

"We find that, in certain circumstances, the advantages of bill-and-keep arrangements outweigh the disadvantages, but no party has convincingly explained why, in such circumstances, parties themselves would not agree to bill-and-keep arrangements." (para. 1112).

"If state commissions impose bill-and-keep arrangements, those arrangements must either include provisions that impose compensation obligations if traffic becomes significantly out of balance or permit any party to request that the state commission impose such compensation obligations based on a showing that the traffic flows are inconsistent with the threshold adopted by the state." (para. 1113).

Mandatory "bill and keep" was rejected in the first ISP Reciprocal Compensation Order

In the ISP Reciprocal Compensation Order, the FCC concluded that:

its "policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." (para. 25).

"We acknowledge that, no matter what the payment arrangement, LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network." (para. 29).

a number of compensation schemes are possible, such as per minute-of-use pricing, flat-rate pricing, and separate call set-up charges, and compensation rates should "be based on commercial negotiations undertaken as part of the broader interconnection negotiations between incumbent LECs and CLECs." (para. 29). The Commission does not mention bill-and-keep as a possible mechanism.

Mandatory "bill and keep" would not comport with the D.C. Circuit's remand decision

The D.C. Circuit stated that:

> Calls to ISPs terminate within the local service area; "the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party'." Bell Atlantic v. FCC, 206 F.3d 1, 7(D.C. Cir. 2000)

> The Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, 'simply a communications-intensive business end user selling a product to other consumer and business end users.'" Bell Atlantic v. FCC, 206 F.3d at 7.

The 5th Circuit stated that:

> The ISP's local facility is the called party's premise, and "the call indeed 'terminates' at the ISP's premises." Southwestern Bell, 208 F.3d at 483

Mandatory "bill and keep" would completely ignore the contrary conclusions of a vast majority of state public service commissions

The ILECs have pled their case to the FCC only because most of the state commissions have flatly rejected their position.

A few examples:

The New York Public Service Commission (8/26/99) upheld and modified its reciprocal compensation scheme over bill and keep, stating:

> "one must begin with the very basic point that reciprocal compensation was chosen over bill-and-keep in part because some imbalances were seen as likely." (p. 56)
>
> "To deny all compensation for ISP termination would be to unfairly ignore the indisputable fact that CLECs completing these calls incur costs in doing so." (p. 61)

The Texas Public Utilities Commission (7/13/00) found that:

> "current volumes of traffic between carriers do not support adoption of the bill-and-keep method."

Mandatory "bill and keep" would completely ignore the contrary conclusions of a vast majority of state public service commissions.

The Proposed Decision of ALJ Pulsifer to the Public Utilities Commission of the State of California (11/3/00) concluded that:

> bill and keep does not provide "an equitable alternative" to recip comp for ISP calls, and thus is "unacceptable." (pages 82, 85).
>
> in particular, bill and keep would result in a significant asymmetrical distortion between the services rendered in terminating ISP calls and the payment made for that service; because bill and keep does not treat carriers equally in terms of services rendered, it "would disproportionately penalize the CLECs." (pages 83-84).
>
> attempting to define the ISP as the cost causer would be at odds with the traditional approach of linking payment obligation with cost causation for local calls. Because the ISP is the called party like any other business end user, and the ILEC customer is the calling party, the originating ILEC must "pay for the costs of terminating the call, on behalf of the call originator who causes the costs to be incurred." (pages 84-85).

Mandatory "bill and keep" would completely ignore the contrary conclusions of a vast majority of state public service commissions.

Dozens of other state commissions have reached similar conclusions about the actual economic costs incurred in terminating calls to ISPs, such as:

Ohio PUC: "[T]here is no question [a CLEC] incurs costs when it delivers ISP-bound traffic that has originated from an [ILEC] customer. Once an ISP call is handed off by [the ILEC], these calls are transported and switched by [the CLEC] and delivered to the ISP. Any carrier would incur some costs in performing this transport and switching function." ICG Telecom Group, Case No. 99-1153-TP-ARB (January 11, 2000)

Florida PUC: "We note that evidence is also clear that a cost is involved in the delivery of this traffic, including traffic to ISPs." GlobalNAPs, Inc., Docket No. 991267-TP (April 24, 2000)

Illinois Commerce Comm.: "[The ILEC's] local exchange competitors are obligated by law to terminate calls made by [the ILEC's] customers, they incur costs in order to do so, and they are entitled to be compensated for the use of their equipment and facilities." Teleport Comm., 97-0404 (March 11, 1998)

Alabama PSC: "[I]t is undeniable that [a CLEC] will incur costs in terminating traffic to its ISP customers which originates from [ILEC] customers. It would be entirely inconsistent with the competitive principles underlying the Act not to provide [the CLEC] with some mechanism to recover those costs as they are incurred." ICG Telecom Group, Docket 27069 (November 10, 1999)

Mandatory "bill and keep" would contradict the FCC's application of reciprocal compensation to one-way paging calls

In the wireless area, the FCC has concluded that CMRS providers are entitled to enter into reciprocal compensation arrangements for the transport and termination of telecommunications.

-The Local Competition Order concluded that LECs are required to pay reciprocal compensation for "all CMRS providers, including paging providers...." (Local Competition Order, para. 1008; see also paras. 1041-1045).

The Ninth Circuit upheld the FCC's decision concluding that one-way paging companies are entitled to reciprocal compensation.

Pacific Bell claimed that it is inherently not "reciprocal" to enter into an agreement with a paging company because the compensation flows only one way where the paging company generates no traffic for termination by the ILEC.

The Ninth Circuit -- buttressed by the FCC -- rejected this view, concluding that the reciprocal compensation provisions do not require that each carrier actually receive termination compensation from the other. Instead, "whether or not either carrier actually receives any compensation depends on whether the other carrier originates traffic." Pacific Bell v. Cook Telecom, -- F.3d. ------, 1999 WL 1249707 (9th Cir. 1999).

Citing the FCC's own rules and statements, the Ninth Circuit found:

-"when traffic originates with one carrier and terminates with another, the terminating carrier must receive compensation."

-"arrangements under which a carrier receives no compensation for the traffic that it terminates are not reciprocal."

Mandatory "bill and keep" would fly in the face of the ILECs' previous opposition to the requirement

In 1996, the ILECs fought against the imposition of bill-and-keep arrangements, arguing that mandatory bill-and-keep would:

(1) conflict with the 1996 Act,

(2) fail to adequately compensate carriers for costs incurred,

(3) give CLECs no economic incentives to use lower cost facilities or services,

(4) fail to account for differences in traffic balances between ILECs and CLECs, and

(5) violate the 5th Amendment as a taking through uncompensated use of ILEC property

(Local Competition Order, paras. 1099-1105).

One ILEC even derided the concept as "bilk and keep."

Mandatory "bill and keep" would fly in the face of the ILECs' previous opposition to the requirement

Bell Atlantic in particular argued vociferously against a bill and keep requirement, stating:

> "Moreover, the notion that bill and keep is necessary to prevent LECs from demanding too high a [reciprocal compensation] rate reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers who calls are predominantly inbound, such as credit card authorization centers and Internet access providers. The LEC will find itself writing large monthly checks to the new entrant." (Bell Atlantic Reply Comments, CC Docket No. 96-98, at 21).

This extraordinary statement reveals, among other things, that Bell Atlantic believed that if the initial recip comp rates were set too high by the parties, "the market" would take care of the situation because CLECs rightfully could seek out ISPs as local customers.

The New York Commission has since observed that:

> "The ILECs' earlier advocacy of reciprocal compensation over bill-and-keep does not legally estop them from now urging changes in reciprocal compensation, or even its total abandonment; but it does suggest at least that the existence of imbalances should not be seen by them as a complete surprise." (p. 56)

Mandatory "bill and keep" would fly in the face of the ILECs' prior admissions that traffic terminating to ISPs imposes significant network costs

In early 1997, the ILECs filed comments in the FCC's inquiry into the ISPs' use of the public switched networks. The ILECs uniformly complained about the network congestion caused by ISP traffic on their networks, and that this alleged congestion was being caused by heavy ISP traffic on the ILECs' terminating local switches. For example:

> Bell Atlantic argued that the Commission needed to address the growing congestion in the ILECs' central office switches and facilities, and interoffice trunk facilities, serving ISPs. (Bell Atlantic/NYNEX Comments, CC Docket No. 96-263, filed March 24, 1997, at i, 1-6)

In early 1998, several ILECs filed petitions pursuant to Section 706 of the Telecom Act. Again, the ILECs complained about network congestion caused by ISP traffic. For example:

> Bell Atlantic admitted that the growth of the Internet "has caused some traffic congestion in certain Bell Atlantic switches, especially those located near major ISP points of presence." (Bell Atlantic Petition, CC Docket No. 98-11, filed April 6, 1998 (attached White Paper, at 15).
>
> Ameritech acknowledged that increasing Internet usage brings "significant network congestion" on its circuit-switched networks. (Ameritech Petition, CC Docket No. 98-32, filed March 5, 1998, at 6-7).

These statements point up the inarguable observation that local carriers incur significant costs when terminating ISP-bound traffic.

Mandatory "bill and keep" would fly in the face of the ILECs' prior admissions that end user charges fail to cover the costs of providing service

Another ILEC claim is that the CLEC should simply recover from its own customer (the ISP) all of the additional costs imposed on it by the ILEC's originating end user customer. This claim is based on the premise that CLECs already are fully compensated from the fees they receive from ISPs.

Tellingly, the ILECs already have told the Commission that this argument is without merit. In several FCC proceedings in 1996 and 1997, the ILECs argued for the imposition of federal access charges on ISPs precisely because the cost burdens imposed by ISPs far exceeded the revenues the ILECs derived from serving the ISPs as local customers. For example:

> "information derived from our network engineers can be used to generally illustrate the conclusion that current revenues derived from local services provided to ISPs do not come close to recovering the cost of providing service." Bell Atlantic Ex Parte Letter to Jim Schlichting, (June 28, 1996), at 14.

> "The low, flat rates that the ISPs pay are not covering the massive costs that they are imposing on the telephone network to avoid network congestion that would degrade service to other customers....[T]here is no justification for allowing ISPs to pay below-cost rates for their access." Bell Atlantic/NYNEX Ex Parte Letter, CC Docket No. 96-262 (March 24, 1997), at 3, 5.

> Increased Internet usage has "driven the monthly cost of delivering this traffic over a business line to an Internet provider to at least $75 and an ISDN line to about $50. Yet the revenues from that line remains at $16-30 per month...." Id. at p. 7.

Mandatory "bill and keep" would ignore the obvious role played by the ILECs' local rate structures

Not only have the ILECs repeatedly complained to the FCC and the state commissions that local end user charges fail to cover the costs incurred when their customers make calls to ISPs, the FCC and the states have told the ILECs exactly what they should do about it.

The FCC: "To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators." Access Charge Reform Order, 12 FCC Rcd 15982, para. 346 (1997).

The Illinois Commerce Commission: "[S]urely Ameritech Illinois recognizes that it has done nothing to meaningfully address the alleged underrecovery of costs which, if it exists at all, arises primarily from its own rate structure." Teleport Comm., 97-0404 (March 11, 1998) at 14.

The ILECs have never sought to recover the alleged revenue shortfalls through changes in local rate structures.

Mandatory "bill and keep" would violate the fundamental principles of cost causation

The ILECs also argue that the ISP in essence is the "cost causer," and that the CLEC therefore should seek to recover all its costs from its ISP customers, and not from the originating end user on the ILEC network. (see Qwest Communications, A Legal Roadmap for Implementing A Bill and Keep Rule For All Wireline Traffic, CC Docket No. 99-68, dated November 22, 2000, at 13-16).

The problem with this view, of course, is that it is completely inconsistent with the "sent-paid" model, which is the standard model for all local calling. Under the sent-paid system,

- the calling party (originating end user) compensates its LEC for all traffic-sensitive elements, as well as all non-traffic-sensitive elements (calling party's loop, line ports, etc.), with the exception of the destination end user's loop.
- the called party (terminating end user) pays its own LEC for the cost of delivering the traffic over its loop.

In essence, the ILECs are attempting to avoid the implications of the sent-paid system by delinking the payment obligation from cost causation for local calls. Contrary to their assertions, and as numerous state commissions and federal courts already have found:

- Calls between end users -- including ISPs -- located within a local calling area are local calls
- The ISP is the called party, like any other local business end user
- The ILEC end user customer is the calling party, responsible for incurring the cost

Thus, the originating ILEC must pay for the costs of terminating the call, on behalf of the call originator who causes the costs to be incurred.

Mandatory "bill and keep" would violate the fundamental principles of cost causation

The ILECs further claim that CLECs' costs already are covered by by the CLECs' local business line rates, the subscriber line charge, and special access charges (SBC Ex Parte Letter, CC Docket No. 99-68, dated September 15, 2000).

This view is completely inconsistent with the longstanding "sent-paid" system, under which all traffic-sensitive costs, and many non traffic-sensitive costs, are allocated to the calling party. These costs include the variable, intrastate costs of originating, transporting, and terminating local calls, and are reflected in the ILECs' local service charges. Further, the calling party alone pays for any given call, whether local or long distance.

With regard to SBC's specific assertion:

- CLEC local business line charge -- typically covers the fixed, intrastate costs of the end user's loop connection; CLEC rates are not set to recover the costs associated with receiving sent-paid traffic.
- Subscriber Line Charge (SLC) -- covers certain interstate costs of the local loop
- special access surcharge -- covers certain interstate costs associated with private lines

Thus, contrary to SBC's claim, it is the originating carrier, and not the terminating carrier, responsible for the costs of originating, transporting, and terminating local calls.

Mandatory "bill and keep" would allow the ILECs to shift their terminating costs to CLECs, for free

As shown above, ILEC costs to both originate and terminate ISP-bound traffic already are, or could be, recovered in their retail local end user rates.

The ILECs' own words revealed their apparent inability or unwillingness to deploy sufficient local facilities at the terminating end of their networks, and their obvious desire to be rid of this traffic. Not surprisingly, when competitive alternatives began to appear in 1996 and 1997, many ISPs looked to CLECs to terminate traffic from their customers.

One obvious conclusion is that CLECs are removing actual economic costs from the ILECs' networks because CLECs are terminating traffic that the ILECs otherwise would be forced to terminate themselves. Of course, the ILECs now want to wash their hands of any obligation to compensate CLECs for the very real value they are providing – relieving the ILECs of the very real costs of terminating ISP-bound traffic.

Mandatory "bill and keep" would contradict the Commission's adoption of per-minute charges for unbundled switching and shared transport

Any conclusion that carriers should not be compensated for transporting and terminating local traffic would run counter to the Commission's local competition rules establishing federal rates for transport and switching.

Sections 51.505-51.515 of the FCC's Rules (some vacated) established pricing rules for unbundled network elements, including switching and shared transport, and set up interim proxy rates.

In particular, the Commission found that the TELRIC-based per-minute proxy rate for unbundled local switching should be between 0.2 cents and 0.4 cents (para. 811), while rejecting USTA's proposed per-minute rate of 1.3 cents (para. 813). A price within this proxy range "should allow carriers the opportunity to recover fully their additional cost of terminating a call...." (para. 815).

The Commission also found that the TELRIC-based per-minute proxy rate for tandem switching should be an additional 0.15 cents (para. 824).

Mandatory "bill and keep" would remove any incentives for ILECs to propose lower, cost-based UNE rates

To the extent the reciprocal compensation rates originally demanded by the ILECs are far above forward-looking cost, the ILECs should be incented to adopt lower, cost-based rates for other interconnection services and network elements as well.

Most state commissions use the ILECs' UNE rates for transport and local switching as the basis for the transport and termination portions of reciprocal compensation. This linkage has helped force more realistic and lower ILEC UNE rates that will enable further local competition.

Were the Commission to ignore this market force and adopt mandatory bill and keep, the ILECs would be free to return to their usual course of seeking the highest possible rates for interconnection with, or use of, their local networks.

Mandatory "bill and keep" would obviate the principles of just compensation

The "subsidies" and "regulatory arbitrage" allegations raised repeatedly by the ILECs have nothing to do with reciprocal compensation per se, and everything to do with the high, above-cost rates insisted upon originally by the ILECs.

In 1996 and 1997, the ILECs sought -- and to a large extent received -- excessive rates for reciprocal compensation precisely because they anticipated that the flow of traffic would result in the CLECs paying enormous sums of money to the ILECs, with little money going the other way. Of course, the ILECs claimed then that these sums of money were merely for the recovery of actual economic costs, and disputed any notion that they amounted to "regulatory arbitrage" or "subsidies."

When the rates for transporting and terminating traffic are based on actual economic cost, and not the ILECs' own inflated "cost" claims, the proper economic incentives will be in place.

Mandatory "bill and keep" would obviate the principles of just compensation

In this proceeding, BellSouth points to ILEC data showing that CLECs terminate 18 minutes of local traffic originated by an ILEC for every one minute of traffic that the CLECs' customers originate and subsequently terminate on an ILEC network (BellSouth Ex Parte Letter, CC Docket No. 99-68, dated November 6, 2000, at 1). If, as BellSouth claims, this means there is "an acute imbalance in the volume of local traffic that the ILECs and CLECs send one another," (BellSouth Ex Parte Letter at 2), that is all the more reason that a mandatory bill and keep policy would deny CLECs just and fair compensation for the costs imposed by the ILECs' end user customers.

The ILECs claim that per-minute recip comp rate structures are inherently inefficient because traffic termination costs are fixed to a certain extent (Joint ILEC Ex Parte Letter, CC Docket No. 99-68, dated November 3, 2000, at 4). Several states have examined and rejected this viewpoint, while others (notably Texas) have adopted plans which include a call set-up charge and smaller per-minute charges. Again, the proper issue before the Commission is not whether to pay any compensation at all, but rather what type of payment mechanism and rate level to adopt. Mandatory bill and keep provides no cost recovery.

Mandatory "bill and keep" would represent the ultimate regulatory arbitrage

The ILECs claim that reciprocal compensation for ISP-bound traffic is a matter of pure regulatory fiat, and that bill and keep represents a true market-based solution (Joint ILEC Ex Parte Letter at 4).

Nothing could be further from the truth. Reciprocal compensation represents what the Act mandates, what the rules require, and what the parties have agreed to; mandatory bill and keep represents nothing more than a heavy-handed political fix on behalf of the incumbents. The irony, of course, is that the ILECs --after essentially insisting upon what turned out to be a bad deal from their perspective in their interconnection agreements -- now runs first to the state regulators, then to the courts, and now to the FCC (and, of course, Congress) for a classic government bail-out.

The preferable solution is to link reciprocal compensation to UNE switching and transport rates; then, the ILECs and CLECs can continue negotiating both sets of rates towards cost. Nonetheless, because paying zero is always better than paying cost-based rates, the ILECs continue to cast aspersions upon reciprocal compensation for ISP traffic.

Mandatory "bill and keep" would represent the ultimate regulatory arbitrage

Contrary to the ILECs' unfounded assertions, there are wholly justifiable business reasons why CLECs seek to serve ISPs. As the New York Commission found last year:

> "CLECs have pursued ISP and other convergent traffic customers for multiple reasons: because reasonable and honest business plans might suggest doing so; because ILECs may not have opened mass markets as quickly and effectively as they might have; and because current reciprocal compensation arrangements may unintendedly overcompensate carriers that terminate calls to convergent customers." (p. 57).

The New York Commission concluded that the reciprocal compensation system "is not fundamentally broken," but instead only required certain cost-based adjustments to the rate structure.

Similarly, the Illinois Commerce Commission found that:

> "Even if the complainants have specifically targeted ISPs in their marketing efforts, that is no more objectionable than if a carrier chooses to target a telemarketing firm, a take-out restaurant or a high-usage household.... [T]he market for service to ISPs is a growth market both in terms of new ISP entrants into the market and the growing demand for service from new and existing ISPs. It is therefore a natural target for new entrants." (p. 14)

Mandatory "bill and keep" would thwart the Commission's stated policy goals in this proceeding

The Commission stated in the first ISP Recip Comp Order that its three policy goals for the proceeding were: (1) ensuring the broadest possible entry of efficient new competitors, (2) eliminating incentives for inefficient entry and irrational pricing schemes, and (3) providing to consumers as rapidly as possible the benefits of competition and emerging technologies (para. 33).

Mandatory bill and keep would flunk all three goals by:

(1) ensuring that efficient new competitors would not remain in, let alone enter, the local market;

(2) introducing as regulatory mandate a completely irrational pricing scheme;

(3) denying to consumers and ISPs the benefits of local competition.

Mandatory "bill and keep" would be wholly impermissible under the FCC's forbearance authority

The ILECs also claim that the FCC has sufficient authority under Section 10 of the Telecom Act (47 U.S.C. §160(a)) to forbear from requiring reciprocal compensation for ISP-bound traffic (Qwest Roadmap at 18-20).

However, the Commission's forbearance authority does not extend to Section 271 checklist items, one of which requires the BOCs to offer "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)." 47 U.S.C. section 271(C)(2)(B)(xiii).

The FCC is forbidden from forbearing from any provision of Section 271 unless and until that provision is fully implemented. 47 U.S.C. section 160(d).

Regardless, the FCC cannot meet the three-part test established by section 10(a) because deciding not to enforce the statutorily-required reciprocal compensation regime would:

(1) fail to ensure that the carriers' charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory;

(2) harm, rather than protect consumers, including ISPs and other end users; and

(3) be inconsistent with the public interest.

Mandatory "bill and keep" would violate the APA's requirement for sufficient notice

The FCC also faces a significant procedural defect because it has never asked for comments on the question of whether it should adopt a mandatory bill and keep regime.

The Public Notice sought comments on the jurisdictional issues identified in the D.C. Circuit's remand decision, as well as "comment regarding any new or innovative inter-carrier compensation arrangements for ISP-bound traffic parties may be considering or have entered into, either voluntarily or at the direction of a state commission, during the pendency of this proceeding." 15 FCC Rcd 11311, 11312 (2000).

Bill and keep is not a "new or innovative inter-carrier compensation arrangement;" it is in fact the very absence of a compensation arrangement. Arguing that CLECs should be eligible for no compensation at all under Section 251(b)(5) is a far cry from presenting a "new or innovative inter-carrier compensation arrangement."

Mandatory bill and keep only for ISP-based traffic will be unjustly & unreasonably discriminatory

The FCC consistently has classified and treated ESPs/ISPs as unregulated end users, not carriers.

Section 64.7 702(a) of the FCC's rules: ESPs "are not regulated under title II of the Act."

Section 69.2(m) of the FCC's rules: an end user is any customer of telecommunications service that is not a carrier.

ISPs utilize the local network in the same way as other local business end users.

Other end users of inbound telecommunication services includes call centers, credit card validation centers, travel reservation agencies, home shopping networks, call-in radio shows, ticket outlets, pizza delivery stores, taxicab companies, etc.

The FCC cannot lawfully single out ISP traffic for differential treatment.

Section 202(a) of the Communications Act of 1934, as amended, forbids "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services, directly or indirectly, by any means or device...."

Section 201(b) prohibits, and declares unlawful, any unjust or unreasonable "charges, practices, classifications and regulations...."

Mandatory "bill and keep" would further block the CLECs' ability to provide local service

Through their control over last-mile facilities, the ILECs have successfully foreclosed the CLECs from providing POTS service to residential and small business customers. Contrary to suggestions by some ILECs (Qwest Roadmap at 16-18), CLECs do not intentionally restrict their operations -- they serve customers where they are able. It is the ILECs who have intentionally sought, and largely succeeded, in limiting the customers that CLECs can profitably serve. As a direct result of the ILECs' actions, CLECs have been able only to compete for the business of large, geographically-dense corporate customers.

When certain CLECs capitalized on the ILECs' greed by developing a niche market based on signing up locally-based ISPs as end user customers, the ILECs now seek to eliminate this final revenue stream. A mandatory bill and keep requirement will leave CLECs completely uncompensated for the service they provide, and take away the viability of this one remaining addressable market.

Mandatory "bill and keep" would provide fewer incentives for the ILECs to deploy advanced services and new technologies

Because reciprocal compensation is tied directly to the ILECs' alleged costs of providing transport and termination, it provides important incentives for the ILECs to install and utilize more efficient, and hence less costly, network equipment. Thus, abandoning recip comp in favor of a mandatory "bill and keep" regime – coupled with the likely negative impact on local competition -- will take away these important incentives, and give the ILECs even less reason to upgrade the outmoded portions of their networks.

Mandatory "bill and keep" would accelerate the disintegration of a viable CLEC industry

Verizon argues that a transition to bill and keep would not harm CLECs or their shareholders because the CLECs and their analysts have not factored reciprocal compensation revenues into their accounting systems and stock valuations (Verizon Ex Parte Letter, CC Docket No. 99-68, dated 11/1/00).

Of course, many of the CLECs have been forced into this precarious financial position precisely because the ILECs are contesting state commission rulings, and otherwise have refused to pay the reciprocal compensation revenues that are owed. In other words, the Commission is being urged to note the result of the ILECs' own intransigence and lack of good faith – the CLECs must write down revenue and avoid reciprocal compensation exposure -- as a positive reason for adopting mandatory bill and keep.

Mandatory "bill and keep" would accelerate the disintegration of a viable CLEC industry

The simple truth is that, as numerous news stories attest, the CLEC industry is in dire straits. As one indicia -- recent stock market data for selected telecom companies -- reveals, the CLECs and other competitive providers have lost a tremendous portion of their value over the past few months. The average industry-wide stock price, as a percentage of the 52-week high during the period ending 11/20/00, is as follows:

RBOCs:	58-97%
Wireless providers:	37-50%
IXCs:	25-32%
CLECs:	5-20%
Data CLECs:	3-5%

While this snapshot does not tell the whole story, it does provide a pointed response to the ILECs' disingenuous statements about the relative health of the CLEC industry.

Mandatory bill and keep would leave the ISPs with no competitive alternatives to the ILECs

One of the ILECs' unstated intentions (besides securing a cost-free ride on the CLECs' networks) is to drive the CLECs out of the local market, and lock up the ISPs as customers -- or perhaps eliminate the ISPs as competitors altogether. It is instructive that, in many cases, ISPs sought out the CLECs beginning in 1996 because the ISPs were interested in higher service quality and lower prices than they were receiving from the ILECs.

Adopting a mandatory bill and keep policy would reward the ILECs for ignoring and losing ISPs as customers in the first place, and would relegate the ISPs to a choice-free scenario of using the ILECs or nobody. In fact, given the ILECs' openly-acknowledged poor performance -- deliberate or otherwise -- in serving ISPs prior to the advent of competition, it is likely that the ILECs, as the sole remaining terminators of traffic, would cause tremendous damage to the ISP market.

Mandatory "bill and keep" limited only to ISP-bound traffic, or to all local traffic, would be arbitrary and capricious

The Commission long has recognized that the ILECs incur actual economic costs for originating, transporting, and terminating traffic on behalf of interexchange carriers.

Section 202(a) of the Communications Act of 1934, as amended, requires nondiscriminatory practices and charges for "like" services.

In the Local Competition Order, the FCC concluded that:

Telephone exchange providers and exchange access providers "us[e] essentially the same equipment to transmit and route traffic...." (para. 185).

"The facilities used to provide exchange access services are the same as those used to provide local exchange services." (para. 363).

"We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. Ultimately, we believe the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge." (para. 1033).

Thus, any proposal requiring bill and keep only for ISP traffic between carriers, or local traffic between carriers, must also require the ILECs not to recover costs incurred for transporting and terminating traffic on behalf of interexchange carriers.

Mandatory "bill and keep" limited only to ISP-bound traffic, or to all local traffic, would be arbitrary and capricious

The Commission long has recognized that the ILECs incur actual economic costs for originating, transporting, and terminating traffic on behalf of their own end user customers.

In the Local Competition Order, the Commission found that:

> "transport of traffic for termination on a competing carrier's network is, therefore, largely indistinguishable from transport of termination of calls on a carrier's own network." (para. 1054).

Thus, any proposal requiring bill and keep only for ISP traffic between carriers, or local traffic between carriers, must also require the ILECs not to recover costs incurred for transporting and terminating traffic on their own networks on behalf of their own end user customers.