Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	

COMMENTS OF BELLSOUTH

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Date: August 21, 2001

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COMMENTS

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), hereby submits its comments in the above referenced proceeding.

I. INTRODUCTION AND SUMMARY

1. On April 27, 2001, the Commission released a *Notice of Proposed Rulemaking* that initiated a reexamination of all currently regulated forms of intercarrier compensation.[1] An objective of the proceeding is to identify a unified approach to intercarrier compensation. The Commission intends for the unified approach to apply to all types of traffic passing over the local telephone network.

2. As observed in the *Notice*, there are two primary forms of compensation associated with the use of the local network by interconnecting carriers — (1) reciprocal compensation and (2) access charges. Technological changes and competitive market conditions are among the many pressures that necessitate that the Commission reevaluate existing intercarrier compensation regimes and investigate opportunities to establish new approaches that are consistent with the pro-competitive, deregulatory goals of the Telecommunications Act of 1996 ("1996 Act").

[1] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, FCC 01-132, released April 27, 2001 ("*Notice*").

3. BellSouth supports moving toward a unified approach for intercarrier compensation. A properly designed mechanism will encourage efficient use of and investment in telecommunications networks. As the Commission recognizes, an approach that is carefully crafted can realize the deregulatory promise that has been a cornerstone of the 1996 Act. In this regard, a key characteristic of a unified intercarrier compensation mechanism should be that it favors competition and allows the market to reward ingenuity and innovation in the provision of telecommunications services while avoiding the creation of pecuniary incentives toward regulatory gaming.

4. The Commission has begun to address the regulatory gaming that has been ongoing. In adopting interim compensation mechanisms for traffic bound for Internet service providers ("ISPs") and competitive local exchange carriers' ("CLEC") access charges, the Commission acknowledged the imperfections that exist in the current regulatory regime that not only permitted but also induced carriers to behave in ways not contemplated by the Commission when it initially adopted its rules and policies.[2] By working and manipulating the Commission's rules, carriers could and did profit handsomely by taking advantage of the imperfections in the regulatory processes. As the Commission approaches redefining the rules for intercarrier compensation, it must remain mindful of this experience.

5. The *Notice* identifies bill-and-keep as an approach that can further the goals of the corrective steps that the Commission took in the *ISP-Bound* and *CLEC Access Charge*

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[2] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, *Order on Remand and Report and Order*, FCC 01-131, released April 27, 2001 (*"ISP-Bound Order")* and *In the Matter of Access Charge Reform and Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, FCC 01-146, released April 27, 2001 (*"CLEC Access Charge Order").*

Orders as well as fulfill the objective of establishing a unified intercarrier compensation mechanism.[3] BellSouth concurs with the Commission's belief that bill-and-keep is an intercarrier compensation mechanism that can achieve the Commission's long-run objectives.

6. Bill-and-keep eliminates the market distortions, some of which the Commission has confronted, created by carrier-to-carrier payments. Experience has shown that the system of carrier payments can be profitably manipulated in unintended ways. If the Commission does not alter the existing carrier payment regime, changes in technology will provide additional opportunities for carriers to avoid carrier payments. For example, as the use of Internet protocol proliferates in networks there will be more and more incentives for carriers to disguise their carrier operations as ISP operations in order to take advantage of the access charge exemption. The consequences of these types of movements can be far-reaching. Not only are there traditional allocative inefficiencies because economic decisions are being driven by non-economic criteria, such as manipulating regulatory disparities, but, in addition, the Commission's public policies, such as universal service, can be undermined as well.[4]

7. Properly crafted, bill-and-keep should lead to more stable interconnection arrangements between carriers and should minimize disputes. As a result, the uniformity of bill-and-keep should reduce administrative expenses associated with interconnection. Such reductions are pro-competitive in effect and most certainly beneficial to a carrier doing business in multiple jurisdictions.

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3 *Notice,* ¶ 4.

4 For example, the current universal service support mechanism is funded by contributions made by interstate carriers based on their retail telecommunications service revenues. If carriers can simply transform their carrier operations to ISP operations, they likewise exempt the revenues from those operations from being included in the contribution base. Thus, the burden of universal service support is shifted to those carriers that cannot, or do not, take advantage of a regulatory loophole.

8. In addition, bill-and-keep can serve as an alternative mechanism for exchange access charges. Nevertheless, at the outset, the Commission must recognize that there are legacy issues surrounding exchange access that will require attention and resolution. Exchange access was spawned from the break-up of the former Bell System. While the Commission was in the forefront in defining the structure of access charges, ratemaking was jurisdictionally split, with different intrastate and interstate rates, each designed to foster the policies of the respective regulatory agencies. Recently, the Commission has taken deliberate steps to reform interstate access charges, not the least of which has been to remove implicit subsidies from access charges and to introduce pricing flexibility.[5]

9. Many state commissions, however, have been slow to follow the Commission's lead. Intrastate access charges still reflect subsidies. In order for bill-and-keep to operate as intended, it must be implemented uniformly across state and interstate jurisdictions.[6] A prerequisite to moving exchange access to bill-and-keep is to remove the subsidies that remain in intrastate access charges. In this regard, the Commission's assistance and participation is vital. While the Commission need not shoulder the responsibility of any single state, it should provide

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[5] *See In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; and Federal-State Joint Board on Universal Service,* CC Docket Nos. 96-262, 94-1, 99-249 and 96-45, *Sixth Report and Order in CC Docket Nos. 96-262 and 94-1*, *Report and Order in CC Docket No. 99-249*, *and Eleventh Report and Order in CC Docket No. 96-45*, 15 FCC Rcd 12962 (2000) ("*CALLS Order"*) and *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*; *Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*; *and Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers*, CC Docket Nos. 96-262, 94-1, 98-157 and CCB/CPD File No. 98-63, *Fifth Report and Order and Further Notice of Proposed Rulemaking,* 14 FCC Rcd 14221 (1999) (*"Pricing Flexibility Order").*

[6] Bill-and-keep could not work for exchange access if only one jurisdiction adopted it. A dichotomy of bill-and-keep in one jurisdiction and carrier access charges in another would simply invite regulatory arbitrage, with interexchange carriers being provided the pecuniary incentive to mask the jurisdictional origin of the traffic that is assessed carrier access charges.

guidance and incentives that enable state commissions to achieve subsidy-free rates.[7] Commission leadership, which is crucial to successful implementation of bill-and-keep, will further the statutory purposes of promoting universal service and competition.

10. Replacing intercarrier payments with bill-and-keep need not be relegated to just a goal. The Commission has the legal authority both to establish bill-and-keep arrangements for reciprocal compensation between telecommunications carriers and to modify existing access schemes to move them into a bill-and-keep regime provided that the Commission establishes a means for carriers to recover their costs from their end users. Under Section 251(a) of the 1996 Act, each telecommunications carrier has a duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.[8] The general duty to interconnect with others is mandated without regard to the jurisdictional nature of either the service or carrier involved. All types of telecommunications carriers need to make appropriate compensation arrangements regarding the various types of telecommunications services provided among them in the context of this interconnection mandate. Section 251's general duty to interconnect, therefore, necessarily encompasses both traditional reciprocal compensation and access charge arrangements. Moreover, under Section 251(g), the Commission has the authority to prescribe regulations that supersede existing access charge mechanisms.[9] Because the Commission's general rulemaking authority extends to implementation of Section 251 of the 1996 Act,[10] the

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7 Recently, the Tenth Circuit Court of Appeals held that, under Section 254 of the 1996 Act, the Commission has an obligation to provide inducements to the states to remove subsidies. *Qwest Corp. v. FCC*, No. 99-9546, slip op. (10th Cir. July 31, 2001). This proceeding, the intercarrier compensation proceeding, provides the Commission with a remarkable opportunity to fulfill its statutory role.

8 47 U.S.C. § 251(a)(1).

9 47 U.S.C. § 251(g).

10 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S 366, 378 (1999) ("*Iowa Utilities Board*").

Commission has the legal authority both to establish bill-and-keep arrangements for reciprocal compensation between telecommunications carriers and to modify existing access charge mechanisms to move them into a bill-and-keep regime.

II. A NEW PARADIGM FOR INTERCARRIER COMPENSATION

11. The time is ripe for the Commission to reexamine existing intercarrier compensation mechanisms. The Commission must test the validity of old assumptions in the context of the changing telecommunications environment. In this regard, the *Notice* identifies relevant considerations that provide impetus for change to existing intercarrier compensation.

A. Regulatory Arbitrage

12. One of the most pernicious problems plaguing the telecommunications marketplace today is regulatory arbitrage. As the Commission recognizes, regulatory classifications and policies which treat entities in different ways are being exploited in unintended ways. One consequence is that competition takes on bizarre attributes. The system rewards participants that are adept at taking advantage of the "business" opportunities created by inconsistent regulations.

13. Historically, the division of regulatory and ratemaking responsibilities has provided ample arbitrage opportunities with regard to exchange access. Often, state and federal regulatory objectives have differed. Accordingly, interstate and intrastate exchange access rates have differed. Such differences have created opportunities for carriers to attempt to disguise the jurisdictional nature of their traffic in order to take advantage of whichever jurisdiction had the lower exchange access rates.

14. Taking advantage of the regulatory arbitrage opportunities presented by exchange access rates that differ jurisdictionally does not require extraordinary efforts. Jurisdictional

markers often do not accompany interexchange calls terminated in the local exchange. In these instances, local exchange carriers rely on percent interstate usage factors of their access customers, which are frequently found to be skewed toward the jurisdiction with the lower switched access rates.

15. This historical problem is further complicated by different carrier compensation arrangements for local and interexchange calls. Originating interexchange access charges can be avoided in their entirety by positioning the interexchange carrier ("IXC") behind a CLEC or an ISP. In other words, if the originating call can be made to "look" local, the chances are excellent that exchange access charges can be avoided.

16. With the advent of local competition, new forms of regulatory arbitrage have evolved. For example, CLECs have used "virtual" NXXs ("VNXXs") as a means of making calls look local. Simply described, VNXXs have been established by CLECs by assigning an NXX to a particular rate center and then assigning telephone numbers associated with the NXX to customers that are neither located in the rate center to which the NXX has been assigned nor do they subscribe to facilities physically located in the rate center. The VNXX transforms intraLATA toll calls, for which carrier-to-carrier compensation is based on access charges, to local calls, for which carrier-to-carrier compensation is based on reciprocal compensation.

17. Not only does the VNXX warp the existing intercarrier compensation mechanisms, but it also distorts the competitive landscape. Numerous types of carriers compete for intraLATA toll traffic, not all of whom, such as IXCs, have the right to lay claim to scarce

numbering resources in order to avoid access charges.[11] CLECs, by virtue of special regulatory treatment, have arbitraged their position to advantage themselves competitively.

18. Regulatory disparity has likewise made possible other arbitrage opportunities. The most notable is associated with ISP-bound traffic. ISPs, under the Commission's rules, are considered information service providers and, hence, fall within the Commission's access charge exemption for enhanced service providers. The access charge exemption creates a pecuniary advantage to those that provide interexchange communications as Internet telephony because they can avoid access charges.

19. The arbitrage opportunity that is associated with access charge avoidance by ISPs is compounded by reciprocal compensation. As the Commission correctly recognized in its *ISP-Bound Order*, Internet usage has made the validity of traditional assumptions regarding traffic questionable "because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results."[12] The Commission explained:

> Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime. It was not long before some LECs saw the opportunity to sign up ISPs as customers and collect, rather than pay, compensation because ISP modems do not generally call anyone in the exchange. In some instances, this led to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their service, potentially driving ISP rates to consumers to uneconomical levels.[13]

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[11] The VNXX arrangement allows the CLEC to provide as "local" the equivalent of a foreign exchange service.

[12] *ISP-Bound Ord*er, ¶ 21.

[13] *Id.*

20. The significance of the arbitrage opportunities lies in the distorted incentives that they create. In the *ISP-Bound Order*, the Commission identified a critical flaw in the reciprocal compensation mechanism. The mechanism does not reflect the degree to which carriers can recover costs from end users. As a result, reciprocal compensation payments enabled carriers to offer services to their customers at rates that bore little relationship to actual costs and provided the recipients of reciprocal compensation an advantage over their competitors. Equally troubling was the fact that the reciprocal compensation mechanism provided incentives for carriers to target customers with high volumes of incoming traffic that generate high reciprocal compensation payments. The market distortions that flowed were immediately apparent:

> To the extent that carriers offer these customers below cost retail rates subsidized by intercarrier compensation, these customers do not receive accurate price signals. Moreover, because the originating LEC typically charges its customers averaged rates, the originating end-user receives inaccurate price signals as the costs associated with the intercarrier payments are recovered through rates averaged across all of the originating carrier's end-users.[14]

Thus, the Commission found that reliance on an intercarrier compensation mechanism based on reciprocal compensation for ISP-bound traffic undermined the operation of competitive markets:

> We are concerned that viable, long-term competition among efficient providers of local exchange and exchange access services cannot be sustained where the intercarrier compensation regime does not reward efficiency and may produce retail rates that do not reflect the costs of the services provided.[15]

21. No industry in recent history has undergone the pervasive change that the telecommunications industry has experienced. Nor is the pace of change likely to slow anytime in the near future. Technology will continue to fuel dynamic market alterations. These changes will increase the opportunities to take advantage of incongruities within the maze of regulatory

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[14] *ISP-Bound Order,* ¶ 68.

[15] *Id.* ¶ 71.

rules that apply. Unless disparities in intercarrier compensation mechanisms are addressed, the incentives to profit from regulatory gaming and arbitrage are perpetuated.

B. Traditional Rationales For Calling-Party's-Network-Pays ("CPNP") Regimes Are Too Simplistic

22. As the *Notice* summarizes, the analyses that supported CPNP regimes are based on two assumptions. The first assumption was that carriers would charge other carriers interconnection prices. The fundamental question of whether such charges should be assessed was never considered. The second assumption was that the calling party was the cost causer. It was a simplifying assumption which, as the Commission notes, made the analysis of determining prices more tractable.[16]

23. These assumptions, however, never anticipated the advent of local competition and the explosion in the number of telecommunications providers that has occurred. Not only are there new forms of competition, but new forms of services that have changed the dynamics of the marketplace. The importance of inbound calling has grown substantially. The Internet has dramatically changed the telecommunications landscape. The simplifying assumptions of the CPNP model are outmoded in the current environment.

24. The analyses of DeGraba[17] and Atkinson and Barnekov[18] recognize that it is simply not just the calling party that benefits from a call. They outline approaches to intercarrier compensation that reflect that fact in the current multiple-carrier marketplace where all networks benefit from interconnection, not just the network upon which the communication originates.

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16 *Notice,* ¶ 19.

17 Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime* (Federal Communications Commission, OPP Working Paper No. 33, December 2000).

25. As recognized in the *Notice*, there is one similarity in the two analyses, which is that they both establish analytical support for moving to a bill-and-keep mechanism for intercarrier compensation.

C. The Goals For An Intercarrier Compensation Mechanism

26. Historically, intercarrier compensation has been used to satisfy multiple goals. While efficiency in some form has been a consideration, other regulatory and public policy goals have had equal impact on intercarrier compensation. Without question, access charges, for example, were not only a vehicle for compensating local exchange carriers for the use of the local network in the origination or termination of interexchange calls, but also a vehicle for preserving and promoting universal service. Indeed, intrastate access charges continue to perform a universal service function.

27. Competition makes it difficult, if not impossible, for interconnection to serve multiple masters. The 1996 Act recognized these conflicts by mandating that implicit subsidies be made explicit. In reexamining intercarrier compensation, the Commission should build upon the experience of the recent past.

28. As the Commission has observed, regulations can create "business" opportunities that, while financially rewarding, run counter to long term competitive goals. Market participants have had the incentive to focus on exploiting aberrations created by the operation of regulatory rules. Competition, investment and innovation gave way to the short-term pursuit of pecuniary gains.

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[18] Jay M. Atkinson and Christopher C. Barnekou, *A Competitively Neutral Approach to Network Interconnection* (Federal Communications Commission, OPP Working Paper No. 34, December 2000).

29. The goal of this proceeding should be to craft an intercarrier compensation mechanism that minimizes opportunities for manipulation for private gain. Such an approach creates the conditions for efficient interconnection and provides the climate needed for investment and innovation. Business success will be tied to how well market needs are satisfied. Investment in new technology and network infrastructure will be essential elements of the formula for profitability.

30. Bill-and-keep, properly implemented, is the intercarrier compensation mechanism that can achieve this goal. Not only should bill-and-keep eliminate regulatory arbitrage, but it should also lead to more efficient retail rates and efficient network usage. With bill-and-keep, these improvements can be accomplished with a minimum of regulatory intervention.

D. Parameters of Bill-And-Keep

31. A precondition to the development of a bill-and-keep mechanism is the establishment of a common understanding of the parameters that delimit the mechanism. As an initial matter, bill-and-keep is a compensation mechanism for the interchange of traffic between carriers. End users will purchase services from carriers that will enable them to communicate with other end users.

32. While bill-and-keep will apply to the interchange of traffic between carriers, there will be instances where some carriers will purchase additional services or functions from another carrier. For example, if an IXC wanted to provide an interstate foreign exchange service to one of its end-user customers, at the open-end of the service, the IXC would have to purchase a functionality that is equivalent to Feature Group A that would connect at its point of interchange. Likewise, other functionalities, such as access to Line Information Data Base

(“LIDB”) and 800 Access Service, would have to be purchased by carriers and would not be part of the bill-and-keep mechanism.

33. Under bill-and-keep, carriers will have to establish a point of interchange with each other. The point of interchange defines the point where the carrier must deliver traffic to another carrier’s network. For example, assume there are two carriers, A and B. Carrier A’s end user originates a call to an end user that is served by Carrier B. Carrier A will be responsible for delivering the call originated on its network to the point of interchange it has established with Carrier B. Carrier B is responsible for completing the communication.

34. Essentially, the point of interchange defines the transport responsibility of a carrier. It does not, nor should it, determine the manner in which a carrier fulfills its responsibility. A carrier could deliver its traffic to the point of interchange by building facilities to that point. Alternatively, it could go to a third carrier and lease facilities or purchase services from that carrier in order to deliver its traffic to the point of interchange. Likewise, the carrier can make a similar arrangement with the carrier to which it is delivering the traffic.

35. It is key that the responsibility for delivering traffic is differentiated from the way in which a carrier meets its obligations. Bill-and-keep neither favors nor disfavors any particular method. In other words, carriers will continue to be free to purchase services or build facilities as their specific circumstances may dictate.[19]

36. BellSouth believes that carriers should be permitted to negotiate points of interchange. Negotiation recognizes that there are many factors that bear upon an appropriate

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[19] Bill-and-keep does not need to be nor should it be disruptive to existing network arrangements. Many arrangements have a long history and considerable investment and should not be dismantled because the intercarrier compensation mechanism moves to bill-and-keep. Rather, bill-and-keep should be able to accommodate existing arrangements. The
Footnote Continued

point of interchange. Carriers may place different weight on one factor or another or circumstances may be in a rapid state of change (*e.g.*, increases/decreases in traffic interchanged). Negotiations could result in different points of interchange to reflect these differing circumstances.

37. Nevertheless, there will be times where carriers cannot agree on the point of interchange. Because one objective of a bill-and-keep intercarrier compensation mechanism is to reduce the need for regulatory intervention, the Commission should establish a reasonable default point of interchange that would apply in the event that carriers cannot negotiate an interchange point. The default point of interchange would eliminate the need for arbitration in the event agreement could not be reached through negotiation.

38. Establishing a default point of interchange should benefit the negotiation process. Because the default is fixed, there is no possibility that arbitration would result in a more favorable outcome than the ones being discussed at the negotiating table. Accordingly, a default point of interchange provides an incentive for the carriers to negotiate more efficient points.

39. There must be a geographic limitation associated with the point of interchange. For example, absent a geographical limitation, a carrier could attempt to establish a single point of interchange to serve the entire United States. Such an arrangement would entail extraordinary transport costs. If carriers were free to establish rate schedules for their end users that were specific to the off-network carriers that were being called, rational pricing might well be sufficient to deter such arrangements because the cost to an end user for calling another end user on such a network would be prohibitive. There are, however, regulatory obstacles, such as rate

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accommodation under bill-and-keep is to employ services and facilities of other carriers and to pay these carriers for the transit function they provide.

averaging, that prevent marketplace mechanisms from operating completely. Hence, there must be a compensating regulatory rule. In this instance, the rule must require that a carrier have at least one point of interchange within a local access transport area ("LATA").[20] A LATA is a reasonable point. It is a well-established area with which most carriers have experience and within which to one degree or another carriers have established a network presence.

40. Movement to a bill-and-keep intercarrier compensation mechanism will impact cost recovery. Where a carrier recovered some of its network costs from other carriers, these costs will now have to be recovered from a carrier's end users. As part of the bill-and-keep mechanism, the Commission must provide for cost recovery by permitting all carriers the maximum pricing flexibility to establish retail rates. Pricing flexibility is the only sure way of ensuring that market responsive rates are established. Failure to provide for pricing flexibility would only transfer to the services sold to end users the many regulatory conundrums that have been encountered with regard to intercarrier compensation.

41. To achieve the objectives of moving to a bill-and-keep regime, bill-and-keep must apply to all public switched network traffic that is interchanged with a local exchange carrier, regardless of jurisdiction. It will require the simultaneous implementation of bill-and-keep in the state and federal jurisdictions. Accordingly, a process whereby the state commissions can coordinate with this Commission will be critical to successful implementation of bill-and-keep.

42. In this regard, the Commission must be prepared to assist states in making the transition from a CPNP regime to a bill-and-keep regime. One of the most significant problems

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[20] Additional points of interchange may be required as traffic increases to a given threshold across the LATA.

faced by many state commissions is the degree to which they have continued to rely on implicit subsidies in their ratemaking processes. Nonetheless, the Commission has the opportunity to lead and assist the state commissions as they work to remove these subsidies. The 1996 Act contemplates that all implicit subsidies should be made explicit. In its recent decision, the Tenth Circuit Court of Appeals found that the Commission has a statutory duty to induce state commissions to act in ways that are consistent with the universal service goals of the 1996 Act.[21]

43. Moving to a bill-and-keep regime provides the Commission with a fortuitous opportunity to advance the 1996 Act's universal service principles and goals by creating unique assistance programs that would provide incentives for state commissions to move quickly to bill-and-keep. An approach where the state and federal commissions have a shared responsibility will further statutory goals and public interest objectives. Indeed, unless a federal transition mechanism to assist the states is established, it is questionable as to whether the state commissions could accomplish the transition to bill-and-keep without creating severe dislocations among many end user groups.

E. Bill and Keep Benefits Consumers

44. The benefits of bill-and-keep are not limited to bringing efficiency to intercarrier compensation and curing the regulatory arbitrage that has been attendant with CPNP. Consumers stand to benefit as well. To be sure there will be a period of adjustment for consumers. Costs of network connection that have been recovered in a myriad of indirect ways will become explicit. This shift, however, will lead to more rational pricing and provide consumers with the opportunity to better control their telecommunications expenditures.

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21 *Qwest Corp. v. FCC*, No. 99-9546, slip op. (10^{th} Cir. July 31, 2001).

45. Consumers will be able to directly affect their economic welfare by the choices they make. This in turn increases competitive pressures on prices. There will be an incentive for carriers to compete for consumers through innovative pricing structures. Consumer choice will flourish. Thus, bill-and-keep will enhance price competition, with the consumer being the beneficiary and the promise of the 1996 Act being fully realized.

III. THE COMMISSION HAS BOTH GENERAL AND SPECIFIC STATUTORY RULEMAKING AUTHORITY TO ESTABLISH BILL-AND-KEEP ARRANGEMENTS TO REPLACE EXISTING RECIPROCAL COMPENSATION AND ACCESS CHARGE RULES

46. The Commission seeks comment on whether it has legal authority both to establish bill-and-keep arrangements for reciprocal compensation between telecommunications carriers and to modify the existing interstate access charge rules to move them to a bill-and-keep regime.[22] It has this authority provided that as part of the bill-and-keep mechanism, the Commission permits carriers to recover their costs from their end users. Under Section 251(a) of the 1996 Act, each telecommunications carrier has a duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.[23] The general duty to interconnect with others is mandated without regard to the jurisdictional nature of either the service or carrier involved. All telecommunications carriers need to make appropriate compensation arrangements regarding the various types of telecommunications services provided among them in the context of this interconnection mandate. Section 251's general duty to interconnect, therefore, necessarily encompasses both traditional reciprocal compensation and

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22 *Notice*, ¶ 121.

23 47 U.S.C. § 251(a)(1). The Conference Report to both the House and Senate Bills provide that this section "adopts a new model for interconnection," and that "[n]ew section 251(a) imposes a general duty to interconnect directly or indirectly between all
Footnote Continued

access charge arrangements. Because the Commission's general rulemaking authority extends to implementation of Section 251 of the 1996 Act,[24] the Commission has the legal authority both to establish bill-and-keep arrangements for reciprocal compensation between telecommunications carriers and to modify existing interstate access charge rules to move them to a bill-and-keep regime.

47. In the alternative, the Commission may lawfully prescribe bill-and-keep for traffic subject to current reciprocal compensation and access charge rules under other parts of Section 251. Nothing in the statute or its legislative history prohibits the Commission from mandating bill-and-keep as a reciprocal compensation mechanism for traffic subject to Section 251(b)(5). Indeed, Congress has specifically endorsed bill-and-keep as one among a range of permissible compensation schemes. As long as the mutual compensation of carrier costs is predicated on each carrier recovering its own costs of transport and termination from end-user customers, the Commission need not condition the implementation of bill-and-keep on the existence of balanced traffic.

48. Section 201(a) and Section 251(g) provide additional authority to modify the existing access charge rules to a bill-and-keep regime. Under Section 201, the Commission has long exercised its *jurisdictional* authority to regulate the interstate exchange and information access services that LECs provide to connect callers with IXCs or ISPs to originate or terminate calls that travel across state lines.[25] Nothing in the 1996 Act precludes the Commission from

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telecommunications carriers . . . ." S. Rep. No. 104-230, 121 (1996); H. Rep. No. 104-458, 121 (1996).

24 *Iowa Utilities Board*, 525 U.S. at 378 (1999).

25 *ISP-Bound Order*, ¶ 52.

continuing to exercise its jurisdictional authority to regulate interstate access services.[26] Moreover, Section 251(g), which lists "exchange access, information access, and exchange services for such access,"[27] appears to contain an independent grant of post-enactment rulemaking authority to the Commission with respect to these access services.[28]

49. Thus, the Commission has both general and specific rulemaking authority to implement the general duty of interconnection imposed on all telecommunications carriers, including its terms and conditions, by adopting bill-and-keep as a unified intercarrier compensation regime in lieu of the current reciprocal compensation and access charge arrangements. Nevertheless, the Commission frames the questions concerning its authority in the *Notice* incrementally, reflecting the Commission's current interpretation of the appropriate scope of various provisions of Section 251. Thus, the Commission asks whether it has the authority to mandate bill-and-keep for traffic subject to Section 251(b)(5) as well as for traffic subject to the Commission's own existing interstate access charge rules.[29] The Commission also inquires as to whether state commissions have authority to mandate bill-and-keep for traffic subject to current intrastate access charge rules, and how the Commission can ensure that all states adopt a bill-and-keep approach.[30]

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26 To the contrary, Section 251(i) specifically provides that nothing in Section 251 shall be construed "to limit or otherwise affect the Commission's authority under Section 201." 47 U.S.C. § 251(i).

27 Such access is traffic that the Commission has determined to be "carved out" of the universe of telecommunications services for which LECs are to establish reciprocal compensation arrangements.

28 47 U.S.C. § 251(g) (". . . until such restrictions and obligations are explicitly superseded *by regulations prescribed by the Commission after such date of enactment."*) (emphasis added).

29 *Supra* n. 22.

30 *Id*.

A. Traffic Currently Subject to Reciprocal Compensation

50. The *Notice* states that the Commission seeks comment on whether it has the legal authority to establish bill-and-keep arrangements for telecommunications carriers for traffic subject to Section 251(b)(5).[31] The Commission does not appear to question its authority to implement the provisions of Section 251 that impose upon each LEC the duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[32] Rather, by asking whether a Commission mandated bill-and-keep arrangement "is consistent with the 1996 Act,"[33] the Commission seems to be asking whether a federal bill-and-keep mandate is consistent with its own determination in the *Local Competition Order* that bill-and-keep may not be appropriate under certain circumstances when traffic is not in balance.[34]

51. There is no requirement in the statute or its legislative history that bill-and-keep as a form of reciprocal compensation is limited to situations where traffic is in balance. That is not to say that the Commission's earlier determinations in the *Local Competition Order* were inconsistent with the statute, but simply to state that there is no express or implied statutory requirement that traffic be balanced before bill-and-keep can apply to reciprocal compensation

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[31] *Id.* However, in ¶ 121, the Commission erroneously cross-referenced section II.B.6 of the *Notice*. The Commission probably intended to reference Section III.B.6 of the *Notice*, which is entitled "Bill and Keep for Traffic Subject to Section 251(b)(5)."

[32] *Notice,* ¶ 73, quoting 47 U.S.C. § 251(b)(5). The Commission notes that in the *Local Competition Order* it rejected claims that the Commission and the states lack the authority to mandate bill-and-keep arrangements under any circumstances. *Notice*, ¶ 74.

[33] *Notice*, ¶ 75.

[34] *Notice*, ¶¶ 74-76. *See also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98 and 95-185, *First Report and Order*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

arrangements. Further, Congress set no limit in the statute or in its legislative history on the scope of any particular bill-and-keep regime other than that any intercarrier compensation mechanism that the Commission establishes provide for the mutual recovery of costs.[35] The Commission, therefore, is not precluded by statute from adopting an appropriate form of bill-and-keep for reciprocal compensation arrangements involving LECs, particularly one that specifically addresses traffic imbalance by allowing the recovery of costs from end users.

52. BellSouth therefore agrees with the Commission's conclusion in the *Notice* that bill-and-keep arrangements provide for the "mutual and reciprocal recovery of costs associated with the transport and termination of traffic" when traffic is not in balance.[36] The Commission correctly notes that the text of the 1996 Act provides that bill-and-keep arrangements are not precluded and that the 1996 Act's legislative history indicates that the term "mutual and reciprocal recovery of costs" includes bill-and-keep arrangements.[37] Neither the 1996 Act nor the legislative history limits the application of bill-and-keep to symmetrical transport and termination volumes. Thus, a federally mandated bill-and-keep regime is consistent with the 1996 Act.

53. The Commission asks a series of questions that suggest it sees an implicit balanced traffic requirement in the statute's use of the terms "*mutual* and *reciprocal* recovery"

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[35] Where mutual recovery of costs is predicated on payments flowing between carriers, a bill-and-keep mechanism in that context might be conditioned on traffic being balanced between carriers. However, where mutual compensation of costs is predicated on each carrier recovering its own costs of transport and termination directly from its end users, as is proposed here, the condition that traffic be balanced is unnecessary.

[36] *Notice*, ¶ 75.

[37] *Id*. ¶ 73.

and "*mutual* recovery of costs through the offsetting of *reciprocal* obligations."[38] The dilemma is apparently underscored by the statute's use of the term "*offsetting*;" indeed, the Commission asks whether the use of the term *offsetting* implies that traffic must be balanced.[39] No such implication is necessary or even consistent with a reasonable reading of the statute. Indeed, bill-and-keep arrangements are specifically contemplated in ILEC interconnection agreements and may not be rejected as a matter of law as incompatible with the statute's reciprocal compensation standards.[40]

1. Bill-and-Keep is Endorsed by Congress as an Appropriate LEC Reciprocal Compensation Mechanism

54. The statutory lodestar is, of course, the requirement in Section 251(b)(5) that all LECs are obliged to establish "reciprocal compensation arrangements for the transport and termination of telecommunications."[41] The plain meaning of the term "reciprocal" is "given or owed mutually as between two persons; interchanged."[42] In the context of Section 251(b)(5), the conjoined concepts of mutuality and reciprocity[43] are reflected in the legislative history, which expressly endorsed bill-and-keep as a form of "reciprocal compensation":

> [A]ny interconnection agreement entered into must provide for mutual and reciprocal recovery of costs, and may include a range of compensation schemes,

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38 *Id.* ¶ 76.

39 *Id.*

40 *See infra* ¶¶ 55-56.

41 47 U.S.C. § 251(b)(5).

42 Black's Law Dictionary 1269 (6th ed. 1990).

43 Just as the term "reciprocal" is defined as "given or owed *mutually* as between two persons," the term "mutual" means "*reciprocally* acting, giving, receiving, interchanging." *Canal-Commercial Trust & Savings Bank v. Brewer*, 108 So. 424, 431 (Miss. 1926) (italics added).

> such as an in-kind exchange of traffic without cash payment (known as bill-and-keep arrangements).[44]

Interconnection agreements between LECs, therefore, must provide for the "mutual and reciprocal" recovery of costs, but there is no implicit condition that this can only occur when traffic is balanced or that mutual recovery of costs can be accomplished only by payments between LECs.   In-kind traffic exchanges without cash payment are one type of reciprocal interchange expressly contemplated by Section 251(b)(5). There is no indication at all that Congress intended to preclude interconnecting LECs from recovering their costs from any source. Congress simply mandated that the parties have an obligation to address the reciprocal costs of interconnection through the establishment of mutually acceptable compensation arrangements, in-kind or otherwise, without any "balanced traffic" predicate for bill-and-keep arrangements.

55. Although Section 251(b)(5) applies generally to all LECs, the statute mandates state commission approval only for those interconnection agreements involving ILECs.[45] It is in this context that Congress provided a reciprocal compensation standard for state commissions to follow in resolving compulsory arbitration proceedings involving an ILEC. The standard set forth in Section 252(d)(2)(A)(i) simply reiterates the requirements of Section 251(b)(5), namely that the terms and conditions of the reciprocal compensation arrangement established through compulsory arbitration "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."

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44 S. Rep. No. 104-230, 125 (1996).

45 47 U.S.C. § 252(e)(1).

56. Because state commissions may *only* reject a reciprocal compensation arrangement arrived at through compulsory arbitration if it does not provide for the mutual and reciprocal recovery of each carrier's transport and termination costs arising out of the interconnection,[46] Congress provided a rule of construction for its reciprocal compensation standard applicable to arbitrated interconnection agreements with ILECs. Congress expressly provided that the standard must not be construed by state commissions to 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)."[47] This rule of construction restates the principle in the legislative history that a "wide range of compensation schemes," including cashless, in-kind traffic exchanges, and, specifically, bill-and-keep arrangements, are lawful under Section 251(b)(5). As with Section 251(b)(5), there are no statutory requirements that a state commission determine that traffic is balanced before it can approve a bill-and-keep reciprocal compensation arrangement. Nor is there a statutory prohibition that prevents the Commission from establishing a rule for the mutual recovery of transport and termination costs that mandates carriers recover such costs from their end users.[48]

2. The Commission Should Give the Terms "Offset," "Mutual," and "Reciprocal" Their Ordinary Commercial and Legal Meanings

57. Because bill-and-keep arrangements are specifically endorsed by the express terms of the statute and its legislative history, there is no reason for the Commission to read into

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46 47 U.S.C. § 252(e)(2)(B).

47 47 U.S.C. § 252 (d)(2)(B)(i).

48 There is no basis for the Commission to construe the term "mutual," in this context, as in any way limiting either interconnecting carrier's ability to recover costs from end users. The Commission must afford interconnecting carriers the right to recover costs associated with LEC interconnection of traffic transport and termination from end users. In this way, a bill-and-keep
Footnote Continued

the terms "mutual recovery," "reciprocal recovery," or "offsetting" any implicit requirement that traffic be balanced before a bill-and-keep arrangement can be imposed. Moreover, such a requirement, even if it existed, would not limit the Commission's ability to establish a unified bill-and-keep intercarrier compensation regime under any rulemaking authority it may have elsewhere in Section 251. But the better course of the Commission is to presume that Congress used the terms "mutual," "reciprocal," and "offsetting" in the context of their generally accepted meanings when enacting the 1996 Act.[49] The statute's use of the term "offsetting" simply underscores the mutual and reciprocal nature of the interconnection arrangement: a right of setoff, also called an offset, allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A.[50] Indeed, the term "offset," as a synonym of "set-off," is a demand that a defendant makes against a plaintiff in a suit for the purpose of liquidating a whole or part of his claim and does not require an equal balance.[51]

58. Thus, the "balanced traffic" predicate for bill-and-keep reciprocal compensation is not a statutory mandate, but rather a Commission limitation established pursuant to its general rulemaking authority in the *Local Competition Order*.[52] As demonstrated above, the Commission may, consistent with the statute, establish bill-and-keep as a unified intercarrier compensation regime for all telecommunications carriers that interconnect pursuant to Section

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regime will afford the "mutual recovery" of appropriate interconnection costs, consistent with the clear statutory mandate, even when traffic is imbalanced.

49 *See, e.g., Martin v. United States*, 100 F.2d 490, 494 (10th Cir. 1938) (construing "reciprocal," among other terms, in context of Motor Carrier Act of 1935).

50 *Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1398 (9th Cir. 1996).

51 *Lalime v. Desbiens*, 55 A.2d 121, 123 (Vt. 1947).

52 *Local Competition Order*, 11 FCC Rcd at 16054-56.

251(a), including carriers that exchange traffic subject to Section 251(b)(5), regardless of the asymmetric nature of the traffic exchange.

B. Traffic Currently Subject to Access Charges

59. The Commission asks whether it may modify its existing access charge rules to move to a bill-and-keep regime, whether states have authority to mandate bill-and-keep for intrastate access, and whether, assuming it is important that bill-and-keep arrangements be administered uniformly, the Commission can ensure that all states adopt a bill-and-keep approach to intrastate access charges.[53]

60. As noted above, under Section 201, the Commission has long exercised its *jurisdictional* authority to regulate the interstate exchange and information access services that LECs provide to connect callers with IXCs or ISPs to originate or terminate calls that travel across state lines.[54] Nothing in the 1996 Act precludes the Commission from continuing to exercise its jurisdictional authority to regulate interstate access services. States clearly have jurisdictional authority under the 1996 Act to mandate a bill-and-keep regime for intrastate access services that does not conflict with any unified intercarrier compensation regime ultimately adopted by the Commission. In order to ensure that all states adopt a bill-and-keep approach for intrastate access charges, the Commission may rely on its general rulemaking authority to implement Section 251(a)'s general and jurisdiction-free duty imposed on all telecommunications carriers to interconnect with each other. The Commission may also consider whether it has an additional grant of specific rulemaking authority under Section 251(g).

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53 *Notice*, ¶ 121.

54 *ISP-Bound Order*, ¶ 52.

61. In the *ISP-Bound Order,* the Commission concluded that Congress intended to exclude the traffic listed in Section 251(g) – all forms of access – from the reciprocal compensation requirements of Section 251(b)(5).[55] Section 251(g) imposes a duty on LECs to provide "exchange access, information access, and exchange services for such access" to IXCs and ISPs until existing obligations are "explicitly superseded by regulations prescribed by the Commission."[56] Just as the Commission noted that, on its face, Section 251(b)(5) contains no limitations or exceptions on the type of telecommunications subject to reciprocal compensation,[57] Section 251(g) likewise contains no jurisdictional qualification or limitation on the scope of access services subject to that section's independent grant of rulemaking authority.

62. The Commission's only consideration of the rulemaking grant under Section 251(g) appears in the *ISP-Bound Order*:

> By its express terms, of course, section 251(g) permits the Commission to supersede pre-Act requirements for interstate access services. Therefore the Commission may make an affirmative determination to adopt rules that subject such traffic to obligations different than those that existed pre-Act.[58]

This is undoubtedly correct. But the Commission is not necessarily limited by the express terms of Section 251(g) to supersede pre-Act requirements for interstate access services only.

63. Section 251(g) preserves the *status quo ante* (including a LEC's obligation to comply with intrastate access charge rules) only until "such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after the date of such

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55 *Id*. ¶ 34.

56 47 U.S.C. § 251(g).

57 *ISP-Bound Order*, ¶ 31.

58 *Id*. ¶ 40.

enactment."[59] Arguably, Congress has here given the Commission authority to prescribe rules that subject intrastate access traffic to obligations different than those that existed pre-Act. Interestingly, the intrastate access charge rules under state jurisdiction that remain binding on LECs upon passage of the 1996 Act, are, by statute, "enforceable in the same manner as regulations of the Commission."[60] If Congress has here given the Commission enforcement authority over intrastate access charge rule compliance during the post-enactment period covered by Section 251(g), it is not inconceivable that Congress intended its grant of rulemaking authority in Section 251(g) to constitute the complete set of "tools to ensure that the regulatory environment keeps pace with innovation."[61]

64. While the Commission has thus far chosen to interpret the rulemaking grant in Section 251(g) as it pertains to traffic that is jurisdictionally interstate in nature, it is settled that Section 251 generally broadens the Commission's authority.[62] The Commission could interpret 251(g)'s "forward looking" provisions as providing it with the authority to establish the framework for states to follow in implementing a unified bill-and-keep intercarrier compensation regime for all types of access traffic, without regard to jurisdiction, where each carrier recovers its own costs of transport and termination directly from its end users.

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59 47 U.S.C. § 251(g).

60 *Id.*

61 *ISP-Bound Order*, ¶ 51.

62 *Id.* ¶ 50, noting that Section 251 has expanded the Commission's historic functions by providing it with the authority to set the framework for pricing rules applicable to unbundled network elements, purchased under interconnection agreements. *See Iowa Utilities Board*, 525 U.S. at 385 (FCC has jurisdiction to design a pricing methodology for states to apply and implement in the course of the establishment of rates).

IV. CONCLUSION

65. BellSouth endorses moving to bill-and-keep as a unified intercarrier compensation mechanism. An integral and essential part of the bill-and-keep mechanism is that carriers recover their costs of interchanging traffic directly from their end users. As long as the bill-and-keep mechanism provides for adequate cost recovery, the Commission has the authority to establish a unified intercarrier compensation mechanism based on bill-and-keep.

Respectfully submitted,

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Date: August 21, 2001

CERTIFICATE OF SERVICE

I do hereby certify that I have this 21st day of August 2001 served the following parties to this action with a copy of the foregoing **COMMENTS OF BELLSOUTH** by electronic filing and by placing a copy of same in the United States Mail addressed to the parties listed on the attached service list.

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Juanita H. Lee

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