

**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 THE PUBLIC UTILITY COMMISSION OF TEXAS

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EXECUTIVE SUMMARY

Texas strongly believes that partnership between the states and the Commission is a critical precursor to making any far-reaching changes to the intercarrier compensation framework. State and federal regulators must coordinate their efforts to ensure that market-affecting decisions are in the public interest and deliver the regulatory certainty needed to sustain competitive viability. Because the Commission's fundamental reevaluation of the intercarrier compensation regime affects multiple variables simultaneously, there is no simple solution. Before states and the Commission can legitimately assess the impacts of any particular change, a systematic and agreed-upon analytical framework must be developed.

This is especially critical given the jurisdictional issues raised in the NPRM. Texas is particularly concerned as to potential impacts upon intrastate access rates and universal service. A number of the questions raised in the NPRM appear to modify certain longstanding jurisdictional relationships. A reinterpretation of this basic separation of powers must not be undertaken without referring such matters to the Separations Joint Board.

Similarly, the PUCT believes that the Commission should, in cooperation with the states, as an initial step determine if an efficiency standard is consistent with existing requirements in state and federal law regarding reasonableness in pricing and compensation. Additionally, the PUCT has concerns whether striving toward the goal of economic efficiency fully discharges the state and federal obligations under the FTA. The PUCT is not persuaded that the goal of economic efficiency can be said to fully satisfy the public interest. As such, assumptions made in the COBAK and the BASICS economic models may be inconsistent with current market conditions. For example, each model assumes perfect information, competition and efficiency with the presence of large number of equally powerful, equally situated, suppliers. Even in the competitive post-271 environment in Texas, these assumptions appear unrealistic.

Of particular concern to the PUCT is the possible shifting of all costs to end-users. Section 254(f) of the FTA gives states the authority to preserve and advance universal service; FTA § 254(k) goes on to explicitly empower states to establish any necessary cost allocation rules with respect to intrastate services. The PUCT would reiterate its position, as set forth in its comments to the Commission's CALLS Order, that the Commission consider the effect a change to interstate intercarrier compensation rules may have on "states' intrastate switched access structures and universal service funding mechanisms." The PUCT believes any transition to the

proposed bill-and-keep regime would affect the assumptions underlying the sizing and distribution of the Texas Universal Service Fund (TUSF), including intrastate switched access charges. Further, the Texas Commission would not support a regime that did not include non-ISP bound traffic.

As an alternative to pursuing the goal of economic efficiency directly through a revision to intercarrier compensation methodology, the PUCT has pursued this goal perhaps less directly, but from the standpoint of technological and network efficiency, as such efficiencies have been evidenced in litigated arbitration proceedings in Texas. Based upon the multiple arbitration proceedings conducted in Texas and, in particular, based upon the lengthy § 271 approval process, the PUCT is convinced that efficiency may take more than one form. The PUCT has articulated a regulatory policy that encourages economically efficient decisions through optimizing network efficiency.

In conclusion, the PUCT suggests that the Commission consider convening a working group with representatives of state and federal regulators, consumer advocates, and carriers to further define the scope of the proceeding represented by this NPRM.

I. INTRODUCTION

On April 27, 2001, the Federal Communications Commission (“FCC” or “Commission”) issued a *Notice of Proposed Rulemaking* (“NPRM”) in this proceeding, beginning a fundamental re-examination of all currently regulated forms of intercarrier compensation. In the NPRM, the FCC seeks comment on numerous issues related to the payments among telecommunications carriers, as well as more global issues involving the impact of intercarrier compensation on end-user charges and universal service. The Public Utility Commission of Texas (“PUC” or “Texas Commission”), having jurisdiction over telecommunications services in Texas, herein provides its comments in response to the Commission’s NPRM.

The PUC has addressed some of the issues on which the FCC is seeking comment. Many of the other issues contained in the NPRM have not yet been addressed by the PUC, or are part of pending proceedings. Therefore, the comments of the PUC are likely to be more specific where the PUC has made final decisions, and more broad on non-final matters, focusing on general observations or concerns.

The PUC views this NPRM as possibly the most important in the series of proceedings to implement the 1996 Act. This NPRM opens the door to evaluating the complex relationships between interconnection and compensation issues, jurisdictional separations, and universal service.

II. FUNDAMENTAL CONCERNS

Because the PUC considers this NPRM to be a principal cornerstone in implementing the 1996 Act, Texas maintains that partnership between the states and the Commission is critical to making any far-reaching changes to intercarrier compensation. Cooperation is necessary to allow regulators at both the state and federal levels to determine the potential effects upon industry that could result from a fundamental restructuring of the intercarrier compensation regime. Because regulatory certainty has a direct relationship to market confidence and, therefore, competitive viability, the PUC stresses that regulators must assure first that they “do no harm.”

In order to make appropriate determinations regarding potential impacts upon end users, state and federal regulators must work together to ensure that market-affecting decisions are in the public interest. If the Commission intends, as a result of this NPRM, to shift the recovery of

all common costs to end users, a result that the Texas Commission would generally oppose without clearly articulated justification, such a decision must be referred to the USF Joint Board, pursuant to § 254(a)(2) of the federal Telecommunications Act.¹ In the Commission's discussion of goals in ¶ 34, it is clear that bill-and-keep is at least under discussion as a means to recover all loop costs from end users, and Texas remains opposed to that outcome.² Similarly, where bill-and-keep may be proposed as a way of shifting recovery of common network interstate costs to end users, the PUCT contends that possible conflicts under FTA § 254(k)³ must be investigated thoroughly, given the requirement that non-competitive services may not be used to subsidize competitive services.

In jointly evaluating the impacts upon end users and industry, states and the Commission will be ideally situated to fully assess together the complex jurisdictional questions raised by the proposed expansive new approach to intercarrier compensation. Of particular concern to the PUCT is the possible shifting of all costs to end users. The PUCT has already raised concerns regarding the effects upon end users prompted by modifications to the interstate access charge structure.⁴ To the extent that a transition to a bill-and-keep regime for all intercarrier compensation is contemplated, the PUCT believes potential impacts upon intrastate access charges and, further, the consequences to the end user's bill, should be carefully studied. Section 254(f) of the FTA⁵ gives states the authority to preserve and advance universal service; FTA § 254(k)⁶ goes on to explicitly empower states to establish any necessary cost allocation rules with respect to intrastate services. A reinterpretation of this basic separation of powers must not be undertaken without referring such matters to the Separations Joint Board.

While acknowledging that a theoretical examination of the intercarrier compensation

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C. (FTA).

² *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Comments of the Public Utility Commission of Texas at 2 – 6. The PUCT expressed various concerns with the *CALLS Order* shift of joint and common costs of the local loop from interexchange carriers to subscribers.

³ 47 U.S.C. 254(k).

⁴ See PUCT Comments, *supra* note 2.

⁵ 47 U.S.C. 254(f).

⁶ 47 U.S.C. 254(k).

regime has its benefits, the PUCT would, nonetheless, assert that factual support is vital before modifications to the competitive compensation structure can be definitively evaluated. Objective, empirical data will allow the Commission to measure the potential effects upon competitors and end users before making any across-the-board changes to the existing intercarrier compensation regime. Moreover, the states stand ready as the Commission's best tools in gathering information. For example, Texas routinely conducts proceedings such as workshops, collaborative sessions, or hearings, to collect evidence and information. However, the PUCT would propose that consideration be given to developing a standardized set of evaluative criteria to assist the states in providing the requisite "on-the-ground" information, thereby ensuring that the information on a state-by-state basis could be systematically assessed by the Commission.

The PUCT is reluctant at this time to base market-altering decisions upon a theoretical model that assumes perfect conditions, that is not based upon factual benchmarks, and that assumes economic efficiency to be the highest good. The PUCT finds such assumptions to be, at a minimum, inconsistent with protecting the public interest. The Central Office Bill and Keep (COBAK) and Bill Access to Subscribers-Interconnection Cost Split (BASICS) proposals assume large numbers of equally-powerful suppliers on a level playing field; even in Texas, where the requirements of § 271⁷ market entry have been demonstrated, such a theory is far from reality. Further, in setting rates under either federal or state law, both the states and the Commission must assure that rates, charges, terms and conditions are, in relevant part, reasonable. True economic efficiency, as espoused in the BASICS and COBAK models, arguably does not consider reasonableness to be a necessary component of efficiency. Texas would strongly contend that an intercarrier compensation regime based solely upon pure economic efficiency is likely to be inconsistent with existing requirements in both federal and state law regarding reasonableness in pricing and compensation.

III. JURISDICTION: THE STATE – FEDERAL PARTNERSHIP

The PUCT urges the Commission, should it choose to move forward in this proceeding, to do so in full collaboration with state regulators and other affected parties. The PUCT agrees

⁷ 47 U.S.C. § 271.

that the various inter-relationships described in the NPRM should be studied, now that state and federal regulators have real-time experience in bringing competition to the local exchange telecommunications market. The Texas Commission believes it would be most prudent to evaluate and address the myriad issues within this NPRM as a whole, in concert with the states, based on our mandate from Congress and our experience in implementation of federal initiatives on the state level. Federal and state regulators should not proceed on separate paths under a patchwork of potentially conflicting decisions.

Consistent with the FTA, the PUCT remains the primary fact-finder for most areas of intercarrier compensation in Texas. As such, the PUCT has recently arbitrated the issue of reciprocal compensation, has pending a proceeding on appropriate compensation for foreign exchange (FX) traffic,⁸ and has addressed the issue of points of interconnection in a variety of fact situations. The PUCT, further, in supporting approval of Southwestern Bell Telephone Company's (SWBT) FTA § 271 application, performed substantial investigation into multiple parties' specific experiences regarding SWBT's performance, as it related to the 14-point checklist.⁹

Now that legally sufficient competition under § 271 has been shown to exist in Texas, the PUCT must ensure that competition flourishes and "encourage the deployment of advanced telecommunications capabilities on a reasonable and timely basis . . . to all [Texans]."¹⁰ During this time of significant transition in the telecommunications industry, federal and state regulators will be instrumental in assuring that local competition continues unabated and the deployment of advanced services is encouraged.

An essential component of preserving the vitality of competition in a post-271 environment is enforcement. Texas continues to implement the performance measures adopted as part of SWBT's Texas 271 interconnection agreement (T2A). Further enforcement efforts relating to access charges, quality of service and rates arise under state law. For any state to move forward to meet its burden in an enforcement proceeding, it must enjoy clear and

⁸ *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for "FX-type" Traffic Against Southwestern Bell Telephone Company*, Docket No. 24015 (pending).

⁹ See 47 U.S.C. § 271(c)(2)(B)(i) – (xiv).

¹⁰ 47 U.S.C. § 706(a).

unequivocal jurisdiction. To the extent that any ambiguities as to jurisdiction might be created through a piecemeal redesign of intercarrier compensation and shifting of all or some costs to end-use customers, the PUCT would suggest that jurisdictional questions be fully examined and expeditiously resolved at the outset. Consequently, the Commission and states must retain their commitment to the Federal-State Joint Board process articulated in the FTA.¹¹ This process will ensure that a uniform approach is developed which decreases the opportunities for regulatory arbitrage and provides carriers with regulatory certainty. Furthermore, this process serves to clarify jurisdictional limits between the Commission and states.

Federal and state cooperation is essential to determine the effects upon end users and to ensure that end users fully participate in the benefits of competition. That said, federal and state regulators must ensure that decisions are in the public interest, a standard applicable to both the FCC and the states. Specifically, any uniform regime of intercarrier compensation that involves the shifting of common cost recovery to end users must be referred to the USF Joint Board.¹² Consequently, the PUCT generally opposes a bill-and-keep regime that would propose recovery of all loop costs from end users.¹³ Similarly, a bill-and-keep regime that proposed shifting recovery of common network interstate costs to end users, seems to contravene FTA § 254(k).¹⁴

IV. APPROPRIATE GOALS FOR INTERCARRIER COMPENSATION IN COMPETITIVE MARKETS

One of the Commission's main goals in setting intercarrier compensation rules has been to encourage efficiency. (¶ 31). With this goal in mind, the Commission seeks comment on the appropriate goals for intercarrier compensation regulations in light of the current state of

¹¹ *In the Matter of Federal-State Joint Board on Universal Service*, FCC 97-157, CC Docket No. 96-45, Report and Order at ¶ 807 (rel. May 8, 2001) (addressing the decision of the Commission to decline to exercise the entirety of its authority regarding universal service support mechanisms to promote comity between the federal and state governments; based on the Commission's respect for the states' historical expertise in providing for universal service).

¹² 47 U.S.C. § 254(c); 47 U.S.C. §254(k). *See also* The requirement that "services included in the definition of universal service bear no more than a *reasonable share* of the joint and common costs of facilities used to provide those services." (Emphasis added).

¹³ *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Comments of the Public Utility Commission of Texas at 5 (Mar. 29, 2000).

¹⁴ 47 U.S.C. § 254(k).

competition and telecommunications markets. (¶ 33). In particular, the Commission seeks comment on whether an intercarrier compensation regime is possible that “will encourage efficient use of, and investment in, telecommunications networks, and the efficient development of competition” and that “minimizes the need for regulatory intervention, both now and as competition continues to develop.”(¶ 2).

In addressing the question of efficiency as a goal of a revised intercarrier compensation framework, the PUCT believes that the Commission should, in cooperation with the states, as an initial step determine if an efficiency standard is consistent with existing requirements in state and federal law regarding reasonableness in pricing and compensation. It should not necessarily be assumed that economic efficiency is synonymous with reasonableness. For example, universal service is premised on the availability of service at reasonable rates to all. True economic efficiency, as espoused in the COBAK and BASICS proposals, seems to support requiring the calling party to bear the full costs of service. Such an approach is antithetical to the longstanding principles of universal service. The PUCT reiterates its observations that changes to the fundamental architecture of universal service on both a federal and state level should be prefaced with considerable stakeholder involvement, as well as significant collaboration between state and federal officials.

Additionally, the PUCT is not convinced that striving toward the exclusive goal of economic efficiency fully discharges the state and federal obligations under the FTA. Section 1 of the Communications Act charges the Commission with ensuring the availability to all people of the United States “adequate facilities at reasonable charges.” Furthermore, the FTA requires telecommunications providers to interconnect,¹⁵ and to provide unbundled access to network elements¹⁶ and collocation¹⁷ at “rates, terms, and conditions that are just, reasonable, and non-discriminatory.” Quality services must also be made available at rates that are “just, reasonable, and affordable.”¹⁸ Finally, all consumers in all regions of the nation should have access to telecommunication and information services that are “reasonably comparable to rates charged . .

¹⁵ 47 U.S.C. § 251(c)(2)(D).

¹⁶ 47 U.S.C. § 251(c)(3).

¹⁷ 47 U.S.C. § 251(c)(6).

¹⁸ 47 U.S.C. § 254(b)(1).

. in urban areas.”¹⁹ In a parallel manner, Texas law embraces reasonableness as a guiding principle of telecommunications regulation.²⁰ The PUCT cites to these sections to highlight the substantial interaction between the goal of economic efficiency and the multiple pricing decisions that potentially would be affected by a significant paradigm shift.

In particular, the PUCT is not persuaded that the goal of economic efficiency can be said to fully satisfy the public interest. The PUCT does not believe that protecting the public interest can ever be simply a matter of economic efficiency. Under Texas law, providing minimum standards of service quality, customer service and fair business practices to ensure high-quality service to customers and a healthy market place where competition is permitted by law are goals consistent with the public interest.²¹ Moreover, as it relates to rates, Texas law prohibits rates that are unreasonably preferential, prejudicial, or discriminatory; subsidized either directly or indirectly by a regulated monopoly service; or predatory or anticompetitive.²² It is unclear how the substitution of economic efficiency as the primary goal underpinning intercarrier compensation and, therefore, any resulting shifting of increased costs to end users, would demonstrably ensure that the public interest standard has been satisfied. As such, assumptions made in the COBAK and the BASICS economic models may be inconsistent with current market conditions. For example, each model assumes perfect information, competition and efficiency with the presence of a large number of equally powerful, equally situated, suppliers. Even in the competitive post-271 environment in Texas, these assumptions appear unrealistic. Arguably, such assumptions become even less reasonable in the majority of states that have much less robust levels of competition. While Texas certainly had sufficient competition for 271 approval,²³

¹⁹ 47 U.S.C. § 254(b)(3).

²⁰ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 51.001(g) (Vernon Supp. 2001) (PURA) (customers in all regions of the state should have access to telecommunications and information services, that are reasonably comparable to those services provided in urban areas); § 52.001(a) (policy of the state to protect the public in having adequate and efficient telecommunications service available to all residents at just, fair, and reasonable rates); and § 56.021(1) (directing the PUCT to establish a universal service fund to assist telecommunications providers in providing basic local telecommunications service at reasonable rates in high cost rural areas).

²¹ PURA § 51.001.

²² PURA § 52.053.

²³ *In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of* (continued....)

the fact remains that CLECs, as of December 31, 2000, have captured only 12% of the market in Texas.²⁴ Therefore, the PUCT urges the Commission to consider first testing such economic models against fact-based benchmarks, in collaboration with the various state commissions.

Current market conditions also have significantly affected the number of providers providing service in the last 8 months. As in other states, Texas has experienced a steady stream of providers' discontinuing or scaling back local service offerings. Further, as noted in the PUCT's most recent Scope of Competition Report, "key CLECs that were expected to challenge SWBT are now limiting their push into residential voice markets in Texas."²⁵

V. REFORMING INTERCARRIER COMPENSATION

The Commission articulates four policy justifications for a bill-and-keep regime: (1) that end users pay for the benefit of making and receiving calls (§ 37); (2) that current policies may create the opportunity to exploit undesirable pricing power for the terminating carrier (§ 38); (3) that regulators are spared the necessity of allocating common cost (§ 39); and (4) that end users may ultimately have more direct control over access arrangements. The PUCT does not necessarily disagree with these theoretical benefits of a bill-and-keep regime, nor that bill-and-keep, under the right circumstances, may be an appropriate intercarrier compensation mechanism. But the PUCT is mindful that theory often falls victim to the imperfections of the marketplace.

The PUCT considers working toward a bill-and-keep compensation methodology to be a reasonable, appropriate and achievable goal, but one that must be tempered by actual market conditions. The PUCT has previously recognized in the Texas Reciprocal Compensation Award that a bill-and-keep method of intercarrier compensation is preferred over other compensation regimes.²⁶ But while the PUCT hopes that the bill-and-keep method will become a viable option

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the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, Memorandum Opinion and Order (rel. June 30, 2000).

²⁴ *Local Telephone Competition: Status as of December 31, 2000* at Table 6 (rel. May 21, 2001).

²⁵ *Report to the 77th Texas Legislature: Scope of Competition in Telecommunications Markets of Texas* at 83 (Jan. 11, 2001).

²⁶ *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, Revised Award at 36 (Aug. 31, 2000) (Texas Reciprocal Compensation Award).

as the market matures, the PUCT nevertheless recognized that current traffic volumes between carriers did not support adoption of a bill-and-keep compensation scheme as a general rule.²⁷

The Commission also invites comment on whether the FCC should evaluate an intercarrier compensation regime by considering whether it encourages efficiency, encourages the efficient use by end users, and is technologically and competitively neutral. (¶ 33). The PUCT agrees that encouraging efficiency, encouraging efficient use by end users and assuring technological and competitive neutrality are appropriate goals for intercarrier compensation rules in competitive markets. However, based upon its experience in its reciprocal compensation proceeding, the PUCT has observed that these expectations are not necessarily met under a framework that presumes symmetrical compensation. In adopting its “blended tandem rate,” the PUCT noted that CLECs had “failed to evidence that every call terminated on their networks involves actual tandem or tandem-like functions, or that every such call needs such function, for that matter.”²⁸ Consequently, the Texas Commission determined that only some calls terminating on the CLEC’s network merited symmetrical compensation.²⁹ The PUCT concluded that “to award CLECs the full tandem rate for every call, under these circumstances, would overcompensate them and effectively award them a higher rate for end-office switching than what SWBT receives.”³⁰ To do otherwise, the PUCT determined, would have been inequitable and discriminatory.³¹ For these reasons, based upon the detailed record from the lengthy litigated proceeding, the PUCT is persuaded that an intercarrier compensation regime premised upon system-wide rate symmetry, absent evidence to warrant symmetrical rates on every call, does not necessarily encourage efficient use of the network and may not be technologically and/or competitively neutral. The PUCT believes that the adoption of any particular technology by a carrier does not, alone, justify the application of symmetrical rates unless there is clear evidence that the new technology is the most efficient method of provisioning a call and incurs justifiably comparable costs to those of the ILEC.

²⁷ *Id.*

²⁸ *Id.* at 37.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

The PUCT further notes that this observation was made approximately one year ago, prior to recent events resulting in CLECs' departure from the telecommunications marketplace. Arguably, such concerns would be even greater in the current competitive climate. The PUCT would, therefore, strongly caution against adoption of a comprehensive framework of intercarrier compensation without development of a sufficient evidentiary record to document market maturity levels and the full range of effects such adoption might have. Moreover, the PUCT believes that significant cooperation between federal and state regulators would be essential to fully address the factual and legal implications of this complex issue.

The Commission also seeks comment on the allocation of transport costs. (¶ 46). The PUCT has previously addressed this issue in the AT&T/SWBT Arbitration Order.³² Based upon the significant evidence adduced at hearing in that proceeding, the PUCT advocates a cost-sharing mechanism similar to that discussed in Section B. The PUCT has insufficient evidence to address in detail whether bill-and-keep is a solution to existing interconnection issues, (¶¶ 52-57) or the potential disadvantages of such a regime. (¶¶ 58-65). However, the PUCT has concluded that “the current means by which reciprocal compensation is accomplished has contributed to a significant imbalance of traffic between originating and terminating carriers” and has determined that “the current scheme has created perverse economic incentives that result in an imbalance in revenues between certain interconnected carriers, in favor of the termination carrier.”³³ From that perspective, the PUCT could agree that a bill-and-keep regime may remove some of the “perverse” economic incentives as they relate to serving Internet service providers (ISPs). But, at this point, the PUCT has insufficient evidence through its litigated proceedings to determine whether shifting cost recovery to other end-use customers, non-ISPs, would have other unknown or inadvertent effects.

³² *Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications, Inc. Pursuant to Section 252(b)(1) of the Federal Telecommunications Act of 1996, Order Approving Revised Arbitration Award (Mar. 14, 2001) (AT&T/SWBT Arbitration Order).*

³³ Texas Reciprocal Compensation Award at 38.

A. ISP-Bound Traffic

The PUCT's definition of "local traffic" does not distinguish between types of calls (Internet and voice) and the PUCT has yet to be persuaded "that it should treat ISP-bound traffic differently for purposes of reciprocal compensation."³⁴ The PUCT, therefore, would not support a regime for local intercarrier compensation that distinguished between voice and ISP-bound traffic. (¶ 66). The Commission asserts that a bill-and-keep approach to ISP-bound traffic will not compromise the ability of state commissions to rely on the cost studies that ILECs have submitted over the past 12-24 months in support of lower rates for reciprocal compensation and UNEs. (¶ 68) Although the PUCT has not yet conducted a proceeding addressing UNE rates, the Texas Commission would note that in its recent (last 12 months) Reciprocal Compensation Award it relied upon SWBT cost studies from 1996. In other words, recent cases in Texas have not necessarily been based upon current cost studies; therefore, a revised bill-and-keep regime could potentially compromise these studies and the decisions made in reliance upon them. Deserving of special mention, the Texas 271 Interconnection Agreement, approved as part of the approval of SWBT's entry into the intraLATA market in Texas, adopted prices from the Texas Mega-Arbitration proceedings,³⁵ which were also based upon SWBT cost studies from 1996.

B. Section 251(b)(5) Traffic

The Commission seeks comment on the best method for allocating transport responsibilities and costs among interconnected carriers (¶ 70) and whether, under a bill-and-keep regime an interconnecting CLEC should be permitted to provide only one point of interconnection (POI) in a LATA. (¶ 72). The PUCT believes that once a *de minimis* level of traffic is exceeded, it is appropriate to require the "cost causer" that locates a POI outside the local calling area to share in transport costs. As an alternative to pursuing the goal of economic efficiency directly through a revision to intercarrier compensation methodology, the PUCT has pursued this goal perhaps less directly, but from the standpoint of technological and network

³⁴ *Id.* at 17.

³⁵ *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, Docket No. 16189, *et al.*, Award (Nov. 8, 1996) (First Mega-Arbitration Award) and *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, Docket No. 16189, *et al.*, Award (Dec. 19, 1997) (Second Mega-Arbitration Award).

efficiency, as such efficiencies have been evidenced in litigated arbitration proceedings in Texas. The PUCT has articulated a regulatory policy that encourages economically efficient decisions through optimizing network efficiency. In the WorldCom/SWBT Arbitration Order, the PUCT affirmed the CLEC's right to "choose any method of technically feasible interconnection at a particular point on the ILEC's network."³⁶ But the PUCT noted, "to avoid network and/or tandem exhaust situations, the [Texas] Commission determines, on this record, that it is reasonable that a process exist for requesting interconnection at additional, technically feasible points."³⁷ Consequently, the PUCT determined it was appropriate for WorldCom to provision POIs in local calling areas where it had originating customers and that the parties should negotiate the provisioning of additional facilities upon reaching a specific traffic threshold.³⁸

In conjunction with implementing the goal of technological and network efficiency, the PUCT also has approached the issues of fairness and cost causation. In the AT&T/SWBT Arbitration Order, the PUCT addressed the issue of allocating transportation costs when the CLEC-selected POI is outside the local calling area. The PUCT, relying upon rates determined in the Texas Reciprocal Compensation Award, determined that after a *de minimis* traffic threshold is reached, the reciprocal compensation rates will continue to apply to all local calls that are transported within the local calling area. For calls that originate and terminate within the local calling area but that are transported across a local calling area boundary, the reciprocal compensation rates, specifically the local transport rate, will apply to the last 14 miles of the call on the terminating end of the call, regardless of whether the ILEC or CLEC terminates the call.³⁹ In addition, the PUCT determined that each carrier would be responsible for the transport costs for the first 14 miles of a local call originated by its own end-use customer.⁴⁰ The remaining

³⁶ *Petition of Southwestern Bell Telephone Company for Arbitration with MCI WorldCom Communications, Inc. Pursuant to Section 252(b)(1) of the Federal Telecommunications Act of 1996*, Order Approving Interconnection Agreement at 4 (. Sep. 20, 2000) (WorldCom/SWBT Arbitration Order).

³⁷ *Id.*

³⁸ *Id.* at 4-5.

³⁹ AT&T/SWBT Arbitration Order at 6. *See also Texas Reciprocal Compensation Award* at 40, fn 153 ("A 14-mile estimate shall also be used in computing the facilities mileage element for purposes of the blended tandem rate. This inter-office transport rate also applies to the full tandem rate calculation.")

⁴⁰ *Id.*

additional transport costs, beyond the 14 miles, incurred by both the ILEC and the CLEC in hauling the traffic to the CLEC-designated POI in the LATA, shall be borne by the CLEC, the cost-causer.⁴¹

Again, the PUCT encouraged the negotiation of additional POIs upon reaching, a yet undefined, *de minimis* threshold.⁴² And, importantly, the PUCT found “that this compensation mechanism strikes a reasonable balance between a CLEC’s right to designate the [POI] on the ILEC’s network and the need to provide the appropriate incentives to the CLEC to make economically efficient decisions about where to interconnect.”⁴³

The Commission also seeks comment regarding the interplay between the FCC single-POI rules and transport costs. (¶ 114). As discussed above, the PUCT has confidence that its tested approach of analyzing network efficiency sends the appropriate “price signals” to CLECs. The PUCT supports allowing a CLEC to choose a single POI, based upon its own network design and business plan. However, as the PUCT made clear in its POI rulings, solely designating a single POI, without requiring some portion of the resulting transport costs to be borne by the CLEC making the affirmative siting choice, would be an unfair allocation of costs. Moreover, the PUCT is persuaded that its approach properly allocates transport costs to the appropriate “cost causer,” namely, the CLEC that is designating a particular POI. A compensation system that disregards transport costs as a mitigating factor in POI siting decisions runs the risk of encouraging economically inefficient siting decisions, thereby burdening the end user initiating a call, instead of the CLEC making the siting choice. This is particularly true under a bill-and-keep compensation regime where the carriers can recover all transport costs from the end users. Given Texas’ vast rural areas, and multiple LATAs, the PUCT has concerns about the negative impact such an approach could have upon remote, rural customers. Ultimately, a bill-and-keep compensation regime that fails to consider POI siting decisions and, concomitantly, allocation of transport costs, may merely foster a compensation system that is no more technologically or economically efficient than the current reciprocal compensation

⁴¹ *Id.*

⁴² *Id.* at 3.

⁴³ *Id.* at 5. *Citing Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-96, *First Report and Order*, FCC No. 96-325 at ¶ 209.

framework, but, this time, at the expense of the end user.

C. Interstate and Intrastate Access Charges

The Commission also seeks comment on what comes after CALLS and, specifically, the potential effects of a bill-and-keep rule for the intercarrier arrangements that currently fall under the access charge rules. (¶ 97). The PUCT would reiterate its recommendation, as set forth in its comments to the Commission's CALLS Order, that the Commission consider the effect a change to interstate intercarrier compensation rules may have on "states' intrastate switched access structures and universal service funding mechanisms."⁴⁴ In those comments, the Texas Commission acknowledged that the CALLS proposal is designed to affect only interstate rates and charges, but asserted that the proposal would have a direct impact on the monthly rates of Texas customers and would apply pressure on intrastate rate structures.⁴⁵ Now that the CALLS plan is being implemented over the next five years, the PUCT believes that the results of that plan, particularly upon intrastate rate structures and customers' rates should be fully evaluated before making additional changes that could further place pressure upon intrastate rate structures. The PUCT continues to question how further modification of interstate access charge recovery mechanisms will affect end users.⁴⁶

As recently as 1999, Texas conducted a lengthy USF proceeding.⁴⁷ The PUCT believes any transition to the proposed bill-and-keep regime could affect the assumptions underlying the sizing and distribution of the Texas Universal Service Fund (TUSF). By way of example, the statewide average revenue benchmarks were calculated using the "sum of the residential revenues generated by basic and discretionary local services, as well as a reasonable portion of toll and access services..."⁴⁸ Similarly, the business benchmark summed business revenues and

⁴⁴ *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Comments of the Public Utility Commission of Texas at 6 (Mar. 29, 2000).

⁴⁵ *Id.* at 1.

⁴⁶ *Id.* at 2.

⁴⁷ *Compliance Proceeding for Implementation of the Texas High Cost Universal Service Plan*, Docket No. 18515, Final Order (rel. Jan. 14, 2000) and *Compliance Proceeding for Implementation of the Small and Rural Incumbent Local Exchange Carrier Universal Service Plan*, Docket No. 18516, Final Order (rel. Jan. 14, 2000). Both of these decisions acknowledged that universal service support should be "explicit and sufficient to achieve the purposes of [FTA 96 § 254]" and consistent with Commission rules to preserve and advance universal service.

⁴⁸ P.U.C. SUBST. R.26.403(e)(1)(B).

included a reasonable portion of toll and access services.⁴⁹ Further, the base support amount an eligible telecommunications provider (ETP) may receive from the Texas USF is calculated by determining the difference between the base amount the ETP is eligible for, less the amount of federal universal service high cost support received.⁵⁰ Accordingly, any revision to either intrastate or interstate access revenues, or both, may affect the sizing of the Texas USF at its most basic level, requiring a statewide recalculation of support rates for each and every eligible provider.

VI. LEGAL AUTHORITY

The Commission seeks comment on whether state commissions have authority to mandate bill-and-keep arrangements for intrastate access charges. (¶ 121). Pursuant to FTA § 254(k), the establishment of necessary intrastate service cost allocation rules, accounting safeguards, and guidelines, as they relate to universal service, is explicitly reserved to the states. Traditionally, states have maintained regulatory authority over intrastate rates. The PUCT sees no justification for determining intrastate access to be an exception to this general rule. The more fundamental question remains, however, whether the FCC has authority to impose any particular arrangement for intrastate access charges upon the states.

VII. CONCLUSION

The PUCT has reservations about making economic efficiency the paramount goal of intercarrier compensation policy. In its NPRM, by seeking further comment on issues ranging from jurisdictional separations to universal service, the Commission itself recognizes that the discussion should transcend the use of bill-and-keep as an intercarrier mechanism. If economic efficiency is to be the guiding principle for regulation of intercarrier compensation and, perhaps, other areas, as well, state and federal regulators should jointly investigate and evaluate the efficiencies of the entire telecommunications revenue and cost system. An analysis of the economic efficiency of the bill-and-keep system for intercarrier compensation, albeit detailed

⁴⁹ P.U.C. SUBST. R. 26.403(e)(1)(B)(ii).

⁵⁰ See P.U.C. SUBST. R. 26.403(e)(3)(B).

and focused, cannot answer questions regarding the impact of such arrangements on local exchange service customers or other stakeholders in the larger model.

Given the significant transition present in the telecommunications market, regulatory certainty as to industry's revenue sources is more critical than ever. In particular, as states wrestle with issues related to line-sharing and broadband deployment, the PUCT would again urge caution in pursuing regulatory approaches that could undermine market confidence. Texas believes it is premature to act upon any comprehensive restructuring of the intercarrier compensation regime without developing real-world, real-time data to document impacts to both end-use customers and carriers.

The PUCT suggests that the Commission consider convening a working group with representatives of state and federal regulators, consumer advocates, and carriers to further define the scope of the proceeding represented by this NPRM. In particular, priority should be given to issues related to impacts to intrastate access charges, end-use customers' rates, and universal service. The potential consequences of these decisions are far too important to proceed on a piecemeal basis without adequate discussion and evidence. When the scope is more adequately defined, the various pieces of the overall puzzle should be referred to the appropriate joint boards, bureaus, or industry/regulatory working groups.

We appreciate the opportunity to provide comments in this proceeding.

Respectfully submitted,

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Commissioner Rebecca Klein