reasonable conclusion is that the calling party benefits more overall.[94]

This view has been echoed by numerous commenters, particularly those that, like the Joint Commenters, commissioned third-party economic analysis of the OPP Proposals. Economics and Technology, Inc. ("ETI") has issued a follow-up report that reviews the economic analysis elicited in this proceeding. This report is attached to these Reply Comments *("ETI* ***Reply Report").*** ETI found that the economic studies offered by other commenting parties confirm ETI's conclusion that the bill-and-keep approach, as manifested in the OPP proposals, offers no efficiency advantages or other net benefits over existing arrangements.[95]

AT&T obtained the analysis of two economists, Professors Ordover and Willig, to review the economic underpinnings of the bill-and-keep approach in general, and the OPP Papers in particular.[96] As noted in the *ETI* ***Reply Report:***

> Ordover and Willig recognize this shortcoming [invalid assumption of equal benefit] of the COBAK proposal. They find that "there is.. .little basis in logic or economics for this assumption," and provide further examples that contradict the assumption of equal benefits.[97]

Professors Ordover and Willig note that the "equal benefit" assumption is particularly inapplicable to unwanted calls such as a telemarketing call occurring at the recipient's dinnertime.[98] Bill-and-keep also does a particularly poor job, relative to CPNP arrangements, of

94 Focal/PacWest/RCN/US LEC Comments at 44.

95 *ETI Reply* ***Report*** at 1

96 AT&T Comments, Declaration of Janusz A. Ordover and Robert D. Willig On Behalf of AT&T Corp. at ¶1 1 ("Ordover/Willig Declaration").

97 *ETI* ***Reply Report*** at 2, ***citing*** Ordover/Willig Declaration at ¶¶ 32-33.

98 *Id.* at 3, ***citing*** Ordover/Willig Declaration at ¶ 31.

treating negative externalities, *i.e.*, the costs arising from unwanted calls, including but not limited to telemarketing calls. Since bill-and-keep would shift some of the costs of placing a call onto the call recipient, it would reduce the calling parties' share of the costs of unwanted calls and increase the supply of unwanted calls.[99] Other commenters have also recognized this adverse outcome of bill-and-keep.[100]

Another shortcoming of bill-and-keep is that "B&K actually restricts the ability of consumers to internalize the positive externalities of a call"[101] **As** noted in the *ETI Reply* ***Report:***

> [Professors Ordover and Willlig] explain that CPNP has the flexibility to allow end users to more closely match cost recovery to their respective benefits from calling, so that, for example, businesses that expect to gain disproportionate benefits from customer calls can subscribe to 800-number services and absorb the costs of inward calls. In contrast, 800-type services would not be workable under bill-and-keep, because the interexchange carrier would be able to offer called-party-pays pricing on only the interexchange portion of the call. The loss of this flexibility means that, all other things being equal, bill-and-keep would be 'less likely to produce efficient results.'[102]

This shortcoming has been highlighted by other commenters. CompTel remarks that the OPP proposals would wrest control of costs away from subscribers because they would no longer be able to reduce costs by choosing to place fewer calls.[103] NTCA observes that by shifting costs to the called party and its carrier, bill-and-keep provides incentives to the calling party to place

99 *Id.*, *citing* Ordover/Willig Declaration at ¶ 36 and n. 9.

100 *Id., citing Maryland OPC Comments* at *26-28, NASUCA Comments* at *33*.

101 *Id.*, *citing* Ordover/Willig Declaration at ¶ *35*.

102 **Id.,** *citing* Ordover/Willig Declaration at ¶¶ 30, *35*.

103 CompTel Comments at 12-13.

calls that otherwise would not have been cost effective under a CPNP approach.[104] The calling party is the party with the complete information. The called party may not want the call, but the OPP proposals impose the costs on the called party.[105] The Maryland Office of People's Counsel contends that the OPP proposals create economic inefficiency because only the calling party is in a position to know the content and therefore the benefit of the call, and that rational decision-making requires a comparison of costs and benefits.[106] While a called party may be an "accomplice," any assignment of costs, whether 50/50 or otherwise, under a benefit theory is arbitrary because regulators cannot truly measure the relative benefits of the call.[107] NASUCA notes that "we do not deny that the call receiver benefits from SOME calls, but it is impossible to say how the benefits of the call are shared, and therefore it is bad policy to assume that both parties benefit equally, and to base policy changes on this assumption."[108] This sentiment is echoed by the Ad Hoc Telecommunications Users Committee ("Ad Hoc Telecom Users"), a coalition of end users.[109] The Ad Hoc Telecom Users note that the "equal benefit" assumption is unproven and not likely to be true. If, in fact, benefits inure disproportionately to the calling party, then shifting half of the cost-recovery burden to the called party would be inefficient."'

104 NTCA Comments at 18.

105 *Id.* at 16.

106 Maryland Office of People's Counsel Comments at 24-26.

107 Public Utility Counsel of Texas Comments at 55-57; ***see*** *also,* CompTel Comments at 14-16.

108 NASUCA Comments at 21 (emphasis in original).

109 Economics and Technology, Inc., served as economic consultant to the Ad Hoc Telecom Users in the preparation of their comments.

110 The Ad Hoc Telecommunications Users Committee Comments at 5.

Time Warner likewise solicited the analysis of two economists, Professors Farrell and Hermalin. Accompanying the analysis was a paper by Dr. Hermalin and Dr. Michael Katz. Both Professors Farrell and Katz were former Chief Economists at the Commission. Professors Farrell and Hermalin note that the bill-and-keep proposal, and **COBAK** in particular, are based on two "implausible" assumptions.'[11] The first is that the caller and called party derive *equal* benefit from the call. This is a much stronger assumption than the assumption that both parties benefit.[112] COBAK also assumes that the marginal costs of interconnecting networks are precisely equal, but this assumption is "unlikely to hold, because different networks use different technologies and have different blocking probabilities."'[13]

The paper by Drs. Hennalin and Katz provides insights into bill-and-keep when the "equal benefits" and/or "equal marginal costs" conditions are violated. **As** observed in the *ETI Reply Report:*

> [Drs. Hermalin and Katz] have developed a series of economic models of two-party communications (including, but not limited to, telephone calls) that analyze the welfare consequences when benefits of the communication may be shared between the two parties. One of those models encompasses the scenario relied upon by Mr. DeGraba in his construction of the COBAK mechanism, as a special case of their more generalized model.'[14] They demonstrate that, within the limits of this model, Mr. DeGraba's finding that a zero interconnection charge (i.e., bill-and-keep) is an efficient solution holds only for a very narrow range of conditions,

111 *ETI Reply Report* at *3.*

112 *Id., citing* Time Warner Comments, Exhibit 1, Drs. Farrell and Hermalin, Analysis of Central Office Bill and Keep at 4 (August 2001) ("Farrell/Hermalin Analysis").

113 *Id.*, *citing,* Farrell/Hermalin Analysis at 4.

114 Hermalin and Katz, Section *5* ("Stochastically Dependent Message Values"). In addition to allowing the marginal costs of the two interconnecting networks to vary, their model assumes that the expected values of the communication for each end user are in a linear relationship, which is an extension of Mr. DeGraba's assumption that they are equal. *ETI Reply Report* at *3, citing, id.* at pages 22, 26.

outside of which a positive interconnection charge (i.e., an explicit reciprocal compensation scheme) will be the efficient solution *(id.,* at page **26).** *This finding means that, even in the ideal case (abstracting away* ***from*** *all* ***of*** *the daunting implementation problems addressed elsewhere in these reply comments), COBAK, along with other similar forms of bill-and-keep, is unlikely to result* ***in*** *socially optimal, efficient retail prices for telephone service.* [115]

B. Bill-and-Keep Would Not Be Prevalent In An Unregulated, Competitive Market

A particularly damaging point against bill-and-keep is the fact that it would not be the likely compensation scheme to emerge in an ideally competitive market. As Professors Ordover and Willig note:

> We think it would be highly unlikely for B&K to emerge as a unique *equilibrium* interconnection and access regime in an effectively competitive telecommunications market. The simple reason is that B&K encourages more unwanted calls by effectively allowing telemarketers and others to terminate their unwanted calls for free. Worse yet, it forces the called parties to pay terminating charges for the privilege of receiving such unwanted calls. Because most consumers would justifiably resist the imposition of such costs, carriers seeking to satisfy consumers (as would any carrier seeking success in the hypothetical world of effectively competitive markets) would be unlikely to enter into B&K arrangements.[116]

Prior to the advent of telecommunications regulation, when parties could freely choose any type of intercarrier compensation arrangements, bill-and-keep was not the compensation regime of choice. **As NASUCA** observes, however:

> Beginning in 1894, the Bell System had to enter into interconnecting contracts with Independent telephone companies, and the Independents similarly entered signed contracts with each other that governed the terms of interconnection. Bill-and-Keep was adopted in certain situations, but the most prevalent form of interconnection was revenue

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115 *ETI Reply Report* at 4. Hermalin and Katz also reject Atkinson and Barnekov's assumption that retail prices are independent of the way interconnection is priced. *Id., citing,* Hermalin and Katz, page 3. This fundamental problem with the Atkinson and Barnekov analysis was also identified in the *ETZ* ***Report*** (pages 39-40).

116 Ordover/Willig Declaration at ¶ 14.

> sharing. For example, the typical interconnection contract for a toll carrier required that fifteen to twenty-five percent of the originating revenue be paid to the terminating local exchange carrier. The contracts discussed in the prior paragraph were established prior to the advent of federal or state regulation of the telephone industry. The terms varied little after regulation was established. Bill-and-Keep contracts were negotiated some of the time, but only where traffic was balanced. In those situations where traffic was out of balance, a settlement payment was made by the company that originated the majority of the calls.‘[17]

Even today, in unregulated markets, bill-and-keep is not the prevailing compensation mechanism where traffic is unbalanced. The Internet, which is often invoked as a paradigm example of use of bill-and-keep arrangements, actually undercuts the case for bill-and-keep. Where the "terms of trade are balanced," the largest carriers do use a bill-and-keep, or peering, arrangement when they interconnect.’’* **As** NASUCA observes:

> Smaller ISPs, on the other hand, pay for the privilege of interconnection to backbone carriers by leasing lines from one of the major backbone operators. Or stated differently, where the benefits of interconnection are unbalanced, carriers in this unregulated market enter into a commercial relationship in which the party who provides a greater service to the smaller network receives compensation from the smaller carrier. Conceptually the payment by the smaller carrier is the same as in the world of telecommunications where the network that originates the majority of the minutes of traffic compensates the terminating network."’

Another example of where the cost-causer pays for "the privilege of using another network basis" is roaming charges for wireless communications networks.[120] The network was "created for its subscribers, but the incremental costs attributable to the caller who ‘roams' onto the network

117 **NASUCA** Comments at 7.

118 **NASUCA** Comments at 10.

119 *Id.*

120 *Id.*

pays these costs."[121] As NASUCA appropriately concludes:

> These examples illustrate a powerful trend in network economics – that the party which causes the increase in network costs pays. This is true in cases where the cost-causer benefits 100% or when the benefits are shared with another party. Moreover, because of the existence of positive network externalities, it is more likely that these externalities will be properly internalized through a cost-causer pays arrangement.[122]

Thus, bill-and-keep would not emerge as the prevailing compensation scheme in unregulated markets where the "terms of the trade" are not balanced. The reality of the telecommunications market is that traffic will be unbalanced, and will continue to be unbalanced for some time. This is not an unexpected or undesirable result.[123] As the Ad Hoc Telecom Users contend:

> The authors of both papers appear to subscribe to the view that any intercarrier compensation structure that results in a less than balanced flow of traffic between one carrier and another is somewhat flawed and must be changed. **As** with their "equal benefit" theory, this premise is also unsupported by factual or economic evidence, is untested, and is most likely untrue. Prior to the introduction of competition in the local service market, when LECs provided service within non-geographically overlapping service areas, the expectation (and the reality) was that the transfer of traffic between carriers would be relatively in 'balance." The introduction of competitors into this segment changes the paradigm, and there is no longer any reason for the expectation that traffic will be in balance.[124]

Since unbalanced traffic is the reality of the marketplace, and is likely to be the reality for some time, bill-and-keep is a compensation mechanism ill suited to this reality.

C. Bill-and-Keep Does Not Provide "Equal Responsibility" For A Call

Another fundamental principle in the OPP Papers, particularly in the BASICS proposal, is

121 *Id.*

122 *Id.*

123 Focal/PacWest/RCN/US LEC Comments at 12-14.

124 The Ad Hoc Telecom Users Comments at 6-7.

that both parties will share equal responsibility for a call.[125] Bill-and-keep, however, "requires each party's carrier (and therefore each carriers's end-user) to bear its own costs, and the cost of originating the call may be less than or greater than the cost of terminating the call."[126] As noted in the *ETI Reply Report*, "the failures of COBAK and BASICS to live up to this principle are particularly noticeable in the varying (and inconsistent) treatments of transport cost, neither of which would result in equal sharing of those costs between the two parties to the call."[127]

D. Proponents of Bill-and-Keep Do Little To Shore Up Their Case

The proponents of bill-and-keep do little to shore up the economic foundations of the theory. Qwest contends merely that bill-and-keep is "as least as efficient" as any CPNP approach and concedes that even under a CPNP regime, carriers will have a substantial incentive to reduce their termination costs.[128] The other proponents of bill-and-keep "fail to provide any meaningful economic support for adopting COBAK, BASICS, or any other bill-and-keep arrangement on a mandatory basis."[129] USTA offers "economic efficiency" as the basis for adopting bill-and-keep, and also asserts vaguely that bill-and-keep properly allocates "cost causation" between the calling party and the called party. USTA, however, "supplies no further analysis of calls' cost causation, or precisely *how* the costs of calls should be split between the caller and the called party."[130]

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125 *ETI Reply Report* at **2.**

126 *Id., citing* Ordover/Willig Declaration at ¶ 34.

127 *Id.* at 2.

128 Qwest Comments at 21; *ETI Reply Report* at 4.

129 *ETI Reply Report* at 4.

130 *Id., citing* Qwest Comments at 21.

USTA does not say *how* bill-and-keep correctly allocates cost causation between the parties, or even whether this allocation is any better than the allocation under CPNP. Therefore, USTA's assertions provide no basis for a conclusion that bill-and-keep is justified because it provides an efficient allocation of costs or an allocation in accordance with cost causation. The comments of Verizon and SBC do not address the issue of relative efficiency at all.[131] BellSouth simply assumes that bill-and-keep will increase efficiency, but narrowly bases this supposition on purported efficiency gains that will arise from the elimination of regulatory arbitrage.[132] BellSouth, however, provides no specific evidence of the magnitude of the efficiency gains,[133] and would be hard-pressed to do so since, as discussed elsewhere in these Reply Comments, bill-and-keep will not remove opportunities for regulatory arbitrage and may, in fact, heighten the opportunities.

V. THE FCC LACKS LEGAL AUTHORITY TO IMPLEMENT BILL-AND-KEEP

A. Local Traffic

The Joint Commenters noted in their initial Comments that Section 252(d)(2)(B)(i) precludes the use of arrangements that do not include "the mutual recovery of costs."[134] The Joint Commenters also observed that the bill-and-keep proposals being considered by the

131 *Id.* at 4.

132 *Id.* at 5, *citing* BellSouth Comments at 16.

133 *Id.* at 5.

134 Focal/PacWest/RCN/US LEC Comments at 29, *citing* 47 U.S.C. § 252(d)(2)(B)(i). *See also,* Section II., *supra,* discussing the *Local Competition Order,* in which the Commission ruled that bill-and-keep arrangements did not satisfy the standard of section 252(d)(2)(A)(i) because "bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs." *Local Competition Order* at ¶ 1112.

Commission would not provide for such mutual recovery when traffic is not balanced, nor would it provide a "reasonable approximation of the additional costs of terminating such calls" as required by Section 252(d)(2)(A)(ii).[135] The Joint Commenters stated that while the Act allows for use of bill-and-keep arrangements those arrangements may only be mandated when traffic is in balance between the two parties. When traffic is not in balance, then bill-and-keep should be limited to voluntary arrangements where parties agree to waive their mutual recovery of costs for some *quid pro quo*.[136] Finally, the Joint Commenters noted that by mandating bill-and-keep for Section 251(b)(5) traffic, the Commission might be encroaching on the authority of state commissions under Section 252(c)(2) to set rates.[137]

Numerous commenters echoed the limitations on the Commission's authority to impose bill-and-keep for local traffic. Global NAPs observes that given the statutory language in Section 252(d)(2), it is hard to see how the Commission could establish a mandatory bill-and-keep regime for Section 251(b)(5) traffic.[138] Time Warner states that the requirements of "mutual recovery of costs" and "offsetting of reciprocal compensation obligations" in the Act create difficult legal problems for the Commission in regard to implementing a bill-and-keep regime. Time Warner contends that the situation for the Commission is made more difficult because the Commission lacks authority to forbear from Sections 251(b)(5) and 252(d)(2).[139] KMC argues

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135 Focal/PacWest/RCN/US LEC Comments at 30-31, *citing* 47 U.S.C. § 252(d)(2)(A)(ii).

136 Focal/PacWest/RCN/US LEC Comments at 32, *citing* 47 U.S.C. § 252(d)(2)(B)(i).

137 Focal/PacWest/RCN/US LEC Comments at 33, *citing* 47 U.S.C. § 252(c)(2).

138 Global NAPs Comments at 16.

139 Time Warner Telecom Comments at 27-28.

that bill-and-keep regimes do not meet the "compensation" requirement of Section 251(b)(5) or "the reasonable approximation of the additional costs" requirement of Section 252(d)(2) because a bill-and-keep regime would lead to a reciprocal compensation rate of zero for surplus traffic where traffic flows between carriers are not roughly equal. KMC also contends that bill-and-keep would violate Section 201(b) of the Act, which requires that "all charges, practices, classifications, and regulations" be "just and reasonable," and a rate of zero is not just and reasonable.[140]

AT&T argues that the Act prohibits an across-the-board bill-and-keep rule for the transport and termination of telecommunications. AT&T observes that the mutual recovery of costs is not afforded, and cannot be afforded, when traffic is out of balance, and recovery cannot be afforded reciprocally when carriers are required to recover costs from end users.[141] CompTel submits that mandating bill-and-keep would violate the Act, the U.S. Constitution, and the WTO Basic Telecom Agreement Reference Paper on Pro-Competitive Regulatory Principles.[142]

It is not only the competitive providers of local exchange service that voice serious reservations about the Commission's authority to implement bill-and-keep for local traffic. NASUCA argues that mandating bill-and-keep will violate the Act's requirement that LECs negotiate reciprocal termination charges and adopting bill-and-keep as a default would remove

140 KMC Telecom Comments at 5.

141 AT&T Comments at 38-39.

142 CompTel Comments at 3, 22-25.

all incentives to negotiate in good faith.[143] The Ronan Telephone Company and Hot Springs Telephone Company ("RTC/HSTC"), two rural ILECs, state that mandating bill-and-keep where traffic is not in balance would be a "blatant violation" of the Act and probably an unconstitutional taking.[144] RTC/HSTC posits that the Commission could only mandate bill-and-keep where traffic is equal or very close to being equal and where the respective costs of termination are proven to be the same.[145]

The parties that support the Commission's authority to mandate bill-and-keep at best make a case that bill-and-keep is one of a range of possible intercarrier compensation arrangements that the Act allows, but proffer no basis as to how the Commission can mandate that it be the exclusive option.[146] Clearly from the language of the Act, intercarrier payments were presumed to be the predominant form of reciprocal compensation. As BellSouth notes, the definition of "reciprocal" is "given or owed mutually as between two parties; interchanged."[147] The term mutual means "reciprocally acting, giving, receiving, interchanging."[148] Thus, by its plain meaning, reciprocal compensation contemplates compensation that is owed between two parties and that is interchanged between parties. Nowhere is the language is there a suggestion that carriers should rely on their end users to recover their costs of terminating calls.

143 NASUCA Comments at 29.

144 Ronan Telephone Company and Hot Springs Telephone Company Comments at 3-4.

145 *Id.*

146 **See,** BellSouth Comments at 18.

147 BellSouth Comments at 22.

148 *Id.*

The Act does provide for "bill-and-keep" arrangements but as a limited exception to the rule. The Commission rightfully gave proper definition to the limited nature of the exception by allowing such arrangements only when traffic is balanced between the parties.[149] Proponents of the bill-and-keep approach seek to make it the rule, not the exception, however, and the Act does not support such an extension. Even Qwest, a proponent of bill-and-keep, notes in regard to the provision in Section 252(d)(2)(A) that allows for bill-and-keep:

> While this language is unclear in some respects, it could not be plainer in preserving at a minimum, 'arrangements that waive mutual recovery (such as bill-and-keep arrangements).'[150]

The language, however, simply provides the limited nature of the exception and does not provide any authority to mandate bill-and-keep where parties do not agree to waive their right to mutual recovery.

The limited nature of the exception fits in with what NASUCA notes are "decades of experience in interconnection in telecommunications."" NASUCA describes the experience as follows:

> Bill-and-keep contracts were negotiated some of the time, but only where the traffic was balanced. In situations where traffic is out of balance, a settlement payment was made by the company that originated the majority of the calls. The pricing structure was also reflected in end user rates. The originating party paid for the cost of interconnection. Furthermore, the retail rates were generally designed so that the customers who initiated the calls paid for the calls, rather than

149 *Local Competition* ***Order*** at ¶ 1112.

150 Qwest Comments at n. 25.

151 NASUCA Comments at 7.

having the cost of interconnection distributed evenly among the customers.[152]

There are significant statutory obstacles to mandating a bill-and-keep regime. For instance, proponents of bill-and-keep attempt to get beyond the requirement of "mutual recovery" of costs by arguing that recovery from end users provides such recovery.[153] As Joint Commenters have noted, however, when their traffic is not balanced, carriers do not recover their costs and will have to transfer these costs to their end users through higher local rates. **As** noted above, the definitions of "mutual" and "reciprocal" contemplate that recovery would come from the other carriers that were using the carrier's facilities and not from their customers.

Likewise, Qwest attempts to get beyond the requirement that an originating carrier must pay "a reasonable approximation of the additional costs of terminating such calls" by suggesting that "additional costs" could be reasonably construed to include only the "short-run (per-call) incremental costs of delivering traffic to the called party."[154] Qwest argues that "*those* costs may well be negligible, because . . . individual calls do not typically 'cause' transport and termination costs; those costs instead consist of lumpy investments needed to ensure peak load capacity."[155] The statute speaks of the "additional costs of terminating such calls"; thus, it is not focused on the incremental costs of one call but on the incremental costs of delivering all such calls to the terminating carrier's customer. The "lumpy investments" needed to provide the capacity to

152 *Id.*

153 SBC Communications Comments at 43; Sprint Comments at 20.

154 Qwest Comments at 42.

155 *Id.*

terminate such calls would surely fall under the incremental costs of terminating such calls. These costs are surely not negligible, particularly, when traffic is not balanced. When traffic is not balanced, one carrier would face numerous "additional costs" in providing the facilities to terminate the other carriers' traffic, but would not be compensated for such calls. The California Public Utilities Commission, which in 1995 had actually set bill-and-keep as an interim default mechanism for intercarrier compensation for local traffic where the parties did not agree on compensation, recognizes that when traffic is not balanced, there is a need to establish an intercarrier compensation mechanism to send proper pricing signals.[156]

Qwest, clearly recognizing that unbalanced traffic is an obstacle to bill-and-keep, suggests that a bill-and-keep regime would "remove most of the arbitrage opportunities that create large categories of unbalanced intercarrier traffic."[157] As the Joint Commenters noted, however, unbalanced traffic is to be expected in the early stages of a competitive market as competitive carriers focus on specialization and niche marketing that are vital to promoting competition.[158] This sentiment was echoed by the Ad Hoc Telecom Users, which note that both papers assume that any intercarrier compensation structure that results in a less than balanced traffic flow is flawed and must be changed. The Ad Hoc Telecom Users argue that this assumption is "unsupported by factual or economic evidence, is untested and is most likely untrue."[159] There is no reason to believe that LECs with overlapping service territories would have balanced traffic.

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156 California Public Utilities Commission Comments at 4-5.

157 Qwest Comments at 43.

158 Focal/Pac-West/RCN/US LEC Comments at 12-14.

159 The **Ad** Hoc Telecom Users Comments at 6-7.

As the Ad Hoc Telecom Users astutely observe,

> [P]rior to the introduction of competition in the local service market, when LECs provided service within non-geographically overlapping service areas, the expectation (and the reality) was that the transfer of traffic between carriers would be relatively 'in balance.' The introduction of competitors into this segment changes the paradigm, and there is no longer any reason for the expectation that traffic will be in balance. The natural laws of competition dictate that if and to the extent that local service competitors can find particular classes of customers for whom they are able to originate or terminate calls (either because of greater efficiency than the ILECs, the use of less expensive technology than the ILECs, or above cost pricing by the ILEC) at a cost that is lower than what it would have cost to have the ILEC originate or terminate those calls, then they should be successful in marketing those services to those particular classes of customers. At the present time, CLECs have found that situation to exist for customers that receive large volumes of incoming calls (terminating traffic), and have taken advantage of the real and natural opportunities for that segment.[160]

Qwest, however, is seeking to make competitive carriers mimic Qwest's traffic patterns. This balance in traffic is one that would be forcefully imposed through regulation and require that certain market segments with high-volumes of terminating traffic be underserved.

It is very telling that another proponent of bill-and-keep, Sprint, suggests that if the Commission is concerned that "Section 252(d)(2)(B) does not confer upon it legal authority to adopt a bill-and-keep regime, it could rely upon its authority under Section 10 of the Act to forbear from applying requirements relating to reciprocal compensation."[161] This is an implicit recognition of the statutory obstacles to the imposition of a bill-and-keep regime for Section 251(b)(5) traffic. As Time Warner, notes, however, the Commission does not have authority to forbear from the reciprocal compensation provisions. The Commission does not have the

160 ***Id.***

161 Sprint Comments at 21

authority to forbear from the requirements of Section 251(c),[162] and Section 251(c) incorporates the obligations of Section 25 1(b) that include reciprocal compensation.[163] In addition, Section 10(b) requires the Commission in making its forbearance determination to consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[164] Numerous commenters have noted how bill-and-keep would not promote competition but stifle it, and enhance the competitive position of the incumbents. Given the nascent state of the local competition market, and the precarious state of competition in the local market, there would be no basis for forbearance.

The approach most supported by the statute is to maintain the current compensation system for Section 251(b)(5) traffic and to allow carriers to negotiate bill-and-keep arrangements voluntarily where the situation so warrants. The Commission would only have the authority to mandate bill-and-keep for such traffic if the traffic is roughly in balance.[165]

B. ISP-bound Traffic

The Joint Commenters argued in their initial Comments that the Commission's determination that ISP-bound traffic is "information access" under Section 251(g) is erroneous

162 47 U.S.C. § 160(d).

163 Time Warner Comments at 28-29, *citing*, Letter from Carol E. Mattey, Deputy Chief of the Common Carrier Bureau, to Michael L. Shor, *Bell Atlantic/GTE **Merger Order***, 16 FCC Rcd. 22, 23 (2000) (concluding that "Section 25 1(b) is incorporated explicitly into section 25 1(c) at the outset of the subsection.")

164 47 U.S.C. § 160(b).

165 Focal/PacWest/RCN/US LEC Comments at 31; KMC Comments at 3.

and does not provide a basis to support a bill-and-keep regime for ISP-bound traffic.[166] The Joint Commenters noted that Section 251(g) does not provide the broad statutory authority that the Commission has recently imbued it with, and represents a complete reversal of the Commission's reading of the section.[167]

AT&T also concurs that the Commission's conclusion that Section 251(g) "carves out ISP-bound traffic from the requirements of Section 251(b)(5) is fundamentally misguided."[168] AT&T agrees that Section 251(g) is a "narrow transitional provision that ensures that the 1996 Act amendments did not inadvertently relieve dominant incumbent LECs of their pre-existing equal access and non-discrimination obligations to interchange carriers and information service providers."[169] This is corroborated by the legislative history of Section 251(g).[170] By its terms, Section 251(g) was only intended to preserve "obligations 'that apply. . . on the date immediately preceding [the date of enactment] February **8,** 1996 [of the Act]."[171] The Commission, however, did not have a pre-existing rule governing inter-carrier compensation for ISP-bound, traffic and did not implement one until this year.[172]

166 Focal/Pac-West/RCN/US LEC Comments at 33-34.

167 *Id.* at 35-36.

168 AT&T Comments at 43.

169 *Id.*

170 *Id., citing,* H.R. Rep. 104-458, at 123, *reprinted in* 1996 U.S.C.C.A.N. 124, 134 (1996) ("Because the [1996 Act] completely eliminates the prospective effect of the [Consent Decree], some provision is necessary to keep these requirements in place . . . Accordingly, the conference agreement includes a new section 251(g).")

171 *Id.* at 45

172 *Id., citing, Implementation of the Local Competition Provisions in **the** Telecommunications Act of 1996,* Declaratory Ruling, 14 F.C.C. Rcd. 3689, ¶¶ 9, 22 (1999) ("Currently the Commission has no rule governing inter-
(con't.)

If the Commission fails to prevail on its reading of Section 251(g) before the D.C. Circuit, then the Commission should resign itself to the reality that such traffic is governed by Section 251(b)(5). At the very least, the Commission should not embark on any compensation reform that would entail differential treatment for ISP-bound traffic until the Commission's authority to do so is validated by the D.C. Circuit.

C. Interstate Access Charges

While the Commission may have broad authority in regard to interstate access charges, there are significant obstacles to implementing bill-and-keep for interstate access charges. Rural and independent ILECs predict a tremendous increase in rural and independent LEC retail rates under bill-and-keep. Not only would cost recovery be shifted away from IXCs and onto end users, but many parties also noted that bill-and-keep for interstate access charges would shift substantial costs from the interstate jurisdiction to the intrastate jurisdiction in contravention of long-established separations policies articulated by the **U.S.** Supreme Court in ***Smith v.*** *Illinois*.[173] NECA laments that the Commission gives little consideration to separations issues, and that while the Commission's proposal is characterized as forward-looking, it is actually a return to methods long since discredited in the separations process. NECA notes that CPNP methods are not a product of happenstance. Today's intercarrier mechanisms, including current separations methodologies and access charge regimes, are the product of more than a century of cooperative effort by federal and state regulators. Bill-and-keep could undermine existing

carrier compensation for ISP-bound traffic.").

[173] NTCA Comments at 14-15; NECA Comments at 12

jurisdictional separations.[174]

D. Intrastate Access Charges

Even the strongest proponents of bill-and-keep admit that the issue of jurisdiction over intrastate access charges presents a formidable obstacle to the imposition of a mandatory bill-and-keep regime.[175] There is nothing in the Act that gives the Commission rulemaking authority to prescribe bill-and-keep for intrastate access. While the Supreme Court in *Iowa Utilities Board* gave the Commission broad authority to implement the local competition provisions of the Act, the Court did find that section 2(b) of the Act and *Louisiana Pub. Sew. Comm'n v. FCC*, 476 U.S. 355 (1986) places a limit on Commission authority where it attempts to regulate services over which it has "not explicitly been given rulemaking authority."[176] Thus, the Commission would have no authority to mandate that states impose a bill-and-keep mechanism for intrastate access charges.[177] As Time Warner astutely observes:

> This threshold issue [legal authority to implement bill-and-keep for intrastate access traffic] should be resolved before the Commission expends significant resources on considering the manner in which bill-and-keep should be implemented at the federal level. The extent to which bill-and-keep can be adopted at the state level is an important factor that must be weighed as part of the

174 NECA Comments at 12.

175 Qwest Comments at 45

176 *AT&T Corporation v. Iowa Utilities Board,* 525 U.S. 366, 381 and n. 7 (1999); *see also,* Peter W. Huber, *et al., Federal Telecommunications Law* at § 3.3.4 (2d ed. 1999); *see also*, CC Docket No. 99-68, Reply Comments of the Association for Local Telecommunications Services at 16, n. 26 (Apr. 27, 1999) (In those instances where the "1996 Act's local competition provisions are 'silent,"' Justice Scalia "acknowledges that '[Section 2(b) continues to function]."'

177 As noted elsewhere in these Comments, if bill-and-keep is applied on a federal basis, there will continue to be opportunities for regulatory arbitrage.

cost-benefit analysis in this proceeding.[178]

Further, as discussed above, there are significant perils in a piecemeal approach to implementation of a bill-and-keep regime. It is clear that the Commission does not have authority to impose bill-and-keep for intrastate access charges. The only "unified intercarrier compensation regime" available to the Commission is the existing CPNP regime. Once subsidies are eliminated from access charges and replaced with explicit universal service support mechanisms, and originating and terminating rates are set at cost, the Commission's hope for a unified regime will have some foundation.[179]

VI. IMPOSING BILL-AND-KEEP WILL REQUIRE MAJOR NEW FEDERAL PROGRAMS

In their initial comments in this proceeding, the Joint Commenters pointed out that bill-and-keep would require major new regulatory programs and proceedings.[180] First, the bill-and-keep proposals being considered would alter end user rates significantly and require new federal end user charges. States would be unwilling to raise local rates, so federal rates would have to be crafted.[181] Second, the Commission would have to transform the existing complex system of access charges into a program of federal end user charges. In addition, the Commission would

178 Time Warner Comments at 29.

179 In the *Local Competition Order*, the Commission recognized that "transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and the transport and termination of long distance traffic should converge." *Local Competition Order* at ¶ 1033. Thus, cost based transport and termination rates complete the unified intercarrier compensation regime.

180 Focal/PacWest/RCN/US LEC Comments at 6-12.

181 Focal/PacWest/RCN/US LEC Comments at 7.

need to establish new and separate end user charges covering the LEC's cost of providing local exchange terminating service to ISPs, now that the Commission has exercised exclusive jurisdiction over this traffic.[182] Third, bill-and-keep would require entirely new intrastate retail pricing structures.[183] Finally, the bill-and-keep proposals under consideration would require close regulatory oversight over interconnection between local exchange carriers.[184] The comments by other parties demonstrate that the Joint Commenters' concerns are well founded. The "quick fix" envisioned by the Commission's bill-and-keep proposals would be anything but quick, and it is questionable whether there is anything to fix.

The ILECs and other commenters amply describe the sorts of comprehensive reform that must be undertaken if a bill-and-keep regime is to be implemented:[185] radical changes to the cost and revenue structures of small and rural ILECs would have to be imposed;[186] access charges must be restructured for rate-of-return companies;[187] universal service support mechanisms must be made explicit;[188] inefficient retail rate structures must be corrected and residential rates must be raised to reflect true cost;[189] the Federal-State Joint Boards on Universal Service and

[182] Focal/PacWest/RCN/US LEC Comments at 7-8.

[183] Focal/PacWest/RCN/US LEC Comments at 10.

[184] Focal/PacWest/RCN/US LEC Comments at 11-12

[185] SBC Comments at 19-32; Qwest Comments at 31-40; Verizon Comments at 19; Sprint at 2; ALLTEL Comments at ii; CenturyTel Comments at 2.

[186] NRTA/OPASTCO Comments at 15-19; NECA Comments at ii-iii.

[187] NTCA Comments at 1.

[188] NECA Comments at 11; NTCA Comments at 6; MSTG Comments at 14; Qwest Comments at 30-31; United States Telephone Association (USTA) Comments at 26; SBC Comments at 11; ALLTEL Comments at **12.**

[189] SBC Comments at 9, 21; The Ad Hoc Telecom Users Comments at 4.

Separations must be convened to consider any transition to bill-and-keep;[190] and contrary to the claims that bill-and-keep would be deregulatory, regulatory oversight must be continued, including setting rates and evaluating cost studies.[191] Accordingly, initial comments amply verify Joint Commenters concerns that bill-and-keep would necessitate a host of new intrusive federal regulatory programs.

VII. THE COMMISSION SHOULD REITERATE THAT ILECS MUST ABIDE BY ITS "RULES OF THE ROAD"

A. The BOCs Acknowledge the Soundness of the Single POI per LATA Requirement

In the *NPRM*, the Commission asked whether an ILEC should be required to bear its own transport costs when a CLEC establishes a point of interconnection ("POI") outside the local calling area of the ILEC end user originating a call to a CLEC customer.[192] The Joint Commenters stated that the Commission should retain the rule that allows a CLEC to establish a single POI per LATA because any other rule would introduce inefficiencies and would require CLECs to mimic anachronistic ILEC local calling areas.[193]

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[190] NARUC Comments at 1, 4; Florida Public Utility Commission Comments at 1; Regulatory Commission of Alaska Comments at 4-5; Iowa Utilities Board Comments at 3; Missouri Public Service Commission Comments at 4; NASUCA Comments at 26; Texas Public Utility Commission Comments at 2; NRTA/OPASTCO Comments at 8; NTCA Comments at 6; NECA Comments at 4; Sprint Comments at 27.

[191] AT&T Comments at 5-6, 26-29, 35; Z-Tel Comments at 5-6; Maryland Office of People's Counsel Comments at 34-36; WorldCom Comments at 25-26; Illinois Commerce Commission Comments at 10; Time Warner Comments at 12-13; Qwest Comments at 25; Allegiance Comments at 28.

[192] *NPRM* ¶ 113.

[193] Focal/PacWest/RCN/US LEC Comments at 16-18, 55-56.

The BOCs that addressed the issue agree that a single POI per LATA is the appropriate default rule. For example, Qwest recognizes that any resolution of this issue should seek to reduce regulatory intervention.[194] A single POI per LATA requirement would certainly reduce regulatory intervention – each carrier is responsible for all transport on its side of the POI. If it is more efficient for a carrier to lease transport facilities on its side of the POI than it would be to provide them itself, it will make that decision completely independent of whatever arrangements the other carrier makes on its side of the POI. Further, with a single POI per LATA as the default rule, carriers are free to negotiate around that rule to provide for more efficient traffic exchange arrangements where circumstances warrant. Qwest's concern about providing an originating carrier with some flexibility to determine where it will deliver traffic to the terminating carrier could be adequately addressed through negotiations.[195]

While SBC contends that it should be compensated for providing transport beyond the local exchange area of the calling party under the current single POI per LATA rule,[196] it proposes a single POI per LATA for the exchange of traffic between local calling areas under a bill-and-keep regime.[197] This rule, according to SBC, "encourages carriers to build out their networks and prevents them from unfairly transferring transport costs to the calling party's service provider."[198] The Joint Commenters completely agree with this statement. The Joint

194 Qwest Comments at 29.

195 *Id.* at 29-30.

196 SBC Comments at 18-19.

197 *Id.* at 27.

198 *Id.* at 30.

Commenters, however, find it amusing that SBC suddenly agrees with CLECs and realizes that establishing a single POI per LATA makes great economic sense – when the alternative to SBC is transport to the CLEC end office for calls that SBC customers originate, as would be the case under the COBAK proposal. Yet SBC seems to forget that economic rationality under a CPNP regime when it suggests it should always be compensated for all transport out of its own local calling areas. It is a convenient flip-flop, but inconsistent. The proper conclusion is that, in all circumstances, a single POI per LATA is the efficient default rule for interconnection. As SBC itself acknowledges, the "death of distance" in telecommunications pricing is imminent.[199] It makes no sense to predicate interconnection requirements on a near-obsolete regulatory distinction that has no sound technological basis. The only distinction should be the one imposed by the Act, which prohibits BOCs from providing interLATA service.

BellSouth also proposes a single POI per **LATA** under a bill-and-keep regime.[200] Verizon discusses the transport issues raised in the *NPRM* obliquely, and merely proposes that "[t]he Commission should send the right signals to the market and encourage efficient interconnection by not placing unreasonable burdens on one interconnecting carrier as opposed to the other, by not allowing regulatory arbitrage and by not encouraging carriers to offer uneconomic services."[201] In response, the Joint Commenters simply restate SBC's position – a single POI per LATA "encourages carriers to build out their networks and prevents them from unfairly

199 *Id.* at 19.

200 BellSouth Comments at 14-15.

201 Verizon Comments at 11.

transferring transport costs to the calling party's service provider."[202]

B. The Commission Should Not Abandon its Tandem Treatment Rule

The Commission correctly confirmed that Section 51.711(a)(3) requires a carrier to demonstrate only that its switch serves "a geographic area comparable to that served by the incumbent LEC's tandem switch" in order to be entitled to the tandem switch reciprocal compensation rate.[203] The Commission also asked, however, whether a "functional equivalency" concept should be added to the test of whether a CLEC is entitled to receive the tandem switch reciprocal compensation rate.[204]

There is no principled reason to revise this rule to also require a "functionality" test. The Commission recognizes that language in the *Local Competition **Order*** may have created some confusion in the implementation of this rule, but the functionality test used by some states completely ignores the intent of the rule and inappropriately relies on network distinctions found only in the ILEC network.

Section 51.711(a)(3) was intended to recognize that some carriers use fiber rings or wireless transmission facilities instead of hub-and-spoke tandem-switched network architecture.[205] Even though carriers may use alternate network architectures, they may still have the ability to transport and terminate traffic over a geographic area as large as the area served by

202 SBC Comments at 30.

203 *NPRM* at ¶ 10.5.

204 *NPRM* at ¶ 107.

205 *Local Competition **Order*** at ¶ 1090.

the ILEC tandem switch. Accordingly, they should be compensated comparably regardless of the network architecture they choose.

Further, the "functionality" that some states have required CLECs to provide inappropriately relies on network distinctions found only in the ILEC network. Tandem switch "functionality" in the ILEC network is the ability to provide switching between switches, or to connect trunks to trunks. Yet there is no particular value added by providing switching between switches, except to be able to route calls to destinations within a geographic area that are not served by the end office switch of the calling party. A CLEC network using a fiber ring and a single switch completes this identical "function." A functionality test has only one purpose—to deny comparable compensation to the CLEC when it provides the same service that the ILEC tandem switch provides. Accordingly, the Commission should retain the rule, without revision, that permits a CLEC to be paid the tandem rate when its switch serves a geographic area comparable to the area served by the ILEC tandem switch.

C. Calls to ISPs Are Subject to the *ISP Traffic Remand Order* Regardless of Whether the LEC Assigns the ISP a Physical or Virtual NXX

The Commission also asked for comment regarding the use of "virtual" central office codes.[206] The Joint Commenters stated that CLEC use of virtual central office codes was a competitive response to substantially similar services provided by the BOCs to ISPs.[207] The Joint Commenters also stressed that the physical location of the terminating carrier's customer has no

206 *NPRM* at ¶ 115.

207 Focal/PacWest/RCN/US LEC Comments at 57-59.

relevance to the amount of transport that the originating party must provide to complete a call.[208] Finally, the Joint Commenters explained that a "virtual" presence in any local calling area begins with the questionable premise that CLECs must adhere to ILEC local calling area boundaries.[209] The BOCs respond to the questions posed in the *NPRM* by little more than impugning CLECs that provide customers with telephone numbers that allow them to have calls to them rated as local calls under the ILEC system of rating traffic. Verizon goes so far as to call this practice a "fraudulent misuse of telephone numbers" or a "theft of service scheme."[210] It is odd, then, that Verizon would sign a series of freely negotiated contracts, which any CLEC could have opted into and ported into another state under the Bell Atlantic-GTE merger conditions, that permit CLECs to use these so-called virtual NXX arrangements and receive terminating compensation from Verizon.[211] It is also rather curious that Verizon cites what it calls "the Maine Game" in its comments to refer to a situation in which Verizon transports traffic more than one hundred miles

208 Focal/PacWest/RCN/US LEC Comments at 58.

209 Focal/PacWest/RCN/US LEC Comments at 58.

210 Verizon Comments at 4-5.

211 See, *e.g.,* Interconnection Agreement between Verizon-Virginia, Inc., and Focal Communications Corporation of Virginia, Section 1.16 ("'Compensable Internet Traffic' means dial-up switched Internet Traffic that is originated by an end-user subscriber of one Party, is transmitted to the switched network of the other Party, and then is handed off by that Party to an Internet Service Provider which has been assigned a telephone number or telephone numbers within an NXX or NXXs which are local to the originating end-user subscriber."); Interconnection Agreement between Verizon-Maryland, Inc., and Focal Communications Corporation of the Mid-Atlantic, Section 1.16 (same); Interconnection Agreement between Verizon-Washington, D.C., Inc., and Focal Communications Corporation of the Mid-Atlantic, Section 1.16 (same); Interconnection Agreement between Verizon-New England, Inc., and Focal Communications Corporation of Massachusetts, Section 1.16 (same) ("Focal-Verizon New England Agreement"); Interconnection Agreement between Verizon-New York, Inc., and Focal Communications Corporation of New York, Section 1.16 (same); Interconnection Agreement between Verizon-Pennsylvania, Inc., and Focal Communications Corporation of Pennsylvania, Section 1.16 (same); Interconnection Agreement between Verizon-Delaware, Inc., and Focal Communications Corporation of Pennsylvania, Section 1.16 (same); Interconnection Agreement between Verizon-New Jersey, Inc., and Focal Communications Corporation of New Jersey, Section 1.16 (same).

to the CLEC POI, yet the same Verizon–New England, lnc. affiliate in Maine complaining of this practice has executed a negotiated interconnection agreement in New Hampshire that specifically allows the practice and provides compensation for it.[212] Similarly, SBC calls this practice "yet another arbitrage problem,"”' yet it also has signed negotiated interconnection agreements permitting the practice.[214]

Further, several states have approved and validated the use of virtual NXX codes. The states of Michigan, California, North Carolina, and Kentucky agree that calls are rated by comparing the NXX codes of the calling and the called parties, regardless of the physical location of the called party.[215] As the North Carolina Utilities Commission explained in an arbitration proceeding between BellSouth Telecommunications, Inc. and MCImetro Access Transmission Services, LLC,

The Commission notes that NPA/NXX codes were developed to rate calls and,

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212 Focal-Verizon New England Agreement; Amendment No. 1 to Interconnection Agreement between Verizon-New England, Inc. and Global NAPs, Inc., Section 3, adding new Section 1.94 to the Agreement ("'Compensable Internet Traffic' means dial-up switched Internet Traffic that is originated by an end-user subscriber of one Party, is transmitted to the central office switch of the other Party that is physically located in the state of New Hampshire, and then is handed off by that Party to an Internet Service Provider located in the state of New Hampshire that has been assigned a telephone number or telephone numbers within an NXX or NXXs which are local to the originating end-user subscriber.").

213 SBC Comments at 17.

214 *See, e.g.,* Amendment No. 2 to Interconnection Agreement between Ameritech Ohio and ICG Telecom Group, Inc., Section 4.2 ("If ICG designates different rating and routing points such that traffic that originates in one rate center is carried by Ameritech to a routing point designated by ICG in a rate center that is not local to the calling party even though the called NXX is local to the calling party, such traffic ('Virtual Foreign Exchange' traffic) shall be rated in reference to the rate centers associated with the NXX prefixes of the calling and called parties' numbers, and treated as Local traffic for purposes of compensation.")

215 *In re Complaint of Glenda Bierman against CenturyTel of Michigan, Inc. d/b/a CenturyTel*, Opinion and Order, Case No. U-11821 (Mich. PSC Apr. 12, 1999); *In the matter of the application of Ameritech Michigan to revise its reciprocal compensation rates and rate structure and to exempt foreign exchange service from payment of reciprocal compensation,* Case No. U-12696 (Mich. PSC Jan. 23,2001).

> therefore, MCIm's assertion that whether a call is local or not depends on the NPA/NXX dialed, not the physical location of the customer, is reasonable and appropriate. Further, based on the FCC's 1980 ruling in the New York Telephone case and MCIm witness Price's testimony at the hearing, the Commission believes that these calls should be classified as local as long as they are originated and terminated within a LATA. Therefore, the Commission concludes that calls within a LATA originated by BellSouth customers to MCIm FX customers are to be considered local and, therefore, subject to reciprocal compensation.[216]

The California Public Utilities Commission has ruled repeatedly and unambiguously that a local call is determined by the NPA-NXX of the called and calling party, regardless of the location of the ISP. The California Commission determined that "[w]hether an ISP-bound call should be treated as local is based on the rating of the call measured by the distance from the rate center associated with the originating caller's telephone number to the rate center associated with the telephone number used to access the ISP modem."[217]

The issue of intercarrier compensation for virtual NXX traffic was also addressed in the arbitration proceeding between Level 3 and BellSouth before the Kentucky Public Service Commission. The Kentucky Commission ruled in favor of Level 3, saying "foreign exchange and virtual NXX services should be considered local traffic when the customer is physically located within the same LATA as the calling area with which the telephone number is associated."[218]

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216 *Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Recommended Arbitration Order, Docket No. P-474, Sub 10 (NCUC April 3, 2001) at 74, upheld and affirmed, Order Ruling on Objections and Requiring the Filing of the Composite Agreement (NCUC, Aug. 2, 2001), at 28.

217 Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, Rulemaking 95-04-043, Investigation 95-04-044 (Cal P.U.C. September 3, 1999); *Level 3 Communications, LLC Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, for Rates, Terms, and Conditions with Pacific Bell Telephone Company*, D. 00-10-032, Application 00-04-037 (Ca. PUC Oct. 5, 2000).

218 *In re Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc.*

(con't.)

In fact, the use of virtual NXX arrangements has brought the Internet to previously underserved locations. As the Public Utility Counsel of Texas recognizes, virtual NXX arrangements are "critical" to ISPs.[219] The Public Utility Counsel of Texas recognizes that the use of virtual NXX arrangements do not deprive originating carrier of access charges and universal service subsidies contained therein because ISP subscribers would rarely, if ever, place toll calls to reach an ISP.[220] ILEC toll revenues are not at **risk** because those toll revenues would not exist even if CLECs did not use virtual NXX arrangements.

In addition, calls to ISPs using virtual NXX arrangements are already subject to the restrictions and requirements imposed on CLECs serving ISPs by the Commission's *ISP Traffic Remand Order*.[221] The rules applicable to the transport and termination of traffic to ISPs make no distinction between calls using virtual NXX arrangements and those using non-virtual NXX arrangements.[222] All ISP-bound traffic is compensated at the applicable rates under the federal regime in the ISP *Traffic Remand Order*, and the *NPRM* provides no reason to vary from that result for virtual central office code traffic.

Pursuant to Section 252(b) ***of*** *the Communications Act* ***of*** *1934, as Amended by the Telecommunications Act* ***of*** *1996,* Order, Case No. 2000-404 (Ky. P.S.C. Mar. 14,2001).

219 Public Utility Counsel of Texas Comments at 118.

220 *Id.*

221 *ISP Traffic Remand Order* at ¶¶ 77-94. *Implementation* ***of*** *the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation* ***for*** *ISP-Bound Traffic,* CC Dkt Nos. 96-98, 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27,2001) at ¶ 44 ("*ISP Traffic Remand Order*"). Focal, Pac-West, RCN, and US LEC have intervened in the appeal of the *ISP Traffic Remand Order* at the United States Court of Appeals for the District of Columbia Circuit. *WorldCom, Inc. v. FCC,* Dkt. 01-1218 (D.C Cir.) The positions taken here by Focal, Pac-West, RCN, and US LEC are not to be construed as an acknowledgment by them of the lawfulness of the *ISP Traffic Remand Order.*

222 Focal/PacWest/RCN/US LEC Comments at 60.

VIII. CONCLUSION

For these reasons, the commission should abandon its proposal to implement bill-and-keep.

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