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

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

COMMENTS OF COMPTEL/ALTS

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I. Introduction

As the Federal Communications Commission (Commission) undertakes this omnibus review of intercarrier compensation, all parties to the proceeding will advise the Commission that the current intercarrier compensation system is broken and in need of imminent repair.[1] But consensus will be limited to the fact that the Commission must holistically revise the intercarrier compensation regime: parties will demonstrate little agreement regarding the form that revision should take. No fewer than a dozen different industry groups are currently at work developing intercarrier compensation plans to present to the Commission. Many of those plans have much to recommend; indeed, many plans are specifically designed to incorporate and build on other plans that have already been developed.

Although CompTel/ALTS[2] does not at this time endorse any specific plan that has been presented to the Commission, these comments are intended to provide the Commission with an overview of the concerns of the competitive industry as it participates in the process of intercarrier

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[1] In these comments, the term "intercarrier compensation" is meant to encompass both access charges (payments made to local exchange carriers to originate and terminate long distance calls) and reciprocal compensation (payment made between carriers for transport and termination of local calls).

[2] CompTel/ALTS was formed in March 2005 by the merger of CompTel/ASCENT and the Association for Local Telecommunications Services (ALTS). With more than 350 members, CompTel/ALTS is the leading industry association representing competitive facilities-based telecommunications service providers, emerging VoIP providers, integrated communications companies, and their supplier partners. CompTel/ALTS members are building and deploying packet and IP-based networks to provide competitive voice, data and video services in the U.S. and around the world. The association, based in Washington, D.C., includes companies of all sizes and profiles, from the largest next-generation network operators to small, entrepreneurial companies. CompTel/ALTS members share a common objective: To create and sustain true competition in the telecommunications industry

compensation reform. Many individual member companies of CompTel/ALTS have participated in different industry-wide fora that are submitting reform proposals to the Commission, and several CompTel/ALTS members are submitting their own comments to the Commission in this docket. CompTel/ALTS attempts to synthesize in the instant comments those principles and issues that are of uniform interest to its member companies, but these comments are not intended to supplement or endorse any independent filings by CompTel/ALTS member companies or the consortia in which they participate. CompTel/ALTS applauds the diligent efforts of industry participants to craft workable solutions to these difficult issues.[3]

As the Commission recognized in its *Notice*, the current myriad intercarrier compensation regimes are in need of replacement by a "unified regime designed for a

market characterized by increasing competition and new technologies."[4] The Commission first sought comment on development of a unified regime in 2001, at which time it tentatively sought to adopt mandatory bill and keep rules.[5] In the instant *Notice*, the Commission has not endorsed any specific

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[3] Particular recognition is due to the NARUC Ad Hoc Subcommittee on intercarrier compensation, chaired by Iowa Utilities Board Commissioner Elliott Smith. The NARUC working group has sought to bridge the gap between several proposals by working toward unified principles of intercarrier compensation reform.

[4] *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, FCC 05-33 at ¶ 1 (rel. Mar. 3, 2005) (*Notice)*.

[5] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9612-13 (2001). Bill and keep is a mechanism by which two interconnecting network providers agree that neither will charge the other for terminating traffic. Instead, "each network recovers from its own end users the cost of both

plan for reform. The Commission concluded, however, that the current system – which provides for different compensation arrangements depending on the type of carrier, the type of traffic, and the end points of communication – is no longer workable, and indeed creates artificial arbitrage opportunities that lead to inefficient network deployment and deter innovation.[6]

II. Principles for Reform

With the need for reform undisputed, the Commission must act to adopt a new, unified intercarrier compensation regime. To assist the Commission in its task, CompTel/ALTS offers the following principles as guidance to the Commission's efforts. Although these principles are not intended to endorse any of the industry proposals that will be submitted to the Commission, they do provide a starting point for the Commission's analysis of the various reform plans.

First, the Commission should eliminate regulatory or jurisdictional distinctions that provide incentives to provide service in less than optimal ways. The Commission's current intercarrier compensation regime assigns

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originating traffic delivered to the other network, and terminating traffic received from the other network." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499, at ¶ 1096 (1996) (subsequent history omitted).

[6] *Notice* at ¶ 3. In addition to maintaining different compensation schemes depending on type of carrier, traffic, and location of end users, the Commission also maintains certain special exemptions from intercarrier compensation. For example, the Commission has, since 1983, maintained what it calls the "ESP exemption," which treats enhanced service providers (now known as information service providers) as end users, rather than carriers, and thus entitles ESPs to pay local business rates for connections to the public switched network, rather than the usage-sensitive access charges paid by long distance companies. *MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682 (1983).

services to regulatory classifications without any regard to the most efficient and technologically neutral means of deploying networks. Thus, traditional "long distance" services classified by the FCC as subject to access charges may, in fact, be offered via the same type of transport facilities used to provide "local services" that are subject to reciprocal compensation. Technological advancement, and indeed efficient network deployment, are hindered if carriers must treat similar services and technologies differently pursuant to the Commission's rules. Moreover, the potential for arbitrage, rather than innovation and efficiency, may drive network deployment decisions where obsolete regulatory classifications present revenue opportunities.

Second, the Commission must revisit the differentiation between different "units of use" on the telecommunications network. The distinction between "local" and "long distance" minutes no longer makes sense in an era of all-distance service offerings. Similarly, it is difficult to measure a "minute" of service as different communications protocols are introduced into the telecommunications network and the network migrates from analog to digital. As such, the Commission must unify the concept of "units" and apply a unified rate to ensure that all traffic is treated the same. Put another way, the Commission must ensure that a single rate for intercarrier compensation applies to every minute of traffic, notwithstanding whether that traffic is local or long distance, wireless or wireline, TDM or IP. Existing compensation schemes deter innovation by encouraging carriers to seek out and take advantage of arbitrage opportunities, including deployment of inefficient network architectures.

Third, the Commission must ensure that the transition period to a new intercarrier compensation regime is properly calibrated to prevent disruption in the telecommunications marketplace, while still providing proper incentive for carriers to quickly comply with the new regime. Pursuant to existing rules, access charges are generally incorporated into tariff offerings of carriers, both incumbents and competitors, while reciprocal compensation arrangements are generally incorporated into interconnection agreements. The adoption of a unified system will call into question the utility of this dual-mode scheme. Should the Commission require that carriers incorporate the new, unified intercarrier compensation regime into interconnection agreements, the history of negotiating such agreements should guide the timing of the Commission's implementation schedule. The Commission is well aware that negotiations between incumbent LECs and competitive LECs to implement the Commission's rules are rarely completed rapidly, and indeed are generally brought before a state commission for resolution of disputed issues. To the extent that the Commission's intercarrier compensation rules are incorporated into interconnection agreements, CompTel/ALTS urges the Commission to ensure that the process is completed quickly and fairly. Such agreements will be negotiated and, in many cases, arbitrated by carriers in the months after the Commission adopts new rules. As such, the Commission must carefully calibrate the transition period to its new regime to account for the time period necessary for renegotiation of agreements.

Fourth, the Commission must carefully evaluate calls for "revenue neutrality" from carriers that are participants in the intercarrier compensation dialogue.[7] Although the Commission's new rules can certainly take account of reduced revenue opportunities for carriers that have been net recipients of intercarrier compensation, including both access charges and reciprocal compensation, the Commission should not permit incumbent LECs to capture revenue beyond that necessary to address changes to the intercarrier compensation regime simply because the Commission's new rules eliminate outdated implicit subsidies. Rather, all carriers – incumbents and

[7] Intercarrier compensation is often referred to as a "cost recovery" regime that ensures that a carrier required to transport or terminate traffic from another carrier's network is properly compensated for network facilities and services utilized. Different intercarrier compensation reform proposals submitted to the Commission take different approaches to the term "cost recovery." For example, the Cost-Based Intercarrier Compensation Consortium (CBICC) proposal contemplates a uniform, cost-based rate that would apply for transport or termination of traffic. On the other hand, the Intercarrier Compensation Forum (ICF) plan proposes a migration to mandatory bill and keep, whereby carriers would not exchange payment for such transport or termination of traffic. Although proponents of both plans agree that a uniform rate is appropriate, they disagree about whether that rate should be zero (ICF) or some positive, cost-based rate (CBICC). CompTel/ALTS does not endorse either plan or any of their particular provisions at this time, but notes that agreement that there should be a uniform rate across telecommunications platforms is an important and positive step. The Commission is left to determine whether mandatory bill and keep properly reflects that carrier traffic is generally in balance and thus the exchange of compensation is not necessary, or whether carriers incur costs associated with termination or transport of traffic that would not be recovered from other carriers via mandatory bill and keep. In making this determination, the Commission should ensure that carriers have an economic incentive to interconnect and carry telecommunications traffic, while at the same time ensuring that arbitrage opportunities are eliminated.

competitors alike – should have the same opportunities to recover revenues lost through implementation of the new regime. Put another way, if the Commission decides to make available a mechanism for carriers to recover revenue lost in the migration to new intercarrier compensation rules, the Commission must make that mechanism available to all carriers, not just incumbents.

Fifth, the Commission must carefully evaluate the needs of rural providers – incumbents in particular, but also competitive carriers that serve rural areas. Many of the reform plans submitted to the Commission adopt special provisions for rural providers, including measures that allow additional cost recovery above and beyond the unified intercarrier compensation rate that would be otherwise applicable to rural providers. Although the Commission's rules must be tailored to promote competition in all regions of the country, a goal best served by unified national rules, rural providers do incur additional costs for transport and termination of traffic that may lend themselves to a legitimate claim for recovery. The Commission must carefully examine the need to provide an additional mechanism for cost recovery in rural areas.[8]

Sixth, the Commission must ensure that its new intercarrier compensation regime is competitively neutral and promotes efficient network architectures. The Commission has concluded that a competitive carrier can

[8] *See Notice* at ¶ 32 ("[W[e must be certain that any reform of compensation mechanisms does not jeopardize the ability of rural consumers to receive service at reasonable rates.").

request a single point of interconnection in a LATA, which minimizes a new entrant's costs of entering the market.[9] Competing carriers can choose to interconnect with the incumbent LEC in the minimum number of points so as to avoid deployment of duplicate facilities for interconnection. The Commission must ensure that, whatever intercarrier compensation reform proposal it adopts, all competitive carriers retain the right to adopt a single point of interconnection with the incumbent LEC, and that the competitive carrier can designate the point of interconnection with the incumbent LEC on the incumbent LEC's network within each LATA. In addition, the incumbent LEC must be responsible for the costs of carrying traffic on its network to the designated point of interconnection with the competitive carrier, as the Commission's current rules require.[10] Any modification to these existing rules, such as a requirement that competitive carriers interconnect in every local calling area, would require competitive LECs to inefficiently duplicate the incumbent LEC network and interexchange carriers to stretch their networks inefficiently, which would impose insurmountable barriers to entry.[11]

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[9] *See Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18390, at ¶ 78 n.174 (2000).

[10] The Commission's rules make incumbent LECs responsible for the costs of carrying traffic on their networks to the designated point of interconnection with the competitive LEC. *See* 47 C.F.R. § 51.703(b).

[11] Of course, competitive carriers should be free to interconnect with incumbent LECs at more than one point in a LATA, should the competitive carrier choose to do so. The

Seventh, the Commission should adopt rules that facilitate indirect interconnection by expressly requiring incumbent LECs to provide transiting service to interconnecting carriers at just, reasonable, and nondiscriminatory rates.[12] Indirect interconnection through a transit service, generally provided by an incumbent LEC, is the most efficient means for competitive LECs to deploy networks and serve customers. Wireless providers also use transit services, particularly in rural areas where they do not generate sufficient volumes of traffic to deploy their own network facilities. Although the Commission reached no conclusions in the instant *Notice,* it did recognize the vital role of transit services in deployment of competitive networks.[13] The Commission also recognized in the *Notice* that although some incumbent LECs make transit services available voluntarily in the course of interconnection agreement negotiations, it is by no means the case that all incumbents do so, and there is no certainty that the rates, terms and conditions of such service offerings will permit competitive entry.[14] Given the Commission's recognition that competitive entry is not possible in the

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Commission's rules merely operate to prevent the incumbent LEC from requiring the new entrant to interconnect at multiple points in a LATA.

[12] A transit service is necessary when two carriers that are not directly interconnected seek to exchange non-access traffic by routing such traffic through an intermediate carrier's network. The intermediate carrier is often an incumbent LEC.

[13] *See Notice* at ¶ 125 ("The record suggests that the availability of transit service is increasingly critical to establishing indirect interconnection – a form of interconnection explicitly recognized and supported by the Act. It is evident that competitive LECs, CMRS carriers, and rural LECs often rely upon transit service from the incumbent LECs to facilitate indirect interconnection with each other. Without the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks.").

[14] *Notice* at ¶ 129.

absence of access to transit services, the Commission must act to adopt rules requiring incumbent LECs to provide such services at just, reasonable, and nondiscriminatory rates. The Commission has clear authority, pursuant to sections 201, 251(a) and 251(c)(2)(B) of the Act, to adopt rules requiring transit services.[15]

Eighth, the Commission should ensure that the nation's universal service system retains sufficient funding to promote important societal goals, while reforming contribution methodologies and distribution processes to make support explicit and funding fair. The best way to ensure that consumers get the best and most innovative communications products at the lowest prices is through a well-functioning competitive marketplace. The outmoded legacy universal service mechanisms threaten more than just the country's commitment to universal service: they also create substantial investment and business uncertainty for all providers, including those in urban as well as rural areas. Fundamentally, reform of universal service should focus on its beneficiary – the consumer. Universal service policies should ensure that consumers in all parts of the country, including low income Americans, have access to affordable and reasonably comparable universal telecommunications services. Universal service policies should seek to retain the core benefits of competition: consumer choice with myriad

[15] *See* 47 U.S.C. § 251(a)(1) (requiring telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers"); 47 U.S.C. § 251(c)(2)(B) (requiring incumbent LECs to provide interconnection "at any technically feasible point within the carrier's network").

services available at low prices, thus fostering the greatest amount of innovation. To do this, universal service support should be distributed in ways that allow the market for subsidized services to function just like an unsubsidized market, except with lower prices for consumers. Support must be distributed in ways that are competitively and technologically neutral, allowing the consumer to select the best services and technologies in the marketplace, rather than having government pick the technologies it thinks are best. Support should also be limited to the minimum necessary to ensure that rates for universal service are affordable and reasonably comparable. Excessive support can unnecessarily distort competitive markets and frustrate consumer choice. Similarly, universal service support must be collected in a competitively neutral manner that recognizes that consumers bear the burden of universal service, and that therefore support must be collected in the most efficient and competitively neutral manner. Finally, universal service support mechanisms must maintain a high level of accountability and transparency. The FCC and the interested public must have open and transparent ways to monitor carriers' claims for universal service support.

Finally, the Commission must ensure that the new intercarrier compensation regime does not permit any carrier to use ownership of local networks to discriminate against other carriers. The Commission must enforce rules that provide nondiscriminatory access to the public switched network, allowing all carriers to compete on the basis of quality and price of service, rather than on the advantages of incumbency. Such nondiscrimination rules will also ensure that intercarrier compensation reform does not unintentionally foreclose competition in certain markets while enhancing competition in others.

III. Transition Issues

It is clear that a unified intercarrier compensation reform cannot be adopted in a matter of weeks. The Commission must carefully evaluate the myriad reform plans that will be submitted on the record, and will likely request additional comment from interested parties before adopting final rules. As such, the Commission's existing intercarrier compensation rules will likely govern the relationship between interconnecting carriers for some time. Given the pervasive uncertainty surrounding the Commission's existing regime as it applies to certain classes of telecommunications traffic, the Commission should take the opportunity presented by the development of this record to issue a separate order clarifying the operation of certain of its rules. Such action in a timely manner is vital to maintaining the proper operation of the existing intercarrier compensation scheme while the Commission deliberates a new regime.

First, the Commission should take the opportunity to resolve certain questions raised in the D.C. Circuit's remand of the *ISP Remand Order*.[16] The Commission should rule, in a separate order released as soon as possible, that all

[16] *See Notice* at ¶ 48 ("In this proceeding, the Commission hopes to address the compensation regime for all types of traffic, including ISP-bound traffic.").

local dialed traffic (where the calling and called telephone numbers are assigned to the same local calling area) – whether VoIP, VNXX, or ISP-bound traffic -- is subject to section 251(b)(5) of the Act. Section 251(b)(5) generally governs the compensation between telecommunications carriers for the transport and termination of calls not subject to access charges. Section 252(d)(2)(A) states that, for the purpose of incumbent LEC compliance with section 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions: (i) provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier;" and (ii) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." Section 252(d)(2)(B) further provides that the language in section 252(d)(2)(A) shall not be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)."

The Commission must conclude that locally dialed ISP-bound traffic fits squarely within the parameters of section 251(b)(5) of the Act. The Commission's prior decisions excluding such traffic from section 251(b)(5) as non-local traffic, and its efforts to use section 251(g) to justify treating ISP-bound traffic as different from similar telecommunications traffic, have both been soundly rejected by the D.C. Circuit.[17] The D.C. Circuit concluded that the fact that ISP calls are jurisdictionally interstate does not mean they do not fall within section 251(b)(5). The court further concluded that ISP-bound traffic is not subject to any pre-Act obligation, pursuant to section 251(g), that would exempt ISP-bound traffic from section 251(b)(5) reciprocal compensation.[18] Section 251(b)(5) of the Act requires that all local exchange carriers "establish reciprocal compensation arrangements for transport and termination of telecommunications." The duty established by section 251(b)(5) of the Act applies to all telecommunications, including calls delivered to an ISP. In the *ISP Remand Order*, the Commission correctly acknowledged the broad scope of section 251(b)(5) of the Act: "[o]n its face, carriers are required to establish reciprocal compensation arrangements for transport and termination of all telecommunications they exchange with another telecommunications carrier, without exception."[19] As such, the applicability of section 251(b)(5) to ISP-bound telecommunications traffic is clear.

It is important for the Commission to note that various proposals for intercarrier compensation reform *require* the Commission to conclude that

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[17] *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000); *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 430 (D.C. Cir. 2002).

[18] *WorldCom*, 288 F.3d at 433.

[19] I*n the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98); *Intercarrier Compensation for ISP-Bound Traffic* (CC Docket No. 99-68), Order on Remand and Report and Order, FCC 01-131, 16 FCC Rcd 9151 (rel. Apr. 27, 2001), *remanded without vacatur*, *WorldCom, Inc. FCC*, 288 F.3d 429 (D.C. Cir. 2002) at ¶ 31 ("*ISP Remand Order*").

ISP-bound traffic is subject to section 251(b)(5) of the Act. For example, the ICF has warned the Commission not to conclude that ISP-bound traffic falls outside the scope of section 251(b)(5). Specifically, the ICF cautioned that the Commission "should not rely on a theory that particular categories of traffic are beyond even the potential scope of section 251(b)(5). Such a finding could complicate the Commission's efforts to use that provision later to exercise jurisdiction . . . ."[20] The ICF notes that its plan "does not call for an immediate shift to bill and keep for ISP-bound traffic."[21] It is clear, therefore, that the Commission cannot unduly prejudice its omnibus intercarrier compensation proceeding by concluding that ISP-bound traffic falls outside of section 251(b)(5).

As the D.C. Circuit recognized, the classification of Internet-bound traffic as jurisdictionally interstate does not mean that such traffic is not subject to section 251(b)(5) of the Act. Specifically, section 251(i) of the Act preserves the Commission's authority over interstate telecommunications services. Section 251(i) provides that: "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."[22] CompTel/ALTS agrees that the FCC has authority to conclude

[20] *See* Letter from Gary Epstein, Counsel, Intercarrier Compensation Forum, to Marlene Dortch, Secretary, FCC, WCB Docket No.s 96-98 and 99-68, at 1 (Sept. 13, 2004).

[21] ICF Sept. 13 Letter at 2 n.3.

[22] 47 U.S.C. § 251(i). *See also* H.R. Conf. Rep. No. 458, 104* Cong., 2d Sess. at 116 (1996) "New subsection 25l(i) makes clear the conferees' intent that the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission 's existing authority regarding interconnection under section 201 of the Communications Act."

that ISP-bound traffic, while clearly subject to section 251(b)(5) of the Act, also falls within the FCC's legacy jurisdiction under section 201 of the Act because of the grandfathering provisions of section 251(i) of the Act.[23] While CompTel/ALTS believes that ISP-bound traffic should be treated the same as all other 251 (b)(5) traffic, such jurisdiction would permit the FCC to maintain an interim federal pricing regime for ISP-bound traffic while it develops a unified compensation regime for all intercarrier traffic. Such a holding would ensure that the Commission continues to assert its jurisdiction over Internet traffic.

The Commission should also immediately address so-called virtual NXX/FX[24] issues in a separate order. In such arrangements, a LEC assigns a telephone number associated with a specific local calling area to a customer who may be physically located in another "distant" local calling area in order to give the customer a "local presence" in the local calling area of the assigned number. These services have been used by end users for decades, and such arrangements are often used by ISPs to provide customers a "local" phone number for dial-up access to the Internet, even where an ISP cannot as a practical or technical matter have a physical point of presence (POP) in every

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[23] The Commission has long held that ISP-bound traffic is local in nature and interstate in jurisdiction. *See, e.g., In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98); *Intercarrier Compensation for ISP-Bound Traffic* (CC Docket No. 99-68), Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, 14 FCC Rcd 3689 (rel. Feb. 26, 1999), *vacated and remanded*, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) at ¶ 23 ("*ISP Declaratory Ruling*").

[24] Virtual NXX services offered by a competitive carrier are architecturally the same as foreign exchange (FX) services offered by incumbent carriers.

local calling area in the country.[25] Such arrangements may also be used by small businesses that seek a local presence where they do not have physical facilities, so as to permit the appearance of local presence. Consumers are the obvious beneficiaries of such practice, because it allows widespread access to the Internet in rural and other areas of the country where prohibitively expensive long distance toll calls would otherwise be the only means for such access.[26] Indeed, it is important to note that Bell Operating Company ISP affiliates offer service in exactly this way.

Because the Commission has already determined that ISP-bound traffic is interstate and within the Commission's jurisdiction, it may decide to maintain the federal rate it has set for such traffic. If the Commission elects to preserve a federal rate, CompTel/ALTS urges the Commission to take the necessary steps to ensure that the federal rate is actually implemented by the states. In particular, the FCC must conclude that certain state decisions regarding so-called "foreign exchange traffic" that is ISP-bound conflict with the FCC's federal rate regime for ISP-bound traffic. Specifically, the Commission must conclude that its treatment of ISP-bound traffic here, as

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[25] Indeed, it would be incredibly inefficient for any carrier – ILEC or CLEC – to force its ISPs customers to establish a point of presence in every single central office in the country in order to serve end users. No ISP could afford to do so, and indeed, no efficient network design would contemplate such an architecture. Yet that is the very network arrangement that this Commission will force on ISPs if it does not expressly overturn those state commissions that have ruled against VNXX/FX arrangements.

[26] The Commission should also require LECs immediately and without charge to allow IXCs or their affiliates to use access trunks to receive VNXX and similar traffic at nondiscriminatory rates, terms and conditions and regardless of whether other local traffic is carried over such trunks.

under the ISP Remand Order, is not limited to situations where the ISP server is physically located within the geographic local calling area of the end user originating the call.[27] Regardless of the physical location of an ISP's equipment or its mailing address, ISP-bound calls exchanged between LECs are not excepted from section 251(b)(5) reciprocal compensation.[28] Therefore, state commission decisions that purport to impose intrastate access charge regimes on such traffic must not be permitted to stand, given their obvious conflict with assertion of federal interstate jurisdiction over such traffic.

In short, the Commission must make clear that its determinations regarding intercarrier compensation for ISP-bound traffic are based on the nature of that traffic, not on the physical location of the server. Because the FCC has authority, pursuant to sections 201, 251(b)(5) and 251(i) of the Act, to set the rate for ISP-bound traffic, states have no authority to conclude that intrastate access charges apply to such traffic. The states do, however, retain authority to arbitrate interconnection agreement disputes between carriers.

In addition, the ICF recently cautioned the Commission not to conclude that the scope of section 251(b)(5) is defined by the local calling area within which traffic originates and terminates. Specifically, the ICF noted that "[s]uch a narrow view of the statute . . . could needlessly compromise the Commission's efforts to complete comprehensive intercarrier compensation

[27] An ISP typically collocates its server at the switch site of its serving LEC. When the ISP changes LECs, it moves its server to the switch site of the new LEC.

[28] *See, e.g.*, *ex parte* presentation by XO Communications, KMC Telecom, and Xpedius, WCB Docket Nos. 96-98 and 99-68 (Sept. 9, 2004).

reform in a timely, efficient and administrable manner."[29] Not only should the Commission take the steps proposed by the ICF to avoid interference with future action on intercarrier compensation reform, it must also ensure that the states do not interfere with such action by, for example, asserting jurisdiction over ISP-bound traffic that is clearly within the FCC's ambit. State commission decisions applying intrastate access charges, or otherwise denying interstate intercarrier compensation, to ISP-bound traffic, regardless of where that traffic originates, risk "perpetuating differing rate regimes for particular categories of IP-enabled and other calls."[30] As such, the Commission should "take great care not to constrict its future authority over intercarrier compensation"[31] and must take affirmative steps to prevent state commissions from overriding the Commission's clear authority.

[29] ICF Sept. 13 Letter at 3.

[30] *Id.*

[31] *Id.*

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