Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF PAC-WEST TELECOMM, INC., US LEC CORP., RCN TELECOM SERVICES, INC., CAVALIER TELEPHONE CO., PAETEC COMMUNICATIONS, INC., BROADVIEW NETWORKS, INC., AND BRIDGECOM INTERNATIONAL, INC., TELCOVE OPERATIONS, INC.

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Dated: May 23, 2005

SUMMARY

The Commission in this proceeding is considering significant reforms to the ways carriers compensate each other when they exchange traffic and must adopt reforms in light of the enormous changes in the telecommunications industry since 2001. This docket presents the Commission with some make-it-or-break-it choices. Commenting CLECs urge the Commission to adopt focused and limited reforms that retain the portions of intercarrier compensation that work and replace the portions that do not. The Commission should adopt the cost-based approach proposed by the Cost-Based Intercarrier Compensation Coalition that would establish cost-based compensation rates for all carriers, and apply a single rate to the termination of all types of traffic, including ISP-bound traffic and VoIP traffic terminated on the public switched network. The Commission must reject bill-and-keep as the default form of intercarrier compensation because mandatory bill-and-keep is impermissible under the Telecom Act. Existing interconnection rules of a single POI per LATA to exchange traffic should not be changed. The Commission must make it clear that the fundamental obligation to interconnect networks includes the obligation to provide transit service at cost-based rates. The Commission should reject the radical changes offered by proponents like the Intercarrier Compensation Forum that have never been tested in the market or the courts and that were abandoned by more parties than the remainder that endorsed them. The Commission should reject those plans whose fundamental goal is the preservation of existing revenues. To the extent the Commission addresses universal service reform at this time, it should make universal service support explicit and funding fair.

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Pac-West Telecomm, Inc., US LEC Corp., RCN Telecom Services, Inc., Cavalier Telephone Co., PAETEC Communications, Inc., Broadview Networks, Inc., Bridgecom International, Inc., and TelCove Operations, Inc. (collectively "Commenting CLECs"), submit these comments in response to the Further Notice of Proposed Rulemaking on intercarrier compensation reform of March 3, 2005.[1]

I. INTRODUCTION

In the four years since the Commission issued its first NPRM to develop a unified intercarrier compensation regime,[2] the telecommunications industry has seen remarkable changes. Since then, the Commission has granted Bell operating companies ("BOCs") the authority to provide in-region interexchange services in 44 states.[3] Wireless carriers have seen subscription rates grow enormously. Broadband service has become widely available, and Voice

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1 *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 05-33, (rel. Mar. 3, 2005) ("FNPRM").

2 *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132, (rel. Apr. 27, 2001) ("Intercarrier Compensation NPRM" or "NPRM").

Over Internet Protocol has emerged as a viable type of service that could supplant traditional voice-grade POTS. Most recently, SBC has asked the Commission to approve its acquisition of AT&T, and Verizon has asked for approval of its acquisition of MCI. In the blink of an eye, the two largest regional Bell monopolies will be made much larger, and two of the largest competitors to the BOCs and wholesale service providers to competitive local exchange carriers ("CLECs") will vanish.

One consequence of these changes is that traffic is becoming "all distance" and carriers provide retail services on a bundled basis making no distinction between "local" and "long distance" calls. Yet today regulatory distinctions between local and long distance lie at the heart of intercarrier compensation—long distance calls are generally subject to interstate and intrastate access charges, and other calls are subject to reciprocal compensation arrangements. Just as the local and long distance distinctions are vanishing from the sphere of retail services, they must also be eliminated by telecommunications regulators.

The Commission in this proceeding is considering significant reforms to the ways carriers compensate each other when they exchange traffic and must adopt reforms in light of these enormous changes. This docket presents the Commission with some make-it-or-break-it choices. Unlike in 1996 when the Commission had a relatively blank slate on which to write its local competition rules, in 2005 the competitive local exchange industry has taken root. Not as robust as proponents and investors believed it would be by this time, but it has taken root nonetheless.

A fundamental consideration for the Commission in reaching its decisions in this case must be how intercarrier compensation reform will impact the competitive communications

[3] Prior to April 27, 2001, the Commission had granted Section 271 authority in only five states (New York, Texas, Kansas, Oklahoma, and Massachusetts).

industry. It is not enough to devise a regime that protects incumbent local exchange carriers ("ILECs") from loss of revenue as subsidy-laden access charge revenues diminish. Unless the Commission is willing to preside over a regulatory environment where competitive carriers willing to challenge the BOCs follow AT&T and MCI into extinction, it must adopt policies in this docket that will support continued intramodal competition.

Parties may disagree whether AT&T and MCI had the same opportunities to compete in the local exchange market that the BOCs were given to compete in the interexchange market. Parties may disagree whether the market-opening intentions of the Telecom Act have been fully realized. What is clear is that the competitive local exchange industry will face increased discriminatory burdens in its uphill struggle to take market share from the BOCs if the Commission adopts policies proposed by the ILECs that are transparently anticompetitive and impose onerous obligations on their local exchange competitors.

Commenting CLECs urge the Commission to adopt focused and limited reforms that retain the portions of intercarrier compensation that work and replace the portions that do not. The Commission should adopt the cost-based approach proposed by the Cost-Based Intercarrier Compensation Coalition ("CBICC").[4] The CBICC Plan would establish cost-based compensation rates for all carriers, and apply a single rate to the termination of all types of traffic, including ISP-bound traffic and VoIP traffic terminated on the public switched network. Existing interconnection rules of a single point-of-interconnection ("POI") per LATA to exchange traffic would not be changed. The Commission must make it clear that the fundamental obligation to interconnect networks includes the obligation to provide transit service

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[4] Cost-Based Intercarrier Coalition, Sept. 2, 2004 ("CBICC Proposal"), attached to Letter from Richard M. Rindler, Counsel for the Cost-Based Intercarrier Compensation Coalition, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Sept. 2, 2004).

at cost-based rates. The universal service reform proposals offered by the NARUC Intercarrier Compensation Task Force merit serious consideration.[5] The Commission should, therefore, reject the radical changes offered by proponents like the Intercarrier Compensation Forum ("ICF")[6] that have never been tested in the market or the courts and that were abandoned by more parties than the remainder that endorsed them. The Commission should also reject those plans whose fundamental goal is the preservation of existing revenues.

II. THE KEY GOALS OF INTERCARRIER COMPENSATION REFORM MUST BE ECONOMIC EFFICIENCY AND THE PROMOTION OF COMPETITION

Commenting CLECs agree with the FCC's statement of principles in the FNPRM. This docket presents the Commission with the opportunity to unify the different intercarrier compensation mechanisms into a single regime that could greatly simplify traffic exchange arrangements and provide much-needed rationality to the process of carriers' using each others networks to complete telephone calls. Commenting CLECs urge the Commission to keep economic efficiency and promotion of competition as the key attributes of intercarrier compensation reform. While intercarrier compensation reform implicates many regulatory issues, the best approach for the Commission at this time is to focus on the key objectives, and limit its scope to only the most important reforms.

A. The Commission Should Eliminate Regulatory Distinctions That Provide Incentives To Provide Service In Less Than Optimal Ways

The most important thing the Commission can do in this docket is to unify the intercarrier compensation regimes. As the Commission is aware, the straightforward service of call

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[5] NARUC March 1, 2005 Ex Parte, "Intercarrier Compensation Proposal, Version 5." ("NARUC Task Force Proposal").

[6] Regulatory Reform Proposal of the Intercarrier Compensation Forum, October 5, 2004 ("ICF Proposal"), attached to Letter from Gary M. Epstein and Richard R. Cameron, Counsel for the Intercarrier Compensation Forum, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, Tab A (filed Oct. 5, 2004).

termination has at least four different types of compensation: intrastate access charges, interstate access charges, reciprocal compensation, and intercarrier compensation for ISP-bound traffic. As a result, carriers that pay compensation seek to have the traffic they originate classified at the lowest rate; carriers that receive compensation seek to have the traffic they terminate classified at the highest rate. Thus, not only is a significant portion of business planning for competitors taken up with consideration of ways to reduce excessive access charge expenses while also seeking to maximize access charge revenues, competitors must attempt to divine which compensation regime may apply to the traffic as new services are created based on the newest technologies. If all transport and termination services were priced the same, and the pricing regime were cost-based and stable, carriers could concentrate on competing for service on the basis of quality of service, new products, and price.

Further, by adopting a uniform cost-based intercarrier compensation regime, the Commission could eliminate a considerable amount of regulation and litigation. Endless disputes over the classification of calls as local or long distance, interstate or intrastate, traditional circuit-switched or emerging IP-enabled, would be eliminated. All traffic terminated on the public switched telephone network ("PSTN"), regardless of origin or technology, would be subject to the same intercarrier compensation mechanism.[7]

If the pricing regime for intercarrier compensation is not cost-based, the Commission can expect parties to expend time, effort, and money to find ways to maximize the returns while operating within the compensation system, as well as dispute and litigate rates that appear unreasonable and unsubstantiated. Just as above-cost rates compel certain profit-maximizing

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[7] Commenting CLECs assert that, at this time, the Commission does not need to address intercarrier compensation for purely packet-switched traffic, such as the traffic on the Internet that does not originate or terminate on the PSTN.

behavior, below-cost rates will also compel profit-maximizing behavior. Moreover, the "heavy lifting" to establish a cost-based intercarrier compensation regime has been completed. States have already set reciprocal compensation rates for the major ILECs under the Commission's TELRIC cost standard, and some have already revised those rates downward. By adopting the existing cost-based reciprocal compensation rates for all intercarrier compensation, the Commission would be building upon a substantial amount of hard work already performed by state commissions on this issue. On the other hand, adoption of an intercarrier compensation regime that does not rely on cost-based rates—such as the bill-and-keep arrangements proposed by ICF and the wireless carriers—would discard almost nine years of state proceedings examining reciprocal compensation rates.

The Commission's belief that it can never get the rates right, and therefore it shouldn't try, is erroneous.[8] After nine years of experience under the Telecom Act, it is fairly safe to say that reciprocal compensation rates have settled to the actual cost of providing transport and termination.[9] History has already proven that when reciprocal compensation rates are set too high as initially advocated by the ILEC, and then the ILEC fulfills its own prophecy of "find[ing] itself writing large monthly checks to new entrants,"[10] those rates come down. That is exactly what market forces do: they drive prices to cost. Reciprocal compensation rates had been trending downward even before the Commission's decision in the *ISP Remand Order* to slash the

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8 *See, e.g.*, FNPRM Appendix C at 108; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), *remanded, WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003) ("*ISP Remand Order*") at ¶ 76.

9 Also disproving the Commission's position is the fact that the rates tested by time are not substantially different from the proxy rates set by the Commission in the *Local Competition Order* in 1996. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *vacated in part, Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721 (1999) ("*Local Competition Order*") at ¶ 1060.

rate of compensation for terminating calls to ISPs. It is possible to get the rate right, as the States have demonstrated.

B. Intercarrier Compensation Reform Should Adhere To Existing Law And Respect State Commission Jurisdiction

The FCC has ample authority under the Communications Act of 1934, as amended by the Telecommunications Act of 1996, to devise an intercarrier compensation regime that promotes competition and compensates carriers for the services they provide for other carriers. The legal authority to establish a unified cost-based intercarrier compensation mechanism is discussed below in Section III. Moreover, the Commission should not seek to preempt state commission jurisdiction over intrastate services. Whether the Commission may or may not preempt state commission jurisdiction over an intercarrier compensation mechanism for intrastate services is not a struggle worth undertaking. Instead, the Commission should adopt an approach that shares jurisdiction with the states along the lines of the approach proposed by the NARUC Intercarrier Compensation Task Force, which, unlike some other proposals, is consistent with the structure envisioned by the Telecom Act and upheld by the Supreme Court.

C. Intercarrier Compensation Reform Should Improve The Universal Service System By Making Support Explicit And Funding Fair

Commenting CLECs strongly support the universal service policy goals of the FCC. Commenting CLECs, however, have a limited business interest in the implementation of those goals. They generally are not recipients of USF support. They are opposed, however, to universal service policies that are centered on an effort to maintain ILEC revenues absent a substantial showing that such revenues are essential to the Act's universal service policy goals. As NASUCA notes, universal service policy should focus on what is best for consumers that

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[10] Reply Comments of Bell Atlantic, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (May 30, 1996) at 21.

deserve universal service support, not on the carriers that serve those customers.[11] Commenting CLECs also support funding mechanisms that are fair to all carriers and can be seen as predictable business expenses.

III. LEGAL ISSUES

The Commission has ample authority under the Act to implement intercarrier compensation reform. Section 201 provides the Commission with jurisdiction over all interstate or foreign communications by wire or radio, and the Telecom Act of 1996 expands the Commission's jurisdiction into the regulation of competition in the local exchange through enforcement of the Telecom Act.[12]

In the FNPRM, the Commission correctly identified specific statutory requirements that it felt governed intercarrier compensation reform: the reciprocal compensation requirement at section 251(b)(5); the pricing standard for reciprocal compensation at section 252(d)(2); and the rate averaging and rate integration requirements at section 254(g).

A. A "Unified" Intercarrier Compensation Regime Must Adhere to the Section 252(d)(2) "Additional Cost" Standard

A unified intercarrier compensation regime must bring together the disparate intercarrier compensation structures developed under section 201, section 251(g), section 251(b)(5), and applicable state law. Because any unified intercarrier compensation regime must encompass the reciprocal compensation requirements of section 251(b)(5), the rate-setting basis for a unified intercarrier compensation regime must be consistent with the pricing standard for reciprocal compensation found at section 252(d)(2) of the Act. Thus, all intercarrier compensation reform

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11 NASUCA Intercarrier Compensation Proposal, December 14, 2004 (NASUCA Proposal), attached to Letter from Philip F. McClelland, Senior Assistant Consumer Advocate, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, Attach. (filed Dec. 14, 2004).

12 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721, 730 (1999).

must stem from a rate that is permissible under section 252(d)(2). For the purposes of developing a <u>unified</u> intercarrier compensation regime the Commission is restricted by sections 251(b)(5) and 252(d)(2) of the Act.

Section 252(d)(2) requires, in pertinent part, that reciprocal compensation rates are just and reasonable only if "(i) such terms and conditions 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) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[13] A unified intercarrier compensation regime must satisfy this standard. As the Commission recognizes, the only proposal for a unified intercarrier compensation regime that is consistent with existing law is the cost-based approach of CBICC.[14]

1. The "Additional Cost" Standard Should Continue to be Tied to TELRIC

In its 1996 *Local Competition Order*, the Commission interpreted the "additional cost" standard for reciprocal compensation at section 252(d)(2) to be the same as the TELRIC standard it developed for unbundled network elements.[15] The Commission should not abandon this view.

Fortunately, a substantial body of decisions establish a benchmark for determining whether a particular reciprocal compensation rate is a "reasonable approximation" of the "additional costs of terminating such calls." Since 1996, the Commission has required ILECs to provide switching as an unbundled network element. As the Commission has already

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13 47 U.S.C. § 252(d)(2).
14 FNPRM at ¶¶ 65, 66.
15 *Local Competition Order* at ¶ 1054.

recognized, the network functionality for which reciprocal compensation is owed is the same as the network functionality required to be provided as an unbundled network element.[16]

Even though switching is no longer required as a section 251 unbundled network element, every state commission has either set an unbundled switching rate through the arbitration process, or has approved interconnection agreements that include rates for unbundled switching. Those rates reflect the forward-looking cost of a carrier to provide terminating switching. A reciprocal compensation rate would be “a reasonable approximation” of a carrier’s costs to terminate a call only if it is reasonably comparable to the carrier’s TELRIC cost for the switching unbundled network element.

If the Commission wanted to require a reciprocal compensation rate different from the UNE switching rate, it would need to explain how the services of “transport and termination” under section 251(b)(5) differ substantially from the definition of the switching unbundled network element from which state commissions determined their UNE switching rates. Considering that the Commission has already determined that switching as a UNE is “largely indistinguishable” from the termination services for which reciprocal compensation is owed, this would be extremely difficult for the Commission to do.

Word games over the term “additional costs” should be avoided.[17] In the *Local Competition Order*, the Commission decided that “the ‘additional cost’ to the LEC of terminating a call that originates on a competing carrier’s network primarily consists of the

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16 *Local Competition Order* at ¶ 1054.

17 As more thoroughly explained in the white paper prepared by Lee L. Selwyn and Helen E. Golding, Economics and Technology, Inc., “Intercarrier Compensation In a Diverse Competitive Environment,” filed today in this docket, the idea that terminating switching costs could be considered *de minimis* “is at odds with economic reality.” Selwyn & Golding at 14-17.

traffic-sensitive component of local switching."[18] The Commission also rejected the idea that reciprocal compensation rates should be limited to incremental costs: "A rate equal to incremental costs may not compensate carriers fully for transporting and terminating traffic when common costs are present. We therefore reject the argument by some commenters that 'additional costs' may not include a reasonable allocation of forward-looking common costs."[19]

One might surmise from the FNPRM that the Commission is considering a reciprocal compensation rate that differs from the TELRIC rate for UNE switching on the grounds that the TELRIC rate does not reflect the "additional cost" standard required by section 252(d)(2). This argument likely would be based on a legal interpretation that the UNE pricing standard ("the cost . . . of providing the interconnection or network element") differs from the reciprocal compensation pricing standard ("a reasonable approximation of the additional costs of terminating such calls.") First, the Commission has already rejected this argument.[20] Absent a reasonable argument that the Commission erred in its original interpretation of the statute, it is bound by that earlier decision.[21]

Second, it would be difficult to square Congress' intent to compensate terminating carriers for their "additional costs" with the notion that a terminating carrier has no "additional costs." Clearly Congress expected there to be some level of compensation paid to terminating carriers, while recognizing that in some cases carriers may choose to "waive" recovery of their costs by offsetting the obligations they owe with the right to compensation to which they are entitled. If the Commission thought that terminating carriers had zero "additional costs," then there would never be any situation in which carriers enter into arrangements that "waive mutual

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18 *Local Competition Order* at ¶ 1057.
19 *Local Competition Order* at ¶ 1058.
20 *Local Competition Order* at ¶ 1054.

recovery" of their costs or "offset reciprocal obligations." An "obligation" to owe somebody nothing (which would be the case if "additional costs" were zero) can hardly be considered an obligation at all.

Further, if the Commission is reconsidering its decision from 1996 to link the reciprocal compensation rate under 252(d)(2) with the unbundled network element rate for switching under 252(d)(1) in order to generate a lower reciprocal compensation rate, it must also consider that delinking 252(d)(2) from TELRIC might also result in a higher reciprocal compensation rate. The cost standard for reciprocal compensation is "a reasonable approximation of the additional costs of terminating *such* calls," not *all* calls. The "such calls" referred to in the statute are the calls originated by other carriers. If a terminating carrier is required to augment its network facilities in order to transport and terminate traffic coming to it from other carriers, all of the costs of such augmentation could be reasonably considered to be "additional costs" to terminate "such calls." In other words, a terminating carrier might be entitled to reciprocal compensation at a rate that permits it "mutual and reciprocal recovery" of all costs incurred to handle the increase of traffic coming from other carriers: the baseline costs of a network without any traffic coming to it from other carriers are excluded from the reciprocal compensation cost standard, while any costs beyond the baseline costs that are incurred to handle another carrier's traffic would be recovered through reciprocal compensation. For example, if a hypothetical carrier were to design and build a network whose sole function was to terminate calls originated by other carriers, then it is conceivable that the "additional costs" to terminate the calls from other carriers were all of the costs of that carrier's network. Commenting CLECs are not advocating adoption of this alternative cost standard; instead, Commenting CLECs assert that the cost

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[21] *National Ass'n of Broadcasters v. FCC,* 740 F.2d 1190 (D.C. Cir. 1984).

standard for reciprocal compensation should be the same cost standard that applies to unbundled network elements, and both should be set at TELRIC.

Contrary to the Commission's apparent belief, TELRIC rates are not one of the problems associated with intercarrier compensation.[22] Commenting CLECs assert that the position that TELRIC rates for reciprocal compensation "has created some problems" improperly pre-judges the issue. What the Commission ignores is that the TELRIC rate for reciprocal compensation must reflect the ILEC's rate to terminate a call, and it must also reflect the most efficient technology available. Accordingly, an ILEC should be indifferent to whether it incurs the cost itself or pays another carrier to incur the cost. If reciprocal compensation rates overcompensate a carrier (meaning that the terminating carrier's costs are below the set compensation rate), then the ILEC has improperly set the rate. As discussed above, however, after nine years of implementation of the Telecom Act, it is safe to say that reciprocal compensation rates reflect forward-looking costs.

2. Mandatory Bill-and-Keep Is Not Permissible

Mandatory bill-and-keep when traffic is out of balance can never satisfy the 252(d)(2) standard. Section 252 of the Act requires the "mutual recovery of costs" between carriers terminating each other's traffic. When traffic is out of balance, bill-and-keep does not provide for the mutual recovery of costs. Bill-and-keep also fails the standard of section 252 because it would not provide recovery of the "additional costs of terminating such calls." The Commission cannot reconcile a mandatory bill-and-keep arrangement with the plain language of the Act, a conclusion the Commission came to in 1996 in the *Local Competition Order*.[23]

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22 FNPRM ¶ 66.

23 *Local Competition Order* ¶¶ 1033-1034.

Second, a terminating compensation rate of zero under bill-and-keep arrangements, without the consent of the terminating carrier, is not "just and reasonable," and therefore would violate Section 201. As long as the Commission requires compensation by any carrier to any other carrier for the provision of any service, it is difficult to imagine how the Commission could justify no compensation for the provision of the fairly simple service of transport and terminating switching for the completion of a telephone call. If a zero rate of compensation can satisfy a "just and reasonable" standard, then the Commission can expect any number of petitions seeking to set rates for unbundled network elements at the same zero compensation rate. If an ILEC is not entitled to compensation from another carrier for providing transport and termination, it is probably not entitled to compensation when it is providing other services or functions of its network.

In addition, Section (B), the "Rules of Construction" for the reciprocal compensation pricing standard, permits the Commission to allow "arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations." The heart of this requirement is that a carrier must be permitted to recover its costs <u>only</u> through the offsetting of reciprocal obligations. It does not permit the Commission to order that a carrier recover its costs from its own end users. A carrier can only recover its terminating switching costs without receiving compensation from the originating carrier if the terminating carrier owes the originating carrier enough compensation to offset the amount that the terminating carrier would be owed. As long as the terminating carrier incurs costs to terminate traffic for another carrier, and the terminating carrier does not incur a reciprocal obligation to the originating carrier, bill-and-keep can never satisfy the 252(d)(2) pricing standard. Parties may mutually agree not to seek compensation, of course, and subsection (B) of section 252(d)(2) permits the Commission to accept such arrangements, but under the law, the Commission simply cannot order a party not to collect compensation from a carrier sending traffic to it for termination under section 251(b)(5).

Further, the Telecom Act anticipated that carriers may wish to adopt bill-and-keep arrangements by specifically identifying "arrangements that waive mutual recovery" of costs as acceptable alternatives to reciprocal compensation. 47 U.S.C. §252(d)(2)(B)(i). The word "waive," however, requires some affirmative, voluntary, and intentional action on the part of a carrier;[24] the Commission cannot order a carrier to "waive" its rights under the Act.

3. Capacity-Based Charges Need Further Study

The Commission also seeks comment on whether to replace per-minute charges with capacity-based charges.[25] Capacity-based charges would satisfy the legal requirement under section 252(d)(2) that reciprocal compensation arrangements "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." A properly set capacity-based charge would also be "a reasonable approximation of the additional costs of terminating such calls." As a legal matter, therefore, capacity-based charges are permissible forms of reciprocal compensation arrangements.

Commenting CLECs are not opposed to capacity-based charges in lieu of per-minute charges, but the Commission should realize that capacity-based port charges have problems of there own. In particular, it is not clear how carriers would be responsible for augmenting capacity to meet demand. Under per-minute charges, the terminating carrier simply tracks the number of minutes of traffic coming from an originating carrier, and then bills the originating

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[24] Webster's New College Dictionary defines "waive" as "to give up or relinquish (a right or claim) voluntarily." Similarly, a "waiver" is "Intentional relinquishment of a right, claim, or privilege." (emphasis added)

[25] FNPRM ¶ 70.

carrier accordingly. Under a capacity-based port charge system, the terminating carrier would dedicate a certain amount of switch capacity to the originating carrier. The problems with capacity-based port charges arise when the originating carrier sends the terminating carrier more traffic than the terminating carrier has dedicated to the originating carrier. Is the terminating carrier allowed to bill the originating carrier in a capacity-based increment for the overflow? Are the overflow calls to be blocked by the terminating carrier? These are just a sample of the potential problems that arise under a capacity-based port charge system that do not occur under a per-minute compensation system.

4. Forbearance from Enforcement of Section 251(b)(5) Is Not Authorized

The FNPRM also seeks comment on whether the Commission has the authority to forbear from enforcing the section 251(b)(5) reciprocal compensation requirement.[26] Commenting CLECs assert that the statutory requirements for forbearance are clear, and they cannot be met under these circumstances. Forbearance is permissible only if enforcement of section 251(b)(5) is not necessary to ensure that the charges and practices of telecommunications carriers are just and reasonable and not unjustly or unreasonably discriminatory. Forbearance would only be conceivable if the FCC concludes that a reciprocal compensation rate of zero is just and reasonable. As explained above, a mandatory reciprocal compensation rate of zero when traffic is out of balance can never be just and reasonable.

5. Transport and Network Interconnection Rules Should Remain Unchanged

The requirement for a single POI in a LATA is the only alternative proposed to date that the Commission has already found satisfies the requirements of the Act. The Act grants CLECs, not ILECs, the right to select the POI, which the ILEC must provide at any technically feasible

[26] FNPRM ¶ 74.

point selected by the CLEC.[27] As a result, the Act and the FCC recognize that new entrants must be able to determine the most efficient location for the exchange of traffic.

Section 251(b)(5) imposes additional obligations on the parties. This Section requires that each party: (i) establish reciprocal compensation arrangements for the transport and termination of telecommunications;"[28] (ii) bear financial responsibility for transporting its originating telecommunications traffic to the point of interconnection selected by the requesting carrier;[29] and (iii) compensate the terminating carrier for the transport[30] and termination services provided to terminate the call.[31] Together, the ILEC's interconnection and compensation duties, sometimes referred to as "the rules of the road," require the ILEC to bear financial responsibility for delivering traffic originated by its customers to the CLEC's chosen POI.[32]

Requiring the originating LEC to bear the costs of delivering its originating traffic to the POI selected by the CLEC, and to compensate the terminating LEC for the transport and termination functions it performs, is a function of the current calling-party's-network-pays ("CPNP") regime.[33] As the Commission has found, a LEC's costs of delivering its originating traffic to the network of a co-carrier are recovered in the LEC's end users' rates. The FCC has explained its rationale as follows:

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27 47 U.S.C. § 251(c)(2)(B).

28 47 U.S.C. § 251(b)(5).

29 47 C.F.R. § 51.703(b); *Local Competition Order* at ¶¶ 1042, 1062; *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218 *et al.*, Memorandum Opinion and Order, DA 02-1731, at ¶ 52 (rel. Jul. 17, 2002) ("*FCC Arbitration Order*").

30 FCC rules define transport as "the transmission… of telecommunications traffic…from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party." 47 C.F.R. § 51.701(c).

31 47 U.S.C. § 251(b)(5); 47 C.F.R. §§ 51.701(e), 51.703(e).

32 *TSR Wireless, LLC. v. U S West Communications, Inc.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194, ¶ 34 (rel. June 21, 2000) ("*TSR Wireless*") (emphasis added), *aff'd, Qwest Corp. et al. v. FCC et al*, 252 F.3d 462 (D.C. Cir. 2001); *FCC Arbitration Order* at ¶ 67.

> In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call. Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.[34]

Pre-empting and standing in the place of the Virginia Commission, the FCC's Wireline Competition Bureau ("Wireline Bureau") considered Verizon's arguments concerning the interpretation of the FCC's rules and paragraphs 199 and 209 of the *Local Competition Order* and it resolved that dispute by rejecting the ILEC proposal for multiple POIs in a LATA entirely.[35] In addition, the Wireline Bureau clarified that under FCC rules, the ILEC must also compensate the CLEC for the dedicated transport that the CLEC provides from the POI to the CLEC's switch, at which point the termination portion of reciprocal compensation applies.[36] State commissions in several states have reached the same results.[37]

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33 *Intercarrier Compensation NPRM* at ¶ 9.

34 *TSR Wireless* at ¶ 34 (emphasis added).

35 *FCC Arbitration Order* at ¶¶ 39, 51-54.

36 *FCC Arbitration Order* at ¶¶ 66, 67 n. 187. The *FCC Arbitration Order* provides a succinct summary of the obligations an ILEC bears under federal rules: (1) competitive LECs have the right, subject to questions of technical feasibility, to determine where they will interconnect with, and deliver their traffic to, the incumbent LEC's network; (2) competitive LECs may, at their option, interconnect with the incumbent LEC's network at only one place in a LATA; (3) all LECs are obligated to bear the cost of delivering traffic originating on their networks to interconnecting LECs' networks for termination; and (4) competitive LECs may refuse to permit other LECs to collocate at their facilities.

37 *Petition by AT&T Communications of the Southern States, Inc., d/b/a AT&T for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc., Pursuant to 47 U.S.C. Section 252*, Docket No. 000731-TP, Final Order on Arbitration, Order No. PSC-01-1402-FOF-TP, at 41 (Fla. PSC June 28, 2001). ("AT&T should be permitted to designate the interconnection points in each LATA for the mutual exchange of traffic, with both parties assuming financial responsibility for bringing their traffic to the AT&T designated interconnection point."); *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Michigan,* Case No. U-12460, Opinion and Order, 33-35 (Mich. PSC Oct. 24, 2000)*; Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(b)*

Further, if the BOCs seek revision to the statutory requirement permitting CLECs to establish a single POI per LATA, revision may be appropriate with the BOCs' authority to provide in-region interexchange services throughout the country in mind. The original rule that required CLECs to establish at least one point of interconnection with the ILEC within a LATA presumably imposed that geographic limitation because the BOCs were prohibited from providing transport services across LATA boundaries.[38] If a CLEC attempted to designate a single POI within a multi-LATA state, the BOC would be legally prohibited from transporting traffic it originated to that POI unless it had already obtained section 271 authority.[39] Because no BOC had been granted section 271 authority at the time the original network interconnection rules had been established in 1996, a CLEC could not expect a BOC to provide interLATA transport and had to exchange traffic with the BOCs only on a LATA-by-LATA basis. Now that every BOC has obtained section 271 authority in every state where it was needed, every BOC may transport traffic across LATA boundaries and the single POI per LATA requirement is an anachronism. This rule now actually imposes obligations on CLECs to interconnect with BOC networks <u>greater</u> than those required by the Act.

Commenting CLECs are not at this time advocating the elimination of the single-POI-per LATA requirement. They have already established POIs with the BOC networks that are serving them well and are not interested at this time in relocating those traffic-exchange points. Commenting CLECs note, however, that the Act permits CLECs to interconnect with ILECs "at

of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc., Case 01-C-0095, Order Resolving Arbitration Issues, 25-28 (N.Y. PSC Jul. 26, 2001); *Re Global NAPs, Inc.*, DT 02-207, Order No. 24,087 (NH PUC Nov. 22, 2002); *Re Global NAPs, Inc.*, Docket No. 6742 (Vt. PSB Dec. 26, 2002), 2002 WL 32059712 at *3-5, *21-22; *Re Global NAPs, Inc.*, Docket No. 011666-TP, PSC-03-0805-FOF-TP, Final Order on Arbitration (Fla. PSC July 9, 2003), 2001 WL 21658341at *5, *6; *AT&T Broadband Phone of Kentucky, LLC v. ALLTEL Kentucky, Inc.*, Order, Case No. 2003-00023 (Ky. PSC Mar. 25, 2004).

[38] *See, e.g., Application by SBC Communications, Inc. et al. to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, at ¶ 78.

any technically feasible point within the carrier's network" "for the transmission and routing of telephone exchange service and exchange access," and that nothing now prohibits any of the BOCs from transporting calls from one LATA to another.

The Commission should also take the opportunity to make clear that transport facilities between a CLEC switch and an ILEC switch are interconnection facilities under section 251(c)(2) that must be provided at TELRIC rates. In the *Triennial Review Order*, the Commission distinguished transport facilities that would qualify as UNEs from transport facilities provided as interconnection facilities: the Commission explained that "transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic" were "[u]nlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection."[40] Section 251(c)(2) interconnection facilities must be provided under the same pricing principles as UNEs. Section 251(c)(2)(D) requires interconnection facilities to be provided "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with . . . the requirements of this section and Section 252." This is identical to the pricing standard for UNEs found at section 251(c)(3), which must be provided "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and Section 252." The pricing standards under Section 252(d)(1) apply specifically and equally to section 251(c)(2) interconnection facilities and section 251(c)(3) network element charges. Thus, the facilities provided by an ILEC to interconnect in order to exchange traffic with a CLEC, such as interconnection trunks

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[39] 47 U.S.C. § 271(a), (b)(1).

[40] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking CC Docket Nos. 01-338, 96-98 and 98-147, FCC 03-36 (rel. Aug. 21, 2003) ("*Triennial Review Order*") at ¶ 365.

between an ILEC wire center and the CLEC wire center, are interconnection facilities under section 251(c)(2) that must be provided at TELRIC.

6. Tandem Transit Services Are Essential and Must Be Provided by ILECs at TELRIC Rates

The Commission is correct to recognize that the availability of tandem transit service is increasingly critical to establishing indirect interconnection among carriers, and that transit service is an efficient way to interconnect carriers that do not exchange significant amounts of traffic.[41] Commenting CLECs assert that ILECs have an obligation under both section 251(a) and 251(c)(2) to provide tandem transit service to any requesting telecommunications carrier, and the appropriate pricing standard is the section 252(d) standard that applies to section 251(c)(2).

Tandem transit service was raised as an issue in the Wireline Competition Bureau's Virginia Arbitration Order. The Bureau in that case did not rule on whether ILECs have an obligation to provide tandem transit service; the Bureau decided only that it was not going to establish Commission precedent and order ILECs to provide tandem transit service at TELRIC rates.[42] The Commission should take the opportunity to make such a ruling in this proceeding.

In fact, section 251(c)(2) requires an ILEC to provide interconnection with its network "for the transmission and routing of telephone exchange service and exchange access." This requirement is not limited only to the routing of traffic originated by either the ILEC or the requesting carrier. The statute is written broadly enough to include traffic originated by a third party or terminated to a third party. In order for a competitive carrier to transmit and route

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41 FNPRM ¶ 125.
42 FCC Arbitration Order at ¶ 117.

telephone exchange service to a third-party carrier, at the request of the competitive carrier, an ILEC has an obligation under 251(c)(2) to provide tandem transit service.

Further, section 251(a) imposes a general duty on all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." The "indirect" interconnection option has no meaning if a CLEC cannot avail itself of the right to access third-party networks via the ILEC. Otherwise, an ILEC could use its market power to compel all CLECs to use only the "direct" option to interconnect with other networks.

Taken together, 251(c) and 251(a) indicate policy preferences to encourage efficient interconnection among all networks. In many cases, use of ILEC-provided tandem transit is the most efficient form of inter-network interconnection available. To find that there is no obligation of the ILEC to provide tandem transit would permit the ILEC to exercise its market power over CLEC interconnection, to the detriment of the CLEC and policy goals overall.

Numerous state commissions have already ruled that ILECs have an obligation to provide tandem transit service. The North Carolina Utilities Commission ordered Verizon to provide tandem transit service, and questioned why Verizon was even challenging its obligation. In one of the best statements of the issue to date and the policy favoring a transit requirement, the NCUC said:

> If there were no obligation to provide transit service, the ubiquity of the telecommunications network would be impaired. . . The fact of the matter is that transit traffic is not a new thing. It has been around since "ancient" times in telecommunications terms. The reason that it has assumed new prominence since the enactment of [the Telecom Act] is that there are now many more carriers involved—notably, the CMRS providers and the [CLECs]—and the amount of traffic has increased significantly. Few, if any, thought about complaining about transit traffic until recently. It strains credulity to believe that Congress, in [the Telecom Act] intended, in effect, to impair this ancient practice and make it merely a matter of grace on the part of ILECs, when doing so would

> inevitably have a tendency to thwart the very purposes that [the Telecom Act] was designed to allow and encourage.[43]

State Commissions in Michigan,[44] Connecticut,[45] Massachusetts,[46] California,[47] and Indiana[48] have also required ILECs to provide tandem transit service to requesting telecommunications carriers.

In Illinois, the Administrative Law Judge in the arbitration proceeding between SBC and Level 3 has issued a proposed decision recently requiring SBC to provide tandem transit service.[49] The Proposed Decision states as follows:

> This Commission now confirms that ILEC transiting promotes telecommunications competition and efficiency (both economic and technical), that it is an essential element of carrier interconnection under the Illinois PUA, and that a transiting requirement is not inconsistent with the Federal Act. An ILEC is ubiquitous within its service territory,

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43 *Petition of Verizon South, Inc., for Declaratory Ruling that Verizon is Not Required to Transit InterLATA EAS Traffic between Third Party Carriers and Request for Order Requiring Carolina Telephone and Telegraph Company to Adopt Alternative Transport Method*, Docket No. P-19, Sub 454, Order Denying Petition (NCUC Sep. 22, 2003) at 6-7.

44 *Petition of Level 3 Communications, LLC, for arbitration pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the applicable state laws for rates, terms, and conditions of an interconnection agreement with Michigan Bell Telephone Company, d/b/a SBC Michigan*, Case No. U-14152, Decision of the Arbitration Panel (Mich. PSC Dec. 10, 2004).

45 *Petition of Cox Connecticut Telcom, L.L.C. For Investigation of The Southern New England Telephone Company's Transit Service Cost Study Rates*, Docket No. 02-01-23, Decision, (Conn. DPUC Jan. 15, 2003) at 14.

46 *Petitions of MediaOne Telecommunications of Massachusetts, Inc. and New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for arbitration, pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement, and Petition of Greater Media Telephone, Inc. for arbitration, pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts*, D.T.E. 99-42/43, D.T.E. 99-52, (Mass. D.T.E. Aug. 25, 1999) ("[W]e find that Section 251(c)(2) requires, not just permits, Bell Atlantic to make available to new entrants its network for the purpose of allowing new entrants to exchange traffic with other CLECs without having to interconnect with each and every CLEC.")

47 *Petition of Level 3 Communications, LLC (U-5941-C) for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms and Conditions for Interconnection with SBC Bell Telephone Company dba SBC California and SBC Communications*, A.04-06-004, Draft Arbitrator's Report (Ca. PUC Dec. 22, 2004) at 39.

48 *Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(B) of the Communications Act of 1934, As Amended By The Telecommunications Act of 1996, and the Applicable State Laws For Rates, Terms, And Conditions Of Interconnection With Indiana Bell Telephone Company d/b/a SBC Indiana*, Cause No. 42663 INT-01, (Ind. URC Dec. 22, 2004) at 12.

49 *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, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Illinois Bell Telephone Company (SBC Illinois)*, Docket No. 04-0428, Proposed Arbitration Decision, (Ill. PUC Dec. 23, 2004) at 74.

> while a CLEC will not necessarily have sufficient resources to directly interconnect with every other CLEC in that territory, at least until its traffic to each such CLEC reaches the critical mass that justifies capital investment. Furthermore, neither competition nor customer welfare would be promoted by deploying assets to directly interconnect CLECs that exchange trivial traffic quantities. We further conclude that, to promote competition and efficiency, the terms and conditions governing transiting should be addressed in the parties' ICA with the other terms governing interconnection, unless the parties agree otherwise.[50]

The Commission should rule, consistent with these state commission decisions, that ILECs have an obligation under section 251(c)(2) of the Act to provide tandem transit service. As a section 251(c)(2) interconnection obligation, the proper pricing standard for tandem transit service is TELRIC under section 252(d)(2).

B. This Commission Should Not Initiate a Preemption Battle With the States

The Commission also seeks comment on the Commission's legal authority to preempt intrastate access charge mechanisms. The FNPRM states that the Commission had previously identified section 251(g) as carving out intrastate access charge requirements from the section 251(b)(5) obligations, and asks whether section 251(g) also permits the Commission to replace intrastate access regulation with some alternative mechanism.[51]

The Commission should abandon any approach that attempts to preempt state commission jurisdiction over intercarrier compensation. As the results of the NARUC Task Force demonstrate, the States will fiercely defend their authority to regulate intercarrier compensation for intrastate communications. Instead of provoking prolonged and contentious litigation with the States, the Commission should engage the States in a reasonable compromise that shares regulation of intercarrier compensation for intrastate communications. The industry

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50 *Id.*
51 FNPRM ¶ 79.

would be best served by certainty on this issue and provoking a legal battle with the States will not accomplish this objective.

Further, the statutory basis for preemption is not clear. Section 251(g) does not clearly apply to intrastate communications; it refers to exchange access arrangements established by the Commission prior to the 1996 Act, which would necessarily be interstate access charges, but it does not refer to such arrangements established by the states. Therefore, section 251(g) by itself does not provide grounds for the Commission to preempt States on the regulation of intrastate exchange access charges. The Commission has interpreted section 251(g) to exclude intrastate access charges from reciprocal compensation requirements, but that legal theory has not been subjected to judicial review.

Recognizing this potential hole in the statutory scheme, the FNPRM also seeks comment on alternative legal theories to preempt intrastate access requirements, such as the "mixed use" or "impossibility" doctrine.[52] In particular, with the development of number portability and the use of VoIP and CMRS services, the FNPRM asks whether telephone numbers still indicate the geographic location of the end users. Commenting CLECs assert that, over time, the current telephone numbering system in the United States, first established by AT&T in 1947, will become obsolete as telephone numbers will bear less and less relation to a specific geographic location. That is not the case now, however, as CMRS telephone numbers are still assigned on a geographic basis and VOIP services are still largely in their infancy. Even when VOIP service becomes more prevalent, the connection between a telephone number and specific physical location will persist. Telephone numbers that do not indicate the geographic location of end

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[52] FNPRM ¶ 80.

users are now, and will continue to be, the exception to the rule and not of enough significance to warrant the preemption of state commission jurisdiction over intrastate exchange access charges.

C. Joint Board Referrals Should Be Made As a Matter of Courtesy, Not Necessity

The FNPRM seeks comment on whether the Commission should refer any of the issues related to intrastate access charges to a Joint Board, and whether any of the issues in this docket fall within the scope of the mandatory referral requirement of section 410(c). Commenting CLECs assert that the Commission should engage the existing Joint Boards on Universal Service and Separations to consider the proposed revisions to the intercarrier compensation regimes, but it is not required to wait for their responses before imposing changes. The only mandatory joint board referral is for matters pertaining to separations, and separations issues do not appear to be implicated here.[53] The NARUC Task Force has proposed a reasonable compromise that engages the Federal-State Joint Boards on the issues of intercarrier compensation reform.[54] The NARUC Task Force Proposal recommends that the Commission consult with the Federal-State Joint Boards on Universal Service and Separations prior to adopting a plan for intercarrier compensation reform, and then seek expeditious Recommended Decisions from the Joint Boards addressing implementation issues within their areas of responsibility after an intercarrier compensation reform plan has been adopted.

D. Rate Averaging and Rate Integration Requirements Lose Significance Under a Unified Compensation Regime

The FNPRM also seeks comment on how the rate averaging and rate integration requirements of section 254(g) bear on intercarrier compensation issues.[55] Commenting CLECs

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53 47 U.S.C. § 410(c).

54 NARUC Task Force Proposal at 11-12.

55 FNPRM ¶¶ 83-86.

assert that the negative consequences that have come as a result of the section 254(g) requirements are the result of wildly disparate originating and terminating access charge rates around the country. The negative consequences of the rate averaging and rate integration requirements diminish significantly when all traffic is subject to the same intercarrier compensation requirements.[56] When the access charges of LECs are reduced to cost, there will be significantly less disparity among the terminating compensation requirements than there is now. To the extent that the section 254(g) requirements continue to provide disincentives for carriers to serve certain parts of the country after intercarrier compensation rates have been unified and reduced to cost, those issues can be addressed accordingly at a later time. The chief objective of this proceeding should be to unify all of the intercarrier compensation regimes into one mechanism with rates based on a carrier's costs.

IV. SPECIFIC INTERCARRIER COMPENSATION REFORM PROPOSALS

Several industry groups have already presented intercarrier compensation reform proposals to the Commission. Each of these proposals has some merit, but none constitutes a complete package that can be adopted without significant amendment. Commenting CLECs urge the Commission to adopt the Cost-Based Intercarrier Compensation Coalition ("CBICC") proposal, while recognizing that the CBICC proposal lacks a universal service reform component. Commenting CLECs also urge serious consideration of major components of the NARUC Intercarrier Compensation Task Force proposal, even though, as a whole, it has flaws that make it unacceptable in its current form as a complete package.[57]

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[56] FNPRM ¶ 86.

[57] These Comments are limited to the NARUC Task Force Proposal filed on March 1, 2005. These Comments do not address the revised NARUC Task Force Proposal first filed with the Commission on May 18, 2005.

A. The CBICC Proposal Should be Adopted

The Commission should adopt the cost-based approach proposed by CBICC.[58] The CBICC Plan would establish uniform baseline rates for each carrier based on TELRIC rates for tandem switching, interoffice transport, and end office switching (*i.e.*, reciprocal compensation rates for traffic exchanged at the ILEC tandem). Interstate access rates would move immediately to the baseline rate; intrastate access rate reductions would be referred to a Joint Board to move to the baseline rate on a schedule set by the states. Compensation would be owed for terminating traffic, and for 1+ and 1-800 originating traffic where the IXC has the retail relationship with the end user. Existing interconnection rules of a single POI per LATA to exchange traffic would not be changed. All traffic would be subject to the baseline rate, including ISP-bound traffic and VoIP traffic terminated on the public switched network. The CBICC proposal permits LECs to increase the monthly SLC by 50 cents each year to offset losses in interstate access charges, with no cap other than the amount of lost interstate access charge revenues.

The CBICC proposal is preferable to the alternative proposals because cost-based rates are economically efficient and will promote rational decisions regarding the deployment of network facilities. Rates other than cost-based rates will have a tendency to encourage inefficient use of network facilities, to encourage arbitrage, and to impair rational decision-making regarding facilities deployment.

The CBICC proposal is also preferable to the alternative proposals because it accomplishes the goals of this proceeding in the most focused way: it unifies intercarrier compensation regimes by building upon existing state commission decisions and existing interconnection arrangements. The rates have already been set, and carriers for whom rates have

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58 FNPRM ¶ 51.

not yet been set would be permitted to choose between adopting a rate that has already been set, or presenting a cost case to a state commission for a different rate. Until a carrier demonstrated otherwise in a cost case, the rate of the largest ILEC in the state would apply.

The CBICC proposal proposes nothing radical or untested in the market or the courts. It is not based on theoretical constructs regarding the ability of carriers to recover all of their terminating switching costs from end users in a market that continues to be dominated by monopoly providers. It has the virtue of being demonstrably effective at both compensating terminating carriers and compelling ILECs to lower their intercarrier compensation rates to cost. Quite simply, the CBICC proposal is the lowest-risk alternative available to the Commission.

The interconnection requirements under the CBICC proposal are also conservative and tested in the market. As discussed above, the requirement for a single POI in a LATA is the only alternative proposed to date that the Commission has already found satisfies the requirements of the Act. The CBICC Proposal retains the single POI per LATA interconnection requirement.

The CBICC proposal defers the issue of reconciling intrastate access charges with a new federal policy for interstate access charges and reciprocal compensation by referring the matter to a Federal-State Joint Board. This approach respects the authority of state commissions. To the extent a proposal to unify intrastate access charges by the NARUC Task Force is acceptable to the states, such a referral may not be necessary. The NARUC Task Force proposes consultation with the Joint Board rather than reliance on the Joint Board to propose a recommendation that the Commission could adopt at a later date.[59]

The CBICC proposal also retains one vestige of the current access charge regime—compensation for originating switching is paid by the interexchange carrier to the LEC whose

[59] NARUC Task Force Proposal at 11-12.

customer uses the interexchange carrier's network to complete a long distance telephone call. Commenting CLECs note that free-standing IXCs are a vanishing breed. As the BOC takeovers of AT&T and MCI illustrate, IXCs are now only pieces that other carriers need to complete a portfolio of end-to-end "all distance" service. In the future, the notion of pre-subscribed IXCs will be a quaint anachronism to an era of a competitive long-distance market. The disappearance of IXCs, however, will not be immediate. As long as there are presubscribed IXCs, they will have retail relationships with end users and they should bear the responsibility for the costs of originating switching incurred by LECs originating calls on their behalf. The existing cost-based rates for terminating switching should be used as originating switching rates.

Commenting CLECs also believe that there should be no distinction made for ISP-bound traffic and for VOIP traffic terminated on the PSTN. As the Commission recognized in the *ISP Remand Order*, the costs of terminating calls to ISPs are no different than the costs to terminate calls to any other end users.[60] Accordingly, the intercarrier compensation rate should be the same. Further, VOIP traffic terminated on the PSTN should also be subject to the same intercarrier compensation obligations as all other traffic. Calls transmitted through a VOIP gateway (*i.e.*, the functionality of converting packet-switched VOIP traffic carried over the Internet into circuit-switched TDM traffic terminated on the PSTN) utilize the same terminating switching services as any other circuit-switched calls. Finally, an intercarrier compensation regime that subjects different categories of traffic to different compensation regimes cannot be considered "unified" or technologically neutral.

Finally, Commenting CLECs are aware that a common criticism of the CBICC Plan is that it does not adequately address revenue recovery for ILECs that will lose revenue as

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[60] *ISP Remand Order* at ¶ 90.

intrastate and interstate rates move to the baseline rate. As previously emphasized, Commenting CLECs stress that the Commission needs to decide certain fundamental principles related to intercarrier compensation first, and then fashion a transition that accomplishes the Commission's universal service goals. Converting implicit universal service support into explicit support will be a key component of that transition, and explicit support must be conditioned on a carrier's true need for subsidies in order to meet universal service objectives. Maintaining ILEC revenue neutrality for its own sake should not be part of a universal service transition plan.

Along those lines, Commenting CLECs commend the efforts of the NARUC Intercarrier Compensation Task Force. While the NARUC Task Force may have attempted to bundle intercarrier compensation reform with universal service reform when that is not completely necessary, their result deserves serious consideration by the Commission. In particular, the NARUC Task Force Proposal to set a national benchmark level for retail rates, and to condition eligibility for universal service funds on raising end user rates to that benchmark, has merit.[61] The collaborative effort where the federal government collects universal service support revenues, and the States determine the distribution of universal service funds is also worthy of support.[62]

B. Certain Components of the NARUC Intercarrier Compensation Task Force Would be a Next-Best Alternative to the CBICC Proposal

As a next-best alternative to the CBICC proposal, certain components of the intercarrier compensation reform proposal offered by the NARUC Intercarrier Compensation Task Force deserve serious consideration.[63] Commenting CLECs believe that the NARUC Task Force

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[61] NARUC Task Force Proposal at 9.

[62] NARUC Task Force Proposal at 10.

[63] As stated above, these Comments are limited to the March 1, 2005 proposal. Commenting CLECs responses to the May 18, 2005 NARUC Task Force Proposal will be provided in their Reply Comments.

Proposal is not ideal for a number of reasons, but it is a better reflection of an industry-wide collaboration on the issue than the proposal offered by the Intercarrier Compensation Forum or any other group. It should not be adopted, however, without substantial modification.

Commenting CLECs strongly agree with certain aspects of the NARUC Task Force proposal. First, as discussed above, the Commission should adopt forward-looking cost-based rates for the transport and termination for all traffic. The NARUC Task Force recognizes that forward looking, cost-based rates are economically rational and more likely to be sustainable in a competitive market.[64]

Second, the Commission should consider the adoption of NARUC's proposal for national uniform rates for all carriers, based on the number of access lines in the applicable ILEC wire center. The NARUC Task Force proposes that ILECs should be allowed to adopt, without a cost showing, unified termination charges by category of wire center.[65] The great majority of traffic exchanged with CLECs would fall into the category with the lowest compensation rate of $0.002 per minute. The NARUC Task Force proposal permits carriers to petition the appropriate state commission to set the terminating compensation rate if they are not satisfied with the applicable default rate.[66] The default rate of $0.002 per minute is consistent with existing reciprocal compensation rates for end-office switching.[67] This aspect of the NARUC Task Force Proposal

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64 NARUC Task Force Proposal at 5.

65 NARUC Task Force Proposal at 5. Specifically, the NARUC Task Force Proposal requires default termination rates of $0.002 in wire centers with greater than 5000 access lines; $0.005 in wire centers with 500-5000 access lines; and $0.01 in wire centers with less than 500 access lines.

66 NARUC Task Force Proposal at n.1

67 CBICC Proposal at 3 ("Based on information available to CBICC, the current national average of TELRIC rates for transport and termination of calls is approximately $0.00212").

As an historical note, the proposed default rate of $0.002 is also consistent with the conclusion reached by the Commission almost nine years ago. In the 1996 *Local Competition Order*, the Commission instructed state commissions to require "proxy" reciprocal compensation rates until they could conduct their own proceedings to set rates: "Thus, for the time being, we adopt a default price range of 0.2 cents ($0.002) to 0.4 cents ($0.004) per minute of use for calls handed off at the end-office switch." *Local Competition Order* ¶ 1060. Further, "We observe that has the substantial benefit of immediately providing an intercarrier compensation rate for those ILECs that have not yet set TELRIC reciprocal compensation rates. The NARUC Task Force plan could be implemented on a nationwide basis with very few, if any, additional regulatory proceedings to set rates.

Further, adoption of a reasonable default rate is acceptable under the statute. Section 252(d) states that the pricing standard for section 251(b)(5) reciprocal compensation is "a *reasonable approximation* of the additional costs of terminating such calls."[68] The standard does not require an elaborate showing by a carrier to set reciprocal compensation rates; it only requires a reasonable approximation. The Commission would be completely justified to rule that a default rate of $0.002 per minute is a reasonable approximation of a reciprocal compensation rate because that rate is supported by the findings of state commissions that have set reciprocal compensation rates, as well as the Commission's proxy rates from 1996. Given that the national average cost-based reciprocal compensation rate is approximately $0.00212/mou, a default rate of $0.002/mou is not unreasonable.

Commenting CLECs are not opposed to other aspects of the NARUC Task Force proposal; they are not consistent, however, with the CBICC proposal. First, the NARUC Task Force proposes the elimination of charges for the origination of traffic carried by IXCs.[69] This proposal has some merit because the primary statutory basis for intercarrier compensation provides for only compensation for the transport and termination of telecommunications.[70] As discussed above, there is a diminishing likelihood that free-standing IXCs will continue to exist

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the most credible studies in the record before us fall at the lower end of this range, and we encourage states to consider such evidence in their analysis." *Id.* The Commission also recognized that the use of default rates relieved small and mid-sized carriers from having to conduct cost studies. *Id.*

68 47 U.S.C. §252(d)(2)(A)(ii) (emphasis added).

69 NARUC Task Force Proposal at 5.

70 47 U.S.C. § 251(b)(5).

in the telecommunications industry, so the elimination of separate charges for the origination of traffic may occur through market forces alone.

At a minimum, Commenting CLECs propose retaining originating charges at cost-based rates for calls dialed to 8YY numbers. The Commission's rules regarding access charges for calls to 8YY numbers reverse the distinction between originating access charges and terminating access charges, and compensate the originating carrier as though it were providing terminating switching by paying it the terminating access charge rate rather than the originating access charge rate. Thus, there is Commission precedent for the notion that originating switching for 8YY traffic qualifies for terminating compensation.[71] Accordingly, the practice of compensating originating carriers for originating calls to 8YY numbers should be retained.

Second, the NARUC Task Force proposes converting per-minute charges to capacity-based port charges within five years. While NARUC proposes capacity-based charges, they also ask the FCC to conduct a proceeding to determine implementation. Commenting CLECs are not opposed to capacity-based port charges in lieu of per-minute charges, but, as discussed above, there are a number of problems associated with capacity-based port charges. Commenting CLECs endorse the use of an FCC proceeding to address issues surrounding capacity-based port charges as the default reciprocal compensation arrangement.

Third, the NARUC Task Force proposal permits increases in the monthly Subscriber Line Charge ("SLC") up to the lesser of $3.00, or the amount of intercarrier compensation losses.[72] The CBICC proposal permits LECs to increase the monthly SLC by 50 cents each year to offset losses in interstate access charges, with no cap other than the amount of lost interstate access

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[71] 47 C.F.R. § 69.105(b)(1)(iii); *Access Charge Reform*, First Report & Order, 12 FCC Rcd. 15982, *aff'd*, *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) at ¶ 366.

[72] NARUC Task Force Proposal at 9.

charge revenues. The NARUC proposal caps the SLC increase while the CBICC plan does not, but the CBICC plan limits each annual increase to 50 cents while the NARUC plan does not specify an annual limit to the SLC increase.

Other aspects of the NARUC Task Force proposal do not merit adoption by the Commission. First, the NARUC Task Force proposal to adopt the ICF transit and transport proposal is unacceptable. This aspect of the NARUC Task Force should be rejected because the ICF transit and transport proposal is discriminatory on its face, imposes unfair burdens on competitive carriers, and will stifle competition in the interoffice transport market. The flaws of the ICF transit and transport proposal are described in more detail below. The Commission should also be aware that the NARUC Task Force's "tentative adoption" of the ICF transit and transport proposal was not because it felt the ICF plan had merit, but because "[t]he ICF proposal is the only complete proposal put forward to date[.]"[73]

If the Commission wants to revise the network interconnection requirements at the same time that it reforms intercarrier compensation—which Commenting CLECs assert is not necessary at this time—then it must revise the ICF transit and transport proposal as follows:

First, eliminate the distinction between "Hierarchical" and "Non-Hierarchical" networks. The distinction exists only to identify carriers on whom additional transport obligations are imposed when they interconnect with ILECs. Commenting CLECs propose distinguishing only between rural carriers and non-rural carriers.

Second, compensation for the provision of tandem transit should be set under the cost-based standard of section 252(d). As discussed above, tandem transit service is an

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[73] NARUC Task Force Proposal at 11. Commenting CLECs note that the May 18, 2005 NARUC Task Force Proposal revises this approach. Further discussion of the May 18, 2005 NARUC Task Force Proposal will be provided in Reply Comments.

interconnection obligation required by section 251(c)(2) of the Act. As an interconnection obligation under 251, it is subject to the cost-based standard of 252(d). Therefore, under the current interpretation of the cost-based standard of 252(d), ILECs must provide tandem transit service at TELRIC rates.

Commenting CLECs do not disagree with the aspects of the NARUC Task Force proposal regarding rural carrier interconnection, universal service reform, and state commission jurisdiction. These appear to be reasonable compromises to reflect the needs of rural carriers and state commissions. Commenting CLECs question whether universal service reform must be accomplished in this docket, or whether it might naturally follow as a result of unification of the intercarrier compensation regimes.

C. Primary Components of the Intercarrier Compensation Forum Proposal Are Not Acceptable

Commenting CLECs recognize that the Intercarrier Compensation Forum ("ICF") proposal involved substantial give-and-take among some of the largest carriers in the industry and that ICF asserts that it is a compromise that must be accepted as a whole if it is to be accepted at all.[74] Commenting CLECs also expect the ICF to argue that their proposal is due deference by the Commission because it took as long as it did to come together, at great expense to the parties involved. The Commission must reject this approach. In light of the multiple proposals before the Commission and substantial opposition to the ICF proposal, the Commission may not simply accept the ICF proposal as an unalterable package. Instead, the Commission has an obligation to maximize the benefits to all parties, not just the members of the

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[74] *See, e.g.,* Ex Parte Brief of the Intercarrier Compensation Forum in Support of the Intercarrier Compensation and Universal Service Reform Plan, CC Docket No. 01-92, Oct. 5, 2004, at 7 ("ICF Ex Parte Brief").

ICF. Moreover, it is clear that the NARUC Task Force involved a broader array of stakeholders than ICF.

One reason to reject the ICF proposal is that membership in the ICF was not open and it reflects a small contingent of the industry. The ICF began with 36 members, including SBC, AT&T, MCI, Verizon, and BellSouth. By the time it made its proposal public, ICF had been reduced to only 9 members. Over the course of the deliberations, 27 members, including Verizon and BellSouth, abandoned the process. At no time in the process were state commissions involved. The ICF proposal is really nothing more than a bargain struck among a handful of carriers that was rejected by more carriers than agreed to it. The rump proposal now being advocated primarily by merger partners SBC and AT&T should really be viewed as an SBC proposal with a few hangers-on.

The ICF Proposal also should be rejected because it intentionally seeks to avoid state commission participation. It asks the Commission to preempt the states on the issue of intrastate access charges.[75] And instead of going to the state commissions to rebalance or increase local rates, it asks the Commission to permit increases in federally-mandated subscriber line charges that bypass state commission review. In other words, the ICF Plan increases end user subscription rates to recover lost intrastate access charge revenues without having to seek the approval of a single state commission.

Further, the ICF Plan is simply too radical, and as discussed above, is not supported by the law. Commenting CLECs acknowledge that the crazy quilt of the existing intercarrier compensation schemes is irrational and uneconomic, but the solution to this situation is not to toss them away in exchange for a different compensation scheme that is also irrational and

[75] ICF Ex Parte Brief at 35-38.

uneconomic. The solution is to salvage the pieces of the existing system that work and replace the pieces that do not. A terminating compensation rate of zero for all traffic (other than rural telephone traffic) as proposed by the ICF will create arbitrage opportunities for the industry just as compensation rates significantly above cost did.[76] The rational and legal approach is a cost-based system that reflects the result that would be achieved in a competitive market by compensating carriers for the services they provide. If a terminating compensation rate of zero is what two willing interconnected carriers would prefer absent regulatory intervention, then carriers should be permitted to reach that result through negotiations.[77] It should not be foisted on an industry that is generally unwilling to accept it. Adoption of the ICF Plan to require bill-and-keep arrangements against the will of individual carriers could very well be the most significant decision (but not the first) to impose a federal regulatory regime that compels a party to provide a service to a competitor for free.[78] Given the enormous changes already underway in the telecommunications industry as a result of major technological advances and consumer demands, the Commission should not also load the industry with the radical change of requiring a carrier to terminate calls originated by other carriers for free. A more focused and limited

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[76] ICF has anticipated the argument that a terminating compensation rate significantly (and admittedly) below cost will result in regulatory arbitrage. They contend that such arbitrage opportunities are overstated because a carrier that originates traffic to be terminated by another carrier for free will have to incur some costs in order to impose costs on others. This position, however, relies on carriers continuing to provide service as they do currently. It fails to anticipate how carriers will reconfigure their service offerings in order to take advantage of being able to originate calls that other carriers will have to terminate without compensation.

[77] The best evidence that such arrangements may be the preference of some carriers are the numerous traffic exchange agreements in the industry where traffic is exchanged on a bill-and-keep basis where the carriers have not been compelled to do so.

[78] Commenting CLECs note that the Commission had the good sense to undo the last regulatory regime that required a party to provide a service to a competitor for free. In the *ISP Remand Order*, the Commission ordered carriers that had not terminated traffic to ISPs prior to June 14, 2001 to do so without compensation. The Commission wisely reversed that decision in 2004 in the *Core Forbearance Order*. *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, FCC 04-241, WC Docket No. 03-171 (rel. Oct. 18, 2004) ("*Core Forbearance Order*") (Appeal pending, *Core Communications, Inc. v. FCC*, 04-1423, D.C. Circuit.)

approach is demanded under the circumstances; intercarrier compensation should be cost-based and paid by the carrier that sends traffic to another carrier to be completed.

The "Edge" proposal in the ICF Plan should also be rejected unless it is significantly modified. The Edge proposal substantially changes the current law of network interconnection by superseding the requirement that a CLEC may choose to interconnect at a single point within a LATA. The Edge proposal effectively requires multiple POIs throughout the LATA for interconnected competitive carriers to transport traffic that they want other carriers to terminate.

The unreasonable and discriminatory nature of this proposal is made clear by the way that ICF changed the original Edge proposal that was conceived by Qwest. Under the original Qwest proposal, carriers would have to establish a certain number of Edges within a LATA, but every carrier delivering traffic to another carrier's Edge would bear the cost of transport to get the traffic to that Edge.[79] Although the Qwest Edge proposal did distinguish between "Hierarchical" and "Non-Hierarchical" carriers, this distinction was made only to determine what would qualify as an Edge for the different types of carriers. More specifically, ILECs typically operate hub-and-spoke networks with access tandems subtended by end offices. Their Edges would be defined by the access tandems. Carriers other than ILECs generally do not operate access tandems, so an alternative definition of their Edge was needed. If the Qwest Edge proposal had not distinguished between "Hierarchical" and "Non-Hierarchical" carriers, a definition of an Edge that would apply to carriers only using End Office switches would permit ILECs to create an Edge at every one of their End Offices, an undesirable result that would require non-ILECs to duplicate the network configurations of ILECs. Hence, the Qwest proposal established one set of

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[79] Ex Parte letter from John W. Kure, Qwest Corporation, to William F. Caton, Federal Communications Commission, CC Docket No. 01-92 (Mar. 27, 2001).

Edge default rules for carriers operating access tandems, and another set of Edge default rules for other carriers. The transport obligations of carriers to bring traffic to other carriers' Edges were the same for all carriers under the original Qwest proposal.

The ICF Plan distorts the Qwest Edge proposal by substantially changing the transport obligations. Unlike the Qwest Edge proposal, the ICF Plan imposes different transport obligations based on whether a carrier operates a traditional ILEC network or a modern CLEC-configured network. Under the ICF Plan, a "Hierarchical" network (*i.e.*, ILEC) bears the financial obligation of transporting its traffic to the Edge of another "Hierarchical" network (*i.e.*, ILEC). In turn, the second Hierarchical network (ILEC) bears the financial obligation of transporting its traffic to the Edge of the first Hierarchical network (ILEC). However, when a Non-Hierarchical (*e.g.*, CLEC or CMRS carrier) network exchanges traffic with a Hierarchical network (ILEC), the Non-Hierarchical network must bear the financial obligation of transporting <u>all</u> traffic between the two networks, both the traffic the CLEC originates and the traffic the CLEC terminates. On its face, the ICF Plan is discriminatory against CLECs and CMRS carriers.

The ICF Plan attempts to temper this outrageous proposal by offering a "discount" to the CLEC or CMRS carrier: if, and only if, the CLEC or CMRS carrier purchases transport from the ILEC, the ILEC will provide the CLEC or CMRS carrier a 50% discount from the applicable rate for the transport facilities purchased. This phony "reasonableness" must be rejected by the Commission. If the CLEC or CMRS carrier wants to use the transport services of any carrier other than the ILEC, it gets no financial contribution from the ILEC. As a result, a CLEC or CMRS carrier is at a significant competitive disadvantage compared to other CLECs, CMRS carriers (such as a CMRS affiliate of the ILEC like Cingular or Verizon Wireless) or IXCs (such as the interexchange affiliates of the BOCs) that do purchase transport services from the ILEC at a discount. As long as any CLEC, CMRS carrier, or IXC takes the discount from the ILEC (and of course the BOC affiliates will), all CLECs, CMRS carriers, and IXCs will be required to do so to remain competitive.[80] It would be difficult to imagine a clearer example of a BOC exploiting its market power to require other carriers to obtain services from it and exclude competition in the interoffice transport market. Acceptance of the ICF Plan as proposed would set in stone the BOC stranglehold on the provision of interoffice transport facilities, drive out any existing competitive transport providers, and provide a complete barrier to competitive entry.[81] If an Edge proposal is adopted, a far more rational and pro-competitive solution is to require all carriers to bear the same transport obligation: each carrier is financially responsible for transporting traffic it originates to the Edge of the carrier receiving or terminating the call.

The ICF Plan is silent about why CLECs and CMRS carriers should bear a greater financial obligation to transport traffic than ILECs. It does not attempt to rationalize the

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80 There would be a single exception to this statement if traffic exchanged between the ILEC and the CLEC or CMRS carrier was exactly in balance and the ILEC's transport rates were set at levels indicative of a competitive market. In that single hypothetical case—which Commenting CLECs assert does not now exist and likely will never exist—the ICF Plan would be rational and potentially competitive. However, rather than hope for a set of circumstances that exists only in theory, a more reasonable approach under any Edge proposal would be to require each carrier to bear the financial obligation of its own traffic to the Edge of the terminating carrier.

81 Consider the following examples: assume transport costs for a given increment of traffic are $1000 in each direction in a competitive market. If traffic is perfectly in balance, the CLEC would be indifferent to the 50% discount proposal because it would pay either $1000 to get only its traffic to the ILEC Edge, or it would pay 50% of $2000 ($1000) to get its traffic to the ILEC Edge and to get the ILEC's traffic to its own Edge. However, if the CLEC terminates as little as 2 times as much traffic as it originates, it would pay $1000 under an equal-responsibility Edge arrangement, and $1500 under the ICF plan, but only if it purchased all transport from the ILEC ($1000 + $2000 = $3000, with 50% discount = $1500). If it purchased transport from a competitive carrier at the competitive rates, it would have to pay $3000 to fulfill its obligations under the ICF proposal. This is beneficial to no one other than the ILEC that passes on $500 of its financial obligation to the CLEC if the CLEC purchases transport from the ILEC, or $2000 of its financial obligation if the CLEC purchases transport from a competitive carrier. Similarly, if a CMRS carrier originates 2 times as much traffic as it originates, under the ICF proposal it would spend $1500 to fulfill its transport obligation (50% of the $2000 the CMRS carrier is responsible for plus $1000 that the ILEC is responsible for), while shifting $500 of cost onto the ILEC. The disparities increase as the exchange of traffic is more out of balance. In neither case when traffic is out of balance does a competitive transport carrier have any rational hope of competing for the business of the CLEC or the CMRS carrier.

discriminatory treatment. In fact, the ICF Plan is silent because the proposal is indefensible. The ICF Plan sets up one set of rules for LECs that existed prior to the 1996 Act that is fair and balanced, and another set of rules for LECs that entered the market after the 1996 Act that is unfair and unbalanced. The Edge and Transport section of the ICF Plan is a "heads I win, tails you lose" proposal from an ILEC perspective, and it must be rejected.

The ICF Plan should also be rejected because it proposes mandatory bill-and-keep arrangements. As discussed above, imposing bill-and-keep for Section 251 traffic without the consent of the terminating carrier would be unlawful. Moreover, although any carrier should be permitted to change its mind., the Commission must recognize that the ICF Plan represents a complete reversal on the issue for both AT&T and SBC, current advocates of the ICF Plan. As recently as 2001, AT&T said that imposing bill-and-keep without the consent of the carriers involved would violate the Act.[82] Similarly, in 1996, Ameritech, Bell Atlantic, BellSouth, GTE, NYNEX, Pacific Bell, SWBT and U S West all took the position that imposing bill-and-keep was unlawful. U S West went so far as to say "bill and keep arrangements are economically wasteful arrangements."[83] The BOC trade association USTA filed a report in 1996 titled "Bill and Keep: A Bad Solution to a Non-Problem."

Further, traffic imbalances between carriers should not be considered a problem to be solved by regulatory intervention. Traffic imbalances may also indicate service to a particular market niche, which should not be discouraged. Regulators should not attempt to second-guess the market by defining what types of product sets and customer mixes a carrier should be serving. While some CLECs may have traffic imbalances because a subset of their customers

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82 Comments of AT&T Corp., CC Docket No. 01-92 (Aug. 21, 2001) at 36-41.

83 Comments of US West, Inc., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (May 14, 1996) at 70.

are ISPs, CMRS carriers are just as likely to have traffic imbalances because CMRS end users typically originate more traffic than they terminate.[84]

The Commission should be promoting, not discouraging, service to market niches because this is the only way to prevent ubiquitous cross-subsidization of services by the ILECs. For example, unless a competitor were able to target niche markets such as high-volume call originators, an ILEC would be able to overcharge end users that are high-volume call originators in order to subsidize high-volume call terminators. Service to market niches is nothing more than identifying, and responding to, market opportunities.

It bears repeating in this context that CLECs did not create the "regulatory arbitrage" of traffic to ISPs. Their decision to serve ISPs was a rational response to the likelihood that they would owe enormous amounts of compensation to ILECs when reciprocal compensation rates were high. The irony is that the Commission was right in 1996 when it set the end-office proxy switching rate at \$0.002-\$0.004. Had ILECs agreed to that rate, rather than demand rates as high as 4 cents per minute (USTA proposed a rate of 1.3 cents per minute to this Commission in 1996), CLECs might not have been as willing to seek out customers with high volumes of terminating traffic. Along those lines, Bell Atlantic hit the nail on the head in its 1996 Reply Comments: if reciprocal compensation rates were set too high, CLECs will respond by seeking out customers with high inbound call volumes.[85] The rates were set too high by the ILECs (because they were set significantly above cost), and CLECs did seek out customers with lucrative balances of traffic.

The ICF Plan should also be rejected because mandatory bill-and-keep arrangements would convey enormous competitive advantages to ILECs. Under a system where carriers must

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[84] *ISP Remand Order* ¶ 89, n.176.

recover their terminating switching costs from their own end users, the carrier with the largest customer base would have an insurmountable pricing advantage over competitors. To collect the same amount of compensation lost through cost-based intercarrier compensation arrangements, an ILEC may either impose very small rate increases over its entire customer base, or may disproportionately allocate rate increases among customer classes, decreasing rates for the customer classes that CLECs tend to target and increasing other customer classes rates for which competition does not exist, while a smaller carrier such as a CLEC would be required to impose very high rate increases over its smaller set of customers. One way to prevent this conduct would be to review all ILEC rates to deter possible cross-subsidization, but it is questionable whether that sort of rate regulation is more feasible than simply requiring the originating carrier to pay the terminating carrier a cost-based terminating switching rate.

While cost-based intercarrier compensation will require regulatory review of terminating switching rates, this would be far more focused and narrowly tailored than a review of all ILEC service rates and costs to eliminate potential cross-subsidies. In addition, the major ILECs have a considerable incentive to keep terminating switching rates low in order to minimize not only their own network costs, but also their intercarrier compensation payments to their competitors. The ICF proposal will impair the competitive industry to the benefit of the entrenched monopolists, and it should be rejected accordingly.

Further, Commenting CLECs expect the rural carriers to make the point more persuasively, but a bill-and-keep regime would have a disproportionate impact on rural ILECs that receive a substantial portion of revenues from above-cost access charges. Cost-based termination rates provide one form of compensation to rural carriers that would have to come

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[85] *See* note 10, supra.

from other sources under a bill-and-keep regime. Unless these revenues are replaced through additional universal service payments or an increase in end user fees, the Commission can expect reductions in telephone penetration rates, harms to the financial solvency of small ILECs, and degradation in service quality as network maintenance costs are reduced to offset revenue losses.[86]

D. The Expanded Portland Group Proposal Fails to Unify the Intercarrier Compensation Regimes

The proposal by the Expanded Portland Group (EPG) should also be rejected by the Commission for failing to achieve any particular objective other than preservation of ILEC streams of revenue.[87] While the EPG plan purportedly reduces intrastate access charges to the levels of interstate access charges, it simply shifts recovery of any lost revenue to a so-called "Access Restructure Charge." Beyond this measure to lock-in revenues, the EPG plan makes no attempt to unify the disparate intercarrier compensation regimes: Local and EAS traffic would continue to be subject to reciprocal compensation charges, and ISP-bound traffic would continue to be subject to the terms of the FCC's *ISP Remand Order*.[88] Simply doing nothing would be more effective than adoption of the EPG Plan because doing nothing would save the parties an enormous amount of effort by avoiding the inevitable appeals that will result from any Order on this issue.

E. The Alliance for Rational Intercarrier Compensation Proposal Is Insufficient

Likewise, the proposal by the Alliance for Rational Intercarrier Compensation (ARIC) should be rejected because it would result in little more than preservation of rural carriers'

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86 This statement assumes, as discussed below, that the ILEC seeking universal service support has demonstrated actual financial need to meet universal service policy objectives.

87 Ex Parte letter from Glenn H. Brown, McLean & Brown, on behalf of Expanded Portland Group, to Marlene H. Dortch, Federal Communications Commission, dated November 2, 2004 ("EPG Plan").

revenues.[89] While it unifies intercarrier compensation into a single rate, it bases that rate on unseparated, interoffice, embedded costs. Using embedded costs rather than TELRIC is likely to overcompensate terminating carriers and lead to uneconomic network deployment decisions. The ARIC proposal also improperly classifies ISPs as telecommunications carriers, and it is excessively concerned about intercarrier compensation for traffic transmitted entirely over packet-switched networks, which Commenting CLECs believe is beyond the scope of this proceeding.

The best components of the ARIC proposal have been incorporated in the NARUC Task Force proposal: a unitary cost-based terminating compensation rate, rate rebalancing to benchmark levels established by state commissions, and explicit universal service support for high-cost carriers. The NARUC Task Force proposal, however, has the added benefit of being the product of a collaborative effort that has considered not only the views of rural carriers, but also the views of large ILECs, CLECs, CMRS carriers, state commissions and state consumer advocates.

F. The Remaining Proposals Are Insufficient to Reform Intercarrier Compensation

The remaining proposals can also be rejected as inadequate for the task of unifying the intercarrier compensation regimes. The most salient feature of the Home Telephone Company and PBT Telecom (Home/PBT) proposal is the replacement of existing per minute charges with connection-based intercarrier charges using a DS-0 level of connection. As discussed above with respect to capacity-based charges under the NARUC Task Force proposal, Commenting CLECs are not opposed to capacity-based interconnection charges, but the Commission must recognize

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88 EPG Plan at 32-33.

89 Intercarrier Compensation Plan of the Alliance for Rational Intercarrier Compensation, CC Docket No. 01-92, filed Oct. 25, 2004.

that while capacity-based may capture the "lumpiness" of interconnection facilities, there are a number of problems associated with adoption of capacity-based port charges.

For the reasons stated above regarding the ICF proposal to require bill-and-keep arrangements, the Commission should also reject the proposals by Western Wireless and the Cellular Telecommunications & Internet Association (CTIA) to impose bill-and-keep arrangements on carriers. The Telecom Act does not permit the Commission to require carriers to accept bill-and-keep arrangements. Carriers are free to negotiate bill-and-keep arrangements, but cost-based compensation for termination services is more economically rational and will lead to more efficient interconnection arrangements. Any proposal that requires adoption of bill-and-keep would require new legislation to implement.

As with the EPG plan, the proposal by the National Association of State Utility Consumer Advocates (NASUCA) to reduce rates to a target cap of $0.0055 per minute and retain all existing rates below that cap would do very little to unify the disparate intercarrier compensation regimes. As long as there are disparate intercarrier compensation regimes for the identical service of providing terminating switching, carriers will seek ways to have traffic they originate classified at the lowest possible rate and traffic they terminate classified at the highest possible rate. Whatever arbitrage opportunities exist under the current system would still exist, but on a smaller scale.

V. NETWORK INTERCONNECTION ISSUES NEED NOT BE ADDRESSED IN THIS PROCEEDING

The FNPRM also seeks comment on network interconnection issues, presumably on the grounds that they are inextricably linked to intercarrier compensation.[90] Commenting CLECs disagree with the premise. Network interconnection issues and intercarrier compensation are linked under the ICF Proposal, but that is because the parties that were permitted to participate in that process chose to link them. By linking interconnection with intercarrier compensation, the FNPRM simply accepts the paradigm posited by the ICF members; that paradigm, however, represents the compromises that were essential to get the various ICF factions to agree to a single proposal. The Commission is not limited to those compromises; to the contrary, Commenting CLECs submit that those compromises should be disregarded because they did not represent the concerns of many CLECs, rural carriers, wireless carriers, state commissions, or consumers.

Commenting CLECs assert that intercarrier compensation can, and should, be considered separately from interconnection requirements. The existing rule of a single POI per LATA under section 251(c) of the Telecom Act is sufficient to determine a carrier's interconnection obligation with an ILEC. Unlike any other proposal before the Commission on this issue, the single POI per LATA requirement has already withstood legal challenge as discussed above. Again, the Commission should take a focused and limited approach in this proceeding by changing the rules that clearly need changing and leaving the rules that have not been particularly problematic.

Commenting CLECs have commented on the Qwest and ICF proposals for POIs and transport obligations above. As for small and rural ILECs, the requirements of section 251(c)(2) that permit a "requesting telecommunications carrier" to interconnect "at any technically feasible point within the carrier's network" apply to all incumbent local exchange carriers. Incumbent local exchange carriers that satisfy the definition of "rural telephone company" qualify for a limited exemption from the requirements of section 251(c). 47 U.S.C. § 251(f). Therefore, for those ILECs that are rural telephone companies and qualify for the exemption, the Commission has the authority to promulgate network interconnection

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[90] FNPRM ¶¶ 87-97.

requirements different from those that apply to the BOCs and other ILECs that do not qualify for the exemption.

VI. COST RECOVERY ISSUES SHOULD BE CAREFULLY DESIGNED TO MEET ESSENTIAL OBJECTIVES, NOT MERELY TO ASSURE REVENUE NEUTRALITY

Access charges continue to represent a significant revenue source for LECs and a significant cost component for IXCs. The FNPRM asks whether the Commission should adopt revenue offsets for LECs if access charges are reduced or eliminated.[91] Commenting CLECs assert that, if the Commission believes it is necessary to establish a revenue recovery mechanism for LECs (including CLECs), any revenue recovery mechanism should not have revenue neutrality as one of its goals. If the Commission makes the prudent decision to require cost-based intercarrier compensation for the transport and termination of telecommunications as Commenting CLECs are recommending, then the only purpose for a mechanism to offset access charge revenue losses is to recoup funds that constituted implicit universal service support within access charge rates. Recovery of these lost funds would be proper only to ensure the maintenance of universal service goals. The Commission must first determine, however, whether access charge revenue losses actually impair universal service goals before it decides to implement a revenue recovery mechanism for lost implicit universal service support funds. It may be that a combination of local service rate benchmarks, local service rate rebalancing, and modest increases in SLCs will be sufficient to maintain universal service without resorting to more drastic revenue recovery mechanisms. As Commenting CLECs stated above, the Commission should take a focused and limited approach to the issue of intercarrier compensation reform and universal service reform. Once the disparate intercarrier compensation mechanisms

[91] FNPRM ¶ 100.

are unified at cost-based rates, it will be easier to identify methods of making universal service funding sustainable over the long term. If the Commission tries to manufacture a regulatory regime with so many moving parts as to solve all of its intercarrier compensation, universal service, and network interconnection concerns in one Order, it is much more likely to create havoc in the industry as carriers try to digest massive changes.

Commenting CLECs also see merit in the adoption of a benchmark for rural local retail rates as ARIC, EPG, and the NARUC Task Force have proposed to ensure compliance with the statutory requirement that consumers in rural, insular and high cost areas have access to telecommunications at rates that are "reasonably comparable to rates charges for similar services in urban areas."[92] Adoption of a benchmark for rural local retail rates would be sound public policy. It makes no sense to impose universal service contribution requirements on carriers before rural end user rates are brought within a reasonable level of parity nationwide. Once rural carrier local retail rates have been brought to a reasonable level of parity, it should be easier to identify the needs of rural carriers in order to maintain universal service objectives.

With respect to lost intrastate access charges, the FNPRM asks whether the Commission should create a federal mechanism to offset any lost intrastate revenues, or whether the States should be responsible for establishing alternative cost recovery mechanisms for LECs within the intrastate jurisdiction.[93] Commenting CLECs believe that the NARUC Intercarrier Compensation Task Force has wrestled with these questions adequately.[94] Commenting CLECs endorse the compromise solution reached by the NARUC Task Force on the issue of shared jurisdiction between the FCC and the State.

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[92] 47 U.S.C. § 254(b)(3).
[93] FNPRM ¶ 115.

VII. INTERCARRIER COMPENSATION REFORM SHOULD BE IMPLEMENTED THROUGH RULES REVISED THROUGH MUTUAL AGREEMENT

The FNPRM seeks comment on how to reconcile the implementation differences between access charges (which are governed by tariffs) and reciprocal compensation arrangements (which are governed by interconnection agreements). The FNPRM asks what the default compensation rule should be if the parties exchanged traffic in the absence of an interconnection agreement. Commenting CLECs contend that the FCC should establish default intercarrier compensation rules that individual carriers may revise through mutually acceptable interconnection or traffic exchange agreements, but that individual carriers may not revise unilaterally through tariff filings. To the extent not inconsistent with existing requirements, ILECs should be required to tariff the default intercarrier compensation rules adopted by the FCC.

The FNPRM asks whether a transition period is needed and, if so, what type of transition would be needed for a new regime. In particular, the FNPRM asks whether intrastate access charges should be reduced or eliminated on the same schedule as interstate access charges. CBICC has proposed separate transition periods for the migration to a single compensation structure for interstate access charges and intrastate access charges. The NARUC Intercarrier Compensation Task Force has proposed a single transition period to cover all forms of traffic. Although the CBICC proposal provides more time to implement reforms related to intrastate access charges, Commenting CLECs are willing to accept the more abbreviated transition schedule proposed by the NARUC Intercarrier Compensation Task Force.

[94] NARUC Task Force Proposal at 8-11.

VIII. THE COMMISSION SHOULD RESOLVE ADDITIONAL ISSUES

A. The Commission Should Rule that NPA/NXX Codes Should Be Used for the Rating of All Traffic

The distinction between reciprocal compensation rates and access charge rates is the crux of the argument whether CMRS carriers owe reciprocal compensation or access charges for calls that are originated on their networks. Once those rates are brought into alignment so that there is no distinction between the two, the dispute over which compensation regime applies to which type of traffic largely vanishes.

As for whether CMRS traffic should be rated by comparing the NPA/NXX codes of the calling party and the called party, Commenting CLECs strongly agree that NPA/NXX codes should be used for the rating of all traffic. Again, once a single intercarrier compensation rate applies to all traffic, and carriers no longer need to distinguish "exchange access" traffic from any other type of traffic, the question of "rating" a call disappears: all traffic would be subject to the same terminating compensation rate.

B. The Remand of the *ISP Remand Order* Should Be Resolved on an Expedited Basis

Although not raised in the FNPRM, the Commission should take the opportunity to resolve the questions raised in the remand of the *ISP Remand Order*. The Commission should rule, in a separate order released as soon as possible if necessary, that ISP-bound traffic is subject to section 251(b)(5) of the Act.

In June 1997, the Association of Local Telecommunications Services ("ALTS") requested a declaratory ruling from the Commission that nothing in the Commission's Orders or regulations excluded ISP-bound traffic from the reciprocal compensation obligations of the

Act.[95] Almost two years later in February 1999, after more than 30 state commissions had ruled that the exchange of ISP-bound traffic was subject to reciprocal compensation obligations and no state had ruled otherwise, the Commission released a *Declaratory Ruling* in which it stated that section 251(b)(5) of the Telecom Act did not require the payment of reciprocal compensation for calls to the local telephone number of an ISP.[96] In March 2000, the D.C. Circuit vacated and remanded the *Declaratory Ruling* for lack of reasoned decision-making.[97] On remand in April 2001, the Commission issued an Order in response to the D.C. Circuit's *Bell Atlantic* decision, and also implemented a new, interim, prospective compensation mechanism for carriers that exchanged telephone calls to ISPs.[98]

In the *ISP Remand Order,* the FCC asserted that section 251(g) of the Telecom Act provided it with the authority to exclude ISP-bound traffic from the requirements of section 251(b)(5). The FCC then established an interim, intercarrier compensation mechanism under its general regulatory authority under section 201. In May 2002, the D.C. Circuit rejected the view that section 251(g) provided the FCC with the authority it claimed to have.[99] While rejecting the statutory basis for the *ISP Remand Order,* however, the D.C. Circuit did not vacate that *Order*, or the interim intercarrier compensation mechanism. The panel observed that the FCC may be able to find some other statutory authority that would allow it to avoid application of section 251(b)(5) to ISP-bound traffic and implement its new compensation regime, which the FCC had not identified at the time, and thirty-six months later, still has not identified.

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95 Letter from Richard J. Metzger, General Counsel for ALTS, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC (June 20, 1997).

96 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689 (1999) ("*Declaratory Ruling*").

97 *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir 2000).

98 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

Because the Commission refused to resolve the open question posed by the Court, Core Communications, Inc., was forced to seek a writ of mandamus from the D.C. Circuit to compel the Commission to complete its review and provide a response to the Court's remand instructions.[100] The Commission has still not responded. The Commission must now answer the D.C. Circuit and identify the statutory basis for an intercarrier compensation regime applicable to ISP-bound traffic if section 251(b)(5) does not apply.

In fact, it is clear that section 251(b)(5) provides the <u>only</u> authority for an intercarrier compensation regime applicable to ISP-bound traffic. The FCC has tried twice now to find some statutory basis to exclude ISP-bound traffic from reciprocal compensation obligations. Initially, the FCC relied upon an "end-to-end" analysis of an Internet communication to conclude that it fell outside the scope of 251(b)(5), which the FCC had limited to "local" traffic. The D.C. Circuit rejected that analysis, and the FCC subsequently abandoned the "local" limitation on section 251(b)(5) completely.[101]

In its second bite at the apple, the FCC asserted that section 251(b)(5) applied to <u>all</u> telecommunications, but that section 251(g) "carved out" certain services from the scope of section 251(b)(5).[102] The Court also rejected that analysis because "[section] 251(g) is not susceptible to the Commission's reading" and "nothing in [section] 251(g) seems to invite the Commission's reading[.]"[103] Thus, on remand this time, the FCC has painted itself into a corner. Having said that section 251(b)(5) applies to all telecommunications, and now having been rebuffed that section 251(g) excludes ISP-bound traffic from section 251(b)(5), logic dictates

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99 *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

100 *In re Core Communications, Inc.*, D.C. Cir. No. 04-1179, Supplemental Petition for Writ of Mandamus to Enforce the Mandate of this Court (Mar. 2, 2005).

101 No party challenged the FCC's elimination of the "local" limitation on traffic eligible for reciprocal compensation.

102 *ISP Remand Order* at ¶¶ 34, 46.

that section 251(b)(5) applies to ISP-bound traffic.[104] Therefore, the Commission should rule, in a separate order released as soon as possible if necessary, that ISP-bound traffic is subject to section 251(b)(5) of the Act.

IX. CONCLUSION

The Commission in this proceeding is considering significant reforms to the ways carriers compensate each other when they exchange traffic and must adopt reforms in light of the enormous changes in the telecommunications industry since 2001. Commenting CLECs urge the Commission to adopt focused and limited reforms that retain the portions of intercarrier compensation that work and replace the portions that do not. The Commission should adopt the cost-based approach proposed by the Cost-Based Intercarrier Compensation Coalition that would establish cost-based compensation rates for all carriers, and apply a single rate to the termination of all types of traffic, including ISP-bound traffic and VoIP traffic terminated on the public switched network. The Commission must reject bill-and-keep as the default form of intercarrier compensation because mandatory bill-and-keep is impermissible under the Telecom Act. Existing interconnection rules of a single POI per LATA to exchange traffic should not be changed. The Commission must make it clear that the fundamental obligation to interconnect networks includes the obligation to provide transit service at cost-based rates. The Commission should reject the radical changes offered by proponents like the Intercarrier Compensation

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[103] 288 F.3d at 432, 433.

[104] Pac-West Telecomm, Inc. filed an extensive discussion of the application of Section 251(b)(5) to ISP-bound traffic in response to several *ex parte* letters filed by the BOCs in connection with the remand of the *ISP Remand Order*. Response of Pac-West Telecomm, Inc. to Bell Operating Companies' Ex Partes Regarding Section 251(b)(5) and ISP-Bound Traffic, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 99-68, 96-98 (filed Aug. 25, 2004). That filing is incorporated herein by reference.

Forum that have never been tested in the market or the courts and that were abandoned by more parties than the remainder that endorsed them. The Commission should also reject those plans whose fundamental goal is the preservation of existing revenues. To the extent the Commission addresses universal service reform at this time, it should make universal service support explicit and funding fair.

Respectfully submitted,

_/s/ Richard M. Rindler_________________

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