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

In the Matter of	)	
	)	
Developing a Unified Intercarrier	)	
Compensation Regime	)	CC Docket No. 01-92
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COMMENTS OF XO COMMUNICATIONS, INC. IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED RULEMAKING

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EXECUTIVE SUMMARY

The current system of intercarrier compensation is stressed. Developed over a period of decades, the current system is a hodgepodge of rates and rules that vary considerably based on distinctions that have no basis in cost. These variations distort the market for telecommunications services and, ultimately, encourage carriers to find the least cost way to exchange traffic, not necessarily the most efficient way to exchange the traffic.

Although there is widespread agreement that the system is in need of reform, it is unrealistic to expect that the Commission will be able to address all of the distortions in today's intercarrier compensation mechanisms immediately. Many of the issues are complex and have widespread implications for the development of competition. Some issues are of uncertain jurisdiction, and may need to be addressed through more deliberative means when the Commission would prefer immediacy. Nevertheless, the Commission can and should proceed toward a unified compensation scheme within the confines of its jurisdiction.

XO recommends that the Commission work toward the development of a unified compensation system that has as its components the following features:

- The Commission should set a uniform Target Rate for all types of traffic exchanged, including TDM-based traffic, IP-enabled traffic, ISP-bound traffic and switched access traffic.

- The Target Rate should be based on costs, but may include separate Target Rates for rural and non-rural carriers.

- For terminating traffic, the Commission should set a Target Rate for non-rural providers of $.002 per minute of traffic.

- For originating traffic, the Commission should set a Target Rate of zero, assuming that jurisdictional issues can be addressed appropriately.

- All LECs should transition to the Target Rate(s) over a period of 7 years. Each year of the transition, a LEC would reduce its intercarrier compensation rates by one-seventh of the difference between the current rate and the Target Rate. Rates currently below the Target Rate(s), such as reciprocal compensation for ISP-bound traffic, would remain unchanged until the final step in the transition plan.

- While revenue neutrality should not be mandated, LECs should be required to recover any lost revenues initially through increased subscriber line charges (SLCs) assessed in an equitable and competitively neutral manner. The Commission should prohibit ILECs from shifting multiline business costs to residential subscribers or from allocating multiline business costs to harm competition in business services.

Although the Commission has jurisdiction to set Target Rates for terminating traffic, mandatory bill and keep is inconsistent with Section 251(b)(5) of the Act. Instead, the Commission must permit carriers to consider bill and keep on a voluntary basis.

Finally, the Commission should not enact "back door" revisions to its interconnection architecture rules under the guise of setting intercarrier compensation rates, nor should it relieve ILECs of the obligation to provide transit service at cost-based rates. Proposals to require competitive carriers to bear the financial burden of transporting traffic to specified "edges" of ILEC networks are inconsistent with the Telecommunications Act of 1996 and numerous Commission decisions under the Act declaring that CLECs are permitted to establish a single point of interconnection in a LATA. Similarly, an ILEC is obligated by Section 251(a) and 251(c)(2) to provide transiting service to requesting carriers, so that they may indirectly interconnect with each other. The Commission should advance the development of competition in local services by clarifying that transiting services must be provided at TELRIC rates.

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XO Communications, Inc. ("XO"), by its attorneys, hereby submits these Comments in response to the Commission's Further Notice of Proposed Rulemaking to replace current intercarrier compensation mechanisms with a unified regime.[1]

I. INTRODUCTION

The current system of intercarrier compensation is stressed. Developed over a period of decades, the current system is a hodgepodge of rates and rules that vary considerably based on distinctions that have no basis in cost. Telecommunications carriers exchange traffic at one rate if the traffic is interstate long distance, another rate if it is jurisdictionally intrastate, and yet another rate if the traffic is local telecommunications. Telecommunications traffic is exchanged at a different rate than is information services traffic, wireline traffic is exchanged at a different rate than is wireless traffic and ISP bound traffic[2] is exchanged at a different rate than is non-ISP

1 *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, FCC 05-33, CC Docket 01-92 (rel. Mar. 3, 2005) (*FNPRM*).

2 The Commission defined ISP-bound traffic as traffic that is delivered to an information service provider, particularly an Internet Service Provider ("ISP"). *Intercarrier Compensation for ISP-bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999) (subsequent history omitted).

bound local telecommunications. Moreover, within the same category of traffic, rates will vary, sometimes considerably, based on the identity of the carrier with whom the traffic is exchanged or the geographic locations of the end points of the call.

These variations distort the market for telecommunications services. Some services are favored with lower traffic exchange rates – and therefore lower end user costs – while functionally similar services are disadvantaged by higher costs. New services such as voice over IP ("VOIP") often become mired in extensive litigation to fit the new technology into established regulatory boxes. Such litigation adds uncertainty and risk to these technologies, sometimes significantly inhibiting their growth while classification decisions are being made.

Ultimately, carriers are encouraged by these rules to find the least cost way to exchange traffic, not necessarily the most efficient way to exchange the traffic. These decisions are derided by some as "arbitrage" and hailed by others as innovative, but in the end they are the product of a broken system that discriminates among services, technologies and classifications of carriers.

Although there is widespread agreement that the Commission should move toward a more unified system, the task of unifying these disparate compensation systems is enormous. The Commission has before it seven proposals for reforming intercarrier compensation, with several more that were filed in the days leading up to the comment date or are expected to be filed shortly.[3] Two of these proposals, the Intercarrier Compensation Forum ("ICF") proposal and the Western Wireless proposal, recommend bill and keep for most or all intercarrier compensation traffic.[4] The other proposals, such as proposals by the Expanded Portland Group ("EPG"), the Alliance for Rational Intercarrier Compensation ("ARIC") and the Cost-Based

3 *See FNPRM*, ¶¶ 40-59 (describing industry proposals).

Intercarrier Compensation Coalition ("CBICC"), would restructure and unify compensation to target rates, but these proposals do not agree on the level of those target rates or other significant elements such as cost recovery for revenues previously collected through above-cost access charges.

We did not reach this point overnight. It is unrealistic to expect that the Commission will be able to address all of the distortions in today's intercarrier compensation mechanisms immediately. Many of the issues are complex and have widespread implications for the development of competition. The Commission should proceed cautiously before altering established methods of interconnection and rights governed by the Telecommunications Act of 1996. It should be particularly skeptical of proposals that impose legacy architectures on new carriers, directly or indirectly, as these proposals will harm competition and limit consumer choices. It also must recognize that some issues are of uncertain jurisdiction, and may need to be addressed through more deliberative means when the Commission would prefer immediacy.

XO recognizes that there is much to do. But the Commission should not stand in place while it tries to assemble every piece of the puzzle to everyone's satisfaction. It can and should move toward a more unified rate structure over time, while maintaining the core system of interconnection among carriers. The Commission should ensure that these changes do not threaten the viability of universal service support mechanisms, but it should also be careful not to establish new subsidies that further distort competitive outcomes.

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[4] *Id.*, ¶¶ 40-42 (describing ICF proposal) and 54 (Western Wireless)

II. THE COMMISSION SHOULD PROCEED TOWARD A UNIFIED RATE STRUCTURE FOR THE TRANSPORT AND TERMINATION OF ALL TRAFFIC

The most critical element in reforming intercarrier compensation is the elimination of arbitrary distinctions among types of traffic exchange. XO agrees with the Commission and plan proponents that a new approach to intercarrier compensation should provide uniform cost recovery mechanisms for all traffic within the Commission's jurisdiction, should be competitively and technologically neutral, should not threaten the objectives of universal service, and, most importantly, should promote competition among multiple providers of telecommunications services. XO respectfully submits that the Commission can achieve these goals through the principles discussed below.

A. The Commission Should Establish A Single Target Rate for Termination of all Traffic Traversing the Public Switched Telephone Network in a Particular Area.

The common element in all intercarrier compensation reform proposals is that the Commission should set a uniform rate for all traffic within its jurisdiction. XO agrees with NARUC that the charges a local exchange carrier ("LEC") may assess for providing a particular service or function should not discriminate against carriers based on (1) the classification of the requesting carrier, (2) the classification of the requesting carrier's customers, (3) the location of the requesting carrier's customer, (4) the geographic location of any of the parties to the communication or (5) the architecture or protocols of the requesting carrier's network.[5]

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[5] See National Association of Regulatory Utility Commissioners, ex parte filing in CC Docket 01-92, at Appendix B, p. 6 (March 1, 2005) ("NARUC March 1, 2005 ex parte"). Twice since this filing, NARUC has modified its intercarrier compensation proposal. *See* NARUC ex parte filings, CC Docket 01-92, April 28, 2005 and May 17, 2005. These filings make several changes to the proposed unified rates for terminating compensation and, offer alternative proposals for originating compensation. XO believes NARUC's March 1, 2005 proposal provides a more reasonable option for unifying intercarrier compensation. All references herein to NARUC's proposal refer to its March 1, 2005 proposal.

Although there is some debate over the scope of the Commission's jurisdiction over certain types of traffic, much of the Commission's jurisdiction is not in dispute. Section 201 gives the Commission jurisdiction over all interstate and foreign communications by wire.[6] Similarly, Section 332 gives the Commission jurisdiction over all commercial mobile radio service ("CMRS") communications, whether interstate or intrastate.[7]

Further, Section 251(b)(5) on its face applies to the transport and termination of telecommunications between carriers.[8] XO agrees with the ICF that Section 251(b)(5) can be interpreted to apply to the transport and termination of all telecommunications, including long distance traffic usually subject to interstate switched access charges.[9] Thus, the Commission would appear to have sufficient jurisdiction pursuant to Section 252(d)(2) to establish a pricing methodology for all termination charges for local telecommunications traffic as well as for interstate switched access traffic.

It is not clear whether the Commission has sufficient jurisdiction over some types of traffic. For example, many parties question the scope of the Commission's jurisdiction over intrastate switched access charges. It is not clear that Congress intended Section 254 to reach these matters, as the ICF suggests.[10] XO believes that the Commission would have a high hurdle

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6 47 U.S.C. § 201.

7 47 U.S.C. § 332.

8 47 U.S.C. § 251(b)(5) (requiring all local exchange carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." In the *Local Competition Order*, the Commission construed this provision to apply to the transport and termination of "local telecommunications traffic." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition Order*).

9 *ICF Ex Parte Brief* at 29, attached to Letter from Gary Epstein, Counsel, Intercarrier Compensation Forum, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-92, Oct. 5, 2004 (*ICF Ex Parte Brief*).

10 *See FNPRM*, ¶ 82 (citing *ICF Ex Parte Brief* at 35-38).

to overcome in order to show that these charges necessarily implicate universal service goals in a way that would justify the use of the Commission's preemption authority. In the *FNPRM*, the Commission suggested that Section 251(g) might reach intrastate switched access charges.[11] However, Section 251(g) only applies to interconnection and nondiscrimination obligations previously imposed under consent decrees with the RBOCs and GTE. Intrastate access charges, though imposed in a manner consistent with obligations under those consent decrees, were not explicitly mandated by the consent decrees. The rates for access, so long as they were applied on a nondiscriminatory basis, were subject to state commission jurisdiction and regulation. Thus, it is not clear that Section 251(g) provides an adequate basis to reform all intercarrier compensation either.

In light of the uncertainty involving the Commission's jurisdiction, it would be preferable for the FCC to work in a cooperative manner with state interests to ensure that all traffic is subject to a uniform regime. The Commission can ill afford the delay and legal risk associated with venturing into these areas without accommodating state interests and concerns. Therefore, XO urges the Commission to give serious consideration to NARUC's proposal that states continue to have a significant role in setting rates under the uniform scheme.[12] It would be beneficial for the Commission to solicit state participation in its process, whether through informal federal-state forums or through the Joint Board process.

At a minimum, the Commission should work toward the development of a uniform Target Rate for all types of traffic exchanged. This Target Rate should apply to traditional

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11 *Id.*, ¶ 79.

12 NARUC March 1, 2005 ex parte at Appendix B, p. 7.

TDM-based traffic, IP-enabled traffic (including VOIP), ISP-bound traffic as well as other types of traffic exchanged between carriers.[13]

Specifically, XO supports the establishment of a uniform Target Rate for all termination charges, which would be implemented over a period of time. The Commission could immediately begin the transition to a uniform rate for termination charges because all parties agree that the Commission has jurisdiction over the cost methodology for this traffic pursuant to Section 251(b)(5). With respect to originating charges, the scope of the Commission's jurisdiction is less clear, and therefore may affect the pace at which the Commission may transition originating charges to a uniform rate. XO has no objection, after an appropriate transition period, to NARUC's recommendation that a uniform charge for origination of traffic be set at zero.[14] Over time, the significance of originating switched access charges should be diminished as bundled local and long distance services continue to gain in popularity and as VOIP gains in acceptance. Any proposal to reduce originating switched access charges should provide for the gradual reduction in origination rates over a transition period similar to the period described below for terminating traffic rates.

1. The Target Rate Should Be a Cost-Based Rate.

Intercarrier compensation for termination should be unified at a rate that is based on forward looking economic costs. NARUC's proposal of a uniform Target Rate of $.002 appears

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13 Because the Commission has yet explicitly ruled upon the issue of what charges, if any, apply to the exchange of IP-enabled traffic, carriers may be taking different positions regarding the applicability of intercarrier compensation for this traffic. In order to ensure that all providers will be operating under the same rules for IP-enabled traffic during the transition period, the Commission should clarify this issue as soon as possible.

14 *NARUC March 1, 2005 ex parte* at Appendix C, p. 5.

reasonable based on current data.[15] This rate is similar to the average TELRIC-based rate that CBICC calculates applies under state reciprocal compensation rates.

The Target Rate ideally should be set on a nationwide basis at the rate discussed above. Use of a nationwide Target Rate would be consistent with the desire to set a rate that does not depend on the geographic location of a customer or the location of the end points of a particular call. Use of a nationwide Target Rate also would reduce the concerns articulated in the *FNPRM* about the impact that the rate averaging and rate integration requirements have upon the incentives for carriers to serve rural or high cost areas of the country.[16]

If it is necessary to establish Target Rates that differ by geographic area, such as by state in order to address jurisdictional concerns, the Commission should establish pricing guidelines for such rates. Rates should be set by the appropriate state commission using the TELRIC standard for costs. Under no circumstances should a state commission be permitted to establish rates based on an ILEC's embedded costs. Embedded cost pricing is not consistent with forward looking costs.

2. The Commission Could Establish a Separate Target Rate Applicable to Rural Areas.

XO recognizes that it may be appropriate to establish separate Target Rates for non-rural LECs and for rural LECs. As the Commission recognized in the *FNPRM*, many rural LECs collect a significant percentage of their revenue from interstate and intrastate switched access charges.[17] Because these carriers face higher costs in serving rural areas, these carriers may face costs that justify a higher Target Rate than is applicable for non-rural LECs. Further, rural LECs

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15 *NARUC March 1, 2005 ex parte* at Appendix C, p. 5.

16 *See FNPRM*, ¶ 86.

typically have fewer subscribers than most non-rural LECs and may be less able to recover costs through their subscribers without impacting the Commission's universal service goals. Therefore, if the Commission determines that it is appropriate, it may establish a separate Target Rate for rural LECs. The Commission should establish such rates based on the additional costs incurred in serving the rural areas.

Importantly, the Commission should ensure that its definition of rural local exchange carriers is narrowly tailored to capture only those carriers that (1) face higher costs and (2) lack a sufficient volume of access lines to recover any lost revenues without threatening their ability to continue to provide local exchange service. XO recommends that only local exchange carriers defined as "rural" for purposes of Section 251's incumbent LEC duties, or competitive LECs serving the areas of a rural incumbent LEC, be covered by this exception.[18] Under this approach, a rural rate would apply only if the incumbent LEC in the area qualifies as a "rural telephone company" under Section 3 of the Act.[19]

B. All LECs Should Transition Their Termination Charges to the Target Rate Over a Specified Transition Period.

Once Target Rates are established, local exchange carriers should move toward those rates over a transition period in order to avoid significant disruptions in rates and revenues. XO recommends that LECs transition from current rates to the $.002 Target Rate over a period of 7 years.

During this transition period, each LEC would determine the difference between its existing intercarrier compensation rate(s) and the Target Rate(s). Each LEC would divide this

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17 *FNPRM*, ¶ 32.

18 *See* 47 U.S.C. § 251(f).

19 *Id.*, § 153(37) (defining "rural telephone company").

amount by the number of years in the transition period, and would reduce its intercarrier compensation rates in equal annual increments. As a result, all intercarrier compensation rates would move toward the Target Rate(s) in a linear progression during the transition.

An exception to this linear reduction should be in the case of intercarrier compensation rates that currently are below the Target Rate(s). Any rate already below the rate, such as the reciprocal compensation rate for ISP-bound traffic, should remain at current levels during the interim years of the transition. As a last step in the transition, these rates should be increased to the Target Rate when all other rates are unified at this target.

C. The Commission Should Resolve the ISP-Bound Traffic Remand and Reject ILEC Attempts to Exclude virtual NXX Traffic from Reciprocal Compensation

In addition to establishing a unified system for future intercarrier compensation, the Commission should promptly resolve, in a separate order issued as soon as possible, remaining questions concerning the scope of reciprocal compensation pursuant to Section 251(b)(5). These issues should be resolved so that all parties may begin the transition to a unified intercarrier compensation regime from a common understanding of the impact of the reform.

First, the Commission must resolve the over three year old remand from the D.C. Circuit concerning reciprocal compensation due for ISP-bound traffic.[20] The Commission should rule that all ISP-bound traffic is subject to section 251(b)(5) and should be exchanged at appropriate reciprocal compensation rates.

Twice the Commission has attempted to exclude ISP-bound traffic from the reciprocal compensation provisions of Section 251(b)(5), and twice those attempts have been reversed by the D.C. Circuit. In 1999, the Commission held that ISP-bound traffic is jurisdictionally

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

interstate and therefore not subject to Section 251(b)(5).[21] The D.C. Circuit remanded this ruling to the Commission, holding that the Commission had not explained why the Commission's jurisdictional analysis was relevant to the question of whether ISP-bound traffic was "local telecommunications service" under Section 251(b)(5).[22] On remand, the Commission changed its approach, abandoning reliance on the classification of ISP-bound traffic as non-local. Instead, the Commission concluded that ISP-bound traffic was "information access," subject to Section 251(g) rather than Section 251(b)(5).[23] The D.C. Circuit again remanded this determination, concluding that there was no pre-Act obligation to exchange ISP-bound traffic, and thus that Section 251(g) could not exempt ISP-bound traffic from Section 251(b)(5).[24] In the three years since *WorldCom*, the Commission has not taken action on the court's remand.

XO submits that the Commission cannot delay any longer in addressing this question. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications extends to all telecommunications traffic, including calls to ISPs. The Commission can and must classify ISP-bound traffic as subject to Section 251(b)(5) as soon as possible, *before* the Commission adopts an order reforming and unifying intercarrier compensation. Several of the plans rely on the assumption that the Commission has jurisdiction over ISP-bound traffic because it is subject to Section 251(b)(5). For example, the ICF recommended that the Commission avoid a narrow interpretation of Section 251(b)(5), stating that "such a finding could complicate the Commission's efforts to use that provision later to

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21 *Intercarrier Compensation for ISP-bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999) (*Declaratory Ruling*).

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

23 *Intercarrier Compensation for ISP-bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*).

24 *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432-33 (D.C. Cir. 2002).

exercise jurisdiction."[25] An order in response to the *WorldCom* remand is an important first step in reforming intercarrier compensation.

A determination that ISP-bound traffic is subject to Section 251(b)(5) does not require the Commission to abandon its interim compensation amount for the traffic. Rather, pending the implementation of a unified rate, the Commission has ample discretion to maintain ISP-bound rates at the present compensation amount for a transition period. As discussed above, XO recommends that the rate for ISP-bound traffic remain the same during the initial years of the transition, and that it transition (up) to the Target Rate only during the final step of the transition.

Second, the Commission must reject ILEC attempts to carve out virtual NXX/FX traffic from the reciprocal compensation provisions of the Act. Virtual NXX service is a service in which a LEC assigns a customer a telephone number associated with a particular rate center within a LATA, regardless of the location of the customer's premises within the LATA. CLECs often provision virtual NXX service to ISPs who wish to offer ubiquitous dial up access within all rate centers in a LATA. An ISP typically will locate modems and concentration equipment in collocation facilities at the CLEC switch and obtain PRI circuits associated with telephone numbers from multiple rate centers in the LATA. In this way, ISPs may aggregate traffic more efficiently, without forcing customers to incur per minute charges to reach the Internet.

These calls traditionally have been rated as toll or non-toll by comparison between the local exchange calling areas associated with both the originating and terminating telephone numbers. From a calling party's perspective, it has no way to determine whether that dialed number is associated with an ordinary local call, a virtual NXX service or "foreign exchange" ("FX") service. Further, virtual NXX calls are handed off at the same POI as other local calls,

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[25] Letter from Gary Epstein, Counsel, Intercarrier Compensation Forum, to Marlene Dortch, Secretary, FCC, WCB Docket Nos. 96-98 and 99-68 (Sept. 13, 2004).

and are routed identically by a LEC serving the originating party. An ILEC does not incur any more costs in delivering a virtual NXX call than it does in delivering other terminating traffic. Indeed, today, LECs routinely exchange FX traffic (whether destined to the ILEC or to the CLEC) as reciprocal compensation traffic.

Despite this, many ILECs are urging the Commission to declare virtual NXX calls as "toll service" for which the CLEC must pay to receive terminating traffic, rather than collecting compensation for terminating the calls. The Commission must deny these attempts. The physical location of the end user is irrelevant to the determination of whether a service constitutes transport and termination of "telecommunications" under Section 251(b)(5). As the *Bell Atlantic* court squarely held, the jurisdictional classification of the traffic as interstate does not exempt it from the compensation provisions of Section 251(b)(5).[26] The key question is whether a carrier provides a termination function to the originating carrier. Clearly, in the case of virtual NXX service, the LEC is terminating a call made by the originating party's end user. Moreover, the standard industry practice is to rate calls based on the originating and terminating telephone numbers of the communication, not the physical location of either calling or called parties. This proxy is the only way to determine with some accuracy whether the call is subject to reciprocal compensation. Virtual NXX and FX calls are indistinguishable from other local calls made to NXX numbers within the LATA; the rates applied to such traffic should be the same as well.

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[26] *Bell Atlantic*, 206 F.3d at 5-6.

III. THE COMMISSION MAY NOT MANDATE BILL AND KEEP

The Commission first sought comment on development of a unified regime in 2001, at which time it tentatively sought to adopt mandatory bill and keep rules.[27] In the *FNPRM*, the Commission wisely has not endorsed that solution (or any particular plan).[28] As explained below, while carriers are free to agree to a bill and keep arrangement, the Commission may not mandate bill and keep as compensation for the transport and termination of telecommunications traffic.

Section 251(b)(5) requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of "telecommunications."[29] Section 252(d)(2) establishes the pricing standard for reciprocal compensation arrangements. In order for a reciprocal compensation rate to be just and reasonable, it must provide for "*the mutual and reciprocal recovery* by each carrier of costs associated with the transport and termination on each carriers' network facilities of calls that originate on the network facilities of

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[27] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9612-13 (2001). Bill and keep is a mechanism by which two interconnecting network providers agree that neither will charge the other for terminating traffic. Instead, "each network recovers from its own end users the cost of both originating traffic delivered to the other network, and terminating traffic received from the other network." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499, at ¶ 1096 (1996) (subsequent history omitted).

[28] *FNPRM*, ¶ 62 ("we ask parties to comment on whether it is preferable for the Commission to adopt a single proposal in its entirety, rather than adopting a modified version of any particular proposal or attempting to combine different components from individual plans"); *see also* Separate Statement of Commissioner Michael J. Copps at 1 (noting that the staff analysis on bill and keep "is not the product of a Commission vote [and] does not reflect my opinion at this time").

[29] 47 U.S.C. § 251(b)(5).

the other carrier."[30] The rate further must be determined based on the "additional costs of terminating such calls."[31]

In the *Local Competition Order*, the Commission interpreted these provisions to require compensation to be set at symmetrical rates based on the cost incurred in transporting and terminating calls on the carrier's network.[32] Because carriers incur non *de minimis* costs in terminating traffic, bill and keep arrangements that lack any provisions for compensation do not provide for "recovery of costs" as required by the statute.[33] The Commission concluded that state commissions could mandate bill and keep only if two conditions are satisfied: (1) neither carrier has rebutted the presumption of symmetrical rates, and (2) the volume of terminating traffic is approximately equal and is expected to remain equal in the future.[34]

The ICF's proposal for bill and keep is not consistent with these principles. The ICF does not limit bill and keep to situations where the traffic is roughly in balance. Instead, the ICF would establish bill and keep for all traffic exchange, even where the amount of terminating traffic is skewed toward one carrier. Under such circumstances, the proposal does not provide for the recovery of the "additional costs" incurred in terminating telecommunications originating on another carrier's network.

To be clear, voluntary bill and keep arrangements are permissible under the statute. Section 252(d)(2)(B)(i) explicitly permits "arrangements that waive mutual recovery (such as bill and keep arrangements.)"[35] However, the parties to the arrangement must waive these rights; the

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30 47 U.S.C. § 252(d)(2)(A).

31 *Id.*, § 252(d)(2)(A)(ii).

32 *Local Competition Order*, ¶¶ 1056-58.

33 *Id.*, ¶ 1112.

34 *Id.*, ¶ 1111.

35 47 U.S.C. § 252(d)(2)(B)(i).

Commission cannot require parties to waive mutual recovery.[36] Thus, if traffic volumes are roughly in balance, carriers could conclude that it is more efficient to waive mutual recovery in favor of a bill and keep arrangement.

IV. BEFORE CONSIDERING THE CREATION OF NEW SUBSIDY FUNDS, THE COMMISSION SHOULD ADJUST SUBSCRIBER LINE CHARGES TO ENSURE THAT REVENUES PREVIOUSLY ASSOCIATED WITH ABOVE COST SWITCHED ACCESS RATES ARE RECOVERED FROM END USERS IN AN EQUITABLE MANNER

The *FNPRM* raises a number of issues relating to whether the Commission should provide a cost recovery mechanism for revenues that previously were recovered through switched access charges that are above the unified compensation rate.

XO does not endorse the idea that carriers (incumbent LECs, in most cases) should be guaranteed "revenue neutrality" as a result of reform of intercarrier compensation. The Commission has acknowledged for years that switched access charges substantially exceed cost, and has placed everyone on notice that it intends, over time, to transition switched access charges to cost. Indeed, the *CALLS Order*[37] and similar access charge reform activities are designed explicitly to bring access rates closer to their true costs. Under these circumstances, it is neither reasonable nor in the public interest to guarantee revenue neutrality to any class of carriers in the local telecommunications marketplace.

Rather than guaranteeing revenue neutrality, the Commission should focus on ensuring that all carriers have an opportunity to recover revenues previously associated with switched access rates in a reasonable manner. Any such cost recovery should be consistent with the

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36 Similarly, state commissions may mandate bill and keep only in response to an arbitration petition and only if the symmetry and traffic balance preconditions are met. *Local Competition Order*, ¶ 1111.

37 *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, 15 FCC Rcd 12962 (2000).

operation of a competitive market and should be made available in a competitively neutral manner. XO believes that, before the Commission considers establishing new "universal service" mechanisms (or increasing support provided under the current universal service funds), the Commission should fully explore direct recovery of increased costs from end users of the services. In particular, XO believes it would be appropriate first to authorize modest increases in the federal Subscriber Line Charges, which would be implemented over a transition period coinciding with reductions in intercarrier compensation rates. The Commission should establish rules to ensure that any costs recovered this way are done so in a reasonable manner and that ILECs do not cross subsidize by shifting a disproportionate amount of increases to residential subscribers.

Specifically, XO recommends that the Commission authorize, coincident with reductions in intercarrier compensation rates, an increase in the federal subscriber line charges. For residential subscribers, XO agrees with NARUC that the Commission should authorize an increase up to the lesser of $3 or the amount of intercarrier compensation lost by the particular carrier under the reform plan.[38] This increase should be implemented over time, with the $3 increase in the cap taking full effect only after completion of the transition period to a unified intercarrier compensation rate.

Importantly, the Commission should prohibit LECs from shifting losses in multiline business revenues to residential subscribers. Under any intercarrier compensation reform plan, LECs will experience reductions in switched access revenues recovered from both business and residential subscribers. In today's market conditions, ILECs face considerably more competition with respect to multiline business customers than they do in serving residential subscribers.

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[38] *See NARUC March 1, 2005 ex parte* at Appendix C, pp. 8-9.

With the recent demise of the unbundled network element platform as a means of providing competing residential service, it is likely that in the coming years the ILECs will have more incentive to shift costs to residential subscribers where competition is less prevalent. Therefore, it will become increasingly important that the Commission ensure that lost revenues are recovered from residential end users in a reasonable manner.

Currently, the ILECs hold a commanding presence in mass market telecommunications services. ILECs serve over 90% of residential subscribers in virtually every market. Although the ILECs often point to the potential threat that CMRS and VOIP present for their businesses, each of these alternatives account for an extremely small percentage of the total access lines served by the ILECs.

The Commission should adopt rules to ensure that ILECs do not recover lost revenues by imposing charges on more captive customers. First, the Commission should require ILECs to recover residential revenue reductions from residential customers and business revenue reductions from business customers. That is, any revenue previously associated with switched access charges assessed on single line business and residential lines must be recovered through the above increases in the SLC cap applicable to residential subscribers. Equally importantly, ILECs should not be permitted to increase the SLC for residential subscribers in order to offset revenue reductions flowing from multiline business lines. Instead, to the extent that an ILEC seeks to recover lost multiline business expenses, it should do so through SLC charges assessed on multiline business customers.

Similarly, just as ILECs should not recover multiline business revenues from residential customers, ILECs should not shift multiline business costs from customers facing more competition to those facing less competition. Such selective increases in prices for the more captive customer would result in an unreasonable discrimination among customers in violation of Section 202 of the Act. In particular, there is no justification at this time for granting ILECs additional retail pricing flexibility. The Commission's limited experience with pricing flexibility in the special access context indicates that such flexibility is not operating to lower end user rates. There is no reason to believe that the Commission can be any more successful in preventing discrimination by policing retail telecommunications rates offered by the ILEC. Plus, since retail services tend to be intrastate services traditionally regulated by the states, the FCC's intervention raises substantial questions as to its legality.

If competition rebounds from the set backs caused by the court of appeals' UNE remands, and the business market appears to be growing more competitive, the Commission should consider elimination of the multiline business SLC cap entirely, rather than enacting open ended pricing flexibility rules. This alternative provides the flexibility to recover revenues directly from end users without raising the concern that the ILEC will discriminate against other CLECs serving the area. The Commission could increase the multiline business SLC cap in several steps over the transition period, and, if competition has sufficiently developed during this period, eliminate the cap entirely once intercarrier compensation rates are reduced to the Target Rates.

Finally, the *FNPRM* requests comment on various reforms of USF mechanisms if these mechanisms are appropriate to recover revenues previously associated with switched access charges.[39] As stated above, XO recommends that the Commission consider universal service recovery funds only after fully considering direct recovery of authorized costs through federal subscriber line charges. Assuming for purposes of this discussion that the Commission decides

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[39] *FNPRM*, ¶¶ 98-107.

additional support is needed, XO recommends that the Commission modify the existing USF fund and distribution system to accommodate any additional universal service goals. In particular, it is critical that new universal service support amounts are carrier neutral and technology neutral. All local service providers should contribute on a fair and equitable manner, including new providers such a VOIP service providers. In addition, the Commission should examine the contributions made by wireline carriers compared to CMRS carriers, to ensure that overall contributions are allocated equitably between these two classes of carriers. As XO discussed in comments in the USF docket, the Commission should modify its revenues-based assessment system rather than replacing it with connections-based alternatives.[40]

V. THE UNIFIED INTERCARRIER COMPENSATION REGIME SHOULD OPERATE USING THE EXISTING NETWORK INTERCONNECTION ARCHITECTURE

Many of the intercarrier compensation plans propose or assume interconnection architectures that differ from those permitted under law today. The Commission should be skeptical of making "back door" changes to methods of interconnection established under Section 251 of the Act and Part 51 of the Commission's rules. The Part 51 interconnection rules have been in place for 9 years now, and parties have made substantial investments in interconnection architectures based on the rules established in those proceedings. This is not the place to make fundamental changes to the methods through which carriers may interconnect with each other. Instead, any intercarrier compensation plan should work with the existing system, rather than modifying it in ways that may have far reaching implications for competition.

In particular, the Commission should reaffirm its commitment to establishing intercarrier compensation mechanisms that are consistent with the use of a single point of interconnection in

[40] *See* Reply Comments of XO Communications, Inc., CC Docket 96-45, filed April 18, 2003.

a LATA and with an ILEC's obligation to provide transiting service at TELRIC rates, as described below.

A. Non-Rural ILECs Must Provide a Single Point of Interconnection in a LATA to Which a Terminating Carrier Bears Financial Responsibility for Transporting its Traffic.

Section 251(c)(2) of the Act permits a CLEC to establish a point of interconnection for the exchange of all traffic, including interexchange traffic. This section provides that the incumbent LEC shall have the duty "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network … (B) *at any technically feasible point* within the carrier's network."[41] Federal law is clear and unequivocal: A CLEC is required to establish only a single point of interconnection within the LATA for the exchange of all traffic between the parties' networks. In the *FCC Virginia Arbitration Order*[42], the Bureau held that Section 251(c) permits CLECs to establish a single point of interconnection:

> Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point. This includes the right to request a single point of interconnection in a LATA. . . .

This obligation has been confirmed numerous other times by the Commission, including:

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325 (rel. Aug. 8, 1996), ¶¶172, 1062 (competitors may choose the points of interconnection on the ILEC's network; further, a local carrier providing an interconnection trunk facility for the exchange of traffic between its network and that of another local carrier may recover from the other carrier a portion of the costs for that facility based on the carriers' proportionate use thereof).

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41 47 U.S.C. § 251(c)(2) (emphasis added).

42 *In re Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection*, 17 FCC Rcd 27039 (2002) ("*FCC Virginia Arbitration Order*").

In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, Memorandum Report and Order, CC Docket No. 00-65, FCC 00-238 (rel. June 30, 2000), ¶78 (competitive carriers may choose a SPOI).

In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Kansas and Oklahoma, Memorandum Report and Order, CC Docket No. 00-217, FCC 01-29 (rel. Jan. 22, 2001), ¶¶ 232-33. (competitive carriers may choose a SPOI, and cautioning SBC against expansive and out-of-context interpretations of FCC findings re SPOI and reciprocal compensation rules).

Further, the Commission has been clear that each carrier is required to "bear its own cost of delivering its originating traffic to the point of interconnection designated by the competitive LEC.' This requirement, the Commission found, flowed directly from the Telecommunications Act. As the Bureau explained in the *Virginia Arbitration Order*, a requirement that each party bear its own costs for facilities that reach the POI was "more consistent with the right of competitive LECs to interconnect at any technically feasible point."[43]

Several of the intercarrier compensation reform proposals would alter the cost sharing rulings the Commission made under the Act. The ICF plan, for example, requires carriers to bear the cost of transporting traffic to the "edge" of an ILEC's network. The "edge" is defined as each access tandem that an ILEC deploys, even where there are multiple tandems in a LATA. In short, CLECs would be required to interconnect with the ILEC (at least from a financial perspective) at multiple points in a LATA, dictated by the ILEC's network preferences, not technical feasibility.

The ICF proposals are flatly inconsistent with Commission precedent interpreting the Telecommunications Act of 1996. The ICF proposals would require a CLEC to establish multiple POIs in a LATA, one for as many tandems that the ILEC has deployed. In effect, this would require the CLEC to mirror the ILEC's network architecture in its own deployment. Such a requirement would present an insurmountable cost barrier for new entrants in the local telecommunications market. Furthermore, the ILEC network is not as efficient as most CLEC networks deployed today. As the Commission recognized in the Triennial Review proceedings, CLEC switches generally are able to serve a larger geographic area than ILEC switches.[44] CLECs do not need to deploy a hierarchical architecture in order to reach their customers in a market. However, if the ICF's "edge" proposal is adopted, CLECs would be required to do precisely that in order to mirror the ILEC's hierarchical system.

The Commission should not alter its interconnection rules in this proceeding. Instead, it should develop uniform intercarrier compensation mechanisms that are consistent with the interconnection methods in use today. Non-rural LECs should be required to exchange traffic, using the uniform rate, at a single point of interconnection within a LATA. Each party should be required to bear the cost of establishing the single POI and of transporting traffic to that POI. Moreover, if two-way facilities are deployed for the exchange of traffic, the parties should share the cost of those facilities equally, whether the facilities are provided by the ILEC or by the CLEC.

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43 *Virginia Arbitration Order*, ¶ 53.

44 *Unbundled Access to Network Elements*, Order on Remand, FCC 04-290, ¶ 207 (rel. Feb. 4, 2005).

B. ILECs Should Provide Transiting at Cost-Based Rates.

A final interconnection issue raised in this docket involves the exchange of transit traffic. "Transit traffic" is traffic that is originated by the customer of a third party local service provider (such as an Independent Phone Company (ICO), Cellular Mobile Telephone System (CMTS) or another CLEC) and is transported over the facilities of the ILEC for termination to a CLEC customer, or traffic originated by the CLEC's customer and destined for one of these other local service providers. While CLECs have direct trunks to some other carriers, only the ILEC has ubiquitous interconnection to every third-party provider in each region and exchanges traffic with all third party providers on a regular basis. If a CLEC customer calls the customer of another local service provider that is not directly interconnected with the CLEC, the ILEC acts as a "hub" and is paid transit rates to carry the traffic between the carriers.

Transiting service is not new. Prior to divestiture, the Bell System companies performed this transit function for third party service providers. Since adoption of the 1996 Act, ILECs have provided transit service to CLECs pursuant to interconnection arrangements. Recently, some ILECs have reversed their position, and now state that they are not required to provide transit services pursuant to an interconnection agreement. These ILECs argue that Section 251(c)(2) of the Act obligates an ILEC only to provide direct and indirect interconnection for purposes of exchanging traffic to and from its network, and transit is not a form of interconnection. These ILECs appear willing to continue to exchange transit traffic, but only at non-regulated rates of their choosing.

Transit traffic is a fundamental part of an ILEC's interconnection obligation and should be exchanged between carriers under a unified intercarrier compensation scheme. For the foreseeable future, the ILEC's dominant position in the local exchange market means that it will be the only carrier with interconnection to virtually every other local exchange provider in the region. Every competing local service provider will have a sufficient volume of traffic with the ILEC to justify interconnection for purposes of traffic exchange. Conversely, each competing local service provider will not have a sufficient volume of traffic exchanged with most other CLECs. Unless and until third party transit providers become ubiquitous, transiting through the ILEC will be the only feasible method of exchanging traffic with the vast majority of other competing carriers in a region. The Wireline Competition Bureau of the FCC has recognized that the ILECs' provision of transit service is critical to the CLECs' ability to interconnect efficiently with other carriers. In fact, in the *FCC Virginia Arbitration Order*, the FCC's Wireline Competition Bureau expressly directed the parties to include language in a Section 251 interconnection agreement that the ILEC must provide transit services to the CLECs.[45]

Under Section 251 of the Communications Act, an ILEC has a legal obligation to provide transit service to a CLEC as a part of interconnection. The FCC has held that a fundamental purpose of Section 251 is "to promote the interconnection of all telecommunications networks by ensuring that incumbent LECs are not the only carriers that are able to interconnect efficiently with other carriers."[46] Federal law requires all carriers to interconnect either directly *or* indirectly, and transit is a form of indirect interconnection between a CLEC and other carriers. 47 U.S.C. § 251(a)(1). Nothing in the language in Section 251(a) limits an ILEC's obligations under this section to traffic that originates or terminates on the ILEC's network.

Moreover, Section 251(c)(2) states that incumbent LECs have a duty to interconnect with telecommunications providers "for the termination and routing of telephone exchange service and exchange access." Nothing in Section 251(c)(2) limits an ILEC's interconnection duty to the

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45 *FCC Virginia Arbitration Order*, ¶¶ 115-20.

exchange of traffic between the ILEC and a particular CLEC, as some ILECs have contended.[47] Rather, Section 251(c)(2) requires that parties exchange all traffic regardless of origination or termination. Therefore, the Commission should make clear that ILECs have an obligation to provide this service to so that they may exchange transit traffic with other third parties also connected to the ILEC.

Further, transiting service must be provided at cost-based rates. Section 51.501(a) of the Commission's rules applies the TELRIC pricing standards to "the pricing of network elements, *interconnection* and the methods of obtaining access to unbundled network elements, including physical and virtual collocation."[48] Because transiting is a form of interconnection pursuant to Sections 251(a) and 251(c)(2), the rates at which an ILEC provides this interconnection must be consistent with the TELRIC standard.

Similarly, the rate for the exchange of traffic in a transiting arrangement must be consistent with TELRIC. Section 51.701 of the Commission's rules applies the TELRIC standard to "reciprocal compensation for the transport and termination of telecommunications traffic between LECs and other telecommunications carriers."[49] Nothing in this section limits the scope of the rules to traffic exchanged directly between an ILEC and a CLEC. Rather, this section is broad enough to encompass traffic delivered to the ILEC for delivery to a third party carrier as well. Thus, the ILEC's charges for use of its network to exchange traffic with a third party should be subject to the pricing principles outlined in the Commission's rules.

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46 *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, Fourth Report and Order, 16 FCC Rcd 15435, 15478, ¶ 84 (2001), *aff'd sub nom. Verizon Telephone Cos. v. FCC*, 293 F.3d 903 (D.C. Cir. 2002).

47 *See FNPRM* at n.347 (citing ILEC arguments that they are not required to provide transit service).

48 47 C.F.R. § 51.501(a) (emphasis added).

49 *Id.*, § 51.701(a).

VI. CONCLUSION

For the foregoing reasons, XO respectfully requests that the Commission implement a unified intercarrier compensation mechanism consistent with the principles described above.

Respectfully submitted,

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