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

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

REPLY COMMENTS OF ESCHELON TELECOM, INC.

ESCHELON TELECOM, INC.

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Eschelon Telecom, Inc. (Eschelon) submits these reply comments in response to the Federal Communication Commission's (Commission or FCC) Further Notice of Proposed Rulemaking in the above-captioned matter. [1]

I. Introduction

Founded in 1996, and based in Minneapolis, Minnesota, Eschelon is a facilities-based CLEC employing over 1,000 telecommunications and Internet professionals. Eschelon operates in eight states in the West and mid-West: Arizona, California, Colorado, Minnesota, Nevada, Oregon, Utah, and Washington. Eschelon owns and operates thirteen voice and fifteen data switches and over 130 collocations in the nineteen markets it serves. Via the use of unbundled network elements ("UNEs") at the DS-0 and DS-1 levels, the company provides integrated voice, data, and Internet services to approximately 343,000 access lines serving almost 56,000 business customers. On average, each Eschelon customer location is served by five to seven access lines. Almost half of all Eschelon customers take service at multiple physical locations. Rather than

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

being concentrated in core urban centers, Eschelon's customer base is geographically dispersed over the markets in which it operates.

The market segment Eschelon serves, small and medium sized businesses, is relatively underserved by SBC, Verizon and Qwest, the ILECs in whose markets Eschelon operates. Small businesses such as those served by Eschelon typically have more complex telecommunications needs than residential consumers, but unlike bigger businesses, Eschelon's small business customers generally do not have a telecommunications expert on staff. To better meet its customers' needs, Eschelon also distributes and installs business telephone systems. Today, approximately 60% of our customers who purchased business telephone systems also subscribed to our network services.

Eschelon applauds the Commission's focus on encouraging facilities-based competition, as stated in the FNPRM, and supports the principles that the Commission articulates as the basis for this proceeding: 1) encouraging efficient competition and efficient use of and investment in telecommunications networks; 2) preservation of universal service; 3) creation of a technologically and competitively neutral system that can accommodate continuing marketplace changes, and provide regulatory certainty; and 4) a compensation scheme that requires minimal regulatory intervention and enforcement.[2] Eschelon believes, however, that the Commission's principles, albeit laudatory individually, are in conflict collectively, at least insofar as the Commission envisions regulatory certainty resulting from further regulatory change.

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[2] *FCC Acts to Eliminate Outmoded Intercarrier Compensation Rules*, News Release (Feb. 10, 2005).

Eschelon submits that, given the evolving state of competition, and rapid technological evolution, in the market for voice and data services, the Commission's primary focus should be to maintain regulatory certainty over the near- and mid-term, and make only such adjustments to the intercarrier compensation regime as are absolutely necessary to maintain universal service. Too many of the Commission's previous attempts to force goal-oriented fixes onto the intercarrier compensation system have been lopsided in their conception, punitive to CLECs in their application, and resulted only in years of litigation, partial resolutions of the underlying issues, and protracted regulatory instability.[3] Moreover, while all carriers likely would support a more simplified and rational intercarrier compensation scheme over the long term, the status quo contniues to work, despite the Commission's various tinkerings over the last nine years. Given the history of intercarrier compensation reform, and the wide range of industry opinion as to what should be done, by whom, to what end, and for how long, Eschelon fears that the Commission's cure would once again be far worse, especially for CLECs, than the disease, and would further destabilize the market, throwing business plans into disarray at a time when the industry is struggling to adapt to technological innovation and can ill afford instability.[4]

Accordingly, rather than immediately revamping the entire intercarrier compensation scheme, Eschelon suggests that the Commission do the following: 1) apply

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[3] *See, e.g.,Intercarrier Compensation for ISP-Bound Traffic,* Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001)("*ISP Remand Order"*), *remanded, WorldCom v. FCC,* 288 F.3d 429 (D.C.Cir. 2002), *cert. Denied*, 538 U.S. 1012 (2003), the litigation from which order is ongoing.

[4] Eschelon is not alone in urging caution on the Commission as it entertains action in this proceeding. Indeed, the fear that a Commission decision in this docket might lead only to more complicated rules and regulations, and years of litigation and industry instability as a result, is reflected in

its existing intercarrier compensation rules in a uniform manner to all users of local facilities; 2) work with the state commissions, rather than pre-empting them, to unify rates currently under disparate jurisdictional regimes; 3) not mandate a bill-and-keep solution that would preclude the mutual recovery of costs per Section 252 of the Act, but instead leave bill-and-keep as it is today, an option for carriers to negotiate; and, 4) leave intact and in place the existing network interconnection rules and regulations, which have been relatively stable since 1996, and need not be implicated in any intercarrier compensation reform plan. Nevertheless, if the Commission does undertake any dramatic intercarrier compensation reform, the Commission should truly democratize the rules and structure such that ALL carriers of voice and data services, rural or urban, CLEC, ILEC, or CMRS, and all platforms, digital or analog, are subject to the same compensation scheme, and that all carriers have the same revenue recovery opportunities to offset any decline in intercarrier compensation.

II. The Timing of Intercarrier Compensation Reform

Despite the fact that compensation of various natures continues to flow between and among carriers much the same as it has for decades, it has become a self-evident truth that despite the fact that it works, more or less well, the current intercarrier compensation regime no longer is viable. Before the Commission issued its FNPRM in March, as many as eight different plans had been submitted for consideration in reforming the Commission's current rules, each of which proposed different and complex formulas, and rationales, for such reform. The proposals for reform under these eight

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the comments of numerous parties from across the industry. *See, e.g.*, Comments of Cincinnati Bell Inc. at 6; Comments of KMC Telecom, Inc. and Xspedius Communications, LLC at 19-24, 65, 68.

plans recommended everything from the ultimate abolishment of intercarrier compensation to the long term retention of some form of compensation for some or all carriers. Nevertheless, the majority of the plans favored retaining some form of compensation rather than a mandated bill-and-keep solution, albeit without any agreement as to rate levels.[5] Likewise, many of the plans favored, or appeared to favor, revenue neutrality for the ILECs, but lack agreement on appropriate cost recovery mechanisms or rates.[6] Further complicating matters, some plans favored a connections-based rate structure,[7] while others retained a minutes-of-use structure. Finally, many of the plans propose different interconnection architectures than those permitted under existing law.

In the end, many of the proposals for reform submitted to the Commission are, individually, at least as complex as the Commission's current rules. Collectively, the plans, especially when taken together with the more the than one hundred sets of comments and recommendations submitted on the FNPRM, amount to a vast and contradictory record of recommendations for, and against, any specific intercarrier compensation reforms that the Commission might entertain. Given the universe of complex and contradictory opinions presented to the Commission to date, there is little doubt that any reform plans that the Commission might adopt likely would result in yet another set of complicated rules that no doubt would give rise to new arbitrage opportunities rather than eliminating such opportunities, and may well require more, or at least no less, regulation of the market in the future than do the current rules.

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[5] *See, e.g.* CBICC Plan, ARIC Plan, EPG Plan, NASUCA Plan, Home/PBT Plan, and NARUC Plan.

[6] *See, e.g.,* ICF Plan, CBICC Plan, ARIC Plan, and EPG Plan.

III. Intercarrier Compensation Rules Should Be Applied in a Uniform Manner to All Users of Local Switching Facilities

From Eschelon's perspective, it makes little sense for the Commission to wade too deeply into the details and complexities of intercarrier compensation reform at this time, particularly if the end result is the replacement of one set of complicated regulatory rules with another set that either is no less complicated – and results in more regulation rather than less – or one that is confiscatory. That is not to say that some improvements cannot be made to the current rules, short of unnecessarily revamping the entire system at once.

Chief among the issues that the Commission should address in the near term is the disparate treatment of VoIP, which is resulting in significant arbitrage opportunities and is distorting network deployment decisions by facilities-based service providers. Few other issues are as potentially destabilizing as the uncertainty surrounding the application of intercarrier compensation rules to calls transmitted between the Internet and the PSTN. This issue has been circling the FCC in a holding pattern for most of the last six or seven years.[8]

The principle question to be addressed is the applicability of access charges to VoIP under existing law. The question's urgency derives, of course, from the threat that a widespread move from circuit switched calls to VoIP poses to access charge revenues, and by extension, to Universal Service funding.[9] At present, VoIP providers claim to

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[7] *See*, EPG Plan, Home/PBT Plan, and NARUC Plan.

[8] *See, Universal Service Report to Congress*, 13 FCC Rcd 11501, 11544-45 para. 91 (1998)("Stevens Report"); US West Petition for Expedited Declaratory Ruling, *Petition for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephone* (April 5, 1999).

[9] Order on Remand, *Access Charge Reform; Price Cap Performance Review for LECs*, 18 FCC Rcd 14976 para. 5 (2003).

operate under the "ESP exemption" which, if applicable, would exempt them from any obligation to pay access charges for traffic passed through the network to a PSTN subscriber, even though the PSTN subscriber on the receiving end of the call is not receiving an information service, but rather a standard issue voice telephone call. This claimed immunity gives the VoIP service provider a distinct, but artificial, pricing advantage over other long distance carriers that do pay access charges to complete calls, and cheats the terminating service providers out of compensation for those services. Such an expansion of the ESP exemption, if the Commission does not act quickly to correct it, threatens to become the tail that wags the dog, foisting onto the market new disparities of regulatory treatment that distort the manner in which all carriers do business, and exacerbating the need for intercarrier compensation reform.

Rather than subsume this issue within the larger intercarrier compensation framework and proceeding, and postpone its resolution, Eschelon agrees with SBC and other commenters that the simplest fix would be for the Commission to issue an order clarifying that its intercarrier compensation rules apply uniformly to all services provided via the use of switching facilities.[10] Such an order would eliminate the regulatory arbitrage in the market today as a result of the lack of clarity surrounding the treatment of VoIP traffic, would return the market to a rough competitive equilibrium, and ensure that all users of the PSTN share in its cost.

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[10] *See* Comments of SBC Communications Inc. at 18-23 (although Eschelon does not agree with SBC's characterization of the VoIP-PSTN traffic issue as a problem caused by VoIP providers "and their CLEC partners." The instant problem exists regardless of the party providing network access to the VoIP service provider). *See also* Comments of Pac-West Telecom, Inc., US LEC Corp., RCN Telecom Services, Inc., Cavalier Telephone Co., Paetec Communications, Inc., Broadview Networks, Inc., Bridgecom International, Inc., and Telcove Operations, Inc., at 30.

IV. Federal-State Cooperation is Critical to the Long Term Success of Intercarrier Compensation Reform

Perhaps the thorniest issue facing the Commission, should it choose to proceed with broader intercarrier compensation reform, is the question of the Commission's legal authority to require reform of intrastate access charge mechanisms. As stated in the FNPRM, the Commission has identified section 251(g) as sequestering intrastate access charge requirements from the obligations under section 251(b)(5).[11] The Commission goes on to inquire whether section 251(g) also allows it to adopt an alternative mechanism to replace intrastate access regulation.

Eschelon reiterates that the primary goal of the Commission at this point should be the preservation and perpetuation of regulatory stability. Rather than precipitously entering into unnecessary turf wars and litigation about the ultimate reach of its jurisdiction over intrastate access charges, the Commission should work cooperatively with the States to harmonize federal and state intercarrier compensation mechanisms and rates. This is particularly true given the serious questions, acknowledged by the Commission, as to its authority to preempt state authority over intrastate access charges.

Eschelon agrees with other commenters[12] that the Commission's jurisdiction to occupy the area of intrastate access charges is attenuated at best, and most likely is precluded under Sections 253(b) and (d) which would require the Commission to make case by case determinations as to its preemption authority over individual state statutes and regulations, rather than on a blanket basis. Rather than undertake either piecemeal or blanket preemption actions, Eschelon recommends that the Commission work

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[11] FNPRM at para 79.

cooperatively with the state commissions to unify the interstate and intrastate access charge systems in a manner consistent with the Act. A shared jurisdictional approach, rather than a protracted jurisdictional battle in the courts, would serve the industry, and telecommunications end users, best.

V. The Commission Must Preserve the Right of Carriers to be Compensated for Use of Their Networks

As noted at the outset of these comments, the majority of the plans submitted to the Commission prior to the release of the FNPRM in this proceeding supported a positive intercarrier compensation rate structure rather than a mandated move to bill and keep. Of those groups supporting bill and keep, their largest members are carriers that originate more traffic than they terminate, or who neither originate nor terminate traffic, and want to avoid paying for either. Thus, any schism relating to the appropriate structure for intercarrier compensation is driven not by varying interpretations of the Commission's legal authority to adopt or preserve a positive compensation rate structure, but rather purely by the economic self interest of some of the country's largest telecom companies.

Eschelon believes that there is little question that mandated bill and keep is unlawful under Section 252 of the Act because, where traffic is out of balance, bill and keep would preclude mutual recovery of costs as permitted under the Act.[13] The Commission has itself recognized that, when traffic is out of balance, bill and keep cannot meet the Section 251(b)(5) requirement that carriers are entitled to a mutual and

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[12] Comments of KMC Telecom, Inc. and Xspedius Communications, LLC at 68-70; Comments of Cincinnati Bell Inc. at 15; Comments of Pac-West, et al. at 7.

[13] 47 U.S.C. § 252(d)(2).

reciprocal recovery of costs, and that in-kind payments are inequitable and not "economically efficient because they distort carriers' incentives, encouraging them to overuse carriers' termination facilities by seeking customers that primarily originate traffic."[14] This simple statutory requirement is but the beginning of the hurdles that the Commission would face if it were to seriously attempt to impose a mandatory bill and keep regime for all traffic.[15] Of course, just as they may do so now, carriers should be free to mutually agree not to seek the compensation they may be due, but under the existing statute, the Commission does not have the discretion simply to order parties not to collect compensation, and should not seriously consider any such proposals.

VI. Existing Interconnection Architectures Should be Preserved

In addition to lobbying the Commission to strip carriers of their rights to compensation from other carriers for use of their networks and services, the ICF proposes extensive changes in the network interconnection rules currently in place.[16] As with the ICF's proposed adoption of a bill and keep solution for all traffic, its proposals for network interconnection are inequitable, unnecessary, and unworkable in a competitive environment, as well as unlawful. First, as a practical matter, and to Eschelon's overarching point, the time is not ripe for any change in interconnection methods between and among carriers. The rules that have been in place for the last nine years have served as the basis for substantial investment in network facilities. Any change in those rules

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[14] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 154999, ¶ 1112 (1996)("*Local Competition Order*").

[15] See Comments of Time Warner Telecom, Conversent Communications Inc., Cbeyond Communications LLC, and Lightship Telecom at 19-30. As Time Warner, et al, demonstrate, in addition to the statutory bar on bill and keep for out of balance traffic, the obstacles to the Commission forbearing from exercising its authority under Section 251(c) are numerous.

[16] Comments of the Intercarrier Compensation Forum at 20-25.

now would be purely gratuitous, and if implemented as the ICF proposes, would permit the ILECs to artificially raise CLEC interconnection costs by requiring them to cover all of the cost of constructing interconnection facilities, or purchasing such facilities from the ILECs at inflated costs.[17] Where mutual benefit is derived from the network interconnection, the costs and the responsibility of the interconnection must be shared.

Second, the ICF proposal is unlawful under Section 251(c)(2), which imposes an interconnection duty on ILECs to meet CLECs at any technically feasible point. The ICF proposal, which grants ILECs the right to designate the location and number of points of interconnection on their networks, clearly contravenes the statutory requirement. Absent any "technically necessary" reason, CLECs cannot be compelled to interconnect with ILEC networks at any or every point dictated by an ILEC's whim.

Eschelon submits that this is not the time, this proceeding is not the place, and the ICF proposal is not a practical or legal method by which to modify the manner in which carriers interconnect their networks.

VII. All Voice and Data Carriers Touching the PSTN Should be Subject to the Same Intercarrier Compensation Rules

Next to the overwhelming support for the preservation of a positive compensation rate, the proposal with the greatest support on the record in this proceeding concerns the ability of carriers to offset any revenue lose as a result of intercarrier compensation reform with a concomitant increase in other funding sources. But, that is where the agreement ends on the subject. As with most other aspects of this proceeding, there is a

[17] *Id.*

widespread difference of opinion as to how this particular proposal should be structured, and to what effect on different classes of carriers.

Eschelon does not endorse any specific proposal for offsetting revenue losses as a result of access charge reform. Moreover, Eschelon does not agree with the notion that carriers of any class (ILEC, RLEC, CMRS, or CLEC) be guaranteed revenue neutrality as one of the outcomes of the Commission's restructuring of intercarrier compensation. The Act makes no specific provision for alternative revenue recovery mechanisms, or for revenue neutrality, and any attempt by the Commission to ensure such neutrality would likely result in further tipping of the competitive balance in favor of incumbent carriers.

Rather than setting its sights on ensuring revenue neutrality in whatever compensation reform scheme it might ultimately settle upon, Eschelon recommends that the Commission focus on making sure that all carriers have an equal opportunity to recover revenues they might lose from switched access. To that end, Eschelon believes that small increases in federal Subscriber Line Charges ("SLCs") should be examined before any of the proposed plans for new universal service funding mechanisms are explored. In doing so, however, the Commission must ensure that ILECs not shift any losses from multiline business revenues to their residential subscribers. With the demise of UNE-P, the principle market in which ILECs face any real competition is the multiline business market. As such there would be a natural incentive for the ILECs to increase charges on residential customers to make up for switched access revenues lost on both business and residential customers.[18] The use of SLCs to recover switching costs from

[18] *See Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996,* Report and Order, 11 FCC Rcd 17539, ¶ 74 (1996).

end users under an intercarrier compensation reform plan presents just such an opportunity. It would be necessary, therefore, for the Commission to ensure that ILECs recapture lost revenues in strict relation to the nature of the customers from whom those revenues are lost through the adoption of regulations that limit the ILECs' ability to misallocate costs. Further, the Commission should look very skeptically upon any ILEC calls for additional pricing flexibility or deaveraging, which only would exacerbate the problem of ILEC cost shifting and the incentives to do so.

Finally, should the Commission determine that the appropriate course of action is to revise the structure of intercarrier compensation, Eschelon recommends that any changes given over to implementation via interconnection agreements allow for a default to which the parties have recourse in the event that they cannot reach a mutually agreeable interconnection and traffic exchange agreement. As the Commission is aware, there is a wide disparity in the relative bargaining power between CLECs and ILECs. Many if not most interconnection agreements that are negotiated point-by-point result in arbitration before a state commission. To the extent that carriers cannot agree to rates or terms, the Commission should require the ILEC to tariff the default compensation rules.

VII. Conclusion

The ungainly but serviceable regulations that are today's intercarrier compensation regime, has been adapted to by all carriers currently operating. Whatever its relative demerits, the current intercarrier compensation regime represents a status quo that few commenters have advocated changing the regime without the Commission guaranteeing revenue neutrality by also adopting mechanisms that would make them whole throughout, and at the end of, the process. As such, and as argued herein,

Eschelon believes that while a make-over may be in order, touch-ups to the current intercarrier compensation regime would provide the greatest benefit at the least cost, both for the Commission and for the industry. Accordingly, Eschelon respectfully requests that the Commission conclude this proceeding in accordance with its recommendations above.

Dated: July 20, 2005

Respectfully submitted,

ESCHELON TELECOM, INC.

/s/ Russell C. Merbeth
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