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

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

REPLY COMMENTS

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Date: July 20, 2005

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BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), hereby submits the following Reply Comments in the above referenced proceeding.

I. INTRODUCTION AND SUMMARY

The broad participation in this proceeding evidences the importance of intercarrier compensation to all those connected to or touched by the telecommunications industry: carriers, end users, associations, consultants, and regulators. The comments uniformly recognize that intercarrier compensation forms the foundation upon which a competitive market must operate, while noting that competition is undermined by distortions in the current intercarrier compensation mechanisms.

The record in this proceeding chronicles the nature of the problems that carriers encounter under the existing mechanisms. Such problems with the current intercarrier compensation system cited by the commenters include Virtual NXX, alleged "phantom traffic," misclassification of traffic and gaming, and arbitrage resulting from different compensation rates.

At the same time, as the Commission already appreciates, changes in technology and the marketplace will not remedy these problems. Instead, they will exacerbate them. New developments, such as Voice over Internet Protocol ("VoIP") will blur and render call types and jurisdictional classifications indistinguishable. The traditional jurisdictional placeholders and call type identifiers that have been used in the past to classify communications and upon which existing compensation mechanisms depend will lose their relevance as the foundation for intercarrier compensation.

The substantial benefits that reform can bring will flow from the solid competitive foundation that intercarrier compensation creates. As a result, the telecommunications industry can flourish. The marketplace will reward telecommunications providers that innovate, create, and deliver products and services that satisfy the needs and desires of consumers. The focus of telecommunications providers will be the customer. No longer will some providers be able to succeed simply by playing the regulatory game effectively.

Failure to reform intercarrier compensation would disserve the public interest. Continuation of a Byzantine approach to intercarrier compensation would send a message to the marketplace that the Commission intends to maintain a system that neither complements competition nor rewards innovation. Affirmation of the current regulatory approach would hardly be seen as a policy that encourages further investment in new product development and innovative technologies.

To achieve the benefits of reform, a new intercarrier compensation regime must be farsighted. The new rules must properly compensate network providers and establish a single set of rules that enable carriers to meet their financial obligations and to serve their customers. It is imperative that the new system be competitively neutral. It should neither reward nor penalize a

carrier on the basis of the market segments in which it chooses to compete or the network technology that it chooses to deploy.

Although some commenters suggest that the Commission should do nothing until all elements are decided at once, the Commission has a sufficient record to adopt the core elements of a new intercarrier compensation plan. Once the Commission establishes the core elements of the plan, the implementing details can be developed. Thus, at a minimum, the Commission should:

- Adopt a unified, nationwide compensation mechanism that is based on BellSouth's proposal;
- Adopt the principle of revenue neutrality;
- Adopt pricing flexibility for subscriber line charges ("SLCs"); and
- Permit indirect interconnection through market-based, negotiated transit arrangements.

Once the Commission adopts these elements, it can establish expedited proceedings to resolve implementation details.

II. DISCUSSION

A. The Scope of Intercarrier Compensation Reform

As the comments recognize, the mechanisms that fall under the umbrella of intercarrier compensation, and, hence, are subject to possible modification, include not only compensation among carriers for the exchange of local traffic, but also exchange access. In addition to the exchange of traffic between traditional TDM networks, intercarrier compensation reform must address new technologies, such as Internet protocol ("IP"), that are being deployed and used for providing voice communications capabilities.

Putting aside which intercarrier compensation proposal that a commenter supports, there is a general recognition that intercarrier compensation reform should govern all traffic that interconnects to the public switched network.[1] If the Commission exempts certain types of traffic that interconnect with the public switched network, such exemptions will serve to produce new compensation problems or exacerbate existing ones. As SBC observed, the reformation of intercarrier compensation should not "create *new* regulatory disparities that would distort competition still further."[2]

Accordingly, many commenters urge, and BellSouth agrees, that intercarrier compensation should apply to VoIP services to the extent that such services interconnect with the public switched network.[3] Regardless of how a service is ultimately classified by the Commission, information service or telecommunications service, such classifications should no longer be used to determine the level of compensation a provider pays for the use of the public switched network. Indeed, a fundamental criticism of the existing intercarrier compensation mechanisms made by a wide spectrum of commenters is that varying the rate of compensation by the type of provider or type of traffic or the end points of the communication creates

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1 *See, e.g.*, Comments of XO Communications, Inc. ("XO") at 4; Comments of the Rural Iowa Independent Telephone Association ("RIITA") at 18-19; Comments of Beehive Telephone Company, Inc. ("Beehive") at 5; Comments of Interstate Telecom Consulting, Inc. ("ITCI") at 14-15; National Cable & Telecommunications Association ("NCTA") Comments at 5; Corr Wireless Communications, LLC Comments at 2-5.

2 SBC Communications, Inc. ("SBC") Comments at 19.

3 For example, Cox Communications, Inc. ("Cox"), who strongly advocates that the Commission should make clear that intercarrier compensation reform would not impact the exchange of traffic between IP networks (*i.e.*, IP-to-IP), accepts that intercarrier compensation rules should apply to VoIP traffic that use the public switched network. Cox Comments at 22-23.

opportunities for mischief.[4] It provides perverse pecuniary incentives to carriers that successfully disguise traffic in order to pay the lowest compensation rate and imposes costs on carriers and customers alike. As CompTEL/ALTS points out, existing compensation schemes "deter innovation by encouraging carriers to seek out and take advantage of arbitrage opportunities, including deployment of inefficient network architectures."[5]

A critical principle of intercarrier compensation reform is that compensation payments should not be based on the classification of the traffic exchanged, or otherwise any new regime will be burdened with the same problems that are characteristic of the existing mechanisms. BellSouth's intercarrier compensation proposal is consistent with this principle, unifying the intercarrier compensation mechanism and, when fully implemented, establishing the same compensation rates that are applicable to all types of traffic. Under BellSouth's proposal, any traffic that interconnects with the local public switched network would be subject to the new intercarrier compensation plan.

A unified intercarrier compensation approach will eliminate the concerns with the current system that commenters have expressed. For example, several LECs allege they are insufficiently compensated because of phantom traffic.[6] As explained by these commenters,

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[4] CenturyTel Comments at 4-7; Cincinnati Bell Comments at 2-3; Comments of Pac-West Telecomm, Inc., *et al.* ("Pac-West"), at 4-6; Comments of KMC Telecom, Inc. and Xspedius Communications, LLC ("KMC/Xspedius") at 22-24; ITCI Comments at 2; Intercarrier Compensation Forum ("ICF") Comments at 2-3; Verizon Comments at 11/14.

[5] Comptel/ALTs Comments at 6.

[6] *See, e.g.*, CenturyTel Comments at 5-6; Eastern Rural Telecom Association ("ERTA") Comments at 4; Comments of the Iowa Telecommunications Association ("ITA") at 3-4. *See also* Comments of GVNW Consulting, Inc. at 27; ITCI Comments at 15; Comments of Alexicon Telecommunications Consulting at 7; Initial Comments of the South Dakota Public Utilities Commission at 8-9; Comments of North Dakota Public Service Commission at 3; Comments of Mid America Computer Corporation at 2.

phantom traffic arises where call type and/or jurisdictional modifiers are not included in the call detail of a terminating call. As a result, the terminating carrier may undercharge the originating carrier or, in some very limited instances, may not bill any termination charge. To the extent phantom traffic exists and stems from the intentional stripping of call type and jurisdictional information, it would be an example of the arbitrage that can result under the current system of fractured intercarrier compensation charges.[7] The resolution of the issue is reformation of intercarrier compensation and BellSouth's proposal would provide a solid solution in two very important ways. First, BellSouth's intercarrier compensation proposal does away with varying compensation rates on the basis of type and jurisdiction of traffic and establishes the same compensation rates for all types of traffic. Under BellSouth's proposal, the incentives to mask or misidentify traffic are eliminated.

The second important way that BellSouth's proposal resolves the phantom traffic issue is that it clarifies the obligations of carriers regarding transit traffic. Indeed, the phantom traffic problems that commenters describe cannot be resolved unless the Commission simultaneously clarifies the rights and obligations of interconnecting carriers that use transit services. As BellSouth discusses in Section D below, carriers may indirectly interconnect with another carrier by obtaining transit from a third carrier. No carrier has the obligation to provide a transit function. Thus, where an originating carrier employs a transit service, it is the originating carrier's obligation to arrange for the service and to notify the terminating carrier that a transit service will be used to indirectly interconnect. The originating and terminating carrier can then negotiate how records will be transferred. If there is a record failure, the terminating carrier

[7] The Commission has rules in place which require an originating carrier to deliver calling party number ("CPN") to a terminating carrier. The Commission, as an immediate step, should remind carriers of their obligation to provide CPN.

would look to the originating carrier for compensation.[8] Thus, BellSouth's proposal maintains as a cornerstone the obligation of each carrier to interconnect to other carriers, and recognizes that this obligation cannot be shifted to a third carrier.

In this way BellSouth's proposal is superior to some of the proposals aimed at remedying the alleged phantom traffic problem, such as the ARIC proposal, which would impose an obligation on the transit provider to compensate a terminating carrier in the case of phantom traffic. Such an approach undermines the integrity of the obligation that carriers have to interconnect with and to compensate other carriers. By imposing financial responsibility on third party transit providers, there is no incentive to establish the proper interconnection relationships between originating and terminating carriers. In other words, it just continues the same kind of problem that currently exists, but unfairly shifts the financial burden to the transit carrier. Such a result does not constitute reform.

B. The Appropriate Form of a Reformed Intercarrier Compensation Mechanism

In its comments, BellSouth provided an evaluation of the proposals that had been submitted in this proceeding and concluded that none of these proposals would achieve the Commission's objectives or provide a solid foundation for the telecommunications industry to

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[8] In considering this issue, the Commission must be mindful that not all record failures represent phantom traffic. As new requirements are implemented that impact the manner in which carriers exchange traffic, situations arise in which changes to existing systems must be made that had not been anticipated. For example, when local number portability was implemented, a problem was identified in connection with providing sufficient information to a terminating carrier to bill an interexchange carrier. The problem was associated with interexchange calls that were being terminated to a number that had been ported from BellSouth to a CLEC. After the problem had been identified, BellSouth developed a solution and modified its systems so that appropriate information would be sent to the terminating carrier to correctly bill the termination charge to the originating carrier.

grow and prosper. As discussed further below, nothing has been presented in the comments that should cause the Commission to reach a different conclusion. Indeed, the comments confirm that the unified intercarrier compensation reform proposal outlined by BellSouth is the only proposal that would meet the Commission's goals and serve the industry well in the future as new technologies and services emerge.

Advocates of a bill-and-keep approach to intercarrier compensation reform advance similar types of arguments in support of its adoption. They contend that bill-and-keep: (i) achieves the Commission's objectives and remedies the problems associated with the existing mechanisms;[9] (ii) obviates the problem of establishing wholesale termination rates;[10] and (iii) puts all carriers in the same position by which they must recover their own costs from their customers.[11]

Proponents of bill-and-keep overstate their case and overlook two salient points in the process. The first is that bill-and-keep is formulated upon the unstated assumption that the marketplace equilibrium would be characterized by fully functional (*i.e.*, local and interexchange) facilities-based carriers. The assumption that all carriers have facilities-based networks is critical to the assertion by bill-and-keep advocates that bill-and-keep will provide incentives for carriers to interconnect efficiently because it would be in their own economic interest.

The market reality is quite different. Rather than a market characterized by only fully integrated carriers, it is replete with specialized market players and non-facilities based service

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9 *See*, *e.g.*, ICF Comments at 25-28; Qwest Comments at 19-22.

10 *See*, *e.g.*, SBC Comments at 10-11; Qwest Comments at 21-22.

11 *See*, *e.g.*, Qwest Comments at 20.

providers – a market characteristic that is unlikely to change. There will always be, or at least in the foreseeable future, providers that focus on a single market segment, such as interexchange communications, and others that do not own networks, such as resellers and service providers that use the Internet.

Bill-and-keep neither anticipates nor accommodates the diversity of providers in the market. Instead, as BellSouth demonstrated in its comments, bill-and-keep creates competitive distortions.[12] For example, a provider of only interexchange services would, under bill-and-keep, be able to use local exchange networks to receive a call originated by one of its customers and to terminate that call without having to compensate the owners of the local networks. There is, however, no circumstance under which the local carriers can use the interexchange network without compensating the owner of the interexchange network. This is not bill-and-keep. The interexchange carrier is just receiving free service.[13]

The second point overlooked by bill-and-keep supporters is that bill-and-keep is not the holy grail of intercarrier compensation reform. While bill-and-keep may correct the problems associated with varying compensation levels for different types of traffic, it does not ensure adequate cost recovery by carriers for the use of their networks. A properly structured compensation mechanism, such as BellSouth's unified intercarrier compensation reform proposal, would accomplish both results. BellSouth's proposal provides a unified approach that has the same corrective benefit that bill-and-keep would have, but does so in a way that

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12 BellSouth Comments at 9-10.

13 Such a result flies in the face of arguments that some proponents make, such as Qwest, that bill-and-keep puts all carriers on an equal footing to recover their own costs. In the example above, the local carriers are burdened with the costs of originating and terminating the interexchange carrier's service, while the interexchange carrier enjoys the retail revenue.

accommodates the diversity of the market and ensures adequate cost recovery for all market participants that bill-and-keep does not.[14]

Commenters other than BellSouth have proposed usage-based mechanisms.[15] From these proposals, certain attributes that should be included in a new intercarrier compensation regime can be culled: (1) a uniform rate structure applicable to all types of traffic; (2) rules that promote efficiency and are technologically neutral; (3) the use of increased end user rates as a recovery vehicle; and (4) a reasonable transition plan. Using these attributes as a starting point, BellSouth developed its usage-based proposal. BellSouth's proposal remedies deficiencies that are present in the other proposals.

For example, the CIBCC proposal, even though it would have the same compensation rate apply to all types of traffic, calls for the rates to vary among geographic areas. Such an approach would not qualify as a unified mechanism. It also has the potential of fulfilling a criticism of a usage-based charge – endless litigation before state commissions over the proper compensation level – which would benefit neither the industry nor end users.

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[14] In its comments, BellSouth explained that the capacity-based proposals advocated by Expanded Portland Group and Home Telephone Company and PBT Telecom run afoul of the Commission's goal that a new compensation mechanism be competitively and technologically neutral. BellSouth Comments at 13-14. It should further be pointed out that capacity-based arrangements, like bill-and-keep, do not accommodate diversity among the types of participants in the marketplace. As BellSouth explained, capacity-based proposals would result in different rate structures for different types of traffic based solely on the regulatory classification of the traffic in question. In other words, the mechanism would change, but the problems would remain.

[15] Mechanisms based on various measures of cost have been proposed: the Fair Affordable Comprehensive Telecom Solution proposed by the Alliance for Rational Intercarrier Compensation; the proposal of the Cost-Based Intercarrier Compensation Coalition ("CIBCC"); the proposals of the National Association of State Utility Consumer Advocates ("NASUCA") and the National Association of Regulatory Utility Commissioners ("NARUC").

BellSouth has proposed unified compensation rates that apply nationwide. In this regard, BellSouth's proposal captures an important element that must be reflected in a new intercarrier compensation plan, namely, that the plan adapt to new market developments and not impede them. To think of intercarrier compensation, however, only as a local issue would disconnect the plan from current market developments and likely make it irrelevant to the future. The nationwide approach proposed by BellSouth ensures that innovation does not become geographically skewed because of disparate regulatory outcomes that would likely follow from compensation determinations made by each state commission.

The additional salutary benefit of BellSouth's nationwide approach is that it would obviate the concerns that geographically specific compensation rates would merely perpetuate the same kinds of problems that exist under the current regime. BellSouth has proposed rates that reflect a reasonable balance between carrier charges and end user charges. The post transition usage charges recommended by BellSouth were designed to reflect the approximate average reciprocal compensation levels BellSouth had proposed in its serving area. Given the diversity of BellSouth's serving territory, the proposed intercarrier compensation rates reflect urban and rural characteristics that would be found nationwide.

BellSouth's interconnection proposal would bring certainty to the interconnection process. The usage-based portion of the plan is based on the principle that the retail service provider should compensate the network provider. Accordingly, BellSouth's proposal is not merely focused on terminating charges. Intercarrier compensation would also apply on the originating end of 1+ and 10XXXX calls. Interexchange carriers have the retail relationship with the call originator. The interexchange carrier receives the retail revenue from the calling party

and it is appropriate that the local network provider be compensated at both ends of the call for the use of the local public switched network.

The comments of several parties acknowledge the appropriateness of assessing the usage charge on the originating end of a 1+ or 10XXXX call.[16] These commenters recognize that long haul providers are using the local public switched network functionality and benefit from the origination services that they use. Local providers cannot be expected to continue to provide these origination services and incur the related network costs without just compensation.

BellSouth's intercarrier compensation proposal, which includes an origination charge for interexchange communications, has a strong economic rationale that is further buttressed by sound public policy considerations. The origination charge completes the unified proposal. By maintaining an origination charge, the existing access charge mechanism becomes fully integrated into the new intercarrier compensation regime.

C. Revenue Neutrality

Most commenters recognize that implementation of a unified intercarrier compensation regime would entail substantial reductions of revenue that local exchange carriers currently obtain through access charges. Accordingly, any proposal for reforming intercarrier compensation must address this revenue loss. Providing a means by which these revenues are made up in some fashion is generally considered under the rubric of revenue neutrality.

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16 *See e.g.*, Cox Comments at 8-10; Pac-West Comments at 28; Comments of Time Warner Telecom, *et al.* ("Time Warner"), at 16-17.

For some commenters, the term revenue neutrality evokes visceral opposition.[17] They equate proposals for revenue neutrality as nothing less than claims by ILECs for a guarantee of revenue levels they received before any change is made to intercarrier compensation. In their view, such guarantees would be inconsistent with a fully competitive market and indeed insulate ILECs from the full impact of competitive losses.

These commenters have misconstrued the concept of revenue neutrality. In BellSouth's view, revenue neutrality reflects the means by which local carriers are afforded an opportunity to generate new revenue to replace the revenue reductions resulting from the modification of intercarrier compensation. Under BellSouth's plan, local carriers would be permitted to offset access reductions by increasing subscriber line charges. Thus, there is nothing in BellSouth's proposal that creates a revenue guarantee. Indeed, even outspoken opponents of revenue neutrality, such as Cox Communications, acknowledge that revenue replacement by increasing subscriber line charges should be permitted.[18]

The debate surrounding revenue neutrality appears to stem from proposals that include new universal service funding mechanisms as part of the plan for reforming intercarrier compensation. Unquestionably, universal service reform in and of itself is important and must be pursued by the Commission. The question, however, of whether universal service should be modified because of a change to intercarrier compensation is an independent question.

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17 *See, e.g.*, Comments of XO Communications, Inc. ("XO") at 16; Nextel Communications, Inc. ("Nextel") Comments at 19-23; Comments of T-Mobile USA, Inc. ("T-Mobile") at 13; Ionary Consulting Comments at 9.

18 Cox Comments at 11-14. *See also* XO Comments at 16 ("[r]ather 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.").

BellSouth's proposal does not create an additional universal service fund requirement. BellSouth believes that the first step in the process is to define all the parameters of a revised intercarrier compensation plan. Once this is accomplished, carriers can determine the impact that replacing revenues previously generated from carrier charges will have on subscriber line charges. It is only after this step is completed that an evaluation can occur of whether universal service goals could be adversely affected by the new intercarrier compensation plan. After such an evaluation, the Commission would have sufficient facts to determine whether and how the universal service program should be modified.

BellSouth's approach effectively addresses the concerns that commenters have raised regarding revenue neutrality. BellSouth is not looking to guarantee that its revenues will not change. It has proposed a mechanism that provides local carriers with the opportunity to replace carrier charges with end user charges. For this opportunity to be credible, an important corollary is that the Commission also provide local carriers with pricing flexibility. Such pricing flexibility is necessary to enable local carriers to establish end user prices that are consistent with market conditions. While shifting revenue recovery responsibility from carrier charges to end user charges, as BellSouth's proposal does, is rational and necessary in a competitive market, the Commission must also recognize that most state commissions have not rooted out the implicit universal service subsidies nor have they rebalanced local exchange rates to remove geographic or class of service subsidies that exist. If SLC increases permitted under BellSouth's proposal were implemented in a rigid, uniform way, such an approach would simply exacerbate the rate inequities that exist. Not only is such a result inconsistent with the goals and objectives of Section 254 of the Act, but in addition, it would be contrary to the pro-competitive aspirations that a unified compensation system should complement.

D. Transit Traffic

In response to the Commission's request for comments regarding transit traffic, numerous CLECs urge the Commission to find that incumbent LECs have a statutory obligation to provide transit traffic at cost-based rates.[19] As discussed below, the CLECs' position is based on a strained reading of the Act. The fact of the matter is that there is no statutory requirement that obligates incumbent LECs to provide transit services.

The CLECs start with Section 251(a)(1), which states that each telecommunications carrier has the duty "to connect directly or indirectly with the facilities and equipment of other telecommunications carriers."[20] They argue that transit is a form of indirect interconnection between a CLEC and other carriers and nothing in the language of the statute limits an ILEC's obligations under this section to traffic that originates or terminates on the ILEC's network.

Section 251(a)(1) refers only to the linking of "the facilities and equipment" of carriers; it does not mention the actual transport of traffic, let alone traffic that neither originated nor terminated on the transiting carrier's network. It is wrong to read the "indirect interconnection" requirement of Section 251(a)(1), as some commenters do, as also requiring a carrier to transit traffic between the originating carrier (say Carrier A) and the terminating carrier (say Carrier B). In that case, the transiting carrier (say Carrier C) is not "indirectly interconnected" with either Carrier A or Carrier B; rather it is directly interconnected with both. Thus, as described further below, any obligation on the part of a carrier to permit indirect interconnection with other

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19 Cox Comments at 14-22; Pac-West Comments at 21-24; KMC/Xspedius Comments at 56-59; XO Comments at 24-26.

20 47 U.S.C. § 251(a)(1).

carriers for the exchange of traffic simply cannot be interpreted to impose on that carrier a duty to provide a transit service.

The following hypothetical illustrates how the "indirect interconnection" requirement actually works. Assume Carrier A wants to interconnect with Carrier B. Section 251(a)(1) obligates Carrier B "to interconnect directly or indirectly" with Carrier A. Thus, if Carrier A requests the establishment of direct interconnection, Carrier B must agree to this request. Assume, however, that Carrier A does not have sufficient traffic to warrant direct interconnection with Carrier B, and instead enters into a voluntary arrangement whereby Carrier C, which has a direct interconnection with Carrier B, agrees to transit traffic for Carrier A. In this situation, Section 251(a)(1) requires Carrier B to allow Carrier A to "indirectly interconnect" with it through Carrier C. In other words, Section 251(a)(1) prohibits Carrier B from insisting upon direct interconnection with Carrier A and from refusing to interconnect indirectly with Carrier A by means of the transiting service voluntarily provided by Carrier C. But again, nothing in Section 251(a)(1) imposes any duty upon Carrier C to provide a transiting service. Had Congress intended to require carriers to provide a transiting service, it could readily have said so. Section 251 contains express duties imposed by Congress upon carriers, but transiting is not one of these enumerated duties. Indeed, Section 251(a)(1) applies to all "telecommunications carriers," not just ILECs or even all LECs. Consequently, to read Section 251(a)(1) as encompassing a duty to provide a transiting service would mean that any telecommunications carrier in the nation could demand that any other carrier provide a transiting service. There is no indication that Congress intended such a result nor has any party provided evidence that would permit the Commission to conclude otherwise.

CLECs also argue that Section 251(c)(2) establishes the duty of an ILEC to provide transit services.[21] Reliance upon Section 251(c)(2) as the source of the Commission's purported authority to impose a transit service obligation also is misplaced. Section 251(c)(2), which applies only to ILECs, requires an incumbent to provide a CLEC "interconnection with the [incumbent] local exchange carrier's network." Transit traffic is not mentioned, and, the Commission has previously rejected claims that transiting is required by Section 251(c)(2), expressly finding that its "rules have not required incumbent LECs to provide transiting."[22]

As the Commission has correctly held, "'interconnection' under Section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic."[23] According to the Commission, the term "interconnection" "does not include the transport and termination of traffic."[24] The Commission's reasoning is correct and forecloses any argument that transiting service is required under Section 251(c)(2).

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21 *See, e.g.*, Cox Comments at 16-18; KMC/Xspedius Comments at 58-59.

22 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17320, ¶ 534 n.1640 (2003) ("*TRO*") (emphasis added), *aff'd in part, rev'd in part and remanded, United States Telcom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert denied*, 125 S. Ct. 313 (2004); *see also Ex Parte* Letter from Peter Karoczkai, InfoHighway Communications Corp., to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338 *et al.*, Attach. at 2 (filed Feb. 14, 2003) (noting that the Commission specifically rejected the claim that "[t]ransiting is required by section 251(c)(2)").

23 *Local Competition Order*, 11 FCC Rcd at 15590, ¶ 176 (1996) (emphasis added).

24 47 C.F.R. § 51.5 (emphasis added) (defining "interconnection"); *see Local Competition Order*, 11 FCC Rcd at 15590, ¶ 176.

E. Legal Authority

Some commenters argue that the Commission does not have the legal authority to implement and administer a unified intercarrier compensation plan.[25] These commenters analytically approach intercarrier compensation as if the multi-jurisdictional mechanisms must remain. They perceive that reciprocal compensation, intrastate access and interstate access remain as independent mechanisms.[26] For these commenters, the only way that a unified intercarrier compensation regime can be implemented is for the state commissions and the FCC to agree on the same target rate and maintain those elements of the regime under its jurisdiction at the target rate. Such a result could hardly be considered a unified plan nor could it realistically be viewed as a remedy to the fractured intercarrier compensation mechanisms that are in place today.

The fact is that the Commission's legal authority is not so constrained. As BellSouth discussed in its comments, a fundamental source of the Commission's authority to adopt a

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[25] ITCI Comments at 16; Rural Alliance Comments at 140-41; NARUC Comments at 4-6; Missouri Public Service Commission ("MoPSC") Comments at 12; Public Utilities Commission of Ohio ("Ohio PUC") Comments at 2-3.

[26] Some commenters believe that the terminating end of exchange access can be brought within the scope of Section 251(b)(5), which applies to the transport and termination of local traffic. For example, the ICF contends that there would have been no purpose for Section 251(g) and grandfathering exchange access unless Section 251(b)(5) in fact addressed access traffic. ICF Comments at 41-42. Simple reflection suggests just the opposite: if Section 251 governed exchange access provided to interexchange carriers, then its implementation would have obviated the need to preserve existing exchange access arrangements. The implementing rules prescribed by the Commission would have superseded existing arrangements as required by Section 251(g). The fact is that Section 251(b)(5) and the implementing rules have nothing to do with exchange access and Section 251(g) is unrelated to Section 251(b)(5). Section 251(g) was necessary because the 1996 Act made both the AT&T and GTE consent decrees inapplicable after enactment. *See* Sec. 601, Pub. L. 104-104, Title VI, Feb. 8, 1996, 110 Stat. 143, reproduced in the notes under 47 U.S.C. § 152. As a result, absent Section 251(g), the cornerstone to the requirement to provide exchange access pursuant to tariff would have been eliminated.

unified compensation plan emanates from Section 201 of the Act that provides broad authority to address physical connections among carriers as well as associated compensation.[27] Section 201 has been consistently construed to govern the interconnection and division of charges among carriers that connect to carriers that provide interstate services. The only way a carrier could avoid the reach of the Commission's jurisdiction was not to have a physical connection to a carrier that provided interstate communications. Once such a connection was established, however, it was irrelevant that the carrier in question had purely intrastate facilities or is merely a connecting carrier. Under Section 201, the Commission can, as it did in the past, exercise jurisdiction regarding physical connections and compensation for all traffic exchanged between the interconnected carriers.[28]

Accordingly, the Commission can adopt a unified compensation plan if it follows the requirements of the second clause of Section 201(a). Thus, the Commission must make a finding after a hearing that the physical connections are in the public interest. As part of that finding, the Commission may determine the appropriate compensation among carriers. It is long settled that the Communications Act does not require an evidentiary hearing in order for the Commission to make an appropriate finding.[29] A notice and comment rulemaking, in which interested parties may present information to the Commission, is sufficient. Thus, this

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[27] BellSouth Comments at 40.

[28] For example, *United Telephone Company of the Carolinas v. FCC*, 559 F.2d 720 (D.C. Cir. 1977), involved a traffic agreement between the United Telephone Company and Southern Bell Telephone and Telegraph Company that included both interstate and intrastate traffic. The traffic agreement was filed with the Commission pursuant to Section 211 of the Act.

[29] *Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1265 (3d Cir. 1974).

proceeding provides a proper platform for the Commission to determine the necessary course to achieve the goals of the statute.[30]

Even if Section 201 alone were insufficient for the Commission to assume jurisdiction over a unified intercarrier compensation regime, the Commission has other sources of jurisdiction that, in combination with Section 201, would provide the Commission with the legal authority to adopt and implement an intercarrier compensation approach that the public interest demands.

In addition to Section 201(a), Section 251(g) grants the Commission jurisdiction over exchange access charges. This provision singles out exchange access for special treatment and grandfathered existing exchange access provided to interexchange carriers, including "the receipt of compensation."[31] Exchange access was preserved until explicitly replaced by regulations prescribed by the Commission.

Some commenters argue that Section 251(g) does not empower the Commission to replace intrastate access charges.[32] Such an argument is misguided. Section 251(g) applies to exchange access that was provided prior to enactment of the 1996 Act "under any court order,

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[30] The record in this proceeding demonstrates that the existing fractured system of intercarrier compensation, with the state and federal commissions each playing a role, is misguided. It is inefficient and fails to present the proper incentives for carriers to invest and innovate. The ultimate consequence of this failed system is that the consuming public is denied the full benefits of a robust competitive market wherein carriers expend resources on new technologies and services rather than on profiting from arbitrage opportunities created by an imperfect regulatory system. Accordingly, the public interest finding required by Section 201(a) is easily made.

[31] 47 U.S.C. § 251(g).

[32] *See e.g.*, Pac-West Comments at 24-26; Comments of the Rural Independent Competitive Alliance ("RICA") at 14-15; Rural Alliance Comments at 146-49; NARUC Comments at 9-10; Ohio PUC Comments at 8-11.

consent decree, or regulation, order, or policy of the Commission."[33] Both intrastate and interstate access charges have their origin in the 1982 AT&T consent decree and the subsequent GTE consent decree. But for the requirement in the decrees that exchange access be provided pursuant to tariff, there would have been no need for separate intrastate and interstate regimes.[34] It would be absurd to suggest that Congress only meant for Section 251(g) to apply to interstate exchange access and that the access obligations, including equal access, ceased to apply with respect to intrastate access.

The plain language of Section 251(g) is not jurisdictionally limited. It covers all exchange access that was provided pursuant to a consent decree or Commission order. Intrastate access as well as interstate access falls within the scope of Section 251(g). Under Section 251(g), the Commission is given exclusive authority to adopt regulations that will replace exchange access. Thus, the Commission has the authority to incorporate both intrastate and interstate exchange access into a unified intercarrier compensation plan.

Even if there still remained a question regarding the Commission's explicit statutory authority to adopt a nationwide uniform intercarrier compensation plan, the Commission can move forward and assert jurisdiction over any of the remaining aspects of intrastate regulation of intercarrier compensation that present obstacles to achieving legitimate federal goals. As BellSouth has demonstrated in its comments, the Commission has the authority to preempt state

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33 47 U.S.C. § 251(g).

34 Section 203 of the Communications Act only governs the filing of tariffs for interstate communications. At the time of the 1982 decree, the Commission did not have forbearance authority that would have enabled a unified interstate tariff.

regulation that is incompatible with the implementation of a unified intercarrier compensation plan.[35]

Not only will continuation of separate intrastate and interstate compensation regimes frustrate the achievement of the Communications Act's goals, but also, the ability to distinguish between different types of traffic (*e.g.*, local, intrastate access and interstate access), is rapidly disappearing. In cases where the separate jurisdictional aspects cannot be separated, the Supreme Court has recognized the supremacy of the Commission's jurisdiction. In *Louisiana Public Service Commission v. FCC,* the Court stated that the Commission's authority is paramount when it is not possible to carve out separate spheres in which the Commission and state commissions can operate independently.[36] Based on *Louisiana Public Service Commission,* the Commission can preempt state regulation to the degree necessary to prevent such regulation from negating the Commission's exercise of its lawful authority.[37]

A carrier will use the same physical interconnection arrangement to exchange all types of traffic (local, intrastate toll, interstate toll). The record fully supports a Commission determination that there simply is no practical way to identify and separate intrastate and

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35 As the courts have found:

> FCC preemption of state regulation is . . . permissible when (1) the matter to be regulated has both interstate and intrastate aspects; (2) [it] is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate[] the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate aspects.

Pub. Serv. Comm'n of Md. V. FCC, 909 F.2d 1510,1515 (D.C. Cir. 1990) (internal quotation marks and citations omitted).

36 *La. Pub. Serv. Comm'n v. FCC,* 476 U.S. 355 (1986).

37 *See NARUC v. FCC*, 880 F.2d 422, 425 (D.C. Cir. 1989).

interstate components. If state regulation is not displaced, the Commission will be thwarted from achieving the statutory goal of a free, open, technologically advanced and competitive market.

Implementation of a unified, nationwide intercarrier compensation system is essential to an arbitrage-free, pro-competitive marketplace. The Commission has the responsibility and obligation to formulate and implement such a system. Its broad authority under Section 201, coupled with the Commission's ability to preempt state regulation that would otherwise impede fulfillment of legitimate and important statutory objectives, vests in the Commission the authority to adopt the unified intercarrier compensation reform proposed by BellSouth.

III. CONCLUSION

A reformed intercarrier compensation regime must correct the fractured system that is currently in operation. It must eliminate compensation rates that vary by type and classification of interconnected traffic. The new rules must properly compensate network providers and establish a single set of rules that enable carriers to meet their financial obligations. It is equally imperative that the new system be competitively and technologically neutral. It should neither reward nor penalize a carrier on the basis of the market segments in which it chooses to compete or on the basis of the technology a carrier chooses to use to serve a market segment. BellSouth has proposed an intercarrier compensation regime that will accomplish these objectives. Using BellSouth's proposal, BellSouth urges the Commission to adopt the key elements of a new unified intercarrier compensation plan.

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I do hereby certify that I have this 20th day of July 2005 served the following parties to this action with a copy of the foregoing **REPLY COMMENTS** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

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