basis for rate discrimination for telecommunications traffic termination. *FNPRM* at 4693-94, ¶15.[10] While the Commission is certainly afforded wide discretion to determine rates, it is also obligated to follow well-established methodology and procedures—in this case TELRIC—in order to set rates. *See e.g., Prometheus Radio Project v. FCC*, 373 F.3d 372, 390, 395 (3d Cir. 2004) (permitting an agency to engage in "line drawing determinations" but requiring agencies that do so to "support its decision with reasoned analysis"). Accordingly, any order resolving the *WorldCom* remand that preserves the existing rate discrimination would contradict the Commission's existing findings, and thus be arbitrary and capricious.

The Commission has repeatedly found "no economic or technical" reason for the disparate intercarrier compensation regimes preserved through the section 251(g) "carve out" from the unified standard for all "telecommunications" under section 251(b)(5). In 1996, the Commission correctly concluded that "transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions," and as a result, "that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge." *Local Competition Order* at 16013, ¶1033. In 2001, the Commission further concluded that "a [local exchange carrier]

10 The *FNPRM* also notes that one of the key goals of the Act – and intercarrier compensation reform – is to promote facilities-based competition. *See FNPRM* at ¶31 (stating that "one of the Commission's most important policies is to promote facilities-based competition in the marketplace"); *see also Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 18 FCC Rcd 18945, ¶3 (2003) (facilities-based competition is "one of the central purposes of the Act."). Core is a facilities-based carrier that has deployed telecommunications facilities throughout the Mid-Atlantic and into the Northeast. Core understands that resellers, like Sage Telecom and others, would prefer to have below cost access to the networks that other carriers build, *see generally* Sage Telecom Ex Parte, CC Docket No. 99-68 (May 9, 2008), but that is not the Commission's policy. Indeed, it is a policy that the Commission rejected in part in response to court decisions, including *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

generally will incur the same costs when delivering a call to a local end user as it does delivering a call to an ISP." *ISP Remand Order* at 9156-57, ¶8. Indeed, the Commission went so far as to state that "the record developed in response to the *Intercarrier Compensation NPRM* and the Public Notice fail[ed] to establish any inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP." *Id.* In 2005, the Commission again reiterated that "existing [intercarrier] compensation regimes are based on jurisdictional and regulatory distinctions that are not tied to economic or technical differences between services." *FNPRM* at 4693-94, ¶15.

Furthermore, this Commission's own undisputed finding is that existing, disparate intercarrier compensation regimes are the source of "regulatory arbitrage," and that no technical or economic reason exists to justify mandating high intercarrier compensation rates for some telecommunications traffic, and low intercarrier compensation rates for other telecommunications traffic. As noted, in 2005, the Commission defined the problem of regulatory arbitrage with regards to intercarrier compensation:

> [R]egulatory arbitrage arises from different rates that different types of providers must pay for essentially the same functions. Our current classifications require carriers to treat identical uses of the network differently, even though such disparate treatment usually has no economic or technical basis. These artificial distinctions distort the telecommunications markets at the expense of healthy competition.

FNPRM at 4693-94, ¶15. This, in part, is why the Commission's stated policy objective is to unify intercarrier compensation rates, not preserve disparate rates. Commission vacatur of the *ISP Remand Order* would further, not frustrate, the Commission's efforts by eliminating piecemeal regulation that has no statutory basis.

At bottom, although ostensibly designed to limit "regulatory arbitrage," the *ISP Remand Order* regime has only compounded existing problems and created new ones in direct contradiction to the Commission's stated goal of unifying intercarrier compensation rates. Section 251(b)(5) speaks in terms of all "telecommunications," and provides no hook for subdividing that statutorily-defined term into distinct baskets for discriminatory treatment. Similarly, as noted in more detail below, nothing in section 252(d)(B)(i) of the Act suggests that the Commission may treat section 251(b)(5) telecommunications traffic disparately. Rather, like section 251(b)(5), any reading of section 252(d)(2)(B)(i) demonstrates a congressional desire to treat all telecommunications (excluding section 251(g)) the same. Finally, the Commission never sought comment on establishing a below-TELRIC rate for telecommunications to ISPs or other end users. As a result, the promulgation of that rule also violated the APA's notice and comment requirement. The Commission's finding that maintaining multiple intercarrier compensation schemes creates regulatory arbitrage precludes the Commission from issuing an order resolving the *WorldCom* remand that preserves the existing, disparate rates for telecommunications traffic termination. Any finding maintaining the non-cost-based \$0.0007 rate cap for telecommunications traffic to ISPs would be flatly contrary to the Commission's findings and thus arbitrary and capricious.

D. Any Order Resolving The *WorldCom* Remand Must Adequately Justify On-Going Application Of The *ISP Remand Order's* "Mirroring Rule" And The "3:1 Ratio"

As demonstrated above, there is no basis for maintaining discriminatory rates under the *ISP Remand Order* for the provision of a technically and economically identical termination function. The same holds true for the "mirroring rule" and "3:1 ratio" test. The mirroring rule's only possible purpose is to allow for the disparate treatment of traffic otherwise subject to equal treatment under 252(d)(B)(i) – *at the incumbent's election.*

The "mirroring rule" may have surface appeal; however, it does not in reality ensure parity of rates. Each incumbent is (unlawfully) delegated the decision of whether to "offer" the mirroring rates on a state-by-state basis. The incumbent (based on an unsupported delegation of authority by the Commission) is thus enabled to dictate whether the Communications Act or the "interim" rules apply. Each incumbent, of course, makes this election based on the incoming and outgoing traffic flows on its network – precisely the "regulatory arbitrage" the Commission claims to abhor and is seeking to eliminate through the *FNPRM*. Moreover, the incumbent merely needs to "offer" this option; it is not forced to exchange traffic at the rate cap.

The related 3:1 ratio separates section 251(b)(5) telecommunications traffic into "voice" and "ISP-bound" baskets, even though the statute provides for no such distinction, and (as noted above) regardless of whether the traffic is actually ISP-bound. All traffic over the ratio is "presumed" ISP-bound, and all such traffic is subjected to the rate caps, whether actually ISP-bound or not. This presumption is inherently arbitrary, as there is no means to identify the type of traffic that is sent (ISP and non-ISP traffic display the same characteristics) other than relying on the mistaken assumption that if the exchange is greater than the arbitrary 3:1 ratio, then it is automatically classified as "ISP-bound." Thus, even if ISP traffic were to disappear tomorrow, the interworkings of this order allow the incumbent carrier unilaterally to determine whether section 251(b)(5) of the Act applies to certain "telecommunications," and on-going application of the rate cap would apply to other forms of traffic, such as VoIP traffic.

In any event, the "mirroring rates" are not mirrors at all. The rate caps apply only to traffic above the 3-to-1 ratio, even though the Commission found that voice and ISP-bound traffic incur the same termination costs. This rule arbitrarily rewards providers that handle roughly equal volumes of inbound and outbound traffic, and punishes specialists. As an example, if a carrier exchanges 1 billion minutes each direction, it now has a 2-billion-minute quota under which it can terminate at the state-based reciprocal compensation rate. By contrast, a specialist competing primarily for inbound traffic (ISP or not) is forced into the rate cap. Ultimately, the specialist may charge only the capped rate, while the generalist may charge the state-based reciprocal compensation rate, typically three to four times higher than the capped rate.

Nothing in the statute, however, suggests that the rate for terminating "telecommunications" traffic should vary based on relative inbound and outbound traffic flows. Indeed, the whole purpose of intercarrier compensation is for one carrier to pay another for use of its network for traffic termination. The Commission has explicitly and repeatedly found that termination costs do not vary based on the type of "telecommunications" traffic terminated. As is the case with other elements of the *ISP Remand Order*, the Commission never put the "3:1 ratio" or "mirroring rule" out for comment, and the Commission provided the industry with no public notice that such regulations were even under consideration by the Commission. For these reasons, the "mirroring rule" and the "3:1 ratio" are arbitrary and capricious.

V. SECTION 252(d)(2) CANNOT BE CONSTRUED TO PERMIT RATE DISCRIMINATION AGAINST TELECOMMUNICATIONS TO ISPs

For the past 12 years, the Commission has interpreted the statutory "pricing standards" established for the "transport and termination of traffic" under section 252(d)(2) to be the same as that required for "interconnection and network elements" under section 252(d)(1). *Local Competition Order* at ¶1054. This unified pricing standard – known as TELRIC – is the only cost-based pricing standard the Commission ever has established for purposes of interconnection under section 251(c)(2), network elements under sections 251(c)(3), and telecommunications traffic termination under section 251(b)(5). After the Commission established this cost-based methodology, certain ILECs challenged TELRIC as resulting in rates that were so low as to constitute a Takings of property without just compensation. However, the United States Supreme Court ultimately affirmed the Commission's standard as reasonable, *Verizon v. FCC*, 535 U.S. 467 (2002), and state commissions have applied the TELRIC standard to set rates for telecommunications termination under section 251(b)(5) and related items ever since. There is no basis for refusing to apply section 252(d)(2)'s pricing standard to telecommunications to ISPs and any such result, through forbearance or otherwise, would fail.

A. The Section 252(d)(2) TELRIC Pricing Principles Are Well Established And Provide A Fair Compensation Mechanism For All Telecommunications Traffic

Some providers have suggested that section 252(d)(2) permits this Commission to set a discriminatory rate against telecommunications to ISPs. Such a notion has absolutely no basis in the statute, which is why the Commission never has adopted anything of the sort. On its face, section 252(d)(2) provides: (i) a pricing standard for ***compliance by an incumbent local exchange carrier*** with section 251(b)(5) and (ii) a means by which a ***state commission*** may evaluate an ***ILEC's compliance*** with section 251(b)(5). 47 U.S.C. § 252(d)(2)(A). "Such terms and conditions provide for the mutual recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." 47 U.S.C. § 252(d)(2)(A)(i). The pricing rules established in section 252(d)(2)(A) are not construed to "preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, ***including arrangements that waive*** mutual recovery (such as bill-and-keep arrangements)." 47 U.S.C. § 252(d)(2)(B)(i).

Agreements must provide, for the carrier that is receiving telecommunications from the other carrier, an equal means of cost recovery based on a "reasonable approximation" of the cost of providing termination. Neither the FCC nor a state commission can require a carrier to establish its termination costs with "particularity," nor to maintain records related to the establishment of its costs. 47 U.S.C. § 252(d)(2). Bill-and-keep only is appropriate if a party agrees to ***waive*** its right of cost recovery. *Id.*

As an alternative to setting TELRIC rates based on cost studies, the FCC permitted state commissions to use "default proxies," which for telecommunications traffic termination, this Commission set "a default price range of 0.2 cents ($0.0020) to 0.4 cents ($0.0040) per minute of use." *Local Competition Order* at ¶1060 (noting that the default proxy for telecommunications termination was the same as that the Commission adopted for switching as an unbundled network elements).[11] "Thus," the Commission concluded, state commissions "must set the price" for section 251(b)(5) telecommunications transport and termination by: (1) using a forward-looking, economic cost study that complies with the forward-looking, economic cost methodology, *i.e.*, TELRIC or (2) adopting a price less than or equal to 0.4 cents ($0.0040) per minute, and greater than or equal to 0.2 cents ($0.0020) per minute, pending completion of a TELRIC study. *Id.* The Commission further determined that telecommunications termination rates must be "symmetrical," which the Commission defined as arrangements where "the rate paid by an incumbent LEC to another telecommunications carrier for transport and termination

---

[11] Embarq admits that its average reciprocal compensation rate is $0.0065 per minute of use, which is more than 50% higher than the high end of the zone of reasonableness established by the Commission for traffic termination. *See* Embarq Ex Parte, CC Docket No. 99-68, at 5 (Apr. 30, 2008). Embarq's unwillingness to pay what it charges others demonstrates that Embarq is a regulatory arbitrageur as defined by the Commission in its *FNPRM* and elsewhere.

of traffic originated by the incumbent LEC is the same as the rate the incumbents LEC to transport and terminate traffic originated by the other telecommunications carrier." *Id.* at ¶1069.

Finally, the Commission permitted bill-and-keep arrangements pursuant to section 252(d)(2)(B)(i) "if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing in the opposite direction, and is expected to remain so." *Id.* at ¶1111. Indeed, the Commission concluded that if parties do not maintain a balance of traffic that is "approximately equal," bill-and-keep would impermissibly violate section 252(d)(2)(A)(i) of the Act because "carriers incur costs in terminating traffic that are not *de minimis*, and consequently, bill-and-keep arrangements ... do not provide for the recovery of costs." *Id.* at ¶1112. The Commission further concluded that "bill-and-keep arrangements are not economically efficient" because they encourage the "overuse of competing carriers' termination facilities." *Id.*

As set forth above, the Commission always has always understood section 252(d)(2) to require TELRIC-based rates for the transport and termination of telecommunications under section 251(b)(5). State commissions – not ILECs – are charged with setting rates in accordance with the Commission's TELRIC methodology or utilizing the $0.0020-$0.0040 per minute "zone of reasonableness" established by the Commission with its default proxies. Bill-and-keep only is permissible in cases where traffic exchange is balanced and is expected to remain so.[12] Under section 251(b)(5), the Commission never has wavered

---

[12] In direct contradiction of its advocacy in this proceeding, AT&T just last week stated that bill-and-keep arrangements are only proper in instances when there is a ***determination by a state commission*** that the balance of telecommunications traffic is "roughly balanced." 47 C.F.R. § 51.711(b); *In the Matter of AT&T ILECs' Petition for a Declaratory Ruling*, WC Docket No. 08-23, *Ex Parte* Submission of AT&T at 2 (May 7, 2008) (attached hereto); *see also Local Competition Order*, 11 FCC Rcd at 16054-55 (concluding that bill-and-keep arrangements are appropriate *only* "when the flow of traffic between the interconnected carriers is roughly

from these principles, or modified the "zone of reasonableness" it established for an appropriate traffic termination rate. *See Vonage v. FCC*, 489 F.3d 1232, 1242 (D.C. Cir. 2007); *see also WorldCom, Inc. v. FCC*, 238 F.3d 449, 461-62 (D.C. Cir. 2001) ("The relevant question is whether the agency's numbers are within a zone of reasonableness, not whether its numbers are precisely right.") (internal quotation marks omitted).

The \$0.0007 rate "pluck[ed] ... out of thin air" by the Commission for telecommunications to ISPs is several orders of magnitude lower than the "zone of reasonableness" established by the Commission and also violates every Commission-established pricing principle established under section 251(b)(5). First, the \$0.0007 rate is not based on a TELRIC cost study; rather, it is based on privately negotiated arrangements by a small number of parties, a number of which have since gone out of business. *ISP Remand Order* at 9190-91, ¶85 & n.158 (KMC Telecom and ICG Communications have long been out of business). The ever-expanding graveyard of CLECs and those that have gone through bankruptcy multiple times demonstrates the folly of the Commission's below-cost rates. Second, the \$0.0020 per minute floor established by the Commission for telecommunications termination is nearly 300% higher

---

balanced and is expected to remain so"). Therefore, only state commissions may determine whether circumstances merit the adoption of bill-and-keep. The Commission may not delegate this function to an ILEC, such as AT&T. To this end, in its May 7, 2008 letter to the Commission, AT&T "confirms that bill-and-keep is just one particular pricing arrangement for the transport and termination and cannot be rationally treated differently from a positive reciprocal compensation rate." AT&T at 2. Bill-and-keep arrangements "undeniably must be considered a price—a price of zero for traffic exchange." AT&T at 3, And, as AT&T affirmatively states, bill-and-keep is a "state-specific prerogative, and to ignore that prerogative is no different than ignoring the state's pricing decisions in any other context." *Id.* at 3. "States have been given the responsibility for determining precisely when traffic is sufficiently balanced to warrant bill-and-keep." *Id.* at 3. By its own admission, AT&T recognizes that the Commission has no authority to delegate this rate-setting function to ILECs, such as AT&T, and must leave it to state commissions to determine the appropriate rate under the FCC's rules. The *ISP Remand Order* blatantly violates these very simple pricing principles by removing the assessment and circumstances to warrant bill-and-keep from the state commissions and making bill-and-keep available in instances where there is an ***imbalance*** of traffic.

than the $0.0007 *ISP Remand Order* rate. Third, telecommunications classified as "ISP" is inherently out-of-balance as the "3:1" ratio is the only means of identifying such traffic. An imbalance of over 3:1 certainly is not *de minimis*, and therefore bill-and-keep for telecommunications to ISPs would preclude reasonable cost recovery in violation of the Commission's long-held understanding of the section 252(d)(2) pricing standard.

For all of these reasons, in responding to the *WorldCom* remand the Commission should find that section 252(d)(2)'s pricing standard applies equally to all telecommunications, including telecommunications to ISPs, and accordingly vacate the *ISP Remand Order*. Any other result – including any result that would set a rate outside of the Commission's established proxy range – would violate the requirements of section 252(d)(2) as interpreted by the Commission and the Commission's stated unification plans pursuant to the *FNRPM*.

B. Under Commission Precedent, Forbearance From Section 251(b)(5) Or 252(d)(2) Or Its Subparts Would Create a "Regulatory Void"

The Commission cannot forbear from applying the reciprocal compensation rules and pricing requirements to telecommunications traffic (ISP or otherwise) under section 251(b)(5). Forbearance from the removal of, or from an exception to, the obligations under Section 252(d)(2) or its subparts would not resurrect the obligation but would simply leave a regulatory void, which the Commission has found contrary to each of section 10(a)'s subparts. 47 U.S.C. § 160(a)(1)-(3).

In the *Local Competition Order,* the Commission found that "Section 252 generally sets forth the procedures that state commissions, incumbent LECs and new entrants must follow to implement the requirements of section 251." *Local Competition Order* at ¶116. Therefore, forbearing from section 252(d)(2) or its subparts is improper as it is clear that the Commission views its rules as a means, not the end, to full implementation of section 251.

Section 251(b)(5) requires compensation for the termination of calls by all telecommunications providers. The only exception to this simple compensation scheme is narrowly carved out in section 251(g).

Procedures are in place, via section 252, which permit carriers to pay other carriers for the costs associated with the termination of telecommunications traffic (both to ISPs and non-ISPs) which their end user customers send. State commissions set 251(b)(5)'s rates under section 252(d)(2) as they have done for the past 12 years in accordance with the Commission's pricing standards. And, when state commissions do not set a rate, proxies apply. The applicability of the TELRIC pricing mechanism under section 251(b)(5) is wholly consistent with the Commission's stated principles in the *FNPRM* and eliminates the creation of arbitrary and capricious rate categories, which only serve to enable regulatory arbitrage. Forbearance from the statutorily-established rate setting scheme would result in a "regulatory void."

For example, Qwest mistakenly suggests that forbearance from section 252(d)(2)(A)(i) would leave rate regulation under sections 201 and 202 for section 251(b)(5) traffic. *See* Qwest Ex Parte, CC Docket No. 99-68 (Apr. 25, 2008).[13] Qwest seems to suggest that a Commission forbearance from 252(d)(2)(A)(i) could only apply to certain telecommunications. That position is absurd. Forbearance from 252(d)(2)(A)(i) would leave no pricing standard for section 251(b)(5). As explained above, section 251(b)(5) applies to all traffic that constitutes telecommunications under section 153(43) of the Act. Qwest offers no suggestion for how the FCC could utilize such forbearance to create a new category of telecommunications traffic to which section 252(d)(2)(A)(i) would not apply, because no

---

13 Even if this were not the case, any discriminatory rate regime preserved by the Commission would be unjust and unreasonable and thus unlawful under section 201, as well as contrary to the Commission's stated objectives in the *FNPRM*.

statutory provision provides the Commission with that power. Qwest similarly fails to explain how such forbearance would enable the Commission to create a new pricing rule.

Recent Commission precedent further demonstrates the folly of Qwest's suggestion. In its July 27, 2007 Memorandum Opinion and Order denying Core's petition for forbearance, the Commission explicitly stated that forbearance from intercarrier compensation rate regulation would create a "regulatory void" that would contradict each prong of section 10(a)'s three part standard. *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, WC Docket No. 06-100, Memorandum Opinion and Order, ¶12 (rel. July 26, 2007) (appeal pending *sub nom Core Commc'ns, Inc. v. FCC*, No 07-1381 (D.C. Cir.)). The Commission stated that it could not grant Core the requested forbearance because: "[i]f the Commission were to forbear from the rate regulation preserved by section 251(g), there would be no regulation governing the exchange of traffic currently subject to the access charge regime." *Id.* This is precisely the case here: the Commission cannot forbear from 252(d)(2) because, by doing so, there would be a "regulatory void," as no pricing standard would exist for telecommunications termination under section 251(b)(5).[14] To be sure, any forbearance from 252(d)(2) or its subparts would have to apply to all "telecommunications," as nothing in section 251(b)(5) or otherwise suggests that the Commission may pick and choose the "telecommunications" to which section 251(b)(5) applies, other than those items "carved out" by section 251(g).

---

[14] While the Commission was correct in its reasoning it erred in its analysis vis-à-vis Core's specific forbearance request. As Core has already explained, forbearance from section 251(g) leaves section 251(b)(5) as the default regulation to govern compensation for the exchange of traffic because section 251(g) is, as the Commission has found, a "limitation" on section 251(b)(5). Section 251(b)(5) is subject to rate regulation under section 252(d)(2). In the case of Qwest's ex parte, the forbearance proposed would leave a "regulatory void" under the Commission's precedent because no other rate regime would exist.

Furthermore, Commission precedent prohibits the use of forbearance to create new regulatory obligations. *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, WC Docket No. 05-261, Memorandum Opinion and Order, 21 FCC Rcd 11125, 11129, ¶7 (2006). Similarly, here, forbearance would "not bring around the rights [Qwest] seeks" as forbearance would "only create a vacuum rather than confer any rights upon the requesting carriers or obligation upon incumbent LECs." *Id.* at 11130, ¶9.

VI. THE COMMISSION MUST CONTINUE TO RECOGNIZE THAT DIAL-UP TELECOMMUNICATIONS TO ISPs CONTINUES TO DECLINE

For at least the last three years, the FCC has repeatedly recognized that telecommunications to dial-up ISPs is declining and continues to decline. And, given these past findings, predictive judgments (which have proved correct), and the known technological superiority, efficiency, and market penetration of broadband services (via DSL, cable modem, and otherwise), it is inconceivable how the Commission could come to any conclusion other than that dial-up Internet access is declining and will continue to decline.

On October 18, 2004, the Commission granted Core forbearance from applying the growth caps on total ISP-bound minutes for which a LEC may receive compensation on the basis that market developments affirmatively demonstrated the "declining usage of dial-up ISP services." *Core Forbearance I Order* at 20186, ¶20. This finding was upheld by the D.C. Circuit in *In re Core Communications*, 455 F.3d 267, 282 (D.C. Cir. 2006). Specifically, the court found that there was nothing unreasonable about the Commission's reliance on the evidence illustrating market developments (*e.g.*, a declining dial-up subscriber base) to issue a predictive judgment that the overall usage of dial-up ISP services was in decline. *Id.* Indeed, as the Commission's Office of General Counsel told the D.C. Circuit on December 27, 2008:

> Increasingly, end users are not using dial-up connections to connect to the Internet, but, rather cable modem, DSL, and other broadband platforms. These broadband services, which involve only one provider and therefore do not trigger reciprocal compensation arrangements, have led to a significant decline in demand for dial-up ISP services since 2001. In fact, by 2004, the Commission found that there had been such a decline in 'the usage of dial-up ISP services" that it granted Core's request that the agency forbear from enforcing the interim growth caps and new market rules. In affirming the Commission's decision, [the D.C. Circuit] noted that the record before the Commission showed "a ten-fold increase in high-speed access lines between 1999 and 2003" and forecasted a decline in the percentage.[15]

FCC Counsel reiterated these same arguments to a panel of the D.C. Circuit on May 5, 2008. *See, e.g., In re Core Communications, Inc.*, D.C. Cir. No. 07-1446, May 5, 2008 Transcript at 14 (noting that dial-up Internet "is a small and diminishing question").

Furthermore, incumbent carriers themselves admit that dial-up ISP is a fixture of the past as carriers fully embrace the deployment of broadband services nationwide. For example, in the last two weeks, three incumbent providers have filed *ex parte* presentations in this very docket admitting this very point. In fact, Qwest's own chart illustrates that the number of allegedly ISP-bound minutes to CLECs has declined by nearly 60% over the 2005-2007 time period. *See* Qwest Ex Parte, CC Docket No. 99-68 (Apr. 25, 2008).[16] Level 3 Communications

---

[15] *In re Core Communications, Inc.*, D.C. Cir. No. 07-1446, Opposition of Federal Communications Commission to Petition for a Writ of Mandamus at p. 20 (filed Dec. 27, 2007).

[16] Of course, data provided by Qwest and others, like Embarq, raise more questions than answers. For example, neither party explains how they came up with a number for "ISP-bound" telecommunications, and their ability to do so is belied by the FCC's own finding that there is no way to identify this traffic because telecommunications to ISPs are no technically no different than telecommunications to any other end users. Indeed, that is the whole reason the FCC established the "3:1" ratio. In any event, although unverifiable, the best data that Qwest has to offer demonstrates a rapid drop in dial up minutes – Qwest's own data shows

definitively states that "dial-up access is declining sharply" and even provided a projection, similar to the evidence the Commission relied upon in *Core*, illustrating that broadband access will continue be the preferred method of access in residential markets and will penetrate up to 80% of domestic households in as little as three years. *See* Level 3 Ex Parte, CC Docket No. 99-68 (Apr. 25, 2008). US Telecom also admits that the number of dial-up customers have dropped, and will continue to drop as consumers spend more and more time online. *See* US Telecom Ex Parte, CC Docket No. 99-68 (Apr. 29, 2008).

And, while the comments of the Independent Telephone & Telecommunications Alliance ("ITTA") and Embarq indicate that dial-up ISP services are still utilized in rural America, the overwhelming evidence demonstrates that the overall trend, as illustrated in the study from the Pew Internet & American Life Project relied upon by US Telecom, is a definitive movement away from such services to broadband due to the superior capabilities offered by broadband that simply do not present viable options for dial-up users. Despite the attempts by US Telecom to manipulate the findings of the Pew Report, the Report couldn't be more clear: "in addition to using the Internet more frequently than individuals with dialup access, broadband users also participate in a wider range of online activities." Therefore, while US Telecom is correct that consumers *overall* are using the Internet more, nothing suggest that dial-up minutes are increasing overall.

The inherent qualities of broadband permit consumers to access content at a pace far faster, and less cumbersome, than dial-up would ever permit. Given the demand for such access, it is inconceivable that customers would forego a broadband connection to return to using a dial-up connection or curtail a provider's decision to offer broadband services in lieu of dial-

---

telecommunications to ISPs declining more rapidly over the 2006-2007 period than during the 2005-2006 period.

up. The foregoing has been recognized by several circuit courts and the United States Supreme Court. *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet*, 545 U.S. 967, 974-75 (2005) ("technological limitations of local telephone wires, however, retard the speed at which data from the Internet may be transmitted through end users' dial-up connections .... 'Broadband' Internet service, by contrast, transmits data at much higher speeds"); *Earthlink, Inc. v. FCC*, 462 F.3d 1, 2 (D.C. Cir. 2006) ("many internet users lumbered along via dial-up connections ... [i]ncreasingly, however, broadband internet service is becoming available, providing significantly higher access speeds"); *Global NAPS, Inc. v. Verizon-New England, Inc.*, 454 F.3d 91, 94 n.4 (2d Cir. 2005) ("proliferation of broadband and wireless, among other things, has made Internet traffic via the wirelines seem dated").

Thus, there can be no doubt that the record before the Commission demonstrates that dial-up ISP traffic is on the decline, and any suggestion to the contrary would contradict Commission findings, the Commission's predictive judgment, and reality.

VII. CONCLUSION

For the foregoing reasons, the Commission should conclude that ISP-bound traffic is "telecommunications" traffic subject to section 251(b)(5) of the Act, 47 U.S.C. § 251(b)(5) and the Commission's cost-based pricing methodology under section 252(d)(2) of Act, 47 U.S.C. § 251(d)(2). As a result, the Commission should respond to the *WorldCom* remand by vacating the *ISP Remand Order* and globally resolving intercarrier compensation reform in accordance with the principles established by the Commission in the 2005 *FNPRM*.

Respectfully submitted,

Michael B. Hazzard
Danielle M. Benoit
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
1401 Eye Street, N.W., Seventh Floor
Washington, DC 20005
Tel: (202) 857-4540
Fax: (202) 261-0035
Email: mhazzard@wcsr.com

Dated: May 14, 2008

ATTACHMENT

Gary L. Phillips
General Attorney &
Associate General Counsel

AT&T Services, Inc.
1120 20th St. NW, Suite 1000
Washington, D.C. 20036
Phone 202 457-3055
Fax 202 457-3074

May 7, 2008

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: WC Docket No. 08-23, *In the Matter of AT&T ILECs' Petition for Declaratory Ruling*

Dear Ms. Dortch:

On February 5, 2008, AT&T filed the above-referenced Petition for Declaratory Ruling to prevent Sprint Nextel (Sprint) from improperly turning Merger Commitment 7.1 in the *AT&T/BellSouth Merger Order* into an instrument of economically irrational arbitrage, contrary to its express terms and stated purpose. Specifically, AT&T sought a ruling that Commitment 7.1 does not authorize Sprint to port a bill and keep arrangement for the transport and termination of telecommunications from one state to another. I write to update the record and to amplify why Merger Commitment 7.1 does not sanction the porting of bill and keep arrangements from one state to another.

Merger Commitment 7.1 requires AT&T ILECs to allow requesting telecommunications carriers to port effective interconnection agreements from one state in the AT&T/BellSouth ILEC territory to another.[1] That commitment is not unqualified, however, and among its core limitations is the proviso that the ported agreement shall be "subject to state-specific pricing." As we showed in our previous filings and further explain below, a bill-and-keep arrangement is inherently a pricing arrangement, and, under current Commission rules, it is a state-specific pricing arrangement. As such, it cannot be ported from one state to another. Sprint nonetheless maintains that bill-and-keep is a pricing methodology, not a price, and that the particular bill-and-keep arrangement it seeks to port is not state-specific. These arguments are meritless.

To begin with, both the Act and the Commission's rules expressly refer to bill-and-keep as a "charge" or a "rate." The Act describes bill-and-keep in section 252(d)(2), which is titled "CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC." Notably, that subsection establishes a single pricing standard for transport and termination of traffic, irrespective of whether a reciprocal compensation rate or bill-and-keep is established. Either way, the arrangement must provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that

[1] *In re AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd 5662, Appendix F, at 149.

originate on the network facilities of the other carrier. This confirms that bill-and-keep is just one particular pricing arrangement for transport and termination and cannot rationally be treated differently from a positive reciprocal compensation rate for purposes of Commitment 7.1. The Commission's rules, as well, characterize bill-and-keep as a price. In particular, section 51.705 of those rules, which is entitled "Incumbent LECs' rates for transport and termination," states: "(a) An incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of ... (3) a bill-and-keep arrangement, as provided in § 51.713."

Sprint's only response is to ignore the language of the Act and the Commission's rules and to insist that bill-and-keep is a pricing *methodology,* not a price. But that answer is mere sophistry because there is no meaningful distinction between a pricing methodology and a price when that methodology dictates one and only one price. Thus, regardless of whether bill-and-keep could be considered a pricing methodology, it undeniably must be considered a price -- a price of zero for traffic exchanges.

But beyond the fact that Sprint's purported distinction between methodology and price in the context of bill-and-keep is based on empty semantics, it also flies in the face of the statutory regime. Under that regime, the Commission has broad discretion in its implementation of section 252(d) of the Act to determine the circumstances, if any, in which bill and keep should apply to traffic subject to section 251(b)(5),[2] but it is the *states* that actually give effect to the Commission's rules and impose bill and keep in accordance with them, just as they impose other prices under section 252. Hence section 51.705 of the Commission's rules states that "an incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, *at the election of the state commission,* on the basis of: (1) the forward-looking economic costs of such offerings ...; (2) Default proxies ...; or (3) A bill-and-keep arrangement, as provided in § 51.713" (emphasis added). Section 51.713(b), in turn, states: "*A state commission* may impose bill-and-keep arrangements if the *state commission* determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to § 51.711(b)" (emphasis added). This framework, under which the *states* establish bill-and-keep arrangements in accordance with rules adopted by the Commission, cannot be squared with Sprint's claim that bill-and-keep is not a rate. To the contrary, it is the very same framework that applies to other rates.

Indeed, consistent with this framework, numerous states have issued orders addressing when traffic should be considered balanced, for purposes of the Commission's rules, such that bill-and-keep applies. For example:

- The Kansas Corporation Commission, in a "mega-arbitration" between AT&T Kansas (f/k/a SBC Kansas) and numerous CLECs, adopted a proposal pursuant to

[2] *AT&T v. Iowa Utilities Board,* 525 U.S. 366, 378 (1999) ("We think the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the "provisions of this Act," which include §§251 and 252, added by the Telecommunications Act of 1996.")

which two carriers would exchange 251(b)(5) traffic on a bill-and-keep basis if the traffic between those carriers was within 5 percent of equilibrium and the minutes of use differential did not exceed 7,500,000 per month for a three-month period.[3]

- The Public Utilities Commission of Ohio, in establishing an interim bill-and-keep arrangement between two arbitrating carriers, ruled that the parties would revert to reciprocal compensation payments if it were determined that their traffic was out of balance, which the Ohio commission defined as falling outside the 55 percent to 45 percent range.[4]

- The Oklahoma Corporation Commission ruled that bill-and-keep would apply if the amount of traffic exchanged between the parties did not exceed +/- 5% away from equilibrium for three consecutive months, and rejected a proposal to impose an additional threshold based on minutes of use.[5]

These state commission decisions implementing the FCC's directive regarding bill-and-keep confirm, not only that bill and keep is a rate, but that it is a *state-specific* rate. While under current federal rules, bill and keep may be imposed by a state only when traffic is balanced, states have been given the responsibility for determining precisely when traffic is sufficiently balanced to warrant bill-and-keep, and as the above examples demonstrate, the results vary from state to state. The determination of when to impose bill and keep arrangements, pursuant to section 51.713, is thus a state-specific prerogative, and to ignore that prerogative is no different from ignoring a state's pricing decisions in any other context.

To be sure, if the FCC decides in the future to change its rules regarding bill-and-keep and to require that all traffic subject to section 251(b)(5) be exchanged on a bill-and-keep basis, an argument could be made at that time that bill-and-keep is no longer state-specific pricing. But that is not the case today. Today, Commission rules provide that bill-and-keep may be imposed only under certain circumstances – circumstances that may be present in some states (and as between some carriers) but not others – and it is left to each state to determine whether the requisite traffic balance exists.

Sprint attempts to confuse matters by pointing to the fact that the bill-and-keep provision it wishes to port was the product of a multi-state negotiation. That argument, however, is nothing more than a red herring. The merger commitment plainly states that a ported agreement is subject

[3] *In re Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b)(1) of the Telecommunications Act of 1996*, No. 05-BTKT-365-ARB, 2005 Kan. PUC LEXIS 689, at ¶¶ 46, 49 (Kan. Corp. Comm'n June 6, 2005).

[4] *In re Petition of Sprint Communications Company L.P. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with The Chillicothe Telephone Company*, No. 06-1257-TP-ARB, 2007 Ohio PUC LEXIS 174, at *41-*45 (Ohio Pub. Utils. Comm'n Apr. 11, 2007).

[5] *Petition of Navigator Telecommunications, LLC for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996*, No. PUD 200400499, 2006 Okla. PUC LEXIS 63, at *90-92 (Okla. Pub. Utils. Comm'n Mar. 24, 2006).

to state-specific pricing. Thus, when Sprint ports the Kentucky ICA to another state, that ICA must be conformed to reflect the pricing that would apply in the port-to state. This means that if traffic is balanced under the rules of the port-to state, bill-and-keep should apply; if not, it does not apply.

In this respect, the application of the merger commitment to bill-and-keep is consistent with its application to any other pricing term. The Kentucky ICA includes pricing provisions for hundreds of products and services aside from transport and termination. Notably, with respect to each of these, Sprint agrees that the "state-specific pricing" condition in Merger Commitment 7.1 requires that those provisions be converted to pricing provisions specific to each state to which the ICA is to be ported. Sprint agrees, for example, that the prices in the Kentucky ICA for 2-wire analog loops should be converted to state-specific prices in the port-to state; that the fees in the Kentucky ICA for per foot conduit occupancy should be converted to state-specific fees in the port-to state; and that the resale discounts in the Kentucky ICA should be converted to state-specific resale discounts in the port-to state. It is only with respect to bill-and-keep that Sprint embarks on a different course – claiming that "state-specific pricing" references pricing in the "port-from" state, not the "port-to" state. But this is at war with the plain language of Merger Commitment 7.1. The commitment does not say, as Sprint would have it, that "state-specific pricing terms may not be ported." If that were the case, the focus would properly be on whether the bill-and-keep provision in the Kentucky ICA was state-specific.[6] Instead, the commitment states that the ported agreement shall be *subject to* state-specific pricing. The only sensible construction of that language is that the rates (including any bill-and-keep arrangement) contained in a ported agreement must be conformed to the pricing rules of the port-to state.

Indeed, that is precisely what the Staff of the Illinois Commerce Commission just concluded, in an ongoing proceeding concerning Sprint Nextel's proposed port of the Kentucky ICA to Illinois. In pre-filed testimony in that proceeding, Staff's witness testified:

> **Q. In your opinion, is a reciprocal compensation rate "state specific" pricing, as that term is used in FCC Merger Commitment 7.1?**
>
> A. Yes. Rates for the transport and termination of local traffic transmitted by one carrier to another have been established in Illinois Commerce Commission tariffs, as well as approved by this Commission in interconnection agreements between carriers. These are state-specific rates. . . .
>
> **Q. In your opinion, is a bill-and-keep reciprocal compensation regime "state-specific" pricing, as that term is used in FCC Merger Commitment 7.1?**
>
> A. Yes. Under bill-and-keep, each carrier's reciprocal compensation rate is set at zero (for application by both parties to the traffic exchange), rather

---

[6] AT&T has previously shown that, in all events, that the bill-and-keep provision that Sprint seeks to port is specific to the port-from state (Kentucky). *See* AT&T Reply at 2-8.

> than a positive value for that rate. Each carrier thus provides transport and termination services for the other carrier's local traffic at no charge.
>
> . . .
>
> **Q. In your opinion, are "traffic balance" considerations, as a component of (or potential condition for) bill and keep reciprocal compensation, "state-specific" pricing, as that term is used in FCC Merger Commitment 7.1?**
>
> A. Yes. Relative traffic flows, and whether these flows are approximately "balanced" (i.e. roughly equal between the two carriers involved), has been and remains central to any consideration of bill-and-keep reciprocal compensation. This is true generally, and is true specifically in Illinois.[7]

The ICC Staff has it exactly right. In fact, any other conclusion would be absurd. The very point of the "state-specific pricing" limitation in Merger Commitment 7.1 is to preclude requesting carriers from demanding a "foolish consistency" in the rates charged from one state to the next. In some cases, the pricing differences among states will relate to matters such as population density or differences in terrain. Here the difference has to do with the balance of traffic. For purposes of applying this merger commitment, it makes no difference whether state pricing varies because of divergent population densities or different traffic balances, because in either context, the policy considerations are identical. Just as it would make no sense to allow a requesting carrier to port New York's UNE rates to Wyoming, it would also be nonsensical to import a bill-and-keep arrangement to a state where traffic is out-of-balance. Sprint's proposed construction of Merger Commitment 7.1 is thus, not only inconsistent with its express terms, but its core purpose. The Commission should promptly so conclude.

Sincerely,

/s/ Gary L. Phillips

---

[7] Direct Testimony of Jeffrey H. Hoagg, Principal Policy Advisor, Telecommunications Division, Illinois Commerce Commission, *Sprint Comm. L.P. v. Illinois Bell Tel. Co.*, Ill. Comm. Comm'n Docket No. 07-0629 (March 25, 2008).