> interconnected markets, including extracting monopoly rents from competitors or erecting artificial barriers to competitive entry.

Finally, consumers would also realize benefits from a 50/50 sharing approach resulting from the decreased cost of administration, efficiency gains, and strengthened competition.

In summary, because Sprint's 50/50 sharing proposal would be "efficient and equitable,"[107] the Commission should replace the "proportional use" standard contained in current Rule 51.709(b) with this equal sharing arrangement.

5. The Commission Should Confirm That Sprint's Changes to Its Existing TDM Interconnection Arrangements Are Consistent With the Act and Its Rules

The implementation on July 1, 2012 of bill-and-keep with wireless traffic changes the economics of how wireless carriers can interconnect most efficiently with incumbent LECs. As explained below, with bill-and-keep, wireless carriers can decommission numerous POIs in each LATA and transition towards a single-POI-per-LATA model. While incumbent LECs will likely object to this change, this change is fully consistent with both the Act and FCC rules. Indeed, it would be economically irrational for wireless carriers to retain the *status quo*.

Historically, wireless carriers like Sprint interconnected with ILECs using a combination of tandem switch (Type 2A) facilities and end office (Type 2B) facilities with selected end office switches.[108] Type 2B end office interconnection facilities typically involve DS1s, while Type 2A tandem interconnection facilities often involve DS3s. From a capacity standpoint, one DS3 is the equivalent of approximately 28 DS1s.[109]

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107 *See USF/ICC Transformation FNPRM* at ¶ 1315.

108 *See, e.g., Bowles* v. *United,* 12 FCC Rcd 9840, 9843 (1997) ("Type 2A service is interconnection to a local telephone company tandem similar to that used by an end office. Type 2B involves interconnection at an end office to a high usage interoffice trunk.").

109 Actually, one DS3 can carry more traffic than 28 individual DS1s because of network efficiencies. Individual DS1s are engineered with some reserve capacity, often referred to as a "fill factor," and the average utilization is well below that "fill factor," thereby leaving a large amount of

In most instances, the ILEC has required Sprint to obtain the interconnection facilities that the two companies will use pursuant to the ILEC's special access rates. In many instances, no competitive alternatives were available, so Sprint had no choice but to use the ILEC's above-cost special access facilities. Consistent with Rule 51.709(b), Sprint and the ILEC often shared the cost of the interconnection facilities based on each company's use of them.

As a result of ILEC pricing decisions, Type 2B (end office) interconnection facilities are considerably more expensive per unit of capacity than are Type 2A (tandem) facilities. This is due in part because the ILEC charges, on a per unit of capacity basis, are much more for a DS1 than for a DS3. This is also due to the fact that ILECs have chosen to charge by mile, and interconnection facilities to end offices generally are much longer than facilities to tandem switches.

To illustrate the magnitude of the cost difference caused by the imposition of end office interconnection requirements, Sprint evaluated the current situation in the Kansas City LATA. Specifically, Sprint analyzed billing records for switched DS1 direct end office trunks ("DEOTs") to ILEC end offices in the LATA and found that decommissioning these DEOTs (*i.e.,* limiting Sprint's financial responsibility to interconnection at the LATA tandems) would reduce Sprint's interconnection facility costs in the Kansas City LATA by approximately 46 percent. Sprint pays for thousands of these DS1 DEOT connections throughout the nation.

Historically, the higher cost of Type 2B interconnection was justified by savings in intercarrier compensation payments to the ILEC. With Type 2B interconnection, a wireless carrier would pay the ILEC for end office termination. In contrast, with 2A interconnection, a

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unused capacity on 28 individual DS1s. That traffic can be aggregated onto a single DS3 in a more efficient manner, leaving more usable capacity on the DS3.

wireless carrier would pay the ILEC, in addition to termination, extra charges for tandem switching and common transport.

With bill-and-keep, this trade-off between accepting high 2B interconnection costs in order to avoid even higher costs associated with 2A interconnections is irrelevant, as wireless carriers no longer pay any intercarrier compensation whether the traffic is delivered at an ILEC tandem or an ILEC end office. As a result, wireless carriers will no longer receive any benefit by continuing to pay the substantial extra cost of small, inefficient Type 2B facilities. The rational economic decision is to decommission the Type 2B facilities and move this traffic to more efficient Type 2A facilities.[110]

Sprint will work closely with ILECs during the process of decommissioning Type 2B facilities. An ILEC will no doubt want to improve the efficiencies within its own network. In the event the ILEC determines that it would realize efficiencies by maintaining some or all of the current Type 2B facilities, Sprint will accommodate this request, provided that the ILEC agrees to stop billing Sprint for the facilities that are properly part of the ILEC's own network.[111]

In the *Transformation Order,* the Commission recognized once again that under § 251(c)(2), competitive carriers like Sprint have "the option to interconnect at a single point of interconnection (POI) per LATA."[112] It is almost certain that ILECs will object to decommissioning Type 2B facilities, and it is likely that they will want to pursue this matter on a state-by-state basis in the hope of prevailing in some states. The issue is one exclusively of

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[110] Wireless carriers may also decommission certain Type 2A facilities in LATAs where the ILEC operates multiple tandem switches.

[111] However, under CTIA's METE proposal, an ILEC may not want to maintain and use the current Type 2B facilities, because the traffic segregation component of the METE proposal may provide the ILEC with even more efficient alternatives.

[112] *See USF/ICC Transformation FNPRM* at ¶ 1316.

federal law and Sprint should not be forced to re-litigate the identical federal law issue in 50 states. Accordingly, the Commission should declare that the decommissioning of Type 2B facilities is consistent with both the Act and the FCC's rules.

6. The Commission Should Explicitly and Unequivocally Confirm That the Act Requires ILECs to Provide to All Competitive Carriers Interconnection Facilities at Cost-Based Rates

Last June, the Supreme Court affirmed orders the FCC had issued in 2003 and 2005, which held that incumbent LECs subject to § 251(c)(2) of the Act are required to provide to competitive carriers interconnection facilities at cost-based (TELRIC) rates.[113] Although the Commission recognized in its 1996 *Local Competition Order* the right of competitive carriers to obtain such facilities, over 15 years later wireless carriers still have been unable to obtain such facilities at cost-based rates. The reason for this, as demonstrated below, is that ILECs have consistently – and deliberately – disregarded FCC orders on this subject.

The Commission can help to put an end to this unlawful conduct by confirming - expeditiously, definitively and unequivocally – that incumbent LECs are required to reduce the rates for the interconnection facilities they provide to competitive carriers to cost-based levels. Moreover, since ILECs have deliberately ignored three different FCC orders over the past 16 years, the Commission should further direct ILECs to provide this relief immediately – without the further delay involved in re-negotiating interconnection agreements.

By way of background, the FCC, in its *Local Competition Order,* ruled that wireless carriers could obtain under the UNE statute dedicated facilities at cost-based rates for their use,

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[113] *See Talk America* v. *Michigan Bell,* 131 S. Ct. 2254 (2011).

whether for interconnection or backhaul (*e.g.*, connecting an MSC with base stations).[114] Seven years later, the Commission acknowledged that ILECs had simply refused to comply with the requirements of its 1996 *Order*:

> CMRS providers have demanded, and incumbent LECs have denied, access to unbundled transmission circuits.[115]

In its 2003 *Triennial Review Order* ("*TRO*"), the FCC held that ILECs were no longer required to provide as UNEs dedicated facilities for interconnection and backhaul because such facilities were no longer network elements within the scope of the UNE statute. The Commission nevertheless made clear that ILECs were, under the interconnection statute, § 251(c)(2), still required to provide to competitive carriers interconnection facilities at cost-based rates:

> [T]o the extent that requesting carriers need facilities in order to "interconnect with the [incumbent LEC's] network," Section 251(c)(2) provides for this and we do not alter the Commission's interpretation of this obligation.[116]

On appeal, the D.C. Circuit rejected the FCC's finding that interconnection facilities are not network elements for purposes of UNE statute, and because the FCC's reasoning had "little or no footing in the statutory definition," the Court remanded the issue for further consideration.[117]

On remand, in its 2005 *Triennial Review Remand Order* ("*TRRO*"), the FCC found that, contrary to its conclusion in 2003, entrance facilities are within the incumbent's network and are therefore correctly classified as UNEs (basically reinstating the position it had followed between

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114 *See Local Competition Order*, 11 FCC Rcd 15499, 15517 ¶ 34 (1996); *Second CMRS Report*, 12 FCC Rcd 11266, 11331 (1997) ("[I]ncumbent LECs [must] offer interconnection and access to their network elements on an unbundled basis to CMRS providers.").

115 *TRO*, 18 FCC Rcd 16978, 17201 ¶ 362 (2003).

116 *Id.* at 17204 ¶ 366.

117 *See USTA* v. *FCC*, 359 F.3d 554, 585-86 (D.C. Cir. 2004) ("*USTA II*").

1996 and 2003).[118] However, the FCC then ruled that competitive carriers are not impaired in their ability to provide services without access to entrance facilities and that as a result, ILECs were not required to provide such facilities as UNEs.

Importantly, though, as it had in its *TRO*, the FCC again emphasized that its "finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)":

> Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.[119]

Notwithstanding the clarity of both the *TRO* and the *TRRO*, ILECs still refused to recognize their obligation to provide interconnection facilities at cost-based rates. In subsequent litigation, three different federal appellate courts unanimously rejected the ILEC arguments.[120] However, AT&T was able to convince a majority of a Sixth Circuit panel that its refusal to provide interconnection facilities at cost-based rates was somehow consistent with all FCC orders.[121]

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118 *TRRO,* 20 FCC Rcd 2533, 2609-10 (2005).

119 *Id.* at 2611 ¶ 140.

120 *See Pacific Bell* v. *California PUC*, 621 F.3d 836 (9th Cir. 2010); *Southwestern Bell* v. *Missouri PSC*, 530 F.3d 676 (8th Cir. 2008); *Illinois Bell* v. *Box*, 526 F.3d 1069 (7th Cir. 2008).

121 *See Michigan Bell* v. *Covad,* 597 F.3d 370 (6th Cir. 2010).

The Sixth Circuit decision was appealed to the Supreme Court and that Court unanimously reversed the lower court's decision.[122] While noting that neither the interconnection statute nor the FCC's implementing rule explicitly addresses whether an ILEC must provide access to interconnection facilities at cost-based rates as part of its interconnection duty under § 251(c)(2), the Court held that the FCC's interpretation of this statute and its own rules – ILECs must provide interconnection facilities at TELRIC-based rates – is reasonable: "We defer to the Commission's views and reverse the judgment below":

> The FCC as *amicus curiae* has advanced a reasonable interpretation of its regulations, and we defer to its views. The judgment of the United States Court of Appeals for the Sixth Circuit is reversed.[123]

In so ruling, the Supreme Court rejected every argument made by the incumbent LECs.

In short, ILECs disregarded completely the FCC's directives in its 1996 *Local Competition Order*. They then disregarded completely the FCC's directives in its 2003 *TRO* and 2005 *TRRO*. Given this long history, there is no reason to believe that ILECs will suddenly "see the light" and finally begin complying with FCC orders.

Sprint urges the Commission to issue expeditiously an order specifically directing all ILECs to begin billing immediately, at cost-based (TELRIC) rates, all of the interconnection facilities competitive carriers use with those ILECs subject to the requirements of § 251(c)(2).

To further eliminate any possibility of yet more litigation involving the scope of the ILEC's obligation, the Commission should further confirm that this ILEC duty applies to all portions of an existing interconnection facility.[124] Section 251(c)(2) of the Act imposes on

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122 *See Talk America* v. *Michigan Bell,* 131 S. Ct. 2254 (2011).

123 *Id.* at 2257, 2265.

124 Sprint does not here ask the FCC to address whether an ILEC has a § 251(c)(2) duty to build new interconnection facilities on routes where the ILEC has no available facilities.

ILECs the "duty to provide" to a competitive carrier upon request "interconnection with the [ILEC's] network," at cost-based rates, "at any technically feasible point within the [ILEC's] network." Wireless carriers like Sprint historically have connected to both ILEC tandem and end office switches, and both sets of interconnection points unquestionably are technically feasible.[125] So ILECs cannot claim any further misunderstanding over their duty, the FCC should squarely rule that ILECs must provide, at cost-based (TELRIC) rates: (a) the entire Type 2A facility (typically a DS3) connecting an MSC with an ILEC LATA tandem, and (b) the entire Type 2B facility (often a DS1) connecting an MSC to an ILEC end office.

7. The Commission Should Make Two Clarifications With Regard to Rural ILECs

The Commission should make two adjustments to the rules that apply to ILEC affiliates for purposes of voice traffic exchanged via TDM interconnection:

(a) The Commission should clarify that rural ILECs affiliated with LATA tandem owners are not eligible to invoke the Rural Transport Rule. The Commission adopted the Rural Transport Rule ("RTR"), new Rule 51.709(c), to "ease the move to bill-and-keep for rural, rate-of-return regulated LECs."[126] This rationale does not apply to rural ILECs that are affiliated with the owners of LATA tandem switches, and the Commission should accordingly clarify its RTR to prevent such affiliates from invoking this rule.

For most RLECs, the RTR relieves them from having to continue to pay another ILEC's transit charges, often set well above cost, for the local land-to-mobile intraMTA traffic that

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[125] Indeed, in Rule 51.305(a)(2) adopted nearly 16 years ago, the FCC specifically found that the provision of access to the "trunk-side of a local switch" and the "trunk interconnection points for a tandem switch" constitutes "technically feasible point[s] within the incumbent LEC's network" that ILECs must provide to "any requesting telecommunications carrier."

[126] *See USF/ICC Transformation Order* at ¶ 978. *See also id.* at ¶ 35 (ease the move); and ¶ 998 (measured transition).

originates on their networks.[127] The RTR will shift this burden of paying above-cost transit costs to the wireless carrier – which will now be responsible for paying these above-cost transit prices for land-to-mobile traffic (in addition to the transit rates they are already paying for mobile-to-land traffic). As demonstrated in Part III.B below, transit prices in many states are well above cost.

The Commission's rationale for adopting the RTR – to "ease the move to bill-and-keep" for RLECs – does not apply to those RLECs that are owned by the same holding company that owns (typically in a separate corporation) the LATA tandem switch. In most instances, the facilities connecting this RLEC's network with the LATA tandem switch were installed decades ago, so it is likely that the costs of these facilities were fully depreciated long ago – with the result that the incremental cost such an RLEC incurs in delivering its land-to-mobile calls to the terminating wireless carrier via its transit carrier affiliate, if not zero, is miniscule.[128] The RTR forces wireless carriers to use more of the RLEC's affiliate's above-cost transit services.

The federal government should not force competitive carriers to use an incumbent's transit services to benefit an affiliate of the transit provider. Such a mandate certainly cannot be justified when the transit arrangements provided by an affiliate are priced at rates well above cost. Accordingly, Sprint encourages the Commission to clarify that RLECs affiliated with the LATA tandem owner cannot invoke the new Rural Transport Rule.

(b) <u>All of an ILEC's affiliates providing voice services in a LATA should be permitted to designate only one POI/network edge in the LATA.</u> There has been considerable

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[127] RLECs typically send to IXCs their "toll" land-to-mobile intraMTA traffic, so the issue of transit costs becomes irrelevant for this traffic.

[128] Even if the RLEC imputes its affiliate's tariffed transit rates for purposes of its "regulated books," the profits merely shift from the RLEC subsidiary to the tandem owner subsidiary, and have no effect whatsoever on the profits the holding company reports to its shareowners.

consolidation within the telecommunications industry, including among incumbent LECs, since the FCC first adopted its interconnection rules nearly 16 years ago. For example, CenturyLink currently has 16 different ILEC affiliates in Wisconsin, 7 in Arkansas and 9 in Louisiana; Frontier operates 12 in Illinois and 8 in Wisconsin.

While ILEC holding companies may realize certain benefits by maintaining each ILEC affiliate as a separate entity, rarely do they operate separate networks for each affiliate. To the contrary, proposed acquisitions are often justified because of claimed economies of scale by, among other things, taking advantage of the efficiencies realized by consolidating all network operations. Moreover, separate legal entities are irrelevant to the functions of interconnection, transport and termination of voice traffic. Whether a particular facility, or piece of network equipment, is owned by one affiliate or another is irrelevant to how a holding company manages its network. In the end, networks do not recognize different legal corporate structures.

Yet, while ILEC holding companies operate only one consolidated network, they have used their affiliate structure to artificially increase revenues derived from what they extract from their competitors' intercarrier compensation payments, under the fiction that interconnection with a tandem owner's affiliate constitutes indirect interconnection. Consider the following that Sprint has experienced:

- CenturyLink-Qwest in Colorado bills Sprint transit to deliver Sprint traffic to other CenturyLink affiliates that subtend the tandem switch, whereas CenturyLink does not impose transit in any instances in which a legacy Qwest end office subtends a legacy Qwest tandem;
- Similarly, Verizon-North in New York bills Sprint transit for traffic terminating to Verizon's affiliate, MCI-WorldCom.
- An ILEC-affiliated wireless carrier is willing to direct connect with Sprint in areas outside the ILEC service areas, but refuses to directly connect with Sprint within the ILEC's service areas - thereby forcing Sprint to use the ILECs' above-cost transit arrangements to terminate traffic to the ILEC's wireless affiliate.

The Commission disregarded an ILEC's corporate structure in reforming the universal service fund. For example, the new CAF Phase I rules adopted for price-cap carriers apply to "price cap carriers and their rate-of-return affiliates":

> Consistent with our goal of providing support to price cap companies on a forward-looking cost basis, rather than based on embedded costs, we will, for the purposes of CAF Phase I, treat as price cap carriers the rate-of-return operating companies that are affiliated with holding companies for which the majority of access lines are regulated under price caps.[129]

The FCC adopted the same approach with CAF Phase II support, treating "as price cap carriers the rate-of return operating companies that are affiliated with holding companies for which the majority of access lines are regulated under price caps. A 'price cap territory' therefore includes a study area served by a rate-of-return operating company affiliated with price cap companies."[130]

The Commission should adopt the same approach with respect to TDM interconnection. Specifically, it should rule that an ILEC and all its affiliates in a LATA shall jointly establish one, consolidated POI/network edge in a LATA. The type and amount of intercarrier compensation due should not depend on the internal decisions of an ILEC holding company to consolidate its subsidiaries or maintain them as separate subsidiaries. Indeed, allowing ILECs to maintain separate POIs for each of its affiliates will give the ILECs an artificial incentive to maintain this disaggregated structure solely in order to reap more intercarrier compensation and/or raise their rivals' costs.

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129 *USF/ICC Transformation Order* at ¶¶ 128-29.

130 *Id.* at ¶ 158 n.253,

B. ROLE OF TARIFFS AND INTERCONNECTION AGREEMENTS (¶¶ 1322-24)

Sprint below responds to the Commission's request for comment on the role and interplay of LEC access tariffs and interconnection agreements. Sprint asks the Commission to take three steps in this area.

(a) The Commission should establish a specific deadline when LECs may no longer rely on access tariffs. Historically, LECs have been allowed to set unilaterally, via tariffs they prepare and file, the prices, terms and conditions under which they offer their exchange access services. The FCC recognizes this one-sided procedure is not compatible with the negotiation process that Congress has mandated for the reciprocal compensation regime that the Commission has now applied to access traffic (*albeit* subject to a transition).[131] Yet, the Commission concludes that LECs should be permitted to continue to tariff their access serves during the transition to bill-and-keep because tariffs "provide[] the certainty of a tariffing option."[132]

This is an odd result. When the Commission addressed the identical situation in the context of non-access traffic, it prohibited LECs from filing tariffs altogether so one party could no longer set unilaterally the terms of interconnection. FCC Rule 20.11(d) provides:

> Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs.

With respect to access traffic, the Commission now predicts that LECs "will rely primarily on negotiated interconnection agreements rather than tariffs to set the terms on which traffic is exchanged."[133] The *FNPRM* does not explain the basis for this prediction. Sprint

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[131] *See USF/ICC Transformation FNPRM* at ¶ 1323 ("Although we maintain a role for tariffing as part of the transition, we believe the reliance on interconnection agreements is most consistent with this Order's application of reciprocal compensation duties to all carriers.").

[132] *Id.* at ¶ 1322.

[133] *Id.* at ¶ 1323.

respectfully submits this prediction is contrary to the documented history of LEC tactics which, in the non-access traffic arena, compelled the FCC to prohibit LECs from using tariffs altogether.

Why would any LEC agree to negotiate terms pertaining to its access services when it knows that it can ignore all of a competitor's proposals simply by forcing the competitor to follow whatever terms it sets unilaterally in its tariffs? As one federal court has recognized, if LECs are permitted to continue to set the terms of interconnection unilaterally via tariffs, the tariffing regime "places a thumb on the negotiating scales."[134]

The Commission should, therefore, prohibit LECs from tariffing their access services by a date certain. Sprint proposes this deadline be set for July 1, 2013, when all access rates are unified at interstate rate levels. This date should give LECs sufficient time to transition to an environment where the terms governing access traffic will be negotiated and included in the same interconnection agreement ("ICA") that governs non-access traffic.

(b) In the meantime, the FCC should also confirm that if a competitive carrier wants to negotiate an ICA with an ILEC, those negotiations, at the competitor's request, will apply to all traffic that two companies exchange, including access traffic. The price terms of access traffic are set via the transition plan that the Commission has adopted. There is no reason why the non-price terms for access traffic should be different than the non-price terms of non-access traffic – particularly when the rates for access traffic are also moving to bill-and-keep.

The Commission should further confirm that any ICA involving an ILEC that includes prices, terms and condition of access traffic be filed with State commissions per § 252(e)(1),

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134 *Wisconsin Bell* v. *Bie,* 340 F.3d 441, 444 (7th Cir. 2003).

made publicly available per § 252(h), and further be available for adoption by any requesting telecommunications carrier per § 252(i).

(c) The Commission should clarify the scope of new LEC "grooming" tariffs. The Commission in its *Transformation Order* authorized LECs to include "traffic grooming" requirements in their tariffs.[135] To eliminate future controversy, Sprint urges the Commission to make two clarifications concerning these "grooming" tariffs.

First, the Commission should make clear that a LEC is obligated to negotiate traffic grooming requirements upon request even if it has a grooming tariff on file. As the Commission recognized in its 2005 *T-Mobile Order,* and as it reaffirmed only three months ago, the negotiation process, not the tariffing procedure, is "most consistent with the Order's application of reciprocal compensation duties to all carriers" because negotiations allow carriers to "better tailor their arrangements to their particular circumstances and the evolving marketplace than would be accommodated by exclusively relying on 'one size fits all' tariffs."[136]

Second, the Commission should remind all LECs that they may not in their "grooming" tariffs attempt to change unilaterally their transport obligations in a bill-and-keep environment. The FCC has made clear that its wireless bill-and-keep rule, Rule 51.705(a), encompasses both termination and transport. Under this rule, beginning July 1, 2012, LECs and wireless carriers are responsible for all transport costs within their respective networks – including if a wireless carrier exercises its statutory right to maintain only one POI in a LATA. Consequently, if a grooming tariff specifies that competitive carriers must use additional interconnection facilities under the circumstances unilaterally determined by the ILEC, those tariffs must further provide

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135 *See USF/ICC Transformation Order* at ¶ 754.

136 *See USF/ICC Transformation FNPRM* at ¶¶ 1322-23.

that (a) it is the LEC that will provide and maintain these additional interconnection facilities, and (b) the LEC will pay the full cost of these additional facilities.

III. TRANSITIONING ALL RATE ELEMENTS TO BILL-AND-KEEP (§ XVII.M - ¶¶ 1297-1314)

Sprint below responds to the Commission's request for comment on the steps it should take to "complete our reform effort and establish the proper transition and recovery mechanism for the remaining elements" that were not addressed in the *Transformation Order*.[137]

A. TERMINATING ACCESS TRANSPORT RATE ELEMENTS (INCLUDING TANDEM SWITCHING) (¶¶ 1306-10)

The incumbent LEC "ABC Plan" focused largely on the termination (*i.e.*, end office switching) component of their terminating access charges, while proposing "a more limited approach to reforming certain transport elements."[138] The *Transformation Order* adopted the ABC Plan's "limited approach" for the transport rate elements of access charges. Specifically, the *Order* adopted the following transition plan for price-cap ILECs in some of their service areas (where they own tandem switches):

- By July 1, 2013, these LECs' intrastate terminating access rates for their transport rate elements will be reduced to, and be unified with, their interstate terminating access rates for their transport rate elements;
- These LECs' interstate terminating access rates for the transport rate elements will then be frozen for four years (from July 1, 2013 to June 30, 2017); and
- On July 1, 2017, these interstate terminating transport rates will be reduced to $0.0007/minute, and the next year, on July 1, 2018, bill-and-keep will be used for both transporting and terminating all terminating access traffic.[139]

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137 *See USF/ICC Transformation FNPRM* at ¶ 1315.

138 *August 3 Public Notice*, 26 FCC Rcd 11112, 11124 (Aug. 3, 2011).

139 *See USF/ICC Transformation Order* at ¶ 801, Intercarrier Compensation Reform Timeline.

The transport rate elements with LEC access charges generally include entrance facility charges; tandem switching charges; switched common and dedicated interoffice transport charges; multiplexing charges; and port charges (collectively, "transport rate elements" or simply "transport").

The Commission now seeks comment on the "proper transition" for these transport access rate elements:

> We agree that such [transport] elements must be transitioned to bill-and-keep at the end state, as required by the Order, and seek comment on the final transition to bill-and-keep for these charges.[140]

Sprint submits that the interstate access transport rate elements for all price cap ILECs (and their competitors) should be reduced at the pace that coincides with the transition adopted for access termination.

1. Price Cap ILEC Interstate Access Transport Rates Should Be Phased Down Expeditiously

Price cap ILEC interstate terminating transport rates during the four-year period, July 1, 2013 through June 30, 2017, should phase down at the same pace these ILECs are phasing down their interstate access termination rates. As demonstrated below, the interstate access rates for transport are sizable, are set at levels well above costs, encourage traffic and mileage pumping, and will disincent LECs from establishing IP interconnection agreements that would benefit consumers.

(a) <u>ILEC access transport rates constitute a sizable proportion of the total intercarrier compensation that competitive carriers pay to ILECs for their access traffic</u>. The Commission explained that the reason its *Transformation Order* focused on access termination is because these charges are "where the most acute intercarrier compensation problems, such as arbitrage,

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[140] *USF/ICC Transformation FNPRM* at ¶¶ 1306-07.

currently arise."[141] Sprint agrees that current access rates for end office switching are bloated and problematic.[142] Indeed, the Wireline Bureau recognized nine years ago that Verizon incurred no incremental end office switching costs in terminating third-party traffic on its network.[143]

But as Sprint has earlier documented,[144] the transport components of access charges are also sizable – and in many cases, *are higher* than ILEC rates for end office switching:

LEC	Interstate Transport[145]	Interstate Termination[146]	Total Access Charge (MOU)
AT&T (Pacific Bell FCC 1)	$0.006816	$0.002620	$0.009436
CenturyLink (Embarq-FL FCC 1)	$0.003243	$0.003568	$0.006811
NECA FCC 5 (Rate Band 2)	$0.011876	$0.026941	$0.038817
Verizon FCC 1	$0.003282	$0.002406	$0.005688

The Commission has determined that the high ILEC access rates for termination warranted continued phase down during each of the four years, 2013 through 2017. Given that

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141 *Id.* at ¶ 800.

142 Current access rates are also greatly inflated by the ILECs' continued collection of loop costs in the form of carrier common line for intrastate traffic.

143 *See Virginia Arbitration Cost Compliance Filing Order*, 19 FCC Rcd 1259, 1269 ¶ 30 (2004) ("To avoid any confusion on this matter, we reiterate that Verizon may not include end-office switch or end-office trunk port costs in its reciprocal compensation rates. We therefore set the Meet-Point A reciprocal compensation rate at zero ($0.00).")(underscoring added). *See also Virginia Arbitration Cost Order,* 18 FCC Rcd 17772 (2003).

144 *See* Sprint *August 3 PN* Comments at 13-14 (Aug. 24, 2011).

145 Transport includes local transport termination; local transport facility (assuming 10 miles); tandem switching; common multiplexing; host-remote terminating (assuming applicable 40% of the time); host-remote per mile (assuming 40% of the time and further assuming 10 miles); and common trunk port.

146 Termination includes end office switching.

ILEC access rates for transport are significant and can be even higher than their access termination rates, Sprint submits that using the FCC's own reasoning, transport rates must also be phased down during each of the four years, 2013 through 2017.

(b) ILECs' access transport rates are set well above cost and constitute monopoly prices. Verizon has lower interstate access rates than most other ILECs (and even CLECs in non-Verizon service areas). Yet, the Wireline Bureau determined nine years ago that, based on a Verizon cost study, Verizon's additional cost of transporting incoming calls over its network was *less than half* of the rate which, under the new transition plan, Verizon will not even begin to charge for another five years (in 2017).[147] AT&T has similarly recognized that its additional costs of transport and termination are "comfortably below" the $0.0007 rate that it will also begin using in 2017 for its access traffic.[148] These facts confirm that any rate these ILECs use before 2017 are bloated and constitute monopoly prices.

Permitting ILECs, and accordingly the CLECs that mirror ILEC rates, to impose access transport rates this high for so long will encourage and facilitate traffic and mileage pumping schemes.[149] Permitting LECs to maintain their high access transport rates will also provide

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147 *See Virginia Arbitration Further Compliance Order,* 20 FCC Rcd 5279, 5297 Appendix A (2005) ("Traffic Delivered at Verizon Tandem: $0.00029 MOU."). *See also Virginia Arbitration Cost Order,* 18 FCC Rcd 17772 (2003). Verizon has since modernized its transport network so its additional transport costs today are almost certainly lower than they were nine years ago.

148 *See* AT&T Written Ex Parte Letter, Docket No. 01-92, at 4 (Oct. 13, 2008).

149 *See, e.g.,* Sprint *August 3 PN* Comments at 15 (Aug. 24, 2011); T-Mobile *August 3 PN* Comments at 7 (Aug. 24, 2011). Indeed, as an example, in a tariff filed with the FCC scheduled to take effect one week from now (on March 2, 2012), a South Dakota LEC, NAT-Pine Ridge, wants its tariffed rates to be benchmarked to Qwest rates under the FCC's new access stimulation rules, but which would impose a composite rate of $0.0114870. The composite rate is comprised of 74% mileage charges – 283 miles of transport.

powerful disincentive for them to establish more efficient IP interconnection, with all of the attendant benefits that consumers would realize with IP interconnection.[150]

2. All Price Cap ILECs (and Their Competitors) Should be Subject to the Same Transition for the Access Transport Rate Elements

The *Transformation Order's* transition plan for the access transport rate elements, after July 1, 2013, applies only in those areas where a price cap ILEC (or its affiliate) owns a tandem switch.[151] No transition for the period after July 1, 2013 was adopted for those areas where price cap carriers (or their affiliates) provide their services without owning a tandem switch.[152] Thus, under the current transition plan, these ILECs would continue using *indefinitely* their current bloated interstate transport access rates – even after their termination rates are set at zero in 2017.

Whether or not a price cap carrier owns and uses a tandem switch in a given area has no relevance whatsoever to the need for price cap carriers to phase down all of their interstate access rates – including the transport rate elements. Because ILECs did not create transport rates to differentiate between areas where they own a tandem switch and areas where their end offices subtend another ILEC, all of the problems discussed above in connection with the current transition plan for price cap ILEC "tandem serving areas" apply with equal force to price cap ILEC "non-tandem serving areas." In fact, the problems would be extended if price cap carriers in their "non-tandem serving areas" are excused from reducing their transport rates to $0.0007 in 2017 and bill-and-keep the following year.

Accordingly, the Commission should eliminate the distinction between "tandem serving areas" and "non-tandem serving areas" and instead subject all price cap ILECs (and their

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150 *See, e.g.,* Sprint *August 3 PN* Comments at 15-16 (Aug. 24, 2011).

151 *See USF/ICC Transformation Order* at ¶ 801, Intercarrier Compensation Reform Timeline; *see also* New Rule 51.907(g) and (h).

152 *See USF/ICC Transformation Order* at ¶ 1306 n.2358.

competitors) to one, unified transition to bill-and-keep for all terminating access transport rate elements.

3. There Is No Need to Establish an Additional Cost Recovery Mechanism for Price Cap ILECs Relating to the Transition of Their Access Transport Rate Elements to Bill-and-Keep

In response to the Commission's question,[153] price cap carriers do not need any additional cost recovery mechanism regarding the transition of their access transport rate elements, set at monopoly prices today, to bill-and-keep. Price cap ILECs are enormously profitable, as their 2011 annual reports document:

	2011 OIBDA[154]	% of Revenue
AT&T	$27.6B	21.8%
Verizon	$29.4B	26.5%
CenturyLink	$6.1B	39.4%
Windstream	$1.8B	42.4%
Frontier	$2.3B	43.9%

Competitive carriers would love to enjoy these kinds of profits. But one of the reasons they do not, while these large ILECs do, is because competitive carriers have been forced since the inception of access charges in 1983 to pay above-cost access charges to ILECs. This system – competitive carriers forced to subsidize the incumbent's operations – is clearly anti-competitive and completely antithetical to the 1996 Act's requirement that the Commission

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153 *See USF/ICC Transformation Order* at ¶ 1309.

154 OIBDA refers to Operating Income Before Depreciation and Amortization.

eliminate all implicit subsidies.[155] This system also contravenes the explicit commands of § 254(k) of the Act.[156]

It bears remembering that ILECs since the inception of access charges and (CLECs since the passage of the Act) have been allowed to impose above-cost access charges – even though the Act's access charge exception to the reciprocal compensation regime was, as the FCC itself has recognized, supposed to be "***temporary***."[157] The passage of 16 years is not temporary. And, even if the Commission modifies its transition plan for access charges as discussed above, ILECs will still be able to impose above-cost access charges for another five years – for a total of 21 years.

In these circumstances, adoption of yet another access recovery mechanism is not only unnecessary, but also would be entirely inappropriate.

B. TRANSIT (¶¶ 1311-13)

Sprint below responds to the questions the Commission posed in connection with transit arrangements. As explained below, there is an acute need for the Commission to address expeditiously the scope of an incumbent LEC's obligations to provide transit arrangements under § 251 of the Act.

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155 *See, e.g., 2000 Biennial Review,* CC Docket No. 01-174, FCC 01-218, at n.28 (Aug. 31, 2001) ("The 1996 Act required the Commission to eliminate implicit universal service subsidies and to establish specific, predictable, and sufficient mechanisms to preserve and advance universal service.").

156 Section 254(k) prohibits LECs from using services that are "not competitive to subsidize services that are subject to competition." Bloated LEC access charges contravene this statute because there is no restriction on how LECs use the proceeds from their monopoly access services, thereby giving them a strong incentive to use these proceeds to subsidize their competitive services.

157 *See 2008 ISP Remand Order,* 24 FCC Rcd 6475, 6480 ¶ 9 (2008)("[S]ection 251(g) . . . temporarily grandfathered the pre-1996 Act rules."). *See also WorldCom v. FCC,* 288 F.3d 429, 430 (D.C. Cir. 2002)(Section 251(g) is "worded simply as a transitional device."); *Advanced Services Order,* 15 FCC Rcd 385, 407 ¶ 47 (1999).

"[T]ransiting occurs when two carriers that are not directly interconnected exchange non-access traffic by routing the traffic through an intermediary carrier's network."[158] Simply put, transit arrangements are "how" competitive carriers can exercise their right and fulfill their obligation to interconnect indirectly with other carriers. As the Commission has recognized, transit is "critical to establishing indirect interconnection – a form of interconnection explicitly recognized and supported by the Act":

> Without the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks.[159]

Of course, for the right of indirect interconnection to be meaningful, transit must be not only available but also available at reasonable prices.

1. Section 251(c)(2) Requires ILECs to Provide Transit Arrangements to Enable Indirect Interconnection

The plain language of § 251(c)(2) of the Act requires "each" incumbent LEC to provide transit services so competitive carriers can interconnect indirectly with other networks that connect to an ILEC's network. As a practical matter, this statutory duty applies to large ILECs because rural ILECs are less likely to operate tandem switches, let alone a tandem which other carriers subtend.

Specifically, § 251(c)(2) imposes on ILECs the "duty to provide" upon request "interconnection with the local exchange carrier's network –

> (A) for the transmission and routing of telephone exchange service and exchange access; [and]
>
> (B) at any technically feasible point within the carrier's network."

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158 *USF/ICC Transformation FNPRM* at ¶ 1311.

159 *Id.* at 4740 ¶ 125.

The Supreme Court has held this statute "obligates the incumbent to 'interconnect' the competitor's facilities to its own network to whatever extent is necessary to allow the competitor's facilities to operate."[160]

Section 251(c)(2) imposes two conditions before an ILEC's duty under this statute is triggered: the interconnection must be both technically feasible and used in part for the exchange of non-access traffic. Both conditions are met with transit arrangements. Interconnection with an ILEC's tandem switch unquestionably is technically feasible.[161] And by connecting to such a tandem, an originating carrier can then send its traffic to any switch that is connected to the tandem, whether the subtending switch is owned by the tandem owner or a third party network (*e.g.*, a rural LEC).[162] Accordingly, § 251(c)(2) on its face requires ILECs to provide transit arrangements to any other network that interconnects to it.[163] As one federal court held in rejecting AT&T's argument that § 251(c)(2) does not require it to provide transit:

> The plain meaning of the statute's text establishes Congress's clear intent to impose such a [transiting] duty on ILECs. . . . [T]he unambiguous language

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160 *Verizon* v. *FCC*, 535 U.S. 467, 491 (2002).

161 Indeed, in Rule 51.305(a)(2) adopted nearly 16 years ago, the FCC specifically found that the provision of access to "trunk interconnection points for a tandem switch" constitutes a "technically feasible point within the incumbent LEC's network" that ILECs must provide to "any requesting telecommunications carrier."

162 For purposes of regulatory classification, sending non-access traffic to an end office owned by the tandem owner is referred to as "transport" (*see* 47 C.F.R. § 51.701(c)), while sending non-access traffic to another carrier's switch subtending the tandem is known as "transit." *See USF/ICC Transformation FNPRM* at ¶ 1311. Nevertheless, as the FCC has recognized, transport and transit involve "the same functionally." *See id.* at ¶ 1313. Because the FCC in the *Transformation Order* (¶ 972) made clear that "as long as an interconnecting carrier is using the section 251(c)(2) interconnection arrangement to exchange some telephone exchange service and/or exchange access traffic section 251(c)(2) does not preclude that carrier from relying on that same functionality to exchange other traffic with the ILEC as well," hereafter references to "non-access traffic" and "access traffic" will be collectively "traffic".

163 Sprint is not asking the FCC here to rule that § 251(c)(2) requires non-rural ILECs to provide transit services to other carriers that are not already interconnected to the ILEC's network.

of Section 251 demonstrates that an ILEC must provide transit under Section 251(c)(2).[164]

Even if § 251(c)(2) was ambiguous (and it is not), the obligation of ILECs to provide transit service is clear from the very structure of § 251 of the Act. Section 251(a) gives "each" carrier the right to interconnect "indirectly with the facilities and equipment of other telecommunications carriers." As one federal court observed, "By permitting carriers to fulfill their interconnection obligations through indirect interconnection, Congress clearly envisioned that indirect interconnections would be an available means of interconnection."[165]

The Commission has recognized that competitive carriers make "widespread use of transiting arrangements" because they do "not exchange significant amounts of traffic" with most other carriers that would justify direct interconnection to these other networks.[166] The FCC was also correct in concluding that transit is "critical to establishing indirect interconnection – a form of interconnection explicitly recognized and supported by the Act."[167]

When Congress enacted § 251 in the 1996 Act, only the RBOCs had the equipment (LATA tandem switches) and ubiquitous interconnections with other carriers to provide transit arrangements.[168] Thus, when AT&T claims that § 251(c)(2) does not require it to provide transit,

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164 *Qwest* v. *Cox*, 4:08-cv-3035, 2008 U.S. Dist. LEXIS 102032, at *8 (D. Neb., Dec. 17, 2008). *See also SNET* v. *Perlermino,* 3:09-cv-1787, 2011 U.S. Dist. LEXIS 48773, at *12 (D. Conn., May 6, 2011) ("Reviewing the applicable FCC regulations and decisions as well as the relevant case law, the Court must conclude that interconnection under section 251(c) includes the duties to provide indirect interconnection and to provide transit service.").

165 *Qwest* v. *Cox*, 4:08-cv-3035, 2008 U.S. Dist. LEXIS 102032, at *8 (D. Neb., Dec. 17, 2008).

166 *See 2005 Unified Intercarrier Compensation Regime FNPRM*, 20 FCC Rcd 4685, 4740 ¶ 126 (2005).

167 *Id.* at 4740 ¶ 125.

168 Indeed, the RBOCs first deployed their LATA tandem switches over a decade earlier as a condition to implementing the AT&T divestiture decree. *See United States* v. *Western Electric,* 569 F. Supp. 990 (D.D.C. 1983); *United States* v. *Western Electric,* 569 F. Supp. 1057 (D.D.C. 1983). The costs of these switches were paid for by monopoly ratepayers and by IXCs that were forced to pay bloated access charges (including tandem switching charges).

it would have the Commission believe that Congress intended to give competitive carriers and rural LECs a right to indirect interconnection without any means to obtain such indirect interconnection. As federal courts have held, this AT&T argument renders "meaningless" the rights guaranteed by § 251(a):

> When Section 251(a) is read in conjunction with Section 251(c), it is clear that Congress imposed this [transit] obligation in Section 251(c) of the Act. . . . Otherwise, the indirect interconnection could not be used "for the transmission and routing of telephone exchange service and exchange access," and an ILEC could frustrate the flow of traffic and prevent carriers from indirectly interconnecting. Such a finding would render the "indirectly" language in Section 251(a) meaningless.[169]

Including transit within the scope of the § 251(c)(2) further promotes the overarching purpose of the 1996 Act. Congress enacted this Act to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers."[170] "Ensuring carriers can obtain transit service at cost-based rates facilitates this goal" because the alternative – requiring competitive carriers to "directly interconnect with every carrier they need to exchange traffic" – is "neither economical nor efficient."[171] Moreover, as another federal court has held, the redundancy of requiring each competitive carrier to replicate an ILEC's extensive direct interconnection arrangements with other networks is "precisely what the 1996 Act sought to eliminate."[172]

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169 *Qwest* v. *Cox*, 4:08-cv-3035, 2008 U.S. Dist. LEXIS 102032, at *9 (D. Neb., Dec. 17, 2008).

170 *See* Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

171 *Qwest* v. *Cox*, 4:08-cv-3035, 2008 U.S. Dist. LEXIS 102032, at *11-*12 (D. Neb., Dec. 17, 2008).

172 *SNET* v. *Perlermino,* 3:09-cv-1787, 2011 U.S. Dist. LEXIS 48773, at *15 (D. Conn., May 6, 2011).

Accordingly, the Commission should confirm that those incumbent LECs subject to § 251(c)(2) are required to provide transit arrangements to originating carriers that wish to interconnect indirectly to third party networks that also interconnect to the incumbent's network.

2. Because § 251(c)(2) Requires Them to Provide Transit, ILECs Must Provide This Arrangement at Cost-Based Rates

Section 251(c)(2)(D) specifies that the rates an incumbent LEC may charge for interconnection must comply with "the requirements of . . . section 252 of this title" – specifically, § 252(d)(1). The Commission has implemented § 252(d)(1) with its "TELRIC" rules.

With indirect interconnection, both the originating and terminating carriers must interconnect with an ILEC's tandem switch in the LATA, and this generally requires both of these carriers to obtain interconnection facilities to the tandem. In addition, the critical component of transiting arrangements is the intermediate interconnection function the ILEC provides within its network to enable the originating and terminating carrier networks to interconnect with each other for the exchange of traffic.

(a) <u>The law is now clear that those ILECs subject to § 251(c)(2) must provide interconnection facilities at cost-based (TELRIC) rates</u>. As discussed more fully above (in Subpart II), the Supreme Court has recently affirmed the FCC's decisions holding that those incumbent LECs subject to the requirements of § 251(c)(2) are obligated, upon request, to provide interconnection facilities at cost-based (TELRIC) rates.[173]

Wireless carriers like Sprint typically interconnect with LEC tandem switches using Type 2A interconnection facilities that connect its mobile switching centers ("MSCs") with an ILEC

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[173] *See Talk America* v. *Michigan Bell,* 131 S. Ct. 2254 (2011).

tandem switch.[174] The Commission should therefore confirm that incumbent LECs must, upon request, provide to wireless carriers at TELRIC rates, the Type 2A interconnection facilities that wireless carriers use in sending their traffic to those terminating carriers with which they interconnect indirectly. The FCC should similarly confirm that all terminating carriers to which Sprint sends its traffic (*e.g.*, rural LECs, competitive LECs) also have a right to obtain from the incumbent interconnection facilities at cost-based (TELRIC) rates.

(b) ILECs must provide transit interconnection arrangements at cost-based (TELRIC) rates. The essential component of transit is the interconnection the incumbent provides to connect the originating carrier's network with the terminating carrier's network. This indirect interconnection function that an incumbent performs involves use of its tandem switches.[175] Depending on the interconnection arrangement the terminating carrier has with the tandem owner, the incumbent may also provide some common transport.[176]

The function the incumbent performs in transit – tandem switching and perhaps some common transport – is identical to the function it performs in delivering incoming traffic to one of its own subtending end office switches.[177] The Commission held in its *Transformation Order* that transport (including tandem switching) should transition to bill-and-keep, with terminating

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[174] *See, e.g., Bowles* v. *United,* 12 FCC Rcd 9840, 9843 (1997) ("Type 2A service is interconnection to a local telephone company tandem similar to that used by an end office.").

[175] By definition, the transmission path through the tandem switch is not dedicated. Rather, as with all traffic that is routed *via* a tandem switch, the tandem establishes "a temporary transmission path between two other switches. *Local Competition Order,* 11 FCC Rcd 15499, 15713 ¶ 426 (1996).

[176] If the terminating carrier interconnects with the tandem owner at the tandem, the tandem owner does not provide any common transport; under the "old" (pre bill-and-keep) regime, the originating carrier rather pays the terminating carrier for all transport from the tandem to its end office switch. The tandem owner does provide some common transport if it has a "meet point" arrangement with the terminating carrier or if its POI with the terminating carrier is located at the latter's switch.

[177] *See USF/ICC Transformation FNPRM* at ¶ 1311 ("[T]ransit is the functional equivalent of tandem switching and transport today."); at ¶ 1313 ("[T]ransit service includes the same functionality as the tandem switch and transport services subject to a default bill-and-keep methodology.").

carriers recovering their transport costs from their own retail customers, rather than recovering some of these costs from other, oftentimes competing carriers.

This same bill-and-keep arrangement will not work for transit service, because transit providers have no retail customers from which they can recover their transit costs. Accordingly, it makes sense for the FCC to continue to use for transit a calling-party's-network-pays ("CPNP") regime rather than a bill-and-keep methodology. Under a CPNP regime, ILECs must comply with their § 251(c)(2) obligations by charging transit rates that are consistent with the TELRIC rules – rules that specifically include a "reasonable profit, plus a reasonable share of forward-looking common cost."[178] This TELRIC-based CPNP arrangement enables ILEC transit providers to recover their economic costs, including a reasonable profit.

(c) The Commission should adopt a voluntary "transit rate cap" alternative for those ILECs subject to § 251(c)(2). Because ILECs have the incentive to inflate their costs in TELRIC studies (and have done so in the past), arbitration regarding TELRIC rates is often inevitable, and such arbitration is costly to all involved, including for competitive carriers and State regulators. In addition, with continuing technological innovation, TELRIC rates can quickly become obsolete shortly after they are adopted.[179] Sprint therefore recommends that the Commission give those ILECs subject to § 251(c)(2) a less regulatory intrusive alternative to preparing and litigating TELRIC rates for transit.

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[178] *See Local Competition Reconsideration Order,* 11 FCC Rcd 13042 at ¶ 2 (1996). *See also Local Competition Stay Denial Order,* 11 FCC Rcd 11754, 11757 ¶ 10 (1996)("[O]ur pricing methodology does not require 'below-cost' pricing. On the contrary, it affirmatively provides for the recovery of all the economic costs of providing interconnection . . . and includes a reasonable profit."); *Local Competition Order,* 11 FCC Rcd 15499, 15854 ¶ 699 (1996)("We find that the TELRIC pricing methodology we are adopting provides for such a reasonable profit.").

[179] That is, unless the TELRIC rates are based on a truly scorched earth, most-efficient all-IP network. Such TELRIC rates would provide reductions in interconnection costs and promote ILECs moving to IP networks as they would not otherwise recover the now obsolete inflated TDM-based TELRIC rate.

A decade ago, the FCC gave ILECs the option of using the rate of $0.0007/minute (the "ISP rate") for all ISP-bound traffic if they offered the same rate to wireless carriers.[180] All three RBOCs accepted this option – and it is reasonable to assume they would not have agreed voluntarily to use this "ISP rate" if they believed the rate was below their actual economic costs. The adoption of the voluntary ISP rate cap was very successful; there was no litigation by ILECs over the use of this rate cap.[181]

Sprint submits that a similar approach should be adopted for transit, although the ISP rate obviously needs to be adjusted to reflect the fewer functions an ILEC performs with transit as compared to the intranetwork functions it performs in delivering calls to its own retail customers. The ISP rate was designed for ILECs to recover the costs of three different network functions: (1) tandem switching; (2) common transport (to the end office); and (3) end office switching using a TDM-based network. The provision of transit does not involve end office switching, but does involve tandem switching; as discussed above, depending on the interconnection arrangement between the transit provider and the terminating carrier, transit may or may not also involve some common transport. Given the differences between transport to an ILEC's own retail customers (the called parties) and the fewer functions an ILEC performs in transit, Sprint submits that a rate cap for transit that is half of the ISP rate ($0.00035/minute) would be generous.[182]

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180 *See 2001 ISP Remand Order,* 16 FCC Rcd 9151 (2001).

181 The parties that challenged the rate cap were rather CLECs that were then serving dial-up ISPs. The fact that the ILECs intervened on these challenges on the FCC's side to uphold the cap indicates strongly that the ILECs considered the level of the rate cap conservatively high.

182 TELRIC-based UNE rates that State commissions have adopted for Tandem Switching and Common Transport (*e.g.,* AL ($0.00042); GA ($0.00029); MA ($0.00031); and PA ($0.00043)), confirm the proposed transit rate cap would be generous for the ILECs. Those UNE rates were adopted long ago and thus likely overstate today's forward-looking cost of switching and transport because they were based on yesterday's TDM technology, not today's packet technology.

In all Verizon territories, Sprint terminates all non-access traffic at a rate of $0.00040, which includes three rate elements (tandem switching, transport, and end office switching). This would suggest that if this rate were cut in half (*i.e.,* $0.00020), ILECs would still recover all of their costs in providing transit.

It is noteworthy that, based on evidence AT&T has already submitted in the record,[183] a rate cap of $0.00035/minute almost certainly is higher than the economic costs large ILECs incur in providing transit. According to AT&T, the traffic sensitive percentage for several different modern switches ranges from zero (0%) to "less than 20%."[184] Even assuming the worst case – 20 percent of the cost of a switch is traffic sensitive – AT&T estimated that the incremental cost of switching would be "between $0.00010 to $0.00024" per minute – for an average rate of $0.00017/minute.[185] AT&T then stated, "These figures are comfortably below the Commission current [reciprocal compensation] figure of $0.00070 per minute."[186] This data suggests that a transit rate-cap of $0.00035/minute, double AT&T's estimated cost of switching alone, would enable ILECs to recover their costs of tandem switching and any common transport they may perform.

However, the attraction of a voluntary rate cap alternative is that the Commission need not be overly concerned whether the proposed cap is above or below an ILEC's economic costs. This is because each ILEC would determine for itself whether or not to use this rate cap alternative in place of submitting to a TELRIC-based rate based on an "all IP" network.

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183 *See* AT&T Written Ex Parte Letter, CC Docket No. 01-92 (Oct. 13, 2008).

184 *See id.* at 3-4. Although AT&T's data involved several different end office switches, it is Sprint's experience that the cost of tandem (trunk-to-trunk) switches is even less than the cost of end office (trunk-to-line) switches.

185 *See id.* at 4.

186 *Ibid.*

Nevertheless, based on the record evidence that AT&T has submitted, it appears likely that a rate cap for transit of $0.00035/minute would be "comfortably above" an ILEC's economic cost of providing transit.

3. The ILECs' Own Actions Confirm That the Transit Market Is Not Competitive

The Commission asks whether "the transit market demonstrate[s] the hallmark of a competitive market."[187] ILECs claim that the transit market is competitive and that as a result, they should be free to impose "market prices." The simple answer is that large ILECs do not possess the flexibility they claim given the explicit commands of § 251(c)(2) of the Act. But the ILECs' claims are also belied by their own actions.

In a market that is competitive, one would expect prices to fall and move toward economic costs – and the more competitive the market, the closer prices would be to economic costs. This fundamental maxim of economics does not apply to the transit market, however. This is because ILEC transit providers charge much higher prices in states that have not addressed the ILEC's statutory obligation to provide transit as opposed to states that have required ILECs to price transit at TELRIC rates as § 251(c)(2) requires.

For example, California and Michigan are among the approximately 20 states that have ruled that ILECs must price transit at TELRIC rates. In California, Sprint pays AT&T an average transit rate of $0.000453/minute; in Michigan, Sprint pays AT&T a transit rate of $0.000454.

In contrast, AT&T charges much higher rates in those states that have not yet addressed its obligation to provide transit consistent with the TELRIC rules. For example, throughout the former BellSouth territory, Sprint pays AT&T a transit rate of $.0020. Thus, ILECs' proposed

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[187] *See USF/ICC Transformation FNPRM* at ¶ 1313.

use of "market prices" is tantamount to a proposal to ***increase*** transit rates by a factor of four – or more.

The Commission faced a similar situation a decade ago with ILEC special access prices. In 1999, the FCC stopped regulating the prices of special access in certain markets that the ILECs claimed were competitive.[188] In response, the ILECs dramatically increased their prices for special access in those markets *above* the levels in "non-competitive" markets where prices remained capped – demonstrating that these markets were anything but competitive. The Commission has been investigating special access pricing virtually continuously since then. Sprint urges the Commission to take note of LECs' pricing actions in the special access market and avoid a similarly deleterious outcome in the transit market.

4. There Is a Critical Need for the Commission to Address the ILECs' Obligations to Provide Transit Arrangements Under the Act

The Commission asks about "the need for regulatory involvement" regarding ILEC provision of transit services under the Act.[189] Sprint submits there is a critical need for the FCC to address the obligations of non-rural ILECs to provide transit under § 251 of the Act, and under what terms.

Congress enacted the 1996 Act to provide for "a pro-competitive, deregulatory *national policy framework*" by opening all markets to competition.[190] In implementing the Act, and § 251 in particular, the FCC concluded that national rules are "necessary to promote Congress's goals for a national policy framework and serve the public interest":

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188 *See Pricing Flexibility Order*, 14 FCC Rcd 14221 (1999).

189 *See USF/ICC Transformation FNPRM* at ¶ 1313.

190 *See* Joint Statement of Managers, S. CONF. REP. NO. 104-230, 104th Cong., 2d Sess. Preamble (1996)(emphasis added).

> We adopt national rules where they facilitate administration of sections 251 and 252, expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish.[191]

The FCC did not address transit in its 1996 *Local Competition Order* – largely because the subject of transit received little attention in that proceeding. Besides, at the time the ILECs routinely discussed transit during interconnection negotiations and transit provisions were routinely included in interconnection agreements. As a result, competitive carriers had the right to arbitrate transit issues before State regulators if they deemed an ILEC's proposals to be unreasonable.

This began to change as ILECs become more aggressive in arguing that their provision of transit arrangements is unregulated because § 251 supposedly does not apply to transit. In response, the Commission was asked repeatedly to address the ILECs' obligations to provide transit under the Act, but for whatever reason, it has declined to address the matter.

The result has been that competitive carriers have been compelled to re-litigate the identical legal issue in multiple states. To date, the ILEC obligation under § 251 to provide transit has been litigated in approximately 20 states and to Sprint's knowledge, state commissions have uniformly rejected the ILEC position. This state-by-state litigation involving core obligations of the Act, however, is grossly inefficient – and this procedure further empowers AT&T and other ILECs to continue to charge above-cost transit rates in other states. More fundamentally, however, this state-by-state litigation does not achieve the "national policy framework" that Congress directed the FCC to establish.

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[191] *Local Competition Order,* 11 FCC Rcd 15499, 15520 ¶ 41 (1996).

But there are more pressing reasons for the Commission to address expeditiously the ILEC obligation to provide transit arrangements under the Act. Last fall, AT&T filed a brief with the Second Circuit arguing that because the FCC has chosen not to address the status of transit under the Act, states are now precluded altogether from addressing this issue as well:

> Given that the FCC has thus far declined to treat transiting as interconnection under the 1996 Act, and has asserted authority over any potential regulation of transiting in the future, the DPUC was preempted from asserting that same authority and imposing new transiting obligations in the name of Section 251 on its own, for that undermines and conflicts with federal law and policy.[192]

In other words, having lost the "§ 251 transit" issue in nearly every state which has considered the matter, AT&T now wants to preclude competitive carriers from even continuing to re-litigate this issue in the remaining states – simply because the FCC, to date, has declined to address the matter.

Given the Congressional mandate that the FCC establish a "national policy framework" to implement § 251, and given the extreme positions that AT&T has taken, Sprint urges the Commission to address definitively – and expeditiously – the obligation of those ILECs subject to § 251(c)(2) to provide transit arrangements under the Act.

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[192] AT&T Opening Brief at 20 (Sept. 23, 2011), *SNET* v. *Cablevision*, No. 11-2332 (2d Cir.), *attached to* Neutral Tandem Ex Parte, Docket No. 01-92 (Sept, 30, 2011).

Respectfully submitted,

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