State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: November 21, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF COMPETITIVE SERVICES (HINTON, BLOOM)
DIVISION OF LEGAL SERVICES (KEATING, BANKS)

RE: DOCKET NO. 000075-TP - INVESTIGATION INTO APPROPRIATE METHODS TO COMPENSATE CARRIERS FOR EXCHANGE OF TRAFFIC SUBJECT TO SECTION 251 OF THE TELECOMMUNICATIONS ACT OF 1996.

AGENDA: 12/05/01 - SPECIAL AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\000075.RCM

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CASE BACKGROUND

On January 21, 2000, this docket was established to investigate the appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996 (the Act). On December 20, 2000, Order No. PSC-00-2452-PCO-TP provided, in part, that Issues 1-9 would be addressed in the March 7-8, 2001 hearing (Phase 1) and Issues 10-17 would be addressed in the July 5-6, 2001 hearing (Phase 2). A pre-hearing conference was held on June 13, 2001, in which it was decided that Issue 11 would be removed from consideration at the administrative hearing. Due to the fact that Issue 11 was for informational purposes only, no decision by the Commission would be required. An administrative hearing on the remaining issues delineated for Phase 2 in this docket was held July 5-6, 2001. This recommendation addresses the Phase 2 issues.

DISCUSSION OF ISSUES

ISSUE 10: Pursuant to the Telecommunications Act of 1996 (Act), the FCC's rules and orders, and Florida Statutes, what is the Commission's jurisdiction to specify the rates, terms, and conditions governing compensation for transport and delivery or termination of traffic subject to Section 251 of the Act?

RECOMMENDATION: Staff believes that the Commission has jurisdiction to specify rates, terms and conditions governing compensation for transport and delivery or termination of traffic pursuant to Section 251 of the Act, the FCC's rules and orders, and Sections 364.161 and 364.162, Florida Statutes, so long as not otherwise inconsistent with the FCC's rules and orders, and the Act. Further, staff believes that Section 120.80(d), Florida Statutes, authorizes the Commission to employ procedures necessary to implement the Act. **(BANKS)**

POSITION OF PARTIES

BELLSOUTH: The Commission has jurisdiction to set rates, terms and conditions for traffic subject to Section 251(b)(5) of the Act.

VERIZON: This Commission currently has jurisdiction to establish a reciprocal compensation scheme for traffic subject to section 251 of the Act, but the FCC will address this same matter in its unified intercarrier compensation rulemaking. As such, this Commission should defer any ruling until the federal approach has been defined.

SPRINT: The FCC has jurisdiction to establish rules governing the transport and delivery or termination of local traffic, pursuant to the Act. The Commission has jurisdiction to implement the FCC rules for the transport and delivery or termination of local traffic.

JOINT ALEC (Global NAPs, MCI WorldCom, e.spire Communications, US LEC, Time Warner, Florida Cable Telecommunications Association, Florida Competitive Carriers Association, KMC Telecom, KMC Telecom II and KMC Telecom III): Under Section 364.162(1), Florida Statutes, the Commission has jurisdiction to establish rates, terms and conditions for interconnection and for transport and termination of local traffic. Such rates, terms and conditions

must comply with the requirements of Sections 251 and 252 of the Act and applicable FCC rules.

AT&T, TCG, & MEDIAONE: Under Section 364.162(1), Florida Statutes, the Commission has jurisdiction to establish rates, terms and conditions for interconnection and for transport and termination of local traffic. Such rates, terms and conditions must comply with the requirements of Sections 251 and 252 of the Act and applicable FCC rules.

ALLEGIANCE & LEVEL 3: The Commission has jurisdiction to establish rates, terms and conditions for interconnection between ILECs and ALECs pursuant to Section 364.162(1), Florida Statutes and Section 251(d)(3) of the Act. The Act and FCC rules limit the Commission's discretion to set such rules.

XO: The Commission has jurisdiction to establish rates, terms and conditions for interconnection between ILECs and ALECs pursuant to Section 364.162(1), Florida Statutes. In addition, Section 251(d)(3) of the Act preserves the authority of state commissions to establish access and interconnection obligations of local exchange carriers consistent with the requirements of Section 251.

ARGUMENTS

BellSouth

In its posthearing brief, BellSouth states that pursuant to Section 251(b)(5) of the Telecommunications Act of 1996 (Act), the Commission is obligated to ensure that BellSouth has established reciprocal compensation arrangements for the transport and termination of telecommunications traffic. (BR 4) BellSouth asserts that this obligation includes establishing rates that are compliant with Section 252(d)(2) of the Act. (BR 4) BellSouth contends that the Commission must ensure that the terms and conditions under which carriers interconnect are "just, reasonable and nondiscriminatory" either through review of the interconnection agreements or arbitrations conducted pursuant to Section 252 of the Act. (BR 5) Further, BellSouth's witness Ruscilli states that Paragraph 1027 of the *FCC's First Report and Order* in CC Docket 96-98 states that for purposes of compliance by an incumbent LEC with Section 251(b)(5), a state commission shall not consider terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions:

(1) provide for the "mutual and reciprocal recovery by each carrier of the 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, and

(2) determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls. (TR 26)

Verizon

In its posthearing brief, Verizon states that, at the present time, the Commission has jurisdiction to adopt a reciprocal compensation scheme for local traffic subject to Section 251(b)(5) of the Act. (BR 2) However, Verizon explains that the FCC has undertaken a rulemaking to establish a compensation methodology for this traffic (as well as for other types of traffic carried over the local telephone network). (BR 2) Verizon recommends that this Commission retain the record in this proceeding, but refrain from making any generic decisions about intercarrier compensation pending further development of the issue at the federal level. (BR 2) Verizon contends that the "FCC's *Remand Order* definitely confirmed that internet-bound traffic is not subject to reciprocal compensation obligations under Section 251 of the Act." (BR 3)

Sprint

In its posthearing brief, Sprint states that state commissions have jurisdiction to implement the FCC rules and apply any FCC-required methodologies in establishing actual rates, terms and conditions. (BR 2) Sprint asserts that the FCC rules setting forth the parameters for state implementation of reciprocal compensation requirements are set forth in 47 C.F.R. sections 51.701-51.717. (BR 2) The only limitation that the FCC has applied to state commissions is that state actions must be consistent or not otherwise conflict with the FCC rules and policies. (BR 2) Sprint contends that Section 364.161 and 364.162, Florida Statutes, authorize the Commission to arbitrate disputes relating to the negotiations of telecommunications companies to establish the rates, terms and conditions of interconnection and unbundling network elements. (BR 2-3) Sprint opines that Section 120.80(d), Florida Statutes, provides the necessary procedural authority for the Commission to implement the Act. (BR 3)

Sprint's witness Maples states that pursuant to Sections 251 and 252 of the Act, as well as the U.S. Supreme Court decision in AT&T vs. Iowa Utilities Board (119 S. Ct. 721 (1999), the FCC has jurisdiction to establish rules governing the rates, terms and conditions for the transport and termination of local traffic. (TR 503) He explains that this Commission has jurisdiction to implement these rules and apply any FCC-required methodologies in establishing actual rates, terms and conditions. (TR 503-504) Witness Maples opines that the only limitation that the FCC has applied to state commissions is that the rules implemented by the state commissions must be consistent or otherwise not conflict with the federal rules. (TR 504) Witness Maples asserts that Sections 364.161 and 364.162, Florida Statutes, authorize the Commission to arbitrate disputes relating to negotiations of telecommunications companies to establish the rates, terms and conditions of interconnection and the unbundling of network elements. (TR 504) Further, he states that Section 120.80(d), Florida Statutes, provides that in implementing the Act, the Commission is authorized to employ procedures consistent with the Act, which gives the Commission the necessary state authority to implement the Act. (TR 504)

Sprint states there is a recent decision by the FCC which has significant bearing on the Commission's authority in this proceeding. (BR 3) Sprint acknowledges that on April 27, 2001, the FCC released its Order on Remand regarding the jurisdiction of ISP-bound traffic and the appropriate intercarrier compensation mechanism for such traffic. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report Order, FCC 01-131 (released April 27, 2001)(*ISP Remand Order*). (BR 3)

Joint ALECs

In its posthearing brief, the Joint ALECs assert that the FCC has adopted pricing rules (Rules 51.701 through 51.717) to implement the reciprocal compensation provisions of the Act. (BR 4) Joint ALECs contend that Rule 51.705 allows the Commission to set the ILEC's rates for transport and termination either at TELRIC-based rates or if the requirements of Rule 51.713 are met, on a bill-and-keep basis. (BR 4) Joint ALECs assert that in setting prices for transport and termination of traffic, the Commission is required to apply the FCC's pricing rules. (BR 4) Joint ALECs

indicate that to the extent that the FCC's rules do not address a particular situation, the Commission retains authority under Section 251(d)(3) to establish and enforce state policies that are not inconsistent with the requirements of Section 251 of the Act. (BR 4)

Also, the Joint ALECs assert that the Commission has independent authority pursuant to Section 364.162(1), Florida Statutes, to set rates, terms and conditions for transport and termination of traffic. (BR 4) Joint ALECs state that the Florida Statutes, unlike the Act, do not distinguish between interconnection and transport and termination of traffic. (BR 4) Instead, both are subsumed under the broad term of "interconnection." (BR 4) The Joint ALECs state that the FCC recently declared that ISP-bound traffic is not "telecommunications" within the meaning of Section 251(b)(5) of the Act and thus is not subject to the Act's reciprocal compensation provisions. *In re: Matter of Implementation of the Local Competition Provisions in the Telecommunications At of 1996*, Order on Remand and Report order, FCC 01-131, CC Dockets 96-98 and 99-68, (April 27, 2001) (*ISP Remand Order*). Instead, such traffic constitutes "information access" subject to the FCC's regulatory jurisdiction. (BR 5) The Joint ALECs state that the FCC has established a rebuttable presumption that traffic delivered to a particular carrier that exceeds a 3:1 ratio of terminating traffic is ISP-bound traffic subject to the compensation mechanism established in that Order. *Id* ¶9. (BR 5) Therefore, the Joint ALECs conclude that under the ISP Remand Order, state commissions retain pricing jurisdiction over 251(b)(5) traffic but do not have prospective jurisdiction over ISP-bound traffic. *Id* ¶82. (BR 5)

AT&T, TCG and MediaOne

In its posthearing brief, AT&T, TCG and MediaOne state that they adopt the discussion and arguments provided in the posthearing briefs filed by the Joint ALECs on this issue. (BR 2)

Allegiance and Level 3

In their posthearing brief, Allegiance and Level 3 state that although Section 364.162(1), Florida Statutes, and Section 251(d)(3) of the Act grant the Commission jurisdiction to establish rates, terms and conditions for the transport and delivery or termination of traffic subject to Section 251 of the Act, the

Commission must adopt rules that are consistent with Section 251 of the Act and the FCC's rules. (BR 3) Further, Allegiance and Level 3 indicate that the "Commission rules must comply with, among other things, FCC Rule 711(a) regarding reciprocal compensation rates, Rule 711(a)(3) regarding tandem classification of the ALEC switch, and Rules 703(b) and 709(b) regarding the LEC's obligation to deliver its originating traffic to the POI at no charge to the terminating LEC." (BR 3)

XO

In its posthearing brief, XO states that it adopts the positions set forth in its prehearing statements. (BR 1) In its prehearing statements, XO asserts that the Commission has jurisdiction to establish rates, terms and conditions for interconnection between ILECs and ALECs pursuant to Section 364.162(1), Florida Statutes. In addition, XO contends that Section 251(d)(3) of the Act preserves the authority of the state commissions to establish access and interconnection obligations of local exchange carriers consistent with the requirements of Section 251 of the Act. (Prehearing Statement, 6)

STAFF ANALYSIS

The issue to be addressed is whether or not the Commission has jurisdiction to specify rates, terms and conditions governing compensation for transport and delivery or termination of traffic pursuant to the Section 251 of the Act, the FCC's rules and orders, and Florida Statutes. Staff believes that the Commission has jurisdiction to establish rates, terms and conditions governing compensation for transport and delivery or termination of traffic pursuant to the FCC's rules and policies, the Act and the Florida Statutes. Staff also believes that pursuant to Section 120.80(d), Florida Statutes, the Commission, in implementing the Act, has authority to employ procedures consistent with the Act.

There appears to be no significant disagreement among the parties that the Commission has jurisdiction to implement the rates, terms and conditions of intercarrier compensation mechanisms for intrastate traffic subject to Section 251(b)(5) of the Act, so long as such rates, terms and conditions are not inconsistent with the rules and orders of the FCC governing such intercarrier compensation. Verizon states that the Commission has jurisdiction to adopt a reciprocal compensation scheme for local traffic subject

to Section 251(b)(5) of the Act, but explains that the FCC has undertaken a rulemaking process to establish a compensation methodology. Verizon contends that the FCC's *Remand Order* confirms that internet-bound traffic is not subject to reciprocal compensation obligations under Section 251 of the Act. (BR 3) Therefore, Verizon recommends that the Commission refrain from making a decision regarding intercarrier compensation. (BR 2)

In its posthearing brief, Sprint asserts that the Commission has authority to specify rates, terms and conditions pursuant to Sections 364.161 and 364.162, Florida Statutes. (BR 2) However, Sprint notes that the *ISP Remand Order* has a significant impact on the Commission's authority in this proceeding, but it fails to provide an analysis of the extent of this impact. (BR 3) Further, the Joint ALECs assert that, unlike the Act, the Florida Statutes do not distinguish between interconnection and transport and termination of traffic and conclude that both are subsumed in the broad term of "Interconnection." (BR 4) However, the Joint ALECs assert that the *ISP Remand Order* declared that ISP-bound traffic is not "telecommunications" within the meaning of Section 251(b)(5) of the Act and thus not subject to the Act's reciprocal compensation provisions." (BR 5) Staff notes that although the *ISP Remand Order* does indicate that the Commission's jurisdiction has been narrowed in the context of determining rates for ISP-bound traffic, the Commission can specify rates, terms and conditions governing compensation for transport and delivery or termination of traffic consistent with Section 251 of the Act. Staff believes that pursuant to Sections 364.161 and 364.162, Florida Statutes, the Commission has authority to establish the rates, terms and conditions of interconnection agreements.

Conclusion

Staff believes that the Commission has jurisdiction to specify rates, terms and conditions governing compensation for transport and delivery or termination of traffic pursuant to Section 251 of the Act, FCC's rules and orders and Sections 364.161 and 364.162, Florida Statutes, so long as not otherwise inconsistent with the FCC rules and orders and the Act. Further, staff believes that Section 120.80(d), Florida Statutes, authorizes the Commission to employ procedures necessary to implement the Act.

ISSUE 12(a): Pursuant to the Act and FCC's rules and orders, under what condition(s), if any, is an ALEC entitled to be compensated at the ILEC's tandem interconnection rate?

RECOMMENDATION: Staff recommends that an ALEC is entitled to be compensated at the ILEC's tandem interconnection rate when its switch either serves a comparable geographic area to that served by an ILEC tandem switch, or performs functions similar to those performed by an ILEC tandem switch. **(HINTON)**

POSITION OF PARTIES

BELLSOUTH: An ALEC is entitled to the tandem interconnection rate when it can commensurate compliance with FCC Rule 51.711. "Similar Functionality" is defined in FCC Rule 51.319(c)(3), while "Comparable Geographic Area" requires demonstration of the physical location of customers actually served.

VERIZON: An ALEC may receive the ILEC's tandem interconnection rate when it is actually serving a geographic area comparable to that served by the ILEC. Geographic comparability is a fact-specific inquiry that will need to be performed on a case-by-case basis.

SPRINT: The FCC rules afford ALECs compensation at the ILEC's tandem interconnection rate under two scenarios: 1) when the ALEC switch utilizes a tandem or "equivalent facility" under FCC Rule 51.701(c); or 2) when the ALEC switch serves a "comparable geographic area" under FCC Rule 51.711(a)(3).

JOINT ALEC: An ALEC is entitled to be compensated at the ILEC's tandem interconnection rate if either (i) its switch serves a geographic area comparable to the ILEC's local tandem switch, or (ii) it provides similar functionality to that provided by the ILEC's local tandem.

AT&T, TCG, & MEDIAONE: An ALEC is entitled to be compensated at the ILEC's tandem interconnection rate if either (i) its switch serves a geographic area comparable to the ILEC's local tandem switch, or (ii) it provides similar functionality to that provided by the ILEC's local tandem.

ALLEGIANCE & LEVEL 3: If an ALEC's switch is capable of completing calls within substantially the same area as that served by an ILEC tandem switch, then the ALEC switch serves a "comparable geographic

area" and qualifies for the tandem interconnection rate. The Commission may not apply a two-prong test that includes similar functionality.

XO: FCC Rule 51.711(a)(3) requires only that the comparable geographic area test be met before carriers are entitled to the tandem interconnection rate for local call termination. As recently confirmed by the FCC, any ALEC demonstrating that its switch serves "a geographic area comparable to that served by the incumbent LEC's tandem switch" is entitled to the tandem interconnection rate to terminate local telecommunications traffic on its network.

STAFF ANALYSIS

The issue before the Commission is to determine under what circumstances an ALEC is entitled to the ILEC's tandem interconnection rate for the purposes of reciprocal compensation. This issue addresses the application of the FCC's rules and orders pertaining to the employment of Symmetrical Reciprocal Compensation. In that regard, 47 C.F.R. 51.711 (Rule 51.711) states in part:

> For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services. (Rule 51.711(a)(1))

More specifically, the matter of contention revolves around the interpretation and application of Rule 51.711(a)(3), which states:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

While this rule may appear quite clear at first glance, the waters are muddied considerably by arguments that have centered largely on language contained in the FCC's *Local Competition Order* (FCC 96-325). FCC 96-325 states in ¶1090:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate. (emphasis added)

This language has given rise to what is traditionally known as the "two-prong" test. As explained by BellSouth witness Ruscilli, in order for an ALEC to be entitled to the tandem interconnection rate the ALEC must demonstrate that: "1) its switches serve a comparable geographic area to that served by BellSouth's tandem switches and that 2) its switches actually perform local tandem functions." (emphasis in original) (TR 28-29) He asserted that the language in ¶1090 establishes the FCC's two requirements that must be met before an ALEC is entitled to the tandem rate: the ALEC's switch must perform the tandem switching function, and it must serve a comparable geographic area. (TR 30) Verizon witness Beauvais concurred, stating that an ALEC "must meet a two-prong test under the FCC's Order adopted pursuant to the Act. To receive compensation at the ILEC's tandem rate, the ALEC's switches must serve an area comparable to the ILEC's tandem switch; and the ALEC's switches must perform functions similar to the ILEC's tandem switch." (TR 308)

However, in its recent Notice of Proposed Rulemaking (NPRM) in CC Docket No. 01-92,[1] released after the parties' pre-filed

[1] Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Notice of Proposed Rulemaking (FCC 01-132), released April 27, 2001.

testimony, the FCC clarified that a two-prong test does not apply. In its NPRM, at ¶105, the FCC states:

> section 51.711(a)(3) of the Commission's rules requires only that the comparable geographic area test be met before carriers are entitled to the tandem interconnection rate for local call termination. Although there has been some confusion stemming from additional language in the text of the Local Competition Order regarding functional equivalency, section 51.711(a)(3) is clear in requiring only a geographic area test. Therefore, we confirm that a carrier demonstrating that its switch serves "a geographic area comparable to that served by the incumbent LEC's tandem switch" is entitled to the tandem interconnection rate to terminate local telecommunications traffic on its network.

BellSouth witness Ruscilli now acknowledges that the FCC seems to have resolved the question of whether a two-prong or a single-prong test is to be used for determining when an ALEC is entitled to the tandem rate pursuant to Rule 51.711. (TR 100-101) He states that while BellSouth's position is that there is a two-part test suggested in ¶1090 of FCC 96-325, the FCC has now rendered a rather concise statement that geographic coverage is the requirement for the tandem rate. (TR 155-156, 194-195) Verizon witness Beauvais also concedes that the FCC has taken the functionality test out of the two-prong interpretation of Rule 51.711, moving to a comparable geographic area test only. (TR 349)

While the FCC has clarified that Rule 51.711 establishes only a single geographic criterion for obtaining the tandem rate, Joint ALEC witness Selwyn maintains that ¶1090 of FCC 96-325 presents two criteria governing when an ALEC is entitled to the tandem rate. (TR 598) However, as opposed to the two-prong test supported by ILECs, witness Selwyn suggests that what is traditionally known as the "either/or" test should be applied to this language. He states that "the Commission should consider the geographic coverage area of an ALEC's switch, or the particular functionality offered by interconnection at that switch, in determining whether an ALEC should receive the tandem rate or an end office rate." (emphasis added)(TR 603)

WorldCom witness Argenbright agrees, stating:

> an ALEC need rely on proving the similar functionality of its network in order to be compensated at the tandem rate *only if* its network does not serve a geographic area comparable to that served by the ILEC's tandem. If the ALEC serves a comparable geographic area, the "functionality" inquiry is simply unnecessary. (emphasis in original)(TR 1007)

Sprint witness Maples also supports an either/or approach, stating that there are two scenarios in which the FCC rules afford ALECs reciprocal compensation at the tandem rate. He explains that an ALEC is entitled to the tandem rate when its switch utilizes a tandem or "equivalent facility" under FCC Rule 51.701(c), or when its switch serves a "comparable geographic area" consistent with FCC Rule 51.711(a)(3). (TR 508)

Analysis

Staff believes this issue has been largely resolved by the FCC's clarification in its recent NPRM. Specifically, the FCC has rendered the ILEC argument of a two-prong test moot by stating that Rule 51.711 requires only geographic comparability. However, staff believes that although Rule 51.711 only requires geographic comparability, the FCC clearly stated in ¶1090 of FCC 96-325 that states shall consider the functionality of an ALEC's network when determining if the tandem rate should apply. ¶1090 states in part:

> states shall...consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminated on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch.

Staff believes the language in ¶1090 suggests that there are two scenarios by which an ALEC may be entitled to the tandem rate for reciprocal compensation: similar functionality or geographic comparability. Staff agrees with Sprint witness Maples that there is no linkage between these two scenarios which would require an ALEC to meet a two-prong test, but rather an either/or application of these two scenarios is appropriate. (TR 524-525)

While the FCC did mention in its NPRM that the language in ¶1090 regarding "functional equivalency" has caused some confusion, it did not retract this language.[2] The FCC merely clarified that Rule 51.711 requires only geographic comparability. Therefore, staff believes that pursuant to ¶1090 of FCC 96-325, similar functionality is still a consideration when determining if an ALEC is entitled to the tandem rate. Staff agrees with Joint ALEC witness Selwyn that it is appropriate to consider the functionality of an ALEC's network in situations where it does not serve a geographic area comparable to that served by an ILEC tandem switch. (TR 606) In this way, an ALEC may qualify for the tandem rate if it actually performs tandem functions, regardless of the geographic area served.

Conclusion

Staff recommends that an ALEC is entitled to be compensated at the ILEC's tandem interconnection rate when its switch either serves a comparable geographic area to that served by an ILEC tandem switch, or performs functions similar to those performed by an ILEC tandem switch. Staff believes that Rule 51.711 establishes that an ALEC need only show geographic comparability to be entitled to the tandem rate. However, staff also believes that ¶1090 of FCC 96-325 establishes similar functionality as a second scenario by which an ALEC may receive the tandem rate. Staff notes that what actually constitutes "similar functionality" and "comparable geographic area" will be addressed in Issues 12(b) and 12(c) respectively.

[2] NPRM at ¶105.

ISSUE 12(b): Pursuant to the Act and FCC's rules and orders, under either a one-prong or two-prong test, what is "similar functionality?"

RECOMMENDATION: Staff recommends that "similar functionality" should be defined as trunk-to-trunk switching when determining if an ALEC is entitled to the tandem interconnection rate pursuant to FCC 96-325, ¶1090. **(HINTON)**

POSITION OF PARTIES

BELLSOUTH: An ALEC is entitled to the tandem interconnection rate when it can demonstrate compliance with FCC Rule 51.711. "Similar Functionality" is defined in FCC Rule 51.319(c)(3), while "Comparable Geographic Area" requires demonstration of the physical location of customers actually served.

VERIZON: An ALEC may receive the ILEC's tandem interconnection rate when it is actually serving a geographic area comparable to that served by the ILEC. Geographic comparability is a fact-specific inquiry that will need to be performed on a case-by-case basis.

SPRINT: An ALEC switch performs "functions similar to those performed by an incumbent LEC's tandem switch" if the switch is capable of trunk to trunk connectivity and has the necessary software activated in the switch to perform the actual tandem function.

JOINT ALEC: A "similar functionality" test would be met if, for example, an ALEC switch aggregates traffic over a wide geographic area and performs other measurement and recording functions. Similar functionality does not require trunk-to-trunk switching.

AT&T, TCG, & MEDIAONE: A "similar functionality" test would be met if, for example, an ALEC switch aggregates traffic over a wide geographic area and performs other measurement and recording functions. Similar functionality does not require trunk-to-trunk switching.

ALLEGIANCE & LEVEL 3: If an ALEC's switch is capable of completing calls within substantially the same area as that served by an ILEC tandem switch, then the ALEC switch serves a "comparable geographic area" and qualifies for the tandem interconnection rate. The

Commission may not apply a two-prong test that includes similar functionality.

XO: Although the FCC has now definitely declared that an ALEC is not required to meet a similar functionality test, similar functionality would be met if, for example, an ALEC switch aggregates traffic over a wide geographic area and performs other measurement and recording functions. Similar functionality does not require an ALEC switch to perform trunk-to-trunk switching.

STAFF ANALYSIS

The issue before the Commission is to determine what constitutes "similar functionality" when determining whether an ALEC is entitled to the tandem interconnection rate. This criterion is identified in ¶1090 of the FCC's *Local Competition Order* (FCC 96-325), which states:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate. (emphasis added)

If the Commission approves staff's recommendation in Issue 12(a), similar functionality will be one of two possible criteria that would on its own entitle an ALEC to receive the tandem interconnection rate for the purposes of reciprocal compensation. The second criterion, comparable geographic area, will be addressed

in Issue 12(c). To be determined in this issue is what constitutes functionality similar to that of an ILEC tandem switch, thereby establishing a test for ascertaining whether an ALEC is entitled to the tandem rate under this criterion.

BellSouth witness Ruscilli contends that similar functionality should be established by compliance with 47 C.F.R. 51.319(c)(3), which states:

> *Tandem Switching Capability.* The tandem switching capability network element is defined as:
>
> > (i) Trunk-connect facilities, which include, but are not limited to, the connection between trunk termination at a cross connect panel and switch trunk card;
> >
> > (ii) The basic switch trunk function of connecting trunks to trunks; and
> >
> > (iii) The functions that are centralized in tandem switches (as distinguished from separate end office switches), including but not limited to call recording, the routing of calls to operator services, and signaling conversion features. (TR 31-32)

Witness Ruscilli explains that "to provide transport utilizing tandem switching, an ALEC's switch must connect trunks terminated in one end office switch to trunks terminated in another end office switch. In other words, a tandem switch, as defined by the FCC, provides an intermediate switching function." (TR 32-33) He states that "this definition of tandem switching capability has long been accepted and applied within the telecommunications industry." (TR 32)

Verizon witness Beauvais agrees, also referring to Rule 51.319 in defining similar functionality when determining if an ALEC is entitled to the tandem rate. (TR 309) He states that tandem switching refers to the practice of using intermediate trunk-to-trunk switching between the end office of the originating end-user and the end office serving the called party. (TR 307) Witness Beauvais explains that intermediate switching replaces direct trunking between end offices, and is utilized as an economically

cost efficient method of concentrating traffic when a LEC has multiple end office switches serving a particular geographic area. (TR 307)

Witness Beauvais cites to a South Carolina Public Service Commission decision in which that Commission concluded that "AT&T's switches must connect trunks terminated in one end office switch to trunks terminated in another end office switch." He states that the South Carolina Commission concluded that because AT&T's switches did not connect in such a manner, "they cannot be found to perform tandem switch functions."[3] (TR 309) Witness Beauvais also cites court decisions that he claims "confirm that the South Carolina Commission's common-sense interpretation of the FCC's rules is correct.[4] (TR 309-310) However, witness Beauvais provides no explanation as to how these court decisions support his position.

Sprint witness Maples states that the FCC rules afford an ALEC reciprocal compensation at the tandem rate when the ALEC actually utilizes a tandem switch or "equivalent facilities" in its network consistent with the definition of termination found in FCC Rule 51.701(c). (TR 508) He contends:

> an ALEC switch performs "functions similar to those performed by an incumbent LEC's tandem switch" if the switch is capable of trunk to trunk connectivity and has the necessary software activated in the switch to perform the actual tandem function. This is the same definition that should be utilized to determine whether the switch is an "equivalent facility" under FCC Rule 51.701. (TR 510)

Witness Maples argues that an ALEC should be entitled to the tandem rate for all traffic that passes through that switch or "equivalent facilities." (TR 509) FCC Rule 51.701(c) referenced by witness Maples states:

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[3] Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252, S.C. PSC Order No. 2001-079, at 34 (Jan. 30, 2001)

[4] MCI Telecomms. Corp. v. Ill. Bell Tel., 1999 U.S. Dist. LEXIS 11418 (N.D. Ill., June 22, 1999); U.S. West Comm. v. MFS Intelenet, Inc., 193 F.3d 1112,1124 (9th Cir. 1999).

> *Transport*. For purposes of this subpart, transport is the transmission and any necessary tandem switching of local telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

WorldCom witness Argenbright disagrees with the above mentioned positions, stating that "there is no requirement that the ALEC network must perform intermediate trunk to trunk switching in order to be considered similar to the ILEC tandem switch." (TR 1020) He contends that the definition of tandem switching capability found in FCC Rule 51.319(c)(3) referenced by BellSouth witness Ruscilli is intended to identify the tandem switch as an unbundled network element in the ILEC's network. (TR 1020-1021) He argues that because of the differences in the networks deployed by ALECs and ILECs, applying the technical definition found in this rule would result in the disqualification of the ALEC's network from performing similar functions to those performed by an ILEC's tandem switch. (TR 1021) Witness Argenbright states:

> In fact, such a requirement begs the question as to why the FCC even bothered to direct the states to consider "new technologies." If the FCC had intended for the traditional technical definition of tandem switching, as found in the ILEC's networks, to be the litmus test, they simply could have skipped the consideration of "new technologies" because there are no new technologies that would meet this definition. Only the replication of the ILEC network would stand up to this traditional technical definition of tandem switching. (TR 1021)

Witness Argenbright contends that any comparison of functionality must recognize the technical differences inherent in the ILEC and ALEC networks. He states that failure to do so would result in ILECs avoiding the cost of utilizing their own tandem switch, while receiving similar functionality from the ALEC's network and paying only the lower cost of end office switching. (TR 1009) Witness Argenbright argues that although ALEC and ILEC networks are fundamentally different on a technical level, it is far more important to focus on the "results" of the networks' operations when comparing functionality. (TR 1016) He argues that

a focus on technical definitions at the expense of the "results" provided by an ALEC's network places them in a position of replicating the ILEC's network in order to qualify for the tandem rate. He asserts that an incentive to construct inefficient networks is clearly not in the public interest. (TR 1020)

Joint ALEC witness Selwyn agrees, stating:

> The FCC adopted the "similar functionality" criterion precisely in order to allow for the possibility that some ALECs would *not* deploy tandem switches, or otherwise design their networks in the same manner as do ILECs, and yet preserve the ability of ALECs to be compensated (via reciprocal compensation arrangements) on a par with the ILECs as long as their networks provide the same kind of call transport and termination services. (emphasis in original)(TR 600-601)

Witness Selwyn argues that the FCC in forming ¶1090 of FCC 96-325, expressly recognized that an ALEC might deploy a different network architecture that does the same thing as an ILEC's network, but does it in a different way. (TR 604) Witness Selwyn explains that the FCC directed states to "consider whether new technologies...perform functions similar to" those performed by ILEC tandems, but he states that the FCC did not specify what those functions might be. (TR 605) However, he asserts that "[b]ased upon my experience in the industry, I would suggest that capabilities such as billing and recording, as well as the convenience offered by having a single point of interconnection for an entire network, constitute such functions." (TR 605)

In addition to the above suggestion, witness Selwyn states that an ILEC tandem switch typically performs the following functions:

- It aggregates traffic originated from/terminated to multiple exchange areas, so that traffic between customers calling outside of their own local exchange can be switched and transported efficiently;

- It routes IXC-bound traffic directly to the interexchange carrier handling the call;

- It serves as the interconnection point for operator services facilities, so that calls requiring operator services can be routed in aggregate to the operator services bureau(s);

- It measures and records traffic detail for billing purposes. (TR 600)

He contends that as long as an ALEC's network provides these functions it is providing similar functionality, whether the ALEC has deployed an actual tandem switch or not. (TR 600)

WorldCom witness Argenbright concurs, arguing that despite differences in network architecture, there are several functions performed by an ALEC's network that are also performed by an ILEC tandem switch. He states that one of these is traffic aggregation. He explains that "an ALEC's network collects traffic from across many exchanges in various rate centers allowing the efficient switching and transporting of traffic originating and terminating among these exchanges and rate centers. Traffic aggregation is a central function of the ILEC's tandem switch." (TR 1010) In addition, he states that the ALEC network provides a centralized point of interconnection for access to operator services platforms, as well as measuring and recording traffic for the creation of call records for billing purposes. He argues that these functions are also performed by an ILEC tandem switch. (TR 1010)

Analysis

Approaching the issue of symmetrical reciprocal compensation, staff recognizes that there is an inherent problem in taking a compensation structure designed for a particular network architecture, and applying it to a different architecture. This becomes glaringly evident when attempting to determine what constitutes "similar functionality" for the purposes of applying the ILEC's tandem interconnection rate to an ALEC's network. Nevertheless, the Commission is left with the task of doing just that. While the FCC has delegated to the states the responsibility of considering whether new technologies deployed in ALEC networks perform functions similar to those performed by an ILEC tandem switch, the FCC has provided no guidance as to what constitutes similar functionality. However, staff notes that the FCC did not require that the states make a finding in one direction or another, but merely that states "shall also consider" whether new

technologies perform similar functions. (FCC 96-325, ¶1090) It appears to be at the Commission's discretion to decide whether new technologies deployed by ALECs perform functions similar to those of an ILEC tandem switch, or whether they do not.

In determining whether an ALEC is entitled to the tandem rate under the similar functionality criterion, the Commission is presented with two compelling arguments. One option presented to the Commission by ALEC witnesses is an interpretation of similar functionality in terms of aggregating traffic from remote locations. (Argenbright TR 1010; Selwyn TR 600) WorldCom witness Argenbright contends that ALEC networks collect traffic from across many exchanges in various rate centers allowing the efficient switching and transporting of traffic originating and terminating among these exchanges and rate centers. (TR 1010) ALECs also argue that functions performed by ALEC switches such as measuring and recording traffic detail, and aggregating calls to operator services platforms should entitle them to the tandem rate. (Selwyn TR 600; Argenbright TR 1010)

The second option presented by ILECs is a strict interpretation of similar functionality based upon the definition of tandem switching capability found in FCC Rule 51.319(c)(3). (BellSouth TR 31-32; Verizon TR 309) Under this interpretation, an ALEC switch would be required to provide trunk-to-trunk connectivity as an intermediate switch between two end offices. (BellSouth TR 32-33; Verizon TR 307) Although not citing Rule 51.319 specifically, Sprint witness Maples also contends that an ALEC switch must provide trunk-to-trunk switching to be entitled to the tandem rate. (TR 510)

The ALECs counter this argument by stating that the definition in Rule 51.319(c)(3) is intended to define the functionality that ILECs must provide as an unbundled network element (UNE). They contend that since ILEC tandems perform trunk-to-trunk switching, the tandem switching UNE must offer the same capability. However, they argue that the definition of tandem switching for unbundling purposes, in terms of the functions performed by the ILEC's network configuration, does not control what constitutes "similar functionality" in an ALEC's network that has a different technical configuration. (BR 10) Staff disagrees. Staff believes that when determining similar functionality, the benchmark by which an ALEC's network functionality is to be measured is the ILEC tandem switching function. If FCC Rule 51.319(c)(3) defines the

functionality of an ILEC tandem switch, staff believes it would stand to reason that this definition of tandem functionality would be controlling, regardless of the fact that it is pertaining to the tandem switching network element.

Staff does not believe that traffic aggregation by an ALEC network end office switch is similar to the tandem function of an ILEC tandem switch. In looking at an ILEC network, there are several points of traffic aggregation. Traffic is aggregated at remote terminals for transport to an end office. Traffic is aggregated at end offices for transport to a tandem switch. Traffic is aggregated at tandem switches for transport to other end offices. However, staff believes an important distinction can be made between the traffic aggregation performed by an end office switch and that performed by a tandem switch. End offices aggregate traffic from end users, and deliver that traffic to either other end users or to a tandem switch. On the other hand, a tandem switch aggregates traffic from end offices for delivery to other end offices. Joint ALEC witness Selwyn explains that in the ALEC network configuration, the transport function is carried out on the "line side" of the switch. (TR 602) In other words, the traffic is aggregated and transported to end users. Staff believes the switches deployed in an ALEC network perform functions similar to an ILEC end office switch, not a tandem switch. Therefore, staff recommends that the Commission find that the "new technologies" addressed in this proceeding do not perform functions similar to an ILEC tandem switch unless found to provide trunk-to-trunk connectivity.

Staff believes the definition of similar functionality to be applied when determining if an ALEC is entitled to the tandem rate should be trunk-to-trunk switching pursuant to FCC Rule 51.319(c)(3). Staff recognizes the argument presented by WorldCom witness Argenbright when he states:

> a focus on technical definitions at the expense of the results places ALECs in the position of having to replicate the ILEC's tandem/end office network in order to "qualify" for tandem level compensation. Such an incentive toward the construction of inefficient networks is clearly not in the public interest. (TR 1020)

However, staff believes that an ALEC's incentive to construct a particular network should not be the receipt of reciprocal

compensation at a particular rate; rather, ALECs should construct networks that will enable them to efficiently serve end users. In addition, staff believes that the FCC established the "geographic comparability" criterion to enable an ALEC to receive the tandem rate when it doesn't actually perform tandem switching. Staff would also note that the FCC provided for asymmetrical compensation based upon the ALEC's own costs, if an ALEC can show that the costs it incurs in terminating traffic are greater than that provided for in the ILEC's tandem rate. (FCC 96-325, ¶1089 and ¶1091)

Conclusion

Staff recommends that "similar functionality" should be defined as trunk-to-trunk switching when determining if an ALEC is entitled to the tandem interconnection rate pursuant to FCC 96-325, ¶1090. Staff believes that the FCC has clearly defined the tandem switching function in Rule 51.319(c)(3) as the basic switch function of connecting trunks to trunks. Although the FCC also described the functions of call recording, routing calls to operator services, and signaling conversion features in Rule 51.319(c)(3), staff does not believe these functions alone would qualify a switch as performing functions similar to an ILEC tandem switch.

ISSUE 12(c): Pursuant to the Act and FCC's rules and orders, under either a one-prong or two-prong test, what is "comparable geographic area?"

RECOMMENDATION: Staff believes that a "comparable geographic area," pursuant to FCC Rule 51.711, is a geographic area that is roughly the same size as that served by an ILEC tandem switch. Staff recommends that an ALEC "serves" a comparable geographic area when it has deployed a switch and has opened NPA/NXXs to serve the exchanges within this area. In addition, staff recommends that the ALEC must show that it is serving this area either through its own facilities, or a combination of its own facilities and leased facilities connected to its collocation arrangements in ILEC central offices. **(HINTON)**

POSITION OF PARTIES

BELLSOUTH: An ALEC is entitled to the tandem interconnection rate when it can demonstrate compliance with FCC Rule 51.711. "Similar Functionality" is defined in FCC Rule 51.319(c)(3), while "Comparable Geographic Area" requires demonstration of the physical location of customers actually served.

VERIZON: An ALEC may receive the ILEC's tandem interconnection rate when it is actually serving a geographic area comparable to that served by the ILEC. Geographic comparability is a fact-specific inquiry that will need to be performed on a case-by-case basis.

SPRINT: Sprint maintains that the ALEC must in fact hold itself out to serve customers in the geographic area served by the ILEC tandem absent any technical feasibility limitations, in order to satisfy the "comparable geographic area" criteria found in Rule 51.711(a).

JOINT ALEC: An ALEC switch serves a "comparable geographic area" to an ILEC local tandem switch if the ILEC uses a tandem switch to serve the rate centers associated with the NPA/NXXs that the ALEC has opened in its switch for the origination and termination of local traffic.

AT&T, TCG, & MEDIAONE: An ALEC switch serves a "comparable geographic area" to an ILEC local tandem switch if the ILEC uses a tandem to serve the rate centers associated with the NPA/NXXs that the ALEC has opened in its switch for the origination and termination of local traffic.

ALLEGIANCE & LEVEL 3: If an ALEC's switch is capable of completing calls within substantially the same area as that served by an ILEC tandem switch, then the ALEC switch serves a "comparable geographic area" and qualifies for the tandem interconnection rate. The Commission may not apply a two-prong test that includes similar functionality.

XO: A "comparable geographic area" refers to the coverage areas of the ALEC switch and the ILEC tandem switch. If an ALEC's switch enables an ILEC to interconnect and complete local calls within substantially the same area as that served by an ILEC tandem switch, then the ALEC switch serves a "comparable geographic area" for purposes of qualifying for the tandem interconnection rate.

STAFF ANALYSIS

The issue before the Commission is to determine what constitutes a "comparable geographic area" when determining whether an ALEC is entitled to the tandem interconnection rate pursuant to 47 C.F.R. 51.711 (Rule 51.711). This rule states in part:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate. (Rule 51.711 (a)(3))

If the Commission approves staff's recommendation in Issue 12(a), serving a comparable geographic area will be one of two possible criteria that would on its own entitle an ALEC to receive the tandem interconnection rate for the purposes of reciprocal compensation. The second criterion, similar functionality, was addressed in Issue 12(b). However, in this issue the Commission is to determine what qualifies an ALEC's network as serving a comparable geographic area to that served by an ILEC tandem switch. The Commission is presented with several options in the record.

Verizon witness Beauvais states that the straightforward meaning of "comparable geographic area" under the FCC's rules is that "the area served by the ALEC's switch is about the same physical area as that served by the ILEC's tandem switch." (TR 310) Witness Beauvais suggests that geographic comparability can be determined by comparing the square mileage served by an ILEC

tandem, as well as information regarding the number of customers served by that tandem switch, with the same information provided by a particular ALEC. (BR 7-8; EXH 7, Item 2a) He suggests that to prove geographic comparability an ALEC should provide a map depicting its deployed facilities and switch locations. In addition, he suggests ALECs provide information indicating the number of customers being served by those facilities along with the geographic distribution of those customers. (EXH 7, Item 2b) He states that comparing this information is one way you could approach the issue of determining geographic comparability. (TR 366)

BellSouth witness Ruscilli contends that several courts have rendered decisions on this issue. He explains that the types of evidence which courts have found to be relevant include:

> (1) Whether the ALEC's switch currently serves every exchange served by one of the ILEC's switches;
>
> (2) Evidence of percentage of population served in a given LATA served by an ILEC's switch;
>
> (3) Evidence as to the location of the ALEC's customers within the area served;
>
> (4) Whether the ALEC has customers in every wire center territory within an area served by an ILEC's tandem switch;
>
> (5) Whether the ALEC's customers are concentrated in a small area, or whether its customers are widely scattered over a large area. (EXH 5, Item 4a; BR 9)

Witness Ruscilli contends that ALECs should provide customer data via maps or charts that indicate the number of lines by location that is commensurate with the geographic area covered by the ILEC tandem. (EXH 5, Item 4b; TR 231)

Sprint witness Maples disagrees with such detailed information being required. Witness Maples suggests that ALECs should self-certify that they hold themselves out to serve the particular geographic area in question. (TR 511; EXH 6, Item 4a) He states that an ALEC should be required to provide a self-certification letter to the Commission certifying that its switch serves a

comparable geographic area to that served by an ILEC tandem switch. (EXH 6, Item 4b) He explains that by "holding itself out," an ALEC is certifying that it is providing service to customers via their own facilities or by leasing facilities from the ILEC as unbundled network elements, including UNE-P. (TR 536; 578) In addition, witness Maples makes the point that "comparable" does not mean identical, but rather similar. (TR 511)

Joint ALEC witness Selwyn contends that comparable geographic area should be defined as "the degree to which the geographic area in which the ALEC network affords call transport and termination for ILEC-originated traffic is similar to the geographic area in which the ILEC's tandem switch provides transport and termination." (TR 601) He too argues that there is no requirement that the geographic area served by an ALEC's switch be identical to that served by an ILEC tandem switch. (TR 602) Rather, witness Selwyn asserts that if an ALEC's switch covers an area of essentially the same size as that served by an ILEC tandem switch, then the tandem rate should apply. (TR 605) He states that the relevant test is whether the ALEC's network is designed so that the ILEC can establish a single point of interconnection with the ALEC that will offer connectivity to all of the communities served by the ALEC's switch. (TR 603)

WorldCom witness Argenbright offers an even more simplified test for defining geographic comparability. He explains:

> if an ALEC has opened an NPA/NXX and established network facilities which allow end users within rate centers to originate and terminate local exchange service, such rate centers would be considered within the physical or geographic reach of the ALEC's network regardless of the number of customers the ALEC has been able to attract. (TR 1012)

He contends that an ALEC can make a demonstration of geographic comparability by comparing the NPA/NXXs that an ALEC has activated in its switch for the origination and termination of local traffic, with the tandem and end office switch combinations an ILEC utilizes to serve those rate centers. If the ILEC utilizes a tandem switch to serve the same area as that served by the ALEC's network, the ALEC should be found to have satisfied the geographic comparability test. (TR 1027) Witness Argenbright argues that this would be a valid comparison because when an ALEC obtains NPA/NXXs in order to

open rate centers for local service, an ALEC must prepare its network to serve customers in those rate centers. This would include network investment in switch capacity and transport facilities, all of which must be accomplished prior to acquiring customers. (TR 1027)

Witness Argenbright suggests several benefits to this approach. First, he states that this comparison can be accomplished based upon publicly available information from the Local Exchange Routing Guide (LERG), obviating the need for divulging proprietary or competitively sensitive information. (TR 1028) Second, he states that parties would have the necessary facts to resolve this issue, removing the Commission from the role of arbitrator. (TR 1028) A third benefit identified by witness Argenbright is that it will avoid any reliance on testing the functionality of the ALEC's network. He argues that without the adoption of this or a similar method, ILECs will continue to "shoehorn in" functionality arguments as having a bearing on the geographic area served. (TR 1028) Finally, witness Argenbright states that this test is technologically neutral. This test is not impacted by the type of network constructed by an ALEC, allowing for the deployment of the most efficient technologies in individual network architectures. (TR 1028)

Witness Argenbright clarifies that this test would not include the use of "virtual NXXs," which are utilized to provide a local presence in an exchange different than the physical location of a particular end user. (TR 1030) In their joint brief, other ALEC parties support witness Argenbright's proposed method, including: Global NAPs, US LEC, e.spire, Time Warner, FCTA, FCCA and KMC. (BR 12-13)

Analysis

When addressing the issue of defining "comparable geographic area" for the purposes of applying the ILEC's tandem interconnection rate to an ALEC's network, staff believes there are several sticking points that must be addressed before any definition can be established. The first is the interpretation of the word "serves" contained in FCC Rule 51.711(a)(3). This rule states:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by

> the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate. (emphasis added)

The debate revolves around whether this word means that an ALEC is actually providing service to a particular number of geographically dispersed customers in that area, or simply capable of providing service to customers throughout the area.

BellSouth witness Ruscilli states that to demonstrate that its switch serves a comparable geographic area to an ILEC tandem, an ALEC must show that it has customers in each of the wire centers served by that ILEC tandem. In addition, he asserts that these customers must be evenly dispersed throughout that area as well. (TR 159) Witness Ruscilli argues that Rule 51.711 states that an ALEC must "demonstrate that it serves, which means to me not capable of serving, but is serving." (TR 157) BellSouth contends that the "[a]doption of a 'capable of serving' standard would render the FCC Rule meaningless, in that every switch is capable of serving virtually any point within the continental United States." (BR 8)

In support of its "actually serves" standard, BellSouth cites to a previous Commission decision in the Intermedia/BellSouth arbitration.[5] (BR 8-9) In that order, the Commission found that the maps submitted by Intermedia were insufficient to reasonably determine if Intermedia was actually serving the areas they had designated as local calling areas. (Order at p.14) Staff notes that this decision was based upon the record in that proceeding. While the Commission used the term "actually serving" in its order, staff does not believe the Commission was attempting to establish a standard by which companies must demonstrate a particular level of customer service within a geographic area. Rather, staff believes the Commission was expressing the fact that a lack of evidence precluded it from determining if Intermedia was providing *any* service to those areas.

Under cross examination Witness Ruscilli acknowledges that a test that looks at the number of customers served, and their

[5] Petition of BellSouth Telecommunications, Inc. for Section 252(b) Arbitration of Interconnection Agreement with Intermedia Communications, Inc., Docket No. 991854-TP, Order No. PSC-00-1519-FOF-TP, dated August 22, 2000.

general dispersion throughout a particular area, is very subjective. (TR 159) He also concedes that BellSouth has proposed no test to determine a certain numerical threshold of customers that must be served to be entitled to the tandem rate. (TR 163) Verizon witness Beauvais agrees that an ALEC must be serving customers in a particular area, and that they should show some degree of geographic dispersion. (TR 343, 346) However, he too concedes that he does not know how many customers an ALEC must serve to be entitled to the tandem rate. (TR 346)

WorldCom witness Argenbright argues that "a look at number of customers really is a test of marketing success and market penetration." (TR 1030-1031) In addition, he contends that the number of customers is not particularly directive as to whether or not an ALEC has investment and a network in place. (TR 1031) Sprint witness Maples agrees. He too argues that looking at customer dispersion is basically evaluating success at marketing. (TR 544) He contends that "when you say actually serve, we believe that they are actually seeking customers through advertising or whatever for those geographic areas." (Tr 543) Witness Maples explains:

> I think by advertising - the fact that they are advertising in that area also assumes that they have perhaps incurred costs, they could have collocated, they could have done - made whatever arrangements necessary to serve that area. So if they have incurred the costs, why not be able to recover it. (TR 544)

Witness Maples also emphasizes the subjective nature of basing geographic comparability upon customer information. He explains that the Commission would be looking at marketing efforts and making a judgement based upon how successful an ALEC has been. He states that "today they have got 100 customers, tomorrow they have got 110. Today they are dispersed this way, tomorrow they disperse, you know, some other way." (TR 554) He argues that the problem with establishing very detailed specifics regarding customer information, is that they are going to change from day-to-day and week-to-week. (Tr 554-555)

Staff believes this argument is very compelling. While basing a decision upon the quantity and dispersion of an ALEC's customers may seem at first glance to be a logical approach, staff believes this customer information would be subject to flux in a competitive market. One week an ALEC may qualify, the next week it may not.

Staff agrees with ALEC witnesses that this approach would be more akin to basing the decision of whether an ALEC is entitled to the tandem rate on the ALEC's marketing success. Staff does not believe that this approach finds support in FCC Rule 51.711, which bases the determination upon whether an ALEC serves a comparable geographic area, not a comparable customer base within this area.

Staff also believes that establishing a geographic comparability threshold based upon the number and location of customers served would be administratively burdensome. With the churn that would presumably occur in a competitive market, an ALEC would be forced to track the location and quantity of customers served on a monthly basis to establish that it is entitled to bill the tandem rate. Staff agrees with Sprint witness Maples that this would create an "administrative nightmare." (TR 553) Staff also emphasizes the difficulty inherent in trying to establish a numeric benchmark. As ILEC witnesses concede, this is a very subjective approach in which they themselves could give no guidance. (Ruscilli TR 159, 163; Beauvais TR 346) Therefore, staff does not believe a determination of geographic comparability should be based upon ALEC customer information.

Without basing a decision upon customer information, what then does it mean for an ALEC to serve a comparable geographic area? Staff believes that the appropriate application of the term "serves" found in Rule 51.711 is that an ALEC should be found to serve a geographic area if it has prepared and offered a product throughout that area. Absent any direction from the FCC regarding what they meant by the word "serves" as contained in FCC Rule 51.711, staff believes this more liberal interpretation is appropriate.

To loosely illustrate this application of the term "serves," staff would use the example of a landscaping business. A particular landscaping company could advertise that it serves Tallahassee and the surrounding area. Of course, this company may not have customers within every neighborhood of this area, but it is capable and prepared to serve anyone within each of these neighborhoods. In other words, this company has invested in the equipment necessary to serve any prospective customer within each of these neighborhoods. The number and location of customers that actually subscribe to this company's service will vary depending upon marketing success, but that does not change the fact that Tallahassee is the area it serves.

The next point for consideration is how an ALEC is to demonstrate that it serves a particular area without showing customer information. What information would be needed to verify that an ALEC is in fact capable and prepared to serve a comparable geographic area to that of an ILEC tandem switch? Sprint witness Maples suggests that ALECs be permitted to self-certify that they serve a comparable geographic area. (TR 550) However, staff believes that this approach opens the door for further proceedings before the Commission to determine the validity of each ALEC self-certification. As witness Maples acknowledged during cross examination, ILECs could object to every self-certification and bring those objections before the Commission for a decision. (TR 551) Since this proceeding is intended to eliminate the need for the Commission to repeatedly arbitrate this issue, staff believes Sprint's self-certification approach would not be appropriate.

In their joint brief, certain ALECs have supported the method proposed by WorldCom witness Argenbright. (BR 12) Witness Argenbright suggests:

> An ALEC can make this demonstration by comparing the rate centers associated with the NPA/NXXs that the ALEC has opened in its switch for the origination and termination of local traffic to the tandem and end office combinations that the ILEC utilizes in serving those same rate centers. (TR 1027)

Witness Argenbright explains that prior to obtaining NPA/NXXs for the purposes of opening a particular rate center, an ALEC must prepare its network to serve customers located in that particular rate center. (TR 1027) He contends that since the network investment is carried out in advance of acquiring customers, a comparison based upon the NPA/NXXs obtained for the purpose of assigning numbers to customers should be sufficient to show that an ALEC has developed its network to serve the area in question. (TR 1027, 1030, 1034)

While staff acknowledges the logic in this argument, staff believes a more liberal application of the term "serves" should be accompanied with a more detailed demonstration of network ability. While staff believes it is appropriate for an ALEC to provide a list of the NPA/NXXs that an ALEC has opened to show that it is prepared to serve customers in specific rate centers, staff also

believes an ALEC should be required to make a showing of its actual capability to serve those customers.

Staff believes the first step is the provision of switching. Rule 51.711 provides that an ALEC is entitled to the tandem rate when its "switch" serves a comparable area to that of an ILEC tandem. Therefore, the first requirement is that an ALEC must deploy a switch and be performing a switching function. While Sprint witness Maples acknowledges that to seek reciprocal compensation an ALEC must deploy a switch, he also requests that UNE-P be included in the criteria established for demonstrating geographic comparability. (TR 578) Staff disagrees. The UNE-P is a combination of UNEs (loop/port combination), in which the ALEC would utilize the ILEC's local switching as an unbundled network element. Since an ALEC would not be performing a switching function when providing service via UNE-P, staff does not believe that the use of UNE-P should serve as a qualification for serving a comparable area pursuant to Rule 51.711.

Staff believes that the context of FCC Rule 51.711, and its supporting discussion in ¶1090 of FCC 96-325, is the function of an ALEC's network. Therefore, staff believes an ALEC must show that it is serving the area through its own facilities, or a combination of its own facilities and UNEs leased from the ILEC. WorldCom witness Argenbright explained that one method of expanding geographic service areas is through the establishment of collocation arrangements within ILEC wire centers and the provision of transport facilities between the collocation arrangement and the ALEC switch. (TR 1012) Staff believes this is a reasonable method of serving a geographic area pursuant to Rule 51.711. Witness Argenbright also describes the use of enhanced extended links (EELs) to reach geographic areas where an ALEC's network does not currently reach. (TR 1012) Since the ALEC would still be providing its own switching under this approach, staff believes this too is a reasonable method of serving a comparable geographic area pursuant to Rule 51.711.

While staff believes the above-mentioned methods of serving a comparable geographic area should qualify an ALEC for the tandem rate, staff does not want to limit an ALEC's ability to qualify for the tandem rate by serving a particular area through some other combination of its own switch/facilities and facilities leased from an ILEC. Staff merely holds these out as present examples of

methods utilized to serve a comparable geographic area that would qualify an ALEC for the tandem rate pursuant to FCC Rule 51.711.

Finally, the issue of what actually constitutes a comparable geographic area must be established. BellSouth witness Ruscilli maintains that an ALEC must be serving customers in each of the exchanges served by its tandem switch. (TR 158-159) He contends that an ALEC must be serving the "same" geographic area as BellSouth's tandems. (TR 35) However, it appears that no other parties to this proceeding hold to such a strict interpretation. Verizon witness Beauvais states that the area served by the ALEC's switch should be "about the same physical area as that served by the ILEC's tandem switch." (emphasis added)(TR 310) AT&T in its brief states that an ALEC "need only show that its switch is *capable of serving* an area *comparable to* the area served by the ILEC's switch, not that it is *currently serving* customers in an *identical* geographic area." (emphasis in original)(BR 8) Sprint witness Maples contends that comparable does not mean identical, but rather similar. (TR 511) Joint ALEC witness Selwyn agrees, stating that there is no requirement that an ALEC switch serve an identical area. (TR 602) He argues that the ALEC switch should serve an area "essentially the same size" as that served by the ILEC tandem. (TR 605) Staff agrees. Staff does not believe FCC Rule 51.711 requires an ALEC switch to serve "the same" area as that of an ILEC tandem switch, but rather a "comparable" area. Staff believes a geographic area comparable to that served by an ILEC tandem would be an area roughly the same size in comparison, but not necessarily identical.

Conclusion

Staff believes that a "comparable geographic area," pursuant to FCC Rule 51.711, is a geographic area that is roughly the same size as that served by an ILEC tandem switch. Staff recommends that an ALEC "serves" a comparable geographic area when it has deployed a switch to serve this area, and has obtained NPA/NXXs to serve the exchanges within this area. In addition, staff recommends that the ALEC must show that it is serving this area either through its own facilities, or a combination of its own facilities and leased facilities connected to its collocation arrangements in ILEC central offices.

ISSUE 13: How should a "local calling area" be defined, for purposes of determining the applicability of reciprocal compensation?

RECOMMENDATION: Staff recommends that parties be permitted to negotiate the definition of local calling area for the purposes of reciprocal compensation to be contained in their interconnection agreements. However, if negotiations fail, staff recommends that "local calling area" for the purposes of reciprocal compensation be defined as "all calls that originate and terminate in the same LATA." **(HINTON)**

POSITION OF PARTIES

BELLSOUTH: For reciprocal compensation purposes, carriers should be able to define their own local calling areas.

VERIZON: For purposes of applying reciprocal compensation, "local calling area" should be defined through mutual agreement, pursuant to the terms of the parties' interconnection contract. If the parties cannot agree, then the ILEC's tariffed definition should apply.

SPRINT: The ILEC's local calling scope, including mandatory EAS, should define the appropriate local calling scope for reciprocal compensation purposes for wireline carriers. This should not affect the ability of an ALEC to designate its own flat-rated calling scope for its retail services provided to its end user customers.

JOINT ALEC: ALECs should be allowed to establish their own local calling areas which may or may not be the same as the ILEC's.

AT&T, TCG, & MEDIAONE: ALECs should be allowed to establish their own local calling areas which may or may not be the same as the ILEC's.

ALLEGIANCE & LEVEL 3: ALECs should be allowed to establish their own local calling areas which may or may not be the same as the ILEC's.

XO: ALECs should be allowed to establish their own local calling areas which may or may not be the same as the ILEC's. Local competition will be enhanced by allowing ALECs that wish to do so

to operate without the constraints of traditional ILEC local calling areas or rate centers that can serve to hamper the ability of ALECs to offer innovative calling plans and services.

STAFF ANALYSIS

The issue before the Commission is to determine how a local calling area should be defined for the purposes of applying reciprocal compensation. Staff notes that the purpose of this issue is not to establish local calling areas for retail purposes, but rather for the application of intercarrier compensation. However, staff acknowledges that the definition of local calling area for the purposes of reciprocal compensation could affect how a particular carrier structures its retail calling offerings.

Verizon witness Beauvais states that Verizon is not attempting to limit how an ALEC defines its local calling scope for retail customers. (TR 337) However, he argues that for intercarrier compensation purposes, an ALEC should not be authorized to circumvent the access charge regime established by the Commission (and the FCC) by establishing a different retail calling area. (TR 337) Witness Beauvais asserts that "[o]ne aspect that should be beyond contention is that to be eligible for reciprocal compensation purposes, the call must be local under the definitions in place; that is, the call must both originate and terminate in the local calling scope agreed to by the parties." (TR 311) Witness Beauvais suggests that the local calling area for the purposes of reciprocal compensation should be established through negotiations between carriers. (TR 338)

Similarly, BellSouth witness Ruscilli states that "local calling area," for the purposes of reciprocal compensation, should be defined as mutually agreed to by the parties and pursuant to the terms and conditions contained in the parties' negotiated agreements. (TR 35) BellSouth witness Taylor explains:

> The most appropriate mechanism by which to determine the local interconnection calling area for compensation purposes is the use of negotiations between interconnecting carriers. Interconnecting parties themselves are in the best position to negotiate where and how interconnection should occur between their respective networks and whether local interconnection or

access charges should be the basis for inter-carrier compensation. (TR 256)

ALECs have also supported the position that negotiations are the appropriate venue for establishing local calling areas for the purposes of intercarrier compensation. In its brief, Level 3 (jointly with Allegiance Telecom) states that because of the proliferation of local calling plans offered by carriers, the Commission should permit parties to negotiate the local calling area that will determine which calls qualify for reciprocal compensation in their interconnection agreements. (BR 10) However, Level 3 witness Gates testifies that a call should be deemed local by comparing the NPA/NXX codes of the called and calling parties. He contends that this proposal would work for all carriers regardless of their local calling area definition. (TR 757)

AT&T witness Follensbee states that each ALEC should be free to establish its own local calling area, and the Commission should not mandate a single definition for local calling area for determining the applicability of reciprocal compensation. (TR 961) However, Sprint witness Maples disagrees with the above mentioned proposals. He states that "this is one of the most contentious areas of the negotiation process. Sprint believes that the industry is best served by the Commission's adoption of a minimum standard for the definition of a 'local calling area.'" (TR 526) Witness Maples suggests that the Commission should base this standard upon the ILEC's local calling scope, including any non-optional or mandatory extended area service (EAS). (TR 526) He states that this is not intended to place any restrictions on an ALEC's ability to define its own retail local calling area. (TR 526) Nor is this an attempt to require ALECs to mirror the ILEC's local calling area. (TR 536) However, witness Maples contends that the existing boundaries used by the industry to determine the applicability of local or toll charges should also be used to determine the applicability of reciprocal compensation. He states that failure to do so would result in situations in which competing carriers could incur different costs for the same call. (TR 536-537)

BellSouth witness Ruscilli agrees that the local calling area for reciprocal compensation purposes should be based upon the ILEC local calling area, if negotiations fail. However, he disagrees with Sprint witness Maples on one point, stating that EAS is a substitute for paying toll charges. Witness Ruscilli suggests that

the definition of local calling area be based upon the ILEC "basic local calling area," which would not include EAS or LATA-wide retail offerings. (TR 108-109)

Verizon witness Beauvais concurs with Sprint witness Maples, stating that if negotiations fail, the local calling areas contained in the ILEC tariffs should be the basis for reciprocal compensation. (TR 338) Witness Beauvais explains that his recommendation is not based upon a superiority inherent in the ILEC definitions, but rather the fact that ILECs are not completely at liberty to adjust their calling areas at will. (TR 338) In its brief, Verizon states that the ILECs' local calling areas were defined over the years by either the Commission or by the ILEC with Commission approval. (BR 9) In addition, witness Beauvais states that the ILEC calling areas are defined for all carriers to examine, which will hopefully help facilitate the negotiation process. (TR 338)

Joint ALEC witness Selwyn disagrees, arguing that ALECs should not be constrained by the traditional ILEC local calling areas which would hamper their ability to offer innovative calling plans. (TR 628) He contends:

> The significant decrease in the cost of telephone usage, coupled with the elimination of distance as a cost driver, makes the local/toll distinction largely obsolete as a technical matter. It certainly eliminates the traditional cost basis for using "rate centers" as a device for calculating the (no-longer-technically-required) distance attribute. The persistence of rate centers in today's and tomorrow's telecommunications market is thus an *anachronism*, a holdover from the past that is neither required nor appropriate in the modern telecommunications market environment. (emphasis in original)(TR 625)

The Joint ALEC position is that ALECs should be allowed to establish their own local calling areas which may or may not be the same as the ILECs. (BR 13) Witness Selwyn states that establishing different local calling areas is one way in which an ALEC can differentiate its product from that of an ILEC. (TR 612) This may even include extended area services such as LATA-wide local dialing. (BR 13) Witness Selwyn argues that ILECs are attempting to preserve their retail pricing regime by limiting reciprocal

compensation payments to calling areas as they define them, regardless of how the ALECs define local calling areas. In addition, he states that ILECs want to apply access charges to calls terminated by ALECs outside of the ILEC's local calling area. (TR 682) He explains:

> So, for example, if an ALEC wanted to offer LATA-wide outward calling type of service, the ILECs seem to agree that the ALEC has the right to do that, but would charge the ALEC an access charge for termination beyond the ILEC's local calling area. That charge would make it an economic impossibility for the ALEC to introduce this type of distance and [sic] sensitive pricing. (TR 682-683)

Witness Selwyn suggests that it would be preferable if ALECs did not have to pay access charges for any intraLATA calls. He states that this is the rule today in New York and Massachusetts. (TR 616) Witness Selwyn explains that this arrangement would not compel a carrier to make any particular choices with regard to local calling areas, but it would eliminate the economic pressure on ALECs to conform to ILEC local calling areas. (TR 616) He states that conforming to ILEC local calling areas is a rational strategy that some ALECs may pursue, but they simply should not be forced to do so. (TR 616)

AT&T witness Follensbee states that "AT&T and BellSouth have agreed to define local calls as any calls that originate and terminate within the LATA. Thus, the local calling area is LATA-wide." (TR 960) However, he does not suggest that this should necessarily be the same for all ALECs; rather, he states that each ALEC should be free to establish its own local calling area. (TR 961) BellSouth witness Ruscilli acknowledges that BellSouth has some agreements where regardless of the actual local calling areas, the parties compensate each other with reciprocal compensation for all calls within a LATA. (TR 211)

However, Verizon argues that if the Commission considers doing away with the local/toll distinction, then it must concurrently consider the effects of eliminating toll and access subsidy flows to basic local rates. (BR 10) In addition, BellSouth witness Taylor argues that undoing the distinction between toll and local calls will create arbitrage opportunities between reciprocal compensation and carrier access charges. (TR 266)

Analysis

As staff has noted, the purpose of this issue is not to establish a definition of local calling area for retail purposes. However, the crux of this issue appears to be the problems inherent in establishing an intercarrier compensation mechanism to apply to two carriers that have established different local calling areas for retail purposes. BellSouth suggests that the Commission should allow each party to establish their own local calling area for reciprocal compensation purposes. However, the originating carrier's local calling area should determine whether reciprocal compensation is due for a particular call. (BR 9-10) In other words, if the originating carrier treats a call as local, then it would be treated as local for intercarrier compensation purposes as well. This would seem to be a reasonable approach to this issue. However, staff believes that the proliferation of different local calling plans being offered by carriers today gives rise to disputes, as evidenced by the fact that this particular issue has consistently appeared before the Commission in arbitrations between carriers.

Many parties to this proceeding have argued that the definition of local calling area for the purposes of reciprocal compensation is best left to the parties to negotiate in their interconnection agreements. (BellSouth TR 35; Verizon TR 338; Level 3 and Allegiance BR 10) However, staff believes that parties have shown through repeatedly arbitrating this issue that negotiations have often failed on this point. Hence, this issue is being addressed in a generic docket. Staff agrees with Sprint witness Maples that this is a rather contentious issue, and the Commission should establish a standard for defining local calling areas for the purpose of reciprocal compensation. (TR 526) While staff agrees that negotiations between parties should be the primary means of establishing local calling areas to be contained in individual interconnection agreements, staff believes that the Commission should establish a default definition that will apply when negotiations fail. Otherwise, staff believes the Commission will continue to be presented with this issue in arbitrations.

That being the case, the matter remains of determining what definition of local calling area should be established as a default. ILECs argue that the definition of local calling area for the purposes of reciprocal compensation should be based upon the ILEC local calling areas. (BellSouth TR 108-109; Verizon TR 338;

Sprint TR 526) Verizon witness Beauvais contends that Verizon's local calling areas were established by the Commission, or with Commission approval, and should continue to be applied for the purposes of reciprocal compensation. (TR 338) However, as BellSouth witness Ruscilli concedes during cross examination, the ILEC local calling areas were established prior to the Telecommunications Act of 1996 and were not defined for the purposes of interconnection with competitive carriers. (TR 208-209) Staff agrees with Joint ALEC witness Selwyn that ALECs should not be forced to mirror ILEC local calling areas, for retail or intercarrier compensation purposes. (TR 616) In addition, staff does not believe that establishing a default definition based upon ILEC local calling areas will inspire ILECs to compromise during negotiations; rather, staff believes this would merely serve to increase the ILECs' negotiating power.

With the proliferation of different calling plans being offered in the market today, staff believes that a broader definition of local calling area for the purposes of reciprocal compensation should be established, if for no other reason than administrative ease. AT&T witness Follensbee testifies that AT&T and BellSouth have agreed to define local calls as any calls that originate and terminate within the same LATA. In other words, their local calling area for the purposes of reciprocal compensation is LATA-wide. (TR 960) BellSouth witness Ruscilli confirms this, stating that BellSouth has entered into "some agreements where regardless of the actual local calling areas, we compensate each other with reciprocal comp for all calls within a LATA." (TR 211) Staff believes this is a reasonable approach. Witness Ruscilli states that due to the fact that ALECs can adopt these LATA-wide provisions pursuant to Section 252(i) of the Act, BellSouth would not object if the Commission were to determine that local calling should be defined as LATA-wide for reciprocal compensation purposes. (TR 213) Witness Ruscilli also acknowledges that there could be some administrative efficiencies to having one definition of a local calling area for purposes of intercarrier compensation. (TR 213)

Staff acknowledges Verizon's concerns regarding doing away with the local/toll distinction, and the access subsidy flows to basic local rates. (BR 10) However, a LATA-wide local calling area for the purposes of reciprocal compensation will not necessarily necessitate changes in how it sets retail rates. If a Verizon customer places what is a long distance call for that customer,

Verizon still collects toll charges from that customer. The only difference is that Verizon will pay reciprocal compensation to whatever local carrier terminates that call within the LATA. In addition, staff does not believe this will impact access charges assessed upon an interexchange carrier (IXC) that may transport a call from a Verizon customer to the customer of another local carrier. In that situation, the IXC would still pay access charges to the originating and terminating carriers for the use of their networks. LATA-wide local calling for reciprocal compensation purposes only applies when a call is originated by one local carrier and handed off directly to another local carrier for termination.

Staff would also note, as is pointed out by Sprint witness Maples (TR 512), that the Commission has the authority to determine what geographic areas should be considered local for the purpose of applying reciprocal compensation. In its *Local Competition Order* (FCC 96-325), at ¶1035, the FCC states:

> With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs. We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different.

Conclusion

Staff recommends that parties be permitted to negotiate the definition of local calling area for the purposes of reciprocal compensation to be contained in their interconnection agreements. However, if negotiations fail, staff recommends that "local calling area" for the purposes of reciprocal compensation be defined as "all calls that originate and terminate in the same LATA."

ISSUE 14: **(a)** What are the responsibilities of an originating local carrier to transport its traffic to another local carrier?

(b) For each responsibility identified in part (a), what form of compensation, if any, should apply?

RECOMMENDATION: **(a)** An originating carrier has the responsibility for delivering its traffic to the point(s) of interconnection designated by the alternative local exchange company (ALEC) in each LATA for the mutual exchange of traffic. **(BLOOM)**

(b) An originating carrier is precluded by FCC rules from charging a terminating carrier for the cost of transport, or for the facilities used to transport the originating carrier's traffic, from its source to the point(s) of interconnection in a LATA. These rules require an originating carrier to compensate the terminating carrier for transport and termination of traffic through intercarrier compensation. **(BLOOM)**

POSITION OF PARTIES

BELLSOUTH:

The FCC determined that each originating carrier has the right to designate its POI on the ILEC's network. Thus, if an ALEC wants BellSouth to bring BellSouth's originating traffic to a point designated by the ALEC, then that ALEC should pay for those additional facilities.

SPRINT:

a) It is the responsibility of the originating carrier to transport its traffic to the Point of Interconnection (POI) where it will be delivered to the terminating carrier. The ALEC has the right to designate the location of this POI for both the receipt and delivery of local traffic with the ILEC at any technically feasible location within the ILEC's network.

b) The appropriate compensation mechanism would assign responsibility between the ILEC and the ALEC based on a combination of minutes of traffic and distance between the local calling area and the point of interconnection, so long as the ALEC determines the point of interconnection and no more than one point of interconnection per local calling area is required.

VERIZON:

The originating carrier's obligations to transport traffic to an interconnecting carrier are to be specified in the carriers' interconnection agreement.

JOINT ALEC:

a) An ILEC must allow a requesting ALEC to interconnect at any technically feasible point, including the option to interconnect at a single point of interconnection point per LATA. Once a point of interconnection is established, each carrier is responsible for delivering originating traffic to the point of interconnection.

b) FCC rules and orders preclude an originating carrier from charging a terminating carrier for the cost of switching and transporting traffic originated on its network to the point of interconnection. These rules also require the originating carrier to compensate the terminating carrier for transport and termination of such traffic through the payment of intercarrier compensation.

AT&T, TCG, & MEDIAONE:

a) An ILEC must allow a requesting ALEC to interconnect at any technically feasible point, including the option to interconnect at a single point of interconnection point per LATA. Once a point of interconnection is established, each carrier is responsible for delivering originating traffic to the point of interconnection.

b) FCC rules and orders preclude an originating carrier from charging a terminating carrier for the cost of switching and transporting traffic originated on its network to the point of interconnection. These rules also require the originating carrier to compensate the terminating carrier for transport and termination of such traffic through the payment of intercarrier compensation.

ALLEGIANCE & LEVEL 3:

An ILEC must allow interconnection for the exchange of traffic at any technically feasible point on its network selected by the ALEC, including at a single POI per LATA. An originating carrier may not charge a terminating carrier for delivering traffic from the originating carrier's end user to the POI.

XO:

a) Section 251(c)(2) of the Act and FCC Rules and Orders obligate each ILEC to allow interconnection by an ALEC at any technically feasible point on the ILEC's network that is designated by the ALEC for the transmission and routing of telephone exchange service and exchange access. An ILEC must allow a requesting ALEC to interconnect at any technically feasible point, including the option to interconnect at a single point of interconnection per LATA. Once a point of interconnection is established, each carrier is responsible for delivering originating traffic to the point of interconnection.

b) FCC Rules and Orders preclude an originating carrier from charging a terminating carrier for the costs of switching and transporting traffic originated on its network to the point of interconnection. This was recently reaffirmed by the FCC in the Notice of Proposed Rulemaking released on April 27, 2001, in CC Docket No. 01-92, in which the FCC stated at Paragraph 112 that: "Our current reciprocal compensation rules preclude an ILEC from charging carriers for local traffic that originates on the ILEC's network." These Rules also require the originating carrier to compensate the terminating carrier for transport and termination of such traffic through the payment of intercarrier compensation.

STAFF ANALYSIS

The parties advocate conflicting schemes for designating the point(s) of interconnection (POI) in a LATA and the parties disagree over when - or even if - compensation is appropriate under specific circumstances stemming from the an ALEC's decision to interconnect at a single POI per LATA. The parties do not dispute their respective obligations to interconnect under the Act, which imposes on all telecommunications carriers a duty to, "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers," under Section 251(a)(1), and more specific obligations on ILECs in Section 251(c)(2). For the most part, the parties agree an ALEC has the right to determine a single, technically feasible, point of interconnection (POI) in each LATA for the mutual exchange of traffic, although BellSouth witness Ruscilli offers testimony that appears self-contradicting (TR 36; TR 87) on this point, which will be discussed later in this recommendation.

The shared position of the ALECs in this proceeding is as follows: An originating party is responsible for the cost of bringing its traffic to the POI, and the originating carrier is responsible for compensating the terminating carrier for its traffic through the payment of intercarrier compensation. (AT&T BR p.3; Joint ALEC BR p. 16-17; Level 3 BR p. 10-11)

The positions of the ILECs differ:

BellSouth argues an ILEC is entitled to compensation when, as the originating carrier, it is required to carry traffic from a local calling area to a distant local calling area where the ALEC-designated POI is located. (BellSouth BR p.10) BellSouth witness Ruscilli offers a specific compensation scheme linked to distance and traffic volumes that he contends provides an equitable balance. (TR 87-88)

The essential elements of witness Ruscilli's proposal are:

- The initial POI in a LATA shall be established by mutual agreement of the parties. If the parties are unable to agree, each originating party may establish a single interconnection point per LATA for delivery of its traffic.

- Additional POIs within a LATA may be established through mutual agreement of the parties.

- An ALEC would not be required to compensate BellSouth for transport costs between local calling areas until the volume of the traffic exceeded 8.9 million minutes (equivalent to a DS-3) of local traffic or ISP-bound traffic per month for three consecutive months during the busy hour.

- BellSouth agrees not to designate a POI at a central office where physical or virtual collocation space or BellSouth fiber connectivity is not available.

- BellSouth agrees not to designate more than one POI per local calling area unless the local calling area exceeds 60 miles in any one direction. (TR 87-88; 102-103)

Sprint's direct and rebuttal testimony on this issue are in conflict. In direct testimony, Sprint witness Hunsucker addressed the issue of an originating carrier's responsibility accordingly:

> Sprint maintains that it is the responsibility of the originating carrier to transport its traffic to the point of interconnection (POI) where it will be delivered to the terminating carrier. The ALEC has the right to designate the location of this POI for both the receipt and delivery of local traffic with the ILEC at any technically feasible location within the ILEC's network. Furthermore, it is the responsibility of both parties to build facilities to that physical meet point. Specifically, the FCC has stated in Paragraph 553 of the First Report and Order (FCC Order No. 96-325) that ILECs have an obligation for some build-out as a reasonable accommodation for interconnection. (TR 513-514)

On the issue of compensation, witness Hunsucker provided the following direct testimony:

> Once the traffic is delivered to the terminating carrier at the POI, the originating carrier must pay the terminating carrier reciprocal compensation for the transport and termination of their traffic from the POI to the terminating switch. (TR 514)

In rebuttal testimony, however, witness Hunsucker adopts a version of BellSouth's proposal that leaves the selection of interconnection points to the ALEC (TR 531) but adopts BellSouth's proposed compensation scheme:

> The ALEC would be financially responsible for the transport costs between the local calling area and the ALEC point of interconnection when the relevant traffic is greater than 8.9 million minutes of use per month and the distance between the local calling area and the point of interconnection is greater than 20 miles and not located in the same local calling area. (TR 532)

During cross examination, Sprint witness Maples, who adopted witness Hunsucker's direct and rebuttal testimony, was asked to explain the difference in Sprint's positions: "I think the rebuttal testimony that was filed supports the BellSouth proposal with two modifications which, in effect, I think contradicts this to some degree. I mean, I won't say contradict, but it is in addition to that, modifies this position." (TR 540) BellSouth witness Ruscilli

testifies he does not agree with the modifications proposed by Sprint witness Hunsucker. (TR 114)

In its brief, Verizon asserts that while it supports neither BellSouth nor Sprint's position on a compensation scheme, it believes some sharing of transport costs is appropriate, but that any arrangement between parties should be reached through negotiation. (Verizon BR p.15)

While the question of which party has the right to designate the POI in a LATA for the mutual exchange of traffic was not explicitly posed in this proceeding, a number of parties chose to address the issue. Staff acknowledges a resolution of which party has the authority to designate POIs is inextricably linked to the resolution of a carrier's interconnection responsibilities and what compensation mechanism, if any, should be imposed by the Commission. Staff's intention, therefore, is to present the arguments on the POI issue, followed by a discussion of the respective carrier's responsibilities, concluding with the proposed compensation schemes.

Point of Interconnection Designation

BellSouth witness Ruscilli presents what appears to be two positions on the POI designation issue. Witness Ruscilli proposes contract language that reads in part:

> Pursuant to the provisions of this Attachment, the location of the initial Interconnection Point in a given LATA shall be established by mutual agreement of the parties. If the Parties are unable to agree to a mutual initial Interconnection Point, each Party, as originating Party, may establish a single Interconnection Point in the LATA for the delivery of its originated Local Traffic, ISP-bound Traffic, and intraLATA Toll Traffic to the other Party for call transport and termination by the terminating Party. (TR 87)

During cross examination, however, witness Ruscilli agrees that the Act allows ALECs to choose any technically feasible point in a LATA at which to interconnect and that the FCC's rationale for giving ALECs this discretion is to minimize the costs of transport and termination. (TR 118) As noted previously, witness Ruscilli said he does not agree with modifications to his proposal advanced by

Sprint witness Hunsucker, which would give ALECs the exclusive right to designate POIs in a LATA. (TR 114)

A possible explanation for the apparent dichotomy in witness Ruscilli's position may lie in his efforts to distinguish between a POI and an interconnection point in his direct testimony. (TR 38) Witness Ruscilli testifies:

> The term "Point of Interconnection" describes the point(s) where BellSouth's and the ALEC's networks physically connect. In its First Report and Order, at Paragraph 176, the FCC defined the term "interconnection" by stating that:
>
> We conclude that the term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic.
>
> Therefore, the Point of Interconnection is simply the place, or places, on BellSouth's networks where that physical linking of the ALEC's networks takes place. (TR 38)

Witness Ruscilli testifies the term "interconnection point" is used by ALECs and BellSouth to define the place where financial responsibility for a call changes from one carrier to the other. He concludes, "The 'Point of Interconnection' and the 'interconnection point' can be at the same physical point or they can be at different points." (TR 38) Witness Ruscilli does not provide any references to the Act, or FCC orders or rules, to support this distinction.

Witness Ruscilli's efforts to separate a POI from an interconnection point are apparently not shared by Sprint, which in its brief observes, "BellSouth attempts to make a weak argument that there is a difference between a 'point of interconnection' as provided in the FCC rules and an 'interconnection point' established by the parties for the exchange of their respective traffic. However, there is no support for this position anywhere in the FCC rules or orders..." (Sprint BR p.10)

Verizon witness Beauvais believes "The cleanest method from Verizon's point of view would be to have a POI in each of its local exchange/rate centers," although he recognizes that ALECs would not

agree to multiple POIs per LATA. (TR 325) Witness Beauvais testifies that because the circumstances of interconnection vary widely, negotiation should play a role in resolving these issues:

> It well may be the case that a single POI is the most efficient way to exchange traffic in many situations. In others it may not be. Thus, the reliance on negotiation between carriers to arrange for a mutually advantageous outcome should be the initial mechanism to establish the points of physical interconnection of the networks. (TR 335)

Level 3 witness Hunt testifies portions of the Act render unacceptable BellSouth's proposal to unilaterally designate POIs or to demand equal authority in the designation of POIs in a LATA:

> Congress placed the requirement to provide technically feasible POIs in Section 251(c)(2), which applies only to incumbent LECs. If Congress wanted to have ALECs bear the same duty in establishing POIs as incumbent LECs bear, it would have specifically stated that outcome, rather than separating out the interconnection obligations to apply only to incumbent LECs under Section 251(c)(2). Although an ALEC has an obligation under Section 251(a) to interconnect directly or indirectly with an ILEC, the Act places no obligation on an ALEC to provide an ILEC interconnection at any technically feasible point, nor does it give an ILEC any right to select POIs at its whim. (TR 718-719)

Joint ALEC witness Selwyn testifies the nature of interconnection obligations imposed under the Act and by subsequent FCC orders are deliberately asymmetrical (TR 629-630), creating extensive responsibilities for ILECs that do not exist for ALECs. (TR 631) As an example, witness Selwyn juxtaposes the ILEC obligations under Section 251(c)(2) of the Act with 47 C.F.R. 51.223(a), which "specifically forbids states from imposing upon ALECs the obligations that Section 251(c) imposes upon ILECs." (TR 632) Further, witness Selwyn believes, the FCC stated in a 1998 amicus curiae brief (Memorandum of the FCC as Amicus Curiae at 20-21, US West Communications Inc. v. AT&T Communications of the Pacific Northwest, Inc., [D.Or.1998] No. CV-1575-JE):

> Nothing in the 1996 Act or binding FCC regulations require a new entrant to interconnect at multiple locations within a single LATA. Indeed, such a requirement could be so costly to new entrants that it would thwart the Act's fundamental goal of opening local markets to competition. (Emphasis by the witness, TR 632)

Level 3 witness Gates testifies the FCC has made clear on a number of occasions that the designation of interconnection points is a right that is vested exclusively with competitive carriers, beginning with FCC 96-325, ¶172, the relevant portion of which reads, "The interconnection obligation of Section 251(c)(2), discussed in this section, allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competitive carriers' costs of, among other things, transport and termination of traffic." (TR 770)

Witness Gates asserts FCC 96-325, ¶4, should be read to exclude ILECs from making POI decisions because to do otherwise would thwart one of the goals of competition, which he testifies is to prevent the ability of ILECs to impede competition. (TR 771). The portion of ¶4 quoted by witness Gates reads:

> Competition in the local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of local services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition. Under section 251, incumbent local exchange carriers (LECs), including Bell Operating Companies (BOCs), are mandated to take several steps to open their networks to competition, including providing interconnection , offering access to unbundled elements of their networks, and making their retail services available at wholesale rates so that they can be resold. (TR 771)

Witness Gates contends, "If an ILEC were allowed to identify POIs for originating traffic it would be able to disadvantage ALECs by imposing additional and unwarranted costs on new entrants." (TR 772)

Witness Gates also relies on ¶78 of the FCC's decision to grant Southwestern Bell Telephone Company interLATA relief in Texas (FCC Order No. 00-238), which reads "Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in a LATA." (TR 803) Witness Gates concludes from this paragraph that, "The FCC's intent was to give ALECs a clear, low cost path of entry into the local market." (TR 803)

Originating Carrier Obligations

There appears to be agreement among some parties on the responsibilities of an originating carrier to deliver its traffic to an ALEC-designated point of interconnection within a LATA. (AT&T BR p.3; Allegiance/Level 3 BR p.10; Joint ALEC BR p.16; Sprint BR p.9) Verizon, in its brief, appears to suggest that while an ALEC has the right to designate a POI for interconnection purposes, how traffic arrives at that POI is conditional, based on compensation mechanisms determined through negotiations between the parties. (Verizon BR 11) BellSouth witness Ruscilli asserts that BellSouth's network is not a single network at all, but a series of disparate networks, each of which requires separate interconnection. (TR 36)

Witness Ruscilli and Level 3 witness Gates disagree on the responsibilities of an originating carrier to deliver traffic to a POI, and both witnesses reference the FCC's decision in the TSR Wireless Order (TSR Wireless, LLC, et al, Complainants, v. US West Communications, et al, Defendants, Memorandum and Order, June 21, 2000). (TR 78; TR 145-147; TR 773-775; TR 978)

BellSouth witness Ruscilli testifies the TSR Order determined that an ILEC is obligated to deliver its originated traffic to a wireless carrier without charge anywhere within the wireless carrier's major trading area (MTA) as defined by 47 C.F.R. 51.701(b)(2). (TR 78) Witness Ruscilli argues that when FCC Rule 51.701(b)(2) is read in conjunction with FCC Rule 51.703(b), which addresses reciprocal compensation obligations of ILECs, and in conjunction with the TSR Wireless Order, it can be concluded that the ILEC's obligation is to deliver traffic without charge only within the local calling area in which the call originated. (TR 79) Witness Ruscilli contends the TSR Wireless Order has no

applicability in this proceeding because BellSouth does not dispute its obligation to deliver its originated traffic without charge in the local calling area from which the traffic originates. (TR 79)

During cross examination, BellSouth witness Ruscilli acknowledged that another interpretation of the TSR Wireless Order is possible. (TR 147) Responding to a series of questions from counsel for AT&T, witness Ruscilli agreed the focus of the TSR Wireless Order could be read to assert that it is the local calling area defined by the ALEC that is the basis for determining when compensation is paid, not the local calling area defined by the ILEC. (TR 147)

Level 3 witness Gates testifies the TSR Wireless Order is relevant, contending its meaning is, "Each carrier is responsible, financially and operationally, to deliver traffic to the POI." (TR 773) Witness Gates relies on ¶34 of the TSR Order, part of which reads:

> In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the cocarrier, who will then terminate the call. Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. (TR 775)

Witness Gates asserts that if an ALEC is forced to deploy or lease facilities from an ILEC's local calling area to a POI, the ILEC will be "getting a free ride" for its traffic, which is inconsistent with the TSR Wireless Order. (TR 776)

Verizon witness Beauvais does not address the TSR Wireless order in his testimony concerning the obligations of an originating carrier, but appears to agree an originating carrier has the responsibility of bringing traffic to a POI. (TR 334-335) Witness Beauvais advocates negotiation to resolve differences over compensation. (TR 335)

Compensation Responsibilities

The dichotomy between ILEC and ALEC positions on the issue of compensation are clearly articulated: ILECs believe they are entitled to compensation if they are required to transport a call to a POI located outside the local calling area from which the call originated (BellSouth BR pp.16-17; Sprint BR pp.9-10; Verizon BR p.15), and ALECs contend an originating carrier is financially responsible for bringing its local traffic to the POI. (AT&T BR p.26; Allegiance/Level 3 BR p.11; Joint ALEC BR p.17; XO BR p.8)

While the ILEC positions are consistent in seeking compensation for traffic originating in one local calling area and terminating in another, variations exist among the individual ILECs, and the testimony of BellSouth witness Ruscilli appears to suggest differing compensation rates.

BellSouth witness Ruscilli offers direct testimony suggesting the appropriate rates for transporting traffic between a local calling area and a POI in a distant local calling area are DS1 rates. (TR 48) In rebuttal testimony, however, witness Ruscilli recommends ALECs pay nothing such for transport until traffic reaches the DS3 level (TR 87), at which time ALECs should pay DS3 rates. (TR 215)

Compensation is warranted when BellSouth is required to transport traffic between local calling areas, witness Ruscilli testifies, because local calling rates do not cover these costs. (TR 44-45) Witness Ruscilli testifies such compensation is contemplated in FCC Order 96-325, ¶199, a portion of which he quotes in his direct testimony: "A requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to Section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit. (TR 46-47, emphasis by the witness) The witness quotes further from ¶209 of FCC Order 96-325, which reads:

> Section 252(c)(2) lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC's network at which they wish to deliver traffic. Moreover, because competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have

> an incentive to make economically efficient decisions about where to interconnect. (TR 47, emphasis by the witness)

During cross examination, witness Ruscilli acknowledges ¶198 of FCC Order 96-325 explicitly bars consideration of economic, space or site considerations stemming from interconnection decisions, and that the term "technically feasible" refers solely to technical or operational concerns. (TR 131) Also during cross examination, witness Ruscilli agrees that FCC Order No. 01-132, ¶112, precludes an ILEC from charging carriers for local traffic and requires an ILEC to compensate a co-carrier for transport and termination. (TR 153)

Sprint witness Maples concurs with BellSouth witness Ruscilli that when an ILEC is the originating carrier, and the distance from the originating local calling area is more than 20 miles from the ALEC POI in a distant local calling area, the ALEC should pay ILECs for transport costs. (TR 538) During cross examination, witness Maples acknowledges that in previous dockets, Sprint has argued that ILECs should bear the transport costs when the ALEC point of interconnection is located in a local calling area distant from the local calling area from which the ILEC traffic originated. (TR 541) While conceding "It can be argued both ways," Sprint witness Maples does not specify at what rate compensation should be paid for purposes of this proceeding. (TR 541)

Verizon witness Beauvais testifies he believes an ILEC should receive compensation when it is required to haul traffic from one local calling area to a POI in a distant local calling area (TR 323), but argues variables such as distances involved and traffic volumes should be resolved in negotiations between parties. (TR 313-314). Ultimately, witness Beauvais testifies, "In the simplest arrangement, I would argue for matching the intercompany compensation arrangement to the end user rate structure most prevalent in the local calling area. In the case of Verizon Florida, that suggests a zero marginal price for usage -- the bill-and-keep arrangement that I have already recommended. If that is the case, no explicit nominal compensation need take place for the transport facilities between the carriers on a usage sensitive basis." (TR 314)

Level 3 witness Gates argues ILECs are barred from seeking compensation for delivering their traffic to a POI as a result of the FCC's TSR Wireless Order. (TR 774) Witness Gates makes

specific reference to ¶34 of the TSR Wireless Order, part of which reads:

> The *Local Competition Order* requires a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of the co-carrier, who then terminates that traffic and bills the originating carrier for termination compensation. In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call. Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company. (TR 775; emphasis by the witness)

Witness Gates also cites ¶78 of the FCC's Texas 271 Order (Application by SBC Communications Inc, Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, Order No. FCC 00-238), which reads, "Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA." (TR 803) Witness Gates testifies the combined effect of these statements in separate rulings by the FCC is to prohibit ILECs from charging for the delivery of their originated traffic anywhere within a LATA. (TR 805)

AT&T witness Follensbee believes Section 252(d)(2)(A) of the Act assigns originating and terminating costs to the originating carrier:

> [A] a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless...such terms and conditions 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 originate on the network facilities on the other carrier. (TR 962)

Witness Follensbee asserts that in order to meet the FCC's "just and reasonable" test, transport and termination obligations must be comparable, which he contends will not be the case if an ALEC is required to pay a portion of an ILEC's originating costs. (TR 963) Witness Follensbee also establishes that in Order No. 01-29, ¶232, the FCC made clear that allowing ALECs to establish a single POI per LATA is a condition for receiving interLATA relief, as was the case with Southwestern Bell's application in Kansas and Oklahoma. (TR 979)

BellSouth witness Ruscilli appears not to agree that the cost of ILEC facilities used to deliver traffic to an ALEC between local calling areas are recovered by rates charged to ILEC customers. (TR 44-45) Witness Ruscilli does not quantify the extent to which local exchange rates fall short of handling local calls and provides the following reason for why cost data is not part of this proceeding:

> I don't think cost data is necessary nor could it be effectively or efficiently produced. The cost itself is simply the costs that were filed in the UNE cost docket which has been approved by this Commission for dedicated interoffice transport. To do a function of the cost itself would be dependent on CLECs providing us data on how much traffic they intend to put in various local calling areas and what will be necessary to resize the trunk groups, and that has not occurred. (TR 138)

BellSouth witness Taylor supports witness Ruscilli's assertion that compensation should be paid when a call leaves the local calling area from which it originates. (TR 266) Witness Taylor asserts that when a BellSouth customer makes a call that does not leave a local calling area, the cost is recovered by BellSouth. (TR 267) In instances where the BellSouth customer's call leaves the local calling area from which it originates and goes to an ALEC POI in a distant local calling area, nothing in the local exchange rate regime covers BellSouth's cost. (TR 267)

Joint ALEC witness Selwyn does not agree that ILEC transport costs for traffic within a LATA are unrecovered. (TR 668) Witness Selwyn acknowledges that while most interconnection agreements between ALECs and ILECs do not include distance-sensitive rate elements, he asserts that distance-sensitive costs of interoffice and interexchange transport are small and could be covered by non-distance-sensitive compensation. (TR 668) To arrive at his conclusion, witness Selwyn uses the DS3 rate of $4.17 per mile supplied by BellSouth in Docket No. 990649-TP as the basis for his calculations; he then assumes a DS3 circuit has a capacity of 672 DS0 voice-grade equivalents with each carrying about 12,000 minutes per month. (TR 670) This means a fully loaded DS3 can carry about 8 million minutes of traffic per month, according to witness Selwyn. (TR 670) [BellSouth witness Ruscilli testifies 8.9 million minutes of traffic per month is "typically equivalent" to a DS3 level. (TR 88)] From his figures, witness Selwyn calculates, "At $4.17 per mile, that works out to $0.000000517 per mile per minute (that's about 5 one-hundred-thousandths of a penny per mile per minute)." Using BellSouth witness Ruscilli's example of a call transported 60 miles to a POI, witness Selwyn testifies, this would create a cost to the ILEC of $0.000031. (TR 670)

Witness Selwyn concludes, "I do not believe there is any basis on the record in this proceeding by which the Commission can affirmatively determine that this almost immeasurably small $0.000031 'additional' transport cost is not in fact already fully embraced within the existing tandem reciprocal compensation rate." (TR 67-671)

Verizon witness Beauvais concurs with witness Selwyn that transport costs on a per-minute basis have dropped because, "capacity has grown so large and a lot of the transport costs are, in fact, driven by the electronics on the end. However, I think it is also true that an additional mile of transport facilities costs - five miles costs more than four miles." (TR 371)

Neither BellSouth witness Ruscilli nor Sprint witness Maples address witness Selwyn's cost related assertions. In its brief, however, BellSouth contends, "If the amount to be assessed in additional transport costs are 'immeasurably small,' then requiring the ALECs to reimburse BellSouth for this cost should not be a burden on the ALECs." (BellSouth BR p.13)

Analysis

Point of Interconnection Designation

The ILECs present three separate views on how POIs should be designated, only one of which staff believes can be substantiated by the record of the proceeding.

BellSouth witness Ruscilli proposes shared decision making between an ILEC and an ALEC in determining where in a LATA parties will interconnect. (TR 87) If agreement is not possible, witness Ruscilli advocates the parties should be free to choose separate POIs. (TR 87) Further, witness Ruscilli argues, a difference exists between POIs and interconnection points, with the former existing for the physical joining of networks and the latter for determining compensation. (TR 38) In its brief, Sprint describes witness Ruscilli's attempt to distinguish between a POI and an interconnection point as "a weak argument" that lacks support from FCC rules or orders. While staff would have chosen a different adjective to describe witness Ruscilli's efforts to separate a POI from an interconnection point, staff agrees the argument suffers from a lack of corroborative citations. Similarly, witness Ruscilli offers nothing to support his position that an ILEC has a right to designate POIs in a LATA for the purpose of interconnection. Lacking a foundation in the Act, FCC orders, rules or decisions, staff cannot recommend the Commission adopt witness Ruscilli's proposals.

BellSouth's brief is confusing to staff on this issue. In its brief, filed August 10, 2001, BellSouth states, "As noted, two FCC rules bear on this position. The first is 47 C.F.R. §51.702(b)..." (BellSouth BR p.14) Staff notes that there is no §51.702(b) in the FCC rules. Based on the language of the rule cited in BellSouth's brief, staff believes the reference is to Rule 51.703(b), which the brief quotes as follows, "a LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on a LEC's network." (BellSouth BR p.14) Staff is puzzled as to why BellSouth failed to note in its brief changes to 47 C.F.R. 51.703(b), which Commission staff counsel raised during cross examination of BellSouth witness Ruscilli during the hearing July 5. (TR 218) The effect of the FCC's change is to eliminate the word "local" when it appears in the phrase "local telecommunications traffic." (TR 218) During the July 5, 2001,

hearing, BellSouth witness Ruscilli said he had no opinion on the FCC changes and had not read them prior to the hearing. (TR 218)

Verizon witness Beauvais asserts that the designation of POIs between an ALEC and an ILEC in an interconnection agreement should be determined through negotiations. (TR 335) Staff agrees with witness Beauvais that negotiation is preferable to confrontation in a regulatory climate. However, this issue exists in the context of a generic proceeding because the Commission has been asked repeatedly to reconcile the interconnection differences between parties during a series of recent arbitrations (Docket Nos. 000649, WorldCom/BellSouth; 000731 AT&T/BellSouth; 000907 Level 3/BellSouth; 000828 Sprint/BellSouth). Additionally, as is the case with witness Ruscilli's argument, witness Beauvais offers no provision of the Act or any FCC order or rule that gives an ILEC the authority to designate a POI in a LATA.

In its brief, Sprint states "The ALEC has the right to designate the location of the POI for both the receipt and delivery of local traffic with the ILEC at any technically feasible location within the ILEC's network." (Sprint BR p.9) Sprint maintains its position is consistent with FCC Order No. 96-325, ¶553, which witness Hunsucker testifies, creates an obligation for some build-out as a reasonable accommodation for interconnection. (TR 513-514)

Joint ALEC witness Selwyn contends the Act is deliberately asymmetrical on the issue of interconnection, creating obligations for ILECs that do not exist for ALECs in order to spur competition. (TR 629-630) Further, witness Selwyn argues, FCC rules prohibit the imposition of interconnection obligations by state commissions on ALECs, and the FCC has made clear that nothing in the Act can be construed to require a new entrant to interconnect at multiple locations in a LATA. (TR 632)

Level 3 witness Gates cites FCC Order No. 96-325, ¶172, to support his testimony that ALECs can select technically feasible POIs to lower their transport and termination costs (TR 770), and the FCC's Order No. 00-238, ¶78, that affirms an ALEC need only designate one POI per LATA. (TR 803)

AT&T witness Follensbee contends the FCC Order granting Southwestern Bell interLATA authority in Kansas and Oklahoma makes

clear that the ILEC must abide by single, technically feasible, interconnection points, chosen by the ALEC.

Originating Carrier Obligations

There appears to be little dispute among the parties that the Act imposes on all carriers the obligation of interconnecting to facilitate the flow of telecommunications traffic. It also appears that the parties do not dispute the obligation of an originating carrier to deliver its traffic to the network of a terminating co-carrier. The disputes emerge when the dialogue turns to where the exchange of traffic will take place, which is addressed in the POI designation section of this recommendation, the distance the traffic will have to travel, which is addressed in Issue 13 of this recommendation, and what compensation -- if any -- applies, which is dealt with later in this recommendation.

Compensation Responsibilities

Staff observes that the disputes among the parties on the issue of compensation in this docket parallel issues on which the FCC is seeking comment on the development of a unified intercarrier compensation regime (Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132). Specifically, ¶113 of the Notice reads as follows:

> If a carrier establishes a single POI in a LATA, should the ILEC be obligated to interconnect there and thus bear its own transport costs up to the single POI when the single POI is located outside the local calling area? Alternatively, should a carrier be required either to interconnect in every local calling area, or to pay the ILEC transport and/or access charges if the location of the single POI requires the ILEC to transport a call outside the local calling area? Further, if we should determine that a carrier establishing a single POI outside a local calling area must bear some portion of the ILEC's transport costs, do our regulations permit the imposition of access charges for calls that originate and terminate within one local calling area but cross local calling area boundaries due to the placement of the POI?

While the ultimate outcome of the FCC's proceedings may result in a seismic restructuring of intercarrier compensation rules, staff

believes such a conclusion may not be reached for a number of years.

Staff is persuaded by the record that an originating local exchange carrier is financially responsible for bringing its traffic to the POI in a LATA. AT&T witness Follensbee points out that Section 252(d)(2)(A) establishes a "just and reasonable" standard for compensation that requires "mutual and reciprocal recovery" by each carrier for costs associated with transport and termination. (TR 962) Staff cannot reconcile the compensation proposals advocated by BellSouth witness Ruscilli (TR 87-88), Sprint witness Maples (TR 532) and Verizon witness Beauvais (TR 312-313) with the Act's requirement for "mutual and reciprocal recovery." If the ILEC proposals are adopted, a terminating carrier would be responsible for paying a portion of the transport costs of an originating carrier's traffic. Staff believes such a system would provide for asymmetrical recovery and, in addition, would appear to be contrary to 47 C.F.R. 51.703(b), which prohibits a LEC from assessing charges on any other carrier for traffic originating on the LEC's network. Witness Ruscilli contends FCC Order No. 96-325, ¶199, which discusses technically feasible but expensive interconnections, justifies the compensation scheme he proposes. (TR 46-47) He acknowledges, however, that the same FCC order limits consideration of technical feasibility to operational or technical concerns and excludes the use of economic factors. (TR 131) Neither witness Beauvais nor witness Maples provide any additional cites to support their positions.

Witness Ruscilli also alludes to the portion of FCC Order No. 96-325, ¶209, that reads, "Moreover, because competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect." (TR 47) From this language, witness Ruscilli concludes the FCC expects an ALEC to pay the additional costs it causes ILECs to incur. (TR 47)

ALEC witness Selwyn contends the additional costs referred to by witness Ruscilli are "immeasurably small" and may be covered by the tandem reciprocal compensation rate. (TR 670-671)

Portions of the TSR Wireless Order cited by Level 3 witness Gates appear to substantiate AT&T witness Follensbee's position: The order places the financial burden of the cost of the facilities

used to deliver traffic to a co-carrier on the originating carrier. (TR 775)

BellSouth witness Ruscilli's efforts to refute the application of the TSR Wireless Order in this proceeding appear to be contingent on his belief that the order must be read in context with 47 C.F.R. 51.701(b)(2) and 51.703(b). (TR 79) Witness Ruscilli testifies the effect of this interpretation is to require an ILEC to deliver its originated traffic without charge to the network of a co-carrier only if the POI is within the local calling area in which the call originates. As noted in the analysis of POI issues earlier in this recommendation, the definition in Rule 51.703(b) on which witness Ruscilli relies in his testimony and on which BellSouth relies in its brief was changed by the FCC in Order No. 01-131. Asked during the hearing if he had an opinion on what the FCC intended by these changes, witness Ruscilli responded, "No I don't. This is the first time I have looked at this." (TR 218)

As staff noted earlier in the analysis section, BellSouth's brief does not reflect the FCC's change. (BellSouth BR p.14)

Conclusion

Point of Interconnection Designation

Neither BellSouth witness Ruscilli nor Verizon witness Beauvais provide any basis on which staff could author a recommendation supporting the right of an ILEC to have authority in designating POIs. Staff specifically rejects BellSouth witness Ruscilli's argument that a point of interconnection and an interconnection point are separate entities because the distinction lacks any discernable authority. Conversely, Sprint witness Hunsucker and ALEC witnesses Selwyn, Gates and Follensbee, offer specific citations to the Act, FCC orders and rules in support of their position. Staff finds persuasive the extensive authority cited by Sprint witness Hunsucker and the ALEC witnesses, and therefore, staff recommends that ALECs have the exclusive right to unilaterally designate single POIs for the mutual exchange of telecommunications traffic at any technically feasible location on an incumbent's network within a LATA. Nothing in this recommendation should be construed as an infringement on an ALEC's ability to negotiate this prerogative in exchange for other considerations.

Originating Carrier Obligations

The parties do not dispute their respective obligations under Section 251(a)(1) or Section 251(c)(2)(A) of the Act. Therefore, staff recommends that an originating carrier has the responsibility for delivering its traffic to the point(s) of interconnection designated by the alternative local exchange company (ALEC) in each LATA for the mutual exchange of traffic.

Compensation Responsibilities

Staff finds nothing in the record to support the imposition by this Commission of the intercarrier compensation scheme advocated by the ILEC witnesses. Staff believes the concerns expressed by the ALEC witnesses are valid and that the mandated sharing of originating carrier transport costs proposed by the ILEC witnesses potentially conflicts with the requirements of Section 252(d)(2)(A) of the Act. Additionally, ALEC witnesses cite recent interpretations of the FCC's rules at paragraph 34 of the TSR Wireless Order, and in FCC Order No. 01-132, ¶112, that appear to prohibit an originating carrier from imposing any originating costs on a co-carrier.

The undisputed testimony in the record is that the transport costs identified as being at issue in this proceeding are *de minimus*. Whether or not these costs are covered by an ILEC's local calling rates or tandem switching rates paid by ALECs is debatable, but not reconcilable by the record evidence.

Based on the foregoing, staff believes an originating carrier is precluded by FCC rules from charging a terminating carrier for the cost of transport, or for the facilities used to transport the originating carrier's traffic, from its source to the point(s) of interconnection in a LATA. These rules require an originating carrier to compensate the terminating carrier for transport and termination of traffic through intercarrier compensation.

While this recommendation is intended to stand alone, staff notes that if the Commission adopts staff's recommendation for LATA-wide calling as a default compensation mechanism for purposes of intercarrier compensation, the ILEC position on this issue would be moot.

ISSUE 15: **(a)** Under what conditions, if any, may carriers assign telephone numbers to end users physically located outside the rate center in which the telephone number is homed?

(b) Should the intercarrier compensation mechanism for calls to these telephone numbers be based upon the physical location of the customer, the rate center to which the telephone number is homed, or some other criterion?

RECOMMENDATION: **(a)** Staff recommends that carriers be permitted to assign telephone numbers to end users physically located outside the rate center to which the telephone number is homed, within the same LATA. **(HINTON)**

(b) Staff recommends that intercarrier compensation for calls to these numbers be based upon the end points of the particular calls. However, staff does not recommend that the Commission mandate a particular intercarrier compensation mechanism for virtual NXX/FX traffic. Since non-ISP virtual NXX/FX traffic volume may be relatively small, and the costs of modifying the switching and billing systems may be great, staff believes it is best left to the parties to negotiate the best intercarrier compensation mechanism to apply to virtual NXX/FX traffic in their individual interconnection agreements. While not recommending a particular compensation mechanism, staff does recommend that virtual NXX traffic and FX traffic be treated the same for intercarrier compensation purposes. **(HINTON)**

POSITION OF PARTIES

BELLSOUTH:

Carriers should assign NPA/NXXs outside the rate centers to which they are homed only if the carrier can identify the physical endpoint of the call so that the appropriate compensation can be determined by the other carriers involved in the completion of the call.

VERIZON:

Carriers should not be permitted to assign telephone numbers to end users outside the rate center to which the numbers are homed. Intercarrier compensation should continue to depend upon the physical location of the customer. Otherwise, it will be

impossible to maintain the distinction between local and toll calls.

SPRINT:

(a) Carriers should be permitted to assign NPA/NXX codes to end users outside the rate center in which the NPA/NXX is homed.

(b) It should be the responsibility of the originating carrier to deliver its traffic to the rate center in which the NPA/NXX is homed.

JOINT ALEC:

(a) Carriers should be allowed to assign telephone numbers to end users physically located outside the rate center in which the telephone [number] is homed anytime the carrier deems appropriate.

(b) Reciprocal compensation obligations should apply without regard to whether the physical location of the called customer is located within the originating rate center of the ILEC. The appropriate method to determine whether such traffic is local is to compare the calling and called parties NPA/NXXs.

AT&T, TCG, & MEDIAONE:

(a) Carriers should be allowed to assign telephone numbers to end users physically located outside the rate center in which the telephone [number] is homed anytime the carrier deems appropriate.

(b) Reciprocal compensation obligations should apply without regard to whether the physical location of the called customer is located within the originating rate center of the ILEC. The appropriate method to determine whether such traffic is local is to compare the calling and called parties NPA/NXXs.

ALLEGIANCE & LEVEL 3:

(a) If an ALEC establishes a POI within the LATA, it may offer service in any rate center in the LATA, assign telephone numbers to end users physically located outside the rate center to which the number is homed, and terminate calls dialed to that rate center at any location.

(b) Reciprocal compensation obligations should apply without regard to whether the physical location of the called customer is within the originating rate center of the ILEC. The appropriate method to determine whether such traffic is local is to compare the calling and called party's NPA/NXXs.

XO:

(a) Carriers should be allowed to assign telephone numbers to end users physically located outside the rate center in which the telephone is homed anytime the carrier deems appropriate. Both ILECs and ALECs should be allowed to define both their outward and inward local calling areas. ALECs should be allowed to offer customers competitive alternatives to the local calling areas that are embodied in the ILEC's services. The costs that the ILEC incurs in transporting originating traffic to an ALEC are entirely unaffected by the location at which the ALEC delivers the calls to the ALEC's end user customer. As long as the ALEC establishes a point of interconnection within the LATA, it should be allowed to offer service in any rate center in the LATA and terminate calls dialed to that rate center at any location it wishes.

(b) Reciprocal compensation obligations should apply without regard to whether the physical location of the called customer is located within the originating rate center of the ILEC. The appropriate method to determine whether such traffic is local is to compare the calling and called party's NPA/NXXs.

STAFF ANALYSIS

In this issue the Commission is presented with two matters for determination. First, the Commission is to determine under what conditions carriers may assign telephone numbers to end users physically located outside the rate center in which the telephone number is homed. Second, the Commission is to determine whether intercarrier compensation for calls to these numbers should be based upon the physical location of the calling and called parties or upon a comparison of the NPA/NXXs assigned to them. Staff notes that due to the FCC's recent *ISP Remand Order*,[6] which removes ISP-bound traffic from state jurisdiction, this issue is limited to intercarrier compensation arrangements for traffic that is

[6] Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, CC Docket Nos. 96-98 and 99-68; FCC 01-131 released April 27, 2001.

delivered to non-ISP customers. (Level 3 BR 27) Sprint witness Maples explains that when you take ISP-bound traffic out of the equation, any real voice FX traffic is going to be minor. (TR 571) Nevertheless, no party to this proceeding has suggested that a Commission decision on this issue is no longer needed. Staff merely notes that the volume of traffic that will be subject to the Commission's decision on this issue has potentially decreased considerably since this docket was originally opened.

This issue centers around the ALECs' use of so-called "virtual NXXs." A virtual NXX is the practice of assigning NPA/NXXs to end users physically located outside of the rate center to which the NPA/NXX is homed. This is done in order to give virtual NXX customers a local dialing presence in rate centers other than the rate center in which they are physically located. In other words, end users located in a particular rate center can dial a NPA/NXX that is local to them, but it in fact connects them to a virtual NXX customer physically located outside of the rate center traditionally associated with that NPA/NXX.

Verizon witness Haynes argues that carriers should not be permitted to assign NPA/NXXs to end users located outside of the rate center to which the NPA/NXX is homed unless foreign exchange service is ordered. (TR 420) He explains that a customer's telephone number (NPA/NXX) serves two separate but related functions: proper call routing and rating. Telephone numbers serve to provide the network with specific information necessary to route calls correctly from the caller to the intended destination, as well as identifying the exchanges of the originating caller and the called party to provide for proper rating of calls. (TR 385-386) Witness Haynes states that assigning virtual NXXs does not affect the routing of calls. (TR 388) However, he contends that the proper rating of calls is at the heart of the virtual NXX issue.(TR 386)

Witness Haynes states that "a major public policy goal that has guided regulators and the telecommunications industry for many decades has been the widespread availability of affordable telephone service." (TR 386) He explains that to achieve this objective certain pricing conventions or principles were adopted. The primary principle is that basic exchange access rates typically provide unlimited calls within a confined geographic area at modest or no additional charge. He states that this "confined geographic area consists of the customer's 'home' exchange area and additional surrounding exchanges, together designated as the customer's 'local

calling area.'" (TR 386-387) Witness Haynes states that calls outside of this local calling area are subject to an additional "toll" charge. He explains that toll service is generally priced higher on a usage-sensitive basis. In order to ensure that basic local phone service is universally available and affordable, local exchange companies are permitted to use revenues gained from toll service to hold down the price of basic local service. (TR 387)

Witness Haynes states that a second pricing principle is that the calling party pays to complete a call, with no charge levied on the called party. (TR 387) However, he explains that there are a few exceptions to this principle, such as where a called party agrees to pay toll charges in lieu of those charges being assessed upon the calling party (e.g., 1-800 calling, collect calling, and third party billing). Another suggested exception is where both the calling and called parties share the cost of the call, as with Foreign Exchange (FX) service. (TR 387)

Witness Haynes describes Verizon's FX service as a "toll substitute service." (TR 398) He explains that FX is a private line service designed so that a calling party may place what appears to be a local call, to a FX customer located outside the caller's local calling area. He states that if this was truly a local call, the called party would not be subject to a charge for the call. However, the FX customer (the called party) agrees to pay the additional charges which the calling party would otherwise have to pay to transport the call beyond the caller's local calling area, to the exchange where the FX customer is physically located. (TR 398) Witness Haynes explains that FX service provides a customer with the appearance of a presence in another local calling area. He states that the FX customer achieves this by "subscribing to basic exchange service from the 'foreign' switch and having its calls from that local calling area transported over a private line, *which it also pays for*, from the distant local calling area to its own premises." (emphasis in original)(TR 398) Witness Haynes explains that en route, the call is transported through the end office to which the FX customer is connected, without being switched, to the FX customer's local loop. (TR 398)

With regards to the proper rating of calls, witness Haynes explains:

> the local exchange carrier tariff billing systems use the NXX codes of the calling and called parties to determine

> the originating and terminating rate centers and exchange areas of the call. This information, in turn, is used to properly rate and subsequently bill the call. If the rate center or exchange area of the called party as determined by the called numbers NXX code is included in the originating subscriber's local calling area, then the call is rated as a local call.
>
> If the rate center exchange area of the called party, again determined by the NXX code of the called number, is outside of the local calling area then the call is determined to be toll. Thus the rate centers of calling and called parties as expressed in the unique NXX codes assigned to each rate center are absolutely essential for LECs to properly rate calls as either local or toll. (TR 421-422)

He argues that "the ALEC's virtual NXX codes scheme completely undermines the rating of a call as local or toll, thereby denying Verizon compensation for the transport costs it incurs to deliver the calls to the [ALECs]." (TR 422)

Witness Haynes defines a virtual NXX as an entire exchange code, consisting of 10,000 NPA/NXXs, obtained by a carrier and assigned to a rate center in which that carrier has no facilities or customers. The carrier then uses this exchange code to serve customers that are physically located in exchanges other than that to which the code is assigned. (TR 392) He states that in essence, virtual NXXs sever the connection between exchange areas and their corresponding exchange codes (NPA/NXXs), preventing ILECs from collecting for toll calls and inhibiting their ability to maintain affordable basic local service. (TR 393-394) In addition, witness Haynes contends that ALECs use virtual NXXs to make the call appear to be local to both the caller and the caller's carrier, and thereby claim reciprocal compensation for the call. (TR 392)

Witness Haynes asserts that the term "virtual NXX" was coined a few years ago by ALECs to describe the arrangement they devised to provide their customers (generally ISPs) with a one-way/inward 800-type service. However, he argues:

> Had the [ALECs] legitimately provided their ISP customers with a one-way/inward toll-free number service, the customer with the toll-free 800, 877 or 888 number (i.e.,

> the ISP) would pay to receive all incoming calls, the terminating carrier (the [ALEC]) would pay the originating carriers (e.g., Verizon, independent telephone companies) carrier access charges, and the callers would reach the ISP free of charge. However, under the virtual NXX scheme employed by some, [ALECs] receive an 800-like arrangement, with Verizon bearing the costs to transport their traffic without compensation. (TR 394)

BellSouth witness Ruscilli also draws a comparison between virtual NXX service and 1-800 toll-free service. He states that virtual NXX and 800 service are similar toll-free services in which an interexchange toll call is made by a consumer who does not pay toll charges. He explains that the subscriber receiving the call pays to haul the call outside of the local calling area in which the call originates. (TR 90)

Verizon witness Haynes raises an additional issue regarding the use of a virtual NXX as he has defined it: number conservation. He argues that an ALEC's request of numbers for rate centers in which they have no customers appears to be a waste of numbering resources. (TR 410) Witness Haynes cites a June 2000 decision by the Maine Public Utilities Commission (PUC) in support of this position. He explains that an ALEC in Maine had requested 54 NXX codes for use outside the rate center in which their switch resided. These codes were used to provide interexchange service from across Maine to a single exchange within the state. He states that the Maine PUC ordered the return of these 54 codes since they were not used to serve local customers. He explains that over 500,000 numbers had been "stranded" with little chance of being utilized since the ALEC was only providing service in one rate center. (TR 410; EXH 16) In its brief, Verizon states that even if virtual NXX call rating problems could be allayed, the number conservation issues will remain. (BR 24)

Level 3 witness Gates disagrees that the use of virtual NXXs has a negative impact on numbering resources. He argues that if virtual NXX calls do impact the availability of numbers, then the ILEC's FX service, extended reach, Cyber DS-1, and other systems have impacted the number resources of Florida for decades. (TR 833) Witness Gates also contends that ALECs don't always have to obtain NPA/NXX codes in blocks of 10,000 as stated by Verizon witness Haynes. Witness Gates states that in jeopardy situations,

companies can obtain codes broken down into 1,000, 500, even 100 number blocks. (TR 865) He argues that there is no proof that virtual NXXs have impacted the numbering resources of Florida, and it would be wrong to limit the availability of service based on a fact that is not in evidence. (TR 889)

Level 3 witness Gates also disagrees with ILEC contentions that virtual NXX calls are similar to 1-800 service. He explains that 8XX NPAs are not associated with a particular geographic area. In other words, callers from many geographic areas can place a toll-free call by dialing the same 8XX, while toll-free virtual NXX calls can only be placed from the rate center in which the customer's NPA/NXX is homed. (TR 782) In addition, he states that a 1-800 call has always been a toll call, as portrayed by the dialing pattern of 1-8XX-NXX-XXXX. He explains that when the call is dialed, the local switch recognizes the call as toll by the 1+ toll indicator, and routes the call to the access tandem for additional routing instructions. (TR 782) In contrast, virtual NXX calls are routed by the local switch like any other local call. (TR 783)

Witness Gates contends that the ALEC's virtual NXX service is a competitive response to the FX service that ILECs have provided for decades. (TR 843) However, witness Gates states that because ALEC and ILEC networks are so different, virtual NXX is provided a little different than FX service. He explains that ILEC networks, such as BellSouth's or Verizon's, have central offices in every exchange. When they provide FX service, they provide a private line from the foreign exchange (in which the NPA/NXX is homed) to the home exchange in which the FX customer is physically located. The ILEC then charges the FX customer for that private line. However, ALECs do not have central offices in every exchange. Witness Gates states that it is physically impossible for ALECS to offer a private line between exchanges. Therefore, ALECs provide this service via number assignment, hence the virtual NXX. (TR 843) Witness Gates asserts that "[t]he use of virtual NXX codes is not unlawful or in any other way improper." (TR 781) He states:

> Customers want to use these so-called virtual NXX codes because it allows them to take advantage of state-of-the-art, currently available technologies that allow consumers to reach their businesses without the disincentive of a toll call. It also allows businesses and organizations to provide service in other areas

> before they actually have facilities or offices in those areas. Absent such calling plans, consumers would have to wait for carriers to build out their networks - which could take years and millions of dollars. (TR 779)

Witness Gates contends that carriers use virtual NXXs because they allow them to respond to customer demand for new and innovative services, and a prohibition from using virtual NXXs would constitute an artificial impediment to the natural progression of competitive markets. He states that this will deny Florida residents the benefits associated with competitive development. (TR 780) Witness Gates describes what he contends are three negative impacts of prohibiting the use of virtual NXXs. First, he states that "ILECs would be able to evade the intercarrier compensation arrangements they have negotiated with ALECs." (TR 784) He explains that classifying virtual NXX calls as toll would make it nearly impossible and much more economically burdensome for ALECs to utilize virtual NXXs in the provision of service to customers. (TR 785) Second, witness Gates states that restrictions on the use of virtual NXXs would have a negative impact on the competitive deployment and use of affordable dial-up internet services in Florida. (TR 784-785) Finally, he argues that restrictions placed on virtual NXXs, and not on the ILEC's FX service, would give ILECs a competitive advantage over ALECs. (TR 785)

On the other hand, witness Gates suggests several benefits of permitting the use of virtual NXXs. He asserts that these benefits include: (1) providing ALEC customers with a local presence in additional local calling areas; (2) allowing short-term business expansion while carriers build-out their facilities over time; (3) enabling ISPs to provide cost-effective dial-up internet access throughout the state without the need for offices in every local calling area; (4) allowing consumers in lightly populated areas with low-cost dial-up access to the internet; (5) treating virtual NXX calls consistently with the way ILEC FX and other services are treated; and (6) providing a competitive alternative to ILEC FX service. (TR 793-794) In the end, witness Gates contends that this issue is really about a competitive loss for ILECs. He argues:

> Total market dominance is a valuable asset, although it is not necessarily in the public interest. It would make sense for an ILEC to protect and preserve its monopoly by proposing language that would make it uneconomic for

> Level 3 to chip away at its monopoly market share. (TR 790)

Joint ALEC witness Selwyn agrees that virtual NXX is a competitive response to the ILECs' FX service. He explains that the idea of terminating a call in a rate center that is different than that to which the customer's NPA/NXX is homed was not invented by ALECs. (TR 662) He argues that "ILECs have been offering foreign exchange ("FX") service for decades, and FX service accomplishes essentially the same result, although it is provisioned in a different way." (TR 662) Witness Selwyn explains that a caller in exchange B dials the FX number as a local call to exchange B, but the call is actually delivered to the FX customer physically located in exchange A. He states that this is "pretty much what happens under the 'virtual NXX' approach that is used by some ALECs." (TR 662)

Witness Selwyn suggests that ILECs also enable a customer to have a local presence in a different exchange to which they are physically located through remote call forwarding (RCF). (TR 663) He explains that instead of utilizing a leased channel between exchange A and exchange B, as is done in FX service, with RCF calls placed to the exchange B NPA/NXX are forwarded by the central office switch in exchange B to the customer's phone number in exchange A. He states that the call still appears to be local to the calling party located in exchange B, while the RCF customer located in exchange A pays the toll charge for the call. (TR 663) Witness Selwyn contends that with both the FX and RCF services, "the exchange A customer's *inward* local calling area has been expanded to include exchange B." (emphasis in original)(TR 663)

Witness Selwyn contends that since ALECs do not have switching facilities in every ILEC local calling area, ALECs need to develop alternative means for providing the equivalent functionality to their customers. He states:

> And that alternative to the ILECs' creation of a virtual presence for their FX customers in the "foreign exchange" is for the ALECs to use NXX codes rated in exchanges other than the one at which the incoming call will ultimately be delivered - which is exactly the same as what happens in the case of an ILEC FX or RCF call. (TR 665)

Witness Selwyn argues that prohibiting the use of virtual NXXs would penalize the ALECs for their lack of ubiquity while at the same time permitting ILECs to continue providing their customers with a "virtual presence" in an existing ILEC NXX code. He states that this amounts to protecting ILECs from ALEC incursion into the FX/RCF market. (TR 667) Witness Selwyn argues that carriers should be allowed to define both their outward and inward local calling areas. More specifically, he states that "ALECs should be allowed to offer customers competitive alternatives to the local calling areas that are embodied in the ILEC's services." (TR 637)

Verizon witness Haynes agrees that ALECs should be permitted to determine their own outward-dialing calling scopes. He states that a company's ability to offer different calling scopes is an important way to differentiate its services in the market. (TR 406) However, he argues that this "does not mean that an ALEC can arbitrarily expand the local dialing scope of an ILEC customer, as they propose to do here with a service that resembles 1-800 inward dialing, at least without appropriate compensation to the ILEC handling the call." (TR 406-407)

BellSouth witness Ruscilli agrees. He states that an ALEC is free to design whatever local calling area it wants for its own customers; however, it is not free to determine the local calling area for BellSouth customers. (TR 55) He argues:

> What the ALEC is doing is offering a service that allows customers of other LECs (i.e., BellSouth) to place toll-free calls to selected customers of the ALEC who are physically located in a different local calling area...the ALEC is attempting to redefine BellSouth's local calling area, but only in those instances in which a BellSouth end user places a call to the ALEC's selected end users. (emphasis in original)(TR 54-55)

Witness Ruscilli states that BellSouth is not asking the Commission to limit an ALEC's ability to assign NPA/NXXs in whatever manner it sees fit. However, BellSouth requests that the Commission find that a call terminated to a virtual NXX customer physically located outside the local calling area of the rate center to which the NPA/NXX is homed, is not a local call. (TR 67)

Witness Ruscilli states that "BellSouth's position is that regardless of the numbers an ALEC assigns to its end users,

BellSouth should only pay reciprocal compensation on calls that originate and terminate within the same local calling area." (TR 50) He argues that carriers should utilize NPA/NXXs in such a way that other carriers are able to distinguish local traffic from toll traffic. (TR 50) He states:

> BellSouth is asking that ALECs separately identify any number assigned to an ALEC end user whose physical location is outside the local calling area associated with the NPA/NXX assigned to that end user, so that BellSouth will know whether to treat the call as local or long distance. Providing that an ALEC will separately identify such traffic, for purposes of billing and intercarrier compensation, BellSouth would not object to an ALEC assigning numbers out of an NPA/NXX to end users located outside the local calling area with which that NPA/NXX is associated. (TR 50)

Witness Ruscilli argues that without this information, ILECs have no way of knowing which calls are local and which calls are toll. (TR 50)

Witness Ruscilli explains that local traffic, for which reciprocal compensation is due, is traffic that originates and terminates in the same local calling area. On the other hand, intraLATA toll traffic, for which access charges apply, is traffic that originates in one local calling area and terminates in another local calling area. (TR 50) He states that ALECs are free to assign NPA/NXXs to end users physically located outside of the local calling area of the rate center to which the NPA/NXX is homed, but calls originated by BellSouth end users to those numbers are not local calls. Consequently, calls to these virtual NXXs are not local traffic and reciprocal compensation does not apply. (TR 50-51)

Witness Ruscilli provides an example of what occurs when an ALEC disassociates the physical location of a customer with a particular phone number from the rate center where that NPA/NXX code is homed. In his example, an ALEC takes a NPA/NXX that is homed in Jacksonville and assigns it to an end user physically located in Lake City. He explains that if a BellSouth end user in Jacksonville dials this NPA/NXX, BellSouth would bill its Jacksonville customer for a local call. BellSouth would hand off the call to the ALEC, and the ALEC would then carry the call from

that point to its end user in Lake City. Witness Ruscilli contends that "[t]he end points of that call are in Jacksonville and Lake City, and therefore, the call is a long distance call." (TR 52) Witness Ruscilli also provides a more extreme example in which the ALEC could assign that Jacksonville NPA/NXX to an end user in New York. He states that in the same way, this call from Jacksonville to New York would be billed to BellSouth's customer as a local call even though it is clearly a long distance call. In addition, witness Ruscilli argues that BellSouth would be billed reciprocal compensation for these calls, which are clearly long distance calls and not subject to reciprocal compensation. (TR 53)

Witness Ruscilli contends that the FCC has made it clear that traffic jurisdiction is determined based upon the originating and terminating end points of a call. (TR 53) He states the Feature Group A (FGA) access service is one example of this. He explains that with FGA, a customer would dial a 7 (or 10) digit number and receive dial tone from a distant office. The customer would then dial a long distance number. Witness Ruscilli contends that even though the customer dials a number that appears local, no one disputes that this FGA traffic is switched access with respect to jurisdiction and compensation between the involved companies. (TR 53)

Witness Ruscilli also suggests that BellSouth's FX service is another example of jurisdiction based upon end points of the call. He explains:

> FX service is exchange service furnished to a subscriber from an exchange other than the one from which the subscriber would normally be served. Here again, it appears to the originating customer that a local call is being made when, in fact, the terminating location is outside the local calling area (i.e., long distance). Further, because the call to the FX number appears local and the calling and called NPA/NXXs are assigned to the same rate center, the originating end user is not billed for a toll call. Despite the fact that the calls appear to be local to the originating caller, FX service is clearly a long distance service. The reason the originating end user is not billed for a toll call is that the receiving end user has already paid for the charges from the real NPA/NXX office to the FX office. There are charges for this function and they are being

> paid by the customer that is benefitting from the FX service. (TR 54)

Witness Ruscilli states that prior to February 23, 2001, BellSouth billed reciprocal compensation for calls from ALEC end users to BellSouth's FX customers, except for ISPs. (TR 57) However, he states that BellSouth has implemented a process to ensure that reciprocal compensation is not charged for any calls to its FX customers. (TR 58) He explains that BellSouth built a database of all existing FX numbers, to which newly assigned FX numbers are added as they are assigned. He states that this database is used to prevent billing reciprocal compensation for calls to BellSouth FX customers. (Tr 58-59)

Witness Ruscilli states that BellSouth requests the Commission find that calls placed to NPA/NXXs assigned to customers physically located outside of the local calling area to which the NPA/NXX is assigned are not local calls, based upon the end points of these calls. In addition, witness Ruscilli contends that the Commission should find that ALECs must identify calls to these numbers as long distance, and pay BellSouth for the originating switched access service that BellSouth provides on those calls. (TR 67) He argues that a call to a virtual NXX is not local, so it is not subject to reciprocal compensation; instead, BellSouth is entitled to access charges because it is providing the ability for ALECs to have customers in BellSouth's local calling area make long distance calls on ALEC networks. (TR 170-171) Witness Ruscilli explains:

> When a BellSouth end user calls a person located outside of that end user's basic local calling area, BellSouth receives compensation in addition to the basic local rates it charges to its customers. When BellSouth carries an intraLATA toll call, for instance, BellSouth collects toll charges from its customer who placed the call. When a BellSouth customer places an interLATA call, BellSouth collects originating access from the IXC. When BellSouth carries an intraLATA call from a BellSouth end user to a BellSouth FX customer, BellSouth receives compensation for the FX service (including the toll component of that service) from its FX customer. Similarly, when BellSouth carries calls to a BellSouth customer with an 800 number, BellSouth receives compensation for the 800 service (including the toll

component of that service) from its 800 service customer. (TR 56-57)

He contends that in each of these cases BellSouth receives compensation for calls placed to points outside of the local calling area from some source other than the local rates charged to its customers making the call. (TR 57)

Verizon witness Haynes agrees that ILECs are not compensated for virtual NXX calls. He argues that the use of virtual NXXs by ALECs makes an inward toll call appear local, thereby denying Verizon the opportunity to collect just compensation for the transport it provides to ALECs on that call. (TR 389) Witness Haynes contends that virtual NXX calls are terminated by the ALEC to end users located outside of the local calling area of the originating customer, in which case toll charges would normally apply. He asserts that ALECs then claim that these calls are local, and bill Verizon for reciprocal compensation for the calls. (TR 390) Witness Haynes contends that Verizon incurs the transport costs related to these calls, yet is denied an opportunity to recover its costs from either its originating subscriber or the ALEC, due to misapplication of proper NXX codes. (TR 390)

Verizon witness Haynes also argues that reciprocal compensation is not appropriate for virtual NXX calls. He states that under the Act, reciprocal compensation is paid only for local calls. He states that "reciprocal compensation was predicated on reciprocity - the assumption that carriers would be exchanging local traffic." (TR 395) He argues that since virtual NXX calls are not local, but rather toll calls, reciprocal compensation does not apply. (TR 422-423)

Witness Haynes agrees with BellSouth witness Ruscilli that end points determine jurisdiction, stating that "the determining factor for rating a call as local in all instances is the location of the calling and called parties within the same local calling area." (TR 395) He argues that if the ALEC's virtual NXX customer is located outside of the local calling area of the Verizon caller, the call is not local regardless of whether the ALEC has assigned a number that appears to be within the Verizon customer's local calling area. (TR 392)

Sprint witness Maples supports an ALEC's right to assign NPA/NXXs to end users outside the rate center in which the NPA/NXX

is homed. (TR 515) However, he agrees that the end points of a call determine its jurisdiction. He states that the jurisdiction of voice traffic for purposes of establishing intercarrier compensation obligations should be based on the definition of local calling areas and the physical end points of the call. (TR 538) Witness Maples suggests that the physical end points of a call in relation to the definition of local calling area has historically driven intercarrier compensation. (TR 573)

Level 3 witness Gates disagrees. He argues that "[h]istorically, the telecommunications industry has compared NXX codes to determine the appropriate treatment of calls as local or toll." (TR 759) He states that calls are conventionally rated and routed throughout the industry based upon the NXX codes of the originating and terminating numbers. (TR 818-819) Witness Gates argues that even under the proposals of BellSouth and Verizon, virtual NXX calls would still be rated as local for retail purposes since no ILEC has proposed to assess toll charges on its own customers, even though they claim these calls are toll for intercarrier compensation purposes. (TR 819)

In addition, witness Gates states that virtual NXX calls are routed to the point of interconnection (POI) and handed off to the ALEC just as any other local call. (TR 819) Witness Gates explains that there is no additional cost to an ILEC when it originates a call to an ALEC's virtual NXX customer, because the ILEC carries the call the same distance to the POI and incurs the same facilities cost regardless of the physical location of the virtual NXX customer. (TR 786) He states that "the ILEC's obligations and costs are the same in delivering a call originated by one of its customers, regardless of whether the call terminates at a so-called 'virtual' or 'physical' NXX behind the ALEC switch." (TR 786) He argues that there is "no economic, engineering, factual or policy basis for making intercarrier compensation depend on the actual location of the terminating carrier's customer." (TR 758)

Witness Gates also asserts that since the physical location of the customer is irrelevant to the costs incurred by the ILEC in delivering a virtual NXX call, it would not be justified in assessing originating access charges for these calls. (TR 795-796) He explains:

> The so-called virtual NXX calls are locally-dialed calls. They are treated as local at retail by the ILECs. They

> are routed as local over interconnection facilities, specifically the local interconnection trunks. The ILEC has no more responsibility for originating these calls than it does for any other local call, yet the ILECs want to deny the ALECs reciprocal compensation for these calls, and to add insult to injury, want to charge the ALECs originating access charges, as well. (TR 832)
>
> . . .
>
> Access charges have not and should not apply to locally-dialed calls as they have nothing to do with the costs associated with routing locally-dialed calls. These virtual NXX calls are local, they do not increase the incumbents' costs one iota, and they provide a valuable service to consumers. Incumbents should pay reciprocal compensation on all locally dialed calls. (TR 833)

Joint ALEC witness Selwyn agrees, stating that an ILEC's costs are not affected by the physical location of the ALEC's customer to whom it delivers a call. (TR 637) He argues that the ILEC only transports a virtual NXX call to the POI, and "the location where the ALEC ultimately delivers the call has no effect whatsoever upon the ILEC's work or its costs." (TR 643) Witness Selwyn contends that the only cost an ILEC will possibly incur as a result of virtual NXX is a competitive loss. He explains that when a customer dials a number that is rated to one exchange but delivered to another, under the ILEC's tariff a toll charge may apply. However, an ALEC may, in an effort to differentiate its service, offer features that are not offered by the ILEC, such as treating these calls as local and thus not imposing a specific charge for the call. (TR 646) He states:

> If, as a result of the ALEC's offering, some of the ILEC's customers are persuaded to switch over to the ALEC's service, the ILEC will sustain a loss of both local and toll revenue. *Such a loss of business is a direct and inescapable outcome of competition;* the ILEC can either respond by reducing or eliminating its own (toll) charge for these calls (thereby sustaining some revenue loss), or risk losing customers to the less expensive ALEC service (thereby also sustaining some revenue loss). The issue here is entirely one of *pricing*

> *and competitive response*, not one of policy. (emphasis in original)(TR 646-647)

Verizon witness Haynes challenges these conclusions, arguing that ILECs "would lose revenue not through legitimate competition, but because an ALEC inappropriately assigned numbers to customers located in rate centers outside of the local calling area." (TR 413) BellSouth witness Ruscilli agrees, stating that when an ALEC assigns a Jacksonville NPA/NXX to a Lake City end user, no local competition is created in Jacksonville. He argues that BellSouth customers dialing virtual NXX numbers remain BellSouth's local customers. Witness Ruscilli contends that "[t]here is nothing that the ALEC is providing in this case that even resembles local service." (TR 65-66)

BellSouth witness Taylor asserts that treating virtual NXX calls as local instead of toll "would represent a regulatory anomaly or loophole, not a competitive loss." (TR 263) He explains that when the ILEC responds to customer demand for toll-free calling, it offers FX service that allows customers to dial a local number while the FX customer pays for the cost of the service. Since the call is a toll call, no reciprocal compensation is paid when an ALEC end user calls the FX customer. He argues that in contrast, virtual NXX service is free to both the calling and called parties. In addition, ALECs want to charge reciprocal compensation for these calls. (TR 263-264) Witness Taylor states:

> While both the ILEC and the ALEC are free to offer FX-like services under any pricing structure they want, it is important that both ALEC and ILEC services be subject to the same regulatory treatment. Since the call originates and terminates in different local calling areas, it is not a local call and neither ALEC nor ILEC should pay reciprocal compensation when its subscriber dials such a number. (TR 264)

Level 3 witness Gates argues that denying reciprocal compensation for virtual NXX traffic, and imposing access charges, would make it uneconomical for ALECs to provide this service. (TR 829) However, Verizon witness Haynes contends that the Commission should require ALECs to recover their costs from their own virtual NXX customers, rather than ILECs. He states that "[t]his would be consistent with the way Verizon recovers its costs for its own FX service - from its FX customer, the *called* party." (TR 402)

BellSouth witness Ruscilli agrees, stating that ALECs are free to charge its virtual NXX customers for the service provided to them, similar to how BellSouth charges its FX customers. (TR 91)

Verizon witness Haynes also disagrees with the ALEC position that it is industry practice to determine jurisdiction of calls based upon the NXX of the calling and called parties. He argues that national numbering policy requires that numbers be provided to carriers with the understanding that they will be used to serve customers physically located within the rate center for which they are being requested. He contends that virtual NXX service violates these guidelines because the ALEC is not providing local service within the exchanges to which the NPA/NXXs are homed. (TR 410)

Witness Gates argues that locally dialed calls are treated as local regardless of the location of the terminating customer because that is the way the network works. He argues that ALEC and ILEC switches are set up to treat locally dialed calls as local traffic. (TR 853) Level 3 argues in its brief that treating virtual NXX calls as toll calls would impose costs on all LECS by requiring billing system changes. (BR 30) Witness Gates suggests that "we keep the status quo," and not require costly changes be made to the switches and switching architecture that has been deployed throughout the United States. (TR 854)

Sprint witness Maples suggests a similar conclusion. He proposes that an industry task force be established to examine the ramifications of this before a decision is made. (TR 575) He explains that when you take ISP-bound traffic out of the virtual NXX issue, what is left is a relatively small amount of traffic. If the Commission were to decide that access charges are due for virtual NXX/FX traffic, then modifications would have to be made to the billing systems in order to accommodate that. (TR 574) Witness Maples questions whether the industry would want to incur this cost for a relatively small amount of voice virtual NXX/FX traffic. (TR 574-575) He suggests that more evidence should be gathered before a ruling be made that would require these modifications. For example, if the non-ISP traffic is relatively small and the necessary modifications to the billing system are large, the industry may want to just pay reciprocal compensation for this traffic as a compromise. On the other hand, if the volume of non-ISP traffic is large, then perhaps reciprocal compensation should not be paid. (TR 575) Nevertheless, witness Maples agrees that

jurisdiction is determined by the end points of a call, and access charges would apply to long distance traffic. (TR 575)

Parties to this proceeding have cited several decisions by other state commissions in support of their respective positions regarding virtual NXXs. In its brief, Level 3 cites decisions in North Carolina, Kentucky, and Michigan. (BR 32-34) In the North Carolina decision, the North Carolina Utilities Commission (NCUC) ruled that calls to MCIm's virtual NXX customers should be treated as local, and reciprocal compensation should be paid. The NCUC stated that determining whether a call was local or not based upon the NPA/NXX dialed was reasonable and appropriate.[7] (BR 32) In the Kentucky decision cited by Level 3, the Kentucky Public Service Commission (KPSC) found that virtual NXXs should be treated the same as FX service. In addition, the KPSC stated that both FX and virtual NXX service should be treated as local traffic when delivered within the same LATA.[8] (BR 33) Finally, in a Michigan Public Service Commission (MPSC) decision, the MPSC decided not to reclassify FX service as exchange access traffic exempt from reciprocal compensation.[9] (BR 33) In a second Michigan decision cited by Level 3, the MPSC found that virtual NXX arrangements do not impact an ILEC's financial or operational responsibilities, stating that the ILEC's costs are "the same as when the call is undisputedly local."[10] (BR 33-34)

In their joint brief, the ALECs cite an additional decision by the California Public Utilities Commission. (BR 25-26) In that decision, the CPUC stated that the rating of a call should be determined based upon the designated NXX prefix. The CPUC found that abandoning the linkage between the NXX prefix and its

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[7] Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Docket No. P-474, Sub 10, Recommended Arbitration Order, 74 (N.C.U.C., adopted April 3, 2001).

[8] In the Matter of Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Case No. 2000-404, Order, 7 (Ky. PSC March 14, 2001)

[9] Application of Ameritech Michigan to Revise its Reciprocal Compensation Rates and Rate Structure and to Exempt Foreign Exchange Service from Payment of Reciprocal Compensation, Case No. U-12696, 8-11 (Mich. PSC, Jan. 23, 2001)

[10] Petition of Coast to Coast Telecommunications, Inc. for Arbitration of Interconnection, Rates, Terms, Conditions, and Related Arrangements with Michigan Bell Telephone Company, d/b/a Ameritech Michigan, Case No. U-12382, Order Adopting Arbitration Agreement, 9 (Mich. PSC, Aug. 12, 2000)

associated rate center would undermine the ability of customers to know whether they are making a local or toll call, as well as the service expectations of the called party (ISPs).[11] (BR 25)

BellSouth witness Ruscilli cites several state commission decisions as well. (TR 59-65) Witness Ruscilli states that the Public Service Commission of South Carolina (SCPSC) reached a decision on this issue in the recent BellSouth/Adelphia arbitration case on January 16, 2001 (Docket No. 2000-516-C, Order No. 2001-045). He explains that the SCPSC adopted BellSouth's proposed language that specifies that virtual NXX traffic that originates in one local calling area and terminates in another local calling area is not local traffic. In addition, the SCPSC ruled that reciprocal compensation was not due for this traffic, and that BellSouth was entitled to collect access charges from Adelphia when BellSouth originates virtual NXX traffic. (TR 59) Witness Ruscilli also refers to a February 6, 2001, decision by the Tennessee Regulatory Authority (TRA), in which the TRA ruled that "the calls to an NPA/NXX in the local calling area outside the rate center where the NPA/NXX is homed should be treated as intrastate interexchange toll traffic for purposes of intercarrier compensation and are subject to access charges." (TR 61)

Witness Ruscilli also cites a July 5, 2000, decision by the Georgia Commission in BellSouth's arbitration with Intermedia (Docket No. 11644-U). In this decision the Georgia Commission ordered that Intermedia be permitted to assign NPA/NXXs in accordance with its local calling areas, provided that it furnish the necessary information for other carriers to properly route and rate calls to those numbers as either toll or local. (TR 61) This is similar to a decision that was reached by the Florida Commission (FPSC) in the BellSouth/Intermedia arbitration (Docket No. 991854-TP, Order No. PSC-00-1519-FOF-TP dated August 22, 2000). In that decision the FPSC decided that Intermedia would not be permitted to assign NPA/NXXs outside the areas to which they are traditionally assigned until such time as it could provide information necessary for the proper routing and rating of calls. (TR 60) Witness Ruscilli states that since this decision, BellSouth has identified a means to handle the rating issue identified by the FPSC. He explains that BellSouth proposes not to charge its customers for long distance calls, even though a long distance call has been made

[11] Order Instituting Rulemaking on the Commission's own Motion into Competition for Local Exchange Service, Rulemaking 95-04-043 at 26 (California PUC, September 2, 1999)

to a virtual NXX. He contends that this is similar to how BellSouth rates calls by its customers to 800 numbers. Witness Ruscilli states that similar to 800 service, the ALEC is incurring the long distance costs, and if it chooses to do so it may recover these costs from the end user that subscribes to the ALEC service. However, he emphasizes that, like 800 service, virtual NXX is a long distance service. (TR 60-61)

In addition, witness Ruscilli refers to decisions made outside of BellSouth's region in Maine, Texas, and Illinois. He asserts that these states found that the virtual NXX call scenario is not local service. He also states that Texas and Illinois further found that reciprocal compensation should not apply in virtual NXX situations. (TR 62) Witness Ruscilli explains that in the Illinois Commerce Commission (ICC) decision in Docket 00-0332, dated August 30, 2000, the ICC stated that since FX/virtual NXX traffic does not originate and terminate in the same local rate center, as a matter of law it cannot be subject to reciprocal compensation. (TR 63-64) The Public Utilities Commission of Texas reached a similar conclusion in its decision in Docket No. 21982, dated July 13, 2000. (TR 64)

Analysis

In keeping with the issues as presented for determination, the first question to consider is under what circumstances a carrier may be permitted to assign NPA/NXXs to end users physically located outside the rate center in which the NPA/NXX is homed. Verizon witness Haynes contends that ALECs should not be permitted to assign numbers in such fashion unless FX service is ordered. (TR 420) One of witness Haynes' arguments in support of a prohibition on the use of virtual NXXs is number conservation. He contends that the practice of obtaining entire NXX codes for exchanges in which an ALEC has no customers appears to be a sheer waste of numbering resources. (TR 410) As an example, witness Haynes cites a decision in which the Maine Commission ordered the recall of 54 codes from which only a limited number of NPA/NXXs were assigned to customers through virtual NXX. (TR 410)

While staff shares the concern that entire NXX codes could be obtained for the purpose of actually utilizing only a small percentage of the numbers, there is no evidence in the record that this has taken place in Florida. Staff agrees with Level 3 witness Gates that a decision to prohibit the practice of virtual NXXs

should not be based upon evidence not in the record. (TR 889) However, if at some time in the future facts are presented that prove this practice is in fact adversely affecting number conservation in Florida, staff believes that the Commission should exercise its authority to reclaim NXX codes that have not been utilized to serve customers, or have only been utilized to serve a select few customers while leaving the remaining numbers from that code to lie dormant. Staff agrees that in those situations, this practice would be a waste of numbering resources.

Level 3 witness Gates argues that ALEC virtual NXX service is a competitive response to ILEC FX service. (TR 843) He states that it is provisioned differently because the networks of ALECs and ILECs are designed differently. He explains that ILECs provision FX service through private lines, made possible by the presence of end offices in every exchange. Since ALECs do not have end offices in every exchange, witness Gates contends that the only way ALECs can offer this service is through number assignment. (TR 843) Joint ALEC witness Selwyn concurs, stating that the practice of terminating a call in an exchange that is different than the exchange to which the NPA/NXX is assigned is nothing new. He contends that ILECs have been providing this service for decades through their FX service. (TR 662)

Staff agrees. Staff believes that virtual NXX is a competitive response to FX service, which has been offered in the market by ILECs for years. Differing network architectures necessitate differing methods of providing this service; nevertheless, staff believes that virtual NXX and FX service are similar "toll substitute services." (TR 398) Therefore, staff believes carriers should be permitted to assign NPA/NXXs in a manner that enables them to provision these competitive services. However, staff believes the practice of assigning NPA/NXXs to customers outside of the rate centers to which they are homed raises additional issues that must be addressed.

Several arguments have been made by parties regarding the virtual NXX issue, and staff has considered them all in framing its recommendation. However, staff believes the primary point of controversy is determining the proper jurisdiction of virtual NXX/FX traffic for the purposes of intercarrier compensation. BellSouth witness Ruscilli states that BellSouth is not asking that the Commission limit an ALEC's ability to assign NPA/NXXs in whatever manner it sees fit, but that the Commission should find

that calls terminated to NPA/NXXs assigned to customers located outside of the rate center to which the NPA/NXX is homed are not local calls. (TR 67) This argument appears to be the crux of Verizon's contention that virtual NXX should not be permitted. As Verizon witness Haynes suggests, this is a rating issue. (TR 386) He argues that virtual NXX service undermines the rating of a call as local or toll. (TR 422)

Fundamentally staff believes this issue should not hinge upon how carriers provision/route virtual NXX/FX traffic, or upon the retail services purchased by end users. Instead, staff believes the resolution of this issue should be based on the premise of what is a local call for intercarrier compensation purposes. This leads us to the second subpart of this issue, which is whether intercarrier compensation for calls to virtual NXX/FX traffic should be based upon the end points of the call or upon the NPA/NXX assigned to the calling and called parties. Level 3 witness Gates contends that the telecommunications industry has historically compared NXX codes to determine the appropriate treatment of calls as local or toll. (TR 759) He argues that virtual NXX calls are locally dialed, and treated as local by the incumbents. He explains that because calls are routed based upon NPA/NXX, virtual NXX calls travel over the ILEC's local interconnection trunks. (TR 852) Witness Gates contends that these calls are locally dialed and should be treated as local calls. (TR 852)

In their joint brief, the ALECs contend that Verizon presently treats FX traffic as local, charging reciprocal compensation for terminating calls to its FX customers. (BR 20-21) Level 3 witness Gates argues that the only reason that BellSouth now separates its FX traffic so that reciprocal compensation is not charged for these calls is because ALECs have had some success with their virtual NXX service. (TR 853)

On the other hand, Sprint witness Maples states that the end points of a call in relation to the definition of local calling area have historically driven intercarrier compensation. (TR 573) BellSouth witness Ruscilli agrees, contending that the FCC has made it clear that traffic jurisdiction is determined based upon the originating and terminating end points of a call. (TR 53)

In an extreme example of the problems associated with determining intercarrier compensation based upon the NXXs assigned to the calling and called parties, witness Ruscilli gives an

example of a Jacksonville NPA/NXX being assigned to an ALEC virtual NXX customer physically located in New York. (TR 53) He argues that based upon a comparison of NPA/NXXs, if a BellSouth customer in Jacksonville calls this virtual NXX number, BellSouth would be charged reciprocal compensation even though a long distance call has clearly been made. (TR 53) While Level 3 witness Gates argues that this is "a ridiculous hypothesis," he states that this would still be a local call. (TR 858-859) Witness Gates contends that the ILEC's responsibilities would not change. He states that the ILEC technical and financial responsibilities would end at the POI, and the ALEC would be responsible for transporting the call 1500 miles to New York. (TR 859) Witness Gates argues that this call is technically feasible, but would never happen. He states that a virtual NXX is usually an intraLATA offering, and Level 3 has other services that they offer for 1500 miles of transport.

Staff acknowledges that this scenario is somewhat unlikely, but it does illustrate the controversy related to this issue. Staff disagrees with the ALEC position that jurisdiction of traffic should be determined based upon the NPA/NXXs assigned to the calling and called parties. Although presently in the industry switches do look at the NPA/NXXs to determine if a call is local or toll, staff believes this practice was established based upon the understanding that NPA/NXXs were assigned to customers within the exchanges to which the NPA/NXXs are homed. Level 3 witness Gates conceded during cross examination that historically the NPA/NXX codes were geographic indicators used as surrogates for determining the end points of a call. (TR 851-852)

Staff believes that a comparison of NPA/NXXs is used as a proxy for determining the actual physical location of the particular customer being called. In other words, the NPA/NXX provides a reasonable presumption of the physical location of a customer as being within the calling area to which the NPA/NXX is homed. Therefore, carriers have been able to determine whether a call is local or toll by comparing the NPA/NXXs of the calling and called parties. However, this presumption may no longer be valid in an environment where NPA/NXXs are disassociated from the rate centers to which they are homed.

Staff believes that the classification of traffic as either local or toll has historically been, and should continue to be, determined based upon the end points of a particular call. Staff believes this is true regardless of whether a call is rated as

local for the originating end user (e.g., 1-800 service is toll traffic even though the originating customer does not pay the toll charges). Staff acknowledges that an ILEC's costs in originating a virtual NXX call do not necessarily differ from the costs incurred originating a normal local call. (Gates TR 786) However, staff does not believe that a call is determined to be local or toll based upon the ILEC's costs in originating the call. In addition, staff does not believe that the proper application of a particular intercarrier compensation mechanism is based upon the costs incurred by a carrier in delivering a call, but rather upon the jurisdiction of a call as being either local or long distance.

This raises the issue of whether reciprocal compensation or access charges should be applied to virtual NXX/FX traffic. Staff agrees with BellSouth witness Ruscilli that calls to virtual NXX customers located outside of the local calling area to which the NPA/NXX is assigned are not local calls for purposes of reciprocal compensation. (TR 67) As such, staff believes that they are not subject to reciprocal compensation. In their brief, the Joint ALECs point to the recently revised FCC Rule 51.701(b)(1) in support of their argument. (BR 22-23) This rule previously stated that telecommunications traffic that is subject to reciprocal compensation is defined as:

> Telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission.

However, in its recent *ISP Remand Order*, the FCC amended this rule to state:

> Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (*see* FCC 01-131, paras 34, 36 39, 42-43). (FCC Rule 51.701(b)(1))

The Joint ALECs assert that the revised rule clearly eliminates as a requirement for reciprocal compensation the previous language that a call be terminated within a local calling area established by the state commission. That being the case, the Joint ALECs contend that the ILEC position, that a virtual NXX call

is not subject to reciprocal compensation because it is not "local telecommunications traffic," has been eliminated. (BR 23) However, staff agrees with Verizon witness Haynes that the FCC's revision of Rule 51.701 has no effect on the jurisdiction of virtual NXX traffic. (TR 498) Staff agrees with witness Haynes that traffic that originates in one local calling area and terminates in another local calling area would be considered *intrastate exchange access* under the FCC's revised Rule 51.701(b)(1). (TR 498) As such, staff believes virtual NXX/FX traffic would not be subject to reciprocal compensation pursuant to Rule 51.701(b)(1).

Witness Ruscilli requests that the Commission find that ALECs must identify calls to virtual NXX customers as long distance and pay BellSouth for originating switched access for these calls. (TR 657) Although it seems reasonable to apply access charges to virtual NXX/FX traffic that originates and terminates in different local calling areas, staff believes that separately identifying virtual NXX traffic for the purpose of applying switched access charges raises additional issues that must be considered.

Level 3 witness Gates states that virtual NXX/FX traffic is treated as local because ALEC and ILEC switches are set up to treat locally-dialed calls as local. (TR 853) Level 3 contends that treating virtual NXX calls as toll would impose costs on all LECs by requiring billing system changes. (BR 30) Witness Gates suggests we "keep the status quo," and not require these costly changes be made to the switching architecture. (TR 854)

Sprint witness Maples raises an additional point that staff believes to be compelling. He explains that when ISP-bound traffic is removed from the virtual NXX issue, what is left is a relatively small amount of traffic. (TR 574) Witness Maples questions whether the industry would want to incur the cost of billing system modifications for a relatively small amount of voice virtual NXX/FX traffic. (TR 574-575) He explains that if the volume of non-ISP traffic is small and the required modifications are large, the industry may want to pay reciprocal compensation for this traffic as a compromise. On the other hand, if the volume of traffic is large, then perhaps reciprocal compensation should not be paid. (TR 575)

Staff is troubled that Verizon insists that reciprocal compensation should not be applied to virtual NXX traffic, while at the same time charging reciprocal compensation for its own FX

traffic. (TR 433, 436) However, staff recognizes that witness Haynes attributes this to the fact that Verizon's billing systems are presently configured to determine whether a call is local or not, based upon the number dialed. He states that Verizon has not as of yet examined the possibility of separating FX traffic from local traffic dialed to the same NPA/NXX. (TR 492-493) While BellSouth has shown that this approach is technically feasible by developing its own database to separate FX traffic, staff is hesitant in recommending that the Commission mandate the development of such a database by all LECs.

Neither does staff recommend that the Commission establish an industry task force to examine this matter, as witness Maples suggests. However, staff does believe that the balance between costly modifications and traffic volumes should be considered when determining what, if any, intercarrier compensation should be applied to virtual NXX/FX traffic. Unfortunately, this factual information is not in the record. Staff believes that whether reciprocal compensation or access charges should apply to virtual NXX/FX traffic is better left for parties to negotiate in individual interconnection agreements. Staff notes that while virtual NXX calls that terminate outside of the local calling area associated with the rate center to which the NPA/NXX is homed are not local calls, and therefore carriers are not obligated to pay reciprocal compensation, parties are free to negotiate intercarrier compensation terms in their agreements that reflect the most efficient means of interconnection. If parties decide to continue to pay reciprocal compensation instead of making costly modifications to their networks and billing systems, staff believes this is reasonable. Staff also believes parties are free to agree to pay no compensation for virtual NXX/FX traffic, or apply access charges, as they deem fit for the purposes of their interconnection agreements.

Conclusion

Staff recommends that carriers be permitted to assign telephone numbers to end users physically located outside the rate center to which the telephone number is homed. In addition, staff recommends that intercarrier compensation for calls to these numbers be based upon the end points of the particular calls. This approach will ensure that intercarrier compensation will not hinge on a carrier's provisioning and routing method, nor an end user's service selection. Staff believes that calls terminated to end

users outside the local calling area in which their NPA/NXXs are homed are not local calls for purposes of intercarrier compensation; therefore, staff believes that carriers are not obligated to pay reciprocal compensation for this traffic. Although this unavoidably creates a default for determining intercarrier compensation, staff does not recommend that the Commission mandate a particular intercarrier compensation mechanism for virtual NXX/FX traffic. Since non-ISP virtual NXX/FX traffic volumes may be relatively small, and the costs of modifying the switching and billing systems to separate this traffic may be great, staff believes it is best left to the parties to negotiate the best intercarrier compensation mechanism to apply to virtual NXX/FX traffic in their individual interconnection agreements. While not recommending a particular compensation mechanism, staff does recommend that virtual NXX traffic and FX traffic be treated the same for intercarrier compensation purposes.

ISSUE 16: (a) What is the definition of Internet Protocol (IP) telephony?

(b) What carrier-to-carrier compensation mechanism, if any, should apply to IP telephony?

RECOMMENDATION: Staff recommends the Commission find that this issue is not ripe for consideration at this time. Staff believes this is a relatively nascent technology, with limited application in the present marketplace. As such, staff recommends that the Commission reserve any generic judgement on this issue until the market for IP telephony develops further. **(HINTON)**

POSITION OF PARTIES

BELLSOUTH:

IP telephony is merely a medium used to complete a telephone call. An IP telephony call should be treated no differently than a traditional circuit switched call for purposes of determining the type of compensation due (*i.e.*, reciprocal compensation, toll, or access).

VERIZON:

Because IP Telephony covers a range of relatively nascent and changing technologies, and because this issue is subject to ongoing FCC proceedings, the Commission should not establish any compensation scheme for IP telephony or change existing compensation methods applied to such traffic.

SPRINT:

(a) Paragraph 84 of the FCC's April 1998 USF Order (FCC-98-67) defines IP telephony services as services that "enable real-time voice transmission using Internet protocols." IP telephony services may be generally classified into one of three categories: computer-to-computer, phone-to-phone and computer-to-phone.

(b) Sprint supports the position in the Joint Position Statement Regarding Issue 16(b) ("IP Telephony") filed with the Commission on July 5, 2001.

JOINT ALEC:

(a) Because it is a nascent, emerging technology, there is no single consensus definition of IP Telephony.

(b) Neither the state of the development of this technology nor the state of the evidentiary record in this proceeding supports an attempt by the Commission to answer Issue 16(b) at this time.

AT&T, TCG, & MEDIAONE:

(a) Because it is a nascent, emerging technology, there is no single consensus definition of IP Telephony.

(b) Neither the state of the development of this technology nor the state of the evidentiary record in this proceeding supports an attempt by the Commission to answer Issue 16(b) at this time.

ALLEGIANCE & LEVEL 3:

As an emerging technology, there is no single consensus definition of "IP telephony." Issues concerning IP telephony compensation are currently being addressed in an FCC rulemaking (CC Docket 01-92). The Commission should refrain from addressing these issues at this time.

XO:

(a) As an emerging technology, there is no single consensus definition of "IP telephony."

(b) Issues concerning IP telephony compensation are currently being addressed in an FCC rulemaking (CC Docket 01-92). The Commission should refrain from addressing these issues at this time.

STAFF ANALYSIS

The issue before the Commission is to determine the appropriate definition of IP telephony, and what intercarrier compensation mechanism to apply to this traffic. Staff notes that all parties to this proceeding (except BellSouth) filed a Joint Position Statement on July 5, 2001, stating:

> Because the term "IP Telephony" covers a range of relatively nascent and changing technologies, and because the entire topic is subject to one or more ongoing proceedings before the FCC, the FPSC should not, in this docket, establish a compensation scheme that would be intended to apply to IP Telephony or change existing compensation methods applied to such traffic. (Sprint BR 15)

IP telephony is described by Verizon witness Geddes as "a standard protocol that provides a connectionless, unconfirmed [packet] transmission and delivery service." (TR 289) She explains that "connectionless" means that "no handshake occurs between IP nodes prior to sending data." (TR 291) In addition, "unconfirmed" means that IP sends packets without sequencing or acknowledgment that the packets reached their destination. She explains that in IP networks, voice packets are transmitted over a shared network in a "best effort" manner of delivering the packets to their destination. (TR 293) Witness Geddes states:

> While there may not be a single definition for IP Telephony, IP Telephony generally refers to voice or facsimile telephony services that are at least partially transported over an IP network in lieu of the traditional circuit-switched network. (TR 292)

Witness Geddes clarifies that IP telephony does not necessarily involve the World Wide Web. She explains that "Internet Telephony," which encompasses only telephony sent over the Internet, is actually a subset of IP telephony. However, it is a misconception that IP Telephony only refers to calls carried over the Internet. (TR 295)

Witness Geddes describes several applications of IP telephony, such as PC-to-PC, PC-to-phone, phone-to-PC, and phone-to-phone IP telephony. (TR 295-300) She explains that IP telephony was originally a telephony application between two Personal Computers (PC). For PC-to-PC IP telephony, each PC requires an active connection to the Internet, a sound card, a microphone and speakers, along with the same software application. (TR 296) Witness Geddes states that since PC-to-PC IP telephony is limited to users who have an active Internet connection and the same software, this probably cannot serve as a substitute for the Public Switched Telephone Network (PSTN). (TR 296)

Another application described by witness Geddes is PC-to-phone IP telephony. With this application you have the introduction of a "gateway," which is software and hardware that permit communications between two different networks based on different protocols. (TR 297) Beyond the gateway, PC-to-phone IP telephony will traverse the PSTN to be switched to the terminating telephone. Therefore, the PC user will dial a 7 or 10 digit telephone number. With this application, only the originating user will need to have a PC and an active Internet connection. (TR 297)

Alternatively, with phone-to-PC IP telephony the originating party first dials a telephone number to access a gateway. Once the connection is established, the calling party dials the terminating party's telephone number (7 or 10 digit number from a conventional telephone). This telephone number will be a unique number assigned to a PC user who has registered for this service. The PSTN routes the call to the gateway that connects the PSTN to the Internet, and from there the call will be routed by the Internet to the terminating party's PC. (Geddes TR 299)

Finally, witness Geddes describes phone-to-phone IP telephony. This IP telephony application employs two gateways instead of the single gateway utilized in PC-to-phone. She explains that the use of two gateways expands the application of IP telephony to include two conventional telephones. (TR 299) Similar to phone-to-PC IP telephony, the originating caller dials a number to access a gateway. Once connected, the caller then dials the terminating party's telephone number. The call employs a second gateway on the terminating party's end. (TR 299-300) Witness Geddes states that "in this configuration, IP telephony service may appear to the user as no different from traditional circuit-switched telephony service." (TR 300)

Sprint witness Maples concurs, stating that "phone-to-phone IP telephony service providers provide services that are virtually identical to traditional circuit-switched carriers from the end-user perspective." (TR 518) He states that in ¶84 of the FCC's April 1998 USF Order (FCC 98-67), the FCC defines IP telephony services as services that "enable real-time voice transmission using Internet protocols." (TR 516-517) Witness Maples explains that the IP telephony provider merely creates a virtual path between points on the PSTN over a packet-switched IP network. He contends that with phone-to-phone IP telephony, "users simply receive voice transmission services using traditional NPA-NXX

dialing patterns and do not receive any data or information services from a functional standpoint." (TR 518)

FCCA witness Gillan disagrees with such a simplified definition of IP telephony, stating that as "with any emerging technology, there is no single consensus definition of 'IP telephony' - but then there is no immediate need for one." (TR 927) He argues that the real value of packet technology is its ability to integrate data and voice, creating so-called "hybrid enhanced services." (TR 927) Witness Gillan contends that it is "where voice becomes but a component of a more sophisticated arrangement, that the future of IP telephony is likely to be determined." (TR 927) He explains:

> IP telephony describes a continuum of applications that range from pure voice to more sophisticated arrangements. Understanding this continuum is critical because where a service resides on the continuum determines not only its regulatory status, but is likely to determine its commercial success as well...those services most likely to find commercial success will be hybrid services that combine a voice and information capability. Importantly, these hybrid services are classified as information services and excused from conventional regulation (and access charge compensation) by FCC order. (emphasis in original)(TR 929-930)

The only party to this proceeding that did not take part in the Joint Position Statement mentioned above is BellSouth. BellSouth witness Ruscilli states that "IP telephony is, in very simple and basic terms, a mode or method of completing a telephone call." (TR 68) He states that phone-to-phone IP telephony is a telecommunications service that is provided using IP for one or more segments of the call. (TR 68) Witness Ruscilli explains:

> The fact that IP technology is used at least in part to complete a call is transparent to the end user. Phone-to-Phone IP Telephony is identical, by all relevant regulatory and legal measures, to any other basic telecommunications service, and should not be confused with calls to the Internet through an Information Service Provider ("ISP"). (TR 69)

Witness Ruscilli states that as with any other local traffic, reciprocal compensation should apply to any local telecommunications provided through IP telephony. Similarly, access charges should apply to long distance calls provided via IP telephony. (TR 70) He argues that the application of access charges to long distance calls does not depend on the technology used; and due to the increased mixture of IP technology with traditional circuit switching, it is important to specify that all long distance calls constitute switched access traffic regardless of the technology used to transport them. (TR 70) Sprint witness Maples concurs, stating that if "the call is jurisdictionally local, then reciprocal compensation should apply and if the call is non-local the appropriate access charges should apply." (TR 519-520)

BellSouth witness Ruscilli argues that unlike calls to ISPs, IP telephony is not exempt from switched access charges. He asserts that the FCC has provided no exemption for long distance traffic transmitted via IP telephony. (TR 71) Witness Ruscilli explains:

> The FCC's April 10, 1998 Report to Congress states: "The record...suggests...'phone-to-phone IP telephony' services lack the characteristics that would render them 'information services' within the meaning of the statute, and instead bear the characteristics of 'telecommunications services'." Further, Section 3 of the 1996 Act defines "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information sent or received." Thus IP Telephony is telecommunications service, not information or enhanced service. (TR 71)

However, FCCA witness Gillan also cites the FCC's Report to Congress in support of his position. He argues that the FCC <u>did not</u> reach the conclusion that pure phone-to-phone IP telephony service would be telecommunications service, as opposed to information service. (TR 934) He cites ¶83 of the FCC's 1998 Report to Congress as well, however, without the ellipses included in BellSouth witness Ruscilli's cite:

> The record <u>currently before us</u> suggests <u>that certain</u> "phone-to-phone IP telephony" services lack the characteristics that would render them "information services' within the meaning of the statute, and instead

> bear the characteristics of "telecommunications services." We do not believe, however, that it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings. (emphasis added to show text omitted from BellSouth witness Ruscilli's cite)(TR 934-935)

In their joint brief, the ALECs argue that BellSouth witness Ruscilli attempted to create the false impression that the FCC has definitively ruled that phone-to-phone IP telephony is subject to access charges. They state that "[i]n its unedited, original form, the report instead demonstrates that the FCC purposely refrained from making the very leap that Mr. Ruscilli falsely ascribed to it." (BR 30)

FCCA witness Gillan states that although the FCC has clearly excused hybrid services from traditional regulation (and access charges), they have left open the possibility that pure (voice only) IP telephony might be subject to regulation in the future. However, he argues that the relevant question is whether the Commission should attempt to address the remaining ambiguity and impose regulation on this emerging technology. (TR 935) He explains that "[w]hile IP technology *can* support pure-IP Telephony services, there is no market evidence that such services are substitutes for conventional long distance services or commercially sustainable." (emphasis in original)(TR 935) Witness Gillan states:

> The Commission should understand that the number of actual services - and, therefore, the amount of traffic - that is ever likely to be designated a "pure IP telephony" will be relatively small. A major benefit of IP-technology is its ability to integrate voice with other applications - in other words, to offer hybrid services. Plain-vanilla telecommunications will likely still be dominated by plain-vanilla providers, using plain-vanilla (read circuit-switched) technology.
>
> There is *no* market evidence that pure IP telephony - i.e., "first generation" IP telephony that has not evolved to a hybrid arrangement - is a sustainable market strategy, or that *any* IP-Telephony will seriously challenge conventional service. At most, initial offerings appear to be little more than the necessary first steps of a learning process, positioning providers

> to move on to more advanced offerings. (emphasis in original)(TR 937)

Witness Gillan argues that applying access charges would impose a chilling effect on entry and innovation of these new services that, as of yet, have no proven market demand. (TR 936)

Level 3 witness Hunt agrees, stating that IP technology blurs the traditional distinctions between local and long distance service, as well as the distinctions between voice, fax, data, and video service. He asserts that this makes regulating this technology a difficult proposition. (TR 726) He explains that "to impose access charges on one Internet Protocol application and not another (*e.g.*, voice but not data, or phone-to-phone but not computer-to-phone) would raise privacy concerns, since a provider would have to determine the origin, destination, and nature of the packet. Such monitoring would likely be expensive if it could be done at all." (TR 735) Witness Hunt states that the Commission should neither adopt a definition of IP telephony, nor determine what intercarrier compensation mechanism should apply. (TR 711-712) Instead, witness Hunt suggests the Commission examine this issue on a case-by-case basis. (TR 712) He explains that if an ILEC alleges that a specific IP telephony service provided by a particular carrier should be subject to access charges, it may make use of the Commission's complaint procedures and attempt to prove its case. (TR 738)

Verizon witness Beauvais agrees that the Commission should not address this issue in this proceeding. He believes that "at least most parties to this docket would agree with the assessment that there is relatively little IP telephony today, especially for voice traffic. Thus there is no pressing need for the Commission to address this compensation issue now, at least in a generic sense." (TR 317) In addition, witness Beauvais contends that the Commission could not likely issue an empirically supported decision in this case. He explains that "there is no single definition of IP telephony and the technology used in IP telephony is still very much evolving." (TR 317)

FCCA witness Gillan concurs, stating that the Commission should allow the market to "filter" this issue. He explains that the Commission should allow the market to determine which innovations, if any, have lasting significance. He states that if the future reveals that there are some IP telephony services that

actually succeed, then the Commission can determine whether this issue still remains. However, he contends that thus far there have been as many services withdrawn as introduced, and there is no real market experience justifying immediate regulatory action. (TR 943)

Analysis

This issue was framed to address what had appeared to be a matter of considerable contention, requiring a Commission decision in a broad generic sense. However, staff now believes this may have been premature. As noted above, the vast majority of parties to this proceeding have filed a Joint Position Statement stating that the Commission should not address this issue at this time.

The only party that did not participate in the Joint Position Statement, BellSouth, argues that phone-to-phone IP telephony call should be treated no differently than a traditional circuit switched call for purposes of determining the type of compensation due. (BR 23) BellSouth requests that the Commission confirm that "the type of network used to transport a call is irrelevant to the charges that apply, whether reciprocal compensation, toll or switched access. Further, the jurisdiction of a call will be determined by its endpoints, irrespective of the protocol used in the transmission." (BR 25) BellSouth cites to an earlier Commission decision in the BellSouth/Intermedia arbitration, in which the Commission stated:

> A call provisioned using phone-to-phone IP Telephony but not transmitted over the internet, to which switched access charges would otherwise apply if a different signaling and transmission protocol were employed, is nevertheless a switched access call. Except for, perhaps, calls routed over the internet, the underlying technology used to complete a call should be irrelevant to whether or not switched access charges apply. Therefore, like any other telecommunications services, it would be included in the definition of switched access traffic. Therefore, we find that switched access traffic shall be defined in accordance with BellSouth's existing access tariff and include phone-to-phone internet protocol telephony. (PSC-00-1519-FOF-TP)

However, in their joint brief, ALECs point out that Intermedia sought reconsideration of this ruling, thereby preventing it from

becoming effective. While the motion for reconsideration was pending, BellSouth and Intermedia agreed to contractual language governing the subject of IP telephony. Intermedia then effectively withdrew the IP telephony issue from the list of issues to be arbitrated. (BR 31) The ALECs explain that the "parties indicated that, in withdrawing the issue from the motion, they were relying on their understanding that the provision of the interconnection agreement rendered the treatment of IP Telephony in Order No. PSC-00-1519-FOF-TP a nullity." (BR 31) Because that decision was based on the facts of that case and would only have had direct application to those parties in the development of their final arbitrated agreement, staff agrees that withdrawal of the issue by the petitioner, Intermedia, did effectively render the decision on that issue a nullity.

Staff agrees in principle with BellSouth that a call is determined to be local or long distance based upon the end points of the particular call. As such, the technology used to deliver the call, whether circuit-switching or IP telephony, should have no bearing on whether reciprocal compensation or access charges should apply. Nevertheless, staff believes that a broad sweeping decision on this particular issue would be premature at this time. Staff agrees with the majority of witnesses who argue that IP telephony is a relatively nascent technology with limited market application at this time. That being the case, staff is hesitant in recommending a specific decision in this proceeding that could possibly serve to constrain an emerging technology.

In its brief, Level 3 (jointly with Allegiance Telecom) states:

> Given the multitude of ways in which a session could be initiated and the wide array of services that can be provided using packetized voice technology, the Commission, like the FCC, needs to consider if a particular definition of the service accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be quickly overcome by changes in technology. The proper classification of IP telephony is a complex technical and legal issue demanding in-depth factual analysis and the consideration of many policy objectives before broad declarations are made about how such services should be characterized. (BR 43)

Staff agrees. Staff believes that with an emerging technology such as IP telephony, a more in-depth factual examination should be made of specific IP telephony services being provided in the market to determine how they should be compensated between carriers. Unfortunately, such factual information is not in the record of this proceeding.

Level 3 witness Hunt suggests that the Commission examine this issue on a case-by-case basis, stating that "[i]f a LEC believes a particular provider has misclassified its IP-based service to avoid access charges, the LEC may seek relief from the Commission." (TR 712) Given the present circumstances, staff believes this is the best approach to deciding this issue at this time.

Staff notes that FCCA witness Gillan disagrees with this approach, stating that "even this would seem to be a 'solution' out of scale with the 'problem'." (TR 949) Witness Gillan states that the FCC has announced that it intends to initiate a general review of intercarrier compensation, and suggests that the Commission simply monitor the FCC's proceeding and developments in the marketplace. (TR 949) However, staff disagrees and believes that where telecommunications are being provided via IP telephony, intercarrier compensation issues may arise that must be addressed by the Commission. Staff merely recommends that this generic docket is not the appropriate avenue for addressing those issues.

Conclusion

Staff recommends the Commission find that this issue is not ripe for consideration at this time. Staff believes this is a relatively nascent technology, with limited application in the present marketplace. As such, staff recommends that the Commission reserve any generic judgement on this issue until the market for IP telephony develops further. However, staff believes this should not preclude carriers from petitioning the Commission for decisions regarding specific IP telephony services through arbitration or complaint proceedings.

ISSUE 17: Should the Commission establish compensation mechanisms governing the transport and delivery or termination of traffic subject to Section 251 of the Act to be used in the absence of the parties reaching an agreement or negotiating a compensation mechanism? If so, what should be the mechanism?

RECOMMENDATION: Yes. The Commission should determine that the default rate structure for compensation shall be the mechanisms established in 47 C.F.R., Part 51 Subpart H, Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic. The rate levels shall be those established in Docket No. 990649-TP. Nothing in this recommendation is intended to preclude parties in a negotiation from adopting other, mutually agreed-upon, compensation rates and structures. (**BLOOM**)

POSITION OF PARTIES

BELLSOUTH: Yes. The parties should first be allowed to try and reach agreement through the negotiation process. If negotiations are unsuccessful, then the Commission-ordered rates, terms and conditions will apply by default.

VERIZON: No. Because the FCC has initiated a proceeding to establish an intercarrier compensation regime for Section 251 traffic, this Commission should not establish it own, potentially conflicting reciprocal compensation regime. If the Commission does act, it should consider approving bill-and-keep as the default regime.

SPRINT: Yes. The Commission should follow the reciprocal compensation procedures already established by the FCC.

JOINT ALEC: Yes. The Commission should establish "default" symmetrical compensation rates based on the ILEC's costs that will apply unless an ALEC can establish that its own costs are greater. Such rates have been set for BellSouth in the UNE cost docket (Docket No. 990640-TP [sic]) and should be set for Verizon and Sprint in the upcoming phase of that docket.

AT&T, TCG, & MEDIAONE: Yes. The Commission should establish "default" symmetrical compensation rates based on the ILEC's costs that will apply unless an ALEC can establish that its own costs are greater. Such rates have been set for BellSouth in the UNE cost

docket (Docket No. 990640-TP [sic]) and should be set for Verizon and Sprint in the upcoming phase of that docket.

ALLEGIANCE & LEVEL 3: Yes. The Commission should establish "default" symmetrical reciprocal compensation rates based upon the ILEC's costs unless an ALEC can establish that its own costs are greater. The "default" rates should include the tandem interconnection rate when the ALEC switch serves a comparable geographic area.

XO: Yes. The Commission should establish "default" symmetrical reciprocal compensation rates based upon the ILEC's costs unless an ALEC can establish that its own costs are greater. The "default" rates should include the tandem interconnection rate when the ALEC switch serves a comparable geographic area.

STAFF ANALYSIS

BellSouth witness Ruscilli testifies the only issue to be resolved is a determination of which party is financially responsible for the facilities used to transport and terminate local traffic. (TR 73) In its brief, however, BellSouth points out that both the Act and the FCC rules require state commissions to ensure that ILECs have established reciprocal compensation arrangements for the transport and termination of §251(b)(5) telecommunication traffic, and that §252 of the Act obligates carriers to negotiate in good faith to reach agreement on issues such as interconnection. (BellSouth BR p.25) BellSouth contends parties in an arbitration should have the opportunity to negotiate any differences that arise from interconnection and pricing issues before the imposition of a default mechanism establishing rates, terms and conditions. (BellSouth BR pp.25-26) BellSouth does not advocate a specific compensation scheme in its brief.

Verizon witness Beauvais advocates the Commission "should establish a policy preference for bill-and-keep arrangements for all local traffic under Section 251 of the Act." (TR 319) Such an arrangement, witness Beauvais testifies, would work accordingly:

> Under a bill-and-keep approach, each carrier simply interconnects its facilities to that of other carriers and traffic flows between and among networks according to arrangements in the carriers' interconnection agreements. In such situations, there is no explicit compensation to

> be paid by any carrier to another at the tandem rate or any other positive price per minute of use. The compensation is that each carrier allows other carriers to use its network in completing calls which both originate and terminate within the agreed-upon local calling area. (TR 306)

In its brief, Sprint argues the record does not support a bias toward bill-and-keep, contending, "While Verizon did discuss the merits of bill-and-keep in its testimony (TR) [sic] this discussion was on a policy level and no factual evidence was presented to support Verizon's position in favor of bill and keep." (Sprint BR p.16) Sprint cites FCC Order No. 96-325 ¶1113 and FCC Rule 51.713 (b) and (c) as the predicate for imposing bill-and-keep arrangements. Those sections read:

> (b) 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 local telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to §51.711(b).
>
> (c) Nothing in this section precludes a state commission from presuming 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, unless a party rebuts such a presumption.

Sprint interprets this rule to require a showing that balance exists between specific carriers and, "There is no evidence in the record of this proceeding concerning whether traffic exchanged between ILECs and ALECs is roughly balanced either on a global or specific carrier basis." (Sprint BR p. 16) In the absence of sufficient evidence to order bill-and-keep as a default mechanism, Sprint advocates the existing, applicable FCC rules. (Sprint BR p.19)

A brief filed jointly by Global NAPS, US LEC of Florida, WorldCom, e.spire, Time Warner Telecom of Florida, the Florida Cable Telecommunication Association, the Florida Competitive Carriers Association, and KMC Telecom, concurs with the assessment

that insufficient evidence exists in the record to support a bill-and-keep regime. (Joint ALEC BR p.38) In their joint brief, the ALECs state:

> If the Commission believes that bill-and-keep is an option worth pursuing at the state level, it should schedule further hearings on this topic in which a full record can be developed. In the interim, based on the record currently before it, the Commission should continue the current mechanism, which requires payment of explicit reciprocal compensation by originating carriers to terminating carriers. (Joint ALEC BR p.38)

The Joint ALEC brief also recommends the Commission not be "quick to initiate a full scale proceeding on bill-and-keep" because of the existence of the FCC's Notice of Proposed Rulemaking (FCC Order No. 01-132), which seeks comment on the establishment of a unified intercarrier compensation scheme. (Joint ALEC BR p.38) These arguments are adopted by AT&T, TCG of South Florida and Media One in their brief. (AT&T, TCG, and Media One, BR p.27)

Analysis

The parties offered little direct testimony, rebuttal testimony or cross-examination on this issue. With the exception of Verizon, the parties agree the Commission should have a default mechanism. Much of the argument contained in briefs, however, focuses primarily on whether the record supports a default mechanism of bill-and-keep for transport and termination of intercarrier traffic.

Verizon takes the position that the Commission should not initiate its own compensation scheme because the FCC has issued a Notice of Proposed Rulemaking (NPRM), in Order No. 01-132, to develop a unified intercarrier compensation regime. If the Commission does act, Verizon argues in its brief, it should be to express a bias toward bill-and-keep. (Verizon BR p.28) Staff disagrees that this Commission should not take action because of the existence of an NPRM by the FCC. The questions posed by the FCC in Order No. 01-132, while similar to issues raised in this proceeding, mean only that the FCC is considering action, and that action may take a number of years to reach fruition. Issues of immediate concern to this Commission are not contingent on the existence of FCC inquiries along parallel lines.

BellSouth believes the parties in an arbitration should be given an opportunity to structure a compensation arrangement that meets the needs of the respective sides in a negotiation prior to the imposition of a default mechanism. (BellSouth BR pp. 25-26) Staff concurs that the parties should be given every opportunity to resolve differences prior to presenting disputes to the Commission under the provisions of §252 of the Act.

Staff also concurs to a limited extent with Sprint (Sprint BR p. 16) and the Joint ALEC brief (Joint ALEC brief BR p.38) that bill-and-keep arrangements are predicated on specific findings between two parties, and that evidence does not exist in this record to justify such a finding among any of the parties in this docket.

Staff differs with the Joint ALEC brief, however, which advocates "further hearings on the topic in which a full record can be developed." (Joint ALEC BR p.38) Staff observes that rules governing bill-and-keep arrangements are contained in 47 C.F.R. Subpart H, which is recommended by staff as the basis for default mechanisms in the absence of agreement by the parties. If this recommendation is adopted by the Commission, the criteria for bill-and-keep arrangements will be in place and will lack only the data from the respective carriers for a determination of whether traffic is "roughly balanced." If, as Sprint and the Joint ALEC briefs argue, such data is specific to co-carriers whose networks are interconnected for the mutual exchange of telecommunications traffic, the co-carriers may submit their respective traffic data for a determination of whether the Commission finds the volumes are roughly balanced. In this instance, there would be no need for further hearings to develop a generic record for carrier-specific findings.

In addition, the Commission has the option of directing parties in an arbitration to enter into the record the relevant traffic volume data in the event a determination of the appropriateness of bill-and-keep becomes an issue.

Conclusion

The parties provide no testimony for the record to support a finding that any specific compensation arrangement should render subordinate all other compensation regimes that may be negotiated

between co-carriers. Therefore, staff recommends the Commission should determine that the default rate structure for compensation shall be the mechanisms established in 47 C.F.R., Part 51, Subpart H, Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic. The rate levels shall be those established in Docket No. 990649-TP. Nothing in this recommendation is intended to preclude parties in a negotiation from adopting other, mutually agreed-upon, compensation rates and structures.

ISSUE 18: How should the policies established in this docket be implemented?

RECOMMENDATION: Staff recommends the Commission adopt the policies and procedures established in this docket on a going forward basis, allowing carriers, at their discretion, to incorporate provisions into new and existing agreements. Nothing in this recommendation is intended to discourage parties from negotiating other, mutually agreed-on terms or conditions. (**BLOOM**)

POSITION OF PARTIES

BELLSOUTH: The policies established by the Commission in this docket should be implemented prospectively in accordance with change of law provisions in existing interconnection agreements and as a default mechanism in new interconnection agreements.

VERIZON: If the Commission establishes any policy preferences in this docket, they may be applied, if appropriate, in the context of specific arbitrations under the Act.

SPRINT: Any policies established in this docket should be implemented through negotiation and amendment of new and existing interconnection agreements.

JOINT ALEC: The Commission should, in a separate proceeding, establish cost based symmetrical compensation rates available to parties unable to negotiate mutually negotiable rates. The Commission should also establish expedited procedures for implementation of the decisions made in this docket, including expedited resolution of disputes regarding any required amendments to their agreements.

AT&T, TCG, & MEDIAONE: The Commission should, in a separate proceeding, establish cost based symmetrical compensation rates available to parties unable to negotiate mutually negotiable rates. The Commission should also establish expedited procedures for implementation of the decisions made in this docket, including expedited resolution of disputes regarding any required amendments to their agreements.

ALLEGIANCE & LEVEL 3: The Commission should, in a separate proceeding, establish cost based symmetrical compensation rates available to parties unable to negotiate mutually negotiable rates.

The Commission should also establish expedited procedures for implementation of the decisions made in this docket, including expedited resolution of disputes regarding any required amendments to their agreements.

XO: The Commission should, in a separate proceeding, establish cost based symmetrical compensation rates available to parties unable to negotiate mutually negotiable rates. The Commission should also establish expedited procedures for implementation of the decisions made in this docket, including expedited resolution of disputes regarding any required amendments to their agreements.

STAFF ANALYSIS

The ILEC participants in this proceeding appear to agree that there are two methods by which the policies approved by the Commission should be implemented: For existing interconnection agreements, a party may invoke a change of law provision to incorporate the Commission's order; for new interconnection agreements, provisions of this proceeding could be applied as a default mechanism in the event negotiations are unsuccessful. (BellSouth BR p.26; Sprint BR p.19; Verizon BR p.32) Verizon asserts that this is the only appropriate way to have the provisions of this proceeding adopted because to do otherwise would deprive parties of their opportunity to negotiate under §252 of the Act. (Verizon BR p.32)

The Joint ALEC brief and the brief filed by Allegiance Telecom/Level 3 appear to concur with the application of the policies in this docket as a default mechanism to be utilized in the absence of agreement between parties in negotiations. (Joint ALEC BR p.41; Allegiance/Level 3 BR p.48) AT&T states in its brief that it adopts the discussion and arguments advanced in the Joint ALEC brief. (AT&T, TCG, MediaOne BR p.27) In its brief, XO adopts the statements set out in its prehearing statement filed May 31, 2001, and offers no further discussion.

The Joint ALEC brief states the Commission would best serve the industry by adopting policies that can, "be implemented by all carriers efficiently and rapidly, without recourse to protracted litigation." (Joint ALEC BR p.41) The Allegiance/Level 3 brief states, "The rules adopted in this docket will become default rules that apply during interconnection negotiations, mediation and arbitrations. To the extent interconnection agreements contain

change in law requirements, LECs will also be able to amend existing agreements to incorporate the new rules." (Allegiance/Level 3 BR p.48)

The Joint ALEC brief proposes an expedited proceeding in the event an ALEC and an ILEC are unable to agree on how to conform their business practices to the policies adopted in this docket. (Joint ALEC BR p.42) The Joint ALEC brief does not offer any insight into the nature of the disputes that it believes may arise or provide specifics on how an expedited resolution procedure should be structured.

Allegiance/Level 3 does offer specific time frames for an expedited dispute resolution procedure in its brief, proposing responses be due 10 days after the filing of a complaint; hearings, when necessary, initiated within 30 days of the filing of a complaint; and decisions rendered within 30 days of the hearing. (Allegiance/Level 3 BR pp.49-50)

The Allegiance/Level 3 brief also seeks a reaffirmation from the Commission that "prior to June 14, 2001, ISP-bound traffic was subject to reciprocal compensation in the state of Florida and BellSouth, Sprint, and Verizon should pay any outstanding, withheld reciprocal compensation for ISP-bound traffic exchanged prior to that date." (Allegiance/Level 3 BR p.49) The Allegiance/Level 3 brief also requests an affirmation that the geographic coverage test is "the sole criteria [sic]" for tandem switching rates. (Allegiance/Level 3 BR p.49)

All ALEC briefs filed state in their position summaries that the Commission should, in a separate proceeding, establish cost-based symmetrical compensation rates as the default mechanism. (Allegiance/Level 3 BR p.48; AT&T BR p.27; Joint ALEC BR p.41) None of the ALEC briefs, however, offer discussion in support of a separate proceeding and it is not clear if the request for a separate proceeding is an allusion to Docket No. 990649.

Analysis

It appears from the parties' briefs that there is consensus that the policies established by the Commission in this docket should stand as a default mechanism, effectively serving as a regulatory lynchpin to which a carrier may defer in the event negotiations pursuant to §252 of the Act are unsuccessful. This

approach appears to be consistent with the Act's expressed preference for voluntary negotiations and mediation prior to a request by a petitioner for compulsory arbitration.

Staff notes the Commission rejected a request to create expedited complaint procedures in Docket No. 981834-TP (Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth Telecommunications, Inc.'s Service Territory). In that docket, the Commission gave three reasons why an expedited procedure was not desirable. First, the Commission found that existing rules permit the filing of petitions with a request for expedited treatment. Second, the Commission found that an expedited complaint procedure would deprive the Commission of its discretion to exercise its jurisdiction. Third, the Commission found the creation of an expedited complaint procedure for ALECs would entitle ALECs to special treatment that consumers and other parties before the Commission would not receive. Staff finds no compelling evidence or testimony in the record of this proceeding to justify the redux of a request previously rejected by the Commission. Staff notes that in a recent case, an informal, expedited process was employed for a dispute arising out of an interconnection agreement. The dispute, however, was resolved.

In its brief, Allegiance/Level 3 seeks a declaration from this Commission regarding tandem switching rates. Staff notes that tandem switching is addressed fully in Issue 12 of this recommendation and sees no reason to reargue those matters here.

The request by the ALECs for separate proceedings to establish symmetrical reciprocal compensation rates is vague in this context and is unsupported by evidence or testimony not considered in Issue 14; therefore, staff has not addressed those matters in this recommendation.

Conclusion

The parties appear to agree that the policies in this docket should serve as a default mechanism. Therefore, staff recommends the Commission adopt the policies and procedures established in this docket on a going forward basis, allowing carriers, at their discretion, to incorporate provisions into new and existing agreements. Nothing in this recommendation is intended to discourage parties from negotiating other, mutually agreed-on terms or conditions.

ISSUE 19: Should this Docket be closed?

RECOMMENDATION: No. This docket should remain open pending the outcome of the Phase 1 proceeding of this docket. **(BANKS)**

STAFF ANALYSIS: This docket should remain open pending the outcome of the Phase 1 proceeding of this docket.

LIST OF ISSUES AND RECOMMENDATION STATEMENTS

ISSUE 10: Pursuant to the Telecommunications Act of 1996 (Act), the FCC's rules and orders, and Florida Statutes, what is the Commission's jurisdiction to specify the rates, terms, and conditions governing compensation for transport and delivery or termination of traffic subject to Section 251 of the Act?

RECOMMENDATION: Staff believes that the Commission has jurisdiction to specify rates, terms and conditions governing compensation for transport and delivery or termination of traffic pursuant to Section 251 of the Act, the FCC's rules and orders, and Sections 364.161 and 364.162, Florida Statutes, so long as not otherwise inconsistent with the FCC's rules and orders, and the Act. Further, staff believes that Section 120.80(d), Florida Statutes, authorizes the Commission to employ procedures necessary to implement the Act. **(BANKS)**

ISSUE 12(a): Pursuant to the Act and FCC's rules and orders, under what condition(s), if any, is an ALEC entitled to be compensated at the ILEC's tandem interconnection rate?

RECOMMENDATION: Staff recommends that an ALEC is entitled to be compensated at the ILEC's tandem interconnection rate when its switch either serves a comparable geographic area to that served by an ILEC tandem switch, or performs functions similar to those performed by an ILEC tandem switch. **(HINTON)**

ISSUE 12(b): Pursuant to the Act and FCC's rules and orders, under either a one-prong or two-prong test, what is "similar functionality?"

RECOMMENDATION: Staff recommends that "similar functionality" should be defined as trunk-to-trunk switching when determining if an ALEC is entitled to the tandem interconnection rate pursuant to FCC 96-325, ¶1090. **(HINTON)**

ISSUE 12(c): Pursuant to the Act and FCC's rules and orders, under either a one-prong or two-prong test, what is "comparable geographic area?"

RECOMMENDATION: Staff believes that a "comparable geographic area," pursuant to FCC Rule 51.711, is a geographic area that is roughly the same size as that served by an ILEC tandem switch.

Staff recommends that an ALEC "serves" a comparable geographic area when it has deployed a switch and has opened NPA/NXXs to serve the exchanges within this area. In addition, staff recommends that the ALEC must show that it is serving this area either through its own facilities, or a combination of its own facilities and leased facilities connected to its collocation arrangements in ILEC central offices. **(HINTON)**

ISSUE 13: How should a "local calling area" be defined, for purposes of determining the applicability of reciprocal compensation?

RECOMMENDATION: Staff recommends that parties be permitted to negotiate the definition of local calling area for the purposes of reciprocal compensation to be contained in their interconnection agreements. However, if negotiations fail, staff recommends that "local calling area" for the purposes of reciprocal compensation be defined as "all calls that originate and terminate in the same LATA." **(HINTON)**

ISSUE 14: **(a)** What are the responsibilities of an originating local carrier to transport its traffic to another local carrier?

(b) For each responsibility identified in part (a), what form of compensation, if any, should apply?

RECOMMENDATION: **(a)** An originating carrier has the responsibility for delivering its traffic to the point(s) of interconnection designated by the alternative local exchange company (ALEC) in each LATA for the mutual exchange of traffic. **(BLOOM)**

(b) An originating carrier is precluded by FCC rules from charging a terminating carrier for the cost of transport, or for the facilities used to transport the originating carrier's traffic, from its source to the point(s) of interconnection in a LATA. These rules require an originating carrier to compensate the terminating carrier for transport and termination of traffic through intercarrier compensation. **(BLOOM)**

ISSUE 15: **(a)** Under what conditions, if any, may carriers assign telephone numbers to end users physically located outside the rate center in which the telephone number is homed?

(b) Should the intercarrier compensation mechanism for calls to these telephone numbers be based upon the physical location of the customer, the rate center to which the telephone number is homed, or some other criterion?

RECOMMENDATION: (a) Staff recommends that carriers be permitted to assign telephone numbers to end users physically located outside the rate center to which the telephone number is homed, within the same LATA. **(HINTON)**

(b) Staff recommends that intercarrier compensation for calls to these numbers be based upon the end points of the particular calls. However, staff does not recommend that the Commission mandate a particular intercarrier compensation mechanism for virtual NXX/FX traffic. Since non-ISP virtual NXX/FX traffic volume may be relatively small, and the costs of modifying the switching and billing systems may be great, staff believes it is best left to the parties to negotiate the best intercarrier compensation mechanism to apply to virtual NXX/FX traffic in their individual interconnection agreements. While not recommending a particular compensation mechanism, staff does recommend that virtual NXX traffic and FX traffic be treated the same for intercarrier compensation purposes. **(HINTON)**

ISSUE 16: (a) What is the definition of Internet Protocol (IP) telephony?

(b) What carrier-to-carrier compensation mechanism, if any, should apply to IP telephony?

RECOMMENDATION: Staff recommends the Commission find that this issue is not ripe for consideration at this time. Staff believes this is a relatively nascent technology, with limited application in the present marketplace. As such, staff recommends that the Commission reserve any generic judgement on this issue until the market for IP telephony develops further. **(HINTON)**

ISSUE 17: Should the Commission establish compensation mechanisms governing the transport and delivery or termination of traffic subject to Section 251 of the Act to be used in the absence of the parties reaching an agreement or negotiating a compensation mechanism? If so, what should be the mechanism?

RECOMMENDATION: Yes. The Commission should determine that the default rate structure for compensation shall be the mechanisms established in 47 C.F.R., Part 51 Subpart H, Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic. The rate levels shall be those established in Docket No. 990649-TP. Nothing in this recommendation is intended to preclude parties in a negotiation from adopting other, mutually agreed-upon, compensation rates and structures. (**BLOOM**)

ISSUE 18: How should the policies established in this docket be implemented?

RECOMMENDATION: Staff recommends the Commission adopt the policies and procedures established in this docket on a going forward basis, allowing carriers, at their discretion, to incorporate provisions into new and existing agreements. Nothing in this recommendation is intended to discourage parties from negotiating other, mutually agreed-on terms or conditions. (**BLOOM**)

ISSUE 19: Should this Docket be closed?

RECOMMENDATION: No. This docket should remain open pending the outcome of the Phase 1 proceeding of this docket. **(BANKS)**