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June 10, 2002

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Ms. Blanca S. Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

Re: Docket No. 000075-TP

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of AT&T Communications of the Southern States, LLC ("AT&T"), TCG of South Florida ("TCG"), and AT&T Broadband Phone of Florida, LLC ("AT&T Broadband") are the following documents:

1. Original and fifteen copies of the Posthearing Brief; and

2. A disk containing a copy of the Posthearing Brief in Word Perfect 6.0.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

Thank you for your assistance with this filing.

Sincerely,

Martin P. McDonnell

Martin P. McDonnell

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996.	Docket No. 000075-TP (Phase IIA) Filed: June 10, 2002

POSTHEARING BRIEF OF AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC, TCG OF SOUTH FLORIDA AND AT&T BROADBAND PHONE OF FLORIDA, LLC (FORMERLY KNOWN AS MEDIAONE FLORIDA TELECOMMUNICATIONS, INC.)

Pursuant to the procedural Orders issued by the Commission in this docket, and Rule 28-106.205, Florida Administrative Code, AT&T Communications of the Southern States, LLC ("AT&T"), TCG of South Florida ("TCG") and AT&T Broadband Phone of Florida, LLC ("AT&T Broadband") (formerly known as MediaOne Florida Telecommunications, Inc.), hereinafter referred to collectively as "AT&T", files its Posthearing Brief.

STATEMENT OF BASIC POSITION

Pursuant to the Federal Telecommunications Act of 1996 ("Act") and Federal Communications Commission ("FCC") rules and orders, state commissions should develop policies that promote local exchange services competition between incumbent local exchange companies ("ILECs") and alternative local exchange telecommunications companies ("ALECs"). Each ALEC, competing for its desired position in the marketplace, should have the opportunity to negotiate its local calling area with the ILEC. In the absence of the parties reaching agreement, the Commission should establish LATA-wide local calling for intercarrier compensation purposes.

In order for the ALECs to meaningfully compete in the marketplace, it is imperative that they not be saddled with "cloning" the ILECs' historical networks and local calling areas in the provision of local telecommunications services. ALECs seek the flexibility to differentiate their service from

ILECs and should not be competitively disadvantaged by being forced to adopt the ILEC's local calling area. LATA-wide local calling for purposes of intercarrier compensation will give ALECs this flexibility, which will in turn enhance competition and result in an overall benefit to consumers.

The Commission should retain its current reciprocal compensation policy as the appropriate compensation mechanism governing the transport and delivery or termination of traffic subject to Section 251 of the Act, unless negotiating parties agree otherwise. Section 252(d)(2)(A) of the Act states that an interconnection agreement between an ILEC and ALEC cannot be found just and reasonable unless the agreement itself provides 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 of the other carrier. Reciprocal compensation appropriately imposes costs on the cost-causer, and allows the costs to be shared by both the originating company and the terminating company. Bill-and-keep, on the other hand, preserves objectionable aspects of the existing patchwork of intercarrier compensation. Bill-and-keep would be neither efficient nor competitively neutral and would result in significant unintended and undesirable consequences, including potential regulatory arbitrage, increased unwanted calls to consumers, and a considerable financial windfall to ILECs.

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

(a) What is the Commission's jurisdiction in this matter?

AT&T: *The Commission has jurisdiction to define its local calling areas for determining the applicability of reciprocal compensation pursuant to Section 251(b)(5) of the Act, and the Florida Supreme Court ruling in Florida Interexchange Carriers v. Beard, 624 So.2d 248 (Fla. 1993).*

In paragraph 1035 of its *Local Competition Order* (FCC 96-325),[1] the FCC specifically addressed the authority of state commissions to define local calling areas for purposes of determining the applicability of reciprocal compensation. Paragraph 1035 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 commission's 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, or 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.

In addition, the Florida Supreme Court has determined that the Commission has statutory authority to determine local calling areas:

> The exclusive jurisdiction in section 364.01 to regulate telecommunications gives the [Florida Public Service] Commission the authority to determine local routes.

[1]*In the matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, (1996) ("*Local Competition Order*").

Florida Interexchange Carriers v. Beard, 624 So.2d 248, 251 (Fla. 1993).

(b) **Should the Commission establish a default definition of local calling area for the purpose of intercarrier compensation, to apply in the event parties cannot reach a negotiated agreement?**

AT&T: *Yes. The Commission should establish a default definition of local calling area for the purpose of intercarrier compensation in the event parties cannot reach a negotiated agreement.*

A default definition of local calling area would serve the dual purpose of assisting carriers in negotiating their local calling area in their agreements as the carriers would know the parameters of the default mechanism, and would result in a consistent statewide default definition of local calling area for the purpose of intercarrier compensation.

(c) **If so, should the default definition of local calling area for purposes of intercarrier compensation be: (1) LATA-wide local calling, (2) based upon the originating carrier's retail local calling area, or (3) some other default definition/mechanism?**

AT&T: *The default definition of local calling for purposes of intercarrier compensation should be LATA-wide local calling.*

The Commission should adopt a true LATA-wide local calling area which would include all calls that originate and terminate in the LATA. LATA-wide local calling allows for fair reciprocal compensation between all carriers for calls placed between ILEC and ALEC customers. As AT&T witness Paul Cain stated, LATA-wide local calling would simplify the process of reciprocal compensation between carriers and, more significantly, benefit consumers by making it possible for ALECs to offer more flexible retail calling plans. (Tr. A215-216).[2]

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[2]The Commission held two hearings regarding Issues 13 and 17 of the instant docket. The first hearing was held on July 5-6, 2001 (Phase II) and the second hearing was held May 8, 2002 (Phase IIA). Separate transcripts were prepared for each hearing. When references are made to the July 5-6, 2001 hearing, the citation will read (Tr. _). When the references are made to the May 8, 2002 hearing, the citation will read (Tr. A__).

A LATA-wide calling area would simplify retail call rating as well as intercarrier billing of reciprocal compensation. (Tr. A218). Additionally, a clear "fallback" policy statement while encouraging negotiations would also tend to reduce the number of issues that must be arbitrated. In order to allow all LECs and their customers to achieve the administrative and consumer benefits resulting from a LATA-wide local calling area for reciprocal compensation purposes, all calls that originate and terminate in the same LATA of the calling and called parties should be treated as local. The Commission should not consider the numerous exceptions bound to be raised by the ILECs who seek to complicate the issue in order to maintain their traditional (and sometimes anti-competitive) sources of income. (Tr. A219).

ALECs are using their networks in more flexible ways in attempting to compete with the ILECs and the Commission should encourage such innovation by instituting rational and simple compensation policies. When a call originates and terminates in the same LATA and travels between one local provider and another, neither dialing pattern nor the path between the two networks should determine the compensation for that call. There is simply no reason, other than entrenched monopoly thinking, for maintaining a distinction. (Tr. A219).

A LATA-wide local calling area results in the elimination of intra-LATA toll charges for various paths that a call traverses and eliminates the need to input different rates for those calls. IntraLATA calls should be consistently rated the same no matter what dialing pattern is used.

LATA-wide local calling will simplify what is now a complex billing system and will alleviate future arbitrage over various calling plans, calling patterns and incorrect ratings of calls between carriers. The billing systems already in place would be significantly simplified as LECs would only need to rerate calls to one rate for all of the calls that originate and terminate in the

LATA regardless of dialing pattern. (Tr. A220).

The current limitations on the ALECs' local calling area flexibility, championed by the ILECs, has effectively negated any real competition in the local telecommunications market in Florida. (Tr. 683). In virtually every other section of the telecommunications industry where competition is effective, including long distance, wireless and the Internet, distance costs are no longer a factor. (Tr. 626). Prior to the emergence of true competition in the wireless market, cellular carriers offered limited local calling areas (often replicating the local calling area defined by the ILECs), and also imposed high "roaming" charges for outward calls that were originated outside of the customer's "home" service territory (even where the call was originated from another service territory controlled by the same cellular carrier). (Tr. 613). As competitors entered the wireless market, they began to offer extended, sometimes nationwide local calling, and today there are calling plans that eliminate most or all toll charges. (Tr. 683-684). The potential for similar results in the landline local exchange market is there if directed by pro-competitive regulatory policies.

Ironically, wireless affiliates of the very same ILECs that have presented testimony to preserve local calling areas in this docket are themselves offering services with nationwide local calling, that is, offering services that have no toll charges for calls anywhere in the United States. (Tr. 683-684). Nonetheless, Sprint, Verizon and BellSouth all assert that the default local calling area should be defined by the Commission as the ILECs' local calling areas. (Sprint, Tr. A170, Verizon, Tr. A86, BellSouth, Tr. A23).

i. The ILECs' proposal to define a default local calling area as the ILECs' historical local calling area must be rejected.

The ILECs' local calling areas were established prior to the Act and were not established for the purpose of interconnection with competitive carriers. (Tr. 208-209). More importantly, ILECs have the flexibility, based upon their ubiquitous networks, to extend their local calling areas beyond the boundaries of the basic local calling areas on file with the Commission. BellSouth's tariffs, for example, specify extended area service (EAS) exchanges and extended calling service (ECS) exchanges. BellSouth's (and the other ILECs') ability to offer their customers local calling area options is an effective marketing tool and should be equally available to the ALECs. Yet, under the ILECs' proposal, it is not. Establishing a default definition of local calling area as LATA-wide local calling would enhance competition, level the playing field and result in overall benefits to consumers.

In this docket, the ILECs contend that they support an ALEC's right to define its own local calling area as the ALEC sees fit. However, lurking behind this seeming fair-mindedness is the true ILEC position: the ILECs contend they should not pay reciprocal compensation, instead ILECs believe they should be collecting originating switched access charges, for calls that an ALEC terminates in the ALEC's extended local calling area. (BellSouth, Tr. 67, Verizon, Tr. 311, Sprint, Tr. 526). If the Commission were to adopt the ILECs' position, ALECs would not be able to offer their customers local calling areas other than the ILEC's without paying the ILECs the artificially high originating switched access charges. Such a compensation regime would stifle competition and increase the ILEC's formidable competitive advantages.

An ALEC does have some flexibility with respect to "outward" calling plans. That is, an ALEC may decide that it will not assess toll charges on its customers for originated calls that terminate outside the ILEC's local calling area. (Tr. 615). However, in the case of "inward" calls, that is, calls received by the ALEC customer from another calling party (who is most likely to be an ILEC customer), the calling party's local calling plan will necessarily govern the rate treatment of the call. (Tr. 616). In fact, BellSouth witness Ruscilli testified that if an ALEC were to terminate a call originated by a BellSouth end user in the ALEC's extended local calling area, BellSouth believes it should not have to pay reciprocal compensation to the ALECs. BellSouth would also demand that the ALECs pay to BellSouth originating switched access charges. (Tr. 50). That position is shared by Verizon. (Tr. 446). Forcing the ILEC's local calling area to control the intercarrier compensation of a call, and assessing a switched access charge on an ALEC for every telephone call that terminates outside the ILEC's local calling area (but within the ALEC's extended local calling area), would make it an economic impossibility for the ALEC to introduce any sort of extended local calling area pricing. (Tr. 683).

BellSouth and Verizon have both asserted in this docket that a LATA-wide local calling concept has two primary detriments: LATA-wide local calling will negatively impact the ILEC's ability to perform its "universal service" functions; and, LATA-wide local calling violates Section 364.16(3)(a), Florida Statutes. Both of these assertions are specious.

ii. Establishing a LATA-wide local calling area will not impact any ILEC's ability to perform its universal service functions; however, if an ILEC asserts that the functions will be implicated, Florida Statutes and this Commission's own policies allow an ILEC to petition the Commission for a change in the interim universal service mechanism

"Universal service" is defined by Section 364.025, Florida Statutes as "an evolving level of access to telecommunications services that, taking into account advantages and technologies, services, and market demand for essential services, the Commission determined should be provided at just, reasonable, and affordable rates to consumers, including those in rural, economically disadvantaged, and high-cost areas." It is the stated intent of the Legislature that the ubiquitous nature of the local exchange telecommunications companies be used to satisfy these objectives, and from January 1, 1996 through January 1, 2004, ILECs are required to furnish basic local exchange telecommunications service within a reasonable time period to any person requesting such service within the company's service territory.[3] Further, Section 364.025(3), Florida Statues, recognizes the right of an ILEC to petition the Commission for a change in universal service, and states as follows:

> (3) In the event any party, prior to January 1, 2004, believes that circumstances have changed substantially to warrant a change in the interim mechanism, that party may petition the Commission for a change, but the Commission shall grant such petition only after an opportunity for a hearing and a compelling showing of changed circumstances, including that the provider's customer population includes as many residential as business customers. The Commission shall act on any such petition within one hundred twenty days.

Noticeably absent from the record in the instant docket are any cost studies provided to the Commission by any ILEC that would establish that the economic impact on the ILECs of a LATA-wide local calling area would constitute a "compelling showing of changed circumstances" to trigger an ILEC's statutory right to petition the Commission for a change in the interim universal service mechanism.[4] In fact, in response to questions from Commissioner Deason, BellSouth witness

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[3]Section 364.025(1), Florida Statues.

[4]See *In re: Determination of Funding for Universal Service and Carrier of Last Resort Responsibilities*, Docket No. 950696-TP, Order No. PSC-95-1592-FOF-TP issued December 27, 1995 wherein the Commission addressed Florida's universal service mechanism and held that BellSouth and GTE Florida had not demonstrated that competition would erode their ability to sustain universal service as a carrier of last resort. The Commission held that the universal service mechanism should consist of two parts. First, LECs should continue to fund their

Shiroishi admitted that currently, there are numerous wireless plans which BellSouth offers to customers which provide expanded local calling areas or eliminate toll calls entirely. (Tr. A56). Further, Ms. Shiroishi testified that the wireless market expanded more quickly than BellSouth suspected, and BellSouth is experiencing a decrease in landline minutes of use every month. (Tr. A57). Nonetheless, BellSouth has never petitioned the Commission pursuant to Section 364.025(3), F.S., for a change in its universal service support mechanism based upon the decrease of monthly minutes of intraLATA toll traffic due to competition from wireless carriers.

Verizon witness Trimble testified that access revenue is only one of many components that help support the Universal Service Fund. (Tr. A149). Witness Trimble stated for example that in Florida, Verizon has PBX trunk rates in downtown Tampa that are priced at approximately $55 a line, which is in excess of the competitive market rate and the cost. (Tr. A149). According to Mr. Trimble, Commission staff generated a report in 1999 that reviewed the pricing of various ILEC services in relationship to their underlying cost. Many of these services were priced at 1,000% to 5,000% above their underlying cost. (Tr. A150). There is no reason to believe that a LATA-wide local calling area will impair an ILEC's ability to perform its universal service obligations. If so, it is free to petition the Commission for relief pursuant to Section 364.025(3), Florida Statutes.

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universal service obligations as they currently do; that is, through markups on the services they offer.

Secondly, if a LEC finds that its ability to sustain universal service obligation has, in fact, been eroded due to competitive pressures it may file a petition with the Commission for company specific universal service relief. Its petition would be handled on an expedited basis. The petition must specifically demonstrate that competitive entry has eroded its ability to sustain universal service, and specifically quantify the alleged shortfall that is due to competitive entry. The LEC would also need to submit incremental cost data to identify the amount of its universal service subsidy as well as calculations of the amount of net contribution lost that had been supporting the universal service subsidy. *Order* at page 28.

iii. LATA-wide local calling does not violate Section 364.16(3)(a), Florida Statutes

The ILECs' second argument; that LATA-wide local calling would violate Section 364.16(3)(a), Florida Statutes,[5] is equally misleading. That section reads:

> (a) No local exchange telecommunications company or alternative local exchange telecommunications company shall knowingly deliver traffic, for which terminating access charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

Clearly, Section 364.16(3)(a), F.S., proscribes an ALEC or ILEC from knowingly delivering local traffic for which *terminating access service charges would otherwise apply.* If the Commission were to decide that the appropriate default mechanism is LATA-wide local calling, obviously terminating access service charges would *not* apply and Section 364.16(3)(a) would not be implicated.

To further illustrate the absurdity of BellSouth's position that LATA-wide local calling violates Section 364.16(3)(a), BellSouth witness Shiroishi testified that BellSouth is currently operating under 14 (or more) interconnection agreements wherein BellSouth recognizes LATA-wide local calling for purposes of reciprocal compensation. (Tr. A71). BellSouth currently recognizes LATA-wide local calling in interconnection agreements with AT&T, Level 3 Communications, LLC, Alltel Florida, Inc., US LEC of Florida Inc. and Time Warner Telecom of Florida, L.P., all parties to this docket. (Tr. A71). In fact, BellSouth witness Ruscilli testified that due to the fact that ALECs can adopt the LATA-wide local calling area provisions in interconnection agreements 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.

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[5]See Tr. A39 (Shiroishi) and Tr. A104 (Trimble).

(Tr. 213). Witness Ruscilli also acknowledged that there could be some administrative efficiencies in having one definition of the local calling area for purposes of intercarrier compensation. (Tr. 213).

The Commission should establish a true LATA-wide local calling area as the default mechanism. A LATA-wide local calling area would simplify retail call rating as well as intercarrier billing of reciprocal compensation. All intraLATA calls would then be treated the same for reciprocal compensation purposes with each minute billed the same way. Establishing the LATA as the default local calling area will allow ALECs to offer their customers local calling arrangements that may vary from those offered by the ILECs. Such a policy would enhance competition which will ultimately benefit Florida's consumers.

<u>Issue 17</u>: **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 agreement or negotiating a compensation mechanism? If so, what should be the mechanism?**

(a) Does the Commission have jurisdiction to establish bill-and-keep?

<u>AT&T</u>: *Yes, the Commission has jurisdiction to establish bill-and-keep, if local traffic between the carriers is roughly balanced.*

Pursuant to FCC Rule 51.713(b), the Commission may impose bill-and-keep arrangements if 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.

(b) What is the potential financial impact, if any, on ILECs and ALECs of bill-and-keep arrangements?

<u>AT&T</u>: *A bill-and-keep arrangement would cause major adverse financial impact on ALECs without a concomitant reduction in administrative costs.*

Under bill-and-keep, ALECs will lose a significant source of income that is necessary to recover the costs for transporting and terminating calls originating on an ILEC network. Further, under a bill-and-keep arrangement, the carrier that originates more calls than it terminates obviously would receive a financial windfall.

Section 252(d)(2)(a) of the Act states that an interconnection agreement between carriers cannot be found just and reasonable unless the agreement itself "provides 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 of the other carrier." Reciprocal compensation appropriately imposes costs on the cost-causer, while bill-and-keep allows the originating party to retain the money it normally would have to pay for the use of the terminating carrier's network. (Tr. A226).

Bill-and-keep would create new opportunities for both regulatory arbitrage and monopoly abuse by encouraging carriers to seek out customers who make more calls than they receive (e.g., telemarketers, stockbrokers). (Tr. A223). Additionally, a bill-and-keep regime would not significantly reduce ALECs' administrative costs as ALECs still must track each minute of use (MOU) to determine whether the traffic exchanged is roughly balanced.

As outbound calls would surely increase under a bill-and-keep regime, pricing signals to customers would have to change dramatically in order to pay for the costs of running the network. If the current local calling traffic patterns in Florida were to continue under a bill-and-keep regime, ILECs would achieve a considerable windfall, as ALECs would be forced to terminate the ILECs' local traffic to the ALECs without any commensurate compensation. (Tr. A224).

In fact, BellSouth witness Shiroishi admitted that in or around 1996, BellSouth took the position before the Commission that a bill-and-keep arrangement does not allow it to recover its costs of terminating traffic. On Thursday, May 8, 2001, in Phase I of the instant docket, the following exchange took place between counsel for AT&T and Ms. Shiroishi:

Question:	Okay, are you aware that BellSouth has previously taken the position before this Commission that a bill-and-keep arrangement does not allow it to recover its costs of terminating traffic?
Answer:	Are you referring to the early proceedings, the '96 time frame?
Question:	Yes.
Answer:	Yes, I am aware.
Question:	Okay. So you are aware that BellSouth previously has taken the position that a bill-and-keep arrangement does not allow it to recover its costs of terminating local traffic?
Answer:	For local traffic, that is correct.
	. . .
Question:	Would you agree with me then because BellSouth understood at that time back in the 96 time frame that substantially all the traffic would be terminated to BellSouth, that it was for that reason that BellSouth opposed bill-and-keep before the Commission in 1996?
Answer:	Again, I'm not sure I can speak to all the reasons behind. I don't - - I haven't recently read all the proceedings and what was said. But I understand that we were not advocating bill-and-keep.
Question:	Is my statement unreasonable?
Answer:	No, I don't think it is unreasonable.[6]

The admission by Ms. Shiroishi that BellSouth opposed bill-and-keep in 1996 when BellSouth terminated virtually all of the local traffic highlights AT&T's position that a bill-and-keep

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[6]See Tr. 689-690 of Phase I in generic docket no. 000075-TP, March 8, 2001.

arrangement is simply unfair to any party that terminates more local traffic than it originates because that carrier is unable to fully recover its costs in a bill-and-keep arrangement.

(c) If the Commission imposes bill-and-keep as a default mechanism, will the Commission need to define generically "roughly balanced?" If so, how should the Commission define "roughly balanced?"

AT&T: *Yes, if the Commission imposes bill-and-keep as a default mechanism, it will need to define generically "roughly balanced." Traffic should be considered "roughly balanced" when the difference between the amounts of traffic terminated by each carrier is almost insignificant.*

FCC Rule 51.713(b) allows state commissions to impose bill-and-keep arrangements only if traffic is roughly balanced between providers. It would inappropriately put the cart before the horse to impose bill-and-keep without defining roughly balanced.

A bill-and-keep regime can only provide for mutual recovery of costs when traffic between the parties is in balance. If traffic is out of balance, the carrier that terminates more traffic incurs greater termination costs than it is relieved of - - in essence, subsidizing the other carrier. Thus the definition of "roughly balanced" is essential to a fair implementation of a bill-and-keep regime. Without a Commission definition, ALECs and ILECs must negotiate this definition, which inevitably will lead to disputes and ultimately force the Commission to decide the issue.

ILECs and ALECs are unlikely to exchange precisely the same number of minutes of local traffic. Therefore, FCC Rule 51.713(b) does not require precision, but instead allows bill-and-keep when the exchange of traffic is approximately - - rather than precisely - - the same for each party such that the difference between the amounts is insignificant. If the Commission adopts bill-and-keep, the definition of "roughly balanced" is critical to AT&T and must comport with the requirement in Section 252(b)(2)(b)(i) of the Act that the Commission's authority to set rates for the transport and termination of traffic subject to 251(b)(5) "shall not be construed to preclude arrangements that afford a *mutual recovery* of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." (Emphasis added). The more traffic *imbalance* the Commission allows under a bill-and-keep regime, the more disadvantaged is the party that terminates more traffic than it originates - - generally the ALEC. (Tr. A197).

BellSouth witness Shiroishi recommends that the Commission should find that all traffic below a 3:1 ratio of originating to terminating traffic is "roughly balanced." (Tr. A29). That recommendation should be rejected. In support of her recommendation, Ms. Shiroishi grossly mischaracterizes the FCC's recent ruling regarding intercarrier compensation for ISP-bound traffic.[7] Ms. Shiroishi's profound misreading of the FCC's *ISP Remand Order* is illustrated in her following conclusory testimony regarding bill-and-keep:

> a. BellSouth requests that the Florida Public Service Commission make the finding that traffic subject to 251(b)(5) is presumed to be roughly balanced, and, *following already established precedent*, find that traffic below a 3:1 ratio of originating to terminating traffic is roughly balanced. (Tr. A31). (Emphasis supplied).

In the *ISP Remand Order* the FCC did not address a definition of "roughly balanced" within the context of Rule 51.713(b) but only discussed the 3:1 ratio in the context of a presumption regarding ISP-bound traffic:

> We understand that some carriers are unable to identify ISP-bound traffic. In order to limit disputes and avoid costly efforts to identify this traffic, we adopt a rebuttal presumption that traffic delivered to

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[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, Order on Remand, FCC 01-131 (April 27, 2001) ("*ISP Remand Order*"). Remanded in *WorldCom v. FCC*, D.C. Circuit Ct. of Appeals, No. 01-1218, decided May 3, 2002.

> a carrier, pursuant to a particular context, that exceeds a 3:1 ratio of terminating to originating traffic as ISP-bound traffic that is subject to the compensation mechanism set forth in this Order.[8]

Ms. Shiroishi's attempt to misguide the Commission into believing that the FCC established a precedent that traffic below a 3:1 ratio of originating to terminating is "roughly balanced" for purposes of Rule 51.713(b) must be dismissed. Should the Commission find that traffic below a 3:1 ratio of originating to terminating traffic is roughly balanced (in light of the FCC presumption that any traffic over 3:1 is presumed to be ISP-bound and not subject to reciprocal compensation), every ALEC in Florida would be forced to terminate all of BellSouth's local traffic for free; even if that ALEC terminates three times the BellSouth traffic that it originates and sends to BellSouth. Such a result, although constituting a huge financial windfall for BellSouth, violates the letter and spirit of Section 252(d)(2)(b)(i) of the Act which, as stated above, dictates that the authority to set rates for the transport and termination of traffic subject to 251(b) shall not be construed "to preclude arrangements that afford the *mutual* recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements.)" (Emphasis added).

FCC Rule 51.713(c) addresses a commission's authority to presume that traffic is in balance and states as follows:

> (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.

Although Rule 51.713(c) does not *preclude* a state commission from presuming traffic is balanced,

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[8] Id. At ¶79.

there was no evidence presented in this docket to draw that presumption.

The American Heritage Concise Dictionary defines the word "presumption," in part, as follows:

> Belief based on reasonable evidence; assumption or supposition.[9]

The record in the instant docket is devoid of any evidence, reasonable or otherwise, to support a presumption that traffic is "roughly balanced." In fact, the only evidence provided to the Commission regarding traffic balance proves that the opposite is true - - there is no balance of traffic between ILECs and ALECs in Florida. According to Exhibit 3 (MRH-1), submitted by Sprint witness Michael Hunsucker, Sprint exchanges approximately 6.1 billion MOUs (based on first quarter 2001, annualized) with ALECs in Florida. (Tr. A197). Of this amount, Sprint originates approximately 5.8 billion minutes to other carriers while terminating approximately .3 billion minutes from other carriers - - a traffic ratio of approximately 17:1. (Tr. A198). The traffic ratios for individual carriers are as high as 231:1, and for three carriers, Sprint originated in excess of 1.5 billion minutes annually while those three carriers terminated 0 minutes to Sprint. (Tr. A198).

According to the Sprint witness Hunsucker, even if one were to exclude dial up ISP minutes, the traffic is still not in balance. According to Mr. Hunsucker's calculations, if the Commission were to adopt bill-and-keep, when adjusted to exclude ISP traffic, Sprint would gain approximately $325,000 annually. (Tr. A199). Stated another way, that's $325,000 that Sprint would not have to pay to ALECs for terminating Sprint's local traffic.

Nonetheless, BellSouth Shiroishi recommends that the Commission "presume" that traffic

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[9]The American Heritage Concise Dictionary, 3rd Ed. (1994).

is in balance. (Tr. A29). Not surprisingly, BellSouth has presented no evidence to support any inference or presumption that local traffic is in balance. Therefore, any "presumption" that traffic is in balance would not be supported by any evidence presented in this proceeding. It is respectfully submitted that BellSouth's request that this Commission presume that traffic is in balance (when it obviously is not) and find that traffic is "roughly balanced" if an imbalance is as great as 3:1 (for which there is no precedent) is a thinly disguised attempt by BellSouth to create huge financial windfalls for itself and engage in grossly anti-competitive behavior.

(d) What potential advantages or disadvantages would result from the imposition of bill-and-keep arrangements as a default mechanism, particularly in comparison to other mechanism already presented in Phase II of this docket?

AT&T: *Bill-and-keep has many potential disadvantages as it preserves objectionable aspects of the existing patchwork of compensation.*

One obligation the 1996 Act places on all LECs is to put in place a system under which interconnecting local carriers compensate each other for the use of their network to transport and terminate local calls. The payment of reciprocal compensation between carriers reflects the fact that the originating carrier makes use of the terminating carrier's facilities rather than investing in those facilities itself. Reciprocal compensation allows the terminating carrier to recover the costs associated with the investment and expenses necessary to transport and terminate traffic originated by the local customer of an interconnected carrier. (Tr. A223). If ILECs have accurately established terminating reciprocal compensation rates based upon their own costs, they should be economically indifferent with respect to whether a call terminates on their network or on an ALEC's network.

The ILEC will either incur the terminating costs via its own facilities or it will incur that cost via a cost based rate paid to the ALEC for performing the termination function. A symmetrical reciprocal compensation arrangement promotes economic efficiency on the part of both ILECs and ALECs to the public's benefit. The Commission should therefore set cost-based, symmetrical rates for the exchange of 251(b)(5) traffic. Symmetrical rates will insure that all LECs receive appropriate compensation for the terminating functions they provide interconnecting carriers.

Bill-and-keep would discourage good faith negotiations between parties as the party that expects to originate more traffic than it terminates would have the incentive to avoid any negotiated agreement knowing that the windfalls that come with the default bill-and-keep mechanism are readily available. (Tr. A222). Bill-and-keep would create new opportunities for both regulatory arbitrage and monopoly abuse by encouraging carriers to seek customers who make more calls than they receive. Bill-and-keep also requires recipients of unwanted telephone calls to pay for terminating those calls. Consequently, consumers who make few calls or those who subscribe to phone service primarily for safety reasons would likely see their phone rates increase, while customers who make a large number of calls (e.g., telemarketers) would likely see their rates decline. (Tr. A223). Customers largely have no control over who calls them or how often, so they will be forced to pay for the "pleasure" of receiving dinner and family time interruptions from cranks and hawkers of credit cards, funeral plots, timesharing condominiums, vinyl siding, penny stocks and burglar alarms. (Tr. A223).

Bill-and-keep offers an advantage when the exchange of local traffic is precisely in balance. The only advantage is that there is less burdensome administrative work as the interconnecting parties would not need to render monthly bills and checks to each other. Of course, this benefit could easily be achieved between the parties by negotiating bill-and-keep where traffic is expected to be roughly in balance. (A 225).

On April 27, 2001, the FCC released its *Notice of Proposed Rulemaking* in *the Matter of Developing a Unified Intercarrier Compensation Regime.*[10] In the *NPRM*, the FCC recognized that shifting to a new regime for intercarrier compensation, such as bill-and-keep, may create new and unexpected problems, and that those new problems may outweigh the benefits of the new regime.[11]

In the *NPRM*, the FCC invited comments from the parties regarding its concerns for increased volumes in unwanted calls. Under the current regime, called parties do not pay for unwanted calls. However, under bill-and-keep, unwanted calls may increase because there are no additional costs imposed for the additional calls. Depending on the retail rate structure, called parties may have to pay traffic-sensitive charges for unwanted calls.[12] Until competition and transport develops further, it may be necessary to regulate the transport rates charged by ILECs.[13] The NPRM solicited comments regarding whether the adoption of a bill-and-keep arrangement would generate new billing or collection problems for carriers, particularly where a carrier seeks to charge an entity that is not its customer.[14] The NPRM further requested comments regarding whether bill-and-keep for ISP-bound traffic will cause carriers to increase the rates they charge ISPs and result in higher Internet access prices. To the extent that Internet access prices would rise, the FCC questioned whether the increase would likely take the form of higher flat rates or the

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[10]*In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132 (April 27, 2001) ("*NPRM*").

[11]Id. at ¶58.

[12]Id. at ¶60.

[13]Id. at ¶61.

[14]Id. at ¶63.

introduction of traffic-sensitive rates.[15]

In the *NPRM*, the FCC offered no solutions to the above potential problems. The FCC sought comment from all parties to the *NPRM* or other interested parties, regarding the above potential disadvantages of bill-and-keep. Parties were requested to provide concrete evidence and explanations for their calculations and assumptions. However, to date, the FCC has not released its opinion regarding whether the disadvantages of bill-and-keep may outweigh any potential advantages. The Commission, like the FCC, should cautiously weigh the potential advantages and disadvantages of bill-and-keep. Prior to considering bill-and-keep as a surrogate for reciprocal compensation, the Commission should seek comments and concrete evidence for the parties' calculations and assumptions related to the consequences of bill-and-keep.

The FCC's Section 251(b)(5) rules are an important piece of the new federal regime. The interim federal intercarrier compensation regime established in the *ISP Remand Order* applies only if an ILEC makes an *offer* to all carriers in a given state to exchange all Section 251(b)(5) reciprocal compensation traffic at the applicable federal capped rate.[16] If an ILEC chooses not to adopt a federal rate regime by making such an offer, then the FCC "mirroring rule" mandates that all Section 251(b)(5) traffic *and all ISP-bound traffic* must be compensated at the state-approved reciprocal compensation rate. The purpose of the FCC's mirroring rule is to avoid the "patently unfair" situation in which the ILEC seeks to use its "superior bargaining power" in order to "pick and choose intercarrier compensation regimes depending on the nature of the traffic exchanged with

[15]Id. at ¶64.

[16]*ISP Remand Order*, at n. 179.

another carrier."[17] Thus, where an ILEC has not availed itself of the FCC's rate caps, the state-approved reciprocal compensation rates apply to *all* Section 251(b)(5) and *all* ISP-bound traffic. Any rules the Commission adopts for 251(b)(5) traffic could therefore effect the exchange of both 251(b)(5) and ISP-bound traffic if an ILEC does not elect the federal regime.

On May 3, 2002, the D.C. Circuit Court of Appeals reversed the FCC's finding in the *ISP Remand Order* that ISP-bound traffic is exempt from reciprocal compensation pursuant to Section 251(g).[18] The court remanded the issue to the FCC for further analysis and therefore the possibility still exists that ISP-bound traffic will ultimately be found to be local traffic within 251(b)(5) and subject to reciprocal compensation. The Commission must consider this possibility in adopting default rules for the exchange of Section 251(b)(5) traffic.

Faced with record evidence of a traffic imbalance, the Arizona Communications Commission ("Arizona Commission") recently abandoned its prior bill-and-keep policy in favor of an alternative compensation regime proposed by Level 3 Communications, LLC, in an arbitration request. The Arizona Commission determined that bill-and-keep:

> May be more appropriate when the amount of traffic is roughly balanced, however, in this case, Level 3 is a new entrant into the market and traffic between Level 3 and Qwest is not balanced. Adopting a bill-and-keep approach would stifle competition in Arizona. If Level 3 and other CLECs are not compensated for services that they provide, then CLECs will not find it profitable to do business in Arizona.[19]

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[17]Id. at ¶89.

[18]*WorldCom Inc. v. FCC*, D.C. Circuit Ct. of Appeals, No. 01-1218, May 3, 2002.

[19]*Petition of Level 3 Communications, LLC for Arbitration pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, with Quest Corporation regarding rates, terms, and conditions for Interconnection,* Docket Nos. T-03654A-00-0822, T-01051B-00-0882, opinion and order, 8 (Arizona CC, April 10, 2001).

The Commission, like the Arizona Commission, should cautiously view bill-and-keep because of its potential to stifle competition and significantly impact the economic success of ALECs.

The Commission should continue to utilize cost-based rates for purposes of reciprocal compensation as the default mechanism in the event that the parties are unable to negotiate an intercarrier compensation regime. Since 1996, the guiding principle for a unified approach to intercarrier compensation has been clear: efficiency and competitive neutrality are fostered by intercarrier compensation that is based upon forward-looking costs. Properly structured forward-looking, cost-based pricing encourages efficient investment and use of the carrier's networks, discourages regulatory arbitrage, and creates a level, competitively neutral playing field.[20]

Bill-and-keep on the other hand, in which the terminating carrier would be required to recover terminating costs from the called party, would be neither efficient nor competitively neutral and would result in significant unintended and undesirable consequences.

Bill-and-keep is no more "deregulatory" than cost-based intercarrier compensation and would create new opportunities for both regulatory arbitrage and monopoly abuse. Bill- and-keep would simply mean that costs that have always been recovered from cost-causing carriers would now be foisted upon interconnecting carriers and their customers. Because ILECs will retain substantial local market power for the foreseeable future, ALECs will be forced to raise the retail prices to their customers to offset the revenue losses they will incur under a bill-and-keep regime. And, as the Arizona Commission recognized, perhaps ALECs will find it not profitable to do business in a bill-and-keep state. Any "deregulatory" virtues of a bill-and-keep regime are entirely

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[20]The *Local Competition Order*, ¶¶672-703.

illusory.

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