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 II) Filed: August 10, 2001

JOINT POSTHEARING BRIEF OF
GLOBAL NAPS, INC., US LEC OF FLORIDA, INC., MCI WORLDCOM,
e.spire COMMUNICATIONS, INC., TIME WARNER TELECOM OF FLORIDA, LP,
FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.
THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION
AND KMC TELECOM, INC.

Global NAPS, Inc., MCI WorldCom, e.spire Communications, Inc., US LEC of Florida, Inc., Time Warner Telecom of Florida, LP, Florida Cable Telecommunications Association, Inc., the Florida Competitive Carriers Association, KMC Telecom, Inc., KMC Telecom II, Inc. and KMC Telecom III, Inc. (hereinafter referred to as "Joint ALECs")[1], by and through their undersigned counsel, and pursuant to Rule 28-106.215, Florida Administrative Code, and Order No. PSC-00-2229-PCO-TP issued November 22, 2000, Order No. PSC-00-2350-PCO-TP issued December 7, 2000, Order No. PSC-00-2452-PCO-TP issued December 22, 2000, and Order No. PSC-01-0632-PCO-TP issued March 15, 2001, and Order No. PSC-01-1362-PHO-TP issued June 22, 2001, hereby file their Joint Posthearing Brief.

[1]The other Joint ALECs who joined in the Joint ALEC positions reflected in the Prehearing Order (Order No. PSC-01-1362-PHO-TP) have filed separate posthearing briefs - - one filed by AT&T Communications of the Southern States, Inc. ("AT&T"), TCG of South Florida ("TCG") and MediaOne Florida Telecommunications, Inc. ("MediaOne"), and the other filed by Level 3 Communications, LLC and Allegiance Telecom of Florida, Inc.

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Statement of Basic Position

Consistent with the letter and intent of 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 determine its local calling areas, network architectures, and use of assigned telephone numbers. 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. The ALECs must also be able to define their own "local calling area" for the purposes of determining the applicability of reciprocal compensation.

Local competition will also be enhanced by ensuring that ALECs are paid reciprocal compensation when ALECs choose to assign telephone numbers to end users physically located outside the ILEC rate center in which the telephone number is homed. This service, termed by some as a "virtual NXX" service, is essentially the equivalent of the ILECs' foreign exchange service, which ILECs have been offering to their customers for decades. If the Commission were to deny ALECs reciprocal compensation for virtual NXX service, competitive alternatives to the ILECs' foreign exchange service will cease to exist and the costs of Internet access will likely increase. The practice of offering local telephone numbers to customers physically located outside the rate center in which the telephone is homed does not violate the Act or any FCC Rule, and imposes no additional obligation or cost on the ILEC as the costs to the ILEC in transporting a call to the

ALEC's point of interconnection are the same irrespective of where the ALEC ultimately transports and terminates the call.

In addition, in order to meet the spirit and intent of the Act and the FCC's Rules and Orders, the Commission should determine that ALECs are entitled to be compensated at the ILECs' tandem interconnection rate if they satisfy a single test: the ALEC switches must serve a "comparable geographic area" as the ILEC switches.

At the hearing, the Commission asked the parties to address in their briefs several questions related to a "bill-and-keep" compensation mechanism for local traffic, including the range of the Commission's discretion to adopt bill-and-keep; the factual and policy issues related to bill-and-keep, including the sufficiency of the factual record in this proceeding to support a bill-and-keep regime; and information on what actions other states have taken regarding bill-and-keep. (See Tr. 910-912) All of these points are addressed in this Joint Brief under Issue 17, as part of the broader question of what default compensation mechanisms, if any, the Commission should establish for transport and termination of traffic.

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?**

Joint ALECs: *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.*

The Act makes a distinction between interconnection and the transport and termination of traffic.

Section 251(a) requires all telecommunications carriers to interconnect with other telecommunications carriers. Section 251(c)(2) imposes additional interconnection obligations on ILECs, including the obligation to interconnect on rates, terms and conditions that are just, reasonable and nondiscriminatory and that comply with the requirements of Section 252. Section 252(d)(1) in turn establishes a TELRIC-based pricing standard for interconnection.

Section 251(b)(5) requires all local exchange carriers (ILECs and ALECs) to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Section 252(d)(2) sets forth the pricing standards for such transport and termination. The FCC has adopted pricing rules (Rules 51.701 through 51.717) to implement the reciprocal compensation provisions of the Act. Rule 51.705 allows the Commission to set the ILECs' rates for transport and termination either at a TELRIC-based price or, if the requirements of Rule 51.713 are met, on a bill-and-keep basis. (See Issue 17 for a discussion of bill-and-keep.)

In setting prices for transport and termination of traffic, this Commission is required to apply the FCC's pricing rules. To the extent the FCC's rules do not cover 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.

Under Section 120.80(13)(d), Florida Statutes, the Commission is authorized to conduct proceedings to discharge its responsibilities under the Act. In addition to authority derived from the Act, the Commission has independent authority under Section 364.162(1), Florida Statutes, to set rates, terms and conditions for transport and termination of traffic. Unlike the Act, the Florida Statutes do not distinguish between interconnection and transport and termination of traffic. Instead, both are subsumed under the broad term "interconnection." In its first proceedings to implement the

1995 revisions to Chapter 364, the Commission applied Section 364.162(1) in its consideration of both what the federal Act calls "interconnection" and what it calls "transport and termination." *See In re: Resolution of petitions to establish nondiscriminatory rates terms and conditions for interconnection*, Order No. PSC-96-0668-FOF-TP (May 20, 1996).

The FCC has recently declared that ISP-bound traffic is not "telecommunications" within the meaning of Section 251(b)(5) 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 Act of 1996*, Order on Remand and Report and Order, FCC 01-131, CC Dockets 96-98 and 99-68, rel. April 27, 2001 (*"ISP Remand Order"*). Instead, such ISP-bound traffic constitutes "information access" subject to the FCC's regulatory jurisdiction. The order established an interim compensation mechanism for ISP-bound traffic which governs compensation for terminating such traffic beginning on the effective date of the order. *ISP Remand Order* ¶ 78.

Because of the problems involved in identifying ISP-bound traffic, the FCC established a rebuttable presumption that traffic delivered to a particular carrier that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic subject to the compensation mechanism established in that order. *Id.* ¶ 79. Unless and until that presumption is rebutted in proceedings between two specific carriers before a state commission, terminating traffic above the 3:1 ratio is subject to compensation as ISP-bound "information access" and traffic below the 3:1 ratio is subject to compensation as "251(b)(5) traffic" under the reciprocal compensation provisions of the Act and FCC Rules.

Under the *ISP Remand Order*, state commissions retain pricing jurisdiction over 251(b)(5) traffic, but do not have any prospective jurisdiction over ISP-bound traffic. *Id.* ¶ 82.

<u>Issue 12</u>: **Pursuant to the Act and FCC's rules and orders:**

(a) Under what condition(s), if any, is an ALEC entitled to be compensated at the ILEC's tandem interconnection rate?

<u>Joint ALECs</u>: *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.*

Section 251(b)(5) of the Act imposes on each local exchange carrier the duty to establish reciprocal compensation for the transport and termination of telecommunications under terms and conditions meeting the requirements of Section 252(d)(2)(A). The FCC has implemented these statutory provisions by requiring that reciprocal compensation be "symmetrical" and that the ILEC's reciprocal compensation rates should be the "presumptive proxy" for the ALEC's rates. *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, FCC 96-325, CC Dockets 96-98, rel. August 8, 1996, ¶ 1085 (*"Local Competition Order"*). The FCC permits the states to establish rates for transport and termination by ILECs that vary depending on whether the traffic is routed through a tandem switch or directly to an end-office switch. *Id.* ¶ 1090. (Argenbright, Tr. 1003-1004)

This Commission has established a three-element rate structure for transport and termination both in arbitration proceedings and in the recent BellSouth phase of the UNE cost docket (Docket No. 990649-TP). Under that structure, a call terminated by an ILEC using only an end-office switch receives compensation consisting of the transport and end-office switching rate elements (the "end-office interconnection rate"). A call terminated by an ILEC using both tandem and end-office switches receives compensation consisting of the transport, end-office switching and tandem switching rate elements (the "tandem interconnection rate").

The dispute underlying Issue 12(a) is under what circumstances, if any, an ALEC is entitled to receive compensation at the tandem interconnection rate for terminating traffic originated by an ILEC. In particular, the dispute is whether the FCC's rules and orders -- which address both comparable geographic coverage and similar functionality -- establish an "either-or" test or a "both-and" test to determine when an ALEC is entitled to compensation at the tandem interconnection rate.

FCC Rule 51.711(a)(3) is clear and unambiguous:

> 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.

Any doubt or confusion about the meaning of this rule which may have been created by the FCC's discussion of similar functionality at Paragraph 1090 of the *Local Competition Order* was recently resolved by the FCC's clarification that:

> In addition, 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 services "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.

In the Matter of Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking, FCC 01-132, CC Docket No. 01-92, rel. April 27, 2001, ¶105 (*"Intercarrier Compensation NPRM"*). *Accord US West Communications, Inc. v. Washington Utilities and*

Transportation Commission, 2001 WL 740573, ___ F.3d ___, Case No. 98-36013 (9th Cir. July 3, 2001).

Both BellSouth and Verizon took the position in their prehearing statements that the FCC rules and orders establish a "both-and" test, so that comparable geographic coverage alone would not entitle an ALEC to compensation at the tandem interconnection rate. However, witnesses for both companies conceded on cross-examination that, in light of the FCC's recent clarification, comparable geographic coverage would be sufficient. (Ruscilli, Tr. 193-195; Beauvais, Tr. 362-364)

Given the plain language of the FCC Rule, the recent confirmations of that plain language by both the FCC and the Ninth Circuit Court of Appeals, and BellSouth's and Verizon's concessions that the rule now means what it says, the Commission must hold that an ALEC is entitled to compensation at the tandem interconnection rate if it *either* meets the comparable geographic coverage test *or* provides similar functionality.

(b) Under either a one-prong or two-prong test, what is "similar functionality?"

Joint ALECs: *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.*

In Paragraph 1090 of the *Local Interconnection Order*, the FCC concluded that states may establish transport and termination rates for ILECs that vary according to whether traffic is routed through a tandem switch or directly to the end-office switch. The FCC then stated:

> 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.[2]

Id. ¶ 1090. The question under Issue 12(b) is what definition of similar functionality should apply when an ALEC whose switch does not meet the geographic coverage test seeks compensation at the tandem interconnection rate based on the functionality provided by its network.

The appropriate test in such a situation is whether the ALEC switch performs the types of functions that are typically performed by a tandem switch in an ILEC network. (Selwyn, Tr. 599-600; Argenbright, Tr. 1008-1010) These functions include things such as the aggregation of traffic over a geographic area larger than that served by an ILEC end-office switch, the provision of a centralized point of interconnection for access to operator services platforms and facilities, and measurement and recording of traffic for billing purposes. (Argenbright, Tr. 1010; Selwyn, Tr. 600) Because of the difference in architecture between the ILEC's networks, which typically use many switches and relatively short loops, and the ALEC's networks, which typically use few switches and relatively long loops, it is inappropriate to impose a requirement that an ALEC must perform a trunk-to-trunk switching function in order to be entitled to the tandem interconnection rate. Such a test would effectively penalize ALECs for using a different *technical* means to perform the same underlying functions. (Selwyn, Tr. 600-01, 658-659; Argenbright, Tr. 1008-1009, 1019-1020) It would also protect the ILECs from competition by ALECs who have deployed more modern network architectures, thereby insulating them from the efficiencies and innovations that a competitive market is intended to foster. (Selwyn, Tr. 659)

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[2]The next sentence of Paragraph 1090 then established the rule, discussed under Issue 12(a), that an ALEC is entitled to the tandem interconnection rate without regard to functionality so long as its switch serves a geographic area comparable to that served by the ILEC's tandem.

BellSouth witness Ruscilli argues that FCC Rule 51.319(c)(3) defines the functions that an ALEC must provide in order to be entitled to the tandem switching rate under the similar functionality test. (Tr. 32-33) These include trunk-to-trunk switching. Mr. Ruscilli's argument misses the point. The rule he cites defines the "tandem switching capability network element"; that is, the tandem switching functionality that ILECs must offer to ALECs as an unbundled network element. Since ILEC tandem switches perform trunk-to-trunk switching, the tandem switching UNE must offer that same capability. The definition of tandem switching for UNE 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.

The proper focus on "traffic aggregation" rather than "trunk-to-trunk switching" is supported by the Ninth Circuit's decision in *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999). In that case, the court held that the Washington Commission had properly considered the similar functionality test when it found that MFS's switch " 'performs the function of aggregating traffic from widespread remote locations' as a tandem switch does." *Id.* at 1224.

(c) Under either a one-prong or two-prong test, what is "comparable geographic area?"

Joint ALECs: *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.*

With the ILEC's concession that the Rule 51.711(a) entitles an ALEC to compensation at the tandem interconnection rate based on a showing of comparable geographic coverage (see Issue 12a),

the debate has shifted from "one-prong vs. two-prong" to a debate about what constitutes a "comparable geographic area." This phrase is used, but not defined, in the FCC rule.

The Commission cannot resolve carrier specific issues or address every possible factual situation in this proceeding. The Commission can and should use this proceeding to establish an easy-to-understand, bright-line, safe-harbor test which defines situations in which the tandem interconnection rate will be payable. An ALEC whose switch coverage meets this mechanical test would be entitled to the tandem interconnection rate. An ALEC whose switch does not meet this test, but which believes that its factual situation nevertheless demonstrates comparable geographic coverage, could negotiate with the ILEC and, failing agreement, petition the Commission to make a fact-specific determination on an expedited basis. (Argenbright, Tr. 1014) Unless the Commission establishes a clear safe-harbor test in this proceeding, it can expect a flurry of disputes between ALECs and ILECs regarding entitlement to the tandem interconnection rate.

None of the ILEC witnesses proposed any specific test to determine when an ALEC's switch serves a comparable geographic area to an ILEC's tandem. Mr. Ruscilli's prefiled testimony for BellSouth says only that an ALEC should provide "real evidence" that its switches "actually serve the same geographic area as BellSouth's tandems." (Tr. 35) When pressed on cross-examination, Mr. Ruscilli indicated that the Commission should consider the number of customers served by the ALEC and their geographic dispersion relative to similar data for the ILEC, but he provided no details on how that comparison should be made or what would constitute a sufficient showing. (Tr. 163-165) Verizon's witness Beauvais likewise did not propose a specific test, but merely said that the comparability requirement is met if the areas served by the ALEC's switch are about the same physical area as that served by the ILEC's tandem switch. (Tr. 310) Sprint's witness Maples

advocated looking to whether an ALEC held itself out, through advertising or other means, to serve customers in a specific area. (Tr. 536, 543-544) Mr. Maples ultimately proposed no specific test, saying that disputes should all be resolved on a case-by-case basis, or perhaps through some type of self-certification. (Tr. 536, 549-550) None of these vague ILEC proposals is of any real assistance to the Commission in answering the question posed by Issue 12(c).

The only detailed proposal for a geographic coverage test was put forward by Mr. Argenbright on behalf of WorldCom. That test would first identify the rate centers served by NXXs that have been opened in an ALEC's switch for the purpose of originating and terminating local traffic. It would not include "virtual NXXs" or any NXXs opened for the sole purpose of terminating traffic to ISPs. If the rate centers opened by the ALEC were served by the ILEC through the use of a tandem switch and subtending end-offices, the ALEC would be entitled to compensation at the tandem interconnection rate. (Argenbright, Tr. 1027, 1030; Ex. 1)

This test has several advantages. First, the data required to apply the test is easy to obtain from public sources. Information on what ALEC NXXs have been opened, the rate centers to which they are assigned, and the coverage of the ILEC's local tandem switches is readily available from the Local Exchange Routing Guide (LERG). (Tr. 1028) Second, the test is easy to understand, so there should be few, if any, disputes about its application. (Tr. 1028) Third, the opening of an NXX requires the ALEC to make investments in both switch capacity and network capacity to offer service to the rate center with which the NXX is associated. These costs of having network facilities in place to aggregate traffic from a broad geographic area are the types of costs that the tandem interconnection rate is designed to compensate. Fourth, the requirement to open an NXX also provides much better assurance that the ALEC in fact stands ready to serve customers in a given

geographic area than Sprint's vague "intending to serve" test. (Tr. 1027, 1030-1032, 1034) Fifth, by not depending on market penetration and number of customers served, this test measures the technical capability of the ALEC's network to serve an area, not the ALEC's success at marketing. (Ex. 2). Finally, the test is neutral with respect to the technology selected by the ALEC in constructing its local network. (Tr. 1028)

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

Joint ALECs' Position: *ALECs should be allowed to establish their own local calling areas which may or may not be the same as the ILECs.*

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. ALECs should be allowed to define their local calling areas in a different geographic configuration from that of an ILEC. Indeed, as explained by Dr. Selwyn, an ALEC may use this difference in local calling scope as a way to distinguish its service from that of the incumbent LEC. (Tr. 612) With the introduction of competition at the local level, carriers seek to differentiate their service from the incumbent and other ALECs. Such differentiation can take the form of a additional features, reduced prices, different pricing schemes, and expanded local calling areas. (Tr. 762) Depending upon calling characteristics, an expanded local area could be an important service feature in the minds of discerning consumers. (Tr. 762) ALECs (and ILECs) should have the flexibility to define their local calling area as they deem appropriate. For example, a LEC may wish to offer LATA-wide local calling. In fact, under the current interconnection agreement between AT&T and BellSouth, the

parties have agreed to define a local call as any call that originates and terminates within the entire LATA. (Tr. 960)

When consumers and businesses subscribe to local service, they are frequently provided with many different service types to choose from, all of which may be considered local calling. A customer may select flat rate service or measured service. (Tr. 760) Flat rate service results in unlimited calling within the local calling area whereas local measured service has a charge per minute or per telephone call. Depending on where a person is located relative to another area, he or she may purchase other local calling plans in addition to basic service to extend his or her local calling area. (Tr. 761) Such plans can be one-way (i.e., from calling area A to calling area B, but not from calling area B to calling area A), two-way, optional or mandatory. It is entirely possible that a half dozen neighbors would have very different local calling areas based upon their local calling patterns, income, age, interests, etc. (Tr. 761) Further, the local calling area might be different based upon the LEC selected by the consumer or business.

In the instant docket, the ILECs say that they support an ALEC's right to define its own local calling area as it sees fit. However, lurking behind this seeming fair-mindedness is the true ILEC position: the ILECs contend they should not pay reciprocal compensation, but instead, should collect originating switched access charges, for calls that an ALEC terminates in the ALEC's extended local calling area. (Tr. 67 (BellSouth), Tr. 311 (Verizon), Tr. 526 (Sprint)) The ILECs' desire to gain even further competitive advantage is readily apparent. ILECs have the flexibility, based upon their ubiquitous networks, to extend their own "local calling areas" beyond the boundaries of the basic local calling areas on file with the Commission. For instance, BellSouth's tariffs specify local calling areas, which include extended area service (EAS) exchanges and

extended calling services (ECS) exchanges. Calls placed to points located within the EAS exchanges are provided without additional charge to flat rate and message rate service subscribers (both residential and business customers). (Tr. 608) BellSouth's flexibility to offer its customers these local calling area options is an effective marketing tool and should be equally available to ALECs. Yet, it is not.

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 calls they make to any given set of NPA/NXX codes. (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 ALECs' extended local calling area (utilizing a virtual NXX service), BellSouth believes it should not to have to pay reciprocal compensation to the ALEC, and would also demand that the ALEC pay to BellSouth switched access charges. (Tr. 50) That position is shared by Verizon. (Haynes, Tr. 446) Because the ILECs enjoy a huge majority of the customers in the local markets, 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)

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 sector of the telecommunications industry where

competition is effective, including long distance, wireless and the Internet, distance costs are no longer a factor. (Tr. 626) In fact, 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)

ALECs should not be limited to competing solely with respect to price, nor should they be forced to mirror the ILECs with respect to services that are offered. For example, an ALEC may wish to offer a local service package that includes one or more vertical service features, such as call waiting, three-way calling, and/or caller ID, features that ILECs typically offer separately from the dial tone access lines, at often substantial additional charge. (Tr. 612) 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 ILEC), and also imposed high "roaming" charges for outward calls that were originated outside of the customers "home" service territory (even where the call was originated from another service territory controlled by the same cellular carrier). (Tr. 613). As competitors came into 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 regulating policies.

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

Joint ALECs' Position: *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) For each responsibility identified in part (a), what form of compensation, if any, should apply?

Joint ALECs' Position: *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.*

The Joint ALECs adopt the discussion and arguments set forth in the Joint Posthearing Brief filed by AT&T, TCG and MediaOne.

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 is homed?**

Joint ALECs' Position: *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.*

b) Should the carrier 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?

Joint ALECs' Position: *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.*

When an ALEC establishes an NPA/NXX code in one rate center but delivers the call to its customer physically located in a different rate center, it is providing what some have described as a virtual NXX service. When an ALEC establishes a virtual NXX service, the calling party dials a local number rated to one particular exchange and the call is then delivered to an ALEC customer who is physically located in a different exchange outside the local calling area of the calling party. (Tr. 646)

This is a service that ILECs have been offering their customers for decades. (Tr. 662) ILECs offer their customers foreign exchange ("FX") service which accomplishes the same result as the virtual NXX service. (Tr. 662) In the case of an ILEC's FX service, a customer located in exchange A may want a local telephone number presence in exchange B, from which exchange A would otherwise be a toll call. A caller in exchange B dials the FX number as a local call to exchange B, and the call is physically delivered to the FX customer located in exchange A. Generally, ILECs offer their customers the FX service in one of two ways. Either the FX customer pays for the dial tone in exchange B and pays for the leased line between exchange B and exchange A, or the ILEC establishes a "remote call forwarding" ("RCF") service. (Tr. 663) Both FX and RCF arrangements require the physical presence of a switch within the local and "foreign" rate center, something that does not necessarily exist in an ALEC's network architecture. (Tr. 664) Thus, with FX and RCF, the ILEC is able to create a virtual presence for its exchange A customer in exchange B because it owns switches in both exchanges.

The Act was intended to ensure that ALECs were not handicapped with respect to the nature of the services they can offer merely as a result of their lack of ubiquity or because they choose not to "clone" the ILEC networks. The current lack of real competition in the FX services market is evidenced by the fact that, although the cost of transport has reduced 98% over the last five years, the FX rates of BellSouth and Verizon over the same five year period have not changed. (Tr. 666-667) ALECs must be offered the opportunity to compete with ILECs in the market for FX-type services, and ILECs should not be allowed to thwart such competition solely because their infrastructures are more extensive than those of the new entrants. Because, as a general rule, an ALEC does not have switches located within every rate center, the ALECs use NXX codes rated in

exchanges other than the one at which the incoming call will ultimately be delivered to accomplish the same result as an ILEC FX or RCF call. (Tr. 665) Sprint witness Maples confirmed that if an ALEC does not have a switch in every ILEC local calling area, virtual NXX is the method by which an ALEC can technically provide an FX alternative to customers. (Tr. 572) The Commission must reject the ILECs' attempt to foster a compensation scheme that is one-sided, anti-competitive and intended only to secure an ILEC monopoly on FX-type services.

There is no additional cost to an ILEC when ALECs terminate calls to virtual NXX customers. (Tr. 168, 637) The ILEC delivers all local traffic traveling to the same NPA/NXX to the same ALEC point of interconnection where traffic with the ILEC's network is exchanged. In other words, ALECs specify a single point of interconnection for an NPA/NXX, regardless of the physical location of the ALEC terminating customer. (Tr. 786) Since the point of interconnection to which an ILEC delivers traffic is the same, the ILEC's network costs to deliver traffic to that point of interconnection are necessarily the same. From the standpoint of reciprocal compensation, the ILEC is financially unaffected by the terminating location within the ALEC's network, since the physical location of the customer has no effect on the ILEC's costs for transport and termination. (Tr. 786) If there are any additional costs to complete such traffic, such as transport beyond the local calling area of the ILEC's originating customer, all such costs are borne by the ALEC. (Tr. 169) Accordingly, ALECs should be entitled to receive reciprocal compensation for local calls originated by ILECs and terminated to such ALEC (non-ISP) end users.[3]

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[3]The Joint ALECs limit their position to "non-ISP end users" because the FCC, in the recent *ISP Remand Order*, discussed *supra*, ruled that calls to ISPs are "information access service" and are therefore not subject to the reciprocal compensation provisions of the Act.

Despite the fact that a virtual NXX call appears to the calling customer as a local call, travels across the ILEC network as if it were a local call, and the ILEC collects local revenue from its end user, the ILECs argue that a call to a virtual NXX customer is not local. (Tr. 169), and, therefore, not subject to reciprocal compensation. Worse, and incredibly, the ILECs also contend they should be paid originating switched access charges for these calls. (Tr. 67, 311, 526) At the same time, the ILECs maintain that their FX service, which technically performs the same functions as a virtual NXX service, should be treated in all respects as if it were a local call. (Tr. 90) The ILECs' position is logically inconsistent, anti-competitive, and violates the letter and the spirit of the Act.[4]

The inconsistency in the ILECs' position perhaps is best highlighted by the testimony of Verizon witness Terry Haynes. Mr. Haynes conceded that:

(1) Verizon bills reciprocal compensation based only upon a comparison of the NXX codes of the originating and terminating callers. (Tr. 435);

(2) Verizon does not verify the location of the terminating customer for purposes of billing reciprocal compensation and both Verizon and the ALECs would have to revise their billing systems to initiate a reciprocal compensation scheme that is not based upon a comparison of NXX codes but includes the identification of the physical location of the terminating customer. (Tr. 435-36, 438-39, 443);

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[4]Federal law directly supports the conclusion that the status of a call as "toll" or "local" is determined not by geography or distance, but by the retail charges associated with the call. *See* 47 U.S.C. §153(47) (defining "telephone exchange service" [i.e., local service] as "intercommunicating" service either within one physical "exchange" or a connected set of exchanges, or any comparable service) and 47 U.S.C. §153(48) (defining "telephone toll service," explicitly, as service "for which there is a separate charge" not included in local charges). Under federal law, therefore, calls that are rated to end users as local, such as VNXX calls, **are** local.

(3) Verizon also bills its retail customers based only upon a comparison of the NXX codes of the originating and terminating callers. (Tr. 437);

(4) Verizon charges its customers local rates for the origination of a virtual NXX call. (Tr. 449); and

(5) Verizon bills reciprocal compensation to ALECs for the transport and termination of foreign exchange calls. (Tr. 436).

These five concessions would lead an objective observer to conclude that certainly Verizon (and the other ILECs) believe that a virtual NXX call, like the ILEC's FX call, should be subject to reciprocal compensation. Such fair-minded symmetry is lost on the ILECs. While Mr. Haynes conceded, as stated above, that Verizon bills ALECs reciprocal compensation for foreign exchange calls (Tr. 448), he refused to agree that ALECs should likewise receive reciprocal compensation from the ILEC when an ILEC places a call to the ALECs' virtual NXX. (Tr. 468) In fact, the ILECs believe not only that reciprocal compensation should not be due for virtual NXX calls, but that, as stated above, the ALEC should actually pay the ILEC switched access charges for such calls. (Tr. 173, 446) The support offered by Mr. Haynes for these inequitable, anti-competitive results frankly only lend further support for the ALECs' position that virtual NXX calls should be subject to reciprocal compensation.

For example, Mr. Haynes stated that when Verizon carries traffic from its central office switch to Verizon's tandem switch and interconnects with the ALEC at that tandem switch - - all over local interconnection trunks - - that such calls, even though they are clearly local, should not be subject to reciprocal compensation. (Tr. 462-467) While agreeing that Verizon incurs no additional costs and that the routing is the same for delivery of a virtual NXX call to an ALEC's

point of interconnection, Mr. Haynes calls for the payment by the ALEC to Verizon of originating switched access charges because the ALEC incurs additional costs. (Tr. 468-71) Mr. Haynes also claimed that the use of virtual NXXs wastes numbering resources; yet, at the same time, he argued that the use of virtual NXXs amounts to rate center consolidation which he conceded is an instrument designed to conserve numbering resources. (Tr. 476)

Finally, the FCC's recent amendment to FCC Rule 51.701(b)(1) eliminates any credible argument that virtual NXX calls are not subject to reciprocal compensation because they are not local calls. *See* Tr. 450-451. As reflected in Exhibit 17, in Appendix B to the *ISP Remand Order*, the FCC amended Rule 51.701(b)(1) to define "Telecommunications Traffic" subject to reciprocal compensation as follows (shown in legislative format):

> 1. The title of part 51, Subpart H, is revised to read as follows:
>
> **Subpart H - - Reciprocal Compensation for Transport and Termination of Telecommunications Traffic**
>
> 2. Section 51.701(b) is revised to read as follows:
>
> **(a) §51.701 Scope of transport and termination pricing rules.**
>
> . . .
>
> (b) ~~Local~~ Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:
>
> (1) telecommunications traffic exchanged 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~~, 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, 42-42)....

As demonstrated above, the FCC eliminated language in Rule 51.701(b)(1) which had previously defined traffic subject to reciprocal compensation as "Local Telecommunications Traffic". Rule 51.701(b)(1), as amended by the FCC, clearly eliminates as a requirement for reciprocal compensation the previous language and requirement in the rule that a call be terminated within a local calling area established by the state commission. Based on the amendments to Rule 51.701(b)(1), the ILEC's position that a virtual NXX call is not subject to reciprocal compensation because it is not "local telecommunications traffic" has been eliminated by the amendment to the FCC rule. Under amended FCC Rule 51.701(b)(1), all virtual NXX traffic exchanged between an ILEC and an ALEC - - except for telecommunications traffic that falls within one of the three exceptions outlined in the amended FCC rule (which would include, on a prospective basis, calls terminated to ISPs) - - are subject to reciprocal compensation.

BellSouth witness Ruscilli claimed that virtual NXX traffic is not local but is "most similar" to a long distance call to a 1-800 number. (Tr. 90) Such is clearly not the case. The first and most important distinction between virtual NXX and 1-800 numbers is that 1-800 numbers are not associated with any particular geographic area; callers from many geographic areas can thus place a toll-free call to a 1-800 NPA. In contrast, for a virtual NXX customer, only those callers located within the rate center with which the customer's NXX is associated can reach them without incurring a toll charge. Additionally, a 1-800 call is and always has been a toll call. (Tr. 782) When a 1-800 call is dialed, the local switch recognizes the call as a toll call (because of the 1+ toll indicator) and routes the call to the access tandem for additional routing instructions. This service provided for 1-800 customers is generally used for intraLATA, interLATA or interstate calling, not for local calling.

Virtual NXX calls, on the other hand, are routed like all other local calls. They use standard seven or ten digit dialing and they do not go through the access tandem. (Tr. 783)

Under any scenario involving a locally dialed call, the only cost an ILEC incurs are the transport and switching charges required to bring traffic to the POI between the ILEC and the ALEC. (Tr. 168) These costs do not change based upon the location of ALEC customers, so there is no economic justification for treating these calls differently from any other locally dialed call. (Tr. 786) Further, it would be inconsistent and anti-competitive to allow the ILECs to evade their intercarrier compensation obligations and, at the same time, to charge an ALEC originating switched access charges for calls going to a local NXX code. Not only would the ILEC double recover its costs (once through local rates paid by its customers and again through access charges paid by the ALEC) for carrying the traffic over local interconnection facilities to a POI, it would be compensated for costs it does not even incur. The ILECs' proposal to impose on the ALECs the requirement to pay the ILEC access charges on these locally dialed calls, and to force ALECs to forego recovery of expenses for terminating ILEC calls, would be detrimental to any ALEC that wishes to offer competitive local exchange service in Florida.

Recently, the Michigan Public Service Commission recognized the applicability of the industry standard for determining jurisdiction of traffic in an order addressing the nature of FX traffic.[5] The Michigan Commission held:

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[5] *In the Matter of the 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, Opinion and Order, (Michigan PSC, January 23, 2001).

> As a matter of historical convention, the routing of that call, i.e., whether or not it crosses exchange boundaries has not been equated with its rating, i.e., whether local or toll.
>
> . . .
>
> And the Commission rejects the proposal to reclassify FX calls as not local for reciprocal compensation purposes. Ameritech Michigan has not explained whether, or how, the means of routing a call placed by one LEC's customer to another LEC's point of interconnection affects the costs that the second LEC necessarily incurs to terminate the call.[6]

Additionally, the California Public Utilities Commission recognized the anti-competitive effects of applying access charges to a LEC's virtual NXX service:

> The rating of a call, therefore, should be consistently determined based upon the designated NXX prefix. Abandoning the linkage between NXX prefix and rate center designation could undermine the ability of customers to discern whether a given NXX prefix will result in toll charges or not. Likewise, the service expectations of the called party (i.e., ISPs) would be undermined by imposing toll charges on such calls since customers of the ISPs would be precluded from reaching them through a local call. Consequently, the billing of toll charges for Internet access, which is designed to be local, could render an ISP's service prohibitably expense, thus limiting the competitive choices for Internet access, particularly in rural areas.[7]

As the California Commission recognized, the retail offering of virtual NXX service and its associated rating as a local call based on the rate centers associated with the assigned NXXs must be applied to virtual NXX offerings from ALECs. Failure to do so distorts the way in which an

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[6] Id. at 10-11.

[7] *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).

ALEC can make a competitive FX offering available and, as described above, would in fact eliminate competition for this increasingly important service.

For ALECs to be able to offer a competitive alternative to the ILECs' FX service offerings, the traffic associated with virtual NXX service must be classified as "local" just as the ILECs classify their own FX traffic as local. Whether a call is local or not depends on the NPA/NXX dialed, not the physical location of the customer. Jurisdiction of traffic is properly determined by comparing the rate centers associated with the originating and terminating NPA/NXXs for any given call, not the physical location of the end users. (Tr. 818-819) Comparison of the rate center is associated with the calling and called NPA/NXXs is consistent with how the jurisdiction of traffic and the applicability of toll charges are determined within the industry to date. (Tr. 785)

The Commission should resist the ILECs' efforts to treat ALECs' virtual NXX service as a toll service. Such a determination would be detrimental to the local exchange competition as it would provide significant competitive advantages to ILECs by allowing ILECs to avoid paying reciprocal compensation, allowing ILECs to assess access charges on local calls, and effectively shielding ILECs' local FX service from competition. The Commission should further reject toll classification for virtual NXX service because virtual NXX calls are rated as local industry-wide and because ILECs treat their own FX service as a local service subject to reciprocal compensation. The Commission should determine that the proper method for determination of reciprocal compensation obligations for virtual NXX service is by comparison of rate centers associated with the originating and terminating NPA/NXXs, and reject the ILECs' contention that virtual NXX service is a "non-local" service subject to switched access charges.

Issue 16(a): What is the definition of Internet Protocol (IP) Telephony?

Joint ALECs: *Because it is a nascent, emerging technology, there is no single consensus definition of IP Telephony.*

Issue 16(b): What carrier-to-carrier mechanism, if any, should apply to IP Telephony?

Joint ALECs: *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.*

Generally, the term "IP (Internet Protocol) Telephony" refers to the use of digital packet technology and a specific network interconnection protocol to deliver voice, data, and combinations thereof. The reference to "Internet" within the term "IP Telephony" is derived from the fact that the protocol is the same as that used to tie together the individual networks that comprise the Internet. (Tr. 928-929)

The technology is well suited to the seamless handling of a mixture of voice and data. (Tr. 927) However, it is in an early stage of development. Pure voice traffic using IP Telephony is rare, and typically is used in an experimental mode as providers evaluate more complex offerings. (Tr. 931) The commercial viability of such pure voice-only applications is unproven, as the markets for IP Telephony have not had an opportunity to develop and evolve. (Tr. 936)

As the result of FCC rulings, which exempt from the application of access charges any service that includes "information services," such pure "Voice Over IP" ("VOIP") is the only "subset" of IP Telephony to which access charges even arguably could apply. (Tr. 935) Even with respect to this limited fraction of the broader category of IP Telephony, the FCC has deliberately refrained from concluding that pure VOIP is subject to the access charge regime while it investigates the matter further in pending dockets. (Tr. 935, 945-946)

Early in the proceeding, it became clear that BellSouth is the only party advocating that the Commission address any aspect of Issue 16 in this docket. In fact, immediately prior to the beginning of the hearing, eleven parties - including Verizon and Sprint - jointly updated their position statements to emphasize their conviction that it would be premature for the Commission to address the issue. (Tr. 10) (See Attachment A). Other parties had previously communicated similar views in their position statements.

Those statements of position are strongly supported by the testimony of record. For instance, FCCA witness Joseph Gillan stated in direct testimony:

> 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)
>
> . . . .
>
> While 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. . . . Technology and market conditions are in flux and providing the market more time to evolve is the best approach. (Tr. 935-936)

Similarly, William Hunt, witness for ALEC Level 3 Communications, testified:

> As I will show in this testimony, the technology underlying a communication makes a difference in how that communication is classified, and how a communication is classified has far-reaching impacts that are not addressed in Issue 16. Level 3 therefore recommends that the Commission neither adopt a definition of IP telephony nor determine what intercarrier compensation mechanism applies to IP telephony. (Tr. 711)
>
> . . . .
>
> IP telephony is in its infancy, and regulators may stunt its growth and stifle innovation by imposing burdensome regulatory obligations on such services at this time. (Tr. 736)

The witnesses who urged the wisdom - - indeed, the necessity – of restraint under the circumstances were not limited to those who appeared for ALECs. Verizon witness Edward Beauvais stated:

> I believe 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. . . Indeed, the Commission could not likely issue an empirically supported decision on compensation for IP telephony in this case. (Tr. 317)

BellSouth did not attempt to rebut this testimony. Significantly, during the hearing BellSouth conceded that the technology is incapable of even a definition at the present time. The following exchange took place between counsel for AT&T and John Ruscilli, BellSouth's witness on the subject of IP Telephony:

Q. And there is no definition of what is just IP Telephony, is there?

A. No. And the person that can coin that, I think it would be a million dollars. (Tr. 177)

However, this candid admission by BellSouth's witness did not stop him from offering in direct testimony a "rationale" for the proposition that access charges apply to what he characterized as "IP Telephony."

Disappointingly, BellSouth's rationale relies heavily on distortion. Part of the complexity of the subject of IP Telephony is that it encompasses a wide spectrum of arrangements, ranging from pure voice to a myriad of combinations of voice and data. (Tr. 927) Again, many applications of data are deemed by the FCC to be "information services," and the FCC has ruled that a service does not belong in the category of "telecommunications service" to which access charges apply if its content is imbued at all with information services. (Tr. 928-934)

BellSouth navigated this fundamental aspect of the subject of access charges by ignoring it. While Issue 16(a) addresses IP Telephony generally, in his testimony Mr. Ruscilli chose to define the subject in narrow terms of phone-to-phone telephony and to proceed to "analyze" only that portion of the spectrum. (Tr. 68)

Mr. Ruscilli attempted to create the false impression that the FCC has ruled definitively that this portion of "IP Telephony" is subject to access charges. His "quotation" of an FCC Report to Congress used a combination of deletions and omissions to mischaracterize the FCC's position. Mr. Ruscilli provided his edited excerpt, then used it to support his contention that IP Telephony is "telecommunications service." In 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. This point is best appreciated by comparing BellSouth's "version" of the FCC report to the full language quoted by Mr. Gillan in his rebuttal testimony. The FCC's language (as quoted by Mr. Gillan) is set forth here; the words **omitted** by witness Ruscilli appear in bold.

> The record **currently before us** suggests **that certain** "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.**

It is easy to see why FCCA witness Joseph Gillan quoted the same report employed by Mr. Ruscilli to make the diametrically different point that the FCC decided to await a fuller record before ruling on the matter. (Tr. 945-946).

During redirect examination, counsel for BellSouth referred Mr. Ruscilli to Order No. PSC-00-1519-FOF-TP, an arbitration order issued by the Commission in Docket No. 991854-- a case involving Intermedia Communications, Inc. and BellSouth. Counsel's stated purpose was to demonstrate that in an earlier docket the Commission had relied on the FCC Report to Congress in the manner suggested by BellSouth in this case. FCCA objected on the basis that the portion of the order that was the subject of the reference had been rendered a nullity. (Tr. 233) A review of the circumstances attending Order No. PSC-00-1519-FOF-TP shows that FCCA's objection is well founded. In the order, the Commission first ruled that "IP Telephony" should be included in the definition of access services contained in the parties' interconnection agreement. However, Intermedia timely sought reconsideration of this ruling, thereby preventing it from becoming effective. While the motion for reconsideration was pending, the parties agreed to contractual language governing the subject of IP Telephony, which agreement took effect pursuant to Section 252(e)(4) of the Act. Intermedia then effectively withdraw the IP Telephony issue from the list of issues to be arbitrated. 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.

In its order on reconsideration, the Commission clearly embraced the view that its ruling had become a nullity. If the Commission had rejected the parties' position, it would have ruled on this aspect of the pending Motion for Reconsideration. It did not. Instead, the Commission acknowledged the withdrawal; observed that it would be considering the issue in another docket; and proceeded to address only the remaining "unresolved" issues raised by the motion for reconsideration. See Order No. PSC-01-1015-FOF-TP, at pages 2-3.

The parties and the Commission were correct. Fundamentally, under the 1996 Act , a party seeking arbitration may file a petition identifying "open, unresolved" issues, and the ability of the Commission to arbitrate is limited to those "open issues" of the petition. Section 252(b)(2) and (4). In the Intermedia case the parties agreed to contractual language governing IP Telephony that became part of an effective interconnection agreement. There was no longer an "open issue" on which the Commission could rule. Further, the filing of the motion for reconsideration prevented the order from becoming effective prior to the parties' notice of withdrawal. Order No. PSC-01-1015-FOF-TP.

Mr. Ruscilli also argued that the Commission should allow BellSouth to apply access charges to calls using "IP Telephony" that would be categorized as long distance calls on the basis of their geographical origin. Here again, BellSouth is jumping the gun. IP Telephony is typically provided through high-speed PRI interfaces. As Mr. Gillan pointed out in unchallenged testimony, there is no indication in this record that BellSouth's access tariff offers what would in effect be a "Feature Group PRI." (Tr. 947) Further, assuming for the sake of argument that "pure voice" IP Telephony is regarded as a telecommunications service, the witness could not explain how this "geographical" approach would distinguish between "voice only" IP Telephony and calls involving information services that are exempt from access charges. (Tr. 177)

Boiled down, BellSouth says of IP Telephony, "We can't define it, but we are sure that access charges apply to it." BellSouth's effort to lay claim to access dollars for IP Telephony in this case is as audacious as it is premature. The Commission should see it as the overeager grab for dollars that it is. Precipitous regulatory action on this emerging technology, taken before an adequate record can be made and before the markets for the technology have had an opportunity to evolve,

is not merely ill advised; it could have the counterproductive effect of stifling innovation. As the many other more reasonable parties urged, the Commission should refrain from any attempt to address Issue 16 at this time.

<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 an agreement or negotiating a compensation mechanism? If so, what should be the mechanism?**

<u>Joint ALECs</u>: *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) and should be set for Verizon and Sprint in the upcoming phase of that docket.*

Note: Because bill-and-keep is one potential compensation mechanism, the bill-and-keep questions posed by the Commission during the hearing will be discussed as part of this issue.

As discussed in Issue 10, the Commission has authority under both state and federal law to set rates for transport and termination of local traffic or, under appropriate circumstances, to require bill-and-keep. Also as discussed in Issue 10, the Commission does not have jurisdiction over the rates to be charged for ISP-bound traffic after the effective date of the FCC's *ISP Remand Order*. The traffic which remains subject to the Commission's jurisdiction will be referred to as "section 251(b)(5) traffic". Under the *ISP Remand Order*, section 251(b)(5) traffic presumptively includes all traffic exchanged between local carriers for whom the ratio of terminating minutes to originating minutes is less than 3:1, and all traffic up to the 3:1 ratio for carriers whose total traffic exceeds that threshold.

Under Rule 51.705, the ILEC's rates for transport and termination must be set on a TELRIC basis unless (i) the traffic qualifies for bill-and-keep arrangements under Rule 51.713, and (ii) the

Commission decides to impose such arrangements instead of setting TELRIC rates. Under Rule 51.711, the ALEC's rates for transport and termination must be symmetrical with the ILEC's rates unless the ALEC proves that its costs of transport and termination are higher than the ILEC's.

The Commission has recently set what were intended to be TELRIC-based transport and termination rates for BellSouth in the first phase of the UNE cost docket. Subject to any adjustments that are made as the result of pending petitions for reconsideration and/or BellSouth's upcoming "120-day cost study" filing, the rates set in that docket should be established as the default to be charged by BellSouth and any ALEC with whom it interconnects. While bill-and-keep issues will be discussed below, it should be noted that BellSouth did not propose bill-and-keep in the UNE cost docket, but instead submitted cost studies and requested that rates be set for transport and termination. Similarly, the Commission is scheduled to consider transport and termination rates for Verizon and Sprint in the upcoming hearings in the next phase of the UNE cost docket. The Commission should continue to use that docket as the vehicle for setting cost-based rates for transport and termination.

Bill and Keep

Verizon is the only party to this docket which advocated the use of bill-and-keep for section 251(b)(5) traffic. Even Verizon does not advocate imposing bill-and-keep at this time; in its view bill-and-keep would only be appropriate if it were also applied to all ISP-bound traffic. (Verizon Position on Issue 17) Since the Commission no longer has jurisdiction over ISP-bound traffic, and since the FCC's interim compensation mechanism for such traffic is *not* bill-and-keep, it does not appear that any party supports establishing a bill-and-keep regime in this docket.

The Commission nevertheless asked the parties to address several aspects of bill-and-keep in their briefs, including the range of the Commission's discretion to adopt bill-and-keep; the factual and policy issues related to bill-and-keep, including the sufficiency of the factual record in this proceeding to support a bill-and-keep compensation regime; and information on what other states have done regarding bill-and-keep.

Range of Commission's Discretion

The FCC has recently initiated a rulemaking docket to consider all aspects of intercarrier compensation, including whether a bill-and-keep mechanism should be mandated for ISP-bound traffic, 251(b)(5) traffic, and eventually interstate access charges. *In re: Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, FCC 01-132, CC Docket No. 01-92, rel. April 27, 2001, at ¶4 (*"Intercarrier Compensation NPRM"*). Until that rulemaking is completed, however, this Commission's discretion to impose a bill-and-keep compensation regime is governed by FCC Rule 51.713. That rule, as amended by the *ISP Remand Order*, provides that:

> (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 telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing [regarding asymmetrical ALEC costs] has been made pursuant to § 51.711(b) of this part.
>
> (c) Nothing in this section precludes a state commission from presuming that the amount of telecommunications traffic from one network to another 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.

These rules reflect the FCC's determination in 1996 that bill-and-keep is appropriate only if the amount of traffic flowing between two carriers is roughly balanced.[8] Neither the FCC rule nor the discussion of the rule contained in the *Local Interconnection Order* contains a definition of "roughly balanced."

In considering the issue of traffic balance, the *Local Interconnection Order* and rules permit a state commission to either (i) adopt specific thresholds for determining "rough balance," citing as an example a five percent threshold for the difference between traffic flows in the two directions which had been established by the Michigan Commission, *id.* at ¶1112-113 and footnote 2717, or (ii) employ a rebuttable presumption that traffic flows are roughly balanced. The ability of the Commission to take either of these actions on the record in this case is discussed below.

The issuance of the *ISP Remand Order* has at least two implications for the Commission's discretion to impose a bill-and-keep arrangement on 251(b)(5) traffic. First, it creates a presumption that all traffic exchanged between carriers up to a 3:1 ratio of terminating to originating traffic is 251(b)(5) traffic. Whatever "roughly balanced" means, it cannot mean that a carrier who terminates three times as many minutes as it originates is in rough balance with its interconnecting carrier. A carrier who provides 3 million minutes of terminating service per month, but receives only 1 million minutes of terminating service from its interconnecting carrier, must be compensated for the

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[8]The FCC concluded in 1996 that bill-and-keep arrangements are not economically efficient because they distort carriers' incentives, encouraging them to overuse competing carriers' termination facilities by seeking customer that primarily originate traffic. *Local Interconnection Order* ¶ 1112. This incentive is eliminated only if bill-and-keep is accompanied by a requirement for rough traffic balance. This is the corollary of the incentive to seek customers that primarily terminate traffic which the ILECs contend existed when per-minute compensation was payable for ISP-bound traffic. This conclusion is one of the items that will be reconsidered in the FCC's current rulemaking proceeding.

additional 2 million minutes it terminates. In this situation, bill-and-keep is not an equitable system for "compensation," as it leaves the one carrier bearing highly disproportionate costs which it has no way to recover except through increasing charges to its end users.

Second, the FCC conditioned an ILEC's right to make payment for ISP-bound traffic at the FCC-established interim rates to situations in which the ILEC offers to exchange all traffic, including 251(b)(5) traffic, at that same rate. *ISP Remand Order* ¶ 89. To the extent an ILEC makes this offer, and ALECs accept it, there is no sphere of operation for a state-imposed bill-and-keep mechanism.

Possible Action in this Proceeding

While the Commission has the authority under the FCC's rule to establish a specific threshold for what constitutes a "rough balance" of section 251(b)(5) traffic flows, there is no evidence before the Commission in this case regarding the appropriate threshold. There also is no evidence in this proceeding of what actual traffic flows are being experienced between carriers after the exclusion of ISP-bound traffic. Simply put, there is no competent substantial evidence on which the Commission could set such a threshold.

The Commission also has the authority under the FCC's rule to adopt a rebuttable presumption that traffic flows are in balance. However, to the extent that carriers are exchanging any ISP-bound traffic above a 3:1 ratio, there necessarily is a 3:1 "imbalance" in their 251(b)(5) traffic. In that situation, it would be inappropriate to apply a presumption that traffic is balanced, when by definition it cannot be balanced. It would be even more inappropriate to apply that presumption in a case where no opportunity was provided for carriers to rebut the presumption of traffic balance. The issues that would have to be resolved before the Commission could impose a

bill-and-keep regime were not identified for resolution in this docket. Accordingly, the record in this docket does not support the imposition of bill-and-keep.

If the Commission believes that bill-and-keep is an option worth pursing as a policy matter 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 the terminating carriers.

The Joint ALECs respectfully suggest that the Commission should not be quick to initiate a full-scale proceeding on bill-and-keep in light of the FCC's *Intercarrier Compensation NPRM.* It is likely that the rules of the road will be changed to some extent in that federal proceeding. An interim state level shift from reciprocal compensation to bill-and-keep may not be advisable when a change in the federal framework may require yet another change in the near future.

Legal, Factual and Policy Issues Surrounding Bill-and-Keep

If the Commission does wish to investigate bill-and-keep, the *Intercarrier Compensation NPRM,* and the NARUC Resolution adopted on July 18, 2001 in response to that NPRM (Resolution Regarding The Development of a Unified "Bill-and-Keep" Intercarrier Compensation Regime), contain a good list of the types of legal, policy and factual issues that should be addressed. These include:

- is bill-and-keep for 251(b)(5) traffic consistent with the Act (*NPRM* ¶ 75)
- are bill-and-keep arrangements economically efficient and, if so, under what circumstances (*NPRM* ¶ 44)
- what are the relative transaction costs of various compensation mechanisms (*NPRM* ¶ 51)

- what is the impact of bill-and-keep on terminating monopolies (*NPRM* ¶ 53)
- will bill-and-keep create new and unexpected problems (*NPRM* ¶ 58)
- will bill-and-keep provide fair compensation to each carrier in the market, especially if there are imbalances in the type or volume of traffic between carriers (NARUC Resolution)
- will bill-and-keep maintain a reasonable link between the "cost-causer" and "cost-payer" (NARUC Resolution)
- will bill-and-keep provide appropriate economic signals to carriers and their customers (NARUC Resolution)
- will bill-and-keep lead to cross-subsidies between low and high volume customers or other customer classes (NARUC Resolution)
- will bill-and-keep create perverse incentives regarding infrastructure development, network configuration, or points of interconnection (NARUC Resolution)
- will bill-and-keep impact the opportunity for regulatory arbitrage (*Intercarrier Compensation NPRM* ¶ 11-12)

Experience in Other States

The Joint ALECs have found little precedent from other states regulating bill-and-keep. There is no central repository for information on intercarrier compensation mechanisms, and bill-and-keep issues have been addressed primarily in individual arbitrations, rather than in generic policy dockets. Therefore the decisions discussed below may not be an exhaustive list. The most recent state decisions regarding bill-and-keep appear to be decisions from Colorado and Arizona in

which state commissions, in individual arbitrations, imposed bill-and-keep for ISP-bound traffic, but not for 251(b)(5) traffic.

Colorado. In arbitrations involving Sprint/US West and ICG/US West, the Colorado Public Utilities Commission imposed a bill-and-keep compensation regime for ISP-bound traffic.[9] In imposing bill-and-keep for such traffic, the Colorado Commission first concluded that ISP-bound traffic was not "local traffic" subject to the Act's reciprocal compensation requirements.[10] Since it was not local traffic, the Colorado Commission further concluded that the FCC rule which requires rough traffic balance as a prerequisite to bill-and-keep for local traffic did not apply to ISP-bound traffic. (*ICG Decision* ¶ G.4) Of the alternatives before it - - reciprocal compensation, access charges, sharing of local revenues from ISP providers, and bill-and-keep - - the Commission chose the latter. These decisions have no precedential value in this Florida proceeding, since compensation for non-Internet-bound traffic was not at issue in the Colorado arbitrations, and the Colorado Commission expressly confirmed that "non-Internet traffic is subject to reciprocal compensation." (*ICG Decision* ¶G.27).

Arizona. In an arbitration involving Sprint and US West, the Arizona Corporation Commission imposed bill-and-keep for ISP-bound traffic, which was the only traffic at dispute in the proceeding. In doing so, the Arizona Commission noted that US West stated that it was able to

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[9]*In re: Petition of Sprint Communications Company for Arbitration with US West*, Initial Commission Decision, Docket No. 00B-011T, Decision No. C00-479 (May 3, 2000) ("*Sprint Decision*"); *In re: Petition by ICG for Arbitration with US West*, Initial Commission Decision, Docket No. 00B-103T, Decision No. C00-858 (August 1, 2000) ("*ICG Decision*").

[10]These decisions were entered after the Ninth Circuit had vacated the FCC's initial decision that ISP-bound traffic was jurisdictionally interstate and while the issue was pending before the FCC on remand.

identify Internet traffic and distinguish it from local traffic, which would remain subject to reciprocal compensation. *In re: Petition of Sprint Communications Company, L.P. for Arbitration with US West*, Opinion and Order, Docket No. T-02432B-00-0026, Decision No. 62650 (June 13, 2000). Subsequently, in a Level 3/Qwest arbitration, the Arizona Commission did not impose bill-and-keep even for ISP-bound traffic, instead applying lower compensation rates to terminating traffic above a 3:1 ratio. *In re: Petition of Level 3 for Arbitration with Qwest*, Opinion and Order, Docket No. T-03654A-00-0882, Decision No. 63550 (April 10, 2001). Since both of these decisions involved only ISP-bound traffic, which is now subject to compensation as "information access" at the FCC's interim rates, they provide no guidance on the issue of bill-and-keep for section 251(b)(5) traffic.

In summary, the Joint ALECs have found no cases in which other states have imposed a general bill-and-keep regime for traffic exchanged between ALECs and ILECs. The cases which imposed such a regime for ISP-bound traffic have no continuing precedential value in light of the FCC's recent declaration that such traffic is "information access" subject to the FCC's exclusive jurisdiction.

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

Joint ALECs' Position: *The Commission should, in a separate proceeding, establish cost based symmetrical reciprocal compensation rates available to parties unable to negotiate mutually acceptable 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.*

To the extent possible, the Commission's rulings in this case should be applied by ILECs and ALECs immediately within the context of their existing business and contractual relationships. The Commission would well serve the industry by establishing rules that can be implemented by all carriers efficiently and rapidly, without recourse to additional protracted litigation. All parties in this

case have an interest in the outcome of these issues and in reflecting these rulings and their on-going business relationships now and in the future. This proceeding has dealt with these issues in a generic way, but ultimately ILECs and ALECs will each need to conform their business practices to the rulings in this case. To the extent that an ILEC and an ALEC cannot agree as to how to do this, they may of course seek redress at the Commission. Such proceedings should be conducted in an expedited, streamlined manner so that this case need not be played out again individually between each ILEC and ALEC.

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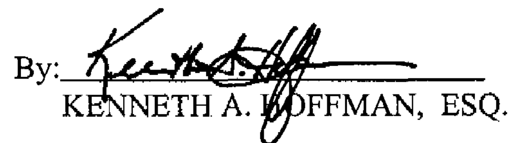
By: 
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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
Filed: July _5_, 2001

JOINT POSITION STATEMENT
OF FCCA, VERIZON, AT&T, MCI WORLDCOM, SPRINT, E-SPIRE, ALLEGIANCE, TCG OF SOUTH FLORIDA, MEDIAONE FLORIDA TELECOMMUNICATIONS, INC., and INTERMEDIA REGARDING ISSUE 16(B) ("IP TELEPHONY")

Florida Competitive Carriers Association (FCCA), Verizon Florida, Inc. (Verizon), AT&T Communications of the Southern States, Inc. (AT&T), MCI WorldCom (MCI), Sprint-Florida, Incorporated and Sprint Communications Company Limited Partnership (collectively, Sprint), e-spire Communications, Inc. (e-spire), Allegiance Telecom of Florida, Inc. (Allegiance), TCG of South Florida, Mediaone Florida Telecommunications, Inc., and Intermedia Communications, Inc. (Intermedia) through their undersigned counsel, hereby supplement their positions regarding Issue 16(b).

Issue 16(b) asks:

> 16(b) What carrier-to-carrier compensation mechanism, if any, should apply to IP telephony?

The above parties hereby supplement their respective positions articulated earlier by 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.

ATTACHMENT "A"

DOCUMENT NUMBER-DATE
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FPSC-RECORDS/REPORTING

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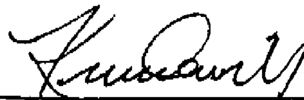

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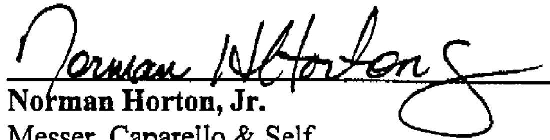

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I HEREBY CERTIFY that a true and correct copy of the foregoing Joint Supplemental Position Statement of FCCA, Verizon, AT&T, MCI, Sprint, e-spire, Allegiance, KMC, TCG, Mediaone and Intermedia Regarding Issue 16(b) ("Voice Over IP"FCCA's has been furnished by hand delivery (*) or U.S. Mail this 5th day of July, 2001 to the following:

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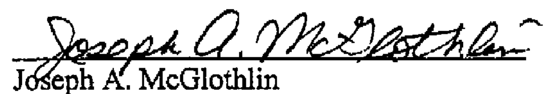

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FCCA/Recip Comp/Pleadings/Joint Supplemental
Position 07-06-01