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 BRIEF OF ALLEGIANCE TELECOM OF FLORIDA, INC. AND LEVEL 3 COMMUNICATIONS, LLC

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Pursuant to Order No. PSC-01-1362-PHO-TP issued June 22, 2001, Allegiance Telecom of Florida, Inc. ("Allegiance") and Level 3 Communications, LLC ("Level 3") file their Joint Brief addressing Phase II issues.

I. INTRODUCTION AND STATEMENT OF POSITION

The Florida Public Service Commission ("Commission") should adopt rules that promote competition between incumbent local exchange carriers ("ILECs") and alternative local exchange carriers ("ALECs") and that are consistent with the federal Communications Act of 1934, as amended ("Act"), and Federal Communications Commission ("FCC") Rules and Orders. In order to attain the pro-competitive goals of the Telecommunications Act of 1996 ("1996 Act") and bring the benefits of competition to consumers in the State of Florida, it is imperative that Commission regulations not require ALECs to "clone" ILECs' historical networks.

The Act and binding FCC rules establish the default rules that apply to interconnection of competing LECs' networks and compensation mechanisms applicable to the traffic LECs exchange at their point(s) of interconnection ("POI"). Under these rules, an originating carrier may not charge the terminating carrier for transporting calls from the originating carrier's end user to the POI selected by the ALEC. Nor may an originating carrier charge for the facilities used to transport its originating traffic to the POI.

Similarly, FCC rules establish the mechanisms that determine what type of compensation the terminating carrier receives for accepting traffic at the POI and delivering it to the terminating carrier's end user. While the Commission has jurisdiction to set rates and terms for the transport and termination of Section 251(b)(5) traffic, under the FCC's *ISP-Bound Traffic Remand Order*, it no

longer has jurisdiction to set rates or terms for "information access" traffic exchanged under Section 251(g). In setting rates and terms for the transport and termination of Section 251(b)(5) traffic, the Commission must apply binding FCC rules that provide an ALEC is entitled to be compensated at an ILEC's tandem interconnection rate if it satisfies a single test: the ALEC switch must be capable of serving a geographic area comparable to the service area of the competing ILEC tandem switch. Further, rates for transport and termination of Section 251(b)(5) traffic must be symmetrical and consistent with the pricing requirements of Section 252(d)(2) and FCC implementing regulations.

The Commission should not disturb the historical LEC practices of (1) assigning NXX codes to customers, including foreign-exchange-type customers, consistent with industry guidelines; and (2) comparing originating and terminating NXX codes to rate and route calls and to determine intercarrier compensation. ALECs should be allowed to assign telephone numbers to end users physically located outside the rate center in which the telephone number is homed, just as ILECs do. Because the costs to the originating LEC of transporting the call to the POI are the same regardless of where the terminating carrier ultimately terminates the call, the Commission should find that no compensation is due the originating carrier in such cases.

The rules adopted in this docket will apply during interconnection negotiations, mediations, and arbitrations. To the extent interconnection agreements contain change in law requirements, LECs will also be able to amend their existing agreements to incorporate the new rules. The Commission should take this opportunity to be proactive and reduce the possibility of further litigation. Specifically, the Commission should reaffirm that prior to June 14, 2001, ISP-bound traffic was subject to reciprocal compensation in the State of Florida and BellSouth, Sprint, and Verizon should pay any outstanding reciprocal compensation for ISP-bound traffic exchanged prior

to that date. The Commission should also affirm that the geographic coverage test is, and has always been, the sole criteria for purposes of tandem rate classification.

II. ARGUMENT

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? (Legal issue)**

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

Although Section 364.162(1), Florida Statutes, and Section 251(d)(3) of the Act grant the Commission jurisdiction to establish rates, terms and conditions for the transport and delivery or termination of traffic subject to Section 251 of the Act, the Commission must adopt rules that are consistent with Section 251 and the FCC's implementing regulations.[1]

The Commission's rules must comply with, among other things, FCC Rule 711(a)[2] regarding symmetrical reciprocal compensation rates, Rule 711(a)(3) regarding tandem classification of the ALEC switch, and Rules 703(b) and 709(b) regarding a LEC's obligation to deliver its originating traffic to the POI at no charge to the terminating LEC.

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[1] 47 U.S.C. § 251(d)(3). Hereafter all references to sections of 47 U.S.C. will be cited as "Section xx."

[2] 47 C.F.R. § 51.711(a). Hereafter all references to sections of Title 47, Part 51, Code of Federal Regulations will be cited as "Rule xxx."

On April 27, 2001, the FCC released its *ISP-Bound Traffic Remand Order*.[3] In this Order, the FCC established a new interim intercarrier compensation regime for ***all*** ISP-bound traffic, including calls that use Virtual NXX ("VNXX") codes, through rules that became effective June 14, 2001.[4] The new regime sets compensation rates for "information access" traffic and includes a gradually declining cap on the amount of compensation that carriers may recover for terminating "information access" traffic. Because the FCC exercised its authority under Section 201 to determine compensation for ISP-bound traffic,[5] this Commission no longer has jurisdiction to set rates or terms for the exchange of traffic destined for ISPs as initially contemplated by Issues 15, 17, and 18. The Commission retains jurisdiction, however, to address compensation obligations for the exchange of Section 251(b)(5) traffic and for the exchange of ISP-bound traffic prior to implementation of the new federal regime.[6]

Issue 12: **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 ILECs tandem interconnection rate?

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

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

***If an ALEC's switch is capable of completing calls within substantially the same area as that served by an ILEC tandem switch, then the ALEC

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[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. April 27, 2001) ("*ISP-Bound Traffic Remand Order*").

[4] *Id.* at ¶¶ 8, 79-80, 89.

[5] *Id.* at ¶ 82.

[6] *Id.*

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

Issue 12 concerns the applicable test for determining if an ALEC switch qualifies for the tandem rate for the purposes of reciprocal compensation. At the hearing, BellSouth and Verizon finally acknowledged the FCC's clear precedent that ALECs are not required to meet ***both*** the "functionality" test and the "geographic coverage" test. (Tr. 39:3-8, 100:21-101:1, 156:7-12, 270:22-271:21) As the FCC recently affirmed, the *sole* applicable test is the "comparable geographic coverage" test set forth in Rule 711(a)(3).

A. The Commission May Not Apply a Two-Prong Test

In their prefiled testimony, BellSouth and Verizon ("the ILECs")[7] sought to impose a two-prong test to determine whether an ALEC qualifies for tandem compensation: (1) a functional prong; and (2) a geographic coverage prong. (Tr. 30:18-23, 308:6-17) Their testimony was based, in part, on Commission precedent that the ILECs claimed required a two-prong test. (Tr. 33:8-34:17) This two-prong test, however, was rejected in the FCC's *Local Competition Order*[8] in August 1996, has been consistently rejected by the FCC, and was most recently rejected by both this Commission[9] and the United States Court of Appeals for the Ninth Circuit.[10]

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[7] In this proceeding, Sprint represented both its ILEC and ALEC operations. Therefore, any references to arguments or positions of "the ILECs" includes only BellSouth and Verizon.

[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) *("Local Competition Order"), aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1069 (9th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T Corp. et al. v. Iowa Utils. Bd. et al.*, 119 S.Ct. 721 (1999), *vacated in part on remand, Iowa Utils. Bd. v FCC*, 219 F.3d 744 (8th Cir. 2000), *motion for partial stay granted, Iowa Utils. Bd. v. FCC*, Case no. 96-3321 et al., Order Granting Motion for Partial Stay of the Mandate (8th Cir. Sept. 22, 2000).

[9] Order No. PSC-01-1015-FOF-TP at 6-7 (BellSouth/Intermedia Order on Reconsideration).

[10] *U.S. West Communications, Inc. v. Washington Utils. & Transp. Comm'n*, 2001 WL 740573 (July 3, 2001 9th Cir.).

In its *Local Competition Order*, the FCC adopted a single-prong test that is embodied in Rule 711(a)(3) and provides that where the ALEC switch "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."[11] The FCC recently reaffirmed the comparable geographic coverage test embodied in Rule 711(a)(3) and dismissed any possible argument that a functional test or any other test must be met by the ALEC to qualify for the tandem reciprocal compensation rate:

> Section 51.711(a)(3) of the [FCC'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 [specifically in ¶ 1090], *Section 51.711(a)(3) is clear in requiring only a geographic area test.* Therefore, we confirm that a carrier demonstrating that its switch serves "a geographic area comparable to that served by the incumbent LEC's tandem switch" is entitled to the tandem interconnection rate to terminate local telecommunications traffic on its network.[12]

In a letter to Sprint PCS, the FCC reaffirmed that Rule 711(a)(3) "requires only that the comparable geographic area test be met before a carrier is entitled to the tandem interconnection rate for local call termination."[13] The United States Court of Appeals for the Ninth Circuit, relying in part on the FCC's Sprint PCS letter, held that "a carrier demonstrating that its switch serves a

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[11] 47 C.F.R. § 51.711(a)(3).

[12] *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, ¶ 105 (rel. Apr. 27, 2001) ("*Intercarrier Compensation NPRM*") (emphasis added) (footnotes omitted).

[13] Joint CCB/WTB Letter from D. Attwood & T. Sugrue to C. McKee, Sprint PCS, re: *Cost-Based Terminating Compensation for CMRS Providers*, CC Docket Nos. 95-185, 96-98 and WT Docket No. 97-207, DA 01-201, 3 (May 9, 2001).

'geographic area comparable to that served by the incumbent LEC's tandem switch' is entitled to the tandem interconnection rate."[14]

Thus contrary to the ILECs' prior claims,[15] the Commission may not apply paragraph 1090 of the *Local Competition Order*, Rule 319(c)(3) (which defines the unbundled tandem switch network element) or Rule 711(a)(1) (which requires symmetrical rates for the same services) to create a "functionality" test. Nor may the Commission limit the right of ALECs to receive tandem compensation under Verizon's "symmetry" theory.[16] As the Ninth Circuit found, and Verizon has now acknowledged (Tr. 363:17-364:1), FCC rules do not grant the ILEC an ability to choose between incurring the cost of interconnecting at end office switches, where the rates are lower, or at tandem switches:

> AT&T's ability to hand off (i.e., deliver) its traffic to U.S. West in a financially efficient way does not justify imposing the end-office rate (rather than the tandem rate) on U.S. West's traffic terminated on AT&T's network. AT&T's ability to efficiently interconnect with U.S. West affects the costs the U.S. West incurs; it does not affect costs that AT&T incurs terminating U.S. West's traffic and should not affect AT&T's recovery under § 252(d)(2)(A). AT&T should be paid for the costs it incurs, not according to the costs it avoids imposing on U.S. West. Penalizing AT&T for its efficiently configured network architecture defeats the letter of § 252(d)(2)(A) and the spirit of the Act.[17]

As the FCC made clear in its *Local Competition Order*, and recently clarified two separate times, the geographic coverage test set forth in Rule 711(a)(3) is the sole test that the Commission may apply when determining whether an ALEC's switch qualifies for the tandem intercarrier compensation rate.

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[14] *U.S. West v. Washington Utils. & Transp. Comm'n*, 2001 WL 740573, *6-7.

[15] *See, e.g.*, Tr. 31:1-33:2 (Mr. Ruscilli arguing that Rules 711(a)(1) and 319(c)(3) impose functionality test).

[16] *See* Verizon Pre-hearing Statement, 5 (filed May 31, 2001).

[17] *Id.* at *4.

B. The Comparable Geographic Coverage Test Involves an Examination of the Areas the ALEC's Switch is "Capable" of Serving Over the Entire Term of the Agreement

Because each ALEC's network architecture and business plan varies, the Commission should determine an ALEC's entitlement to the tandem rate on a case-by-case basis. As discussed in Issue 18 herein, however, the Commission should adopt a streamlined and expedited process for resolution of disputes concerning the geographic coverage test. In order to minimize disputes and provide carriers some measure of certainty, it should also provide guidance on the criteria that will be used to evaluate tandem classification.

An ALEC need only show that its switch is *capable of serving* an area *comparable to* the area served by the ILEC's switch, not that it is *currently serving* customers in *an identical* geographic area.[18] BellSouth proposes that an ALEC show that a particular number of customers are being served by the ALEC switch and that those in-service customers are geographically dispersed in each wire center served by the ILEC tandem. (Tr. 157:8-158:11) Verizon suggest that an ALEC must actually be serving customers throughout the geographic area, but offers no specific criteria for the Commission to apply. (Tr. 343:2-19) The ILECs propose to base compensation upon an ALEC's success in marketing, rather than upon the geographic coverage of the ALEC's switch. (Tr. 543:21-544:8, 1030:23-1031:11) By focusing on customers to whom the ALEC actually provides service,

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[18] *See, e.g., Petition of ITC^DeltaCom Communications, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. P0500, Sub 10, Order Ruling on Objections, Request for Reconsideration, and Composite Agreement, 6 (N.C.U.C. July 25, 2000) ("[A]doption of the argument that the CLP's switch must actually be serving customers in the relevant geographic area instead of being capable of serving them makes the availability of the tandem switching rate contingent upon the market level penetration achieved by the CLP, an outcome which finds no support in Rule 51.711 or Paragraph 1090.").

the ILECs ignore the sunk investments the ALEC made to become capable of serving customers.[19] ALECs on the other hand, acknowledge network and other investments make it possible for the ALEC to provide tandem coverage even if its marketing campaigns have not yet convinced customers to switch service providers. (Tr. 1027:28-51)

As admitted by Mr. Ruscilli, BellSouth's proposed test is "very subjective." (Tr. 159:12-13) Further, BellSouth may not be able to provide the data necessary for the Commission to make its proposed geographic dispersion comparison. (Tr. 165:17-25) The subjectivity of the ILEC test will inevitably lead to disputes between LECs that must be resolved by the Commission. In contrast, the ALEC-proposed test primarily relies on easily verifiable data, such as collocation arrangements and NXX information available in the LERG, which would minimize disputes between LECs. (Tr. 1027:25-1028:10)

The Commission should adopt guidelines for the showing that are consistent with the ALEC-proposed test, such as requiring maps that include switch location, collocation arrangements that are planned and operational, and NXX codes that are assigned or activated. (Tr. 1011:24-1012:18) The guidelines should also recognize that without turning up an NXX code in a particular rate center, an ALEC can serve customers using local number portability, and that without collocating in a particular central office, an ALEC can serve customers served by that office through the use of enhanced extended loops. (Tr. 577:9-16, 1012:17-18) Further, an ALEC can use the unbundled network element platform to serve customers without being collocated in the central office where

[19] *Cf.* Tr. 355:5-356:7 (Verizon's Dr. Beauvais argues it is appropriate for ILECs to recover sunk investments for facilities the ILEC proposes to dedicate to a particular ALEC between a local calling area and POI even where the facility is not used to carry traffic).

the customer's loop terminates and without opening an NXX code for the customer's rate center. As these examples show, the Commission should consider not only the ALEC's current service area, as defined by activated NXX codes and operational collocation arrangements, but also the areas expected to be served by the ALEC's switch during the term of the Agreement, as evidenced by pending NXX and collocation requests and other verifiable business planning data. By adopting guidelines that specify the types of verifiable data the Commission will evaluate under the geographic coverage test, the possibility of disputes between LECs will be minimized.

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

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

Because of the proliferation of local calling plans both ILECs and ALECs offer end users (Tr. 760:9-762:7), the Commission should permit parties to an interconnection agreement to negotiate the local calling area that will be used to determine which calls qualify for reciprocal compensation. An ALEC should be allowed to mirror the ILEC local calling area if it chooses to do so. (Tr. 762:12-13)

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

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

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

The FCC has established "rules of the road" that address an ILEC's financial obligation to deliver its originating traffic to the POI selected by the ALEC, rather than charging the ALEC for such facilities. The first rule is that the ALEC is entitled to select a single "technically feasible" POI in a LATA for the exchange of traffic with the ILEC. The second rule is that each LEC bears the burden of delivering telecommunications traffic originated by its customers to the POI and recovers such costs in the rates charged to its end users. Under these binding FCC rules, the Commission must find that no compensation is due the originating carrier for transporting its traffic to the POI selected by the ALEC.

A. The ILEC Must Deliver Its Originating Traffic to the POI Selected by the ALEC

1. ALECs Have the Right to Select the POI for the Exchange of Traffic

The Act grants ALECs, not ILECs, the right to select the POI for the exchange of both parties' traffic. Under Section 251(c)(2)(B), an ILEC must provide interconnection at "any technically feasible point" within its network selected by the ALEC. This means that the ALEC has the right to select a single POI per LATA.[20] By contrast, there is nothing in the Act that imposes any similar requirement on ALECs and Rule 223(a) prohibits this Commission from imposing such obligations on ALECs. (Tr. 219:19-220:24, 718:16-719:8)

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[20] *Application by SBC Communications., Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶ 78 (rel. Jun. 30, 2000) (*"Texas 271"*); *U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222 WD, 1998 WL 350588 (W.D. Wash. Jan. 7, 1998), *aff'd* 193 F.3d 1112, 1124 (9th Cir. 1999), *cert. denied* 530 U.S. 1284, *reh'g denied* 530 U.S. 1297 (2000); *US West Communications, Inc. v. Minnesota Pub. Utils. Comm'n, et al.*, 1999 LEXIS 22042, *52-56 (D. Minn. March 31, 1999).

Although BellSouth's witness Dr. Taylor admits that an ILEC may not determine the POI (Tr. 259:9-11), BellSouth's Mr. Ruscilli and Verizon's Dr. Beauvais assert that the ALEC does *not* have the sole right to select the POI. (Tr. 114:8-10, 322:1-18) The Commission has rejected such internally inconsistent arguments before and it should do so again here. While Dr. Beauvais is correct that all LECs have a duty to negotiate POIs,[21] the FCC's finding that an ALEC may select the most efficient POI at which to *exchange* traffic with an ILEC precludes the incumbent from requiring that traffic be exchanged at a different point.[22] This Commission, in recent arbitrations, agreed that at the POI, "traffic is mutually exchanged between carriers."[23] The FCC also rejected a similar proposal advanced by a Verizon company, Bell Atlantic:

> we reject Bell Atlantic's suggestion that we impose reciprocal terms and conditions on incumbent LECs and requesting carriers pursuant to section 251(c)(2). Section 251(c)(2) does not impose on non-incumbent LECs the duty to provide interconnection. The obligations of LECs that are not incumbent LECs are generally governed by sections 251(a) and (b), not section 251(c). Also, the statute itself imposes different obligations on incumbent LECs and other LECs (i.e., section 251(b) imposes obligations on all LECs while section 251(c) obligations are imposed only on incumbent LECs).[24]

In rejecting various proposals about ILECs designating separate POIs, the FCC again affirmed an ALEC's right to *exchange* traffic with the ILEC at a single POI:

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[21] As Mr. Hunt and Mr. Gates testified on behalf of Level 3, ALECs and ILECs have agreed, under the default rule of a single POI per LATA, to deploy additional POIs when sound engineering principles, traffic volumes, market topography, and customer base development warrant additional POIs. (Tr. 710:14-711:2, 713:19-714:19, 814:1-19)

[22] *Local Competition Order* at ¶ 172. Even if the ALEC chooses the POI, the ALEC and ILEC must still negotiate how the POI will be effectuated – for example, the parties must determine whether interconnection will be achieved via leased facilities, collocation, or the use of third-party facilities and services.

[23] *See* Order No. PSC-00-1519-FOF-TP (BellSouth/Intermedia Final Order on Arbitration) at 48, Order No. PSC-01-1332-FOF-TP (BellSouth/Level 3 Final Order on Petition for Arbitration) at 11-12, Order No. PSC-01-1095-FOF-TP (BellSouth/Sprint Final Order on Arbitration) at 35.

[24] *Local Competition Order* at ¶ 220 (footnotes omitted).

> Of course, requesting carriers have the right to select points of interconnection at which to exchange traffic with an incumbent LEC under section 251(c)(2).[25]

Because the Act grants ALECs, not ILECs, the right to select any technically feasible point on the ILEC's network for the exchange of both parties' traffic, the Commission should reject the ILECs' proposal and establish a default rule -- consistent with federal law and its own prior rulings -- that ALECs may select a single POI per LATA for the exchange of both parties' traffic.

2. Economic Arguments Cannot Undo the ALEC's Right to a Single Technically Feasible POI

Rule 305(e) assigns the ILEC the burden of showing that the ALEC's requested POI is not technically feasible. The ILECs have not attempted to meet this burden. To the contrary, BellSouth has admitted that interconnection at a single POI per LATA is technically feasible and Verizon has admitted that a single POI per LATA may be not only feasible but efficient. (Tr. 118:8-119:8, 358:25-359:3). Further, as Mr. Hunt testified, Level 3 initially established a single POI per LATA with all three ILECs in Florida: BellSouth, Sprint and Verizon. (Tr. 715:1-5) Level 3's deployment of a single POI per LATA shows that such arrangements are technically feasible.[26]

Under the "technical feasibility" standard, the alleged economic burden to the ILEC is not relevant to the issue of locating the POI. As the FCC found, "the 1996 Act bars consideration of costs in determining 'technically feasible' points of interconnection" and that prohibition "cannot be undone through an interpretation that such considerations are implicit."[27] Under binding FCC

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[25] *Id.* at ¶ 220, n. 464.

[26] 47 C.F.R. § 51.305(c).

[27] *Local Competition Order* at ¶ 198.

rules, unless the ILEC can show that the exchange of traffic at a single POI per LATA is not technically feasible, it must offer such interconnection to an ALEC upon request.[28]

Notwithstanding this directive that cost shall not be considered in assessing technical feasibility, BellSouth and Verizon rely solely upon the argument that the economics of a single POI may make it an "expensive" form of interconnection for which the ALEC must pay the ILEC. Accepting their economic argument and requiring an ALEC to build or lease facilities to each ILEC local calling area would make establishment of a single POI meaningless. (Tr. 812:15-21, 831:11-16) Contrary to FCC rules and sound engineering principles, their proposal would foist inefficient costs on new entrants by forcing them to mirror the legacy ILEC network. (Tr. 682:6-16) Unlike ILECs, who have ubiquitous facilities throughout their service areas,[29] ALECs must construct or lease facilities to reach each POI. (Tr. 769:1-18) Deploying facilities can be an expensive, time consuming process. (Tr. 813:15-17) Compelling use of the ILEC's facilities to reach into every local calling area from the first day an ALEC enters a Florida market could impose additional, unnecessary costs on ALECs because the dedicated facilities BellSouth and Verizon seek to have ALECs purchase may not be efficiently utilized, if they even carry traffic at all. (Tr. 811:7-14) Nor would an ALEC be able to justify the cost of building such facilities to carry a minimal amount of traffic from the local calling area to the POI. (Tr. 772:8-13) In contrast, the costs to the ILEC of carrying the traffic for additional mileage over its existing ubiquitous network is "too small to measure." (Tr. 693:22-694:14) Thus the "build or buy from the ILEC" option is not really an option

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[28] *Local Competition Order* at ¶¶ 198, 205.

[29] *See, e.g.*, Tr. 18:12-17 (acknowledging BellSouth carries calls via its intraLATA trunking network), 279:9-10.

at all; it foists additional, unnecessary costs on its competitor, and creates a financial windfall for the ILEC. (Tr. 810:4-22)

Adopting the ILECs' position could deter an ALEC from serving a local calling area at all until it believes it can win enough customers to justify efficiently utilizing the dedicated interconnection facility it is forced to build or lease under the ILECs' proposals. (Tr. 772:10-13, 811:7-14, 814:14-19) As the FCC argued, and the U.S. District Court for the District of Oregon agreed:

> [n]othing in the 1996 Act or binding FCC regulations requires a new entrant to interconnect at multiple locations within a single LATA. Indeed, such a requirement could be so costly to new entrants that it would thwart the Act's fundamental goal of opening local markets to competition.[30]

Adopting BellSouth's or Verizon's proposal would create a barrier to entry by fundamentally altering the economics of an ALEC's decision to provide service to each and every local calling area in Florida beyond the area where it establishes its initial point of presence. Record evidence shows that interconnection at a single POI per LATA is technically feasible. The Commission should therefore reject the ILECs' economic proposal as inconsistent with both FCC rules and the public policy of opening Florida's telecommunications markets to competition.

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[30] *US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, No. CV-97-1575-JE, Memorandum of the FCC as Amicus Curiae (D. Ore. Sept. 14, 1998). *See also, US West Communications Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, 31 F. Supp.2d 839, 852-3 (D. Ore. 1998) (rejecting US West's claim that an ALEC is required to establish a POI in each local exchange because "the cost might well be prohibitive for prospective competitors" and upholding the commission's decision that US West had failed to prove a single POI per LATA was "expensive"), *rev'd in part US West Communications, Inc. v. Hamilton*, 224 F.3d 1049 (9th Cir. 2000) (the 9th Circuit did not address the District Court's POI finding).

B. FCC Rules Prohibit ILECs from Charging ALECs for Delivery of the ILEC's Traffic to a Single POI

1. The Originating Carrier Must Bear the Costs of Delivering Its Local Traffic to the POI

If BellSouth and Verizon cannot select their own POIs, they propose that the ALEC may select a single POI per LATA, but then must either build facilities from the POI to each local calling area, or lease a dedicated ILEC facility from the local calling area to the single POI -- even if no traffic is coming from that local calling area. (Tr. 47:23-48:2) Because this proposal violates the FCC's second "rule of the road," the Commission must reject it. The second rule of the road is that each LEC bears the burden of delivering local traffic originated by its customers to the POI and recovers such costs in the rates charged to its end users. Rule 703(b) establishes that a "LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." Similarly, Rule 709(b) establishes that "[t]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover *only* the costs of the *proportion* of that trunk capacity used by an interconnecting carrier to *send* traffic that will terminate on the providing carrier's network." (Emphasis added.) In other words, as the providing carrier, the ILEC may only charge an interconnecting ALEC for that portion of the trunk capacity that the ALEC uses to *send* calls to the ILEC. The ILEC may not charge the ALEC for that portion of the facility that carries calls originating from its end users. These rules, in conjunction with the first "rule of the road," establish that each LEC must deliver its originating telecommunications traffic to the POI selected by the ALEC at no charge to the terminating carrier. As the FCC found:

> In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and *is responsible for paying the cost of delivering the call to the network of the co-carrier* who will then terminate the call. Under the Commission's regulations, *the cost of the facilities used to deliver this traffic is the originating carrier's responsibility*, because these facilities are part of the originating carrier's network. *The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls.* This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.[31]

The ILECs' proposal squarely violates the FCC's rules of the road.[32] The ILECs cannot shift the cost of delivering their originating traffic to ALECs, either by moving the POI, or by requiring ALECs to pay for facilities between the ILECs' local calling areas and the POI.

2. An ILEC's Financial Obligation to Deliver Its Originating Traffic to the ALEC's Selected POI Is Not Conditioned on the POI Being Located Within the Local Calling Area in Which the Traffic Originated

BellSouth claims that the "rules of the road" only apply if the POI is located within the same local calling area in which the traffic originates. (Tr. 78:22-79:19) FCC rules, however, say no such thing. (Tr. 148:17-149:11, 268:19-269:23) For example, Rule 701(b)(1) defines "telecommunications traffic" between wireline carriers as "[t]elecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or

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[31] *TSR Wireless, LLC et al. v. U S West Communications, Inc., et al.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194, ¶ 34 (rel. June 21, 2000) *("TSR Wireless")* (emphasis added), *aff'd, Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

[32] BellSouth has alleged that interconnection in each local calling area is required because its local rates are not intended to recover the costs of delivering its customers' traffic to a single POI. (Tr. 44:21-45:7, 84:11-13) This statement is contrary to the FCC "rules of the road" quoted above, and is therefore irrelevant even if proven. If BellSouth could show that its local rates fail to recover its costs of originating calls, its remedy would be to petition this Commission for a rate adjustment, not to recover those costs from the terminating carrier in violation of the FCC's "rules of the road."

exchange services for such access." The rule specifies the *type* of traffic that must be brought to the POI, not the location of the POI.

In order to escape its obligation to deliver its originating traffic to the POI, BellSouth stretches to link the FCC's "rules of the road" to a requirement that the POI be in each local calling area by analogy to *TSR Wireless*. In *TSR Wireless*, the FCC affirmed that its reciprocal compensation rules apply to paging carriers and found that an ILEC had the obligation to take a call to a POI anywhere in a Major Trading Area ("MTA") without charge for interconnection with a wireless carrier. A MTA can be as large as, if not larger than, a LATA.[33] In Florida, although there are seven LATAs, there are only four MTAs, and two of the four cross state boundaries. Under BellSouth's interpretation of *TSR Wireless*, Rules 703(b) and 709(b) (which make no reference to local calling areas) require an ILEC to bear the costs of hauling its customers' local calls all over the LATA for wireless carriers, but only within the local calling area for wireline carriers.[34] The Commission has previously rejected BellSouth's strained, discriminatory interpretation of *TSR Wireless* and it should reject it again here.[35]

The Commission should also take note of more recent FCC rulings that rebut BellSouth's interpretation of *TSR Wireless*. In its application to the FCC for authority under Section 271 to provide in-region, interLATA services in Kansas and Oklahoma, Southwestern Bell Telephone Company ("SWBT") made an argument similar to that raised here by BellSouth. In conformance

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[33] *TSR Wireless* at ¶ 31.

[34] The FCC has emphasized that its rules are designed to be technology neutral. *See, e.g., TSR Wireless* at ¶ 23. Because BellSouth's reading of *TSR Wireless* discriminates against wireline carriers, the Commission should reject it.

[35] Order No. PSC-01-1332-FOF-TP (BellSouth/Level 3 Final Order on Petition for Arbitration) at 11 ("There is no indication in [*TSR Wireless*] that the FCC has committed itself to a definition of local calling areas for the purpose of compensating incumbents for bringing their originated traffic to an interconnection point within a LATA").

with *Texas 271*, SWBT had modified its interconnection offers in Kansas and Oklahoma to provide ALECs the option of interconnecting at a single POI per LATA.[36] Although SWBT provided a single POI per LATA option in the contract, it argued, just as BellSouth argues in this proceeding, that ALECs seeking a single POI should bear *any additional cost associated with SWBT taking its traffic to the POI in the other exchange.*[37] The FCC rejected SWBT's argument:

> we caution SWBT from taking what appears to be an expansive and out of context interpretation of findings we made in our *SWBT Texas Order* concerning its obligation to deliver traffic to competitive LEC's point of interconnection. In our *SWBT Texas Order*, we cited to SWBT's interconnection agreement with MCI-WorldCom to support the proposition that SWBT provided carriers the option of a single point of interconnection. We did not, however, consider the issue of how that choice of interconnection would affect inter-carrier compensation arrangements. *Nor did our decision to allow a single point of interconnection change an incumbent LEC's reciprocal compensation obligations under our current rules. For example, these rules preclude an incumbent LEC from charging carriers for local traffic that originates on the incumbent LEC's network.*[38]

Similarly, in footnote 149 of the *ISP-Bound Traffic Remand Order*, the FCC stated that its decision with respect to intercarrier compensation for ISP-bound traffic "affects only the intercarrier *compensation (i.e.,* the rates) applicable to the delivery of ISP-bound traffic."[39] The FCC clarified that its order "does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of

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[36] *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, ¶ 232, n. 688 (rel. Jan. 22, 2001) (*Kansas/Oklahoma 271*).

[37] *Id.* at ¶ 233.

[38] *Id.* at ¶ 235 (footnotes omitted, emphasis added).

[39] *ISP-Bound Traffic Remand Order* at n.149 (emphasis in original).

interconnection."[40] Thus, the *ISP-Bound Traffic Remand Order* also affirms an ILEC's obligation to take its originating traffic over its own network to the POI without shifting that responsibility to ALECs. These decisions, released after *TSR Wireless*, affirm Allegiance's and Level 3's position that ILECs are not relieved from their financial obligation to deliver their originating traffic to the POI merely because the POI is located outside the local calling area where the traffic originated. Under the FCC's regulations, the cost of bringing traffic over those facilities -- which are part of the "originating carrier's network" -- are borne by the originating carrier. The fact that those facilities may extend beyond the ILEC's local calling area is immaterial.

3. A Single POI Per LATA Is Not *Per Se* "Expensive"

In addition to BellSouth's misplaced reliance on *TSR Wireless*, the ILECs' second, and equally unconvincing, theory in support of charging ALECs for originating traffic is that paragraphs 199 and 209 of the *Local Competition Order* require the ALEC to pay for the "additional costs" ILECs purportedly incur by interconnecting at a single physical POI in each LATA. (Tr. 46:18-47:13) Under this theory, the facilities used to haul ILEC-originated traffic from a local calling area to the single POI are "additional costs."

Contrary to the ILECs' theory, paragraphs 199 and 209 of the *Local Competition Order* do not undo the FCC's "rules of the road." Nothing in paragraphs 199 or 209 of the *Local Competition Order* supports the theory that "additional costs" for *interconnection* may undo an ILEC's *reciprocal compensation* obligation or its obligation to exchange traffic with an ALEC at a single POI per

[40] *Id.* Although the FCC may be considering revisions to its rules in a Notice of Proposed Rulemaking, as suggested by Mr. Ruscilli (Tr. 130:13-131:5), its mere consideration of new rules does not undo rules that are currently effective and binding on this Commission. (Tr. 150:21-151:7)

LATA. The FCC has flatly rejected similar ILEC arguments to escape the obligation imposed by Rule 703(b):

> Defendants argue that section 51.703(b) governs only the charges for "traffic" between carriers and does not prevent LECs from charging for the "facilities" used to transport that traffic. We find that argument unpersuasive given the clear mandate of the *Local Competition Order*. The Metzger Letter correctly stated that the Commission's rules prohibit LECs from charging for facilities used to deliver LEC-originated traffic, in addition to prohibiting charges for the traffic itself. Since the traffic must be delivered over facilities, charging carriers for facilities used to deliver traffic results in those carriers paying for LEC-originated traffic and would be inconsistent with the rules. Moreover, the Order requires a carrier to pay for dedicated facilities only to the extent it uses those facilities to deliver traffic that it originates. Indeed, the distinction urged by Defendants is nonsensical, because LECs could continue to charge carriers for the delivery of originating traffic by merely re-designating the "traffic" charges as "facilities" charges. Such a result would be inconsistent with the language and intent of the Order and the Commission's rules.[41]

Thus BellSouth and Verizon cannot redesignate "traffic" charges as "facilities charges for an expensive form of interconnection" to evade their obligations under Rules 703(b) and 709(b). As the Court of Appeals for the District of Columbia Circuit found, adopting the ILECs' reading of those rules would:

> create an apparently artificial distinction, giving LECs an incentive to game the system by providing dedicated facilities at the [terminating carriers'] expense in cases where they could conveniently carry the traffic at their own expense.[42]

Although paragraph 199 *may* permit ILECs to recover the additional costs caused by a novel and expensive form of interconnection (such as interconnection at a technically feasible point on BellSouth's network that is not in the FCC's minimum list of required interconnection points), it does not support the theory that interconnection at a single POI is *per se* expensive. Interconnection

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[41] *TSR Wireless* at ¶ 25.

[42] *Qwest Corp. v. FCC*, 252 F.3d at 467.

at a single POI is not novel, it is required by FCC rules (as affirmed by numerous FCC and federal court orders).

Even if the ILECs could somehow recharacterize their request for compensation as a request for reimbursement for additional costs caused by an expensive form of interconnection, the Commission should reject the ILECs' position because they have failed to make any cost-based showing required under Section 252(d)(1).[43] Including the rates BellSouth *proposes* to charge[44] for a facility that *it has not proven it must use* for interconnection[45] does not satisfy Section 252(d)(1). (Tr. 138:6-15)

The ILECs have not presented evidence to establish what, if any, "additional" costs they incur using a single POI per LATA as opposed to a POI in each local calling area.[46] To the contrary, the record evidence establishes that such a showing, if it can be made at all, depends on the characteristics of an individual interconnection arrangement between an ILEC and ALEC. (Tr. 808:5-7) The cost of a single POI could vary substantially depending on the type of interconnection

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[43] *See, e.g., US West v. Minn. Pub. Utils. Comm'n*, 1999 LEXIS 22042 at *53 (affirming commission rejection of US West argument that single POI per LATA raises network costs and lowers network efficiency); *US West v. AT&T*, 31 F. Supp.2d at 852-3 (rejecting US West's claim that an ALEC is required to establish a POI in each local exchange because "the cost might well be prohibitive for prospective competitors," and upholding the commission's decision that US West had failed to prove a single POI per LATA was "expensive"); *US West Communications, Inc. v. Jennings*, 46 F. Supp.2d 1004, 1021 (D. Ariz. 1999) (rejecting US West's claim that a POI per local calling area is always required because that "could impose a substantial burden on CLECs, particularly if they employ a different network architecture than US West," and remanding to the commission to make clear that US West could seek relief if problems arise or particular circumstances warrant relief).

[44] *See* Tr. 48:4-17 (proposing to charge DS-1 dedicated interoffice transport (per mile) and facility termination charges).

[45] *See* Tr. 49:6-9 (requesting compensation for facilities that BellSouth "may" be required to install), 205:9-21 (acknowledging "distant" transport under Lake City to Jacksonville example would be unique situation if only two BellSouth local calling areas in Florida are not contiguous).

[46] *See* Order No. PSC-01-1332-FOF-TP (BellSouth/Level 3 Final Order on Petition for Arbitration) at 25 (rejecting BellSouth position because it did not submit cost data to substantiate its claim of higher costs using a single POI per LATA).

employed, the facilities used to transport traffic to the POI, traffic volumes, and mileage. Indeed, one could say that ALECs already pay for the "additional costs" of interconnection today, even at a single POI. When an ALEC wants to interconnect via the lease of entrance facilities, it pays the ILEC a nonrecurring charge and a monthly recurring charge for those facilities to reach the POI. When an ALEC wants to interconnect at a collocation cage, it pays the ILEC tens of thousands of dollars in nonrecurring and recurring charges for the right to collocate. Thus, ILECs are already fairly compensated for the costs of providing interconnection to ALECs. Moreover, as Mr. Ruscilli admitted, the "additional" costs associated with a single POI per LATA could vary depending upon how much traffic from a given local calling area is exchanged with an ALEC outside of the local calling area and whether these volumes would cause the ILEC to resize existing trunk groups.[47] (Tr. 138:6-10) With respect to mileage, Verizon's witness Dr. Beauvais admitted that the costs ALECs arguably impose on ILECs under a single POI per LATA may not be that significant (Tr. 323:16-20, 371:2-16) and that this dispute may be a dispute in principle -- "the costs may not be overwhelming." (Tr. 372:4-6) According to Dr. Beauvais, "a single point of interconnection may be an efficient arrangement depending upon the type of network that whoever we are interconnecting with may have." (Tr. 358:25-359:3) An ILEC would not be permitted to recover supposed expenses of loop provisioning or collocation without making a demonstration that it in fact incurred the costs it was seeking to recover. The same principle should govern here. Without showing the type of interconnection contemplated, the location of the POI, the transport each party must provide on either side of the POI, and the volume of traffic from so-called "distant" local calling areas

[47] Although Mr. Ruscilli does not believe a cost study is necessary, building a network without evaluating the economic trade-offs between trunking and switching costs violates BellSouth's own network build principles. (Tr. 17:9-13)

exchanged at the POI, it is impossible to measure the additional cost, if any, that each party bears under a single POI architecture.

If, as the ILECs claim, interconnection at a single POI per LATA causes them to incur additional costs, they must prove what those costs are under Section 252(d)(1) and must show that they do not recover such costs from their own customers.[48] BellSouth and Verizon have failed to meet this burden.[49]

4. Both Interconnecting LECs and Their Customers Benefit from Interconnection

Contrary to BellSouth's repeated allegations (Tr. 37:5-10, 42:23-24, 45:9-15), ALECs are not asking ILECs to bear the costs of the ALECs' network design. Just as ALECs bear the costs of serving their customers,[50] ALECs are asking BellSouth and Verizon to bear the burden of serving *BellSouth's and Verizon's customers* in a competitive market. Imposing the cost of interconnecting *different* network designs solely on ALECs would undermine the policy of encouraging network innovation and would ignore the fact that the ILECs' own customers cause the ILECs to incur the cost of delivering traffic to ALECs.[51] (Tr. 815:15-816:7) ILECs should not be allowed to use their historic network design -- and their local calling areas that were established prior to the introduction

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[48] As the Commission noted in the Level 3/BellSouth arbitration, the absence of data showing that an ILEC has incurred uncompensated costs by interconnecting at a single POI per LATA is a "curious omission" when the record shows, as this one does (Tr. 715:1-5), that the ILEC has operated under a single POI per LATA. Order No. PSC-01-1332-FOF-TP (BellSouth/Level 3 Final Order on Petition for Arbitration) at 25.

[49] Verizon, preferring to address this issue through negotiations, has submitted neither the prices it proposes to charge ALECs for what Verizon believes are additional costs, nor cost studies showing Verizon's costs of interconnecting at a single location. (Tr. 335:1-336:4, 351:16-352:8, 358:20-359:7)

[50] BellSouth's Mr. Ruscilli admitted that even under the ILEC proposal, BellSouth would never compensate the ALEC for hauling its originating traffic to a "distant" POI. (Tr. 122:11-21)

[51] *See* Tr. 720-23 (Mr. Hunt's discussion of sections of the Act and FCC rules designed to promote efficient networks, including the "comparable service" and "equivalent facility" definitions adopted by Congress and the FCC, respectively).

of local competition (Tr. 208:12-22, 368:18-369:12) -- as an excuse to prevent an ALEC from selecting a technically feasible POI. If the Commission permits ILECs to require a POI, a "virtual" POI, or a "billing" POI in each local calling area -- and there is no substantive difference between any of these "options" -- such rules would undermine congressional, FCC, and Commission intent to promote competition and innovation in network design.

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?**

(b) Should the intercarrier compensation mechanisms 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 criteria?

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

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

The dispute regarding VNXX and Foreign Exchange ("FX")-like services concerns the proper intercarrier compensation for calls destined for customers purchasing such services. The ILECs contend that calls to customers with VNXX codes are not local for purposes of intercarrier compensation under Section 251(b)(5), but are "special" toll calls subject to originating access charges. As shown in Section A below, however, under the FCC's recent *ISP-Bound Traffic Remand Order*, calls using VNXX codes that are also ISP-bound calls are subject to the interim intercarrier compensation regime set forth in the *ISP-Bound Traffic Remand Order* and the

Commission does not have jurisdiction over such calls.[52] To the extent that calls using VNXX codes and FX-like calls are not also ISP-bound calls, the Commission retains jurisdiction over these calls and should treat such calls as eligible for reciprocal compensation under Section 251(b)(5).

A. Because the FCC Regime Does Not Distinguish Between Local and Non-Local ISP-Bound Traffic, the Commission Does Not Have Jurisdiction to Alter Compensation for Locally-Dialed, ISP-Bound Calls

Prior to the *ISP-Bound Traffic Remand Order*, the FCC and this Commission focused on whether ISP-bound traffic was "local" traffic subject to reciprocal compensation. In its *ISP-Bound Traffic Remand Order*, however, the FCC decided that under its precedent, the term "local call" "could be interpreted as meaning ... traffic subject to local rates" in addition to "traffic that is jurisdictionally intrastate."[53]

The FCC underscored that "local call" is "not a term used in Section 251(b)(5) or Section 251(g),"[54] is "susceptible to varying meanings," and "created unnecessary ambiguity because the statute does not define the term 'local call.'"[55] Rather than focusing on whether ISP-bound traffic is local, the FCC determined that "[m]ost Internet-bound traffic traveling between a LEC's subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis."[56] The FCC concluded that "information access" includes all traffic "routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."[57] The FCC expressly declined to

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[52] *ISP-Bound Traffic Remand Order* at ¶ 45.

[53] *ISP-Bound Traffic Remand Order* at ¶¶ 45-46, 54 ("we no longer construe Section 251(b)(5) using the dichotomy set forth in the *Declaratory Ruling* between 'local' traffic and interstate traffic").

[54] *Id.* at ¶ 34.

[55] *Id.* at ¶¶ 34, 45, and 46.

[56] *Id.* at ¶ 58.

[57] *Id.* at ¶ 44.

decide whether ISP-bound traffic is either "telephone exchange service," or "exchange access."[58] Thus "information access" traffic includes all ISP-bound traffic and any purported distinction between "local" ISP-bound traffic and non-local ISP-bound traffic has no basis in the *ISP-Bound Traffic Remand Order*. Because the Commission does not have jurisdiction to change the FCC's classification, or to classify information access service as either telephone exchange or exchange access, it must reject the ILEC position for delivery of traffic to ISPs using VNXX arrangements.

B. Non-ISP Calls Using VNXX Codes And FX-Like Calls Should Be Treated As Section 251(b)(5) Traffic Subject to Reciprocal Compensation

Following the *ISP-Bound Traffic Remand Order*, this issue is limited to intercarrier compensation arrangements for traffic that is delivered to a non-ISP customer who has subscribed to a local telephone number in a calling area where the customer has no physical presence. Both ILECs and ALECs offer customers this ability to obtain a local telephone number in a "distant" local calling area. ILECs offers several services that meet this need, including FX service, and ALECs' services are generally referred to as VNXX service.

BellSouth does not deny that ALECs are permitted to develop a product to respond to customer demand.[59] (Tr. 265:13-22) Rather, this dispute is about the intercarrier compensation mechanism that should apply for traffic that is *dialed as local by the calling party*, rated as local at the retail level, and routed to non-ISP customers that are not physically located in the same calling

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[58] *Id.* at ¶¶ 30, 36, 42.

[59] Although Verizon's Mr. Haynes initially testified that the Commission should prohibit ALECs from assigning VNXX numbers unless foreign exchange service is ordered (Tr. 411:8-21, 420:12-18, 423:17-19), on cross examination he touted the "Maine solution" which would permit VNXX assignment provided Verizon receives special compensation. (Tr. 428:10-432:6) As Mr. Gates testified, because ALECs do not have central offices in every exchange, it is physically impossible for them to offer a private line between exchanges. (Tr. 843:12-18, 851:10-19) As discussed in Issue 14 herein, penalizing ALECs for deploying different network architectures is inconsistent with the Act and FCC rules. The Commission should therefore reject Verizon's invitation to require that ALECs duplicate ILEC FX service.

area as the calling party. BellSouth and Verizon want to collect access and/or transport charges from ALECs for originating calls that have always been treated as local and for which BellSouth and Verizon have acknowledged they incur no additional cost to originate. They also want to avoid paying ALECs reciprocal compensation -- or any terminating compensation that would normally be required if the ALEC terminated an intraLATA toll call for the ILEC – for terminating these calls placed by the ILEC's end users. While BellSouth would treat calls to FX and VNXX customers equally, Verizon proposes special treatment only for ALEC VNXX numbers and intends to continue billing ALECs reciprocal compensation for calls to its FX and FX-like end users. For that reason alone, Verizon's proposal should be rejected.

As explained further below, the Commission should adopt the ALEC proposal to compensate the terminating carrier for the services it provides the originating carrier's customers and prevent overcompensation to the originating carrier. The ALEC proposal is consistent with the historical industry practice of rating calls by comparing the NXX codes of the calling and the called parties. It is also cost-based, as required by Section 252(d) of the Act, and would avoid serious adverse consequences, such as expensive billing system changes and increased costs for business customers – and their own patrons in sparsely populated areas. The ALEC proposal encourages the development of competition by supporting innovative services that, among other things, provide local access to Florida businesses in otherwise underserved areas. The confusion, administrative expense and inconvenience that will result from the ILECs' proposal to create a new "special" toll category of traffic that is likely de minimis[60] would be best avoided by maintaining the standard

[60] As Sprint's Mr. Maples testified, "if you take [ISPs] out of this equation, we believe that any real voice FX traffic is going to be minor." (Tr. 571:15-21) *See also* Tr. 574:10-575:12.

industry practice – which BellSouth employed until February 2001 and Verizon still employs – of comparing NXX codes to rate a call as local or toll for all purposes. The regulatory treatment of a particular call should be the same for retail end user billing and intercarrier compensation.

1. The ILEC Proposal Departs from Long-Standing Industry Practice

Customers like VNXX services (and FX services offered by ILECs) because such services permit them to obtain a telephone number in a local calling area where they do not have facilities. As far as the person calling that number is concerned, it is a "local" call, even though the party answering the call may be physically located in another community. When one of the ILEC's customers makes a call to an ALEC VNXX number, the ILEC's switching software recognizes the call as a call to one of the ALEC's local service customers and the ILEC routes the call to the POI just like any other local call its customer places to an ALEC customer. (Tr. 388:22-23, Tr. 468:9-16) The ILEC's switching software also recognizes the call as a local call, and bills its end user under its local calling rate plan. (Tr. 60:22-24, 387:21-388:11, 437:12-14, 449:21-450:2) Consistent with that practice, BellSouth treated calls to its FX customers as local calls subject to reciprocal compensation and billed ALECs reciprocal compensation for these calls for four or five years (until February 23, 2001). (Tr. 57:12-14) Verizon *still* bills ALECs reciprocal compensation for calls to its FX numbers and proposes to *continue* doing so even as it argues ALECs may not. (Tr. 435:8-436:7)

ALECs seek to treat VNXX and FX calls as a local call, just as the ILECs do for retail purposes and as they have treated their own FX services for years. The ALECs' proposal, among other things, is in the public interest as it will benefit those businesses who find it desirable to obtain local numbers in several communities while maintaining a limited number of physical locations. It

also benefits customers located in rural and sparsely populated areas of the state by allowing them to reach a wider range of businesses and services without incurring toll charges.

The ILECs' proposal, on the other hand, will impose costs on all LECs by requiring billing system changes and will raise the costs incurred by businesses to make their services available to Florida residents who live outside of major metropolitan areas. By classifying a call as local or "special" toll for intercarrier compensation based on the physical locations of the calling and called parties, the ILECs' proposal would create an unjustified exception to the industry's long-standing call-rating practice. The ILECs have admitted that they cannot determine which calls they originate would qualify for "special" toll treatment; they must rely on the ALEC to supply the necessary information. (Tr. 224:20-225:1, 426:24-429:9) Calls that the switch and billing software today recognizes as local would no longer be treated as local and, according to Verizon's Mr. Haynes, adopting the ILECs' proposal could require a "radical" change to carrier billing systems. (Tr. 427:16-428:9) Even BellSouth, which began complaining formally about VNXX in Florida on December 7, 1999 when it filed its arbitration petition against Intermedia, was not able to segregate its FX numbers until February, 2001. Further, no party could quantify the costs, to ILECs or ALECs, of changing billing systems to accommodate the ILEC proposals (Tr. 443:11-14, 827:3-10), or the amount of toll revenue ILECs supposedly lose because of VNXX traffic.[61] (Tr. 494:10-13, 574:10-575:12) The Commission should not compel ALECs to reinvent their billing systems solely to enable ILECs to distinguish locally-dialed calls using VNXX codes so that ILECs may collect

[61] The Commission should also note that, even if the ILECs' proposals for intercarrier compensation were adopted, no one has proposed changing the way these calls are rated at retail. In other words, the ILECs recognize the obvious benefits such VNXX and FX services provide to consumers and do not intend to disrupt the treatment of such calls as local at retail, even as they seek to treat such calls as toll for the purpose of collecting more revenue from competitors.

access charges for such calls.[62] If the Commission were to disturb the historical treatment of FX and VNXX calls, carriers would be required to make significant investments to modify their billing systems, protocols, and processes to accommodate this change in policy. The Michigan Commission recently rejected Ameritech's proposal to reclassify FX and VNXX calls as non-local for reciprocal compensation purposes, in part because it was uncertain whether the necessary charges to billing systems "would be technically feasible at an affordable cost for both Ameritech Michigan and the CLECs."[63]

2. The *Intermedia* Decision Did Not Answer the Question Presented Here

The Commission should not look to the *Intermedia*[64] decision as precedent. In that case, while permitting the parties to establish their own local calling areas, the Commission also required the parties to assign NXXs within the area with which they are traditionally associated.[65] That is not the issue in this case, however. BellSouth admits that ALECs should be permitted to assign numbers outside of the areas with which they are traditionally associated. (Tr. 67:7-9) The fact that ILECs have engaged in such number assignment for years shows, contrary to Verizon's claims (Tr. 477:2-478:8), that this practice does not violate numbering guidelines.[66] The distinct question presented

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[62] Although Allegiance and Level 3 strongly oppose the ILEC proposal, if the Commission nevertheless adopts it, the Commission must, at a minimum, permit all originating LECs, not just ILECs, to assess such charges. *See* Tr. 122:19-21 (BellSouth is now willing to pay access charges), Tr. 493:11-16 (access charges for traffic to Verizon's FX customers "seems like a possibility").

[63] *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, 10-11 (Mich. PSC Jan. 23, 2001).

[64] Order No. PSC-00-1519-FOF-TP (BellSouth/Intermedia Final Order on Arbitration).

[65] *Id.* at 43.

[66] Under cross-examination, Mr. Haynes admitted that the numbering guidelines do not impose an explicit requirement that the customer be physically located in the rate center to which the NXX is assigned. (Tr. 478:1-8) *See also* Tr. 833:9-16 (if VNXX impacts numbering resources, ILECs' FX, extended reach, Cyber DS-1 and other VNXX-type

here is whether the rating of a call should continue to be based upon a comparison of NXX codes – as carriers have done for years – or whether ILECs will be permitted to alter that practice in order to avoid compensating ALECs.

The ILECs refer to decisions from other jurisdictions in favor of their position. Of course, different state commissions are free to establish different standards relating to interconnection and deployment of network facilities. Several state commissions that have ruled on this issue have concluded that calls using VNXX codes should be treated as local calls and subject to reciprocal compensation just as any other locally-dialed call. For example, the North Carolina Utilities Commission ("NCUC") recently ruled that VNXX services should be treated as local traffic subject to reciprocal compensation.[67] Specifically, the NCUC held:

> The Commission believes that the question which the Commission needs to decide in this issue is whether a telephone call from a BellSouth customer physically located in one rate center to a MCIm customer physically located in a different rate center but who has a NPA/NXX code from the same rate center as the caller placing the call is a local call or a long distance call. The Commission believes that based on the evidence presented in this case . . . the calls in question to the extent they are within a LATA should be classified as local and, therefore, subject to reciprocal compensation. The Commission notes that NPA/NXX codes were developed to rate calls and, therefore, *MCIm's assertion that whether a call is local or not depends on the NPA/NXX dialed, not the physical location of the customer, is reasonable and appropriate.*[68]

Accordingly, the NCUC concluded "that calls within a LATA originated by BellSouth customers to MCIm VNXX customers are to be considered local and, therefore, subject to reciprocal

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products have similarly impacted such resources for decades).

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

[68] *Id.* (emphasis added).

compensation." [69] In reaching this conclusion, the NCUC expressly rejected the contention, made by both BellSouth and Verizon in this proceeding, that whether a call is considered local depends upon the physical location of the customer.[70]

Similarly, the Kentucky Public Service Commission found that ALEC VNXX service should be treated the same as BellSouth's FX service, and both services should be treated as local traffic.

> Both utilities offer a local telephone number to a person residing outside the local calling area. BellSouth's service is called foreign exchange ("FX") service and Level 3's service is called virtual NXX service. The traffic in question is dialed as a local call by the calling party. BellSouth agrees that it rates foreign exchange traffic as local traffic for retail purposes. These calls are billed to customers as local traffic. If they were treated differently here, BellSouth would be required to track all phone numbers that are foreign exchange or virtual NXX type service and remove these from what would otherwise be considered local calls for which reciprocal compensation is due. This practice would be unreasonable given the historical treatment of foreign exchange traffic as local traffic.
>
> Accordingly, the Commission finds that *foreign exchange and virtual NXX services should be considered local traffic* when the customer is physically located within the same LATA a[s] the calling area with which the telephone number is associated.[71]

Both of these decisions are consistent with the result reached by the Michigan Public Service Commission, which decided not to reclassify foreign exchange service as exchange access traffic exempt from reciprocal compensation requirements.[72] In Michigan, the Commission found that the use of a VNXX arrangement does not impact the ILEC's financial and/or operational

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[69] *Id.*

[70] *Id.*

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

[72] *Application of Ameritech Michigan to revise its reciprocal compensation rates and rate structure and to exempt foreign exchange service from payment of reciprocal compensation,* Case No. U-12696, 8-11 (Mich. PSC January 23, 2001).

responsibilities, and that under the VNXX framework, the costs to the ILEC do not differ, but are "the same as when the call is undisputedly local."[73]

3. ALECs Would Receive No Compensation Under the ILEC Proposal

The ILEC proposal does not provide for any alternative form of compensation for traffic delivered to ALEC customers using a VNXX arrangement. (Tr. 829:1-4) Thus, the ILEC is getting a "free ride" – the ALEC would receive no compensation from the ILEC for transporting and terminating those calls initiated by the ILEC's subscribers. (Tr. 819:22-820:13) This result is unfair because the network functions provided by the ALEC and ILEC are identical whether the NXX is for the local calling area in which the customer has facilities or for a different local calling area. (Tr. 388:22-25, 787:1-10) Such a result is neither desirable, reasonable, nor consistent with federal or state law. Leaving carriers uncompensated for certain kinds of calls will only discourage them from providing such services to their customers.

4. ILECs Should Not Be Permitted to Impose Access Charges for Originating Traffic that Have No Relationship to the Costs the ILEC Incurs

a. The ILECs' Focus on Customer Location Is Inappropriate Because the Cost to Deliver Traffic to the POI Are the Same for Calls Terminating at a Virtual or Physical NXX

The ILECs' focus on the location of the called party is meaningless for purposes of determining cost-based compensation, because the originating party only transports a given call to the POI, not all the way to the called party. The customer's location will not cause the originating

[73] *Petition of Coast to Coast Telecommunications, Inc., for Arbitration of Interconnection, Rates, Terms, Conditions, and Related Arrangements with Michigan Bell Telephone Company, d/b/a Ameritech Michigan*, Case No. U-12382, Order Adopting Arbitrated Agreement, 9 (Mich. PSC Aug. 17, 2000).

party's costs or functions to differ. As Mr. Gates testified (Tr. 786:10-21), and Mr. Ruscilli and Dr. Taylor agreed (Tr. 168:22-169:18, 261:25-262:5), there will be no difference in an ILEC's costs when one of its customers dials an ALEC customer who happens to reside physically outside the local calling area as compared to any other ALEC customer who resides physically within the same local calling area.

The POI does not depend on where the customer physically resides; rather, it is a fixed point to which the ILEC and ALEC have to take calls irrespective of customer location or local number dialed.[74] (Tr. 470:1-13) Since the ILEC always has to deliver a call originating from a particular area to the same point, it should be economically indifferent as to whether the call terminates to a physical or virtual NXX. If the customer is physically located in a distant calling area, the terminating party -- not the originating party -- bears any additional cost of delivering the call to the customer. Regardless of where the customer is located, the terminating carrier recovers compensation for the transport between the POI and its switch and for terminating switching. This amount never varies based on the location of the customer behind the switch. (Tr. 847:12-22, 859:25-860:24) Thus BellSouth's request for switched access compensation, and Verizon's request for transport compensation, based upon customer location is inappropriate and should be denied.

b. ILECs Should Not Be Made Whole for Losses Resulting from Competition

The real point of the ILECs' argument on this issue is not always clearly stated, but is nonetheless evident. As Mr. Ruscilli admitted, this is a revenue issue, not a cost issue. (Tr. 172:17-

[74] A toll call differs operationally and economically from a VNXX call because, as Mr. Gates testifies, a toll call is routed through a BellSouth access tandem to the toll carrier's point of presence, not the POI, and uses Feature Group D or intraLATA toll trunks. (Tr. 840:17-842:13) *See also* Tr. 179:5-180:9 (Mr. Ruscilli's description of routing toll calls).

25) Similarly, Mr. Hayes testified that if Verizon is not permitted to make up for its "inappropriate revenue loss," it might have to reduce network investment in Florida. (Tr. 400:17-21, 494:2-14) ILECs simply want to recover lost toll revenues, and if they cannot recover them from a customer -- and no one proposes to do so because of the obvious benefits these services present to consumers -- they will gladly recover them from the ALEC instead. As Mr. Haynes explained, when Verizon provides FX service, the FX subscriber pays Verizon for the transport of the call over the private line to the distant local calling area. (Tr. 398:4-23, 436:11-18) If the Verizon customer did not purchase FX service, callers in the "foreign" local calling area would incur toll charges to call it. When the Verizon customer does purchase FX service, Verizon loses toll revenue (because the call is now rated as local) but gains FX revenue. As long as the ILEC provides the service to both the calling and called parties, it is willing to forego its toll revenue from the party initiating this "toll" call.

In a competitive environment, however, the ILECs' traditional method of offsetting lost toll revenue with FX revenue breaks down. The ALEC, not the ILEC, is delivering the call from the POI to the "distant" location of the called party. Yet the ILECs still want to recover "the loss of toll revenue" when they are only providing a local service; that is, originating the call and delivering it to the POI just like any other local call. In short, the ILECs seek to recover the "loss of toll revenue" even though they are not incurring any costs that resemble those associated with a toll call.

The ILECs' desire to recover "loss of toll revenues" as an entitlement is not a basis for setting reasonable interconnection terms in compliance with the Act. (Tr. 890:14-891:9) Perhaps an ILEC can seek to recover lost revenues when *its own customer* buys a service that eliminates toll charges, but it makes no sense for the ILEC to recover its lost revenue from the ALEC, where the ALEC is incurring the additional cost to transport such FX or VNXX calls to the terminating location. (Tr.

694:25-695:13) In a competitive market, when a company loses a customer, it also loses revenue. Rules 505(d)(3) and 705(a)(1) prohibit the Commission from setting intercarrier compensation rates based on such opportunity costs:

> The following factors shall not be considered in a calculation of the forward-looking economic cost of an element... (3) Opportunity costs. Opportunity costs include the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carriers that purchase elements.[75]

The Commission should reject the ILECs' attempt to get paid for not providing a service.

Issue 16: **(a) What is the definition of Internet protocol (IP) telephony?**

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

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

Including "phone-to-phone IP telephony" in the category of services subject to intrastate access charges is an inappropriate attempt to force a square peg into a round hole. BellSouth makes the broad, sweeping claim that phone-to-phone IP Telephony is the same thing as traditional interexchange service provided by long distance carriers.[76] (Tr. 70:4-18, 104:14-18) BellSouth's claim is inconsistent with the Act, FCC precedent, and the record in this proceeding. As such, the Commission should reject BellSouth's position. Because the FCC has opened a rulemaking to

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[75] Rule 705 regarding pricing standards for transport and termination explicitly incorporates the cost study requirements of Rule 505. 47 C.F.R. § 51.705(a)(1).

[76] Although Sprint initially claimed that both phone-to-phone and computer-to-phone IP telephony are the same as traditional long distance service (Tr. 516-20), it later joined a stipulation requesting that the Commission not take action in this proceeding to establish intercarrier compensation mechanisms for IP telephony.

consider, among other issues, intercarrier compensation mechanisms for IP telephony,[77] the Commission should monitor the FCC's proceeding and refrain from addressing Issue 16.

BellSouth argues that in its *Report* the FCC determined that phone-to-phone IP telephony bears the characteristics of telecommunications services. (Tr. 71:14-17) Yet in making this statement, BellSouth's Mr. Ruscilli ignores the plain language of paragraph 89 of the *Report*, which qualifies the FCC's regulatory assessment of the term "phone-to-phone" IP telephony with the phrase "we *tentatively* intend...."[78] Furthermore, the next paragraph of the *Report* -- to which BellSouth does not refer or cite at all -- states that "[w]e do not believe, however, it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings."[79] Thus a complete reading of the *Report* reveals that BellSouth is asking this Commission to take action on IP telephony that the FCC has declined to take.

BellSouth argues that IP telephony providers are avoiding legitimate access charges. (Tr. 71:23-72:3) In the *Report*, however, the FCC refused to classify phone-to-phone IP telephony as telecommunications subject to traditional regulatory obligations such as access charge payments and universal service contributions. As former FCC Commissioner Ness advised the International Telecommunication Union's IP Telephony Forum, in the *Report* the FCC:

> preserved the *unregulated status of IP telephony*, although we noted that we would determine on a case-by-base basis whether certain phone-to-phone IP telephony – as opposed to computer-to-computer

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[77] *Intercarrier Compensation NPRM* at ¶ 133 (discussing the motivation for a generic rulemaking to consider, among other things, the proper regulatory treatment of IP telephony).

[78] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, ¶ 89 (rel. April 10, 1998) ("*Report*") (emphasis added).

[79] *Id.* at ¶ 90. Like the record before the FCC, the record in this proceeding is not focused on individual service offerings. Rather, the record shows that IP telephony encompasses a continuum of services.

> IP telephony configurations – may be properly classified as telecommunications services. Our decision to adopt a case-by-case approach, rather than make definitive pronouncements in the absence of a complete record on specific offerings, was prudent due to the nascent state of the technology. As in other instances, the FCC recognized the dynamism of the Internet and the need to consider whether any tentative definition of IP telephony would be quickly overcome by technological changes.[80]

Indeed, even Mr. Ruscilli acknowledged that the FCC has not adopted a rule or regulation applying access charges to IP telephony. (Tr. 176:12-15) Rather, he argues that because IP telephony is the same thing as traditional voice long distance, and the FCC has provided no exemption for IP telephony, access charges must apply. (Tr. 71:9-12) Mr. Ruscilli's argument that the FCC has not provided an exemption from access charges for IP telephony is inconsistent with the FCC's most recent observation that IP telephony "is exempt from the access charges that traditional long-distance carriers must pay."[81]

In addition to its inapposite reliance on the FCC's *Report*, BellSouth typically cites two cases to support its position: (1) a Colorado state court ruling[82] requiring payment of switched access charges by all providers of Internet telephony services; and (2) this Commission's *Intermedia* decision[83] that phone-to-phone IP telephony that is not transmitted over the Internet is subject to switched access charges. (Tr. 175:24-176:4) Neither case should be persuasive to this Commission. Notably, the Colorado state court case conflicts with two recent decisions of the Colorado Public Utilities Commission, the entity that has the expertise and primary jurisdiction to determine whether

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[80] Remarks of Commissioner Susan Ness (as prepared for delivery), Information Session - WTPF (March 17, 2001) (emphasis added).

[81] *Intercarrier Compensation NPRM* at ¶133.

[82] *Qwest Corporation v. IP Telephony, Inc.*, Case No. 99 CV 8252, Slip op. at 1-2 (Denver D. Ct. Jan. 12, 2001).

[83] Order No. PSC-00-1519-FOF-TP (BellSouth/Intermedia Final Order on Petition for Arbitration).

intrastate IP telephony is a telecommunications service.[84] Moreover, the Colorado commission's most recent IP telephony decision was released subsequent to the Colorado court ruling upon which BellSouth relies.

With respect to the *Intermedia* decision, the Commission initiated this generic proceeding to consider, among other issues, the proper definition of, and compensation for, IP telephony based on a more complete record. The more extensive record in this proceeding shows that IP telephony encompasses an evolving continuum of services.[85] The ever-changing and developing nature of IP applications makes it difficult, if not impossible, to categorize such services and adopt a definition that will not be overcome by innovations in technology. As Verizon's Dr. Beauvais testified, IP telephony is still in relatively early stages of development and constitutes a negligible amount of traffic.[86] (Tr. 316:24-17:5, 334:1-9) Although BellSouth argues that its "narrowed" definition of phone-to-phone IP telephony ensures that only the proper IP services are subjected to access charges, its proposal ignores the fact that in certain cases, a call could begin on an IP-enabled "phone" and still fit within the enhanced services test that even BellSouth does not refute exists under federal law.[87] That is why, as BellSouth's Mr. Ruscilli admitted, there is no generally accepted definition

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[84] *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 00B-601T, Initial Commission Decision, Decision No. C01-312 (Colo. PUC March 30, 2001); *Petition by ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with U S West Communications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 00B-103T, Initial Commission Decision, Decision No. C00-858, 8 (Colo. PUC Aug. 7, 2000).

[85] *See, e.g.*, Tr. 292:3-7, 295-300 (Ms. Geddes' explanation of diverse array of applications encompassed in IP telephony); Tr. 927:10-928:12 (Mr. Gillan's description of continuum of IP telephony applications).

[86] *See also* Tr. 745-46 (FCC Chairman Powell's recognition of nascent stage of IP telephony); Tr. 936-39 (Mr. Gillan's discussion of chilling effects regulation might have on nascent IP telephony market).

[87] *See, e.g.*, Exh. 2, Level 3 Response 13 (describing IP telephony products that qualify under the three prongs of the FCC's test as enhanced services).

of what IP telephony is and "the person that can coin that, ... it would be worth a million dollars." (Tr. 177:9-12)

There is no need, however, to coin a definition of IP telephony. In enacting the 1996 Act, Congress adopted definitions of "telecommunications service" and "information service." After passage of the 1996 Act, the FCC examined these definitions, and found that they were intended to codify the same kind of distinctions between "basic" and "enhanced" services that have applied since the early 1980s under FCC rules and orders. The FCC further determined that these categories are mutually exclusive. Since making this determination, the FCC has had several opportunities to assess whether IP telephony falls into the basic/telecommunications category or the enhanced/information category. In addition to the *Report*, the FCC had this question placed squarely before it when Qwest, then U S West, requested a declaratory ruling that phone-to-phone IP telephony be considered subject to switched access charges.[88] Although the Qwest petition was filed over two years ago, the FCC has still not put it out for public comment.

Likewise, the FCC faced this question in revising its universal service reporting requirements. Initially, the FCC proposed that carriers should report as telecommunications services "calls handled using Internet technology as well as calls handled using more traditional switched circuit techniques."[89] After further consideration, however, the FCC found that "in the Report, [we] specifically decided to defer making pronouncements about the regulatory status of various forms

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[88] *Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony* (filed April 15, 1999).

[89] *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Notice of Proposed Rulemaking and Notice of Inquiry, 13 FCC Rcd 19295 (1998).

of IP telephony until the Commission develops a more complete record on individual service offerings. We, accordingly, delete language from the instructions that might appear to affect the Commission's existing treatment of Internet and IP telephony."[90] As FCC Chairman Powell has noted, classifying IP telephony as subject to traditional regulatory regimes is "probably the $64 billion question, literally."[91] Chairman Powell added that "if the factual analysis were to suggest it was something else [i.e. not telecommunications], it would legitimately fall outside the traditional application of these subsidy programs."[92]

BellSouth's position appears to be that voice is voice and so long as IP telephony transmits voice communications, regardless of whether it qualifies under the statutory definition, it is a telecommunications service subject to access charges. (Tr. 176:17-177:8) While it is possible that some IP telephony services are not enhanced, that does not justify a conclusion that all such services, or even a subset of such services, are *never* enhanced. The FCC's definition of an "enhanced service" contains three separate prongs,[93] each of which standing alone can lead to a service being classified as enhanced.[94] Likewise, the Act defines an information service as an offering that provides a capability for "generating, acquiring, storing, transforming, processing, retrieving,

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[90] *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, ¶ 22 (rel. July 14, 1999) (footnotes omitted). *See also* note 78, *supra*.

[91] *Agenda and Plans for Reform of the FCC: Hearing before the Telecommunications and Internet Subcommittee of the House Energy and Commerce Committee*, 107th Cong. 24, Testimony of Chairman Powell (March 29, 2001) ("Powell Congressional Testimony"); Tr. 742.

[92] *Id.*

[93] 47 C.F.R. § 64.702(a).

[94] Exh. 2, Level 3 Response 13.

utilizing, or making available information . . . ."[95] What might be considered subject to access charges under BellSouth's definition could be a hybrid service that incorporates an information processing component, even as it originates and terminates on "phones." (Tr. 733:14-19, 930:3-931:11) No party has demonstrated that it could distinguish between phone-to-phone and computer-to-phone IP telephony, or between phone-to-phone IP telephony with no enhancements and phone-to-phone IP telephony with enhancements that would bring the service into an information classification. No party has explained how one could even tell whether a call originated on a phone (IP-enabled or otherwise) or a computer or some device that is both phone and computer. To the contrary, Mr. Hunt testified that distinguishing these different types of IP telephony would be difficult and expensive, if it could be done at all. (Tr. 733:11-34:3) Given the multitude of ways in which a session could be initiated and the wide array of services that can be provided using packetized voice technology, the Commission, like the FCC, needs to consider if a particular definition of the service accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be quickly overcome by changes in technology. The proper classification of IP telephony is a complex technical and legal issue demanding in-depth factual analysis and the consideration of many policy objectives before broad declarations are made about how such services should be characterized.

There are many other pieces of this puzzle that the Commission should consider as well. For instance, if the Commission were to rule in BellSouth's favor, it would have to find that *all* intrastate voice phone-to-phone IP telephony is a telecommunications service for purposes of access charges.

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[95] 47 U.S.C. § 153(20) (1996).

To impose access charges on one Internet Protocol application and not another would raise privacy concerns, since a provider would have to determine the nature of the packet. Such monitoring would likely be expensive if it could be done at all. Further, given that the jurisdictional nature of packets cannot easily be discerned, if at all (Tr. 318:6-11, Exh. 7, Verizon Response 4(a)), BellSouth's proposed definition could apply to interstate services over which the Commission does not have jurisdiction. The FCC expressed concern about making such intrastate versus interstate distinctions as another reason for refusing to classify all phone-to-phone IP telephony as telecommunications.[96] In addition to these fundamental jurisdictional questions, the Commission need also consider how classifying all phone-to-phone IP telephony as telecommunications could have intrastate legal and regulatory implications beyond intercarrier compensation. For example, would an IP telephony provider now need to seek certification at the Commission? Would an IP telephony provider be required to pay regulatory fees?

As all of these examples show, the classification of Internet-based services raises many complicated and overlapping issues, with implications far beyond intercarrier compensation. If BellSouth or any other ILEC alleges that a specific service should be subject to access charges, it may take advantage of existing complaint procedures or other legal avenues to attempt to prove that a particular IP telephony provider is using the ILEC's services in violation of its tariff or applicable state or federal law. Rather than adopt a definition of, and compensation arrangements for, IP telephony, the Commission should monitor, and participate in, the FCC's ongoing consideration of these issues.

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[96] *Report* at ¶ 91.

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

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

A. FCC Rules Require Symmetrical Rates for Section 251(b)(5) Traffic

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 networks 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 carrying and terminating traffic originated by the local customer of an interconnected carrier.

Verizon argues that a lower reciprocal compensation rate should apply to ALECs because ALECs often utilize packet-based switching technology and deploy advanced network architectures in which ISP customers are sometimes collocated in close proximity to ALEC facilities. (Tr. 286:11-16, 314-16) The Commission should not seriously consider Verizon's proposal that new entrants be regulated and compensated based upon the technology they use to enter the market. The problems with that approach are obvious and regulators and legislators have wisely avoided attempts

to regulate companies based upon technology.[97] First, to do so would hamper innovation, investment and deployment of leading edge technology. Second, FCC rules specify that rates for transport and termination of local calls shall be symmetrical and equal to the rates that the ILEC assesses upon the other carrier.[98] Third, the FCC has specified on several occasions that the proper cost standard is the *ILEC's* forward-looking cost. Finally, FCC rules do not permit an ILEC to challenge the ALEC's use of the ILEC rate for reciprocal compensation.[99] BellSouth's witness, Dr. Taylor, agreed that symmetric rates are "the law of the land" and the Commission should not abandon the standard of setting rates based on the ILEC's costs. (Tr. 274:23-275:22)

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 an ALEC's network. The ILEC will either incur the terminating cost 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 Section 251(b)(5) traffic. Symmetrical rates, together with the geographic coverage tandem test, will ensure that all LECs receive appropriate compensation for the terminating functions they provide interconnecting carriers.

B. The Commission's Section 251(b)(5) Rules Are an Important Piece of the New Federal Regime

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[97] The FCC recently stated that "our rules do not require that a carrier possess a particular switching technology as a prerequisite for obtaining reciprocal compensation." *TSR Wireless* at ¶ 22.

[98] 47 C.F.R. § 51.711.

[99] Order No. PSC-01-1402-FOF-TP (BellSouth/AT&T Final Order on Arbitration) at 75.

The interim federal intercarrier compensation regime 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 (*e.g.*, local and intra-MTA CMRS traffic) at the applicable federal capped rate.[100] If an ILEC chooses not to adopt the 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 another carrier."[101] 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 Section 251(b)(5) traffic could therefore effect the exchange of both 251(b)(5) and 251(g) traffic if an ILEC does not elect the federal regime.[102]

The Commission must consider this possibility in adopting default rules for the exchange of Section 251(b)(5) traffic. The record shows that if ISP-bound traffic and Section 251(b)(5) traffic are combined in one measurement, traffic between an ILEC and ALEC may be substantially out-of-balance. (Tr. 905:15-22) Faced with record evidence of a traffic imbalance, the Arizona Commission recently abandoned its prior bill and keep policy in favor of an alternative

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[100] *ISP-Bound Traffic Remand Order* at n.179.

[101] *Id.* at ¶ 89.

[102] For example, to Allegiance's and Level 3's knowledge, Sprint has not elected the federal regime in Florida and therefore must exchange all Section 251(b)(5) and 251(g) traffic under rules the Commission adopts for Section 251(b)(5) traffic.

compensation regime proposed by Level 3 in its arbitration with Qwest. 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 the 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.[103]

Where traffic is substantially out-of-balance, whether the ratio is 1.5:1, 3:1, or more than 3:1, a default rule of bill-and-keep will not provide an opportunity for the carrier terminating the greater amount of traffic to recover its costs. To ensure that ALECs are compensated for the services they provide ILECs, the Commission should continue its policy of symmetrical reciprocal compensation rates that are based on the ILEC's forward-looking costs.

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

> ***The Commission should, in a separate proceeding, establish cost-based symmetrical reciprocal compensation rates as the default mechanism. The Commission should also establish expedited procedures for implementation of the decisions made in this docket, including expedited resolution of any disputes regarding any required amendments to interconnection agreements.***

The rules adopted in this docket will become default rules that apply during interconnection negotiations, mediations, and arbitrations. To the extent interconnection agreements contain change in law requirements, LECs will also be able to amend their existing agreements to incorporate the new rules. The Commission should take this opportunity to reduce the possibility of further

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[103] *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 Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection*, Docket Nos. T-03654A-00-0822, T-01051B-00-0882, Opinion and Order, 8 (Ariz. CC April 10, 2001).

litigation and adopt expedited procedures for resolving disputes that result from application of the new rules.

First, the Commission should reaffirm that prior to June 14, 2001, ISP-bound traffic was subject to reciprocal compensation in the State of Florida and BellSouth, Sprint, and Verizon should pay any outstanding, withheld reciprocal compensation for ISP-bound traffic exchanged prior to that date. Second, the Commission should affirm that the geographic coverage test is, and has always been, the sole criteria for purposes of tandem rate classification. Until the hearing on this matter, ILECs steadfastly refused to acknowledge that comparable geographic coverage is the sole test for tandem classification. As shown in Issue 12 above, this argument conflicted with FCC rules and the Commission's own precedent. The Commission should therefore explicitly permit ALECs to seek compensation for tandem switching retroactive to the effective date of Rule 711(a)(3) or the effective date of their current interconnection agreements, whichever is later.

It is critical that carriers have recourse to rapid, certain and decisive Commission resolution of interconnection agreement disputes. Unlike interconnection arbitrations that can have dozens of issues, post-contract disputes are typically more focused, addressing contract amendment or interpretation questions or contract breaches. Carriers engaged in such disputes need rapid and certain resolution so that they can achieve business certainty and continue normal business relations. Indeed, the FCC has a set of well-regarded procedures (specifically, the Accelerated Docket of the Market Disputes Resolution Division) to promptly resolve disputes formally and informally.[104] Two

[104] *See* 47 C.F.R. § 1.730.

state commissions in particular, Illinois and Texas, have post-contract dispute procedures that yield a decision in as little as 60 days.[105]

The Commission should adopt expedited procedures for resolution of disputes arising from implementation of the rules adopted in this proceeding and for contract interpretation and enforcement disputes. Allegiance and Level 3 propose that responses to petitions be due in 10 days, hearings (where necessary) should be commenced within 30 days, and decisions should be rendered within 30 days of the hearing. For carriers that have recourse to the Commission under the dispute resolution terms of their interconnection agreements, such procedures will help ensure that Florida consumers are not disadvantaged by long-unresolved disputes among carriers.

By adopting rules that promote innovation in network and product design, that provide LECs clear guidelines to apply when negotiating interconnection arrangements, and that resolve disputes expeditiously, the Commission will promote competition in Florida's local exchange markets.

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[105] 220 Ill. Comp. State 5/13-516; 16 Tex. Admin. Code §§ 22.321-.328.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to the following this 10th day of August, 2001:

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