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Florida Cable Telecommunications Association

Steve Wilkerson, President

VIA HAND DELIVERY

June 10, 2002

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Ms. Blanca S. Bayo, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RE: **Docket No. 000075-TP**

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and 15 copies of the Florida Cable Telecommunications Association, Inc.'s and Time Warner Telecom of Florida, L.P.'s Joint Posthearing Brief.

Copies of the Joint Posthearing Brief have been served on the parties of record pursuant to the attached certificate of service. Please acknowledge receipt of filing of the above by stamping the duplicate copy of this letter and returning the same to me.

Thank you for your assistance in processing this filing. Please contact me with any questions.

Sincerely,

Michael A. Gross

Michael A. Gross
Vice President, Regulatory Affairs &
Regulatory Counsel

MAG/mj

Enclosure

cc: All Parties of Record

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Cable Telecommunications Association's and Time Warner Telecom's Joint Posthearing Brief in Docket 000075-TP has been furnished by U.S. Mail delivery this 10th day of June, 2002:

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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

**JOINT POSTHEARING BRIEF OF THE FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC. AND TIME WARNER TELECOM OF FLORIDA, L.P.**

The Florida Cable Telecommunications Association, Inc. (FCTA) and Time Warner Telecom of Florida, L.P. (TimeWarner), pursuant to Rule 28-106.215, Florida Administrative Code, and Order No. PSC-02-0139-PCO-TP, issued January 31, 2002, (Second Order on Procedure, Schedule and Issues, Phase II) hereby file their Joint Posthearing Brief.

**STATEMENT OF BASIC POSITION**

The Commission is seeking to establish the most appropriate compensation mechanism to govern the transport and delivery of traffic subject to Section 251 of the Telecommunications Act of 1996 ("the 1996 Act") in the event that carriers cannot successfully negotiate an agreement. Phase I of this docket focused on issues concerning the establishment of an intercarrier compensation mechanism for the delivery of ISP-bound traffic. An Administrative Hearing regarding issues delineated for Phase I of this docket was conducted on March 7-8, 2001. On March 27, 2002, the parties filed a Joint Stipulation, wherein the parties suggested that the Commission defer action on the issues raised in Phase I of the docket based upon the FCC's ruling on April 27, 2001, in *Implementation of the Local Competition Provisions in the Telecommunication Act of 1996, CC Docket No. 96-98, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Order* *on Remand and Report and Order, FCC 01-131, rel. April 27, 2001 (ISP Remand Order).* On May 7, 2002, the Commission entered Order No. PSC-02-0634-AS-TP approving the stipulation. In its order, the Commission agreed that the ISP Remand Order classified ISP-bound traffic as interstate, and therefore, under the jurisdiction of the FCC. The Commission found that the FCC's intent to preempt a state commission's authority to address reciprocal compensation for ISP-bound traffic was clear. Accordingly, the Commission approved the stipulation and deferred ruling on the issues delineated in Phase I. Furthermore, the Commission found that the proposal and the stipulation provided a reasonable means to reinstate consideration of the subject issues in the event that the FCC's decision is modified or overturned.

On May 3, 2002, the U.S. Court of Appeals for the District of Columbia Circuit issued its opinion upon review of the FCC's Order on Remand. *WorldCom, Inc. v The FCC, No. 01-1218 (D.C. Cir. May 3, 2002)* The FCC, while showing a preference for bill-and-keep, but without fully committing itself to it, adopted several interim cost-recovery rules lowering the amounts and capping the growth of ISP-related intercarrier payments. The transitional rules, according to the FCC, will take effect on the expiration of existing interconnection agreements. Further, the FCC carved ISP-bound calls out of Section 251(b)(5) under Section 251(g) and established an interim compensation regime under its general authority to regulate the rates and terms of interstate telecommunications services and interconnections between carriers under Section 201 of the Act. As a result, the state regulatory commissions would no longer have jurisdiction over ISP-bound traffic as part of their power to resolve LEC interconnection issues under Section 251(e)(1) of the Act. The D.C. Circuit found that Section 251(g) does not provide a basis for the FCC's action, but the Court made no further determinations. Consequently, the Court did not vacate the order, but simply remanded the case to the FCC for further proceedings. Thus, it appears that, pending further proceedings, the FCC's interim cost-recovery rules remain intact. It also appears that the Court did not disturb the FCC's intent to preempt state commissions' authority to address reciprocal compensation for ISP-bound traffic. In any event, the establishment of an intercarrier compensation mechanism for the delivery of ISP-bound traffic is a Phase I issue, and it is not necessary for the Commission to address this issue in this phase of the proceedings.

The Commission should require that a reciprocal compensation mechanism be used to govern intercarrier compensation for the non-ISP local exchange traffic that clearly remains under its jurisdiction.[1] The reciprocal compensation, using symmetrical rates, should be based upon the forward-looking costs of the incumbent local exchange carriers ("the ILECs") as approved by the Commission.

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[1] The BellSouth and Verizon witnesses also reference the uniform intercarrier compensation Notice of Proposed Rulemaking that has been initiated by the FCC. *In the matter of developing a unified intercarrier compensation regime, Notice of Proposed Rulemaking, FCC 01-132, CC Docket No. 01-92, rel April 27, 2001 (Intercarrier Compensation NPRM).* Verizon's witness, Dennis B. Trimble, recommends: "To avoid potentially conflicting rulings and subsequent revisions to the state scheme, Verizon has recommended that the Commission retain the record in this case, but defer any ruling until the FCC rules." (Trimble, Tr. 112). Elizabeth R.A. Shiroishi, on behalf of BellSouth, states "[w]hile this Notice by the FCC seeks comments beyond the scope of this issue (i.e. bill-and-keep for local usage elements), the outcome of such proceeding will address this issue." (Shiroishi, Tr. 28).

Sprint states that it has already opted in to the FCC's interim compensation regime for the delivery and termination of ISP-bound traffic. As a result of its decision, the company must agree to exchange all other local traffic (i.e. non-ISP-bound traffic) at the same rates. ( Hunsucker, Tr. 196). The FCTA and Time Warner agree with Sprint in this case where an ILEC has adopted the FCC's interim compensation mechanism for ISP traffic. If an ILEC has opted in to the FCC's interim compensation mechanism, then a reciprocal compensation mechanism will apply to the rest of the local traffic by default. In such a case, the need for a default billing mechanism in this docket would be moot.

Accordingly, the Commission could require that a reciprocal compensation arrangement, as a default mechanism, be implemented at this time. However, it would be understandable if the Commission elected to await the outcome of the rulemaking at the federal level before establishing a default mechanism.

The benefits of implementing reciprocal compensation as a default mechanism far outweigh the consideration of a bill-and-keep regime as an alternative. Bill-and-keep may be a suitable arrangement only in limited circumstances; namely where the traffic flow between carriers is approximately even and the cost structures are essentially the same. The potential pitfalls of bill-and-keep are numerous. The introduction of bill-and-keep can foster market uncertainty, as the financial impact upon alternative local exchange carriers ("ALECs") remains unknown until it is in effect. Bill-and-keep may also encourage new forms of regulatory gamesmanship in the form of network configuration and in the attempt to disguise the nature of traffic.

Most significantly, the use of bill-and-keep as a default compensation mechanism allows the ILECs to exercise their superior bargaining strength. The establishment of bill-and-keep as a default mechanism provides the ILECs the opportunity to capitalize upon their strong preference for bill-and-keep. The arms-length negotiations that should characterize the agreements between ILECs and ALECs will be undermined as the ILECs can hold steadfast, secure in the knowledge that a bill-and-keep regime is the ultimate regulatory remedy to resolve any impasse between the parties.

**<u>ISSUE 13:</u>**

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

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

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

**c) If so, should the default definition of local calling area for purposes of intercarrier compensation be: 1) LATA-wide local calling, 2) based upon the**

**originating carrier's retail local calling area, or 3) some other default definition/mechanism?**

FCTA and Time Warner:

*Restructuring local calling zones can be addressed independently in this proceeding for intercarrier compensation purposes, and any adverse impact on universal service is speculative and can be addressed in a separate proceeding.*[2]

Verizon witness Dennis B. Trimble and BellSouth witness Elizabeth R. A. Shiroishi stated in their prefiled testimony that restructuring or expanding the local calling area will have an adverse impact on universal service. They also suggest that a policy shift toward LATA-wide reciprocal compensation payments is beyond the scope of the current proceeding and should be considered in another proceeding. (Trimble, Tr. 88, 90-91, 101, 123, 132; Shiroishi, Tr. 38). Witness Shiroishi, on cross-examination by the FCTA at the hearing, acknowledged that BellSouth has available a mechanism already in place if BellSouth can demonstrate a bona fide need for universal service relief. (Shiroishi, Tr. 62). Further, Ms. Shiroishi conceded that any contention as to what the impact would be if the local calling area were restructured is speculative. (Shiroishi, Tr. 63). Significantly, Ms. Shiroishi accepted the proposition that restructuring local calling zones can be

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[2] The FCTA did not initially take a position on Issue 13. However, Page 6 of the Second Order on Procedure, Order No. PSC-02-0139-PCO-TP, issued January 31, 2002, discussing prehearing procedure, provides, "[when] an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement." In this instance, Verizon witness Trimble and BellSouth witness Shiroishi raised the issue in their prefiled testimony regarding the adverse impact which restructuring the local calling area would have on universal service, as well as the implication that the local calling area issue and its impact on universal service should be taken up in a separate proceeding. (Trimble, Tr. 88, 90-91, 101, 123, 132; Shiroishi, Tr. 38). Additionally, AT&T witness Cain, in his prefiled testimony, responded to the contentions of witnesses Trimble and Shiroishi. (Cain, Tr. 231-232). Moreover, the FCTA cross-examined witness Shiroishi at the hearing on May 8, 2002 regarding this subsidiary issue subsumed by Issue 13. (Tr. 62-67).

addressed independently in the present proceeding for intercarrier compensation purposes, and any universal service issues can be addressed in a separate proceeding. (Shiroishi, Tr. 64). Ms. Shiroishi also conceded that if BellSouth were able to quantify any net impact on revenues due to loss of billed access charges, that loss would not necessarily translate into a dollar-for-dollar need for universal service relief. (Shiroishi, Tr. 67). Consistent with Shiroishi's testimony, witness Trimble testified on cross-examination by Staff at the hearing, that there would be very little impact on universal service in the short-term as a result of any restructuring or expansion of the local calling area. (Trimble, Tr. 146-147).

It is clear that the issue of restructuring or expanding the local calling area for reciprocal compensation purposes can be addressed in the present proceeding independently, and any action by the ILECs to seek universal service relief can be addressed in a separate proceeding.[3] Conversely, universal service relief should not be considered in the present proceeding. As stated earlier, witnesses Shiroishi and Trimble have testified that any adverse impact on universal service resulting from a restructuring of the local calling area is speculative and without any short-term effect. Accordingly, the Commission should not be deterred from addressing the issue of restructuring the local calling area for reciprocal compensation purposes on the basis of the universal service implications raised by BellSouth and Verizon.

[3] The FCTA and Time Warner expressly deny that either BellSouth or Verizon could make the requisite showing for entitlement to universal service relief, and the FCTA and Time Warner would vigorously oppose any action seeking such relief. The FCTA is simply making the point that mechanisms exist for BellSouth and Verizon to seek relief if they make the requisite showing.

**ISSUE 17:**

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

**FCTA and Time Warner:**

*Yes. The Commission should continue its policy of requiring reciprocal compensation for the local traffic (i.e. non-ISP-bound traffic) that remains under its jurisdiction. The Commission's current rules require that symmetrical rates, based upon the ILECs' Commission-approved unbundled network element rates, serve as the default reciprocal compensation mechanism.*

Since it appears that the FCC's interim cost-recovery rules for ISP-bound traffic remain in effect even after the recent opinion of the D.C. Circuit, it is important to discuss those transitional cost-recovery rules at this juncture. The FCC has implemented a transitional cost-recovery mechanism based upon declining rate caps and volume caps. For the first six months following the effective date of its Order, intercarrier compensation for ISP-bound traffic is capped at a rate of $.0015 per minute-of-use. For the subsequent eighteen months, the rate is capped at $.0010 per minute-of-use. Starting in the twenty-fifth month and continuing through the thirty-sixth month, the rate will be capped at $.0007 per minute-of-use. (Barta, Tr. 245). A volume cap will also be imposed on total ISP-bound minutes for which a local exchange carrier may receive the transitional compensation levels. The FCC established a ceiling for 2002 on the ISP-bound minutes-of-use eligible for compensation. The ceiling reflects a ten-percent growth factor based upon the number of ISP-bound minutes recorded by the carrier during the first quarter of 2001. In 2003, a carrier may receive compensation for ISP-bound minutes up to the level of the 2002 minutes-of-use ceiling. (Barta, Tr. 245). The FCC arbitrarily defined ISP-bound traffic under the rebuttable presumption where any traffic exchanged between carriers that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic subject to the transitional compensation scheme. (Barta, Tr. 245).

The Commission should require that a reciprocal compensation mechanism be used to govern intercarrier compensation for the local exchange traffic that remains under its jurisdiction in the event carriers do not successfully negotiate an agreement for the transport and termination of such traffic. The reciprocal compensation arrangement should be based upon symmetrical rates that reflect the incumbent LEC's costs; specifically, the rates found in the Total Element Long Run Incremental Cost studies approved by the Commission. 47 C.F.R. 51.711. (Barta, Tr. 246).

The Commission has jurisdiction to establish bill-and-keep, but only with respect to non-ISP-bound local traffic. State regulatory authorities may order a bill-and-keep arrangement under certain circumstances for non-ISP-bound local traffic. The Commission can establish bill-and-keep if neither carrier has rebutted the presumption of symmetrical rates <u>and</u> if the flow of traffic between the carriers' networks is approximately equal (and is expected to remain so). 47 C.F.R 51.713. It is noteworthy that under a State imposed bill-and-keep regime, compensation obligations of the parties must be revisited and adjusted in the event the flow of traffic between the carriers' networks becomes significantly out of balance. Thus, the Commission's authority to implement a bill-and-keep arrangement does not appear to extend to those circumstances where the exchange of traffic is not balanced between the interconnecting carriers' networks. (Barta, TR. 246-247).

The FCC's interim cost-recovery rules have at least two implications for the Commission's discretion to impose a bill-and-keep arrangement on non-ISP-bound traffic. First, the rules create a presumption that all traffic exchanged between carriers up to a 3:1 ratio of terminating to originating traffic is non-ISP-bound traffic. Whatever "roughly balanced" means, it cannot mean that a carrier who terminates three times as many minutes as it originates is in rough balance with its interconnecting carrier. A carrier who provides three million minutes of terminating service per month, but receives only one million minutes of terminating service from its interconnection carrier, must be compensated for the additional two million minutes it terminates. In this situation, bill-and-keep is not an equitable system for compensation, as it leaves one carrier bearing highly disproportionate costs which it has no way to recover except through increasing charges to its end users. Second, the FCC conditioned an ILEC's right to make payment for ISP-bound traffic at the FCC-established interim rates to situations in which the ILEC offers to exchange all traffic, including non-ISP-bound traffic, at the same rate. *ISP Remand Order ¶89.* To the extent an ILEC makes this offer, and an ALEC accepts it, there is no authority for a state-imposed bill-and-keep mechanism. Aside from the unnecessary additional administrative and marketing costs that the change to a bill-and-keep arrangement would likely introduce, such a compensation mechanism fails to recognize that the costs an ALEC incurs to transport and terminate a call are very real. The shift to a bill-and-keep arrangement will not relieve the ALEC of the responsibility to terminate a call that the ILEC's customer originates. More importantly, the shift to a bill-and-keep arrangement does not mean the ALEC's cost of terminating the traffic that has been originated on the ILEC's network has decreased or disappears simply because there is no explicit compensation for the carriage of traffic between the carriers. (Barta, TR. 247). As long as the cost of terminating traffic is positive, a bill-and-keep arrangement will not adequately provide for the recovery of an ALEC's costs unless the flow of traffic between the carriers' networks is approximately equal. The potential financial impact upon an ALEC could be materially detrimental, as it will no longer receive the revenue earned for transporting and terminating the local traffic originated by the ILEC's customer. (Barta, Tr. 247).

BellSouth witness, Elizabeth R. A. Shiroishi, in her prefiled direct testimony, cited Section 252(d)(2)(B)(i) to support the proposition that the 1996 Act does not preclude mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery, such as bill-and-keep arrangements. (Shiroishi, Tr. 27-28). Rule 51.711(a) provides for symmetrical rates for transport and termination of telecommunications traffic, and subsection (b) authorizes a state commission to establish asymmetrical rates for transport and termination of telecommunications traffic under certain circumstances. Rule 51.713(b) authorizes a state commission to impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so. Accordingly, it would be fair to conclude that in the event the traffic flows are not balanced, the FCC's rules require that symmetrical rates based upon the ILEC's approved forward-looking cost studies are to be used for reciprocal compensation. Ms. Shiroishi also concluded that the *FCC's ISP Remand Order* provides the foundation for the definition of roughly balanced traffic by establishing a precedent that traffic below a 3:1 ratio of originating to terminating traffic is roughly balanced. (Shiroishi, Tr. 29-30). Contrary to Ms. Shiroishi's contention, the 3:1 ratio was established in order to limit disputes and avoid costly efforts to identify ISP-bound traffic. *ISP Remand Order ¶ 79.* Consequently, the FCC did not treat non-ISP traffic as roughly balanced if it falls below the 3:1 threshold. It would be inherently unfair for one party to provide up to three times the service to a second party without being compensated for its service.

A move from a reciprocal compensation arrangement to a bill-and-keep mechanism would impose a major change in intercarrier compensation rules for both the ILECs and the ALECs. One should expect such a change to be accompanied by a new set of costs. These costs may very well include, but are not limited to, the expense of participating in more intercarrier compensation proceedings, the need to renegotiate (and possibly arbitrate) interconnection agreements, and the effort to develop and implement new retail pricing programs that are in response to regulatory, not competitive, market forces. (Barta, Tr. 248).

The ILECs can expect to enjoy an immediate stream of cash flow because they no longer have the obligation to compensate the ALECs for terminating calls that are originated on their networks. Depending upon the magnitude of the terminating traffic imbalance, the savings realized by the ILEC could be substantial. (Barta, Tr. 248).

Verizon witness, Dennis B. Trimble, in his prefiled rebuttal testimony, expressed his belief that the Florida Commission views simplicity as a principal advantage of bill-and-keep. (Trimble, Tr. 141). In this regard, Mr. Trimble concluded that it is apparent from the testimony of Verizon and other parties that designing an appropriate bill-and-keep mechanism will likely be more complicated than perhaps the Commission anticipated. (Trimble, Tr. 141). Moreover, Mr. Trimble observed that even among the parties that could conditionally support bill-and-keep, there is not any real consensus about how the ideal mechanism should be structured. (Trimble, Tr. 141). It follows from Mr. Trimble's testimony that designing the appropriate bill-and-keep arrangement is problematic, and the straightforward reciprocal compensation mechanism based on symmetrical rates is a much better alternative.

The provisions of the FCC's interim cost-recovery rules have complicated the task of determining traffic flow balances or imbalances between interconnecting carriers. Notwithstanding that it is not currently possible to reliably or accurately identify ISP-bound calls from other forms of local traffic, the FCC has arbitrarily defined the ISP-bound calls for which compensation is due under its transitional reciprocal compensation scheme. It is the carriers' remaining non-ISP-bound local traffic that the Florida Commission must measure for "roughly balanced" traffic loads. (Barta, Tr. 248-249).

One approach to defining a "roughly balanced" exchange of traffic between interconnecting carriers is to place a percentage threshold on the difference in traffic flows in the two directions. An alternative approach would be to establish a dollar threshold where a carrier would not be obligated to compensate the interconnecting carrier unless the net minutes-of-use for terminating traffic resulted in a dollar amount that exceeded the prescribed threshold. (Barta, Tr. 248).

However, working with a materiality threshold has proven to be a daunting challenge in practice. Some interconnecting ALECs and ILECs have entered into bill-and-keep arrangements that included a percentage or dollar threshold as part of the agreement. Experience has shown that the administrative burden of keeping up with the flow of traffic and calculating offsetting payments has outweighed the costs of each carrier billing for actual minutes-of-use. (Barta, Tr. 249).

Furthermore, in response to the FCC's rules and the ILECs' preference for a reciprocal compensation regime, most ALECs have invested in and implemented billing systems in order to track and bill for actual minutes-of-use. Since sophisticated billing systems are already in existence, it would seem to make little sense now to abandon their capability. (Barta, Tr. 249).

In the event that the Florida Commission elects to adopt a bill-and-keep arrangement, the non-ISP-bound local traffic flows between interconnecting carriers should be measured as accurately as possible for each six month period the interconnection agreement remains in effect. If large traffic imbalances between the carriers persist, the Commission may wish to reconsider its decision to adopt a bill-and-keep regime or implement a true-up mechanism to alleviate the financial burden of the disadvantaged carrier. (Barta, Tr. 250).

The advantages of a bill-and-keep regime are limited to those circumstances where payments between the interconnecting carriers are expected to be offset as a result of a balance in the exchange of traffic and/or the respective costs that the carriers incur in transporting and terminating traffic. That is, if the carriers exhibit the same cost structures (an unlikely occurrence), then a balanced traffic flow between the interconnecting networks should result in an offset of payments from one party to the other. An uneven flow of traffic can still result in an offset of payments provided it happens that just the exact differential between the carriers' costs exists (yet another unlikely coincidence). Bill-and-keep arrangements, under these limited circumstances, may reduce each carrier's transaction costs. The probability of maintaining such a perfect balance between each carrier's traffic patterns and cost structures for any duration is most likely remote. (Barta, Tr. 250).

One would expect that the carriers would recognize where a bill-and-keep arrangement is more efficient and would reach such an agreement without the need for regulatory intervention. Therefore, it seems that the most logical default intercarrier compensation mechanism continues to be reciprocal compensation. (Barta, Tr. 251).

Several disadvantages are likely to stem from a Commission decision to rely upon a bill-and-keep arrangement as a default mechanism. As noted earlier, there will be new administrative and marketing costs for the ILECs and ALECs. A shift to a bill-and-keep regime will also foster market uncertainty that carries its own set of cost burdens. In addition, a bill-and-keep arrangement creates a new incentive to engage in regulatory gamesmanship in the form of inefficient network design. But most importantly, bill-and-keep arrangements play right into the hands of the superior bargaining power that the dominant industry players – the incumbent LECs -- hold. (Barta, Tr. 251).

The move to a bill-and-keep arrangement can contribute to market uncertainty because the magnitude of the decision's impact upon the ALECs' financial viability cannot be determined until the regime is in effect. If competitive carriers are unable to timely and successfully react to a regulatory mandated change in the traditional form of compensation for the exchange of traffic, then there will be fewer competitors left to participate in this segment of the market. Although there are no guarantees of financial success in the competitive telecommunications markets, the strength and versatility of the competition emerging in these markets depends upon regulators to consistently send the right pricing and investment signals to the industry participants. (Barta, Tr. 251-252).

Also, complex regulatory and market issues must be addressed as part of the process to implement a bill-and-keep arrangement. A properly structured bill-and-keep mechanism must ensure that alternative carriers are not penalized because they cannot readily attain the economies of scale and scope, and the diversity in customer base, that the incumbent local exchange carriers have long enjoyed. If the Commission desires to use bill-and-keep as a default mechanism, then the Commission should initiate a separate proceeding in order to craft an equitable bill-and-keep arrangement that seeks to balance the interests of the dominant carriers (i.e. the ILECs) and the new entrants. (Barta, Tr. 260).

A reciprocal compensation mechanism using symmetrical rates based upon the incumbent LECs' forward-looking costs is the appropriate regulatory tool to encourage competition and innovation. The FCC recognized the merits of this pricing standard and wisely adopted it to establish the rates for interconnection and unbundled elements:

> **Because a pricing methodology based on forward-looking costs simulates the conditions in a competitive marketplace, it allows the requesting carrier to produce efficiently and to compete effectively, which should drive retail prices to their competitive levels. We believe that our adoption of a forward-looking cost-based pricing methodology should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs similar to those incurred by the incumbents, which may be expected to reduce the regulatory burdens and economic impact of our decision for many parties, including both small entities seeking to enter the local exchange market and small incumbent LECs.**

*In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, FCC 96-325, CC Dockets 96-98, rel. August 8, 1996, ¶ 679 ("(Local Competition Order").* The competitive philosophy embraced in the FCC's TELRIC pricing standards has been borne out as ALECs have introduced efficient network designs to lower the costs of terminating traffic and have found innovative ways to satisfy the communications needs of customers. This competitive outcome should be applauded as a marketplace success and not held out as an example of inefficient regulatory arbitrage. The Florida Commission should continue its sound reasoning to implement a reciprocal compensation mechanism for interconnection using symmetrical rates based upon the ILECs' forward-looking costs. (Barta, Tr. 252-253).

Under a bill-and-keep arrangement, carriers will search for ways to unload the traffic originating on their networks as quickly as possible and to accept terminating traffic as late as possible. For instance, the strategic placement of central offices further out in the network can affect a carrier's costs under bill-and-keep regardless of whether it represents efficient network design practices. In addition, the concern over regulatory arbitrage may shift from carriers seeking an imbalance in terminating traffic to one where carriers target large net originators of traffic. Not only may bill-and-keep influence the carrier to base its network strategy upon concerns for regulatory treatment rather than concerns for the most economically efficient configuration, such an arrangement may invite new opportunities for regulatory arbitrage. (Barta, Tr. 253).

There should be little argument that arms-length contracts negotiated between two private parties offer far greater benefits and advantages than commercial relationships mandated through government regulation. In fact, key sections of the 1996 Act are geared towards encouraging negotiations between private parties over State and/or federal rate regulation. (Barta, Tr. 254).

However, the ALECs' ability to fairly negotiate rates for the exchange of local traffic with the incumbent carriers is compromised because of the ILECs' status as the dominant players in the industry. These concerns over the ILECs' bargaining strength cannot simply be dismissed as the unfounded fears of a group of small carriers seeking regulatory relief for their own competitive shortcomings. (Barta, Tr. 254).

Indeed, the FCC recognized the incumbent LECs' superior bargaining power in the *Local Competition Order* when it comes to the matter of establishing rates for interconnection with competitive carriers:

> **Negotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires. Under section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market. Therefore, although the 1996 Act requires incumbent LECs, for example, to provide interconnection and access to unbundled elements on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, incumbent LECs have strong incentives to resist such obligations. The inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power in part because many new entrants seek to enter national or regional markets.**

*Local Competition Order* ¶ *55.* In order to deter the ability of the ILECs from engaging in anti-competitive behavior by exercising their superior bargaining position in their negotiations with ALECs, the Commission should adopt an equitable reciprocal compensation mechanism based upon symmetrical rates. (Barta, Tr. 254-255).

BellSouth and Verizon overwhelmingly support the change from reciprocal compensation to a bill-and-keep arrangement for the exchange of local traffic. Based upon the dominant firms' preference for a bill-and-keep arrangement, any characterization that the mechanism is merely a "default" regime ignores the reality of negotiations where the parties' objectives are clearly conflicting. In the end, one would expect the incumbent LECs to be tough "negotiators" and resist the offers of the ALECs to craft more equitable and efficient interconnection agreements, based upon the LECs' knowledge that a default bill-and-keep arrangement is the regulatory remedy to resolve the impasse. (Barta, Tr. 255).

Respectfully submitted this 10th day of June, 2002.


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