RUTLEDGE, ECENIA, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

ORIGINAL

STEPHEN A ECENIA
KENNETH A HOFFMAN
THOMAS W. KONRAD
MICHAEL G MAIDA
MARTIN P McDONNELL
J STEPHEN MENTON

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-6515

R DAVID PRESCOTT
HAROLD F X. PURNELL
MARSHA E. RULE
GARY R RUTLEDGE

GOVERNMENTAL CONSULTANTS
MARGARET A. MENDUNI
M LANE STEPHENS

June 10, 2002

RECEIVED-FPSC
02 JUN 10 PM 3:44
COMMISSION
CLERK

Ms. Blanca Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 000075-TP

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of US LEC of Florida Inc. ("US LEC") are the following documents:

1. Original and fifteen copies of US LEC's Posthearing Brief; and

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

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

Thank you for your assistance with this filing.

Sincerely,

Martin P. McDonnell

MPM/rl
USLEC\Bayo.610

AUS
CAF
CMP
COM 5
CTR
ECR
GCL
OPC
MMS
SEC 1
OTH

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
06033 JUN 10 02
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

POSTHEARING BRIEF OF
US LEC OF FLORIDA INC.

Pursuant to Order No. PSC-00-2229-PCO-TP issued November 22, 2000, Order No. PSC-00-2350-PCO-TP issued December 7, 2000, Order No. 00-2452-PCO-TP issued December 22, 2000, Order No. PSC-01-0632-PCO-TP issued March 15, 2001 and Order No. PSC-02-0139-PCO-TP issued January 31, 2002, and Rule 28-106.205, Florida Administrative Code, US LEC of Florida Inc. (hereinafter referred to as "US LEC") hereby files its Posthearing Brief.

STATEMENT OF BASIC POSITION

In order for US LEC and other alternative local exchange telecommunications companies ("ALECs") to meaningfully compete in Florida, it is imperative that they not be saddled with "cloning" the incumbent local exchange companies' ("ILECs") historical networks and local calling areas in the provision of local telecommunications services. ALECs seek the flexibility to differentiate their service from ILECs and should not be competitively disadvantaged by being forced to adopt the ILEC's local calling area. LATA-wide local calling for purposes of intercarrier compensation will give ALECs this flexibility, which will in turn enhance competition and result in an overall benefit to consumers.

Pursuant to the Federal Telecommunications Act of 1996 ("Act") and Federal Communications Commission ("FCC") rules and orders, state commissions should develop policies

06033 JUN 10
FPSC-COMMISSION CLERK

that promote local exchange services competition between ILECs and ALECs. Each ALEC, competing for its desired position in the marketplace, should have the opportunity to negotiate its local calling area with the ILEC. In the absence of the parties reaching agreement, the Commission should establish LATA-wide local calling for intercarrier compensation purposes.

The Commission should retain its current reciprocal compensation policy as the appropriate compensation mechanism governing the transport and delivery or termination of traffic subject to Section 251 of the Act, unless negotiating parties agree otherwise. Reciprocal compensation appropriately imposes costs on the cost-causer, and allows the costs to be shared by both the originating company and the terminating company. Bill-and-keep, on the other hand, preserves objectionable aspects of the existing patchwork of intercarrier compensation. Bill-and-keep would be neither efficient nor competitively neutral and would result in significant unintended and undesirable consequences, including potential regulatory arbitrage, increased unwanted calls to consumers and a considerable financial windfall to ILECs.

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

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

US LEC: *Sections 251 and 252 of the Act grant the Commission jurisdiction to define a "local calling area" for purposes of determining the applicability of reciprocal compensation.*

Section 251(b)(5) of the Act imposes on each carrier the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. The FCC has interpreted Section 251(b)(5) to authorize state commissions to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations

under Section 251(b)(5). In the FCC's *Local Competition Order* (FCC 96-325), the FCC stated that it expects the states to determine whether intrastate transport and termination of traffic should be governed by Section 251(b)(5) reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different.

(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?

US LEC: *In the event parties cannot reach a negotiated agreement, the Commission should establish a default definition of local calling area for the purpose of intercarrier compensation.*

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

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

US LEC: *LATA-wide local calling should be the default definition of local calling area for purposes of intercarrier compensation.*

The Commission should adopt a LATA-wide local calling area. LATA-wide local calling allows for fair reciprocal compensation between all carriers for calls placed between ILEC and ALEC customers. LATA-wide local calling would simplify the process of reciprocal compensation between carriers and, more significantly, benefit consumers by making it possible for ALECs to

offer more competitive retail calling plans. (Tr. A215-216).[1]

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

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

---

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

BellSouth, Tr. A23).

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

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

An ALEC does have some flexibility with respect to "outward" calling plans. That is, an

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

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

First, "universal service" is defined by Section 364.025, Florida Statutes as "an evolving level of access to telecommunications services that, taking into account advantages and technologies, services, and market demand for essential services, the Commission determined should be provided at just, reasonable, and affordable rates to consumers, including those in rural, economically

disadvantaged, and high-cost areas." It is the stated intent of the Legislature that the ubiquitous nature of the local exchange telecommunications companies be used to satisfy these objectives, and from January 1, 1996 through January 1, 2004, ILECs are required to furnish basic local exchange telecommunications service within a reasonable time period to any person requesting such service within the company's service territory.[2] Further, Section 364.025(3), Florida Statues, recognizes the right of an ILEC to petition the Commission for a change in universal service, and states as follows:

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

Absent from the record in the instant docket are any cost studies that would establish that the economic impact on the ILECs of a LATA-wide local calling area would constitute a "compelling showing of changed circumstances" to trigger an ILEC's statutory right to petition the Commission for a change in the interim universal service mechanism.[3] In fact, in response to questions from

---

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

[3]See *In re: Determination of Funding for Universal Service and Carrier of Last Resort Responsibilities*, Docket No. 950696-TP, Order No. PSC-95-1592-FOF-TP issued December 27, 1995 wherein the Commission held that if an ILEC finds that its ability to sustain its universal service obligation has, in fact, been eroded due to competitive pressures it may file a petition with the Commission for company specific universal service relief. Its petition would be handled on an expedited basis. The petition must specifically demonstrate that competitive entry has eroded its ability to sustain universal service, and specifically quantify the alleged shortfall that is due to competitive entry. The ILEC would also need to submit incremental cost data to identify the amount of its universal service subsidy as well as calculations of the amount of net contribution lost that had been supporting the universal service subsidy. *Order* at page 28.

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

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

The ILECs' second argument; that LATA-wide local calling would violate Section 364.16(3)(a), Florida Statutes,[4] is equally misleading. That section reads:

> (a) No local exchange telecommunications company or alternative local exchange telecommunications company shall knowingly deliver

---

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

> traffic, for which terminating access charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

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

To illustrate the paradox in BellSouth's stated position that LATA-wide local calling violates Section 364.16(3)(a), F.S., one need only review BellSouth's current Florida interconnection agreements. BellSouth witness Shiroishi testified that BellSouth is currently operating under 14 (or more) interconnection agreements wherein BellSouth recognizes LATA-wide local calling for purposes of reciprocal compensation. (Tr. A71). BellSouth currently recognizes LATA-wide local calling in interconnection agreements with US LEC, AT&T of the Southern States, Level 3 Communications, LLC, Alltel Florida, Inc. and Time Warner Telecom of Florida, L.P., all parties to this docket. (Tr. A71). In fact, BellSouth witness Ruscilli testified that due to the fact that ALECs can adopt the LATA-wide local calling area provisions in interconnection agreements pursuant to Section 252(i) of the Act, BellSouth would not object if the Commission were to determine that local calling should be defined as LATA-wide for reciprocal compensation purposes. (Tr. 213). Witness Ruscilli also acknowledged that there could be some administrative efficiencies in having one definition of the local calling area for purposes of intercarrier compensation. (Tr. 213).

The Commission should establish LATA-wide local calling area as the default mechanism. A LATA-wide local calling area would simplify retail call rating as well as intercarrier billing of

reciprocal compensation. Establishing the LATA as the default local calling area will allow ALECs to meaningfully compete with the ILECs for customers seeking affordable local service.

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

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

US LEC: *Pursuant to FCC Rule 51.713(b), the Commission may impose bill-and-keep arrangements if the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so.*

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

US LEC: *A bill-and-keep arrangement would have a significant negative financial impact on ALECs as the cost-causer (originating caller) would not be responsible for the cost of transporting and terminating the call.*

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

Section 252(d)(2)(a) of the Act states that an interconnection agreement between carriers cannot be found just and reasonable unless the agreement itself "provides for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." Reciprocal compensation appropriately imposes costs on the cost-causer, while bill-and-keep allows

the originating party to retain the money it normally would have to pay for the use of the terminating carrier's network. (Tr. A226).

The potential disadvantages of bill-and-keep far outweigh the possible benefit of lower carrier transaction costs. Bill-and-keep would foster market uncertainty as its financial impact on ALECs remains unknown until a bill-and-keep regime is in effect. (Tr. A243). Bill-and-keep could also potentially spawn new incentives to engage in regulatory gamesmanship as carriers attempt to design their network to dispose of traffic originating on their networks quickly and to accept terminating traffic as late as possible. (Tr. A243). An obvious consequence of a bill-and-keep regime would be that ALECs that terminate more traffic than they originate would not be fully compensated for their costs incurred in terminating interconnecting ILECs' traffic.

BellSouth witness Shiroishi testified in Phase I in the instant docket, that in or around 1996, BellSouth opposed a bill-and-keep arrangement as it would not allow BellSouth to recover its costs of terminating traffic.[5] At the time BellSouth opposed bill-and-keep, it was terminating substantially all local traffic. The fact that BellSouth opposed bill-and-keep in 1996 (when it terminated virtually all local traffic), and today requests that the Commission impose bill-and-keep regime, supports US LEC's position that a bill-and-keep regime is simply unfair to any party that terminates more local traffic than it originates.

A shift from a reciprocal compensation arrangement to a bill-and-keep mechanism would constitute a major change in intercarrier compensation rules for both the ILECs and the ALECs. Such a change would, in all probability, be accompanied by a new set of costs. These costs may

---

[5]See Tr. 689-690 of Phase I in the instant docket, March 8, 2001.

include, but are not limited to, renegotiating and arbitrating interconnection agreements, participation in more intercarrier compensation proceedings and the deployment of new retail pricing programs in response to regulatory forces. (Tr. A248).

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

US LEC: *The Commission will need to define generically "roughly balanced" if the Commission imposes bill-and-keep as a default mechanism.*

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

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

The more traffic *imbalance* the Commission allows under a bill-and-keep regime, the more disadvantaged is the party that terminates more traffic than it originates.

Traffic should be considered "roughly balanced" when the difference between the amount of traffic terminated by each carrier is statistically insignificant and is expected to remain so. Once the traffic meets a threshold of 1 million minutes per month, and is out of balance by more than 5%, then traffic should no longer be considered in balance, and reciprocal compensation should apply. For the last 5 years, traffic balance has not occurred between US LEC and any ILEC in Florida. Therefore, US LEC would object to the Commission creating a rebuttable presumption in this generic docket that traffic is roughly balanced. According to evidence presented in this docket, most, if not all, of the other ALECs are apparently terminating more traffic than they are originating (Tr. A198).

BellSouth recommends that the Commission should find that all traffic below a 3:1 ratio of originating to terminating traffic is "roughly balanced." (Tr. A29). That recommendation should be rejected. In support of that recommendation, BellSouth witness Shiroishi grossly mischaracterizes the FCC's recent ruling regarding intercarrier compensation for ISP-bound traffic.[6] Ms. Shiroishi's profound misreading of the FCC's *ISP Remand Order* is illustrated in her following conclusory testimony regarding bill-and-keep:

> BellSouth requests that the Florida Public Service Commission make the finding that traffic subject to 251(b)(5) is presumed to be roughly balanced, and, *following already established*

---

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

> *precedent*, find that traffic below a 3:1 ratio of originating to terminating traffic is roughly balanced. (Tr. A31). (Emphasis supplied).

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

> We understand that some carriers are unable to identify ISP-bound traffic. In order to limit disputes and avoid costly efforts to identify this traffic, we adopt a rebuttal presumption that traffic delivered to a carrier, pursuant to a particular context, that exceeds a 3:1 ratio of terminating to originating traffic as ISP-bound traffic that is subject to the compensation mechanism set forth in this Order.[7]

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

---

[7] Id. At ¶79.

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

> (c) Nothing in this section precludes a state commission from presuming that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction and is expected to remain so unless a party rebuts such a presumption.

Although Rule 51.713(c) does not *preclude* a state commission from presuming traffic is balanced, there was no evidence presented in this docket to draw that presumption.

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

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

Nonetheless, BellSouth Shiroishi recommends that the Commission "presume" that traffic is in balance. (Tr. A29). Not surprisingly, BellSouth has presented no evidence to support a presumption that local traffic is in balance. A "presumption" that traffic is in balance would not be supported by *any* evidence presented in this proceeding. Therefore, BellSouth's request that this Commission presume that traffic is in balance (when it obviously is not) be denied.

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

US LEC: *Bill-and-keep only offers any advantage to carriers when the exchange of local traffic is statistically balanced.*

When traffic is statistically balanced, a potential advantage to bill-and-keep may be that carriers would not bill and pay each other every month for terminating the other party's traffic. However, the parties could achieve the same result simply by negotiating a bill-and-keep reciprocal compensation arrangement. Under a bill-and-keep arrangement, the parties would still need to calculate their local minutes of use (MOU) to ensure that the traffic is statistically balanced.

A default bill-and-keep reciprocal compensation mechanism is disadvantageous for a number of reasons. Bill-and-keep inappropriately imposes costs on the recipient of a phone call, whether the recipient wants the call or not. Additionally, a bill-and-keep default mechanism would not encourage carriers to negotiate as a carrier that originates more calls than it terminates would want bill-and-keep as it would create a financial windfall for that carrier. Bill-and-keep encourages carriers to seek customers that originate more telephone calls than they receive, and discourages carriers from seeking customers that terminate more phone calls than they originate.

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

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

Bill-and-keep would discourage good faith negotiations between parties as the party that expects to originate more traffic than it terminates would have the incentive to avoid any negotiated agreement knowing that the windfalls that come with the default bill-and-keep mechanism are readily available. (Tr. A222). Bill-and-keep would create new opportunities for both regulatory arbitrage and monopoly abuse by encouraging carriers to seek customers who make more calls than they receive. Bill-and-keep also requires recipients of unwanted telephone calls to pay for

terminating those calls. (Tr. A223).

On April 27, 2001, the FCC released its *Notice of Proposed Rulemaking* in *the Matter of Developing a Unified Intercarrier Compensation Regime*[8]. In the *NPRM*, the FCC recognized that shifting to a new regime for intercarrier compensation, such as bill-and-keep, may create new and unexpected problems, and that those new problems may outweigh the benefits of the new regime.[9]

In the *NPRM*, the FCC invited comments from the parties regarding its concerns with an increase in unwanted calls. Under the current regime, called parties do not pay for unwanted calls. However, under bill-and-keep, unwanted calls may increase because there are no additional costs imposed for the additional calls. Also, it is possible (depending on the retail rate structure) that called parties may have to pay traffic-sensitive charges for unwanted calls.[10] Further, at least until competition and transport develops further, it may be necessary to regulate the transport rates charged by ILECs.[11] The FCC requested comments regarding whether the adoption of a bill-and-keep arrangement would generate new billing or collection problems for carriers, particularly where a carrier seeks to charge an entity that is not its customer,[12] and whether a move to a bill-and-keep arrangement for ISP-bound traffic, as it proposed, will cause carriers to increase the rates they charge ISPs, which could then result in higher Internet access prices. To the extent that Internet access

---

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

[9]Id. at ¶58.

[10]Id. at ¶60.

[11]Id. at ¶61.

[12]Id. at ¶63.

prices would rise, the FCC questioned whether the increase would likely take the form a higher flat rate or would it likely result in the introduction of traffic-sensitive rates.[13]

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

The FCC's Section 251(b)(5) rules are an important piece of the new federal regime. The interim federal intercarrier compensation regime established in the *ISP Remand Order* applies only if an ILEC makes an *offer* to all carriers in a given state to exchange all Section 251(b)(5) reciprocal compensation traffic at the applicable federal capped rate.[14] If an ILEC chooses not to adopt a federal rate regime by making such an offer, then the FCC "mirroring rule" mandates that all Section 251(b)(5) traffic *and all ISP-bound traffic* must be compensated at the state-approved reciprocal compensation rate. The purpose of the FCC's mirroring rule is to avoid the "patently unfair" situation in which the ILEC seeks to use its "superior bargaining power" in order to "pick and choose

---

[13]Id. at ¶64.

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

intercarrier compensation regimes depending on the nature of the traffic exchanged with another carrier."[15] Thus, where an ILEC has not availed itself of the FCC's rate caps, the state-approved reciprocal compensation rates apply to *all* Section 251(b)(5) and *all* ISP-bound traffic. Any rules the Commission adopts for 251(b)(5) traffic could therefore effect the exchange of both 251(b)(5) and ISP-bound traffic if an ILEC does not elect the federal regime.

On May 3, 2002, the D.C. Circuit Court of Appeals reversed the FCC's finding in the *ISP Remand Order* that ISP-bound traffic is exempt from reciprocal compensation pursuant to Section 251(g).[16] The court remanded the issue to the FCC for further analysis and therefore the possibility still exists that ISP-bound traffic will ultimately be found to be local traffic within 251(b)(5) and subject to reciprocal compensation. The Commission must consider this possibility in adopting default rules for the exchange of Section 251(b)(5) traffic.

The Commission should continue to utilize cost-based rates for purposes of reciprocal compensation as the default mechanism in the event that the parties are unable to negotiate an intercarrier compensation regime. Properly structured forward-looking, cost-based pricing encourages efficient investment and use of the carrier's networks, discourages regulatory arbitrage, and creates a level, competitively neutral playing field.[17]

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

---

[15]Id. at ¶89.

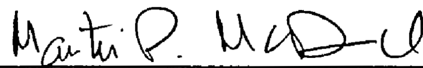
[16]*WorldCom Inc. v. FCC*, D.C. Circuit Ct. of Appeals, No. 01-1218, May 3, 2002.

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

and would result in significant unintended and undesirable consequences.

Bill-and-keep is no more "deregulatory" than cost-based intercarrier compensation, yet it would, in all likelihood, create new opportunities for regulatory arbitrage. Bill- and-keep would simply mean that costs that have always been recovered from cost-causing carriers would now be foisted upon interconnecting carriers and their customers. Because ILECs will retain substantial local market power for the foreseeable future, ALECs will be forced to raise the retail prices to their customers to offset the revenue losses they will incur under a bill-and-keep regime.

Respectfully submitted,



Kenneth A. Hoffman, Esq.
Martin P. McDonnell, Esq.
Marsha E. Rule, Esq.
Rutledge, Ecenia, Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32302
(850) 681-6788 (Telephone)
(850) 681-6515 (Telecopier)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by hand delivery(*) and U. S. Mail to the following this 10th day of June, 2002:

Felicia Banks, Esq. (*)
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, Florida 32399-0850

Morton Posner, Esq.
Regulatory Counsel
Allegiance Telecom, Inc.
1919 M Street, N.W.
Suite 420
Washington, DC 20036

Nancy B. White, Esq.
c/o Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1556

James Meza, III, Esq.
BellSouth Telecommunications, Inc.
Legal Department
Suite 1910
150 West Flagler Street
Miami, Florida 33130

James C. Falvey, Esq.
e.spire Communications, Inc.
133 National Business Parkway
Suite 200
Annapolis Junction, MD 20701

Michael A. Gross, Esq.
Florida Cable Telecommunications, Asso.
246 East 6th Avenue
Tallahassee, FL 32303

Mr. Paul Rebey
Focal Communications Corporation of Florida
200 North LaSalle Street, Suite 1100
Chicago, IL 60601-1914

Global NAPS, Inc.
10 Merrymount Road
Quincy, MA 02169

Donna Canzano McNulty, Esq.
MCI WorldCom
325 John Knox Road, Suite 105
Tallahassee, FL 32303-4131

Norman Horton, Jr., Esq.
Messer Law Firm
215 S. Monroe Street, Suite 701
Tallahassee, FL 32301-1876

Jon Moyle, Esq.
Cathy Sellers, Esq.
The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301

Mr. Herb Bornack
Orlando Telephone Company
4558 SW 35th Street, Suite 100
Orlando, FL 32811-6541

Peter Dunbar, Esq.
Karen Camechis, Esq.
P. O. Box 10095
Tallahassee, FL 32302-2095

Charles R. Rehwinkel, Esq.
Susan Masterton, Esq.
Sprint-Florida, Incorporated
Post Office Box 2214
MS: FLTLHO0107
Tallahassee, FL 32316

Mark Buechele, Esq.
Supra Telecom
1311 Executive Center Drive, Suite 200
Tallahassee, Florida 32301

Kimberly Caswell, Esq.
Verizon Select Services, Inc.
P. O. Box 110, FLTC0007
Tampa, Florida 33601-0110

Charlie Pellegrini, Esq.
Patrick K. Wiggins, Esq.
P. O. Drawer 1657
Tallahassee, Florida 32302

Robert Scheffel Wright, Esq.
John T. LaVia, III, Esq.
P. O. Box 271
Tallahassee, FL 32302

Virginia Tate, Esq.
AT&T Law and Government Affairs
Southern Region
1200 Peachtree Street, N.E.
Suite 8156
Atlanta, Georgia 30309

Carolyn Marek
Time Warner Telecom of Florida, L.P.
233 Bramerton Court
Franklin, TN 37069

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
117 South Gadsen Street
Tallahassee, FL 32301

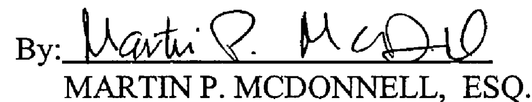
Michael R. Romano, Esq.
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, Colorado 80021

Richard D. Melson, Esq.
Hopping Green Sams & Smith, P.A.
P. O. Box 6526
Tallahassee, FL 32314

Christopher W. Savage, Esq.
Coles, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, N.W., Ste. 200
Washington, DC 20006

J. Jeffry Wahlen, Esq.
P. O. Box 391
Tallahassee, FL 32302

Matthew Feil, Esq.
Florida Digital Network, Inc.
390 North Orange Avenue
Suite 2000
Orlando, FL 32801-1640

By: 
MARTIN P. MCDONNELL, ESQ.

USLECPhaseiia.brief