Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	

REPLY COMMENTS OF CABLE & WIRELESS USA

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I. INTRODUCTION & SUMMARY

Cable & Wireless USA ("Cable & Wireless") reconfirms its view that adopting an appropriate bill-and-keep regime for all traffic would be the best way to solve the problems of the existing interconnection system in the United States, and that the next best alternative is a uniform "calling party's network pays" ("CPNP") regime based on long run incremental costs ("LRIC"). Under either approach, the FCC should focus on two critical goals for reforming the current system: (1) achieving a *uniform* compensation system; and (2) expunging existing *non-relevant costs* from intercarrier cost recovery under the new regime.

Significantly, regardless of whether the FCC moves to bill-and-keep or stays with a CPNP regime, moving the intercarrier compensation regime to a unified system will be a complex process that will take at least several years to complete. It is therefore critical that the FCC begin now to take intermediate steps necessary to ensure the success of either approach. Most importantly, the Commission should take prompt action to eliminate subsidies from intrastate access charges by reducing intrastate rates down to CALLS levels *before* the implementation of a fully-developed new intercarrier compensation regime.

Regarding the choice between a unified bill-and-keep approach and a unified LRIC-based, CPNP approach, Cable & Wireless acknowledges that – although both are vastly superior to the current system – neither regime would be perfect. On balance, however, Cable & Wireless favors bill-and-keep because its cost of implementation is likely to be lower. Although theoretically appealing, implementing a LRIC-based, CPNP regime ultimately would require an extensive (and expensive) costing process across numerous carriers and markets. Bill-and-keep, on the other hand, avoids much of that costing, especially with respect to carriers other than incumbent LECs, but would still require some safeguards to prevent ILECs from engaging in new forms of anti-competitive activity and exercise of dominant power. Cable & Wireless believes that the FCC could implement such safeguards against potential ILEC abuses under bill-and-keep in a relatively cost-efficient manner. We set out some general principles that should guide the creation of such safeguards.

Cable & Wireless's opening comments addressed only those proposals – COBAK and BASICS – that were part of the Office of Plans and Policy's original submissions on this topic. At that time, we left open the possibility that other proposals would emerge. In fact, the comments of several other parties suggested a variant of COBAK that we believe improves on those initial proposals. Specifically, some form of so-called "point-of-interconnection bill-and-keep" ("POIBAK") – proposed by such carriers as Level 3, Sprint and Qwest – would be the most attractive version of bill-and-keep currently on the table. While practical obstacles to POIBAK exist, including the choice of where to designate the POI, several proposals have already been made suggesting that those problems can be overcome.

Regardless of what form of bill-and-keep is adopted, the structure of tariffs paid by end users will be significantly affected by the introduction of bill-and-keep. Where states do not themselves take necessary steps, we advocate switching cost recovery to end-users directly by implementing a federal end-user charge. Addressing the issue through a federal end-user charge rather than through local tariffs will avoid states having to review their local tariff structures, and may prevent some forms of anti-competitive pricing that could otherwise arise. The FCC would, however, have to scrutinize any usage-based end user recovery carefully to ensure that usage rates did not exceed LRIC.

Universal service mechanisms may also have to be changed to implement bill-and-keep. Cable & Wireless recognizes the need for caution in implementing new charges to avoid unnecessary consumer "shock" or undermining of universal service goals. In our view, a Joint State and Federal Board could play a useful role in analyzing consumer impact, reviewing changes required in state regulatory systems, and making recommendations for moving to a unified, state and federal implementation. The need for coordination to implement bill-and-keep at both the federal and state levels should not, however, dissuade regulators from pursuing this opportunity to greatly improve intercarrier compensation and therewith the telecommunications services supplied to consumers.

Finally, Cable & Wireless does not believe that the Communications Act precludes adoption of bill-and-keep. Nothing in the Act bars mutual, end-user-based cost recovery, as opposed to mutual, carrier-based cost recovery. In any event, the Commission also could use its forbearance authority to eliminate any artificial limitation to carrier-based cost recovery that is not in the public interest. Likewise, neither *Smith v. Illinois Bell* nor Section 254(k) precludes bill-and-keep cost recovery.

II. BILL-AND-KEEP IS THE BEST WAY FORWARD

In our initial comments, we agreed with the proponents of bill-and keep that properly implemented the approach would:

- More fairly recognize the roles that the calling and called parties play in an answered call – in terms of both call causation and benefits sharing;
- Reduce the opportunities to charge excessive amounts for termination;
- Increase incentives for efficient investment and operation of local facilities;
- Increase pricing flexibility;
- Unify the system of intercarrier compensation; and
- Simplify regulation.

A number of submissions to the Commission sought to contradict these assertions. In this section, we rebut the most substantive of these arguments.

A. Bill-And-Keep Is The Best Available Option Even Though Calling And Called Parties Do Not Always Benefit Equally From A Call.

A number of commenters attack bill-and-keep by arguing that it would not perfectly capture the relative benefits of a call to the calling and called parties, respectively. Other parties argue that bill-and-keep would not necessarily be the result if interconnection were freely negotiated in a competitive market among parties without market power, and without other regulatory constraints. Although both these points are, strictly speaking, correct, they subject bill-and-keep proposals to a standard that no regulatory system established to constrain market power could ever reach. The fact of the matter is that these markets are *far* from competitive, and are *not* free from other regulatory constraints (such as requirements that some parties charge averaged rates, or prohibitions against refusal to deliver traffic subject to a tariff).

In these markets as they exist today, the question in choosing among alternative regulatory regimes is which scheme will be least distortive, and most efficient, as actually implemented, including the transactions costs and uncertainties of implementation. As with any regulatory scheme, regulation of intercarrier compensation will reflect some assumptions that have an imperfect fit to the reality of a specific transaction. This is to be expected: the search for the "optimal" regulatory regime is really the search for the best "second best" alternative to an unfettered, fully competitive market.

Time Warner argues – relying on papers by Benjamin Hermalin and Michael Katz, and by Hermalin and Joseph Farrell – that bill-and-keep does not accurately reflect the relative benefit received by the calling and called parties from the call.[1] According to these studies, optimal retail prices should reflect an accurate division of the total marginal cost of the call on a "Ramsey" basis, that is, allocated between the parties on the basis of their relative elasticities of

[1] *See* Time-Warner Comments at 4-7.

demand. While appealing in principle, to effectuate this theoretical observation, the calling and called parties would have to negotiate the relative share of the benefits (and therefore their own obligation to pay a portion of the costs) on a call-by-call basis, with full knowledge of what the other party was going to say before they said it. That is wholly unrealistic. Any compensation regime must, of necessity, generalize the relative benefits received by the calling and the called parties across a wide variety of calls.

There is no evidence that the prevailing generalization that all the benefit flows to the calling party and none flows to the called party is more realistic than a generalization that the benefit flows to each party equally.[2] Both generalizations will be more true for some sets of calls than for others. A telemarketing call at dinner might carry relatively little utility for the called party – unless it turns out to be for a product the called party desired. On the other hand, a courteously returned call may be of little utility to the calling party, but of substantial utility to the party who had initially called. As a third example, a Mother's Day call often benefits both the called and the calling party substantially, irrespective of whether the call is placed by mother or by her offspring.

The Commission cannot reasonably hope to institute a regime that perfectly captures the utility of each of these – and many other – kinds of calls to both the calling and called parties. Rather, the Commission should seek to adopt the generalization that makes the most sense, based both on its "fit" with reality and the transactions costs associated with imposing it as a general rule. Cable & Wireless believes that when examined in this manner, the generalization underlying bill-and-keep (sharing of benefits) is preferable to the prevailing generalization (100-0 distribution of benefits): it is likely to be more accurate because it recognizes that called parties

[2] Indeed, neither Time-Warner nor the theorists they cite appear to argue that the prevailing generalization is more accurate; they make only the more modest (and, in fact, indisputable) claim that the generalization that benefits flow equally to both parties is not always correct. *See* Time-Warner Comments at 5-6.

receive at least some benefit from calls that continue beyond a brief, introductory period, and (as further discussed below) the transactions costs associated with maintaining bill-and-keep are lower.

The argument that the called party is not a "cost causer" because, for universal service reasons, regulators have chosen not to treat him as a cost causer is circular.[3] Indeed, taking account of all of the steps necessary to complete a call reveals the extent to which the recipient is also a "cost-causer." In addition to the calling and parties deciding to subscribe to a telephone network, and the calling party deciding to place a call, the called party must also decide to answer, and once the telephone is answered, to continue the conversation. A conversation is just that – a two-way, joint interaction.

Others argue that while CPNP pricing may not appropriately reflect who receives the benefits of a particular call, private parties can and do redistribute costs over repeated interactions.[4] For example, Ordover and Willig point to collect calling and 800 numbers as privately negotiated alternatives to the traditional model, or to private parties alternating initiating a call.[5] They then argue that bill-and-keep would wipe out the flexibility of private distribution of these costs and benefits in favor of a "one-size-fits-all" regulatory rule imposing costs on end users.[6]

These arguments are not convincing. First, 800 services and collect calls for toll service redirect toll charges, which would likely still exist even under a bill-and-keep interconnection regime, and would still be necessary to redirect any origination fees (e.g. payphone) to the called party. As such, they would continue to exist as mechanism to reallocate the non-termination

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[3] *See, e.g.*, CompTel Comments at 11-13.

[4] *See, e.g.*, Ordover-Willig Declaration ¶¶ 30-31 (attached to AT&T Comments).

[5] *See id.* ¶ 30.

[6] *See id.* ¶ 34.

costs for calls, irrespective of the termination compensation mechanism in place for exchange access.[7] Second, it is illusory to think of 800 services or collect calls as reallocating all the costs and benefits among calling and called parties into an optimal pattern. Consumers, even under CPNP, have adopted a host of other mechanisms to reduce unwanted calls, including call screening and caller ID, which would be likely to continue under a bill-and-keep regime. Third, the suggestion that parties allocate origination costs in proportion to relative benefits by alternating origination is overly simplistic and unrealistic. The identity of the calling party in any completed call may depend as much upon human impulse, social conventions, convenience, and the luck of placing a call at the time when the called party is available as on any notion of call benefit.[8] In addition, the market will likely continue to develop mechanisms to reallocate termination charges between the calling and called parties.

Ordover and Willig also critique bill-and-keep on the ground that it is highly unlikely that bill-and-keep would emerge as a "unique equilibrium" interconnection and access regime in a competitive market.[9] This observation, while likely true, is also completely unhelpful. Just as the Commission cannot implement a regime that perfectly captures call benefits to calling and called parties in every situation, it also cannot implement through regulation the "unique" regime that would emerge in a perfectly competitive market. Again, the current proceeding is a search for the best "second best." The unavoidable fact is that interconnection and access are *not* competitive markets, and even if they were, it is unlikely that a single solution to interconnection and access issues would emerge. More likely, a wide variety of relationships would evolve, as has been the case in the arguably analogous context of Internet traffic. But the Commission

[7] Similarly, a collect call from a payphone would not be affected by the intercarrier compensation system because the collect call would still shift the origination charge.

[8] A prolonged "telephone tag" exchange, for example, reflects the fact that both parties have *potential* utility from the call, but does not reveal whom the successful call actually benefits. In fact, the successful calling party may gain little benefit from the call other than appearing to be polite.

[9] AT&T Comments, Ordover-Willig Declaration ¶ 14.

could not be expected to regulate at that level of complexity; the goal of this proceeding is to develop a single, *unified* regime for intercarrier compensation, and the fact that such a regime probably will not precisely reflect the "equilibrium" that would emerge in a perfectly competitive market cannot be allowed to hold up progress toward that goal.

It is, however, possible for the Commission to anticipate at least some of the distortions that would occur with an unbounded bill-and-keep system, and to attempt to mitigate those distortions in the design of the bill-and-keep compensation mechanism. On the Internet, for example, transit arose because small regional ISPs were able to take advantage of peering to "free ride" globally on the networks of global backbones. Here, such "free riding" could be dramatically limited through the selection of the point of interconnection (POI) at which traffic would be exchanged on a bill-and-keep basis. Identifying such distortions and mitigating them is part of developing the best "second best" system, not a fatal flaw that precludes use of bill-and-keep.

In sum, Cable & Wireless believes that bill-and-keep is at least as reasonable as, and probably superior to, CPNP in allocating the origination and termination costs of calls in proportion to the calling parties' relative benefits.

B. Bill-And-Keep Is The Best Way To Address The Terminating Monopoly Problem While Avoiding Complicated Network Costing Proceedings.

Some commenters suggest that it is not necessary to go to bill-and-keep to address the problem of excessive charges made possible by the terminating monopoly. AT&T, for example, points out that the terminating monopoly problem and the potential for price squeezes exist only when access charges are set above cost.[10] Although Cable & Wireless agrees with this observation – and therefore believes that reducing all intercarrier compensation to no greater than long run incremental cost is a *sine qua non* for any unified, intercarrier compensation

[10] *See* AT&T Comments at 13, 17-18.

scheme – we are concerned about the considerable burdens that an all encompassing cost-based regulation would impose.

We agree with those commenters arguing that bill-and-keep would be a less costly and less intrusive method of eliminating terminating monopoly concerns than would a LRIC-based CPNP approach.[11] To be sure, as Ordover and Willig urge, LECs would still be able to effect price squeezes on IXCs under bill-and-keep if all the extra-compensatory costs that are now embedded in access charges are simply shifted to usage-sensitive end-user rates. We believe, however, that this problem may be addressed through the implementation of safeguards (discussed in Section V) on the level of the incumbent LEC usage-sensitive end-user rates.

The advocates of CPNP appear to ignore that, in a "network of networks," termination services are not homogeneous. If each carrier is to be paid the long-run incremental cost of the termination function it provides, then either that termination service must be the same across all providers so that costs are the same, or the LRIC rate will have to be calculated for each different termination service. For example, CPNP advocates have provided no basis for assuming that termination to a mobile wireless handset is the same service with the same cost function as termination to an ordinary wireline telephone.[12] These two services clearly differ both with respect mobility and service quality.[13] The same could be true of termination services with different probabilities of peak-period blocking.

[11] *See, e.g.*, Level 3 Comments at 22-23 ; Qwest Comments at 9-11.

[12] Farrell and Hermalin attempt to avoid the implications of different incremental costs for different functions by arguing that the called party may receive some benefit from the additional functionality, such as reaching the mobile subscriber when she is not at her fixed line location. *See* Time Warner Comments, Farrell-Hermilin Exhibit at 2. This argument, however, ignores the converse: CPNP may assign to the calling party the cost of completing a call to a wireless telephone that the calling party may, if given the choice, have chosen to forego (for example, if the called party had left only a wireless number for return calls). The only party that reliably has the choice of choosing to contract for mobility is the subscriber to the wireless network.

[13] Indeed, service quality clearly varies even between wireline providers.

Even if it were not burdensome to calculate the individual LRICs of different termination services, doing so would open the door to substantial regulatory gaming and uncertainty, and to the exercise of market power by incumbent LECs and other carriers with bottleneck market power. TELRIC is not determined according to a fixed formula, and each carrier therefore has a strong incentive to try to achieve high rates when it is paid, and low rates for when it will pay. Unless the Commission can be assured of "getting the rate right," this uncertainty exposes parties without market power to the exercise of such power by the parties that have it. Imposing a requirement of symmetrical rates limits the gaming of rates, but then also steps away from purely cost-based rates.[14]

A principal advantage of bill-and-keep is that it sidesteps this costing exercise. Under bill-and-keep, the party selecting the network access provider can determine for herself the costs and functions she desires and is willing to pay for. As Level 3 points out in its comments, bill-and-keep places the termination costs on the "cost minimizer" – the party best able to select the most cost effective service, while still allowing the service to vary according to the selecting party's desires.[15] This singular advantage of bill-and-keep cannot be accomplished through CPNP without substantial regulatory implementation costs, uncertainties and opportunities for gamesmanship. By itself, avoiding the morass of determining incremental cost for intercarrier pricing is an important reason for preferring bill-and-keep to CPNP.

[14] *See* Letter of Dorothy Attwood, Chief, Common Carrier Bureau, and Thomas Sugrue, Chief, Wireless Telecommunications Bureau, to Charles McKee, Sprint PCS, 16 FCC Rcd 9597 (2001). The Commission's interconnection rules today carry a presumption of symmetricality, but permit parties to attempt to rebut the presumption, which allows for more economically efficient results than pure symmetricality, but also increases opportunities for gaming and the transactions costs of achieving cost-based rates.

[15] Level 3 Comments at 22-23.

C. Properly Tailored, Bill-And-Keep Will Provide Positive Incentives For Investment And Limit Marketplace Distortions.

Contrary to the claims of some commenters,[16] bill-and-keep will provide positive incentives for investment, not negative incentives. As Cable & Wireless stated in its initial comments, bill-and-keep makes a LEC's cost reductions or investments in innovative services directly apparent to the end user.[17] As Level 3 points out, if it is cheaper to deploy a softswitch network, for example, bill-and-keep returns those benefits directly to the LEC's customers.[18]

Moreover, by eliminating the jurisdictional boundaries and pricing variations between intercarrier compensation regimes, bill-and-keep eliminates the investment-distorting role of definitional classifications such as "telecommunications services" or "information services" without eliminating the ESP exemption. As Qwest observes, bill-and-keep reforms the existing system without imposing per minute charges on Internet access calls.[19]

Some parties argue that where the traffic flow between competing carriers is not roughly equal, only a regime that charges for termination promotes efficient competitive entry and competition.[20] Bill-and-keep would allegedly encourage incumbent LECs to reconfigure their networks to hand off calls early in their routes, in order to shift maximize the costs of transport and termination borne by the interconnected CLEC.[21] While this observation about incentives is correct, this problem can be addressed by placing limits on the selection of the point of interconnection. As discussed later, Cable & Wireless believes that the "point-of-

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[16] *See, e.g.,* CompTel Comments at 18-21.

[17] *See* Cable & Wireless Comments at 9-10.

[18] *See* Level 3 Comments at 23.

[19] *See* Qwest Comments at 12-15.

[20] *See* CompTel Comments at 18-21.

[21] *Id.*

interconnection bill-and-keep" approach is best, and such an approach would reduce an ILEC's ability to raise rivals' costs by handing off traffic, for example, on at an end office.[22]

Others have also argued that a bill-and-keep regime will only replace distortions created by the reciprocal compensation regime with a new set, encouraging local network operators to target customers who originate traffic destined for other networks.[23] This is not a significant concern. First, originating customers will generate costs of origination that the originating network will have to recovery. Second, as Sprint has demonstrated in its comments,[24] zero costs for termination do not create analogous arbitrage possibilities that above-cost termination does.

Some commentators expressed concern that carriers would, under a bill-and-keep regime, be discouraged from serving customers receiving a disproportionate share of calls (*e.g.*, ISPs).[25] This concern depends upon the network designs and rate structures offered to those customers by other carriers. It is not apparent, however, that the absence of intercarrier compensation (as opposed to a discriminatory compensation regime) will deprive those customers of adequate service options, and the Commission should not accept those claims without more documented analysis.

We also disagree with those commenters that suggest that bill-and-keep would allow IXCs to use local network facilities for "free" – as if IXCs would enjoy some windfall profit from this reform.[26] This argument ignores the fact that – absent an implicit subsidy – it is the end user who is paying for his connection to the PSTN, either directly to the LEC or indirectly through the IXC. As the Commission has repeatedly found, the domestic interexchange market

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[22] *See* Section III, *infra*.

[23] *See, e.g.*, CompTel Comments at 17-18 ; AT&T Comments at 30-31.

[24] Sprint Comments at 8-13.

[25] See CompTel Comments at 16-21; Focal Comments at 26-28.

[26] *See, e.g.*, California PUC Comments at 6-9.

is highly competitive, and there is little doubt that any reduction in the cost of providing service would, as a result of this competition, be quickly passed through to consumers.[27]

We similarly reject the argument that shifting the cost recovery from carrier-paid exchange access to end user charges leads to overconsumption of interexchange services. At best, this is an argument that retail rates should include a usage component for recovery of exchange access costs. It does not dictate that the charge must go to the interconnecting carrier rather than to the end user.

In sum, we believe that bill-and-keep, properly tailored and safeguarded, can lead to a more efficient overall regulatory regime than CPNP, and that the criticisms of bill-and-keep are not well founded or exaggerated.

D. Bill-And-Keep Will Allow Simplification of Intercarrier Compensation Regulation.

As discussed in Section II.B, *supra*, bill-and-keep has much to offer in terms of eliminating monitoring and billing of traffic and obviating expensive network costing. We agree, however, with those commenters that point out that bill and keep will not eliminate all regulation of intercarrier compensation. Shifting recovery of origination and termination costs from access charges to end-user charges will still require overall supervision of incumbent LEC rate levels to ensure that consumers are not subjected to supercompetitive rates. Incumbent LEC end user rates will have to be supervised to prevent discriminatory practices. At the same time, however, relatively "low cost" safeguards may be adopted to prevent such abuses. We briefly address such safeguards below in Section V.

Other argued "inefficiencies" of bill-and-keep are really deficiencies of COBAK's particular allocation of transport costs rather than deficiencies of bill-and-keep for the

[27] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730, 20791 (1996) ("*Detariffing Order*"); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd. 3271, 3305-3309 (1995) ("*AT&T Domestic Non-Dominance Order*").

termination component. For example, the task of defining a "central office," which is essential to COBAK, is wholly obviated by a POIBAK approach.

III. POIBAK IS THE BEST OF THE BILL-AND-KEEP PROPOSALS.

Cable & Wireless limited its initial comments to the two bill-and-keep proposals suggested by the Office of Plans and Policy.[28] Of the two, we considered COBAK the more desirable. We found that the other alternative, BASICS, was more of a theoretical than a practicable interconnection regime. To be sure, like many other commenters, we noted that as set out in its original form, COBAK had some problems.[29] Still, COBAK has major advantages over the *status quo*.

The comments of several other parties suggested a variant of COBAK that avoids many of the deficiencies of the original proposal. Specifically, under "point-of-interconnection bill-and-keep," or "POIBAK," financial responsibility for a call would coincide with the physical point of interconnection for the exchange of PSTN traffic.[30] We agree with these commenters that there is no reason to cut off the principle of "own-network" recovery at the central office, but rather believe that it should include a portion of the transport costs as well. Including a portion of interoffice transport costs is both more consistent with the theoretical justification for bill-and-keep – that the parties are splitting the costs of a call that they jointly value – and with the manner in which an efficient network would be designed. POIBAK facilitates, rather than discourages, the use of efficient two-way trunking facilities.

Furthermore, we believe that POIBAK will further reduce the opportunities for a price squeeze by removing terminating transport from the POI to the end office as a potential source of

[28] *See* Cable & Wireless Comments at 11.

[29] *Id.* at 13. COBAK's default rule requiring an interconnecting network to procure transport to numerous end offices could itself increase barriers to entry, and replaces some inefficiencies with others. Moreover, there could be incentives for incumbent LECs to refuse to enter into agreements to contract away from the COBAK default transport allocation in order to raise rivals' costs.

[30] *See, e.g.*, Qwest Comments at 21-31; Level 3 Comments at 20.

a price squeeze. While we agree that price squeezes could still be effected in other ways (such as through discriminatory retail fees), those other squeezes can be addressed through other regulatory safeguards.

POIBAK also addresses some of the other concerns about potential anti-competitive results from COBAK. As Level 3 notes, under COBAK the inefficiencies of the existing architecture are reinforced because competitive carriers must build transport to each and every incumbent end office, or contract with the incumbent LEC or another carrier perform that function.[31] By broadening the geographic area that can be addressed through a single point of interconnection by carriers with relatively small traffic volumes, POIBAK mitigates the extent to which COBAK would force smaller entrant carriers to buy or lease expensive facilities to deliver small amounts of traffic and thereby heightening the cost disadvantages stemming from a lack of scale.

By establishing a single POI, rather than a POI for origination and a POI for termination, POIBAK will also work when non-circuit switched networks interface with circuit-switched networks. Traffic can be delivered by circuit-switched networks and picked up by packet-switched networks at a particular location, and vice versa.

POIBAK also presents a clearer scheme for regulators to model when engaging in retail regulation. Retail rates set in a POIBAK environment would be "sent-paid" to the POI, and in addition would include a component to cover the costs of receiving traffic from the POI. As the POI would not be shifting based on who placed the call (as under COBAK), regulators would have a more stable environment for estimating the transport costs that would need to be recovered through retail rates.

[31] Level 3 Comments at 27.

Clearly, however, POIBAK would require the Commission to address the question of where the physical point of interconnection should be located. Indeed, all of the commenters who support some form of POIBAK acknowledge that restrictions must be placed on the number and location of permissible POIs.[32] While we agree with those commenters who argue that, in the absence of regulation, carriers in a bill-and-keep regime will clearly attempt to hand calls off at the nearest point of any terminating carrier's network, and that carriers with market power will be best able to profit from this approach because their market power will allow them to negotiate to hand-off traffic deep in their own networks,[33] this can be addressed through regulations governing the location of the POI. Similarly, concerns that bill-and-keep over large geographic areas will lead to "free-riding" of small networks on large ones can be mitigated by regulating permissible POI locations and the area that can be reached through a single POI.

Sprint and Level 3 have proposed that a single POI be designated for each defined geographic region and that new POIs be designated as volume thresholds are passed.[34] The proper contours of each geographic region will likely depend on the particular characteristics of the region in question. As Qwest notes, analysis would have to be undertaken as to what POI would generally produce fair or efficient results.[35]

This issue is further complicated by the fact that the existing POI designations differ among LEC-to-IXC, LEC-to-CMRS, and LEC-to-LEC traffic. They also may differ from state to state. Accordingly, there is little question that addressing POI designation will require further analysis and coordination between federal and state jurisdictions. Nevertheless, we believe that

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[32] *See, e.g.*, Qwest Comments at 30-31; Level 3 Comments at 27-29.

[33] *See, e.g.*, CompTel Comments at 16-18.

[34] *See* Sprint Comments at 29-33 ; Level 3 Comments at 27-30.

[35] Qwest Comments at 21-31.

this is a soluble technical problem, with a solution grounded in economic and engineering analysis, and need not represent an obstacle to the introduction of bill-and-keep.

IV. THE COMMISSION HAS THE LEGAL AUTHORITY TO ADOPT BILL-AND-KEEP.

A number of commenters argue that the Commission lacks legal authority to adopt any bill-and-keep approach to intercarrier compensation.[36] Most notably, those commenters claim that bill-and-keep arrangements are inconsistent with Sections 251 and 252 of the 1996 Act, and with the Commission's decision in the *Local Competition Order.* As set forth directly below, however, those arguments misconstrue both the statute and the Commission's *Order*. Moreover, even if the Commission is not certain that bill-and-keep is consistent with Sections 251 and 252, it could clearly adopt bill-and-keep by invoking its forbearance authority under Section 10.

Several commenters also assert that either Section 254(k) of the Communications Act or the Supreme Court's decision in *Smith v. Illinois Bell*,[37] precludes adoption of either a bill-and-keep intercarrier compensation mechanism or flat-rate end user recovery of termination costs.[38] There is no basis in law for these assertions: they have been repeatedly rejected by the Commission and courts in decisions ignored by those commenters.

A. The Act Expressly Authorizes Bill-And-Keep Arrangements.

Several commenters[39] claim that bill-and-keep is inconsistent with Sections 251(b)(5)[40] and 252(d)(2) of the Act when traffic is not in balance because it would not "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and

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[36] *See, e.g.,* AT&T Comments at 36-41; CompTel Comments at 22-25; Focal Comments at 28-33.

[37] 282 U.S. 133 (1930).

[38] NASUCA Comments at 27; California PUC Comments at 7.

[39] *See, e.g.,* AT&T Comments at 36-41; CompTel Comments at 22-25; Focal Comments at 28-33.

[40] Section 251(b)(5) requires that LECs must "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Notably, Section 251(b)(5) clearly applies only to the costs of "transport and termination," not those associated with access. Nothing in the Act even arguably prevents the Commission from applying bill-and-keep to access charges.

termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[41] The statute itself, however, indicates otherwise. Specifically, as the Commission' *NPRM* acknowledged, Section 252(d)(2)(B)(i) expressly authorizes the "mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)."[42] The legislative history confirms that "mutual and reciprocal recovery of costs may include . . . bill-and-keep arrangements."[43]

Commenters opposing bill-and-keep attempt to dismiss Section 252(d)(2)(B)(i) by arguing that it applies only when "two carriers' traffic is roughly in balance."[44] Clearly, however, the statute does not, on its face, contain any such limitation. Bill-and-keep opponents are therefore reduced to arguing that this limitation is somehow implied by the statutory requirements of "mutual recovery of costs" and "offsetting of reciprocal obligations."[45] In fact, however, bill-and-keep is entirely consistent with both requirements.

First, whether recovery of costs from end users is "*mutual*" recovery has nothing to do with whether carrier traffic is in balance. As a matter of ordinary English usage, if carriers can "mutually" recover costs from end users when traffic is in balance – as bill-and-keep opponents concede – then they can "mutually" recover such costs from end users when traffic is not in balance. As long as both carriers actually recover their costs, recovery is assuredly "mutual." Bill-and-keep thus permits "mutual" recovery of costs.

Similarly, whether traffic is in balance has no effect on whether bill-and-keep permits the "offsetting of reciprocal obligations." When traffic is balanced, carriers' recovery of transport and termination costs from their own end users allows the "offsetting of reciprocal obligations"

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[41] 47 U.S.C. § 252(d)(2)(A)(i).

[42] 47 U.S.C. § 252(d)(2)(B)(i); *NPRM* ¶ 73.

[43] *See* Joint Explanatory Statement at 7.

[44] *See, e.g.,* AT&T Comments at 37.

[45] *See, e.g., id.* at 38-39.

that would otherwise exist under the Act. By exactly the same token, even if traffic is not balanced, so long as carriers are able to recover costs of transport and termination from their end users – and, as set forth above, there is no reason to believe that they cannot – then that "recovery of costs" likewise permits the "offsetting of reciprocal obligations" that would otherwise exist.

In sum, 252(d)(2)(B)(i) on its face explicitly authorizes the "mutual recovery of costs" through bill-and-keep arrangements. The efforts of bill-and-keep opponents to undercut that authorization with imaginative implicit limitations are insubstantial.

B. The *Local Competition Order* Does Not Foreclose Bill-And-Keep.

Some commenters suggest that the Commission's decision in the *Local Competition Order* forecloses adoption of a unified bill-and-keep regime.[46] In fact, however, that decision does no such thing.

The question before the Commission in the *Local Competition Order* was whether the Commission and states lacked authority to mandate bill-and-keep under any circumstances, as argued by a number of incumbent LECs.[47] The Commission found that bill-and-keep could properly be imposed in situations where its "advantages . . . outweigh the disadvantages."[48] In particular, the Commission found that bill-and-keep arrangements may "minimize administrative burdens and transaction costs" when traffic is in balance and symmetrical rates apply.[49]

The *Local Competition Order* did *not*, however, hold that bill-and-keep would be unlawful in other circumstances – the question of a single, unified bill-and-keep regime for intercarrier compensation was not before the Commission at that time. Accordingly, the real

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[46] *See, e.g.*, Allegiance Comments at 36-37; AT&T Comments at 37; Focal Comments at 29-30.

[47] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 16054 (1996) ("*Local Competition Order*").

[48] *Id*. at 16055.

[49] *Id*.

question here is not what the Commission said in earlier, tangentially relevant proceedings, but rather whether bill-and-keep would be consistent with the requirements of the Act. As set forth directly above, bill-and-keep is not only consistent with, but is explicitly authorized by, the Act.

In any event, the Commission's reinterpretation of Sections 251(b)(5) and 251(g) in the *ISP-Bound Reciprocal Compensation Order* makes clear that the Commission has discretion to end the 251(g) "carve-out" and bring all termination within Section 251(b)(5), which is no longer limited only to "local" traffic.[50] Thus, while the Commission may regulate intrastate access under Section 201, it is not required to do so.

C. The Commission Could Also Adopt Bill-And-Keep By Invoking Its Forbearance Authority Under Section 10.

As parties pointed out in their opening comments,[51] even if the Commission finds that Section 252(d)(2)(B) does not confer authority on it to adopt a bill-and-keep regime, the Commission could invoke Section 10 of the Act to forbear from applying the reciprocal compensation requirements of Section 251(b)(5). Specifically, under Section 10, the Commission has authority to forbear from applying reciprocal compensation requirements where: (1) enforcement is not necessary to ensure that charges are just and reasonable or unreasonably discriminatory; (2) enforcement is not necessary for protection of consumers; and (3) forbearance is consistent with the public interest. This three-part test is clearly satisfied here.

a. Enforcement is not necessary to ensure that charges would be just, reasonable, and non-discriminatory.

As Sprint pointed out in its opening comments, a properly implemented bill-and-keep regime is likely to minimize the opportunities for one carrier to discriminate against another,

[50] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand, 11 FCC Rcd. 9151, ¶ 39 (2001) ("*ISP-Bound Reciprocal Compensation Order*").

[51] *See, e.g.*, Sprint Comments at 21-22.

because costs are recovered from a carrier's own customers, not from other carriers.[52] Accordingly, carriers will have fewer opportunities to allocate unreasonable common costs, or otherwise to cross-subsidize their own services at the expense of customers of another service. To the extent that retail rates for interstate access remain an issue, these can be addressed under the Commission's § 201 authority.

b. Enforcement is not necessary to protect consumers.

As set forth in detail in Part II of this Reply, and as number of parties pointed out in their opening comments,[53] bill-and-keep is likely to be the most efficient of the intercarrier compensation regimes that the Commission could adopt. As a result, while bill-and-keep will redistribute the way that costs are recovered, it should, on balance, actually benefit consumers by generating system-wide economic efficiencies.[54]

c. Forbearance is consistent with the public interest.

There can be no question that moving to a more efficient system of intercarrier compensation would be in the public interest. In particular, as both Cable & Wireless and other commenters have pointed out, a properly implemented bill-and-keep regime is likely to substantially reduce the amount and complexity of intercarrier compensation regulation.

D. Neither Bill-and-Keep Nor Flat-Rate End-User Recovery of Termination Costs Are Precluded by Jurisdictional Separations or By Section 254(k).

A number of commenters advance an additional argument for why the Commission purportedly lacks authority to adopt bill-and-keep. Specifically, these commenters argue assert that either Section 254(k) of the Communications Act or the Supreme Court's decision in *Smith*

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[52] *Id.* at 21.

[53] *See, e.g., id.* at 5-16; Qwest Comments at 7-21; Cable & Wireless Comments at 9-11.

[54] *See* Section V.B, *infra*.

v. Illinois Bell,[55] precludes adoption of either a bill-and-keep intercarrier compensation mechanism or flat-rate end user recovery of termination costs.[56] These arguments have, however, already been repeatedly rejected by the Commission and courts.

Commenters relying on *Smith* confuse requirements for jurisdictional cost allocation with the issue of cost recovery within any given jurisdiction. In *NARUC v. FCC*, the D.C. Circuit in 1984 clearly held that:

> *Smith* dealt with jurisdiction; it held that a portion of the costs of local subscriber plant may be recovered only under the authority of a body with interstate regulatory powers. The *Smith* Court did not address the manner in which the federal agency was to perform its task. It did not hold that the FCC must order recovery of costs allocated to its jurisdiction through usage-based charges.[57]

Smith presents no impediment to recovery of call termination costs from end users, and does not require that any recovery be usage-based.

Similarly, in *Texas Office of Public Utility Counsel v. FCC*[58] and *Southwestern Bell Telephone Co. v. FCC*,[59] the United States Courts of Appeals for the Fifth Circuit and the Eighth Circuit, respectively, rejected arguments that Section 254(k) precluded flat-rate end user recovery of interstate costs. As the Fifth Circuit explained in *TOPUC II,* "Section 254(k) concerns cost allocation of joint and common costs, while the SLC and the PICC involve the recovery of such costs. Thus, § 254(k) does not implicate the SLC or the PICC: cost recovery involves how and from whom the funds are collected, while cost allocation refers to how the

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[55] 282 U.S. 133 (1930).

[56] NASUCA Comments at 27; California PUC Comments at 7.

[57] *NARUC v. FCC*, 737 F.2d 1095, 1112 (D.C. Cir. 1984). See also *CALLS Order*, 15 FCC Rcd, 12692, 13002, *aff'd in part and rev'd in part sub nom. Texas Office of Public Utility Counsel v. FCC,* 265 F.3d 313 (5th Cir. 2001).

[58] *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) ("*TOPUC II*").

[59] 153 F.3d 523 (8th Cir. 1998).

costs are disbursed."[60] Section 254(k) simply has no bearing on how termination costs are recovered from end users.

V. IMPLICATIONS FOR ADDITIONAL REGULATION FROM POIBAK.

A. Intercarrier Regulation

A number of commentators, both for and against bill-and-keep, have noted that some new regulatory safeguards would be required in a move to bill-and-keep. Some of these regulatory safeguards are more necessary for a COBAK system rather than a POIBAK system, such as intercarrier price regulation of transport facilities between the POI and the end office, because COBAK would likely result in more carriers purchasing these links, which POIBAK places the obligation to deliver traffic to the POI on the originating carrier.

Nonetheless, there are some regulatory safeguards necessary to implement a POIBAK system. First, as discussed in Section III above, rules would have to be established to govern the location of the POI.

Second, procedures, monitoring, and reporting requirements will be needed to ensure that the ILEC does not discriminate in favor of its own affiliated interconnected entities (such as its long distance affiliate), in provisioning or maintaining facilities to reach the POI. In particular, steps would need to be taken to ensure that the ILEC did not engineer its network so as to impair the quality of calls routed to a POI for termination on other networks, while maintaining a higher quality level for calls terminating on its own network. AT&T and Worldcom correctly observe that under a COBAK or POIBAK system, IXCs would lose control over origination and termination facilities, while the influence of LECs would increase.[61] Accordingly, regulators

[60] 265 F.3d at 324.

[61] AT&T Comments at 48-51; Worldcom Comments at 24-27.

would likely need to set both minimum service quality levels for ILECs and reporting requirements to monitor discrimination.

Third, Worldcom correctly observes that ILECs could implement a transition to a COBAK or POIBAK regime in a manner that strands existing investment in competitive transport facilities.[62] Because access transport is part of the demand that helps support competitive provision of interoffice trunking in those few areas where such substitutes exist, it is important for regulators to provide some kind of transition that ensures that competitive transport investment is not stranded merely because of the shift from CPNP for access to bill-and-keep.

B. End-User Pricing

Under bill-and-keep, LECs would recover costs that they now recover from IXCs directly from end-users. Today, strict regulations govern the structure and level of the charges LECs charge IXCs. As AT&T, Worldcom and others have noted,[63] even under bill-and-keep LECs would have both the incentive and the ability to adopt rate structures that would discriminatorily impede competition by their IXC rivals or effect price squeezes. If an incumbent LECs, for example, were to impose a per-minute origination or termination fee on toll traffic that exceeded the LRIC cost of providing that service, long distance companies not affiliated with that ILEC could find their products in a price squeeze vis-a-vis the ILEC's own long distance products. The FCC would clearly need to implement safeguards to prevent incumbent LECs from assessing above cost end-user paid usage-based origination and termination charges.

Thus, although Cable & Wireless believes that pricing flexibility is generally a benefit to consumers in a competitive setting, and bill-and-keep would greatly increase that flexibility, in the current setting of ILEC dominance an important trade-off exists between flexibility in rates

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[62] Worldcom Comments at 24.

[63] *See, e.g.*, AT&T Comments at 50-15; Worldcom Comments at 26-27.

and the need to prevent exploitation of market dominance. Accordingly, the Commission should not permit ILECs to adopt usage-based retail rates for origination and termination that are above LRIC. Moreover, to the extent that ILECs adopt discounts such as for customers using special access – who therefore incur no originating switching costs – the Commission should ensure that those discounts are cost-justified based on LRIC. These safeguards are necessary to avoid the potential for anticompetitive price-margin squeezes.

Equally important, regulation must require that any flat rate and exchange access usage combination offered to an ILECs own long-distance customers be made available to customers of competitive providers of the same service. It would be patently anticompetitive and illegal for an ILEC to offer customers more favorable prices for exchange access service when they use the ILEC's affiliate for long distance.

We recognize that this regulatory oversight will mean that the regulators will still be required to engage in some costing and pricing exercises. However, these exercises would be limited to the incumbent LECs, who have market power, rather than being carried out with respect to a broader range of carriers.

In sum, we believe that the shift of intrastate and interstate cost-recovery to basic end-user rates would have a very positive impact on both the long-distance market and local services. Lower rates for long-distance will spur growth in these services. At the same time, higher rates for basic service will increase facilities-based competition in that sector.

V. IMPLICATIONS FOR UNIVERSAL SERVICE

Cable & Wireless fully supports the need for universal service support to ensure that rates are affordable and comparable between rural and urban areas. We recognize that universal service effects must be considered concurrently so that implementation of a unified intercarrier compensation system – whether bill-and-keep or CPNP – will not adversely affect universal service.

Several commenters, however, assert without any analytical support that implementing a bill-and-keep intercarrier compensation regime would threaten affordable universal service, particularly if termination costs were to be recovered from end-user subscribers through a flat-rate retail charge. In light of the Tenth Circuit's decision in *Qwest v. FCC*, however, the Commission cannot and should not simply assume that any increase in retail charges would be unaffordable.[64] The Commission cannot determine whether universal service support mechanisms are "sufficient" – as *Qwest* requires – without determining the level at which rates are no longer "affordable" or "reasonably comparable" as between urban and rural areas.[65]

The economics literature strongly suggests that monthly subscription charges could increase without harming affordability.[66] The fact that telephone subscribership has increased even as the federal subscriber line was instituted and then increased – with offsetting decreases in usage sensitive interstate access charges – further suggests that increases in monthly subscription fees to eliminate usage charges will not jeopardize universal service.[67] Indeed, studies have generally shown that subscribers are more likely to lose service because of inability to pay toll bills, rather than from inability to pay the monthly service fee.[68] Although the

[64] 258 F.3d 1191 (10th Cir. 2001).

[65] *See id*. at 1201-1204.

[66] *See, e.g.*, Robert Crandall and Leonard Waverman, *Who Pays for Universal Service?*, 89-104 (Brookings Institution Press 2000).

[67] Telephone subscribership has increased from 91.4% in 1983 to 94.1% in November 2000, despite implementation of and increases in the amount of the SLC. *See* Alexander Belinfante, Telephone Subscribership in the United States, Table 1 (rel. March 2001).

[68] Chesapeake and Potomac Telephone Company's Submission of Telephone Penetration Studies, Formal Case No. 850 (filed October 4, 1993); Field Research Corporation, *Affordability of Telephone Service – A Survey of Customers and Noncustomers*, 1993 (study funded by GTE-California and Pacific Bell, mandated by the California PUC); Milton Mueller & Jorge R. Schement, *Universal Service from the Bottom Up: A Profile of Telecommunications Access in Camden, New Jersey*, 12 Information Society 3 (April 1996); John Horrigan & Lodis Rhodes, *The Evolution of Universal Service in Texas* (September 1995) (working paper, LBJ School of Public Affairs).

California PUC argues that "the goals of equity and universal service are far more important than economic efficiency or consistency in determining the viability of any given regime," California poses a false dilemma: there is no evidence that there is yet a conflict between universal service and economic efficiency.

California's own numbers illustrate the point. Assuming, *arguendo*, that California has correctly calculated that bill-and-keep for interstate access would increase monthly subscription charges by $20 annually, this is only $1.67 per line per month. Sprint estimates the result of shifting both interstate and intrastate access to bill-and-keep would be $4-5 per month. Even at that magnitude, there is no evidence that the resulting rates would be unaffordable, particularly if the elimination of per minute access charges opens the door further to flat-rate wireline long distance plans similar to those implemented in the wireless industry. SBC also makes the valid point that in some areas, state commissions have used non-cost based methodologies to set retail rates at levels far below prices necessary for cost-based recovery.[69] The FCC must require parties asserting that rates will become unaffordable to file real econometric analyses on the record, rather than relying on bare assertions.

In addition, it is important that any analysis use the right starting point for comparison. Evaluating the impact of a move to a bill-and-keep intercarrier compensation mechanism should begin from the starting point of full implementation of CALLS, under which the prices for termination and origination will be lower than they are today. Moreover, especially given the Tenth Circuit's direction that the Commission must "develop mechanisms to induce" states to carry out universal service reform,[70] it should not be assumed that states would not otherwise have had to move away from traffic sensitive recovery of non-traffic sensitive costs and other

[69] *See* SBC Comments at 9-11.

[70] *See Qwest v. FCC*, 258 F.3d at 1204.

forms of implicit, non-competitively neutral universal service "subsidies." Indeed, we believe that a better, but still conservative, starting point for comparison between a CPNP regime and a bill-and-keep regime would apply CALLS rates to both interstate and intrastate access levels, as it is unlikely that the forward looking economic cost of intrastate switching and transport exchange access is *higher* than the CALLS prices.

With regard to low income and high cost users, Cable and Wireless accepts that, in some areas, a move to a bill-and-keep regime would likely require additional universal service support. However, there is nothing to suggest that such a requirement is not possible, nor that it could not be offset by reductions in support in areas where rates are being subsidized to levels below those necessary to maintain affordability (i.e. areas in which support may be greater than that required to be "sufficient").

In any case, we fully agree that the implications of bill-and-keep for universal service funding must be fully analyzed and necessary adjustments made. We also believe that there will be ample time before the introduction of bill-and-keep to perform such analysis and to phase in any transition if necessary to prevent "rate shock." We believe that a unified intercarrier compensation regime can be adopted without endangering universal service.

VI. THE FCC SHOULD TAKE STEPS TO ENSURE THAT STATES BEGIN REDUCING INTRASTATE ACCESS RATES TO COST.

Cable & Wireless agrees with the commenters who observe that the advantages of shifting to a bill-and-keep compensation system may be undermined substantially if the compensation mechanism is not uniform, but varies, for example, between interstate and intrastate traffic.[71] Indeed, even if the Commission were to retain a CPNP system, a compensation system that continues to charge different rates for intrastate access traffic than for all other interstate and intrastate traffic will impose unnecessary engineering and bookkeeping

[71] *See* Level 3 Comments at 24; Sprint Comments at 23; Worldcom Comments at 10.

inefficiencies on all telecommunications carriers, particularly carriers developing new products that may not otherwise have usage or geographically-based rates.[72] Moreover, to the extent that intrastate access charges are inflated in order to provide implicit universal service support for local residential rates, as technological advancements continue to open the door to a wide range of substitute products – including IP-based information services – that implicit subsidy cannot economically be maintained.

As such, regardless of whether the ultimate unified regime is bill-and-keep or CPNP, it is critical that the Commission develop mechanisms to move intrastate access rates down to cost-based levels. Moreover, to accelerate the deployment of a truly uniform compensation system, the Commission should implement such a transitional mechanism immediately, so that the transition of intrastate access rates at least down to the same levels as interstate access prices could be completed no later than the end of the other transition mechanisms that the Commission already has in place for interstate access and reciprocal compensation pricing.

As noted in Section IV.B, *supra*, while some commenters assume that the Commission has no jurisdiction to direct reductions in intrastate access rates,[73] that assumption ignores the Commission's reinterpretation of Sections 251(b)(5) and 251(g). In its *ISP-Bound Reciprocal Compensation Order*, the Commission reinterpreted Section 251(b)(5) to apply to all traffic, whether local or long distance, to which Section 251(g) does not apply.[74] By its plain terms,

[72] *See* Worldcom Comments at 10.

[73] *See e.g.*, Allegiance Comments at 38; CompTel Comments at 23-24; AT&T Comments at 36-41.

[74] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand, 11 FCC Rcd. 9151, ¶ 34 (2001) ("*Intercarrier Compensation for ISP-Bound Traffic*").

however, Section 251(g) allows the Commission to end the "carve-out" – and so to regulate intrastate access traffic – by simply adopting superceding regulations.[75]

One example of a mechanism to reduce intrastate access charges would be to shift all intrastate revenue requirement collected through carrier-paid intrastate access charges to the interstate jurisdiction for recovery through a supplemental end-user charge. Both the pre-1996 Act high cost fund and dial-equipment-minutes-weighting ("DEM weighting") subsidies shifted intrastate revenue requirement to the interstate jurisdiction so that they could be subsidized through interstate access charge mechanisms.

This additional revenue requirement, once shifted to the interstate jurisdiction, should then be recovered through end-user charges, rather than carrier-to-carrier charges. To the extent the Commission believes it necessary to cap the fixed component of a supplemental end-user charge, it would need to establish a new set of caps based on its assessment of what combined interstate and intrastate monthly subscription fee (including local service rates and end-user charges) would be "reasonably comparable" and "affordable."[76] If the revenue requirement cannot be fully recovered through a "reasonably comparable" and "affordable" supplemental end-user charge, some additional, "sufficient" universal service support may be necessary.[77] It is important, however, that if the FCC undertakes such a mechanism, that it not simply burden

[75] *See* 47 U.S.C. 251(g); *see also Intercarrier Compensation for ISP-Bound Traffic* at ¶ 39 ("Accordingly, unless and until the Commission by regulation should determine otherwise, Congress preserved the pre-Act regulatory treatment of all the access services enumerated under section 251(g).").

[76] *See Qwest v. FCC,* 258 F.3d 1191, 1201-1204 (10th Cir. 2001). As an alternative, the Commission could leave the supplemental SLC uncapped, and could address any non-"affordable" rates through universal service mechanisms.

[77] In response to the remand in *Qwest v. FCC*, the Commission is obligated to define "reasonably comparable" rates and "sufficient" universal service support. It is difficult to see how it can do so without also better defining what constitutes an "affordable" rate.

federal universal service mechanisms without attempting to ensure that states shoulder their share of the universal service obligation.[78]

In short, by adopting appropriate interim measures, the Commission can place itself and state commissions in a position to move to a wholly unified intercarrier compensation mechanism at the earliest possible date. Failure to begin to take such steps – as required by the *Qwest* remand – will only serve to undermine, and potentially to delay, the much-needed unified intercarrier compensation mechanism.

VII. CONCLUSION

For the foregoing reasons, the Commission should move forward to adopt a bill-and-keep intercarrier compensation mechanism. In the interim, while considering how to design an appropriate bill-and-keep system, the Commission should takes steps to reduce intrastate access charges to *CALLS Order* levels, so that all charges can be moved to a uniform system at approximately the same time.

Respectfully submitted,

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[78] A state universal service mechanism – and by logical corollary its absence of such a mechanism – may not "rely on or burden Federal universal service support mechanisms." 47 U.S.C. 254(f).