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August 4, 2006

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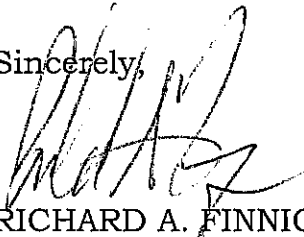
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Oregon Public Utility Commission
550 Capitol Street NE, Ste 215
Salem, OR 97301-2551

Re: ARB 747 – Reply Testimony of Tom A. Linstrom on Behalf of Beaver
Creek Cooperative Telephone Company

Dear Sir/Madam:

Enclosed are the original and five copies of the Reply Testimony of Tom
A. Linstrom and Certificate of Service.

Sincerely,



RICHARD A. FINNIGAN

RAF/km
Enclosures

cc: Service List (w/encl., via U.S. mail and e-mail)
Tom Linstrom (w/encl., via U.S. mail and e-mail)

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of the Petition for Arbitration of
an Interconnection Agreement Pursuant to
Sections 251 and 252 of the Communications
Act of 1934 as amended by the
Telecommunications Act of 1996 (47 U.S.C.
§251 and 252) Between Beaver Creek
Cooperative Telephone Company and Qwest
Corporation

DOCKET NO. ARB 747

REPLY TESTIMONY OF

TOM A. LINSTROM

ON BEHALF OF

BEAVER CREEK COOPERATIVE TELEPHONE COMPANY

August 4, 2006

1 Q. MR. LINSTROM, WHAT IS THE PURPOSE OF YOUR REPLY
2 TESTIMONY?

3 A. I want to be sure the Commission understands BCT's goal in this proceeding. In
4 addition, I will respond to the testimony of Qwest's witnesses.

5

6 Q. WHAT IS BCT'S GOAL IN THIS PROCEEDING?

7 A. As I stated in my opening testimony, BCT is seeking equality of treatment with
8 Qwest. Specifically, BCT is seeking equality of treatment in the way in which
9 traffic is terminated between the parties.

10

11 Q. HOW IS TRAFFIC TERMINATED TO BCT TODAY?

12 A. Qwest is routing traffic to BCT over several trunk groups. There are direct trunk
13 groups between Qwest's Oregon City switch and BCT's switch. There are direct
14 trunk groups between Qwest's Milwaukee switch and BCT's switch. There are
15 trunk groups between BCT's switch and Qwest's local/EAS tandem in downtown
16 Portland. Finally, there are trunk groups between BCT's switch and Qwest's
17 access tandem.

18

19 The traffic that flows between the Oregon City switch and BCT's switch is fairly
20 clean. Qwest does include some traffic from CLEC originated customers on those
21 trunks, but the volume is relatively low. The same situation is true with the
22 Milwaukee trunks.

23

1 The real problems come into play with the two tandems. BCT has two types of
2 trunks between its switch and the Qwest local/EAS tandem in Portland. One set
3 of trunks are the normal trunks that have been in place for many years for BCT's
4 Beavercreek exchange. A second set of trunks are the "LIS" trunks that Qwest
5 insisted be installed as a precondition to allowing porting of numbers. BCT sends
6 traffic to Qwest over the non-LIS trunks. BCT is not willing to use the LIS trunks
7 because they have proven to be unreliable. On several occasions, those trunks
8 have gone out of service.

9
10 On the non-LIS trunks, Qwest sends traffic to BCT which is destined for both the
11 Beavercreek exchange and the Oregon City exchange. Qwest also sends traffic
12 over those trunks that is originated by CLECs and wireless carriers. Qwest also
13 includes traffic that appears to be toll traffic in nature. Over the LIS trunks,
14 Qwest sends traffic designated for the Oregon City exchange and the Beavercreek
15 exchange. Under Qwest's view, it should only be sending traffic for the Oregon
16 City exchange. However, there is traffic for both exchanges and, under Qwest's
17 view traffic for the Oregon City exchange should not be included on the non-LIS
18 trunks, but it is. Qwest also sends CLEC originated and wireless traffic over the
19 LIS trunks. And, Qwest sends what appears to be toll/access traffic over the LIS
20 trunks. Thus, Qwest is sending all sorts of mixed traffic over those trunks.

21
22 I suppose that the fact that there is traffic on LIS trunks that should not be on
23 those trunks and traffic on the non-LIS trunks that should not be on those trunks

1 underscores Ms. Cederberg's Testimony that it is difficult to separate traffic. On
2 the other hand, it undercuts Qwest's argument that it is absolutely necessary to
3 separate Oregon City related traffic onto LIS trunks, since Qwest cannot do that
4 itself.

5
6 **Q. IF THIS IS THE WAY THAT TRAFFIC IS OCCURRING TODAY, WHAT**
7 **IS BCT SEEKING IN TERMS OF EQUALITY OF TREATMENT?**

8 A. If the Commission accepts Qwest's argument that traffic from BCT's operations
9 in the Oregon City exchange must be on LIS trunks and traffic from BCT's
10 operations in the Beavercreek exchange must be on non-LIS trunks, then Qwest
11 should be required to separate traffic itself. This means that CLEC, wireless and
12 other sorts of miscellaneous traffic should not be on the LIS trunks. It also means
13 that CLEC, wireless and other sorts of traffic should not be on the non-LIS trunks.
14 It means that there should be separate trunk groups for that non-Qwest originated
15 traffic. If BCT has to separate CLEC and ILEC traffic, so should Qwest. It gets
16 down to as simple as that.

17
18 On the other hand, if the Commission accepts the proposition that equality of
19 treatment means that all ILEC and CLEC traffic that BCT originates can be on
20 one trunk group, then it is only fair that Qwest be allowed to put non-toll traffic
21 that originates from CLECs and Qwest on the local/EAS trunk groups, without
22 distinction as to whether they are LIS or non-LIS trunks.

1 Q. **WHAT IS BCT'S PREFERRED OUTCOME?**

2 A. BCT agrees with the goal of maximizing trunking efficiency. The best way to
3 maximize trunking efficiency is to allow all sorts of traffic, whether it is CLEC
4 originated or ILEC originated to be on the same trunk group. This is also
5 consistent with the use of a bill and keep form of intercarrier compensation, which
6 I discuss later.

7

8 Q. **DOES THE SAME PROPOSITION APPLY TO TOLL TRAFFIC?**

9 A. No. Toll traffic should not be over local/EAS trunks under the current
10 environment. This is because toll traffic is subject to access charges. Toll traffic
11 should be over the toll trunks. There are other issues associated with the
12 toll/access trunks that I will discuss later in my testimony.

13

14 **ROUTING AND TRANSPORT OF TRAFFIC**

15 Q. **AT PAGE 6 OF MS. CEDERBERG'S TESTIMONY, SHE STATES THE**
16 **FOLLOWING: "IN GENERAL, QWEST'S POSITION MAINTAINS**
17 **THAT THE PARTIES SHOULD COMBINE ON THE SAME TRUNKS A**
18 **VARIETY OF TRAFFIC TYPES, INCLUDING QWEST-ORIGINATED**
19 **LOCAL AND TOLL TRAFFIC, AS WELL AS THIRD-PARTY**
20 **ORIGINATED LOCAL AND TOLL TRAFFIC FOR WHICH QWEST**
21 **SERVES ONLY AS A TRANSIT CARRIER." DO YOU AGREE WITH**
22 **THAT POSITION?**

1 A. Yes, in part. Other than mixing toll and local traffic, if BCT is allowed to do the
2 same thing, BCT has no problem with this position.

3
4 BCT is in the process of seeking to move its point of interconnection (POI) into
5 downtown Portland. This will allow BCT to serve as a transit provider for third
6 party carriers as well as changing the relationship between Qwest and BCT over
7 trunking.

8
9 In other words, BCT can have more control over its own trunking, minimizing its
10 reliance on Qwest and interruptions that might be caused through Qwest's
11 facilities. However, to date, Qwest has opposed BCT's efforts to move its POI.

12
13 On the other hand, if Qwest insists that BCT has to route BCT's Oregon City
14 traffic over LIS trunks and Beavercreek exchange traffic over non-LIS trunks,
15 then Qwest's position is hypocritical. Both parties should be treated the same.

16

17 **Q. IN A DISCOVERY RESPONSE, MR. FREEBERG IMPLIES THAT BCT'S**
18 **REQUEST TO MOVE ITS POI WAS FOR ITS INCUMBENT**
19 **OPERATIONS ONLY. IS THAT CORRECT?**

20 A. No. BCT desired to move its POI for purposes of all switched traffic. To be
21 clear, where traffic volumes warrant direct trunking, there would still be direct
22 trunks such as between BCT's switch and Qwest's Oregon City switch. The POI
23 would not move for special access purposes. However, for switched traffic

1 purposes, the POI would move whether or not the traffic involved BCT's
2 operation in the Oregon City exchange or in the Beavercreek exchange.

3
4 **Q. WHAT IS YOUR VIEW OF THE USE OF LIS TRUNKS?**

5 A. The LIS trunks were put in place because Qwest would not provide porting of
6 numbers without those trunks. BCT has always viewed that as an improper pre-
7 condition to porting. The FCC's more recent orders on porting confirm BCT's
8 position.

9
10 However, in order to be able to compete with Qwest and port numbers, BCT
11 agreed to pay for the LIS trunks. However, those LIS trunks have not been
12 reliable and BCT has chosen not to put its originating traffic on those trunks.

13
14 **Q. AT PAGE 16 OF HER TESTIMONY, MS. CEDERBERG STATES "IT IS**
15 **ENTIRELY INAPPROPRIATE FOR BEAVER CREEK, OR ANY OTHER**
16 **CLEC, TO DICTATE HOW TRAFFIC IS TO BE ROUTED WITHIN**
17 **QWEST'S NETWORK." WHAT IS YOUR REACTION TO THAT**
18 **STATEMENT?**

19 A. This goes to the very heart of BCT's position in this matter. If Qwest believes it
20 is inappropriate for BCT to tell Qwest how to route traffic, then it is just as
21 inappropriate for Qwest to tell BCT how to route its traffic. I further find it ironic
22 that Qwest thinks that it should be able to route traffic for which it receives
23 compensation in ways that bypass BCT's ability to charge access. In sum, that

1 statement is really one of arrogance. Qwest wants to tell BCT how to route
2 BCT's traffic. On the other hand, Qwest wants to be able to route its traffic in
3 any way it wants, whether or not that causes economic harm to the terminating
4 carrier. That is really an amazing statement.

5

6 **Q. DO YOU HAVE ANY REACTION TO MS. CEDERBERG'S TESTIMONY,**
7 **WHICH OCCURS THROUGHOUT HER PRE-FILED TESTIMONY,**
8 **THAT WHAT BCT IS ASKING QWEST TO DO IS TECHNICALLY**
9 **INFEASIBLE?**

10 **A.** Yes. There is some element of agreement with that statement. However, to the
11 extent that Qwest is receiving traffic within the Portland EAS region from a
12 CLEC through LIS trunks, it knows that traffic is coming in on a trunk with a
13 particular assigned trunk number. That traffic could be routed to BCT over a
14 separate set of trunks so that the access tandem is sending traffic that is delivered
15 from the CLEC local LIS trunks over one set of trunk groups and traffic that
16 arrives through an interexchange carrier or non-local LIS trunks over a separate
17 set of trunk groups. This would facilitate BCT's ability to deal with traffic.

18

19 Now, if a particular CLEC is going to transport traffic say, from the Seattle
20 region, down its own facilities into Portland and deliver those calls to Qwest at
21 the local/EAS tandem, I do not see that as a problem that Qwest can handle with
22 today's technology to separate the traffic in real time onto separate trunk groups
23 for the CLEC's local traffic and access traffic, and BCT would not expect that to

1 happen. However, I think there are other ways to address that issue and I will
2 discuss those in the phantom traffic issue discussion.

3
4 **Q. WHAT IS YOUR REACTION TO MR. FREEBERG'S TESTIMONY AT**
5 **PAGE 6 ABOUT QWEST'S CHANGE IN POSITION, WHICH ALSO**
6 **OCCURS AT PAGE 20, THAT QWEST WILL ALLOW BILL AND KEEP**
7 **ONLY IF ALL TRAFFIC FROM BCT IS TREATED AS BEING**
8 **HANDLED UNDER THE INTERCONNECTION AGREEMENT?**

9 A. On the surface this appears to be a workable solution. However, during the
10 negotiations with Qwest on this concept, BCT asked what charges Qwest thought
11 would apply to BCT's traffic from the Beaver creek exchange and to the trunks
12 serving the Beaver creek exchange. Qwest was unable to provide an explanation
13 that BCT could understand. Therefore, it appeared as though Qwest was the fox
14 waiting to be invited into the hen house and wanted to impose a large number of
15 additional costs on BCT's Beaver creek exchange services. When we read Mr.
16 Freeberg's Testimony on this issue, I had counsel contact Qwest to renew the
17 request for the information so we could evaluate the proposal. That information
18 was not provided as a result of that call. The information was only provided
19 through discovery in Mr. Freeberg's response to a data request, which was
20 received August 1.

21

1 Q. **WHAT SORT OF COSTS DO YOU HAVE IN MIND?**

2 A. One example is the trunks to the access tandem. BCT has more than enough
3 trunks in place to handle all conceivable traffic that BCT might originate that goes
4 to the access tandem. BCT sends only access/toll traffic over those trunks.

5

6 However, Qwest sends huge volumes of EAS traffic originated by CLECs over
7 those trunks. Those trunks to the access/toll tandem have been growing to
8 accommodate Qwest's transiting traffic. As Qwest points out, they receive a fee
9 from the originating CLEC for transiting that traffic for termination. On the other
10 hand, it is clear that Qwest wants BCT to pay for the increasing number of trunks
11 even though it is Qwest that has the financial benefit from those trunks. The fee
12 that Qwest apparently believes should apply is the relative percentage of BCT's
13 originating traffic to Qwest customer originating traffic. Qwest does not take into
14 account the CLEC traffic that it transits for a fee. This means that BCT pays for
15 the infrastructure to allow Qwest to have an increasing volume of traffic for
16 which Qwest is paid. That just does not make sense.

17

18 Another set of charges that may come into issue under Qwest's proposal is that
19 for BCT's Beaver Creek operations to date, there is no charge for traffic that is
20 headed to ported numbers or CLECs or wireless carriers in the Portland Metro
21 region. It appears from Mr. Freeberg's response to a data request that there would
22 now be a charge for that traffic.

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BILL AND KEEP

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Q. WHAT DO YOU UNDERSTAND QWEST'S POSITION TO BE ON THE USE OF "BILL AND KEEP."

A. In this docket, Qwest is opposed to the use of bill and keep unless a compromise position is adopted that affects all of BCT's operations -- both in Oregon City and in the Beaver Creek exchange. I addressed the compromise position just above.

Q. WHAT DO YOU UNDERSTAND TO BE THE BASIS FOR QWEST'S POSITION?

A. Qwest seems to be arguing that reciprocal compensation, that is a per minute termination rate, is favored under the law and that bill and keep is not. For example, at page 6, beginning at line 1, Mr. Freeberg states as follows: "The law supports Qwest's position that it is entitled to receive compensation for transporting traffic in these circumstances. Beaver Creek's proposed deletions and additions to certain paragraphs of the parties' interconnection agreement are inconsistent with the law and should be rejected." I view that as trying to imply that bill and keep has a lesser status under the law.

Mr. Freeberg also tries to argue that reciprocal compensation is consistent with the law beginning at page 17, line 15 when he cites to the FCC's regulations. All of this apparently is to imply that reciprocal compensation has a greater status under the law than bill and keep.

1 **Q. DOES QWEST OFFER ANY OTHER RATIONALE AGAINST THE USE**
2 **OF BILL AND KEEP?**

3 A. Yes. At page 16 of his testimony, beginning at line 1, Mr. Freeberg argues that
4 bill and keep should be used only if traffic is in balance. He states, "Bill-and-
5 keep for transport of local calls is proper when each carrier supplies
6 approximately half of the dedicated transport between their respective sites." He
7 also states that a bill and keep arrangement would be appropriate for per call
8 termination "if the parties' traffic were balanced." This last citation is found at
9 page 19, line 29.

10

11 In summary, it appears that Qwest argues that unless the trunk mileage and the
12 traffic volumes are in balance, bill and keep is not appropriate.

13

14 **Q. DO YOU HAVE A RESPONSE TO THE POSITIONS ADVANCED BY**
15 **QWEST ON THE ISSUE OF BILL AND KEEP?**

16 A. Yes. Qwest's positions in this docket are inconsistent with the positions it has
17 taken in front of the FCC. At the FCC, Qwest has argued that bill and keep is the
18 best answer for intercarrier compensation, that it encourages competition and can
19 be used whether traffic is balanced or not.

20

21 **Q. CAN YOU GIVE A SPECIFIC EXAMPLE?**

22 A. Yes. One example is that on May 23, 2005, Qwest submitted comments to the
23 FCC in the docket entitled In the Matter of Developing a Unified Intercarrier

1 Compensation Regime, CC Docket No. 01-92. At page 19 of those comments,¹
2 Qwest states “Bill and keep is the most economically rational intercarrier
3 compensation system.” Qwest’s position is one of absolute support for bill and
4 keep.

5
6 At page 20 of the same comments, Qwest notes that under a reciprocal
7 compensation system where the calling party number pays, which in the local
8 interconnection world would be the originating carrier paying for call termination,
9 “it allows carriers to shift their cost to their competitors, rather than recovering the
10 cost from their subscribers.” Qwest further argues: “There is, of course, a very
11 powerful economic incentive to raise the costs of one’s competitors where
12 possible, especially if such cost shifting can result in increased revenues to the
13 cost shifter.” This appears to be precisely what Qwest wants to do in this case.
14 Qwest wants to raise the costs to BCT to inhibit competition.

15
16 Also at page 20, Qwest argues to the FCC that the benefit of bill and keep is that
17 “success in the marketplace will reflect a carrier’s ability to serve customers
18 efficiently, rather than its ability to extract payments from other carriers.” This is
19 precisely the type of competition BCT is after – the ability to serve customers
20 efficiently. On the other hand, Qwest appears to want to extract payments from
21 BCT.

22

¹ The portion of the Qwest Comments dealing with bill and keep are attached as Exhibit BCT/9.

1 Qwest goes on at page 21 of those comments to state: “Bill and keep therefore
2 encourages the development of competition because, as stated above, carriers
3 must compete in the market based upon their ability to serve customers
4 efficiently, not through regulatory arbitrage.”

5
6 Then, at page 22 of those comments, Qwest summarizes its position on bill and
7 keep: “In sum, bill and keep best meets the Commission’s goals of promoting
8 economic efficiency, being competitively and technologically neutral, providing
9 regulatory certainty, eliminating arbitrage concerns, and requiring minimal
10 regulatory intervention.”

11
12 Qwest is making the case for bill and keep at the FCC. Qwest, in this docket,
13 apparently wants to be able to transfer its costs to BCT and wants a scheme that it
14 describes as not being competitively neutral. The scheme that Qwest wants in this
15 docket is one that Qwest argues to the FCC does not promote economic
16 efficiency. Further, Qwest apparently wants to avoid bill and keep even though it
17 tells the FCC that bill and keep promotes competition.

18
19 **Q. IS QWEST’S ADVOCACY OF BILL AND KEEP ONLY IF TRAFFIC IS**
20 **IN A BALANCE?**

21 A. No. Qwest argued to the FCC in the same docket, in its Reply Comments dated
22 July 20, 2005,² that bill and keep “is optimal even where traffic is not balanced.”

² The portion of Qwest’s Reply Comments on bill and keep are attached as BCT/10.

1 See page 25 of Qwest's Reply Comments. In fact, Qwest points out that
2 reciprocal compensation in the form of a per minute charge really is not
3 appropriate where there is unbalanced traffic. Qwest states "In fact, such
4 [unbalanced] traffic should not and cannot be deemed eligible for "reciprocal
5 compensation" in the first place because there is nothing reciprocal about it."
6 Qwest argues that it is, in fact, where there is unbalanced traffic that the greatest
7 potential for arbitrage exists and, therefore, bill and keep should be used. See
8 page 26 of Qwest's Reply Comments.

9
10 Thus, Qwest argued only a year ago that it does not matter whether traffic is
11 balanced or not balanced. Qwest's position is that bill and keep is a superior
12 position in any situation. Thus, it is difficult for me to understand their opposition
13 to bill and keep in this docket and, in particular, that they place their support for
14 their arguments on the idea that traffic and route miles are not in balance.

15
16 **Q. IS THIS A RECENTLY DEVELOPED POSITION BY QWEST?**

17 **A.** No. Qwest has advocated bill and keep before the FCC since at least 2001. In
18 Comments and Reply Comments filed respectively on August 21, 2001 and
19 November 5, 2001, Qwest strongly advocates that bill and keep is the best form of
20 intercarrier compensation.³

21

³ The portions of Qwest's Comments and Reply Comments on the appropriate portions of the issue of bill and keep are attached as BCT/11.

1 Q. HAS QWEST ENTERED INTO BILL AND KEEP AGREEMENTS IN THE
2 STATE OF OREGON?

3 A. Yes. Qwest has entered into a great many bill and keep interconnection
4 agreements in the State of Oregon. I asked that a sampling of Qwest agreements
5 on file with the Commission be undertaken. While the sampling was not meant to
6 produce every bill and keep agreement in Oregon, in a little over an hour of
7 review, nearly twenty bill and keep agreements were found. This means that
8 there are likely to be very many more already on file with the Commission.

9
10 Q. CAN YOU IDENTIFY THOSE BILL AND KEEP AGREEMENTS?

11 A. Yes. The table below sets out those bill and keep agreements that were found on
12 just a cursory review of the agreements on file with the Commission.

13 BILL AND KEEP AGREEMENTS

14

<u>ARB Number</u>	<u>CLEC</u>	<u>Date Filed</u>
ARB 756	Ymax Communications Corporation	6/23/06
ARB 754	Springfield Radio Communications Inc.	6/14/06
ARB 716	Cordia Communications Corp.	1/19/06
ARB 715	360Networks (USA) Inc.	1/19/06
ARB 711	Monmouth Independent Network	12/8/05
ARB 674	CommPartners, LLC	8/2/05
ARB 660	Trans National Communications International, Inc.	3/29/05
ARB 654	Vycera Communications Inc.	2/22/05
ARB 616	Qwest Communications Corporation	8/2/04
ARB 526	Sprint Communications Company LP	1/16/04
ARB 520	IDT America Corp.	12/22/03
ARB 452	Western Independent Network, Inc.	8/19/02
ARB 435	SCS Communications and Security, Inc.	5/29/02
ARB 401	Douglas Services, Inc.	2/15/02
ARB 398	City of Portland Oregon	1/17/02
ARB 351	Gervais Telephone Company	6/27/01
ARB 324	Eastern Oregon Telecom, LLC	3/28/01

1 **Q. IS THERE ANYTHING THAT STRIKES YOU ABOUT THIS LIST?**

2 A. There are several things that strike me about this list. First, bill and keep
3 agreements have been filed as recently as June of this year. Second, bill and keep
4 agreements for some companies have been in place for over five years. Third,
5 and most striking, is the fact that Qwest put into place a bill and keep agreement
6 with its own affiliate, Qwest Communications Corporation.

7

8 If bill and keep can be put in place between Qwest and Qwest Communications
9 Corporation, bill and keep should certainly be appropriate for BCT.

10

11 The fact that there is a number of these agreements that are in place means that
12 Qwest offers bill and keep in Oregon to CLECs and BCT is entitled to choose bill
13 and keep.

14

15 **Q. IS THERE ANYTHING ELSE THAT STRIKES YOU ABOUT THESE**
16 **AGREEMENTS?**

17 A. Yes. The agreements are both with wireline and wireless carriers. The
18 agreements are with large companies such as Sprint Communications Company
19 LP and small companies.

20

21 I note that Western Independent Networks Inc. has a bill and keep agreement. At
22 the time that agreement was filed, BCT was a significant shareholder of Western
23 Independent Networks.

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I will also note that SCS Communications and Security, Inc. is owned by a cooperative, Stayton Cooperative Telephone Company.

I will also note that another ILEC, Gervais Telephone Company, has a bill and keep agreement.

I will further note that Douglas Services, Inc., which is related to Douglas County PUD, and the City of Portland, as municipalities they are two nonprofit organizations, that are in a sense like a cooperative, and they have bill and keep agreements.

Q. BEGINNING AT PAGE 15, LINE 17, MR. FREEBERG ARGUES THAT BILL AND KEEP IS INAPPROPRIATE BECAUSE QWEST OWNS THE GREATEST SHARE OF THE TRANSPORT. DO YOU HAVE ANY COMMENT ON THIS TESTIMONY?

A. Well, of course, in light of Qwest's national position on bill and keep, Mr. Freeberg's testimony is of questionable weight. However, in specific response, it appears that Mr. Freeberg is talking about the EAS/local tandem since his testimony at page 16, line 5 refers to the switch being located in downtown Portland.

1 Thus, he ignores the trunks that are in place in other locations. There are a great
2 many trunks between BCT's switch and the Qwest Oregon City and Milwaukee
3 switches. There, the traffic mileage is fairly close to balanced.

4
5 More importantly, BCT is trying to move its point of interconnection into
6 downtown Portland very close to Qwest's tandem switch. This will reverse the
7 situation that Mr. Freeberg describes. In fact, most of the transport mileage would
8 be owned by BCT. Even under this scenario, BCT is still willing to do bill and
9 keep.

10
11 It is only Qwest's opposition to BCT's move of its POI that is preventing this
12 from happening. How can Qwest, on the one hand, oppose the move of the POI
13 and, on the other hand, argue that because the mileage is in Qwest's favor, which
14 exists only because the POI has not moved, bill and keep is inappropriate?
15 Qwest's position is not sustainable.

16

17 **Q. AT PAGE 14, LINE 1 AND FOLLOWING, MR. FREEBERG TALKS**
18 **ABOUT THE VOLUME OF TRAFFIC NOT BEING IN BALANCE. DO**
19 **YOU HAVE A REACTION?**

20 A. Yes. It appears to me that Mr. Freeberg is talking about Qwest originating traffic
21 compared to BCT originating traffic. However, Qwest terminates a high volume
22 of transit traffic to BCT. This is traffic for which Qwest receives compensation

1 from the originating CLEC. If that traffic is added in, it appears that the traffic
2 volumes are much closer in volume.

3

4 Further, given Qwest's national position, this whole argument advanced by Mr.
5 Freeberg is irrelevant.

6

7 **Q. WHAT IS YOUR RESPONSE TO QWEST'S POSITION ON BILL AND**
8 **KEEP?**

9 A. Qwest's position on bill and keep is not supported. Its own advocacy to the FCC
10 completely undercuts Qwest's position.

11

12 Qwest has offered bill and keep to CLECs in Oregon for many years. Qwest has
13 offered bill and keep in Oregon to CLECs as recently as this year. Qwest has a
14 bill and keep agreement with its own affiliate, Qwest Communications
15 Corporation.

16

17 Qwest has told the FCC that whether traffic is in balance or not is irrelevant for
18 bill and keep. In fact, Qwest has told the FCC that bill and keep is more
19 appropriate when traffic is not in balance. Qwest has told the FCC that bill and
20 keep enhances competition and that per minute reciprocal compensation inhibits
21 competition.

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23 Qwest's position must be rejected.

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TRANSPORT OF THIRD PARTY TRAFFIC

Q. MR. FREEBERG DESCRIBES THE ISSUE AT SECTION 7.3.2.1.2 OF THE INTERCONNECTION AGREEMENT AS REQUIRING BCT TO PAY FOR TRUNKS TO THE ACCESS TANDEM BECAUSE “QWEST WOULD HAVE NO OPPORTUNITY TO RECOVER FROM EITHER THE INTEREXCHANGE CARRIER OR FROM BCC AND ANY COST FOR TRANSPORT NECESSARY TO MOVE JOINTLY PROVIDED SWITCHED ACCESS (“JPSA”) CALLS FROM QWEST’S ACCESS TANDEM SWITCH TO THE NETWORK INTERFACE WITH BCC, THE DISTANCE FOR 15 MILES.” THIS TESTIMONY APPEARS AT PAGE 29 OF MR. FREEBERG’S PRE-FILED TESTIMONY. DO YOU HAVE ANY REACTION TO THAT?

A. Yes. The issue is what I discussed earlier about Qwest wanting BCT to subsidize Qwest’s use of the access tandem to transit local/EAS traffic for a profit. If only jointly provided switched access traffic was handled over those trunks, I would have no problem with Qwest’s position. However, the problem is that those trunk groups probably handle more EAS/local traffic originated by CLECs and wireless carriers for which Qwest receives transiting payment than it does jointly provided switched access traffic. As a result, Mr. Freeberg’s whole argument disappears. Instead, what Qwest is doing is asking BCT to pay for trunks, the only purpose for which is to allow Qwest to terminate transiting traffic to BCT. This is transiting traffic that the originating CLEC or wireless carrier pays Qwest to

1 transit. Thus, what Qwest is doing is asking BCT to subsidize Qwest's
2 operations.

3
4 The situation is actually totally reversed from what Mr. Freeberg states. Qwest
5 recovers the cost of its transiting traffic from the originating carrier. However,
6 BCT has no opportunity to recover its costs. If Qwest will put only access traffic
7 over those trunks, Qwest's position is accurate. If Qwest does not, then Qwest's
8 position is bordering on fraudulent. Further, if BCT moves its POI, BCT will
9 have most of the mileage for the traffic. Again, Qwest is opposing the move of
10 the POI.

11
12 BCT has no problem in paying its fair share for the traffic that is truly jointly
13 provided switched access traffic. BCT has an absolute and total opposition to a
14 situation where Qwest routes huge volumes of EAS/local traffic for which Qwest
15 is compensated and expects BCT to subsidize Qwest's operations. That is not
16 fair. That is not appropriate.

17
18 **Q. BEGINNING AT THE BOTTOM OF PAGE 30 OF MR. FREEBERG'S**
19 **TESTIMONY, HE DISCUSSES SECTION 7.2.1.2.4 OF THE PROPOSED**
20 **INTERCONNECTION AGREEMENT. HE STATES THAT "IT APPEARS**
21 **THAT BCC WANTS THE AGREEMENT TO STATE THAT BCC IS**
22 **PROVIDING TRANSIT SERVICE TO QWEST EVEN WHEN ITS**
23 **SWITCH IS NOT FUNCTIONING AS A TANDEM." THIS STATEMENT**

1 **APPEARS AT PAGE 31, BEGINNING AT LINE 22. DO YOU AGREE**
2 **WITH THIS STATEMENT?**

3 A. No. Qwest seems to think that BCT wants to charge Qwest for tandem switching
4 of services for Qwest traffic. That is not BCT's motive. In part, Qwest creates
5 this impression through its artificial use of the terms BCC and BCI as though
6 there were two entities. BCT is a single entity and would not charge a tandem
7 switching charge to Qwest for traffic that terminates to or originates from BCT.

8
9 On the other hand, BCT's switch is fully capable as functioning as a tandem.
10 BCT wants to move its POI to Portland and offer tandem services and transport
11 services to other carriers. Qwest is opposing this move. As I noted in my
12 opening testimony, it appears that Qwest wants to maintain a monopoly over
13 these services.

14
15 The problem is that under Qwest's theory, it is only if BCT's switch serves a
16 geographic area comparable to the area served by Qwest's tandem switch that
17 would it be deemed as "functioning" as a tandem switch. That is an artificial
18 distinction.

19
20 BCT is a facilities-based provider. By necessity that means it will serve a lesser
21 area than Qwest in its early stage of operations. Further, BCT is inhibited from
22 serving a larger area because of Qwest's opposition of the movement of BCT's
23 POI to downtown Portland.

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BCT's switch is fully capable of functioning as a tandem. BCT wants to get into the market of providing transport and tandem services. Qwest wants to prevent BCT from doing so.

Q. AT PAGE 32, LINE 21, MR. FREEBERG MAKES THE STATEMENT THAT "THE BCC PROPOSED DELETION AT SECTION 7.1.2.4 COULD STIMULATE FUTURE DISAGREEMENT. BCC SHOULD NOT BE IN A POSITION TO CLAIM IT IS TRANSITING CALLS TO BCI SUCH THAT QWEST CANNOT TRUNK DIRECTLY TO BCI." DO YOU HAVE A REACTION TO THIS STATEMENT?

A. Yes. First, there is a typographical error. It appears that the reference should be to 7.2.1.2.4. However, more to the point, BCT is not suggesting that it wants to charge Qwest transiting charges for calls to reach Beaver Creek's operations in the Beavercreek exchange. In Qwest's testimony, they have created an artificial distinction as though BCT's operations in the Oregon City exchange are provided by a different entity than those provided in the Beavercreek exchange. BCT would never purport to charge Qwest for transiting services in either direction when the traffic is originated or terminated to BCT. Transiting charges would only apply in the instance of a third party. Mr. Freeberg's statement is really an effort at misdirection.

1 Q. AT PAGES 34 AND 35, MR. FREEBERG DISCUSSES THE DEFINITION
2 OF TANDEM SWITCH IN SECTION 4 OF THE PROPOSED
3 AGREEMENT. MR. FREEBERG APPEARS TO ARGUE THAT
4 QWEST'S PROPOSAL IS SUPPORTED BY THE FCC RULE. DO YOU
5 HAVE ANY RESPONSE?

6 A. The rule cited by Mr. Freeberg states a minimum condition where a CLEC switch
7 must be treated as a tandem switch. It is not a limitation. In other words, there
8 can be other circumstances where a CLEC switch can be treated as a tandem
9 switch. My point is that functionally BCT's switch is a tandem switch.

10

11 In addition, BCT's desire to move its POI to downtown Portland would allow the
12 switch to serve the same geographical area as Qwest. However, Qwest is
13 opposing that move. Qwest should not be allowed to use its market power to
14 control transiting services and argue that BCT's switch is not a tandem switch in
15 functionality.

16

17

PHANTOM TRAFFIC

18 Q. AT PAGES 24 AND 25, MR. FREEBERG DISCUSSES SECTION 7.3.4.1.4.
19 AT PAGE 24, HE STATES THAT IT IS HIS BELIEF THAT BCT WANTS
20 QWEST TO PAY TERMINATION CHARGES FOR THIRD PARTY
21 TRAFFIC THAT QWEST DELIVERS TO BEAVER CREEK WITHOUT
22 SUFFICIENT DETAIL TO ALLOW BCT TO BILL THE ORIGINATING
23 CARRIER. IS THAT ACCURATE?

1 A. No. BCT wants Qwest to cooperate in rooting out phantom traffic. In particular,
2 BCT believes that Qwest should provide records that would allow BCT to identify
3 and pursue phantom traffic providers.

4

5 BCT has asked Qwest to cooperate in the past and has met with stiff resistance.

6 In fact, BCT has identified at least one specific carrier that appears to be

7 bypassing both Qwest and BCT for access charge purposes. BCT requested

8 Qwest to cooperate in pursuing that carrier and Qwest refused.

9

10 **Q. AT PAGE 25 OF HIS TESTIMONY, MR. FREEBERG STATES THAT**
11 **BCT'S POSITION IS INCONSISTENT WITH LAW. DO YOU AGREE?**

12 A. No. What Mr. Freeberg is discussing is his impression that BCT wants to charge
13 Qwest for the traffic. As I said, that is not the case. However, even if BCT did
14 want to charge Qwest, that is not inconsistent with law. All that the statute that
15 Mr. Freeberg cites at page 25 states is that carriers should charge each other for
16 calls that originate on the network facilities of the other carrier. It is silent as to
17 transiting traffic and the responsibility for payment or other conditions that might
18 relate to termination of transiting traffic.

19

20 **Q. AT PAGE 26, MR. FREEBERG STATES THAT QWEST HAS PROVIDED**
21 **CALL DETAIL RECORDS FOR ITS INTRALATA TOLL TRAFFIC**
22 **THROUGH THE DATA DISTRIBUTION CENTER AND BCT RECEIVES**

1 **THOSE RECORDS. DO YOU HAVE ANY COMMENT ON HIS**
2 **STATEMENT?**

3 A. Yes. There is something very strange going on with Qwest's records. At the
4 most recent Data Distribution Center (DDC) meeting, which occurred on July 26,
5 2006, the issue of sudden drops in the records provided by Qwest was raised. It
6 appears that Qwest is either having trouble generating its records, which is
7 causing a discernable drop in the billable records running through the DDC, or
8 Qwest is engaging in some other behavior, such as using an IP platform and
9 perhaps claiming those messages are either interstate or not telecommunications
10 traffic at all even though the calls terminate on the PSTN and the originating and
11 terminating end of the calls are both within Oregon. The matter is still under
12 investigation, but it is just another instance of Qwest saying one thing and doing
13 another.

14
15 **Q. AT PAGE 41 OF HIS TESTIMONY, MR. FREEBERG APPEARS TO**
16 **OBJECT TO BEING REQUIRED TO BLOCK TRANSITING CALLS,**
17 **SUPPLYING CALL RECORDS AT NO CHARGE OR PAYING**
18 **PREMIUM RATES FOR CALLS THAT IT DID NOT ORIGINATE? ARE**
19 **EACH OF THESE ITEMS THAT BCT IS SEEKING?**

20 A. No. BCT is seeking only one of the three as a proper response to phantom traffic.
21 BCT is not asking that Qwest block calls. BCT is asking that Qwest make every
22 effort to route calls correctly, however BCT has never suggested that the calls be
23 blocked.

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BCT is not requesting that Qwest pay access rates to BCT for transiting traffic. The ALJ ruled in another proceeding that such a position is not appropriate and BCT has not pursued the issue since the ruling.

However, BCT is requesting that Qwest provide the records that it has to BCT without charge so that BCT may properly bill the traffic. BCT is willing to provide Qwest with any records without charge. BCT notes that Verizon provides such records without charge.

Q. AT PAGE 43 OF MR. FREEBERG’S TESTIMONY, HE MAKES THE STATEMENT THAT “NOWHERE IN THE LAW IS IT REQUIRED THAT THESE [ACCESS RECORDS] RECORDS BE SUPPLIED AT NO CHARGE, YET THAT IS BCT’S POSITION.” IS MR. FREEBERG’S STATEMENT ACCURATE?

A. Yes. It also conveys no meaning. There is also no requirement in law that a charge be levied for the records. The law is silent on the point. As I noted earlier, Verizon provides these records without charge.

I also note that at page 26 of Mr. Freeberg’s Testimony, he admits that Qwest provides intraLATA access records to the DDC without charge which BCT receives from the DDC, also without a charge. If intraLATA records are supplied

1 without a charge, why can't interLATA records be supplied without a charge as
2 well?

3
4 I further note that Mr. Freeberg states that BCT's position may be premised on
5 balanced traffic and that the traffic is not in balance. Actually on this point, Mr.
6 Freeberg is correct, but in the wrong direction. BCT's customers originate more
7 toll than is terminated to BCT. From a record standpoint, this means that BCT
8 would generate more records of interest to Qwest than Qwest would generate for
9 BCT. The financial consequence is just the reverse of what happens with the
10 termination of local traffic. Here it is the origination of toll traffic that is the
11 reason for needing records.

12
13 **Q. ON PAGE 45 OF HIS TESTIMONY, MR. FREEBERG MAKES THE**
14 **POINT THAT QWEST SHOULD BE ENTITLED TO COMPENSATION**
15 **FOR TRANSITING RECORDS. WHAT IS YOUR RESPONSE?**

16 **A.** As I have explained before, the problem that arises is that Qwest places very large
17 volumes of local/EAS traffic over the access trunks. Qwest is compensated by the
18 originating carrier for doing so. Qwest will not provide records on a basis that
19 sorts by toll and local traffic. Therefore, Qwest wants BCT to pay for all the
20 records related to the EAS traffic flowing over the access tandem, which
21 generally is not billable, in order to get a relatively smaller number of records that
22 can be used to bill access. Thus, Qwest's position makes the payment for those
23 records uneconomic.

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This problem is compounded by Qwest's position that it wants BCT to pay for those access trunks that deliver EAS traffic and, in essence, subsidize Qwest's financial operations for its SPOP product. Then, Qwest is saying that BCT must pay for all these unusable EAS records in order to get a few usable access records. This is rubbing salt into the wound.

CHANGE IN LAW

Q. DO YOU HAVE ANY RESPONSE TO MR. FREEBERG'S STATEMENTS ABOUT THE CHANGE IN LAW PROVISION?

A. This is a relatively minor issue. BCT's position is stated in my opening testimony and I do not think anything further is needed on this point.

LANGUAGE FOR AGREEMENT

Q. MR. FREEBERG CRITICIZES BCT'S CHOICE OF LANGUAGE FOR THE AGREEMENT. DO YOU HAVE A RESPONSE?

A. BCT was trying to address a very dense form of agreement. That agreement has circular definitions and numerous cross references. Our goal was to try to be sure that the issues were covered. It may be that in some cases we were not as accurate as we should have been. However, the issues are fairly clear.

In order to address Mr. Freeberg's concerns, I will set out the language that I think should be adopted on the issues.

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On Issue 1, I propose that the language read as follows: “Despite anything in this Agreement to the contrary, the Parties shall exchange local/EAS traffic or Exchange Service traffic, including all transiting traffic that is local/EAS or Exchange Service traffic, on the same trunk groups, without restriction.” This language could be added at the beginning of Section 7.

The alternative language if this position is not accepted would read as follows: “Each Party shall place its originating local/EAS or Exchange Service traffic that is to terminate to the other Party on trunk groups that are separate and apart from trunks that carry any transiting local/EAS or Exchange Service traffic originating from third parties.” Again, this language could go at the beginning at the beginning of Section 7.

On Issue 2, the compensation issue, I suggest that the language read as follows: “CLEC and Qwest shall exchange Exchange Service traffic on a bill and keep basis.” This language would replace the current language in Section 7.3.4.1 related to reciprocal compensation.

On Issue 3, the treatment of transiting traffic, I suggest the following language: “Despite any language in this Agreement to the contrary, nothing in this Agreement shall be construed as limiting either Party from transiting local/EAS or Exchange Service traffic either to or from the other Party for third parties and for

1 all purposes under this Agreement, CLEC's switch shall be treated as a tandem
2 switch; provided, however, CLEC shall not charge Qwest tandem switching
3 charges for CLEC's originated local/EAS or Exchange Service traffic, whether
4 that traffic originates from CLEC's competitive or incumbent operations, nor
5 shall CLEC charge Qwest tandem switching charges for local/EAS or Exchange
6 Service traffic for termination to CLEC's customers, whether those customers are
7 in its competitive or incumbent operations." This is probably more detailed than
8 is absolutely needed. However, I wanted to make it very clear to Qwest that it is
9 not BCT's intent to charge Qwest tandem switching charges for traffic exchanged
10 between the two companies. BCT has never believed that that would be the
11 outcome of this process.

12
13 On the issue of phantom traffic, I suggest the following: "Each Party shall make
14 every commercially reasonable effort to route Exchange Access and Jointly
15 Provided Switched Access Traffic over toll trunks and shall take every
16 commercially reasonable precaution to prevent such traffic from being routed
17 over local/EAS trunks. If a Party receives toll traffic for termination over
18 EAS/local trunks or receives toll traffic over toll trunks for which a corresponding
19 access record is not delivered, the other Party shall provide the receiving Party
20 with whatever records the other Party has available to it concerning such traffic
21 without a charge. The Parties agree that the preferable form of the records is
22 Category 11-01-XX records in EMR mechanized format. However, where such
23 records are not available, the Party providing the records shall provide the best

1 records it has available to it.” Again, this language could go into the start of
2 Section 7.

3
4 On the issue of choice of law, the Commission has before it two fairly clear
5 alternatives and I do not see a need for an additional suggestion on the language.

6
7 As you can see, what I tried to do was simplify the concepts down to their basic
8 components and put them in as exceptions to the existing Qwest language. This
9 seemed to me to be the best way to handle the language without worrying about
10 whether the issues were or were not completely covered in Qwest’s form of
11 agreement. This avoids having to worry about whether there is some language
12 that is cross referenced needs to be modified or whether there is an internal
13 definition that needs to be addressed.

14
15 **Q. DOES THAT CONCLUDE YOUR TESTIMONY?**

16 **A. Yes.**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.
ON FURTHER NOTICE OF PROPOSED RULEMAKING

QWEST COMMUNICATIONS
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May 23, 2005

B. Qwest's Bill And Keep Plan Meets The Commission's Goals

1. Bill and Keep is the Most Economically Rational
Intercarrier Compensation Scheme

Bill and keep is the most economically rational intercarrier compensation system. Qwest provided extensive analysis of the economic benefits of bill and keep in its comments and reply comments in response to the NPRM.³⁵ The Staff Analysis comprises a thorough and concise analysis of the economic rationale for choosing a bill and keep system. Accordingly, these comments simply summarize the benefits of bill and keep as the record already contains Qwest's more detailed explanation of bill and keep's merits. Briefly, bill and keep is an economically superior solution for the following reasons.

First, because both the calling party and the called party may both generally benefit from any given call, the originating and terminating networks should share the costs associated with the call by recovering their costs from their own end-user customers.³⁶ There is no rational economic nexus between cost causation and the identity of the "originating" carrier. To the contrary, in many cases, ISPs providing the most dramatic example, the major "cost causer" in a telephone call may be the terminating customer and the terminating customer's carrier. This is especially onerous and disruptive in a situation (again typified by ISP "reciprocal compensation") wherein the originating carrier is under a regulatory constraint to deliver traffic to a terminating carrier even when such delivery is not only uneconomic but potentially ruinous - in a free market the originating carrier would make the decision not to engage in such an uneconomical transaction.

³⁵ See Comments of Qwest, filed herein on Aug. 21, 2001, at 7-21; Reply Comments of Qwest, filed herein Nov. 5, 2001, at 3-30.

³⁶ Further Notice, Staff Analysis, App. C, at p. 98.

Second, a CPNP approach allows carriers to shift costs to other carriers, which is especially problematic in a competitive market. Even a CPNP regime unified at one rate allows carriers to shift costs to their competitors, rather than recovering the costs from their subscribers. There is, of course, a very powerful economic incentive to raise the costs of one's competitors where possible, especially if such cost shifting can result in increased revenues to the cost shifter. But doing so distorts the pricing signals received by consumers. Because bill and keep puts all carriers in a position where they must recover their own costs from their own retail or wholesale customers, success in the marketplace will reflect a carrier's ability to serve customers efficiently, rather than its ability to extract payments from other carriers. The massive disruptions described in the ISP Remand Order are caused by the diseconomies inherent in a CPNP structure.³⁷

Third, an intercarrier compensation scheme, such as CPNP, that requires termination payments create the opportunity for the terminating carrier to exploit pricing power due to the terminating monopoly.³⁸ This phenomenon has caused the Commission to regulate the maximum access charges that can be charged by CLECs, whose rates are otherwise subject to

³⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("ISP Remand Order"). See Section IV.D., *infra* for a discussion on bill and keep structure for ISP traffic..

³⁸ The terminating monopoly exists because the terminating carrier has a monopoly over the facilities serving the end user who receives calls because any interconnecting carrier attempting to reach that customer must use the terminating carrier's network. Therefore, the terminating carrier may attempt to unilaterally impose unreasonable termination charges which the originating carrier cannot avoid. In many cases, because of the rate-averaging requirement, for example, the originating carrier cannot pass these charges on to the originating caller. The market fails to exert pressure to moderate these unreasonable termination rates, and regulation is needed. See Further Notice, Staff Analysis, App. C, at p. 104. The ISP reciprocal compensation problem is the most obvious, but not the only manifestation of this problem.

competitive market forces.³⁹ Under bill and keep, the terminating carrier must recover its costs from its own end-user customers. This eliminates the ability to charge unreasonable terminating rates because the end-user customer can compare prices and choose the carrier of his or her choice based on that carrier's performance. Bill and keep therefore encourages the development of competition because, as stated above, carriers must compete in the market based upon their ability to serve customers efficiently, not through regulatory arbitrage.⁴⁰

Fourth, because of the terminating monopoly, there is a constant need under a CPNP system to regulate the termination rates that carriers charge each other. Experience has shown that especially in a technologically dynamic market such as the instant telecommunications market, it is simply impossible for regulators to evaluate and establish rates that accurately reflect costs. This is dangerous, because as even bill and keep's opponents acknowledge, arbitrage opportunities arise when regulated rates deviate from costs.⁴¹ What is more, this arbitrage situation is aggravated by each of the factors enumerated above because disparate rates are often established for the same service, causing customers to seek to reduce costs and maximize revenues based on choosing from varying regulated prices for the same functions and services. Thus, under a CPNP system regulators must oversee retail rates, and wholesale termination rates, and expect that they will do so with only limited success in protecting the public interest. As the experience with CLEC access charges shows, the need to regulate

³⁹ See *In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001).

⁴⁰ Further Notice, Staff Analysis, App. C, at pp. 103-04.

⁴¹ See, e.g., Comments of AT&T, filed herein on Aug. 21, 2001, at 8. In a competitive market, prices are driven towards cost based on entirely different factors.

wholesale termination rates will never end in a CPNP regime.⁴² Under bill and keep, regulators must oversee the transition to the wholesale bill and keep plan. After the transition is completed regulators will mildly oversee only retail rates until competition can be relied on to prevent discriminatory rate practices.

In sum, bill and keep best meets the Commission's goals of promoting economic efficiency,⁴³ being competitively and technologically neutral,⁴⁴ providing regulatory certainty,⁴⁵ eliminating arbitrage concerns,⁴⁶ and requiring minimal regulatory intervention.⁴⁷ Thus, Qwest's plan (and the other bill and keep plans) are superior to the non-bill and keep plans in meeting the aforementioned goals. Moreover, Qwest's plan meets the Commission's additional goals of maintaining reasonable and affordable end-user rates,⁴⁸ preserving universal service,⁴⁹ and providing a transition that will give carriers time to adjust their business plans.⁵⁰

III. THE FCC HAS THE STATUTORY AUTHORITY TO ADOPT THE QWEST BILL AND KEEP PLAN

Qwest submits that the FCC's authority to adopt the plan described herein is clear. This authority is essentially threefold: 1) the FCC has the jurisdiction to establish a federal structure for intercarrier compensation, that includes replacement of intrastate access charges with the federal bill and keep structure and, pursuant to different statutory provisions, to fulfill its

⁴² See note 37, *supra*.

⁴³ Further Notice ¶ 31.

⁴⁴ *Id.* ¶ 33.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* ¶ 30.

⁴⁹ *Id.*

⁵⁰ *Id.* ¶ 36.

statutory and constitutional mandate to ensure that carriers have an opportunity to recoup lost access revenues through appropriate increases in end-user charges; 2) the FCC has the power to adopt a bill and keep structure for exchange of carrier traffic, especially traffic involving origination or termination with a LEC; and 3) the FCC has authority to adopt a transition plan that provides immediate reform and/or clarification in areas such as transiting, virtual NXX compensation, CMRS traffic and ISP reciprocal compensation. These issues are examined herein.

A. Intercarrier Compensation Is A Federal Issue

The FCC has been granted plenary jurisdiction over intercarrier compensation matters, at least where an ILEC is involved in one end of a call.⁵¹ Historically, intercarrier contracts have been subject to the FCC's jurisdiction,⁵² and the plain language of Section 251(b)(5) of the Act ultimately rests authority for intercarrier compensation with the FCC.⁵³ State (as well as federal) tariffs for intrastate access services remain in place because of the savings language of Section 251(g) of the Act,⁵⁴ which contemplates ultimate supervision by the FCC. It must be remembered that the Telecommunications Act itself contemplates federal authority to enact rules and policies in the area of interconnection except in those areas where state jurisdiction is expressly recognized.⁵⁵

⁵¹ Section 251(b)(5) speaks in terms of termination of traffic by LECs. Federal authority to regulate termination by non-LECs in particularly CMRS provider is established in Section 332 of the Act.

⁵² 47 U.S.C. § 211(a).

⁵³ Section 251(b)(5) applies to all "telecommunications" terminated by a LEC. The D.C. Circuit Court of Appeals has agreed that the scope of this language is broad, although holding that the ultimate issue has not yet been determined. See *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002).

⁵⁴ 47 U.S.C. § 251(g).

⁵⁵ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 381-86 (1999).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.
ON FURTHER NOTICE OF PROPOSED RULEMAKING

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July 20, 2005

III. QWEST'S BILL AND KEEP PLAN IS THE OPTIMAL APPROACH TO INTERCARRIER COMPENSATION.

Qwest's plan for intercarrier compensation is a simple and straightforward version of bill and keep under which each carrier is responsible for recovering the costs of its own network from its own subscribers, with the exception of costs associated with the provision of transiting traffic. The primary means of recovering forgone intercarrier compensation will be to increase the federal SLC³² such that the combination of the residential and business rates, any state SLC and the federal SLCs (all weighted by lines) would be increased to the lower of a national benchmark³³ or the level needed to recover the forgone intercarrier compensation. If the level needed to recover the forgone intercarrier compensation exceeds the national benchmark, then the carrier could recover the remainder, *i.e.*, that which is not recovered by moving the combined rate to the benchmark level, through a charge on termination of interexchange traffic by carriers upon Commission approval.

A. Qwest's Bill And Keep Plan Avoids The Problems Noted By Those Who Oppose Interconnection At The Edge.

As noted above, the Qwest approach to edge interconnection deals with many of the objections levied against other approaches to interconnection at the edge. Coupled with the Qwest approach to bill and keep, the Qwest proposal eliminates most of the other concerns raised

³² Qwest recommends that the Commission convene a federal-state joint board to develop a plan to bring the revenues, costs and investment associated with intrastate access charges and reciprocal compensation revenues into the federal jurisdiction. Accordingly, the federal SLC increase would recover both interstate and intrastate access, as well as forgone intercarrier compensation for local traffic. It would be assessed on all terminating interexchange traffic.

³³ The national benchmark rate would be set based on the weighted average of the incumbent LEC single line residential and business rates, intrastate SLCs and interstate SLC for urban wire centers, weighted and calculated as of the last day of the base year. Added to this amount would be the forgone intercarrier compensation offset by continuing transiting charges and interconnection revenues. The benchmark rate would be set at 125% of the national average of these urban rates, including the national average of forgone compensation for urban carriers.

by opponents to bill and keep or edge interconnection. Objections to bill and keep advanced by commenters include fears that: 1) costs will be shifted to end users, some of whom may become unable to afford telephone service; 2) incumbent LECs may not be able to attract investment; 3) bill and keep is not suitable for one-way or unbalanced traffic; 4) bill and keep is not suited to the current wide range of competitive models; 5) bill and keep will make negotiations more difficult; 6) costs will be shifted to the Universal Service Fund. As is shown below, Qwest's bill and keep plan does not merit these concerns and, indeed, addresses most them.

1. Qwest's Bill And Keep Plan Maintains Affordable End-User Rates.

Some parties³⁴ have commented that moving from the current incumbent LEC rate structure to a bill and keep rate structure with cost recovery from end users will generally make local phone service unaffordable. Further, rural incumbent LECs have argued that a bill and keep rate structure will make urban and rural telephone rates more disparate in contradiction to the 1996 Telecommunications Act.³⁵

Qwest's proposal for bill and keep at the edge neither makes telephone service unaffordable, nor increases rate disparity between urban and rural areas beyond levels that can be considered within the range of comparability. Qwest's proposal is able to maintain affordability and urban/rural comparability by developing a benchmark based on 125 percent of the weighted average of urban residential and business rates (including SLCs). This benchmark is approximately \$37. Under this proposal, the incumbent LEC's current interconnection revenues are converted to an increase in the SLC up to the benchmark (or revenue neutrality, whichever is

³⁴ Minnesota Independent Coalition at 5; NTCA at 24-26. *See also* CenturyTel at 17-18.

³⁵ *See generally* Rural Associations at 32.

lower).³⁶ By limiting the weighted average of residential and business rates (including SLCs) for rural carriers to this benchmark, rural service is both affordable and comparable to urban rate levels.

The Bureau of Labor Statistics (“BLS”) Consumer Expenditure Survey from 2003 demonstrates the current level of comparability: Urban expenditures for Telephone Services equal 2.3 percent of the average annual urban consumer expenditures, whereas rural expenditures for Telephone Services equal 2.5 percent of the average annual rural consumer expenditures.³⁷

Table 1

	All Consumer Units		Total Urban (Central City & Other)		Rural	
	Monthly Expenditure	% of Total Annual Expenditure	Monthly Expenditure	% of Total Annual Expenditure	Monthly Expenditure	% of Total Annual Expenditure
Telephone Services	\$79.67	2.3%	\$80.58	2.3%	\$72.92	2.5%
Residential/Pay Phones	\$51.63	1.5%	\$51.72	1.5%	\$51.04	1.7%
Cellular	\$26.34	0.8%	\$27.21	0.8%	\$20.23	0.7%
Pager Service	\$0.09	0.0%	\$0.09	0.0%	\$0.11	0.0%
Phone Cards	\$1.57	0.0%	\$1.58	0.0%	\$1.50	0.1%
Average Total Annual Expenditure	\$40,817		\$41,619		\$35,157	

While rural consumers pay 0.2 percent more of their average annual expenditure on telephone services than urban consumers, urban consumers pay on average \$92 more per year for telephone services.

The values in the table above can be modified to reflect the estimated urban and rural rates after the implementation of Qwest’s proposed bill and keep structure. This analysis shows that after bill and keep is introduced the expenditure for basic local service increases, while the

³⁶ If revenue neutrality is not met after moving to the benchmark, the incumbent LEC may petition the Commission to establish an interexchange termination charge to maintain revenue neutrality.

³⁷ In these charts, “Residential/Pay Phones” includes long distance and all features.

expenditure for long distance service decreases. The net result of these changes for the average urban consumer is an increase of \$0.54 per month to \$81.12 per month. This leaves the urban average telephone service expenditure at 2.3 percent of the urban average total expenditures. The average rural telephone expenditure increases \$11.64 per month (assuming the same absolute level of long distance savings as urban consumers) to \$84.56 per month. This moves the rural telephone expenditure to 2.9 percent of total rural expenditures. The resulting difference between urban and rural telephone expenditures as a percent of total expenditures is 0.6 percent, which is less than the current difference in urban and rural expenditures for food and health care.³⁸ These amounts are legally and statistically insignificant.

To the extent that lower income households, both urban and rural are affected by the increases in the SLC, Qwest proposes that the Lifeline program be expanded to offset this increase.

A detailed explanation of the methodology used to calculate the impact of Qwest's bill and keep proposal on urban and rural telephone expenditures is found in Appendix A.

2. Qwest's Plan Will Encourage Efficient Investment In Incumbent LECs.

CenturyTel also claims that shifting costs to end users would discourage investment in incumbent LECs.³⁹ CenturyTel claims that this is so because it fears that bill and keep will not be revenue neutral, as relying only upon end-user fees will be unsustainable in high cost areas. Qwest does not believe the nation's economy will suffer if there is decreased investment in business plans that depend upon inefficient network configurations and arbitrage nor does it believe that real investment is dependent on such inefficiencies. In these times of increasing

³⁸ Bureau of Labor Statistics – Consumer Expenditure Survey 2003, Table 1702.
WWW.bls.gov/cex/2003/Standard/pdf.

³⁹ CenturyTel at 19-26.

competition, one carrier profiting from taxing its competitors is not an appropriate business model in any area, and investment based on an expectation that such a scenario could continue would be imprudent and non-sustainable. Moreover, it is generally accepted that the carrier access charge infrastructure (represented at the federal level in Part 69 of the Commission's rules) is so susceptible to arbitrage and avoidance that it is not sustainable in the long run in any event. Thus, even if CenturyTel's point were superficially valid today, it would ultimately seek to tie the future of the American telecommunications industry to a structure that is ultimately non-viable. The financial community will reward those carriers who present intelligent business and investment plans. If a bill and keep regime discourages investment in certain business models, that is the natural and salutary result of properly functioning market forces.

3. Qwest's Plan Is Optimal Even Where Traffic Is Not Balanced.

Some carriers argue that bill and keep is not suitable for one-way or unbalanced traffic.⁴⁰ In a related complaint, the Indiana Utility Regulatory Commission fears that bill and keep will cause an increased demand for originating traffic since the originator will not have to pay for termination.⁴¹

The Staff Analysis appearing as Appendix C to the *Further Notice* successfully refutes both of these points. First, as to one-way traffic, the customers of the carriers involved each derive a mutual benefit from the calls and should pay their carrier for use of the network of which they are an end user. The Staff analyzed this in the context of paging carriers. The Staff noted that the customers of both carriers experience a mutuality of benefit from any given call⁴²

⁴⁰ See, e.g., *Frontier* at 5-6.

⁴¹ *Indiana Utility Regulatory Commission* at 5-6.

⁴² In fact, the sole reason to subscribe to a paging carrier is to enable the customer to receive paging notifications, and it is ludicrous to suggest that paging customers are not benefited by receiving such notifications.

and concluded that the customers of the paging carriers should pay their carrier for the calls that are terminated to them.⁴³ This same analysis holds true for other networks that do not have balanced traffic. In fact, such traffic should not and cannot be deemed eligible for “reciprocal compensation” in the first place because there is nothing reciprocal about it. In most cases -- e.g., paging and ISP traffic -- the “cost causer” of a particular call is the called party who invited the transaction in the first place, not the calling party or the calling party’s network. The called party and the calling party both receive an economic benefit by virtue of the successful solicitation of the calls (much like the situation with 800 calls in other contexts), and it is simplistic and wrong to argue that there is some inherent right of carriers serving customers with one-way traffic to charge anyone other than their own customers.

The Staff Analysis also addresses fear that bill and keep will cause an increased demand for initiating traffic, including unwanted calls. This seems to be a speculative concern at best, and the Staff noted that intercarrier compensation is not the source of unwanted calls and is not the place for imposing the solution. Services such as caller ID and the state and national “Do Not Call” registries give customers control over the calls they receive, and other solutions are readily available if the problem of unwanted calls increases. Fears that bill and keep is not suitable for unbalanced traffic or will lead to unwanted calls are not sound reasons for retaining an uneconomic system or failing to adopt Qwest’s plan. As is well illustrated by the “ISP reciprocal compensation” scam, it is with unbalanced traffic where the greatest potential for arbitrage lies. While there may be imperfections in any regulatory solution to intercarrier compensation, the current structure is utterly unsustainable, and bill and keep is a far more rational approach.

⁴³ *Further Notice*, 20 FCC Rcd at 4788-89, Appendix C.

4. Qwest's Plan Is Suited To The Wide Variety Of Competitive Models.

BellSouth claims that bill and keep is not suited to the wide range of competitive models currently seen in the market. For example, BellSouth claims that bill and keep would not be competitively neutral between a carrier offering only IXC services and a full service (local and IXC) carrier.⁴⁴ BellSouth gives the following example, Carrier A an IXC, Carrier B a full service carrier, and Carrier C a local carrier all serve the same geographic market. An end user could obtain service from Carrier C and Carrier A or from Carrier B alone. BellSouth posits that between Carrier A and Carrier B only Carrier B has to bear the cost of the local network where the call originates. Both Carrier A and Carrier B must bear the cost of interexchange transport. BellSouth further posits that Carrier C will not have the opportunity to recover the cost of enabling the interexchange call, and thus will not be able to capture the value its network creates for Carrier B and its customers, and will be hesitant to invest in its network.

Qwest believes that BellSouth's fears are not well-founded. For example, an end user buying both local and long distance services could either buy them separately from Carrier C and Carrier A, or buy them bundled from Carrier B. In both instances the end user will pay for use of the local network (either to Carrier B or to Carrier C) and will pay for interexchange transport (either to Carrier B or to Carrier A). Contrary to BellSouth's fears, bill and keep would be competitively neutral between specialized and full service carriers.

5. Qwest's Plan Will Lead To Negotiated Agreements
And Efficiently Interconnected Networks.

BellSouth also complains that bill and keep will not lead to negotiated agreements. BellSouth's claim is that starting at a zero rate does not leave much room for negotiations

⁴⁴ BellSouth at 10.

because carriers would be unlikely to agree to pay.⁴⁵ There are two concepts at issue in Qwest's proposal, interconnection at the edge, and payment for use of another carrier's network. Under Qwest's proposal carriers would negotiate how they interconnect, which would lead to a more efficient network. Payment for use of another carrier's network addresses the methodology for setting the rate, and Qwest's plan tries to circumvent endless arguments about which measure of cost is correct. Qwest agrees that bill and keep is unlikely to lead to a lot of carriers agreeing to pay a rate above zero. But that is not the point. While, BellSouth asks the Commission to dictate cost-based rates,⁴⁶ experience has shown that no one agrees on the appropriate measure of costs: historical costs, TELRIC, TSLRIC or something else. This is made even more difficult as carriers are in the process of switching out their infrastructure from traditional switches to soft switches, which vary in cost more than traditional switches.⁴⁷

It is in recognition of this problem that Qwest supports the approach that requires originating carriers to assume responsibility for bringing their traffic to the edge of the network of terminating carriers. Because both carriers (assuming that they both want to exchange traffic) have to consider their own expense in delivering their traffic to the edge of the other carrier's network, their incentive to negotiate interconnection is enhanced, not dampened, by Qwest's plan.

Verizon opposes bill and keep and seeks negotiated agreements that include compensation.⁴⁸ Qwest supports negotiated agreements within the framework of interconnection at the edge as an integral part of bill and keep at the edge. However, Qwest would not allow

⁴⁵ *Id.* at 11-12.

⁴⁶ *Id.*

⁴⁷ USTA at 23-24.

⁴⁸ Verizon at 19-21.

negotiated compensation arrangements because of the threat that unequal bargaining power might permit one carrier to insist on a compensation scheme that undercuts the basic bill and keep principles that are at the heart of Qwest's plan. The regulatory framework for negotiated agreements under Qwest's approach would include, in addition to bill and keep at the edge, as described herein:

- nationally established core processes;⁴⁹
- a well-coordinated transition as laid out in Qwest's initial comments;
- a negotiations clock under which more detailed default rules would apply if there is no agreement after a certain time frame;
- the states will arbitrate any disputes only to the extent the agreements are subject to Section 252;
- federal, rather than state, oversight of transiting; and
- market-based pricing of transiting.

Within this framework, Qwest's plan will lead to efficiently connected networks, and will achieve that goal through negotiated agreements between carriers.

6. Qwest's Plan Will Not Over-Burden The Universal Service Fund.

BellSouth complains that adopting bill and keep could harm the Universal Service Fund since carriers could no longer recover costs from other carriers. Qwest's bill and keep proposal does not have that problem. Qwest's plan will burden the Universal Service Fund as little as possible because it allows for the highest cost carriers to collect a termination charge for

⁴⁹ While companies should not be limited in their negotiations, industry groups should define baseline issues such as ordering methodology, bill formats, EDI standards, interconnection information (NECA 4, LERG), and so forth. In the absence of a negotiation to the contrary, these baseline issues provide a degree of stability to back office functions that are expensive and time consuming to modify.

interexchange traffic. The only additional charge to the Universal Service Fund will be the potential for additional charges to the Lifeline Program as end-user rates increase.

In sum, Qwest's plan will maintain affordable end-user rates, and encourage efficient investment in the nation's telecommunications system. The plan will be optimal even when traffic is not balanced, and for any business model. It will lead to negotiated agreements and efficiently interconnected networks and will not over-burden the Universal Service Fund.

IV. THE COMMISSION SHOULD ENSURE THE LEGALITY OF ITS UNIFORM NATIONAL APPROACH TO INTERCARRIER COMPENSATION REFORM BY CONVENING A FEDERAL-STATE JOINT BOARD TO ASSIST IT IN RESOLVING THE LATENT JURISDICTIONAL ISSUES RAISED BY SUCH UNIFORMITY.

There is considerable agreement that a rational intercarrier compensation plan must encompass both federal and state intercarrier compensation. Almost all commenters, no matter what their position on the Commission's jurisdiction to actually adopt such a uniform structure, agree that a single approach to intercarrier compensation that covers all traffic is the most desirable approach to the difficult issue of intercarrier compensation.⁵⁰ This only makes sense. An intercarrier compensation plan that dealt differently with interstate and intrastate intercarrier compensation would only perpetuate one of the chief anomalies that intercarrier compensation reform is intended to alleviate – interstate/intrastate arbitrage. Even if the ultimate plan devised by the Commission were to be marked by seminal luminescence, it would be doomed to failure if it applied only to some traffic as differentiated by the jurisdictional end points of particular communications. No one seems to seriously question this premise.

⁵⁰ See, e.g., NARUC at 3, New Jersey Board of Public Utilities at 2; MO PSC at 3; Nebraska Public Service Commission at 2; agreeing that a uniform approach to intercarrier compensation is superior to an approach that is piecemeal based on the jurisdiction of a particular communication.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL, INC.

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August 21, 2001

exception of intrastate access charges, the Commission has such legal authority with respect to all such traffic, including traffic that falls within the scope of 47 U.S.C. § 251(b)(5). Although the accompanying pricing provision – section 252(d)(2) – is ambiguous in a number of key respects, the bill-and-keep savings clause of section 252(d)(2)(B) confirms that, whatever else the statute may prescribe, it undoubtedly permits “arrangements that *waive* mutual recovery [of costs] (*such as bill-and-keep arrangements*).” 47 U.S.C. § 252(d)(2)(B) (emphasis added). Viewed in combination with section 252(d)(2)(A), that provision is most reasonably construed to give the Commission a *choice*, in prescribing a compensation scheme for any given class of traffic, between *either* bill-and-keep *or* a cost-based CPNP regime; and the Commission is free to choose the former rather than the latter if it believes that doing so would serve the public interest.

I. Bill-and-Keep Would Offer Substantial Advantages Over the CPNP and Access Charge Regimes.

The prevailing intercarrier compensation regime consists of two related systems. First, local traffic subject to section 251(b)(5) is governed by a pure CPNP scheme, in which the called party’s network collects full compensation from the calling party’s network for all of the costs of transporting and terminating a call. Second, conventional interexchange traffic, traditionally characterized by the involvement of *three* carriers in any given call, is governed by the “access charge” regime, in which the caller’s IXC pays both the calling party’s LEC and the called party’s LEC for all costs of originating and terminating the call.² One key feature those regimes

² The Commission devoted only one paragraph in the NPRM (§ 97) to the application of bill-and-keep to interstate access traffic. In that paragraph, the Commission noted that, while “[t]he long-term goal of this *NPRM* is to develop a uniform regime for all forms of intercarrier compensation, including interstate access,” it did not “anticipate implementing major changes to our access charge rules in the initial phase of this proceeding.” *Developing a Unified*

have in common is a pervasive need for regulation: because any given LEC is entitled to collect compensation from other carriers to recover costs associated with the LEC's own network, regulators must ensure that the rates charged bear some resemblance to the costs incurred.

Bill-and-keep would eliminate such intercarrier compensation and would instead require each carrier to *internalize* the costs of its network and pass them on to its own end users. Thus, particularly where those end users have choices among telecommunications providers, bill-and-keep would permit market forces, rather than regulation, to determine the best means for recovering those costs; and, in *all* circumstances, it would deprive carriers of any opportunity to exact supracompetitive rates from another carrier for the termination of any call. In a nutshell, that emphasis on simple, market-driven solutions to traditionally vexing regulatory problems explains why bill-and-keep is preferable to either CPNP or the access charge regime. Bill-and-keep is preferable to those alternatives *now* as a method of eliminating arbitrage opportunities, as the Commission has learned in the context of ISP-bound traffic. And, as discussed below, bill-and-keep will become even more preferable as competition continues to develop and the need for regulation of end user rates subsides. Because in this proceeding the Commission should pick a compensation rule to last well into this new century, it should choose a rule that is designed to accommodate, rather than frustrate, the development of full-blown competition in this industry.³

Inter-carrier Compensation Regime, Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132 (rel. Apr. 27, 2001) ("NPRM"), The Commission explained that, under the so-called *CALLS* plan, the structure of current access charge regime for price-cap LECs will persist, with some modifications, until the expiration of the plan on June 30, 2005. See *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962 (2000) ("CALLS Order"). A similar transitional plan has been proposed for non-price cap LECs. See *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Notice of Proposed Rulemaking, 16 FCC Rcd 460 (2001).

³ Under the Commission's current rules for "local" traffic covered by 47 U.S.C. § 251(b)(5), a terminating carrier is entitled to collect, within the category of "termination," only the costs of

A. **Bill-and-keep is the most direct, deregulatory solution to the terminating access monopoly problem.**

At its root, the problem of intercarrier compensation arises because there are many telecommunications networks in the world, calls must cross from one network to another, and some rule must govern how compensation for the costs of those calls should be allocated across those networks. The traditional solution is to permit the terminating carrier to charge the originating carrier (or the IXC) for its costs in completing the call. The most basic flaw in that approach is that the terminating carrier has an obvious incentive to charge other carriers rates that exceed compensatory levels. Moreover, because the terminating carrier typically controls the only switch and only line leading to the called party (and thus enjoys a so-called "terminating access monopoly" in placing calls to that party), it often has not just the incentive, but also the ability, to charge extracompensatory rates to the other carriers, unless regulators step in to cap the rates. See *NPRM* ¶ 53.

end-office switching; it may not recover any portion of its fixed loop costs, which are borne entirely by that carrier's end users. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16024-25 ¶ 1057 (1996) ("Local Competition Order"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98 and 99-68, FCC 01-131 (rel. Apr. 27, 2001) ¶ 68 ("ISP Reciprocal Compensation Order"). (Under the existing access charge regime, the regulatory goal, though not in all cases the current practice, is to remove loop costs from the charges that IXCs pay LECs.) Thus, the most straightforward difference between bill-and-keep and CPNP is that, under CPNP, the originating carrier compensates the terminating carrier for the costs of end office switching (in addition to transport), whereas under bill-and-keep the terminating carrier absorbs those end office switching costs itself. The question of transport is somewhat more complicated: as discussed, under both CPNP and some but not all versions of bill-and-keep, the originating carrier pays all the costs of transport. (Under the access charge regime governing interexchange calls today, the IXC pays the applicable transport costs.) We discuss these distinctions in greater detail below.

So long as one carrier may charge others for the costs of terminating calls, this “terminating access monopoly” would be a problem even under the best of circumstances. The terminating carrier could often succeed in imposing extracompensatory rates even if the carriers that must pay them were able (and they usually are not) to flow them back to their own end users. That is so because those end users typically have no control over the *terminating carrier’s* subscribers and thus are likely to have little leverage in persuading those subscribers to choose a different carrier with lower terminating rates. As it happens, existing regulation makes the problem even worse, because it generally *precludes* the originating carrier or the IXC from flowing a particular terminating carrier’s charges back to the calling parties or from assessing those charges on the terminating carrier’s own customers. For example, state regulators often (though not always) preclude incumbent LECs from imposing usage-sensitive rates on residential subscribers for local calls; that is one reason why incumbent LECs have complained that their end users lack adequate price signals to use the local network efficiently when placing dial-up calls to ISPs. An analogous restriction arises in federal law under 47 U.S.C. § 254(g), which requires IXCs to spread their recovery of access charges across their entire customer base – and therefore shields the calling party from any awareness of, much less any need *to* complain about, the access charges assessed by the terminating LEC.⁴

Properly implemented, bill-and-keep would address the very root of the terminating access monopoly problem by depriving the terminating carrier of the right to collect from another carrier any amount for the termination of a call. Conversely, so long as the Commission retains the CPNP and access charge regimes, the terminating access monopoly problem will

⁴ See 47 U.S.C. § 254(g) (“the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas.”).

persist and, particularly when combined with regulatory restrictions on the flow-back of terminating carrier charges to calling parties, will always create a need for regulation to keep those charges under control. Such regulation has traditionally taken the form of access charge regulation (for interexchange calls) and reciprocal compensation rules (for local calls). Indeed, the consequences of the terminating access monopoly are so acute that the Commission recently had to take the unusual step of subjecting CLECs to its general rate regulation authority under section 201 of the Communications Act, limiting the access charges that CLECs may assess IXCs for the termination of interexchange calls.⁵

The Commission's need to exercise that general ratemaking authority over CLECs is a powerful sign that something fundamental is wrong with the existing intercarrier compensation regime. Over the long term, as consumer choices expand, fewer and fewer carriers will be dominant, and more and more carriers should be freed from any need for regulatory oversight of the rates they charge their end users. Put another way, in the long run, most carriers will be CLECs, whether or not they once were ILECs. In its starkest terms, therefore, the question here is whether it makes sense, as an intercarrier compensation policy for the new competitive telecommunications era, to subject all carriers (including CLECs) to more regulation rather than less. As discussed in the following sections, the answer is plainly no, and bill-and-keep – which would resolve the terminating access monopoly problem potentially *without* regulation – is a far preferable alternative.

⁵ See *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, FCC 01-146 (rel. Apr. 27, 2001).

B. Properly implemented, bill-and-keep would leave the question of cost recovery, as much as possible, to market forces rather than regulation.

Few issues have been the subject of greater regulatory controversy in recent years than (i) what the “true” costs of terminating telecommunications traffic are, (ii) what the most rational rate structure for recovering such costs is (*e.g.*, per minute vs. flat-rated, the proper role for “peak load” considerations, etc.), and (iii) whether termination costs are typically the same for one class of carriers (such as incumbent LECs) as they are for another (such as CMRS providers or those CLECs that specialize in ISP-bound traffic). And, as the Commission itself has acknowledged, regulators, despite their expertise and dedicated effort, are unlikely ever to set termination rates at truly efficient levels. *See ISP Reciprocal Compensation Order* ¶¶ 75-76. That is so for several independent reasons.

First, it may be *conceptually* impossible for any regulator to devise a single, economically rational mechanism for recovering termination costs. In a traditional business with low fixed and substantial incremental costs, a company is expected to set price at marginal cost. But one attribute of a typical telecommunications network (and of any industry with very high fixed costs and low marginal costs) is that, at all points on the supply-demand chart, average cost exceeds marginal cost. Thus, setting prices at marginal cost would obviously leave the telecommunications company unable to recover its fixed costs.

That attribute traditionally fueled the beliefs that a telecommunications network is a natural monopoly; that one carrier (*e.g.*, the Bell System) should provide ubiquitous services within a particular calling area with minimal interconnection obligations; and that rates could be adjusted to reflect a wide range of different political and social goals so long as that carrier’s cost recovery was sufficient in the aggregate. Ever since MCI began offering services in competition with the Bell System, however, regulators have struggled with the problem of setting intercarrier

rates for recovery of costs. There is no economically satisfying solution to that problem, because (1) individual calls “cause” only very small (and sometimes negligible) marginal costs, and (2) every carrier must find some way to recover its fixed costs over time. Traditionally, the Commission has regulated money flows from one carrier to another largely (though by no means entirely) on a per-minute basis, even as it has looked for additional ways to convert per-minute charges into flat-rated ones.⁶ For example, that per-minute cost-recovery framework has largely governed access charges and compensation for LEC-to-LEC traffic, including ISP-bound traffic.

But per-minute cost recovery – and, more generally, any single regulatory plan for intercarrier cost recovery – inevitably fails to reflect the way in which costs are actually incurred. The case of transport and termination costs, the costs principally at issue in this proceeding, is particularly instructive. A carrier incurs most such costs not when it terminates a given call, but when it purchases the switching capacity necessary to ensure that the call can be terminated during the peak load portion of the day. *See, e.g., ISP Reciprocal Compensation Order* ¶ 76. Indeed, for that reason, per-minute termination pricing arguably creates a cross-subsidy running from those who use the network principally during off-peak hours to those who use it principally during peak hours. Of course, regulators could try to tweak the system such that carriers charge more for use during peak periods, an approach analogous to a cost-recovery methodology sometimes used in the electric power industry.⁷ But, even apart from the pragmatic obstacles to

⁶ *See CALLS Order*, 15 FCC Rcd at 13017 ¶ 134; *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16034-35 ¶¶ 123-24 (1997); *see also Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14327-33 ¶¶ 208-225 (1999) (“Pricing Flexibility Order”).

⁷ *See* W. Kip Viscusi, John M. Vernon & Joseph E. Harrington, *Economics of Regulation and Antitrust* 379-86 (3d ed. 2000).

that approach (discussed below), that arrangement would also misrepresent the inevitably lumpy manner in which costs (*i.e.*, the costs of the necessary switching capacity) are incurred.⁸

Second, even if it were *conceptually* possible for regulators to set cost-sensitive rates to recover termination costs, the pragmatic obstacles might nonetheless be insurmountable. To begin with, switching technology changes over time, and regulation simply cannot keep pace with the latest cost-reducing developments. Also, because different carriers have different network architectures and termination facilities, they have different costs of termination, and it would be nearly impossible for regulators to address those costs on a carrier-by-carrier (or switch-by-switch) basis. As the Commission has rightly observed, “there may be administrative difficulties in establishing peak-load pricing schemes that may outweigh the benefits,” since the differences in termination costs “are likely to vary depending on the network, and the amount and type of traffic terminated at a particular switch.” *Local Competition Order*, 11 FCC Rcd at 16028-29 ¶ 1064; *accord ISP Reciprocal Compensation Order* ¶ 76.

By definition, bill-and-keep would resolve many of these problems so long as every carrier has some flexibility in the assessment of retail end user rates. The most immediate benefits of bill-and-keep would appear in the form of a much smaller role for regulation in the business practices of CLECs and, where competition has freed them from traditional rate regulation, incumbent LECs as well. In those settings, the core advantage of bill-and-keep is that it would allow carriers to come up with menus of creative pricing plans to recover (from end users) the costs of the network generally, including the costs of terminating traffic. Where competition has developed, those plans would be subject to full-blown market pressures: if the

⁸ As discussed below, many of these concerns also apply to transport costs, which are lumpy as well. Cables and fibers used for such transport are installed in bulk, not on an incremental strand-by-strand basis as they are needed.

rates are too low, the carrier will fail to recover its costs, and if they are too high (compared to what other carriers offer), consumers will switch to other carriers. Those market pressures are much more likely than regulatory prescriptions to produce efficient results.

As discussed in Section III below, a true solution to this set of problems would require a commitment, not just to bill-and-keep, but also to some flexibility in the rates that carriers may charge their end users for the recovery of costs that used to be recovered from other carriers. But bill-and-keep would remain a necessary element of the solution for the reasons discussed elsewhere in this section. Moreover, precisely *because* it shifts the cost recovery responsibility to end users rather than other carriers, bill-and-keep would permit far greater flexibility, and thus far greater efficiency, than the existing intercarrier compensation schemes in the recovery of termination costs, even if those resulting rates are still subject to regulatory oversight. That is because a carrier has a steady, one-to-one relationship with any given subscriber that it does not have with the multiplicity of other carriers. A carrier and its subscriber can enter into a variety of efficient plans customized to their particular needs – *e.g.*, a large bucket of minutes for a flat monthly fee. Under the existing compensation schemes, by contrast, each carrier may generally *have* to recover costs from every other carrier on a call-sensitive basis because there may be no other feasible way to allocate such costs *among different carriers*. That fact alone may typically preclude any non-usage-sensitive rate structure for the recovery of termination costs under any CPNP regime.

C. Bill-and-keep would reduce opportunities to engage in regulatory arbitrage and anticompetitive uncertainty about the future course of regulation.

Any time a regulator sets intercarrier compensation rates at levels that do not faithfully track the frequently changing costs of the work performed – a problem that, as discussed, will beset any effort to approximate termination costs with regulated rates (see *ISP Reciprocal*

Compensation Order ¶¶ 75-76) – the inaccuracy will give rise to destabilizing arbitrage opportunities. The most notorious example involves the termination of ISP-bound traffic. Although many CLECs have provided a variety of services to a broad base of customers, some CLECs have specialized in the termination of traffic to ISPs. CLECs have done so not because that class of services creates greater overall *value* than other telecommunications services, but principally because (until the Commission intervened this past April) the prescribed termination rates exceeded the underlying costs of termination, and the CLECs in question were thus able to extract extracompany subsidies from originating carriers. *See ISP Reciprocal Compensation Order* ¶¶ 67-76. As discussed above, that problem was exacerbated by the fact that most incumbent LECs cannot flow those extracompany costs back to the end users that make the calls at issue, because, given existing regulatory obstacles, most incumbents cannot generally charge residential subscribers usage-sensitive rates for local traffic or dial-up Internet-bound traffic. As a result, the end users initiating such traffic received no price signals encouraging them to use the network efficiently.

Moreover, because the effects of regulation on the marketplace are so unpredictable, the short-term arbitrage opportunities created by regulation sow uncertainty and instability, and those factors in turn impair rational investment decisions.⁹ That is one essential lesson of the ISP reciprocal compensation experience: whenever a regulatory arbitrage opportunity arises, a few carriers will adopt business plans designed primarily to take advantage of that opportunity. At

⁹ Arbitrage opportunities can also retard the deployment of value-creating new services to consumers. For example, DeGraba claims that, “[b]ecause the use of per-minute termination charges appears to be incompatible with the use of packet-switched technology, carriers that terminate more traffic than they originate may well refuse to cooperate with other carriers in jointly adopting compatible packet-based technologies if this means that they will lose reciprocal compensation revenues.” DeGraba ¶ 85.

that point, changing the rules to restore regulatory rationality can cause severe economic dislocations.

Bill-and-keep would reduce these inefficient arbitrage opportunities by requiring each carrier to internalize its own costs of termination, thereby replacing regulatory solutions to the question of cost-recovery with market-driven solutions. The example of ISP-bound traffic is instructive. So long as originating LECs must pay for the costs of terminating such traffic, and so long as they are barred from “flowing back” those costs to the particular end users that cause them, the result will be economically inefficient on two levels: termination rates will imperfectly match termination costs, and – just as important – cost causers will receive no price signals (from either a carrier or an ISP) to use the network efficiently.

Bill-and-keep would largely eliminate both of those problems. A CLEC providing termination services to an ISP, for example, would negotiate a price with the ISP itself to cover the costs of termination, and the products of such free-market negotiation would almost certainly approximate “true” termination costs more effectively than regulation could. Similarly, bill-and-keep would, in those same circumstances, provide what CPNP can never provide (at least in the absence of any flow-back mechanism): price signals for end users to use the network efficiently. In particular, since bill-and-keep would require ISPs, rather than originating LECs, to pay for the costs of termination, those ISPs would often have, for the first time, an incentive to ensure that their own subscribers use the network with greater efficiency.

A different regulatory dilemma that has arisen from existing intercarrier compensation schemes concerns the recent growth of Internet telephony services. The popularity of Internet telephony has grown in part because enhanced services are typically exempt from access charges

under current regulation.” The contours of that “access charge exemption,” however, are unclear. For example, some IXCs claim that *any* voice traffic employing IP is subject to the access charge exemption, even when it is otherwise indistinguishable from conventional long-distance traffic, a position that, in Qwest’s view, is inconsistent with existing Commission policy. So long as the access charge regime persists in anything like its current form, however, disputes concerning the scope of the exemption will assume extraordinary importance as the technology for delivering interexchange voice calls through Internet protocol (“IP”) becomes more and more efficient. To ensure technological neutrality in this setting, the Commission could either repeal the access charge exemption but do nothing else or it could eliminate the access charge regime to which the exemption applies. Because that regime is itself fatally flawed for the reasons discussed elsewhere in these comments, Qwest supports the latter option.

The arbitrage issues raised by Internet telephony and those raised by intercarrier compensation for ISP-bound traffic may differ in a number of respects, but they share two principal characteristics. First, they reveal that the multiplicity of compensation schemes for different classes of traffic enormously complicate predictions about the regulatory obligations of any given carrier with respect to any other carrier. Second, and more generally, they both point to the disconcertingly prominent role that regulation has assumed in shaping the business plans that define the present and future course of this industry.

The ultimate shape of the telecommunications world should not turn on the outcome of such academic regulatory disputes as whether a LEC-to-CLEC handoff of ISP-bound traffic is more “like” an ordinary exchange of local traffic or more “like” the cooperation of two LECs in

¹⁰ See generally *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) (“1998 Report to Congress”).

the origination and termination of conventional interexchange traffic. Nor should it turn on the fine points of distinction between “computer-to-computer” versus “phone-to-phone” IP telephony. *See 1998 Report to Congress*, 13 FCC Rcd at 11543-44 ¶¶ 87-88. The Commission should drain such disputes of their principal significance – and eliminate the anticompetitive uncertainty that they have sown – simply by adopting bill-and-keep as the single compensation rule for the hand-off of all traffic over the public switched network for any traffic that touches that network.”

Finally, although the Commission had once expressed concern that bill-and-keep would create inefficient incentives for carriers to specialize in *originating* traffic, it has since suggested that this concern may have been somewhat overstated. As it now observes, “[a] carrier must provide originating switching functions and must recover the costs of those functions from the originating end-user, not from other carriers. Originating traffic thus lacks the same opportunity for cost-shifting that reciprocal compensation provides with respect to serving customers with disproportionately incoming traffic.” *ISP Reciprocal Compensation Order* ¶ 73. Of course, it is always hazardous to predict that any given regulatory regime, even a minimalist one such as bill-and-keep, will produce no regulatory anomalies. But we fully agree with the Commission that bill-and-keep is far less likely to produce such anomalies than the CPNP regime has already been shown to produce.

¹¹ The Commission has not sought comment on intercarrier compensation for any hand-off of information service traffic to an Internet backbone. *Cf. NPRM* ¶ 2. In the backbone context, compensation issues have worked themselves out without any government involvement at all: no backbone provider is dominant; “peers” drop traffic off to other peers at the closest point of interconnection; and although non-peers must typically pay for transport and termination services from other backbone providers, those services are typically quite competitive. *See generally* Michael Kende, “The Digital Handshake: Connecting Internet Backbones,” OPP Working Paper #32 (2000).

D. Bill-and-keep is at least as consistent as CPNP with principles of cost causation.

Supporters of the existing CPNP approach claim that bill-and-keep is inefficient because it does not place all the costs of a call on the party that initiates the call. Although bill-and-keep is not a perfect cost-allocation scheme, it is nonetheless at least as efficient, and perhaps more so, than CPNP in this respect.

In any call, both the calling party and the called party make choices that result in the accrual of costs. A calling party chooses to place a call and, at every moment during the call, chooses whether to allow it to continue. The called party chooses whether to accept the call and also chooses, at each point after the first moment, whether to maintain the connection. (To be sure, as discussed below, the terminating carrier typically has no control over whether it incurs call set-up costs; it is in that respect at the mercy of the calling party.) For its part, the terminating carrier makes investment choices that determine the efficiency of its network architecture and termination technology, and those choices also affect the level of costs associated with the receipt of a call.

Under the CPNP regime, the called party and its carrier bear none of the costs of the call, even though each is in a position to reduce those costs (the called party by hanging up sooner, and the terminating carrier by cutting termination costs). That approach is inherently inefficient: because both the called party and its carrier are able to reduce the costs incurred in a call, they should bear some responsibility for paying those costs. Indeed, at least in theory, the CPNP regime could deter many calls from being made even when the aggregate benefits of a call to both parties exceed any usage-sensitive costs of the call, at least where the two parties have no independent business relationship and the originating party has no firm expectation that the called party will reciprocate in the future with an all-expenses-paid call of his own. For example,

if the cost of an interexchange call (or a local call billed on a usage-sensitive basis) is 3, and each party to the call would derive from it a benefit of 2, the call *should* be made from an efficiency perspective, but is *unlikely* to be made unless its costs can be spread out to each party that benefits from it.

For these reasons alone, a bill-and-keep scheme is as efficient as any CPNP approach. It gives calling parties appropriate incentives to make efficient calls that would not otherwise be made; it gives called parties appropriate incentives to end calls earlier if their continuation would be inefficient; and it places greater obligations on each carrier to internalize the costs of its network, thereby inducing each carrier to ensure that it employs efficient termination technology.¹² Bill-and-keep may not embody the perfectly efficient solution to the problem of cost causation: the share of costs a called party may appropriately be said to “cause” is a complex issue, and the “true” share (however defined) may well be different from the share that the called party would be expected to bear under any particular version of bill-and-keep. But, at a minimum, the solution bill-and-keep prescribes to the cost causation problem is no more arbitrary than the solution prescribed under the CPNP approach.

11. The Question of Transport Requires Considerable Analysis and Deliberation.

Under any bill-and-keep regime, a carrier would be expected to provide its own terminating switches and loops and, as a general matter, would be precluded from recovering the costs of those facilities from originating carriers. There remains the problem of assigning

¹² Of course, even under a CPNP regime, carriers will have a substantial incentive to reduce their termination costs, because (1) regulated termination rates tend not to be based on the actual termination costs of any given carrier other than the incumbent LEC, and (2) many calls will require a carrier to internalize termination costs no matter what the intercarrier compensation scheme, because those calls will have *originated* on the terminating carrier’s network as well. Nonetheless, at the margin, bill-and-keep does present some additional incentive beyond what CPNP would provide to ensure efficiency in termination.

ORIGINAL

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

In the Matter of)
)
Developing a Unified Intercarrier)
Compensation Regime)

CC Docket No.

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Moreover, as several CLECs observe, the Commission should view with considerable skepticism any suggestion by incumbent LECs that bill-and-keep makes less sense for access traffic than for other kinds of traffic – or that, five years after enactment of section 254, regulators should still postpone the day in which a competitively neutral funding mechanism, rather than the nationwide customer base of conventional IXCs (see 47 U.S.C. § 254(g)), subsidizes network costs in high-cost areas. The Commission should thus simultaneously adopt bill-and-keep for all traffic within its jurisdiction and encourage the states to do the same.

ARGUMENT

I. Bill-and-keep is preferable to alternative intercarrier compensation schemes, and the policy arguments of its opponents are without basis.

A. Bill-and-keep is the best long-run solution to the terminating access monopoly problem.

There are two serious contenders for the role of unified intercarrier compensation scheme in the long run: a “cost-based” CPNP approach, and bill-and-keep. CPNP would require the government to regulate certain intercarrier rates in perpetuity, whether a given carrier is dominant or not. Moreover, because such regulation is necessarily both imperfect and contentious, it would guarantee a world of arbitrage, litigation, and industry instability. Bill-and-keep avoids those problems, and for that reason alone it is the better choice, particularly over the long term.

1. Bill-and-keep is the optimal solution to the terminating access monopoly in an increasingly competitive world.

The first major advantage of bill-and-keep over CPNP derives from the fact that, whereas there would always be an obvious need to regulate the termination rates that non-dominant carriers charge other carriers, there is never a need to regulate the rates

they charge their end users. Because bill-and-keep would require carriers to recover from *end users* costs that CPNP would entitle them to recover from *other carriers*, bill-and-keep would eliminate the terminating access monopoly with little or no regulation of non-dominant carriers (and potentially, in some contexts, less regulation of dominant carriers as well). In contrast, CPNP would guarantee permanent, heavy regulation of every carrier, whether dominant or not. That advantage is comprehensively discussed in the attached Declaration of William Rogerson ("Rogerson Decl."), at 8-15.

Here it is important to focus on the severity **and** breadth of the "terminating access monopoly." That term refers not only to the recent efforts by some CLECs to charge IXCs radically above-cost rates for the termination of interexchange traffic, although that is perhaps the most obvious and familiar manifestation of the problem, but more generally to an economic phenomenon that arises whenever two or more carriers must cooperate in the completion of a call. In any given local or long-distance call involving more than one carrier, the terminating carrier typically controls the only line and local switch connecting the called party to the network, and the caller typically lacks any relationship with the terminating carrier. As a result, the terminating carrier has strong incentives to extract as high a payment as possible from the carrier with which the caller does have a relationship, and the caller is normally powerless to do much about it.

That terminating monopoly problem would thus require pervasive rate regulation of a carrier's termination rates *even if* the other carrier were entitled to pass the high costs of termination back, in the form of higher rates, to the particular calling parties that place the calls at issue. *See* Rogerson Decl. 9-12. But the problem is even worse than that, because various regulatory obstacles typically preclude ILECs (for local calls) and IXCs

(for long-distance calls) from passing such costs back to a specific calling party. *See, e.g.,* 47 U.S.C. § 254(g). The calling party thus normally lacks any interest in affecting the rates the terminating carrier charges for local or long-distance calls. *See* Rogerson Decl. 9, 12-13.³ Indeed, those same regulatory obstacles deprive a calling party of any incentive to object when a LEC charges an IXC arbitrarily high rates for *origination* as well. *See id.* at 13-14. In short, because the existing regime insulates LECs from any pressure *by their own end users* to lower above-cost intercarrier rates, CPNP does not create the price signals needed to ensure rational correspondence between prices and cost. The Commission has traditionally turned to rate regulation to address that problem: regulation under section 251(b)(5) of transport and termination rates for local traffic, and regulation under section 201 of access charges for interexchange traffic.

Bill-and-keep would eliminate, at the source, the very need for regulation of intercarrier termination charges. Some commenters observe that bill-and-keep would not immediately eliminate the need for regulation of all termination charges, because, until competition develops, dominant carriers may still have the ability and incentive to charge their end users more than the economic cost of the services they provide. *E.g.,* AT&T Comments 17. Even in the short term, that argument misses the key points that CLECs are already significant terminators of traffic; that, where they are, they hold a monopoly over terminating access; and that bill-and-keep would thus dramatically reduce the extent to which this Commission would need to regulate them, since there would be no need to

³ Under CPNP, even if ILECs and IXCs *were* permitted to pass these costs back to calling parties, it is unlikely that calling parties would be sufficiently motivated by (or even attentive to) inefficiently high termination rates that they would withhold calls to end users of particular carriers and thereby exert indirect pressure on those carriers to lower those rates to efficient levels. *See* Rogerson Decl. 8-12.

regulate the rates they charge their own end users (as distinguished from the rates they charge other carriers).

The argument for CPNP, and against bill-and-keep, becomes even weaker when analyzed within the long time horizon that this Commission should consider when deciding the best way to bring long-term rationality to the field of intercarrier compensation. The premise of the 1996 Act, and of the Commission's regulatory philosophy as a whole, is that facilities-based competition will succeed over the long term in providing an ever-growing number of consumers with an expanding set of telecommunications alternatives to incumbent LECs. The parties may dispute the details of that inexorable trend, but even today, and even in the residential sector, competition is more widespread than industry pessimists would have this Commission believe. Wireless services, for example, are already available as an alternative to landline telephony for most Americans. "While most wireless customers may not be willing to 'cut the cord' just yet in the sense of canceling their subscription to wireline telephone service, it is indisputable that wireless service has significantly changed the way Americans communicate. . . . For some, wireless service is no longer a complement to wireline service but has become the preferred method of communication."⁴ Moreover, in a world in which cable modem service has leapt out to an early head start over DSL as the predominant broadband technology for residential subscribers (in part because of regulatory disparities), an increasing number of consumers can be expected to choose the

⁴ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Sixth Report, FCC 01-192 (rel. July 17, 2001), at 32.

cable modem platform as the source for all of their telecommunications needs, including voice telephony.⁵ And, of course, such forms of intermodal competition merely supplement the statutory rights CLECs enjoy to an ILEC's own network under the 1996 Act.⁶

It is against this backdrop that the Commission should review AT&T's claim (Comments 17) that bill-and-keep would have no effect on the need to regulate termination rates and would simply change (from carriers to end users) the identities of the parties that must pay such rates. As AT&T appears to recognize, its position rests on the premise that competition is futile and that incumbent LECs will retain the same market position in ten, fifteen, or twenty years that they have today. If that premise is false – and all indications are that it is false – the advantages of bill-and-keep over CPNP become dramatically apparent. In a competitive world populated by non-dominant carriers, the choice between bill-and-keep and CPNP is, quite literally, a choice between continued heavy regulation of this industry and very little regulation at all.

⁵ See Remarks of FCC Chairman Michael K. Powell, "Digital Broadband Migration' Part II" (Oct 23, 2001) (<http://www.fcc.gov/Speeches/Powell/2001/spmkp109.html>), at 3-4 (noting "the real competitive choices that have been introduced through alternate platforms, particularly wireless and cable telephony services," and predicting that "[a] great deal of competition . . . , particularly for residential consumers, will come from other platforms such as cable and wireless systems").

⁶ See *Local Telephone Competition: Status as of December 31, 2000* (Industry Analysis Div. May 2001), at 1 (reporting a "29% growth in CLEC market size during the *second half* of the year 2000") (emphasis added); *id.* at 2 (reporting that, over the course of the year 2000, the number of UNE loops that ILECs provided to other carriers increased "by 62%, to a total of about 5.3 million," in addition to the 6.8 million lines resold to CLECs).

2. Regulation is incapable of getting intercarrier rates "right."

Opponents of bill-and-keep further suggest that regulation is just as capable as the market of fixing an appropriate price to recover the costs of termination (or, in the case of access traffic, the costs of origination as well). Those opponents both overestimate the ability of regulation to "get the price right" and underestimate the social and economic costs of getting the price wrong. AT&T, for example, contends that any arbitrage problem associated with CPNP "is *easily solved* simply by strict application of the existing requirement of cost-based prices." AT&T Comments 8 (emphasis added).

These opponents appear unaware that regulators have tried and failed for many years to produce prices for origination and termination services that are accurately structured to reflect the "costs" of providing those services, and the result has been litigation, arbitrage, and regulatory uncertainty. Indeed, one need look no further than the Fifth Circuit's recent decision rejecting the 6.5% X-factor justification in the *CALLS Order*, or the D.C. Circuit's rejection of the Commission's prior rationale for the same X-factor, to recall how impossible it is to achieve regulatory certainty in this area so long as one carrier may charge another for its own origination or termination costs.⁷ And, as discussed in Qwest's opening comments (at 12-15), the fault lies not in the regulators but in the type of regulatory question at issue.

"Getting the rates right" is impossible enough on several levels even when the Commission has answered all the basic methodological questions. See Rogerson Decl. 14-15, 18-20. First, as the experience in the states has shown, regulators acting in good

⁷ See *Texas Office of Public Util. Counsel v. FCC*, 265 F.3d 313, 328-29 (5th Cir. 2001); *United States Tel. Ass'n v. FCC*, 188 F.3d 521 (D.C. Cir. 1999).

faith can and do disagree profoundly in the application of a single methodology – TELRIC – to any given rate element.⁸ Second, regulators cannot, and should not, be expected to keep pace on a monthly basis with the latest price-reducing developments in termination rates. *Id.* at 5, 14-15. And, even if they could, the industry's inability to predict what regulators will do itself tends to skew the market. Bill-and-keep would altogether eliminate that problem by specifying a single, predictable, and permanent solution to the recovery of termination costs.

Third, simply as a matter of practical necessity, CPNP narrows the options available for the recovery of termination costs. CPNP all but requires some variant of per-minute pricing because, as a practical matter, that is the only feasible way to enable a terminating carrier to allocate responsibility for termination among the multiplicity of other carriers that deliver traffic to any given subscriber of the terminating carrier.⁹ Bill-and-keep, in contrast, would permit carriers to experiment with various combinations of usage-sensitive and flat-rated charges on the subscribers with whom they have a steady, ongoing relationship – an option that is infeasible under CPNP. This distinction between the two approaches is quite significant, because, as discussed in Qwest's opening comments (at 12-15), no per-minute rate can accurately reflect the costs of providing

⁸ See, e.g., *In the Matter of Joint Application by SBC Communications, Inc., et al., for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, 191 (rel. Jan. 22, 2001) (“TELRIC-based pricing can result in a range of rates, which is wide enough to encompass” “significantly different” rates in different states).

⁹ Indeed, in curtailing the use of the flat-rated PICC on IXCs in favor of an increased subscriber line charge, the Commission itself indicated that direct end user charges allow for more “straightforward, economically rational pricing structure[s]” than do intercarrier charges. *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962, 12991-92, ¶ 78 (2000) (“*CALLS Order*”) (eliminating the residential and single-line business Presubscribed Interexchange Carrier Charge).

termination services. From an economic perspective, the costs to be recovered are the extremely lumpy costs (unassociated with any particular call) of assuring adequate capacity to accommodate traffic during peak load periods.¹⁰ When the market is permitted to decide how those costs should be recovered (as, for example, in the unregulated retail plans offered by wireless carriers), the result is a range of different solutions, most of which involve some element of flat-rated pricing. Again, for the network costs at issue here, that is an option available only under bill-and-keep, not under CPNP.

Even more fundamentally, CPNP would require the Commission and the states to continue playing a heavy regulatory role in the resolution of disputes among different categories of carriers about whether and how each such category should be treated differently in the intercarrier compensation calculus. Such disputes already abound within the industry. For example, CLECs and ILECs argue about whether, as AT&T contends, a CLEC should be able to “charge higher ‘tandem’ switching rates when it terminates calls from a switch in its efficient, single-layer switching architecture that serves a geographic area comparable to a tandem switch in the incumbent’s legacy two-layer switching architecture.” AT&T Comments iii. At the same time, CLECs and ILECs argue about whether carriers that specialize in terminating traffic to a specific kind of customer – such as ISPs – incur lower termination costs and should be compensated less. *See ISP Reciprocal Compensation Order* ¶ 93. Similarly, LECs and CMRS

¹⁰ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68, FCC 01-131, at ¶ 76 (rel. Apr. 27 2001) (“*ISP Reciprocal Compensation Order*”).

providers argue about whether the latter incur higher termination costs than the former.

See, e.g., *NPRM* ¶¶ 104-05; AT&T Wireless Comments 22-23.

Unlike bill-and-keep, CPNP compels the Commission to resolve such disputes. And, to resolve them, the Commission must make intrusive, value-laden comparisons among incommensurable network architectures and technologies and the costs they generate in handling particular kinds of traffic. Such comparisons are inevitably inexact, transitory, controversial – and unnecessary. Indeed, the Commission could avoid such comparisons altogether by moving to a bill-and-keep regime. Under bill-and-keep, the Commission would no longer need to ask whether CLECs have achieved unusual efficiencies by specializing in a single class of customers. Nor would it need to decide whether CLECs should be paid more than ILECs for termination at the central office on the theory that “CLEC networks may use long-loops or fiber rings in place of the tandem switches deployed by ILECs,” and “delivery of a call to the CLEC central office may often be the functional equivalent” – for pricing purposes – “of delivering a call to the ILEC tandem office.” *Focal Comments* 45. These cross-technology comparisons are arbitrary and, ultimately, deeply inimical to any truly deregulatory approach to telecommunications. More fundamentally, no carrier should be compelled to subsidize, through another carrier’s origination or termination rates, that second carrier’s choice of network architecture. That second carrier should have its choice validated – or not – based on the willingness of its own end users to support it by paying rates to that carrier.

3. The regulatory inaccuracies inherent in CPNP have significant market-distorting consequences.

Contrary to the position of CPNP’s champions, the arbitrage consequences of not “getting the price” right under CPNP are considerable and ultimately quite harmful to the

industry. As the ISP experience has shown, an entire segment of the telecommunications industry can grow up in reliance on a gap between termination rates and costs, and the cost of making the necessary regulatory correction is further industry instability. In a competitive environment, so long as CPNP is the rule, such arbitrage opportunities will be unavoidable, because carriers will always look for ways to exploit the inevitable inaccuracies in government-imposed intercarrier rates. And the effects of such distortions will be particularly severe where – as is the norm under current regulation – the originating carrier or IXC lacks authority to pass artificially high intercarrier termination rates back to the specific end users that originate the calls. *See, e.g.*, 47 U.S.C. § 254(g); *see generally* Rogerson Decl. 13-14.

The ISP example illustrates the consequences of such regulatory distortion. Above-cost termination rates produced not just an artificial subsidy for heavy dial-up Internet usage, but a wealth transfer from ILECs (the originating carriers paying the above-cost rates) to CLECs (the terminating carriers that received those rates). Because the states did not permit the ILECs to pass that burden back specifically to the end users who made ISP-bound calls (indeed, the states generally barred the ILECs from responding to the increased traffic by raising their rates at all), those end users received no price signals to use the ILECs' networks efficiently. This Commission wisely recognized that it makes no sense to subsidize heavy use of the Internet by artificially disadvantaging one class of carriers (and their shareholders or rate-payers) to the benefit of another. *See ISP Reciprocal Compensation Order* ¶¶ 66-76. Moreover, correcting the problem disrupted business plans that were based on gaming the regulatory system, and that in turn caused further economic dislocation. Contrary to the inexplicable position

taken by Time-Warner Telecom (Comments 10-11), the underlying culprit here was the regulatory problem, not the correction. And there would have been no such problem, and thus no need for subsequent correction, if the government had chosen bill-and-keep from the outset.

The type of arbitrage opportunity created by excessive *intercarrier* rates should be distinguished from the quite different arbitrage opportunities that arise when regulation sets an above-cost *retail* rate for a service offered by a dominant carrier, a competitive carrier offers the same service at an unregulated rate, and the market actors choosing between those two services *are the same ones who must pay the rate*. In that context, those market actors (typically end users) receive immediate price signals that cause them to choose the cheaper service, and that dynamic automatically begins moving industry prices towards costs.

That is not the case here: When a regulator sets *intercarrier* termination rates too high, it is often the case that *no* relevant market actor will receive appropriate price signals, and arbitrary intercarrier wealth transfers may persist without any market correction whatsoever. That is what was so pernicious about above-cost reciprocal compensation rates in the ISP-bound traffic context. Because the typical originating carrier (an ILEC) was barred from passing back to particular end users the termination rates charged by a CLEC serving an ISP, no end user had any incentive to avoid ISPs served by CLECs that charged above-cost rates, and the only mechanism for correcting the problem was a purely regulatory one. Such distortions will always be a threat so long as government engages in the precarious exercise of making one carrier pay for another's network costs.

B. Bill-and-keep is consistent with principles of cost-causation.

As explained in William Rogerson's Declaration (at 25-28), bill-and-keep is at least as consistent as CPNP with economic principles of cost causation. Indeed, the very premise of CPNP is that the calling party is responsible for all of a call's costs and that the called party is responsible for none. That premise is obviously false: the called party is capable of precluding costs from being incurred simply by declining to take a call or choosing to terminate it, and the called party's network has continuous opportunities to pick more or less efficient terminating technology. The supposed economic advantage of CPNP is illusory on another level as well, because regulatory restrictions preclude carriers in a wide range of circumstances from passing the costs of specific calls back to the individual calling parties that supposedly "cause" them.

In questioning the economic foundation of bill-and-keep, most opponents attack a straw man: the notion, upon which arguments for bill-and-keep do *not* rest, that the calling party and the called party evenly share exactly the same benefit on any given call. *E.g.*, Time-Warner Telecom Comments 6. The question is not whether each party shares *benefits*, but whether each is a causer of *costs* in the sense that each stands in a position to preclude certain costs from being incurred. The answer to that question is undoubtedly yes: each carrier can take measures to lower the costs of termination, and each end user can take measures – from hanging up to requesting an unlisted number – to avoid call-related costs.

Second, and more fundamentally, the argument for bill-and-keep is not that it perfectly assigns costs to the parties that cause them, but that its method of allocating costs is at least as efficient as CPNP's alternative method and that it is preferable to

CPNP in the other respects discussed above (namely, an increased reliance on market forces rather than regulation in the recovery of each carrier's network costs, the elimination of arbitrage opportunities, and the preservation of long-term industry stability). There can be no credible argument that CPNP somehow does a better job than bill-and-keep of allocating costs: with respect to any given call, CPNP inaccurately presumes that the calling party must pay for 100% of the call, even though, by answering the telephone and permitting the call to continue, the called party is responsible for a significant percentage of the costs that are incurred.

Proponents of CPNP contend that this deficiency will be sorted out if every called party perceives an obligation to settle accounts by placing a commensurate number of calls back to the original calling parties. *E.g.*, AT&T Comments 23. But that is no answer at all. Many calls are made between parties without any kind of ongoing relationship, and there is no reason to believe that, even where parties do make an effort to call each other back, the resulting costs will be borne with anything approaching proportionality. In sum, the principle of cost-causation is not remotely a strike against, and if anything is further support for, the adoption of bill-and-keep over CPNP. See Rogerson Decl. 25-28.

- C. There is no basis for concern that bill-and-keep would induce carriers to specialize in originating traffic or would increase the number of unwanted calls.**

In the *ISP Reciprocal Compensation Order*, the Commission soundly repudiated its previous concern that bill-and-keep would give carriers uneconomic incentives to specialize in the origination of traffic. As the Commission observed there, “[a] carrier must provide originating switching functions and must recover the costs of those

functions from the originating end-user, not from other carriers. Originating traffic thus lacks the same opportunity for cost-shifting that reciprocal compensation provides with respect to serving customers with disproportionately incoming traffic.” *ISP Reciprocal Compensation Order* ¶ 73.

That analysis is correct. In contending otherwise, a few CLECs argue that bill-and-keep would enable carriers specializing in origination to undersell the rates that other carriers charge their own subscribers. *E.g.*, Time-Warner Telecom Comments 11. The CLECs’ argument is that those other carriers must charge their subscribers not just for the origination costs of any given call, but for the termination costs of that same call as well. This argument is without merit. If bill-and-keep is the intercarrier compensation rule, a carrier operating in a competitive environment will succeed in charging its end users only for the portion of network costs for which it is legally responsible. By hypothesis, that will not include the costs of terminating a call on another carrier’s network. As a result, there would be no regulatory incentive for a carrier to specialize in originating traffic, because the price it could successfully charge for performing that service would need to cover the quite significant costs of origination plus some significant portion of transport, and those would be the same costs that other, competing carriers would need to recover as well. *See* AT&T Wireless Comments 27-28.

Some CLECs contend that current ILEC retail rates are designed to recover both the origination and the termination costs of all (non-access) calls originating on the ILEC’s network. *E.g.*, Time-Warner Telecom Comments 23-25; *see also* Focal Comments 10-11. That contention, which the Commission has already rejected, is both inaccurate and irrelevant to the merits of bill-and-keep. As a factual matter, the

Commission has repudiated similar claims by the same CLECs “that ILEC end-user rates are designed to recover from the originating end-user the costs of delivering calls to ISPs.” *ISP Reciprocal Compensation Order* ¶ 88. As the Commission observed, “most states have adopted price cap regulation of local rates,” and thus “rates do not necessarily correlate to cost in the manner the CLECs suggest.” *Id.* at n. 174. That is not only true but an understatement. Even apart from the typical inability of ILECs to raise local rates to accommodate the growth of ISP-bound traffic, the use of price caps renders nonsensical any effort to draw a close correspondence between an ILEC’s current retail prices and the specific functions that are performed in the disposition of local calls.

In any event, even if ILEC rates were currently structured such that some CLECs would specialize in originating traffic if exempted from an obligation to cover termination costs, that fact could not logically support an argument against bill-and-keep. Unlike the low termination rates (and sharing of intercarrier revenues) that CLECs could offer ISPs before the Commission stepped in this past April, the lower retail rates charged by the CLECs for originating traffic would not reflect an arbitrary carrier-to-carrier wealth transfer or any other irrational subsidy. They would reflect only the underlying cost of providing the portion of the service for which those CLECs would be responsible under bill-and-keep. To the extent that ILECs respond to those low rates by reducing their own rates to compete for the same customers, that would be an obvious benefit of bill-and-keep, not a disadvantage.

There is, finally, no empirical basis for the argument that bill-and-keep would increase the number of unwanted calls by companies that place more calls than they receive, such as telemarketers. As an initial matter, it is obviously not the case that, as

AT&T contends, bill-and-keep would make “every call a collect call.” AT&T Comments 33. To the contrary, as the Commission has explained, carriers under a bill-and-keep regime – and thus the customers of those carriers – would need to cover the costs of each call’s origination as well as a substantial share of transport costs as well. *See ZSP Reciprocal Compensation Order* ¶ 73. There is no empirical basis for concluding that the volume of telemarketing calls would significantly increase if the costs of a call were split between originating and terminating carriers rather than, as now, borne entirely by the originating carrier. *See also* Rogerson Decl. 30-31.

Even if bill-and-keep were likely to increase the number of unwanted calls, the appropriate solution is not to reject bill-and-keep itself but to address the problem of unwanted calls directly. First, the market has already produced a number of caller identification and call blocking technologies that shield subscribers from unwanted calls, and such market responses can be expected to become even more effective over time. *See* Qwest Opening Comments 39. In any event, even if the market could not be trusted to solve this problem, the appropriate regulatory response would be to enforce direct restrictions on the ability of telemarketers to place calls to nonconsenting individuals. Indeed, the Commission now follows exactly that approach. As AT&T itself observes (Comments 32-33), there are already highly effective restrictions on the kinds of telemarketing calls that can be placed to the subscribers of any wireless service “*or any [other] service for which the called party is charged for the call.*” 47 C.F.R. § 64.1200(a)(1)(iii) (emphasis added). Moreover, the Commission and a number of states independently require telemarketers to place called parties on a “do not call” list upon request. *See* 47 C.F.R. § 64.1200(e)(2)(iii).

CERTIFICATE OF SERVICE
ARB 747

I hereby certify that I have served the attached Reply Testimony of Tom A. Linstrom upon all parties of record in this proceeding by U.S. mail and electronic mail, pursuant to OAR 860-013-0070, to the following parties or attorneys of parties:

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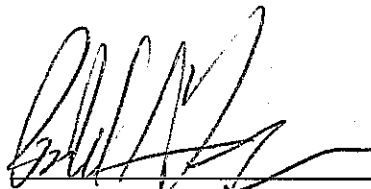
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I further certify that I have sent the attached Reply Testimony of Tom A. Linstrom by e-mail and U.S. mail to the following:

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