

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION  
DIRECT TESTIMONY OF GREGORY D. FOGLEMAN  
DOCKET NO. 000075-TP  
DECEMBER 1, 2000

ORIGINAL

DOCKET NO. 000075-TP - Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996.

WITNESS: DIRECT TESTIMONY OF GREGORY D. FOGLEMAN, Appearing on Behalf of the Florida Public Service Commission

DATE FILED: December 1, 2000

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FPSC-RECORDS/REPORTING

DIRECT TESTIMONY OF GREGORY D. FOGLEMAN

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**Q. Please state your name, address, and position with the Florida Public Service Commission.**

A. My name is Gregory D. Fogleman. My business address is 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399. I am employed as an Economic Analyst at the Florida Public Service Commission (FPSC) in the Division of Policy Analysis and Intergovernmental Liaison. My duties include developing positions on selected intergovernmental telecommunications issues, preparing comments on behalf of the FPSC in selected federal proceedings, and monitoring national level activities at the Federal Communications Commission (FCC), Congress, federal courts and the National Association of Regulatory Utility Commissioners (NARUC). I also serve as a staff member on the Federal-State Universal Service Joint Board, Federal-State Joint Conference on Advanced Services, and as Second Vice Chair of Administration at the NARUC Staff Subcommittee on Telecommunications.

**Q. Please describe your background and experience.**

A. I graduated from the University of Central Florida (UCF) in 1992 with a Bachelor of Arts Degree in Business Administration, majoring in economics and minoring in computer science. In 1995, I completed the Master of Arts in Applied Economics from UCF. During this time, I also

1 completed an internship with the Florida Department of  
2 Commerce, and was later employed by Lakeland Electric and  
3 Water from January 1995 to May 1996. My responsibilities  
4 there included conducting forecasts for service area  
5 population, short-term fuel costs, and water and energy  
6 demand. I was employed by the FPSC in July 1996 in the  
7 Division of Communications as a Regulatory Analyst III. My  
8 responsibilities included preparing and presenting  
9 recommendations concerning telecommunications issues,  
10 researching data regarding the telecommunications market for  
11 the 1996 Florida competition report, and calculating  
12 statewide average rates for taxation purposes. I was  
13 promoted to Regulatory Analyst IV in April 1998. Four  
14 months later, I was promoted to my current classification as  
15 an Economic Analyst. In July 1999, I was transferred to the  
16 Division of Policy Analysis and Intergovernmental Liaison  
17 where I perform the functions previously stated.

18  
19 **Q. Have you previously presented testimony before this**  
20 **Commission?**

21 **A. Yes.** I have filed testimony in Docket No. 000731-TP and  
22 Docket No. 000828-TP. These dockets were arbitrations of  
23 interconnection agreements with BellSouth by AT&T and  
24 Sprint, respectively. My testimony focused solely on the  
25 issue of reciprocal compensation for ISP-bound traffic to

1 provide background information to the Commission.

2

3 Q. **What is the purpose of your testimony?**

4 A. The purpose of my testimony is to discuss the regulatory  
5 treatment of ISP-bound traffic. In addition, I have  
6 summarized this Commission's, the FCC's, and other relevant  
7 state decisions relating to reciprocal compensation. I also  
8 recommend that the FPSC modify its policy of how reciprocal  
9 compensation is structured to more accurately reflect how  
10 costs are incurred.

11

12 Q. **What is "Reciprocal Compensation"?**

13 A. Section 251(b) (5) of the Telecommunications Act of 1996 (the  
14 Act) obligates all local exchange companies (LECs) to  
15 establish reciprocal compensation arrangements whereby LECs  
16 compensate each other for the transport and termination of  
17 "telecommunications" (i.e., local calls). For purposes of  
18 my testimony, I will be using "LEC" to refer to both ILECs  
19 and CLECs.

20

21 Q. **What is the "Reciprocal Compensation" issue specific to  
22 ISP-bound traffic?**

23 A. When an end user of one LEC (LEC #1) calls an ISP within the  
24 their local calling area, that is an end user of another LEC  
25 (LEC #2), there is an issue of how the first LEC (LEC #1)

1 should compensate the second LEC (LEC #2) for the transport  
2 and termination of the call to the ISP.

3

4 Q. **What is your understanding of the purpose of reciprocal**  
5 **compensation?**

6 A. The purpose of reciprocal compensation is to compensate one  
7 LEC for the cost associated with transport and termination  
8 of a call from another LEC.

9

10 Q. **Has reciprocal compensation benefited one category of LEC**  
11 **over another?**

12 A. Yes. Some CLECs have targeted customers with high inbound  
13 call volumes because by terminating more local traffic than  
14 they were generating, they could actually use reciprocal  
15 compensation as a source of revenue. Customers that had  
16 these characteristics include centralized calling centers  
17 and Internet Service Providers (ISPs). With the prevalence  
18 of ISP services expanding, and ISP traffic terminating on  
19 their networks, CLECs began to bill ILECs millions of  
20 dollars for reciprocal compensation.

21

22 Q. **Why were ISPs so attractive as customers?**

23 A. Serving ISPs enables CLECs to minimize the compensation they  
24 would have to pay to the ILEC because ISP-bound traffic is  
25 one-way. It also enables CLECs to maximize the compensation

1 they would receive because of the volume of traffic and the  
2 substantially longer call duration, as compared to other  
3 calls.

4  
5 **Q. What information is available regarding the call duration of**  
6 **ISP-bound traffic?**

7 **A.** NARUC's Internet Working Group (Working Group) noted in its  
8 March 1998 report, "Pricing and Policies for Internet  
9 Traffic on the Public Switched Network," that the average  
10 duration of an ISP-bound call is 20 minutes, as opposed to  
11 three minutes for voice traffic. This information was  
12 referenced from Bellcore's 1996 report, "Impacts of Internet  
13 Traffic on LEC Networks and Switching Systems." It is also  
14 consistent with data found within the FCC's "Digital  
15 Tornado: The Internet and Telecommunications Policy," March  
16 1997 (see figure 9, p. 59).

17  
18 **Q. Has this Commission heard any discussions regarding the**  
19 **average length of ISP-bound calls?**

20 **A.** Yes. Just recently, in Docket No. 991220-TP, Order No.  
21 PSC-00-1680-FOF-TP, issued September 19, 2000, the FPSC  
22 stated that it was persuaded by BST witness Varner's  
23 testimony that the call durations for ISP bound traffic are  
24 longer than for typical calls (20 minutes versus three to  
25 four minutes). It was also presented as part of John A.

1 Ruscilli's testimony on behalf of BellSouth in Docket No.  
2 000828-TP. (P. 47, lines 21-22)

3  
4 Q. **Have the longer call durations of ISP-bound traffic been**  
5 **factored into the rates for reciprocal compensation?**

6 A. Not typically. The rates were based usually on the average  
7 duration for voice traffic.

8  
9 Q. **What impact would this have regarding the amount of**  
10 **compensation recovered by a CLEC with significantly longer**  
11 **holding times?**

12 A. Assuming that the CLEC had similar costs as the incumbent,  
13 the CLEC would over-recover the costs associated with  
14 terminating traffic on its network.

15  
16 Q. **How has the FPSC addressed reciprocal compensation for ISP**  
17 **traffic in the past?**

18 A. The FPSC decided in the MediaOne/BellSouth arbitration  
19 (Order No. PSC-99-2009-FOF-TP, issued Oct. 14, 1999 in  
20 Docket No. 990149-TP), the ICG Telecom/BellSouth arbitration  
21 (Order No. PSC-00-0128-FOF-TP, issued January 14, 2000 in  
22 Docket No. 990691-TP), the ITC^DeltaCom/BellSouth  
23 arbitration (Order No. PSC-00-0537-FOF-TP, issued March 15,  
24 2000 in Docket No. 990750-TP), and the Intermedia/BellSouth  
25 arbitration (Order No. PSC-00-1519-FOF-TP, issued August 22,

1 2000 in Docket No. 991854-TP) that parties should continue  
2 to operate under the terms of their current respective  
3 agreements regarding ISP-bound traffic until the FCC made a  
4 final ruling regarding the nature of ISP-bound traffic.  
5

6 **Q. Has the FPSC issued an order that specifies the**  
7 **jurisdictional nature of ISP traffic?**

8 **A.** No. The Commission has not issued such an order. However,  
9 in the most recent arbitration decision concerning the  
10 issue, Global NAPs/BellSouth, Order No. PSC-00-1680-FOF-TP  
11 issued September 19, 2000 in Docket No. 991220-TP, the FPSC  
12 decided that ISP-bound traffic should be treated as local  
13 traffic for the purposes of reciprocal compensation. The  
14 FPSC stated, "[W]e emphasize that in rendering this  
15 decision, we stop short of determining that ISP-bound  
16 traffic is, in fact, local traffic. Herein, we find only  
17 that this traffic shall be treated like local traffic for  
18 purposes of compensation." (Order No. PSC-00-1680-FOF-TP,  
19 p. 14)  
20

21 **Q. Has the FPSC made any decisions regarding reciprocal**  
22 **compensation that treat ISP-bound traffic as interstate?**

23 **A.** No.  
24

25 **Q. Has the FPSC filed comments with the FCC regarding the**

1           **jurisdictional nature of ISP-bound traffic?**

2   A.    Yes.    The FPSC filed comments in FCC Docket No. 99-69,  
3           Inter-Carrier Compensation for ISP-Bound Traffic on April 9,  
4           1999, and again on July 21, 2000.

5  
6   Q.    **In these comments, what was the FPSC's position regarding**  
7           **the jurisdictional nature of ISP-bound traffic?**

8   A.    The FPSC endorsed what is known as the "two-call theory."  
9           Under this theory, when an end-user calls an ISP to connect  
10          to the Internet, there are two separate services that are  
11          being provided.    The first service is an intrastate  
12          telecommunications service, provided by one or more LECs,  
13          that allows the end user to call an ISP.  The second service  
14          is an interstate information service provided by an ISP  
15          which enables customers to access Internet content and  
16          services.  The access lines purchased by end users are local  
17          access lines that are provided through an intrastate tariff.  
18          Because ISPs are recognized as Enhanced Service Providers  
19          (ESPs) and thus are exempt from paying certain interstate  
20          access charges, they are able to purchase access through  
21          intrastate business tariffs rather than interstate access  
22          tariffs.

23  
24   Q.    **What decision has the FCC made regarding reciprocal**  
25          **compensation and the jurisdiction of this traffic?**

1 A. In the FCC's Declaratory Ruling, FCC 99-38, in CC Docket No.  
2 96-98, released on February 26, 1999, the FCC declared that  
3 ISP-bound traffic is jurisdictionally mixed and appears to  
4 be largely interstate in nature. (FCC 99-38, ¶ 1, 19) Its  
5 decision, however, preserved the exemption of Internet and  
6 other information services from interstate access charges.  
7 (FCC 99-38, ¶ 34) The FCC also found that its conclusion  
8 regarding the nature of ISP-bound traffic "does not in  
9 itself determine whether reciprocal compensation is due in  
10 any particular instance." (FCC 99-38, ¶ 1)

11  
12 **Q. Did the FCC make any decision relating to existing**  
13 **interconnection agreements?**

14 A. The FCC concluded that, in the absence of federal rules  
15 regarding the appropriate intercarrier compensation for  
16 ISP-bound traffic, carriers are bound by their existing  
17 interconnection agreements, as interpreted by state  
18 commissions, and thus are subject to reciprocal compensation  
19 obligations to the extent provided by such agreements or as  
20 interpreted and enforced by state commissions. (FCC 99-38,  
21 ¶ 1, 22)

22  
23 **Q. What was the theoretical basis of the FCC's decision that**  
24 **ISP-bound calls are primarily interstate in nature?**

25 A. The FCC used an "end-to-end" analysis of these calls.

1 Specifically, the FCC concluded that ISP-bound calls do not  
2 terminate at the ISP's local server, but instead continue on  
3 to one or more Internet websites that are often located in  
4 another state. (FCC 99-38, ¶ 10-19)  
5

6 **Q. Does the FCC have rules relating to intercarrier**  
7 **compensation for ISP-bound traffic?**

8 **A.** No. The FCC acknowledged in its Declaratory Ruling in CC  
9 Docket No. 96-98 (FCC 99-38, ¶ 1, 9, 19, 21-22), released on  
10 February 26, 1999, that there are no federal rules  
11 establishing an inter-carrier compensation mechanism for  
12 such traffic or governing what amounts, if any, should be  
13 paid.  
14

15 **Q. What action has the FCC taken to establish rules?**

16 **A.** As part of the FCC's February 26, 1999, Declaratory Ruling  
17 in CC Docket No. 96-98, the FCC issued a Notice of Proposed  
18 Rulemaking to develop an adequate record upon which to adopt  
19 a rule regarding inter-carrier compensation for ISP-bound  
20 traffic. (FCC 99-38, ¶ 28) To date, the FCC has not  
21 adopted a rule regarding this issue.  
22

23 **Q. Did the FCC indicate what should be done until it was able**  
24 **to adopt rules?**

25 **A.** Yes. The FCC specifically stated in ¶ 28 of the Declaratory

1 Ruling that "until adoption of a final rule, state  
2 commissions will continue to determine whether reciprocal  
3 compensation is due for this traffic."  
4

5 Q. **Was the FCC's Declaratory Ruling challenged in court?**

6 A. Yes. As a result of the challenge, on March 24, 2000, the  
7 United States Court of Appeals for the D.C. Circuit in Bell  
8 Atlantic Telephone Companies v. Federal Communications  
9 Commission, 2000 U.S. App. LEXIS 4685 (D.C. Cir. March 24,  
10 2000) vacated certain provisions of the FCC's Declaratory  
11 Ruling, and remanded the matter to the FCC.  
12

13 Q. **What did the court conclude?**

14 A. In the last paragraph of its opinion, the Court stated that  
15 the FCC had not adequately justified the application of its  
16 jurisdictional analysis in determining whether ISP-bound  
17 traffic is subject to the reciprocal compensation. The  
18 Court stated:

19 Because the Commission has not provided a  
20 satisfactory explanation why LECs that  
21 terminate calls to ISPs are not properly  
22 seen as "terminating ... local  
23 telecommunications traffic," and why such  
24 traffic is "exchange access" rather than  
25 "telephone exchange service," we vacate the

1 ruling and remand the case to the  
2 Commission. Id. at 26.

3 However, the Court further noted that:

4 We do not reach the objections of the  
5 incumbent LECs--that § 251(b)(5) preempts  
6 state commission authority to compel  
7 payments to the competitor LECs; at present  
8 we have no adequately explained  
9 classification of these communications, and  
10 in the interim our vacatur of the  
11 Commission's ruling leaves the incumbents  
12 free to seek relief from state-authorized  
13 compensation that they believe to be  
14 wrongfully imposed. Id. at 26-27.

15  
16 **Q. What actions should the FPSC take, if any, with respect to**  
17 **establishing an appropriate compensation mechanism for**  
18 **ISP-bound traffic in light of current decisions and**  
19 **activities of the courts and the FCC?**

20 **A.** The Commission should move forward to develop appropriate  
21 compensation mechanisms for ISP-bound traffic. Based on  
22 past practices, any decision the FCC reaches likely will be  
23 challenged in court. If the FCC's decision were vacated  
24 again, this Commission would still be without a cohesive  
25 policy regarding reciprocal compensation for ISP-bound

1 traffic. In addition, by moving forward, this Commission  
2 would be better positioned to challenge the FCC decision, if  
3 needed, based on the evidence in this record.  
4

5 **Q. What policy considerations should guide the Commission's**  
6 **decision in this docket?**

7 A. The policy issue that must be resolved initially is who  
8 should be responsible for recovering the cost associated  
9 with terminating traffic that is originated from another  
10 carrier. In general, there are two options. The first  
11 option would require the carrier with the originating  
12 traffic to compensate the carrier who has to terminate the  
13 other carrier's traffic (i.e., reciprocal compensation). An  
14 alternative to this would require each carrier to recover  
15 its own costs from its customers (i.e., bill-and-keep).  
16

17 **Q. Please explain the bill-and-keep alternative.**

18 A. Bill-and-keep would require a carrier to recover its own  
19 costs of providing services by billing its own customers.  
20 It would not be required to compensate another carrier for  
21 the costs associated with terminating its traffic on that  
22 carrier's network.  
23

24 **Q. What are the advantages of a bill-and-keep approach?**

25 A. It eliminates the need for billing and the costs associated

1 with monitoring traffic. It also reduces the ability of  
2 carriers to target customers solely for expected reciprocal  
3 compensation revenues.  
4

5 **Q. What are the problems of adopting a bill-and-keep approach?**

6 A. One of the assumptions of the bill-and-keep methodology is  
7 that the amount of traffic from the ILEC to the CLEC is more  
8 or less equivalent to the amount of traffic from the CLEC to  
9 the ILEC. I do not believe that this is currently the case  
10 based on the information I have read.  
11

12 **Q. Assuming that traffic is not roughly balanced, what would  
13 happen if a bill-and-keep mechanism were adopted?**

14 A. Carriers that have to terminate more traffic would be forced  
15 to pass these costs on to their own customers, even though  
16 their customers did not directly cause these costs to be  
17 incurred. This could result in customer erosion for a  
18 carrier, and a decline in competition in the industry.  
19

20 **Q. Have any states excluded ISP-bound traffic from reciprocal  
21 compensation payments?**

22 A. Yes. Eleven state commissions have, but for different  
23 reasons. Colorado, Iowa, and Arizona have adopted bill-and-  
24 keep. Eight other state commissions either ruled that ISP-  
25 bound traffic is interstate, or eliminated reciprocal

1 compensation based on the FCC Declaratory Ruling and are  
2 awaiting anticipated FCC action on the issue.

3  
4 **Q. How does this compare with the number of states that have**  
5 **required reciprocal compensation payments for ISP-bound**  
6 **traffic?**

7 A. Most states have required reciprocal compensation payments;  
8 however, some states have only reached this conclusion as a  
9 matter of contract dispute resolution. Other states have  
10 either initiated or completed generic proceedings to  
11 investigate the issue more thoroughly.

12  
13 **Q. Are there any structural differences on how compensation is**  
14 **paid for those states that require reciprocal compensation**  
15 **payments for ISP-bound traffic?**

16 A. Yes. Most states, like Florida, require that compensation  
17 be paid using a per minute rate(s). The longer the call,  
18 the more compensation must be paid. Several states have  
19 recently changed the payment structure to include a fixed  
20 and a variable component or even a traffic imbalance  
21 adjustment.

22  
23 **Q. What states have adopted compensation mechanisms that**  
24 **include a fixed and a variable component?**

25 A. Both the Public Utility Commission of Texas (Docket No.

1 | 21982, July 13, 2000, p. 49) and the Public Service  
2 | Commission of Wisconsin (Docket No. 05-TI-283, November 8,  
3 | 2000, p. 13) have adopted fixed and per-minute charges. The  
4 | fixed component is designed to recover costs associated with  
5 | setting up the call (e.g., establishing a circuit, and  
6 | creating a billing record). The variable component is  
7 | designed only to recover the costs associated with the  
8 | duration of the call.

9 |  
10 | **Q. What are traffic imbalance adjustments?**

11 | **A.** Once the amount of traffic that terminates to either the  
12 | ILEC or the CLEC network reaches a predetermined level,  
13 | additional reciprocal compensation is still paid, but at a  
14 | lower rate.

15 |  
16 | **Q. What states have adopted traffic imbalance adjustments?**

17 | **A.** New York (Opinion and Order No. 99-10, August 26, 1999),  
18 | Texas (Docket No. 21982, July 13, 2000), and West Virginia  
19 | (Case No. 99-0426-T-P, October 19, 1999) have adopted  
20 | traffic imbalance adjustments.

21 |  
22 | **Q. Can you provide an example of how this was applied by one of**  
23 | **the commissions you noted?**

24 | **A.** Yes. The New York Public Service Commission established a  
25 | rebuttable presumption regarding the reciprocal compensation

1 rate that should be paid to those carriers whose incoming to  
2 outgoing traffic ratio is 3:1 or greater. The presumption  
3 was that traffic in excess of the ratio costs less to  
4 terminate, and therefore should be compensated at a lower  
5 rate. Traffic below the ratio would be compensated at a  
6 higher rate.

7  
8 **Q. What recourse do carriers have once they reach this ratio?**

9 **A.** In New York, a carrier whose compensation would be adjusted  
10 downward may attempt to rebut the presumption with a showing  
11 that its costs are higher.

12  
13 **Q. What factors should the Commission consider in setting the  
14 compensation mechanism for delivery of ISP-bound traffic?**

15 **A.** Because the purpose of reciprocal compensation is to  
16 compensate one LEC for the costs associated with the  
17 transport and termination of a call from another LEC, the  
18 FPSC should consider structuring compensation in a manner  
19 that closely represents how costs are incurred.

20  
21 **Q. Based on the information you have read in other proceedings,  
22 does a flat per minute charge, or a combination of fixed and  
23 variable charges more closely resemble how costs are  
24 incurred?**

25 **A.** A fixed and variable structure appears to more accurately

1 reflect how costs are incurred. As noted by the Public  
2 Service Commission of Wisconsin in its Order (Docket No.  
3 05-TI-283, November 8, 2000, pp 12-13):

4 In the first generation agreements, the rate for  
5 reciprocal compensation was calculated by  
6 combining into a single rate the recovery of two  
7 separate cost elements: (1) set-up costs, which  
8 are incurred one time per call and do not vary  
9 with the duration of the call; and (2)  
10 time-sensitive costs that are incurred over the  
11 entire duration of the call. The cost for call  
12 setup was recovered with an averaged rate based  
13 upon an assumed call length of approximately four  
14 minutes. That assumption was then applied to the  
15 cost for transporting and terminating  
16 interconnected local traffic.

17  
18 **Q. Does a bill-and-keep approach accurately reflect how costs**  
19 **are incurred?**

20 **A.** No. The bill-and-keep approach to recovery has nothing to  
21 do with how the costs are incurred. It is a form of "in  
22 kind" payment that is only equitable when traffic is roughly  
23 balanced.

24  
25 **Q. How would you recommend structuring reciprocal compensation?**

1 | A. In general, I would recommend that the cost associated with  
2 | setting up a call be recovered in the first minute of the  
3 | call, and include a duration charge for the first minute as  
4 | well. During subsequent minutes, the only cost recovered  
5 | would be that associated with duration, or the cost to  
6 | maintain the circuit and transmit the content of the call.

7 |  
8 | **Q. Do you think that imbalance adjustments are necessary?**

9 | A. No. If the rates are established to accurately reflect  
10 | costs, imbalance adjustments are not necessary because only  
11 | the costs associated with duration are being recovered after  
12 | the first minute.

13 |  
14 | **Q. Should ISP-bound traffic be separated from non-ISP bound**  
15 | **traffic for purposes of assessing any reciprocal**  
16 | **compensation payments?**

17 | A. No. It is my understanding based on testimony in other  
18 | dockets and in the NARUC report that separating ISP-bound  
19 | traffic from voice traffic is problematic at best. In  
20 | addition, if we simply carve out ISP-bound traffic without  
21 | addressing the underlying problem of how compensation is  
22 | determined, we are simply providing an opportunity for CLECs  
23 | to over-recover by focusing on a different set of customers  
24 | with large amounts of terminating traffic.

25 |

1 | Q. Does this conclude your testimony?  
2 | A. Yes it does.  
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996.

DOCKET NO. 000075-TP

FILED: DECEMBER 1, 2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Staff's Direct Testimony of Gregory D. Fogleman, have been served VIA-U.S. MAIL, this 1st day of December, 2000, to the following:

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