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

In the Matter of	)	
	)	
Cost-Based Terminating Compensation For CMRS Providers	)	
	)	
Interconnection Between Local Exchange Carriers And Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185
	)	
Implementation Of The Local Competition Provisions Of The Telecommunications Act Of 1996	)	CC Docket No. 96-98
	)	
Calling Party Pays Service Offering In The Commercial Mobile Radio Services	)	WT Docket No. 97-207
	)	

ORDER

Adopted: August 27, 2003 **Released: September 3, 2003**

By the Commission.

I. INTRODUCTION

1. In this Order, we deny SBC Communications Inc.'s (SBC's) Application for Review[1] of the May 9, 2001, letter issued jointly by the Wireless Telecommunications Bureau (WTB) and the Common Carrier Bureau (now the Wireline Competition Bureau (WCB)) (Joint Letter)[2] in response to Sprint PCS's request for clarification of our reciprocal compensation rules.[3] We find that the Joint Letter is consistent with the interpretation of section 252(d)(2)(A) of the Communications Act that the Commission adopted in the *Local Competition Order* and reflected in the Commission's rules and prior orders and, accordingly, affirm the interpretation of our rules stated therein.[4] We note, however, that the

[1] *See* Application for Review of SBC Communications Inc., filed June 8, 2001 (SBC Application).

[2] *See* Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, and Dorothy T. Attwood, Chief, Common Carrier Bureau, to Charles McKee, Senior Attorney, Sprint PCS, CC Docket Nos. 95-185 and 96-98, and WT Docket No. 97-207, 16 FCC Rcd 9597 (2001) (Joint Letter).

[3] *See* Letter from Jonathan M. Chambers, Sprint PCS, to Thomas J. Sugrue and Lawrence E. Strickling, Re: Cost-Based Terminating Compensation for CMRS Providers, CC Docket Nos. 95-185, 96-98, and 97-207, filed Feb. 2, 2000 (Sprint PCS Letter).

[4] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 252(d)(2)(A)); 47 C.F.R. §§ 51.701(c) and (d), 51.711(a)(3); s*ee also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499, 16042, para. 1090 (1996) (*Local Competition Order*);

Commission is considering changes to its interpretation of "additional costs" under section 252(d)(2)(A) in a pending proceeding.[5]

II. BACKGROUND

A. Reciprocal Compensation Rules

2. The reciprocal compensation obligations of section 251(b)(5) of the Act govern the compensation that a telecommunications carrier charges another for the transport and termination of traffic subject to section 251(b)(5) that originated on the other carrier's network.[6] Pursuant to section 252(d)(2)(A) of the Act, a carrier is entitled to a reciprocal compensation rate that provides for the recovery of "a reasonable approximation of the additional costs [to the carrier] of terminating" calls from the other carrier. [7] Pursuant to this provision, section 51.711 of the Commission rules establishes a presumption that the reciprocal compensation rates that two carriers may charge each other are symmetric, with the symmetric rate generally set to cover the forward-looking costs of the larger carrier or the incumbent local exchange carrier (LEC) where one is involved in the call.[8] The rule also provides that a carrier may charge a rate higher than the symmetric rate, however, after verifying to a state commission that its transport or termination costs justify the higher rate.[9]

3. The Commission's rules define the terms "transport" and "termination," the costs of which may be recovered through reciprocal compensation, to include the notion of an "equivalent facility" provided by a carrier other than an incumbent LEC.[10] Section 51.701(c) of our rules defines transport as "the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or *equivalent facility* provided by a carrier other than an incumbent LEC."[11] Section 51.701(d) of our rules defines termination as "the switching of telecommunications traffic at the terminating carrier's end office switch, or *equivalent facility*, and

---

[5] *See In the Matter of Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9646-49, paras. 101-08 (2001) (*Unified Intercarrier Compensation NPRM).*

[6] *See Unified Intercarrier Compensation NPRM*, 16 FCC Rcd at 9613, para. 6 (2001).

[7] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 252(d)(2)(A)). Specifically, section 252(d)(2)(A) of the Act states that "for purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions of reciprocal compensation to be just and reasonable unless":

> such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and [] such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

47 U.S.C. § 252(d)(2)(A).

[8] 47 C.F.R. § 51.711(a).

[9] 47 C.F.R. § 51.711(b).

[10] 47 C.F.R. § 51.701.

[11] 47 C.F.R. § 51.701(c) (emphasis added).

delivery of such traffic to the called party's premises."[12]

B. The Joint Letter

4. On February 2, 2000, Sprint PCS filed a letter and legal memorandum requesting that the Commission confirm and clarify Commercial Mobile Radio Service (CMRS) providers' entitlement to reciprocal compensation for all the additional costs of switching or delivering to mobile customers "local traffic originated on other networks."[13] On April 27, 2001, in the context of seeking comment on a unified intercarrier compensation scheme, the Commission issued the *Unified Intercarrier Compensation NPRM*, which, among other things, reviewed and sought comment on the application of its current orders and rules regarding asymmetric reciprocal compensation to LEC-CMRS interconnection.[14] On May 9, 2001, WTB and WCB responded to the Sprint PCS Letter, relying on clarifications of the asymmetric compensation rules in the *Unified Intercarrier Compensation NPRM.*[15] The Joint Letter stated:

- [B]ased on the language of section 252(d)(2)(A) of the Communications Act, CMRS carriers are entitled to the opportunity to demonstrate that their termination costs exceed those of ILECs.[16]

- [T]he 'equivalent facility' language of sections 51.701(c) and (d) of the Commission's rules does not require that wireless network components be reviewed on the basis of their relationship to wireline network components; nor does it bar a CMRS carrier from receiving compensation for the additional costs that it incurs in terminating traffic on its network if those costs exceed the ILEC's costs. Rather, the determination of compensable wireless network components should be based on whether the particular wireless network components are cost sensitive to increasing call traffic.[17]

- [I]f a CMRS carrier can demonstrate that the costs associated with spectrum, cell sites, backhaul links, base station controllers and mobile switching centers vary, to some degree, with the level of traffic that is carried on the wireless network, a CMRS carrier can submit a cost study to justify its claim to asymmetric reciprocal compensation that includes additional traffic sensitive costs associated with those network elements.[18]

Additionally, the Joint Letter affirmed that a carrier is entitled to the tandem interconnection rate under section 51.711(a)(3) of the Commission's rules if it can satisfy a comparable geographic area test, and need not also satisfy a functional equivalency test.[19]

C. SBC's Application for Review

5. On June 8, 2001, SBC submitted an Application for Review (Application) of the Joint

[12] 47 C.F.R. § 51.701(d) (emphasis added).

[13] *See* Sprint PCS Letter at 1.

[14] *See Unified Intercarrier Compensation NPRM.*

[15] *See* Joint Letter, 16 FCC Rcd at 9598-99.

[16] Joint Letter, 16 FCC Rcd at 9598 (citing *Unified Intercarrier Compensation NPRM* at para. 104).

[17] *Id*.

[18] Joint Letter, 16 FCC Rcd at 9598-99.

[19] 47 C.F.R. § 51.711(a)(3); Joint Letter, 16 FCC Rcd at 9599 (citing *Unified Intercarrier Compensation NPRM* at para. 105).

Letter contending that: (1) the Joint Letter could be read as establishing a broader definition of additional costs for wireless networks than the Commission previously established for wireline networks; (2) the Joint Letter could be interpreted as reading "the equivalent facility" test out of the rules for purposes of deciding whether a new entrant should be compensated at the tandem rate; and (3) the Joint Letter is procedurally improper because the Bureaus may not alter rules established by the Commission and the Joint Letter fails to discuss comments that were filed in opposition to the Sprint PCS Letter.[20] SBC, Qwest, and Verizon further claim the Joint Letter is procedurally improper under the Administrative Procedure Act (APA) because there is no precedent that permits the Commission or Bureaus to promulgate a binding rule without following the notice and comment provisions of the APA.[21]

III. DISCUSSION

A. Traffic-sensitive costs of transport and termination are recoverable.

6. In resolving the SBC Application, we first note again the basic rules that are not in dispute. Section 51.711(a) of the Commission's rules provides that the rates two carriers may charge each other for termination are presumptively equal or symmetric, with the rate set at the forward-looking costs of the incumbent LEC or the larger carrier if no incumbent is involved.[22] Section 51.711(b), however, provides that a carrier may seek from the governing state commission a right to charge a compensation rate higher than the symmetric rate if the carrier's costs justify the higher rate:

> A state commission may establish asymmetrical rates for transport and termination only if the carrier other than the incumbent LEC (or the smaller of the two incumbent LECs) proves to the state commission on the basis of a cost study using the forward-looking economic cost based pricing methodology . . . that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC (or the smaller of the two LECs), exceed the costs incurred by the incumbent LEC and, consequently, that such a higher rate is justified.[23]

7. In the *Local Competition Order*, the Commission determined with some greater specificity the wireline network components the costs of which are recoverable through reciprocal compensation rates.[24] In relevant part, the Commission found that "once a call has been delivered to the LEC end office serving the called party, the 'additional cost' to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching."[25] The Commission concluded that "[f]or the purposes of setting rates under section 252(d)(2), only that portion of the forward-looking, economic cost of the LEC's end-office switching that is usage sensitive constitutes an additional cost to be recovered through termination charges."[26] By contrast, the Commission did not consider, and Commission rules do not identify, the wireless network components that have traffic-sensitive costs to be included in a section 51.711 cost study.

---

[20] *See* SBC Application at i; *see also* Reply of SBC Communications Inc. at 1, filed July 5, 2001 (SBC Reply). Qwest Corporation (Qwest) and Verizon filed Comments and Reply Comments respectively in support of SBC's Application for Review. Oppositions to the SBC Application were filed by Sprint PCS, the Cellular Telecommunications & Internet Association (CTIA), and Mid-Missouri Cellular (Mid-Missouri).

[21] *See* Qwest Comments at 3-4; Verizon Reply at 2-3.

[22] 47 C.F.R. § 51.711(a).

[23] 47 C.F.R. § 51.711(b).

[24] *Local Competition* Order, 11 FCC Rcd at 16025, para. 1057.

[25] *Id.*

[26] *Id.*

8. We reaffirm that, under the current rules, a CMRS carrier can seek a compensation rate that includes the traffic-sensitive costs associated with its network elements.[27] We conclude that the Joint Letter correctly addressed the questions raised in the Sprint PCS request.

9. The Joint Letter correctly reflected the Commission's interpretation of section 252(d)(2)(A) of the Act in the *Local Competition Order* in stating that, based on the language of section 252(d)(2)(A), carriers are entitled to recover all of their additional forward-looking costs of terminating traffic to the extent they demonstrate such costs.[28] Further, section 51.711(b) of our rules expressly permits connecting carriers, including CMRS carriers, an opportunity to prove that their additional costs justify a higher rate than the rate charged by the incumbent LEC.[29] Such additional costs must be established through a cost study using a forward-looking economic cost model.[30]

10. The Joint Letter also correctly explained that the determination of the additional costs of terminating traffic over a wireless network element does not involve an inquiry into whether the wireless network element is "equivalent" to a recoverable wireline element.[31] As the Commission has previously stated, the language in section 51.701(d), which defines "termination" in part as "the switching of telecommunications traffic at the terminating carrier's end office switch, *or equivalent facility*, and delivery of such traffic to the called party's premises,"

> was not intended to require that wireless network components be reviewed on the basis of their relationship to wireline network components. Nor, given the language of the statute, was it intended to have the effect of barring a CMRS carrier from receiving compensation for the additional costs that it incurs in terminating traffic on its network if those costs exceed the ILEC's. Instead, a cost-based approach—one that looks at whether the particular wireless network components are cost sensitive to increasing call traffic—should be used to identify compensable wireless network components. Thus, if a CMRS carrier can demonstrate that the costs associated with spectrum, cell sites, backhaul links, base station controllers and mobile switching centers vary, to some degree, with the level of traffic that is carried on the wireless network, a CMRS carrier can submit a cost study to justify its claim to asymmetric reciprocal compensation that includes additional traffic sensitive costs associated with those network elements.[32]

11. We reaffirm that the term "equivalent facility" was not intended to preclude the recovery by CMRS carriers of the "additional costs" of wireless components that might be regarded as functionally equivalent to wireline elements whose costs are non-recoverable, such as a wireline LEC's local loop. Rather, the language "switch or equivalent facility" was used to "contemplate that a carrier may employ a switching mechanism other than a traditional LEC switch to terminate calls," and more generally to ensure that the costs of non-LEC facilities would be included in transport and termination rates even if such facilities did not precisely track the network facilities architecture of a LEC.[33] Thus, while

[27] *See* Joint Letter, 16 FCC Rcd at 9598-99;*Unified Intercarrier Compensation NPRM*, 16 FCC Rcd at 9648, para. 104.

[28] 47 U.S.C. § 252 (d)(2)(A).

[29] 47 C.F.R. § 51.711(b).

[30] *Id.*

[31] Joint Letter, 16 FCC Rcd at 9598.

[32] *Unified Intercarrier Compensation NPRM*, 16 FCC Rcd at 9648, para. 104.

[33] *TSR Wireless, LLC v. U.S. West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11166, 11178-79, paras. 22, 23 (2000) (stating that "equivalent facilities" also ensures that the "definition of termination will remain relevant as technology changes"), *aff'd*, *Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

equivalence does, in part, define what facilities are involved in the function of "termination," it is simply not relevant to determining which of those terminating facilities imposes costs that can be recovered through reciprocal compensation charges.[34]

12. SBC argues that permitting wireless recovery of the cost of "loop-equivalent" components would establish a new "additional cost" standard applicable uniquely to CMRS carriers,[35] one which affords such carriers a greater right to reciprocal compensation than that provided to LECs.[36] SBC asserts that when the Commission concluded that LECs are not entitled to recover any loop costs through reciprocal compensation, it limited a LEC to recovering only what SBC describes as the "short-term" traffic-sensitive costs of termination, and prohibited recovery of the "long-term" traffic-sensitive costs. SBC argues that CMRS carriers must be subject to the same limitation.[37]

13. We conclude that our interpretation here does not apply a different standard of additional cost to CMRS carriers than the standard applicable to LECs. The "additional cost" standard applicable to both is, as discussed above, whether an element is traffic-sensitive.[38] In asserting that the Commission applied a different standard of recoverable costs in the *Local Competition Order* when it found that loop costs were not recoverable, SBC misconstrues the Commission's reasoning. The Commission did not exclude loop costs because they were "long-term" traffic-sensitive costs. Rather, the Commission concluded:

> The costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities. We conclude that such *non-traffic sensitive costs* should not be considered "additional costs" when a LEC terminates a call that originated on the network of a competing carrier.[39]

Because loop costs were excluded from "additional costs" on the basis of a finding of non-traffic sensitivity, we are not creating a different standard for CMRS carriers by permitting them to recover all costs that *are* traffic-sensitive.[40]

14. SBC argues that the Commission could not have meant in the *Local Competition Order* that loop costs are not traffic-sensitive, notwithstanding the plain language used in the Commission's reasoning, because, it asserts, such costs sometimes are traffic-sensitive.[41] We find, however, that the Commission unambiguously based its decision on a determination that loop costs are non-traffic sensitive. To the extent that SBC challenges that conclusion, its challenge must be directed to the Commission's application of the cost-based standard in the *Local Competition Order*, not to our determinations here. As noted above, the Commission is considering changes to its interpretation of the "additional cost" standard in a pending proceeding, including "whether advances in technology have provided carriers with essentially inexhaustible capacity, and whether the 'additional costs' of delivering

[34] For that reason, we need not and do not determine whether any portion of the wireless network is, in fact, "equivalent" to a wireline loop.

[35] SBC Application at 3-4.

[36] SBC Application at 3.

[37] SBC Application at 4.

[38] *Local Competition Order*, 11 FCC Rcd at 16025, para. 1057.

[39] *Id.* (emphasis added).

[40] *Id.*

[41] SBC Application at 4.

a call that originates on a competing carrier's network currently approach zero."[42]

15. SBC reiterates an argument made by USTA in an earlier stage of this proceeding that, contrary to Sprint's assertions, the majority of costs in a wireless network are not traffic-sensitive.[43] In response, we emphasize that we make no determination here as to whether any particular element of a CMRS network is actually traffic-sensitive. Rather, as the Joint Letter noted, a CMRS carrier that believes it is entitled to asymmetrical compensation must still submit a cost study to the appropriate State commission justifying its claim to asymmetrical compensation for additional traffic-sensitive costs associated with its network elements.[44]

16. In response to the original Sprint PCS Letter, BellSouth, US West and USTA filed comments arguing that (1) wireless and wireline networks are technologically similar;[45] and (2) specifically, wireless components are functionally equivalent to a wireline carrier's loop when they are used to terminate traffic to mobile customers that originates on other carriers' networks.[46] As we have noted, the determination of relevant costs does not involve consideration of which wireless network components might be considered functionally equivalent to specific wireline network components such as local loops. BellSouth also argued therefore that the Commission does not have legal, economic, or policy grounds for treating the loop-equivalent costs in the CMRS network differently.[47] We have not, however, treated these costs differently; to the contrary, we have reaffirmed that these traffic-sensitive costs should *not* be treated differently than other traffic-sensitive costs. GTE, BellSouth, US West, and USTA contended that it is unnecessary for the Commission to consider whether CMRS providers are entitled to additional compensation for traffic-sensitive costs because they are already able to receive asymmetric reciprocal compensation by submitting cost studies to state commissions.[48] As we noted, however, we do not provide CMRS carriers with "additional compensation" beyond that to which they are entitled under the Act and our existing rules for seeking asymmetric reciprocal compensation.

B. Section 51.711(a)(3) of the commission's rules regarding the tandem interconnection rate only requires a geographic area test.

17. In the *Local Competition Order*, the Commission concluded that the "additional costs" incurred when terminating a call were likely to be greater when termination involved the use of an incumbent LEC's tandem switch.[49] The Commission therefore held that states could establish transport and termination rates that varied depending on whether or not traffic was routed through a tandem switch.[50] The Commission also concluded that the higher rate for tandem switching should be available for carriers other than the incumbent LEC if these other carriers offered technologies that "perform

[42] *See Unified Intercarrier Compensation NPRM*, 16 FCC Rcd at 9646, para. 101.

[43] SBC Application at 10 (citing USTA Comments filed in response to Sprint PCS Letter).

[44] 47 C.F.R. § 51.711(b).

[45] BellSouth Comments to Sprint PCS Letter at 7; US West Comments to Sprint PCS Letter at 7-12; USTA Comments to Sprint PCS Letter at 2; *see also* BellSouth Reply to Sprint PCS Letter at 3.

[46] USTA Comments to Sprint PCS Letter at 2.

[47] BellSouth Comments to Sprint PCS Letter at 10; *see also* USTA Reply to Sprint PCS Letter at 2; BellSouth Reply to Sprint PCS Letter at 3.

[48] GTE Comments to Sprint PCS Letter at 4; BellSouth Comments to Sprint PCS Letter at 5; US West Comments to Sprint PCS Letter at 4; USTA Comments to Sprint PCS Letter at 4; *see also* USTA Reply to Sprint PCS Letter at 4, 6; National Telephone Cooperative Association (NTCA) Reply to Sprint PCS Letter at 2-3.

[49] *Local Competition Order*, 11 FCC Rcd at 16042, para. 1090.

[50] *Id.*

functions similar to those performed by an incumbent LEC's tandem switch."[51] In particular, "[w]here the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate."[52] The Commission codified the comparable geographic area test at 47 C.F.R. § 51.711(c).[53] Relying on this rule and a clarification that the Commission issued in the *Unified Intercarrier Compensation Order,* the Joint Letter confirmed that a carrier need only satisfy the comparable geographic area test to be entitled to charge the higher tandem interconnection rate.[54]

18. SBC asserts that the Joint Letter's interpretation ignores Commission rules and other authority requiring a carrier, in addition to satisfying the comparable geographic area test, to demonstrate that its switch performs a function equivalent to that performed by the incumbent LEC's tandem switch.[55] Specifically, SBC argues that the Joint Letter's interpretation conflicts with section 51.701 of the Commission's rules, as well as certain discussion in the *Local Competition Order*.[56] SBC asserts that, absent a functional analysis to ensure that the switching in question is equivalent to tandem switching, originating carriers may be required to pay the higher rate of compensation for tandem switching when the terminating carrier is not actually providing that service.[57]

19. We find that the Joint Letter's interpretation of our rules is correct. Section 51.711(a)(3) of our rules governs when the tandem rate is applicable, and plainly requires *only* a comparable geographic area test to be met for a carrier to receive the tandem interconnection rate: "Where the switch of a carrier other than an incumbent LEC *serves a geographic area comparable to the area served by the incumbent LEC's tandem switch*, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate."[58]

20. SBC and other parties maintain that, under the Commission's rules, both geographic area and functional equivalence are relevant to the determination of whether a carrier is eligible to receive the tandem interconnection rate.[59] SBC asserts that the Joint Letter "ignores section 51.701(d) of the [Commission's] rules and the critical issue of whether a new entrant's switching equipment performs any of the functions of an ILEC's tandem switch."[60] SBC contends that because section 51.701(d) defines "termination" as the switching of telecommunications traffic at the terminating carrier's end office switch or equivalent facility, the "Commission's rules view end office switching as a functionality for purposes of its reciprocal compensation rules [and] the same should be true for tandem switching."[61] Again, SBC's argument ignores the plain language of section 51.711(a)(3), which expressly establishes the conditions for receiving the tandem interconnection rate, and requires only the comparable geographic area test. In contrast, section 51.701(d) addresses neither the definition of a tandem nor when a tandem interconnection rate is appropriate.

---

[51] *Id.*

[52] *Id.*

[53] 47 C.F.R. § 51.711(a)(3).

[54] Joint Letter, 16 FCC Rcd at 9599 (citing *Unified Intercarrier Compensation NPRM* at para. 105).

[55] SBC Application at 8-9.

[56] *Id.* at 7-8.

[57] *Id.* at 9.

[58] 47 C.F.R. § 51.711(a)(3) (emphasis added).

[59] SBC Application at 6-8; *see also* SBC Reply at 4-5; Qwest Comments at 1-2; Verizon Reply at 2.

[60] SBC Application at 7-8.

[61] SBC Reply Comments at 4.

21. SBC also argues that section 51.711(a)(3) of our rules must be interpreted to require both a functional equivalence test and a comparable geographic area test based on discussion in the *Local Competition Order* addressing this issue.[62] As the Joint Letter correctly noted, however, the Commission has previously addressed the import of this language in the *Unified Intercarrier Compensation NPRM*, and stated that "although there has been some confusion stemming from additional language in the text of the *Local Competition [First Report and] Order* regarding functional equivalency, section 51.711(a)(3) is clear in requiring only a geographic area test."[63] We reaffirm this interpretation.[64]

C. The Joint Letter is sound as an interpretive ruling pursuant to the APA.

22. SBC argues that the Bureaus must "demonstrate the rationality" of their decision making process by responding to those comments that are "relevant and significant"[65] and by considering all

---

[62] In relevant part, the *Local Competition Order* stated that

> the 'additional costs' incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

Local Competition Order at para. 1090. SBC notes that the Texas Public Utility Commission has relied on this language in applying a functionality test in addition to a comparable geographic area test. SBC Application at 4. We note, however, that other State commissions have held that carriers need only satisfy the comparable geographic area test. *See*, *e.g.*, In re Carrier Compensation for Exchange of Traffic, No. 000075-TP, PSC-02-1248-FOF-TP, 2002 WL 31060525 (Fla. P.S.C. rel. Sep 10, 2002)(*Florida PSC Order*) (finding that section 51.711 requires only geographic comparability, and does not require a "two-prong test").

[63] *Unified Intercarrier Compensation NPRM*, 16 FCC Rcd at 9648, para. 105. In reaffirming the Commission's interpretation of the tandem interconnection rate rule, we find no inconsistency between the discussion in the *Local Competition Order* quoted above and the language in the promulgated rule. The *Local Competition Order* does refer to a functional analysis that states should apply, but then imposes a geographic area test as a sufficient condition for receiving the tandem rate. *See supra*, n. 49. The comparable geographic area test acts as a special case of the functional analysis, *i.e.*, if the geographic area test is satisfied, then functional similarity is established for purposes of determining the appropriate reciprocal compensation rate. The Commission thus did not preclude states from finding that new technologies are functionally similar to tandem switches even though they do not serve a geographic area comparable to that served by the incumbent LEC's tandem switch. *See*, *e.g.*, *Florida PSC Order*, 2002 WL 1576912 ("it is appropriate to consider the functionality of an ALEC's network in situations where it does not serve a geographic area comparable to that served by an ILEC tandem switch").

[64] We also note that the Ninth Circuit has recently adopted the same interpretation of the tandem interconnection rate rule. *See U.S. WEST Communications Inc. v. Washington Utilities and Transportation Commission*, 255 F.3d 990 (9th Cir., 2001). The issue before the court was whether AT&T Wireless (AWS) was entitled to reciprocal compensation based on US West's end office rate or tandem rate. It was undisputed that AWS's mobile switch served an area comparable in size to US West's tandem switch. *U.S. WEST*, 255 F.3d at 995-96. The Ninth Circuit, taking note of the rule and the explanatory language in the *Local Competition Order*, concluded that section 51.711(a)(3) requires only a comparable geographic area test. *U.S. WEST*, 255 F.3d at 994-998. It therefore found that AWS was entitled to the tandem interconnection rate for the use of its mobile switch. *Id.* at 998.

[65] 5 U.S.C. § 553. *See National Small Shipments Traffic Conference, Inc. v. ICC*, 725 F.2d 1442, 1450 (D.C. Cir. 1984).

important aspects of the problem.[66] The duty to provide consideration of comments, however, is part of the larger obligation to provide notice and opportunity to comment established in section 553 of the APA, and the APA specifically exempts interpretive rulings from these requirements.[67] The APA only requires federal agencies to publish notice of a proposed *rule* in the Federal Register and to receive and consider public comment on the proposed rule prior to adopting and publishing the final rule in the Federal Register.[68] The requirements of notice and opportunity to comment do not apply to interpretive rules — rules that do "not contain new substance but merely express the agency's understanding" of a statute or rule.[69]

23. The D.C. Circuit has repeatedly held that interpretive rulings are properly used to clarify the original meaning and application of an agency's substantive rules.[70] The Supreme Court in reaffirming the authority of agencies to interpret their own rules stated that "a new APA rulemaking is required only if an agency 'adopt[s] a new position inconsistent with any of the [agency's] existing regulations.'"[71] As discussed previously, the clarifications are fully consistent with our rules. Thus, the Joint Letter is not subject to APA notice and comment requirements.[72]

24. For similar reasons, the clarifications announced in the *Unified Intercarrier Compensation NPRM*, which were relied upon in the Joint Letter, were valid interpretive rulings that did not require notice and comment proceedings. SBC dismisses the clarifications in the *Unified Intercarrier Compensation NPRM* as "dicta" and asserts that they have no authority. Qwest echoes this argument, asserting that the *Unified Intercarrier Compensation NPRM*, being a mere notice of *proposed* rulemaking, could not be a vehicle used to "promulgate" rules.[73] These arguments, however, are answered by *Cellnet Communication, Inc. v. FCC*.[74] This decision addressed a materially identical instance in which the Commission issued a Notice that both initiated a rulemaking proceeding and clarified an existing rule.[75] The court upheld the Commission's clarifications, stating that "[a]s the Notice clarified, rather than changed, the rules, the Commission properly issued it without notice and opportunity for comment."[76] Because the statements at issue here also clarified rather than changed the rules, we reject Qwest's assertion that we improperly "promulgated" rules. Further, just as the court found no difficulty in the fact that a clarification was issued as part of a Notice of Proposed Rulemaking, the clarifications at issue here

[66] *See* SBC Application at 10-11 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.,* 463 U.S. 29, 43 (1983)).

[67] *See* 5 U.S.C. §§ 553(b)(3)(A), 553(d)(2).

[68] *See* 5 U.S.C. § 553.

[69] *National Latino Media Coalition v. FCC*, 816 F.2d 785 (D.C. Cir. 1987).

[70] *See Sprint Corporation v. FCC*, 315 F.3d 369, 373-74 (D.C. Cir. 2003); *Cellnet Communications, Inc.* v. *FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992); *Viacom International Inc. v. FCC*, 672 F.2d 1034, 1037, 1039-41 (D.C. Cir. 1982).

[71] *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995).

[72] In this respect, the instant case is clearly distinguishable from *Sprint Corporation*, in which the court found that the Commission improperly modified a rule without notice and comment. *Sprint Corporation*, 315 F.3d at 377. In *Sprint Corporation*, the Commission conceded that it had "revised" and "modified," rather than merely clarified, the old rule. *Id.* at 373. Indeed, the court found that the Commission had entirely "jettisoned" its old rule in favor of a new approach. *Id.* Here, in contrast, we have not modified or revised the existing reciprocal compensation rules.

[73] Qwest Comments at 3.

[74] *Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106 (D.C. Cir. 1992).

[75] *Id.*

[76] *Id.* at 1110-11.

are interpretative rulings, notwithstanding the fact that they were issued in a Notice.[77]

25. Finally, we note that we have, in this Order, addressed the significant arguments raised in the comments in the underlying proceeding as well as the arguments raised in connection with the current SBC Application.[78] We conclude that we have given due consideration of the record through this Order.

IV. CONCLUSION:

26. We conclude the Joint Letter is consistent with the Communications Act, Commission rules, and Commission orders. In addition, we conclude the Joint Letter did not violate the requirements of the APA. The Joint Letter is a lawfully issued restatement of rules already promulgated by the Commission in the *Local Competition Order* and clarified by the Commission in the *Unified Intercarrier Compensation NPRM*. We emphasize that the clarifications reflect the existing reciprocal compensation rules, and may be modified in light of our on-going review of intercarrier compensation rules following the release of the *Unified Intercarrier Compensation NPRM*.

V. ORDERING CLAUSE:

27. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 1.115(c) of the Commission's rules, 47 C.F.R. § 1.115(c), the Application for Review filed by SBC Communications Inc. on June 8, 2001, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[77] We also reject SBC's characterization of the Commission's clarifications as "dicta." The Commission issued the clarifications "[t]o assist parties in helping us explore the broader question of moving to a unified interconnection regime raised in this proceeding . . . ." *Unified Intercarrier Compensation NPRM*, 16 FCC Rcd at 9647, para. 104. The clarifications thus directly related and contributed to the purpose for which the Notice was issued. For example, the Commission raised specifically the question of whether section 51.711(a)(3) should be amended to include a separate test for functional equivalency. *Id.* at para. 107. The raising of such an issue necessarily depends on the determination that a separate functional equivalency test was not already part of the rule.

[78] *See* Comment Sought on Reciprocal Compensation for CMRS Providers, CC Docket Nos. 96-98, 95-185, and WT Docket No. 97-207, *Public Notice*, DA 00-1050 (rel. May 11, 2000). Moreover, the Commission recognizes that the comments and reply comments filed in the underlying proceeding in opposition to the Sprint PCS Letter were not filed by the same parties that filed comments and reply comments in support of SBC's AFR of the Joint Letter in the present proceeding. *See* Application for Review of SBC Communications Inc., filed June 8, 2001 (SBC Application).