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September 10, 2004

VIA HAND DELIVERY

Honorable Pat Miller, Chairman
c/o Sharla Dillon, Docket & Records Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee,37243-0505

RE: Petition of Cellco Partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996, TRA Consolidated Docket No 03-00585

Dear Chairman Miller:

Attached hereto please find an original and thirteen (13) copies of the *Joint Post-Arbitration Brief Submitted on Behalf of the CMRS Providers* and an Appendix thereto for filing in the above-referenced matter.

The enclosed documents have been served on counsel for the Rural Independent Coalition and other parties of record. If you have any questions about this filing or need any additional information, please do not hesitate to give me a call at (615) 744-8446.

Sincerely,

J. Barclay Phillips
Melvin J. Malone

Enclosure
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BEFORE THE
TENNESSEE REGULATORY AUTHORITY

Petition of:	)	
	)	
Cellco Partnership d/b/a Verizon Wireless	)	Consolidated Docket
For Arbitration Under the	)	No. 03-00585
Telecommunications Act of 1996	)	
	)	
	)	

JOINT POST-ARBITRATION BRIEF SUBMITTED ON BEHALF OF THE CMRS PROVIDERS

September 10, 2004

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JOINT POST-ARBITRATION BRIEF SUBMITTED ON BEHALF OF THE CMRS PROVIDERS

I. OVERVIEW

The Telecommunications Act of 1996 (the "Act") fundamentally changed the telecommunications industry and the delivery of telecommunications services to consumers throughout the country. In large measure, Congress designed the Act specifically to bring the benefits of competition to consumers - *including consumers in rural Tennessee.* By requiring traditional monopolies to interconnect with other carriers and by establishing a new regime for determining how carriers compensate one another for traffic exchanged through that interconnection, Congress laid the foundation for lower prices and a greater variety of telecommunications services for all consumers. To that end, for well over a year the CMRS Providers in this proceeding have been attempting to establish appropriate interconnection arrangements pursuant to the Act with the ICOs. However, as the TRA is well aware, those efforts have unfortunately been stymied and the resulting possible consumer benefits put on indefinite hold The CMRS carriers are in this proceeding to remove that impasse

A. The Principles Of Interconnection Under the Act Are Clear

Although the recently concluded arbitration included ample testimony regarding the respective obligations and rights imposed by the Act, the basic principles of interconnection

between a local exchange carrier, including rural local exchange carriers like the ICOs , and CMRS Providers are quite simple

- **Carriers have an obligation to interconnect either directly or indirectly.**

Pursuant to the Act and the Federal Communication Commission's (the "FCC") rules and orders, there are two (2) ways to exchange traffic between a wireless carrier and a rural carrier. an indirect connection or a direct connection. Under an indirect connection, traffic is exchanged between the wireless carrier and the rural carrier through the services of a third party intermediary such as BellSouth. As the FCC has recently recognized, this method of interconnection is especially common and appropriate in circumstances where the volume of traffic exchanged by two (2) carriers does not otherwise warrant the expense of a direct connection [1] A direct connection, on the other hand, employs the use of dedicated transport facilities between the wireless carrier and the local exchange carrier Regardless of the method of interconnection, the Act contemplates that the agreement is *solely* between the carrier on whose network the call originates and the carrier on whose network the call terminates. (See Section III.A, *infra*)

- **Originating carriers are obligated to pay reciprocal compensation to terminating carriers for all intra-MTA traffic.**

Whether traffic is exchanged through indirect or direct interconnection, the FCC has determined, and reiterated on numerous occasions, that a call between an incumbent local exchange carrier and a wireless carrier is considered Telecommunications Traffic –

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[1] *See* FCC Brief filed on July 9, 2004 in *United States Telecom Ass'n, et al , v Federal Communications Commission and United States of America,* No 03-1414, 03-1443 (DC Cir) (the "FCC Brief") (TRA Hearing Exhibit - Pruitt Exhibit No 2) ("In the *Local Competition First Report and Order*, the Commission made clear that carriers "should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices " 11 FCC Rcd 15499, 15991 ¶ 997 (1996) (subsequent history omitted). *In rural areas, CMRS carriers typically interconnect indirectly with smaller LECs through the tandem switch of one of the regional Bell Operating Companies ("RBOCs")* ") (emphasis added), *see also* Hearing Tr Vol 2, 9 15-12 15

and thus subject to reciprocal compensation, not access charges - if the call originates and terminates within the same Major Trading Area ("MTA") (referred to as "intraMTA traffic" or "Telecommunications Traffic").[2] These obligations are mutual and reciprocal *since both the ICOs and the CMRS Providers* respectively terminate traffic that is originated on the network facilities of the other. (See Section III.B, *infra.*)[3]

- **Reciprocal compensation must be based on forward-looking costs or on bill-and-keep.**

The FCC has made it clear that reciprocal compensation for intraMTA traffic exchanged by CMRS Providers and local exchange carriers, including rural carriers, must be based on the forward looking costs of the transport and termination provided by the carriers.[4] In the absence of such forward-looking cost studies, and in the absence of evidence that the traffic being exchanged is not "roughly balanced," the FCC's rules and the Act provide that the appropriate compensation mechanism is bill-and-keep. In this arbitration, the ICOs' failure to provide forward-looking cost studies and their failure to provide any evidence to rebut the presumption that the traffic exchanged is roughly balanced, is undisputed. (See Section III.C, *infra.*)

- **Originating carriers are obligated to deliver their traffic to the terminating carrier's network.**

In addition to the fact that carriers are responsible for paying each other reciprocal compensation for the transport and termination of intraMTA traffic originated on their network that is terminated on the other carrier's network, the FCC's Calling Party Network Pays

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[2] 47 C F R § 51 703(b)(2)

[3] 47 C F R § 57 701(e)

[4] *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* 11 FCC Rcd 15499 (1996) at ¶ ¶ 1054 *et seq* (the "*Local Competition Order*"), *see also* 47 U S C 252(d)(2), 47 C F R §§ 51 705 *et seq*

("CPNP") regime dictates that they are also responsible for delivering that traffic to the terminating party's network and paying for the costs of that delivery.[5] Subject to the principle of dialing parity discussed below, how a carrier chooses to deliver that traffic (i.e., directly or through a transiting carrier) is essentially within the originating carrier's discretion, as long as they are willing to pay for it (See Section III.D, *infra.*)

- **Originating carriers are obligated to treat calls to the terminating carrier's telephone numbers (NPA-NXXs) in a nondiscriminatory manner consistent with the principles of dialing parity.**

Regardless of how a carrier chooses to deliver its Telecommunications Traffic, and separate from the issue of whether particular traffic is subject to reciprocal compensation, carriers are required to treat calls to the other party's numbers on a non-discriminatory basis that is consistent with the principles of dialing parity. Thus, ICOs are required to permit their customers to dial the same number of digits and pay the same charge to call a wireless customer as their customers dial and pay to call a wireline customer whose number is associated with the same rate center as the wireless customer. If not, the competitive goals of the Act simply cannot be met. (See Section III.E, *infra.*)[6]

B. The ICOs are Resistant to the Obligations Imposed by the Act.

Despite the "new" regulatory regime mandated by the Act some eight (8) years ago, the ICOs' position, and the hundreds of pages of testimony submitted by Mr. Watkins on their

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[5] *See* 47 C F R §51 703(b), 47 C F R §51 709(b) *See also,* FCC Brief at pg 35 ("Under current intercarrier compensation rules, then, when a wireless customer calls a rural LEC customer, the wireless carrier is responsible for transporting the call and paying the cost of this transport And conversely, when a rural LEC customer calls a wireless customer, the rural LEC is responsible for transporting the call and paying the cost of this transport "), *see also id* at pp 32-33 (" Rural LECs thus always have been required to deliver traffic to other carriers through indirect or direct interconnection – even when a wireless carrier's switch is not located in the rural LEC's rate center ")

[6] The TRA must also address the remaining open issues including, but not limited to, the standard terms and conditions to be applied, the ability of a carrier to block traffic and network change notifications (*See* Section III F, *infra*) However, none of these more administrative issues alter the underlying principles of interconnection

behalf, can be reduced to a single statement: "We do not want to change anything." Accordingly, the ICOs attempt to construct a multi-layered defense which seems designed to do nothing more than obfuscate the basic principles of interconnection described above. In brief, the ICOs' positions are, at a minimum, unfounded for the following reasons:

First, the ICOs assert that the TRA has no jurisdiction under the Act to conduct this arbitration. This argument - which was also the subject of a failed motion to dismiss – is based on an inaccurate assertion that there are no FCC rules and regulations which apply in this Docket to indirect interconnection.[7] Thus, they assert, the TRA has no authority to conduct this arbitration under the Act. However, the FCC rules and regulations *apply equally to both direct and indirect interconnection* and the arbitration was otherwise both timely and proper. Moreover, even if the FCC had not articulated specific rules, nothing relieves the TRA from its statutory obligation to resolve the open issues between the parties or affirmatively prohibits the TRA from addressing these issues. (See Section II and Section III.F.6, *infra.*)

Second, the ICOs seem to argue that even if its members were subject to arbitration under the Act, section 251(f)(1) (the so-called "rural exemption") relieves them of their obligations to develop reciprocal compensation rates based on forward-looking costs. Although it is true that the rural exemption potentially relieves rural carriers of particular duties under section 251(c), it does not in any way affect their obligations to pay reciprocal compensation for transport and termination under section 251(b)(5) based on the pricing standards contained in section 252(d)(2) (and the accompanying regulations). (See Section II.B.2, *infra*)

Third, the ICOs argue that regardless of the pricing standard for reciprocal compensation or the applicability of reciprocal compensation obligations, they have no obligation to pay

terminating compensation to the extent they have no "local exchange" traffic that they send to CMRS Providers. On its face, this position confuses the concepts of traffic which is subject to reciprocal compensation (i.e., intraMTA traffic) and dialing parity (e.g., the equal treatment of carrier numbering resources for rating purposes). Perhaps even more troubling is that the ICOs position *effectively prevents rural Tennesseans from ever enjoying the benefits of competition envisioned by the Act and the TRA.* (See Section III.B and E, *infra.*)

Fourth, the ICOs claim that they are not obligated to pay for the costs of delivering their Telecommunications Traffic to the CMRS Providers beyond their exchange boundaries. The Act, however, is clear – each originating carrier is required to deliver their traffic to the terminating carrier's network at no charge to the terminating carrier. (See Section III.D, *infra.*)

Fifth, the ICOs seem to take the position that they "cannot" measure the CMRS Provider traffic sent to them over a transiting carrier's network. What the ICOs mean is that they do not want to spend the resources necessary to measure the traffic (despite the FCC's explicit recognition that such costs are a necessary consequence of the Act) and they do not want to agree to rely on the transiting reports that they currently receive and in many cases already use to bill CMRS Providers and other carriers. (See Section III.F, *infra.*)

Finally, the ICOs claim that although there is no basis for an indirect interconnection agreement with the CMRS providers, they are apparently willing to enter into "voluntary" three-party arrangements which include BellSouth. The ICOs, however, fail to recognize that the efforts to reach a negotiated resolution of these issues has passed and this is an arbitration which will ultimately impose an interconnection agreement on the CMRS Providers and the ICOs pursuant to the Act. Moreover, the Act simply does not provide for interconnection agreements

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[7] It is unclear if the ICOs also claim that the TRA is without jurisdiction to conduct an arbitration to establish the terms and conditions for direct interconnection between the CMRS Providers and the Rural Coalition Members

among three (3) parties and common sense dictates that they are not necessary or even preferable. (See Section III.A, *infra.*)

The TRA should look past the ICOs' "smoke and mirrors" and conclude that there is not a legal or practical basis for their arguments. As discussed below and at the hearing, regardless of the number of arguments set forth by the ICOs, they cannot change the basic obligations to interconnect under the Act which, to paraphrase the testimony at the hearing, can best be summed up as follows:

> For intraMTA traffic, both the ICOs and the CMRS Providers have an obligation to get that traffic from their network to the terminating provider. That's their respective obligation, and it's their responsibility to figure out how to do that and to pay for it. It's also their responsibility to pay the company on the terminating end to transport and terminate that traffic once it gets to their network. That's the responsibility of an originating carrier the way the world is now, and that's what we have to do....[8]

Thus, the TRA's task is fairly straightforward given that the vast majority of issues can (and must) be resolved in accordance with these well-established obligations and the principles discussed above.[9]

Such a claim would be equally meritless

[8] *See e g* , Hearing Tr , Vol 5, 71 4 – 72 24

[9] In fact, the record in this proceeding establishes that the only major question left to be resolved is whether the parties should compensate one another for the transport and termination provided based on bill-and-keep or on the forward looking benchmark rates introduced by the CMRS Providers (*See* Section III C, *infra*)

II. THRESHOLD ISSUES: JURISDICTION AND THE RURAL EXEMPTION

Although there are numerous issues before the TRA in this proceeding as discussed more thoroughly below in Section III, the ICOs have raised the specter of two (2) threshold issues which need to be addressed – and then rejected – in order for there to be an orderly and proper resolution of the substantive issues before this regulatory body. In brief, the ICOs assert that (1) the TRA does not have jurisdiction under the Act to conduct this arbitration because there are no FCC regulations that apply to indirect interconnection, and (2) even if the arbitration was appropriate, the so-called "rural exemption" under section 251(f)(1) exempts them from the forward-looking cost methodology used to establish reciprocal compensation rates under 251(b)(5). As discussed below, neither of these positions has any merit.

A. The TRA has Jurisdiction to Conduct this Arbitration under the Act.

From the outset of the arbitration, the ICOs made it clear that they do not recognize the jurisdiction of the TRA to conduct the proceeding as required by the Act.

> The—these issues of established statutory and regulatory principles are like a pall over this entire proceeding. Until we get this threshold issue decided on whether or not you have the jurisdiction to deal with these questions, this is going to be, I submit, ultimately an exercise in futility.[10]

As explained in detail in the various sections of this brief, most of the issues added by the ICOs have not been presented in a manner that would permit the TRA to rule on them in a meaningful manner Many of the issues fail to frame a disputed issue of fact or law for the TRA to decide (*See e g* ICO Issue 4 "CMRS Providers should clarify which of their affiliate entities seeks new terms and conditions for the utilization of indirect 'transit' arrangements " ICO Issue 7 "Many of the issues raised in these proceedings are not the subject of established FCC rules and regulations", *see also* ICO Issue 5, ICO Issue 10) Most of the remaining issues are largely (if not entirely) duplicative of other issues (including some other ICO Issues) (*See e g* ICO Issues 5 and 8 regarding the scope of the agreement, these issues are duplicative of each other and of Joint Issues 13, 14, 15) For none of the issues have the ICOs met their burden of supporting the issues with testimony and record evidence In fact the ICOs submitted no separate pre-filed testimony on these issues, choosing instead to merely incorporate the paltry 2 ½ page summary of their positions on the issues from the ICO Response Moreover at the hearing, ICO witness Watkins only addressed three (3) of the ICO issues and did so in less than one page of hearing transcript For all of these reasons, the TRA should summarily dismiss the ICO Issues *See, e g , In re Petition for Arbitration of the Interconnection Agreement Between AT&T Communications of the South Central States, Inc , TCG Midsouth, Inc , and BellSouth Telecommunications, Inc , Pursuant to 47 U S C Section 252* (TRA Docket No 00-00079) (2001) (Arbitrators rejecting a party's positions on the issues "due to lack of evidentiary support")

[10] Hearing Tr , Vol 1, 21 22 – 22 3

In essence, the ICOs used the recently concluded hearing to reargue their failed Preliminary Motion to Dismiss and Add BellSouth as an Indispensable Party (the "Motion to Dismiss") which was based on the grounds that "[a] state regulatory authority . . . cannot resolve an open issue by imposing a term or condition that is not an established requirement of section 251" and there are no such requirements for indirect interconnection.[11] The ICOs' position is, at the very best, *completely misguided.*

In fact, the arbitration framework of the Act was expressly designed to resolve the sort of impasse that stalled negotiations between the CMRS Providers and the ICOs.[12] The law provides, and the parties have long understood, that if negotiations did not result in a mutually satisfactory interconnection agreement – which they did not in this instance - arbitration under section 252 of the Act would be both necessary and appropriate.

First, the FCC has established comprehensive interconnection and reciprocal compensation requirements which are incorporated in Part 51 of its rules and apply equally to direct and indirect interconnection.[13] (See Section III.B.1 for a more expansive discussion of the applicability of the regulations to indirect interconnection.) Although the CMRS Providers and the ICOs may disagree on the interpretation and/or the application of those requirements, those

[11] Motion to Dismiss at pp 6-7

[12] *See generally* CMRS Providers' Response to the Motion to Dismiss (March 12, 2004) (the "CMRS Response")

[13] *See, e g*, 51 C F R §§ 51 100, 51 701(b)(2), 51 703, 51 709 and 51 711, *see also* 47 U S C §§ 251-252, *see generally* the *Local Competition Order*

are precisely the type of disputes within the statutory authority vested in the TRA by section 252(c).[14]

Second, the TRA itself, pursuant to and consistent with the Act, recognized negotiation and arbitration under sections 251 and 252 as the appropriate procedural vehicles for establishment of interconnection terms and conditions between the CMRS Providers and the ICOs. In the *Order Granting Conditional Stay and Continuing Abeyance, and Granting Interventions in Docket No. 00-00523 (the "May 5, 2003, Order")*, the TRA Hearing Officer opined, in part, that:

> [I]f the Coalition is unable to reach an agreement with the CMRS providers, then the Authority may be called upon to arbitrate disputed issues pursuant to Section 252 of the Telecommunications Act of 1996. Given these alternatives, settlement of this disputed issue is clearly in the best interest of all parties involved in this docket.[15]

In addition, the TRA has already accepted the petitions for arbitration and neither that order,[16] nor the May 5, 2003 Order, was challenged in any way by the ICOs.

Third, the CMRS Providers diligently followed the procedures in the Act in their dealings with the ICOs. The CMRS Providers issued *bona fide* requests to the ICOs and entered into

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[14] *In re Petition of WorldCom, Inc* , 17 FCC Rcd 27,039, at ¶ 1 (July, 17, 2002) ("Virginia Arbitration Order") ("Following the enactment of the Telecommunications Act of 1996 (1996 Act), the Commission adopted various rules to implement the legislatively mandated, market-opening measures that Congress put in place Under the 1996 Act's design, *it has been largely the job of the state commissions to interpret and apply those rules through arbitration proceedings* ") (emphasis added)

[15] May 5, 2003 Order, at pg 5

[16] *Order Accepting Arbitration, Appointing Arbitrators and Appointing Pre-Arbitration Officer, In Re Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No 03-00585 (March 4, 2004)

good faith negotiations for interconnection under sections 251 and 252 [17] When these negotiations were unsuccessful, the CMRS Providers filed timely arbitration petitions and requested that these petitions be consolidated.

Finally, the ICOs themselves have acknowledged that the negotiation and arbitration processes established in sections 251 and 252 are the appropriate procedural vehicles for resolving disputes/open issues between the parties. For example, in TRA Docket 00-00523 (the Rural Universal Service docket), counsel for the ICOs explicitly acknowledged the availability (and the appropriateness) of the arbitration process:

> The process of establishing that rate [for transport and termination] involves a statutory negotiation period in which the parties can have a good faith discussion about what the terms and conditions should be. And to the extent they agree, they file an agreement for approval by the Authority. *To the extent they can't agree, the process is very clear; they come to the Authority and ask for arbitration and ask you to help decide the terms and conditions where they are out of agreement. And that process is absolutely open, always has been open, and continues to be open. Not any independent I work for would suggest otherwise, nor would they try to stop that process.*[18]

Moreover, the ICOs accepted the CMRS Providers *bona fide* requests, specifically agreeing to the dates for the arbitration window under section 252 in its response to the petitions:

> We also agreed that with respect to section 252 of the Act, October 12, 2003 is the 135th day and November 12th is the 160th day following the request for

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[17] *See* Monica M. Barone's June 6, 2003, letter to Steve Kraskin, enclosure to Suzanne Toller's July 20, 2003 letter to Steve Kraskin and filed Aug 1, 2003, *In Re Generic Docket Addressing Rural Universal Service*, TRA Docket No 00-00523 ("Consistent with our discussion during the initial negotiation session in Nashville on June 2-3, 2003, this is to confirm that the CMRS providers' letter dated May 29, 2003, should be considered the CMRS providers' request to the [ICOs] for negotiations pursuant to section 251 of the Telecommunications Act In this regard, the CMRS Providers expect the parties will negotiate all open issues between them and the statutory time lines shall apply to the negotiations If the parties are unable to resolve all issues prior to the statutory deadline contained in Section 252(b), either party may petition the TRA to arbitrate unresolved issues ")

[18] *See* Transcript of Status Conference, TRA Docket No 00-00523 (April 22, 2003) at 10 7-23 (emphasis added) A copy of the relevant transcript pages was attached as Exhibit 1 to the CMRS Response

interconnections issued by each of the CMRS Providers to each of the Coalition Members.[19]

Finally, the ICOs acknowledged the appropriateness of arbitration in their response to the petitions for arbitration.

> The Rural Coalition members are not reluctant to negotiate new terms and conditions in good faith, or to resolve open issues through arbitration and formal processes, if necessary.[20]

In brief, there is simply no basis to support the assertion that the TRA did not have the jurisdiction to conduct the recently concluded arbitration hearings under the Act.[21]

B. The Rural Exemption does not Affect the Pricing Methodology Applicable to Reciprocal Compensation under Section 251(b)(5).

In addition to the jurisdictional argument discussed above, the ICOs claim that they are exempt from the forward-looking cost methodology used to determine reciprocal compensation obligations by virtue of 47 U.S.C. section 252(f)(1), the so-called "Rural Exemption."[22] However, as discussed below, the Rural Exemption – even if it were somehow applicable to this proceeding - simply has no application to the obligations imposed upon the ICOs by section 251(b)(5), or to the pricing standards established by the FCC for those obligations.

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[19] *See* Stephen G Kraskin's June 10, 2003, Letter to Monica M Barone, *In Re Generic Docket Addressing Rural Universal Service*, TRA Docket No 00-00523 ("To the extent that such individual company negotiation does not result in mutual agreement, individual arbitration regarding carrier to carrier arrangements may be required, consistent with Section 252 of the Act ")

[20] *Response of the Rural Coalition of Small LECs and Cooperatives, In Re Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No 03-00585, p 12 (Dec 1, 2003) (the "ICO Response")

[21] The Rural Coalition seems to imply that although the TRA did not have jurisdiction under the Act to conduct the arbitration, it had jurisdiction under some as yet to be identified state law to conduct an arbitration and impose terms and conditions on the parties for the exchange of traffic *See* Hearing Tr , Vol 7, 30 3-19 Other than allowing the ICOs to further complicate the procedural posture of this proceeding, this position is entirely without merit and should be rejected by the TRA

[22] Rebuttal Testimony of Steven E. Watkins, p 20, Hearing Tr , Vol VIII, 46 7-21

1. General Obligations Under the Act

In order to understand the Rural Exemption, it is necessary to understand the general interconnection obligations imposed by the Act. Section 251 sets forth three (3) tiers of obligations: (a) general obligation of all telecommunications carriers to interconnect directly or indirectly;[23] (b) obligations which are imposed specifically upon all local exchange carriers, including the obligation to provide number portability, dialing parity and, *most relevant to this proceeding*, the obligation "to establish reciprocal compensation arrangements for the transport and termination of telecommunications";[24] and (c) obligations for incumbent local exchange carriers, including the obligations to provide unbundled access and collocation.[25]

As the TRA is well aware, the obligations of the ICOs under section 251(b), and in particular their obligations to provide reciprocal compensation pursuant to section 251(b)(5), is perhaps the most critical issue in this proceeding. To that end, it is important to note that section 252(d)(2) explicitly sets forth the pricing standards for determining reciprocal compensation obligations of the incumbent local exchange carriers under section 251(b)(5). Moreover, as noted by the FCC, the obligations of section 251(b)(5) are inextricably tied to the provisions of section 252(d)(2):

> LECs [including rural telephone companies like the ICOs] are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section

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[23] 47 U S C § 251(a)

[24] 47 U S C § 251(b) (obligations include resale, number portability, dialing parity, access to rights-of-way and reciprocal compensation)

[25] 47 U S C § 251 (c) Although Section 251(c)(2) also refers to "Interconnection," the FCC has stated clearly that reciprocal compensation obligations at issue in this arbitration arise from subsection (b) of Section 251, not subsection (c)

"[T]he term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic Including the transport and termination of traffic within the meaning of section 251(c)(2) would result in reading out of the statute the duty of all LECs to establish "reciprocal compensation arrangements for the transport and termination of telecommunications," under section 251(b)(5) " *Local Competition Order* at ¶ 176

252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers... [26]

In brief, section 252(d)(2) mandates that compliance with the obligations of section 251(b)(5) requires the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination ... on the basis of a reasonable approximation of the additional costs of terminating such calls."[27] The methodologies for establishing the "reasonable approximation of the additional costs," i.e., forward-looking economic costs, proxy rates and bill-and-keep, were then set forth by the FCC in the *Local Competition Order* and in the accompanying federal regulations.[28]

2. Exemptions under the Act

There are no exemptions to the obligations imposed by section 251(a) regarding the obligations to interconnect directly or indirectly. Likewise *there are no general exemptions to the obligations of local exchange carriers under section 251(b).* However, the Act does provide that certain local exchange carriers, i.e., those with fewer than 2% of the Nation's access lines, may file a petition with a State commission to modify or suspend some or all of the obligations of section 251(b) – including the reciprocal compensation obligations of 251(b)(5).[29] ICO witness Watkins confirmed this point in testimony filed in the TRA Universal Service Docket, No. 00-00523:

> No LEC is initially exempt from the Section 251(b) requirements. However, small LECs (with less than 2 percent of the Nation's access lines) have been granted the

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[26] *Local Competition Order* at ¶ 1008

[27] Section 252(d)(2)

[28] *See Local Competition Order* at ¶¶ 1054 et seq (establishing, among other things, the forward-looking cost methodology for determining compensation rates for transport and termination under Section 252(d)(2)), see also 47 C F R §§ 51 703, 51 705, 51 707, 51 709, 51 711, 51 713, see also Section III C , *infra*

[29] 47 U S C § 251(f)(2)

opportunity under Section 251(f)(2) to request suspension and/or modification of the Section 251(b) requirements.[30]

In fact, it is the CMRS Providers' understanding that the ICOs have filed such a petition with the TRA in an effort to suspend their obligations to provide wireline to wireless number portability, i.e., another obligation of section 251(b).[31] However, *no such petition has been filed in this proceeding with regard to the ICOs' obligations to provide reciprocal compensation under section 251(b)(5).*

In contrast, the "Rural Exemption" under section 251(f)(1) provides that s*ection 251(c) obligations*, (i.e., the third tier of obligations imposed only on incumbent local exchange carriers) are not applicable to "rural telephone companies" until (a) the rural carrier receives a bona fide request for interconnection and (b) a state commission otherwise terminates the exemption.[32] There is really no substantive dispute that the ICOs are "rural telephone companies" as defined by the Act or that the CMRS Providers submitted bona fide requests for interconnection to the ICOs. The CMRS Providers also do not dispute that the TRA could conduct a proceeding to terminate the ICOs' exemption under 251(f)(1).[33]

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[30] Testimony of Steven E Watkins, TRA Docket No 00-00523, 24 11-19

[31] *See Independent Coalition of Rural Incumbent Telephone Companies and Cooperatives Request for Suspension of Wireline to Wireless Number Portability Obligations Pursuant to Section 251(f)(2) of the Communications Act of 1934*, as Amended, TRA Docket No 03-00633, see also Section 251(b)(2).

[32] 47 U S C § 251(f)(1)(A) ("EXEMPTION --Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof) ")

[33] If the ICOs believed that the Rural Exemption was somehow relevant to the TRA's jurisdiction to conduct this arbitration, or to the pricing methodology to be utilized by the TRA in setting reciprocal compensation rates, they should have brought that to the attention of all of the parties well before the hearing so that the TRA could determine whether it was indeed relevant to the issues before it and if so, initiate the proper proceeding to determine whether the exemption should be terminated In this regard, it is particularly puzzling that the ICOs did not include the issue in their motion to dismiss and resisted adding it to the joint issue matrix prior to the hearing Accordingly, aside from the fact that the Rural Exemption simply has no bearing on the relief requested by the CMRS Providers under Section 251(b)(5) for the reasons discussed above, the ICOs should otherwise be estopped from raising this issue at this time

However, no such proceeding is necessary because the CMRS Providers are seeking reciprocal compensation under *section 251(b)(5)* – not section 251(c) - and the Rural Exemption simply has no application to the reciprocal compensation obligations of the ICOs under section 251(b)(5), or the pricing methodology used to establish those obligations.

Thus, the ICOs claim that the Rural Exemption somehow relieves them of their obligation to establish reciprocal compensation based on either forward-looking economic costs, or transport or termination, or on the basis of bill-and-keep as required by the Act and the FCC is completely without merit, and neither the law nor any type of credible statutory construction provides otherwise.[34]

III. ANALYSIS OF ISSUES ON JOINT MATRIX

As the TRA is well aware, there are numerous issues on the Joint Matrix which require resolution in this arbitration. The analysis which follows will address each issue individually, but do so in the context of the basic principles of interconnection discussed above (and at the hearing) in order to facilitate the TRA's consideration. The CMRS Providers note that many of these issues are purely legal, and not factual, in nature Accordingly, while the testimony at the hearing may have been helpful in understanding these issues, the testimony cannot change the legal obligations of the parties to interconnect in a manner consistent with the principles discussed above.

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[34] The ICOs spent an inordinate amount of time quoting Paragraph 1059 of the *Local Competition Order* which reads, in part, as follows

> We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act *See e g* , Hearing Tr., Vol 3, 34 5 – 36 20

As discussed above, both of these are true statements regarding the exemptions provided for in the Act However, the CMRS Providers fail to see how these factual statements describing Section 251(f), in general, somehow can be interpreted to mean that the ICOs are not obligated under Section 251(b)(5) and the accompanying pricing standards without filing a petition under Section 251(f)(2)

A. Principle No. 1: Carriers have an Obligation to Interconnect either Directly or Indirectly.

1. **Joint Issue No. 1**: Does an ICO have the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers?

   Summary: Yes. The Act and FCC rules expressly require the ICOs to interconnect directly or indirectly with the CMRS Providers, and the ICOs have conceded they interconnect indirectly with the CMRS Providers pursuant to 47 U.S.C. § 251(a)(1).

Sections 251 and 252 of the Act create a framework under which statutory duties are imposed upon all telecommunications carriers to interconnect their respective networks with one another, route and terminate traffic originated on one another's network and compensate one another for the termination of such traffic in a post-monopoly environment. As discussed in the previous section, the obligations imposed on the carriers can vary depending on whether the carriers are local exchange carriers, incumbent local exchange carriers, wireless carriers or rural telephone companies.

It is undisputed that section 251(a) is applicable to all telecommunications carriers, and requires each telecommunications carrier "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers".[35] In fact, the FCC has determined that "telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices."[36]

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[35] 47 U S C § 251(a)(1), 47 C F R § 51.100(a)(1) Direct interconnection occurs between two telecommunications carriers when dedicated transport facilities are installed between the carriers' respective switches and traffic is mutually exchanged between the two networks over such facilities Indirect interconnection occurs between the same two carriers when, instead of using dedicated facilities, each carriers' respective switch is typically connected to a tandem of the same intermediate third-party carrier Traffic originated on each subtending carrier's network is then, as a general matter, mutually exchanged with the other by delivery of such traffic to the intermediate carrier's network which, in turn, delivers it to the terminating network Billy H Pruitt Direct Testimony, at 19 4-9, Hearing Tr Vol 1, 30 5-9, *see also, Local Competition Order*, at ¶ 997

[36] *Local Competition Order* at ¶ 997

It is undisputed that the ICOs and CMRS Providers are each telecommunications carriers. The ICOs concede that they are indirectly interconnected with the CMRS Providers through the BellSouth tandem(s).[37] Although the ICOs seem to tacitly acknowledge that they are indirectly interconnected with the CMRS Providers, they do not acknowledge their obligation to do so in a meaningful way since they fail to acknowledge the various obligations that are integral to interconnection such as reciprocal compensation for all intraMTA traffic, compensation based on forward-looking costs (or bill-and–keep) and dialing parity. [38] (See Sections III.B. and E. for a discussion of those issues.)

The TRA should find that the ICOs and CMRS Providers each have a statutory duty pursuant to 251(a)(1) to interconnect directly or indirectly with each other for the mutual exchange of traffic.

2. **Joint Issue No. 4**: When a third party provider transits traffic, must the Interconnection Agreement between the originating and terminating carriers include the transiting provider?

   Summary: No. Interconnection agreements between the CMRS providers and the ICOs should not include third party transiting carriers.

The CMRS Providers seek arbitration of this agreement with the ICOs in order to enter into an agreement establishing reciprocal compensation obligations pursuant to sections 251(a)(1) and 251(b)(5). The ICOs have the legal obligation under the Act to enter into such an interconnection agreement that includes reciprocal compensation arrangements. Further, although the FCC has recognized that carriers may use an intermediary transiting carrier to

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[37] *See* ICOs' Response, at 18 ("Factually, the ICOs are already in full compliance with the requirements of Section 251(a) There is no issue to arbitrate here because the ICOs already fulfill their duties under Section 251(a) of the Act "), Hearing Tr Vol VII, 21. 20 – 2 1 ("There really is no issue to arbitrate Everyone agrees we're already indirectly interconnected")

[38] *See* ICO Response at pg 20 (" the real unresolved issues involve compensation terms and not whether the ICO fulfills its duty to interconnect directly or indirectly ")

transit traffic to a terminating carrier,[39] there is nothing in the Act or the FCC's rules that require an intermediary transiting carrier to be included as a party to such an agreement or otherwise requires the involvement of the intermediary transiting carrier in the negotiations or arbitration of indirect interconnection agreements. As discussed below, the Act's reciprocal compensation scheme is premised on an arrangement between two parties, not three parties. In this regard, the Hearing Officer in this proceeding correctly held that "BellSouth is an unnecessary third party and need not be joined in this particular arbitration."[40]

As a practical matter, the ICOs have already entered into agreements with carriers that provide for the indirect exchange of traffic yet do not include third party transiting carriers as parties to those agreements. The existence of these agreements is perhaps the most telling evidence that transiting carriers are not necessary parties to indirect interconnection agreements In addition, two-party agreements that do not specifically name a third-party transiting carrier provides the necessary flexibility for carriers to modify their networks, if appropriate, to accommodate new transiting carrier options

In contrast, as discussed below, the ICOs' stated concerns for including BellSouth as a participant to this proceeding are contrary to the law and meritless.

a. There is No Legal Support For the ICOs' Contention that a Three-Party Agreement or Coordination Among the Parties is Necessary

Although the ICOs suggest that a three-party agreement or, at a minimum coordination between the parties, is necessary,[41] they are unable to cite to any supporting law for this position.

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[39] *See* Section III B 2, *infra*, *see also Virginia Arbitration Order,* at paras. 118, and 120 (rejecting Verizon's proposal to terminate transit service unilaterally, and finding that a "fundamental purpose" of section 251 is to "promote the interconnection of all telecommunications networks by ensuring that incumbent LECs are not the only carriers that are able to interconnect efficiently with other carriers ")

[40] April 12, 2004 TRA Order Denying Motion to Dismiss at 8

[41] ICO Response at 40

Nor could they. As LECs, the ICOs have the duty to enter into agreements establishing reciprocal compensation arrangements pursuant to section 251(b)(5) of the Act.[42] As the Hearing Officer correctly found, there "is no provision in federal law for including any additional parties in the negotiation process. Because arbitration is simply an extension of voluntary negotiations, there is, likewise, no allowance made in federal law for participation in arbitration of any party other than the ILEC and requesting carrier(s)."[43]

In fact, legal precedent establishes that there is no such requirement that an intermediary carrier must be involved in negotiations between two carriers. The FCC determined an issue similar to the one raised here in a section 252 arbitration proceeding between two carriers in which one carrier sought to impose an intermediary billing function on a third party transiting carrier. In addressing this proposal, the FCC held that there was no FCC rule or precedent requiring an intermediary carrier to perform a billing function for third party carriers, and *rejected* arguments that the intermediary carrier "should incur the burdens of negotiating interconnection and reciprocal compensation arrangements with third-party carriers."[44] Similarly, the TRA has previously recognized that section 252 agreements are comprised of *two parties* and *not three parties*. For example, in an earlier arbitration, the TRA prohibited a third party from intervening in section 252 arbitrations.[45]

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[42] The ICOs also incorrectly assert that BellSouth has "no 'automatic' right to bring the traffic of other carriers to the ICO networks to achieve their desired 'indirect interconnection '" ICO Response at 43 However, such an argument makes little sense given that the FCC has recognized carriers' rights to indirect interconnection and implicitly recognized that carriers may exchange traffic over the public switched telephone network ("PSTN") in this indirect manner *See Local Competition Order* at para 997 (noting that direct interconnection is not required of *all* telecommunications carriers, including competitive carriers)

[43] April 12, 2004 TRA Order Denying Motion to Dismiss at 6

[44] *Virginia Arbitration Order* at ¶ 119

[45] *See TRA Order Denying the Petition of the Consumer Advocate Division to Intervene,* Docket No 96-01152 (Sept 11, 1996)

Other state commissions have also arbitrated interconnection agreements providing for the exchange of indirect traffic, without including a transiting provider as a party, or coordinating such terms and conditions with a third party transiting provider.[46] Moreover, in a recent section 252 arbitration before the Pennsylvania Commission, the Administrative Law Judge ("ALJ") issued a recommended decision finding that any terms and conditions of separate agreements that carriers must negotiate with third party transiting providers "need not be included in the interconnection agreement between [the parties to the arbitration.]"[47] The ALJ in that proceeding articulated that the "terms and conditions of the agreement between the party choosing to interconnect indirectly and the third party transiting provider are *legally immaterial* to the interconnection agreement between, in this specific case, [the two arbitrating parties]."[48] Thus, there is no legal basis for the ICOs' assertion that BellSouth or any other third party carrier be made a party to this agreement establishing reciprocal compensation obligations.

b. As a Practical Matter, Two-Party Interconnection Agreements are Feasible and Preferable to Three-Party Interconnection Agreements

Two-party interconnection agreements are also more practical and workable than three-party interconnection agreements. It is absolutely false for the ICOs to contend that as a practical matter, it is necessary for them to involve BellSouth in their establishment of these indirect interconnection and reciprocal compensation obligations with the CMRS Providers.

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[46] *See CMRS Providers' Response to ICOs' Motion to Dismiss* at 11, n 30 (citing commission orders in Oklahoma and Iowa)

[47] The Recommended Decision was issued on March 24, and the Commission has yet to issue a final decision in this case. *Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with ALLTEL Pennsylvania, Inc* , Pennsylvania Public Utility Commission, Recommended Decision of ALJ Wayne Weismandel (Mar 24, 2004) at 17

[48] *Id* at 18

Indeed, it actually makes more sense for the parties *not to include* BellSouth or other intermediary providers as parties to this agreement

As the record shows, today there are numerous interconnection agreements providing for interconnection on an indirect basis, but none of these agreements include, or require the transiting carrier to be involved in the agreement.[49] In fact, a number of the ICOs have reached interconnection agreements with wireless carriers without the involvement or even the apparent knowledge of BellSouth.[50] As noted below, the fact that the carriers have entered into and operated under these agreements without BellSouth's inclusion as a party is arguably the most compelling proof that it is unnecessary to resolve certain "issues" with BellSouth as a part of, or prior to, entering into this interconnection agreement.[51]

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[49] *See, e g* , Brown Rebuttal Testimony, at 10, and Exhibit B (noting interconnection agreement between four TDS Telecommunications and US Cellular), Brown Rebuttal Testimony, Exhibit C, Hearing Record Exhibit 8 (interconnection agreement between four TDS ICOs and US LEC), Brown Rebuttal Testimony, Exhibit 10, Hearing Record Exhibit 9 (interconnection agreements between four TDS ICOs and XO Tennessee), Hearing Tr Vol IX, at 34 24- 38 25 (noting agreements filed between TDS ICOs, and New South Communications and US LEC, providing for indirect interconnection and which do not name BellSouth as a party to the agreements) *See also Interconnection Agreement between CenturyTel of Claiborne, Inc and Tennessee RSA No 3 d/b/a Eloqui Wireless* (Docket No 02-00328) (2002) at Section 5 3 (identified in Response of Century Tel of Claiborne to First Set of Interrogatories, Question I-1), *Interconnection Agreement Between TDS Telecom, Inc and US LEC of Tennessee* (Docket No 03-00415) (2003) (identified in Response of Concord Telephone Exchange to First Set of Interrogatories, Question I-1), *Highland Telephone Cooperative, Inc , and BellSouth Personal Communications LLC, d/b/a Cingular Wireless* (Docket No 01-00873) (2002) at Section I D , *Interconnection Agreement between TDS Telecommunications Corporation and Cellco Partnership d/b/a Verizon Wireless* (Docket No 02-00973) (2002), at Section II B ; *Interconnection and Traffic Interchange Agreement for Commercial Mobile Radio Services Between Citizens and AT&T Wireless Services, Inc* (Docket No 02-00973) at Section 2 3 (in the event of indirect traffic exchange, either party's traffic may be transited through one or more intermediaries for interconnection with another party's system)

[50] Brown Rebuttal Testimony, at 10, and Exhibit B (noting interconnection agreement between four TDS Telecommunications and US Cellular, *Interconnection Agreement between CenturyTel of Claiborne, Inc and Tennessee RSA No 3 d/b/a Eloqui Wireless* (Docket No 02-00328) (2002) at Section 5 3 (identified in Response of Century Tel of Claiborne to First Set of Interrogatories, Question I-1), *Highland Telephone Cooperative, Inc , and BellSouth Personal Communications LLC, d/b/a Cingular Wireless* (Docket No 01-00873) (2002) at Section I D , *Interconnection Agreement between TDS Telecommunications Corporation and Cellco Partnership d/b/a Verizon Wireless* (Docket No 02-00973 ((2002), at Section II B, *See also Interconnection and Traffic Interchange Agreement for Commercial Mobile Radio Services Between Citizens and AT&T Wireless Services, Inc* (Docket No 02-00973 (2002) at Section 2 3 (Although Citizens is not a party to this case it is another independent telephone company that operates in Tennessee)

[51] *See* Section III A 4

Indeed, the ICOs fail to cite a single example of an interconnection agreement that includes an intermediary provider as a party, or which requires coordination with the intermediary provider. The only three-party agreements that the ICOs cite are distinguishable in several key respects.[52] Specifically, those agreements were not interconnection agreements; they were settlement agreements of a state commission proceeding, entered into on a voluntary basis, and strictly interim in order to provide the parties further opportunity to negotiate final *two-party interconnection agreements.*

It would make little sense for the TRA to include all intermediary third party carriers that might serve the transiting carrier function in these section 252 arbitrations. As the record indicates, the parties might seek to choose a third party transiting carrier other than BellSouth,[53] and for this reason the CMRS Providers have emphasized that an agreement should provide flexibility to use alternative transit providers. If, as the ICOs assert, all transiting carriers need to be included in the negotiations or arbitrations of these interconnection agreements, and otherwise be made parties to the ultimate agreement, there could easily be three, four, or an ever-increasing number of parties that would need to be included in these proceedings. Further, to the extent that the ICOs seek to use a different transiting provider in the future, under the ICOs' proposal, the entire agreement would then need to be modified and re-negotiated (and possibly arbitrated) in order to resolve all "issues" between the third party transiting provider as a part of this interconnection agreement between the ICOs and the CMRS Providers Clearly, such an outcome is impractical, unworkable, and results in a waste of resources. Instead, the CMRS

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[52] *See* Nieman Rebuttal Testimony at 3 (discussing agreements filed in Kentucky)

[53] Hearing Tr , Vol V, 26 7-10 (ICO cross-examination seeking confirmation the ICOs do not have to send traffic through the transiting carrier selected by CMRS providers)

Providers' position recognizes and allows flexibility for the carriers to select different transiting providers without including any transiting provider as a party to the agreement.

c. The ICOs' Purported "Issues" Regarding Indirect Interconnection Do Not Support Including BellSouth as a Party to the Agreement

The ICOs raise a number of "issues" that they argue need to be resolved with BellSouth as a part of this agreement, or before the ICOs enter into this agreement with the CMRS providers. The ICOs' discussion of these issues essentially boils down to the two key concerns: (i) access to accurate billing records; and (ii) the ICOs' ability to have BellSouth block traffic in the event of a dispute.[54] As is explained below, these concerns can be adequately addressed without BellSouth's participation in the agreement.

With regard to billing records, the CMRS Providers emphasize that in reviewing the voluminous record, the TRA must not overlook that the legal obligation and responsibility for ensuring accurate billing records lies solely with the terminating provider.[55] The FCC did not create any exceptions for small or rural carriers, and in fact specifically acknowledged that in order "to implement transport and termination pursuant to section 251(b)(5), carriers, *including small incumbent LECs and small entities, may be required to measure the exchange of traffic*, but we believe that the cost of such measurement to these carriers is likely to be substantially outweighed by the benefits of these arrangements."[56] The fact that the ICOs have as a matter of

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[54] ICO Response at 41-45, Hearing Tr , Vol VII, 38 7-25 to 39 1-9

[55] *Local Competition Order* at ¶ 1045

[56] *Id* (emphasis added) Moreover, as discussed above, the FCC has already rejected the argument that the law requires the transiting carrier to perform a billing function Section III B 3 , *infra*, *Virginia Arbitration Order* at ¶ 119

convenience and expediency decided to rely on BellSouth's records[57] – and then assert as yet unsubstantiated claims that they *may* not be accurate and thus cannot be relied upon[58] - does not obviate their obligation to interconnect with the CMRS Providers and as a legal matter, should have no effect on this arbitration.

Indeed, as the record establishes, accurate billing records can be obtained in a variety of ways, a number of which do not require BellSouth or the intermediary carrier to provide such records, much less to be included in an agreement.[59] Moreover, the ICOs have previously entered into agreements that appropriately place the obligation to measure traffic *on the terminating carrier or allows them to rely on records from the transiting carrier.* For example, a provision of a current agreement between some of the ICOs and a CLEC reads, "[w]here the Parties utilize indirect interconnection via third party tandems for the exchange of traffic between their respective networks, *each Party shall be responsible for the message recording required to produce accurate bills*, or may utilize records provided by the tandem operator to invoice for traffic terminating on its network."[60] The ICOs have not put forth any rationale why a similar arrangement is not appropriate in this proceeding.

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[57] The ICO witness conceded that a number of ICOs currently do receive billing records from BellSouth which they use to bill the CMRS providers *See* Hearing Tr , Vol VIII, 33 21 -37 9 (conceding that BellSouth provides Ardmore 11-01-01 records identifying CMRS record traffic) *See also Response of the Coalition to Supplemental Interrogatories,* Attachment 1, Question 11c (DeKalb Telephone Cooperative, United Telephone Co , Yorkville, TDS Telecom, Crockett, Peoples and West Tennessee Telephone Companies admitting they bill based on records from BellSouth)

[58] Even in the absence of an ICO agreement with BellSouth, if the ICOs receive billing records that they believe are inaccurate and there is a dispute, such disputes can be resolved through the dispute resolution provisions in the interconnection agreement between the ICOs and the CMRS providers

[59] *See Supplemental Testimony of Suzy Nieman* (September 8, 2004) (the options include upgrading the current ICO switches or purchasing new software for their billing systems so that they can generate billing records on data which is already available to, although not captured by, the ICOs through the SS7 data stream)

[60] *See* Rebuttal Testimony of William H Brown at Exhibit B (emphasis added) (*Interconnection Agreement between TDS Telecom and NewSouth Communications See also* Hearing Tr , IX 37 19 – 38 22, and Hearing Record Exhibits 8 and 9

Finally, the real motive behind the ICOs' desire to include BellSouth in a three-party agreement appears to be that they want to ensure that such agreements require BellSouth to block traffic where there may be a billing dispute. Such an outcome – even if it were feasible in the context of indirect interconnection – is clearly contrary to the public interest and the TRA should not tolerate any attempts to block customers' service because of an intercarrier dispute. As the CMRS Providers have explained, where there is a dispute, such disputes must be resolved mutually and pursuant to the dispute resolution provisions of the CMRS-ICO Agreement.[61] If the parties cannot resolve the dispute, either party may also seek resolution at the TRA, which has the authority to impose the appropriate resolution, which will protect the carriers' as well as the consumers' interests.

3. **Joint Issue No. 6**: Can CMRS traffic be combined with other traffic types over the same trunk group?

   Summary: Yes. There is no technological reason for requiring CMRS provider traffic to be delivered over segregated trunk groups. It is also economically inefficient to require separate and distinct trunk groups for CMRS traffic.

The CMRS Providers submitted persuasive testimony that combining multiple carriers' traffic over a single trunk group is technologically feasible, efficient and a common practice in the industry.[62] In contrast, ICOs offer no compelling reason why the TRA should depart from this sensible, well-accepted practice and require separate trunk groups for CMRS traffic.[63] Instead, the ICOs seem to rely on four unsubstantiated arguments to support their opposition to the current practice of combining CMRS traffic over the existing BellSouth trunk groups.

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[61] *See e g* , Hearing Tr , Vol V, at 37 11-15

[62] Pruitt Direct Testimony at 22 17-23 7

[63] It is worth noting that the ICO's position on this issue, as with many others, is less than clear In their Response the ICOs initially say that this is not an issue for arbitration (ICO Response at 53) yet ICO witness Watkins later requests resolution of the issue Watkins Direct Testimony at 31

First, the ICOs argue that the use of existing facilities is a matter to be resolved between BellSouth and the ICOs.[64] Second, they argue that BellSouth is in a competitively favorable position with respect to the provision of tandem switching and transport services.[65] These arguments, however, ignore the practical reality that the PSTN facilities between BellSouth and the ICOs, and BellSouth's tandem position, *are the facilities that enable the indirect interconnection which the ICOs concede exists today between the ICOs and the CMRS Providers.*[66]

Third, the ICOs assert that they are dependent upon, but question, BellSouth's ability to accurately identify and measure commingled traffic.[67] As discussed in several sections of this brief,[68] that assertion is completely unsupported by the record. Although the ICOs do not want to expend the resources to upgrade their switches or obtain new billing software that would allow them to generate their own billing records based on data that is already provided to them, they certainly have the option to do so. Moreover, the ICOs have not offered any testimony to support the insinuation that the BellSouth 1101-01 records are inaccurate. As Mr. Watkins conceded:

> I'm aware that Bell provides the records. We have been discussing arrangements that would allow us to use the records. *We are not against doing that. We just need assurances that they are correct and we have the proper terms and conditions in place to make sure they're correct.*[69]

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64 ICO Response at 53.

65 ICO Response at 54

66 *See* Section III A 1

67 ICO Response at 55-56

68 *See* Sections IIIA 2 and III F 1

69 Hearing Tr , Vol VIII, 37 2-7, emphasis added

In response to TRA staff's question whether he was "factually certain now that you're getting incomplete records" and to be specific, Mr. Watkins admitted he did not have specifics, only that

> ... some of the carriers have reviewed this information on a trial basis and have responded with questions to BellSouth. I'm not sure we've ever gotten adequate responses.[70]

The ICOs' fourth argument, i.e., each ICO has a right "to establish their own tandem and migrate traffic to direct trunk groups to their own tandem," in order to avoid BellSouth's "questionable" measurement and record keeping and "flawed 'split-billing'" to interconnecting carriers[71], is similarly unavailing. The CMRS Providers do not contest an ICO's right to establish its own tandem. However, an ICO does not have a right to force a CMRS Provider to install "direct trunk groups to [the ICO's] tandem." Therefore, as long as an ICO maintains a connection between its network and the BellSouth network, a CMRS Provider is entitled to obtain indirect interconnection with the ICO network via the BellSouth network.[72]

The CMRS Providers note that the TRA has previously addressed the use of commingled trunks.[73] In *MCIMetro* the TRA held that BellSouth could not force a CLEC, WorldCom, to fragment traffic and use separate interconnection trunks for telephone exchange and exchange access traffic. In so holding, the TRA reasoned that the fragmenting of traffic results in the loss of efficiencies and duplication in network architecture, which increases the interconnecting

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[70] Hearing Tr , Vol VIII, 39 24-40 9

[71] ICO Response at 56.

[72] 47 U S C 251(a)(1), 47 C F R 20 11 (LEC must provide the type of interconnection reasonably requested by a CMRS Provider unless it is not technically feasible or economically reasonable)

[73] *In Re Petition of MCIMetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc Concerning Interconnection and Resale under the Telecommunications Act of 1996*, 2002 Tenn PUC LEXIS 112, Docket No 00-00309 (April 3, 2002)

carrier's costs.[74] The same reasoning applies in this case to the extent a subtending ICO requires the installation of a separate trunk for each CMRS Provider.

In sum, there is no technological or practical reason to require the parties to incur costs to establish separate transit traffic trunk groups for the exchange of transit traffic between CMRS Providers and ICOs in either direction. Further, there has been no specific showing that co-mingling prevents accurate billing. Accordingly, the TRA should find that no basis exists to alter the current method of indirect interconnection that exists between the CMRS Providers and ICOs under which BellSouth sends and receives commingled traffic over existing facilities that BellSouth respectively delivers to both ICOs and CMRS Providers.

4. **Joint Issue No. 14**: Should the scope of the Interconnection Agreement be limited to traffic transited by BellSouth?

   Summary: No. The agreement should apply to all traffic exchanged between the carriers, and it should not be limited to cover only specific transiting carriers.

The CMRS Providers seek to establish a reciprocal compensation arrangement with the ICOs that addresses all traffic exchanged between the carriers regardless of how it is exchanged (i.e., directly or indirectly) – and does not limit the scope of the agreement to only certain traffic exchanged indirectly by specified transiting carriers. In this issue, the ICOs assert a variation of the same argument that they have raised in other issues – namely, that to the extent that the agreement addresses indirect traffic, it is intended to address only the indirect exchange of telecommunications *transited by BellSouth*. The ICOs' proposal to limit the scope of the agreement is contrary to law and public policy, inconsistent with the way that indirect interconnection agreements are traditionally drafted, and it appears, even contrary to the ICOs' own practices and desires.

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[74] *Id* p 14

As discussed, the Act allows competitive telecommunications carriers to choose to connect on a direct or indirect basis.[75] Legally, there is no requirement that requires a competitive telecommunications carrier to use a Regional Bell Operating Company (the "RBOC") such as BellSouth, or another LEC, as the means for indirect interconnection.[76] The Act and the FCC's implementing orders and regulations contemplate an interconnection framework where competitive carriers have extensive flexibility to decide how they will interconnect their network with that of the LECs.[77]

The ICOs attempt to rely on the Hearing Officer's May 5, 2003 Order in TRA Docket No. 00-00523 as the basis for restricting the scope of the agreement.[78] However, the Hearing Officer's May 5, 2003 Order merely required the ICOs and BellSouth to invite CMRS Providers to participate in negotiations with the ICOs for the exchange of traffic between the CMRS and ICO networks.[79] Nowhere in the May 5, 2003 Order did the Hearing Officer establish that such negotiations were intended to limit the scope of the agreement only to reciprocal compensation for traffic *transited by BellSouth.* Moreover, the request for negotiations in this proceeding issued by the CMRS Providers (which the ICOs accepted) broadly requested that the ICOs

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[75] See Section III A 1 *supra*

[76] The CMRS Providers note that they are amenable to modifying Section IV B 1 of their proposed interconnection agreement to address the drafting issue noted during the hearing regarding the use of transiting carriers for indirect interconnection See e g , Hearing Tr Vol V at pg. 55 Accordingly, the phrase in the current agreement that reads " shall be at the point where ILEC's network interconnects with the network of an intermediate third party LEC to whom both the ILEC and CMRS Carrier are interconnected" should be modified to read ". shall be at *a* point where ILECs network interconnects with an intermediate third party *transiting carrier* to whom both the ILEC and CMRS Carrier are interconnected "

[77] *See Local Competition Order* at ¶ 997

[78] ICO Response at 85

[79] In fact, the ICO Coalition and BellSouth noted in a joint motion for a stay that they had agreed to "engage in good faith negotiations with CMRS providers in order to establish contractual terms governing payments between CMRS providers and [the Coalition] of an appropriate rate for termination of *CMRS traffic* " *See* May 5, 2003 Order at 4-5 (emphasis added)

negotiate terms and conditions for payments between the CMRS Providers and the ICOs for all CMRS traffic in general.

The ICO proposal to limit the scope of the agreement to traffic transited by BellSouth is also contrary to the manner in which most interconnection agreements are drafted today. Specifically, the ICOs themselves have entered into a number of interconnection agreements with a variety of CLECs and CMRS Providers that provide for both direct and indirect interconnection, and which do not require a particular intermediary provider to transit the traffic.[80] As discussed above, the fact that these ICOs have entered into, and are clearly operating today under, these interconnection agreements without the inclusion of BellSouth as the specified transiting carrier reflects the feeble nature of their proposal.[81]

The only other reason that the ICOs offer in support of their position is that "there are no other carriers in Tennessee who currently provide transit arrangements to the independents."[82] As a practical matter, if there is no such other carrier, then the ICOs' attempt to limit the scope of the agreement is moot. However, the ICOs themselves have suggested at hearings that there are other transiting options available to deliver traffic to the ICOs that they would like to avail themselves of[83] and one ICO has acknowledged that it is currently connected to two different tandem providers, the Iris tandem and the BellSouth tandem in Nashville.[84] In fact, counsel for the ICOs cross-examined CMRS witness Ms. Nieman at length (for over 10 pages of the hearing transcript) about whether a CMRS Provider would be willing to agree to allow the ICOs to

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80 *See, supra*Section III A 2 b

81 *See also* Section III A 2, *supra*

82 ICO Response at 85-86 *See also* Hearing Tr , Vol X, 16 16-19

83 Hearing Tr Vol V, 26 7-10 (ICO counsel questioning whether ICOs need to send traffic through same intermediary providers as CMRS Providers have selected)

84 *See also* Response of Coalition to Supplemental Interrogatories (Jul 2004), Attachment 1, Question 1 (Ardmore Telephone Company and DeKalb Telephone Cooperative Responses)

choose another transiting provider and specifically referred to the Iris network. This line of questioning is illustrative:

> Q. So it would be okay for my client to say, for example, we don't want to connect to you through the BellSouth tandem, we want to connect through someone else. Is that okay?
> A. That's okay.
> Q. And your client would agree with it?
> A. My company?
> Q. Yes.
> A. In most cases I would say yes.
> Q. Here in Tennessee would your company agree to connect to my client through, say, the Iris network tandem? Would that be okay?
> A. I'm not a network engineer so I can't tell you if -- I don't know who that company is.
> Q. Well, let's just say there is another network out here in Tennessee. Okay? Will you accept that hypothetical first?
> A. Sure.
> Q. And that company has a tandem, which could be used to connect to your client.
> A. My company?
> Q. Are you with me so far?
> A. I'm with you.
> Q. Okay. Is it acceptable with AT&T Wireless for my client to say, we don't want to connect through BellSouth, we want to connect through this Iris tandem, this other network?
> A. That would be acceptable.[85]

Thus, the ICOs' position that it is necessary to limit the scope of the agreement with regard to transit traffic to only that traffic transited by BellSouth is inconsistent with their experience and is otherwise unpersuasive.

5. **Joint Issue No. 15**: Should the scope of the Interconnection Agreement be limited to indirect traffic?

   Summary: No. The scope of the Agreement should include both direct and indirect traffic.

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[85] Hearing Tr Vol V, 18 23-19 25 The ICOs have also expressed concern that wireless carriers would not be allowed to use a different carrier as an intermediary provider unless such new selection is put into proper terms Hearing TR Vol X, at 16 23-17 4 The CMRS providers have addressed this argument fully in CMRS Issue 4 and ICO Issue 9, and incorporate by reference its discussion in those issues Moreover, Ms Nieman explained in direct testimony that, as a practical matter, if another transiting carrier were to provide services, the new intermediary provider would need to approach the ICO to connect facilities Nieman Direct Testimony at 10 24-25

As an initial matter, there is no doubt that issues relating to direct interconnection are disputed and properly before the TRA for resolution Pursuant to sections 252(b)(4) and 252(c) of the Act, the state commission must resolve open issues in accordance with the provisions of sections 251, 252 and the FCC rules.[86] This includes the resolution of any issues, which are disputed provided such issues were addressed during the negotiations phase of the 252(b) process.[87]

During the course of negotiations, the CMRS Providers included provisions for dedicated interconnection facilities in their first proposed interconnection draft.[88] The ICOs countered with terms and conditions for direct interconnection, but no agreement was reached with respect to these proposals.[89] Pursuant to section 252(b) of the Act, the CMRS Providers raised issues arising from their direct interconnection proposals in their initial petitions for arbitrations and the ICOs responded. On July 26, 2004, the CMRS Providers and ICOs filed a final joint issues matrix memorializing the list of open issues agreed to by the parties, which included Joint Issue No. 15.

Somewhat surprisingly, in the face of this unassailable evidence, the ICOs maintain that the scope of the arbitration proceedings should be limited to indirect interconnection.[90]

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[86] *See* 47 U S C § 252(c)(1)-(3) Subsection (c)(1) requires that the TRA rule consistently with the requirements of 251 and the FCC's rules implementing these provisions Section 252(c)(2) requires that the pricing requirements of Section 252(d) apply While subsection (c)(3) requires that the TRA establish an implementation schedule for the decision to be incorporated into an arbitrated agreement

[87] *See US West Communications Inc , v, Minnesota Pub Utils Comm'n*, 55 F Supp 2d 968, 985 (D Minn 1999) ("The parties are again not limited to issues explicitly enumerated in § 251, or the FCC's rules, but rather are limited to the issues which have been subject to negotiations among themselves ")

[88] *See* Hearing Tr , Vol II, 18 12-18

[89] *Id*

[90] *See* ICO Response at 87 It is somewhat ironic that the ICOs seek to limit the arbitration in this manner since they allege in the context of other issues that there are no FCC rules governing indirect interconnection and thus that the TRA has no jurisdiction to conduct an arbitration regarding indirect interconnection *See* Brief Section III B 1, *infra*

Although they cannot allege that the issue of direct interconnection was not negotiated, the ICOs assert, somewhat halfheartedly, that the negotiations were *focused* more on indirect interconnection than direct.[91] The ICOs also claim that the arbitration should be limited to indirect interconnection because CMRS Providers failed to provide "the specific requirements of direct interconnection" including a particular point of interconnection.[92] Finally the ICOs allege direct connection is outside the scope of the May 5, 2003 Order.[93] None of these arguments are persuasive.

As an initial matter, given the extensive provisions regarding direct interconnection in the ICOs' own draft proposed agreement,[94] the ICOs' argument about the lack of focus on this issue during negotiations should be rejected out of hand. Contrary to the ICOs' assertions, the CMRS Providers have provided more than sufficient information about the terms of direct interconnection, including the appropriate point of interconnection for the TRA to rule on this issue.[95]

The public interest would be served by approving an agreement that contains the terms for both direct and indirect interconnection. The CMRS Providers are seeking rates, terms and conditions for direct interconnection in this arbitration because there are certain business justifications which make the use of dedicated facilities economically efficient. Even if much of the traffic exchanged between the ICOs and CMRS Providers is currently indirect, rates, terms

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[91] *Id* at 87

[92] *Id* at 88

[93] *See* Joint Issues Matrix (July 26) at Issue 15 The ICOs do not generally oppose their obligation to connect their networks directly with CMRS provides, but instead argue that issues of direct interconnection were not addressed by the TRA's May 5, 2003 Order, and therefore direct interconnection is beyond the scope of the pending arbitration *See* Brief Section III B 1, *infra*

[94] *See* Response of ICOs, Exhibit 2, Section 4 The ICOs filed their proposed rates terms and conditions for interconnection and reciprocal compensation utilizing direct interconnection facilities

[95] *See e g* Hearing Tr , Vol II, 20 16-20

and conditions for direct interconnection facilities are needed because the growth of CMRS services in Tennessee will change the economic rationale for obtaining direct interconnection facilities. In fact, some CMRS Providers have acknowledged that direct connections with certain ICOs may already be economically reasonable.[96]

As discussed above, section 251(a)(1) of the Act requires all telecommunications carriers to provide both direct and indirect interconnection. Shortly after this provision was enacted, the FCC concluded, "telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices".[97] The TRA should adopt the CMRS Providers' position on this issue because inclusion of direct interconnection terms is consistent with section 251(a) and will promote the most efficient interconnection arrangements between the parties to this proceeding. Additionally, inclusion of direct connection facilities at this juncture will avoid renegotiation, amendment, possible arbitration and subsequent filings with the TRA on the related issues raised in this proceeding.

6. **ICO Issue No. 2**: BellSouth should not deliver third-party traffic to an ICO that does not subtend a BellSouth tandem.

   Summary: The Telecom Act requires all carriers to connect directly or indirectly with each other. 47 U.S C. § 251(a)(1). If it is technically feasible for BellSouth to deliver traffic to an ICO that does not subtend a BellSouth tandem, then such indirect interconnection is appropriate and required under the Act.

This is a prime example of an ICO-added issue that is neither well-defined nor supported by any substantive evidence in the record. As far as the CMRS Providers can determine, the

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[96] *See* Hearing Tr , Vol II 20·1-7 The volume of traffic exchanged between two carriers is one of the chief factors, which determines where a CMRS provider will choose to establish direct facilities Conversely "[t]he concern about establishing direct interconnection facilities at lower volumes is that the cost of the direct connection facility would typically be a flat-rated cost," which will increase the transport costs to CMRS Providers *Id at 19 20-25*

[97] *See Local Competition Order* at ¶ 997

ICOs' entire position regarding this issue is the following statement in their Response and again in the Final Joint Issues Matrix:

> Indirect transit traffic arrangements may be appropriate where small ICOs have not deployed their own tandem switching offices and have elected, for now, to subtend a Bell tandem *However, ICOs that deploy their own tandems have no continuing obligation to use the Bell tandem, transit traffic arrangement, involuntarily.* No law or regulation requires any carrier to subtend a BellSouth tandem. There will be a chilling effect on competition if BellSouth is allowed to establish itself always at the center, between and among all other carriers as the switch and transport provider (emphasis added).[98]

Mr. Watkins addressed this issue briefly at the hearing, but his testimony did little to elucidate the ICOs' position: "Our issue 2 goes back to what I was just saying. You know, we don't think that BellSouth should automatically assume that it's the tandem provider when we were already a tandem provider. And that's an issue we need to work out with BellSouth."[99] This issue simply has not been developed by the ICOs in the record to even be able to determine whether a disputed issue exists for the TRA to address. As a result, CMRS Providers assert that the TRA should dismiss this issue out of hand.

To the extent that the TRA wishes to address the issue, however, it should rule that as long as an ICO continues to be connected to a BellSouth tandem (either from its end office, host office or through another tandem such as that in the Iris network), the CMRS providers are entitled to obtain indirect interconnection with the ICOs through that tandem.[100] In other words,

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[98] ICO Response at 95

[99] Hearing Tr , Vol X, 20 21-21 1

[100] The CMRS Providers do not dispute that when an ICO deploys a tandem that it can disconnect all existing connections between its end office switches and all BellSouth tandem(s) to which the ICO's switches were connected However, the ICO must continue to interconnect to the PSTN, and the CMRS Providers may continue to use the most efficient means of reaching the ICO networks including, but not limited to using the BellSouth tandem if it is technically feasible to do so See 47 C.F R § 20 11 (LEC must provide the type of interconnection reasonably requested by a CMRS Provider unless it is not technically feasible or economically reasonable), 47 U S C § 251(a)(1) (requiring carriers to interconnect directly or indirectly)

the ICOs cannot circumvent the obligations of 251(a) by deploying a tandem in their networks.[101]

7. **ICO Issue No. 9**: Issues governing the physical interconnection arrangement between BellSouth and the ICOs must be resolved before effective new terms and conditions can be established between the CMRS providers and BellSouth.

   Summary: The resolution of any unresolved issues between BellSouth and the ICOs should not be a prerequisite to the establishment of an interconnection agreement between the CMRS providers and the ICOs.

Like many of the ICO-added issues, this issue is largely duplicative of other joint issues and the ICOs provide no testimony on this issue other than their brief position statement in their response.[102] ICO Issue 9 is another variation of the general theme of the ICOs' position on Issue 4 that various issues with BellSouth must be resolved before an interconnection agreement can be established between the CMRS Providers and the ICOs. It would appear that even the ICOs recognize the largely duplicative nature of this Issue. In summarizing his direct testimony, Mr. Watkins stopped summarizing with ICO Issue 6, noting that ICO Issue 7 "is sufficiently redundant [and] *I believe we've covered the rest.*"[103] For this reason, ICO Issue 9 should be dismissed outright. To the extent that the TRA chooses to consider this issue, it should reject the ICOs' attempt to condition an agreement on resolving any alleged issues related to physical arrangements with the intermediary provider.

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[101] As a factual matter it is unclear how the premise as stated in ICO Issue No 2 could ever occur If an ICO disconnects its network from BellSouth's network so that it does not subtend BellSouth then, by definition, it has become physically impossible for BellSouth to transit anything to the ICO's disconnected network If, however, the ICOs are suggesting that when a new tandem is deployed they do not intend to completely disconnect from all of BellSouth's tandems, then, as noted above, there may be a disagreement

[102] ICO Response at 96

[103] Hearing Tr , Vol X, 21 16-18

As an initial matter, the ICOs have a legal obligation under section 251(a)(1) to interconnect directly or indirectly with any requesting carrier.[104] Thus if the CMRS providers choose to interconnect via BellSouth, the Act explicitly allows them to do so. In addition, if the ICOs intend by their statement to suggest that they need to establish terms and conditions for physical interconnection with BellSouth *prior to* entering into an agreement with the CMRS providers, the FCC has flatly rejected such a contention. Specifically, the FCC has expressly found that there is no legal precedent requiring intermediary transit providers to enter into negotiations for interconnection and reciprocal compensation arrangements with the third-party carriers that send traffic over its network.[105]

As the ICOs have conceded, today the CMRS providers and the ICOs are interconnected indirectly through the very physical facilities that are supposedly at issue in this ICO issue. Since the facilities are in place and are being used, it is unclear why the ICOs have concerns about these facilities. Unfortunately, the ICOs do not really provide much illumination of their concerns. In their brief statement of their position, the ICOs categorize five categories of issues allegedly associated with these "physical arrangements," which need to be decided: (i) scope of traffic; (ii) billing and compensation; (iii) billing and revenue distribution; (iv) term and termination; and (v) measurement and treatment of proprietary information.[106] It is clear from this recitation of the issues that once again the billing and termination issues are the ICOs' primary concerns. However, as the TRA is well aware, those specific issues, as well as the general issues of BellSouth's role in the interconnection agreement, are the subject of other joint issues; specifically, Joint Issue 4 (role of BellSouth in the agreement), Joint Issues 3 and 13

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[104] *Local Competition Order* at¶ 998 (noting that, given the requesting carrier's lack of market power, interconnection through another carrier's network satisfies the duty to interconnect indirectly under section 251(a))

[105] *Virginia Arbitration Order* at ¶ 119, *see also* Section III A 2, *supra*

(billing records), and Joint Issue 17 (termination). Moreover, as is explained in detail in this brief on these other issues, the resolution of these issues need not and should not hold up this interconnection agreement.[107]

To the extent that the TRA considers this issue *at all*, it should reject it as moot and duplicative If the TRA decides that this issue merits substantive consideration, it should deny the ICOs' position on the same grounds as it should deny the ICOs' arguments on Joint Issue 4 – and find that BellSouth should not be a party to this agreement and that this agreement should *not* be conditioned on the ICOs' ability (or desire) to make whatever arrangements it feels are necessary with BellSouth to address the transiting function BellSouth provides to all carriers that subtend its tandems. The Act, however, establishes a definitive timeline for negotiations and arbitration, and that timeline does not contemplate delays based upon a party's ongoing disputes with a non-party.[108]

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[106] ICO Response at 97

[107] *See* Sections III A 2, III B 3, and III F

[108] *See* 47 U S C 252(a), (b) (upon receiving a request for interconnection pursuant to section 251 an ILEC has 135 days to negotiate a voluntary agreement and, absent such agreement, either party may file to arbitrate any open issues between the 135th and 160th day following the request for interconnection)

B. Principle No. 2: Originating carriers are Obligated to Pay Reciprocal Compensation to terminating carriers for all IntraMTA Traffic.

1. **Joint Issue No. 2:** Do the reciprocal compensation requirements of 47 U.S.C. § 251(b)(5) and the related negotiation and arbitration process in § 252(b) apply to traffic exchanged indirectly by a CMRS provider and an ICO?

   Summary: Yes. The FCC rules expressly provide for the payment of reciprocal compensation on all intraMTA traffic without regard to how it may be delivered.

The reciprocal compensation requirements in the Act and the FCC's implementing regulations apply to indirect interconnection. Likewise, disputes over the terms of indirect interconnection arrangements are clearly arbitrable under section 252. The ICOs have offered no compelling legal support for their claim that the reciprocal compensation obligations of section 251(b)(5) are limited to direct interconnection and outside the scope of the section 252 arbitration rules. In fact on several occasions in this proceeding, the ICOs themselves have conceded that the instant dispute is subject to arbitration under section 252.[109] Their concessions are understandable. In addition to the literal language of the Act and FCC regulations, the position espoused by the CMRS Providers is supported by FCC, state commission and federal district court orders and a decision by the Hearing Officer in this very docket. The TRA should rule that the reciprocal compensation obligations of the Act apply to indirect interconnection.

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[109] At a pre-hearing status conference, the ICOs stated

> The process of establishing that rate [for transport and termination] involves a statutory negotiation period in which the parties can have a good faith discussion about what the terms and conditions should be And to the extent they agree, they file an agreement for approval by the Authority *To the extent they can't agree, the process is very clear, they come to the Authority and ask for arbitration and ask you to help decide the terms and conditions where they are out of agreement* And that process is absolutely open, always has been open, and continues to be open Not any independent I work for would suggest otherwise, nor would they try to stop that process

Transcript of Status Conference, *In Re Generic Docket Addressing Rural Universal Service*, TRA Docket No 00-00523, p 10 (April 22, 2003) (Emphasis added) The ICOs made a similar statement in their Response to the Petitions for Arbitration filed in these consolidated proceedings "The Coalition members are not reluctant to negotiate new terms and conditions in good faith, or to resolve open issues through arbitration and formal processes, if necessary " See ICO Response at pg 12, see also ICO Response at 25 ("The fact that no other standards exist or are imposed with respect to indirect traffic does not mean that the parties may not negotiate a new arrangement ***under Section 252")*** (emphasis added)

a. Both Statutory and Decisional Law Establish That Reciprocal Compensation Requirements Apply to Indirect Traffic.

For purposes of intercarrier compensation, the Act and applicable FCC regulations do not make any distinction between traffic exchanged directly and traffic exchanged indirectly. The applicable portion of 251(b), entitled "OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS" states:

"Each local exchange carrier has the following duties:

******

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

47 U.S.C. § 251(b)(5). Likewise, the applicable FCC implementing rule, 47 C.F.R. 51.703(a)[110], states:

> Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier.

FCC rule 51.701, entitled "Scope of transport and termination pricing rules," expressly establishes the scope of traffic subject to a LEC's reciprocal compensation obligation.[111] When a CMRS Provider is involved in a call, the FCC has defined "telecommunications traffic" to mean:

> . . . traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this Chapter.[112]

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[110] In the context of a LEC's obligations, "Reciprocal compensation" is initially referred to at 47 C F R § 51 221, contained in the FCC's Part 51, Subpart C rules which codify the "Obligations of All Local Exchange Carriers Section § 51 221 entitled "Reciprocal Compensation" explains that the rules governing reciprocal compensation are set forth in Part 51, subpart H

[111] 47 C F R § 51 701(a)

[112] 47 CFR § 51 701(b)(2)

In fact, the FCC's rules that specifically address CMRS carriers' right to interconnection and reciprocal compensation define interconnection to include "[d]irect or indirect [inter]connection "[113]

That the FCC's reciprocal compensation rules under section 251 of the Act apply to indirect traffic is also evident from the FCC's holding in the Order on Reconsideration in the Texcom matter.[114] There, the FCC held that where two carriers exchanged traffic indirectly via a third party – in that case, the Verizon ILEC – the FCC's rules did not provide for the intermediate *transit* carrier to collect reciprocal compensation, but such reciprocal compensation rules *did* apply between the originating and terminating carrier. As the FCC held, while its "reciprocal compensation rules do not provide for such compensation to a transiting carrier," those "rules provide a mechanism for a terminating carrier, ... to recover from originating carriers the cost of the facilities at issue (transport from the point of interconnection at the LEC tandem to the terminating carrier's switch)."[115]

State commissions that have been asked to review this question have similarly held that a carrier may not avoid its reciprocal compensation obligations under the 1996 Act simply because traffic is exchanged indirectly. For example, the Oklahoma Corporation Commission rejected the argument of the rural independents that the FCC's rules did not apply in cases of indirect interconnection, ruling instead that "each carrier must pay each other's reciprocal compensation for all intra-MTA traffic whether the carriers are directly or indirectly connected, regardless of

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[113] 47 C F R § 20 3 (defining interconnection) and § 20 11(a) and (b) (stating that LECs must provide the type of interconnection reasonably requested by a CMRS provider and that mutual compensation principles apply)

[114] *Texcom, Inc d/b/a Answer Indiana v Bell Atlantic Corp , d/b/a Verizon Communications,* File No EB-00-MD-14, Memorandum and Order released November 28, 2001 (the "Texcom Order"), Order on Reconsideration released March 27, 2002 at ¶ 4 (the "Texcom Reconsideration Order")

[115] *Id* , *see also* Memorandum Opinion and Order, *TSR Wireless v US WEST,* 15 FCC Rcd 11166, 11176-77 ¶ 19 & n 70 (2000) (recognizing that paging carriers receiving traffic in a three-party scenario retain the benefits of the reciprocal compensation rules, notwithstanding their obligation to pay the transit carrier for its transit service)

an intermediary carrier."[116] The decision of the Oklahoma Corporation Commission on this issue was recently affirmed by the U.S. District Court for the Western District of Oklahoma, which found that:

> The court concludes that the Oklahoma Corporation Commission did not err when it ruled that reciprocal compensation obligations apply to all calls originated by an RTC and terminated by a wireless provider within the same major trading area, without regard to whether those calls are delivered via an intermediate carrier. In so ruling, the Oklahoma Corporation Commission merely applied federal regulatory definitions to the dispute before it.[117]

The Western District of Oklahoma and the Oklahoma Corporation Commission are not alone in this view. The regulatory commissions in Iowa and Illinois, and the Federal District Court in Montana have all decided that the Act's reciprocal compensation rules apply to intraMTA traffic between a CMRS provider and a LEC regardless of the existence of an intermediate carrier.[118]

Moreover, in considering the issue, the Hearing Officer in this very docket rendered a similar conclusion, finding that "the Coalition members are required to interconnect with the CMRS Providers, directly or indirectly, and make arrangements for reciprocal compensation."[119] The Hearing Officer also decided that this matter is properly the subject of arbitration.[120]

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[116] *See* Corporation Commission of the State of Oklahoma, *In the Matter of the Application of Southwestern Bell Wireless L L C et al for Arbitration Under the Telecommunications Act of 1996*, Cause Nos PUD 200200149, PUD 200200150, PUD 200200151, and PUD 200200153, Final Order, Order No 468958 (Oct 22, 2002), Attachment B, Unresolved Issue No 2 Copies of this Final Order were filed with the Authority in this Docket on April 14, 2004, and were served on counsel for the ICOs

[117] *Atlas Tel Co v Corporation Comm'n of Okla* , 309 F Supp 2d 1299 (W D Okla 2004)

[118] *In re Exchange of Transit Traffic*, 2001 WL 1672368 (Iowa Utilities Board, Nov 26, 2001), aff'd, 2002 WL 535299 (March 18, 2002), reh'g denied, 2002 WL 1277812 (May 3, 2002), *Verizon Wireless v Adams Tel Coop* , Illinois Commerce Comm'n, Docket No 04-0040 (Apr 7, 2004) , *3 Rivers Tel Coop., Inc , et al v U S West Communications, Inc* , 125 F Supp 2d 417 (D Mont 2000), reversed and remanded in an unpublished memorandum by the Ninth Cir , 2002, reaffirmed in an unpublished Order in Cause No 99-80-GF-CSO, by the District Court, August 22, 2003

[119] Order Denying Motion, Docket No 03-00585, April 12, 2004 at 9

[120] *Id*

b. The ICO's Arguments are Unpersuasive

In opposition to the plain language of the Act and FCC Regulations, the ICOs argue that the application of reciprocal compensation principles to indirect interconnection has never been decided by the FCC, and therefore the TRA is without authority to decide the issue in this arbitration.

The ICOs make two primary arguments to support their position. First, the ICOs argue that since the subpart H interconnection regulations refer to an "interconnection point," the application of these reciprocal compensation rules is limited to case where carriers interconnect directly.[121] However, the FCC has recognized that carriers that interconnect indirectly nonetheless have a "point of interconnection" at which one carrier hands its traffic off for termination on the other carrier's network. In discussing "types of local LEC-CMRS interconnection," the FCC specifically noted that "in rural settings, wireless carriers can elect to deliver CMRS-originated calls to a large ILEC (typically a Regional Bell Operating Company or RBOC) for routing to the rural LEC carrier."[122] The FCC thus, in discussing "interconnection points," specifically described indirect interconnection over an ILEC's tandem. And the FCC has specifically recognized that the terminating LEC's costs for terminating CMRS traffic delivered via such indirect interconnection is subject to "reciprocal compensation."[123]

Second, the ICOs contend that because the FCC "has not had occasion to determine whether even this transit-traffic function is an interconnection requirement,"[124] the exchange of

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[121] CO Response at 20, citing *Local Competition Order* at ¶ 1039, Hearing Tr., Vol VII, 23 22-24 4

[122] Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9642-43 ¶ 91 and n 148 (2001)

[123] *Id* at 9642-43 ¶ 91

[124] Hearing Tr , Vol VII, 24 10-19

traffic via a transit provider is not subject to reciprocal compensation obligations.[125] As support, the ICOs cite to the Virginia Arbitration Order, an FCC Wireline Competition Bureau decision regarding disputed arbitration issues between Verizon and three CLECs (AT&T, WorldCom and Cox Virginia Telcom)[126]

That decision, however, dealt with the issue whether an ILEC is required by the Act to provide transiting service. That issue is not being decided in this proceeding. BellSouth has agreed to provide transit services, and the relevant question here is whether the FCC reciprocal compensation rules apply to traffic that is relayed through a transit provider. Significantly, the Wireline Competition Bureau did not decide (or even address) whether reciprocal compensation principles apply to intraMTA traffic exchanged indirectly by wireline and wireless carriers Thus, the case is of no value in this proceeding.

c. The TRA Should Adopt the Sections of the CMRS-Proposed Contract Applying Reciprocal Compensation Principles to Indirect Interconnection.

The contract proposed by the CMRS Providers is attached as Exhibit 2 to the consolidated Petitions for Arbitration. The beginning of Section IV of that proposed contract states:

> The Parties may elect to exchange Traffic directly and/or indirectly as specified in Sections A. and B. below. The Parties agree that they shall compensate each other for the Traffic exchanged on a reciprocal and symmetrical basis at the rates specified in Appendix A.
>
> Section IV.B.1 of the CMRS-proposed contract states:
>
> All Traffic that is not exchanged via Direct Interconnection Facilities shall be exchanged indirectly, and the point of interconnection for both Parties for Reciprocal Compensation purposes shall be at the point where ILEC's

[125] ICO Response at 21-24

[126] *See* ICO Response at 24 (citing paragraph no 117 of the Virginia Arbitration Order), see also Hearing Tr Vol VII, 24 10-19

network interconnects with the network of an intermediate third party LEC to whom both ILEC and CMRS Carrier are each interconnected.

Those provisions are consistent with the applicable federal law described above and make clear that traffic exchanged through indirect interconnection is subject to reciprocal compensation principles. Accordingly, the TRA should adopt those provisions.

2. **Joint Issue No. 2(b):** (excluding Verizon Wireless and Cingular Wireless): Do the reciprocal compensation requirements of 47 U.S.C. § 251(b)(5) apply to land originated intraMTA traffic that is delivered to a CMRS provider via an Interexchange Carrier (IXC)?

   Summary: Yes The FCC rules expressly provide for the payment of reciprocal compensation on all intraMTA traffic without regard to how it may be delivered.

The ICOs contend that the 47 C.F.R. §§ 51.701 et seq. (the Subpart H rules) apply to "*local exchange service traffic*" of a LEC and, therefore, do not apply to calls that originate on an ICO network but are handed off to an interexchange carrier for delivery to a CMRS Provider network.[127] The ICOs' argument is premised on the idea that the way a call is delivered somehow changes the jurisdictional nature of the traffic, i.e., that a carrier can transform intraMTA traffic into interMTA traffic by sending traffic through an IXC. This is simply not the case.

The FCC could not have been clearer on this issue. In the *Local Competition Order* it stated "traffic *to or from* a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges." [128]. The FCC, cognizant of the new regime it was imposing, and the fact that it – as opposed to the states – was going to determine the scope of Telecommunications Traffic for interconnection with CMRS Providers later specifically stated again in the *Local*

[127] See ICO Response at pg 31 (emphasis added), see also Hearing Tr Vol VII, 34 3–4 ("Recip comp rules apply to local exchange carrier services, not interexchange carrier services")

[128] First Report and Order at ¶ 1036 (emphasis added)

Competition Order, "[w]e reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA ...is subject to transport and termination rates under section 251(b)(5), rather than interstate or interstate access charges."[129] In 2001, in the context of deciding the ISP compensation issue before it, the FCC once again restated the proposition that "all intraMTA" traffic was subject to reciprocal compensation under section 251(b)(5).[130]

There is nothing ambiguous about the FCC's mandates in this regard: reciprocal compensation applies to all "...CMRS traffic that originates and terminates in the same MTA, regardless of whether it flows over the facilities of other carriers along the way to termination."[131] Moreover, had the FCC intended to except from its reciprocal compensation rules intraMTA traffic exchanged through a third-party, the FCC clearly could have done so. When the FCC revisited its definitions of "local traffic" and replaced it with the more generic "telecommunications traffic" in the *ISP Order,* it expressly limited the definition of compensable "telecommunications traffic" for calls between two wireline carriers:

> Telecommunications traffic exchanged between a LEC and a telecommunications carrier *other than a CMRS provider*, except for telecommunications traffic that is *interstate or intrastate exchange access, information access, or exchange services for such access* . . .[132]

In that same decision, however, the FCC did not adopt any exception for calls between a landline carrier and a CMRS Provider. Instead, however, the FCC continued to utilize the MTA

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[129] Id at ¶ 1043

[130] Order on Remand And Report And Order, CC Docket Nos 96-98, 99-69, para 24 (April 18, 2001) ("ISP Order"), at 112, Appendix B – Final Rules

[131] See e g , 3 Rivers Telephone Cooperative, Inc v U S West Communications, Inc , NO 99-90-GF-CSO (slip op) at 50 (D Mont Aug 22, 2003), *Atlas Telephone, supra, 309 F Supp 2d at* ___

[132] 47 C F R § 51 701(b)(1) (emphasis added)

definition for traffic exchanged between a wireline and wireless carrier – as discussed above – stating that reciprocal compensation applies to:

> Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined by § 24.202(a) of this chapter.[133]

Notably, there is no exclusion in this definition for exchange access. Thus, all intraMTA traffic exchanged between a wireless and wireline carrier, regardless of the originating party, and regardless of the presence of an intermediary carrier, is subject to reciprocal compensation principles.

In addition, as a practical matter, the ICO position is untenable. In essence, it would mean that the ICOs do not pay CMRS Providers reciprocal compensation for intraMTA traffic they cause to be terminated on CMRS networks and instead collect originating access charges (from their own customers) for that same traffic. That is clearly not what the FCC or Congress had in mind.

Finally, the concept of "local exchange services" is simply not applicable to the issue of whether traffic to and from a CMRS network is subject to reciprocal compensation under section 251(b)(5) The Subpart H rules have never relied upon the concept of "local exchange carrier services" to define the scope of traffic exchanged between a LEC and CMRS Provider that is subject to reciprocal compensation[134] and the ICOs' attempt to otherwise cloud this issue should be soundly rejected by the TRA.

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[133] 47 C F R § 51 701(b)(2)

[134] As originally drafted, the FCC used the phrase "local telecommunications traffic" to define the traffic that was subject to reciprocal compensation As it related to CMRS traffic, that definition still included all intraMTA traffic In the ISP Order, the FCC revised the term "local telecommunications traffic" to "telecommunications traffic" but otherwise left the definition the same See ISP Order at pp 112, Appendix B- Final Rules

3. **Joint Issue No. 3:** Who bears the legal obligation to compensate the terminating carrier for traffic that is exchanged indirectly between a CMRS provider and an ICO?

   Summary: Under the cost causation principal of reciprocal compensation, the carrier on whose network a call originates is responsible for paying the carrier on whose network the call terminates.

The CMRS position that the originating carrier bears the responsibility to compensate the terminating carrier for traffic that is exchanged directly and indirectly is well founded in both law and policy. As an initial matter, the CMRS providers have provided ample legal support for how the FCC's reciprocal compensation rules apply to the *indirect* exchange of telecommunications traffic between a CMRS provider and a LEC (including ICOs), where such traffic originates and terminates within an MTA.[135] Under the Act and the FCC's reciprocal compensation rules, the *originating carrier*'s reciprocal compensation obligation is not altered when a transiting carrier is interposed between the originating and terminating carriers.[136] As a result, there is no basis for the ICOs' contention that the *intermediary transiting carrier* should pay the ICOs for termination of a call.[137] Indeed, the Hearing Officer early in this proceeding found that "federal law imposes *no compensation obligations on any third party*, including BellSouth over whose network the traffic is being exchanged."[138]

a. The FCC and State Commissions have applied the FCC's Reciprocal Compensation Rules Even Where There is an Intermediary Carrier that Transits the Traffic

Reciprocal compensation under the current calling party network pays ("CPNP") regime requires that the originating carrier pays reciprocal compensation for the transport and

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[135] *See* Brief on Issue 2, Section III B 1 , *supra*

[136] *See* 47 U S C. § 251(b)(5) and 47 C F R § 51 703(b), Hearing Tr , Vol II, 63 7-15

[137] *See* ICO Response at 37

[138] April 12, 2004 Order Denying Motion at 7

termination of telecommunications traffic.[139] In the FCC's *Inter-carrier Compensation NPRM,* the Commission affirmed that its current reciprocal compensation rules require that the "calling party's LEC must compensate the called party's LEC for the additional costs associated with transporting the call from the carriers' interconnection point to the called party's end office, and for the additional costs of terminating the call to the called party."[140] In fact, the FCC clearly indicated that pursuant to its reciprocal compensation rules, the transiting carrier is not responsible for paying a LEC (or CMRS provider for that matter) for the transport and termination of traffic.[141]

In the *Texcom Order*, the FCC addressed a complaint brought by a paging carrier against a transiting LEC that charged the paging carrier for terminating traffic that transited the LEC's network, and reiterated that its rules "follow the cost causation principle of allocating the cost of delivering traffic to the carriers responsible for the traffic, and ultimately their customers." Accordingly, the FCC held that "[w]here the [intermediary] LEC's customers do not generate the traffic at issue, those customers should not bear the cost of delivering that traffic from a CLEC's network to that of a CMRS carrier..."[142]

As the FCC recognized in its *Texcom* Order, there is no practical or policy reason why the transiting carrier should bear the costs of transporting and terminating traffic that originates on another carrier's network. While performing the transiting function, the intermediary carrier

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[139] See e g , 47 U S C § 252(d)(2), 47 C F R § 51 703(b) A "LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network " *Id*

[140] *Inter-Carrier Compensation NPRM* at ¶ 8 (noting that current Commission rules regarding reciprocal compensation obligations of incumbent LECs require that the "calling party's LEC must compensate the called party's LEC for the additional costs associated with transporting the call from the carriers' interconnection point to the called party's end office, and for the additional costs of terminating the call to the called party ")

[141] *See TexcomOrder*) at ¶ 6 Although the ICOs contend that the FCC's reciprocal compensation rules and interconnection standards do not address traffic exchanged via a transiting carrier (Hearing Tr , Vol VII, at 23-24, 35), the FCC in the *Texcom* Order clearly contemplated a situation involving three parties and concluded that under reciprocal compensation rules, the originating carrier in such a case bears the compensation obligation

is not serving a customer, and therefore does not benefit from transiting this traffic. The transiting carrier is merely serving a necessary function and role, pursuant to § 251(a)(1) of the Act, in ensuring that traffic is exchanged between carriers that are interconnected indirectly.

Moreover, requiring the transiting carrier to bear the obligation might well reduce the number of carriers willing to provide transiting functions. In fact, BellSouth has indicated that if they are required to perform the payment or billing and collection function, they will attempt to avoid all transiting functions altogether.[143] Putting aside the legality of such a position at this time, such an outcome would be adverse to the public interest and the pro-competitive environment envisioned by the Act and the FCC's rules (which contemplated permitting competitive entrants to interconnect indirectly).[144]

b. The ICOs' Position Is Legally and Practically Unsupportable

Against the considerable precedent establishing that the intermediary carrier has no reciprocal compensation obligation or billing intermediary role, the ICOs offer virtually no legal support for their position.

First, the ICOs contend that the CMRS Providers are seeking a reciprocal compensation payment mechanism that is not dependent upon any established interconnection standard subject

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[142] *Id*

[143] *See* Ex Parte from Glenn Reynolds, Vice President, BellSouth Corporation, to Marlene H Dortch, Secretary, FCC (CC Docket Nos 01-92, 01-17) (June 4, 2004), Attachment (noting that "BellSouth is willing to continue to act as a transiting company, [but] it is willing to do so only if (1) BellSouth does not have to compensate other carriers merely because the traffic passes through its network, (2) BellSouth is compensated for the use of its network, and (3) BellSouth does not have to become involved in compensation issues or other disputes between originating and terminating carriers ")

[144] Moreover, the FCC has also rejected arguments that the transiting carrier is obligated to perform the billing and collection functions on behalf of the carriers on whose network traffic is terminating In the context of a Section 252 arbitration, for example, the FCC has expressly declined to find that an intermediary carrier has the obligation to perform billing functions or to serve as a "*billing intermediary* for the petitioners' transit traffic " See e g , Virginia Arbitration Order at ¶ 119

to arbitration.[145] As is explained in detail on the CMRS Providers' brief on Issue 2, the ICOs' first argument is simply inaccurate.[146] The interconnection standards contained in the Act and the FCC's implementing rules and decisions clearly apply to indirect traffic, as well as direct traffic. Accordingly, the Authority is required to follow the standards and rules discussed above in making its determinations in this case.

Second, the ICOs argue that BellSouth is responsible for compensating the ICOs under the "existing agreements and practices that govern BellSouth's interconnection to the ICO networks."[147] Presumably, the ICOs are referring to the Primary Carrier Plan and subsequent interconnection agreements that were at issue in Docket No.00-00523. However, the TRA has already effectively rejected this argument. Specifically, in a May 6, 2004 order in that docket, the Hearing Officer decided that although BellSouth did have certain obligations to pay the ICOs under the "Interconnection Arrangements" that continued after the expiration of the Primary Carrier Plan, these obligations should be modified because of a change in circumstances that included the implementation of meet point billing and the fact that the CMRS providers have identified themselves as originating carriers responsible for compensating the terminating carriers. In this regard, the Hearing Officer noted that "[t]his identification allows the Authority to realize the desirable regulatory goal, especially in a developing competitive environment, of *recovering costs from the cost-causer.*"[148]

A full panel of the TRA reconsidered the Hearing Officer's order, upheld the finding that the originating CMRS-ICO would be responsible for intercarrier compensation on traffic

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[145] *See* ICO Response at 39 ("This is not a matter of arbitration because it is not a matter that has been subjected to interconnection rules and established standards ")

[146] Section III B 1 , *supra*

[147] ICO Response at 38

[148] May 6, 2004 Order at 14 (emphasis added)

transiting BellSouth, and eliminated BellSouth's payment obligation to September 30, 2004 – a date sooner than those dates established in the May 6, 2004 Order.[149] Accordingly, the ICOs can no longer legitimately point to the existing arrangements as a basis for BellSouth's purported obligation to pay the ICOs.

Finally, the ICOs contend that it is more efficient to have BellSouth pay, or at a minimum, perform a billing and collection function for the exchange of traffic. As discussed above, the FCC has clearly pronounced that no such billing/collection or payment obligation for an intermediary transiting carrier exists under its reciprocal compensation rules. Because BellSouth has clearly stated that it does not wish to perform this function on a voluntary basis, this argument must fail. Moreover, the ICOs' claims of inefficiency and impracticability are contradicted by the fact that a number of the ICOs have entered into interconnection agreements that impose the reciprocal compensation payment obligation squarely on the originating carrier.[150]

Therefore, as a matter of law and public policy, it is critical that the TRA find that the originating carrier – not the intermediary transiting carrier - bears the compensation obligation to the terminating carrier.

4. **ICO Issue No. 5**: The CMRS providers should indicate the specific scope of the traffic originating on their respective networks that is the subject of these proceedings.

   Summary: The Agreement should not place a limit on the area from which mobile calls can be originated. Instead, the agreement should include appropriate compensation mechanisms for interMTA and intraMTA traffic.

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[149] *See Order Reconsidering Hearing Officer's Initial Order Addressing Legal Issue 2 and Amending the Hearing Officer's Order Issued May 6, 2004* (issued Sept 1, 2004)

[150] See Hearing Tr , Vol IX, at 27-48 (examining Record Exhibits No 7-11, which included interconnection agreements with TDS Telecom and NewSouth Communications, agreements with TDS Telecom and XO Tennessee, agreements between Concord Telephone and US Cellular, providing for indirect interconnection for the purpose of exchanging traffic)

ICO Issue 5 is another example of a non-substantive issue added by the ICOs that does not require TRA resolution. The issue does not seek the TRA's ruling on a disputed issue of fact or law. It simply requests that the CMRS providers "indicate" the specific scope of originating traffic to be included in the proceeding. The ICOs offered no specific testimony in support of this issue. In fact, their only statement on the issue is in their response, which says effectively that the CMRS Providers should identify the geographic scope since it is "one key factor in determining the extent of interMTA traffic."

If the TRA chooses to consider the issue separately, it should find that it is moot. The CMRS providers have complied with the ICOs' request that they indicate the scope of originating traffic subject to the agreement. It is abundantly clear from both the CMRS draft agreement,[151] and CMRS Providers' position on numerous issues (see, e.g., Issues.1, 2, 14, and 15), that the CMRS Providers' position is that the scope of the agreement should be sufficiently broad to cover all traffic exchanged between the parties. Moreover, the only actual issue in dispute is the *extent of interMTA traffic* exchanged between the parties (the determination of which seems to be the underlying motivation for the ICOs' inclusion of this issue) – which is already the subject of another issue, Joint Issue 11.[152]. There is no simply no issue for the TRA to decide.

[151] CMRS Agreement at § IV

[152] See Section III C 4

C. Principle No. 3: Reciprocal Compensation must be based on Forward-Looking Costs or on Bill-and-keep.

1. **Joint Issue No. 8:** What is the appropriate pricing methodology for establishing a reciprocal compensation rate for the exchange of indirect or direct traffic?

   Summary: The TRA should adopt bill-and-keep as the appropriate reciprocal compensation method until the ICOs (1) produce appropriate cost studies, and (2) rebut the presumption of roughly balanced traffic.

a. The FCC's Pricing And Costing Rules are Applicable to Reciprocal Compensation for Telecommunications Traffic Exchanged through Direct and Indirect Interconnection

The Act requires all telecommunications carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). In implementing this provision of federal law, the FCC has promulgated rules that allow transport and termination rates to be established by one of three methods:

> An incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of:
>
> (1) The forward-looking economic costs of such offerings, using a cost study pursuant to §§ 51 505 and 51.511;
>
> (2) Default proxies, as provided in § 51.707; or
>
> (3) A bill-and-keep arrangement, as provided in § 51.713.[153]

As a practical matter, and for purposes of this arbitration, only two (2) alternatives are clearly available under FCC regulations for establishing transport and termination rates: (1)

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[153] 47 C F R § 51 705(a), *see also* Local Competition First Report and Order, ¶ 1055 ("States have three options for establishing transport and termination rate levels A state commission may conduct a thorough review of economic studies prepared using the TELRIC-based methodology outlined above in the section on the pricing of interconnection and unbundled elements Alternatively, the state may adopt a default price pursuant to the default proxies outlined below If the state adopts a default price, it must either commence review of a TELRIC-based economic cost study, request that this Commission review such a study, or subsequently modify the default price in accordance with any revised proxies we may adopt As previously noted, we intend to commence a future rulemaking on developing proxies using a generic cost model, and to complete such proceeding in the first quarter of 1997 As a third alternative, in some circumstances states may order a 'bill-and-keep' arrangement, as discussed below ")

forward-looking rates based on appropriate cost studies, or (2) bill-and-keep [154] In addition, the rates that carriers charge each other for transport and termination generally must be the same. 47 C.F.R § 51.711(a) states that "[r]ates for transport and termination of local telecommunications traffic *shall be symmetrical.*" (Emphasis added.)[155]

If rates are established, rather than compensation by bill-and-keep (the provision of termination services "in kind," without a separate charge between carriers), such rates must be based on the "forward looking costs" of transport and termination, using an appropriate cost study. 47 C.F.R § 51 705. The FCC defines "forward-looking costs" in section 51.505 as the sum of total element long-run incremental cost ("TELRIC") and a reasonable allocation of forward-looking common costs. In 47 C.F.R. §51.505 (e), the FCC further states that rates shall not exceed the forward-looking economic costs.

> (e) *Cost study requirements*. An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and §51.511 of this part.

Section 51.505(e)(2) specifically requires "a written factual record that is sufficient for purposes of review." It also requires the cost study to be included in the record of any proceeding if the study is considered by a state commission in establishing a transport and termination rate for any carrier.

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[154] The availability of default proxies is, at best, unsettled *See Iowa Utilities Bd v F C C* , 219 F 3d 744 (8th Cir 2000)

[155] Subsection (3)(b) of 47 CFR § 51 711 does allow a state commission to establish a different transport and termination rate for a requesting carrier that can demonstrate a cost structure different from the incumbent provider However, none of the CMRS Providers in this matter are requesting such asymmetrical rates

b. The ICOs Failed to Produce Appropriate Cost Studies and Appropriate Rates

The ICOs failed to produce forward-looking cost studies in either the negotiations or subsequent arbitration.[156] ICO witness Watkins attempted to explain away the ICOs' failure by claiming that the ICOs' "voluntary" rates were actually lower than the rates that would have been produced by forward-looking cost studies. However, as witness Watkins was forced to admit, since the ICOs failed to perform forward-looking cost studies, his claim could not be verified.[157]

The ICOs have not proposed any rates derived from the FCC's forward-looking methodology for transport and termination. Thus, if the ICOs are wrong in their argument that reciprocal compensation obligations do not apply to traffic exchanged through indirect interconnection, and if the ICOs are wrong in their argument that the pricing standards of section 252(d)(2) do not apply as a result of their 251(f)(1) status--and the ICOs *are* wrong on both accounts--the ICOs have given the Commission *no appropriate rates to consider.* That was the implication of Director Jones' questions to witness Watkins:

> DIRECTOR JONES: I mean, I think your response is that you don't believe recip comp applies and you believe that this is the rate that applies.
> THE WITNESS: Yes.
> DIRECTOR JONES: My question goes to the extent that in this arbitration there's a decision that recip comp does apply, are you proposing a rate for instances where recip comp applies?
> THE WITNESS: Yes. I think we would say we propose the same rate.[158]

The only rates proposed by the ICOs are derived from their interstate switched access rates as calculated by the National Exchange Carrier Association ("NECA"), which rates include

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[156] Hearing Tr Vol IX, 21 11-13·
Q Have you produced a forward-looking cost study?
A No

[157] Hearing Tr , Vol IX, 22 6-9
Q And if we wanted to find out if that's true in this case, we would perform the cost study and compare the two rates, wouldn't we?
A Yes

[158] Hearing Tr , Vol IX, 56 11-20

embedded costs.[159] The FCC, however, has made it very clear that switched access charges, as well as embedded costs, are inappropriate for developing transport and termination rates. [160]

Thus, there can be no dispute that the rates proposed by the ICOs do not comply with the FCC's pricing and cost regulations for establishing transport and termination rates. The TRA cannot adopt those proposed rates.[161]

c. Bill-and-Keep is the Only Alternative Available to the TRA.

Because the ICOs have not produced appropriate cost studies or proposed appropriate forward-looking rates, only one compensation mechanism remains under FCC Regulations--bill-and-keep. Under bill-and-keep, neither party bills the other for terminating traffic. Instead, each carrier is compensated for terminating the other's traffic by reciprocal termination of its own traffic at no charge. Thus, 47 C.F.R. Section 51.713(a) defines bill-and-keep arrangements as·

> . . . those in which neither of the two interconnecting carriers charges the other for the termination of telecommunications traffic that originates on the other carrier's network.

47 C.F.R. section 51.713(b) allows a state commission to impose bill-and-keep as the required method of reciprocal compensation if the amount of telecommunications traffic between the parties is "roughly balanced." Moreover, under subsection (c), a state commission may presume that traffic is roughly balanced "unless a party rebuts such a presumption." This

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[159] Watkins Direct Testimony, p 35 "The ICOs have proposed to utilize the per-minute rates for identical transport and termination as they use and apply for interstate access purposes." Hearing Tr , Vol IX, 12 18-19 "Well, the rates we have proposed are the rates that NECA has calculated "; see also Hearing Tr , Vol. IX, 16 4-8 (costs studies include embedded costs)

[160] *See* 47 CFR § 51 515 ("Neither the interstate access charges described in part 69 of this chapter nor comparable intrastate access charges shall be assessed by an incumbent LEC on purchasers of elements that offer telephone exchange or exchange access services "), *see also* CFR § 51 505(c)(1)(embedded costs may not be considered) Even the ICOs concede that the FCC rules for reciprocal compensation do not permit embedded costs Hearing Tr , Vol IX, 15 16 - 16 3

[161] As was pointed out at the hearing, the ICOs have failed to propose any rates at all for three companies involved in this hearing CenturyTel of Adamsville, CenturyTel of Claiborne and CenturyTel of Ooltewah Hearing Tr , Vol IX, 24 8-25

provision places the burden of proof on the party asserting unbalanced traffic, both as to going forward with the evidence and the burden of persuasion. The FCC does not require that traffic be exactly balanced, and the state commission has discretion to establish thresholds for determining that the traffic is roughly balanced.

The above-quoted FCC regulations would allow the TRA to impose bill-and-keep as the appropriate form of reciprocal compensation even if each ICO had produced an appropriate forward-looking cost study. If traffic is roughly in balance, then bill-and-keep should be applied, because each company will end up billing roughly the same amount to the other company.

The ICOs did not submit any evidence to rebut the presumption that traffic was "roughly balanced." In fact, in response to a specific CMRS Provider interrogatory, the ICOs stated that they "cannot determine the ratios of traffic that is transmitted pursuant to the existing indirect arrangement through BellSouth."[162] The ICOs also admitted that they have conducted no traffic studies to determine if the traffic between them and the CMRS Providers is "roughly balanced."[163] Indeed, the only ICO testimony on the subject was as follows:

> DIRECTOR TATE: I just had a question about bill-and-keep. Obviously some of these companies that you represent here today have agreed that bill-and-keep might be reasonable or they have agreed to it with the possibility of a correction through some kind of quarterly audit. Can you give us any reason why that isn't a correct assumption for us?[164]

Witness Watkins replied that although traffic might be roughly balanced between two landline carriers, it would not be roughly balanced between a landline carrier and a wireless carrier:

> THE WITNESS: Yeah. The dynamics of exchanging traffic with a wire-line CLEC where the geographic scope of the local traffic is way different than the

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[162] Response of Coalition to First Set of Interrogatories, Interrogatory 22 (Jul 2004)

[163] *Id*, Interrogatory 23

[164] Hearing Tr, Vol IX, 58 3-9

> disparate scope of wireless traffic to wire-line traffic means that quite often CLEC traffic is roughly balanced but often means that wireless traffic is not.[165]

However, no evidence in the record supports that statement. Not one of the 21 ICOs has produced a single traffic study. In the absence of such studies, the TRA is authorized by FCC Regulations to presume that traffic is roughly balanced until such time as an individual ICO demonstrates otherwise through an appropriate study.[166]

Some of the ICOs have filed interconnection agreements containing bill-and-keep compensation provisions. The contract between four ICOs (Concord Telephone Exchange, Inc, Tennessee Telephone Company, Humphreys County Telephone Company and Tellico Telephone Company, Inc.) and NewSouth Communications Corporation, filed of record with the TRA in Docket No. 04-00081, contains the follow provision in Section 4 of Appendix Reciprocal Compensation:

> Based on the assumption that the Local Traffic exchanged by the Parties will be roughly balanced (i.e., neither Party is terminating more than sixty (60) percent of the Parties' total terminated minutes for Local Traffic), the Parties shall initially terminate each other's Local Traffic on a Bill and Keep basis.[167]

Those same four ICOs also have contracts with US LEC of Tennessee[168] and XO Tennessee,[169] containing identical bill-and-keep provisions. Thus, several ICOs in this proceeding have recognized in contracts filed with the TRA that bill-and-keep makes economic sense when traffic is "roughly balanced." Indeed, those filed contracts contain the very phrase--"roughly balanced"--employed in the FCC regulations. Those contracts also specifically define the concept of "roughly balanced" traffic. If one party "is terminating more than sixty (60)

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[165] *Id*, 10-16

[166] *See* 47 C F R § 51 713

[167] Exhibit B to Rebuttal Testimony of William H Brown Hearing Record Exhibit 7

[168] TRA Docket 00-00026, Exhibit C to Rebuttal Testimony of William H Brown, Hearing Record Exhibit 8

[169] TRA Docket 03-00568, Exhibit D to Rebuttal Testimony of William H Brown, Hearing Record Exhibit 9

percent of the Parties' total terminated minutes for Local Traffic," then traffic is not "roughly balanced." In such a situation, bill-and-keep would not be appropriate, because the same amount of compensation would not be flowing both ways.

The ICO contracts specifically allow either party to conduct a traffic study to ascertain if the traffic is no longer in balance:

> "Either Party may request that a traffic study be performed no more frequently than once a quarter. Should such traffic study indicate, in the aggregate, that the traffic is no longer in balance, either Party may notify the other of their intent to bill for Local Traffic termination pursuant to the rates set forth in Appendix PRICING of this Agreement and continue for the duration of the Term of this Agreement unless otherwise agreed by the Parties. A minimum of thirty (30) days written notice is required prior to the first billing of mutual compensation."[170]

This provision prevents one party from remaining locked into an inequitable bill-and-keep arrangement--should traffic turn out not to be roughly balanced at some later date. If the TRA adopts the same provisions for ICO-CMRS contracts in these consolidated cases, the ICOs will not be prejudiced in any way. At any time, the ICOs will have the option of conducting traffic studies to determine whether traffic is in fact roughly balanced. If it is not, then the parties will begin compensating each other pursuant to an appropriate transport and termination rate.

It would be inappropriate, however, for the TRA to presume that ICO-CMRS traffic is not roughly balanced. The FCC Regulations do not allow a state regulatory body to presume unbalanced traffic. The presumption can only be in favor of balanced traffic, with the burden on the party claiming otherwise to rebut the presumption through the use of an appropriate traffic

[170] Exhibit B to Rebuttal Testimony of William H Brown and Hearing Record Exhibit 7, § 4 3, Exhibit C to Rebuttal Testimony of William H Brown and Hearing Record Exhibit 8, § 4 3, Exhibit D to Rebuttal Testimony of William H Brown and Hearing Record Exhibit 9, § 4 3

study. The CMRS Providers submit that the ICOs' failure to produce appropriate traffic or cost studies mandates the use of bill-and-keep for purposes of this arbitration.

d. The Oklahoma Corporation Commission Selected Bill-and-keep Under Similar Circumstances.

The TRA thus finds itself in the identical position to the Oklahoma Corporation Commission, which adopted bill-and-keep as the appropriate compensation mechanism between CMRS Providers and ICOs--primarily because the Oklahoma ICOs failed to produce appropriate cost and traffic studies. The Oklahoma Commission also ruled that the ICOs could at any time produce appropriate cost and traffic studies and set an appropriate reciprocal compensation rate. In upholding that decision, the United States District Court for the Western District of Oklahoma stated:

> "[T]hese [FCC] rules allow a state commission to place the burden of proof on carriers asserting that traffic is not in balance--here, the RTCs. It is also clear that they authorize commissions to invoke a presumption of roughly balanced traffic unless the commission finds that such a presumption has been adequately rebutted. Invoking this presumption is exactly what the Oklahoma Corporation Commission did when it stated in its Interlocutory Order (reaffirmed at p. 3 of the Commission's Final Orders), that 'there is a presumption of balanced traffic.'
> .....
> The court concludes that the Commission did not err when it imposed bill-and-keep as a mechanism for implementing reciprocal compensation between each RTC and each wireless carrier until such time as an individual study is presented which adequately rebuts the presumption of roughly balanced traffic."[171]

No one is claiming that bill-and-keep is an appropriate method of compensation when traffic is not roughly balanced. Thus, if the ICOs subsequently produce appropriate traffic studies demonstrating that one party is terminating more than 60% of the traffic--to use the figure from the ICOs' contracts--then the parties should start paying each other compensation.

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[171] *Atlas Tel , supra,* 309 F Supp 2d at 1307 & 1309

That was the result reached by the Oklahoma Commission, and that is the result that should be adopted by the TRA.

e. If the ICOs Should Subsequently Produce Traffic Studies Demonstrating that Traffic is not Roughly Balanced, the Appropriate Transport and Termination Rates are Those Proposed by the CMRS Providers

If the ICOs subsequently produce traffic studies demonstrating that they are terminating more than 60% of the total traffic exchanged, the only appropriate forward-looking rates proposed in this proceeding came from CMRS witness Conwell, who conducted a study based upon information produced by the ICOs and other publicly available data. Mr. Conwell's benchmark rate for end office switching is $0.0051 per minute of use,[172] over six times higher than BellSouth's unbundled switching rate in Tennessee ($0.0008041/MOU).[173] Mr. Conwell's benchmark for transport is $0.0015 per minute of use, the upper end of transport costs throughout the United States, based upon the West Virginia PSC survey of UNE rates.[174] Added together, those two elements produce a transport and termination rate (exclusive of tandem switching) of $0.0066 per minute of use.[175] Mr. Conwell's benchmark rate for tandem switching, to the extent it is applicable in the case of direct connections, is $0.0022.[176]

Substantial evidence in the record supports Mr. Conwell's benchmark rates. Aside from the careful methodology employed by Mr. Conwell, the rates used by the ICOs themselves seem to support the benchmark rates. For example, per the evidence in this proceeding, four ICOs (Concord, Humphreys County, Tellico and Tennessee) have filed with the TRA three (3) separate contracts with three (3) different carriers, employing bill-and-keep for the compensation

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[172] Rebuttal testimony of W Craig Conwell, 12 11-12

[173] *Id*, 13 1-2

[174] *Id*, 13 5-13

[175] *Id*, 14 3-4

[176] *Id*, 13 15-20

method unless and until one party demonstrates that traffic is out of balance by more than sixty percent. Those four (4) contracts contain an alternate compensation rate of $0.00577--slightly less than Mr. Conwell's benchmark rate for transport and termination [177]

During the hearing, Director Jones inquired if the alternate rate of $0.00577 included tandem switching, and witness Conwell replied that he could not tell from examining the contracts.[178] In response to CMRS discovery requests, however, each ICO in this proceeding has identified whether it operates a tandem switch None of the subject companies operates a tandem.[179] Thus, Mr. Conwell's benchmark transport and termination rate of $0.0066 (exclusive of tandem switching) is very close, and in fact slightly higher, than the comparable rate of $0.00577 (also exclusive of tandem switching) contained in the filed contracts of Concord Telephone Exchange, Inc., Humphreys County Telephone Company, Tellico Telephone Company and Tennessee Telephone Company.

Two (2) of the ICOs in this case (Concord Telephone Exchange and Tellico Telephone Company) have executed interconnection agreements with their wireless affiliate (United States Cellular Corporation). Those two (2) contracts were never filed with the TRA. Both contracts contain a transport and termination rate of $0.00577 per minute of use--again lower than witness Conwell's benchmark rate.[180]

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[177] Exhibit B to Rebuttal Testimony of William H Brown and Hearing Record Exhibit 7, Attachment A to Appendix Pricing, Exhibit C to Rebuttal Testimony of William H Brown and Hearing Record Exhibit 8, Attachment A to Appendix Pricing, Exhibit D to Rebuttal Testimony of William H Brown and Hering Record Exhibit 9, Attachment A to Appendix Pricing

[178] Hearing Tr , Vol III, 55 8-11

[179] Response of Coalition to First Set of Interrogatories, Interrogatory 34, Attachment A (Jul 2004)

[180] Hearing Record Exhibit 11

The contract between Tellico and US Cellular also contains an "Intermediary Transit Charge" of $0.002 per minute of use--again slightly lower than witness Conwell's benchmark tandem switching rate of $0.0022.

Those filed and unfiled contracts demonstrate that witness Conwell's proposed benchmark rates are reasonable. Indeed, as the financial statements produced by the ICOs demonstrate, witness Conwell's benchmark rates are, if anything, conservative. For example:

- Witness Conwell's benchmark end office switching rate assumes a 9.8% depreciation factor that is actually higher than the 7.91% to 8.24% depreciation factors employed in the financial statements containing that level of detail.[181] The higher depreciation factor used in Mr. Conwell's calculation produced higher annual depreciation expense and therefore higher switching rates per minute of use.

- The Conwell benchmark assumes a 4.0% digital switching maintenance expense factor, as opposed to factors ranging from 2.2% to 3.7% for the companies reporting such detail.[182]

- Witness Conwell assumed a 2.1% cost of debt factor, as opposed to actual costs of debt ranging from 0.6% to 2.5%.[183]

In each case, witness Conwell's assumption resulted in a slightly higher estimate of ICO transport and termination costs.

For all the reasons discussed above, the TRA can confidently conclude that witness Conwell's proposed benchmark rates are a reasonably accurate reflection of the ICOs' forward-looking costs of end office switching, transport and (when applicable) tandem switching.

f. Appropriate Contract Provision for Adoption by TRA

Regarding compensation, the ICOs have already produced in their own filed contracts the appropriate compensation provision for adoption by the TRA in these consolidated cases. Bill-

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[181] Second Supplemental Testimony of W Craig Conwell, 9 17-19

[182] *Id*, ll 19-21

[183] *Id*, ll 21-23

and-keep should be the compensation mechanism until an individual ICO produces a study showing that one party is terminating more than 60% of the total traffic. In that case, an alternate compensation rate--based on witness Conwell's benchmarks of $0.0066/MOU for transport and termination, and $0.0022/MOU for tandem switching--should take effect until such ICO produces a cost study in accordance with the FCC's pricing rules.

That is the only result supported by the record.

2. **Joint Issue No. 9:** Assuming the TRA does not adopt bill-and-keep as the compensation mechanism, should the Parties agree on a factor to use as a proxy for the mobile-to-land and land-to-mobile traffic balance if the CMRS Provider does not measure traffic?

   Summary: Yes. There are circumstances under which the Parties may need, or choose, to use factors.

Currently, some of the CMRS Providers have the capability to measure traffic sent to or received from another carrier, while other CMRS Providers do not. Thus, a typical interconnection agreement between an ICO and a CMRS Provider that cannot measure traffic will contain a "traffic factor" to take the place of real-time measurement on the part of the CMRS Provider. If the "traffic factor" is set at 60/40, for example, the minutes of use ("MOUs") billed by the ICO to the CMRS Provider (i.e. the Mobile-to-Land traffic) represent 60% of the total traffic exchanged in both directions between the parties, The CMRS Provider, in turn, uses the known MOUs billed by the ICO to calculate the remaining 40% of the traffic exchanged between the parties for which the CMRS Provider bills the ICO (i e. the Land-to-Mobile traffic). In the 60/40 example, the MOUs billed by the CMRS Provider to the ICO are determined by the following simple formula: Mobile-to-Land MOUs x (40/60) = Land-to-Mobile MOUs to be billed by CMRS Providers.

A traffic factor is common in the industry and, although the agreed-upon ratio can vary from contract to contract, the ratio contained in several of the CMRS Providers' recent interconnection agreements with rural telephone companies is 60/40.[184] However, because bill-and-keep is the appropriate method of compensation between the ICOs and CMRS Providers, the TRA need not adopt a traffic factor. Instead, the interconnection agreements between the ICOs and CMRS Providers should contain, in addition to bill-and-keep provisions, the same language as is contained in Section 4.3 of the Appendix Pricing attachment to the three (3) filed contracts executed by four (4) of the ICOs to this proceeding:

> Either Party may request that a traffic study be performed no more frequently than once a quarter. Should such traffic study indicate, in the aggregate, that the traffic is no longer in balance, either Party may notify the other of their [sic] intent to bill for Local Traffic termination pursuant to the rates set forth in Appendix Pricing of this Agreement and continue for the duration of the Term of this Agreement unless otherwise agreed by the Parties. A minimum of thirty (30) days written notice is required prior to the first billing of mutual compensation.[185]

Assuming that the parties agree regarding the results of the traffic study, then the traffic factor would be set at the percentages shown in the study. If, however, either party challenges the traffic study, any dispute should be resolved pursuant to the Agreement's dispute resolution provision.[186]

3. **Joint Issue No. 10:** Assuming the TRA does not adopt bill-and-keep as the compensation mechanism for all traffic exchanged and if a CMRS provider and an ICO are exchanging only a *de minimis* amount of traffic, should they compensate each other on a bill-and-keep basis? If so, what level of traffic should be considered de minimis?

   Summary: If an ICO produces an appropriate traffic study showing that one party is terminating more than 60% of the total exchanged traffic, the CMRS Providers are

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[184] Direct Testimony of William H Brown, 29 8-23

[185] Exhibit B to Rebuttal Testimony of William H Brown and Hearing Record Exhibit 7, § 4 3, Exhibit C to Rebuttal Testimony of William H Brown and Record Exhibit 8, § 4 3, Exhibit D to Rebuttal Testimony of William H Brown and Hearing Record Exhibit 9, § 4 3

[186] *See* e g , AT&T Wireless Petition, Exhibit 2, Section VIII, "Dispute Resolution Process "

willing to accept Witness Watkins' proposal to defer billing until the amounts involved are material.

If the TRA adopts bill-and-keep as the method of compensation until the ICOs produce appropriate traffic and cost studies, then the issue of *de minimis traffic* will not arise. However, should a given ICO subsequently produce studies demonstrating that a party is terminating more than 60% of the total exchanged traffic, and if an appropriate forward-looking compensation rate then takes effect, the CMRS Providers are willing to relinquish their claim to a *de minimis traffic* provision and accept the suggestion of ICO witness Watkins that the affected ICO and CMRS Provider "voluntarily and mutually agree to defer billing to periods when the amounts would be material."[187]

4. **Joint Issue No. 11:** Should the parties establish a factor to delineate what percentage of traffic is interMTA and thereby subject to access rates? If so, what should the factor be?

   Summary: Yes. The interMTA factor should be zero.

As discussed above, the Act and implementing FCC regulations require reciprocal compensation principles to be applied to Telecommunications Traffic that, at the beginning of the call, originates and terminates in the same MTA. For traffic that does not originate and terminate in the same MTA, access charges may apply.

There is, however, no evidence in this proceeding to indicate that the CMRS Providers and ICOs exchange significant amounts of traffic across MTA boundaries, nor is there any evidence to indicate that any interMTA traffic exchanged by ICOs and CMRS Providers is not roughly balanced. For that reason, the CMRS Providers propose that the TRA adopt the same contract provision that is contained in the filed contract between CenturyTel of Claiborne (one of the ICOs to this proceeding) and Eloqui Wireless:

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[187] Direct Testimony of Steven E Watkins, p 39

"PLU: 100%: The Percent Local Usage (PLU) Factor describes the portion of [Telecommunications] Traffic exchanged between the Parties that both originated and terminated within the same local call area (MTA). This factor applies to both originating and terminating MOUs."[188]

The effect of assuming that 100% of all exchanged traffic originates and terminates in the same MTA is to eliminate interMTA traffic as a source of compensation to either party. CenturyTel of Claiborne likely agreed to such a provision because compensable interMTA traffic is generally believed by the industry to constitute a very small portion of all traffic exchanged between a wireless and wireline carrier.[189] The above provision is also consistent with the application of bill-and-keep principles to intraMTA traffic.

5. **ICO Issue No. 6:** Access charges apply to both the origination and termination of interMTA traffic on the networks of the ICOs.

   Summary: The ICOs submitted no separate testimony on this issue and thus the issue can and should be resolved by the adoption of an interMTA factor of zero.

As discussed above, interMTA traffic exchanged by the CMRS Providers and the ICOs is generally *de minimis* and roughly balanced, and therefore should presumptively be exchanged on a bill-and-keep basis--as is provided for in the contract between CenturyTel of Claiborne and Eloqui Wireless. The ICOs, however, at least in their Response filed in this case, have taken the position that access charges should apply to such traffic.[190] The CMRS Providers would point out that, if the ICOs are correct, if access charges should apply to interMTA traffic, then access charges should apply to both CMRS Providers and ICOs.

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[188] TRA Docket 02-00328 The proposed language is contained in "Attachment I--Rates " *See also* Rebuttal Testimony of William H Brown, Exhibit E

[189] Rebuttal Testimony of William H Brown, 23 15-19

[190] *See* ICO Additional Issue 6, ICOs' Response, p 96

Significantly, however, the ICOs have filed no separate testimony on this issue, nor was it discussed in the hearing.[191] For this reason, the CMRS Providers assert that this issue should be dismissed. Alternatively, if the Commission adopts the 100% PLU factor contained in the CenturyTel of Claiborne/Eloqui Wireless contract (see Section III.C.4), ICO Issue No. 6 will be resolved.

D. Principle No. 4: Originating Carriers are Obligated to Deliver Their Traffic to the Terminating Carrier's Network.

1. **Joint Issue No. 5:** Is each party to an indirect interconnection arrangement obligated to pay for the transit costs associated with the delivery of intraMTA traffic originated on its network to the terminating party's network?

   Summary: Yes. The originating party is responsible for paying applicable transit costs associated with the delivery of its traffic to a terminating carrier.

As discussed above, for the purposes of interconnection with a CMRS network, Telecommunications Traffic is expressly defined by the FCC in Rule 51.701(b)(2) to be traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same MTA. Under the FCC's CPNP regime, the originating network party is not only responsible for the payment of reciprocal compensation to the terminating network party, the originating party is also responsible for all costs associated with the *delivery* of its originated Telecommunications Traffic to the terminating party. This principle is stated within the FCC's Subpart H Reciprocal Compensation Rule 51.703(b) as follows:

> A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

[191] In fact the only statement of the ICO position on this issue is contained in one short paragraph in their response ICO Response at 96

In *TSR Wireless,* the FCC held that "[s]ection 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated."[192]

CMRS Providers acknowledge a responsibility under the CPNP regime to pay a third party tandem provider (e.g. BellSouth) the transit costs associated with the indirect delivery of the CMRS Provider's originated traffic to a terminating ICO's network via the third party's tandem.[193] The cost that a tandem provider typically charges an originating carrier would be the costs associated with tandem switching and transport transmission facilities that are used to deliver the originating party's traffic to another terminating party subtending the transiting carrier's network.[194] Notwithstanding that by its express terms 47 C.F.R. section 51.703(b) is directed at LECs, the ICOs' proposed interconnection agreement at section 4.5.5 seeks to shift to the CMRS Providers any transit costs that a third party tandem provider (i.e. "Intermediary Provider" in 4.5.4) would otherwise charge an ICO to deliver ICO originated traffic to a CMRS Provider via the transit provider's tandem.

The ICOs refuse to pay transit costs based on the contention that "LECs do not have responsibility for services to geographic points beyond their own local service areas" and that "[c]alls to distant locations beyond the established local calling scopes of the LEC are provisioned by the originating customer's toll provider."[195] The ICO position is without merit.

First, the payment of transiting charges for calls originating on an ICO network has nothing to do with "providing service outside of a local service area." In fact, it is the transiting

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[192] *TSR Wireless, LLC v US West Communications, Inc* , 15 FCCR 11166, 11184 ¶ 31 (FCC 2000), *Mountain Communications, Inc v Federal Communications Commissions,* 355 F 3d 644, 647 (U S App D C 2004)

[193] Hearing Tr Vol I, 9 8-13

[194] *See* Billy H Pruitt Direct Testimony, 19 13-18

[195] ICOs' Response, p 48-49

carrier and the terminating carrier that are providing the service; the originating carrier is merely paying for the services being rendered.

Second, the ICOs rely upon two (2) post *TSR Wireless* FCC decisions to argue that they are not obligated to pay transit charges on their originated traffic. The FCC *Texcom* Reconsideration Order[196] decision is cited for the contention that a CMRS Provider is "responsible for compensating the intermediary LEC providing the transit service for traffic that originates on the networks of third party LECs.[197] The FCC *Mountain Memorandum Opinion & Order*[198] is cited for the contention that a LEC is not required "to transport calls beyond its network."[199] The ICOs contentions, however, are directly contrary to a careful reading of the cited decisions, as well as statements recently made by the FCC in filings before the Court of Appeals for the District of Columbia.[200]

In the "Introduction" paragraph of the *Texcom* Reconsideration Order, the FCC summarized the history of the case by stating that the Commission had "denied [Texcom's] complaint alleging that [GTE North] violated section 51.703 of our rules by charging [Texcom] *for traffic that originates on a third carrier's network, transits [GTE North's] network, and terminates on [Texcom's] network.*"[201] However, what the ICOs fail to explain is that GTE North was the transiting carrier, as opposed to the *terminating carrier* under the FCC's CPNP rules; therefore, the FCC's clarification with respect to the transiting carrier does not apply to an

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[196] See Texcom Reconsideration Order at ___

[197] ICOs' Response p 49

[198] *Mountain Communications, Inc v Qwest Communications International, Inc* , File No EB-00-MD-017, Memorandum and Order released February 4, 2002

[199] ICOs' Response p 50

[200] *Mountain Communications, Inc v F C C* , 355 F 3d 644, *see also* FCC Brief at pp 32-33

[201] *Texcom* Reconsideration Order, ¶ 1 (emphasis added)

originating ICO.[202] Moreover, the FCC *did* recognize the CMRS Provider's right to seek reimbursement from an originating ICO for the facility charges that the intermediary LEC might impose upon the CMRS Provider to deliver the ICO's transit traffic.[203]

The ICO's reliance on the *Mountain Memorandum Opinion & Order* is also completely misplaced. As the United States Court of Appeals for the District of Columbia noted when it reversed the FCC's order in the Mountain case:

> It is undisputed that Qwest need not absorb these costs, the only question is whether Qwest can charge Mountain for one of the five portions of this cost or must look to the originating carrier for all the costs. It might well be reasonable for the Commission to authorize Qwest to apportion those costs, but we do not understand why the Commission did so. It did not explain why it rejected Mountain's contention that the originating carrier should be charged for all the costs. In any event, by indicating that Mountain could charge the originating carrier, it suggested that Mountain was essentially correct in claiming that the originating carrier should bear *all* the transport costs.[204]

Finally, in the brief recently filed by the FCC before the United States Court of Appeals for the District of Columbia, the FCC flatly rejects the ICOs' position in this case that the ICOs have no obligation to pay costs associated with the transport of traffic beyond their boundaries:

> Section 51.703(b) of the Commission's rules states that a LEC may not assess charges on any other telecommunications carrier, including a CMRS provider, for telecommunications traffic that originates on the LEC's network. *See* 47 C.F.R. §

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[202] *Id* at ¶ 4 The FCC reaffirmed, "GTE North [transiting carrier] may charge Answer Indiana for the cost of the portion of these facilities used for transiting traffic and Answer Indiana [terminating CMRS carrier] may seek reimbursement of these costs from the originating carriers through reciprocal compensation " In other words, a transiting carrier does not recover the costs of facilities under the reciprocal compensation rules, which apply to the originating and terminating carriers

[203] *Id , see also Mountain Memorandum Opinion & Order,* fn 30, ("As the Commission indicated in *Texcom*, the CMRS carrier pays the interconnecting LEC for the costs of the portion of facilities used to transport transiting traffic from the interconnecting LEC's network to the CMRS carrier's network *The CMRS carrier may then seek reimbursement of the costs associated with the transport and termination of that traffic from the carriers that originated the transiting traffic in question ")* (emphasis added)

[204] 355 F 3d at 649 (emphasis in original) The Court of Appeals also found that the FCC's decision to allow Qwest to impose toll charges was "logically inconsistent" with *TSR* in which the FCC indicated a wireless carrier could agree through a voluntary billing arrangement (e g reverse toll) to pay charges that would otherwise be imposed on the originating landline end-user *Id* The Court of Appeals considered it even more fundamental, however, that the FCC's departure from *TSR* by allowing the charges in the absence of the requisite billing arrangement placed the FCC in direct conflict with its own regulation, 51 703(b) *See id* at 646 citing *TSR Wireless* at 15 FCCR at 11184 ¶ 31 and at 648

51.703(b). The Commission has construed this provision to mean that an incumbent LEC must bear the cost of delivering traffic (including the facilities over which the traffic is carried) that it originates to the point of interconnection ("POI") selected by a competing telecommunications carrier. At least two federal appellate courts have held that this rule applies in cases where an incumbent LEC delivers calls to a POI that is *located outside of its customer's local calling area.*

Under current intercarrier compensation rules, then, when a wireless customer calls a rural LEC customer, the wireless carrier is responsible for transporting the call and paying the cost of this transport. And, conversely, when a rural LEC customer calls a wireless customer, the rural LEC is responsible for transporting the call and paying the cost of this transport. These obligations arose under the Commission's intercarrier compensation rules implementing the 1996 Act, and not under the *Order.* The intervenors' complaint is with the intercarrier compensation regime established by Congress and implemented by the FCC through rules issued in other orders. The *Order* in this case is not the cause of intervenor's claimed injury. That injury thus cannot be redressed by review of the *Order.* This shortcoming is fatal to their claim that the *Order* required rural LECs to transport calls outside their service areas without appropriate compensation.[205]

For the reasons discussed above, the TRA should find that transit costs associated with the indirect delivery of traffic originated on the ICO network and transported beyond the ICO network are costs for which the ICOs are responsible and must pay.

2. **Joint Issue No. 7:** (A) Where should the point of interconnection ("POI") be if a direct connection is established between a CMRS Provider's switch and an ICO's switch? (B) What percentage of the cost of the direct connection facilities should be borne by the ICO?

   Summary: The POI for a dedicated two-way facility may be established at any technically feasible point on the ICO's network or at any other mutually agreeable point. Pursuant to applicable federal rules, the cost of the dedicated facility between the two networks should be fairly apportioned between the Parties based upon usage.

All telecommunications carriers are required to interconnect their networks directly or indirectly.[206] When a CMRS Provider and an ICO do directly interconnect, dedicated transport

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[205] FCC Brief, at pp 34–35

[206] *See* 47 U S C § 251(a)(1), 47 C F R § 51 100

facilities are established for the exclusive transport of traffic exchanged between the two carriers' switches.

With respect to Joint Issue 7(A), the ICOs have not made any argument or submitted any testimony to dispute that the Act *requires* LECs to provide requesting carriers with interconnection, "at any technically feasible point within the carrier's network." With respect to Joint Issue 7(B), the ICOs generally admit that the FCC's rules regarding the sharing of dedicated facilities would apply in the case of a direct connection.[207] What the ICOs do dispute, however, is the scope of the ICOs' cost sharing obligation raised in Joint Issue 7(B).[208]

The FCC, however, has clearly established that with respect to dedicated facilities that interconnect two parties' networks, the parties are to share the costs of such facilities based upon their proportionate use of the facilities, regardless of how the facilities are provisioned, and without regard to the carriers' respective service areas.[209] Notwithstanding the existence of this clear and unqualified FCC rule, the ICOs contend that in the case of a direct interconnection:

> The two-way facilities to which the proportionate use charges would apply are limited in distance to geographic limits of the ICO's LEC service area. That is, the facilities for which the proportionate use applies cannot extend beyond a point at the border of the ICO's service area network....
>
> With respect to one-way facilities, the proportionate share use concept does not apply; each party bears the expense of its one-way facility. For similar reasons as discussed previously, the ICO will not be responsible for transport beyond its service area boundary

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[207] *See* Watkins Direct Testimony at 33 ("To the extent that an interconnection point on the incumbent LEC network then the ICO is willing to share in the costs on a directional basis for those facilities that connect the networks") In the same discussion Mr Watkins points out the willingness to share in facilities costs for dedicated facilities would not include the cost of the entire facility but only the portion within "their network borders."

[208] *See also* Section III, D 1, Joint Issue 5

[209] 47 C F R § 51 507(c) ("The costs of shared facilities shall be recovered in a manner that efficiently apportions costs among users,") *See also Local Competition Order,* 1062 ("The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility"), 1063 ("We recognize that the facility itself can be provided in a number of ways – by use of two service providers, by the other carrier, or jointly in a meet-point arrangement We conclude first that, no matter what the specific arrangements, these costs should be recovered in a cost causative manner and that usage-based charges should be limited to situations where costs are usage sensitive")

for one-way facilities used by the ICO to deliver its local exchange service calls to the CMRS provider.[210]

The ICO position lacks any legal or factual support. As previously discussed, section 51.703(b) prohibits LECs from, "assess[ing] charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network " In particular, the FCC has clearly ruled that: "Section 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated . . . . [A] LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules "[211] Moreover, reviewing courts have found the language of section 51.703(b) to be "unambiguous"[212] and "quite specific"[213] in prohibiting a LEC from shifting the costs incurred from originating traffic onto the terminating carrier.

The ICOs' argument that they are not required to transport traffic beyond its service area boundary is at complete odds with the statutory language and precedent. As previously discussed, those authorities have held that originating LECs are financially responsible for not only (a) the costs of transport and termination of ICO originated intraMTA traffic on a CMRS Provider network,[214] but also (b) the cost to deliver such traffic to the terminating CMRS carrier's switch within the MTA. Simply put there is no statute, regulation or case law to support the position that an originating LEC is only responsible for transporting its traffic up to its service area boundary.

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[210] ICOs' Response, p 60-61, Hearing Tr , Vol VIII, Watkins 44 10 – 45 14

[211] *See TSR Wireless,* 15 FCC Rcd 11166, ¶ 31

[212] *See MCI Metro Access v BellSouth Telecommunications,* 352 F 3d 872, 881 (4th Cir 2003)

[213] *See Southwestern Bell Tel Co v Publ Utils Comm'n of Tex,* 348 F 3d 482, 487 (5th Cir 2003)

[214] *See* Section III D 1, *supra*

Where the parties agree to construct or lease two-way interconnection facilities on a dedicated basis for the purpose of exchanging traffic, both parties must pay their proportionate share of the costs for use of such facilities, regardless of whether such facilities extend beyond an ICO's local exchange area boundary. The obligation to share the cost of two-way direct facilities does not end at the originating carrier's exchange or network boundary; it ceases at the end office or functional equivalent of the terminating carrier.[215] If not, the originating carrier would essentially be able to foist the costs of delivering its traffic to the terminating carrier, which would be antithetical to the "cost causer" principle adopted by the FCC. [216]

The TRA should adopt the CMRS Providers' position, because it will prevent the ICOs from shifting the dedicated transport facility costs associated with ICO-originated traffic onto the CMRS carriers in violation of section 51.703(b) of the FCC's rules.

E. Principle No. 5 – Originating Carriers are Obligated to Treat Calls to the Terminating Carrier's numbers (NPA-NXXs) in a Nondiscriminatory Manner Consistent with the Principles of Dialing Parity.

1. **Joint Issue No. 12** (excluding Cingular as to Issue 12(B)): Must an ICO provide (A) dialing parity and (B) charge its end users the same rates for calls to a CMRS NPA/NXX as calls to a landline NPA/NXX in the same rate center?

   Summary: Yes. The FCC rules expressly require dialing parity regardless of the called party's provider and other state commissions and basic principles of fairness and nondiscrimination requires ICOs to charge the same end user rates.

Dialing parity and non-discrimination are perhaps the cornerstones of the Act as it relates to consumers. As the testimony of the CMRS Providers established, without strict adherence to those principles, the ICOs force consumers to dial more digits, and often to pay toll charges, for calls to wireless numbers that should otherwise be treated as local by the ICOs.[217] The CMRS

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[215] *See* 47 C F R § 51 701(d)

[216] C*f* Sprint's Petition, at fn 22

[217] *See* Hearing Tr Vol V, 74 1-8

Providers submit that rural Tennesseans will never see the fruits of the competitive markets envisioned by the Act unless the TRA rejects the ICO position on this issue.

a. The TRA Has The Statutory Authority To Resolve Issues Related To The Obligations Of Section 251 Of The Act.

The ICOs contend the TRA does not have authority under the pending arbitration to adjudicate sub issue (B) because it is "beyond the scope of interconnection arbitration and beyond the standards for arbitration."[218] However, the dialing parity obligations of section 251(b)(3) and section 51.207 of the FCC's rules clearly relate to the ICOs' dialing parity and nondiscrimination obligations, and therefore the TRA has full authority to resolve this issue.[219] The CMRS providers are not asking the TRA to determine what an ICO may charge its subscriber for services rendered. Instead, the CMRS Providers are merely asking the TRA to ensure that whatever those charges are, they are the same for ICO originated calls to wireline and wireless numbers associated with the same rate center.[220]

b. Federal Law obligates the ICOs to Provide Dialing Parity to Land Originated Traffic Terminated by CMRS Providers

The ICOs clearly have an affirmative obligation to provide dialing parity in accordance with section 251(b)(3) and the applicable FCC rules. Although the ICOs ostensibly agree to abide by section 251(b)(3) "to the extent that the obligation is applicable," the parties apparently

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[218] *See* Watkins Testimony at 46 (" This issue should be dismissed as beyond the scope of interconnection arbitration and beyond the standards for arbitration") Section 252(b) of the Act, however, provides the TRA with authority to resolve all disputed issues raised in a petition and response filed in accordance with the statute Both of the sub issues addressed in Issue 12 were raised in the Petitions of the CMRS providers and therefore the TRA has full authority to resolve this issue

[219] *See In re Petition by ICG Telecom Group, Inc for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc pursuant to 252(b) of the Telecommunications Act of 1996*, docket No 99-00377 Final Order (Aug 4, 2000) at 8-9 Citing to *US West Communications Inc , v, Minnesota Pub* Utils Comm'n, 55 F Supp 2d 968, 985 (D Minn 1999), the TRA held it had authority to impose obligations on BellSouth for issues relating to interconnection The Minnesota Federal District broadly ruled that, " The parties are again not limited to issues explicitly enumerated in § 251, or the FCC's rules, but rather are limited to the issues which have been subject to negotiations among themselves "

[220] *See* Hearing Tr Vol V, 74 1-8

have different views about the definition of dialing parity and the scope of that obligation. However, as set forth in the testimony of the CMRS Providers, and as demonstrated below, both the law and common sense dictate that dialing parity and non-discrimination principles include the obligation to treat calls to wireless customers in the same way (in terms of both the number of digits needed to complete the call, and the local or toll nature of the call) as calls to landline numbers that are similarly rated. [221]

Section 251(b)(3) obligates all LECs, "to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and . . .to permit all such providers to have nondiscriminatory access to telephone numbers."[222] In the *Local Competition Order*, the FCC found that CMRS carriers provide telephone exchange services to their customers.[223] Under section 51.207 of the FCC's rules, a "LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call *notwithstanding the identity of the customer's or the called party's telecommunications service provider.*"[224] This rule expressly precludes dialing distinctions based on the identity of the telecommunications service provider. Further, the FCC has specifically rejected the argument that LECs do not have to provide dialing parity to CMRS providers.[225] CMRS

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[221] *See* e g , *Central Office Code (NXX) Assignment Guidelines*, 95-0407-008, Section 6.2 2 (Jan 7, 2002) Rating and routing points may have different locations The so-called "rating and routing points" are used by other carriers to determine where to deliver a particular call and whether toll charges are appropriate

[222] 47 U S C § 251(b)(3)

[223] *See Local Competition Order* at ¶ 1013 The FCC affirmed that CMRS provide "comparable service to telephone exchange service" as that term is defined under the Act *See* 47 U S C § 153 (47)

[224] 47 C F R § 51 207 (emphasis added) *See also* 47 U S C §251(b)(3)

[225] *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Area Code Relief Plan for Dallas and Houston* CC Docket Nos 96-98, 95-185, 92-237, Second Report and Order and Memorandum Opinion and Order, Release Number FCC 96-333, 1996 FCC Lexis 4311 (Released August 8, 1996) at ¶ 68 ("We reject USTA's argument that the section 251(b)(3) dialing parity requirements do not include an obligation to provide dialing parity to CMRS providers ")

providers are unaware of any support for the ICOs' position that the treatment of originating landline to wireless traffic for dialing parity purposes is not required to the full extent of federal law.

c. The Principle Of Non-Discrimination In Section 251(b)(3) Requires ICO-Originated Calls to Similarly Rated Landline and Wireless Numbers to be Treated Equally.

In addition to dialing parity, the non-discrimination provisions of section 251(b)(3) requires that calls originated by the ICOs, which terminate to locally rated NPA-NXX codes assigned to CMRS providers be treated similarly as calls originated by an ICO to locally rated landline numbers. The assessment of toll charges by the ICOs to locally rated CMRS numbers is discriminatory to the extent a call to a similarly rated landline number would be treated as local. It would simply undermine the competitive goals of the Act, the concept of local number portability, as well as the way that all telecommunications carriers determine how to charge their customers if the ICOs could charge different end user rates for calls to numbers associated with the same rate center depending on the called party's service provider.[226] Moreover, in the absence of any viable alternative for how the ICOs would treat calls to wireless numbers – of which none has been proposed – there is no doubt that carriers are required to use the rating points for determining the local nature of the call. [227]

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[226] *See Virginia Arbitration Order, see also See Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service*, Rulemaking No 95-04-043/Investigation No 95-04-044, Interim Opinion, Decision No 99-09-029, 1999 Cal PUC LEXIS 649 (September 2, 1999) at Section IV B (rejecting ILEC claims that they should be allowed to rate calls to a CLEC NPA/NXX assigned to a local rate center as toll even when the NPA/NXX was assigned to foreign exchange service) *See Case 00-C-0789 - Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Telephone Companies*, Order Establishing Requirements for the Exchange of Local Traffic (Issued December 22, 2000) at 4 (same)

[227] *See Virginia Arbitration Order* at ¶¶ 301-303

The TRA should adopt the CMRS Providers' position because it is consistent with the Act and will otherwise prevent the ICOs from shifting the dedicated transport facility costs associated with ICO-originated traffic onto the CMRS carriers in violation of section 51.703(b) of the FCC's rules.

F. Administrative/Practical Considerations

1. **Joint Issue No. 13**: Should the scope of the Interconnection Agreement be limited to traffic for which accurate billing records (11-01-01 or other industry standard) are delivered?

   Summary: No. All traffic exchanged between the Parties should be included in the scope of the Agreement.

On first blush, this issue may seem somewhat difficult to comprehend – after all, what party would not want there to be accurate billing records? However, that is really not the issue here. The real issue is that the ICOs are once again – through the ruse of alleged concern over "accurate billing records" - trying to improperly limit the traffic which is subject to reciprocal compensation, avoid their obligations to measure traffic and force BellSouth to be a party to this proceeding.[228]

In particular, the ICOs' proposed agreement attempts to exclude traffic from the scope of the agreement, which at worst may be the subject of a billing dispute, and to otherwise impose an obligation on the transiting carrier to provide billing records In this regard, paragraph 3.3.5 of ICO Exhibit 2 states:

> Intermediary Traffic that is within the scope of this Agreement is specifically *limited* to Intermediary Traffic for which the Intermediary Provider provides to both CMRS Carrier and Rural LEC accurate and complete industry standard 110101 format message, call detail, and billing records identifying the originating carrier, terminating carrier, and the minutes of use of such Traffic, or some other form of data which includes this information as may be

[228] *See* ICO Response at 84 ("[t]he concerns related to this issue [Issue 13] further demonstrates the need for BellSouth's presence and participation in these proceedings") *See also*, Section III A 2, *supra*

mutually agreed to by the Intermediary Provider and Rural LEC. (emphasis added)

As an initial matter, the TRA should reject the ICOs' attempt to (once again) make BellSouth a party to this proceeding As discussed above,[229] there already is another issue that generally addresses BellSouth's role in this interconnection agreement and the ICOs' attempt to add BellSouth as a party has already been resoundingly rejected. BellSouth, however, is not, and has never been a party to this proceeding.

With regard to the issue as framed – i.e., whether the scope of the agreement should be limited to traffic for which "accurate billing records" are provided – the CMRS Providers assert that both legal and practical considerations argue against narrowing the agreement as proposed. As a legal matter, the responsibility for measuring telecommunications traffic terminated on one carriers' network is with the terminating carrier.[230] There is no legal basis to impose such an obligation on the intermediary carrier as the ICOs have proposed.

Moreover, none of the interconnection agreements in the record in this proceeding, providing for indirect interconnection, include provisions that would limit the scope of the agreement to traffic for which accurate billing records have been obtained.[231] It is standard practice in the industry that intercarrier compensation obligations apply to all traffic exchanged and to resolve billing record issues between the parties as needed. As CMRS witness Nieman testified, if a party questions the accuracy of a billing record , as they sometimes do, such traffic *should not* be excluded from the terms and conditions of the agreement. Instead, the parties should work together to address those questions and any unresolved disputes about the accuracy of the billing records should be resolved by the dispute resolution provisions of the

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[229] Section III A 2

[230] *See Local Competition Order* at ¶ 1043, *see also* Section III A 2 , *supra*

agreement.[232] This is standard practice in an industry in which billing records involve millions of minutes of use each month, and in which questions about the accuracy of such records are not uncommon.

For the foregoing reasons, the CMRS Providers request that the TRA adopt the CMRS proposal to ensure that the scope of the agreement encompasses all traffic (regardless of how the billing records are created), and that the terms and conditions of the agreement be applied to and resolve any billing disputes. The TRA should reject the ICO proposal because it exceeds the scope of this issue, is unreasonable and unworkable, and would otherwise effectively require BellSouth to become a party to the agreement.

2. **Joint Issue No. 16**: What standard commercial terms and conditions should be included in the Interconnection Agreement?

   Summary: The TRA should adopt the standard terms and conditions contained in (CMRS) Exhibit 2 which are typical of other commercial contracts.

The CMRS Providers filed extensive written testimony, including a detailed matrix, on why certain specific standard terms and conditions contained in the CMRS Proposed Agreement were preferable to the terms and conditions contained in the ICO Proposed Agreement.[233] Significantly, the ICOs failed to offer any written testimony on this issue. Given the complete lack of evidence supporting the ICO position, the TRA must adopt the CMRS proposed standard terms and conditions.[234]

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[231] *See, e g* , Hearing Record Exhibits 7, 8, 9 & 11.

[232] *See* Hearing Tr , Vol X, 12 17-23 These provisions, which are similar in both the CMRS and ICO proposed agreements (compare CMRS Section VIII with ICO Exhibits 1 and 2, Section 8) provide that in the case of a dispute, the parties will appoint representatives to meet and negotiate in good faith to resolve the dispute If the negotiations do not resolve the dispute within 60 days, either party may pursue any remedy available by law

[233] *See e g* , Nieman Direct Testimony, Exhibit A

[234] *See also* T C A 4-5-314(d) ("Findings of fact [in an agency order] shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding The agency member's experience, technical competence and specialized knowledge may be utilized in the evaluation of evidence ")

3. **Joint Issue No. 17**: Under which circumstances should either Party be permitted to block traffic or terminate the Interconnection Agreement?

   Summary: A Party may terminate when the other Party defaults in the payment of any undisputed amount due under the terms of the Agreement, or upon providing requisite notice ninety (90) days prior to the end of the term. All other disputes should be resolved pursuant to the dispute resolution procedures proposed by the CMRS providers. Blocking of traffic should never be permitted.

The CMRS Providers' proposed provisions regarding termination are more reasonable than the ICOs' provisions and should be adopted by the TRA. As is explained in detail below, the CMRS provisions ensure that the agreement's terms and conditions remain in place and that traffic continues to flow between the parties while disputes are resolved and/or new arrangements are reached. Moreover, the drastic remedy of blocking should be employed *only* in extremely limited circumstances and then only after notice to the TRA.

The CMRS providers filed extensive testimony explaining why the CMRS proposed provisions regarding termination and default are more reasonable than the ICO proposed provisions.[235] Most importantly, the CMRS proposed termination provisions would limit termination to default for non-payment of undisputed amounts that continues for 60 days after written notice, and *only if the other party has provided the defaulting party and the appropriate federal and/or state regulatory agencies with written notice at least 25 days prior to such termination of service.*[236] By narrowly tailoring the grounds for termination and including the written notice provisions, the CMRS Providers' termination provisions would prevent one party's taking unilateral (and possibly subjective) action to terminate an agreement and would minimize the opportunity for disruption of customer service.[237]

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[235] Nieman Direct Testimony at 12 17-14 16

[236] *See, Id* at 13 5-10, CMRS Agreement Section VII D, Hearing Tr , Vol V, 51 20 -- 52 3

[237] Hearing Tr , Vol V, 13 10-17

In contrast, as ICO witness Watkins explained, the ICO provisions would allow discontinuance of termination services (blocking) for "any major default of the terms and conditions of the agreement and/or nonpayment."[238] Although this statement may appear to be non-controversial, upon deeper examination, it is seriously flawed. First, nothing in the ICO proposed language defines exactly what the ICOs consider to be a "default." The ICOs' proposed agreement defines "default" only as a material breach of any material term.[239] However, determining a "material term" and a "material breach" is left to the discretion of the ICO. Second, the ICOs' proposal would appear to allow termination for nonpayment of a disputed amount. Such a drastic remedy is never appropriate in the case of a good faith dispute. Third, under the ICOs' proposal, there are no requirements that the TRA or any other regulatory agency be notified prior to termination or blocking. Fourth, and perhaps most significantly, the ICO proposed cure period (30 days) is too short to permit application of the dispute resolution provisions.[240] Accordingly, these ICO provisions would effectively allow the ICOs to terminate an agreement unilaterally and would disrupt the service of customers

CMRS Witness Nieman summed it up when she stated:

> Given the ICOs' extreme reluctance to enter into these interconnection agreements in the first place, the TRA must ensure that the termination provisions are narrowly tailored and minimize the opportunity for abuse. Moreover, under no circumstances should the blocking of traffic be permitted as a self-help remedy. Customers should not have to pay the price of not being able to call friends, family, or business associates because of an intercarrier dispute.[241]

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[238] Hearing Tr , Vol X, 18 9-17, *see also* ICO Exhibit 2, Sections 7 5 and 7 6

[239] ICO Agreement, Exhibit 2, Section 7 5

[240] The ICO provision would provide 30 day notice to a CMRS provider when the ICO perceives a default to have occurred relating to compensation terms of the agreement, and would then permit discontinuation of service However, the dispute resolution provisions of the agreement would provide for the parties to attempt to resolve a dispute for 60 days prior to a party's pursuit of any remedy available under law *See* ICO Exhibit 2, Section 8

[241] Hearing Tr , Vol V, 13 24 to 14 8

For these reasons, the TRA should adopt the termination provisions specified in the CMRS Proposed Agreement,[242] and reject the ICO proposed provisions.[243]

4. **Joint Issue No. 18**: If the ICO changes its network, what notification should it provide and which carrier bears the cost?

   Summary: The ICO must comply with the FCC's rules regarding notification of network changes and should bear the cost of those changes. If the CMRS provider objects to a proposed change, the dispute shall be handled pursuant to the Dispute Resolution process section in the Interconnection Agreement. The ICO may proceed with the network change, but shall also maintain the existing network configuration until the dispute is resolved.

This dispute between the CMRS Provides and ICOs is one of timing and fairness. Contrary to the suggestion of Mr. Watkins, [244] the CMRS Providers have no desire to "dictate to an ICO that it must subtend a BellSouth tandem". The CMRS Providers simply seek sufficient *notice of planned changes before implementation* as contemplated by the FCC's rules regarding notification of network changes.[245] The ICOs' Response contends that "[a]lthough the rules regarding notification of network changes are not applicable to the ICOs, the ICOs have offered to provide the CMRS providers with greater notice of network changes than the FCC rules require" and cites to paragraphs 7.3 and 7.7 of the ICOs' proposed draft agreements.[246] The distinction between FCC requirements and the ICOs' proposal, however, is the specificity of the content of the notice required under FCC requirements (as opposed to no content requirement at all in the ICO proposal) and the FCC requirement of 12 months' pre-implementation notice (versus the ICO proposal of six months' notice).

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[242] CMRS Agreement, Section VII

[243] ICO Exhibit 2, Section 7

[244] Testimony of Steven E Watkins at 53

[245] 47 C F R §§ 51 325 through 51 335, Direct Testimony of Billy H Pruitt at 24-25

[246] Response of Rural Coalition at 93, Exhibits 1 & 2

In addition to adequate notice, the CMRS Providers also want to ensure their right to object to a proposed ICO change that could inappropriately impact interconnection rights. If an ICO purportedly discontinues its connection to the BellSouth network, but the ICO and BellSouth maintain a connection for the exchange of BellSouth-ICO traffic, then the CMRS Providers are entitled to maintain that indirect interconnection to exchange traffic with the ICO network.[247] To ensure that all parties operate in a manner consistent with their statutory interconnection obligations, the TRA should require complete and timely pre-implementation notices of network changes by the ICOs to the CMRS Providers; and the right of CMRS Providers to assert a good-faith objection to such notices pursuant to an established dispute resolution provision.

5. **ICO Issue No. 4:** The CMRS providers should clarify which of their affiliate entities seek new terms and conditions for the utilization of indirect "transit" arrangements.

   Summary: The CMRS providers previously agreed to, and have already provided, the name of the contracting entity(ies).

This is a non-issue. All of the CMRS Providers have already provided the names of the appropriate entities to execute contracts with the ICOs.[248] It is the terms of those contracts that are in dispute, not the identity of the parties.

6. **ICO Issue No. 7.** Many of the issues raised in these proceedings are not the subject of established FCC rules and regulations. The parties must recognize that these issues are subject to voluntary agreement, and not to involuntary arbitration

   Summary: The Act allows a party to seek arbitration of "any open issues." 47 U.S.C. § 252(b)(1). That an issue may or may not be the subject of an FCC regulation does not affect whether it may be arbitrated. The CMRS providers agree that the inclusion of a change of law provision is appropriate and have included such a provision in their draft interconnection agreement. See CMRS Exhibit 2, Section III.

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[247] 47 U S C § 251(a)(1), 47 C F R § 20 11 (LEC must provide the type of interconnection reasonably requested by a CMRS Provider unless it is not technically feasible or economically reasonable)

[248] *See e g* , Nieman Direct Testimony at 5 14-17, Tedesco Direct Testimony (as adopted by Witness Conn) at 4 16-22

The FCC has explained the nature of the arbitration process:

> " . . [T]he 1996 Act provides that, if the parties fail to reach agreement on all issues, either party may seek arbitration before a state commission. The state commission will arbitrate individual issues specified by the parties, or conceivably may be asked to arbitrate the entire agreement. In the event that a state commission must act as arbitrator, it will need to ensure that the arbitrated agreement is consistent with the Commission's rules.[249]

This does not mean that the TRA is without authority to decide issues that have not been the subject of a specific FCC regulation (e.g., what standard terms and conditions should be incorporated into the arbitration agreement or the use of traffic factors). Rather, it means that if an arbitration involves an open issue for which the FCC has not established explicit standards, the TRA is free to apply its own standards, as long as those standards are not inconsistent with the Act and other FCC regulations[250] To hold otherwise would make a mockery of the arbitration process set forth in the Act and the regulators' authority to adjudicate these proceedings.[251]

As discussed above, however, the FCC has in fact established rules and/or standards for almost every one of the issues in this arbitration, most of which are encapsulated in the principles of interconnections discussed above. In order to provide a comprehensive agreement, the TRA is

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[249] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No 96-98, First Report and Order, 11 FCC 15499, FCC 96-325, ¶ 134 (1996), see also 252(d)(4)

[250] *See In re Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc pursuant to 252(b) of the Telecommunications Act of 1996, Final Order*, TRA Docket No 99-00377, pp 8-9 (Aug 4, 2000) Citing to *US West Communications Inc , v, Minnesota Pub* Utils Comm'n, 55 F Supp 2d 968, 985 (D Minn 1999), the TRA held it had authority to impose obligations on BellSouth for issues relating to interconnection The Minnesota Federal District broadly ruled that, "The parties are again not limited to issues explicitly enumerated in § 251, or the FCC's rules, but rather are limited to the issues which have been subject to negotiations among themselves "

[251] See Virginia Arbitration Order (list of issues decided by FCC in 252 arbitration is expansive and goes well beyond the issues of reciprocal compensation and facilities)

certainly not prohibited from deciding the rest of the issues which have been subject to negotiations by the parties and which were otherwise identified in the petitions.

7. **ICO Issue No. 8:** Any agreement must accurately define the scope of traffic authorized to be delivered over an interconnection to ensure that the interconnection arrangement is not misused.

   Summary: The agreement should apply to all traffic exchanged between the parties. To the extent that different types of traffic require different treatment, that should be addressed in the interconnection agreement. See also CMRS positions on Issues 13-15 and ICO Issue 5 above

This is an ICO-added issue that should be dismissed on its face. The issue as formulated does not ask the TRA to resolve anything. As with most of the other ICO-added issues, the ICOs did not file any specific written testimony on this issue,[252] nor did the ICO witness testify on this issue during the hearing. Moreover, from a review of the sections of the ICO proposed agreement (cited in relation to this issue) it appears that to the extent that there are issues for the TRA to decide, these are already covered under the other issues.[253]

8. **ICO Issue No. 10**: The CMRS providers must provide any specific objections or concerns that they have with the terms and conditions proposed by the ICOs

   Summary: The CMRS providers have provided such objections to the ICOs. Those objections are also contained in the filed Petitions for Arbitration and in this Issues Matrix.

This is another ICO- added issue that fails to request anything from the TRA and is not supported by *any* specific ICO testimony.[254] Instead, the ICOs merely request that the CMRS Providers provide specific objections to the terms and conditions in the ICOs' proposed

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[252] The only statement of the ICO position is one sentence in their response that basically states that the agreement should set forth the specific scope of traffic ICO Response at 97

[253] For example, in Section 3 3 of the ICO's proposed agreement, the ICOs include a provision that seeks to limit the terms and conditions of the agreement concerning *indirect traffic* or what they call "Intermediary Traffic" to only traffic carried by "Intermediary Providers" identified in the agreement ICO Exhibit 2, Section 3 3 Whether the agreement should be limited to specifically identified Intermediary Providers is a point raised by the ICOs in response to Joint Issue 14 (whether the scope of the agreement should be limited to traffic transited by BellSouth) and need not be addressed again here

interconnection agreements. The CMRS have done that and in fact the CMRS Providers' objections form the basis for at least part of this arbitration. The TRA may ignore this issue.

IV. CONCLUSION

As discussed above and throughout the arbitration hearing, the basic principles of interconnection are simple and neither they, nor their pro-consumer effects, should be thwarted by the efforts of those parties who refuse to embrace the new competitive paradigm set forth by Congress and the FCC in 1996. Accordingly, the CMRS Providers respectfully submit that the law and the evidence presented in this proceeding dictate that the TRA adopt the CMRS Providers' proposals as set forth in this brief, and in their interconnection agreement attached to the petitions for arbitration, as its final order in this proceeding.

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[254] *See* Watkins Direct Testimony at 55

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