BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

In Re:

PETITION FOR ARBITRATION OF INTERCONNECTION AGREEMENT BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T TENNESSEE AND SPRINT SPECTRUM L.P., NEXTEL SOUTH CORP., AND NPCR, INC. D/B/A NEXTEL PARTNERS	)	**Docket No. 10-00042**
And		
PETITION FOR ARBITRATION OF INTERCONNECTION AGREEMENT BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T TENNESSEE AND SPRINT COMMUNICATIONS COMPANY L.P.	)	**Docket No. 10-00043**

Sprint Spectrum L.P., Nextel South Corp.,
NPCR, Inc. d/b/a Nextel Partners
and
Sprint Communications Company L.P.

Direct Testimony

Of

Mark G. Felton
Filed August 31, 2010

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DIRECT TESTIMONY

I. INTRODUCTION

Q. Please state your name and business address.

A. My name is Mark G. Felton. My business address is 6330 Sprint Parkway, Overland Park, Kansas 66251.

Q. By whom are you employed?

A. Sprint United Management Company, which is the management subsidiary of Sprint's parent entity, Sprint Nextel Corporation.

Q. **What is your position with Sprint?**

A. I am a Contracts Negotiator III.

Q. What are your principal responsibilities?

A. I am responsible for negotiating interconnection agreements ("ICAs") in support of Sprint's wireless and wireline operations pursuant to the Communications Act of 1934, as amended ("the Act").

Q. Please describe your educational and business experience.

A. I graduated from the University of North Carolina at Wilmington in 1988 with a B.S. degree in Economics. I received a Masters degree in Business Administration

from East Carolina University in 1992. I began my career as a Management Intern with Carolina Telephone (a former Sprint affiliate) in 1988 and have held positions of increasing responsibility since that time.

In June, 1999, I assumed responsibility for negotiations and implementation of Sprint Communications Company L.P.'s ("Sprint CLEC") ICAs with various telecommunications carriers, including legacy BellSouth. In fact, I was one of the primary negotiators of the current, combined wireless-wireline ICA with BellSouth Telecommunications, Inc. now d/b/a AT&T Tennessee ("AT&T") that Sprint and AT&T currently operate under (the "AT&T-Sprint ICA"). Also, I was engaged in Sprint Spectrum L.P. ("Sprint PCS") and Sprint CLEC's efforts to implement the interconnection-related provisions of the AT&T – Sprint ICA in the legacy-BellSouth 9-state region.

Although I am not an attorney, throughout the performance of my interconnection-related responsibilities from 1999 through the present, I have been required to understand and implement on a day-to-day basis Sprint's interconnection rights and obligations under the Act, the Federal Communications Commission's ("FCC") rules implementing the Act, and federal and state authorities regarding the Act and FCC rules.

Q. Before what state regulatory agencies have you testified?

A. I have previously testified before the regulatory commissions in Alabama, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, and South Carolina. I have also provided written testimony before the Michigan and Wisconsin Public Service Commissions.

II. PURPOSE AND SCOPE OF TESTIMONY

Q. On whose behalf are you testifying?

A. I am testifying in this proceeding on behalf of three Commercial Mobile Radio Service ("CMRS") entities, Sprint PCS, Nextel South Corp. and NPCR, Inc. (collectively "Nextel") and one wireline competitive local exchange carrier ("CLEC") entity, Sprint CLEC. Sprint PCS and Nextel may be collectively referred to as "Sprint wireless" or "Sprint CMRS". The Sprint wireless and Sprint CLEC entities may also be collectively referred to as "Sprint".

Q. What is the purpose of your Direct Testimony?

A. The purpose of my Direct Testimony is to provide input to the Tennessee Regulatory Authority ("Authority") concerning Sprint's positions regarding various unresolved issues associated with the establishment of a new Interconnection agreement between Sprint wireless and AT&T, and a new Interconnection agreement between Sprint CLEC and AT&T.

Q. What is the scope of your testimony?

A. The testimony of the Sprint witnesses is organized as shown in Attachment JRB-1 to the Direct Testimony of Sprint witness Mr. James R. Burt that has been contemporaneously filed with my Direct Testimony in these proceedings. I am providing testimony on behalf of Sprint regarding the Issues in Attachment JRB-1 that identify me as the Sprint witness. In general, my Direct Testimony addresses the more operational-oriented Issues contained in the following sections of the parties' Joint Decision Point List ("DPL"): Section II.-How the Parties Interconnect; Section III. - How the Parties Compensate Each Other; and Section IV. - Billing. My testimony references the parties' identifying number for each Issue.

Q. Are you sponsoring any Attachments to your Direct Testimony?

A. Yes, I am sponsoring one Attachment, MGF-1, which is a copy of the FCC's *amicus curiae* Brief in the Sixth Circuit case discussed in connection with Issue II.A, which is included immediately below.

III. ISSUES

Section II. – How the Parties Interconnect

Issue II.A – Should the ICA distinguish between Entrance Facilities and Interconnection Facilities? If so, what is the distinction?

Q. Does the FCC define the terms "Interconnection" or "Interconnected"?

A. Yes. The FCC's Part 20 and Part 51 Rules, contain the following definitions:

> 47 C.F.R. § 20.3: *Interconnection* or *Interconnected.* Direct or indirect connection through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit the transmission or reception of messages or signals to or from points in the public switched network.
>
> 47 C.F.R. § 51.5: *Interconnection* is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

Q. What is the issue between the parties?

A. The parties disagree on what constitutes an "Interconnection" Facility between a given Sprint switch and the AT&T switch to which it is Interconnected. The Interconnection Facility is how the "connection … (by wire, microwave, or other technologies)" (§ 20.3) / "linking" (§ 51.5) of the parties' two networks occurs for the mutual exchange of traffic between their respective switches. Sprint contends the Interconnection Facility is the network that spans the entire distance between the two Interconnected switches. AT&T contends that only the very small portion of network that exists somewhere between an AT&T central office building's front door and the Interconnected AT&T switch inside that building constitutes the Interconnection Facility, and everything else linking the parties' respective switches is an unbundled Entrance Facility.

Q. Why is this distinction important?

A. The distinction between Sprint's position and AT&T's position boils down to a pricing dispute. As explained in Sprint witness Randy G. Farrar's testimony at

Issue III.H(1), the pricing standard for an Interconnection Facility is Total Element Long-Run incremental Cost ("TELRIC").

Q. What did the FCC say in the Triennial Review Remand Order regarding an ILEC's obligation to provide Interconnection Facilities as TELRIC-based rates?

A. In the Triennial Review Remand Order ("TRRO")[1], the FCC stated unambiguously its finding that, although an ILEC is no longer required to offer Entrance Facilities at cost-based rates, this had no effect whatsoever on an ILEC's obligation to provide Interconnection Facilities at cost-based rates:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.[2]

Q. What federal precedent further supports Sprint's position?

A. The Federal Courts of Appeal for the Seventh Circuit, the Eight Circuit, and the Ninth Circuit have specifically addressed this issue.[3] These Courts, as well as the FCC itself in its amicus brief in the Sixth Circuit case (discussed below), recognize that the purpose for which a facility is used is important. When facilities are used

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[1] *Id.* at 39.

[2] *Id.* at ¶140.

[3] *Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069 (7th Cir. 2008); *Southwestern Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676 (8th Cir. 2008); *Pac. Bell Tel. Co. v. Cal. PUC*, 597 F.3d 958 (9th Cir. 2010).

to link the Parties' respective equipment (i.e., switches) to enable communications between the Parties' respective networks – a Section 251(c)(2) purpose - the facility is an "interconnection" facility that is subject to regulated TELRIC pricing. When "facilities" provided by AT&T are used by Sprint for purposes other than the exchange of traffic (i.e., "interconnection") such as to move traffic between Sprint's own customer (commonly referred to as "backhaul"), the facilities are considered "unbundled network elements" ("UNEs") under Section 251(c)(3) of the Act. UNEs are also subject to TELRIC pricing but the situations are limited and TELRIC pricing does not apply to Entrance Facilities post-TRRO[4].

Q. Have any Federal Courts disagreed with Sprint's position?

A. Yes, the Federal Court of Appeals for the Sixth Circuit addressed this issue in a case in which Sprint was not a party.[5]

Q. What did the Sixth Circuit conclude and, in layman's terms, how did it reach its conclusion?

A. The Sixth Circuit does not agree that the "use" of the network that connects the parties' networks makes any difference. In explaining its position, the Court analogized the link between the parties switches as a "big orange extension cord" through which AT&T would provide electricity to a requesting carrier. Electricity running through an extension cord, however, only flows in one direction to the

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[4] *TRRO* at ¶139-140.

[5] *Mich. Bell Telephone Co. v. Covad Communs.* Co., 597 F.3d 370 (6th Cir. 2010).

benefit of the Party that "uses" the electricity. In practice, the Interconnection Facility is the entire "link" between the parties' switches that creates the mutually beneficial ability of the parties to deliver traffic between their respective customers. With all due respect to the Sixth Circuit, this "link" is not created simply by virtue of AT&T providing a port receptacle on its switch, (i.e., the "electrical socket" to which the big orange extension cord may be inserted). I do not believe Congress or the FCC intend for "Interconnection" under the Act and the FCC's rules to be implemented in a way that would enable an incumbent local exchange carrier ("ILEC") to reap excessive profits in its fulfillment of its obligation to Interconnect *for the mutual exchange of traffic.*

Q. Was the Sixth Circuit decision unanimous?

A. No. Unlike the Seventh, Eighth, and Ninth Circuit decisions, which were unanimous, the Sixth Circuit determination was based on a 2-1 vote. Notably, the minority judge in the Sixth Circuit case wrote a rather incisive dissent pointing out that the Court invited the FCC to brief the issue and then ignored the FCC's authoritative declaration regarding its own rule.

Q. Did the FCC agree with the Sixth Circuit's determination?

A. Apparently not. During oral argument in the Sixth Circuit case, the court invited the FCC to file a brief as *amicus curiae* to give its view on the issue. The FCC did so and the Sixth Circuit ignored the FCC's guidance. I have attached the FCC amicus brief as Attachment MGF-1 for the Commission's convenience. I am also

certain that Sprint's attorneys will discuss this in further detail in Sprint's briefs for this case.

Q. Please summarize Sprint's position on this issue.

A. The majority of Federal Courts of Appeal addressing this issue, and the FCC, understand the difference between a transport facility that is considered a Section 251(c)(3) UNE transport entrance facility and a Section 251(c)(2) Interconnection Facility. The UNE concept and any restrictions related to that concept are not applicable to Interconnection. The entire facility that "links" Sprint's switch to AT&T's switch is an Interconnection Facility. AT&T seeks to divide this facility into subparts, presumably to limit TELRIC pricing as to the entire "linking" facility.

Q. Does AT&T use the entire link between AT&T's switch and Sprint's switch to deliver calls from AT&T's customers to Sprint's customers?

A. Yes. Both Sprint and AT&T use the entire link between AT&T's switch and Sprint's switch to connect their respective customers' calls to one another.

Q. What language does Sprint recommend the Authority adopt?

A. Sprint recommends the Authority adopt the following definition of "Interconnection Facilities" and include such term within the ICA language that describes the "Methods of Interconnection":

> "**Interconnection Facilities**" means those Facilities that are used to deliver Authorized Services traffic between a given Sprint Central Office Switch, or

such Sprint Central Office Switch's point of presence in an MTA or LATA, as applicable, and either a) a POI on the AT&T-9STATE network to which such Sprint Central Office Switch is Interconnected or, b) in the case of Sprint-originated Transit Services Traffic, the POI at which AT&T-9STATE hands off Sprint originated traffic to a Third Party that is indirectly interconnected with the Sprint Central Office Switch via AT&T-9STATE.

Methods of Interconnection. Sprint may request, and AT&T will accept and provide, Interconnection using any one or more of the following Network Interconnection Methods (NIMs): (1) purchase of ***Interconnection Facilities by one Party from the other Party, or by one Party*** from a Third Party; (2) Physical Collocation Interconnection; (3) Virtual Collocation Interconnection; (4) Fiber Meet Interconnection; (5) other methods resulting from a Sprint request made pursuant to the Bona Fide Request process set forth in the General Terms and Conditions – Part A of this Agreement; and (6) any other methods as mutually agreed to by the Parties. [FOR CMRS ONLY] In addition to the foregoing, when Interconnecting in its capacity as an FCC licensed wireless provider, Sprint may also purchase as a NIM under this Agreement Type 1, Type 2A and Type 2B Interconnection arrangements described in AT&T-9STATE's General Subscriber Services Tariff, Section A35, which shall be provided by AT&T-9STATE's at the rates, terms and conditions set forth in this Agreement.

911 Trunking

Issue II.C.(1) – Should Sprint be required to maintain 911 trunks on AT&T's network when Sprint is no longer using them?

Q. Please describe the issue.

A. Sprint proposed language that would allow it to disconnect any Enhanced 911 ("E911") trunks that are no longer necessary. AT&T apparently disagrees with this language and wants to require Sprint to maintain trunks even if such trunks are no longer being used.

Q. Once installed, how could 911 trunks become unnecessary?

A. Sprint will order 911 trunks as Sprint prepares to offer service in a given area served by a given Public Safety Answering Point ("PSAP"). The ongoing quantity of 911 trunks that Sprint may need, if at all, will be driven by various changing circumstances, such as: 1) whether Sprint continues to offer service in a given area; 2) the quantity of customers that Sprint continues to have in a given area; or 3) if a given PSAP obtains the capability of receiving and processing wireless and wireline 911 traffic on a commingled basis, as I discuss in Issue II.C.(2) below.

Q. What is Sprint's position on this issue?

A. Sprint should not be required to keep in place and pay AT&T for 911 services that are no longer being used.

Q. What is AT&T's position on this issue?

A. Apparently AT&T believes that once Sprint orders and installs 911 services Sprint should be required to maintain such 911 services whether they continue to be necessary or not.

Q. Why would AT&T insist that Sprint maintain circuits that are no longer necessary?

A. AT&T has never provided an explanation for its objection to Sprint's language. Therefore, I can only surmise that AT&T wishes to maintain the revenue stream from the unused circuits.

Q. Do you believe the parties have a legitimate dispute?

A. I am perplexed that this is an issue between the parties. In the DPL, AT&T's position seems to indicate that it agrees with Sprint that Sprint may take down E911 trunks that are no longer being used.

Q. If that is true, then why won't AT&T agree with Sprint's proposed language that explicitly states that Sprint may eliminate unused E911 trunks?

A. AT&T has not provided the details as to its objection to Sprint's proposed language.

Q. Is public safety important to Sprint?

A. Clearly, yes. Sprint customers have and will have the ability to complete calls to emergency services.

Q. Does Sprint intend to disconnect E911 circuits needed for end users to reach emergency services?

A. Absolutely not. This ridiculous insinuation by AT&T is without any basis. Sprint's proposed language clearly states that it reserves the right to disconnect those circuits ***if*** they are no longer utilized to route E911 traffic. Sprint is equally as concerned about consumer safety as AT&T and would never disconnect E911 circuits that would be needed to allow a customer to reach emergency services.

Q. What ICA language does Sprint recommend the Authority adopt?

A. Sprint requests that the Authority adopt its proposed language on this issue as follows:

> The Parties acknowledge and agree that AT&T-9STATE can only provide E911 Service in a territory where AT&T-9STATE is the E911 network provider, and that only said service configuration will be provided once it is purchased by the E911 Customer and/or PSAP. Access to AT&T-9STATE's E911 Selective Routers and E911 Database Management System will be by mutual agreement between the Parties. Sprint reserves the right to disconnect E911 Trunks from AT&T-9STATE's selective routers, and AT&T-9STATE agrees to cease billing, if E911 Trunks are no longer utilized to route E911 traffic.

Issue II.C.(2) – Should the ICA include Sprint's proposed language permitting Sprint to send wireline and wireless 911 traffic over the same 911 Trunk Group when a PSAP is capable of receiving commingled traffic?

Q. Please describe this issue.

A. Sprint simply wants the ability to combine E911 traffic from its wireline and wireless operations on the same E911 trunks when a PSAP is capable of receiving and properly handling such commingled traffic.

Q. Please summarize Sprint's position on this issue.

A. PSAPs are pursuing solutions to reduce costs. Combined wireless/wireline 911 trunking is efficient and economical. When an AT&T-served PSAP is capable of receiving combined 911 traffic, nothing should prevent both the PSAP and Sprint from using combined trunks to reduce 911-related network costs.

Q. Please summarize AT&T's position on this issue.

A. AT&T attempts to couch its objection to Sprint's language as a public safety concern, suggesting that comingled wireless and wireline 911 traffic may be subject to mis-routing because PSAP coverage areas for wireless calls do not align with the areas of wireline calls.

Q. Are AT&T's concerns well-founded?

A. No. AT&T's purported public safety concern ignores the simple fact that Sprint's language makes it clear that the comingling of wireline and wireless E911 traffic would only occur where "the appropriate [PSAP] is capable of accommodating this commingled traffic". Sprint's language pre-supposes the parties will perform testing to confirm the ability to properly route such commingled calls.

Q. Assuming the involved parties do the necessary preliminary testing to ensure public safety before implementing the delivery of commingled 911 wireline and wireless traffic on a permanent basis, why should AT&T insist that Sprint not be able to commingle 911 traffic even if a PSAP is capable of accommodating such traffic?

A. Again, AT&T has not provided an explanation for its objection to Sprint's language. Therefore, I can only surmise that AT&T may wish to pursue commingling itself with the PSAPs, resulting in fewer trunks being necessary (and lower costs) between the AT&T router and the PSAP, while at the same time

protecting its 911 revenue stream by requiring requesting carriers such as Sprint to continue to maintain numerous, segregated wireline and wireless 911 facilities.

Q. What language does Sprint propose that the Authority adopt for the ICA?

A. Sprint requests that the Authority order the parties to incorporate the following language into the ICA, which includes the concept of conditional use of commingled wireless/wireline traffic when a PSAP is capable of handling commingled traffic:

> This Attachment sets forth terms and conditions by which AT&T-9STATE will provide Sprint with access to AT&T-9STATE's 911 and E911 Databases and provide Interconnection and Call Routing for the purpose of 911 call completion to a Public Safety Answering Point (PSAP) as required by Section 251 of the Act. Sprint is permitted to commingle wireless and wireline 911 traffic on the same trunks (DSOs) when the appropriate Public Safety Answering Point is capable of accommodating this commingled traffic.

Issue II.C.(3) – Should the ICA include AT&T's proposed language providing that the trunking requirements in the 911 Attachment apply only to 911 traffic originating from the Parties' End Users?

Q. Please describe this issue.

A. My understanding is that this issue was identified because Sprint objected to the insertion of the words "solely" and "Sprint" into AT&T's original language from its template ICA. In that regard, this sub-issue may be virtually the same as Issue II.C.(2) regarding the comingling of E911 traffic on the same trunk. I would also note that, as of the preparation of the parties' Joint Decision Point List ("DPL") there is no mention of the term "end user" in AT&T's proposed language.

Q. You say this dispute is over the two words "solely" and "Sprint". Can you further describe what you mean?

A. Sure. AT&T proposed language from its template agreement as follows:

> 1.2 This Attachment sets forth terms and conditions by which AT&T-9STATE will provide Sprint with access to AT&T-9STATE's 911 and E911 Databases and provide Interconnection and Call Routing for the purpose of 911 call completion to a Public Safety Answering Point (PSAP) as required by Section 251 of the Act.

Sprint did not object to this language, however, during the course of discussions between the parties, Sprint conveyed to AT&T its desire to combine traffic from multiple carriers on a single 911 trunk to achieve further financial and operational efficiencies. Sprint also clarified that it would only do so when the PSAP was capable of accommodating such commingled 911 traffic. AT&T objected to Sprint's proposal and inserted the words "solely" and "Sprint" into the above language to prevent Sprint from realizing the benefit of commingling 911 traffic. The language is as follows (I have shown the AT&T proposed additions in **bold underline** for clarity):

> 1.2 This Attachment sets forth terms and conditions by which AT&T-9STATE will provide Sprint with access to AT&T-9STATE's 911 and E911 Databases and provide Interconnection and Call Routing **solely** for the purpose of **Sprint** 911 call completion to a Public Safety Answering Point (PSAP) as required by Section 251 of the Act.

Q. Please summarize Sprint's position on this issue.

A. Because this issue is so similar to Issue II.C.(2), Sprint takes the same position as in that issue – namely, that Sprint should be able to combine, or comingle, 911 traffic from any end-user to send over the E911 trunk to the PSAP so long as the PSAP is equipped to properly handle such traffic. Further, AT&T's assumption (as described in the DPL) that Sprint intends to put non-911 traffic on 911 trunks is patently false. Sprint has no such intention and is unsure where AT&T got that idea.

Q. Please summarize AT&T's position on this issue.

A. In the DPL, AT&T states that the 911 trunks should be used only for 911 traffic originated by the parties' end users. Non-emergency traffic interference could congest trunks and make them "unavailable" in an emergency situation. In addition, combining multiple carriers' end users' 911 calls on the same trunk group would prevent identification of the originating carrier in the event of a need to isolate a call back to that carrier. Any failures in the CLEC/CMRS 911 network resulting from the combination of multiple carriers' 911 traffic could have catastrophic consequences.

Q. Based on AT&T's stated position, do you believe that the parties have an issue?

A. Yes and no. If AT&T believes that Sprint intends to put traffic other than E911 traffic destined for a PSAP on the E911 trunk, then there has been a misunderstanding. Sprint has no intention of using the E911 trunks for anything

other than E911 traffic. However, since I believe AT&T's proposed addition of the words "solely" and "Sprint" as I describe above is intended to limit Sprint's ability to utilize its 911 trunks for the transmission of third-party (including Sprint's own affiliates) emergency traffic, the parties do in fact have an issue that needs to be resolved by the Authority.

Q. What is Sprint's proposed language?

A. Sprint's proposed language for Issue II.C.(2) above will resolve this issue as well.

Points of Interconnection

Issue II.D.(1) – Should Sprint be obligated to establish additional Points of Interconnection (POI) when its traffic to an AT&T tandem serving area exceeds 24 DS1s for three consecutive months?

Q. What is the issue between the parties?

A. AT&T's proposed language would impose an artificial threshold of 24 DS1s, at which point Sprint would be required to establish an additional POI within an AT&T tandem serving area.

Q. Please summarize Sprint's position on this issue.

A. Federal law does not require Sprint to install additional POIs based on predetermined traffic thresholds. It is for Sprint to determine when it is most economical to increase the number, or change the locations, of existing POIs.

Q. Please summarize AT&T's position on this issue.

A. AT&T has stated in the DPL that it believes it is "appropriate" for the ICA to obligate Sprint to establish a POI at an additional tandem in a Local Access and Transport Area ("LATA") when Sprint's traffic through the initial POI to that tandem serving area exceeds 24 DS1s at peak for a period of three consecutive months.

Q. What is the FCC rule that governs this issue?

A. Title 47, Section 51.305 of the Code of Federal Regulations describes the Interconnection obligations of incumbent LECs such as AT&T.

Q. Does the FCC permit incumbent LECs to impose a threshold at which it can require requesting carriers such as Sprint to establish additional POIs?

A. No.

Q. Why is Sprint opposed to the creation of a contractual obligation that would require the establishment of separate POIs to additional AT&T tandems when the volume of traffic destined for an additional tandem exceeds 24 DS1s for a period of three consecutive months?

A. The FCC has recognized that a requesting carrier may interconnect with an ILEC in a given LATA via a single POI if the requesting carrier so chooses ("Single POI per LATA")[6]. This is an important right because it gives the requesting carrier control over where and when it chooses to interconnect with an ILEC. While a requesting carrier may indeed choose to establish additional POIs based on its determination of what may be economically advantageous, it cannot be forced to incur additional costs by its competitor that is already getting paid a TELRIC-based rate which includes profit for: a) the existing Interconnection; and b) the applicable per-minute of use ("MOU") for usage that is exchanged via such Interconnection. AT&T's language is an attempt to impose a contractual obligation on Sprint that is not recognized under the FCC's rules, and would result in additional Interconnection costs by requiring the establishment of additional Interconnection Facilities that Sprint is not otherwise required to establish. Contrary to AT&T's view, Sprint does not consider this "appropriate."

Q. What language does Sprint request the Authority order for this issue?

[6] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 01-132, 16 FCC Rcd 9610, 9634-9635, 9650-9651 (April 19, 2001).

A. Sprint proposes the following language:

> Point(s) of Interconnection. The Parties will establish reciprocal connectivity to at least one AT&T-9STATE Tandems within each LATA that Sprint provides service. Notwithstanding the foregoing, Sprint may elect to Interconnect at any additional Technically Feasible Point(s) of Interconnection on the AT&T network.

Issue II.D.(2) – Should the CLEC ICA include AT&T's proposed additional language governing POIs?

Q. Please describe the issue.

A. AT&T has proposed significant additional language regarding the establishment of POIs to be included in the CLEC ICA.

Q. Why does Sprint disagree with AT&T's proposed language?

A. First, this is the perfect example of how AT&T seeks to impose different provisions based simply on whether a requesting carrier is a wireless or wireline provider. AT&T has not even attempted to offer any technology-neutral reason why there is a need for the multi-paragraph POI language in the CLEC ICA as opposed to the parties' single POI paragraph in the CMRS ICA.

Q. What other concerns does Sprint have with AT&T's proposed POI language for the CLEC ICA?

A. During negotiations, AT&T's CLEC POI language included the requirement that "mutual agreement" be reached for the establishment of a POI. As I understand it, though, AT&T has withdrawn its proposal to require mutual agreement of a POI

designation. As such, the parties no longer disagree as to that aspect of AT&T's proposed POI language.

Q. Having resolved the "mutual agreement" aspect to this issue as described above, does Sprint have any additional concerns with AT&T's proposed language?

A. Yes. AT&T's proposed language imposes financial responsibility on Sprint for the facilities and trunks associated with mass calling or third-party trunk groups, even if installed for AT&T's benefit or use.

Q. What do you mean "even if installed for AT&T's benefit or use"?

A. As I discuss further in my testimony regarding Issue II.H.(1), Sprint does not have customers that "cause" mass-calling (e.g., radio stations, call-in contests) and, if it did, it would be willing to address trunking for such customers when and if such customers exist. As to AT&T's inclusion of "Third Party Trunk Groups", Sprint believes AT&T seeks to include this language in an attempt to shift AT&T's financial responsibility for the portion of shared Interconnection Facility costs used by AT&T to deliver its wholesale Interconnection transit customers' originating traffic to the Sprint network. As explained in the testimony of Sprint witness Farrar at Issue III.E.(2), it is AT&T's transit customers that cause AT&T's use of such facilities and that portion of the Interconnection Facility costs are, therefore, attributable to AT&T.

Q. What resolution does Sprint propose for this issue?

A. Sprint believes that its language proposed in Issue II.D.(1) above is the appropriate language under the Act and the FCC's rules to govern the establishment of POIs between the parties and requests the Authority to reject the balance of AT&T's language.

Facility/Trunking Provisions

Issue II.F.(1) – Should Sprint CLEC be required to establish one-way trunks except where the parties agree to establish two-way trunking?

Q. Please describe the unresolved issue between the parties.

A. AT&T has proposed language specific to the CLEC ICA that would require mutual agreement among the parties before 2-way interconnection could be utilized.

Q. What is Sprint's disagreement with AT&T's proposed language?

A. Pursuant to 47 C.F.R. § 51.305(f), AT&T is required to provide 2-way trunking upon Sprint's request if it is technically feasible. AT&T agrees to the use of 2-way facilities/trunking in the CMRS ICA except: a) where it is not technically feasible to provide 2-way facilities/trunking; or b) where Sprint requests the use of 1-way facilities/trunking.[7] AT&T's proposed CLEC language is in violation of 51.305(b),

[7] Attachment 3, Section 2.5.1 of the parties' redlined agreement.

as well as discriminatory, given AT&T's agreement to 2-way facilities in the CMRS ICA.

Q. Has AT&T claimed that it is not technically feasible for it to provide two-way trunking to Sprint?

A. No.

Q. Has the Authority decided this issue before?

A. Yes, the Authority previously determined that BellSouth was obligated by 47 C.F.R. Section 51.305(f) to offer and use two-way trunking unless it can demonstrate to the Authority that it is not technically feasible due to operational or technical concerns.[8]

Q. How does Sprint propose to resolve this issue?

A. Sprint urges the Authority to affirm its prior ruling and adopt Sprint proposed language as follows:

> CLEC Only
>
> 2.5 Interconnection Facilities.
>
> 2.5.1 Directionality and Conformance Standards. Interconnection Facilities/Trunking will be established as two-way Facilities/Trunking except a) where it is not Technically Feasible for AT&T-9STATE to provide the requested Facilities as two-way Facilities /Trunking, or b) where Sprint requests the use of one-way Facilities/Trunking.

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[8] *See* Interim Order of Arbitration Award (MCImetro-BellSouth Arbitration), April 3, 2002.

CLEC & CMRS

2.5.2 Trunk Groups. The Parties will establish trunk groups from the Interconnection Facilities such that each Party provides a reciprocal of each trunk group established by the other Party. Notwithstanding the foregoing, each Party may construct its network to achieve optimum cost effectiveness and network efficiency. Unless otherwise agreed, AT&T-9STATE will provide or bear the cost of all trunk groups for the delivery of Authorized Services traffic from the POI at which the Parties Interconnect to the Sprint Central Office Switch, and Sprint will provide the delivery of Authorized Services traffic from the Sprint Central Office Switch to each POI at which the Parties Interconnect.

Issue II.F.(2) – What Facilities/Trunking provisions should be included in the CLEC ICA, e.g., Access Tandem Trunking, Local Tandem Trunking, Third Party Trunking?

Q. Please describe the disputed issue.

A. The issue with AT&T's proposed Facilities/Trunking provisions is two-fold. First, AT&T, again, inexplicably proposes very different language for the CMRS ICA than for the CLEC ICA. Second, and more importantly, AT&T has buried within its proposed language its position on the POI selection issue (Issue II.D.(1)), the two-way trunking issue (Issue II.F.(1)) with which Sprint has already indicated its disagreement, and its concept of Third Party Trunk Groups.

Q. Have the parties agreed on appropriate language in the CMRS ICA?

A. Yes.

Q. Why has AT&T proposed radically different language for the CLEC ICA?

A. I don't know.

Q. Is there a technological reason why the language must be different between the CLEC and CMRS ICAs?

A. No, not to my knowledge.

Q. What is the issue with AT&T's concept of Third Party Trunk Groups?

A. AT&T's proposal regarding Third Party Trunk Groups is to have Sprint order and pay the entire cost for a two-way Interconnection Facility used solely for the exchange of Transit traffic and other traffic to or from a third party. The problem with that arrangement is that AT&T is essentially double-dipping as described in the testimony of Sprint witness Farrar at Issue III.E.(2). As Sprint witness Farrar persuasively argues, Sprint should in no way be responsible for the cost of the facility AT&T uses to deliver a third-party's originated traffic to Sprint.

Q. Is there any way AT&T's proposed language could be made acceptable to Sprint?

A. While Sprint does not believe the voluminous provisions proposed by AT&T are necessary (as evidenced by the fact that they are not included in the CMRS ICA), in the interest of resolution Sprint would be willing to accept AT&T's proposal if it is cleaned up to conform with the FCC's rules with respect to Sprint's unfettered right to select two-way trunking where technically feasible (as opposed to mutual agreement), and to select the location of the POI as well as clarification that the cost of Third Party Trunk Groups, if used, will be shared by the parties as addressed

above. Absent these modifications to AT&T's language, Sprint's language is sufficient for the parties to interconnect their networks.

Q. What language does Sprint suggest?

A. Sprint proposes the following language:

> 2.5.1 Directionality and Conformance Standards. Interconnection Facilities/Trunking will be established as two-way Facilities/Trunking except a) where it is not Technically Feasible for AT&T-9STATE to provide the requested Facilities as two-way Facilities /Trunking, or b) where Sprint requests the use of one-way Facilities/Trunking.

> 2.5.2 Trunk Groups. The Parties will establish trunk groups from the Interconnection Facilities such that each Party provides a reciprocal of each trunk group established by the other Party. Notwithstanding the foregoing, each Party may construct its network to achieve optimum cost effectiveness and network efficiency. Unless otherwise agreed, AT&T-9STATE will provide or bear the cost of all trunk groups for the delivery of Authorized Services traffic from the POI at which the Parties Interconnect to the Sprint Central Office Switch, and Sprint will provide the delivery of Authorized Services traffic from the Sprint Central Office Switch to each POI at which the Parties Interconnect.

Issue II.F.(3) – Should the parties use the Trunk Group Service Request to request changes in trunking?

Q. Please summarize the status of this issue.

A. Sprint is pleased to report that this issue has been resolved. Sprint has agreed to accept AT&T's TGSR language as follows:

> 2.8.6.3 Both Parties will use the Trunk Group Service Request (TGSR) to request changes in trunking. Both Parties reserve the right to issue ASRs, if so required, in the normal course of business.

Issue II.F.(4) – Should the CLEC ICA contain terms for AT&T's Toll Free Database in the event Sprint uses it and what are those terms?

Q. Please describe the issue.

A. AT&T has proposed a substantial amount of language related to the provision of its Toll Free Database service. Sprint has proposed to delete the language.

Q. What is Sprint's issue with AT&T's proposed language?

A. Although Sprint has no conceptual problem with AT&T's proposed language, there are two issues which prevent Sprint from agreeing to the specific language. First is AT&T's use of the term "Third Party Trunk Groups", on which Sprint and AT&T do not agree as I discuss further in my Testimony in Issue II.F.(2). Second is AT&T's use of the term "251(b)(5) Traffic", which is addressed by Sprint witness Burt in Issue I.B.(2)(a). Finally, while Sprint does not have a conceptual issue with the operational aspects of the exchange of 8YY traffic and the use of AT&T's Toll Free Database, Sprint does have significant concerns with AT&T's belief that it may be entitled to charge Sprint for the Toll Free Database Queries. That issue is addressed by Sprint witness Burt in Issue III.A.4.(2).

Q. How does Sprint propose to resolve this issue?

A. Sprint requests that the Authority reject AT&T's proposed language. If the Authority determines that Toll Free Database language is necessary, Sprint urges to

the Authority to first resolve the issues with respect to the terms "Third Party Trunk Groups" and "251(b)(5) Traffic" as I describe above.

Direct End Office Trunking

Issue II.G. – Which Party's proposed language governing Direct End Office Trunking ("DEOT"), should be included in the ICAs?

Q. Please describe the issue related to the DEOT language.

A. Sprint disagrees with AT&T's proposed DEOT language in that it imposes an artificial threshold at which Sprint would be required to establish DEOT trunking. This is simply a variation on the earlier discussed POI Issues.

Q. Please summarize Sprint's position on this issue.

A. Sprint's DEOT language does two important things: 1) maintains Sprint's right to control Interconnection costs through its POI selections; and 2) provides a fair mechanism to address any AT&T tandem-exhaust concerns through the establishment of DEOTs that benefit AT&T at AT&T's cost.

Q. What concerns does Sprint have with AT&T's CMRS DEOT language?

A. Sprint's concern with AT&T's CMRS DEOT language is that it establishes an artificial volume threshold equal to 24 trunks (DS1) at which Sprint is obligated to

order a DEOT. This threshold is arbitrary and finds no support within the Act or the FCC's rules.

Q. What concerns does Sprint have with AT&T's CLEC DEOT language?

A. Sprint has two concerns with AT&T's CLEC DEOT language. First, like the AT&T-proposed CMRS language, it establishes an artificial a volume threshold equal to 24 trunks (DS1) at which Sprint is obligated to order a DEOT. Second is the concern about the election to utilize two-way interconnection trunks, which I address in Issue II.F.(1). AT&T's language explicitly states that mutual agreement is required before the parties may utilize two-way trunks. As I clearly demonstrate in my testimony supporting Sprint's position on Issue II.F.(1) above, mutual agreement is not a prerequisite to Sprint electing to use two-way trunks.

Q. Does Sprint's language address AT&T's concern over tandem exhaust as articulated in the DPL? If so, how?

A. Yes. Sprint's language provides a means for Sprint to order a DEOT at AT&T's request to address a tandem exhaust situation. In such a scenario, the DEOT will be installed and maintained at AT&T's sole expense. Sprint would continue to share the cost of the Interconnection Facility from the Sprint location to the access tandem that serves the end office.

Q. Why should AT&T have to bear the entire cost of a DEOT installed to relieve a tandem exhaust situation?

A. AT&T should bear the cost because AT&T is the beneficiary of the DEOT in this situation. It is AT&T's tandem office that would otherwise be exhausted, causing AT&T to have to install additional switch ports, processing capacity, or both. Additionally, Sprint may not have been the carrier causing the exhaust situation in the first place. It would be unfair to penalize Sprint just because it may be the "last one to the party".

Q. What is Sprint's proposed language to resolve this issue?

A. Sprint's proposed language is as follows:

> 2.5.3 (f) DEOT Interconnection Facilities. Subject to Sprint's sole discretion, Sprint may (1) order DEOT Interconnection Facilities as it deems necessary, and (2) to the extent mutually agreed by the Parties on a case by case basis, order DEOT Interconnection Facilities to accommodate reasonable requests by AT&T-9STATE. A DEOT Interconnection Facility creates a Dedicated Transport communication path between a Sprint Switch Location and an AT&T-9STATE End Office switch. If a DEOT is requested by Sprint, the POI for the DEOT Interconnection Facility is at the AT&T-9STATE End Office, with the costs of the entire Facility shared in the same manner as any other Interconnection Facility. If a DEOT is being established to accommodate a request by AT&T-9STATE, absent the affirmative consent of Sprint to a different treatment, the Parties will only share the portion of the costs of such Facilities as if the POI were established at the AT&T-9STATE Access Tandem that serves the AT&T End Office to which the DEOT is installed, and AT&T-9STATE will be responsible for all further costs associated with the Facilities between the Access Tandem POI and the AT&T End Office.

Ongoing network management

Issue II.H.(1) – What is the appropriate language to describe the parties' obligations regarding high volume mass calling trunk groups?

Q. Please describe the issue regarding high volume mass calling trunk groups.

A. As I understand this issue, AT&T has proposed language that would require Sprint to install and maintain (at Sprint's sole expense) dedicated trunks for the exchange of calls generated to mass calling events (e.g., a radio contest).

Q. Please summarize Sprint's position on this issue.

A. Sprint's language is appropriate. Sprint is willing to address mass call trunks when it acquires a customer that "causes" mass calls to be initiated; but, it is typically AT&T's customer that creates an issue. Sprint should not be mandated to install and pay for typically idle facility/trunk capacity to address issues caused by AT&T's contest-type customers.

Q. Why should AT&T bear the cost of high volume mass calling trunk groups?

A. To the extent AT&T's customer is the cost-causer – the one causing the excessive call volume to be initiated – it is only fair that AT&T bear the cost of any facility/trunks necessary to support the added call volume. But for the mass calling event created by the AT&T customer, there would be no concern for severe network congestion and potential outages. Sprint applauds AT&T's initiative to deal with these types of events ahead of time, but it should not be Sprint that bears the financial burden required to ameliorate the concern.

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language:

> 3.3.1 High Volume Call In / Mass Calling Trunk Group. Separate high-volume calling (HVCI) trunk groups will be required for high-volume customer calls (e.g., radio contest lines). If the need for HVCI trunk groups are identified by either Party, that Party may initiate a meeting at which the Parties will negotiate where HVCI Trunk Groups may need to be provisioned to ensure network protection from HVCI traffic.

Issue II.H.(2) – What is appropriate language to describe the signaling parameters?

Q. Have the parties reached agreement with respect to AT&T's proposed language in Section 2.3.2.b of the Sprint wireless ICA?

A. Yes and no. Sprint has agreed to the language in Section 2.3.2.b AT&T reflected in the DPL as follows:

> 2.3.2.b Such interconnecting facilities shall conform, at a minimum, to the telecommunications industry standard of DS-1 pursuant to Telcordia Standard No. TR-NWT-00499. Signal transfer point, Signaling System 7 ("SS7") connectivity is required at each interconnection point after Sprint PCS implements SS7 capability within its own network. AT&T-9STATE will provide out-of-band signaling using Common Channel Signaling Access Capability where technically and economically feasible, AT&T-9STATE and Sprint PCS facilities' shall provide the necessary on-hook, off-hook answer and disconnect supervision and shall hand off calling party number ID when Technically Feasible.

However, AT&T did not accurately reflect Section 2.3.2.b in the DPL. The 2.3.2.b language AT&T populated in the DPL is identical to a portion of Section 2.5.1 in the redlined ICAs exchanged between the parties, to which the parties have agreed. That agreed-to language is as follows:

> 2.5.1 Directionality and Conformance Standards. Interconnection Facilities/Trunking will be established as two-way Facilities/Trunking except a)

where it is not Technically Feasible/Trunking for AT&T 9-STATE to provide the requested Facilities as two-way Facilities/Trunking, or b) where Sprint requests the use of one-way Facilities/Trunking. Interconnection Facilities shall conform, at a minimum, to the telecommunications industry standard of DS-1 pursuant to Telcordia Standard No. TR-NWT-00499. Signal transfer point, Signaling System 7 SS7) connectivity is required at each Interconnection Point. AT&T 9-STATE will provide out-of-band signaling using Common Channel Signaling Access Capability where Technically Feasible and economically practicable, each Party shall provide the necessary on-hook, off-hook Answer and Disconnect Supervision and shall hand off calling party number ID when Technically Feasible.

The Section 2.3.2.b language AT&T included in the parties' redlines, however, also contains three additional sentences to which Sprint is adamantly opposed. That language is provided below.

2.3.2.b Such interconnecting facilities shall conform, at a minimum, to the telecommunications industry standard of DS-1 pursuant to Bellcore Standard No. TR-NWT-00499. Signal transfer point, Signaling System 7 ("SS7") connectivity is required at each interconnection point after Sprint PCS implements SS7 capability within its own network. AT&T 9-STATE will provide out-of-band signaling using Common Channel Signaling Access Capability where technically and economically feasible, AT&T 9-STATE and Sprint PCS facilities' shall provide the necessary on-hook, off-hook answer and disconnect supervision and shall hand off calling party number ID when Technically Feasible. **In the event a party interconnects via the purchase of facilities and/or services from the other party, the appropriate intrastate tariff, as amended from time to time will apply. The cost of the interconnection facilities between AT&T 9-STATE and Sprint PCS switches within AT&T 9-STATE's service area shall be shared on a proportionate basis. Upon mutual agreement by the parties to implement one-way trunking on a state-wide basis, each Party will be responsible for the cost of the one-way interconnection facilities associated with its originating traffic.**

The additional language AT&T includes in the redlines exchanged between the parties but not in the DPL (indicated above in **BOLD UNDERLINE**) deals with the price for Interconnection Facilities (addressed by Sprint witness Farrar in Issue III.H.(1)), the facility cost sharing issue (addressed by Sprint witness

Farrar in Issue III.E.(2)), and the one-way vs. two-way interconnection trunking issue (addressed by me in Issue II.F.(1)). Arguably, the three sentences AT&T omits from the DPL have nothing at all to do with signaling parameters and are just a subtle attempt by AT&T to "back-door" the offensive language into the ICA.

Q. What does Sprint propose with respect to AT&T's Section 2.3.2.b?

A. Sprint requests the Authority reject AT&T's proposed language. The first half of the language has already been agreed to by the parties in Section 2.5.1 and, as I argue above, the last half of the language has nothing to do with signaling parameters.

Q. What is the status of the signaling parameters language with respect to the CLEC ICA?

A. The CLEC signaling parameters language is still in dispute.

Q. What changes could AT&T make to their proposed language to make it acceptable to Sprint?

A. While Sprint does not feel all of AT&T's language is necessary (as evidenced by the fact that AT&T did not propose similar language for the wireless ICA), Sprint is willing to accept AT&T's CLEC language as it is consistent with what is in the parties' current ICA.

Issue II.H.(3) – Should language for various aspects of trunk servicing be included in the agreement e.g., forecasting, overutilization, underutilization, projects?

Q. What is the disagreement with respect to this issue?

A. Conceptually, Sprint does not disagree with AT&T on the need to have trunk servicing language incorporated in the ICA. In fact, it is possible that, given more time and good-faith negotiations, the parties may be able to resolve this issue. However, in my review of AT&T's proposed language there are a few problems that became readily apparent.

Q. What is Sprint's overarching perspective with respect to network management?

A. Sprint believes that both parties desire to engineer an efficient network and neither party finds blocked calls or underutilized circuits to be an acceptable situation. Assuming the parties have the same objective, Sprint does not believe that voluminous, very specific provisions are necessary to ensure that objective is achieved. In my experience, engineers from each party typically work together to resolve any network issues that arise without even having to refer to an ICA to determine how to handle a given situation.

Q. Does Sprint have any specific problems with AT&T's proposed CLEC language?

A. Yes. In the language dealing with overutilization (trunk blocking scenario), AT&T's proposed language allows three business days for the parties to address the issue but does not include a provision to address what happens if one of the parties does not agree with the cause of the blocking and wants to have further discussion with the other party to resolve the issue. Also, AT&T's language is patently one-sided. In fact, one AT&T-proposed passage gives AT&T the unilateral right to issue an Access Service Request ("ASR") to resize Interconnection Trunks without Sprint's mutual agreement. Sprint is granted no such right in AT&T's proposed language. Sprint does not believe that AT&T should ever be entitled to perform a unilateral trunk augmentation without Sprint's mutual consent.

Q. Does Sprint have issues with AT&T's proposed CMRS language?

A. Yes.

Q. As a preliminary matter, does the DPL reflect all of AT&T's proposed language that is at issue?

A. No, not as far as I can tell. In the DPL, AT&T has omitted two and a half pages of language dealing with Trunk Provisioning, Trunk Servicing, and Utilization that AT&T has proposed in redlines to Sprint. Therefore, the volume of language is clearly larger than AT&T even presents before the Authority.

Q. With that in mind, what issues does Sprint have with AT&T's CMRS language?

A. AT&T's CMRS language does not appear to be consistent with its CLEC language in that it omits any provisions addressing an overutilization (blocking) scenario. AT&T's proposed CMRS language ***is*** unfortunately consistent with its proposed CLEC language in that it grants AT&T the unilateral right to augment trunks without Sprint's concurrence. Sprint is clearly opposed to that disparity.

Q. Does Sprint's proposed language address how the parties will undertake network management?

A. Yes, although Sprint's proposed language is much broader.

Q. Do you believe Sprint's broader language is appropriate?

A. I certainly believe it is workable. In fact, Sprint's broader approach is more akin to what exists in the parties' current ICA. This is another area where the parties have operated for 10 years without any substantial issues. In fact, as I stated previously, this is an area that negotiators and "regulatory types" typically leave to the engineers. This approach has certainly worked well in the past.

Q. What does Sprint propose to resolve this issue?

A. Sprint proposes that the Authority reject AT&T's proposed language on the basis that language already agreed to by the parties accomplishes exactly the same thing as AT&T's additional, voluminous language. In the alternative, if the Authority is inclined to prefer a more detailed approach, Sprint requests that the Authority order AT&T to remove the objectionable portions of its language as I identify above.

Section III. – How the Parties Compensate Each Other

Traffic Subject to Reciprocal Compensation

Issue III.A.1(1) – Is IntraMTA traffic that originates on AT&T's network and that AT&T hands off to an IXC for delivery to Sprint subject to reciprocal compensation?

Q. Please describe this issue.

A. This issue is simply whether AT&T is obligated to compensate Sprint for intra-Major Trading Area ("MTA") traffic even if AT&T delivers the traffic to an interexchange carrier ("IXC") that, in turn, delivers it to Sprint for termination.

Q. Please summarize Sprint's position on this issue.

A. The majority of federal courts and state regulatory agencies have found that, pursuant to 47 C.F.R. § 51.701(b)(2), an ILEC must pay the CMRS carrier reciprocal compensation for all ILEC-originated IntraMTA traffic, including the ILEC customer's 1+ dialed calls that are handed to an IXC for delivery to the terminating CMRS carrier.[9]

[9] *See e.g., Alma Communs. Co. v. Mo. PSC*, 490 F.3d 619, 625-26 (8th Cir. Mo. 2007); *T-Mobile USA, Inc. v. Armstrong*, 2009 U.S. Dist. LEXIS 44525, **22-23 (E.D. Ky. May 20, 2009); *Atlas Tel. Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1266-67 (10th Cir. Okla. 2005).

Q. Does AT&T agree?

A. No. AT&T apparently believes that when an end user customer dials a 1+ IntraMTA call to a Sprint customer, the call no longer "belongs" to AT&T from a retail perspective and therefore, should also not belong to AT&T from a carrier-to-carrier perspective. Instead, AT&T makes the same argument that has been raised by numerous Rural LECs and rejected, that the dialing customer "belongs" to the end-user's selected IXC, for which AT&T provides exchange access and does not pay anything to the terminating carrier.

Q. When an AT&T customer dials 1+ to make an intraMTA call, does AT&T realize any additional revenue from the call?

A. Yes. While AT&T receives no more or no less revenue from the end-user when the end-user makes a 1+ call, AT&T does receive access revenue based upon tariffed access charges from the end-user's selected IXC.

Q. When an AT&T customer dials 1+ to make an intraMTA call, does that change the fact that, for intercarrier compensation purposes, AT&T originated the call?

A. No.

Q. In addition to being contrary to established decisions, what inherent inequities exist with AT&T's approach?

A. The party that terminates an IntraMTA call is entitled to be paid reciprocal compensation for such terminating usage. The fact that call may be "dialed" 1+ for dialing parity purposes (and routed via an IXC) does not change the IntraMTA nature of the call. AT&T's approach would create a triple windfall to AT&T. Ordinarily when an originating carrier hands an IntraMTA call to an intermediate network for delivery to a terminating carrier, the originating carrier pays the intermediate carrier a transit charge, and the originating carrier also pays the terminating carrier an intercarrier compensation usage charge. AT&T's approach results in AT&T, as the originating carrier, charging the intermediate carrier originating access, and neither the intermediate carrier nor the terminating carrier receive any compensation from the originating carrier, AT&T.

Q. What resolution does Sprint recommend for this issue?

A. Sprint requests the Authority to follow the established law on this Issue and reject AT&T's language that would permit AT&T to shirk its obligation to pay intercarrier compensation to Sprint for the termination of intraMTA traffic simply because AT&T delivered the traffic to Sprint via the use of an intermediate IXC network. As an alternative, instead of one-way bill-and-keep, which is essentially what AT&T wishes to adopt here for calls AT&T's customers originate, AT&T should be willing to accept bill and keep for calls that Sprint's customers originate as well (as I discuss in Issue III.A.1.(4)), and in fact for all calls the parties exchange, and this 1+ issue becomes moot – which is exactly what the end result has been under the parties' existing ICA for almost ten years now.

Issue III.A.1(2) – What are the appropriate compensation rates, terms and conditions (including factoring and audits) that should be included in the CMRS ICA for traffic subject to reciprocal compensation?

Q. Please describe this issue.

A. This is yet another of the numerous pages of language AT&T has proposed from its standard agreement that is unwarranted in the parties' ICA. Basically, AT&T's proposed language lays out an elaborate factoring process in the event Sprint Wireless is unable to properly record traffic volumes originated by AT&T.

Q. Is Sprint wireless capable of properly measuring and recording traffic volumes?

A. Yes and Sprint has had that capability for years.

Q. Does AT&T's language contain any objectionable provisions?

A. Yes. AT&T's proposed language exempts certain categories of traffic from reciprocal compensation – an exemption with which Sprint disagrees. Those categories are Non-facility based traffic, Paging traffic, and 1+ IntraMTA calls that are handed off to an IXC. It is not clear to me why AT&T is attempting to remove the first two categories listed above from reciprocal compensation payments. I address the third category in Issue III.A.1 (1). AT&T includes other terminology at issue in this Arbitration in its proposed language. For example, the term "251(b)(5)

Traffic" as used in AT&T's proposed language is open at Issue I.B(2) and addressed by Sprint witness Burt.

Q. If the Authority rejects AT&T's proposed language on this issue, did Sprint tender language that would adequately address the issue?

A. Yes. Sprint's language calls for the parties to measure actual traffic as the preferred method and if they are unable to do so, then they would jointly agree on an alternative methodology.

Q. Is there any precedent for this language?

A. Yes. It is consistent with what exists in the parties' current ICA.

Q. How does Sprint propose for the Authority to resolve this issue?

A. Sprint proposes the following language to resolve this issue:

> 6.3.6.1 Actual traffic Conversation MOU measurement in each of the applicable Authorized Service categories is the preferred method of classifying and billing traffic. If, however, either Party cannot measure traffic in each category, then the Parties shall agree on a surrogate method of classifying and billing those categories of traffic where measurement is not possible, taking into consideration as may be pertinent to the Telecommunications traffic categories of traffic, the territory served (e.g. MTA boundaries) and traffic routing of the Parties.

Issue III.A.1(3) – What are the appropriate compensation rates, terms and conditions (including factoring and audits) that should be included in the CLEC ICA for traffic subject to reciprocal compensation?

Q. Please describe this issue.

A. I would describe this issue similarly to my description of the preceding issue – AT&T's language is unwarranted. Sprint's language requires actual traffic measurement and that is sufficient for the parties.

Q. Are there problematic areas with AT&T's language?

A. Yes. AT&T's language includes unnecessary "additional" audit provisions, conflicting with another ***undisputed*** section of the ICA[10]. AT&T's language also includes billing dispute language that is inconsistent with its proposed Attachment 7 billing dispute language. AT&T also represents Section 6.1.2 as disputed whereas the parties have already agreed to identical language in Section 6.3.4. It is unclear why the parties would need to have an identical provision recorded twice in the same agreement. Sprint is also adamantly opposed to the affirmative obligation contained in AT&T's proposed language to enter into agreements with non-parties to this ICA. Finally, Sprint finds AT&T's multiple tandem access proposal objectionable in that it improperly inflates the reciprocal compensation rate for the termination of traffic, and it also defeats the underlying purpose of the requesting party being entitled to maintain one POI per LATA as I discuss in Issues II.D.(1) and II.D.(2).

Q. Based on the foregoing, what is Sprint's proposed resolution for this issue?

[10] General Terms and Conditions Part A Section 24, Audits

A. Sprint proposes the following language to resolve this issue:

> 6.3.6.1 Actual traffic Conversation MOU measurement in each of the applicable Authorized Service categories is the preferred method of classifying and billing traffic. If, however, either Party cannot measure traffic in each category, then the Parties shall agree on a surrogate method of classifying and billing those categories of traffic where measurement is not possible, taking into consideration as may be pertinent to the Telecommunications traffic categories of traffic, the territory served (e.g. Exchange boundaries, LATA boundaries and state boundaries) and traffic routing of the Parties.

Issue III.A.1(4) – Should the ICAs provide for conversion to a bill and keep arrangement for traffic that is otherwise subject to reciprocal compensation but is roughly balanced?

Q. Please describe the issue.

A. Sprint has proposed language under which the parties would exchange local traffic under a bill and keep arrangement when the traffic exchanged between the parties is roughly balanced.

Q. Does AT&T agree to bill and keep under any circumstances?

A. According to AT&T's position for this issue in the parties' DPL, apparently it does not feel bill and keep is appropriate under any circumstances. Yet, upon close review of further AT&T language, AT&T has no problem proposing bill and keep when it is to its advantage to do so.[11]

[11] See AT&T proposed bill and keep treatment of what it calls Foreign Exchange ("FX") Internet Service Provider ("ISP") traffic, which is discussed in the Testimony of Sprint witness Burt at Issue III. A. 5.

Q. Why does Sprint generally support the use of bill and keep?

A. Sprint supports the use of bill and keep because it is efficient, economical and relieves both parties of the burdensome task of rendering and verifying bills, collecting payments, and resolving billing disputes. Frequently, the cost of undertaking such billing-related tasks exceeds the amounts billed. In such cases, both parties are clearly better off under a bill and keep arrangement.

Q. Is bill and keep mandated by the Act or the FCC?

A. While not mandated, bill and keep is specifically recognized as a legitimate form of reciprocal compensation in the Act[12] , the First Report and Order[13], and the FCC's Rules[14]. In addition to being recognized by the Act and FCC rules, bill-and-keep eliminates considerable transaction costs associated with tracking, measuring, rating, billing, accounting, verifying, auditing, disputing, and litigating over traffic exchanged between the parties for which the incremental cost of providing traffic termination is close to zero.

Q. How does Sprint propose to resolve this issue?

A. Sprint proposed language for the resolution of this issue and Issue III.A.1(5) is included at the end of my testimony for Issue III.A.1(5) below.

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[12] *See* 47 U.S.C. § 252(d)(2)(B)(i) (2010)

[13] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98; CC Docket No. 95-185, FCC 96-325, 11 FCC Rcd 15499, 16055, ¶1112 (August 8, 1996).

[14] 47 C.F.R. § 51.705(3) (2010)

Issue III.A.1(5) – If so, what terms and conditions should govern the conversion of such traffic to bill and keep?

Q. Please describe this issue.

A. Should the Authority order the parties to incorporate a mechanism for conversion to a bill and keep arrangement into the ICA as Sprint advocates in the issue above, Sprint has proposed the necessary language to effectuate such an arrangement.

Q. What is Sprint's position on this issue?

A. Sprint's proposed language is appropriate, and acknowledges that the exchange of traffic between the parties today is presumed to be roughly balanced. This is because AT&T has not provided any evidence to demonstrate the exchange of traffic is not roughly balanced. Further, any attempt by AT&T to prove an imbalance that may warrant re-initiation of billing must take into consideration any IntraMTA traffic originated on the AT&T network as a 1+ dialed traffic that AT&T delivers to Sprint via an intermediate IXC network. Therefore, until AT&T demonstrates a traffic imbalance exists, the parties should continue to exchange traffic on a bill and keep basis as is done today.

Q. Please summarize AT&T's position on this issue.

A. As I understand it, if the Authority decides that the ICA must provide a bill and keep option, AT&T proposed language calls for the parties to commence operations

under the ICA with each party billing the other for the termination of local traffic. Then, if traffic falls within a 55%/45% exchange ratio, the parties may convert to a bill and keep arrangement.

Q. In the DPL, AT&T claims that Sprint's language provides no mechanism for the parties to convert to billing each other for local traffic. Is that true?

A. Yes. Sprint's proposed language is premised upon the fact the parties currently exchange traffic on a bill and keep basis, and AT&T has not attempted to demonstrate that the parties' exchange of IntraMTA traffic (i.e., including AT&T 1+ traffic) is not roughly balanced. If and when AT&T cooperates with Sprint to analyze the traffic on an appropriate basis and can demonstrate the traffic is not roughly balanced, Sprint certainly will entertain language to convert from bill and keep to a billing arrangement.

Q. What language does Sprint propose the Authority order to resolve this issue?

A. Unless and until AT&T can rebut the presumption that all of the IntraMTA traffic exchanged between the parties is roughly balanced to warrant any edit to Sprint's proposed language, Sprint proposes the Authority order the following language:

6.3.7 Conversion to Bill and Keep for wireless IntraMTA traffic or wireline Telephone Exchange Service traffic.

[CMRS] a) If the IntraMTA Traffic exchanged between the Parties becomes balanced, such that it falls within the stated agreed balance below ("Traffic Balance Threshold"), either Party may request a bill and keep arrangement to satisfy the Parties' respective usage compensation payment obligations

regarding IntraMTA Traffic. For purposes of this Agreement, the Traffic Balance Threshold is reached when the IntraMTA Traffic exchanged both directly and indirectly, reaches or falls between 60%/40%, in either the wireless-to-landline or landline-to-wireless direction for at least three (3) consecutive months. When the actual usage data for such period indicates that the IntraMTA Traffic exchanged, both directly and indirectly, falls within the Traffic Balance Threshold, then either Party may provide the other Party a written request, along with verifiable information supporting such request, to eliminate billing for IntraMTA Traffic usage. Upon written consent by the Party receiving the request, which shall not be withheld unreasonably, there will be no billing for IntraMTA Traffic usage on a going forward basis unless otherwise agreed to by both Parties in writing. The elimination of billing for IntraMTA Traffic carries with it the precondition regarding the Traffic Balance Threshold discussed above. As such, the two points are interrelated terms containing specific rates and conditions, which are non-separable for purposes of this Subsection 6.3.7.

b) As of the Effective Date, the Parties acknowledge that the IntraMTA Traffic exchanged between the Parties both directly and indirectly has already been established as falling within the Traffic Balance Threshold. Accordingly, each Party hereby consents that, notwithstanding the existence of a stated IntraMTA Rate in the Pricing Sheet to this Agreement, there will be no billing between the Parties for IntraMTA Traffic usage on a going forward basis unless otherwise agreed to by both Parties in writing

[CLEC] a) If the Telephone Exchange Service Traffic exchanged between the Parties becomes balanced, such that it falls within the stated agreed balance below ("Traffic Balance Threshold"), either Party may request a bill and keep arrangement to satisfy the Parties' respective usage compensation payment obligations regarding Telephone Exchange Service Traffic. For purposes of this Agreement, the Traffic Balance Threshold is reached when the Telephone Exchange Service Traffic exchanged both directly and indirectly, reaches or falls between 60% / 40%, in either the wireless-to-landline or landline-to-wireless direction for at least three (3) consecutive months. When the actual usage data for such period indicates that the Telephone Exchange Service Traffic exchanged, both directly and indirectly, falls within the Traffic Balance Threshold, then either Party may provide the other Party a written request, along with verifiable information supporting such request, to eliminate billing for Telephone Exchange Service Traffic usage. Upon written consent by the Party receiving the request, which shall not be withheld unreasonably, there will be no billing for Telephone Exchange Service Traffic usage on a going forward basis unless otherwise agreed to by both Parties in writing. The elimination of billing for Telephone Exchange Service Traffic carries with it the precondition regarding the Traffic Balance Threshold discussed above. As such, the two

points are interrelated terms containing specific rates and conditions, which are non-separable for purposes of this Subsection 6.3.7.

b) As of the Effective Date, the Parties acknowledge that the Telephone Exchange Service Traffic exchanged between the Parties both directly and indirectly has already been established as falling within the Traffic Balance Threshold. Accordingly, each Party hereby consents that, notwithstanding the existence of a stated Telephone Exchange Service Rate in the Pricing Sheet to this Agreement, there will be no billing between the Parties for Telephone Exchange Service usage on a going forward basis unless otherwise agreed to by both Parties in writing.

ISP-Bound Traffic

Issue III.A.2 – What compensation rates, terms and conditions should be included in the ICAs related to compensation for ISP-Bound traffic exchanged between the parties?

Q. Please describe this issue.

A. Simply stated, AT&T has proposed additional conditions on the exchange of Internet Service Provider ("ISP")-bound traffic that have no basis in the FCC's rules.

Q. Can you give an example of the type of unsupported conditions AT&T adds to the exchange of ISP-bound traffic?

A. Yes. In the CMRS ICA, AT&T has proposed language in Section 6.1.2 that the directionality of ISP traffic would be limited to mobile-to-land. While AT&T might prefer that condition to exist, there is no basis in the FCC's rules for it.

AT&T has also proposed that ISP-bound traffic be jurisdictionalized based on the end-points of the call. One of the very reasons the FCC took jurisdiction of ISP-bound traffic[15] is because it is impossible to jurisdictionalize. In the CLEC ICA, AT&T has included a rate for Multiple Tandem Switching, which, as I discuss in my testimony for Issue III.A.1(3), appears to be AT&T's attempt to undermine the ISP pricing regime by layering on additional improper rate elements.

Q. How does Sprint propose to resolve this issue?

A. Sprint urges the Authority to reject AT&T's superfluous language and adopt Sprint's language as follows:

> Attachment 3 Pricing Sheet – CMRS and CLEC
>
> - Information Services Rate: .0007
> - Interconnected VoIP Rate: Bill & Keep until otherwise determined by the FCC.

CMRS ICA Meet Point Billing Provisions

Issue III.A.7(1) – Should the wireless meet point billing provisions in the ICA apply only to jointly provided, switched access calls where both Parties are providing such service to an IXC, or also to Transit Service calls, as proposed by Sprint?

[15] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, CC Docket No. 99-68, Declaratory Ruling, 14 FCC Rcd 3689, 3699-3700 (February 26, 1999) ("Declaratory Ruling" or "Intercarrier Compensation NPRM").

Q. Can you give a description of what is meant by wireless meet point billing?

A. Yes. As used between the parties since the implementation of their existing ICA as of January, 2001, wireless meet point billing addresses two distinct things: 1) the parties' provision of jointly provided services to an IXC; and 2) AT&T's provision of transit service to enable the delivery of a Sprint wireless-originated call to a third party via AT&T, or delivery of a third party-originated call to Sprint wireless via AT&T. The original language was designed to ensure AT&T had what it needed from Sprint to be able to provide records as necessary (e.g., 110101 records) so the terminating carrier can properly identify the originating carrier for billing purposes, and also established the $0.002 transit rate that AT&T charged Sprint wireless to deliver Sprint wireless-originated traffic to a third party via AT&T.

Q. What change is AT&T proposing to the Wireless Meet Point Billing Provisions?

A. Based on AT&T's position that it is not required to provide a transit service pursuant to the ICA, it disagrees with Sprint's continuing inclusion of any reference to Transit Service in the Wireless Meet Point Billing provisions of a new ICA. Sprint witness Farrar addresses the issue of whether AT&T has an obligation to provide Transit Service under the Act in Issue I.C.(2). The resolution to that Issue I.C.2 will essentially resolve this Issue III.A.7.(1).

Q. Is there any other aspect to this issue on which the parties disagree?

A. Yes. AT&T's language includes an inappropriate 800 query charge. AT&T's language implies that it will bill Sprint wireless for 800 database queries if Sprint wireless were to use AT&T to dip Sprint wireless-originated 800 traffic to determine who the 800 owner is. Inclusion of any reference to 800 database dips is inappropriate for two reasons. First, Sprint dips its own 800 traffic and therefore has no need to utilize AT&T 800 database query service. Second, even if Sprint wireless did send an 800 call to AT&T undipped, the charge for such a call should be found in an AT&T tariff that should make clear that such tariff charges are paid by the IXC providing the 800 service. It is both unnecessary and inappropriate to include 800 query charges in an ICA since the query charge is a matter between AT&T and the 800 service provider IXC, not between AT&T and Sprint wireless in an ICA.

Q. What language does Sprint propose to resolve this issue?

A. Sprint's proposed language for this issue is included in my testimony for Issue III.A.7.(2) below.

Issue III.A.7.(2) – What information is required for wireless Meet Point Billing, and what are the appropriate Billing Interconnection Percentages?

Q. What is the issue in dispute?

A. There are basically two aspects of this issue that are in dispute. First, AT&T is requiring Sprint wireless to provide billing factors (e.g., Percent Interstate Usage, or

PIU, and Percent Local Usage, or PLU) in order to participate in meet-point billing and it is unclear why. Second, the Billing Interconnection Percentage ("BIP") of 95% AT&T is inappropriate.

Q. Why is it unnecessary for Sprint wireless to provide the meet-point billing factors requested by AT&T?

A. The only traffic subject to meet-point billing for which AT&T would charge Sprint wireless would be Transit traffic that AT&T switches to a non-IXC third-party for termination which is subject to a Transit charge. The Transit charge has never been subject to any type of factor application. The other traffic subject to the wireless meet point provisions is Jointly Provided Switched Access traffic, for which Sprint wireless and AT&T would each be entitled to charge the third-party IXC, rather than one another – again resulting in no type of factor application between Sprint wireless and AT&T.

Q. What is a BIP?

A. The BIP is the percentage that each party bills a third party IXC for use of a facility that is jointly provided by the parties to that IXC. In this case, inbound traffic to Sprint from an IXC would traverse an Interconnection Facility that is shared between Sprint and AT&T. Therefore, each party is entitled to bill the IXC for the portion of the Interconnection Facility for which it is financially responsible.

Q. Is AT&T's proposed BIP of 95% appropriate?

A. No.

Q. Why not?

A. Because AT&T does not pay for 95% of the facility. The BIP for each party should be the percentage that is assigned to each of the parties' for purposes of determining shared facilities costs. This is based on each party's proportionate use for the facility used to transmit traffic from its network to the other party's network. Sprint witness Farrar addresses the proportionate use issue in Issue III.E.(1) in his testimony.

Q. How does Sprint request that the Authority resolve the Wireless Meet Point Billing Issues III.A.7 (1) and III.A.(2)?

A. Sprint proposes the Authority adopt the following language to resolve these issues:

> Wireless Meet Point Billing
>
> 7.2.1 For purposes of this Agreement, Wireless Meet Point Billing, as supported by Multiple Exchange Carrier Access Billing (MECAB) guidelines, shall mean the exchange of billing data relating to jointly provided Switched Access Service calls, where both Parties are providing such service to an IXC, and Transit Service calls that transit AT&T-9STATE's network from an originating Telecommunications carrier other than AT&T-9STATE and terminating to a Telecommunications carrier other than AT&T-9STATE or the originating Telecommunications carrier. Subject to Sprint providing all necessary information, AT&T-9STATE agrees to participate in Meet Point Billing for Transit Service traffic which transits it's network when both the originating and terminating parties participate in Meet Point Billing with AT&T-9STATE. Traffic from a network which does not participate in Meet Point Billing will be delivered by AT&T-9STATE, however, call records for traffic originated and/or terminated by a non-Meet Point Billing network will not be delivered to the originating and/or terminating network.

7.2.2 Parties participating in Meet Point Billing with AT&T-9STATE are required to provide information necessary for AT&T-9STATE to identify the parties to be billed. Information required for Meet Point Billing includes Regional Accounting Office code (RAO) and Operating Company Number (OCN) per state. The following information is required for billing in a Meet Point Billing environment and includes, but is not limited to; (1) a unique Access Carrier Name Abbreviation (ACNA), and (2) a Billing Interconnection Percentage. A default Billing Interconnection Percentage of 50% AT&T-9STATE and 50% Sprint will be used if Sprint does not file with NECA to establish a Billing Interconnection Percentage other than default. Sprint must support Meet Point Billing for all Jointly Provided Switched Access calls in accordance with Mechanized Exchange Carrier Access Billing (MECAB) guidelines. AT&T-9STATE and Sprint acknowledge that the exchange of 1150 records will not be required.

7.2.3 Meet Point Billing will be provided for Transit Service traffic which transits AT&T-9STATE's network at the Tandem level only. Parties desiring Meet Point Billing will subscribe to Tandem level Interconnections with AT&T-9STATE and will deliver all Transit Service traffic to AT&T-9STATE over such Tandem level Interconnections. Additionally, exchange of records will necessitate both the originating and terminating networks to subscribe to dedicated NXX codes, which can be identified as belonging to the originating and terminating network. When the Tandem, in which Interconnection occurs, does not have the capability to record messages and either surrogate or self-reporting of messages and minutes of use occur, Meet Point Billing will not be possible and will not occur. AT&T-9STATE and Sprint will work cooperatively to develop and enhance processes to deal with messages handled on a surrogate or self-reporting basis.

7.2.4 In a Meet Point Billing environment, when a party actually uses a service provided by AT&T-9STATE, and said party desires to participate in Meet Point Billing with AT&T-9STATE, said party will be billed for miscellaneous usage charges, as defined in AT&T-9STATE's FCC No.1 and appropriate state access tariffs, (i.e. Local Number Portability queries) necessary to deliver certain types of calls. Should Sprint desire to avoid such charges Sprint may perform the appropriate LNP data base query prior to delivery of such traffic to AT&T-9STATE.

7.2.5 Meet Point Billing, as defined in section 7.2.1 above, under this Section will result in Sprint compensating AT&T-9STATE at the Transit Service Rate for Sprint-originated Transit Service traffic delivered to AT&T-9STATE

network, which terminates to a Third Party network. Meet Point Billing to IXCs for Jointly Provided Switched Access traffic will occur consistent with the most current MECAB billing guidelines.

Issue III.C – Should Sprint be required to pay AT&T for any reconfiguration or disconnection of interconnection arrangements that are necessary to conform with the requirements of this ICA?

Q. Please describe this issue.

A. AT&T has proposed language that would require Sprint to bear the cost of any rearrangement, reconfiguration, disconnection, termination or other non-recurring fees associated with any network reconfiguration required by the new ICA.

Q. What is Sprint's position on this issue?

A. To the extent either party is required to reconfigure or disconnect existing arrangements to conform to new requirements, each party should bear its own costs. This position is consistent with what the parties agreed to in the current ICA in contemplation of replacing the preceding ICA.

Q. Why is it inappropriate for AT&T to be compensated when it reconfigures network components?

A. AT&T's proposal is unnecessary for two reasons. First, the parties have been interconnected and exchanging traffic for over a decade and no major network reconfigurations should be necessary for the parties to continue their existing

relationship. Second, to the extent a major network reconfiguration is necessitated by an AT&T proposal, AT&T should bear the cost of that, not Sprint.

Q. What is Sprint's desired resolution of this issue?

A. Sprint requests the Authority adopt its proposed language for this issue as follows:

> Neither Party intends to charge rearrangement, reconfiguration, disconnection, termination or other non-recurring fees that may be associated with the initial reconfiguration of either Party's network Interconnection arrangement to conform to the terms and conditions contained in this Agreement. Parties who initiate SS7 STP changes may be charged authorized non-recurring fees from the appropriate tariffs, but only to the extent such tariffs and fees are not inconsistent with the terms and conditions of this Agreement.

CLEC Meet Point Billing Provisions

Issue III.F – What provisions governing Meet Point Billing are appropriate for the CLEC ICA?

Q. Please describe this issue.

A. AT&T has proposed new language to replace the CLEC Meet Point Billing contained in the current ICA between the parties. AT&T claims the new language conforms with current industry standards and should prevent billing disputes between the parties in the future. Sprint sees no reason to replace the language in the existing ICA.

Q. Have the parties had any billing disputes in the last decade that are attributable to any deficiencies in the existing language?

A. No, not to my knowledge. Again, this is a situation where the parties' existing language "ain't broke", and therefore there is no rational reason for AT&T's purported "fix".

Q. What resolution does Sprint propose for this issue?

A. Sprint recommends that the Authority adopt its proposed language to resolve this issue. Sprint's proposed language is as follows:

> 7.3.6 Mutual Provision of Switched Access Service for Sprint and AT&T-9STATE
>
> 7.3.6.1 When Sprint's end office switch, subtending the AT&T-9STATE Access Tandem switch for receipt or delivery of switched access traffic, provides an access service connection between an interexchange carrier (IXC) by either a direct trunk group to the IXC utilizing AT&T-9STATE facilities, or via AT&T-9STATE's tandem switch, each Party will provide its own access services to the IXC on a multi-bill, multi-tariff meet-point basis. Each Party will bill its own access services rates to the IXC with the exception of the interconnection charge. The interconnection charge will be billed by the Party providing the end office function. Each Party will use the Multiple Exchange Carrier Access Billing (MECAB) system to establish meet point billing for all applicable traffic. Thirty (30)-day billing periods will be employed for these arrangements. The recording Party agrees to provide to the initial Billing Party, at no charge, the Switched Access detailed usage data within no more than sixty (60) days after the recording date. The initial Billing Party will provide the switched access summary usage data to all subsequent billing Parties within 10 days of rendering the initial bill to the IXC. Each Party will notify the other when it is not feasible to meet these requirements so that the customers may be notified for any necessary revenue accrual associated with the significantly delayed recording or billing. As business requirements change data reporting requirements may be modified as necessary.
>
> 7.3.6.3 AT&T-9STATE and Sprint agree to recreate the lost or damaged data within forty-eight (48) hours of notification by the other or by an authorized third party handling the data.

7.3.6.4 AT&T-9STATE and Sprint also agree to process the recreated data within forty-eight (48) hours of receipt at its data processing center.

7.3.6.5 The Initial Billing Party shall keep records for no more than 13 months of its billing activities relating to jointly-provided Intrastate and Interstate access services. Such records shall be in sufficient detail to permit the Subsequent Billing Party to, by formal or informal review or audit, to verify the accuracy and reasonableness of the jointly-provided access billing data provided by the Initial Billing Party. Each Party agrees to cooperate in such formal or informal reviews or audits and further agrees to jointly review the findings of such reviews or audits in order to resolve any differences concerning the findings thereof.

Pricing Schedule

Issue III.I.(1)(a) – If Sprint orders (and AT&T inadvertently provides) a service that is not in the ICA, should AT&T be permitted to reject future orders until the ICA is amended to include the service?

Q. What is the issue in dispute?

A. AT&T has proposed language under which it would reject future orders for a service that is not incorporated in the ICA, but which AT&T nevertheless inadvertently provides.

Q. Why does Sprint object to AT&T's proposed language?

A. Sprint will order services that it believes in good faith are subject to the ICA. If there is a dispute over such ordered services then the parties should use the Dispute Resolution provisions to resolve the dispute. AT&T should not, however, reject good-faith orders.

Q. How likely is it that AT&T would "inadvertently" provide a service not included in the ICA?

A. I believe it is extremely unlikely. In the 11 years I have been negotiating and implementing ICAs, I have never known AT&T (or any other ILEC) to provide an Interconnection-related service that was not in some way addressed in the parties' ICA. This type of "belt and suspenders" approach should be roundly rejected by the Authority.

Q. Are there other, more cooperative ways AT&T could handle this possibility?

A. Yes. AT&T could provision the service in question using an interim rate until the ICA could be amended with permanent rates, terms, and conditions. It is unclear why AT&T would propose the harshest of all possible remedies for this highly unlikely event.

Q. What is Sprint's proposed resolution to this issue?

A. Sprint requests that the Authority reject AT&T's proposed language or, at a minimum, require AT&T to eliminate that language which would authorize the rejection of future orders.

Issue III.I.(1)(b) – If Sprint orders (and AT&T inadvertently provides) a service that is not in the ICA, should the ICAs state that AT&T's provisioning does not constitute a waiver of its right to bill and collect payment for the service?

Q. What is Sprint's position on this issue?

A. Conceptually, Sprint has no disagreement with AT&T on this issue. Certainly, if a party provides a service, it is entitled to be paid for the service it provides. Sprint's objection to this language is that it is part of an entire section that is superfluous. As I stated above, I have never seen this situation in my 11 years of negotiating and implementing ICAs. As such, Sprint cannot see any reason to include this language in the ICA. If, however, the Authority requires AT&T to eliminate the offending language that would authorize the rejection of future orders, Sprint believes the parties should be able to acceptably revise AT&T's proposed section 1.4.3 non-waiver language.

Q. How does Sprint propose to resolve this issue?

A. Sprint requests the Authority to reject AT&T's proposed language or, at a minimum, condition its acceptance on the revision of 1.4.2.1 to eliminate any reference to the potential rejection of orders.

Issue III.I.(2) – Should AT&T's language regarding changes to tariff rates be included in the agreement?

Q. Please summarize this issue.

A. AT&T wants to incorporate language into the ICA that would automatically change a rate in the ICA based on a change in the tariff from which the rate originated.

Q. For purposes of your testimony, do you make any assumptions?

A. Yes. I assume the parties are talking about an actual rate that is included in the ICA (e.g., $0.002173) and not simply a reference to a rate in a tariff (e.g., FCC Tariff No. 1, Section 6.1(b)).

Q. What is Sprint's position on this issue?

A. Sprint disagrees with AT&T's proposed language. An initial Authority determination that a tariff rate may be used as an Interconnection Service rate because it meets the 252(d) pricing standard when the ICA is approved, does not provide a blanket authorization to change such pricing based simply on a future change in tariff.

Q. Would Sprint oppose an adjustment to the rate if the ICA simply provided a reference to the tariff where the rate resided?

A. No.

Q. What does Sprint ask the Authority do on this issue?

A. Sprint asks the Authority to reject AT&T's proposed language.

Issue III.I.(3) – What are the appropriate terms and conditions to reflect the replacement of current rates?

Q. Please summarize this issue.

A. The parties disagree on the process to effectuate rate changes in the ICA after the Authority has ordered a change to a Section 252(d) rate.

Q. What is Sprint's process?

A. Basically, either party may send notice to the other when the Authority issues an order that results in changes to any 252(d) rate contained within the ICA that it wants to incorporate the new rate in the ICA. If rates are modified in a rate proceeding to which Sprint is not a party, AT&T has an affirmative obligation to notify Sprint of such rate changes. The parties will negotiate a conforming amendment to the ICA and it will be effective retroactive to the date of the Authority order.

Q. How does AT&T's proposed process differ from Sprint's?

A. The primary difference is the affirmative obligation on AT&T's part to notify Sprint of an Authority order affecting any 252(d) rates in the ICA. AT&T also imposes an arbitrary 90 calendar day period for Sprint to request modification of the rates pursuant to an Authority order for the rates to be effective retroactive back to the date of the order. If Sprint does not make the request within the 90 calendar day period, the rates are only effective as of the date of the amendment incorporating the modified rates.

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language:

1.2 Replacement of Current Section 252(d) Rates

1.2.1 Certain of the current rates, prices and charges set forth in this Agreement have been established by the Commission to be rates, prices and charges for Interconnection Services subject to Section 252(d) of the Act ("Current Section 252(d) Rate(s)").

1.2.2 If, during the Term of this Agreement the Commission or the FCC modifies a Current Section 252(d) Rate, or otherwise orders the creation of new Current Section 252(d) Rate(s), in any order or docket that is established by the Commission or FCC to be applicable to Interconnection Services subject to this Agreement, either Party may provide written notice of the ordered new Current Section 252(d) Rates ("Rate Change Notice"). Notwithstanding the foregoing, if Sprint is not a party to the proceeding in which the Commission or FCC ordered such modification or creation of new Section 252(d) Rate(s), AT&T-9STATE shall provide a Rate Change Notice to Sprint within sixty (60) days after the effective date of such order.

1.2.3 Upon either Party's receipt of a Rate Change Notice, the Parties shall negotiate a conforming amendment which shall reflect replacement of the affected Current Section 252(d) Rate(s) with the new Section 252(d) Rate(s) as of the effective date of the order that determined a change in rates was appropriate, and shall submit such amendment to the Commission for approval. In addition, as soon as is reasonably practicable after such Rate Change Notice, each Party shall issue to the other Party any adjustments that are necessary to reflect the new Rate(s).

Issue III.I.(4) – What are the appropriate terms and conditions to reflect the replacement of interim rates?

Q. Please describe the issue.

A. The issue is what is the appropriate language and process for the replacement of interim rates within the ICA.

Q. What is Sprint's position on this issue?

A. Similar to the language associated with to-be-determined ("TBD") rates below, Sprint's Interim Rate language is appropriate in that it requires an appropriate conforming agreement to be effective as of the Authority order date that establishes a Final Rate that replaces an interim rate.

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language to resolve this issue:

> 1.3.1 Certain of the rates, prices and charges set forth in this Agreement may be denoted as interim rates ("Interim Rates"). Upon the effective date of a Commission Order establishing rates for any rates, prices or charges applicable to Interconnection Services specifically identified in this Agreement as Interim Rates, the Parties shall negotiate a conforming amendment which shall reflect replacement of the affected Interim Rate(s) with the new rate(s) ("Final Rate(s)") as of the effective date of the order that established such Final Rates or such other date as may be mutually agreed upon), and shall submit such amendment to the Commission for approval. In addition, as soon as is reasonably practicable after approval of such amendment, each Party shall issue to the other Party any adjustments that are necessary to implement such Final Rate(s).

Issue III.I.(5) – Which Party's language regarding prices noted as TBD (to be determined) should be included in the agreement?

Q. What objection does Sprint have to AT&T's proposed language to regarding prices noted as TBD?

A. Sprint has two objections to AT&T's language in Section 1.5.1 of Attachment 3. First, AT&T's language implies that AT&T has the right to set the price for an Interconnection Service without gaining Authority approval. Sprint strongly

disagrees with that position and believes Congress and the FCC mandated that ILECs must obtain Authority approval for Interconnection-related pricing to ensure that ILECs such as AT&T adhere to the TELRIC pricing standard. Second, AT&T's language only contemplates AT&T as a Billing Party under this agreement. As I discuss in Issue IV.A.(1) below, Sprint may also be a Billing Party under this agreement, therefore, this provision should be mutual to reflect that reality.

Q. What is Sprint's proposed resolution for this issue?

A. Sprint asks the Authority to adopt its proposed language as follows:

> 1.5.1 When a rate, price or charge in this Agreement is noted as "To Be Determined" or "TBD" for an Interconnection Service, the Parties understand and agree that when a rate, price or charge is established for that Interconnection Service as approved by the Commission, that such rate(s), price(s) or charge(s) ("Established Rate") shall, to the extent a Party provided such Interconnection Services under this Agreement, automatically apply back to the Effective Date of this Agreement without the need for any additional modification(s) to this Agreement or further Commission action. AT&T-9STATE shall provide Written Notice to Sprint of the Established Rate when it is approved by the Commission, Established Rate, and the Parties' billing tables will be updated to reflect and charge the Established Rate, and the Established Rate will be deemed effective between the Parties as of the Effective Date of the Agreement. The Parties shall negotiate a conforming amendment, which shall reflect the Established Rate that applies to such Interconnection Service pursuant to this Section 1.5 above, and shall submit such Amendment to the State Commission for approval. In addition, as soon as is reasonably practicable after such Established Rate begins to apply, the Parties, as applicable, for such Interconnection Services to reflect the application of the Established Rate retroactively to the Effective Date of the Agreement between the Parties.
>
> 1.5.2 A party's provisioning of such Interconnection Services is expressly subject to this Section 1.5 above and in no way constitutes a waiver of a party's right to charge and collect payment for such Interconnection Services, or the Billed Party's right to dispute such charges as provided in this Agreement.

Section IV. – Billing Related Issues

General

Issue IV.A.(1) – What general billing provisions should be included in Attachment 7?

Q. Please describe the issue.

A. During ICA negotiations, AT&T's proposed general billing provisions were deficient in two areas. First, AT&T's language did not recognize the fact that either party may have need to render a bill to the other party. Second, AT&T's language sought to change the long-standing practice the parties have utilized with respect to facility cost sharing.

Q. Have either of the two deficiencies you identify been rectified?

A. Yes. I understand AT&T has agreed that Sprint may be a billing party and agreed to Sprint's proposed language to reflect that mutuality. The agreed-to language is as follows:

> 1.4 Each Party shall bill the other on a current basis all applicable charges and credits.
>
> 1.5 Payment Responsibility. Payment of all charges will be the responsibility of the Billed Party. The Billed Party shall make payment to the Billing Party for all services billed and due as provided in this Agreement. AT&T-9STATE is not responsible for payments not received by Sprint from Sprint's customer, and Sprint is not responsible for payments not received by AT&T-9STATE from

AT&T-9STATE's customer. In general, one Party will not become involved in disputes between the other Party and its own customers.

1.6 The Billing Party will render bills each month on established bill days for each of the Billed Party's accounts

Q. Have the parties resolved the second deficiency you identify above?

A. No.

Q. Regarding AT&T's newly proposed CMRS section 1.6.5, which is unique to the question of AT&T billing "for shared Facilities/and or Trunks, what has been the historical practice between Sprint PCS and AT&T regarding the billing of shared interconnection facilities/trunking?

A. For nearly ten years and continuing to this day, on the CMRS side: 1) AT&T bills Sprint PCS 100% of the cost for facilities used as Interconnection facilities; 2) on a quarterly basis the parties jointly determine the amount for which AT&T issues Sprint PCS a credit based upon a 50% shared facilities factor; and 3) this credit is calculated on a DS1-equivalent basis as to all 2-way facilities that are used for Interconnection purposes. Upon Nextel's adoption of the Sprint PCS ICA, AT&T bills Nextel 100% of the cost for facilities used as Interconnection facilities, and Nextel has the capability of billing AT&T back to obtain the credit due based upon the 50% shared facilities factor. As to Sprint CLEC, the process is more complicated but my belief is that AT&T provides sharing based on factors provided by Sprint CLEC.

Q. What is AT&T proposing for the new ICA?

A. AT&T is proposing a methodology whereby it will bill the Sprint wireless entities for the entire facility and the Sprint wireless entities must each render a separate invoice to AT&T for AT&T's shared portion of the facility.

Q. Why is that a problem for Sprint?

A. Most importantly, as to Sprint PCS, it is a change to the long-standing practice between the parties which represented a compromise. While Sprint would be willing to continue the current practice, if AT&T is going to attempt to insist that Sprint PCS initiate a different practice simply to accommodate AT&T's billing system deficiency (i.e., inability to only bill the amount that Sprint PCS owes based on the shared facility factor), then Sprint must regrettably insist that AT&T follow the rules and not bill any Sprint entity for something Sprint does not owe (i.e., don't bill Sprint entities for portions of shared facilities that are not attributable to Sprint customer usage). As a practical matter, it is less efficient for each party to have to render a bill when one party could render a bill and accomplish the same outcome. When each party renders a separate bill, the administrative costs of verifying the bills and the likelihood of billing disputes doubles – as demonstrated by the fact that Nextel, who has followed the "bill-back" practice, now has a ***very*** substantial shared facility dispute from the parties' past ICA based on AT&T's refusal to pay amounts that Nextel properly billed to AT&T under the express terms of the past Nextel-AT&T ICA.

Q. What language does Sprint propose regarding the invoicing of shared 2-way or non-shared 1-way facilities?

A. As previously discussed in Sprint witness Farrar's testimony (Issue III.E.(1) regarding CMRS , and Issue III.E.(3) regarding CLEC), Sprint's proposed facility language for both the CMRS and CLEC ICAs is the following language, which is at Section 2.5.3 (c)(1), (2) and (d) and includes the invoicing of charges for 2-way shared facilities:

> (c) Two-way Interconnection Facilities. The recurring and non-recurring costs of two-way Interconnection Facilities between Sprint Central Office Switch locations and the POI(s) to which such switches are interconnected at AT&T-9STATE Central Office Switches shall be shared based upon the Parties' respective proportionate use of such Facilities to deliver all Authorized Services traffic originated by its respective End-User or Third-Party customers to the terminating Party. Such proportionate use will, based upon mutually acceptable traffic studies, be periodically determined and identified as a state-wide "Proportionate Use Factor".
>
> (1) As of the Effective Date the Parties' Proportionate Use Factor is deemed to be 50% Sprint and 50% AT&T-9STATE. Beginning six (6) months after the Effective Date, and thereafter not more frequently than every six (6) months, a Party may request re-calculation of a new Proportionate Use Factor to be prospectively applied,
>
> (2) Unless another process is mutually agreed to by the Parties, on each invoice rendered by a Party for two-way Interconnection Facilities, the Billing Party will apply the Proportionate Use Factor to reduce its charges by the Billing Party's proportionate use of such Facilities. The Billing Party will reflect such reduction on its invoice as a dollar credit reduction to the Interconnection Facilities charges to the Billed Party, and also identify such credit by circuit identification number(s) on a per DS-1 equivalents basis.
>
> (d) One-way Interconnection Facilities When one-way Interconnection Facilities are utilized, each Party is responsible for the ordering and all costs of such Facilities used to deliver of Authorized Services traffic originated by its respective End User or Third Party customers to the terminating Party.

Q. In the event the Authority adopts Sprint's facility-specific language in resolving Issues III.E.(1) and III.E.(3), what further "general" billing language does Sprint propose the Authority adopt to resolve Issue IV.A.(1)?

A. Sprint proposes the following additional, general billing language:

> Wireless Only
> 1.6.2 Since Sprint records and identifies the actual amount of Third Party Traffic delivered to it over the Interconnection Trunks, Sprint will not bill AT&T-9STATE for such Third Party Traffic.

Issue IV.A.(2) – Should six months or twelve months be the permitted back-billing period?

Q. Please describe the issue.

A. This disputed issue is the length of time a Billing Party has to bill for services rendered to the other party. Sprint favors 6 months while AT&T has proposed 12 months.

Q. Why does Sprint propose a shorter period?

A. It is unreasonable for a Billing Party to have an extended period of time to issue a bill once a service is rendered. The Billed Party rightfully has an expectation that when a service is purchased, the bill will be rendered in an accurate and timely manner.

Q. Is it necessary for the back-billing time limit to match the period within which a party can bring a billing dispute (as addressed in Issue IV.C.(1) below)?

A. No. As I stated earlier, a Billed Party should reasonably expect to be billed accurately and timely. When the Billing Party bills inaccurately, the Billed Party should be entitled to additional time to rectify that inaccuracy.

Q. Has the Authority previously decided this issue?

A. Yes. In the arbitration between ITC^Deltacom and BellSouth[16], the Authority determined that three billing cycles is a reasonable limit to the back-billing of services by a billing party. While this is more restrictive that Sprint's proposed 6 months, it is in keeping with the spirit of Sprint's proposal – namely, that a billed party has a reasonable expectation that the billing party will render a timely and accurate bill.

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language:

2.10 Limitation on Back-billing

2.10.1 Notwithstanding anything to the contrary in this Agreement, a Party shall be entitled to:

2.10.1.1 Back-bill for any charges for services provided pursuant to this Agreement that are found to be unbilled or under-billed but only when such charges appeared or should have appeared on a bill dated within the six (6) months immediately preceding the date on which the Billing Party provided written notice to the Billed Party of the amount of the back-billing. The Parties agree that the six (6) month limitation on back-billing set forth in the preceding

[16] In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996, TRA Docket No. 03-00119 (Oct 20, 2005).

sentence shall be applied prospectively only after the Effective Date of this Agreement, meaning that the six (6) month period for any back-billing may only include billing periods that fall entirely after the Effective Date of this Agreement and will not include any portion of any billing period that began prior to the Effective Date of this Agreement.

2.10.1.2 Back-billing, as limited above, will apply to all services purchased under this Agreement.

Definitions

Issue IV.B.(1) – What should be the definition of "Past Due"?

Q. Please describe this issue.

A. This issue is straightforward. Sprint's definition of "Past Due" recognizes that only undisputed charges must be paid by the bill due date to not be considered Past Due – AT&T's does not.

Q. Why does Sprint believe that only undisputed charges must be paid by the due date to not be considered past due?

A. Payment is rightly "due" on properly assessed charges, and such assessment does not occur for amounts disputed in good-faith until the dispute is resolved. If payment was due on improperly assessed charges, the Billing Party has no incentive to ensure the billed amounts are accurate or to quickly and efficiently work through billing disputes. Additionally, the Billed Party bears the additional financial obligation of paying invoiced amounts that may ultimately prove to be inaccurate.

Q. Is AT&T's proposal to utilize escrow a fair resolution to this issue?

A. No. I will discuss the problems related to AT&T's proposed escrow language in Issue IV.D.(3) below.

Q. What is Sprint's proposed language to resolve this issue?

A. Sprint's proposed language is as follows:

> "Past Due" means when a Billed Party fails to remit payment for any undisputed charges by the Bill Due Date, or if payment for any portion of the undisputed charges is received from the Billed Party after the Bill Due Date, or if payment for any portion of the undisputed charges is received in funds which are not immediately available to the Billing Party as of the Bill Due Date (individually and collectively means Past Due).

Issue IV.B.(2) – What deposit language should be included in each ICA?

Q. Please describe the issue.

A. Sprint has proposed language that recognizes the existence of mutual billing and therefore requires mutuality in the deposit provisions. Additionally, Sprint's language provides legitimate balance and restraint between a Billing Party's reasonable request for a deposit, and a Billing Party's use of a deposit demand as a competitive weapon to needlessly encumber a Billed Party's capital.

Q. Does Sprint's proposed language reasonably provide for a Billing Party to secure amounts billed to the Billed Party?

A. Yes.

Q. Why is AT&T's proposed language unreasonable?

A. AT&T's language is an overreaction to losses it claims to have incurred over the years and it tips the balance decidedly in favor of the ILEC as a Billing Party to the point of being a potential barrier to competition. Additionally, Sprint has a long and solid payment history with AT&T and, therefore, AT&T's heavy-handed security deposit language is excessive and unnecessary.

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language:

> 1.8.1 General Terms. If the Party that is billed for services under this Agreement (the "Billed Party") fails to meet the qualifications described in this Section for continuing creditworthiness, the other Party (the "Billing Party") reserves the right to reasonably secure the accounts of the Billed Party for the purchase of services under this Agreement with a suitable form of security pursuant to this Section.
>
> 1.8.2 Initial Determination of Creditworthiness. Upon request, the Billing Party may require the Billed Party to provide credit profile financial information in order to determine whether or not security should reasonably be required, and in an amount that does not exceed more than an amount equal to one (1) month's total net billing between the Parties under this Agreement in a given state. The Parties have discussed one another's creditworthiness in accordance with the requirements of this Section and determined that no additional security of any kind is required from one Party to the other upon the execution of this Agreement.
>
> 1.8.3 Subsequent Determination of Creditworthiness. On an annual basis, beginning not earlier than one (1) year after execution of this Agreement, the Billing Party may review the need for a security deposit if (i) subject to a standard of commercial reasonableness, a material change in the circumstances of the Billed Party so warrants and gross monthly billing by the Billing Party to the Billed Party has increased for services under this Agreement by more than twenty-five (25%) over the most recent six-month period, and (ii) the Billed Party (or its parent holding company) does not have total assets of at least five billion dollars ($5,000,000,000.00).

1.8.4 If the conditions required in 1.8.3 are met and the Billed Party does not otherwise have a good payment history, the Billing Party may provide the Billed Party fifteen (15) days written notice of the Billing Party's intent to review the Billed Party's credit worthiness. Upon the Billed Party's receipt of the Billing's Party's intent to review notice, the Parties agree to work together to determine the need for or amount of a reasonable initial or increase in deposit. If there is any dispute regarding whether the conditions required in 1.8.3 have been met, or the Parties are otherwise unable to agree upon a reasonable initial or increase in deposit, then the Billing Party must file a petition for resolution of the dispute. Such petition shall be filed with the Commission in the state in which the Billed Party has the highest amount of charges billed under this Agreement. The Parties agree that the decision ordered by such Commission will be binding within all of the AT&T-9STATES.

1.8.5 Any such agreed to or Commission-ordered security shall in no way release the Billed Party from its obligation to make complete and timely payments of its bills, subject to the bill dispute procedures set forth in this Attachment.

1.8.7 The Billing Party shall release or return any security deposit, within thirty (30) days of its determination that such security is no longer required by the terms of this Attachment, or within thirty (30) days of the Parties establishing that the Billed Party satisfies the standards set forth in this Attachment or at any such time as the provision of service to the Billed Party is terminated pursuant to this Agreement as applicable. The amount of the deposit will first be credited against any of the Billed Party's outstanding account(s), and any remaining credit balance will be refunded within thirty (30) days.

Issue IV.B.(3) – What should be the definition of "Cash Deposit"?

Q. Please describe the issue.

A. Sprint's deposit language does not use the term "Cash Deposit". If it is determined by the Authority to be a necessary term, Sprint's definition of "Cash Deposit" recognizes the fact that either party may render a bill to the other and, therefore,

may need to secure the account with a security deposit. AT&T's language assumes that only AT&T is entitled to secure its account receivables against non-payment.

Q. In the DPL, AT&T makes the claim that "its creditworthiness is notoriously sound". Should that obviate the need for AT&T to provide a cash deposit?

A. No. Assuming for the sake of discussion that AT&T's creditworthiness is and continues to be sound at the time the parties ultimately enter into the ICAs, AT&T's financial situation could certainly change during the life of the ICA. Additionally, under Sprint's proposed security deposit terms, AT&T may not be required to provide a security deposit as long as it maintains the necessary asset threshold and a good payment history with Sprint.

Q. What language does Sprint propose to resolve this issue?

A. To the extent the Authority finds that "Cash Deposit" is a necessary term to be included in the ICA, Sprint proposes the following language:

> "Cash Deposit" means a cash security deposit made by one Party in U.S. dollars that is held by the other Party.

Issue IV.B.(4) – What should be the definition of "Letter of Credit"?

Q. Please describe the issue.

A. Sprint's deposit language does not use the term "Letter of Credit". If it is determined by the Authority to be a necessary term, Sprint's definition of "Letter of Credit" recognizes the fact that either party may render a bill to the other and,

therefore, may need to secure the account with a letter of credit. AT&T's language assumes that only AT&T is entitled to secure its account receivables against non-payment and this is reflected in its definition of "Letter of Credit".

Q. As in the definition of "Cash Deposit" discussed above, AT&T makes the claim that "its creditworthiness is notoriously sound". Should that obviate the need for AT&T to provide a letter of credit?

A. No. As indicated above, AT&T's financial situation could change during the life of the ICA. Additionally, under Sprint's proposed security deposit terms, AT&T may not be required to provide a security deposit as long as it maintains a good payment history with Sprint.

Q. What language does Sprint propose to resolve this issue?

A. To the extent the Authority finds that "Letter of Credit" is a necessary term to be included in the ICA, Sprint proposes the following language:

> "Letter of Credit" means the unconditional, irrevocable standby bank letter of credit from a financial institution acceptable to the Billing Party naming the Billing Party as the beneficiary(ies) thereof and otherwise on a mutually acceptable Letter of Credit form.

Issue IV.B.(5) – What should be the definition of "Surety Bond"?

Q. Please summarize Sprint's position on this issue.

A. Sprint's deposit language does not use the term "Surety Bond". If it is determined by the Authority to be a necessary term, Sprint does not dispute the definition as proposed by AT&T.

Billing Disputes

Issue IV.C.(1) – Should the ICA require that billing disputes be asserted within one year of the date of the disputed bill?

Q. Please describe the issue.

A. This issue deals with the length of time a Billed Party may go back to assert a dispute to an invoice.

Q. What is Sprint's position on this issue?

A. Twenty-four months should be the shortest limitation on the length of time a Billed Party can go back to assert a billing dispute. Billing errors may not be detectable in twelve months, the Billed Party has a reasonable expectation that the bill will be rendered accurately, and there is no legal basis to mandate a further time restriction for billing disputes.

Q. Have the parties agreed to a longer period than AT&T's proposed 12-month limitation anywhere else in the ICA?

A. Yes. The parties agree in the General Terms and Conditions Part A to a 24-month limit as to any ICA dispute, which is likely shorter than a given jurisdiction's applicable statutory limitations period.

Q. Is there any reason for the back-disputing limitation to be equal to the back-billing limitation?

A. No. Those two timeframes arise from the same underlying philosophy and necessarily result in very different limits. As I have stated previously, that philosophy is that the Billing Party will generate a timely and accurate bill. If the Billing Party is observing that principle, there is no reason it would have any reservations about agreeing to a 24-month back-disputing window, while at the same time agreeing to a 6-month limitation to back-bill.

Q. Are there other types of traffic for which the statute of limitations is longer than 6 months?

A. Yes. The FCC's statute of limitations for interstate access billing disputes is 24 months.[17]

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language:

> 3.1.1 Notwithstanding anything contained in this Agreement to the contrary, a Party shall be entitled to dispute only those charges which appeared on a bill

[17] 47 U.S.C. § 415(b).

dated within the twenty-four (24) months immediately preceding the date on which the Billing Party received notice of such Disputed Amounts.

Issue IV.C.(2) – Which Party's proposed language concerning the form to be used for billing disputes should be included in the ICA?

Q. Please describe this issue.

A. AT&T proposes to mandate that Sprint utilize an internal AT&T billing dispute form that Sprint has never used because Sprint has its own automated system for disputing any carrier's improper billing.

Q. What is Sprint's position on the issue?

A. To the extent AT&T issues improper bills, Sprint maintains its right to use its existing automated dispute system. Sprint would consider making the AT&T-requested modifications to its automated dispute system if AT&T is willing to pay for such modifications.

Q. Why does Sprint object to using AT&T's new dispute form?

A. On its face, Sprint objects to a contractually mandated use of an internal AT&T billing dispute form because the only way Sprint could comply with such a mandate at this point would be on a manual basis that will impose additional costs on Sprint. Keep in mind, Sprint's automated system provides AT&T everything that is necessary to identify and process a Sprint dispute – AT&T just doesn't like "how" it is received. The end result of a contract mandate to use an AT&T form that

Sprint does not otherwise use is clearly anti-competitive in that: a) Sprint must incur a new, manual cost to dispute what it considers to be improper AT&T billings; and b) if Sprint fails to incur such costs and simply continues to use its automated system, AT&T will, no doubt, be in a position to render whatever bill it chooses, right or wrong, and prospectively reject Sprint's automated disputes as being non-compliant with the contract mandate.

Q. Does Sprint provide all of the necessary information using the existing Sprint format enabling AT&T to understand the nature of a bill dispute?

A. Yes. In fact, Sprint has used the existing bill dispute format for at least 6 years with AT&T, and the parties have had no difficulty understanding the nature of any bill dispute. Sprint utilizes this same bill dispute system and format with every major carrier that invoices Sprint.

Q. Why would it be reasonable for AT&T to pay to ensure that Sprint can use an AT&T billing dispute form?

A. It would be reasonable because: 1) AT&T is the Billing Party whose improper bills give rise to the dispute; and 2) AT&T is seeking a modification of Sprint's internal automated systems for the sole benefit of AT&T.

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language:

> 3.3.1 A "Billing Dispute" means a dispute of a specific amount of money actually billed by the Billing Party. The Billed Party may, at its sole option and

in its sole discretion, submit disputes through the use of either (a) the Billed Party's internal processes to prepare and submit disputes, or (b) a Billing Party proposed "Billing Claims Dispute Form", subject to the Billing Party paying all non-recurring and recurring costs the Billed Party may incur to modify the Billed Party's internal processes to use such proposed form. The dispute must be made by the Disputing Party in writing and supported by documentation, which clearly shows the basis for dispute of the charges. The dispute must be itemized to show the date and account number or other identification (i.e., CABS/ESBA/ASBS or BAN number) of the bill in question; telephone number, circuit ID number or trunk number in question if applicable; any USOC (or other descriptive information) relating to the item in question; and the amount billed. By way of example and not by limitation, a Billing Dispute will not include the refusal to pay all or part of a bill or bills when no written documentation is provided to support the dispute, nor shall a Billing Dispute include the refusal to pay other amounts owed by the Disputing Party until the dispute is resolved. Claims by the Parties for damages of any kind will not be considered a Billing Dispute for purposes of this Section. Once the Billing Dispute is resolved the Disputing Party will make payment on any of the resolved disputed amount owed to the Billing Party as part of the next immediately available bill-payment cycle for the specific account, or the Billing Party shall have the right to pursue normal treatment procedures. Any credits due to the Disputing Party, pursuant to the Billing Dispute, will be applied to the Disputing Party's account by the Billing Party upon resolution of the dispute as part of the next available invoice cycle for the specific account.

Payment of Disputed Bills

Issue IV.D.(1) – What should be the definition of "Non-Paying Party"?

Q. Please describe this issue.

A. This issue is similar to the issue with the definition of "Past Due" in Issue IV.B.(1) above. Sprint's definition of "Non-Paying Party" recognizes that only undisputed amounts must be paid by the due date for a party to not be considered a Non-Paying Party – AT&T's does not. The same logic and arguments apply to the resolution of this issue as apply to the resolution of the definition of "Past Due" above.

Q. In the DPL, AT&T states that it is obvious that "Non-Paying Party" means a Party that has not paid disputed amounts. If that is obvious, why does AT&T object to Sprint's language?

A. I don't know.

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language:

> "Non-Paying Party" means the Party that has not made payment of undisputed amounts by the Bill Due Date of all amounts within the bill rendered by the Billing Party.

Issue IV.D.(2) – What should be the definition of "Unpaid Charges"?

Q. Please describe this issue.

A. This issue is similar to the issue with the definition of "Past Due" in Issue IV. B.(1) and "Non-Paying Party" in Issue IV. D.(1) above. Sprint's definition of "Unpaid Charges" recognizes that only undisputed amounts must be paid by the due date – AT&T's does not. The same logic and arguments apply to the resolution of this issues as apply to the resolution of the definition of "Past Due" and "Non-Paying Party" above.

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language:

"Unpaid Charges" means any undisputed charges billed to the Non-Paying Party that the Non-Paying Party did not render full payment to the Billing Party by the Bill Due Date.

Issue IV.D.(3) – Should the ICA include AT&T's proposed language requiring escrow of disputed amounts?

Q. What is Sprint's position with respect to AT&T's proposed escrow language?

A. Billing disputes are necessitated when the Billing Party issues inaccurate bills. It is, therefore, inappropriate to require the Billed Party to remit presumptively erroneous billed amounts to a third party before the Billed Party can file a legitimate dispute. A Billed Party should only be responsible for payment of properly assessed charges with applicable interest, at the end of the dispute resolution process. An escrow requirement is unnecessary, problematic, anti-competitive when applied as a "condition-precedent" to a dispute being considered a "valid" dispute, and does not resolve the underlying problem of inaccurate billing.

Q. Why is Sprint opposed to an escrow requirement for disputed amounts?

A. As I have stated, Sprint has an expectation that AT&T as the Billing Party will render an accurate bill. Sprint's experience, however, is that AT&T is as prone to issue an incorrect bill as any other carrier and, in the face of an escrow requirement that serves as a condition-precedent to a party's right to challenge an AT&T bill, there is no reason to believe AT&T's billing practices would somehow become *more* accurate. In the event that there is a billing error, Sprint has the right to dispute the bill – without having to "pay-in" to a third party before it can exercise

such right - and the parties need to work together to resolve the dispute. Sprint does not escrow billing disputes in the normal course of business. An escrow account for disputed charges would be particularly burdensome given the fact that there can be a large number of billing disputes, many for relatively small individual dollar amounts. It can take a year or more to resolve complex billing issues. Additional resources would be needed to track and reconcile the escrow account deposits, balances and payments, especially given the fact that billing disputes may be filed and resolved on multiple accounts each month.

Q. Does Sprint have other concerns with AT&T's proposed escrow requirement?

A. Yes. It is clear that AT&T's policy of requiring an interest-bearing escrow account is intended to discourage the Billed Party from filing disputes by requiring increased working capital requirements when the dispute is filed. If AT&T is allowed to force its escrow requirement upon competitors and thereby discourage competitors from bringing legitimate disputes, AT&T reaps a windfall generated by its own erroneous billing practices. On this basis, it is important that Sprint's incentive to dispute incorrect charges on the bill not be diminished by an escrow requirement. The bottom line is that, so long as AT&T renders the bill accurately, Sprint would have no need to file disputes in the first place, thereby making the escrow issue moot.

Q. Does the escrow requirement do anything to resolve the problem of inaccurate billing?

A. No. In fact there is a potentially chilling, punitive effect (as stated previously) on Sprint lodging legitimate disputes against AT&T bills, with no repercussions for AT&T if it renders an inaccurate bill. If AT&T renders an inaccurate bill and Sprint registers a dispute and wins, AT&T has suffered no consequences of its billing inaccuracy. Meanwhile, Sprint has anteed up working capital and borne the additional administrative burden of managing an escrow account. Because of this inequity, AT&T has no incentive to ensure its bill is accurate, which is the real root of this issue.

Q. Is AT&T's concern about losing millions of dollars through the billing dispute process well-founded?

A. No. AT&T has other means at its disposal to ensure that it is not taken advantage of by unscrupulous carriers that would attempt to game the billing and disputing system. For example, if AT&T has concerns that a carrier is unable to pay its bill, it may conduct a review of that carrier's creditworthiness pursuant to the security deposit language proposed by Sprint in Issue IV.B.(2) above to request an additional deposit to secure the account.

Q. What does Sprint recommend to the Authority to resolve this issue?

A. Sprint urges the Authority to adopt its proposed language and reject the balance of AT&T's proposed escrow language. Sprint's proposed language is as follows:

> 1.12 If any unpaid portion of an amount due to the Billing Party under this Agreement is subject to a Billing Dispute between the Parties, the Non-Paying Party must, prior to the Bill Due Date, give written notice to the Billing Party of the Disputed Amounts and include in such written notice the specific details and

reasons for disputing each item listed in Section 3.3.1 below. On or before the Bill Due Date, the Non-Paying Party must pay all undisputed amounts to the Billing Party.

Service Disconnection

Issue IV.E.(1) – Should the period of time in which the Billed Party must remit payment in response to a Discontinuance Notice be 15 or 45 days?

Q. Please describe this issue.

A. The parties essentially agree on the definition of "Discontinuance Notice" with the exception of whether the recipient of the notice must act with 15 days or 45 days.

Q. What is Sprint's position on this issue?

A. Discontinuance of service is a drastic remedy, therefore, it is not unreasonable to provide forty-five (45) days notice to avoid potential disruption or disconnection of service. Forty-five days will give the parties ample time to ensure they are in agreement over the facts that the noticing party contends exist to give rise to such notice.

Q. Are there potential extenuating circumstances that would further support Sprint's suggested 45 days notice period?

A. Yes. Sprint processes thousands of invoices every month and it is not beyond the realm of possibility that one of those invoices could be lost in its electronic transmission. In the event that happens, it is overly harsh for the first notice Sprint

receives regarding the misplaced invoice to be notification of an impending discontinuance of service in 15 days. A 45-day notice period is more reasonable.

Q. In the DPL, AT&T states that adopting Sprint's language would result in Sprint having 76 days to pay its bill. Is that true?

A. Not really. While Sprint (or any carrier adopting this ICA) could utilize the full 30 days of the invoice due date ***plus*** the notice period before it pays its bill, Sprint's business practice is to pay all undisputed bills by the due date. Moreover, routinely paying bills after the due date would undoubtedly result in a review of the Billed Party's credit status and would likely result in a request for an increased deposit amount. Therefore, the Billing Party is protected against the unlikely event that the Billed Party would use the extra time built into the Discontinuance Notice period and then not pay its bill at all.

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language:

> "Discontinuance Notice" means the written notice sent by the Billing Party to the other Party that notifies the Non-Paying Party that in order to avoid disruption or disconnection of the Interconnection products and/or services, furnished under this Agreement, the Non-Paying Party must remit all undisputed Unpaid Charges to the Billing Party within forty-five (45) calendar days following receipt of the Billing Party's notice of undisputed Unpaid Charges.

Issue IV.E.(2) – Under what circumstances may a Party disconnect the other Party for nonpayment, and what terms should govern such disconnection?

Q. Please describe the issue.

A. AT&T has proposed language that would allow a party to disconnect ***all*** Interconnection services even if the charges associated with only one service is not paid or disputed.

Q. What is Sprint's position on this issue?

A. Disconnection of service is so customer-impacting that it should only be imposed as a last resort and, even then, only after the Billing Party has received Authority approval. Additionally, the ***only*** services that should be disconnected in this scenario are those for which payment has not been made.

Q. What is AT&T's position on this issue?

A. It seems as though AT&T wants as little restriction as possible when it comes to disconnecting the services provided to a competing carrier. AT&T's proposal indicates that it would only provide notice to the Authority when an explicit Authority rule requires it to do so. Additionally, AT&T wants the contractual right to disconnect ***all*** services provided by the Billing Party if the Billed Party fails to pay or dispute even just one service.

Q. Is AT&T's position reasonable?

A. No. AT&T's position on disconnection of services sanctions the most extreme of all remedies available to a Billing Party for the non-payment of services and should be rejected.

Q. Why should a non-paying party have any leeway to continue receiving any services from a Billing Party when they fail to pay their bill?

A. As stated earlier, disconnection of services can have significant end-user customer affecting results and should only be used as a last resort. If AT&T is faced with an unscrupulous carrier that is not cooperating through the Dispute Resolution process, AT&T always has recourse -- go to the Authority.

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language:

2.0 Nonpayment and Procedures for Disconnection

2.1 If a party is furnished Interconnection Services, under the terms of this agreement in more than one (1) state, this section 2.0, shall be applied separately for each state.

2.2 Failure to make payment as required by Section 1.12 will be grounds for disconnection of the Interconnection Services furnished under this Agreement, for which payment was required. If a Party fails to make such payment, the Billing Party will send a Discontinuance Notice to such Non-Paying Party. The Non-Paying Party must remit all Unpaid Charges to the Billing Party within forty-five (45) calendar days of the Discontinuance Notice.

2.3 Disconnection will only occur as provided by Applicable Law, upon such notice as ordered by the Commission.

2.4 If the Non-Paying Party desires to dispute any portion of the Unpaid Charges, the Non-Paying Party must complete all of the following actions not later than forty-five (45) calendar days following receipt of the Billing Party's notice of Unpaid Charges:

2.4.1 notify the Billing Party in writing which portion(s) of the Unpaid Charges it disputes, including the total Disputed Amounts and the specific details listed in the Dispute Resolution Section of this Attachment 7, together with the reasons for its dispute; and

2.4.2 pay all undisputed Unpaid Charges to the Billing Party

2.5 Issues related to Disputed Amounts shall be resolved in accordance with the procedures identified in the Dispute Resolution provision set forth Section 3.0 below.

Issue IV.F.1. – Should the Parties' invoices for traffic usage include the Billed Party's state-specific Operating Company Number (OCN)?

Q. Please describe this issue.

A. AT&T has proposed language in the ICA that would require the Billing Party to include the terminating party's state specific operating company number ("OCN") on its invoice.

Q. Why does Sprint object to this language?

A. Sprint's billing system is based on the SECAB industry standard, which does not identify usage by "Billed Party OCN". AT&T has no right to mandate a change in Sprint's long-standing, industry-standard billing system.

Q. In the DPL, AT&T implies that its accounts payable system will not pay invoices from other carriers that do not include the Billed Party OCN. How do you respond?

A. Sprint does not know what to make of this implication, given the fact that Sprint currently renders bills to AT&T without the Billed Party OCN, and AT&T is paying such bills. If this is, however, simply another instance that AT&T is seeking to impose a contract mandate to 'do it AT&T's way or in the future you will not get paid', then Sprint has the same objection as it did to AT&T's attempt to mandate use of the AT&T billing dispute form. It is simply wrong for AT&T to think it can impose contract mandates upon competing carriers to do something a specific way simply and solely because AT&T says so. AT&T has its own internal systems and other carriers have theirs; AT&T does not have the right to force everyone else to fall lock-step into the AT&T way of doing business.

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language:

> 1.6.3 Each Party will invoice the other by state, for traffic exchanged pursuant to this Agreement, by the Central Office Switch, based on the terminating location of the call and will display and summarize the number of calls and Conversation MOUs for each terminating office and usage period. [FOR WIRELESS ONLY] Sprint will display the CLLI code(s) associated with the Trunk through which the exchange of traffic between AT&T-9STATE and Sprint takes place as well as the number of calls and Conversation MOUs.

Issue IV.F.2(1) – How much notice should one Party provide to the other Party in advance of a billing format change?

Q. Please describe this issue.

A. This issue deals with the notice period for a bill format change. The parties agree on all points except the amount of time a billed party has to adjust to a Billing

Party's invoice changes when notice of such change is not provided at least 90 days in advance of the change. Sprint's language provides the billed party 90 days to adjust to the bill format change under any circumstances. AT&T's language is unclear on the amount of time a billed party would ultimately have to adjust when notice is not provided at least 90 days in advance of the change.

Q. Why does Sprint take issue with AT&T's language?

A. AT&T's language creates an ambiguity that may result in disputes between the parties. AT&T's language does not create a definitive cut-off time by which the Billed Party must act. Instead AT&T's language creates the possibility a Billed Party could forestall payment for an indefinite, unspecified time to "make changes deemed necessary". It is unclear to Sprint why, at most, 90 days from actual receipt of a changed bill is not the appropriate period for the billed party to make the necessary adjustment under all circumstances – even when an advance 90-day notice may not have been provided.

Q. What language does Sprint propose to resolve this issue?

A. Sprint proposes the following language:

> 1.19 Each Party will notify the other Party at least ninety (90) calendar days or three (3) monthly billing cycles prior to any billing format changes that may impact the Billed Party's ability to validate and pay the Billing Party's invoices. At that time a sample of the new invoice will be provided so that the Billed Party has time to program for any changes that may impact validation and payment of the invoices. If the specified length of notice is not provided regarding a billing format change and such change impacts the Billed Party's ability to validate and timely pay the Billing Party's invoices, then the affected invoices will be held and not subject to any Late Payment Charges, until at least

ninety (90) calendar days has passed from the time of receipt of the changed bill.

Issue IV.G.2. – What language should govern recording?

Q. What is the nature of this issue?

A. The disagreement with respect to recording language centers around AT&T's requirement that Sprint CLEC send End User Billable Messages detail to AT&T when Sprint CLEC is the recording party. Because of the rushed nature of the negotiations and the volume of new language proposed by AT&T, Sprint did not have adequate time to thoroughly research the industry standards with respect to this issue. Sprint has no conceptual disagreement with AT&T's proposed language. Sprint does, however, wish to propose one clarifying insertion to what AT&T has proposed.

Q. What are End User Billable Messages?

A. End User Billable Messages are records that are created when the customer of one party originates a call that is to be charged to the customer of another party. The originating customer's carrier would generate a record to send to the paying customer's carrier that would trigger the paying customer's carrier to bill their end-user for the call. The paying customer's carrier would then remit part of the revenue back to the originating carrier, less a small processing fee. End User Billable Messages are also generated when one party's customer originates an

intrastate, intraLATA LEC-to-LEC 8YY call destined for the customer of the other party (i.e., no IXC is involved in the call).

Q. Do Sprint's end users make calls that would generate End User Billable Messages?

A. Yes, on a limited basis. Sprint's end users have unlimited long distance calling included in their calling plan and would, therefore, have no incentive to make a alternately billed call that would generate an End User Billable Message. However, it is possible that a Sprint customer may make an 8YY call to an AT&T customer.

Q. What is Sprint's proposed resolution to this issue?

A. Sprint proposes that the Authority adopt AT&T's proposed language with one small modification underlined below.

> 6.1.9.4 When Sprint is the recording Party, Sprint agrees to provide its recorded End User Billable Messages detail and AUR detail to AT&T-9STATE under the same terms and conditions of this Section 6.1.9.

Issue IV.H. – Should the ICA include AT&T's proposed language governing settlement of alternately billed calls via Non-Intercompany Settlement System (NICS)?

Q. Please describe this issue.

A. Simply put, the parties have a separate Revenue Accounting Office ("RAO") hosting agreement that addresses the subject contained in AT&T's proposed section

5.1.2 and it is not necessary, and would be confusing, to duplicate this specific subject matter in two different agreements. Moreover, the separate RAO hosting agreement is a completely voluntary agreement between Sprint and AT&T and it would be inappropriate to include mandatory NICS language in the ICA between the parties.

Q. What is Sprint's proposed resolution to this issue?

A. Sprint asks the Authority to reject AT&T's proposed language for this Issue.

IV. CONCLUSION

Q. Does this conclude your Direct Testimony?

A. Yes.

ATTACHMENT MGF-1

BRIEF FOR AMICI CURIAE FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 07-2469 & 07-2473

MICHIGAN BELL TELEPHONE COMPANY D/B/A/ AT&T MICHIGAN,
PLAINTIFF-APPELLEE,

v.

COVAD COMMUNICATIONS COMPANY; TALK AMERICA INC.;
XO COMMUNICATIONS SERVICES, INC.,
INTERVENORS-DEFENDANTS – APPELLANTS,

MCLEOD USA TELECOMMUNICATIONS SERVICES, INC.; TDS METROCOM, LLC,
INTERVENORS,

J. PETER LARK, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE MICHIGAN PUBLIC SERVICE COMMISSION AND NOT AS AN INDIVIDUAL; LAURA CHAPPELLE, IN HER OFFICIAL CAPACITY AS COMMISSIONER AND NOT AS AN INDIVIDUAL; MONICA MARTINEZ, IN HER OFFICIAL CAPACITY AS COMMISSIONER AND NOT AS AN INDIVIDUAL,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 07-2469 & 07-2473

MICHIGAN BELL TELEPHONE COMPANY D/B/A/ AT&T MICHIGAN,

PLAINTIFF-APPELLEE,

v.

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DEFENDANTS-APPELLANTS.

BRIEF FOR AMICI CURIAE FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

STATEMENT OF INTEREST

Pursuant to this Court's invitation,[1] the Federal Communications Commission ("FCC") respectfully files this brief as amicus curiae. The FCC has primary responsibility for implementing and enforcing the Communications Act of 1934, 47 U.S.C. § 151, et seq. This case involves this Court's review of a district court's interpretation of section 251(c) of that Act and the FCC orders and rules construing that statutory provision. The FCC has an interest in ensuring that the Act, its rules, and its precedents are correctly interpreted.

In addition, the FCC believes that the district court (in contrast to two circuit courts previously confronting the same issue) improperly disregarded the FCC's authoritative construction of its own rules and authorizing statute. The FCC has an interest in defending its regulatory judgments and in ensuring that they are challenged only in courts with jurisdiction to do so.

QUESTION PRESENTED

Whether an FCC rule relieving incumbent local exchange carriers ("LECs") of their duty under section 251(c)(3) of the Communications Act to make entrance facilities available to competitive carriers as unbundled network elements bars the Michigan Public Service Commission ("MPSC") from construing a different provision of the Act, section 251(c)(2), to require AT&T Michigan, an incumbent LEC, to provide its competitors with similar facilities at cost-based rates when they are used solely for interconnection.

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[1] Letter from Leonard Green, Clerk, U.S. Court of Appeals for the Sixth Circuit to Matthew Berry, General Counsel, FCC (Dec. 10, 2008) ("Green Letter").

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

1. The Telecommunications Act of 1996,[2] which is part of the Communications Act, is designed to "'end[] the longstanding regime of state-sanctioned monopolies' in the local telephone markets"[3] and "to open all telecommunications markets to competition."[4] Congress recognized that no prospective entrant could hope to compete with the incumbent LECs in providing consumers with telephone exchange service and exchange access service by replicating the existing local network infrastructure. Section 251(c), added by the 1996 Act, therefore entitles competitive carriers to enter local telephone markets by utilizing the incumbent LECs' own networks in three distinct but overlapping ways. See 47 U.S.C. § 251(c)(2)-(4).

First, section 251(c)(2) requires incumbent LECs "to provide * * * interconnection" between their networks and those of other carriers, and to do so at "just, reasonable, and nondiscriminatory" rates and terms. 47 U.S.C. § 251(c)(2). See also 47 C.F.R. § 51.305(a). In simple terms, interconnection in this context means linking the physical networks of two carriers in order to exchange traffic

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[2] Pub. Law No. 104-104, 110 Stat. 56 ("1996 Act").

[3] BellSouth Telecomms., Inc. v. Southeast Tel., Inc., 462 F.3d 650, 652 (6th Cir. 2006) (quoting AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999)).

[4] H.R. Rep. No. 104-458, at 1 (1996) (Conf. Rep.). See AT&T, 525 U.S. at 371; Quick Commc'ns, Inc. v. Mich. Bell Tel. Co., 515 F.3d 581, 583 (6th Cir. 2008).

and complete calls between end user customers of the two carriers.[5] Section 251(c)(2) "obligates the incumbent [LEC] to 'interconnect' the competitor's facilities to its own network to whatever extent is necessary to allow the competitor's facilities to operate."[6]

Second, section 251(c)(3) requires all incumbent LECs to provide their competitors with non-discriminatory access to certain elements of the incumbents' networks on an unbundled basis. 47 U.S.C. § 251(c)(3).[7] In determining which non-proprietary network elements ("UNEs") the incumbent LECs must make available to competitive carriers on an unbundled basis, the FCC must consider whether the failure to provide a requesting competitor access to such elements would "impair" the competitor's ability to provision service. 47 U.S.C. § 251(d)(2)(B).[8] The unbundling obligation enables a competitor to enter the local telephone market by assembling components of a network from various sources – some leased from the incumbent LEC, some perhaps self-provisioned, and some possibly obtained from a third party. This facilitates competition by obviating the

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[5] 47 C.F.R. § 51.5 (defining the term "interconnection" to refer to the "physical linking of two networks for the mutual exchange of traffic."). See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15590 (¶ 176) (1996) ("Local Competition Order") (subsequent history omitted).

[6] Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 491 (2002).

[7] See 47 U.S.C. § 153(29) (defining a "network element" as "a facility or equipment used in the provision of a telecommunications service").

[8] The statute prescribes a different unbundling standard for so-called "proprietary" network elements, which are not at issue in this case. See 47 U.S.C. § 251(d)(2)(A).

need for a new market entrant to build a duplicative and costly stand-alone network.

Finally, section 251(c)(4) gives potential competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users. 47 U.S.C. § 251(c)(4).[9]

Section 252 establishes the procedures that incumbent LECs and their competitors must follow when implementing the substantive rights and obligations of section 251(c). 47 U.S.C. § 252. Section 252 provides that the parties enter into negotiated contracts — known as interconnection agreements — for interconnection, resale of services, or network elements, followed by expeditious arbitration by state public utility commissions of any unresolved issues. Id.[10] Section 252(c)(1) requires state arbitrators to conform their disposition of "open issues" in interconnection agreements to "the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1). All interconnection agreements approved or arbitrated by state commissions are subject to review in federal district court to determine whether they "meet[] the requirements" of sections 251 and 252. 47 U.S.C. § 252(e)(4), (6).[11]

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[9] See Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs., 323 F.3d 348 (6th Cir. 2003); Mich. Bell Tel. Co. v. Strand, 305 F.3d 580 (6th Cir. 2002). Section 251(c)(4) is not at issue in this case.

[10] Congress directed the FCC to resolve such disputes whenever a state commission opts out of its statutory role. See 47 U.S.C. § 252(e)(5).

[11] See Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc., 339 F.3d 428, 431 (6th Cir. 2003).

Section 252(d)(1) requires the rates both for interconnection under section 251(c)(2) and for UNEs under section 251(c)(3) to be cost-based. 47 U.S.C. § 252(d)(1). The FCC's rules require those cost-based rates to be calculated under a Total Element Long-Run Incremental Cost ("TELRIC") methodology. See 47 C.F.R. § 51.505(b). The Supreme Court has upheld the TELRIC methodology as lawful and consistent with the statute.[12]

2. Under authority delegated by Congress, see 47 U.S.C. § 251(d)(2), the FCC has adopted rules establishing which network elements should be unbundled and made available to competitive carriers pursuant to section 251(c)(3). See 47 C.F.R. § 51.319. In its 2005 Triennial Review Remand Order ("TRRO")[13] revisiting the list of mandatory UNEs, the FCC considered whether so-called "entrance facilities" – the facilities at issue in this case – must be offered on an unbundled basis under section 251(c)(3). Entrance facilities are "the transmission facilities that connect competitive LEC networks with incumbent LEC networks."[14] Entrance facilities can be used for multiple purposes. For example, entrance facilities may be used simply to link two carriers' networks for the purpose of exchanging traffic (i.e., interconnection). A competitive carrier may

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[12] Verizon, 535 U.S. 467.

[13] Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC Rcd 2533, 26109-10 (¶ 136) (2005) ("TRRO") (subsequent history omitted).

[14] TRRO, 20 FCC Rcd at 2609 (¶ 136). See Ill. Bell Tel. Co. v. Box, 526 F.3d 1069, 1071 (7th Cir. 2008) (describing "entrance facilities" as "connection[s] between a switch maintained by an ILEC and a switch maintained by a CLEC.").

also use entrance facilities, however, to carry its own customers' traffic from an incumbent LEC's central office to the competitive carrier's switch or other equipment, a practice known as "backhauling."[15]

The FCC in the TRRO determined that competitive carriers are not impaired in their ability to provide service without access to entrance facilities as unbundled network elements.[16] Accordingly, the FCC adopted an implementing rule specifying that an incumbent LEC is not obligated to provide a competitive carrier with access to entrance facilities on an unbundled basis at cost-based (i.e., TELRIC) rates under section 251(c)(3). 47 C.F.R. § 51.319(e)(2)(i). As it made this change, however, the FCC emphasized that its non-impairment finding "with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)."[17] The FCC explained that "competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network."[18]

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[15] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17203, 17206-07 (¶¶ 365, 370) (2003) ("TRO") (subsequent history omitted). See Southwestern Bell Tel. L.P. v. Mo. Pub. Serv. Com'n, 530 F.3d 676, 681-83 (8th Cir. 2008), cert. denied, 129 S.Ct. 971 (2009).

[16] TRRO, 20 FCC Rcd at 2611 (¶¶ 137-39).

[17] Id. at 2611 (¶ 140).

[18] Id.

II. Background of This Proceeding

1. Shortly after the FCC issued the TRRO, AT&T Michigan[19] notified competitive LECs that it would modify its interconnection agreements so as to eliminate entirely its obligation to provide entrance facilities at cost-based, TELRIC rates. A number of competitive LECs asked the MPSC to prohibit this modification on the ground that it improperly abrogated their right to cost-based interconnection under section 251(c)(2).[20] On September 20, 2005, the MPSC arbitrated the dispute in favor of the competitive LECs.[21] Based upon the FCC's finding in paragraph 140 in the TRRO, the MPSC determined that "[competitive] LECs still have a right to entrance facilities to the extent required for interconnection pursuant to [s]ection 251(c)(2)."[22] The MPSC determined that AT&T Michigan's proposal "would eliminate any responsibility to provide those facilities at TELRIC rates, contrary to the FCC's specific findings."[23]

2. On April 28, 2006, AT&T Michigan filed a complaint in federal district court challenging the MPSC's ruling,[24] and on September 26, 2007, the district

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[19] At the time the dispute arose, AT&T Michigan was doing business as SBC Michigan Bell. To avoid confusion, the FCC throughout this brief refers to this company as AT&T Michigan.

[20] Record Entry No. 1, MPSC Order, Case No. U-14447 at 11-13 (Sept. 20, 2005) (J.A. 40-42).

[21] Id. at 13 (J.A. 42).

[22] Id. (citing TRRO, 20 FCC Rcd at 2611 (¶ 140)) (J.A. 42).

[23] Id.

[24] Record Entry No. 1, Complaint for Declaratory, Injunctive, and Other Relief of Plaintiff at 19, filed by AT&T Michigan (Apr. 28, 2006) (J.A. 26).

court set it aside.[25] The district court believed that the TRRO broadly "provides that entrance facilities need not be provided by incumbent carriers to competing carriers on an unbundled basis."[26] The district court determined that the MPSC decision was inconsistent with that rule. The court acknowledged that the FCC in paragraph 140 of the TRRO had said that its unbundling determination did not alter incumbent LECs' ongoing interconnection obligation to provide entrance facilities at cost-based rates but asserted that "[i]t is not reasonable to interpret an explanatory comment, such as the one found in ¶ 140 of the TRRO, in a manner that undermines the plain meaning of the rule."[27]

3. The MPSC and several competitive LECs appealed the district court's decision to this Court. This Court held argument on December 10, 2008. On the day of oral argument, the Court by letter invited the FCC to file a brief setting forth its views on the cases and how they should be resolved.[28]

ARGUMENT:

THE DISTRICT COURT ERRED IN HOLDING THAT THE RULE REMOVING AN INCUMBENT LEC'S DUTY TO PROVIDE ENTRANCE FACILITIES AS UNES ALSO RELIEVES AN INCUMBENT LEC OF ITS SEPARATE DUTY TO PROVIDE INTERCONNECTION.

At the outset, it is important to emphasize that incumbent LECs have two independent duties under section 251(c) that are relevant to this case. First, under

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[25] Record Entry No. 32, District Court Order (Sept. 26, 2007) (J.A. 292-314).

[26] Id. at 14 (J.A. 305).

[27] Id.

[28] Green Letter, supra, note 1.

the "unbundling" duty of section 251(c)(3), if the FCC makes an "impairment" finding, an incumbent LEC must offer a particular element of its network to a competitor at cost-based rates. Separately, under the "interconnection" duty of section 251(c)(2), an incumbent LEC must agree to interconnect its network with a competitor's network at cost-based rates at any technically feasible point of the competitor's choosing. See AT&T, 525 U.S. at 371 (specifying the separate ways in which section 251(c) obligates incumbent LECs to provide access to their networks).

The question presented by this case is whether the FCC's decision to remove the unbundling duty automatically relieves an incumbent LEC of its separate duty to provide interconnection to competitive carriers with regard to a type of facility that has multiple uses, one of which was addressed in the unbundling decision. As shown below, the FCC answered that question in the negative in the TRRO, and that determination is not subject to collateral attack in this proceeding. Even if the FCC's statement on-point in the TRRO were reviewable here, it should still control the outcome because (1) the FCC's considered construction of the scope of its own unbundling rule is clearly correct; and (2) even if there were some reason for doubt, its reasonable interpretation of section 251(c)(2) should be accorded deference by the Court.

I. THE TRRO IS NOT SUBJECT TO COLLATERAL ATTACK IN THIS CASE.

The FCC in paragraph 140 of the TRRO declared explicitly that its rule relieving incumbent LECs of the duty to unbundle entrance facilities and its non-

impairment finding "do[] not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)."[29] The FCC went on to state categorically that "competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network."[30] The MPSC was correct in accepting the agency's authoritative interpretation of the scope of the unbundling rule and its specification of the incumbent LECs' section 251(c)(2) obligations.[31] The district court purported to reject the FCC's ruling,[32] but it had no authority to do so.

Challenges to orders of the FCC are governed by section 402 of the Communications Act of 1934, which states that "any proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] under this chapter . . . shall be brought as provided by and in the manner prescribed in Chapter 158 of title 28, United States Code." 47 U.S.C. § 402(a) (emphasis added). Chapter 158, which is known as the Hobbs Act and is codified at 28 U.S.C. §§ 2341 et seq., provides in relevant part that "[t]he court of appeals ... has exclusive jurisdiction to enjoin, set

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[29] TRRO, 20 FCC Rcd at 2611 (¶ 140).

[30] Id.

[31] Record Entry No. 1, MPSC Order at 13 (J.A. 42).

[32] Record Entry No. 32, District Court Order at 14 (Sept. 26, 2007) (J.A. 305). The FCC's statement in paragraph 140 was not a mere "explanatory comment" without legal force, as the district court apparently believed. Instead, it constituted an authoritative interpretation of the meaning of the FCC's unbundling rules and a description of the incumbent LECs' interconnection obligations with respect to these facilities.

aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. § 402(a)]." 28 U.S.C. § 2342(1). The statute specifies that "any party aggrieved by the [FCC's] final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344 (emphasis added).

The Communications Act and the Hobbs Act thus specify the precise procedure for obtaining judicial review of FCC orders and vest exclusive jurisdiction in the courts of appeals considering petitions for review. "'[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute.'"[33] The "appropriate procedure for obtaining judicial review of the agency's disposition of [regulatory] issues [is] to appeal to the Court of Appeals as provided by statute."[34] This general rule applies when, as here, a district court is reviewing a state public utility commission

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[33] Browning v. Levy, 283 F.3d 761, 778 (6th Cir. 2002) (quoting Telecomms. Research and Action Ctr. v. FCC, 750 F.2d 70, 77 (D.C. Cir. 1984)). See Thiokol Corp. v. Dep't of Treasury, State of Mich., Revenue Div., 987 F.2d 376, 379 (6th Cir. 1993); Greater Detroit Res. Recovery Authority v. EPA, 916 F.2d 317, 321 (6th Cir. 1990).

[34] FCC v. ITT World Commc'ns, Inc., 466 U.S. 463, 468 (1984) (emphasis added).

decision under section 252(e)(6). In such cases, the district court is obligated to accept the FCC's previous resolution of any contested question.[35]

If AT&T Michigan wanted to challenge the FCC's authoritative interpretation of its own unbundling regulations in the TRRO, its recourse was to raise this claim in a petition for review of that order within 60 days after its entry.[36] In fact, AT&T's predecessor SBC (and many others) did challenge the TRRO in this manner, but it failed to assert this claim.[37] The FCC's ruling in paragraph 140 of the TRRO thus has become final and is not subject to judicial review in this proceeding.

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[35] See Qwest Corp. v. Pub. Utils. Comm'n of Colorado, 479 F.3d 1184, 1192 n.6 (10th Cir. 2007) ("The parties have not contested the validity of this FCC interpretation, nor could they. See 28 U.S.C. § 2342."); see also Vonage Holdings Corp. v. Minn. PUC, 394 F.3d 568, 569 (8th Cir. 2004) ("[n]o collateral attacks on the FCC order are permitted" in private party litigation); Wilson v. A.H. Belo Corp., 87 F.3d 393, 396-397 (9th Cir. 1996); Telecomms. Research & Action Ctr., 750 F.2d at 75; George Kabeller, Inc. v. Busey, 999 F.2d 1417, 1421-22 (11th Cir. 1993); Bywater Neighborhood Ass'n v. Tricarico, 879 F.2d 165, 167 (5th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); City of Peoria v. Gen. Elec. Cablevision Corp., 690 F.2d 116, 119 (7th Cir. 1982) (describing challenge to FCC rule in private party district court litigation as having been "brought in the wrong court at the wrong time against the wrong party").

[36] To the extent AT&T believed the FCC's statement in paragraph 140 was not clear, it could have filed a petition for reconsideration asking the agency to clarify it.

[37] See Covad Commc'ns, Inc. v. FCC, 450 F.3d 528 (D.C. Cir. 2006).

II. THE COURT IN ANY EVENT SHOULD DEFER TO THE FCC'S REASONABLE INTERPRETATION OF THE UNBUNDLING RULE AND SECTION 251(c)(2).

A. The FCC's Construction of the Scope of Its Own Unbundling Rule Is Controlling.

Under well-established law, an "agency's reading of its own rule is entitled to substantial deference."[38] Indeed, an agency's construction of its own rule is "'controlling'" when, as in this case, "the interpretation reflect[s] a 'fair and considered judgment' and [is] not 'plainly erroneous or inconsistent with the regulation.'"[39] Thus, even assuming, arguendo, that the district court were not precluded from reviewing the FCC's definitive determination in its TRRO as to the scope of its unbundling rule, the district court should have deferred to it.[40]

Section 251(c)(2) and 251(c)(3) are independent statutory obligations that serve different purposes. The cost-based UNEs that incumbent LECs must provide under section 251(c)(3) are designed to enable competitive carriers to assemble their own telecommunications networks by combining elements from various sources (including the incumbent LECs), whereas the interconnection that the incumbent LEC must provide under section 251(c)(2) simply enables a competitive carrier to connect its network with the network of the incumbent LEC to exchange

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[38] Riegel v. Medtronic, Inc., 128 S.Ct. 999, 1010 (2008).

[39] Huffman v. C.I.R., 518 F.3d 357, 367-68 (6th Cir. 2008) (quoting Auer v. Robbins, 519 U.S. 452, 461-62 (1997)).

[40] See MCI Telecommns. Corp. v. Ohio Bell Tel. Co., 376 F.3d 539, 550 (6th Cir. 2004) (according deference to the agency's own construction of an FCC rule).

traffic and complete calls.[41] The FCC thus reasonably determined in the TRRO both that competitive LECs are not impaired without access to entrance facilities (thus relieving them of the obligation to provide those facilities to competitive carriers as UNEs under section 251(c)(3)) and that this determination had no effect on the incumbent LECs' independent obligation to provide interconnection under section 251(c)(2).[42] Because that regulatory interpretation "reflect[s] a 'fair and considered judgment' and [is] not 'plainly erroneous or inconsistent'" with the unbundling rule, that construction is "'controlling.'"[43]

The district court erroneously found that the agency's interpretation of the scope of its unbundling regulation "undermines the plain meaning of the rule."[44] The rule referenced by the court (which states that incumbent LECs need not provide entrance facilities as unbundled network elements) is codified in a section addressing an incumbent LEC's duties "in accordance with section 251(c)(3) of the Act." 47 C.F.R. § 51.319(e). Nothing in that rule suggests that it applies also to an incumbent LEC's separate obligation (embodied in a different rule, 47 C.F.R.

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[41] See Local Competition Order, 11 FCC Rcd at 15636-37 (¶ 270) ("Subsection (c)(3), therefore, allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection.").

[42] See Southwestern Bell, 530 F.3d at 683-84 (holding that FCC rule eliminating the requirement that incumbent LECs provide entrance facilities as UNEs under section 251(c)(3) does not affect the incumbent LECs' continuing duty to offer such facilities at cost-based rates when used for interconnection facilities under section 251(c)(2)); Ill. Bell, 526 F.3d at 1071-72 (same).

[43] Huffman, 518 F.3d at 367-68 (quoting Auer, 519 U.S. at 461-62).

[44] Record Entry No. 32, District Court Order at 14 (J.A. 305).

§ 51.305) to provide interconnection under section 251(c)(2). The FCC's statement in paragraph 140 recognized something that the district court appears to have overlooked: these are two separate statutory obligations that are not necessarily co-extensive.

Nor is the FCC's interpretation inconsistent with the non-impairment determination set forth in the TRRO. Section 251(d)(2) affirmatively required the FCC to make an impairment determination in analyzing whether entrance facilities (or other network elements) should be classified as UNEs that an incumbent LEC must provide at cost-based rates under section 251(c)(3). See 47 U.S.C. § 251(d)(2). In contrast, the statute does not direct the FCC to analyze impairment in determining an incumbent LEC's interconnection duty under section 251(c)(2). So a finding of impairment or non-impairment under section 251(c)(3) is not relevant to the separate question of whether there is an ongoing interconnection obligation under section 251(c)(2).

As a factual matter, AT&T Michigan is mistaken in arguing that the MPSC ruling "circumvents [the FCC's] rule by re-imposing the repealed requirement under a different provision of the 1996 Act."[45] The FCC recognized that competitive LECs may use particular transmission facilities both as a means of interconnection, i.e., a link for the mutual exchange of traffic between an incumbent LEC and a competitive LEC, and to backhaul traffic, i.e., to carry its own customers' traffic from an incumbent LEC central office to the competitive

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[45] Br. of AT&T Michigan at 17.

carrier's switch or other equipment.[46] In its 1996 Local Competition Order, the FCC interpreted section 251(c)(2) to require an incumbent LEC to provide interconnection facilities at cost-based rates.[47] Both the TRO and TRRO made clear that those section 251(c)(2) interconnection obligations continue despite the elimination of section 251(c)(3) unbundling obligations for entrance facilities.[48]

A competitor thus continues to have cost-based access to incumbent interconnection facilities in order to exchange traffic between its customers and those of the incumbent LEC. The incumbent LEC, however, no longer has to provide such facilities at cost-based rates to a competitive carrier that procures the facility to back-haul traffic between the competitor's own customers.[49] The decision to no longer require unbundled access to entrance facilities under section 251(c)(3) thus has a material impact notwithstanding the remaining, narrower obligation to provide those facilities for purposes of interconnection.

B. The Court Should Defer to the FCC's Determination that an Incumbent LEC's Duty to Provide Interconnection under Section 251(c)(2) May Require the Carrier to Offer Cost-based Interconnection Facilities.

Unless Congress unambiguously has expressed an intent on the precise question at issue, a court must give deference to the expert agency's construction

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[46] TRO, 18 FCC Rcd at 17203 (¶ 365).

[47] See Local Competition Order, 11 FCC Rcd at 15605, 15781 (¶¶ 198, 202, 533).

[48] See TRO, 18 FCC Rcd at 17203-04 (¶ 366); TRRO, 20 FCC Rcd at 2611 (¶ 140).

[49] See Southwestern Bell, 530 F.3d at 681; Ill. Bell, 526 F.3d at 1071.

of a statute that it administers.[50] Congress did not speak directly to whether an incumbent LEC's duty to provide interconnection under section 251(c)(2) could include the provision of entrance facilities used to link its network with those of a competitive carrier. By leaving the term "interconnection" undefined in section 251(c)(2) and not otherwise delineating its meaning, Congress delegated authority to the FCC to interpret the scope of an incumbent LEC's interconnection obligation in a permissible fashion.[51]

As noted above, section 251(c)(2) requires incumbent LECs "to provide * * * interconnection" to a requesting competitive LEC "at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2). AT&T Michigan misreads that language as imposing only a passive duty on the incumbent LEC to "to allow the CLEC to connect 'with' the incumbent LEC's network to 'accommodate interconnection,'"[52] but that is plainly not what it says, or how the FCC has interpreted it. Since the adoption of the 1996 Act, the FCC has consistently found that an incumbent LEC, to fulfill that duty to interconnect, may be required to provide facilities that are used for the physical linking of the two networks. For example, in its Local Competition Order, the FCC stated that the right of a competitive LEC to obtain interconnection at any technically feasible

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[50] Chevron USA Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984).

[51] Chevron, 467 U.S. at 843; Nat'l Cable & Telecomms. Ass'n v. Brand X Internet, 545 U.S. 967, 980 (2005). See 47 U.S.C. § 251(d)(1) (directing the FCC to establish regulations to implement section 251); AT&T, 525 U.S. at 397 (Congress intended the FCC to resolve the ambiguities in the 1996 Act).

[52] AT&T Michigan Br. at 29.

point may require "novel use of," and "modifications to" an incumbent LEC's facilities, pointing out that the competitive LEC would pay the cost, "including a reasonable profit."[53] Indeed, the Local Competition Order and the implementing rule it adopted require the incumbent LEC to provide interconnection not just at any feasible point, but by "any feasible method" of interconnection, such as a "meet point arrangement" by which the incumbent LEC must build out its facilities to a designated "meet point."[54] As the FCC explained: "Congress intended to obligate the incumbent to accommodate the new entrant's network architecture by requiring the incumbent to provide interconnection "for the facilities and equipment" of the new entrant.[55]

In its TRO, the FCC reiterated its view that there are "facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection."[56] Thus, the FCC stated, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent LEC's] network,' section 251(c)(2) of the Act expressly provides for this."[57] See also 47 C.F.R. § 51.305(f) (FCC rule implementing section 251(c)(2) requires, where feasible, an

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[53] Local Competition Order, 11 FCC Rcd at 15605 (¶¶ 198, 202).

[54] Id. at 15781 (¶ 553); 47 C.F.R. § 51.321(a), (b).

[55] Id. at 15605 (¶ 202).

[56] TRO, 18 FCC Rcd at 17203 (¶ 365).

[57] Id. at 17204 (¶ 366).

incumbent LEC to provide two-way trunking facilities to a requesting competitive LEC).[58]

The FCC in its discussion of entrance facilities in its TRRO made clear that it was not altering the rights and duties under section 251(c)(2) with respect to facilities that are used for interconnection.[59] Section 251(c)(2) entitles competitive LECs "access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network."[60] Although the FCC did not specifically define what it meant by the term "interconnection facilities," the MPSC's interpretation of that term to include entrance facilities when used for interconnection is fully consistent with the FCC's finding in the TRRO. The district court thus was wrong to overturn the MPSC's decision on this point.

AT&T Michigan and its supporting amici argue that the plain language of section 251(c)(2) prohibits the FCC from interpreting that subsection to require an incumbent LEC to provide facilities used for the physical linking of its network with the network of a competitive carrier. Because an incumbent LEC must provide interconnection with its network "for the facilities and equipment of any requesting telecommunications carrier," 47 U.S.C. § 251(c)(2), these carriers claim

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[58] See also Application by SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18391 (¶ 80) (2000) ("Interconnection trunking . . . and meet-point arrangements are among the technically feasible methods of interconnection.").

[59] TRRO, 20 FCC Rcd at 2611 (¶ 140).

[60] Id.

that an incumbent LEC's duty to provide interconnection cannot reasonably be read to encompass a requirement to provide facilities necessary to link its network with the competitive carrier. That argument is unavailing for several reasons.

First, the statutory interpretation advanced by AT&T Michigan and the supporting amici is flatly inconsistent with prior FCC interpretations (described above) regarding the scope of the interconnection obligation and provision of facilities to achieve such interconnection, which were expressly left unaltered in the ruling issued by the FCC in the TRRO. As demonstrated at pages 10-13, the validity of the FCC's statutory interpretation in the TRRO (and the other prior interconnection and unbundling decisions) is not subject to collateral challenge in this case. The Court therefore should not engage in a review of the FCC's determinations nor entertain AT&T Michigan's contrary interpretation.

If the Court nonetheless does inquire into the scope of interconnection under section 251(c)(2), it should defer to the FCC's reasonable and consistent construction and reject AT&T Michigan's flawed interpretation. The language relied on by AT&T Michigan and the supporting amici states only that the interconnection that an incumbent LEC must provide under section 251(c)(2) — whatever that may be — is "for the facilities and equipment of" the competitive carrier. That language does not delineate what an incumbent LEC must do in order to provide interconnection "for the facilities and equipment of" the competitive carrier, let alone establish unambiguously that an incumbent LEC's duty to provide interconnection does not include the provision of facilities that are necessary to achieve that interconnection.

Moreover, the "plain language" construction advanced by AT&T Michigan and its supporting amici is inconsistent with established administrative and judicial precedent. As noted above, the FCC consistently has stated that an incumbent LEC, in fulfilling its duty to provide interconnection under section 251(c)(2), may be required to provide facilities to effectuate interconnection, and that those obligations continue notwithstanding the FCC's elimination of entrance facilities as an unbundled network element under section 251(c)(3).[61] And both the Seventh and Eighth Circuits have ruled expressly that section 251(c)(2) entitles competitive carriers access to entrance facilities at cost-based rates for purposes of interconnecting with the incumbent LEC's network.[62]

Indeed, the agency charged with administering the Communications Act and every single federal appellate judge addressing the issue has construed section 251(c)(2) directly contrary to AT&T Michigan's alleged "plain meaning" construction. Given this, and especially in light of the deference courts with jurisdiction afford the FCC in construing the Communications Act[63] and its regulations,[64] the Court should reject AT&T Michigan's flawed interpretation.

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[61] TRRO, 20 FCC Rcd at 2611 (¶ 140).

[62] Southwestern Bell, 530 F.3d 676; Ill. Bell, 526 F.3d 1069.

[63] Chevron, 467 U.S. at 844.

[64] Riegel, 128 S.Ct. at 1010.

CONCLUSION

The Court should reverse.

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April 3, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN BELL TELEPHONE COMPANY D/B/A AT&T MICHIGAN, PLAINTIFF-APPELLEE,	)	
V.	)	NOS. 07-2469 & 07-2473
J. PETER LARK, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE MICHIGAN PUBLIC SERVICE COMMISSION AND NOT AS AN INDIVIDUAL; ET AL. DEFENDANTS-APPELLANTS.	)	

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April 3, 2009

07-2469

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michigan Bell Telephone Company, Petitioner,
v.
Covad, et al.

Certificate Of Service

I, Laurel R. Bergold, hereby certify that on this 3rd day of April, 2009, I electronically filed the foregoing "Amicus Curiae Brief of the Federal Communications Commission" with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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BRIEF FOR AMICI CURIAE FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 07-2469 & 07-2473

MICHIGAN BELL TELEPHONE COMPANY D/B/A/ AT&T MICHIGAN,
PLAINTIFF-APPELLEE,

V.

COVAD COMMUNICATIONS COMPANY; TALK AMERICA INC.;
XO COMMUNICATIONS SERVICES, INC.,
INTERVENORS-DEFENDANTS – APPELLANTS,

MCLEOD USA TELECOMMUNICATIONS SERVICES, INC.; TDS METROCOM, LLC;
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 07-2469 & 07-2473

MICHIGAN BELL TELEPHONE COMPANY D/B/A/ AT&T MICHIGAN,

PLAINTIFF-APPELLEE,

V.

COVAD COMMUNICATIONS COMPANY; TALK AMERICA INC.;
XO COMMUNICATIONS SERVICES, INC.,

INTERVENORS-DEFENDANTS –
APPELLANTS,

MCLEOD USA TELECOMMUNICATIONS SERVICES, INC.; TDS METROCOM, LLC,

INTERVENORS,

J. PETER LARK, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE MICHIGAN PUBLIC SERVICE COMMISSION AND NOT AS AN INDIVIDUAL; LAURA CHAPPELLE, IN HER OFFICIAL CAPACITY AS COMMISSIONER AND NOT AS AN INDIVIDUAL; MONICA MARTINEZ, IN HER OFFICIAL CAPACITY AS COMMISSIONER AND NOT AS AN INDIVIDUAL,

DEFENDANTS-APPELLANTS.

BRIEF FOR AMICI CURIAE FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

STATEMENT OF INTEREST

Pursuant to this Court's invitation,[1] the Federal Communications Commission ("FCC") respectfully files this brief as amicus curiae. The FCC has primary responsibility for implementing and enforcing the Communications Act of 1934, 47 U.S.C. § 151, et seq. This case involves this Court's review of a district court's interpretation of section 251(c) of that Act and the FCC orders and rules construing that statutory provision. The FCC has an interest in ensuring that the Act, its rules, and its precedents are correctly interpreted.

In addition, the FCC believes that the district court (in contrast to two circuit courts previously confronting the same issue) improperly disregarded the FCC's authoritative construction of its own rules and authorizing statute. The FCC has an interest in defending its regulatory judgments and in ensuring that they are challenged only in courts with jurisdiction to do so.

QUESTION PRESENTED

Whether an FCC rule relieving incumbent local exchange carriers ("LECs") of their duty under section 251(c)(3) of the Communications Act to make entrance facilities available to competitive carriers as unbundled network elements bars the Michigan Public Service Commission ("MPSC") from construing a different provision of the Act, section 251(c)(2), to require AT&T Michigan, an incumbent LEC, to provide its competitors with similar facilities at cost-based rates when they are used solely for interconnection.

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[1] Letter from Leonard Green, Clerk, U.S. Court of Appeals for the Sixth Circuit to Matthew Berry, General Counsel, FCC (Dec. 10, 2008) ("Green Letter").

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

1. The Telecommunications Act of 1996,[2] which is part of the Communications Act, is designed to "'end[] the longstanding regime of state-sanctioned monopolies' in the local telephone markets"[3] and "to open all telecommunications markets to competition."[4] Congress recognized that no prospective entrant could hope to compete with the incumbent LECs in providing consumers with telephone exchange service and exchange access service by replicating the existing local network infrastructure. Section 251(c), added by the 1996 Act, therefore entitles competitive carriers to enter local telephone markets by utilizing the incumbent LECs' own networks in three distinct but overlapping ways. See 47 U.S.C. § 251(c)(2)-(4).

First, section 251(c)(2) requires incumbent LECs "to provide * * * interconnection" between their networks and those of other carriers, and to do so at "just, reasonable, and nondiscriminatory" rates and terms. 47 U.S.C. § 251(c)(2). See also 47 C.F.R. § 51.305(a). In simple terms, interconnection in this context means linking the physical networks of two carriers in order to exchange traffic

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[2] Pub. Law No. 104-104, 110 Stat. 56 ("1996 Act").

[3] BellSouth Telecomms., Inc. v. Southeast Tel., Inc., 462 F.3d 650, 652 (6th Cir. 2006) (quoting AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999)).

[4] H.R. Rep. No. 104-458, at 1 (1996) (Conf. Rep.). See AT&T, 525 U.S. at 371; Quick Commc'ns, Inc. v. Mich. Bell Tel. Co., 515 F.3d 581, 583 (6th Cir. 2008).

and complete calls between end user customers of the two carriers.[5] Section 251(c)(2) "obligates the incumbent [LEC] to 'interconnect' the competitor's facilities to its own network to whatever extent is necessary to allow the competitor's facilities to operate."[6]

Second, section 251(c)(3) requires all incumbent LECs to provide their competitors with non-discriminatory access to certain elements of the incumbents' networks on an unbundled basis. 47 U.S.C. § 251(c)(3).[7] In determining which non-proprietary network elements ("UNEs") the incumbent LECs must make available to competitive carriers on an unbundled basis, the FCC must consider whether the failure to provide a requesting competitor access to such elements would "impair" the competitor's ability to provision service. 47 U.S.C. § 251(d)(2)(B).[8] The unbundling obligation enables a competitor to enter the local telephone market by assembling components of a network from various sources – some leased from the incumbent LEC, some perhaps self-provisioned, and some possibly obtained from a third party. This facilitates competition by obviating the

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[5] 47 C.F.R. § 51.5 (defining the term "interconnection" to refer to the "physical linking of two networks for the mutual exchange of traffic."). See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15590 (¶ 176) (1996) ("Local Competition Order") (subsequent history omitted).

[6] Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 491 (2002).

[7] See 47 U.S.C. § 153(29) (defining a "network element" as "a facility or equipment used in the provision of a telecommunications service").

[8] The statute prescribes a different unbundling standard for so-called "proprietary" network elements, which are not at issue in this case. See 47 U.S.C. § 251(d)(2)(A).

need for a new market entrant to build a duplicative and costly stand-alone network.

Finally, section 251(c)(4) gives potential competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users. 47 U.S.C. § 251(c)(4).[9]

Section 252 establishes the procedures that incumbent LECs and their competitors must follow when implementing the substantive rights and obligations of section 251(c). 47 U.S.C. § 252. Section 252 provides that the parties enter into negotiated contracts — known as interconnection agreements — for interconnection, resale of services, or network elements, followed by expeditious arbitration by state public utility commissions of any unresolved issues. Id.[10] Section 252(c)(1) requires state arbitrators to conform their disposition of "open issues" in interconnection agreements to "the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1). All interconnection agreements approved or arbitrated by state commissions are subject to review in federal district court to determine whether they "meet[] the requirements" of sections 251 and 252. 47 U.S.C. § 252(e)(4), (6).[11]

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[9] See Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs., 323 F.3d 348 (6th Cir. 2003); Mich. Bell Tel. Co. v. Strand, 305 F.3d 580 (6th Cir. 2002). Section 251(c)(4) is not at issue in this case.

[10] Congress directed the FCC to resolve such disputes whenever a state commission opts out of its statutory role. See 47 U.S.C. § 252(e)(5).

[11] See Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc., 339 F.3d 428, 431 (6th Cir. 2003).

Section 252(d)(1) requires the rates both for interconnection under section 251(c)(2) and for UNEs under section 251(c)(3) to be cost-based. 47 U.S.C. § 252(d)(1). The FCC's rules require those cost-based rates to be calculated under a Total Element Long-Run Incremental Cost ("TELRIC") methodology. See 47 C.F.R. § 51.505(b). The Supreme Court has upheld the TELRIC methodology as lawful and consistent with the statute.[12]

2. Under authority delegated by Congress, see 47 U.S.C. § 251(d)(2), the FCC has adopted rules establishing which network elements should be unbundled and made available to competitive carriers pursuant to section 251(c)(3). See 47 C.F.R. § 51.319. In its 2005 Triennial Review Remand Order ("TRRO")[13] revisiting the list of mandatory UNEs, the FCC considered whether so-called "entrance facilities" – the facilities at issue in this case – must be offered on an unbundled basis under section 251(c)(3). Entrance facilities are "the transmission facilities that connect competitive LEC networks with incumbent LEC networks."[14] Entrance facilities can be used for multiple purposes. For example, entrance facilities may be used simply to link two carriers' networks for the purpose of exchanging traffic (i.e., interconnection). A competitive carrier may

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[12] Verizon, 535 U.S. 467.

[13] Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC Rcd 2533, 26109-10 (¶ 136) (2005) ("TRRO") (subsequent history omitted).

[14] TRRO, 20 FCC Rcd at 2609 (¶ 136). See Ill. Bell Tel. Co. v. Box, 526 F.3d 1069, 1071 (7th Cir. 2008) (describing "entrance facilities" as "connection[s] between a switch maintained by an ILEC and a switch maintained by a CLEC.").

also use entrance facilities, however, to carry its own customers' traffic from an incumbent LEC's central office to the competitive carrier's switch or other equipment, a practice known as "backhauling."[15]

The FCC in the TRRO determined that competitive carriers are not impaired in their ability to provide service without access to entrance facilities as unbundled network elements.[16] Accordingly, the FCC adopted an implementing rule specifying that an incumbent LEC is not obligated to provide a competitive carrier with access to entrance facilities on an unbundled basis at cost-based (i.e., TELRIC) rates under section 251(c)(3). 47 C.F.R. § 51.319(e)(2)(i). As it made this change, however, the FCC emphasized that its non-impairment finding "with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)."[17] The FCC explained that "competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network."[18]

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[15] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17203, 17206-07 (¶¶ 365, 370) (2003) ("TRO") (subsequent history omitted). See Southwestern Bell Tel. L.P. v. Mo. Pub. Serv. Com'n, 530 F.3d 676, 681-83 (8th Cir. 2008), cert. denied, 129 S.Ct. 971 (2009).

[16] TRRO, 20 FCC Rcd at 2611 (¶¶ 137-39).

[17] Id. at 2611 (¶ 140).

[18] Id.

II. Background of This Proceeding

1. Shortly after the FCC issued the TRRO, AT&T Michigan[19] notified competitive LECs that it would modify its interconnection agreements so as to eliminate entirely its obligation to provide entrance facilities at cost-based, TELRIC rates. A number of competitive LECs asked the MPSC to prohibit this modification on the ground that it improperly abrogated their right to cost-based interconnection under section 251(c)(2).[20] On September 20, 2005, the MPSC arbitrated the dispute in favor of the competitive LECs.[21] Based upon the FCC's finding in paragraph 140 in the TRRO, the MPSC determined that "[competitive] LECs still have a right to entrance facilities to the extent required for interconnection pursuant to [s]ection 251(c)(2)."[22] The MPSC determined that AT&T Michigan's proposal "would eliminate any responsibility to provide those facilities at TELRIC rates, contrary to the FCC's specific findings."[23]

2. On April 28, 2006, AT&T Michigan filed a complaint in federal district court challenging the MPSC's ruling,[24] and on September 26, 2007, the district

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[19] At the time the dispute arose, AT&T Michigan was doing business as SBC Michigan Bell. To avoid confusion, the FCC throughout this brief refers to this company as AT&T Michigan.

[20] Record Entry No. 1, MPSC Order, Case No. U-14447 at 11-13 (Sept. 20, 2005) (J.A. 40-42).

[21] Id. at 13 (J.A. 42).

[22] Id. (citing TRRO, 20 FCC Rcd at 2611 (¶ 140)) (J.A. 42).

[23] Id.

[24] Record Entry No. 1, Complaint for Declaratory, Injunctive, and Other Relief of Plaintiff at 19, filed by AT&T Michigan (Apr. 28, 2006) (J.A. 26).

court set it aside.[25] The district court believed that the TRRO broadly "provides that entrance facilities need not be provided by incumbent carriers to competing carriers on an unbundled basis."[26] The district court determined that the MPSC decision was inconsistent with that rule. The court acknowledged that the FCC in paragraph 140 of the TRRO had said that its unbundling determination did not alter incumbent LECs' ongoing interconnection obligation to provide entrance facilities at cost-based rates but asserted that "[i]t is not reasonable to interpret an explanatory comment, such as the one found in ¶ 140 of the TRRO, in a manner that undermines the plain meaning of the rule."[27]

3. The MPSC and several competitive LECs appealed the district court's decision to this Court. This Court held argument on December 10, 2008. On the day of oral argument, the Court by letter invited the FCC to file a brief setting forth its views on the cases and how they should be resolved.[28]

ARGUMENT:

THE DISTRICT COURT ERRED IN HOLDING THAT THE RULE REMOVING AN INCUMBENT LEC'S DUTY TO PROVIDE ENTRANCE FACILITIES AS UNES ALSO RELIEVES AN INCUMBENT LEC OF ITS SEPARATE DUTY TO PROVIDE INTERCONNECTION.

At the outset, it is important to emphasize that incumbent LECs have two independent duties under section 251(c) that are relevant to this case. First, under

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[25] Record Entry No. 32, District Court Order (Sept. 26, 2007) (J.A. 292-314).

[26] Id. at 14 (J.A. 305).

[27] Id.

[28] Green Letter, supra, note 1.

the "unbundling" duty of section 251(c)(3), if the FCC makes an "impairment" finding, an incumbent LEC must offer a particular element of its network to a competitor at cost-based rates. Separately, under the "interconnection" duty of section 251(c)(2), an incumbent LEC must agree to interconnect its network with a competitor's network at cost-based rates at any technically feasible point of the competitor's choosing. See AT&T, 525 U.S. at 371 (specifying the separate ways in which section 251(c) obligates incumbent LECs to provide access to their networks).

The question presented by this case is whether the FCC's decision to remove the unbundling duty automatically relieves an incumbent LEC of its separate duty to provide interconnection to competitive carriers with regard to a type of facility that has multiple uses, one of which was addressed in the unbundling decision. As shown below, the FCC answered that question in the negative in the TRRO, and that determination is not subject to collateral attack in this proceeding. Even if the FCC's statement on-point in the TRRO were reviewable here, it should still control the outcome because (1) the FCC's considered construction of the scope of its own unbundling rule is clearly correct; and (2) even if there were some reason for doubt, its reasonable interpretation of section 251(c)(2) should be accorded deference by the Court.

I. THE TRRO IS NOT SUBJECT TO COLLATERAL ATTACK IN THIS CASE.

The FCC in paragraph 140 of the TRRO declared explicitly that its rule relieving incumbent LECs of the duty to unbundle entrance facilities and its non-

impairment finding "do[] not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)."[29] The FCC went on to state categorically that "competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network."[30] The MPSC was correct in accepting the agency's authoritative interpretation of the scope of the unbundling rule and its specification of the incumbent LECs' section 251(c)(2) obligations.[31] The district court purported to reject the FCC's ruling,[32] but it had no authority to do so.

Challenges to orders of the FCC are governed by section 402 of the Communications Act of 1934, which states that "any proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] under this chapter . . . shall be brought as provided by and in the manner prescribed in Chapter 158 of title 28, United States Code." 47 U.S.C. § 402(a) (emphasis added). Chapter 158, which is known as the Hobbs Act and is codified at 28 U.S.C. §§ 2341 et seq., provides in relevant part that "[t]he court of appeals ... has exclusive jurisdiction to enjoin, set

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[29] TRRO, 20 FCC Rcd at 2611 (¶ 140).

[30] Id.

[31] Record Entry No. 1, MPSC Order at 13 (J.A. 42).

[32] Record Entry No. 32, District Court Order at 14 (Sept. 26, 2007) (J.A. 305). The FCC's statement in paragraph 140 was not a mere "explanatory comment" without legal force, as the district court apparently believed. Instead, it constituted an authoritative interpretation of the meaning of the FCC's unbundling rules and a description of the incumbent LECs' interconnection obligations with respect to these facilities.

aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. § 402(a)]." 28 U.S.C. § 2342(1). The statute specifies that "any party aggrieved by the [FCC's] final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344 (emphasis added).

The Communications Act and the Hobbs Act thus specify the precise procedure for obtaining judicial review of FCC orders and vest exclusive jurisdiction in the courts of appeals considering petitions for review. "'[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute.'"[33] The "appropriate procedure for obtaining judicial review of the agency's disposition of [regulatory] issues [is] to appeal to the Court of Appeals as provided by statute."[34] This general rule applies when, as here, a district court is reviewing a state public utility commission

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[33] Browning v. Levy, 283 F.3d 761, 778 (6th Cir. 2002) (quoting Telecomms. Research and Action Ctr. v. FCC, 750 F.2d 70, 77 (D.C. Cir. 1984)). See Thiokol Corp. v. Dep't of Treasury, State of Mich., Revenue Div., 987 F.2d 376, 379 (6th Cir. 1993); Greater Detroit Res. Recovery Authority v. EPA, 916 F.2d 317, 321 (6th Cir. 1990).

[34] FCC v. ITT World Commc'ns, Inc., 466 U.S. 463, 468 (1984) (emphasis added).

decision under section 252(e)(6). In such cases, the district court is obligated to accept the FCC's previous resolution of any contested question.[35]

If AT&T Michigan wanted to challenge the FCC's authoritative interpretation of its own unbundling regulations in the TRRO, its recourse was to raise this claim in a petition for review of that order within 60 days after its entry.[36] In fact, AT&T's predecessor SBC (and many others) did challenge the TRRO in this manner, but it failed to assert this claim.[37] The FCC's ruling in paragraph 140 of the TRRO thus has become final and is not subject to judicial review in this proceeding.

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[35] See Qwest Corp. v. Pub. Utils. Comm'n of Colorado, 479 F.3d 1184, 1192 n.6 (10th Cir. 2007) ("The parties have not contested the validity of this FCC interpretation, nor could they. See 28 U.S.C. § 2342."); see also Vonage Holdings Corp. v. Minn. PUC, 394 F.3d 568, 569 (8th Cir. 2004) ("[n]o collateral attacks on the FCC order are permitted" in private party litigation); Wilson v. A.H. Belo Corp., 87 F.3d 393, 396-397 (9th Cir. 1996); Telecomms. Research & Action Ctr., 750 F.2d at 75; George Kabeller, Inc. v. Busey, 999 F.2d 1417, 1421-22 (11th Cir. 1993); Bywater Neighborhood Ass'n v. Tricarico, 879 F.2d 165, 167 (5th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); City of Peoria v. Gen. Elec. Cablevision Corp., 690 F.2d 116, 119 (7th Cir. 1982) (describing challenge to FCC rule in private party district court litigation as having been "brought in the wrong court at the wrong time against the wrong party").

[36] To the extent AT&T believed the FCC's statement in paragraph 140 was not clear, it could have filed a petition for reconsideration asking the agency to clarify it.

[37] See Covad Commc'ns, Inc. v. FCC, 450 F.3d 528 (D.C. Cir. 2006).

II. THE COURT IN ANY EVENT SHOULD DEFER TO THE FCC'S REASONABLE INTERPRETATION OF THE UNBUNDLING RULE AND SECTION 251(c)(2).

A. The FCC's Construction of the Scope of Its Own Unbundling Rule Is Controlling.

Under well-established law, an "agency's reading of its own rule is entitled to substantial deference."[38] Indeed, an agency's construction of its own rule is "'controlling'" when, as in this case, "the interpretation reflect[s] a 'fair and considered judgment' and [is] not 'plainly erroneous or inconsistent with the regulation.'"[39] Thus, even assuming, arguendo, that the district court were not precluded from reviewing the FCC's definitive determination in its TRRO as to the scope of its unbundling rule, the district court should have deferred to it.[40]

Section 251(c)(2) and 251(c)(3) are independent statutory obligations that serve different purposes. The cost-based UNEs that incumbent LECs must provide under section 251(c)(3) are designed to enable competitive carriers to assemble their own telecommunications networks by combining elements from various sources (including the incumbent LECs), whereas the interconnection that the incumbent LEC must provide under section 251(c)(2) simply enables a competitive carrier to connect its network with the network of the incumbent LEC to exchange

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[38] Riegel v. Medtronic, Inc., 128 S.Ct. 999, 1010 (2008).

[39] Huffman v. C.I.R., 518 F.3d 357, 367-68 (6th Cir. 2008) (quoting Auer v. Robbins, 519 U.S. 452, 461-62 (1997)).

[40] See MCI Telecommns. Corp. v. Ohio Bell Tel. Co., 376 F.3d 539, 550 (6th Cir. 2004) (according deference to the agency's own construction of an FCC rule).

traffic and complete calls.[41] The FCC thus reasonably determined in the TRRO both that competitive LECs are not impaired without access to entrance facilities (thus relieving them of the obligation to provide those facilities to competitive carriers as UNEs under section 251(c)(3)) and that this determination had no effect on the incumbent LECs' independent obligation to provide interconnection under section 251(c)(2).[42] Because that regulatory interpretation "reflect[s] a 'fair and considered judgment' and [is] not 'plainly erroneous or inconsistent'" with the unbundling rule, that construction is "'controlling.'"[43]

The district court erroneously found that the agency's interpretation of the scope of its unbundling regulation "undermines the plain meaning of the rule."[44] The rule referenced by the court (which states that incumbent LECs need not provide entrance facilities as unbundled network elements) is codified in a section addressing an incumbent LEC's duties "in accordance with section 251(c)(3) of the Act." 47 C.F.R. § 51.319(e). Nothing in that rule suggests that it applies also to an incumbent LEC's separate obligation (embodied in a different rule, 47 C.F.R.

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[41] See Local Competition Order, 11 FCC Rcd at 15636-37 (¶ 270) ("Subsection (c)(3), therefore, allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection.").

[42] See Southwestern Bell, 530 F.3d at 683-84 (holding that FCC rule eliminating the requirement that incumbent LECs provide entrance facilities as UNEs under section 251(c)(3) does not affect the incumbent LECs' continuing duty to offer such facilities at cost-based rates when used for interconnection facilities under section 251(c)(2)); Ill. Bell, 526 F.3d at 1071-72 (same).

[43] Huffman, 518 F.3d at 367-68 (quoting Auer, 519 U.S. at 461-62).

[44] Record Entry No. 32, District Court Order at 14 (J.A. 305).

§ 51.305) to provide interconnection under section 251(c)(2). The FCC's statement in paragraph 140 recognized something that the district court appears to have overlooked: these are two separate statutory obligations that are not necessarily co-extensive.

Nor is the FCC's interpretation inconsistent with the non-impairment determination set forth in the TRRO. Section 251(d)(2) affirmatively required the FCC to make an impairment determination in analyzing whether entrance facilities (or other network elements) should be classified as UNEs that an incumbent LEC must provide at cost-based rates under section 251(c)(3). See 47 U.S.C. § 251(d)(2). In contrast, the statute does not direct the FCC to analyze impairment in determining an incumbent LEC's interconnection duty under section 251(c)(2). So a finding of impairment or non-impairment under section 251(c)(3) is not relevant to the separate question of whether there is an ongoing interconnection obligation under section 251(c)(2).

As a factual matter, AT&T Michigan is mistaken in arguing that the MPSC ruling "circumvents [the FCC's] rule by re-imposing the repealed requirement under a different provision of the 1996 Act."[45] The FCC recognized that competitive LECs may use particular transmission facilities both as a means of interconnection, i.e., a link for the mutual exchange of traffic between an incumbent LEC and a competitive LEC, and to backhaul traffic, i.e., to carry its own customers' traffic from an incumbent LEC central office to the competitive

[45] Br. of AT&T Michigan at 17.

carrier's switch or other equipment.[46] In its 1996 Local Competition Order, the FCC interpreted section 251(c)(2) to require an incumbent LEC to provide interconnection facilities at cost-based rates.[47] Both the TRO and TRRO made clear that those section 251(c)(2) interconnection obligations continue despite the elimination of section 251(c)(3) unbundling obligations for entrance facilities.[48]

A competitor thus continues to have cost-based access to incumbent interconnection facilities in order to exchange traffic between its customers and those of the incumbent LEC. The incumbent LEC, however, no longer has to provide such facilities at cost-based rates to a competitive carrier that procures the facility to back-haul traffic between the competitor's own customers.[49] The decision to no longer require unbundled access to entrance facilities under section 251(c)(3) thus has a material impact notwithstanding the remaining, narrower obligation to provide those facilities for purposes of interconnection.

B. The Court Should Defer to the FCC's Determination that an Incumbent LEC's Duty to Provide Interconnection under Section 251(c)(2) May Require the Carrier to Offer Cost-based Interconnection Facilities.

Unless Congress unambiguously has expressed an intent on the precise question at issue, a court must give deference to the expert agency's construction

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[46] TRO, 18 FCC Rcd at 17203 (¶ 365).

[47] See Local Competition Order, 11 FCC Rcd at 15605, 15781 (¶¶ 198, 202, 533).

[48] See TRO, 18 FCC Rcd at 17203-04 (¶ 366); TRRO, 20 FCC Rcd at 2611 (¶ 140).

[49] See Southwestern Bell, 530 F.3d at 681; Ill. Bell, 526 F.3d at 1071.

of a statute that it administers.[50] Congress did not speak directly to whether an incumbent LEC's duty to provide interconnection under section 251(c)(2) could include the provision of entrance facilities used to link its network with those of a competitive carrier. By leaving the term "interconnection" undefined in section 251(c)(2) and not otherwise delineating its meaning, Congress delegated authority to the FCC to interpret the scope of an incumbent LEC's interconnection obligation in a permissible fashion.[51]

As noted above, section 251(c)(2) requires incumbent LECs "to provide * * * interconnection" to a requesting competitive LEC "at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2). AT&T Michigan misreads that language as imposing only a passive duty on the incumbent LEC to "to allow the CLEC to connect 'with' the incumbent LEC's network to 'accommodate interconnection,'"[52] but that is plainly not what it says, or how the FCC has interpreted it. Since the adoption of the 1996 Act, the FCC has consistently found that an incumbent LEC, to fulfill that duty to interconnect, may be required to provide facilities that are used for the physical linking of the two networks. For example, in its Local Competition Order, the FCC stated that the right of a competitive LEC to obtain interconnection at any technically feasible

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[50] Chevron USA Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984).

[51] Chevron, 467 U.S. at 843; Nat'l Cable & Telecomms. Ass'n v. Brand X Internet, 545 U.S. 967, 980 (2005). See 47 U.S.C. § 251(d)(1) (directing the FCC to establish regulations to implement section 251); AT&T, 525 U.S. at 397 (Congress intended the FCC to resolve the ambiguities in the 1996 Act).

[52] AT&T Michigan Br. at 29.

point may require "novel use of," and "modifications to" an incumbent LEC's facilities, pointing out that the competitive LEC would pay the cost, "including a reasonable profit."[53] Indeed, the Local Competition Order and the implementing rule it adopted require the incumbent LEC to provide interconnection not just at any feasible point, but by "any feasible method" of interconnection, such as a "meet point arrangement" by which the incumbent LEC must build out its facilities to a designated "meet point."[54] As the FCC explained: "Congress intended to obligate the incumbent to accommodate the new entrant's network architecture by requiring the incumbent to provide interconnection "for the facilities and equipment" of the new entrant.[55]

In its TRO, the FCC reiterated its view that there are "facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection."[56] Thus, the FCC stated, "to the extent that requesting carriers need facilities in order to 'interconnect[] with the [incumbent LEC's] network,' section 251(c)(2) of the Act expressly provides for this."[57] See also 47 C.F.R. § 51.305(f) (FCC rule implementing section 251(c)(2) requires, where feasible, an

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[53] Local Competition Order, 11 FCC Rcd at 15605 (¶¶ 198, 202).

[54] Id. at 15781 (¶ 553); 47 C.F.R. § 51.321(a), (b).

[55] Id. at 15605 (¶ 202).

[56] TRO, 18 FCC Rcd at 17203 (¶ 365).

[57] Id. at 17204 (¶ 366).

incumbent LEC to provide two-way trunking facilities to a requesting competitive LEC).[58]

The FCC in its discussion of entrance facilities in its TRRO made clear that it was not altering the rights and duties under section 251(c)(2) with respect to facilities that are used for interconnection.[59] Section 251(c)(2) entitles competitive LECs "access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network."[60] Although the FCC did not specifically define what it meant by the term "interconnection facilities," the MPSC's interpretation of that term to include entrance facilities when used for interconnection is fully consistent with the FCC's finding in the TRRO. The district court thus was wrong to overturn the MPSC's decision on this point.

AT&T Michigan and its supporting amici argue that the plain language of section 251(c)(2) prohibits the FCC from interpreting that subsection to require an incumbent LEC to provide facilities used for the physical linking of its network with the network of a competitive carrier. Because an incumbent LEC must provide interconnection with its network "for the facilities and equipment of any requesting telecommunications carrier," 47 U.S.C. § 251(c)(2), these carriers claim

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[58] See also Application by SBC Communications Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18391 (¶ 80) (2000) ("Interconnection trunking . . . and meet-point arrangements are among the technically feasible methods of interconnection.").

[59] TRRO, 20 FCC Rcd at 2611 (¶ 140).

[60] Id.

that an incumbent LEC's duty to provide interconnection cannot reasonably be read to encompass a requirement to provide facilities necessary to link its network with the competitive carrier. That argument is unavailing for several reasons.

First, the statutory interpretation advanced by AT&T Michigan and the supporting amici is flatly inconsistent with prior FCC interpretations (described above) regarding the scope of the interconnection obligation and provision of facilities to achieve such interconnection, which were expressly left unaltered in the ruling issued by the FCC in the TRRO. As demonstrated at pages 10-13, the validity of the FCC's statutory interpretation in the TRRO (and the other prior interconnection and unbundling decisions) is not subject to collateral challenge in this case. The Court therefore should not engage in a review of the FCC's determinations nor entertain AT&T Michigan's contrary interpretation.

If the Court nonetheless does inquire into the scope of interconnection under section 251(c)(2), it should defer to the FCC's reasonable and consistent construction and reject AT&T Michigan's flawed interpretation. The language relied on by AT&T Michigan and the supporting amici states only that the interconnection that an incumbent LEC must provide under section 251(c)(2) — whatever that may be — is "for the facilities and equipment of" the competitive carrier. That language does not delineate what an incumbent LEC must do in order to provide interconnection "for the facilities and equipment of" the competitive carrier, let alone establish unambiguously that an incumbent LEC's duty to provide interconnection does not include the provision of facilities that are necessary to achieve that interconnection.

Moreover, the "plain language" construction advanced by AT&T Michigan and its supporting amici is inconsistent with established administrative and judicial precedent. As noted above, the FCC consistently has stated that an incumbent LEC, in fulfilling its duty to provide interconnection under section 251(c)(2), may be required to provide facilities to effectuate interconnection, and that those obligations continue notwithstanding the FCC's elimination of entrance facilities as an unbundled network element under section 251(c)(3).[61] And both the Seventh and Eighth Circuits have ruled expressly that section 251(c)(2) entitles competitive carriers access to entrance facilities at cost-based rates for purposes of interconnecting with the incumbent LEC's network.[62]

Indeed, the agency charged with administering the Communications Act and every single federal appellate judge addressing the issue has construed section 251(c)(2) directly contrary to AT&T Michigan's alleged "plain meaning" construction. Given this, and especially in light of the deference courts with jurisdiction afford the FCC in construing the Communications Act[63] and its regulations, [64] the Court should reject AT&T Michigan's flawed interpretation.

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[61] TRRO, 20 FCC Rcd at 2611 (¶ 140).

[62] Southwestern Bell, 530 F.3d 676; Ill. Bell, 526 F.3d 1069.

[63] Chevron, 467 U.S. at 844.

[64] Riegel, 128 S.Ct. at 1010.

CONCLUSION

The Court should reverse.

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April 3, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN BELL TELEPHONE COMPANY D/B/A AT&T MICHIGAN, PLAINTIFF-APPELLEE,	)	
V.	)	NOS. 07-2469 & 07-2473
J. PETER LARK, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE MICHIGAN PUBLIC SERVICE COMMISSION AND NOT AS AN INDIVIDUAL; ET AL. DEFENDANTS-APPELLANTS.	)	

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April 3, 2009

07-2469

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michigan Bell Telephone Company, Petitioner,
v.
Covad, et al.

Certificate Of Service

I, Laurel R. Bergold, hereby certify that on this 3rd day of April, 2009, I electronically filed the foregoing "Amicus Curiae Brief of the Federal Communications Commission" with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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