COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

| | | |
|---|---|---|
| PETITION OF BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a AT&T KENTUCKY FOR ARBITRATION OF INTERCONNECTION AGREEMENT WITH SPRINT SPECTRUM L.P., NEXTEL WEST CORP., and NPCR, INC. d/b/a NEXTEL PARTNERS | ) | CASE NO. 2010-00061 |

# REBUTTAL TESTIMONY OF MARK G. FELTON

**September 17, 2010**

# REBUTTAL 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. Are you the same Mark G. Felton that submitted Direct Testimony in these proceedings on August 17, 2010?**

A. Yes.

## II. PURPOSE AND SCOPE OF TESTIMONY

**Q. On whose behalf are you testifying?**

A. I am testifying in this proceeding on behalf of Sprint Spectrum L.P. ("Sprint PCS"), Nextel West Corp. and NPCR, Inc. (collectively "Nextel") and Sprint Communications Company L.P. ("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 Rebuttal Testimony?**

A. The purpose of my Rebuttal Testimony is to provide input to the Kentucky Public Service Commission ("Commission") and respond to the Direct Testimony of AT&T witnesses Christensen (Issues IV.F.1, IV.F.2, and IV.G.2), Ferguson (Issues III.C, IV.A.(1), IV.A.(2), IV.B.(1), IV.B.(2), IV.B.(3), IV.B.(4), IV.B.(5), IV.C.(1), IV.C.(2), IV.D.(1), IV.D.(2), IV.D.(3), IV.E.(1), IV.E.(2), and IV.H), McPhee (Issues III.A.1.(3), III.A.1.(4), III.A.1.(5), III.A.(2), and III.F, Hamiter (Issues II.C.(1), II.C.(2), II.C.(3), II.D.(1), II.D.(2), II.F.(1), II.F.(2), II.F.(3), II.F.(4), II.G, II.H.(1), II.H.(2), II.H.(3)); and Pellerin (Issues II.A, III.A.1.(1), III.A.1.(2), III.A.7.(1), III.A.7.(2), III.I.(1)(a), III.I.(1)(b), III.I.(2), III.I.(3), III.I.(4), and III.I.(5)) 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.

## 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. Having read the Direct Testimony of AT&T Witness Pellerin, do you have any general comments regarding her assertions with respect to this issue?**

A. Yes. First, I would like to provide the Commission with a clear understanding of what constitutes an "Interconnection Facility" and how that differs from an "Entrance Facility." A great deal of Ms. Pellerin's testimony focuses on Unbundled Network Elements ("UNEs") and how the Triennial Review Remand Order ("TRRO") altered an ILEC's obligation to provide UNEs, including unbundled entrance facilities at cost-based rates. Indeed, much of what she asserts about UNEs in general and entrance facilities *as UNEs* is accurate, but it has little to do with the issue at hand. Ms. Pellerin's lengthy discussion of UNEs, though educational, is irrelevant as to whether AT&T is obligated to provide Interconnection Facilities at cost-based rates[1] pursuant to Section 251(c)(2) of the Act. Whether intentional or not, Ms. Pellerin blurs the lines between UNEs and Interconnection Facilities and, thus, creates unnecessary confusion by improperly attempting to apply the Federal Communication Commission's ("FCC") rules with respect to UNEs that are provided under Section 251(c)(3) of the Act to Interconnection Facilities that are provided under Section 251(c)(2) of the Act.

[1] I use the term "cost-based" to refer to Total Element Long Run Incremental Cost ("TELRIC") throughout my Rebuttal Testimony.

**Q. Can you give a specific example of how Ms. Pellerin blurs the lines between UNEs and Interconnection Facilities?**

A. Yes. In describing the facilities that are at issue,[2] Ms. Pellerin goes into a lengthy explanation of an entrance facility. Nothing in her description is particularly wrong. In fact, the "facility" she describes could be either an Unbundled Entrance Facility or an "Interconnection Facility." Although there is no physical or technological difference between an Unbundled Entrance Facility and an Interconnection Facility, there is very different regulatory treatment from the FCC's perspective, which I will go into later. Ms. Pellerin's testimony ignores this disparate treatment and, thus, obfuscates this issue.

**Q. How does AT&T define an "interconnection facility?"**

A. As I discuss in my Direct Testimony,[3] AT&T contends that a cross connect, the beginning and end of which will exist somewhere between an AT&T central office building's front door and the Interconnected AT&T switch inside that building to which the cross-connect is "connected", constitutes the Interconnection Facility. Ms. Pellerin supports this view by stringing together some relatively unrelated references in proceedings and the Federal regulations.

[2] Pellerin Direct, Page 17, Line 8 through Page 19, Line 9
[3] Felton Direct, Page 5, Lines 2-6.

**Q. Do you agree with Ms. Pellerin's characterization that ¶ 140 of the TRRO is a "side comment"?**[4]

A. No. Apparently, the FCC doesn't agree with her assessment either. In its amicus brief filed in the Sixth Circuit court case, the FCC specifically states:

> 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.[5]

**Q. Based on that, do you believe Ms. Pellerin's "interpretation" of the FCC's true intention in the TRRO is credible?**

A. No. After Ms. Pellerin dismisses what the FCC calls its "authoritative interpretation" of its own rule as a "side comment", she then goes on to offer her own interpretation of what the FCC really meant, by saying that the FCC couldn't take away TELRIC pricing with one hand and reinstate it with the other. Using that logic, she then concludes that the FCC must have meant that an interconnection facility consists of merely the low-cost, inconsequential facility within the AT&T central office – the "cross-connect." AT&T's motivation is clear – to shift as much cost as possible to requesting carriers.

---

[4] Pellerin Direct, Page 22, Lines 16-17.

[5] "Brief for Amici Curiae Federal Communications Commission in Support of Defendants-Appellants and Reversal of the District Court" at p. 11, footnote 32, filed April 3, 2009 in *Michigan Bell Telephone v. Covad Communications Company, et al.*, Case No. 07-2469 & 07-2473 (6th Cir.), a copy of which is attached to this Rebuttal Testimony as Attachment MGF-1.

**Q. Ms. Pellerin goes on to discuss the four federal Circuit Court cases that address this issue. Do you agree with her assessment of those cases?**

A. No. I am not an attorney and will not attempt to offer a legal opinion here.

**Q. On what do you base your disagreement with Ms. Pellerin's assessment of the four Circuit Court cases?**

A. I place great weight on the FCC's amicus brief filed in the Sixth Circuit Court case. I discussed the Sixth Circuit Court determination on this issue further in my Direct Testimony.

**Q. Ms. Pellerin relies heavily on the Sixth Circuit case and states that this Commission is "bound" to rule in AT&T's favor on this issue.[6] Is that true?**

A. I am not an attorney and will, therefore, not offer any legal opinion on what this Commission is "bound" to do. Sprint's attorneys will address such matters in briefs. The fact remains that three other Circuit Courts ***and the FCC*** disagree with AT&T's and the Sixth Circuit's position. In fact, the Ninth Circuit recently issued a revised Order specifically rejecting the reasoning advanced by AT&T ***and*** the Sixth Circuit.[7]

---

[6] Pellerin Direct, Page 23, Line 14 through Page 24, Line 2.

[7] *Pac. Bell Tel. Co. v. Cal. PUC*, Case Nos. 08-15568 and 08-15716, "Order and Amended Opinion", September 1, 2010 (9th Cir.), a copy of which is attached to this Rebuttal Testimony as Attachment MGF-2.

**Q. Ms. Pellerin's focus on the Sixth Circuit ignores what other Circuit Courts have ruled on this very same issue. What recent action did the Ninth Circuit take with respect to this issue?**

A. On September 1, 2010, the Ninth Circuit removed any doubt regarding the independence of its decision when it issued its "Order and Amended Opinion" that generally referred to the Seventh and the Eighth Circuit's recent rejection of AT&T's position to expressly state:

> "Both the Seventh and the Eighth circuits recently rejected AT&T's position, and have concluded that FCC regulations authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection. *See Sw. Bell Tel., LP v. Mo. Pub. Serv. Comm'n,* 530 F.3d 676 ((8tch Cir. 2008) ("*SWBT*"); *Ill. Bell Tel. Co. v. Box,* 526 F.3d 1069 (7th Cir. 2008) ("*Box I*"); *contra Michigan Bell Tel. Co. v. Lark,* 597 F.3d 370 (6th Cir. 2010). For the reasons that follow, we agree with the Seventh and Eighth Circuits and reject the reasoning advanced by AT&T and the Sixth Circuit in its recent 2-1 decision."[8]

**Q. Please summarize your Rebuttal Testimony on this issue.**

A. Sprint encourages the Commission to not be sidetracked with AT&T's lengthy, yet irrelevant, discussion of unbundled entrance facilities and the FCC's finding of non-impairment in the TRRO. As the FCC itself has stated, its finding of non-impairment with respect to a 251(c)(3) obligation has no effect upon an incumbent LEC's obligation with respect to Section 251(c)(2) of the Act. The FCC has provided its own authoritative interpretation of an incumbent LEC's obligation to provide interconnection facilities that extend between the parties' respective networks at cost-based

[8] *Id.*, at 13163. .

rates, and, notwithstanding the 2-1 split decision of a panel of the Sixth Circuit on this issue, the right decision would be to acknowledge and affirm the FCC's prior pronouncement on this issue.

**Q. What language does Sprint recommend the Commission adopt?**

A. Sprint recommends the Commission 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.

**Issue II.C – 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. On Page 10, lines 20 through page 11, line 5 of his Direct Testimony, AT&T witness Mr. Hamiter explains AT&T's objection to Sprint's language. Do you agree with Mr. Hamiter's assessment?**

A. I am puzzled by Mr. Hamiter's explanation. I believe he misunderstands Sprint's position on the issue.

**Q. Why do you say Mr. Hamiter misunderstands Sprint's position on this issue?**

A. Because, as I stated in my Direct Testimony, Sprint has no intention of disconnecting 911 trunks where Sprint has end user customers. The FCC does not require a carrier to offer 911 service where it does not have customers. In fact, it would be nonsensical to offer 911 services to non-existent end-users. Where Sprint does have customers, however, Sprint follows all industry guidelines in providing diverse and redundant facilities and monitors usage and capacity on its 911 trunks to ensure that all emergency calls are successfully completed.

**Q. The tone of Mr. Hamiter's testimony implies that he believes Sprint would reduce the number of 911 trunks to save money resulting in a bare bones 911 network. Is this the case?**

A. Absolutely not. Mr. Hamiter does not truly understand Sprint's position on this issue. To reiterate, Sprint follows all industry guidelines in providing diverse and redundant facilities and monitors usage and capacity on its 911 trunks to ensure that all emergency calls are successfully completed.

**Q. What ICA language does Sprint recommend the Commission adopt?**

A. Sprint requests that the Commission 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. In reading AT&T witness Hamiter's Direct Testimony, how would you describe the arguments against Sprint's position on this issue that he puts forth?**

A. Mr. Hamiter's Direct Testimony would lead one to believe that AT&T is responsible for the integrity of Sprint's network.

**Q. Why do you say that?**

A. Mr. Hamiter's Direct Testimony spends a great deal of time discussing the risks to Sprint's network and to Sprint's customers if Sprint were to combine wireless and wireline 911 traffic on a single 911 trunk.

**Q. Is AT&T responsible for the integrity of Sprint's network?**

A. No, that is a matter between Sprint, this Commission, and Sprint's customers.

**Q. If there were a network problem on the Sprint 911 network or there was a need to trace a call made by a Sprint customer (whether that call be a wireline or wireless call) on a 911 trunk ordered by Sprint, who would be responsible to perform that function?**

A. Sprint is responsible for its 911 network. Sprint has network engineers that monitor its networks 24 hours a day, 7 days a week. Sprint would isolate the network problem and perform any call traces for law enforcement. To the extent AT&T needed to be involved in this effort, Sprint would work

collaboratively with AT&T to ensure that end user customer's emergency needs are met.

**Q. Who is responsible for monitoring capacity and ensuring that 911 calls route correctly and are successfully completed on Sprint's 911 network?**

A. Sprint is responsible for monitoring capacity, ensuring that calls route correctly, and ensuring that 911 calls are successfully completed.

**Q. Would the commingling of wireline and wireless traffic on 911 trunks ordered and monitored by Sprint prevent Sprint from isolating a network problem performing call traces for law enforcement?**

A. No. From Sprint's perspective, having fewer 911 trunks makes trunk monitoring and isolation of network troubles more straightforward.

**Q. Mr Hamiter also discusses the threat of fraudulent network attacks and how the commingling of wireless and wireline 911 traffic would prevent AT&T from isolating the source of the network trouble to rectify it.[9] How do you respond?**

A. Sprint acknowledges that there may be unscrupulous individuals or entities that would seek to cripple the emergency services network provided by Sprint or by AT&T. Sprint resoundingly condemns such efforts to harm the

[9] Hamiter Direct, Page 12, Lines 7-16.

(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. Do you believe the parties have a legitimate dispute on this issue?**

A. No, not based on Mr. Hamiter's Direct Testimony. Mr. Hamiter states that AT&T's concern is that Sprint will use its 911 trunks for non-emergency services traffic.[11] Mr. Hamiter even goes on to say he "[does] not know why Sprint has disputed this language."

**Q. Does Sprint intend to route traffic other than 911 traffic on 911 trunks?**

A. As I stated in my Direct Testimony, Sprint will not use 911 trunks for non-emergency services traffic.[12] Sprint only routes 911 traffic over 911 trunks and has no intention of using 911 trunks for any other purpose. Sprint follows the National Emergency Number Association's ("NENA") recommendations and dedicates those trunks to emergency services.

**Q. Then what is Sprint's issue with AT&T's proposed language?**

[11] Hamiter Direct, Page 13, Lines 2-10.
[12] Felton Direct, Page 15, Lines 1-4.

A. Sprint objects to the insertion of the words "solely" and "Sprint" into AT&T's original language from its template ICA.

**Q. Please elaborate.**

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 accomodating 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. How could the addition of two words be such a major problem for Sprint?**

A. Sprint believes that based upon AT&T's objection to Sprint's ability to commingle wireless and wireline 911 traffic on the same 911 trunk[13] and the definition of "Sprint" within each of the ICAs, AT&T could use the language in Section 1.2 above (as it proposes to modify) to deny Sprint the right to commingle wireless and wireline 911 traffic on a single 911 trunk, regardless of the Commission's determination on Issue II.C(2).

**Q. Does the unmodified language of Section 1.2 assuage AT&T's concern regarding Sprint using 911 trunks for non-emergency services traffic?**

A. It should. The unmodified language of Section 1.2 states that AT&T will "provide Interconnection and Call Routing for the purpose of 911 call completion to a Public Safety Answering Point (PSAP)." The language does not provide for Sprint to use 911 trunks for any other purpose than the transmission of emergency services traffic to the appropriate PSAP.

**Q. What is Sprint's proposed language?**

A. Sprint's proposed language for this issue is the same language as included in Issue II.C(2) above.

**Issue II.D – Points of Interconnection**

[13] As discussed in Issue II.C(2) above.

**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. Mr. Hamiter stated in his testimony that AT&T has proposed that in order to maintain network reliability, Sprint should be required to establish one or more additional POIs.[14] Who is responsible for ensuring Sprint's network reliability?**

A. Sprint is responsible for ensuring its network reliability. Sprint is a large, stable carrier, with extensive experience in managing wireless and wireline networks and will do what is necessary to manage its network to the highest standards. Besides that, the FCC clearly supports the "single POI per LATA" rule as I clearly demonstrated in my Direct Testimony. Therefore, it is not AT&T's prerogative to pre-determine a threshold for Sprint to establish additional POIs in a particular LATA.

**Q. Have the parties agreed upon language that addresses network management that prevents network congestion and call blocking?**

A. Yes. Sprint has agreed to language in Attachment 3, of both the CLEC and Wireless agreements that states: "The Parties will work cooperatively to apply sound network management principles by invoking appropriate network

[14] Hamiter Direct, page 13, lines 20-22.

management controls to alleviate or prevent network congestion." This includes preventing call blocking.

**Q. Does preventing call blocking sometimes require that a CLEC establish more than one POI per LATA?**

A. Possibly. However, it is Sprint's prerogative to determine the design of its network and when it is most economical to increase the number, or change the locations, of existing POIs. Sprint is capable of designing its own network – it has done so successfully for years. The FCC instituted the "single POI per LATA" rule presumably to prevent an ILEC, such as AT&T, from intervening in the network design decisions of a requesting carrier, such as Sprint, and, by preventing such intervention, from increasing a competitor's costs by requiring the deployment of costly, unneeded facilities by the requesting carrier.

**Q. Mr. Hamiter agrees with you that there is no federal law that prescribes a threshold at which additional POIs should be established. Has the FCC ever changed the right of a CLEC to establish a single POI per LATA?**

A. No. Mr. Hamiter states that the FCC has signaled on several occasions its view that a requesting carrier is entitled to a single POI. In my Direct

Testimony, I referred to the Single POI per LATA.[15] I know of no change in the FCC's position on this issue.

**Q. Mr. Hamiter suggests that the FCC has questioned whether the single POI rationale applies where we are no longer dealing with a truly "new entrant." Can you comment on this?**

A. Mr. Hamiter refers to the Intercarrier Compensation NPRM. The FCC considered multiple issues and sought comments in the Intercarrier Compensation NPRM, but it has not reached any conclusion and has made no changes to the law. In fact, when the FCC issued its Order and Further NPRM on USF,[16] the FCC contemplated a regime in which the point of interconnection would be at the edge of the carriers' network and there would be no requirement for an interconnecting carrier to establish additional physical points of interconnection. The FCC did not make a distinction for

---

[15] *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).*

[16] *In the Matter of High-Cost Universal Service Support; Federal-State Joint Board on Universal Service, Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Service,* WC Docket No. 05-337; CC Docket No. 96-45; WC Docket No. 03-109; WC Docket No.06-122; CC Docket No. 99-200; CC Docket No. 96-98; CC Docket No. 01-92; CC Docket No. 99-68; WC Docket No. 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6619-6620, Appendix A ¶275, Released Nov. 5, 2008. ("Following the transition, once carriers are charging the final uniform reciprocal compensation rate, we establish the following default rules regarding the network "edge." These default rules would not require changes to physical points of interconnection, but would simply define functions governed by a uniform terminating rate.") (citations omitted).

new entrants. The FCC has also explicitly stated: "Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point. This includes the right to request a single point of interconnection in a LATA."[17] The United States Courts of Appeals for the Third and Ninth Circuits have also explicitly ruled that a CLEC has the right to establish a single POI per LATA for the mutual exchange of telecommunications traffic.[18] AT&T cannot force Sprint to establish more than one POI.

**Q. Mr. Hamiter's argument is based upon the risk associated with a single point of failure in the network. Even if Sprint establishes more than one POI with AT&T, are there other single points of failure within the network?**

A. Certainly. Very few end-users have more than one loop from the central office switch to its premises. For obvious reasons, a single loop represents a single point of failure for a particular end-user.

---

[17] Memorandum Opinion and Order, In the Matter of the Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, CC Docket No. 00-218; In the Matter of Cox Virginia Telecom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc. and for Arbitration, CC Docket No. 00-249; In the Matter of the Petition of AT&T Communications of Virginia Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., CC Docket No. 002-51 (DA 02-1731) (Rel. July 17, 2002).

[18] *MCI Telecommunications Corp. v Bell Atlantic-Pennsylvania, 271 F.3d 491 (3rd Cir. Nov. 2 2001)*

**Q. If Sprint establishes a single POI with AT&T, are there other ways for Sprint to deliver its traffic to AT&T?**

A. Yes. Sprint may use any of a number of other alternate access vendors to deliver its traffic to AT&T. AT&T would certainly also have this alternative available to it.

**Q. Why is AT&T proposing that Sprint establish more than one POI?**

A. This seems to be is an overt attempt by AT&T to advantage itself (with increased interconnection facility revenue) at the expense of the requesting carrier.

**Q. Does Sprint increase the risk of network outages and isolation if it retains a single POI because the single POI becomes a single point of failure if Sprint has large volumes of traffic passing through the POI?**

A. Whether a carrier has a single POI is traffic insensitive. The risk of network outages is a reality for any carrier, and traffic volumes are not necessarily a determining factor. Whether a carrier originates one minute or one million minutes has no bearing on whether a single POI represents a single point of failure in the network.

**Q. Then shouldn't a carrier establish more than one POI in each LATA from the very inauguration of its service offering?**

A. According to AT&T's logic, yes. However, as I have discussed, this is not the requirement of the FCC and should be roundly rejected by this Commission.

Q. **If a catastrophic event that Mr. Hamiter suggests were to occur, would Sprint lose all ability to exchange calls with AT&T?**

A. Not necessarily. If a catastrophic event such as Mr. Hamiter suggests were to occur, Sprint would invoke disaster contingency plans and use any necessary means to ensure that its network was up and running as quickly as possible, just as AT&T would. It is Sprint's responsibility, decision, and right to decide how its network is designed, where its POI is located on the AT&T network, and whether it establishes one POI or multiple POIs. Like AT&T, Sprint has a Network Organization that is responsible for designing, maintaining, and protecting Sprint's network. AT&T has no right or obligation to engineer Sprint's network for Sprint.

Q. **Are you aware that this Commission appears to have previously ruled that, under certain conditions, a requesting carrier has an obligation to establish an additional POI within a LATA as Mr. Hamiter points out in his Direct Testimony?**[19]

A. Yes. Mr. Hamiter correctly cites two Commission orders that both, in turn, rely on two earlier 2001 Commission orders from the same Level 3

[19] Hamiter Direct, Page 23, Line 13, through Page 24, Line 2.

arbitration with AT&T for the proposition that a requesting carrier is "required to establish another POI" when the amount of traffic that it delivers to an interconnected ILEC tandem reaches a DS3 level of traffic. Since I am not an attorney, Sprint's position regarding this Issue will be more fully addressed by Sprint's attorneys in post-hearing briefs. It is, however, Sprint's position that a careful reading of the Level 3 orders indicates that, in the absence of agreement between the parties, the Commission ordered the establishment of an additional POI if the "amount of traffic passing through a BellSouth access tandem switch reaches an OC-3 level"[20]; and, following this order, the parties subsequently submitted a "*negotiated agreement*" in which "the parties agree[d] that a DS-3 level would be more appropriate."[21]

Q. **Have Sprint and AT&T agreed to establish additional POIs within a LATA at a threshold lower than an OC3?**

A. No. There is no agreement between Sprint and AT&T to establish additional POIs at any threshold lower than the OC-3 threshold that the Commission has established to be used in the absence of a lower negotiated threshold. And, the overriding fact remains that the FCC's pronouncements on this issue do not impose any threshold on Sprint's right to maintain single POI per LATA.

---

[20] *See In the Matter of: The Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1934, as amended by the Telecommunications Act of 1996*, Case No. 2000-404 (Order dated March 14, 2001) at pp. 2-3.

[21] *Id.*, (Order dated April 23, 2001) at pp. 1-2.

**Q. Please summarize your Rebuttal Testimony for this issue.**

A. AT&T's witness Hamiter presents many good ideas on telecommunication network management – many that may well be employed by Sprint and any other interconnecting carrier in the management of their respective networks. While much of Mr. Hamiter's Direct Testimony represents sound network engineering principles, the FCC does not permit an incumbent LEC such as AT&T to impose its desires with respect to such engineering principles as a contractual requirement upon a requesting carrier such as Sprint. Therefore, the Commission should reject AT&T's proposed thresholds for the establishment of POIs.

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

A. Sprint proposes the following language:

> Point(s) of Interconnection. The Parties will establish reciprocal connectivity to at least one AT&T-9STATE Tandem 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. Do you believe that AT&T's proposal of this additional language is just, reasonable and non-discriminatory as Mr. Hamiter implies?**[22]

A. No. Although I am not an attorney, AT&T's language appears to me to be discriminatory. Although AT&T claims to propose this language to all CLECs, the language that AT&T proposed for the CLEC ICA is quite different from the language proposed for the Sprint wireless ICA. At a minimum, though, it represents disparate treatment of two requesting carriers based solely on the technology used by the requesting carrier and, as I stated in my Direct Testimony, AT&T has given no technical reason for the differences in language.

**Q. What other concerns does Sprint have with the additional language proposed by AT&T?**

A. In addition to the arguments I made in my Direct Testimony, I would add that high level language for implementing interconnection or making any network changes is sufficient in the ICA. AT&T and Sprint have worked cooperatively in establishing interconnection arrangements, including the completion of necessary forms and participation in joint planning meetings. The excessive detail proposed by AT&T is unnecessary for an ICA. The type of detailed operational documentation proposed by AT&T is better left for just that – operational documents.

[22] Hamiter Direct, Page 28, Lines 8-9.

**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 Commission to reject the balance of AT&T's language.

**Issue II.F – 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?**

**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?**

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

**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 those terms?**

**Q. Does the language that Sprint has proposed lack the specificity that is needed to define how the network architecture between AT&T and Sprint should look in order to properly originate and terminate traffic?**

A. No. Sprint's proposed language represents the right balance between generality and specificity. Clearly, AT&T prefers a very restrictive approach containing extreme amounts of detail better left for joint operational discussions between the parties' engineers. Though the existing ICA does not contain AT&T's preferred level of detail, the parties have successfully interconnected their networks for over a decade, therefore, it is not clear here why AT&T objects to Sprint's language.

**Q. Mr. Hamiter states that AT&T's language does not require Sprint to order one-way trunks.[23] Is that true?**

A. No. AT&T's proposed language states that Sprint will order one-way trunks and may order two-way trunks upon mutual agreement. As I addressed in my Direct Testimony, it is Sprint's prerogative to order two-way trunks if it is technically feasible. There is no distinction in this right determined by whether the request is made by a new entrant or an established carrier. This is another self-serving criterion conjured up by AT&T that has no basis in the law or the FCC's rules.

**Q. But Mr. Hamiter's Direct Testimony implies that either one-way or two-way trunking is available to Sprint.[24] Is that the case?**

---

[23] Hamiter Direct, page 30, lines 15-17.
[24] Hamiter Direct, Page 30, Lines 17-19.

A. No. AT&T's language requires mutual agreement between the parties before two-way trunking will be used. This is simply not consistent with the FCC rules.

**Q. Should language be included in the ICA for 800/8YY Toll Free Service?**

A. No. There is no need to include language for 800/8YY Toll Free Service, as Sprint does not use this service today. That being said, as I stated in my Direct Testimony, the parties may be able to resolve this particular issue of including 800/8YY Toll Free Service language in the agreement if Sprint's concerns with that language are resolved satisfactorily.

**Issue II.G – 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. AT&T witness Hamiter calls the establishment of DEOTs the "efficient use of network resources."[25] Do you agree?**

A. In certain circumstances, yes.

**Q. Then why is Sprint opposed to establishing DEOTs as Mr. Hamiter alleges?[26]**

[25] Hamiter Direct, Page 33, Lines 2-3.

A. Mr. Hamiter misrepresents Sprint's position. Sprint is not opposed to establishing DEOTs when necessary to ensure sound network engineering principles are properly applied. Sprint is amenable to placing orders for such DEOTs, but, as I state in my Direct Testimony,[27] the cost of such DEOTs should be borne by AT&T.

**Q. Why should AT&T bear the cost of DEOTs ordered by Sprint to AT&T's end office?**

A. In addition to the explanation I provided in my Direct Testimony,[28] ordering a DEOT is tantamount to establishing an additional POI in a LATA and, as I explain in my Testimony (Direct and Rebuttal) for Issue II.D, Sprint cannot be required to establish more than one POI in a LATA.

**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

[26] Hamiter Direct, Page 33, Lines 15-17.
[27] Felton Direct, Page 28, Lines 16-20.
[28] Felton Direct, Page 29, Lines 1-5.

**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. Do you have any Rebuttal Testimony for this issue?**

A. No. My Direct Testimony sufficiently addresses this issue.

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

**Q. Do you have any Rebuttal Testimony for this issue?**

A. No. My Direct Testimony sufficiently addresses this issue.

## Section III. – How the Parties Compensate Each Other

**Issue III.A.1 – 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. AT&T witness Pellerin suggests that when a customer initiates a call by dialing 1+, the customer is not acting as a customer of AT&T.[30] Do you agree?**

A. No. While the customer may be utilizing the services of an IXC, they are nonetheless still a customer of AT&T. Moreover, frequently when an AT&T customer makes a 1+ call, the customer is actually using ***AT&T's*** IXC network. AT&T Inc. (the parent company of AT&T Kentucky) has stated publicly its intention to ward off competitive pressures by utilizing a bundling strategy that combines local and long-distance services (in addition to other AT&T services).[31] In those situations, the call never leaves the AT&T network before being delivered to Sprint wireless.

**Q. Are you saying that AT&T only owes Sprint reciprocal compensation when the AT&T customer is also an AT&T IXC customer?**

A. No. I am simply pointing out that, even if one accepted AT&T's view, AT&T would be in a position to skirt its reciprocal compensation obligation

[30] Pellerin Direct, Page 51, Lines 5-9.
[31] See, e.g., AT&T Inc. Financial Review 2009, page 45.

by simply handing its originating traffic off to its own IXC affiliate. Having said that, regardless of who the IXC is, Sprint believes AT&T legitimately owes reciprocal compensation anytime one of its customers originates an intraMTA call.

**Q. Ms. Pellerin implies that Sprint's motivation for seeking reciprocal compensation on AT&T originated 1+ intraMTA traffic is the prohibition by the FCC for wireless carriers to tariff access charges.[32] Is that true?**

A. No. While Sprint disagrees with the FCC's prohibition against wireless carriers filing tariffs for access charges, that has no bearing on whether AT&T, as the originator of an intraMTA call (1+ or otherwise), is liable for reciprocal compensation to the terminating carrier.

**Q. What is AT&T's motivation for its opposition to Sprint's suggestion?**

A. It is clear to me that AT&T would like to collect as much revenue as possible while avoiding expenses whenever possible.

**Q. How have the parties avoided addressing this issue in the past?**

A. The parties enjoy a bill and keep reciprocal compensation arrangement today and, therefore, have avoided the need to address this issue head-on. If Sprint's proposed resolutions in Issues III.A.1(4) and (5) are adopted (the

[32] Pellerin Direct, Page 54, Line 4-8.

continued use of bill and keep), this 1+ intraMTA compensation issue III.A.1(1) remains moot.

**Q. Ms. Pellerin also discusses the application of FCC Rule 51.701 to this issue.[33] Please comment.**

A. Ms. Pellerin focuses on FCC Rule 51.701(b)(2) and fabricates an argument that 1+ intraMTA traffic is not actually ***exchanged*** between AT&T and Sprint wireless when an IXC is involved because the traffic never actually ***belonged*** to AT&T in the first place. In a telling excerpt from Ms. Pellerin's Testimony, she has to differentiate 1+ intraMTA calls from other calls in which an intermediate carrier is involved (i.e., transit calls), presumably because AT&T frequently acts as a transit provider and does not want to be on the hook for intercarrier compensation in those situations. Regardless of AT&T's motivation, AT&T's smoke and mirrors approach to this issue should be rejected.

**Q. Are you aware that this Commission has previously addressed this issue as Ms. Pellerin points out in her Direct Testimony?[34]**

A. Yes. Ms. Pellerin correctly points out that this Commission addressed the 1+ intraMTA issue and she correctly reflects the conclusion this Commission reached. What Ms. Pellerin artfully relegates to her footnote

---

[33] Pellerin Direct, Page 55, Line 20 through Page 57, Line 10.
[34] Pellerin Direct, Page 57, Line 21 through Page 58, Line 13.

38, however, is the compelling fact that the Commission's order was challenged in federal district court by a group of wireless carriers and the court reversed the Commission's decision on that issue.[35] According to the court, "although an access charge regime may be applicable to exchange carriers involved in LEC to non-wireless carrier traffic, the same regime is not applicable to LEC to wireless carrier traffic."[36]

**Q. What resolution does Sprint recommend for this issue?**

A. Sprint requests that the Commission 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 IntraMTA 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, and in fact for all calls the parties exchange. If the parties exchange all traffic on a bill and keep basis, 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**

---

[35] *See T-Mobile USA, INC., et al. v. David Armstrong et al.*, Civil Action No. 3: 08-36-DCR,2009 WL 1424044 at * 8 (E.D. KY 2009).
[36] *Id.*, at pp. 14 – 15.

**in the CMRS ICA for traffic subject to reciprocal compensation?**

**Q. In her discussion of this issue, AT&T witness Pellerin states that "Sprint may not have the ability to measure and bill based on actual usage."[37] Does Sprint have the ability to measure and bill based on actual usage?**

A. Yes. As I stated in my Direct Testimony, Sprint has had that capability for years.[38]

**Q. Even if Sprint did not have that capability, would Sprint object to AT&T's language?**

A. Yes. Aside from the reasons set forth in my Direct Testimony,[39] Sprint further objects to AT&T's proposed "surrogate factor billing" process.

**Q. Why?**

A. AT&T's surrogate billing factor process relies upon AT&T's faulty view of the proper methodology of Interconnection Facility sharing.[40] Additionally, as I discuss in my Direct Testimony,[41] Sprint disagrees with the universe of traffic to which AT&T intends to apply the surrogate billing factor (i.e., AT&T's exclusion of 1+ land-to-mobile originated IntraMTA traffic).

---

[37] Pellerin Direct, Page 62, Lines 15-16.
[38] Felton Direct, Page 40, Line 12.
[39] Felton Direct, Page 40, Lines 15-23.
[40] Addressed by Sprint witness Farrar in Issue III.E.(1).
[41] Felton Direct, Page 40, Lines 16-20.

**Q. How does Sprint propose for the Commission 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. AT&T witness McPhee discusses at length the necessity of including Calling Party Number ("CPN") provisions in the ICA.[42] Does Sprint object to the concept of Calling Party Number being included in the CLEC ICA?**

A. No. In fact, as Mr. McPhee acknowledges, the parties have agreed to language that provides for the parties to transmit CPN to each other. What Sprint does object to is the punitive nature of AT&T's language if one party is unable, for whatever reason, to provide CPN to the other. Under Sprint's proposal, the parties would work cooperatively to resolve any technical issues with passing CPN and either party would have the dispute resolution process available if a dispute arose regarding CPN. AT&T's language once

[42] McPhee Direct, Pages 36-38.

again resorts to the most extreme position it could take – billing intrastate access rates on any traffic passed without CPN if AT&T's arbitrary threshold of traffic with CPN is not met.

**Q. Does the parties' existing ICA contain the 90% CPN threshold proposed by AT&T?**

A. No.

**Q. Does the parties' existing ICA contain any CPN threshold?**

A. No.

**Q. Have the parties had any dispute about the transmission of CPN during the life of the existing ICA?**

A. Not to my knowledge.

**Q. So, is Sprint's intention to "game the system"[43] under the CPN language the parties have already agreed to?**

A. Absolutely not. As I've stated, the parties have not had an issue under the existing ICA, which does not include the type of CPN threshold language AT&T proposes here.

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

[43] McPhee Direct, Page 39, Line 25.

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?**

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

**Q. Having read the testimony of Mr. McPhee, do you have any general observations?**

A. Yes. Sprint's proposed language, which Mr. McPhee calls "defective,"[44] a means to "game the system,"[45] and "unreasonable,"[46] was put in place because, during negotiations, AT&T would not consider including any mention of bill and keep in the ICA. Therefore, Sprint's proposed approach to reciprocal compensation between the parties is absent any substantive discussion with AT&T, so, obviously it contemplates the arrangements

[44] McPhee Direct, Page 46, Line 23.
[45] McPhee Direct, Page 55, Line 17.
[46] McPhee Direct, Page 57, Line 14.

Sprint would prefer. Only now does Sprint see in Mr. McPhee's Direct Testimony a proposal from AT&T regarding how to handle Bill and Keep.

**Q. So, if there have not been any substantive discussions on the topic during the negotiations, do you believe the parties could engage in further negotiations and reach agreement on this issue?**

A. No. AT&T has clearly indicated its intransigence on this issue to Sprint and it should also be evident to the Commission after reading Mr. McPhee's Direct Testimony. Sprint is certainly willing to engage in further negotiations with AT&T, but, the Commission should be realistic in its expectation that the parties will never be able to reach agreement on this issue as long as AT&T remains inflexible in its position.

**Q. Mr. McPhee discusses § 51.713 in his Direct Testimony.[47] Do you have any comment?**

A. Yes. FCC Rule 51.713 is controlling with respect to this issue. Mr. McPhee correctly points out that the FCC has delegated authority to the Commission to impose bill and keep arrangements if the Commission ***presumes*** traffic between AT&T and Sprint is roughly balanced, is expected to remain so, and neither party has sought to charge asymetrical reciprocal compensation rates. Interestingly, while the FCC grants the latitude to the Commission to presume traffic is roughly balanced, AT&T seeks to impose its will upon the

[47] McPhee Direct, Pages 49-50.

Commission as well and remove the Commission's prerogative granted under § 51.713.[48]

**Q. Mr. McPhee goes on to point out that, in ¶ 1112 of the Local Competition Order, the FCC said that bill and keep arrangments are economically inefficient because they distort carriers' incentives by encouraging them to originate more traffic than they terminate.[49] Is there more to that paragraph?**

A. Yes. The FCC goes on to say that "bill-and-keep arrangements may minimize administrative burdens and transactions costs" and that, "in certain circumstances, the advantages of bill-and-keep outweigh the disadvantages, but no party has convincingly explained to us why, in such circumstances, parties themselves would not agree to bill-and-keep."

**Q. Is that the case here?**

A. I believe it is.

**Q. What administrative savings have the parties realized using a bill and keep arrangement for the past 10 years?**

A. Mr. McPhee focuses on the recording and processing of call usage data as the areas where the parties should realize cost savings to justify bill and

[48] McPhee Direct, Page 63, Lines 10-12.
[49] McPhee Direct, Page 50, Lines 18-20.

keep and he says that there are "almost none."[50] He is probably right, however, he overlooks one obvious (and very significant) administrative benefit the parties have realized – there has not been one single reciprocal compensation billing dispute between the parties during the period the parties have operated under the existing ICA. In my experience, I have seen billing disputes that consume countless person-hours to resolve and drag on for months, and even years. That is to say nothing of the costs associated with bill verification and auditing.

**Q. What other administrative savings have been realized as a result of the bill and keep arrangement currently in place between the parties?**

A. The parties have disagreed on the proper treatment of 1+ intraMTA traffic for years. However, heretofore there has been no compelling reason to resolve that dispute since resolution of the issue would have no practical effect on billing between the parties as long as they were exchanging traffic on a bill and keep basis. Similarly in this proceeding, and as previously indicated, if the Commission embraces Sprint's position on bill and keep, the resolution of Issue III.A.1.(1) becomes moot.

**Q. Mr. McPhee discusses the incentive carriers have under bill and keep to game the system.[51] Please comment.**

[50] McPhee Direct, Page 51, Line 16 through Page 52, Line 1.
[51] McPhee Direct, Page 52, Lines 9-17.

A. It is true that ILECs that *insisted* on reciprocal compensation after the Act was passed later claimed some CLECs "gamed" the reciprocal compensation system by seeking out customers with significant inbound traffic. Mr. McPhee even points to one of the best-known examples – dial-up ISP traffic.[52] But that issue is a red herring here—inbound traffic is not the issue AT&T seems concerned about. Rather, AT&T claims that bill and keep creates an incentive for Sprint to "maximize" the amount of traffic it sends to AT&T. Perhaps, but Sprint can only do that by *winning more customers and encouraging them to use Sprint's services*. Those are desirable outcomes for any carrier, and AT&T has the exact business opportunity to "maximize" its own traffic sent to Sprint.

**Q. How might a carrier arbitrage a bill and keep arrangement?**

A. Mr. McPhee describes a hypothetical in which a carrier with a bill and keep arrangement might attempt to aggregate local traffic that originates on third party networks for delivery to the other party of the bill and keep arrangement.[53] In the 10 years Sprint and AT&T have enjoyed a bill and keep arrangement, Sprint has not attempted any such strategy, nor does it make much sense – Sprint opens itself up to the exact same risk of AT&T engaging in such arbitrage for which Sprint would not get paid either. Moreover, Mr. McPhee himself acknowledges that the traffic balance gap has been narrowing between Sprint and AT&T,[54] so it follows that Sprint

[52] McPhee Direct, Page 52, Line 23 through Page 53, Line 11.
[53] McPhee Direct, Page 53, Line 13 through, Page 54, Line 2.
[54] McPhee Direct, Page 63, Line 19.

has not engaged in any efforts to artificially boost its originating traffic to take advantage of the bill and keep arrangement the parties currently enjoy.

**Q. But shouldn't the Commission protect AT&T against the prospect of an unscrupulous carrier adopting Sprint's agreement and engaging in the arbitrage tactics described above?**

A. Not necessarily, but, if the Commission feels compelled to do so, it can certainly do so without adopting AT&T's language. The Commission could, for example, direct the parties to insert further language into the ICA stating that the Commission has recognized that bill and keep is a continuation of the parties' existing compensation mechanism, and, to obtain the immediate benefit of such provisions, any party adopting the ICA must independently establish that, either it had a pre-existing bill and keep arrangement with AT&T, or, a rough balance of traffic exists at the time the ICA is adopted.

**Q. Is Sprint's "strong push for bill and keep" an indication that Sprint "is looking for an unfair economic edge?"[55]**

A. Absolutely not. Rather, it is an indication of Sprint's desire to maintain the status quo between the parties based upon the belief that the costs of commencing a system of reciprocal compensation payments would exceed the benefits realized by either party.

---

[55] McPhee Direct, Page 55, Lines 1-2.

**Q. Mr. McPhee puts forth a three-pronged criticism of Sprint's proposal.[56] Please address his critique of Sprint's approach.**

A. First, Mr. McPhee claims 60%/40% is too great a disparity to be considered in balance. However, he acknowledges that neither the FCC nor this Commission have established the appropriate threshold at which traffic would be considered roughly balanced.

**Q. Mr. McPhee next claims Sprint's proposal is defective because it "does not provide for a return to billing and paying reciprocal compensation if the parties convert to bill and keep and the traffic then goes out of balance."[57] Is that true?**

A. Yes and it is not an oversight. It is simply recognition of what the parties currently enjoy in the existing ICA. Sprint's language is no more "defective" than AT&T's in that once traffic falls out of rough balance and the parties move away from bill and keep to a system of payments, AT&T's language does not provide for a return to bill and keep should the traffic return to rough balance. It is not surprising to me that AT&T would attempt to justify its approach as somehow superior to Sprint's, but, the fact is, AT&T's approach is the simply the polar opposite of Sprint's. The difference is that Sprint's approach represents a continuation of the current

[56] McPhee Direct, Pages 58-63.
[57] McPhee Direct, Page 61, Lines 6-16.

arrangment utilized by the parties, whereas AT&T's proposal represents a 180 degree change.

**Q. Finally, Mr. McPhee states that AT&T has made "no such acknowledgement" that the traffic the parties are exchanging is in balance. Is that true?**

A. Fair enough. To put Mr. McPhee's Direct Testimony in the proper context, though, the statement that the parties acknowledge that the traffic is in balance was Sprint's proposed language – Sprint has not represented that AT&T agrees.

**Q. Mr. McPhee then suggests that it is Sprint's burden to prove the traffic is in balance.[58] Do you agree?**

A. No, not in this instance. The parties have been operating under a bill and keep arrangement for 10 years, and it is AT&T that seeks to deviate from the status quo. Moreover, Sprint would have been willing – and still is willing – to cooperate with AT&T to evaluate traffic volumes to determine what the balance truly is. Based on AT&T's unyielding position that bill and keep has no place in any ICA, the parties were unable to have a productive discussion on the issue.

[58] McPhee Direct, Page 62, Lines 18-20.

**Q. How should the Commission arrive at the presumption that traffic between AT&T and Sprint is roughly in balance?**

A. The FCC did not prescribe a definitive range for determining rough balance, so, I believe it is clearly (and intentionally) left to the Commission's discretion. As is obvious from its proposed language, Sprint believes rough balance is achieved when the parties are no more than +/- 10% from equilibrium. Mr. McPhee makes some vague references to what he believes the balance to be[59] (based, I am sure, upon AT&T's incorrect view of the treatment of 1+ intraMTA traffic as I discuss in Issue III.A.1) but he provides no frame of reference in regards to time period or geography. Assuming for the sake of discussion that Mr. McPhee's 70%/30% was historically close to accurate, when that ratio is adjusted for the natural narrowing of that ratio as conceded by Mr. McPhee, and a proper view of the treatment of 1+ intraMTA traffic, common sense dictates that any gap that may still exist in the traffic exchange ratio between the parties would be considerably closer than it was been 10 years ago – when the parties adopted bill and keep without any balance of traffic requirement at all.

**Q. Please summarize your Rebuttal Testimony on this issue.**

A. Sprint and AT&T have operated under a bill and keep arrangement for nearly 10 years. During negotiations, AT&T made it clear that it would not agree to a bill and keep arrangement going forward under any

---

[59] McPhee Direct, Page 63, Lines 18-19.

circumstances. It is only now, in Direct Testimony, that Sprint learns the details of how AT&T might handle bill and keep if forced to do so in the future, but, the parties have been unable to have any fruitful discussions in an effort to amicably resolve this issue. AT&T would not voluntarily participate in data analysis to determine the true traffic balance (although doing so would have likely been futile given the philosophical differences on important issues such as 1+ intraMTA traffic). If the Commission is inclined to adopt AT&T's position on this issue, Sprint urges the Commission to ensure AT&T utlizes proper methodology in measuring traffic and, in doing so, Sprint believes traffic will be well within rough balance.

**Q. What does Sprint propose 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 Commission 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.

**Issue III.A.2 – 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. Does AT&T witness McPhee adequately address the CMRS ICA dispute between the parties with respect to ISP-bound traffic?**

A. No. Mr. McPhee makes no mention of AT&T's proposed limitation in the CMRS ICA that there can be no land-to-mobile ISP-bound traffic. As I stated in my Direct Testimony,[60] the FCC placed no such limitation on wireless carriers in the ISP Remand Order.[61] Mr. McPhee also neglects to

[60] Felton Direct, Page 48, Lines 27-28.
[61] *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, Decalratory Ruling, 14 FCC Rcd 3689, 3699-3700 (February 26, 1999) ("Declaratory Ruling" or "Intercarrier Compensation NPRM").

address AT&T's proposed language stating that ISP-bound traffic would be jurisdictionalized based upon the end-points of the call. Again, as I stated in my Direct Testimony, one of the very reasons the FCC took jurisdiction of ISP-bound traffic is because of the impossibility of jurisdictionalizing the traffic and the strong likelihood that a great proportion of the traffic is interstate in nature.

**Q. How about the CLEC ICA? Does Mr. McPhee completely address the issue there?**

A. No. Mr. McPhee makes no attempt to jusatify AT&T's proposal to bill for Multiple Tandem Access ("MTA") associated with ISP-bound traffic. When an ILEC opts into the FCC's ISP rate plan, the $0.0007 rate is intended to cover all intercarrier compensation. The FCC did not leave room for an ILEC such as AT&T to layer on additional charges.

**Q. How does Sprint propose to resolve this issue?**

A. Sprint urges the Commission 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.

**Issue III.A.7 – 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?**

**Q. Do you have any response to AT&T witness Pellerin's Direct Testimony on this issue?**

A. Yes. Ms. Pellerin discusses meet point billing in a traditional sense as used between LECs. She even refers to Sprint wireless as a LEC,[62] which is obviously incorrect. Nevertheless, as I stated in my Direct Testimony, I described the expanded sense in which AT&T and Sprint PCS have utilized the term "meet point billing" since the inauguaration of the existing ICA. That expanded use of the term included the provision of transit service pursuant to the ICA. As I discussed in my Direct Testimony, AT&T disagrees with the inclusion of a transit obligation within the ICA, and that issue will be resolved in Issue I.C.2. The other disagreements with respect to this issue were adequately discussed within my Direct Testimony.

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

[62] Pellerin Direct, Page 66, Line 9.

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. AT&T witness Pellerin describes in her Direct Testimony why Sprint wireless must provide PIU, PLU, and 800 PIU from meet point billing.[63] Please respond.**

A. PIU and PLU are unnecessary because Sprint wireless will never route its originated traffic to an IXC other than its own affiliate for carriage to a terminating party. Additionally, since Sprint wireless is currently unable to bill IXCs access charges for either the origination or termination of traffic, those factors are meaningless to Sprint wireless for traditional meet point billing purposes.

**Q. In her Direct Testimony, Ms. Pellerin also addresses the default BIP between the parties.[64] Do you agree with her testimony?**

A. No, although I would point out that, unless AT&T has drastically changed its position, Ms. Pellerin mis-states it.[65] For purposes of my Rebuttal

[63] Pellerin Direct, Page 70, Lines 3-7.
[64] Pellerin Direct, Page 70, Line 10-23.

Testimony, I will assume it was a simple mistake. Having said that, my Direct Testimony clearly reflects the reasons that a 95% AT&T – 5% Sprint BIP is not appropriate.

**Q. How does Sprint request the Commission resolve the Wireless Meet Point Billing Issues III. A. 7 (1), (2) and (3)?**

A. Sprint proposes the Commission 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

[65] AT&T's position in the DPL states that the default BIP should be 95% AT&T – 5% Sprint. Ms. Pellerin appears to have reversed those numbers.

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. Is Sprint's proposal on this issue "a self-serving attempt to avoid paying AT&T for significant amounts of work"[66] as AT&T witness Ferguson alleges?**

A. No. As I stated in my Direct Testimony, the parties have been interconnected for years and no major network reconfigurations should be necessary. To the extent any are, they will likely be driven by an AT&T request and, therefore, AT&T should bear the cost of the work.

**Q. Mr. Ferguson says that Sprint "maintains that it should not have to compensate AT&T for processing Sprint's orders."[67] Is that true?**

A. No, and I am surprised at Mr. Ferguson for taking Sprint's proposed language out of context to make such an insinuation. Sprint's proposed language is as follows:

3.4 Neither Party intends to charge rearrangement, reconfiguration, disconnection, termination or other non-recurring fees that may be

[66] Ferguson Direct, Page 6, Lines 5-6.
[67] Ferguson Direct, Page 6, Lines 15-16.

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. [Emphasis added]

Clearly, Sprint's proposal only applies to any "initial reconfiguration" of the network, not the ongoing placement of orders.

**Q. Is there any other justification for Sprint's proposed language?**

A. Yes. It is substantially similar to what the parties included in the existing agreement at Attachment 3, Section 4.4. That language is as follows:

4.4 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 contained in this Agreement. However, the interconnection reconfigurations will have to be considered individually as to the application of a charge. Notwithstanding the foregoing, BellSouth and Sprint PCS do intend to charge non-recurring fees for any additions to, or added capacity to, any facility or trunk purchased. Parties who initiate SS7 STP changes may be charged authorized non-recurring fees from the appropriate tariffs.

**Q. How does Sprint propose to resolve this issue?**

A. Sprint requests the Commission 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.

**Issue III.F – CLEC Meet Point Billing Provisions**

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

**Q. Do you have any Rebuttal Testimony for this issue?**

A. No. My Direct Testimony sufficiently addresses this issue.

**Issue III.I – Pricing Schedule**

**Issue III.I.(1)(a) – If Sprint orders (and AT&T inadvertently provides) a service that is not in the ICA, (a) should AT&T be permitted to reject future orders until the ICA is amended to include the service? (b) 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. Having read AT&T witness Pellerin's Direct Testimony on this issue do you believe it is possible that AT&T may provide a service that is not in the ICA?**

A. Yes, I believe it is possible (as I believed before reading her Testimony), but I still do not believe it is likely. As I stated in my Direct Testimony, in 11 years of negotiating and implementing ICAs, I have never seen this happen.

**Q. Assuming this does happen, is rejecting future orders the appropriate remedy?**

A. No. This seems to be an overarching theme with AT&T – reject orders from or disconnect the services of requesting carriers as the first alternative to remedy issues that arise under the ICA. This is intercarrier extremism and should be rejected by the Commission.

**Q. Then what is the appropriate remedy?**

A. As I stated in my Direct Testimony,[68] a more cooperative way to deal with this issue would be to provide the service under an interim rate, negotiate an amendment to the ICA, and true the rate up or down, as appropriate.

**Q. Does Sprint hold the view that the omission of a product or service that AT&T provides from the ICA constitutes a waiver of AT&T's right to bill for such service?**

A. No.

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

A. Sprint requests that the Commission 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.

---

[68] Felton Direct, Page 59, Lines 20-23.

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

**Q. After reading Ms. Pellerin's Direct Testimony, do you believe the parties have a legitimate dispute?**

A. I don't know. As I stated in my Direct Testimony,[69] if the parties have simply incorporated a rate from an AT&T tariff by reference, Sprint agrees that any changes in the tariff would apply to Sprint. Moreover, if Sprint purchases a product or service directly out of the tariff, certainly any change to the tariff price would apply to Sprint. AT&T cannot, however, avoid its obligation to provide interconnection-related services that are subject to Section 252(d)(2) pricing (e.g. Interconnection Facilities) by only offering such services via a tariff that does not include the appropriate pricing.

**Q. Is there more than one perspective from which to view this issue?**

A. Yes, and I covered these in my Direct Testimony. The first scenario is where a rate (e.g., $0.002173) is actually "lifted out of" the underlying tariff and populated in the ICA price sheet so that the actual rate appears in the ICA. The second scenario is where a reference to the tariff (e.g., FCC Tariff No. 1, Section 6.1(b)) is populated in the ICA price sheet such that no rate for that particular product or service appears in the ICA.

[69] Felton Direct, Page 62, Lines 1-3.

**Q. What about a situation where a rate is "lifted out of" an AT&T tariff and populated directly in the ICA price sheet?**

A. In those situations, the price becomes part of the ICA and is disassociated with the tariff from which it originated. Any future changes to the actual tariff rate would no longer have any effect on the ICA rate, although the tariff was the original source of the rate.

**Q. If a tariff reference is populated in the ICA price sheet, do future tariff rate changes apply to Sprint?**

A. Yes, to the extent the "tariff" service is not otherwise subject to Section 252(d) pricing. If the tariff service is subject to Section 252(d) pricing (e.g., facilities used for interconnection), the appropriate cost-based rate itself should be incorporated into the price sheet rather than a mere reference to a tariff.

**Q. Are you able to make a clear distinction based on Ms. Pellerin's Direct Testimony or AT&T's proposed language which of those two scenarios actually apply here?**

A. No. Neither AT&T's proposed language nor Ms. Pellerin's Direct Testimony describing it clearly distinguish between these two alternatives.

**Q. Under what circumstances would Sprint agree to utilize a tariff rate for an interconnection service?**

A. Sprint would agree to utilize a rate from a tariff for an interconnection service if Sprint was comfortable that the rate was based upon TELRIC pricing principles, or when ordered to do so by the Commission.

**Q. So, is Sprint trying to gain some kind of "competitive advantage"[70] or "receive preferential treatment"[71] as Ms. Pellerin alleges in her Direct Testimony?**

A. No. This is a matter of Sprint seeking clear and unambiguous language in the ICA with respect to this issue.

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

**Q. In her Direct Testimony, AT&T witness Pellerin claims that Sprint's proposed language obligates the parties to incorporate changes to current rates affected by an FCC or Commission order.[72] Is that true?**

A. No. The parties are always free to negotiate rates that differ from Commission orders and nothing in Sprint's language eliminates that right.

---

[70] Pellerin Direct, Page 101, Line 15.
[71] Pellerin Direct, Page 101, Line 23.
[72] Pellerin Direct, Page 102, Lines 16-17.

**Q. Does Sprint really expect AT&T to notify Sprint of Commission-ordered rate changes as Ms. Pellerin claims?**[73]

A. Yes.

**Q. Why?**

A. It is AT&T's obligation to provide interconnection services at cost-based rates pursuant to Section 252(d)(2) of the Act. To the extent the FCC or the Commission modifies a cost-based rate, AT&T must notify all carriers with ICAs that include that particular rate element of the change.

**Q. And, Sprint's proposal would apply that rate change retroactively to the date of the FCC's or Commission's order?**

A. Yes, otherwise AT&T would have the incentive to delay notification for rate decreases and expedite notification for rate increases. If all rate changes apply back to the date of the relevant order, AT&T and every affected carrier is treated equally. And this proposal doesn't necessarily advantage one party or the other as rate changes could be up or down.

**Q. What about Ms. Pellerin's concern that huge balances due or refunds due could accrue if too much time passes before notification is made and the billed or billing party has not set aside adequate funds to meet that obligation?**

[73] Pellerin Direct, Page 104, Lines 11-14.

A. Under Sprint's proposal, that would not happen as AT&T would have the affirmative obligation to notify Sprint of a change when Sprint was not a party to the relevant proceeding instituting the change. When both parties were participants in the relevant proceeding, the party receiving the benefit of the rate change will undoubtedly notify the other party promptly of its desire to amend the ICA with the new rate.

**Q. Finally, Sprint's proposal requires an amendment to the ICA to effectuate the rate change. Why?**

A. Congress established interconnection agreements as the means to accomplish the goals of the Act. Amendments to implement rate changes are just the natural extension of that process. If AT&T disagrees with that process, its disagreement is with Congress, not Sprint.

**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. Does Sprint's process for the replacement of interim rates require the parties to modify such interim rates?**[74]

A. Yes.

**Q. Why?**

A. Sprint's process requires the parties to replace interim rates when permanent rates are ordered by the Commission because interim rates are by definition ***interim***. Calling a rate "interim" assumes the parties are including the rate in the ICA with the expectation that a future rate will be developed at some

[74] Pellerin Direct, Page 107, Lines 5-6.

point in the future and will be incorporated in the ICA with an amendment.[75] Sprint's proposed language is simply a recognition of this fact.

**Q. Are the parties free to agree to rates that differ from a Commission order or continue use of the interim rates?**

A. Yes. The parties are always free to mutually agree to rates, terms, or conditions that differ from a Commission order, regardless of what the ICA provisions require, as long as such rate, term, or condition conforms with applicable law and is non-discriminatory.

**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?**

[75] See discussion on necessity of ICA amendments above (Issue III.I.(3)).

**Q. Do you have any issues with AT&T witness Pellerin's Direct Testimony with respect to this issue?**

A. Yes. Ms. Pellerin's Direct Testimony implies that AT&T has the right to unilaterally establish rates without Commission oversight and approval, and such rates would automically apply to Sprint.[76] Sprint believes this is contrary to the spirit of the Act and FCC rules. As I've stated repeatedly, interconnection services should be priced at cost-based rates, and Commission oversight is necessary to ensure Congress' intentions are faithfully carried out.

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

A. Sprint asks the Commission 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

[76] Pellerin Direct, Page 109, Lines 10-12.

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

### Issue IV.A – General

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

**Q. In your Direct Testimony, you address Sprint's concern that AT&T's proposed general billing provisions did not recognize that Sprint may be a billing party. Has that aspect of this issue been resolved?**

A. Yes. As I understand it, the parties have resolved the reciprocity aspect to this issue by agreeing to Sprint's language for Sections 1.4 – 1.6 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. Is Sprint's concern with AT&T's proposed methodology for effectuating the facility cost sharing provisions of the ICA still an issue?**

A. Yes.

**Q. On page 8, lines 21-22, AT&T witness Ferguson claims that AT&T "has been manually applying the Shared Facility Factor for Sprint." Is that accurate?**

A. Generally, yes. However, contrary to Mr. Ferguson's assertion, this process has not been unilaterally undertaken by AT&T at its sole cost.[77] It is more accurate to say that it is a cooperative process between both parties and that both parties share in the cost to ensure the Shared Facility Factor is appropriately applied.

**Q. Mr. Ferguson also states that the easiest way to accomplish the sharing of facility costs would be for AT&T to render a bill for only Sprint's proportionate use of the facility. Do you agree?**

A. Absolutely. In fact, the FCC agrees with this premise as well. In 47 C.F.R. § 51.709(b) the FCC clearly provides that:

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an

[77] Ferguson Direct, Page 9, Lines 1-3.

interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

**Q. Can you paraphrase this FCC rule in layman's terms?**

A. Yes. Applying this rule to the instant issue, AT&T should only bill Sprint for that portion of the Interconnection Facility used by Sprint to terminate Authorized Services traffic that Sprint sends to AT&T.

**Q. It seems that, based on a clear reading of 51.709(b), the parties are not following the proper process for billing for the shared Interconnection Facility today. Please comment.**

A. I would agree. Mr. Ferguson characterizes the currently utilized practice as a "special accommodation that AT&T first made to Sprint – and only Sprint – in 2001".[78] This couldn't be further from the truth. In actuality, this was an accommodation ***Sprint made to AT&T***. It was AT&T, not Sprint, whose billing system lacked the functionality to properly implement Rule 51.709(b). Just as Sprint was cooperative in accommodating AT&T's billing system limitations in the current agreement, Sprint is willing to continue that accommodation, although technically, under Rule 51.709(b), Sprint has no obligation to do so.

**Q. Why is Sprint opposed to AT&T's proposed process?**

[78] Ferguson Direct Page 8, Lines 19-20.

A. AT&T's proposed language shifts the entire burden for operationalizing this contract provision to Sprint. In fact, the burden placed on Sprint by the AT&T proposed language is greater than the burden currently shared by the parties with the long-standing existing practice.

Q. **Why does Sprint believe that the burden imposed by AT&T in its proposed language is greater than the burden that the parties currently share?**

A. In order for Sprint to comply with AT&T's proposed language, Sprint would be required not only to audit circuit activity against the invoice rendered by AT&T but also track all AT&T rate elements, AT&T rates, and commission orders that impact the amounts Sprint would use to render such an invoice to AT&T. This burden is much greater than rendering a bill using one's own pricing and circuit activity systems.

**Q. Mr. Ferguson states in his Direct Testimony[79] that he does not know Sprint's reasoning for objecting to AT&T's proposed language in 2.10.1.1. Can you explain Sprint's reasoning?**

A. Yes. Sprint does not object to language regarding time periods for billing disputes ("credit claims"), however, language regarding disputes[80] is

[79] Ferguson Direct, Page 10, Line 6.

[80] Addressed as Issue IV.C in this arbitration.

already included in Section 3 of Attachment 7 (as appropriate) and should not be duplicated here.

**Q. What further objections does Sprint have to AT&T's proposed language for 2.10.1.1?**

A. Sprint also objects to AT&T's proposed language regarding the ability of a party to back-bill for existing products and/or services for which prices are altered by a Commission order. Sprint recognizes that this Commission has the authority to address back-billing time periods when altering ICA provisions. Sprint also recognizes that the parties will comply with any Commission order. However, this agreement should not presuppose the timelines within which the Commission may rule or add additional framework beyond what is provided for in such Commission order. Moreover, any Commission action that does not specify a back-billing period should apply on a prospective basis only.

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

**Q. Mr. Ferguson repeatedly refers to the "consistency" of AT&T's proposed back billing and back disputing time limits in his Direct**

**Testimony.[81] Is there any compelling reason for making back billing and back disputing time limits equal?**

A. No. The billing party is auditing its own internal data to ensure accuracy of its billing. Since the data used to perform such audits is internal and available, it is not unreasonable for a billed party to expect timely and accurate bills within six (6) months of receiving service. On the other hand, the billed party must audit the invoice received from the billing party using not only internal data but external data found in the billing party's tariffs, price lists, commission orders, etc. The billed party's audit process is impacted by the availability of these external documents as well as the amount of detail (or lack thereof) provided on the invoice by the billing party.

**Q. Mr. Ferguson argues that charges for services rendered between 6 months and 12 months ago are not more difficult to validate.[82] Why does Sprint believe that billing over 6 months old is more difficult to validate?**

A. Sprint points out that even computer records are archived after certain periods of time making the validation of delayed (or stale) billing more difficult. For example, traffic records (which include millions of call records each day) become more difficult to analyze for a specific vendor and period of time when a billing party back-bills more than 6 months. Sprint

[81] Ferguson Direct, Page 12, Lines 6-8; Page 12, Lines 13-16; Page 34, Lines 9-11.
[82] Ferguson Direct, Page 12, Line 14-Page 13, Line 20..

stores archived data in summary format making it more costly and time consuming to perform audits.

**Q. Does Sprint's proposed language benefit Sprint more than AT&T?**

A. No. Mr. Ferguson's assertion[83] does not make sense to me. Unless and until AT&T demonstrates otherwise, using an appropriate measurement of exchanged IntraMTA traffic, the parties traffic exchange is presumed to be roughly balanced so the billing would also be balanced - resulting in no added benefit to either party. Moreover, the size or quantity of the billed amounts bears no relationship to whether the billing party should be provided more leniency in producing an accurate and timely 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 sentence shall be applied prospectively only after the Effective Date of this Agreement, meaning that the six (6)

[83] Ferguson Direct, Page 14, Lines 12-18.

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.

**Issue IV.B – Definitions**

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

**Q. Mr. Ferguson states in his Direct Testimony that the parties agree charges are "Past Due" when payment is not received by the Bill Due Date, received after the Bill Due Date, or not received in funds that are readily available.[84] Does Sprint concur with his statement?**

A. Yes. Sprint does not dispute the fact that payments of valid charges should be made by the due date or will be considered "Past Due." However, as I state in my Direct Testimony,[85] once a charge is disputed it becomes a Disputed Amount rather than a Past Due amount and is not "rightly" due until the dispute is resolved.

**Q. What is the benefit to AT&T if its proposed definition of "Past Due" is approved?**

[84] Ferguson Direct, Page 15, Lines 4-8.
[85] Felton Direct, Page 72, Lines 30-31.

A. AT&T's apparent reason for including disputed charges as part of the definition of "Past Due" hinges on its ability to assess late payment charges ("LPC") for amounts that are part of a good faith dispute.

**Q. Should the billing party assess LPC associated with disputed amounts?**

**A.** No. Charges in dispute are not subject to billing and collection treatment by the billing party until the dispute is resolved. As a matter of fact, Mr. Ferguson states in his own testimony[86] that if a disputed amount is resolved in favor of the billed party a credit for the LPC would be required.

**Q. When is a disputed amount subject to LPC?**

A. LPC are never applicable while a dispute is pending resolution. LPC are only applicable if the dispute is resolved in favor of the billing party at which time it is no longer a disputed amount but an unpaid ("Past Due") amount.

**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).

[86] Ferguson Direct, Page 16, Lines 17-20.

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

**Q. What is AT&T's logic for exempting itself from being subject to the deposit provision?**

A. Mr. Ferguson states[87] that AT&T has lost tens of millions of dollars over the years due to non-payment. He also erroneously states that Sprint has not incurred any losses due to non-payment by billed parties. Further, Mr. Ferguson provides a comparison that is somewhat confusing. He compares the payment histories of AT&T's billing to any and all customers (not just Sprint) to AT&T's payment history with Sprint. This comparison is immaterial since it assumes that Sprint doesn't bill any other party. While AT&T has a good payment history with Sprint, Sprint also has a good payment history with AT&T (as well as every other vendor with which it does business). By extension, AT&T's logic in exempting itself from a deposit requirement (in a reciprocal fashion) would imply that Sprint should also be exempted and the entire section removed. Finally, Mr. Ferguson suggests that it is fair to exempt itself from the symmetrical language proposed by Sprint out of concern that a carrier might opt-in to this ICA and somehow disadvantage AT&T. AT&T's imagined threats are no reason for it to disadvantage Sprint.

**Q. Is Sprint's desire then to remove the section altogether?**

[87] Ferguson Direct, Page 20, Lines 7-8.

A. No. As I have stated, Sprint is amenable to including deposit provisions in the ICA but believes that such provisions should be fair and balanced.

**Q. Does the reciprocal deposit language in any way harm AT&T?**

A. No. In fact the same provisions that exempt credit worthy companies would protect AT&T from paying a deposit just as it does Sprint. That is, AT&T by virtue of a good payment history would also not represent a significant risk and could be exempt from the deposit provision under the same rules as Sprint.

**Q. Is AT&T's proposed language and associated testimony consistent with the reciprocity of the other sections in Attachment 7?**

A. No. AT&T and Sprint have agreed on reciprocal language concerning billing, payment, disputes, etc. The deposit language discussed here is just one more aspect of billing and should be addressed in a reciprocal fashion as well.

**Q. Why does Sprint object to AT&T's language regarding new and certain existing CLECs in paragraph 1.8.1?**

A. Sprint objects to AT&T's proposed language regarding new and certain existing CLECs in 1.8.1 because those references make the provision non-reciprocal. Mr. Ferguson states that Sprint fails to address circumstances involving new CLECs and certain existing CLECs who have filed for

bankruptcy. To the contrary, Sprint's language would allow the billing party (whether AT&T or Sprint) to secure the accounts of the Billed Party based on appropriate financial and billing history criteria. Sprint's provision would include new CLECs or existing CLECs that have filed bankruptcy.

**Q. Sprint's proposed language in Section 1.8.3 requiring that subsequent determinations of creditworthiness be governed by certain rules is characterized by Mr. Ferguson as "too limiting."[88] Please comment.**

A. Both parties agreed that parameters would be included to describe when a subsequent audit would be conducted. Sprint has offered that an increase in the Billed Party's gross billing of 25% over the most recent six-month period and the current financial position of the Billed Party would provide adequate guidelines for determining when/if a subsequent review of creditworthiness should occur. AT&T on the other hand, proposes language that is completely ambiguous.

**Q. What makes AT&T's proposed language ambiguous?**

A. AT&T's proposed language provides that the increase in gross monthly billing is "beyond the level most recently used to determine the level of security deposit." AT&T's language would basically give it the unilateral authority to, at any point, request whatever deposit amount it chooses and

[88] Ferguson Direct, Page 25, Line 17..

then threaten the billed party with discontinuance of service if the billed party does not provide the deposit.

**Q. What recourse is available to the billed party if it does not agree with the AT&T deposit request under the AT&T proposed language?**

A. Even if Sprint disagreed with AT&T's deposit request and sought redress through the dispute resolution process in the ICA, nothing in AT&T's proposed language would prevent it from discontinuing service to Sprint pending the outcome of the dispute resolution process.

**Q. Is the timeframe proposed by AT&T for deposit payments adequate time to review and pay/dispute the requested deposit?**

A. No. If AT&T's proposed language is approved, Sprint would have only 15-30 days to request the associated back-up, wait for its arrival, conduct audits, dispute or enter the payment cycle and escalate as needed. This is not a sufficient amount of time, especially since AT&T's language further would provide that after the 15 or 30 days, it may begin to disconnect service.

**Q. Mr. Ferguson states that the insertion of "agreed to or Commission-ordered" is not necessary for Section 1.8.5.[89] Why is the descriptive "agreed to or Commission-ordered" appropriately inserted by Sprint?**

[89] Ferguson Direct, Page 28, Lines 7-13.

A. The insertion by Sprint provides clarity concerning the security that is the subject of this section. The security described in 1.8.5 is one that has been either agreed to or Commission-ordered. Besides that, Mr. Ferguson concedes that "[i]f a security deposit is in place, it is in place because the Parties agreed or a [C]ommission ordered it." Therefore, it is unclear why AT&T would object to explicitly saying as much when the parties are in conceptual agreement.

**Q. Mr. Ferguson states that Sprint did not provide alternative language for Sections 1.8.7 and 1.8.8.[90] Is that a correct statement?**

A. Not completely. Sprint has provided proposed language for Section 1.8.7 as below. Sprint's proposed language would simply seek to make the section reciprocal.

> '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.'

Sprint did not propose language for Section 1.8.8 because the provision for a subsequent determination of creditworthiness is already covered by Section 1.8.3. AT&T's proposed language in 1.8.8 is repetitive.

[90] Ferguson Direct, Page 29, Line 22.

**Q. Did Sprint provide any alternative language for Section 1.8.9?**

A. No. Sprint's proposed language regarding deposits does not include references to Letters of Credit or Surety Bonds so there was no need for this section.

**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. Do you have any Rebuttal Testimony for this issue?**

A. No. My Direct Testimony sufficiently addresses this issue.

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

**Q. Do you have any Rebuttal Testimony for this issue?**

A. No. My Direct Testimony sufficiently addresses this issue.

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

**Q. Do you have any Rebuttal Testimony for this issue?**

A. No. My Direct Testimony sufficiently addresses this issue.

**Issue IV.C – 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. Since Mr. Ferguson repeatedly discusses the inconsistency of Sprint's proposed time frames for back-billing versus disputes,[91] what evidence would Sprint provide to support a differing time frame for filing a dispute than for discovering one's own billing errors?**

A. Sprint would offer the same support as provided in this rebuttal for issue IV.A.2. The party who is auditing an invoice (whether it be AT&T or Sprint) must audit using external resources (invoices received with differing amounts of detail, tariffs, commission orders, etc.) that are not controlled by the auditing party to validate against the auditing party's internal resources. This process is time consuming and the billed party should be afforded

[91] Ferguson Direct, Page 12, Lines 6-8; Page 12, Lines 13-16; Page 34, Lines 9-11.

every opportunity to ensure that it is being billed properly for services. When the billing party conducts audits of its own data to ensure billing accuracy, there is a reasonable expectation that the billing party should be able to conduct those audits within 6 months of providing the service.

**Q. Mr. Ferguson refers to Sprint's proposed 24 month-limit as "overly liberal."[92] Do you agree that 24 month's is "overly liberal"?**

A. No, I don't believe twenty-four months is liberal at all. Rather, it is a commercially reasonable time frame, particularly when measured against statutes of limitation. As stated in my testimony,[93] the FCC's statute of limitations for interstate access billing disputes is 24 months. A general Kentucky statute of limitations for written contracts is fifteen years (KRS 413.090(2)).

**Q. Would the adoption of Sprint's proposed language benefit one party more than the other?**

A. No. As stated previously in rebuttal of IV.A.(2), unless and until AT&T can demonstrate otherwise, the current traffic balance is presumed to be roughly balanced, resulting in any associated billing also being presumed to be roughly balanced, making this assertion[94] by AT&T generally incorrect.

[92] Ferguson Direct, Page 34, Line 5.
[93] Felton Direct, Page 79, Lines 16-17.
[94] Ferguson Direct, Page 36, Lines 3-8.

**Q. Mr. Ferguson notes that this Commission has approved at least six ICAs that included AT&T's proposed 12-month back-billing limitation.[95] What is the relevance of that fact?**

A. There is really no relevance to the fact that AT&T voluntarily agreed to a 12-month back-billing limitation with 6 carriers in the Commonwealth of Kentucky and the Commission approved all of those ICAs. If Sprint and AT&T agreed to a 12-month back-billing limitation, I'm sure the Commission would approve that aspect of the ICA as well. Since the parties do not agree, however, it is up to this Commission to consider the importance of a billed party having the latitude to look back 24 months to ensure the billing party is issue accurate bills.

**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 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. Mr. Ferguson describes unfair costs to AT&T to "correct Sprint's billing information, populate the missing and incomplete data, look up**

[95] Ferguson Direct, Page 36, Lines 12-13.

**accounts, and reformat the dispute forms."[96] Please address these concerns.**

A. The parties have successfully agreed on the specific data that is required when filing a dispute with the other party in this same section 3.3.1. The only disagreement is the form used to transmit the data and whether one party should bear the burden of cost related to the other party's internal systems. If AT&T is truly altering the information provided by Sprint on its dispute notice (in substance rather than format), there is a larger concern that AT&T may be altering the nature of the dispute or critical details. However, if AT&T is simply reformatting data provided by Sprint so it will fit neatly within AT&T's automated bill dispute platform, I would reiterate that Sprint has been using its existing bill dispute format for at least 6 years with AT&T.[97]

**Q. Can Sprint elaborate on the cost associated with using AT&T's form for filing billing disputes?**

A. Yes. Sprint audits invoices from 2000 different billing parties each month. Each of those billing parties renders multiple bills to Sprint. Sprint has implemented mechanized controls to assist with bill processing and payment in order to facilitate its timely payment to vendors such as AT&T (much like AT&T has done). These controls include a system generated billing dispute form that provides all the necessary information required by AT&T and

[96] Ferguson Direct, Page 38, Lines 8-11.
[97] Felton Direct, Page 81, Line 10.

agreed upon by the parties for a dispute. If Sprint were to alter its system to accommodate the individual dispute forms for AT&T or each of the other billing parties who render invoices to Sprint, the cost to Sprint and the overall bill processing cycle would increase exponentially and have ripple effects to the other vendors for which Sprint pays bills.

**Q. Does use of a form other than the Billing Party's form hinder resolution of the dispute?**

A. No, not as long as the dispute form contains all of the relevant information. It is the content of the dispute notice that drives resolution of a dispute issue, not the form used to deliver that information. AT&T is simply forcing its own internal system limitations on the rest of the industry. Sprint currently accepts AT&T's dispute notices in the format that AT&T chooses to provide and AT&T should ***continue*** to reciprocate by accepting Sprint's bill dispute format.

Q. **Does Sprint's dispute form contain all of the necessary information to effectively resolve disputes?**

A. Yes. As I stated in my Direct Testimony, the parties have successfully used Sprint's dispute form for the past 6 years.

**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.

**Issue IV.D – Payment of Disputed Bills**

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

**Q. Mr. Ferguson states that the use of Sprint's definition would "effectively eliminate [Section 1.12] from the ICA."[98] Is it Sprint's**

[98] Ferguson Direct, Page 40, Line 11.

**intention to eliminate Section 1.12 by its proposed definition of Non-Paying Party?**

A. No. Section 1.12 requires the Billed Party to give notice to the Billing Party of the amount that is unpaid and in dispute by the bill due date. Sprint is in agreement with the concept of this section. Perhaps the term "Billed Party" is best used in this reference to ensure the contract term is clear.

**Q. Is the term Non-Paying Party appropriately used under the Sprint's proposed definition in Section 2.4?**

A. Yes. This section addresses a situation where the billing party has not received notice of dispute or payment of charges and a notice has been sent to the Non-Paying Party. At this point, there is no dispute so the amounts due are "undisputed and unpaid." If the Non-Paying Party receives the notice and determines that a portion or the entire amount due is under dispute, a dispute is filed. Once the dispute is filed, the billed party would appropriately be referred to as the Disputing Party as referenced in section 3 of this attachment.

**Q. Are there other uses of this definition that should be addressed?**

A. Yes. Mr. Ferguson only addresses one other instance.

**Q. Which other instance is addressed by Mr. Ferguson?**

A. Mr. Ferguson addresses the use of "Non-Paying Party" in AT&T's proposed escrow provision addressed in this hearing under Issue IV.D.3. Sprint opposes the use of escrow for disputed billed amounts, however, if escrow language is approved, Sprint proposes that the billed party filing a dispute be referred to as the Disputing Party rather than the Non-Paying Party.

**Q. What other section uses the term "Non-Paying Party"?**

A. Section 2.2. The term as defined by Sprint is appropriately used in this section. This section refers to undisputed and unpaid charges so the billed party would appropriately be referred to as the Non-Paying Party. Further this section states that the Billing Party will send a disconnect notice to the Non-Paying Party.

**Q. What is the harm if the Commission approves the AT&T definition of "Non-Paying Party" as it relates to Section 2.2?**

A. AT&T's definition of Non-Paying Party would imply that Sprint's services could be subject to disconnect even if a billed amount is part of a good faith dispute. Treatment action such as disconnection of service should only apply to balances that are undisputed and meet the other qualifications described in the agreement.

**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. Mr. Ferguson states that use of the term "Unpaid Charges" in Section 2.4 requires the definition proposed by AT&T in order for the provision to work.[99] Is that a correct statement?**

A. No. Section 2.4 addresses the actions required by the billed party if it desires to dispute any of the "Unpaid Charges." Since all charges are undisputed before a dispute has been filed, either AT&T's or Sprint's definition of "Unpaid Charges" would render the same result in Section 2.4. At the point a dispute is filed, the appropriate term for the amount not paid would then be Disputed Amount as used in Section 3 (where dispute provisions are stated).

**Q. Are there other sections that also require the use of Sprint's proposed definition of "Unpaid Charges"?**

A. Yes. As mentioned in Issue IV.E below, Section 2.2 provides for the Billing Party to send disconnect notice associated with Unpaid Charges. If the Commission approves the definition as proposed by AT&T, Section 2.2 would imply that Sprint's services could be disconnected if there are amounts in dispute beyond the bill due date.

[99] Ferguson Direct, Page 42, Lines 12-15.

**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. Mr. Ferguson asserts that AT&T has lost tens of millions of dollars to carriers that disputed bills without a proper basis and then had no funds to pay the amounts owed.[100] Does this situation apply to Sprint?**

A. No. Sprint only files disputes that are good-faith disputes. Sprint recognizes the fact that there are situations where a dispute may be filed, rejected by the billing party with additional facts provided to billed party, and then paid to billing party as a result of the additional auditable information. At the point that a dispute is resolved, Sprint certainly pays any amounts owed.

**Q. In that same regard, describe other provisions within the agreement that provide adequate protection to both parties for resolution of disputes and associated payments/credits.**

[100] Ferguson Direct, Page 43, Lines 18-22.

A. Section 3.3.1 of Attachment 7 describes specific requirements associated with filing a dispute, resolution timelines, and cure based on the final resolution. This section provides that either party may take additional measures beyond informal dispute resolution in the event that a dispute issue is not being resolved. In addition, Section 2[101] describes rights to review a billed party's creditworthiness and collect or increase a security deposit based on certain criteria. Both of these sections as proposed by Sprint would provide adequate protection to both AT&T and Sprint as a Billing Party.

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

A. Sprint requests the Commission reject AT&T's proposed escrow language.

**Issue IV.E – 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. Why is Mr. Ferguson's assertion that a 15-day period is sufficient time to render payment or file a dispute after receiving a Disconnection Notice[102] unreasonable?**

[101] As further discussed in Issue IV.B(2).
[102] Ferguson Direct, Page 46, Lines 18-19.

A. The Disconnect Notice is the first notice to the Billed Party that an issue exists. Sprint's practice is to either pay the balance due by the due date or file a good-faith dispute. If there is ever an instance where a Disconnection Notice is sent to Sprint as a result of an unpaid/past-due balance, the first action on Sprint's part is to ensure receipt of the original invoice for which payment is not made. If the invoice was not received, the invoice must first be sent to Sprint for processing and subsequent payment and/or dispute. This process takes longer than AT&T's overly aggressive 15 days. It is not reasonable for AT&T to disconnect service within 15 days in this situation. Further, if the invoice was received timely but the payment and/or dispute transmission was lost or misrouted, resolution of this circumstance also requires more than 15 days and should not place Sprint's customers at risk of losing their service. It is not unheard of that a Billing Party may misapply a payment or that a payment/dispute transmission may be lost. Sprint's proposal simply protects the Billed Party in the event that there is some loss of data that has caused the unpaid/undisputed past due situation.

**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. Based on Mr. Ferguson's testimony regarding the involvement of this Commission prior to termination of Sprint's service to Kentucky consumers,[103] what risk is presented if AT&T's proposed language is approved?**

A. Based on AT&T's proposed language, a Kentucky consumer who receives service from Sprint could be disconnected if there were some issue with invoicing, payment, or dispute transmission that is not resolved within 15 days of an invoice due date. This action is extreme not only for Sprint but for consumers within Kentucky.

**Q. Mr. Ferguson states that adding time for Commission approval of a discontinuance of service is a tactic of delaying payment.[104] Please comment.**

**A.** Nothing could be further from the truth. This is an overreaction to unfortunate circumstances - bills unpaid by other carriers, not Sprint - in the past. Moreover, the viability of any carrier's business relies on its customers and their satisfaction with the service they enjoy. It would be detrimental to Sprint or any other carrier to have service terminated, not to mention the negative effect on end users. Sprint seeks to have provisions

[103] Ferguson Direct, Page 48, Lines 7-10.
[104] Ferguson Direct, Page 48, Lines 10-14.

within the agreement that would protect the consumer as well as Sprint from premature treatment activities of this severity.

**Q. Mr. Ferguson states that the party receiving the notice of discontinuance certainly has the opportunity to take the issue to the Commission.[105] How likely is it that every notice of discontinuance would become an issue before this Commission anyway?**

A. Very likely. As described above, disconnection of service is the most extreme measure AT&T could take against the Billed Party and its end users. Any "threat" of disconnection (as AT&T describes it) would immediately be brought before this Commission.

**Q. What other protection does the Billing Party have in this ICA?**

A. The deposit language,[106] as well as the dispute language, provides adequate protection to the Billing Party against carriers who "continue to run up bills it does not pay."[107]

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

A. Sprint proposes the following language:

2.0 Nonpayment and Procedures for Disconnection

---

[105] Ferguson Direct, Page 48, Lines 20-23.
[106] See Issue IV.B(2).
[107] Ferguson Direct, Page 51, Lines 4-5.

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. Mr. Christensen states in his Direct Testimony[108] that Sprint provided a state-specific indicator on the Sprint invoices at one time. What is this state-specific indicator?**

A. I am not certain what state specific indicator Mr. Christensen references. Sprint has never provided the billed ("originating") party state specific OCN on an invoice from either its wireless or CLEC entity. The wireless invoice submitted by Sprint CMRS to AT&T has been a national level invoice since January 2000. The CLEC invoice submitted by Sprint to AT&T was produced by LATA prior to November 2009 and delivered as a national invoice after that date.

**Q. What change was made by Sprint in November 2009?**

A. In November 2009, Sprint implemented a Billing Account Number ("BAN") consolidation for our CLEC entity. Prior to the consolidation, Sprint rendered 81 invoices to AT&T for CLEC reciprocal compensation each month in states other than Kentucky.[109]

**Q. Prior to November 2009 when the CLEC invoices were rendered by LATA, was an originating state-specific indicator provided by Sprint on the invoice?**

A. No. For LATAs that cross over state boundaries multiple states would be billed on the same invoice even prior to the BAN Consolidation.

---

[108] Christensen Direct, Page 16, Lines 4-6.
[109] The parties enjoy a bill & keep compensation mechanism today in Kentucky.

**Q. In Mr. Christensen's description of the steps AT&T must perform, he states that the AT&T system allows for mechanized receipt of billing data. What cure is available to AT&T in mechanized format from Sprint that would provide the needed detail?**

A. Sprint offers a mechanized transmission of bill data. Currently AT&T has chosen not to subscribe to this mechanized invoice media.

**Q. Does AT&T have the option to receive totally mechanized invoices from Sprint that would provide the reporting functionality described by Mr. Christensen in his Direct Testimony?**[110]

A. Absolutely. Sprint offers a mechanized invoice through electronic data transfer that would allow AT&T to mechanically download invoice data for validation and reporting. This invoice would include state level summaries.

**Q. Is there additional cost for AT&T to receive the mechanized invoices described above?**

A. No. If AT&T changes the primary media to a mechanized invoice, there is no monthly recurring cost to AT&T for the primary media.

**Q. If this Commission were to approve AT&T's proposed language to include the state specific OCN for the billed ("originating") party, are**

[110] Christensen Direct, Page 17, Lines 6-8.

**there factors that impact Sprint's ability to comply with AT&T's proposed language?**

A. Yes. The method in which AT&T publishes its Kentucky numbers in the Local Exchange Routing Guide ("LERG") impacts Sprint's ability to comply with the AT&T proposed language. As I mentioned in my Direct Testimony,[111] Sprint complies with the requirements of Small Exchange Carrier Access Billing ("SECAB") as provided by the industry. AT&T has requested that Sprint provide the Originating Party ***state specific*** OCN on the invoice. However, because AT&T does not populate state specific OCNs in the LERG, it would be impossible for Sprint to obtain the requested information with the resources Sprint has its disposal. To clarify further, when the Billing Party analyzes the call detail record ("CDR") for invoicing, the Billing Party may perform a LERG lookup using the CPN or Local Routing Number to determine the OCN of the originating party Since AT&T only populates the LERG with an overall regional OCN, Sprint's query using the CPN that is recorded as part of the CDR, yields only the regional OCN, not the state-specific OCN AT&T desires.

**Q. What is Sprint's recommendation to the Commission?**

A. Rather than approve the AT&T proposed language that would be impossible to operationalize since the state specific codes are not even utilized by AT&T for its own numbering resources in Kentucky, Sprint recommends

[111] Felton Direct, Page 90, Lines 20-23.

that the Commission approve Sprint's proposed language. Further, as I state above, Sprint is happy to offer AT&T its mechanized bill format in order to receive the state level summaries in mechanized form rather than through the email transmission elected by AT&T.

**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. Mr. Christensen states that Sprint's proposed language is imprecise and would lead to unnecessary disputes that this Commission might have to decide.[112] Please comment.**

A. Sprint actually seeks to provide clarity to this contract provision with two insertions to the section. I will address each insertion separately.

**Q. What is Sprint's first insertion to Section 1.19?**

[112] Christensen Direct, Page 20, Lines 2-4.

A. The first insertion involves limiting the amount of time that the billed party may withhold payment when notification of a bill format change is not received at least 90 days prior to the change. The language that AT&T proposes allows the Billed Party to withhold payment indefinitely, which is surprising since AT&T claims to have losses in the tens of millions of dollars due to non-payment of invoices. It is more likely that this Commission would be called upon to resolve a non-payment issue under AT&T's proposal.

**Q. What is Sprint's second insertion to Section 1.19?**

A. The second insertion involves the added phrase "*that may impact the Billed Party's ability to validate and pay the Billing Party's invoices.*" Sprint recognizes that not every bill format change will require programming changes on the part of the Billed Party in order to process the invoice for payment. In those situations, there is no reason for the Billed Party to withhold payment beyond the due date of the invoice regardless of the notification timeline. This language would certainly not seek to create uncertainty for the Billing Party. The Billing Party would most certainly have the option to send notification for every billing format change if it so chooses. Instead, Sprint's proposal seeks to protect the Billing Party from non-payment when notification is either not sent or delayed for a bill format change which does not impact the Billed Party's processing/validation of the invoice.

**Q. How do you address AT&T's assertion that 90 calendar days may not provide enough time for necessary preparations by the Billed Party?**[113]

A. I do not understand AT&T's assertion. It certainly is not consistent with the other agreed upon language in this section. AT&T and Sprint have agreed that 90 calendar days is an appropriate timeframe for sending "timely" notification of a billing format change. If the notice is provided timely, the Billed Party has 90 days to prepare for the billing format change. In this scenario, the Billed Party is not afforded any additional time to make necessary preparations. If the notice is not provided timely, Sprint's proposed language would suggest that the Billed Party should have the same amount of time deemed as "timely" from the date that notice is provided even if that notice is receipt of the invoice containing the bill format change. AT&T's proposed language would give the Billed Party an unlimited amount of time to withhold payment.

**Q. Mr. Christensen references Sprint's CLEC BAN Consolidation Project as an example of a time when AT&T required more than 90 days preparing for a change in billing format.**[114] **How did Sprint respond to AT&T's delayed implementation?**

A. Upon AT&T's request, Sprint developed and provided customized summary reports to meet the needs of AT&T's audit process. In addition, at no time

---

[113] Christensen Direct, Page 21, Lines 9-10.
[114] Christensen Direct, Page 22, Lines 1-18.

did Sprint bill a late payment charge to AT&T for the delay in processing payment since the parties were working together to resolve AT&T's concern.

**Q. Mr. Christensen asserts that Sprint failed to include bill summary pages with its invoices to AT&T from November 2009 through June 2010.[115] Is that a correct statement?**

A. No. The change implemented by Sprint in November 2009 was to consolidate CLEC invoices only. The summary page of the invoice was still present but represented a summary at the national level rather than at the LATA level as previously provided. Prior to the CLEC BAN Consolidation Project a state level summary was not provided. In addition, at no time since January 2000 has there been a state level summary provided for invoices rendered by Sprint wireless to AT&T for wireless reciprocal compensation.

**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

[115] Christensen Direct, Page 22, Lines 12-14.

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. Do you have any Rebuttal Testimony for this issue?**

A. No. My Direct Testimony sufficiently addresses this issue.

**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. Mr. Ferguson asserts that Sprint proposes that the ICA include no language for NICS.[116] Is that correct?**

A. No. As a matter of fact, AT&T and Sprint have agreed on all sections relating NICS with the exception of 5.1.2.

**Q. What is the purpose of section 5.1.2?**

A. This section provides for AT&T to "collect revenue earned by Sprint within the AT&T-9STATE territory from another LEC also within the AT&T-9STATE territory where the messages are billed, less a message billing and collection fee indicated in the Pricing Schedule." This is a service that is

[116] Ferguson Direct, Page 51, Lines 23-24.

provided to Sprint by its Revenue Accounting Office ("RAO") host company. At this time, Sprint's RAO host company is AT&T. However, Sprint has the option of choosing another RAO host company who will then perform these functions on our behalf. AT&T's proposed language would not allow Sprint to choose a different company as its RAO host.

**Q. Mr. Ferguson mentions that AT&T had proposed a revision to address Sprint's concern.[117] Did the proposal address the concern adequately?**

A. No. AT&T offered to add the statement, "This section 5.1.2 applies only if AT&T and Sprint do not have an RAO Hosting Agreement." AT&T's proposed resolution does nothing more than move the function from one agreement with AT&T to another. Carriers have the option of choosing any RAO host company to perform the functions required by NICS. Sprint should not be stripped of its option to choose another company as its host company.

**Q. Did Sprint offer a counter proposal to resolve this issue?**

A. Yes. Sprint counter-offered to accept the paragraph with the following revision of the additional statement offered by AT&T (as mentioned above): "This section 5.1.2 applies only if Sprint does not have an RAO Hosting Agreement." AT&T declined Sprint's proposed change.

[117] Ferguson Direct, Page 52, Lines 4-6.

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

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

## IV. CONCLUSION

**Q. Does this conclude your Rebuttal Testimony?**

A. Yes.

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,

DEFENDANTS-APPELLANTS.

---

P. MICHELE ELLISON
ACTING GENERAL COUNSEL

JOSEPH R. PALMORE
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

LAUREL R. BERGOLD
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes and Regulations**

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.

---

[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

---

[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

---

[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]

---

[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

---

[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]

---

[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

---

[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

---

[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

---

[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

---

[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.

---

[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

---

[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.

---

[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

---

[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

---

[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

---

[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

---

[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.

---

[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.

Respectfully submitted,

P. MICHELE ELLISON
ACTING GENERAL COUNSEL

JOSEPH R. PALMORE
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

s/ LAUREL R. BERGOLD
LAUREL R. BERGOLD
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

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. | ) | |

**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type volume limitation in Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 5454 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word 2003.

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it uses a 14-point proportionally spaced typeface (Times New Roman).

3. The file copied to the CD-ROM containing an electronic copy of this brief has been scanned for viruses and is virus free.

s/ Laurel R. Bergold
Laurel R. Bergold
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

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.

I further certify that some of the participants in the case may not be CM/ECF users. As such, I will cause the foregoing document this day to be sent by First-Class Mail to the following parties:

Jeffery V. Stuckey
Dickinson Wright
215 S. Washington Square
Suite 200
Lansing, MI 48933
Counsel for: Michigan Bell

William J. Champion, III
John M. Dempsey
Dickinson Wright
301 E. Liberty Street
Suite 500
Ann Arbor, MI 48104
Counsel for: Michigan Bell

J. Tyson Covey
Demetrios G. Metropoulos
Theodore A. Livingston
Mayer Brown
71 S. Wacker Drive
Chicago, IL 60606
Counsel for: Michigan Bell

Bill Magness
Casey, Gentz & Magness
98 San Jacinto Boulevard
Suite 1400
Austin, TX 78701
Counsel for: Talk America, Inc.

Michael S. Ashton
Graham K. Crabtree
Fraser, Trebilcock, Davis &
Dunlap
124 W. Allegan
Suite 1000 Michigan Nat'l Tower
Lansing, MI 48933
Counsel for:
Talk America, Inc.
Covad Comm. Co.

Scott H. Angstreich
Kellogg, Huber, Hansen, Todd,
Evans & Figel
1615 M Street, N.W.
Suite 400
Washington, DC 20036
Counsel for: Verizon

s/ Laurel R. Bergold
Laurel R. Bergold

FOR PUBLICATION

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

PACIFIC BELL TELEPHONE COMPANY, DBA AT&T California,
*Plaintiff-Appellant,*

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; MICHAEL R. PEEVEY; DIAN M. GRUENEICH; JOHN BOHN; RACHELLE CHONG; TIMOTHY ALAN SIMON,
*Defendants-Appellees.*

No. 08-15568
D.C. No. 3:07-CV-01797-SI

PACIFIC BELL TELEPHONE COMPANY, DBA AT&T California,
*Plaintiff-Appellee,*

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; MICHAEL R. PEEVEY; DIAN M. GRUENEICH; JOHN BOHN; RACHELLE CHONG; TIMOTHY ALAN SIMON,
*Defendants,*

and

CBEYOND COMMUNICATIONS, LLC,
*Defendant-intervenor-Appellant.*

No. 08-15716
D.C. No. 07-CV-01797-SI
ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted
October 6, 2009—San Francisco, California

Filed March 4, 2010
Amended September 1, 2010

Before: Mary M. Schroeder, A. Wallace Tashima and Carlos T. Bea, Circuit Judges.

Opinion by Judge Bea

## COUNSEL

Scott K. Attaway, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC, for the plaintiff-appellant.

Frank R. Lindh, California Public Utilities Commission, San Francisco, California, for the defendants-appellees.

Clay Deanhardt, Law Office of Clay Deanhardt, Orinda, California, for the intervenor-appellant.

## ORDER

The opinion filed on March 4, 2010 is amended as follows:

**Replace the following text on Slip Op. page 3398:**

> Both the Seventh and the Eighth circuits recently rejected AT&T's position, and have concluded that FCC regulations authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection. *See Sw. Bell Tel., LP v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676 (8th Cir. 2008) ("*SWBT*"); *Ill. Bell Tel. Co. v. Box*, 526 F.3d

1069 (7th Cir. 2008) ("*Box I*"). We agree with our sister circuits.

**With:**

Both the Seventh and the Eighth circuits recently rejected AT&T's position, and have concluded that FCC regulations authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection. *See Sw. Bell Tel., LP v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676 (8th Cir. 2008) ("*SWBT*"); *Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069 (7th Cir. 2008) ("*Box I*");[11] *contra Michigan Bell Tel. Co. v. Lark*, 597 F.3d 370 (6th. Cir. 2010). For the reasons that follow, we agree with the Seventh and Eighth Circuits and reject the reasoning advanced by AT&T and the Sixth Circuit in its recent 2-1 decision.

Judges Schroeder and Bea vote to deny the suggestion for rehearing en banc, and Judge Tashima so recommends. All judges vote to deny the petition for panel rehearing.

The suggestion for rehearing en banc has been circulated to the full court, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

Petitioner's petition for panel rehearing and suggestion for rehearing en banc are denied.

No further filings will be accepted in this closed case.

---

**OPINION**

BEA, Circuit Judge:

This case involves the balance the Telecommunications Act of 1996 ("the Act") strikes between providing newer competi-

tors access to previously monopolistic telecommunications markets, on the one hand, and encouraging and protecting infrastructure investments of older, incumbent telecommunications providers on the other. We must interpret two provisions of the Act that impose requirements on older, incumbent local exchange carriers ("incumbent LECs")—like appellant AT&T—to lease certain components of their existing infrastructure to rival newer, competitive carriers ("competitive LECs")—like intervenor Cbeyond.

First, we must determine whether 47 U.S.C. § 251(c)(2) requires an incumbent LEC to lease its "entrance facilities" (wires that connect rival telephone systems) to a competitive LEC at regulated rates when the competitor wishes to use the "entrance facility" to permit its own customers to reach customers of the incumbent LEC.

Second, we must determine whether 47 C.F.R. § 51.319(e)(2)(ii)(B) (the "DS1 Cap Rule"), which limits to ten the number of low-capacity DS1 telephone lines an incumbent LEC must lease to a competitive LEC at regulated (low) rates along certain routes, is a limitation which also applies to any route, regardless whether the competitive LEC is "impaired" as to the alternative to such low-capacity lines: the competitive LEC's own higher-capacity DS3 lines.

Properly to understand the terms used and the regulatory area into which we are about, some background would help.

## BACKGROUND

### A. The Telecommunications Act of 1996

Prior to 1996, local telephone service generally was provided by a local monopolist who offered services at prices regulated and imposed by a variety of governmental agencies. Such monopolist providers are commonly referred to as "incumbent local exchange carriers" or "incumbent LECs." Con-

gress enacted the Act to deregulate the telecommunications market. *See generally Verizon Comms. Inc. v. FCC*, 535 U.S. 467, 475-76 (2002). But, to facilitate the entry of new participants into these local markets, the Act imposes on incumbent LECs two duties relevant in this case.

*Interconnection Duty at Regulated Rates.*

First, the Act imposes a duty on incumbent LECs to permit "interconnection." Pursuant to 47 U.S.C. § 251(c)(2),[1] incumbent LECs must allow the competitive LEC to link its network to that of the incumbent LEC, so that customers of the competitive LEC may place calls to customers of the incumbent LEC. Without the ability to link its network to that of the incumbent LEC, the competitive LEC would have little prospect of selling its telephone services, to say nothing of competing for the customers of the incumbent LEC. A local telephone service is of little use if it cannot connect to other local telephone users.

*Lease of Network Parts at Regulated Rates.*

Second, the Act imposes a duty that incumbent LECs "unbundle"[2] parts of their network. Each such part of the incumbent LEC's network is a "network element". Pursuant to 47 U.S.C. § 251(c)(3),[3] incumbent LECs must permit competi-

[1]47 U.S.C. § 251(c)(2) provides that each incumbent LEC has "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network."

[2]"Unbundling" is the process of breaking apart something into smaller parts. An example is taking a bundled computer system and unbundling it into its individual pieces such as the PC unit, monitor, keyboard, and mouse, and then selling each of these items individually. In the context of this case, "unbundling" is the term used to describe the access provided by incumbent LECs so that other service providers (i.e., competitive LECs) can buy or lease portions of the incumbent LECs' network elements, such as interconnection loops, to serve subscribers.

[3]47 U.S.C. § 251(c)(3) provides that incumbent LEC's have: "The duty to provide, to any requesting telecommunications carrier for the provision

tive LECs to lease, at regulated cost-based rates, parts of the incumbent's network, such as telephone wires, call exchanges, and routing systems. This provision promotes competition by allowing a competitive LEC to enter the telephone service market without having first to overcome capital barriers to entry, i.e., without having to construct, at high cost, every component necessary to operate a network. *See Ill. Bell Tel. Co. v. Box*, 548 F.3d 607, 609-10 (7th Cir. 2008) ("*Box II*"). For example, a competitive LEC might enter a market by providing residential telephone service in two far-flung neighborhoods. Rather than having to lay its own wire to connect the two neighborhoods, the competitive LEC can, under § 251(c)(3), piggyback on the incumbent LEC's pre-existing network at regulated, cost-based rates. In this way, a competitive LEC may more easily and less expensively begin to establish its market presence.

However, before an incumbent LEC is obligated to lease network elements on an unbundled basis, the Federal Communications Commission ("FCC") must find that a refusal to deal would "impair" competition. Section 251(d)(2) requires the FCC to determine which network elements incumbent LECs must offer to a competitive LEC on an unbundled basis. 47 U.S.C. § 251(d)(2).

Once the FCC determines that a particular network element must be offered on an unbundled basis, a competitive LEC that wishes to lease the network element must negotiate with

---

of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement [negotiated in good faith by the incumbent LEC and competitive LEC pursuant to § 251(c)(1)] and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

the incumbent LEC to determine price and other terms. 47 U.S.C. § 251(c)(1). If the negotiations come to an impasse or otherwise fail to produce and agreement, the parties must submit the dispute to binding arbitration.[4] The arbitrator's decision is subject to approval by the relevant state regulatory commission, usually the state public utilities commission. *Id.* If the parties have failed to agree on the lease price, the state regulatory commission may set a price that is "just and reasonable." *Id.* § 252(d)(1).

These "just and reasonable" rates must be based upon the Total Element Long Run Incremental Cost ("TELRIC") methodology. 47 C.F.R. § 51.505. The TELRIC methodology is based on what it cost the incumbent LEC to acquire the network elements; this historical cost method often results in prices that, under certain circumstances, can be highly favorable to the competitive LECs. *See Verizon Communications*, 535 U.S. at 489, 496-97 (upholding 47 C.F.R. § 51.505); *Box II*, 548 F.3d at 609.

The FCC's attempts to implement the incumbent LEC's unbundling obligations have a long history. The first three published rules were invalidated by the courts, in part,[5] and it was not until the FCC issued the Triennial Review Remand Order in 2005 (the "TRRO"), Order on Remand, *In the Matter of Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 (Feb. 4, 2005), that the FCC's rules survived judicial review, *see Covad Comms. Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). Two predecessor orders, the relevant parts of which were not invalidated by

[4]As the Seventh Circuit has noted, the "arbitration" is really the first stage in a regulatory proceeding, for it bears none of the traditional hallmarks of normal arbitration such as voluntary consent and finality. *See Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069, 1070 (7th Cir. 2008) ("*Box I*").

[5]*See Covad Comms. Co. v. FCC*, 450 F.3d 528, 533-534 (D.C. Cir. 2006) (describing history of invalidated FCC unbundling orders).

courts, are relevant to our analysis and are discussed in greater detail below: the 2003 Triennial Review Order (the "TRO"),[6] and the 1996 Local Competition Order (the "LCO").[7]

### B. Procedural History

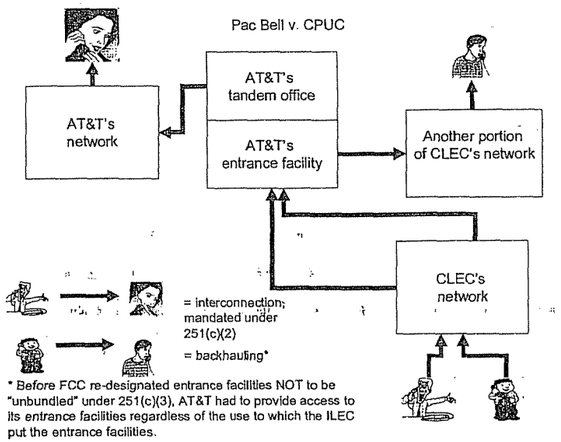
After the FCC issued the TRRO, AT&T—the incumbent LEC in California—sought to negotiate changes to its agreements with competitive LECs to bring their contracts into conformity with AT&T's now-changed obligations. After negotiations broke down, AT&T brought a consolidated arbitration proceeding before the California Public Utilities Commission ("CPUC"). CPUC issued a decision favoring the competitive LECs on several disputed issues, and AT&T filed an action in federal district court seeking to set aside four of CPUC's orders related to unbundling. Two of these orders are at issue on appeal:

1. *Entrance Facilities*—CPUC ordered AT&T to lease entrance facilities to competitor LECs at TELRIC rates for the purpose of interconnection. An entrance facility is a "dedicated transport" (a wire) that connects one LEC's "switch" (a computer that routes calls) to another LEC's switch. In other words, an entrance facility is the high capacity wire that links telephone networks. Entrance facilities may be used for two distinct purposes. First, a competitive LEC can use an entrance facility for interconnection—that is, to link the competitive LEC's network with that of the incumbent LEC so that the competitive LEC's customers may reach the incumbent LEC's customers. *See* TRRO ¶ 138-40; TRO ¶ 366-67.

[6]Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16978 (2003), *vacated in part by United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[7]First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996) (subsequent history omitted).

Second, a competitive LEC can use an entrance facility for what the industry calls "backhauling." In the case of backhauling, the competitive LEC uses the entrance facility to permit its *own* customers to reach *one another* over the incumbent LECs network. *See id.*[8] The following diagram illustrates the difference between interconnection and backhauling:




Under the TRRO, incumbent LECs are not obligated to offer entrance facilities on an unbundled basis under 47 U.S.C. § 251(c)*(3)*. AT&T and the competitive LECs disputed, however, whether § 251(c)*(2)* obligates incumbent LECs to lease their entrance facilities to competitive LECs at TELRIC rates for the purposes of "interconnection" (*i.e.*, for the purpose of allowing competitive LEC customers to place

[8]Incumbent LECs are capable of screening out calls that would be used for backhauling. A computer identifies the destination of the call, and, if the call is bound for a customer of the competitive LEC, the computer can screen out the call.

calls to incumbent LEC customers). CPUC concluded that § 251(c)(2) requires incumbent LECs to lease entrance facilities to competitive LECs at TELRIC rates for interconnection. On cross motions for summary judgment, the district court confirmed CPUC's arbitral order on this point, and AT&T timely appealed.

2. *DS1 Transport*—CPUC also ruled that the DS1 Cap Rule applies only on routes where competitive LECs are not "impaired"[9] as to DS3 transport circuits. A "transport circuit" is a wire that carries telecommunications signals along "routes" between switching centers (computers that direct calls to other locations). TRRO ¶ 67. Transport circuits come in two grades relevant here: DS1 (low capacity) and DS3 (high capacity). A DS3 line can carry twenty-four times as many calls as a DS1 line but is more expensive to buy and install than DS1 lines. TRRO ¶ 129 n. 361. All parties agree that the FCC's rules cap the number of DS1 circuits competitive LECs may lease from incumbent LECs on an unbundled basis along routes where competitive LECs are not "impaired" as to higher capacity DS3 lines. Once a competitive LEC has sufficient traffic to justify leasing ten or more DS1 lines, it is economical for the competitive LEC to build, deploy, and install its own DS3 line. TRRO ¶¶ 71-73.

However, AT&T and the competitive LECs disputed whether this cap also applies to routes where the FCC had concluded that competitive LECs were "impaired" as to higher capacity DS3 lines. CPUC ruled in favor of the competitive LECs, and held that the cap did not apply along such

[9]According to FCC regulations, a competitive LEC's ability to provide service is " 'impaired' if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including elements self-provisioned by the requesting carrier or acquired as an alternative from a third-party supplier, lack of access to that element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market by a reasonably efficient competitor uneconomic." 47 C.F.R. § 51.317(b).

"DS3-impaired" routes. The district court disagreed, concluding that, under the plain language of the FCC's rule, the DS1 Cap applies along all routes, and vacated the arbitral order on this point. Cbeyond filed a motion in the district court to join the action as an intervenor for the purpose of appeal.

## ANALYSIS

This court reviews *de novo* claims of error in a district court's order determining whether an arbitrator's decision complies with FCC regulations. *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142, 1150 (9th Cir. 2006). This court owes no deference to the arbitrator's decision. *Id.* The parties may not challenge the validity of any final order of the FCC, including FCC regulations, in this action. 28 U.S.C. § 2342.[10]

### A. Access to Entrance Facilities Under 47 U.S.C. § 251(c)(2).

**[1]** AT&T contends the district court erred by affirming the CPUC's arbitral order permitting competitive LECs to lease entrance facilities from incumbent LECs under 47 U.S.C. § 251(c)(2), the interconnection provision. Both the Seventh and the Eighth circuits recently rejected AT&T's position, and have concluded that FCC regulations authorize state public utilities commissions to order incumbent LECs to

[10]Under the Hobbs Act, this court lacks jurisdiction to rule on a collateral attack of an FCC order. 28 U.S.C. § 2342; *see also US West Comms, Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002) ("Properly promulgated FCC regulations currently in effect must be presumed valid for the purposes of this appeal. The Hobbs Act, 28 U.S.C. § 2342, requires that all challenges to the validity of final orders of the FCC be brought by original petition in a court of appeals. The district court thus lacked jurisdiction to pass on the validity of the FCC regulations, and no question as to their validity can be before us in this appeal."); *see also GTE S., Inc. v. Morrison*, 199 F.3d 733, 742-43 (4th Cir. 1999) (holding the court lacked jurisdiction to rule on the validity of FCC rules "including those relating to rulemaking" on review of district court order affirming state public utility's arbitral decision relating to provisions of the Act).

lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection. *See Sw. Bell Tel., LP v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676 (8th Cir. 2008) ("*SWBT*"); *Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069 (7th Cir. 2008) ("*Box I*");[11] *contra Michigan Bell Tel. Co. v. Lark*, 597 F.3d 370 (6th. Cir. 2010). For the reasons that follow, we agree with the Seventh and Eighth Circuits and reject the reasoning advanced by AT&T and the Sixth Circuit in its recent 2-1 decision.

**[2]** Section 251(c)(2) provides that "each incumbent local exchange carrier has the . . . duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." 47 U.S.C. § 251(c)(2). The FCC defines interconnection as "the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. In other words, interconnection provides a way for a competitive LEC's customers to reach AT&T's customers and vice versa. Section 251(c)(2)(B) specifies that incumbent LECs must offer competitive LECs such interconnection "at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2)(B). The FCC regulation also states that incumbent LECs must provide competitive LECs with "any technically feasible method of obtaining interconnection." 47 C.F.R. § 51.321(a).

**[3]** The FCC calls entrance facilities "the transmission facilities that connect competitive LEC networks with incumbent LEC networks." TRRO ¶ 136. As the term "entrance"

[11]In *Box I*, the Seventh Circuit held that because entrance facilities were a "technologically feasible" means of handing off traffic between a competitive LEC and an incumbent LEC, an obligation to lease such facilities at TELRIC rates was within the scope of § 251(c)(2) and the implementing regulations. 526 F.3d at 1071-72. The Eighth Circuit reached the same conclusion in *SWBT*, 530 F.3d at 683-84. In *SWBT*, the Eighth Circuit stated: "If a [competitive] LEC needs entrance facilities to interconnect with an [incumbent] LEC's network, it has the right to obtain such facilities from the [incumbent] LEC." *Id.* at 684.

implies, entrance facilities provide a way for a competitive LEC's calls to enter AT&T's network and reach AT&T customers, a fact that AT&T concedes. For the competitive LECs to use the entrance facilities this way is interconnection.[12]

**[4]** That AT&T's entrance facilities can be used for a purpose besides interconnection (i.e., backhauling) does not change the result that 47 U.S.C. § 251(c)(2) mandates AT&T to provide competitive LECs access at regulated rates to its entrance facilities for *interconnection.* The parties disagree about the effect on this result of the FCC's finding in its TRRO that under a different subsection of the Act, § 251(c)*(3)*,[13] competitive LECs are not impaired[14] in building entrance

[12]AT&T seeks to distinguish the historical use of entrance facilities for interconnection by long distance service providers, which did not compete with AT&T, and the current use by competitive LECs, which do compete with AT&T. AT&T states that "entrance facilities in this case provides the same function" as entrance facilities did historically (*i.e.*, connecting networks), but competitive LECs can feasibly interconnect with AT&T at a different point in AT&T's network, whereas the long distance providers could not. This contention does not survive the plain language of § 251(c)(2)(B), which requires an incumbent LEC to provide interconnection "at *any* technically feasible point within [its] network." (Emphasis added.)

[13]Section 251(c)(3) provides that incumbent LECs have "[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

[14]The Act tasks the FCC with deciding whether a particular network element, i.e., "a facility or equipment used in the provision of a telecommunications service," 47 U.S.C. § 153(29), is one that incumbent LECs must lease to competitive LECs at regulated rates, i.e., the element is "unbundled" under 47 U.S.C. § 251(c)(3). 47 U.S.C. § 251(d). To make that determination, the FCC must consider, at a minimum, two factors:

facilities and therefore that entrance facilities are not "unbundled network elements" that incumbent LECs like AT&T have a duty to provide competitive LECs *for any purpose*, including backhauling. TRRO ¶¶ 136-141.

As an initial matter, under general principles of statutory interpretation, the specific duty found in 47 U.S.C. § 251(c)(2) of providing interconnection facilities prevails over the general duty of providing network elements at unbundled rates, found in § 251(c)(3) (regardless whether that general unbundling duty exists as to entrance facilities). *See NLRB v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir. 1994) ("It is a well-settled canon of statutory interpretation that specific provisions prevail over general provisions.").

Moreover, as the district court found, the TRRO reinforces that the duties of incumbent LECs under 47 U.S.C. § 251(c)(2) and § 251(c)(3) are independent. The TRRO states that the FCC's finding that incumbent LECs need not lease entrance facilities as unbundled network elements under (c)(3) "does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)." TRRO ¶ 140.

**[5]** AT&T contends TRRO Paragraph 140 does not require incumbent LECs to offer entrance facilities at TELRIC rates because the TRRO uses the term "interconnection facilities" instead of "entrance facilities" when it refers to the right under 47 U.S.C. § 251(c)(2) that is not altered by the TRRO's determination that "entrance facilities" need not be unbundled under § 251(c)(3). First, although the FCC did not use the

---

"whether — (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* The FCC thus makes an "impairment finding" as to that network element. *See Covad Comms.*, 450 F.3d at 534-45.

term "entrance facilities" in Paragraph 140, the paragraph appears in a section of the TRRO entitled "Entrance Facilities," which solely discusses the effect of the FCC's finding as to entrance facilities. Moreover, prior FCC rulings make clear that the interconnection obligation contained in § 251(c)(2) includes a duty to lease entrance facilities at TELRIC rates when such facilities will be used for the purposes of interconnection. The 1996 Local Competition Order ("LCO") broadly defined the interconnection obligation to include a duty to offer unbundled network elements at TELRIC rates:

> We conclude that, under sections 251(c)(2) *and* 251(c)(3), any requesting carrier may choose *any method of technically feasible interconnection* or access to unbundled elements at a particular point. Section 251(c)(2) imposes an interconnection duty at any technically feasible point; *it does not limit that duty* to a specific method of interconnection or *access to unbundled elements*.

LCO ¶ 549 (emphasis added); *see also* 47 C.F.R. § 51.321(a) (stating that incumbent LECs are required to offer "any technically feasible method of obtaining interconnection").

**[6]** Though the LCO did not expressly state that entrance facilities were one of the "network elements" incumbent LECs were required to make available under 47 U.S.C. § 251(c)(2), the later Triennial Review Order ("TRO") expressly interpreted the LCO to impose this obligation. The TRO stated:

> In reaching [the determination that entrance facilities are not "network elements" subject to the unbundling obligation in § 251(c)(3)] we note that, 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* and we do not alter the Commission's interpretation of this obligation.

TRO ¶ 365. The TRO elaborated:

> [C]ompetitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users. These links constitute the incumbent LEC's own transport network. However, in order to access UNEs [unbundled network elements], including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic.

TRO ¶ 366. The TRO thus expressly interpreted the LCO to allow competitive LECs to lease entrance facilities or "transmission links" at TELRIC rates for the purpose of achieving interconnection. This interpretation of the LCO is reasonable and entitled to deference.[15] *Auer v. Robbins*, 519 U.S. 452,

[15]Contrary to AT&T's assertion, this portion of the TRO was not vacated in *USTA II*, 359 F.3d 554. *USTA II* vacated only the TRO's conclusion that entrance facilities are categorically excluded from the definition of "network elements" under § 251(c)(3). *Id.* at 585. The court did not rule on the validity of the FCC's conclusion that, under § 251(c)(2), incumbent LECs are obligated to offer entrance facilities at TELRIC rates.

461 (1997) (An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation.").[16] Moreover, AT&T's contention that the TRO's interpretation of the LCO conflicts with the terms of 47 U.S.C. § 251(c)(2) is foreclosed because AT&T cannot challenge the validity of FCC orders in this proceeding. *See Jennings*, 304 F.3d at 958 n.2.

AT&T also contends CPUC's interpretation conflicts with the FCC's express findings that competitive LECs are not "impaired" as to entrance facilities. *See* TRRO ¶¶ 138, 139. But those FCC findings also expressly distinguished entrance facilities used for the purpose of interconnection and for backhauling. TRRO ¶¶ 138-140. In light of the different economic considerations associated with the use of entrance facilities for interconnection, on the one hand, and for backhaul, on the other, the FCC could reasonably conclude that different regulations were appropriate. Where a competitive LEC uses an interconnection facility for backhaul, only the competitive LEC benefits—both the originator and the recipient of the call are competitive LEC customers. But when the competitive LEC uses the entrance facility for interconnection, both competitor and incumbent benefit: the incumbent's customers can reach customers of the competitor, and vice versa. *See generally* LCO ¶ 162 ("In this situation . . . each gains value from

[16]The specific statements in the TRO and the LCO that the obligation to provide facilities and equipment under § 251(c)(2) includes a duty to provide entrance facilities foreclose AT&T's interpretation of the term "interconnection facilities." AT&T relies on 47 C.F.R. § 51.5, which defines "interconnection" to exclude the "transport and termination of traffic." AT&T construes this language to exclude *any* duty under § 251(c)(2) to carry a competitive LEC's traffic. This conflicts with TRRO ¶ 140 itself, which explains that "interconnection facilities" are "for transmission and routing" of telephone calls. If the duty to provide "interconnection" did not include any duty to provide *any* transport of calls, then § 251(c)(2) would be meaningless because incumbents could physically link networks with the competitive LEC, but refuse to carry calls to the incumbent LEC's terminal customers, thus effectively locking the competitive LEC out of the market.

the interconnection arrangement."); TRO ¶ 367 ("Our conclusion in this respect is buttressed by the fact that the economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an incumbent LEC's network that our analysis must adequately reflect this distinction."); *see also Box I*, 526 F.3d at 1071 ("What's the point of specifying that [competitive] LECs cannot demand access to entrance facilities as unbundled network elements, AT&T inquires, if state commissions can turn around and require the same access at the same price anyway? The answer . . . is that [competitive] LECs do not enjoy the "same" access to entrance facilities under the state commission's decision as they did before the FCC's order. Until then, [competitive] LECs could use entrance facilities for both interconnection and backhauling.").

**[7]** Accordingly, we agree with the district court and hold that, under 47 U.S.C. § 251(c)(2), incumbent LECs must lease entrance facilities at TELRIC rates to competitive LECs for the purpose of interconnection.

### B. Unbundled Access to DS1 Circuits Under 47 U.S.C. § 251(c)(3).

**[8]** In its cross-appeal, Cbeyond contends the district court erred in vacating the CPUC's order that required incumbent LECs to grant unbundled access to an unlimited number of DS1 transport circuits along routes on which competitive LECs are impaired as to DS3 transport circuits.[17] The district

[17]AT&T incorrectly contends Cbeyond waived this issue by failing to raise it in the district court. This issue is (1) a pure question of law; and (2) was fully briefed in the district court by the CPUC. Accordingly, the issue has not been raised for the first time on appeal and this court can reach the issue. Even if the issue was presented for the first time on appeal, the court could reach the question. *See K&N Eng., Inc. v. Bulat*, 510 F.3d 1079, 1081 n.2 (9th Cir. 2007) (the court may, in its discretion, reach issues raised for the first time on appeal if the record is fully developed, the question is a pure question of law, and no prejudice will result).

court concluded that the plain language of the governing regulation, 47 C.F.R. § 51.319(e)(2)(ii)(B) (the "DS1 Cap Rule"),[18] limits a competitive LEC to a maximum of ten DS1 circuits along any route regardless whether the competitive LEC is impaired as to DS3 lines. We agree. Under the plain language of the regulation, the DS1 Cap Rule applies to *all* routes where DS1 circuits are available on an unbundled basis.

On appeal, Cbeyond contends the district court's interpretation of the DS1 Cap Rule is contrary to the FCC's findings in the earlier TRRO. Cbeyond concedes, however, that the language of the DS1 Cap Rule—47 C.F.R. § 51.319(e)(2)(ii)(B)—unambiguously limits to ten the number of DS1 circuits an incumbent LEC must offer at TELRIC rates on *any* route.

In general, the plain meaning of an administrative regulation controls. *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1084 (9th Cir. 2007). Plain meaning, however, is "not the end of the inquiry." *Id.* at 1086; *see also Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007). The plain language of a regulation does not control if "clearly expressed administrative intent is to the contrary or if such plain meaning would lead to absurd results." *Id.* (internal quotation marks and alterations omitted). "[T]he regulatory intent that overcomes plain language must be referenced in the published notices that accompanied the rulemaking process." *Id.* A rule leads to absurd results only if it would be "patently inconceivable" that the agency intended the result. *Id.* at 1098.

**[9]** Here, there is no "clearly expressed administrative intent" in the published notices that accompanied the DS1 Cap Rule rulemaking process. Further, the DS1 Cap Rule as we read its plain text would not lead to absurd results. It is

[18]The DS1 Cap Rule provides: "Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis."

perfectly conceivable the FCC meant what it said when it limited the number of DS1 circuits that a competitive LEC can lease on routes where the competitive LEC is impaired as to a higher capacity DS3 circuit. Where a competitive LEC is so impaired, it will have access to an incumbent's DS3 circuits on an unbundled basis. Hence, it would be more economical for the competitive LEC to lease a single DS3 line from the incumbent LEC, rather than eleven or more DS1 lines at greater cost. TRRO ¶ 128 ("This is consistent with the pricing efficiencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s."). The FCC expressly found that once a competitive LEC could aggregate sufficient traffic, the DS3 rules should apply: "When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply." *Id.*

**[10]** It is hardly "patently inconceivable" that the FCC intended the DS1 cap to apply on all routes, even those where competitive LECs are impaired as to DS3 circuits. In such circumstance, the competitive LEC can obtain more economical DS3 circuits, and there is no reason why the FCC would have intended to permit competitive LECs to impose greater costs on incumbent LECs by allowing unlimited leases of DS1 circuits.

Cbeyond's contention that the DS1 Cap Rule conflicts with the terms of 47 U.S.C. § 251(c)(3) is foreclosed because Cbeyond cannot challenge the validity of the FCC orders in this proceeding. *See Jennings*, 304 F.3d at 958 n.2.

**[11]** Accordingly, we agree with the district court and hold that, under the plain language of the regulation, the DS1 Cap Rule limits to ten the number of DS1 lines an incumbent LEC must lease to a competitive LEC at TELRIC rates on all routes.

## CONCLUSION

For the all of the foregoing reasons, we affirm the district court's order confirming in part and vacating in part the CPUC's arbitral order.

**AFFIRMED.**