

ATTACHMENT

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EXHIBIT 1



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August 16, 2013

Ms. Mary J. Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way, P.O. Box 30221
Lansing, MI 48909

Re: MPSC Case No. U-17349; In the Matter of the Petition of SPRINT SPECTRUM, L.P. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish Interconnection Agreements with MICHIGAN BELL TELEPHONE COMPANY d/b/a AT&T MICHIGAN

Dear Ms. Kunkle:

On behalf of Michigan Bell Telephone Company d/b/a AT&T Michigan (“AT&T Michigan”), please find for filing in the above-captioned case the following:

1. AT&T Michigan’s Response to Petition for Arbitration;
2. AT&T Michigan’s DPL;
3. Proposed Interconnection Agreement;
4. AT&T Michigan’s Brief on the Arbitration Issues;
5. Testimony of Bill Anglin;
6. Testimony of Sherri Bazan;
7. Testimony of William E. Greenlaw;
8. Testimony of Patricia H. Pellerin;
9. Proof of Service.

Confidential information in this submission will be filed separately today.

Please call me with any questions concerning this filing.

Sincerely,

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**STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

* * * * *

In the matter of Petition of Sprint Spectrum)
L.P. for Arbitration pursuant to Section 252(b))
of the Telecommunications Act of 1996 to)
establish Interconnection Agreements with)
Michigan Bell Telephone Company d/b/a)
AT&T Michigan)

Case No. U-17349

**AT&T MICHIGAN'S BRIEF
PUBLIC VERSION**

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**STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

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In the matter of Petition of Sprint Spectrum)
L.P. for Arbitration pursuant to Section 252(b))
of the Telecommunications Act of 1996 to) Case No. I-17349
establish Interconnection Agreements with)
Michigan Bell Telephone Company d/b/a)
AT&T Michigan)

AT&T MICHIGAN’S BRIEF

Michigan Bell Telephone Company (“AT&T Michigan”), by its counsel, respectfully submits its brief supporting resolution of the arbitration issues in favor of AT&T Michigan.

INTRODUCTION

This brief generally tracks the organizational scheme of Sprint’s Initial Brief (Exhibit G to Sprint’s Petition for Arbitration), with two exceptions: Sprint’s Initial Brief addresses Issues 22-25 in Section IV.B. This brief includes no Section IV.B, and discusses Issues 22-25 in Section II.E. With the elimination of Section IV.B, this brief discusses under Section IV the issues Sprint’s Initial Brief discusses under Section IV.A.

Our discussion of each issue on the DPL begins with a short statement of AT&T Michigan’s position on the issue, at the end of which the AT&T Michigan witness(es) on that issue and the pertinent page numbers of their testimony are identified.

I. PURPOSE AND SCOPE OF THE AGREEMENT (ISSUES 1, 2, 3 AND 4)

I.A. PARTIES’ RIGHTS AND OBLIGATIONS UNDER THE AGREEMENT

ISSUE 1: WHAT PROVISIONS SHOULD BE INCLUDED IN THE ICA REGARDING THE EXCHANGE OF TRAFFIC IN IP FORMAT?

AT&T Michigan Position: The parties' interconnection agreement ("ICA") should not provide for IP-to-IP interconnection, for two principal reasons. First, the interconnection requirement in section 251(c)(2) of the Telecommunications Act of 1996 does not apply to IP-to-IP interconnection. The Commission should not address that legal point, however, because the FCC is considering it, and because the second reason for resolving this issue in favor of AT&T Michigan is simple and straightforward and does not require the Commission to anticipate what the FCC will do. That second reason is that AT&T Michigan has no IP network. In other words, it has no IP-capable equipment with which Sprint can interconnect. That indisputable fact rules out any possibility of IP-to-IP interconnection at this time. Sprint wants the Commission to require an affiliate of AT&T Michigan – AT&T Corp. – to permit Sprint to interconnect with that affiliate's IP-capable equipment, but any such requirement would be unlawful, not only because AT&T Corp. is not a party to this proceeding, but also because federal law requires that interconnection be at a point on the ILEC's network – not on an affiliate's network. Since there can be no IP-to-IP interconnection between AT&T Michigan and Sprint, any traffic that Sprint carries on its network in IP format and wishes to deliver to AT&T Michigan must be converted to TDM format before Sprint delivers it to AT&T Michigan's TDM network. In case the circumstances change, AT&T Michigan proposes language that will allow Sprint to propose terms and conditions for IP-to-IP interconnection during the term of the ICA. In a just completed arbitration between Sprint and AT&T Illinois, the Illinois Commerce Commission adopted the language AT&T Michigan proposes here. (Anglin at 3-26.)

1. Introduction

All traffic that AT&T Michigan exchanges with other carriers, including Sprint, is exchanged in Time Division Multiplexing ("TDM") format. Testimony of Bill Anglin ("Anglin") at 3. This is because AT&T Michigan has a TDM network. AT&T Michigan's network includes no equipment that is capable of processing traffic in any other format, including IP (Internet Protocol) format. *Id.*¹ While some companies with which AT&T Michigan exchanges traffic carry traffic in IP format on their networks, those companies must convert any such traffic to TDM before they deliver the traffic to AT&T Michigan. *Id.* at 11.

¹ When carriers exchange voice traffic in Time Division Multiplex ("TDM") format, they send the traffic over dedicated circuits. Anglin at 4. In Internet Protocol ("IP") format, in contrast, the voice signals are divided into packets and each packet is sent over the fastest available route in a packet-switched network. *Id.* The packets are then reassembled into the complete voice message at the receiving end.

Sprint, however, proposes that the ICA include provisions for IP-to-IP interconnection, *i.e.*, provisions that would allow each party to deliver traffic in IP format to the other party, with no conversion to TDM format. AT&T Michigan opposes Sprint's proposed language.

One reason for AT&T Michigan's opposition is that AT&T Michigan disagrees with Sprint's premise that the interconnection requirement in section 251(c)(2) of the Telecommunications Act of 1996 ("1996 Act" or "Act") extends to IP-to-IP interconnection. That disagreement, however, is currently before the Federal Communications Commission ("FCC") (see Anglin at 6), and, as an Arbitration Panel recently concluded in Case No. U-16906, this Commission should not get out in front of the FCC on this issue. Furthermore, there is no need for a decision in this case on whether section 251(c)(2) requires IP-to-IP interconnection, because even if it did, the Commission would still have to reject Sprint's proposed language. This is the second reason for AT&T Michigan's opposition to Sprint's proposal: Sprint cannot establish IP-to-IP interconnection with AT&T Michigan, because under controlling federal law, any interconnection must be at a point on AT&T Michigan's network, and there is no point on AT&T Michigan's network at which an IP-to-IP interconnection can be established because there is no IP equipment on AT&T Michigan's network.

AT&T Michigan recognizes, however, that the FCC may at some point require incumbent local exchange carriers ("ILECs") to provide IP-to-IP interconnection to requesting carriers, and that in the future, AT&T Michigan's network may include IP-capable equipment. In light of that, AT&T Michigan's proposal is not that the parties' ICA be silent on the subject of IP-to-IP interconnection. Rather, AT&T Michigan proposes that the ICA allow either party to propose terms and conditions for IP-to-IP interconnection during the term of the ICA, with recourse to this Commission if the parties fail to reach agreement.

Sprint recently arbitrated the IP-to-IP interconnection issue with AT&T Illinois. In that case, Staff of the Illinois Commerce Commission (“Illinois Commission” or “ICC”) recommended that the ICC reject the IP-to-IP interconnection language Sprint proposed. One reason Staff gave for this recommendation was that Sprint’s language was “inconsistent with the requirements of Section 251 of the Act and the FCC and ICC rules and regulations implementing it.”² As we explain below, the language Sprint proposes here, though different from the language it proposed in Illinois, is contrary to law for the same reasons as the language Sprint proposed there.

The ICC Staff, having rejected Sprint’s unlawful proposal, recommended that the Illinois ICA include a provision that would allow either party to develop language prescribing rates, terms and conditions for IP-to-IP interconnection and to petition the ICC during the term of the ICA to add the language to the ICA.³ That way, the ICC could defer until later a decision on whether the 1996 Act even requires IP-to-IP interconnection – a question that the ICC Staff noted is “an open one at the FCC.”⁴

AT&T Illinois proposed language to implement the Staff’s suggestion, as did Sprint.⁵ Staff endorsed AT&T Illinois’ language; the Administrative Law Judges (“ALJs”) recommended it;⁶ and the ICC adopted AT&T Illinois’ language.⁷

² Staff of the Illinois Commerce Commission’s Initial Brief, Docket No. 12-0550, *SprintCom, Inc. Wireless Co., L.P., NPCR, Inc. d/b/a Nextel Partners and Nextel West Corp.’s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996, to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a AT&T Illinois* (March 22, 2013) (Anglin Exhibit BA-1) at 32.

³ Arbitration Decision, Docket No. 12-0550, *SprintCom, Inc. Wireless Co., L.P., NPCR, Inc. d/b/a Nextel Partners and Nextel West Corp.’s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996, to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a AT&T Illinois* (June 26, 2013) (“*Sprint Illinois Arbitration Decision*”) (Anglin Exhibit BA-2) at 33-34.

⁴ *Id.* at 33.

⁵ *Id.* at 34.

Here, AT&T Michigan proposes exactly the same language that the ICC approved – except that references to “AT&T Illinois” have been changed to “AT&T Michigan.

Sprint asserts that AT&T refused to negotiate IP-to-IP interconnection in good faith. Sprint’s Initial Brief (“Sprint Br.”) at 24, 25, 30, 31. That is not true. Apart from the fact that AT&T spent hours negotiating the IP-to-IP interconnection issue with Sprint, AT&T Michigan’s advocacy here of language that the Illinois Commerce Commission just approved⁸ can hardly constitute a failure to negotiate in good faith.⁹

AT&T Michigan’s proposal is this:

3.11.2.2 All traffic that Sprint delivers to AT&T Michigan pursuant to this Agreement will be delivered in TDM format.

3.11.2.2.1 This Agreement does not provide for IP-to-IP interconnection. (See section 3.11.2.2.). AT&T Michigan maintains (and Sprint acknowledges that AT&T Michigan maintains) that the interconnection duties imposed by the 1996 Act do not encompass IP-to-IP interconnection and that the Commission is without

⁶ Illinois arbitrations are conducted by Administrative Law Judges, who perform essentially the same function as an MPSC Arbitration Panel. The ICC Staff files testimony and briefs.

⁷ *Sprint Illinois Arbitration Decision* at 34.

⁸ The ICC, having adopted AT&T’s proposed language in the arbitration, approved the complete interconnection agreement including AT&T’s language concerning IP-to-IP interconnection on August 14, 2013, in ICC Docket No. Docket No. 13-0443. The ICC’s Order approving the ICA is available at <http://www.icc.illinois.gov/docket/files.aspx?no=13-0443&docId=201771>.

⁹ In support of its baseless contention that AT&T failed to negotiate in good faith, Sprint complains of AT&T Michigan’s response to Sprint’s burdensome requests for information relating to IP-to-IP interconnection (*e.g.*, Sprint Br. at 30) – information that Sprint represented it hoped “to use . . . to negotiate and resolve the open IP-Interconnection issue.” See Exhibit D, Part 1, to Sprint’s Petition for Arbitration (May 23, 2013, letter from Sprint to AT&T). That representation was patently false, because Sprint knew full well that the parties were at an impasse and were not going to resolve the issue. In reality, Sprint requested the information to try to strengthen its arbitration position, notwithstanding that MPSC Arbitration Rule 705 provides that “there is no right to conduct discovery” in an arbitration. Furthermore, much of the information Sprint requested concerned the network of AT&T Corp., which is not a party to this proceeding, rather than of AT&T Michigan. And to the limited extent that the requests did ask about AT&T Michigan’s network, AT&T Michigan provided the information. See Exhibit D, Part 2, to Sprint’s Petition for Arbitration (AT&T’s June 4, 2013, response to Sprint’s requests). Good faith requires no more. The only information that the good faith negotiation requirement in the 1996 Act requires a negotiating party to provide is “information necessary to reach agreement,” including, under certain circumstances, information about that party’s network (not its affiliate’s network). 47 C.F.R. § 51.301(c)(8).

authority to establish terms for IP-to-IP interconnection. Sprint maintains (and AT&T Michigan acknowledges that Sprint maintains) that the interconnection duties imposed by the 1996 Act encompass IP-to-IP interconnection and that the Commission has authority to establish terms for IP-to-IP interconnection. The Parties have included the following section 3.11.2.2.2 in this Agreement based upon, and conditioned on Commission recognition of, their agreement that inclusion of section 3.11.2.2.2 in the Agreement neither waives nor in any way derogates from either Party's position as set forth in this section 3.11.2.2.1.

3.11.2.2.2 After the Effective Date, Sprint may propose to AT&T Michigan that the Parties amend the Agreement to provide for IP-to-IP interconnection (and/or to permit Sprint to deliver traffic to AT&T Michigan in IP format rather than in TDM format). If, after Sprint makes such a proposal, the parties do not agree on an amendment, or that there shall be no amendment, Sprint may seek resolution of the matter by invoking Dispute Resolution pursuant to Section 12 of the General Terms and Conditions, and the Commission shall be the forum for any Formal Dispute Resolution. AT&T Michigan may contend in any Formal Dispute Resolution proceeding that the interconnection duties imposed by the 1996 Act, including but not limited to section 251(c)(2) thereof, do not govern IP-to-IP interconnection and that the Commission is without authority to establish terms and conditions for IP-to-IP interconnection for inclusion in a section 251/252 interconnection agreement. Sprint, does not agree with that contention and does not waive its right to oppose that contention, but acknowledges that AT&T Michigan has not waived its right to assert such a contention, either by agreeing to this Section 3.11.2.2.2 or by any other action or inaction.

The Commission should approve that language and reject Sprint's proposal. There is no basis for including any IP-to-IP interconnection terms in the ICA (let alone the unlawful terms proposed by Sprint) unless section 251(c)(2) of the 1996 Act applies to IP-to-IP interconnection, and the question whether it does is pending at the FCC. Neither the FCC nor this Commission nor any federal court has ever decided that question. As we explain at the end of our discussion

of Issue 1, the answer to the question is no – section 251(c)(2) does not require ILECs to provide IP-to-IP interconnection. We defer that point to the end because there is no reason for the Commission to decide the question in this case since it must reject Sprint’s proposal in any event on other grounds.

This Commission has already recognized that it should not decide IP-to-IP interconnection issues until the FCC decides whether section 251(c)(2) requires IP-to-IP interconnection. In Case No. U-16906, the Commission arbitrated ICAs between AT&T Michigan and a group of competitive local exchange carriers (“CLECs”). One issue in the case was whether the ICAs should include a certain CLEC-proposed provision relating to IP-to-IP interconnection. The Arbitration Panel ruled it should not, reasoning:

[T]he bottom line is that the language that is being proposed by the CLECs is based on an issue that is still pending at the FCC and is awaiting a legal determination to be made in regards to whether IP-to-IP interconnection falls within Section 251/252. Until the FCC takes action on that issue, the Panel believes that other arguments being made by both parties cannot be taken up at this time. It would not be fruitful to accept the proposed language of the CLECs on an issue that is still pending at the FCC. . . . The CLECs’ argument appears to be premature, and until the FCC makes a ruling/determination, the Panel recommends that the CLEC’s language should not be adopted¹⁰

That logic applies equally here. In fact, it applies even more forcefully here, because Sprint’s language, unlike the language the CLECs proposed in Case No. U-16906, could not be

¹⁰ Notice of Decision of Arbitration Panel, Case No. 16906, *In the matter of the petition of ACD TELECOM, INC., ARIALINK TELECOM, LLC, CYNERGYCOMM.NET, INC., DAYSTARR LLC, LUCRE, INC, MICHIGAN ACCESS, INC., OSIRUS COMMUNICATIONS, INC., SUPERIOR SPECTRUM TEL. AND DATA, LLC, TC3 TELECOM, INC. and TELNET WORLDWIDE, INC. for arbitration of interconnection rates, terms, conditions, and related arrangements with MICHIGAN BELL TEL. CO. d/b/a AT&T MICHIGAN* (Jan. 9. 2012) (“ACD Telecom Arbitration DAP”), at 25-26.

adopted even if the 1996 Act did require IP-to-IP interconnection.¹¹ As we demonstrate below, this is so for two reasons:

First, any interconnection Sprint establishes with AT&T Michigan must, under the FCC's Rules, be at a point on AT&T Michigan's network. AT&T Michigan's network includes no IP-capable equipment, however, so no IP-to-IP interconnection can be established on AT&T Michigan's network. Sprint recognizes this, and proposes to establish IP-to-IP interconnections on the network of AT&T Corp., which is an entirely separate company from AT&T Michigan and which is not a party to this proceeding. That proposal is directly contrary to the FCC's Rules. As we explain below, the AT&T Corp. equipment with which Sprint proposes to interconnect is not even in Michigan. It is in Philadelphia, Pennsylvania.

Second, Sprint asserts, in connection with other issues, that it must interconnect with AT&T Michigan at a point in every LATA in AT&T Michigan's service territory in which Sprint provides service. Under Sprint's proposal, however, Sprint would not interconnect with AT&T Michigan in every LATA in AT&T Michigan's service territory. In fact, Sprint would not interconnect with AT&T anywhere in Michigan.

Sprint asserts that if the Commission does not decide the 251(c)(2) question, it will be failing to carry out its responsibility under section 252 and that "Sprint would then have the ability to go directly to the FCC for resolution" under 47 U.S.C. § 252(e)(5)." Sprint Br. at 37. That is false. The Commission's responsibility as arbitrator is to resolve disagreements about contract language, not to decide every legal question a party asks. The Commission will discharge its responsibility under the 1996 Act by adopting AT&T Michigan's proposed

¹¹ Sprint attempts to distinguish Case No. U-16906 on the ground that it presented a different IP-to-IP interconnection issue than this case. Sprint Br. at 40-42. But nothing Sprint says detracts from the force – or the applicability to this case – of the Panel's prudent conclusion quoted above.

language. A decision not to resolve the issues in the way Sprint proposes is not a failure to carry out the Commission's responsibility.¹²

2. There is no disagreement about the Commission's jurisdiction to arbitrate Issue 1.

Sprint suggests that AT&T Michigan disputes the Commission's authority to arbitrate Issue 1 (Sprint Br. at 35); argues that the Commission does have that authority (*id.*); and peppers its brief with rhetoric designed to appeal to the Commission's sense of responsibility to Michigan consumers (*e.g., id.* at 29-30). The Commission should disregard these red herrings.

AT&T Michigan does not dispute the Commission's authority to choose between the competing language that is the subject of Issue 1. To be sure, AT&T Michigan maintains that the 1996 Act does not require IP-to-IP interconnection. But AT&T Michigan recognizes that the Commission has authority to decide whether that is correct. AT&T Illinois did not challenge the ICC's authority to arbitrate the IP-to-IP interconnection issue in Illinois, and Sprint knows that AT&T does not question the Commission's authority to resolve Issue 1 here. On the contrary, AT&T Michigan has joined Sprint in presenting Issue 1 to the Commission. Sprint's pretense to the contrary is an attempt to give the impression that AT&T Michigan's position is an affront to the Commission's authority. It is not.¹³

¹² Sprint made the same argument based on section 252(e)(5) to the ICC before the ICC rejected Sprint's IP-to-IP interconnection proposal without deciding whether section 251(c)(2) requires IP-to-IP interconnection. That was nearly two months ago, and Sprint has not asked the FCC to step in for the ICC under section 252(e)(5). Sprint knows that if it did, the FCC would reject its request, because the ICC obviously did fulfill its responsibility as arbitrator.

¹³ The *SNET* decision on which Sprint relies in this connection (Sprint Br. at 39-40) is irrelevant, as are the Michigan statutes that Sprint contends authorize the Commission to implement IP-to-IP interconnection (*id.* at 39-40). All the *SNET* decision stands for is the proposition that the FCC's silence on an issue does not necessarily prohibit a state commission from deciding the issue. But AT&T Michigan does not contend, and the Panel in Case No. U-16906 did not hold, that the fact that the FCC has not decided whether section 251(c)(2) requires IP-to-IP interconnection deprives the Commission of authority to decide whether section 251(c)(2) requires IP-to-IP interconnection. Rather, the point is that the Commission *should not* decide that question under circumstances, such as those here, where (a) the FCC is considering the question, and (b) the answer to the question makes no difference because Sprint's proposal must be rejected regardless. Similarly, the authority provided by the Michigan statutes

3. **Sprint’s IP-to-IP interconnection proposal is contrary to law because it would require interconnection at points that are not on AT&T Michigan’s network.**
 - a. **The law is clear that any interconnection with AT&T Michigan must be on AT&T Michigan’s network.**

Section 251(c)(2)(B) of the 1996 Act provides that interconnection is to be “at any technically feasible point *within the [incumbent] carrier’s network.*” (Emphasis added.) Accordingly, the FCC, in its initial set of rules implementing the 1996 Act, noted that section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC’s network at any technically feasible point “*on that network*” (*Local Competition Order*,¹⁴ ¶ 209 (emphasis added), and promulgated 47 C.F.R. § 51.305(a)(2), which requires interconnection “at any technically feasible point *within the incumbent LEC’s network*, including, at a minimum,” six enumerated locations within that network. (Emphasis added.)

Sprint acknowledges that any interconnection it establishes must be on AT&T Michigan’s network. Indeed, in Issue 6 in this arbitration, Sprint proposes the following for General Terms and Conditions (“GT&C”) section 2.89:

“Point of Interconnection” (“POI”) means a point *on the AT&T MICHIGAN network . . .* where the Interconnection Facilities connect *with the AT&T MICHIGAN network . . .* (Emphasis added)

Thus, there is no debate about the applicable law: *IF* IP-to-IP interconnection were required, the interconnection would have to be at points on AT&T Michigan’s network.

- b. **There is no point on AT&T Michigan’s network at which an IP-to-IP interconnection can be established.**

Sprint cites is neither here nor there, because the parties’ disagreement in Issue 1 is not about the Commission’s authority – and Sprint does not contend (and cannot contend) that those Michigan statutes require IP-to-IP interconnection.

¹⁴ First Report and Order, FCC 96-325, In the Matter of Implementation of the Local Competition *Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd. 15499 (rel. Aug. 8, 1996) (“*Local Competition Order*”) (subsequent history omitted).

Sprint argues that IP-to-IP interconnection affords great benefits and that AT&T Michigan plans to transition to an all-IP network. AT&T Michigan will not debate those points, because it makes no difference how wonderful IP networks of the future may be, or how much more efficient IP-to-IP interconnection of the future might turn out to be than the TDM-to-TDM interconnection of today. For even if section 251(c)(2) of the 1996 Act required AT&T Michigan to provide IP-to-IP interconnection when it is technically feasible, there is, as of today, no point on AT&T Michigan's network at which Sprint could establish IP-to-IP interconnection. To be sure, there may be such a point in the future, and that is one reason that AT&T Michigan's proposed language, which provides a mechanism for incorporating IP-to-IP interconnection language into the ICA later, should be adopted. But there can be no IP-to-IP interconnection with AT&T Michigan now.

(1). It is undisputed that AT&T Michigan itself has no IP equipment on its network.

As AT&T Michigan witness Bill Anglin explains, AT&T Michigan “does not have IP-capable equipment with which Sprint could interconnect even if section 251(c)(2) did require incumbent carriers with IP networks to provide interconnection with those networks.” Anglin at 4. That is because “AT&T Michigan's network is a TDM network. AT&T Michigan's network simply does not include IP-capable equipment with which Sprint could interconnect any IP-capable equipment that it might own or operate.” *Id.* at 11.

AT&T Michigan does have wholesale customers that carry traffic in IP format, but AT&T Michigan does not have IP-to-IP interconnection with any of those customers; rather, those carriers convert their IP traffic to TDM before they deliver the traffic to AT&T Michigan. *Id.* That is exactly what AT&T Michigan is proposing here.

Similarly, AT&T Michigan has retail U-verse customers who originate and receive calls in IP format, but the VoIP (Voice over Internet Protocol) calls that those customers make and receive are not carried on an AT&T Michigan IP network, because there is no such network. Rather, they are carried over the IP network owned by AT&T Michigan's affiliate, AT&T Corp., which performs the IP-to-TDM conversion. *Id.* at 11-12.

In short, AT&T Michigan witness Anglin testifies "without reservation that there is no point on AT&T Michigan's network at which Sprint could establish IP-to-IP interconnection." Anglin at 14.¹⁵

(2). AT&T Corp.'s network is not AT&T Michigan's network.

Sprint does not dispute that it is AT&T Corp., rather than AT&T Michigan, that owns the equipment with which Sprint proposes to interconnect.¹⁶ Sprint, contends, however, that it should be permitted to establish IP-to-IP interconnection at the AT&T Corp. softswitch that is used in the provision of service to AT&T Michigan U-verse customers. That contention is contrary to law. The AT&T Corp. softswitch belongs to AT&T Corp., not AT&T Michigan, and it is not part of AT&T Michigan's network. AT&T Michigan cannot lawfully be required to provide interconnection at a softswitch that it does not own and that is not part of its network. Indeed, AT&T Michigan could not provide interconnection at the AT&T Corp. softswitch even if it were erroneously ordered to do so, because it is not AT&T Michigan's switch. And AT&T Corp., which does own the softswitch, is not a party to this proceeding; will not be a party to the

¹⁵ Mr. Anglin provides additional detail on why IP-to-IP interconnection cannot be established at certain points in AT&T Michigan's network. Anglin at 12-13. Sprint does not contend otherwise.

¹⁶ On the contrary, Sprint concedes this fact. *See, e.g.*, Sprint Br. at 27; *see also, e.g.*, Sprint's proposed GT&C section 3.11.2.2.2.

ICA that emerges from this proceeding; and therefore cannot be required to do anything in this proceeding.¹⁷

Sprint engages in all sorts of linguistic gymnastics to try to convince the Commission to deem AT&T Corp. switches AT&T Michigan switches. The Commission should not be misled; the indisputable *facts* trump Sprint’s word play. Sprint also pretends there is legal authority for its unlawful proposal, but that simply is not so.

(a). Pertinent facts.

Sprint proposes to establish what it calls “IP Interconnection” at “a Softswitch (or an applicable network edge router associated with such Softswitch) that is, or is deemed to be, part of the AT&T MICHIGAN network.” Sprint proposed Att. 2, section 2.1.9.¹⁸ In particular, Sprint contemplates interconnection at “each Softswitch to which” twelve identified AT&T Michigan tandem switches “are connected.” Sprint proposed Att. 2, section 2.1.9.3.2.

Those twelve AT&T Michigan tandem switches are connected to a single softswitch. That softswitch is owned by AT&T Corp., not AT&T Michigan. Anglin at 15. *In fact, the softswitch is not even in Michigan. It is in Philadelphia. Id.* at 15-16.¹⁹ There are no “applicable network edge router[s]” in Michigan associated with that softswitch. *Id.* at 16. Moreover, AT&T Michigan owns no network routers; any network router associated with *any* AT&T Corp. softswitch is owned by AT&T Corp. *Id.*

¹⁷ One way of thinking of Sprint’s proposal is that Sprint is actually proposing to establish IP-to-IP interconnection *with AT&T Corp.* If that is what Sprint wants, Sprint should approach AT&T Corp. In this brief, however, we approach the issue with the understanding that Sprint is asserting its right to interconnect with AT&T Michigan – but at a point that is not on AT&T Michigan’s network.

¹⁸ Sprint’s language capitalizes, but does not define, “Softswitch.” Based on context and the general understanding of the word “softswitch” within the industry, Sprint plainly means a switch that, unlike AT&T Michigan’s switches, is IP-capable. See Anglin at 15.

¹⁹ AT&T Corp. owns two softswitches – one in Philadelphia, Pennsylvania and one in Richardson, Texas. Anglin at 16.

AT&T Corp. and AT&T Michigan are entirely different companies. As AT&T Michigan witness Sherri Bazan testifies²⁰:

Corporate Structure

- Michigan Bell Telephone Company d/b/a AT&T Michigan is a wholly owned subsidiary of AT&T Teleholdings, Inc. a/k/a AT&T Midwest, which is a wholly-owned subsidiary of AT&T Inc.
- AT&T Corp. is a wholly-owned subsidiary of AT&T Inc.

Incorporation and Place of Business

- AT&T Michigan is incorporated in Michigan and has its principal place of business at 444 Michigan Avenue, Detroit, MI 48226.
- AT&T Corp. is incorporated in New York and has its principal place of business at One AT&T Way, Bedminster, NJ 07921.

Officers

- The President of AT&T Michigan is Jim Murray.
- The President and Chief Executive Officer of AT&T Corp. is Andrew M. Geisse.
- The Treasurer of AT&T Michigan is Jonathan P. King.
- The Chief Financial Officer and Treasurer of AT&T Corp. is George B. Goeke.
- The Secretary of AT&T Michigan is April J. Rodewald.
- The Secretary of AT&T Corp. is Wayne A. Wirtz.

Employees

- As of August 1, 2013, AT&T Michigan had 4,871 employees.
- As of that same date, AT&T Corp. had a total of 5,883 employees.
- No employee of AT&T Michigan is also an employee of AT&T Corp.

As the first two bullet points above show – and this becomes significant when we discuss Sprint’s flawed legal authority below – neither AT&T Corp. nor AT&T Michigan is a subsidiary

²⁰ Testimony of Sherri Bazan at 1-3.

of the other. If one sees a corporate family tree as akin to a human family tree, AT&T Corp. is an aunt of AT&T Michigan.

The history of AT&T Corp.'s ownership of the IP equipment is illuminating. The product that is now called AT&T U-verse evolved from what was originally called Project Lightspeed. Anglin at 18. The mission of Project Lightspeed, which got underway at SBC in 2004 (before SBC merged with AT&T), was to offer the most complete, flexible bundle of high quality communications solution in the market, including integrated IP voice, high-speed Internet access, and video. *Id.*

These products were to be offered by the SBC ILECs. *Id.* SBC already had an internet affiliate, however – called SBCIS (SBC Internet Services) – and there was no reason for the ILECs to build an IP network that mirrored SBCIS's network. On the contrary, that would have been wasteful. Thus, it made financial sense for SBCIS to provide its internet services to the ILECs for their use in providing the entire suite of Lightspeed services to their end-user customers. Accordingly, that is what was done. *Id.*

After the merger of SBC with AT&T, SBCIS became ATTIS. And in 2011, the affiliate that owned the IP assets was changed to AT&T Corp. Consequently, AT&T Michigan (and the other AT&T ILECs) now contract with AT&T Corp. for the High Speed Internet Service and the VoIP Service that are used to furnish U-verse services to the ILEC customers that subscribe to U-verse. AT&T Corp. and AT&T Michigan are parties to a written contract pursuant to which AT&T Corp. provides those services to AT&T Michigan. That contract is called the Mutual Service Asset Agreement, which includes an Informational Supplement that sets forth the terms and conditions on which AT&T Corp. (previously, SBCIS) provides the services to AT&T Michigan. *Id.* at 18-19.

The reasons that AT&T Corp., rather than AT&T Michigan, owns the IP backbone network thus have nothing to do with AT&T Michigan trying to “hide equipment in its affiliate” (Sprint Br. at 43) or avoiding section 251 requirements, as Sprint falsely claims. Anglin at 19.

(b). Sprint’s linguistic ploy

Sprint repeatedly characterizes the AT&T Michigan/AT&T Corp. relationship in ways that are designed to give the impression that AT&T Corp’s equipment should be treated as if it were AT&T Michigan’s equipment. For example, Sprint asserts:

- “AT&T [Michigan] and AT&T Corp. together operate an IP network.” Sprint Br. at 27.
- AT&T Corp’s softswitch “has effectively been incorporated with AT&T Michigan’s ILEC network.” *Id.*
- “AT&T [Michigan] and its affiliate, AT&T Corp., together operate an integrated IP-TDM network.” *Id.* at 28.
- “This is a jointly operated IP network.” *Id.*

This may (or may not) be good lawyering, but it is entitled to no weight, because it is not fact and it is not law. It is mere self-serving characterization. Indeed, Sprint has used some very different language to characterize the same facts. In the recent Illinois arbitration, Sprint witness Burt vehemently argued that AT&T Illinois and AT&T Corp. were interconnected, and that Sprint should therefore be allowed to interconnect with AT&T Corp. as well. He stated, “AT&T has IP interconnection with another entity, albeit an affiliate, AT&T Corp.”²¹ Then, referring to a diagram, he stated, “This is IP interconnection between AT&T the ILEC and AT&T Corp.” Sprint made the same point in its Brief on Exceptions, stating, “[I]t is also important to note that

²¹ Supplemental Verified Written Statement of James Burt, ICC Docket No. 12-0550 (Feb. 2, 2013), at 13, lines 272-273; 289-290. (Exhibit BA-4).

AT&T ILEC and AT&T Corp. interconnect in IP. . . . AT&T ILEC has an interconnection point on the AT&T Corp. network.”²²

That characterization – that AT&T Michigan and AT&T Corp. are interconnected – reflects the on the ground reality,²³ and is very different from Sprint’s characterization that the two companies “together operate an IP network” or that AT&T Corp’s softswitch “has effectively been incorporated with AT&T Michigan’s ILEC network.” By the same token, Sprint and AT&T Michigan are interconnected, but Sprint would never say that it and AT&T Michigan together operate a network just because AT&T Michigan needs to be connected to Sprint in order to deliver calls from Sprint’s customers to its own customers. There is a Sprint network and an AT&T Michigan network, and the two are connected for the provision of certain services. Likewise, there is an AT&T Corp. network and an AT&T Michigan network, and the two are connected for the provision of certain services. Sprint’s talk of an integrated AT&T Corp./AT&T Michigan network is pure rhetoric that the Commission should disregard.

Sprint’s self-serving mischaracterizations carry over to Sprint’s proposed contract language. Sprint proposes to establish IP-to-IP interconnection at “[a]ny Softswitch (or network edge router associated with such Softswitch) that is or has been used by AT&T Michigan to provide Telephone Exchange or Exchange Access services.”²⁴ But AT&T Michigan does not – contrary to Sprint’s proposed contract language – use AT&T Corp.’s IP equipment to provide Telephone Exchange or Exchange Access service. Rather, AT&T Michigan purchases High Speed Internet Service and VoIP Service from AT&T Corp. and pays AT&T Corp. for providing

²² Sprint’s Brief on Exceptions, ICC Docket No. 12-0550, at 53-54. (Exhibit BA-5.)

²³ The AT&T Michigan/AT&T Corp. interconnection is not an IP interconnection. It cannot be, because AT&T Michigan has no IP equipment. Rather, the interconnection is at the TDM level; AT&T Corp. converts any traffic that it hands off to AT&T Michigan from IP to TDM before the hand-off. Anglin at 11-12, 20.

²⁴ See Sprint’s proposed GT&C section 3.11.2.2.2.3.

those services. To be sure, *AT&T Corp.* uses the AT&T Corp IP network, including the AT&T Corp. softswitches, to furnish those services to AT&T Michigan – but that is a far cry from Sprint’s mistaken notion that AT&T Michigan itself uses that equipment.²⁵

(c). Applicable law

Sprint contends that its request to establish interconnection at points on AT&T Corp.’s network is supported by “well-established federal law” and by a “controlling case on this issue.” Sprint Br. at 43. If that were true, Sprint would not have buried its discussion of the supposedly controlling law at the tail end of its discussion of Issue 1. In fact, there is no legal support for Sprint’s unlawful proposal to interconnect with AT&T Michigan at a point on AT&T Corp.’s network.²⁶

Sprint’s supposedly controlling case, *Ass’n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir.) (amended Jan. 18, 2001) (“*ASCENT*”), is irrelevant. That case had to do with resale, not interconnection, and, unlike this case, involved an ILEC’s “*wholly owned affiliate providing telecommunications services with equipment originally owned by its ILEC parent, to customers previously served by its ILEC parent*, marketed under the name of its ILEC parent.” 235 F.3d. at 668. Here, AT&T Corp. is not a wholly owned subsidiary of AT&T Michigan; the IP equipment that AT&T Corp. uses to provide IP services was never owned by AT&T Michigan; and AT&T Michigan’s customers have not been somehow transferred to AT&T Corp.

²⁵ When a Sprint customer calls an AT&T Michigan customer, Sprint would not say that it uses AT&T Michigan’s end office switch to terminate the call

²⁶ As we have noted, Sprint could be understood as proposing interconnection with AT&T Corp. Such a proposal cannot, of course, be entertained in this proceeding, to which AT&T Corp. is not a party, or for an ICA with AT&T Michigan.

Indeed, it was undisputed in *ASCENT* that the ILEC transferred its own assets to its wholly-owned affiliate for the purpose of avoiding a section 251 obligation. *Id.* at 665. Here, in contrast, there was no transfer of ILEC assets to an affiliate; rather, an affiliate (which was not owned by the ILEC) always owned the IP-capable equipment – and the undisputed evidence establishes that the reason for the AT&T Michigan /AT&T Corp. U-verse arrangement was *not* to avoid a section 251 obligation, but rather was that it made financial sense to leave the IP assets where they were, with an affiliate.²⁷

ASCENT differs from this case in another critically important way. The underlying question in that case was whether the ILEC’s wholly-owned data affiliate was a “successor or assign” of the ILEC. This issue arose because the duties imposed by section 251(c) of the 1996 Act are imposed on ILECs, and “ILEC” is defined in section 251(h)(1)(B)(ii) of the 1996 Act to include any company that is a “successor or assign” of a company that was an incumbent local exchange carrier when the 1996 Act was enacted. In *ASCENT*, the data affiliate was a “successor or assign” of the ILEC, because it had been set up by the ILEC and the ILEC had transferred its assets and services to the affiliate. From this it followed that the data affiliate was subject to the duties imposed by section 251(c), including the section 251(c)(4) resale duty, because the data affiliate was, for purposes of section 251, an “ILEC” as defined in section 251(h)(1)(B)(ii). Here, in contrast, there can be no contention that AT&T Corp. is a successor or assign of AT&T Michigan and so should be treated as an ILEC under that provision.

²⁷ The D.C. Circuit in *ASCENT* overturned an FCC decision that allowed the merged Ameritech/SBC to avoid the section 251(c)(4) resale obligation as it applied to certain advanced telecommunications services by providing those services through a subsidiary. The D.C. Circuit’s stated concern was that under the FCC’s logic, any ILEC could “set up a similar affiliate and thereby avoid § 251(c)’s resale obligations.” 235 F.3d at 665 (emphasis added). Again, AT&T Michigan did not set up AT&T Corp. or transfer assets to AT&T Corp.

Finally, this case and *ASCENT* differ in another crucial respect: In this case, Sprint is asking the Commission to require something that is directly contrary to the FCC's Rules, namely, to allow Sprint to interconnect with AT&T Michigan at points that are not on AT&T Michigan's network. *ASCENT*, in contrast, did not involve the imposition of a requirement that violated an FCC Rule or any law.

The FCC's *Verizon 271 Order* that Sprint cites on this issue (Sprint Br. at 44) does not support Sprint's position either. Rather, it corroborates the points we have just made. First, the one sentence of the *ASCENT* decision that the FCC cited in the *Verizon 271 Order* is the sentence that stated, "the Act's structure renders implausible the notion that a *wholly owned affiliate providing services with equipment originally owned by its ILEC parent, to customers previously served by its ILEC parent*, marketed under the name of its ILEC parent, should be presumed to be exempted from the duties of that ILEC parent."²⁸ Again, that is not this case.

Perhaps more important, the proposition for which Sprint cites that FCC Order is incorrect and would not help Sprint here in any event. That proposition is that "data affiliates of incumbent LECs are subject to all obligations of section 251(c) of the Act."²⁹ That proposition considerably overstates the holding in *ASCENT*. As we have seen, the court's holding in *ASCENT* was limited to *wholly owned data affiliates that provide services with equipment originally owned by their ILEC parent, to customers previously served by its ILEC parents*. Furthermore, if Sprint's proposition were correct and applied here, the result would be that *AT&T Corp.* would be required to provide interconnection to Sprint pursuant to section 251(c)(2) of the 1996 Act, and to negotiate terms for interconnection with Sprint pursuant to section

²⁸ *In the Matter of Application of Verizon NY Inc., et al. for Authorization to Provide In-Region InterLATA Servs. in CT.*, 16 FCC Rcd. 14147 (2001) ("*Verizon 271 Order*") at ¶ 28 n. 69.

²⁹ Sprint Br. at 44, citing *Verizon 271 Order*.

251(c)(1). If Sprint believes that is the case, it should communicate its request for interconnection to AT&T Corp.

In short, even if the law entitled Sprint to IP-to-IP interconnection with an ILEC with IP equipment with which Sprint could interconnect, AT&T Michigan has no such equipment, so there can be no such interconnection “at [a] technically feasible point within the incumbent LEC’s network,” as 47 C.F.R. § 51.305(a)(2) requires.

4. Sprint’s IP-to-IP interconnection proposal is contrary to Sprint’s own position that it must interconnect at a point in every LATA in which it provides service.

Sprint witness Felton, testifying on Issue 7, states “Sprint is only required to maintain one POI in each LATA where it provides service.” Direct Testimony of Mark G. Felton on behalf of Sprint Spectrum L.P.) (“Felton”) at 15. Mr. Felton makes the same point in his discussion of Issue 8 when he states, “Title 47, Section 51.305 of the Code of Federal Regulations describes the Interconnection obligations of incumbent LECs such as AT&T. The FCC has interpreted this rule to mean that a requesting carrier need only establish one POI per LATA.” *Id.* at 21. Sprint made the same point in a prior case in this Commission, where it argued that “it is only required to establish one POI per LATA.”³⁰

Sprint’s proposal for IP-to-IP interconnection is directly at odds with its own “one POI per LATA” principle. Sprint makes no bones about that. In Attachment 2, section 2.2.1, the parties have agreed on language that provides that:

[T]he location of the POI(s) will be as follows:

³⁰ Order, Case No. U-15534, *In the matter of the petition of Sprint Communications Co. for arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with CenturyTel Midwest – Michigan, Inc.* (July 1, 2008), at 10.

2.2.1.1 The Parties will interconnect their network facilities at a minimum of one Sprint designated POI on AT&T MICHIGAN's network where the parties exchange traffic.

However, Sprint proposes to insert the words "*Except where the Parties utilize IP Interconnection*" at the beginning of section 2.2.1, so that the "one POI per LATA" would not apply if IP-to-IP interconnection were established.

Moreover, given the facts, there would not be a POI *in any LATA* in Michigan if Sprint's proposal were adopted. Since the AT&T Corp. softswitch to which AT&T Michigan's tandems connect is in Philadelphia, Sprint is, in effect, proposing that the Commission require the establishment of a point of interconnection in Philadelphia – with no POI whatsoever in Michigan once (under Sprint's view of the world) the parties are exchanging all traffic in IP format. AT&T Michigan would then bear the cost of transporting all of Sprint's calls from Philadelphia to Michigan. It is precisely in order to avoid imposing such costs on the ILEC that the interconnecting carrier is not given free rein to decide at how many points it will interconnect.³¹

5. Section 251(c)(2) of the 1996 Act does not require IP-to-IP interconnection.

The Commission should steer clear of the question whether the interconnection requirement in section 251(c)(2) of the 1996 Act comprises IP-to-IP interconnection, because (a) there is no need to answer that question in order to resolve Issue 1 and (b) the Commission would be ill-advised to decide the question before the FCC does.

³¹ See, e.g., Order, Case No. U-15534, *In the matter of the petition of Sprint Communications Co. for arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with CenturyTel Midwest – Michigan, Inc.* (July 1, 2008), at 10.

That said, section 251(c)(2) does not require IP-to-IP interconnection.³² Congress added section 251 to Title II of the Communications Act in order to promote competition in various markets for Title II “telecommunications services.” To that end, section 251(a)-(c) gives “telecommunications carriers” various rights with respect to other “telecommunications carriers” in general and “local exchange carriers” and “incumbent local exchange carriers” in particular. By their terms, those provisions are inapplicable *either* when the party seeking to interconnect *or* when the party from whom interconnection is sought is not itself a “telecommunications carrier.”

For all relevant purposes, the term “telecommunications carrier” is synonymous with “common carrier”³³ and is defined as “any provider of telecommunications services.” 47 U.S.C. § 153(51). The Act further specifies that any “telecommunications carrier shall be treated as a common carrier under this [Act] *only to the extent that it is engaged in providing telecommunications services.*” *Id.* (emphasis added). As the FCC has long observed, moreover, the statutory categories “telecommunications service[s]” and “information service[s]” are mutually exclusive.³⁴ Thus, the Commission may not invoke any provision of section 251 to require X to interconnect with Y if Y is providing an information service, let alone when *both X and Y* are offering such services, as in most or all cases of IP-to-IP interconnection.

Section 251(c)(2) requires *incumbent LECs* “to provide, for the facilities and equipment of any *requesting telecommunications carrier*, interconnection with the local exchange carrier’s

³² Sprint begins its discussion of this issue by misquoting section 251(c)(2). Sprint states: “Section 251(c)(2) obligates AT&T to provide ‘the facilities and equipment’ for interconnection with its network.” Sprint Br. at 35. That is wrong. Section 251(c)(2) does not require the ILEC to provide any facilities or equipment. What it requires is that the ILEC “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) (emphasis added).

³³ See, e.g., *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999).

³⁴ 47 U.S.C. § 153(51); see Report to Congress, 13 FCC Rcd at 11522-23, at ¶ 43; see also Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4823-24 ¶ 41 (2002), *aff’d*, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

network” “for the transmission and routing of telephone exchange service and exchange access.” 47 U.S.C. § 251(c)(2), (c)(2)(A) (emphasis added). That provision is inapplicable to IP-to-IP interconnection for at least three reasons. The first two relate to the status of the requesting party, while the third relates to the status of the party against whom section 251(c)(2) would be invoked.

First, VoIP providers – as well as providers of other IP-based information services – are not “telecommunications carriers.” They therefore may not invoke interconnection rights under section 251(c)(2). Second, section 251(c)(2) is unavailable to VoIP providers because, even if they were “telecommunications carriers,” they would not be invoking this provision in order to provide the local services identified in section 251(c)(2)(A): “telephone exchange service and exchange access.” As the FCC found in its *Vonage Order*, VoIP is an indivisibly interstate, *interexchange*-type service.³⁵ And as the FCC concluded in 1996, “[a] telecommunications carrier seeking interconnection only for interexchange services is not within th[e] scope of the statutory language” and is therefore not entitled to seek interconnection under section 251(c)(2).³⁶ That is the correct – and indeed the only permissible – reading of the statutory text, which requires that the “request[.]” to interconnect be *for the purpose* of “the transmission and routing of telephone exchange service and exchange access.” In other words, the requesting carrier must be “offering” those services and not merely receiving them in order to satisfy the statutory criteria for interconnection.

³⁵ See Memorandum Opinion and Order, *Vonage Holdings Corporation Petition for a Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, 22415-16, 22423-24 ¶¶ 20, 31 (2004) (“*Vonage Order*”), *aff’d*, *Minn. PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007).

³⁶ See *Local Competition Order* at ¶ 191.

Third, the *other* IP network, against which interconnection rights would be invoked, would not qualify as an “ILEC” subject to section 251(c)(2) – or, for that matter, to *any* of the ILEC-specific obligations under section 251(c). Instead, it would be an IP-based *broadband information services provider* to which section 251(c) is simply inapplicable.

The term “incumbent local exchange carrier” means a “local exchange carrier” that either (1) falls within a defined list of companies operating in 1996 or (2) is a successor or assign of those companies. 47 U.S.C. § 251(h)(1). The term does not include any entity that offers broadband Internet and managed IP services, which did not exist in the consumer market in 1996, by means of new fiber-based, packet-switched networks, which also did not exist in that market in 1996.

In addition, once an *existing* “ILEC” (or the affiliate of such an ILEC) stops offering “LEC” services within a given area, it will no longer be an “ILEC” subject to section 251(c)(2). The statutory definition of “ILEC” requires “that the entity *be* a ‘local exchange carrier’” and “remain[] a ‘local exchange carrier’” during the period in which any ILEC-specific regulation is applied. *CAF Order* at ¶ 1386 & n.2524 (emphasis added). Put differently, the entity must, in the FCC’s words, be a “live LEC” in order to qualify as an ILEC. *WorldCom, Inc. v. FCC*, 246 F.3d 690, 694 (D.C. Cir. 2001). But a “local exchange carrier” is defined as “any person that is engaged in the provision of telephone exchange service or exchange access.” 47 U.S.C. § 153(32). For the reasons just discussed, VoIP falls outside those categories. And providers that offer information services (including VoIP) but not these legacy services are not LECs and therefore do not fall within the subset of LECs designated as “ILECs.” Finally, that hurdle cannot be avoided by invoking section 251(h)(2), entitled “treatment of comparable carriers as

incumbents,” because that provision, too, authorizes such treatment only for “a local exchange carrier (or class or category thereof).” *Id.* § 251(h)(2) (capitalization altered).

None of this is changed by the FCC’s stated expectation that carriers would negotiate in good faith in response to requests for IP-to-IP interconnection.³⁷ In the very Order in which the FCC expressed that expectation – and note that the FCC merely expressed an expectation; it did not, contrary to Sprint’s assertion (Sprint Br. at 36), “direct” carriers to do anything – the FCC clearly stated that it was uncertain whether legal authority for a good faith negotiation requirement for IP-to-IP interconnection was to be found in section 251(a) of the 1996 Act, section 251(c)(2) of the 1996 Act, “other provisions” of the 1996 Act; section 706 of the 1996 Act; or the FCC’s “ancillary authority under Title I.”³⁸ Thus, the FCC’s statement that it expected carriers to negotiate IP-to-IP interconnection does not imply that section 251(c)(2) of the 1996 Act requires IP-to-IP interconnection, or that IP-to-IP interconnection is a proper subject for an interconnection agreement.

Sprint’s statement that “Two state commissions have decided that IP interconnection is within the scope of section 251” (Sprint at 38) is false. Neither of the commission decisions to which Sprint refers has decided that IP interconnection is within the scope of section 251. For that matter, neither decision remotely supports Sprint’s position. The Puerto Rico commission’s discussion of IP-to-IP interconnection does not mention section 251, let alone hold that it encompasses IP interconnection. Furthermore, no question was presented in the Puerto Rico arbitration that is presented here. In that case, the requesting carrier (“Liberty”) proposed contract language that provided for IP-to-IP interconnection “upon mutual agreement of the

³⁷ See Sprint Br. at 36-37 (quoting Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, WC Docket No. 10-90 et al., FCC 11-161 at para. 1404 (rel. Nov. 18, 2011) (“CAF Order”).

³⁸ *CAF Order* at ¶ 1351; see also *id.* at ¶¶ 1352-1358.

parties,” with recourse to the state commission if the parties failed to agree. As the commission explained, the ILEC, Puerto Rico Telephone Company (“PRTC”) “agrees that the ICA should provide for IP-to-IP interconnection upon mutual agreement of the Parties. PRTC does not agree with the remainder of Liberty’s proposal for two reasons. First, PRTC argues that the inconclusive nature of the FCC’s review of this issue means that the Board cannot enforce IP-to-IP interconnection. Second, PRTC argues that Liberty’s proposal is inappropriately one-sided, because, under Liberty’s proposal, only Liberty can make a request for IP-to-IP interconnection, and only Liberty can pursue other remedies should negotiation fail.” *Id.* Thus, the disagreement did not concern whether the ILEC had a duty to provide IP-to-IP interconnection. *See also id.* at 15 (“Liberty’s request is narrow in scope – seeking only to ensure Liberty’s right to seek review of negotiations that have reached an impasse. Liberty does not seek to compel IP-to-IP interconnection. Rather, Liberty merely seeks a means to reach a decision regarding IP-to-IP interconnection under the specific factual circumstances to be presented to the tribunal in which Liberty seeks review”). The Puerto Rico decision thus sheds no light on the disagreement presented here.

The Ohio order to which Sprint cites, like the Puerto Rico decision and contrary to Sprint’s representation, does *not* hold that section 251(c)(2) requires IP-to-IP interconnection or even (at least in the pages to which Sprint cites) mention section 251. *See* Exhibit JRB-1.4 at 4-6. Notably, the proposed rule that the Ohio commission adopted that relates to section 251(c)(2) interconnection (Rule 4901:1-7-06(A)(4)) (*Id.* at 9) does not say anything that suggests ILECs must provide IP-to-IP interconnection pursuant to section 251(c)(2).

6. Conclusion

The Commission should reject Sprint’s proposed IP-to-IP interconnection proposal. Sprint’s language is unlawful even if section 251(c)(2) of the 1996 Act extends to IP-to-IP

interconnection, because it would require AT&T Michigan to provide interconnection with Sprint at a point that is not on AT&T Michigan's network. In addition, Sprint's IP-to-IP interconnection proposal is contrary to Sprint's stated view that it is required to establish a point of interconnection in each LATA in which AT&T Michigan provides service.

The Commission should adopt the language proposed by AT&T Michigan, which provides for the ICA to be amended to accommodate IP-to-IP interconnection later, as appropriate. The Illinois Commerce Commission's adoption of this language strongly supports this result. Sprint argues that it would be inefficient for Sprint to have to maintain TDM-to-TDM interconnections, but it is now a given that Sprint is going to have to maintain TDM-to-TDM interconnections in Illinois for the indefinite future. It makes good sense for Sprint to be on the same footing in Michigan. That way, when and if Sprint proposes IP-to-IP interconnection language for Illinois (presumably, not before the FCC rules on whether ILECs are required to provide such interconnection), Sprint can propose the same language for Michigan.

I.B. SERVICE AND TRAFFIC RELATED DEFINITIONS

ISSUE 2: WHAT IS THE APPROPRIATE DEFINITION OF "INTRAMTA TRAFFIC"?

AT&T Michigan Position: The Commission should adopt AT&T Michigan's proposed definition of "IntraMTA Traffic," which appropriately refers to traffic exchanged between the parties' end users. AT&T Michigan's proposed definition, which was recently approved by the Illinois Commerce Commission, is consistent with the agreed purpose of the definition, which is to include all IntraMTA calls that are subject to reciprocal compensation requirements. Sprint's proposed definition, on the other hand, is unduly vague and could be interpreted to include traffic which is not subject to the reciprocal compensation requirements. (Pellerin at 140-147.)

As defined by the FCC, "MTA" stands for "Major Trading Area," a geographic area established by the FCC for purposes of Commercial Mobile Radio Service ("CMRS")

licensing.³⁹ The FCC's 1996 *Local Competition Order* established the MTA as the geographic scope of "local" traffic for CMRS traffic under section 251(b)(5) of the 1996 Act. Under the FCC's rules, MTAs are used to define CMRS calls that were subject to reciprocal compensation (now, under the *CAF Order*,⁴⁰ subject to bill-and-keep), as opposed to access charges, in the same way that local exchange areas are used with respect to wireline calls. Testimony of Patricia H. Pellerin ("Pellerin") at 140.

While the parties generally agree that "IntraMTA Traffic" (defined in GT&C section 2.66) means traffic that originates and terminates within the same MTA, they disagree over the exact definition. AT&T Michigan's proposed definition makes clear that "IntraMTA Traffic" refers specifically to traffic exchanged between Sprint's end users and AT&T Michigan's end users. Pellerin at 141, 146-47. AT&T Michigan's proposed definition is identical to the one proposed by the Staff of the Illinois Commission and approved by that commission in the *Sprint Illinois Arbitration Decision*, at 50-51.

Sprint's proposed definition, on the other hand, refers simply to "traffic exchanged between Sprint and AT&T" without any reference to "end users." Pellerin at 141. Sprint's proposed definition is unduly vague and, therefore, open to dispute. For example, "traffic exchanged between Sprint and AT&T" could be interpreted to mean any traffic that is switched by both parties, which would include transit traffic, even though transit traffic is exchanged between Sprint and third parties (not AT&T Michigan) and, as such, is not subject to the rules governing reciprocal compensation. *Id.* at 141-42. Thus, Sprint's proposed definition could be interpreted in a manner inconsistent with what Sprint itself acknowledges to be the purpose of

³⁹ There are 51 MTAs in the United States and its island territories (46 in the continental U.S.).

⁴⁰ Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, WC Docket No. 10-90 et al., FCC 11-161 at para. 1404 (rel. Nov. 18, 2011) ("*CAF Order*").

the definition of IntraMTA Traffic, *i.e.*, “to include all IntraMTA calls that are subject to reciprocal compensation requirements.” Sprint Br. at 50. AT&T Michigan’s proposed language, in contrast, is fully consistent with the agreed purpose of the definition, because it makes clear that IntraMTA Traffic – traffic formerly subject to reciprocal compensation and now, pursuant to the *CAF Order*, subject to bill-and-keep – is “originated by one Party on its network from its End User and delivered to the other Party for termination on its network to its End User.” *Id.*⁴¹

Moreover, AT&T Michigan’s proposed definition is consistent with the FCC’s concern about abuse of the “IntraMTA Rule,” which provides that:

traffic between a LEC and a CMRS provider that originates and terminates within the same Major Trading Area (MTA) is subject to reciprocal compensation obligations rather than interstate or intrastate access charges.⁴²

The FCC was aware of such abuse (using Halo as an example) where Halo had claimed that calls it had received from other carriers, routed through its base stations, and passed to third party carriers for completion had originated with Halo for purposes of reciprocal compensation. In other words, regardless of where a call actually originated, Halo asserted that it effectively “re-originated” the call within the same MTA where the call terminated. Under this scheme, Halo represented many wireline calls as though they were wireless IntraMTA calls subject to reciprocal compensation rather than wireline calls legitimately subject to terminating access

⁴¹ Sprint argues that its definition of “IntraMTA Traffic” tracks the definition of “Non-Access Telecommunications Traffic” in FCC Rule 51.701(b)(2). Sprint Br. at 50. What is important, however, is the manner in which the term “IntraMTA Traffic” is used in the ICA, not simply how the FCC described IntraMTA traffic in its rules. Pellerin at 142.

⁴² *CAF Order* at ¶¶ 979, 1003.

charges.⁴³ Pellerin at 143. To prevent future abuse of this nature, the FCC made clear that transit calls are not subject to reciprocal compensation with respect to the transiting carrier:

We clarify that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider. Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules. Thus, we agree with NECA that the “re-origination” of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo’s contrary position.⁴⁴

As previously discussed, Sprint’s proposed definition might be interpreted in a manner that would improperly apply bill-and-keep to calls originated outside the MTA that Sprint (or an adopting carrier) transits, a result that would be inconsistent with the *CAF Order*. Pellerin at 144.

In opposing AT&T Michigan’s proposed reference to “end users,” Sprint relies on a paragraph from the *CAF Order* in which the FCC ruled that a call originated by one party on its network from its end user and delivered to the other party for termination on its network to its end user must be classified as IntraMTA traffic and, therefore, subject to reciprocal compensation, even if the call is routed through an IXC or other intermediate carrier outside the LEC’s local calling area. Sprint Br. at 50-51. Sprint’s reliance on this paragraph is misplaced. AT&T Michigan’s proposed definition cannot reasonably be interpreted to require the traffic in the scenario described in the referenced paragraph to be treated as anything other than IntraMTA traffic for purposes of intercarrier compensation. Pellerin at 144. Furthermore, contrary to

⁴³ *CAF Order* at ¶¶ 979, 1005-1006. While most of Halo’s abuse involved wireline-originated calls, Halo purported to “re-originate” wireless calls as well, representing InterMTA calls as IntraMTA. *Id.*

⁴⁴ *CAF Order* at ¶ 1006 (footnotes omitted).

Sprint's suggestion, AT&T Michigan has never expressed an intention (and has no intention) of charging Sprint originating or terminating switched access charges on such IntraMTA traffic. *Id.*

For the reasons discussed, the Commission should approve AT&T Michigan's proposed definition of "IntraMTA Traffic" in GT&C section 2. 66.

ISSUE 3: WHAT ARE THE APPROPRIATE DEFINITIONS RELATED TO "INTERMTA TRAFFIC"?

AT&T Michigan Position: AT&T Michigan's definitions of "InterMTA Traffic" and "Terminating InterMTA Traffic" are accurate and consistent with the FCC's intercarrier compensation rules. Sprint's proposal to include separate definitions for "Toll" and "Non-Toll" InterMTA Traffic should be rejected, because the FCC's intercarrier compensation rules make no distinction between "toll" and "non-toll" InterMTA traffic. (Pellerin at 147-151.)

Issue 3 concerns definitions relating to InterMTA traffic (*i.e.*, traffic that, at the beginning of the call, originates and terminates in different MTAs). The parties' primary dispute under Issue 3 concerns Sprint's proposal to separately define "Toll" and "Non-Toll" InterMTA traffic, and its disagreement with AT&T Michigan's proposed definition of "Terminating InterMTA Traffic," all predicated upon Sprint's theory that only "Toll" InterMTA traffic is subject to access charges. As explained below under Issues 20 and 21, Sprint misconstrues the FCC's intercarrier compensation rules, which make no distinction between "toll" and "non-toll" InterMTA traffic.

Further, while AT&T Michigan proposes to define "InterMTA Traffic" in a manner consistent with the parties' current ICA and the FCC's rules (*see* Pellerin at 147-48), Sprint proposes to limit the definition to InterMTA traffic that originates and terminates on the parties' networks and that is "exchanged directly over the Interconnection Trunks." Sprint GT&Cs § 2.65. As Ms. Pellerin explains (at 148), Sprint's limitations make no sense. For example, the parties have agreed that InterMTA traffic to or from an interexchange carrier may be carried on certain trunk groups, but Sprint's narrow definition would exclude this traffic. In addition,

Sprint's proposed reference to "Interconnection Trunks" is dependent upon the Commission's resolution of other issues regarding the routing of such traffic (namely Issues 14 and 17), and makes no sense if the Commission finds for AT&T Michigan on those issues. *See* Pellerin at 148.

Sprint's only justification for its proposed definition is its suggestion that if the definition is not limited to traffic "directly exchanged" by the parties, AT&T Michigan would somehow attempt to double-bill Sprint for InterMTA traffic that is routed through an interexchange carrier. *See* Sprint Br. at 52-53. That is nonsense. Sprint has not identified anything in the ICA, or in AT&T Michigan's proposed language, that would permit such double-billing, because there is no such language. Pellerin at 149. As Sprint states (at 52), such "calls would be subject to compensation under applicable tariff or contract between AT&T and the IXC."

ISSUE 4: WHAT IS THE APPROPRIATE DEFINITION OF "SWITCHED ACCESS SERVICE"?

AT&T Michigan Position: The definition of "Switched Access Service" should include AT&T Michigan's proposed language, which simply refers to "access" to AT&T Michigan's network pursuant to the switched access tariff. The Commission should reject Sprint's language improperly limiting the application of the term to AT&T Michigan's provision of exchange access to IXCs and not to Sprint. (Pellerin at 151-155.)

AT&T Michigan proposes to define "Switched Access Service" in GT&C section 2.105 as "an offering of **access** to AT&T Michigan's network for the purpose of the origination or the termination of traffic, from or to End Users in a given area, pursuant to a Switched Access Services tariff." Sprint's proposed definition is the same, with one crucial exception: Sprint proposes to replace the phrase "offering of **access**" with the phrase "offering *to an IXC of Exchange Access by AT&T Michigan.*" Thus, Sprint would limit "Switched Access Service" to a service provided to an "IXC," as "IXC" is defined in the ICA. Pellerin at 152. Neither Sprint nor AT&T Michigan is an IXC as that term is defined in the proposed ICA. *Id.*

Sprint's restrictive definition of "Switched Access Service" goes hand-in-hand with its position that InterMTA traffic should not be subject to tariffed switched access charges (Issues 20 and 21). Indeed, in its brief (at 55), Sprint's sole justification for its proposed definition is that it purportedly does not obtain switched access service. As explained in the discussion of Issues 20 and 21, Sprint is wrong, and hence the Commission also should reject Sprint's proposed definition of "Switched Access Services."⁴⁵

In any event, Sprint's argument (at 55) that switched access service is only provided to IXCs that provide "telephone toll" services is demonstrably wrong. For purposes of the state and federal tariffs pursuant to which AT&T Michigan provides switched access services, *any carrier* that provides services between exchanges or, in the case of CMRS providers, between MTAs, is considered an "interexchange carrier" whether or not it provides "toll" services. Pellerin at 153-54. Accordingly, AT&T Michigan's switched access tariffs apply to any carrier, including Sprint, that uses its network to access AT&T Michigan's network for the purpose of originating or terminating an interexchange call, *i.e.*, one that begins and ends in different exchanges (or MTAs for CMRS providers). The switched access tariffs are not limited to "IXCs" as defined in the parties' ICA (which definition of "IXC" excludes Sprint), nor are they limited to carriers that provide "telephone toll" services. Thus, Sprint's proposed language is inconsistent with the switched access services tariffs themselves.

II. ISSUES REGARDING HOW THE PARTIES INTERCONNECT (ISSUES 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 AND 15)

II.A. INTRODUCTION

⁴⁵ Indeed, Sprint's proposed definition would be unworkable if the Commission adopts AT&T Michigan's language for Issues 20 and/or 21, or AT&T Michigan's language regarding the routing of switched access services traffic (Issue 17). *See* Pellerin at 153.

As background for the Interconnection-related issues discussed below, it is important to understand the differences between (i) the standard network interconnection arrangement that AT&T Michigan and other ILECs have entered into with CLECs pursuant to the requirements of section 251(c)(2) of the 1996 Act since that statute was enacted (the “section 251(c)(2) model”); and (ii) the standard network arrangement that AT&T Michigan and ILECs have typically entered into CMRS providers, and that is reflected in the currently effective interconnection agreements between Sprint and AT&T ILECs, including AT&T Michigan (the “CMRS model”).

In accordance with the requirements of section 251(c)(2)(B) of the 1996 Act, a section 251(c)(2) model interconnection arrangement includes one or more points of interconnection (“POIs”) on the ILEC’s (*e.g.*, AT&T Michigan’s) network.⁴⁶ Section 251(c)(2) requires the establishment of POIs only on the ILEC’s network; it does not contemplate, much less require, the establishment of a POI on the requesting carrier’s network. POIs serve as demarcation points between the parties’ networks for the purpose of section 251(c)(2) Interconnection, which has been defined by the FCC in its Rule 51.5 as the “linking of two networks for the mutual exchange of traffic.” 47 C.F.R. § 51.5. As will be discussed in connection with Issues 6 and 24(a), each party to this arrangement is financially responsible for the facilities on its side of the POI(s). Pursuant to the Supreme Court’s decision in *Talk America, Inc., v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254 (June 9, 2011), existing transport facilities (referred to in *Talk America* as “entrance facilities”) that connect the networks of the requesting carrier and the ILEC, and that are used solely for Interconnection, as defined in FCC

⁴⁶ Section 251(c)(2)(B) provides that interconnection is to be “at any technically feasible point within the [incumbent] carrier’s network.” The rule promulgated by the FCC to implement this provision requires interconnection “at any technically feasible point within the incumbent LEC’s network.” 47 C.F.R. § 51.305(a)(2).

Rule 51.5, must be made available to the requesting carrier at a TELRIC-based price. Pellerin at 6.⁴⁷ Requesting carriers, however, have no right to use TELRIC-priced entrance facilities for purposes, such as “backhauling,” that do not constitute the “mutual exchange of traffic” between the requesting carrier and the ILEC.⁴⁸ 131 S. Ct. at 2264.

Unlike the section 251(c)(2) model described above, the CMRS model interconnection arrangement, such as the one under which Sprint and AT&T Michigan currently operate, was not developed to conform with the requirements of section 251(c)(2). In fact, the CMRS model does not conform with the requirements of section 251(c)(2). The CMRS arrangement was developed before the 1996 Act, and it evolved on a negotiated business-to-business basis. Pellerin at 5, 8. In contrast to the section 251(c)(2) model, in which each interconnection features a POI on the ILEC’s network, the CMRS model is a “dual POI” arrangement, *i.e.*, POIs may be established (i) at an AT&T Michigan location (typically a tandem office); (ii) at a Sprint location; or (iii) at any other mutually agreed point. Thus, a POI may be established at AT&T Michigan’s tandem for Sprint’s traffic to AT&T Michigan, and a separate POI may be established at Sprint’s location for AT&T Michigan’s traffic to Sprint. Pellerin at 4. Sprint purchases facilities connecting the two networks from AT&T Michigan’s access tariff, at prices that are not (and that are not required to be) TELRIC-based.⁴⁹ *Id.* The same facilities can be, and are, used by Sprint for both the mutual exchange of traffic between end users of Sprint and AT&T Michigan

⁴⁷ We use “TELRIC-based” and “cost-based” interchangeably in this brief. Section 252(d)(1) of the 1996 Act requires that rates for interconnection of facilities and equipment be “based on the cost” (47 U.S.C. § 252(d)(1)), and the FCC has established TELRIC (Total Element Long Term Incremental Cost) as the methodology to be used when the 1996 Act mandates cost-based rates.

⁴⁸ Backhaul traffic is traffic that does not involve an AT&T Michigan customer, such as traffic that is carried between two points on Sprint’s network.

⁴⁹ Sprint may self-provision and/or obtain facilities from other carriers to connect with AT&T Michigan. However, Sprint elected to lease facilities from AT&T Michigan.

(Interconnection traffic) and for other, non-Interconnection, traffic, including backhaul traffic, transit traffic and 911 traffic. The parties share the cost of the facilities that connect their switches and apportion the costs based on a shared facility factor (“SFF”). AT&T Michigan bills Sprint the tariffed access price for this facility, discounted by the SFF. The SFF in the parties’ current ICA is 20%. That percentage reflects that of all the interconnection traffic that flows over the shared facility, 20% is originated by AT&T Michigan; accordingly, AT&T Michigan bears 20% of the cost of the facility. Pellerin at 5.

AT&T Michigan was willing to maintain the current CMRS model interconnection arrangement with Sprint, just as AT&T Michigan is doing with other CMRS providers and just as AT&T Michigan’s affiliated ILECs are doing with Sprint in at least ten other states. Pellerin at 106. Sprint, however, in order to take advantage of TELRIC-priced Interconnection Facilities, requested section 251(c)(2) Interconnection, as it is entitled to do, and AT&T Michigan has agreed to provide section 251(c)(2) Interconnection, as it must. At the same time, though, Sprint seeks to maintain certain aspects of its existing CMRS model interconnection arrangement that are inconsistent with section 251(c)(2) in several major respects.

First, Sprint proposes that it be allowed to use TELRIC-priced Interconnection Facilities not only to route Interconnection traffic (*i.e.*, traffic exchanged between end users of Sprint and AT&T Michigan), but also to route traffic that is not exchanged with AT&T Michigan end users (*e.g.*, backhaul traffic between Sprint customers, 911 traffic, and traffic sent by Sprint to, or received by Sprint from, IXCs). Sprint’s proposal in this regard is contrary to the rule that ILECs are required to make TELRIC-priced entrance facilities available solely for

Interconnection, as defined by the FCC for purposes of section 251(c)(2), *i.e.*, “the linking of two networks for the mutual exchange of traffic.”⁵⁰ See Issues 5, 9-11 and 22.

Second, Sprint proposes a “pro-rata” pricing methodology that would result in a price for the facilities leased by Sprint for Interconnection that is, in fact, equal to only a fraction of the Commission-approved TELRIC-based price for those facilities. See Issue 22.

Third, to add insult to injury, Sprint proposes a “cost-sharing” arrangement under which Sprint would be allowed to pay only 50% of the price (as determined pursuant to Sprint’s “pro-rata” pricing methodology) of the Interconnection Facilities it leases from AT&T Michigan. See Issues 6, 24(a) and (b). As demonstrated in the discussion of Issue 22, the net effect of Sprint’s “pro-rata” pricing and “sharing” proposals would be to require AT&T Michigan to provide Sprint with existing Interconnection Facilities for a price equal to *only 11%* of the approved TELRIC-based rate, in flagrant violation of the FCC’s rules and the Supreme Court’s decision in *Talk America*. In addition to violating *Talk America*, Sprint’s “sharing” proposal is directly contrary to (i) the FCC’s directive in the *CAF Order* to implement “bill-and-keep” as the default method of compensation for costs associated with the transport and termination of IntraMTA Traffic;⁵¹ and (ii) the principle that, under section 251(c)(2), each carrier is financially responsible for the transport facilities on its side of the POI. See Issues 6 and 24(a).

In the recent Sprint Illinois Arbitration, the Illinois Commission rejected proposals identical to those made by Sprint in this case, as summarized above and discussed in detail below.⁵² Like the ICC, this Commission should reject Sprint’s attempt to cherry-pick the aspects

⁵⁰ 47 C.F.R. § 51.5.

⁵¹ *CAF Order* at ¶ 978.

⁵² Sprint’s filed an application for rehearing with respect to the issues for which the *Sprint Illinois Arbitration Decision* rejected Sprint’s position. Sprint’s rehearing request was denied by the Illinois Commission on August 14, 2013. Pellerin at 11.

of each type of interconnection arrangement that are advantageous only to Sprint and to cobble together something entirely new and at odds with controlling law. Sprint is not entitled to do that, and while AT&T Michigan was previously willing to agree to interconnection that did not comply with section 251(c)(2) as part of a voluntary arrangement that suited both parties' needs,⁵³ AT&T Michigan cannot be required to accept an arrangement in which Sprint gets the benefit of those aspects of section 251(c)(2) that work to Sprint's advantage, while spurning those aspects of section 251(c)(2) that provide the balance to make the arrangement acceptable to both parties.

II.B. INTERCONNECTION METHODS

ISSUE 5(a): SHOULD THE DEFINITION OF INTERCONNECTION BE BASED ON BOTH PART 51 AND PART 20 OF THE FCC'S RULES?

ISSUE 5(b): SHOULD THERE BE A DISTINCTION BETWEEN "INTERCONNECTION," AS DEFINED AND "interconnection"?

AT&T Michigan Position: The definition of "Interconnection" in the ICA should refer solely to the definition of "Interconnection" in FCC Rule 51.5 because that is the definition the FCC adopted to implement sections 251 and 252 of the 1996 Act. Sprint's proposal to also refer to the broader definition of "Interconnection or Interconnected" in FCC Rule 20.3 should be rejected, as it recently was in Illinois, because that definition goes beyond the requirements of section 251(c)(2). (Pellerin at 11-17.)

These issues relate to the definition of "Interconnection" in GT&C section 2.60. With respect to Issue 5(a), AT&T Michigan proposes to define "Interconnection" to mean the same as the definition of Interconnection that the FCC adopted in its Rule 51.5 for purposes of implementing sections 251 and 252 of the 1996 Act. 47 C.F.R. § 51.5. Sprint, on the other

⁵³ Section 252(a) of the 1996 Act allows parties to negotiate ICA provisions "without regard to" the requirements of section 251. 47 U.S.C. § 252(a).

hand, proposes to define Interconnection by cross-referencing the FCC's definition of "Interconnection or Interconnected" in 47 C.F.R. § 20.3, in addition to Rule 51.5.

The parties have negotiated and are arbitrating this ICA pursuant to sections 251 and 252 of the 1996 Act. Pursuant to section 252(c) of the 1996 Act, the Commission, in resolving issues in this arbitration, must "ensure that such resolution and conditions meet the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section 251.*" 47 U.S.C. § 252(c) (emphasis added). The FCC promulgated Part 51 of its Rules for the purpose of implementing sections 251 and 252 of the 1996 Act. 47 C.F.R. § 51.1. Accordingly, pursuant to section 252(c), the appropriate definition of "Interconnection" for purposes of this ICA is the definition that appears in section 51.5 of Part 51, *i.e.*, the "linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. Pellerin at 13.

Part 20 of the FCC's rules, in contrast, was not promulgated for the purpose of implementing sections 251 and 252. Rather, the purpose of the rules in Part 20 is to "set forth the requirements and conditions applicable to commercial mobile radio service providers." 47 C.F.R. § 20.1. For that purpose, the FCC adopted a much broader definition of "Interconnection" than the definition in Rule 51.5.⁵⁴ Sprint's proposal to incorporate the broader definition of "Interconnection or Interconnected" in 47 C.F.R. § 20.3 is inconsistent with the requirements of section 251(c)(2).

Sprint argues that its Interconnection rights under Rules 51.5 and 20.3 are the same. Burt at 71; Sprint Br. at 56. If that were truly the case, it should make no difference to Sprint if the definition of "Interconnection" includes only a reference to Rule 51.5 and not to Rule 20.3.

⁵⁴ The definition in 47 C.F.R. § 20.3 reads: "*Interconnection or Interconnected.* Direct or indirect connection through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit the transmission or reception of messages or signals to or from points in the public switched network."

In fact, however, there is a significant difference between the two definitions. Rule 20.3 provides for both direct *and indirect* interconnection rather than the linking of two (and only two) networks. Furthermore, Rule 51.5 defines Interconnection in terms of the “mutual exchange of traffic.” As previously discussed and as will be demonstrated by the discussion of Issues 10 and 11, below, this phrase has been consistently interpreted to refer to the exchange of traffic between end user customers of the parties that are directly interconnected (in this case, Sprint and AT&T Michigan). Rule 20.3, by comparison, defines interconnection much more broadly in terms of “permitting the transmission or reception of messages or signals to or from points in the public switched network.” This language includes no limiting reference to an “exchange” of traffic, “mutual” or otherwise. Sprint’s assertion that it should be allowed to use section 251(c)(2) Interconnection Facilities to send traffic to third parties, such as IXCs, located anywhere in the public switched network might be supportable if Rule 20.3’s broad definition of Interconnection were applicable to section 251(c)(2). But it clearly is not. The fact that the FCC chose to define Interconnection for purposes of section 251(c)(2) more narrowly than it defined that term in Rule 20.3 further supports a rejection of Sprint’s position that it should be allowed to use Interconnection Facilities for purposes other than the “mutual exchange” of traffic between the parties’ end users. Finally, Rule 51.5 clearly *excludes* the transport and termination of traffic from the definition of Interconnection; Rule 20.3 does not. Pellerin at 14-15.

Sprint asserts that paragraph 806 of *CAF Order* “affirms the linkage between Part 20 and Part 51,” thereby supporting Sprint’s proposal to define Interconnection with reference to Rule 20.3. Sprint Br. at 56; Burt at 72. Sprint’s assertion is without merit. The discussion in paragraph 806 of the *CAF Order* has nothing to do with Interconnection. Rather, that paragraph

relates to compensation for the transport and termination of IntraMTA traffic, which is explicitly excluded from the definition of Interconnection under Rule 51.5.⁵⁵ Pellerin at 15.

Sprint also argues that FCC Rule 20.11(e) grants ILECs the right to request interconnection with CMRS providers. Burt at 72. AT&T Michigan, however, did not request interconnection with Sprint pursuant to Section 20.11(e), or any other rule for that matter. Rather, the ICA negotiations that resulted in this arbitration were initiated by Sprint's request for interconnection with AT&T Michigan, and that request was made pursuant to sections 251 and 252 of the Act. Pellerin at 16. In any event, Sprint's argument is irrelevant to the definition of Interconnection as it relates to the permissible uses by Sprint of TELRIC-priced Interconnection Facilities, which is the dispute at the heart of this issue. That is because AT&T Michigan's obligation to provide Sprint with such facilities is an obligation that flows only from section 251(c)(2). See the discussion for Issue 9. And it is the definition of Interconnection contained in Rule 51.5, not the one contained in Rule 20.3, that applies to section 251(c)(2). *Id.*

Issue 5(b) relates to AT&T Michigan's proposal to include in GT&C section 2.60 a sentence that explains that "when the word 'interconnection' (as opposed to 'Interconnection') is used in this Agreement it shall mean the connection of the Parties' networks for the exchange of Authorized Traffic." The purpose of this sentence is to accommodate terms and conditions in the ICA that address both section 251(c)(2) Interconnection, as defined in 47 C.F.R § 51.5, and other interconnection arrangements that do not fall within that definition (*e.g.*, indirect interconnection) by making clear that capital "I" Interconnection specifically means as defined

⁵⁵ Specifically, in paragraph 806, the FCC determined that bill-and-keep applies to IntraMTA traffic exchanged between CMRS providers and local exchange carriers under both section 20.11 and Part 51. It was important for the FCC to establish a "linkage" between these two rules in order to implement the adoption of bill-and-keep for IntraMTA traffic, because only ILECs have Part 51 obligations; and CMRS carriers and non-ILEC local exchange carriers (*e.g.*, CLECs) are not otherwise subject to the Part 51 rules. Pellerin at 16.

by Part 51.5, while lower case “i” interconnection refers to connections for the exchange of all Authorized Services traffic. The distinction is relevant because only those existing facilities used for Interconnection as defined in section 251(c)(2) and 47 C.F.R. § 51.5 (*i.e.*, “Interconnection Facilities”) are subject to TELRIC-based pricing. Facilities connecting the parties’ networks that are used for sending non-Interconnection traffic, such as 911 traffic, or Equal Access traffic, which do not constitute the mutual exchange of traffic between end users of Sprint and AT&T Michigan, are not eligible for TELRIC-based pricing. See the discussion of Issues 9, 10 and 11, below. AT&T Michigan’s proposed additional language for GT&C section 2.60 will remove the potential for disputes regarding any ambiguity between “Interconnection” and “interconnection,” as those words are used in the ICA. Pellerin at 16-17.

For all the reasons discussed, the Commission should adopt AT&T Michigan’s proposed language for GT&C section 2.60.

II.C. POIs

ISSUE 6: WHAT IS THE APPROPRIATE DEFINITION OF THE “POINT OF INTERCONNECTION”?

AT&T Michigan Position: AT&T Michigan’s definition of Point of Interconnection (“POI”) accurately describes the POI as the point where the “Parties’ networks meet.” Furthermore, each carrier is physically and financially responsible for the transport facilities on its side of the point of interconnection (“POI”). Thus, as AT&T Michigan proposes, the word “financially” should also be included in the definition of POI. Sprint’s opposition to that proposal is based entirely on its position for Issue 24(a) that AT&T Michigan should be required to share in the cost of Interconnection Facilities located on Sprint’s side of the POI. Sprint’s position should be rejected for the reasons discussed in connection with Issue 24(a). (Pellerin at 18-21.)

The disputed definition of “Point of Interconnection,” reflecting the parties’ differences, is as follows, with AT&T Michigan’s language underlined and Sprint’s in italics

“Point of Interconnection” (“POI”) means a point on the AT&T MICHIGAN network (*e.g.*, End Office or Tandem building) where the ***Interconnection Facilities connect with the AT&T MICHIGAN network***

Parties' networks meet for the purpose of establishing Interconnection and also serves as a demarcation point between the facilities that each Party is physically **and financially** responsible to provide.

As indicated, the parties agree that the POI is a point on AT&T Michigan's network that serves as the demarcation between the facilities for which each Party is physically responsible.

However, the parties disagree on two aspects of the definition. *First*, the parties disagree about how to express the linking of the two networks. *Second*, Sprint does not accept that the POI serves as the financial, as well as the physical, demarcation point.

With respect to the first disagreement, AT&T Michigan proposes to refer to the POI as the point on its network where the "Parties' networks meet" for the purpose of establishing Interconnection. Sprint's objection to this phrase is puzzling since it succinctly and accurately tracks what Sprint acknowledges to be the parties' agreement: "The parties agree that the POI will serve as the physical demarcation point between their networks" (Sprint Br. at 57). Pellerin at 18-19. Sprint's proposed language is less precise because it refers to the point where "Interconnection Facilities connect with AT&T Michigan's network," rather than the point where the two parties' networks meet and, therefore, does not accurately track what Sprint has acknowledged to be the parties' agreement. *Id.*

With respect to the second disagreement, Sprint's opposition to describing the POI as the financial, as well as the physical, demarcation point is based entirely on its position that AT&T Michigan should be required to share in the cost of Interconnection Facilities located on Sprint's side of the POI. Sprint Br. at 57-61. Because the question of whether AT&T Michigan should be required to share in such costs is the subject of Issue 24(a), AT&T Michigan will address Sprint's arguments on "sharing" in connection with Issue 24(a). As Sprint's discussion of Issue 6 makes clear, if AT&T Michigan prevails on Issue 24(a), the Commission should also approve AT&T Michigan's proposed definition of POI.

ISSUE 7: MUST SPRINT OBTAIN AT&T'S CONSENT TO SPRINT'S REMOVAL OF A PREVIOUSLY ESTABLISHED POI?

AT&T Michigan Position: Sprint's request to unilaterally decommission all POIs is not supported by any law and is not required for Sprint to manage its network. AT&T Michigan's proposal allows the Parties to negotiate in good faith over a requested decommissioning and allows Sprint to bring any dispute to the Commission for resolution. Thus, the ultimate authority on any decommissioning issue will be the Commission. (Anglin at 26-41.)

In section 2.2.1.4 of Attachment 2, Sprint asks for authority to decommission any and all POIs without consulting AT&T Michigan or the Commission ("Sprint may remove any previously established POIs for Sprint network optimization, subject to the other requirements of this Section 2.2.")⁵⁶

AT&T Michigan, on the other hand, proposes language that would obligate Sprint to either reach agreement with its interconnection partner to decommission a POI or obtain Commission approval. ("Sprint's removal of any previously-established POI is subject to negotiation with AT&T Michigan. If the parties do not agree, Sprint cannot unilaterally remove a POI, but may invoke the dispute resolution procedures of this Agreement.") AT&T Michigan's proposal is more balanced and commercially reasonable and should be adopted.

Beginning in the early 1990's, AT&T Michigan and Sprint established a robust interconnection architecture that connects their networks at multiple POIs in the Detroit, Grand Rapids, Lansing and Saginaw LATAs. Anglin at 27. At last count, Sprint had established *****BEGIN CONFIDENTIAL*****END CONFIDENTIAL***** POIs in Michigan. As Mr. Anglin explains, there were sound network engineering reasons for it to do so. A multiple-POI network is inherently more reliable because there is always an alternate path for routing traffic in case of a network outage caused by a fire or natural disaster. Anglin at 30-32. In a single POI

⁵⁶ Under section 2.2.1.1 of Appendix 2 the Parties agree to maintain at least one POI in each LATA.

environment, on the other hand, a catastrophic failure at that POI location could completely isolate a carrier's network from the rest of the public switched telephone network.

A multiple-POI architecture is also desirable because it distributes traffic load among several locations and avoids congestion at a single bottleneck, thus minimizing the chances that customers would experience call blocking in heavy traffic situations. Anglin at 30-32, 39. Sprint was not required to establish all these POIs in Michigan; it did so voluntarily. Thus, Sprint explicitly recognized the value of establishing a multi-POI network in Michigan.

Both AT&T Michigan and Sprint incurred costs to establish this multi-POI architecture. For AT&T Michigan, these costs included the engineering and provisioning of switch ports, transport facilities and central office termination equipment (*e.g.*, multiplexers, fiber optical termination equipment and distribution frames). Anglin at 34-35. In addition, a POI sometimes requires AT&T Michigan to construct new facilities (*i.e.*, transport, ports or termination equipment) or augment existing facilities to accommodate additional traffic after a POI is established. Given the large number of Sprint interconnection trunks and the high volume of Sprint traffic, it is quite likely that AT&T Michigan did, in fact, have to construct or augment facilities to accommodate Sprint's POIs. Anglin at 34.

Decommissioning POIs would detract from the reliability and security that the Parties have engineered into their networks. It would also be a waste of the costs AT&T Michigan incurred to establish these POIs. While some of the switching, transport and central office equipment might be reusable elsewhere in the network, this would certainly not be true in all cases and would cause stranded investment. Anglin at 34, 39. It could also cause facilities (*i.e.*, transport) exhaust and call blocking as traffic that is now distributed among several locations is concentrated to just one location in a LATA.

AT&T Michigan does not oppose decommissioning; it opposes unilateral decommissioning. In Illinois, for example, AT&T recognized that some reduction in the number of POIs made sense, especially because Sprint was turning down one of its overlay networks (called the “iDEN” network). Sprint does not say whether or not it plans to do the same thing in Michigan, but if it did this would be an obvious situation for decommissioning.

AT&T Michigan’s proposal is reasonable because it establishes a process to guide the parties in this area. Under AT&T Michigan’s language, Sprint would identify any POI, or a group of POIs, it desires to decommission. AT&T Michigan would then evaluate the potential impact on the parties’ interconnection arrangement. Thereafter, the parties would conduct good faith negotiations to determine if they agree. If they cannot work out their differences, then either party could invoke the dispute resolution procedures of the ICA and the matter would be resolved by the Commission.

This is the same process that was developed by the Illinois Commission in 2004 in the *MCI Illinois Arbitration Decision*.⁵⁷ There, the Commission ruled that MCI could not unilaterally eliminate POIs. “The Commission does not prohibit MCI from dismantling established interconnection arrangements in all circumstances. Instead, a LEC shall not be allowed to dismantle any established interconnection arrangement unless it either reaches an agreement with its interconnection partner, or receives Commission approval based upon sufficient justification.”⁵⁸ The Illinois Commission recently re-affirmed this ruling in its *Sprint Illinois Arbitration Decision*, at 37. (“The Commission does not see anything in the record

⁵⁷ Arbitration Decision, Docket 04-0469, *MCI Metro Access Transmission Communications, Inc., et al. Petition for Arbitration of Interconnection Rates, Terms and Conditions, and Related Arrangements with Illinois Bell Telephone Company Pursuant to section 252(b) of the Telecommunications Act of 1996* (ICC Nov. 30, 2004) (“*MCI Illinois Arbitration Decision*”).

⁵⁸ *Id.* at 88-89.

before us that would lead us to overturn this previous decision. Rather, the evidence provided by AT&T lends further support to this conclusion. It is clear that both commissioning and decommissioning a POI requires work on the part of both carriers and it would be inappropriate to allow this to be done unilaterally.”)

Sprint’s proposal, in contrast, is patently unreasonable. Even though the parties have worked cooperatively to establish a strong interconnection architecture, Sprint now seeks authority to unilaterally degrade it by eliminating as many POIs as it wants, which could leave as few five POIs in Michigan – one in each LATA. Sprint has not engaged AT&T Michigan in business-to-business discussions about decommissioning and has not proposed any specific reduction in POIs. Nor does its proposal allow for any consideration of AT&T Michigan’s interest when decommissioning issues arise. The parties established the POIs by mutual agreement. It is only fair that they be decommissioned by the same mutual agreement.

Sprint’s Criticisms of AT&T Michigan’s Proposal Miss the Mark

Sprint’s chief argument is that this is purely a matter of Sprint’s internal network management and that AT&T Michigan should have no voice in the process. Sprint Br. at 63-64. Sprint’s concerns are fully addressed by AT&T Michigan’s even-handed proposal to require the parties to negotiate in good faith to attempt to reach agreement over a requested decommissioning. The dispute resolution process ensures that the ultimate authority on any decommissioning issue will be the Commission – not Sprint and not AT&T Michigan.

Sprint complains that a dispute resolution proceeding at the Commission will “ensure delay and create a standardless review process.” Sprint Br. at 71-72. But a potential dispute about POIs is no different from any other dispute under the ICA and would be resolved by the same dispute resolution processes that have successfully governed interconnection arrangements

for years. In fact, such a dispute would receive expedited resolution under the alternative dispute resolution procedures of section 203(14) of the MTA. MCLA 484.2203(14). And the Commission's resolution of such a dispute would not be "standardless." Rather, it would be fully informed by the Commission's reasoned judgment and expertise.

Sprint also contends that AT&T Michigan will "stand in the way of" of decommissioning in order to sell more transport to Sprint. Sprint Br. at 64, 67. There is no basis for this allegation. Mr. Anglin explained that AT&T Michigan will evaluate each decommissioning request on its engineering merits, not on the basis of whether it would result in Sprint buying less transport from AT&T. Anglin at 41. Mr. Anglin's testimony shows that AT&T Michigan would bring network sensibility to discussions about POIs. This is a far cry from the interfering, obstructionist picture Sprint paints.

Next, Sprint asserts that AT&T Michigan incurs no meaningful costs when Sprint decommissions a POI and merely has to "pull[] a plug." Sprint Br. at 67. Sprint is mistaken. Mr. Anglin demonstrates that AT&T Michigan incurs costs to establish a POI and that those costs will be wasted if a POI is decommissioned. Anglin at 34-35. This includes costs for the engineering and provisioning of switch ports, transport facilities and central office equipment, as well as costs for the construction of new facilities that may be required to establish the new POI. *Id.* Augmentation of other facilities may be required to handle additional traffic after a POI is established. *Id.* Mr. Anglin further explained that "stranded investment" can occur if those facilities go unused after a POI is decommissioned. *Id.* at 34, 39. As the Illinois Commission found, this is ample evidence of the type of costs incurred by AT&T Michigan to establish and decommission POIs.⁵⁹

⁵⁹ *Sprint Illinois Arbitration Decision* at 36.

Sprint also argues that facilities exhaust is not a valid concern at an end office because “the total number of minutes will remain the same” and can simply route through the tandem over common facilities. Sprint Br. at 66. Sprint misses the point. It is the very act of loading up the common transport facilities with more traffic – traffic that used to travel over dedicated facilities directly to the end office – that creates the problem. The reason that Sprint agreed to place that traffic over direct end office facilities in the first place was to avoid the congestion that would otherwise occur at the tandem and over the common transport facilities that run from the tandem to the end offices. Returning that traffic to the common transport facilities increases the risk that those facilities will run out of capacity.

Sprint concedes that facilities exhaust is an issue when the decommissioned POI is a tandem. Sprint Br. at 66. This is because all the traffic that used to go directly to the tandem in question will be re-routed to a different POI, thereby putting a greater traffic load on that tandem and its associated transport facilities. Sprint does not deal with this problem, other than to say that AT&T Michigan did not submit “clear and convincing” evidence that it is a problem. As we discuss below, there is no such “clear and convincing” standard for decommissioning POIs.

Sprint argues that AT&T Michigan’s position “undermines” the bill-and-keep regime for IntraMTA wireless traffic adopted by the FCC in the *CAF Order*. Sprint Br. at 68. On the contrary, AT&T Michigan’s proposal is perfectly consistent with the *CAF Order*. There is no disagreement that IntraMTA wireless traffic is now subject to bill-and-keep and that, as a result, neither party can charge the other for the transport and termination of such traffic. This, however, imposes a significant transport burden on ILECs, which can no longer look to reciprocal compensation to recover their substantial transport costs. This is a particular problem in single POI arrangements that require the ILEC to carry traffic all over the LATA. The *CAF*

Order acknowledges this dynamic and provides that states will determine through the arbitration process the points on a network at which one carrier must deliver terminating traffic to another.⁶⁰ Thus, a multi-POI architecture is entirely consistent with a “bill-and-keep” regime.

Finally, Sprint contends that AT&T Michigan’s position is “directly counter to its advocacy at the FCC on the issue of IP Interconnection.” Sprint Br. at 64. Sprint is mistaken. The AT&T quote that Sprint relies upon was made in the FCC’s forward-looking inquiry about how IP-to-IP interconnection might take place in the future. AT&T Michigan’s interconnection with Sprint is TDM, and we expect it to stay that way indefinitely for all the reasons discussed in Issue 1.⁶¹ For purposes of Issue 7 in this proceeding, what matters is the current TDM interconnection arrangement, not AT&T’s advocacy to the FCC about what future IP interconnection arrangements might look like.

Sprint’s Legal Authority Is Unpersuasive

Sprint also raises a number of legal objections, but none of them is well-founded. Sprint argues that the right to establish a single POI per LATA carries with it the right to unilaterally decommission as many POIs as necessary to get down to a single POI in a LATA. Sprint Br. at 69-70. The orders that Sprint relies upon say nothing of the kind. None of them addresses decommissioning or gives an interconnecting carrier free license to move, decommission or re-configure POIs. That is no surprise, because establishing a POI in the first instance is far

⁶⁰ “Moreover, states will retain important responsibilities in the implementation of a bill-and-keep framework. An inherent part of any rate setting process is not only the establishment of the rate level and rate structure, but the definition of the service or functionality to which the rate will apply. Under a bill-and-keep framework, the determination of points on a network at which a carrier must deliver terminating traffic to avail itself of bill-and-keep (sometimes known as the ‘edge’) serves this function, and will be addressed by states through the arbitration process where parties cannot agree on a negotiated outcome.” *CAF Order* at ¶ 776.

⁶¹ Even under Sprint’s proposal for Issue 1, the parties’ interconnections would remain TDM-to-TDM for quite some time under Sprint’s proposed language for Attachment 2, section 2.9.3.1.

different from decommissioning an existing POI. The only on-point authority supports AT&T Michigan and rejects Sprint's argument on this point.⁶²

Sprint's analysis also overlooks section 251(c)(2)(D) of the 1996 Act, which requires that interconnection take place on terms and conditions "that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement." Under this provision, the Commission has leeway to approve interconnection terms and conditions for the decommissioning of POIs, as long as those terms and conditions are "just, reasonable, and nondiscriminatory."

Sprint also claims that AT&T Michigan must submit "clear and convincing evidence" that Sprint's proposed language would cause "specific and adverse impacts" to AT&T Michigan's network. Sprint Br. at 65, 67. There is no such requirement. The *MediaOne Order* that Sprint cites deals with a very different question, namely, whether a CLEC should be required to establish a direct trunk to an end office once traffic to that end office reaches the maximum capacity of a DS1 transport facility.⁶³ That case involved the *establishment* of an interconnection arrangement. Issue 7, in contrast, involves the *decommissioning* of a voluntarily-established POI. Sprint's theory appears to be that the "specific and adverse impact" standard applies to any interconnection issue. Nothing in the *MediaOne Order* supports such a broad application of that very narrow ruling.

⁶² *MCI Illinois Arbitration Order* at 88-89; *Sprint Illinois Arbitration Decision* at 37.

⁶³ *In re MediaOne Telecommunications of Michigan, Inc.*, Case No. U-12198, Opinion and Order issued March 3, 2000. ("*MediaOne Order*").

Finally, Sprint asserts that the Commission's *Telnet/Verizon Arbitration Order* limiting the number of trunks to a tandem somehow supports its position here.⁶⁴ It does not. The question in Issue 7 is whether Sprint can unilaterally decommission POIs that it voluntarily established with AT&T Michigan, and for which both parties incurred time and expense. An order that rejects a limit on the number of trunks a carrier may have to a tandem has nothing to do with this question.

In conclusion, multiple POIs provide the diversity, security and reliability that a single POI does not. Sprint voluntarily established the existing POIs and should not be permitted to unilaterally remove them. AT&T Michigan's proposal establishes a reasonable process to decommission POIs through negotiation, with Commission involvement if needed, and should be adopted.

ISSUE 8(a): SHOULD SPRINT BE REQUIRED TO ESTABLISH ADDITIONAL POINTS OF INTERCONNECTION (POIS) WHEN ITS TRAFFIC TO AN AT&T TANDEM SERVING AREA EXCEEDS ONE (1) DS3?

ISSUE 8(b): SHOULD SPRINT BE REQUIRED TO ESTABLISH ADDITIONAL POINTS OF INTERCONNECTION (POI) AT AN AT&T END OFFICE NOT SERVED BY AN AT&T TANDEM WHEN ITS TRAFFIC TO THAT END OFFICE EXCEEDS ONE (1) DS3?

ISSUE 8(c): SHOULD SPRINT ESTABLISH THESE ADDITIONAL CONNECTIONS WITHIN 90 DAYS?

AT&T Michigan Position: The reliability of the public switched network will be enhanced if Sprint establishes an additional POI when its traffic to any tandem serving area reaches a level of a DS3. This will also equitably apportion transport costs in the new "bill-and-keep" environment. AT&T Michigan's proposal is consistent with federal law and should be adopted by. (Anglin at 41-47.)

⁶⁴ *In the Matter of the Application of Telnet Worldwide, Inc., for arbitration of interconnection rates, terms and conditions and related arrangements with Verizon North Inc and Contel of the South, Inc, d/b/a Verizon North Systems*, Case No. U-13931, Opinion and Order issued October 14, 2004. ("*Telnet/Verizon Arbitration Order*").

For established carriers, an interconnection architecture with more than one POI is desirable because it enhances network reliability. A single POI arrangement is less desirable because it concentrates traffic at a single location, increasing the chance that a catastrophic failure at that location, such as a fire or flood, may completely isolate a carrier's network from the public switched telephone network. An outage in one carrier's network can also create a "backlash" into other carriers' networks, blocking calls and leading to more blocked calls as customers attempt to redial. National concerns about network reliability have never been higher, and having more than one POI undeniably enhances network reliability. Anglin at 42-43.

A multiple POI network also balances facilities investment between carriers. The *CAF Order*'s institution of "bill-and-keep" for non-access wireless traffic makes this consideration all the more important. A single POI approach, coupled with "bill-and-keep" for non-access wireless traffic, imposes significant transport burden on ILECs, because they can no longer look to reciprocal compensation as a means of cost recovery. The *CAF Order* acknowledges that states will use the arbitration process to determine the points on a network at which a carrier must deliver terminating traffic to another carrier.⁶⁵ Thus, state commissions have authority in arbitration proceedings to require additional POIs for the exchange of traffic that is subject to a "bill-and-keep" regime. With the demise of reciprocal compensation for wireless traffic, the time is ripe for the Commission to recognize that a multiple POI interconnection arrangement is appropriate for established carriers.

Much to their credit, two state commissions have already recognized that – at some traffic level – it is reasonable for interconnected carriers to establish an additional POI. In Illinois, the ICC ruled that it is "reasonable" to require a carrier to establish an additional POI

⁶⁵ *CAF Order* at ¶ 776.

when traffic volume between two carriers reaches an OC-12 level.⁶⁶ The Commission made this ruling in full awareness of the FCC’s pronouncements that “a CLEC need have only one POI per LATA.” *Id.*

The Public Utility Commission of Texas likewise imposed an “additional POI” requirement – but at a much lower traffic level.⁶⁷ The Texas commission held that the FCC’s *Local Competition Order* recognizes that states may go beyond national rules and “impose additional pro-competitive interconnection requirements, as long as such requirements are otherwise consistent with the 1996 Act and the FCC’s regulations.”⁶⁸ It went on to find that it is reasonable to require additional POIs to avoid network or tandem exhaust and required MCIW and SWBT to negotiate additional POIs when MCIW’s traffic usage exceeds a traffic level equal to twenty-four DS1s.⁶⁹

AT&T Michigan’s proposal is consistent with the principle the Illinois Commission established in the *Level 3 Illinois Arbitration Order* and with the result in the Texas *MCIW Order*. It requires Sprint (and any carriers opting into Sprint’s ICA) to establish additional POIs as the volume of traffic exchanged between them grows.

Sprint previously accepted the principle behind AT&T Michigan’ proposal, because it agreed to a provision in its current ICA that requires Sprint to establish a POI at each switch

⁶⁶ Arbitration Decision, Docket No. 00-0332, *Petition for Arbitration Pursuant to Section 252 (b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois*, (ICC Aug. 30, 2000) (“*Level 3 Illinois Arbitration Order*”) at 31.

⁶⁷ Order Approving Interconnection Agreement, Docket No. 21791, *Petition of Southwestern Bell Telephone Company for Arbitration with MCI Worldcom, Inc. Pursuant to Section 252(b)(1) of the Federal Telecommunications Act of 1996*, (Pub. Util. Comm’n Texas Sept. 20, 2000) (“*MCIW Order*”).

⁶⁸ *Id.* at 4.

⁶⁹ *Id.* at 6-7.

where the traffic volume reached one DS1.⁷⁰ AT&T Michigan’s proposal here is significantly less demanding because it provides the much higher traffic threshold of a DS3 – which is equal to *twenty-eight* (28) DS1s.⁷¹ A single DS-3 carries a very large amount of traffic – up to 5,600,000 minutes of use (“MOU”) per month (28 DS1s x 200,000 MOU). So, a carrier can have as many as 5½ million MOUs per month to a tandem serving area without triggering the DS3 threshold. This ensures that an additional POI is established only where there is a continued, sustained exchange of large amounts of traffic between carriers. As Mr. Anglin explains, 75% of the interconnections in Michigan fall below the threshold AT&T Michigan proposes. Anglin at 44.

Sprint cites to four Commission cases (Sprint Br. at 73-75), but none of them involved a DS3 threshold. Three of the four address a DS1 traffic threshold. Sprint claims that the fourth case (the *Level 3 Michigan Arbitration Order*) made a ruling on a DS3 threshold, but this is not so. The Commission order in that case shows that “the contract language submitted by the parties does not speak to the two proposed traffic levels at which additional points of interconnection would be required.”⁷² Thus, none of Sprint’s cases addresses the traffic threshold that AT&T Michigan proposes here.

⁷⁰ Section 2.3.2 of the current ICA between Sprint Spectrum and AT&T Michigan dated June 7, 2001 requires Sprint to establish a POI at “each **SBC-13STATE** Tandem switch or End Office Switch where trunking is required under this Agreement.” Section 2.1.11 of the ICA requires the parties to establish direct trunking to an end office when traffic between them at that end office “meets the CCS equivalent of one DS1 (*i.e.* 500 busy hour centum call seconds), for three consecutive Months.”

⁷¹ A DS1 provides 24 voice grade channels, so it can handle 24 simultaneous conversations. There are 28 DS1 channels in a DS3, so a DS3 can provide 672 (24 x 28) voice grade channels. There are three DS3s in an OC-3, so an OC-3 can provide 2,016 (672 x 3) voice grade channels. There are four OC-3s in an OC-12, so an OC-12 can provide 8,064 (2,016 x 4) voice grade channels.

⁷² *Re Level 3 Communications, LLC*, MPSC Case No. U-12460, Opinion and Order, October 24, 2000, 2000 WL 1726949 (“*Level 3 Michigan Arbitration Order*”) at *18.

Sprint makes the same argument it raises in Issue 7, *i.e.*, that federal law permits it to have a single POI per LATA, so it cannot be required under any circumstances to establish an additional POI. Felton at 21. Sprint is mistaken about federal law. This Commission has conclusively ruled that nothing in federal law prevents it from requiring multiple POIs in the same LATA (“Neither 47 CFR 51.305(a) nor 47 USC 251(c)(2) require only one POI”).⁷³ In the *CAF Order*, the FCC made clear (at ¶ 776) that states have authority to determine the points on a network at which a carrier must deliver terminating traffic to another carrier.

Sprint argues that AT&T presented no evidence of facility exhaust or network reliability concerns. Sprint Br. at 76. This is wrong. Mr. Anglin explained that multiple POIs are warranted by the very real concern that tandem facilities, *i.e.*, transport to and from tandem switches, are subject to exhaust if all traffic is run over the same facilities rather than spread over the transport facilities at multiple tandem locations. Anglin at 38-39, 43. He also showed that AT&T Michigan’s interconnection arrangements handle immense volumes of traffic, nearly 1.5 *billion* minutes of use each month. Anglin at 43. If this huge number of MOUs were to be routed through a single tandem in each LATA, the transport facilities serving those tandems would be in a serious danger of exhaust. That argument is fully supported by the record.

Sprint also discounts AT&T Michigan’s network reliability concerns (Sprint Br. at 76), but the Commission can see for itself that the huge amount of traffic exchanged between AT&T Michigan and interconnecting carriers is at risk if several of those carriers route all traffic to a single AT&T Michigan tandem. The consequences of a network failure at such a location would be catastrophic. But such consequences are avoidable – or at least manageable – when additional POIs are established at appropriate traffic thresholds.

⁷³ *Re Sprint Communications Company, LP*, MPSC Case No. U-15534, Order, July 1, 2008 (“*Sprint CenturyTel Arbitration Order*”) at 7.

Finally, Mr. Anglin explains that a 90-day interval is reasonable to establish an additional POI. Anglin at 46. This is *longer than* the 60-day interval for establishing a new POI at an end office in the current Sprint/AT&T Michigan ICA and *equal to* the 90 day interval adopted by the Texas Commission.⁷⁴

For all of the reasons set forth above and in the testimony of AT&T Michigan witness Bill Anglin, AT&T Michigan requests the Commission to adopt the language it proposes for the sections of the ICA addressed in Issues 8(a) and 8(c).

II.D. FACILITIES AND TRUNKING PROVISIONS (NON-COMPENSATION)

ISSUE 9:

SPRINT ISSUE STATEMENT: WHAT IS THE APPROPRIATE DEFINITION OF “INTERCONNECTION FACILITIES”?

AT&T ISSUE STATEMENT: SHOULD THE DEFINITION OF “INTERCONNECTION FACILITIES” PROVIDE THAT THE FACILITIES REFERRED TO IN THE DEFINITION MEAN ENTRANCE FACILITIES USED EXCLUSIVELY FOR INTERCONNECTION AS DEFINED BY THE FCC IN 47 C.F.R. § 51.5?

AT&T Michigan Position: The definition of “Interconnection Facilities” should include AT&T Michigan’s proposed language making clear that such facilities are to be used exclusively for Interconnection as the FCC defined that term in the context of section 251(c)(2) of the 1996 Act (*i.e.*, 47 C.F.R. § 51.5). AT&T Michigan’s position is supported by the FCC’s rules and the United States Supreme Court’s decision in *Talk America*. In the recent Sprint Illinois Arbitration, the Illinois Commission approved a definition of “Interconnection Facilities” identical to the one proposed by AT&T Michigan in this case. Sprint’s proposed definition, with its reference to Sprint’s proposed language for Attachment 2, section 3.8.2, should be rejected because it is intended to allow Sprint to use Interconnection Facilities for both Interconnection and Backhaul traffic in direct contravention of *Talk America*. (Pellerin at 21-24.)

⁷⁴ *MCIW Order* at 7.

The purpose of the ICA's definition of "Interconnection Facilities," as set forth in GT&C section 2.61, is to define the entrance facilities that AT&T Michigan will be obligated to provide to Sprint at TELRIC-based rates in accordance with the U.S. Supreme Court's decision in *Talk America*. The parties agree that "Interconnection Facilities" should be defined as "transmission facilities that connect Sprint's network with AT&T Michigan's network for the mutual exchange of traffic" and that "these facilities connect Sprint's network from Sprint's Switch or associated point of presence within the LATA [Local Access Transport Area] to the POI for the transmission and routing of telephone exchange service and/or exchange access service." The parties' dispute concerns the last sentence of the definition, which states:

For avoidance of doubt, but subject to Attachment 02, Sections 3.8.2 and 5.6, the facilities referred to in this definition mean the entrance facilities used *only **exclusively*** for *the purpose of linking the Parties' two networks for the mutual exchange of traffic **Interconnection as defined at 47 C.F.R. Section 51.5.***

AT&T Michigan proposes the bold underlined language to make clear that Interconnection Facilities are to be used by Sprint exclusively for Interconnection as the FCC has defined that term in the context of section 251(c)(2) of the 1996 Act (*i.e.*, 47 C.F.R. § 51.5). This limitation has been expressly recognized by the FCC and the U. S. Supreme Court and necessarily flows from the fact that section 251(c)(2) (the section that requires ILECs to provide interconnection) is the only statutory source of an ILEC's obligation to make cost-based entrance facilities available to requesting carriers. In the *Triennial Review Remand Order*, the FCC made a finding of "non-impairment" with respect to entrance facilities, thereby eliminating the ILECs' obligation to provide CLECs with access to entrance facilities as unbundled network elements ("UNEs") pursuant to section 251(c)(3) of the 1996 Act.⁷⁵ Thus, as the FCC made clear in its

⁷⁵ *Unbundled Access to Network Elements*, 20 FCC Rcd 2533, 2609-2611, ¶¶ 136-141(2005) ("*Triennial Review Remand Order*" or "*TRRO*").

amicus brief to the Supreme Court in *Talk America*, cost-based entrance facilities are to be “provided *solely* for interconnection under Section 251(c)(2)” and can no longer be used “more expansively” by CLECs for non-interconnection purposes (*i.e.*, backhauling), as they were before the elimination of such facilities as UNEs. Exhibit PHP-2, p. 22, n. 6 (emphasis added). The Supreme Court agreed: “entrance facilities leased under § 251(c)(2) can be used *only* for interconnection,” *i.e.*, “to link the incumbent provider’s telephone network with the competitor’s network for the mutual exchange of traffic.” *Talk America* at 2257, 2264 (emphasis added). *See also, Illinois Bell Telephone Company v. Box*, 526 F.3d 1069, 1071 (7th Cir. 2008) (“CLECs use entrance facilities *exclusively* for interconnection” (emphasis added)); *Southwestern. Bell Telephone, L.P. v. Missouri Pub. Serv. Comm’n*, 530 F. 3d 676, 684 (8th Cir. 2008) (entrance facilities are to be “used *solely* for interconnection purposes within the meaning of § 251(c)(2)” (emphasis added)).

In the recently completed Sprint Illinois Arbitration, the ICC approved, over Sprint’s objection, a definition of Interconnection Facilities identical to the definition proposed by AT&T Michigan in this case, correctly concluding that “[a]fter the *Triennial Review Remand Order*, entrance facilities have been available at TELRIC rates only for Section 251(c)(2) Interconnection.” *Sprint Illinois Arbitration Decision* at 8.

Rather than agree to the phrase “exclusively for Interconnection as defined at 47 C.F.R. Section 51.5,” as approved by the Illinois Commission, Sprint insists on using the phrase “only for the purpose of linking the Parties’ two networks for the mutual exchange of traffic.” Since this phrase tracks a portion of the language from the Rule 51.5 definition of “Interconnection,” and the words “only” and “exclusively” when used in this context are synonymous, it might appear at first glance that Sprint’s proposed language, like the language proposed by AT&T

Michigan, appropriately incorporates the limitation on the use of Interconnection Facilities recognized by the FCC and the Supreme Court. Sprint's proposed language, however, tracks only the first sentence of the FCC's Rule 51.5 definition of Interconnection, and omits the qualifying second sentence, which states that "Interconnection" "does not include the transport and termination of traffic." For the reasons discussed by Ms. Pellerin, it is preferable to refer to the rule for a complete definition than to include a portion of the language from that rule.

Pellerin at 22.

Furthermore, Sprint proposes to make this limitation subject to Attachment 2, section 3.8.2, which contains Sprint's so-called "pro-rata pricing proposal," which is the subject of Issue 22. It is unnecessary and inappropriate to reference this specific pricing proposal in the definition of Interconnection Facilities. Pellerin at 23-24. Moreover, as will be discussed for Issue 22, below, Sprint's pro-rata pricing proposal unlawfully assumes that Sprint will have the right and the ability under the ICA to use the same DS3 (or higher capacity) entrance facility to carry both section 251(c)(2) Interconnection traffic and Backhaul traffic. *Id.* Sprint acknowledges that Backhaul represents the use of a transport facility for a purpose "that does not involve the mutual exchange of traffic" and, therefore, does not constitute the use of such a facility for section 251(c)(2) Interconnection as defined by the FCC in Rule 51.5. Sprint Br. at 80. Accordingly, Sprint's proposal to make section 3.5.2's limitation on the use of Interconnection Facilities "subject to" section 3.8.2 creates an exception that swallows the rule and is directly contrary to *Talk America*.

For these reasons, the Commission must reject Sprint's proposed definition of Interconnection Facilities and approve AT&T Michigan's.⁷⁶

⁷⁶ Sprint's assertion that using the word "exclusively" "would prejudice Sprint's pro rata pricing proposal" (Sprint Br. at 79) makes no sense in light of the fact that Sprint itself uses the word "only," which in this context is

ISSUE 10: WHAT IS THE APPROPRIATE DEFINITION OF “BACKHAUL”?

AT&T Michigan Position: AT&T Michigan’s proposed definition of “Backhaul” correctly tracks the FCC’s description of “backhauling,” as discussed in the FCC’s amicus brief to the Supreme Court in *Talk America*. Sprint’s definition is unduly narrow and is based on its position that all calls to and from Sprint that happen to touch an AT&T Michigan switch along the way represent the “mutual exchange of traffic” within the meaning of Rule 51.5, and as such are eligible for transmission over Interconnection Facilities purchased from AT&T Michigan at TELRIC-based prices, even when the calls are not exchanged with AT&T Michigan’s end users. Sprint’s argument is directly contrary to the FCC’s own interpretation of its rules, myriad court decisions (including *Talk America*) and this Commission’s decision in the ACD Telecom Arbitration (Case No. U-16906), all of which demonstrate that (i) Interconnection, as defined in Rule 51.5, is limited to the exchange of traffic between the end users of the interconnected carriers; and (ii) backhaul constitutes a CLEC’s (or CMRS provider’s) use of entrance facilities for any purpose other than Interconnection as defined in Rule 51.5. (Pellerin at 24-32.)

This issue involves the definition of “Backhaul” in GT&C section 2.13. The definition is relevant because Sprint and AT&T Michigan have agreed in Attachment 2, section 3.5.3, that Sprint may not use Interconnection Facilities for the purpose of “Backhaul.” As Sprint notes in its brief, the parties’ dispute over the definition of the term “Backhaul” is closely related to the parties’ basic dispute over the meaning of FCC Rule 51.5, which defines “Interconnection” for purposes of section 251(c)(2) to mean the “link[ing] of [AT&T Michigan’s] network with [Sprint’s] network for the mutual exchange of traffic.” That dispute, in turn, is relevant to the parties’ dispute over whether Sprint should be allowed to use TELRIC-priced Interconnection Facilities to carry 911 traffic and IXC (“Equal Access”) traffic. (Issue 11).

The basic dispute for all of these issues involves Sprint’s argument that all calls to and from Sprint that happen to touch an AT&T Michigan switch along the way represent the “mutual exchange of traffic” within the meaning of Rule 51.5, and as such are eligible for transmission over Interconnection Facilities purchased from AT&T Michigan at TELRIC-based

synonymous with the word “exclusively.” What “prejudices” Sprint’s pro-rata pricing proposal is the law, which limits Sprint’s use of TELRIC-priced Interconnection Facilities to Interconnection, as defined in FCC Rule 51.5.

prices, even when the calls are not exchanged with AT&T Michigan's end users. Based on this position, Sprint argues that it should be allowed to use Interconnection Facilities to send calls to, and receive calls from, the end user customers of interexchange carriers ("IXCs"). Sprint also argues that it should be allowed to use such Interconnection Facilities to send 911 calls to the public safety answering point ("PSAP"), even though such calls are not exchanged with AT&T Michigan end users and, therefore, 911 trunks solely benefit customers of Sprint. Pellerin at 26.

Sprint's position is contradicted by the U.S. Supreme Court's statement in *Talk America* that the purpose of the section 251(c)(2) interconnection requirement is to "ensure[] that customers on a competitor's network can call customers on the incumbent's network, and vice versa." 131 S. Ct. 2254, 2258. Sprint's position is also contradicted by the FCC's own interpretation of Rule 51.5, as expressed in the *amicus* briefs it filed with the Sixth Circuit Court of Appeals and the U. S. Supreme Court in the *Talk America* appeal.⁷⁷ In its brief at the Sixth Circuit, the FCC described section 251(c)(2) Interconnection as:

Linking the physical networks of two carriers in order to exchange traffic and complete calls between end user customers of the two carriers.

Exhibit PHP-1 at 3-4. The FCC further stated that, although the *TRRO* relieved ILECs of the obligation to make entrance facilities available as UNEs, "[a] competitor continues to have cost-based access to incumbent interconnection facilities in order to exchange traffic between its customers and those of the incumbent LEC." *Id.* at 17

Similarly, in its brief at the Supreme Court, the FCC made the following statements:

Section 251(c)(2) requires incumbent LECs to "provide * * * interconnection" between their networks and the networks of competitive LECs (CLECs). 47 U.S.C. 251(c)(2). Interconnection is "the physical linking of two networks for the mutual exchange of traffic."

⁷⁷ A copy of the FCC's brief in the Sixth Circuit is Exhibit PHP-1. A copy of the FCC's brief in the Supreme Court is Exhibit PHP-2.

Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, 11 F.C.C.R. 15,499, 15,590 ¶ 176 (1996) (subsequent history omitted) (*Local Competition Order*); see 47 C.F.R. 51.5. *Such linking enables customers of a competitive LEC to call the incumbent's customers, and vice versa.* The absence of such interconnection would disadvantage the competitive LEC, whose customers would be unable to call (or receive calls from) the incumbent's much larger customer base.⁷⁸

Entrance facilities have two distinct principal uses. *First, a competitor can use an entrance facility to interconnect its equipment with the incumbent's equipment, so that calls can move back and forth between customers on the two networks.*⁷⁹

Section 251(c)(2) requires incumbent carriers to provide interconnection to their competitors at cost-based rates, *making it possible for the customers of a competitive carrier to call (and receive calls from) an incumbent's larger customer base.*⁸⁰

As these quotes make clear, Interconnection, as defined in Rule 51.5, involves the mutual exchange of traffic between end users of the interconnected carriers. This understanding of the purpose and definition of Interconnection is supported by myriad court decisions in addition to *Talk America*. See, e.g., *Autotel v. Nevada Bell Telephone Co.*, 697 F.3d 846, 849 (9th Cir. 2012) (interconnection allows “customers of one LEC to call the customers of another” (quoting *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1146 (9th Cir. 2006)); *Puerto Rico Telephone Co., Inc. v. SprintCom, Inc.*, 662 F.3d 74, 80 (1st Cir. 2011) (“Interconnection allows customers of one LEC to call the customers of another, with the calling party’s LEC (the ‘originating’ carrier) transporting the call to the connection point, where the called party’s LEC (the ‘terminating’ carrier) takes over and transports the call to its end point.”); *Pacific Bell Telephone Co. v. California Public Utilities Com’n*, 621 F.3d 836, 840 (9th Cir. 2010) (“interconnection provides a way for a competitive LEC's customers to reach AT&T's customers and vice versa”);

⁷⁸ Exhibit PHP-2 at 2-3 (emphasis added).

⁷⁹ *Id.* at 5 (emphasis added).

⁸⁰ *Id.* at 12 (emphasis added).

Global Naps, Inc. v. Verizon New England, Inc., 444 F.3d 59, 62 (1st Cir. 2006)

(“Interconnection permits customers of one local exchange carrier to make calls to, and receive calls from, customers of other local exchange carriers.”); *Global Naps, Inc. v. Massachusetts Dept. of Telecommunications and Energy*, 427 F.3d 34, 36 (1st Cir. 2005) (“Interconnection allows customers of CLECs to receive calls from, and place calls to, customers of ILECs.”); *Verizon New York Inc. v. Global NAPS, Inc.*, 463 F. Supp. 2d 330, 333 (E.D.N.Y. 2006) (interconnection “permits customers of one local exchange carrier to make calls to, and receive calls from, customers of other local exchange carriers”).

This common sense understanding of what constitutes the “mutual exchange of traffic” is also supported by the Commission’s decision in the ACD Telecom Arbitration. The Decision of the Arbitration Panel (“DAP”) in that case approved language proposed by AT&T Michigan, similar to language proposed by AT&T Michigan for Issues 11(a) and 11(b) in this case, which provides that TELRIC-priced Entrance Facilities “may not be utilized for 911, OS/DA, HVCI, Third Party and Meet Point Trunk Groups.” Pellerin at 37.⁸¹ The DAP approved this language over the CLECs’ objections based, in part, on the facts that the “definition of entrance facilities that the parties agreed to states that they are for the *mutual exchange of traffic*” and “these ancillary services are for the benefit of the CLECs’ customers.” *ACD Telecom Arbitration DAP* at 16 (emphasis added); *ACD Telecom Arbitration Order* (Feb. 15, 2012) at 11-12 (affirming DAP). As in the ACD Telecom Arbitration, the agreed portion of the definition of Interconnection Facilities in this case states that such facilities are for the “mutual exchange of traffic.” GT&C section 2.61. Consistent with the decision in the ACD Telecom Arbitration, that phrase (which comes from the Rule 51.5 definition of Interconnection) can, and must, be

⁸¹ Like the “Equal Access Trunk Groups” referred to in this case, Meet Point Trunk Groups are trunk groups used by a CLEC to send and receive IXC traffic. *Id.*

interpreted to exclude the use of Interconnection Facilities by Sprint for sending or receiving ancillary traffic, like 911 and IXC traffic, that is “for the benefit of [Sprint’s] customers” and is not exchanged with AT&T Michigan’s customers.⁸²

AT&T Michigan’s interpretation of the phrase “mutual exchange of traffic” was also adopted by the Illinois Commission:

Therefore a local exchange carrier can lease entrance facilities at TELRIC rates in order to interconnect its customers with the ILEC’s customers. A call between a Sprint customer and an IXC does not involve an AT&T customer and, thus, is not Section 251(c)(2) traffic.

Sprint Illinois Arbitration Decision at 8-9.

Consistent with its misguided interpretation of the phrase “mutual exchange of traffic,” Sprint proposes to narrowly define “Backhaul” to mean the use by Sprint of a facility for internal purposes to transmit that traffic that is not switched by an AT&T Michigan switch (including a 911 selective router), regardless of the points of origination and termination (bold italics text).

“Backhaul” means ***the use of a transmission facility for the purpose of transmitting traffic that is not, at either end of such facility, switched by an AT&T MICHIGAN Central Office Switch or Selective Router.***

Sprint further takes the position that all traffic that falls outside Sprint’s definition of “Backhaul” traffic constitutes “Interconnection Traffic” eligible for transmission over Interconnection Facilities. Thus, Sprint’s position would allow it to use Interconnection Facilities for the transmission of traffic (such as 911 and IXC traffic) that does not represent the mutual exchange of traffic between end users of Sprint and AT&T Michigan. Accordingly, Sprint’s position,

⁸² In its Brief (at 88), Sprint’s cites the *ACD Telecom Arbitration DAP* on another issue as support for Sprint’s position, quoting the DAP as stating that “neither the [Talk America] court nor the FCC has restricted the use of entrance facilities to one type of interconnection as AT&T seeks to do.” That statement, however, was referring to the use of entrance facilities in conjunction with different methods of interconnection (*e.g.*, collocation) and had nothing to do with the meaning of the phrase “mutual exchange or traffic” or the types of traffic that can be sent over Interconnection Facilities. As discussed above, the DAP’s interpretation and application of the phrase “mutual exchange of traffic” was entirely consistent with AT&T Michigan’s.

including its proposed definition of “Backhaul,” is contrary to the purpose of Interconnection, as described by the FCC, the Supreme Court, this Commission, the Illinois Commerce Commission, and the many court decisions discussed above.

Furthermore, Sprint’s attempt to narrow “Backhaul” to the transport of “traffic that is not switched by the ILEC network” (Br. at 80) is contradicted by the FCC’s description of backhauling in its *Talk America amicus* brief. There, the FCC made clear that “backhauling is not limited to calls that originate and terminate with a competitive LEC’s [or wireless carrier’s] customers. Instead, it occurs whenever a competitive LEC [or wireless carrier] uses an entrance facility for a purpose other than interconnection.” Exhibit PHP-2 at 6, n.4. As one example of backhauling (*i.e.*, an example of what does not constitute Interconnection), the FCC described the use by a CLEC of an ILEC’s entrance facility to exchange traffic with a third party. *Id.*; Pellerin at 30.⁸³ Similarly, in *Illinois Bell Telephone Co. v. Box*, 526 F.3d 1069, 1071 (7th Cir. 2008), the Court of Appeals for the Seventh Circuit recognized that “backhauling,” for which the use of section 251(c)(2) Interconnection Facilities is not permitted, includes not only a CLEC’s use of entrance facilities to route traffic among its own customers, but also a CLEC’s use of entrance facilities “to transport traffic from the customers of one CLEC to the customers of another using the ILEC’s circuits as intermediaries.” 526 F.3d 1069, 1071.⁸⁴

⁸³ Sprint argues that the facility described by the FCC in its example “directly interconnected two competitive carriers via a leased facility” and, therefore, a call over that facility “would not be switched by the ILEC.” Sprint Br. at 89. In fact, the FCC did not state that the backhauling for calls between CLECs and third parties in its example was limited to *direct* interconnection to the exclusion of indirect interconnection, nor did the FCC state (or even imply) that those calls would bypass the ILEC’s switch. Sprint’s further suggestion that if the FCC intended backhauling to include indirect interconnection, the FCC would have used the term “transit” rather than “transport” (Sprint Br. at 89, n. 4) makes no sense. The originating CLEC “transports” the call to the ILEC over the entrance facility; the ILEC then provides the “transiting” function and routes the call off its network. The use of the entrance facility is the same whether the call between the CLEC’s end user and the wireless provider’s end user is completed directly or indirectly – it is backhauling in both cases. Pellerin at 31.

⁸⁴ As the FCC *amicus* brief and the Seventh Circuit’s decision in *Illinois Bell v. Box* demonstrate, AT&T Michigan is not legally required to allow Sprint to use Interconnection Facilities to send and receive transit traffic. AT&T Michigan has voluntarily agreed to allow Sprint to send and receive transit traffic over those facilities. Pellerin at

Consistent with this broad understanding of “backhauling” as articulated by the FCC and the Seventh Circuit, the Court of Appeals for the Ninth Circuit observed in *Pacific Bell Telephone Co.*, *supra*, that the key distinction between the use of entrance facilities for backhauling and the use of such facilities for Interconnection, is that, in the case of backhauling, “only the competitive LEC benefits” whereas, in the case of Interconnection, “both competitor and incumbent benefit: the incumbent’s customers can reach customers of the competitor, and vice versa.” 621 F.3d at 847 (emphasis added). As will be discussed in connection with Issues 11(b) and (c), and as this Commission recognized in the ACD Telecom Arbitration, a competitor’s 911 and Equal Access trunks are used to provide service solely on behalf of the customers of the competitor and, therefore, such trunks benefit only the competitor’s customers, not the ILEC’s customers. Thus, the use of transmission facilities to carry such trunks should properly be deemed to constitute “Backhaul,” not “Interconnection,” even though such traffic may pass through an AT&T Michigan switch along the way.

In support of its position, Sprint erroneously argues that it is “settled law in Michigan that AT&T is obligated to provide transit service as part of its Section 251(c)(2) obligation, even though transit service does not involve AT&T’s end users.” Sprint Br. at 85. In fact, this Commission has *never* ruled that AT&T Michigan has an obligation to provide transit service pursuant to section 251(c)(2). While the Order in Case Nos. U-11151 and U-11152 cited by Sprint did find that AT&T Michigan should provide transit service, the Order did *not* find transit to be a section 251(c)(2) obligation; nor does the Order address the meaning of the phrase “mutual exchange of traffic” as applied to AT&T Michigan’s section 251(c)(2) Interconnection

33, n. 28; 146, n. 117. In doing so, however, AT&T Michigan has not waived its rights to block Sprint’s attempted use of Interconnection Facilities for routing other forms of backhaul (*i.e.*, non-Interconnection) traffic, such as 911 and IXC traffic. *Id.*

obligations. In fact, in an order in a subsequent case, which Sprint does not cite, the Commission indicated the source of AT&T Michigan's transiting obligation is section 251(a) of the 1996 Act, not section 251(c)(2):

Section 251(a) of the federal Act requires telecommunications providers to interconnect with other carriers either directly or indirectly. The Commission has previously found that CLECs may purchase transit service from ILECs in order to deliver traffic to third-party carriers. This is an efficient method to permit all carriers to interconnect with each other so that all end-users may reach all other end-users, particularly when traffic levels are low.⁸⁵

Accordingly, the Commission's transit decisions do not in any way undermine AT&T Michigan's position that its obligation to provide for TELRIC-based Interconnection Facilities (which is a section 251(c)(2) obligation) is limited to allowing Sprint to use such facilities for the mutual exchange of traffic between end users of Sprint and AT&T Michigan. Nor is there any basis for Sprint's assertion (Br. at 85) that AT&T Michigan is asking the Commission to "reverse" its precedent on transit service. AT&T Michigan is not asking the Commission to do anything of the sort.

Sprint also relies on the following contract language from a Joint filing made in Case No. U-14447:⁸⁶

⁸⁵ Case No. U-13758, *In the matter of the petition of Michigan Bell Telephone Company, d/b/a SBC Michigan, for arbitration of interconnection rates, terms, conditions, and related arrangements with MCI Metro Access Transmission Services, LLC, pursuant to Section 252b of the Telecommunications Act of 1996*, Opinion and Order, August 18, 2003 at 46.

See also, Case No. U-11168, *MCI Telecommunications Corporation Petition for Arbitration Pursuant to Section 252(b) of the telecommunications Act of 1996 to Establish an Interconnection Agreement with Michigan Bell Telephone Company d/b/a Ameritech Michigan*, DAP November 26, 1996 ("MCI Decision") at 21-22 ("[T]ransit service is directly contemplated by the Act. The Act established two general forms of interconnection: direct (§ 251(c)(2)) and indirect (§ 251(a)(1)). Indirect interconnection, as the name implies, involves the use of transit service. ...").

⁸⁶ Case No. U-14447, *In the matter, on the Commission's own motion, commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC Michigan and Verizon*, Order (Sept. 20, 2005).

6.3.5 Pursuant to the network interconnection terms and conditions in the underlying Agreement, an interconnection trunk (e.g., entrance facility) meets the requirements of Sections 6.3.3(v) and 6.3.3(vii) of this Attachment if CLEC will transmit the calling party's Local Telephone Number in connection with calls exchanged over the trunk (e.g., entrance facility).

Sprint argues that “by approving” this language, the Commission “decided that Interconnection Facilities would be distinguished by a CLEC’s transmission of ‘the calling party’s Local Telephone Number in connection with calls exchanged over the trunk’.” Sprint Br. at 82-83. Sprint’s argument is nonsense. First, the portion of the language from section 6.3.5 specifically relied on by Sprint was agreed language and, therefore, the Commission, in Docket U-14447, was not asked to, nor did it, “approve” that language. More importantly, section 6.3.5 does not purport to define the scope of the permitted uses of a TELRIC-priced Interconnection Facility. Rather, that language is from the section of the agreement that deals with Enhanced Extended Links (“EELs”) and simply states that, if a CLEC “will use the calling party’s Local Telephone Number in connection with calls exchanged over the trunk” (which would occur, for example, if the calls exchanged over the trunks are local calls made between end users of the CLEC and ILEC), the Interconnection Facility will be deemed to meet two of the requirements that a CLEC must satisfy in order to obtain EELs. Pellerin at 28-29.⁸⁷ There is no basis for interpreting section 6.3.5 to support the notion that a CLEC may use TELRIC-priced Interconnection Facilities to exchange traffic with a third party carrier, such as an IXC.

Finally, Sprint cites a recent decision of the Court of Appeals for the Second Circuit, *Southern New England Tel. Co. v. Comcast Phone of Connecticut, Inc.*, Docket No. 11-2332, slip

⁸⁷ Sprint has apparently misquoted section 6.3.5. In the amendment being arbitrated, section 6.3.5 referenced sections 6.3.2(v) and 6.3.2(vii), not sections 6.3.3(v) and 6.3.2(vii). Section 6.3.2 of the amendment attachment addressed EELs: “The following criteria must be satisfied for each High-Cap EEL, including without limitation each DS1 circuit, each DS3 circuit, each DS1 EEL and each DS1 equivalent circuit on a DS3 EEL pursuant to TRO Rule 51.318(b)(2).”

op. (2d Cir., May 1, 2013) (“*SNET*”). Sprint Br. at 84. That decision, however, also does not support Sprint’s position. There, the court concluded that the provision of transit service by ILECs is necessary to enable CLECs to meet their obligations under section 251(a) to indirectly interconnect with one another for the mutual exchange of *non-access* (i.e., local exchange) traffic between their end users. *SNET* does not address the issue here, which is whether Sprint can use TELRIC-priced Interconnection Facilities provided by AT&T Michigan pursuant to section 251(c)(2) for the exchange of *access* traffic with an IXC or 911 traffic with PSAPs. In any event, Second Circuit decisions are not controlling in Michigan. To the extent that the Second Circuit can be interpreted to hold that that section 251(c)(2) Interconnection, as defined in Rule 51.5, is not limited to the “mutual exchange of traffic” between customers of the two parties to such an interconnection arrangement, that suggestion is contradicted by the extensive precedent discussed above.

In stark contrast to Sprint’s proposed definition, AT&T Michigan’s proposed definition of “Backhaul” is fully consistent with the law:

“Backhaul” means **the use of an entrance facility by Sprint for a purpose other than Interconnection as defined in 47 C.F.R. § 51.5 including, but not limited to, use of an entrance facility to provide a final link in the dedicated transmission path between Sprint’s customer and Sprint’s switch or to carry traffic to and from its own end users.**

This definition accurately tracks the FCC’s statement that “backhaul” “occurs whenever a competitive LEC [or wireless carrier] uses an entrance facility for a purpose other than interconnection.” Exhibit PHP-2 at 6, n.4; Pellerin at 27-28. The definition also includes two examples of backhauling, which are not in dispute.

Sprint acknowledges that AT&T Michigan’s proposed definition “is not technically incorrect,” but complains that it “lacks specificity about what constitutes the mutual exchange of traffic.” Sprint Br. at 79. Sprint’s complaint is without merit. For the reasons previously

discussed, the question of what constitutes the “mutual exchange of traffic” is one that will need to be addressed by the Commission in this case in order to resolve a number of issues, including Issues 11(b) and (c). If the Commission answers this question the same way that it did two years ago in the ACD Telecom Arbitration, it will conclude, consistent with the statements made by the FCC and numerous courts, including the U. S. Supreme Court, that the “mutual exchange of traffic” refers to traffic exchanged between end users of Sprint and AT&T Michigan. There is, however, no practical need to incorporate into the definition of “Backhaul” a specific meaning of “mutual exchange of traffic.”

Finally, no matter how the Commission resolves the dispute over the meaning of “the mutual exchange of traffic,” AT&T Michigan’s proposed definition of “Backhaul” will be accurate, since there does not appear to be any dispute that “backhaul” constitutes the use of entrance facilities for purposes other than the “mutual exchange of traffic.” On the other hand, if, as it should, the Commission affirms AT&T Michigan’s interpretation of the phrase “mutual exchange of traffic,” Sprint’s definition of “Backhaul” will be demonstrably inaccurate, for the reasons previously discussed.

For all these reasons, the Commission should adopt AT&T Michigan’s proposed definition of “Backhaul.”

ISSUE 11(a): SHOULD THE ICA LIMIT THE USE OF INTERCONNECTION FACILITIES AVAILABLE AT TELRIC-BASED PRICES TO THOSE FACILITIES USED “ONLY” FOR SECTION 251(c)(2) INTERCONNECTION?

AT&T Michigan Position: The Commission should approve the language for Attachment 2, section 3.5.2, stating that Interconnection Facilities may be used “only” for Interconnection for the same reasons that the Commission should adopt AT&T Michigan’s proposed definition of “Interconnection Facilities” in Issue 9. Sprint’s proposal to include a reference to proposed language for Attachment 2, Section 3.8.2, should be rejected because it is intended to allow Sprint to use Interconnection Facilities for both Interconnection and Backhaul traffic in direct contravention of *Talk America*. Sprint’s proposal to add language that would permit it to use Interconnection Facilities

for the transmission of “other AT&T-switched traffic” is also improper and should be rejected because it is intended to enable Sprint to use Interconnection Facilities for purposes other than the mutual exchange of traffic between end users of Sprint and AT&T Michigan. (Pellerin at 32-40.)

This issue involves the following language for Attachment 2, section 3.5.2, which addresses AT&T Michigan’s obligation to provide Sprint with access to existing Interconnection Facilities at TELRIC-based rates.

3.5.2 AT&T MICHIGAN shall, ***subject to Attachment 2, Section 3.8.2***, provide Sprint existing Interconnection Facilities when used only for Interconnection purposes within the meaning of Section 251(c)(2) of the Act, *i.e.*, for the transmission and routing of Telephone Exchange Service and/or Exchange Access service ***and other AT&T-switched traffic***, at the TELRIC based rates set forth in the attached Pricing Sheets. An Interconnection Facility is existing if, at the time of Sprint’s request, the facility is present in AT&T MICHIGAN’s network and available for use as an Interconnection Facility and no special construction is required.

The agreed portions of that provision state that AT&T Michigan is required to provide Sprint with TELRIC-priced Interconnection Facilities “only when used for Interconnection purposes within the meaning of Section 251(c)(2) *i.e.*, for the transmission and routing of Telephone Exchange Service and/or Exchange Access service.” As discussed in connection with Issue 9 (definition of “Interconnection Facilities”), this limitation on Sprint’s use of Interconnection Facilities is fully consistent with the principle established by the FCC, and recognized by the Supreme Court, that “entrance facilities leased under § 251(c)(2) can be used *only* for interconnection.” *Talk America* at 2257 (emphasis added). Sprint proposes modifications to the agreed language for section 3.5.2 that violate this principle in two respects.

First, as with its proposed definition of “Interconnection Facilities,” Sprint proposes to make the language in section 3.5.2 “subject to Attachment 02, Section 3.8.2,” which contains Sprint’s so-called “pro rata pricing proposal,” which is the subject of Issue 22. As discussed in connection with Issues 9 and 22, however, Sprint’s pro rata pricing proposal unlawfully assumes

that Sprint will have the right and the ability under the ICA to use a DS3 (or higher capacity) Interconnection Facility for Backhaul. Sprint acknowledges that Backhaul represents the use of a transport facility for a purpose “that does not involve the mutual exchange of traffic” and, therefore, does not constitute the use of such a facility for section 251(c)(2) Interconnection as defined by the FCC in Rule 51.5. Sprint Br. at 80. Accordingly, Sprint’s proposal to make section 3.5.2’s limitation on the use of Interconnection Facilities “subject to” Attachment 2, section 3.8.2 provides for an exception that swallows the rule and is directly contrary to *Talk America*.

Second, Sprint proposes to add language that would permit Sprint to use Interconnection Facilities for the transmission of “other AT&T-switched traffic.” In support of this language, Sprint makes a long, convoluted and erroneous argument to the effect that there is a difference between “Rule 51.5 Interconnection” and “Section 251(c)(2) Interconnection.” Sprint Br. at 92-99. In fact, Rule 51.5 defines the term Interconnection as it is used in Section 251(c)(2). Sprint’s argument is really a smoke screen to obscure the purpose and intended effect of including the words “other AT&T-switched traffic,” which is to incorporate Sprint’s interpretation of the term “mutual exchange of traffic,” as used in Rule 51.5, to include the transmission of traffic (in particular, 911 and IXC traffic) that is not exchanged with end users of AT&T Michigan. For the reasons discussed above in connection with Issue 10, Sprint’s interpretation of the phrase “mutual exchange of traffic” should be rejected.

In support of its position, Sprint relies on FCC Rule 51.305 (47 C.F.R. § 51.305). Sprint Br. at 93. That rule, however, merely provides that a carrier cannot obtain interconnection from an ILEC pursuant to section 251(c)(2) if the only reason for the interconnection is to originate and terminate interexchange traffic. Contrary to Sprint’s assertions, the rule does not say that a

carrier that is entitled to obtain TELRIC-priced Interconnection Facilities pursuant to section 251(c)(2) for the mutual exchange of local traffic is entitled to use the same facilities for sending interexchange traffic to, or receiving interexchange traffic from, IXCs. In fact, Rule 51.305 does not talk about Interconnection Facilities at all. The rule certainly cannot be interpreted as superseding the FCC's and Supreme Court's pronouncements in *Talk America* that Interconnection Facilities are to be used "only" for section 251(c)(2) Interconnection.

Sprint is also mistaken in its assertion that the *CAF Order* "confirmed" Sprint's "right to deliver all traffic on a Section 251(c)(2) Interconnection Facility so long as there is *some* traffic that is indisputably Section 251(c)(2) telephone exchange or exchange access traffic." Sprint Br. at 93-94, 96 (emphasis in original). The language of the *CAF Order* on which Sprint relies was intended to resolve a "potential ambiguity in existing law" regarding carriers' ability to use existing section 251(c)(2) interconnection arrangements to exchange VoIP-to-PSTN traffic, given the fact that the FCC has never classified interconnected VoIP services as "telecommunications services." *CAF Order* at ¶¶ 954, 972. In resolving that ambiguity, the FCC stated that as long as a carrier is using an existing section 251(c)(2) interconnection arrangement to exchange some telephone exchange service and/or exchange access service, section 251(c)(2) "does not preclude the carrier from using that same functionality to *exchange other traffic with the incumbent LEC*, as well." *CAF Order* at ¶ 972 (emphasis added). VoIP-to-PSTN traffic is exchanged between the VoIP providers' end users and ILECs' end users. Pellerin at 39. The phrase "exchange other traffic with the [ILEC]," as used in Paragraph 972 of the *CAF Order* should, therefore, be read as a reference to the FCC's Rule 51.5 definition of Interconnection as the "linking of two networks for the mutual exchange of traffic" (47 C.F.R. § 51.5), which is properly interpreted to mean the exchange of traffic between end users

of the ILEC and the CLEC or CMRS provider. Nothing in the *CAF Order* overrides the prohibition on a CLEC's or CMRS provider's use of TELRIC-priced Interconnection Facilities for purposes other than Interconnection as defined in Rule 51.5 (see discussion of Issue 9). Accordingly, as the ICC correctly found, the *CAF Order* "does not" "help Sprint's position." *Sprint Illinois Arbitration Decision* at 8.

Finally, Sprint argues that AT&T Michigan's proposed limitation on the use of Interconnection Facilities should be rejected on "policy" grounds because it would require Sprint to "maintain unnecessary, costly and duplicative facilities." Sprint Br. at 100-101. This argument is meritless. Sprint could easily have avoided any need to maintain separate transport facilities for Interconnection and non-Interconnection traffic simply by agreeing to maintain the current, voluntarily negotiated CMRS model interconnection arrangement, because that arrangement allows Sprint to use the same transport facilities, leased from AT&T Michigan at special access rates (as discounted by a shared facilities factor), to carry both section 251(c)(2) Interconnection traffic and non-Interconnection traffic (*i.e.*, backhaul traffic). Pellerin at 109. Sprint has been operating under that arrangement for many years, and AT&T Michigan was willing to maintain that arrangement, just as it is doing with other CMRS providers and just as AT&T Michigan's affiliated ILECs are doing with Sprint in at least ten other states. *Id.* at 106. In fact, Sprint is the *only* CMRS carrier in any of the AT&T ILEC service territories that has requested to change from the current CMRS interconnection model to one that would provide TELRIC-based pricing for Interconnection Facilities (*i.e.*, would conform with section 251(c)(2)). Pellerin at 71. If Sprint's change to a model different than the one used by other CMRS carriers places Sprint at a competitive disadvantage, that is an outcome of Sprint's own making. *Id.*

Any need for Sprint to maintain separate facilities for both Interconnection and non-Interconnection purposes under the new ICA is a necessary consequence of Sprint's desire to convert its network interconnection arrangement with AT&T Michigan from the CMRS model to the section 251(c)(2) model in order to take advantage of the right conferred by *Talk America* to obtain TELRIC-priced Interconnection Facilities. In order to take advantage of that right, Sprint must also live with *Talk America*'s limitation on the use of such facilities to Interconnection as defined in FCC Rule 51.5. Sprint has agreed that Backhaul does not constitute the use of such a facility for Interconnection as defined by the FCC in Rule 51.5. Sprint Br. at 80. This necessarily means that Sprint will need to establish separate facilities for Interconnection and non-Interconnection purposes (*i.e.*, Backhaul). Sprint cannot complain about its self-imposed need to maintain separate transport facilities for Interconnection and non-Interconnection traffic.

In any event, as discussed in connection with Issue 22, below, Sprint has failed to demonstrate that the need to establish separate facilities for Interconnection and non-Interconnection purposes will, in fact, necessarily lead to an "inefficient" network design. Pellerin at 71-73.

For all these reasons, the Commission should adopt the agreed portions of the proposed language for Attachment 2, section 3.5.2 and reject Sprint's proposed modifications to that language.

ISSUE 11(b): SHOULD THE ICA PROVIDE THAT INTERCONNECTION FACILITIES PURCHASED AT TELRIC-BASED RATES MAY NOT BE USED FOR 911 TRUNKS?

AT&T Michigan Position: Consistent with its decision in the ACD Telecom Arbitration, the Commission should approve language prohibiting Sprint from using TELRIC-priced Interconnection Facilities for 911 trunks because such trunks are used by Sprint for the sole purpose of making a service (911) available to its own customers and are not used for the mutual exchange of traffic between customers of Sprint and AT&T. (Pellerin at 40-45.)

It is undisputed that 911 trunks are used by Sprint to carry its own customers' 911 calls to the PSAP and, therefore, benefit only its customers. Such trunks carry no traffic to or from AT&T Michigan's end users and have nothing to do with any local exchange service provided by AT&T Michigan. Pellerin at 40-41. Accordingly, the use of transport facilities to carry 911 trunks does not constitute Interconnection (*i.e.*, the linking of the parties networks for the "mutual exchange of traffic"). See discussion of Issue 10, above. Sprint, therefore, has no right to use Interconnection Facilities (which are to be used only for Interconnection) for 911 trunks. See discussion of Issues 9 and 11(a), above.⁸⁸

As Sprint acknowledges, this Commission has adopted contract language prohibiting CLECs from using Interconnection Facilities for 911 calls. *ACD Telecom Arbitration DAP* at 15-16; Sprint Br. at 102. Sprint's attempts to distinguish that decision are without merit.

First, Sprint erroneously claims that its proposal in this case is "more narrow" than the one made by the CLECs in the ACD Telecom Arbitration because "Sprint seeks to use Interconnection Facilities only for 911 calls when AT&T owns the selective router" and not for 911 calls to a selective router owned by providers other than AT&T Michigan. Sprint Br. at 102. In fact, the proposal made by the CLECs, and rejected by the Commission, in the ACD Telecom Arbitration is identical to Sprint's proposal in this case. Sprint's suggestion that the CLECs in that case proposed to use Interconnection Facilities for sending 911 calls to non-AT&T selective routers, in addition to AT&T selective routers, is simply wrong. The agreed 911 provisions of

⁸⁸ Because of the requirement there be a "mutual exchange of traffic," the mere fact that the 911 service Sprint provides to its customers uses a "telephone exchanges service," does not, contrary to Sprint's assertion (Br. at 101), bring 911 traffic within the scope of section 251(c)(2) interconnection. As subscribers of AT&T Michigan's 9-1-1 service (which is a non local exchange service), AT&T Michigan-served PSAPs are not local exchange customers of AT&T Michigan and thus are not customers of an ILEC within the context of section 251(c)(2). As a result, calls between Sprint end user customers and AT&T Michigan-served PSAPs are not traffic between Sprint end user customers and end user customers of an ILEC (or AT&T Michigan the ILEC) and are not section 251(c)(2) traffic. Pellerin at 41.

the ICA at issue in that case apply *only* when AT&T Michigan is the 911 service provider; that ICA does not, and never did, allow for CLECs to send 911 traffic to non-AT&T selective routers.⁸⁹ Pellerin at 42-43. Thus, the CLECs’ proposal that they be allowed to send 911 traffic over Interconnection Facilities necessarily applied only to 911 traffic sent to a selective router owned by AT&T Michigan. Accordingly, the rejection of CLECs’ proposal in the ACD Telecom Arbitration is directly on point and fully supports the rejection of Sprint’s position in this case.

Second, Sprint wrongly asserts that, unlike the CLECs in the ACD Telecom Arbitration, “Sprint has not agreed to be ‘solely responsible’ for 911 trunks.” Sprint Br. at 102. In fact, Sprint has agreed to exactly that. Sprint’s proposed language for Attachment 2, section 3.4 (addressed in Issue 12(a)) states as follows:

Regardless of how Sprint may choose to provision the facilities for the purpose of carrying one-way 911 and/or E911 trunks, Sprint is *solely responsible* for the facilities (or the applicable portion of high capacity facilities) that is used for such purpose.

(Emphasis added). Thus, Sprint has indisputably agreed that it is 100% responsible for the facilities that carry “one-way” 911 trunks. There is no such thing as a two-way 911 trunk; such trunks are *always* one-way because they only carry calls from Sprint to the PSAP and never in the opposite direction. Pellerin at 43-44. Accordingly, section 3.4 necessarily represents an agreement by Sprint that is “solely responsible” for all facilities that carry 911 trunks.

⁸⁹ For example, agreed language for Attachment 5, section 1.2 of the ICA at issue in the ACD Telecom Arbitration states: “The Parties acknowledge and agree that AT&T Michigan can only provide E911 Service in a territory where AT&T Michigan 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 Michigan’s E911 Selective Routers and E911 Database Management System will be by mutual agreement between the Parties.” Similarly, section 3.1 states: “When AT&T Michigan is the 911 or E911 Service provider, AT&T Michigan shall provide CLEC with access to and service for 911 and E911.” Pellerin at 43, n. 50.

In any event, the decision in the ACD Telecom Arbitration to prohibit use of Interconnection Facilities for 911 trunks was not based only on the CLECs' agreement to be solely responsible for the facilities that carry such trunks. Rather, as discussed in connection with Issue 10, the decision in that case was also supported by the facts that the "definition of entrance facilities that the parties agreed to states that they are for the *mutual exchange of traffic*" and "these ancillary services [including 911 service] are for the benefit of the CLECs' customers." *ACD Telecom Arbitration DAP* at 16 (emphasis added). Here, too, the parties' agreed portion of the definition of "Interconnection Facilities" states that such facilities are for the "mutual exchange of traffic." GT&C section 2.61. And it is undisputed that 911 trunks are "for the benefit" of Sprint's customers, not AT&T Michigan's customers. Accordingly, the ACD Telecom Arbitration decision fully supports the adoption of AT&T Michigan's position on this issue.

For all of these reasons, the Commission should approve AT&T Michigan's proposed language for Attachment 2, section 3.5.3(iii) prohibiting the use of Interconnection Facilities for 911 trunks.

ISSUE 11(c): SHOULD THE ICA PROVIDE THAT INTERCONNECTION FACILITIES PURCHASED AT TELRIC-BASED RATES MAY/MAY NOT BE USED FOR EQUAL ACCESS TRUNKS?

AT&T Michigan Position: Consistent with its own decision in the ACD Telecom Arbitration and the ICC's decision in the *Sprint Illinois Arbitration Decision*, the Commission should approve language prohibiting Sprint from using TELRIC-priced Interconnection Facilities for Equal Access trunks because such trunks are not used for the mutual exchange of traffic between customers of Sprint and AT&T Michigan. Rather, they are used to connect Sprint with IXCs for traffic exchanged between Sprint's end users and the IXCs' end users. (Pellerin at 45-47.)

Like 911 trunks, Equal Access trunks are not used for the "mutual exchange of traffic" between the end users of Sprint and AT&T Michigan. Rather, as Sprint has agreed in GT&C

section 2.48, an Equal Access Trunk Group is used solely to deliver traffic “through an AT&T access tandem to or from an IXC, using Feature Group D protocols.”⁹⁰ Pellerin at 45. Thus, such trunks connect Sprint with IXCs for traffic exchanged between Sprint’s end users and the IXCs’ customers. Interconnection is defined by the FCC in Rule 51.5 as “the linking of *two networks* for the *mutual* exchange of traffic.” (Emphasis added). The situation presented here involves the linking of *three networks* (Sprint, AT&T Michigan, and an IXC) and does not involve the mutual exchange of traffic between the end users of AT&T Michigan and Sprint. The mere fact that AT&T Michigan provides a certain functionality that enables Sprint to provide exchange access to IXCs does not magically change the linking of three networks into the linking of two networks (Sprint’s and AT&T Michigan’s) for the mutual exchange of traffic. Therefore, Sprint is not entitled to use TELRIC-priced Interconnection Facilities for Equal Access trunks. Pellerin at 45-46.

Once again, this conclusion is supported by the *ACD Telecom Arbitration Order*, which approved language stating that TELRIC-priced Entrance Facilities “may not be utilized for 911, OS/DA, HVCI, Third Party and Meet Point Trunk Groups.” Pellerin at 46-47. “Meet Point Trunks,” as used in the ICA at issue in that case, means the same thing as “Equal Access Trunks,” as used in the ICA at issue in this case. Both terms describe trunks that connect CLECs or CMRS providers with IXCs via AT&T Michigan’s access tandem. *Id.* In approving this language, the Arbitration Panel in the *ACD Telecom Arbitration* cited the facts that the “definition of entrance facilities that the parties agreed to states that they are for the mutual exchange of traffic” and “these ancillary services are for the benefit of the CLECs’ customers.” *ACD Telecom Arbitration DAP* at 16. The same facts pertain here.

⁹⁰ Feature Group D is the equal access protocol used for connecting IXCs with local carriers, providing for carrier identification and enabling access usage recordings. *Id.*

AT&T Michigan's position on this very issue was adopted by the Illinois Commerce

Commission:

Therefore a local exchange carrier can lease entrance facilities at TELRIC rates in order to interconnect its customers with the ILEC's customers. A call between a Sprint customer and an IXC does not involve an AT&T customer and, thus, is not Section 251(c)(2) traffic....[T]he Commission agrees that IXC traffic cannot be sent over TELRIC priced Interconnection Facilities.

Sprint Illinois Arbitration Decision at 8-9, 12.

ISSUE 12(a): SHOULD THE ICA PROVIDE THAT SPRINT IS SOLELY RESPONSIBLE, INCLUDING FINANCIALLY, FOR THE FACILITIES THAT CARRY E911 TRUNK GROUPS?

ISSUE 12(b): SHOULD THE ICA PROVIDE THAT SPRINT IS SOLELY RESPONSIBLE, INCLUDING FINANCIALLY, FOR THE FACILITIES THAT CARRY EQUAL ACCESS TRUNK GROUPS?

AT&T Michigan Position: Because E911 and Equal Trunk Groups are used by Sprint for the sole benefit of its own customers, and not for the mutual exchange of traffic with AT&T Michigan's customers, Sprint should be solely responsible, including financially, for the facilities that carry those trunk groups. AT&T Michigan's position for Issue 12(a) is also supported by Sprint's concession that it has sole financial responsibility for facilities used to carry one-way 911 trunks (which are the only kind of 911 trunks that exist). In the Sprint Illinois Arbitration, the Illinois Commission approved language virtually identical to the language of Attachment 2, section 3.4, proposed here by AT&T Michigan. (Pellerin at 47-50.)

For Issues 12(a) and 12(b), AT&T Michigan proposes the following language for

Attachment 2, section 3.4:

Sprint is solely responsible, including financially, for the facilities that carry E911 and/or Equal Access Trunk Groups.

The Illinois Commerce Commission approved virtually the same language in the Sprint Illinois Arbitration.⁹¹ Pellerin at 50.

⁹¹ The only difference is that AT&T Michigan proposes "E911 *and/or* Equal Access Trunk Groups" whereas AT&T Illinois proposed "E911 *or* Equal Access Trunk Groups." Pellerin at 50, n. 54.

With respect to Issue 12(a), Sprint does not appear to disagree with the proposition that it should be “solely responsible, including financially, for the facilities that carry E911 . . . trunk groups.” According to Sprint witness Felton, “Sprint does concede that it is fully responsible for the cost of Interconnection Facilities used to carry *one-way* 911 trunks (*i.e.*, agrees to forego sharing.” Felton at 46 (emphasis in original). All 911 traffic is carried over one-way trunks; there is no such thing as a two-way 911 trunk. Pellerin at 43. Accordingly, Mr. Felton’s testimony is a concession that Sprint is responsible for all facilities that carry 911 trunks.

Sprint, however, has not agreed to the language proposed by AT&T Michigan. Rather, for Issue 12(a), Sprint proposes the following language:

Regardless of how Sprint may choose to provision the facilities for the purpose of carrying one-way 911 and/or E911 trunks, Sprint is solely responsible for the facilities (or the applicable portion of high capacity facilities) that is used for such purpose.

This language should be rejected in favor of AT&T Michigan’s proposed language for two reasons.

First, Sprint’s language does not make clear that Sprint has sole *financial* responsibility for the facilities that carry 911 trunks, even though its witness concedes that Sprint should have that responsibility. Felton at 46.

Second, AT&T Michigan objects to the reference in Sprint’s proposal to the “applicable portion of high capacity facilities.” That language wrongly implies that Sprint has an option of sending 911 traffic over the same “high capacity” Interconnection Facilities used for Interconnection traffic. For the reasons discussed for Issue 11(b), Sprint is not entitled to use Interconnection Facilities for 911 traffic. That language also wrongly implies that Sprint is not solely responsible for the cost of those portions of high capacity Interconnection Facilities used to carry traffic other than 911 traffic, *i.e.*, that AT&T Michigan will be required to “share” in the

pro rata cost of that portion of high capacity Interconnection Facilities used to carry traffic other than 911 calls. For the reasons discussed for Issue 24(a), Sprint should be fully responsible for the entire cost of any Interconnection Facilities it leases from AT&T Michigan, regardless of the types of traffic it is allowed to send over those facilities.

As with facilities used to carry 911 trunks, the Commission should find that Sprint has sole financial responsibility for the facilities that carry Equal Access trunks (Issue 12(b)). As discussed for 11(c), Equal Access trunks are used to carry traffic between Sprint's customers and various IXCs' customers; there are no AT&T Michigan end users involved in any of these calls. Requiring AT&T Michigan to bear any of the cost of the facilities used for Equal Access trunks would improperly shift Sprint's costs to AT&T Michigan, and AT&T Michigan would have no mechanism for cost recovery. Pellerin at 49.⁹²

In support of its position that it should not have sole financial responsibility for the facilities it uses for Equal Access trunks, Sprint appears to rely on its positions that (i) IXC traffic is eligible to ride on Interconnection Facilities (Issues 11(a) and 11(c)); and (ii) the cost of Interconnection Facilities should be "shared" between the parties (Issues 6 and 24(a)). For the reasons discussed in this brief, Sprint's positions for all of these issues are without merit and should be rejected. Moreover, for the reasons discussed in connection with Issue 24(b), in the calculation of any "sharing" factor, Sprint should be assigned full responsibility for the cost of the portion of the Interconnection Facility used to carry IXC traffic. Thus, even if the

⁹² As Ms. Pellerin explains, these costs are not recovered by AT&T Michigan through access charges to the IXCs. Access charges paid by IXCs cover only the cost of the facilities between the IXCs and AT&T Michigan's tandem switch and the tandem switching itself, which are the functions AT&T Michigan actually provides to the IXCs. AT&T Michigan does not charge the IXCs for the facilities located between AT&T Michigan and Sprint (*i.e.*, the facilities at issue here). Those facilities are Sprint's responsibility. *Id.*

Commission were to adopt Sprint's positions for Issues 11(a), 11(c), 6 and 24(a), the Commission should still approve AT&T Michigan's proposed language for Issue 12(b).

ISSUE 13(a): SHOULD THE ICA PERMIT AT&T TO OBTAIN AN INDEPENDENT AUDIT OF SPRINT'S USE OF INTERCONNECTION FACILITIES?

AT&T Michigan Position: AT&T Michigan should be allowed to request an independent audit of Interconnection Facilities to ensure that Sprint's use of those facilities complies with the requirements of the ICA, including the requirement that such facilities be used solely for Interconnection as defined in FCC Rule 51.5. Contrary to the premise underlying Sprint's opposition to the proposed audit provisions, AT&T Michigan will not always be able to tell from its own records that Sprint is not compliant. Accordingly, it is necessary, and entirely reasonable, to allow AT&T Michigan to request an independent audit. AT&T Michigan's proposed audit provisions are identical to the audit provisions approved in the *Sprint Illinois Arbitration Decision* and are also very similar to audit provisions included in the ICA that was the subject of this Commission's *ACD Telecom Arbitration Order*. (Pellerin at 50-56.)

AT&T Michigan's proposed language for Attachment 2, sections 3.5.5 through 3.5.5.4 would permit it to request an independent audit of Sprint's use of TELRIC-priced Interconnection Facilities. AT&T Michigan should be allowed to request such an audit to ensure that Sprint's use of those facilities complies with the requirements of the ICA, including the requirement that such facilities be used solely for Interconnection as defined in FCC Rule 51.5. To avoid an undue burden on Sprint, AT&T Michigan's proposal allows for such an audit no more frequently than once a year. Pellerin at 50-52.

Audit provisions such as those proposed by AT&T Michigan are not unusual. In fact, the ICA that was the subject of the ACD Telecom Arbitration includes provisions for auditing the use of Interconnection Facilities that are substantially the same as the audit provisions that AT&T Michigan has proposed in this case. Pellerin at 52-53. That language is shown in Exhibit PHP-4. As recognized by the Commission, those audit provisions serve "to protect AT&T Michigan from the potential misuse of the [Interconnection] facility." *ACD Telecom Arbitration Order* at 9. In addition, audit provisions identical to those proposed by AT&T Michigan in this

case were approved by the ICC, which found that such provisions “are necessary” to provide an adequate incentive for Sprint and adopting carriers to ensure that they do not send non-Interconnection traffic over Interconnection Facilities. *Sprint Illinois Arbitration Decision* at 14. Similarly, AT&T Michigan’s ICA with Sprint’s CLEC affiliate, Sprint Communications, LLP, allows AT&T Michigan to request an independent audit of Sprint’s use of certain UNEs to ensure compliance with the eligibility criteria applicable to such UNEs. Pellerin at 53. That language is shown in Exhibit PHP-5.⁹³

Sprint does not comment on the specific language of AT&T Michigan’s proposed audit provisions. Rather, Sprint asserts they are unnecessary because “the relevant data is already within AT&T’s business records” and AT&T Michigan is free to invoke the ICA’s dispute resolution provisions if it “believes that Sprint is misusing facilities in some way.” Sprint Br. at 105. Contrary to Sprint’s assumption, however, AT&T Michigan may not always be able to tell from its own records that Sprint is in noncompliance with the ICA’s provisions for the use of Interconnection Facilities. Pellerin at 51. If AT&T Michigan has reason to believe that Sprint (or an adopting carrier) is not in compliance, but does not have the records to confirm that belief, it may be necessary, and is entirely reasonable, for AT&T Michigan to request an independent audit. *Id.* On the other hand, if AT&T Michigan’s records contain data sufficient to enable it to pursue corrective action, the audit provisions will not come into play and, therefore, their inclusion in the ICA should not bother Sprint. *Id.*

Sprint also argues that the proposed audit provisions should be rejected because they are “premised” on AT&T Michigan’s position that Sprint has a right to use TELRIC-priced Interconnection Facilities only for the mutual exchange of traffic between end users of Sprint and

⁹³ AT&T ILECs have numerous ICAs with identical or substantially similar EEL audit provisions. Pellerin at 53, n. 56.

AT&T Michigan, a position Sprint calls “flawed.” Sprint Br. at 105. For the reasons discussed for Issues 10 and 11, however, AT&T Michigan’s positions regarding the appropriate limitations on the use of Interconnection Facilities are fully supported by the law and Commission precedent and, therefore, should be approved.

Moreover, even if the Commission were to reject AT&T Michigan’s positions for Issues 10 and 11, AT&T Michigan would still need the ability to request an independent audit of the use of those facilities. For example, Sprint has agreed not to route wireline-originated traffic from or through IXCs over Interconnection Facilities.⁹⁴ Pellerin at 55. If AT&T Michigan suspects that Sprint (or an adopting carrier) is allowing Interconnection Facilities to be used in a manner that violates this agreement, but cannot verify it from its own records, AT&T Michigan needs another mechanism to prove (or disprove) its suspicions, and that mechanism is an independent audit. *Id.*

The Commission should approve AT&T Michigan’s proposed Attachment 2, sections 3.5.5 through 3.5.5.4.

ISSUE 13(b): IF AUDIT PROVISIONS ARE INCLUDED IN THE ICA AND AN AUDIT DEMONSTRATES SPRINT IS NOT COMPLIANT, HOW SHOULD THE ICA ADDRESS SPRINT’S NON-COMPLIANCE?

AT&T Michigan Position: AT&T Michigan’s proposed audit-related remedy provisions are substantially the same as those included in the ICA that was the subject of the *ACD Telecom Arbitration Order* and identical to those recently approved in the *Sprint Illinois Arbitration Decision*. Under those provisions, if an independent auditor finds Sprint to be out of compliance regarding use of Interconnection Facilities, Sprint would be obligated to (i) remedy the non-compliance; and (ii) make AT&T Michigan whole through a billing adjustment or by placing disputed amounts in escrow. If Sprint does not issue the orders necessary to remedy the non-compliance, AT&T Michigan should be allowed to initiate the required orders. Sprint should not be permitted to sustain non-compliance by failing to take the necessary remedial action. Nor should

⁹⁴ See Attachment 2, section 4.8.9. The parties dispute whether section 4.8.9 should be limited to wireline-originated traffic or should include all traffic. See Issue 16. Pellerin at 55, n. 57.

Sprint benefit financially from its non-compliance. If Sprint disagrees with the auditor's report, Sprint may avail itself of the ICA's Dispute Resolution provisions. (Pellerin at 56-62.)

This issue involves AT&T Michigan's proposals for remedies in the event that an audit demonstrates that Sprint's (or an adopting carrier's) use of Interconnection Facilities is not in compliance with the ICA. Those remedies are spelled out in Attachment 2, sections 3.5.5.5, 3.5.5.5.1, 3.5.5.5.2, 3.5.5.6, 3.5.5.5.7 and 3.5.5.5.8. (Section 3.5.5.5.3, which deals with the recovery of auditor costs, is covered by Issue 13(c)).

These proposed audit-related remedy provisions are substantially the same as those in the ICA that was the subject of the *ACD Telecom Arbitration Order* and are identical to those recently approved in the *Sprint Illinois Arbitration Decision*. Pellerin at 61.

Under these provisions, if an independent auditor finds non-compliance, Sprint would be required to (1) remedy the non-compliance (section 3.5.5.5.1); and (2) make AT&T Michigan whole through a billing adjustment (section 3.5.5.5.2) or by placing disputed amounts in escrow (section 3.5.5.8). If Sprint does not issue the orders necessary to remedy the non-compliance, AT&T Michigan would be allowed to initiate the required orders (section 3.5.5.6). AT&T Michigan's proposed language for section 3.5.5.7 allows Sprint to notify AT&T Michigan that it disagrees with the auditor's report regarding Sprint's use of Interconnection Facilities. The parties would then engage in two weeks of negotiation to resolve the dispute. If the discussions failed, Sprint could file a complaint with the Commission. Pellerin at 57-58.

Sprint acknowledges that section 3.5.5.5.2 is "not unreasonable and would serve to provide AT&T with fair compensation." Sprint Br. at 105-106. Sprint, however, objects to 3.5.5.5.1 on the grounds that it is a "penalty." *Id.* Sprint offers no comments on any of the other sections that are the subject of this issue.

Sprint's objection to section 3.5.5.5.1 is unfounded. That provision gives Sprint 45 days after receipt of the auditor's report to correct violations by converting or disconnecting non-compliant facilities. Section 3.5.5.6 states that if Sprint does not issue the orders to bring the facilities into compliance (or disconnect them), AT&T Michigan may issue the conversion orders. Contrary to Sprint's suggestions, by proposing these provisions, AT&T Michigan is not seeking to "penalize" Sprint. Instead, AT&T Michigan is simply proposing that Sprint be required to remedy any non-compliance, which is what AT&T Michigan's language requires. Sprint should not be permitted to sustain non-compliance by failing to take the necessary remedial action. Nor should Sprint be allowed to benefit financially from its non-compliance. Pellerin at 59-61

AT&T Michigan's proposed section 3.5.5.5.2 (to which Sprint does not object), while necessary, does not provide a sufficient remedy for non-compliance. That section only provides for a retroactive true-up to access rates and does not provide for a future change in billing (absent conversion orders). Thus, unless Sprint submits an order for the conversion of the non-compliant Interconnection Facility to access, as would be required by section 3.5.5.5.1 (or unless AT&T Michigan is allowed to initiate such a conversion on its own (assuming Sprint failed to do so itself), as provided for by section 3.5.5.6), AT&T Michigan could be forced to provide TELRIC-priced Interconnection Facilities that have been proven to be used for non-Interconnection purposes with no requirement that Sprint cease its non-compliance. Pellerin at 60. While AT&T Michigan could perform a one-time billing adjustment (in accordance with section 3.5.5.5.2), AT&T Michigan cannot simply change Sprint's billing going forward without the related Access Service Requests ("ASRs"). That is why, in part, AT&T Michigan's proposed section 3.5.4 obligates Sprint to issue the necessary ASRs to transition its existing tariffed special access

facilities to Interconnection Facilities obtained pursuant to the ICA before Sprint can enjoy TELRIC-priced Interconnection Facilities. See Issue 25. *Id.* The same is true in reverse; Sprint would need to issue ASRs to convert Interconnection Facilities to tariffed access facilities before AT&T Michigan could assess the appropriate access charges. If Sprint refuses to issue the orders, AT&T Michigan should be permitted by section 3.5.5.6 to issue them on Sprint's behalf.

Id.

For these reasons, the Commission should approve AT&T Michigan's proposed Attachment 2, sections 3.5.5.5, 3.5.5.5.1, 3.5.5.5.2, 3.5.5.6, 3.5.5.5.7 and 3.5.5.5.8.

ISSUE 13(c): IF AUDIT PROVISIONS ARE INCLUDED IN THE ICA, HOW SHOULD THE COSTS OF THE INDEPENDENT AUDITOR BE ALLOCATED?

AT&T Michigan Position: Under AT&T Michigan's proposed language, Sprint should be required to reimburse AT&T Michigan for the independent auditor's costs the auditor determines that 10% or more of the facilities subject to the audit are out of compliance, *i.e.*, if Sprint is using 10% or more of the facilities for impermissible purposes. The 10% trigger is a reasonable (if not overly generous to Sprint) measure of material non-compliance. This proposal is substantially the same as the audit-related cost recovery language included in the ICA that was the subject of the *ACD Telecom Arbitration Order* and is identical to the language recently approved in the *Sprint Illinois Arbitration Decision*. (Pellerin at 62-64.)

AT&T Michigan's proposed Attachment 2, section 3.5.5.5.3 provides that if the number of circuits found by an audit to be non-compliant is equal to or greater than 10% of the number of circuits audited, then Sprint must reimburse AT&T Michigan 100% of the cost of the auditor. If the number of non-compliant circuits is less than 10%, Sprint would reimburse AT&T Michigan for the cost of the auditor in direct proportion to the number of non-compliant circuits.

This proposed audit-related cost recovery provision is substantially the same as the one in the ICA that was the subject of the *ACD Telecom Arbitration Order* and is identical to the one approved in the *Sprint Illinois Arbitration Decision*. Pellerin at 63-64.

Sprint characterizes this provision as “unreasonable, punitive [and] disproportionate” (Sprint Br. at 107), but offers not even the slightest bit of evidence or analysis to support such a characterization. In particular, Sprint fails to explain why AT&T Michigan should be required to bear any portion of the auditor’s costs if the audit confirms that Sprint is in material non-compliance with the ICA’s restrictions on the use of Interconnection Facilities. The 10% trigger used in this provision is a reasonable (if not overly generous to Sprint) measure of material non-compliance. Pellerin at 62. Moreover, the difference between tariffed special access rates and TELRIC-priced Interconnection Facilities may be sufficient to incent Sprint (or an adopting carrier) to use Interconnection Facilities in a non-compliant manner. AT&T Michigan hopes that the requirement that Sprint bear the auditor’s costs if an audit shows 10% or more of the audited circuits to be out of compliance will serve as an incentive for Sprint to comply. If that incentive proves effective, Sprint will never have to pay any auditor’s costs. *Id.* at 63.

ISSUE 14(a): WHAT ARE THE APPROPRIATE TERMS THAT SHOULD BE INCLUDED IN THE ICA REGARDING COMBINED TRUNK GROUPS?

ISSUE 14(b): WHAT ARE THE APPROPRIATE TERMS THAT SHOULD BE INCLUDED IN THE ICA REGARDING EQUAL ACCESS TRUNKS?

AT&T Michigan Position: Combined Trunk Groups may carry both InterMTA Traffic (between Sprint and IXCs) and IntraMTA Traffic (between Sprint’s and AT&T Michigan’s end users). TELRIC-priced Interconnection Facilities can be used only for Interconnection, so Sprint is not entitled to TELRIC-priced transport when it uses Combined Trunk Groups because those trunk groups carry IXC traffic. Such traffic is switched access traffic between Sprint and the IXC. It is not Interconnection traffic under § 251(c)(2), because it is not going to, or coming from, an AT&T Michigan end user and therefore there is no “mutual exchange of traffic” within the meaning of FCC Rule 51.5. Consequently, Sprint may not use Combined Trunk Groups when the underlying facilities were obtained at TELRIC-based rates pursuant to the ICA. See Issues 11(a) and (c). (Pellerin at 116-125.)

The dispute in Issue 14(a) is whether Sprint can mix Interconnection traffic with all other types of traffic (principally IXC switched access) on Combined Trunk Groups, while still paying

TELRIC-based rates for the underlying transport facilities. To be clear, this issue does not involve the question of whether Sprint can combine its traffic on a single transport facility. It can. Rather, it involves the question of how a single transport facility will be priced if Sprint mixes traffic in the way it proposes.

At a high level, Attachment 2, section 4.2 lists and describes the different trunking options available to Sprint for handling traffic between its switches and AT&T Michigan switches.⁹⁵ The disputed language in section 4.2.3 concerns “Type 2A Combined Trunk Groups.” This language is part of the larger dispute over the circumstances under which Sprint is entitled to TELRIC-based pricing for Interconnection Facilities – which is addressed in detail in Issue 11. In Issue 11, AT&T Michigan proposes language that prevents Sprint from using TELRIC-priced transport facilities to carry traffic that Sprint exchanges with IXC (“IXC switched access”) or 911 traffic. Likewise, here in Issue 14(a), AT&T Michigan proposes language that rules out TELRIC-based pricing for the “underlying facilities” that connect the parties’ networks when Sprint mixes Interconnection traffic with IXC switched access traffic.

As AT&T Michigan explained in the discussion of Issue 11, Sprint may use TELRIC-priced Interconnection Facilities only for Interconnection, and not to carry switched access traffic. To summarize, the Supreme Court’s decision in *Talk America* states that “entrance facilities leased under § 251(c)(2) can be used *only* for interconnection.” 131 S.Ct. at 2264 (emphasis added). “Interconnection,” as the Supreme Court noted, is defined in FCC Rule 51.5 as the “linking of two networks for the mutual exchange of traffic.” *Id.* at 2262. There is no mutual exchange of traffic within the meaning of FCC Rule 51.5 if the traffic is not going to, or coming from, an AT&T Michigan end user. This is confirmed by the Supreme Court’s statement

⁹⁵ “Trunking” is a defined, agreed, term in GT&C section 2.123 that means “the switch port interface(s) used and the communications path created to connect two switches.”

in *Talk America* that the purpose of the section 251(c)(2) interconnection requirement is to “ensure[] that customers on a competitor’s network can call customers on the incumbent’s network, and vice versa.” *Id.* at 2254, 2258. It is further confirmed by the FCC’s *amicus* brief in *Talk America*, which explains that the Interconnection required by section 251(c)(2) and Rule 51.5 is “the physical linking of two networks for the mutual exchange of traffic” which “enables customers of a competitive LEC to call the incumbent’s customers, and vice versa.” Pellerin Exhibit PHP-2 at 2-3.

Thus, AT&T Michigan’s language for section 4.2.3 accurately reflects federal law when it says, “Type 2A Combined Trunk Groups may only be used when Sprint obtains the underlying facilities pursuant to AT&T Michigan’s access tariff or from another carrier or self-provisions those facilities.” Sprint’s proposal for section 4.2.3 runs afoul of the law because it allows “any type” of traffic to ride over TELRIC-priced “Interconnection Facilities.” Sprint’s language would always allow it to use Interconnection Facilities for switched access traffic and should therefore be rejected.

Sprint also contends that switched access traffic it sends to, or receives from, an IXC via an AT&T Michigan access tandem is Interconnection traffic that can be carried on TELRIC-priced transport facilities because it is “exchange access” under section 251(c)(2)(A) of the Act. Felton at 51. But AT&T Michigan and Sprint are not providing “exchange access” services to each other in this situation, because AT&T Michigan is not sending Sprint InterMTA traffic from AT&T Michigan’s end users. The traffic in question is from IXCs – not from AT&T Michigan’s end users. Indeed, Sprint concedes that AT&T Michigan is not providing “exchange access” to Sprint. *Id.* In short, there is no “mutual exchange of traffic” within the meaning of FCC Rule 51.5 in this situation, and the traffic does not qualify as section 251(c)(2) traffic

eligible for TELRIC-priced transport facilities. In the Sprint Illinois arbitration, the ICC Staff agreed with this analysis and the ICC adopted its Staff's recommendation.⁹⁶

In light of this, Sprint makes the only argument left open to it, namely, that Sprint and AT&T Michigan are jointly providing exchange access to an IXC. Felton at 52-53. This argument fails for two reasons. First, even if it were true that AT&T Michigan and Sprint were somehow jointly providing exchange access to an IXC (and they are not), that would not bring this traffic within the scope of section 251(c)(2). As we have demonstrated, section 251(c)(2) applies only to "Interconnection," *i.e.*, the "linking of two networks for the mutual exchange of traffic" between end users of AT&T Michigan and Sprint. *Talk America*, 131 S. Ct. at 2254, 2258; 47 C.F.R. § 51.5. AT&T Michigan has no end users in this situation. Pellerin at 121-123.

Second, and more to the point, AT&T Michigan and Sprint are not jointly providing exchange access to an IXC. It is Sprint that is providing the exchange access to the IXC, because it is Sprint's exchange customer the IXC is "accessing." AT&T Michigan simply provides tandem switching and transport to the IXC, which then allows Sprint to provide the exchange access service to the IXCs, *i.e.*, allows the IXC customer to connect with the Sprint customer. At no point is an AT&T Michigan exchange customer involved, so AT&T Michigan is not providing access ("joint" or otherwise) to its exchange customers in any sense of the word. Pellerin at 122-123. The fact that AT&T Michigan provides a functionality that enables Sprint to provide exchange access to IXCs does not change the linking of three networks into the linking

⁹⁶ Direct Testimony of Dr. Qin Liu, ICC Docket No. 12-0550 (Feb. 2, 2013) at 57-64 (Exhibit PHP-6); *Sprint Illinois Arbitration Decision* at 16.

of two networks for the mutual exchange of traffic. Here again, the ICC Staff and the Illinois Commission adopted this analysis.⁹⁷

Moreover, Sprint has been exchanging traffic with IXCs through AT&T Michigan access tandems for years, and that traffic has never been sent over Interconnection Facilities. It has always been treated as switched access traffic and it has always been routed over switched access facilities. Not coincidentally, this is also true for all CLEC traffic to and from IXCs via AT&T Michigan's tandem. There is no reason that Sprint should be treated differently than all other carriers. Pellerin at 123-124.

Policy considerations also support AT&T Michigan's position. The FCC's *CAF Order* establishes a nationwide plan to fundamentally restructure intercarrier compensation to reduce and eliminate some (but not all) access charges in a "gradual, measured transition that will facilitate predictability and stability." *CAF Order* at ¶ 35. Some changes to switched access take place quickly, some take place over a six-year schedule, and some take nine years to implement. *Id.* Sprint's proposal would immediately eliminate the transport components of switched access charges and would thereby interfere with the FCC's nation-wide transition plan. Indeed, in the words of Illinois Staff, Sprint's proposal would lead to "a relatively immediate elimination of certain access charges, a result inconsistent with the FCC's specific determination to transition, rather than flash cut, away from traditional switched access charges."⁹⁸ It is not good public policy to undermine the FCC's carefully-crafted plan to reform intercarrier compensation.

Sprint asserts that AT&T Michigan charges an IXC for the tandem switching and transport it provides in this situation. Felton at 53. AT&T Michigan does not charge the IXC for

⁹⁷ Direct Testimony of Dr. James Zolnierok, ICC Docket No. 12-0550 (Feb. 2, 2013), at 61-62 (Exhibit PHP-9); *Sprint Illinois Arbitration Decision* at 16.

⁹⁸ Direct Testimony of Dr. James Zolnierok, ICC Docket No. 12-0550 (Feb. 2, 2013), at 52 (Exhibit PHP-9).

the transport link between AT&T Michigan and Sprint. Pellerin at 49. Even if it did, that would not mean that AT&T Michigan and Sprint are jointly providing exchange access. If charging is somehow the touchstone of whether carriers are jointly providing exchange access, then this cuts strongly against Sprint. Sprint does not have a tariff for switched access charges because it is not allowed to have such tariffs.⁹⁹ And there is nothing in the record that indicates that Sprint is charging IXCs via contract rather than tariff. Moreover, the entire concept of jointly charging an IXC breaks down when wireless providers are involved, as the FCC explained in *Petitions of Sprint PCS and AT&T Corp For Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling 17 FCC Rcd. 13192, 13195-96 (2002). There, Sprint unsuccessfully sued pre-merger AT&T to collect access charges. The FCC pointed out that CMRS providers have never operated under the same calling party's network pays compensation regime as wireline LECs. "LECs are compensated for terminating calls by the carrier of the customer that originates the call, not by the customer receiving the call. In contrast, since the advent of commercial wireless service, and continuing today, CMRS carriers have charged their end users both to make and to receive calls." *Id.* at 13198. This difference in compensation mechanisms does not support Sprint's theory of "jointly provided exchange access."

Finally, there is another problem with Sprint's proposed language: it is internally inconsistent with agreed provisions in the ICA, because it would allow Sprint to mix together access traffic and 911/E911 traffic on a single trunk group. Yet, as Sprint recognizes elsewhere in the ICA, 911/E911 traffic is routed to Type 1/Type 2C Trunks (respectively),¹⁰⁰ which are

⁹⁹ *Implementation of sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Gen. Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480, ¶ 179 (1994).

¹⁰⁰ Attachment 2, section 3.10.2.

inherently different than Type 2A Combined Trunks because Type 2A trunks use equal access signaling per section 4.2.3; Type 1 and Type 2C trunks do not. Pellerin at 118.

For all of these reasons, and for those additional reasons set forth in the testimony of Ms. Pellerin, the Commission should adopt the language proposed by AT&T Michigan and approved by the Illinois Commission for section 4.2.3 of Attachment 2.

ISSUE 15: SHOULD SPRINT BE REQUIRED TO ESTABLISH A DIRECT TRUNK GROUP OR ALTERNATIVE TRANSIT ARRANGEMENT BETWEEN ITSELF AND A THIRD PARTY TERMINATING CARRIER IF TRANSIT TRAFFIC ORIGINATED BY SPRINT REQUIRES 24 OR MORE TRUNKS TO THAT CARRIER?

AT&T Michigan Position: The overwhelming weight of legal authority supports the establishment of direct trunks when transit traffic reaches a DS1. AT&T Michigan's DS3 proposal is much less demanding and should be adopted. (Anglin at 47-51.)

AT&T Michigan proposes language that would require Sprint to establish direct connections with another carrier when traffic between Sprint and that other carrier that transits through the AT&T Michigan network exceeds the capacity of one (1) DS3 (*i.e.*, 672 trunks). Sprint proposes that there be no direct connection requirement at any traffic level. AT&T Michigan's language is more commercially reasonable, based on the facts, the law and Sprint's past agreement to do what the language requests.

AT&T Michigan witness Bill Anglin explains that transit service benefits the many carriers that rely on AT&T Michigan to serve as an intermediary network between themselves and other carriers with which they exchange traffic. Anglin at 47. He further explains that the provision of transit service should nonetheless be subject to reasonable volume limitations in order to make sure that AT&T Michigan has enough network resources to provide it to all carriers who need it. Accordingly, when transit traffic between Sprint and a third party carrier that passes through AT&T Michigan's network reaches a threshold of one (1) DS3's worth of

traffic, Sprint (like any company that transits traffic through AT&T Michigan) should seek direct interconnection with that third party carrier. This allows AT&T to effectively manage its network in order to offer transit services to all CLECs and CMRS providers.

Mr. Anglin also explains that a DS3 is a very high threshold for this purpose. AT&T Michigan Trunk Planning guideline for a DS1 traffic threshold is 200,000 minutes of use (MOU) per month. There are 28 DS1s in a DS3. Using this threshold, Sprint would not be required to establish direct interconnection with another carrier until its transit traffic flowing through AT&T Michigan's network to that carrier exceeds 5,600,000 MOUs (28 DS1s x 200,000 MOU = 5,600,000). Anglin at 47. By any measure, that is a very large volume of traffic to any single carrier.¹⁰¹

The commercial reasonableness of this proposal is proved by Sprint's agreement to include a provision of this type in the current Sprint/AT&T Michigan ICA. Section 3.2.4.3 of that ICA requires Sprint to directly interconnect with a third party carrier when transit traffic exceeds one (1) DS1's worth of traffic:

When the Carrier is notified that there is more than a DS1's worth of traffic to any Third Party Provider, then the Carrier will use best effort to effect an direct interconnection arrangement with the Third Party Provider (subtending LEC) of concern within 135 calendar days. Except for overflow traffic that is mutually agreed to by the Parties, once direct trunk groups are established between Carrier and the subtending Third Party Provider switch, Carrier will cease routing Transit Traffic through **SBC-13STATE** Tandem to such Third Party Provider switch.

Section 3.2.4.3 of the Sprint/AT&T Michigan ICA, approved October 7, 2003. Instead of the previously agreed one (1) DS1 threshold, AT&T Michigan is proposing here a threshold of

¹⁰¹ AT&T Michigan's language is even more reasonable because the threshold applies only to traffic *originated by* Sprint and does not include traffic Sprint *receives from* the other carrier.

twenty-eight (28) DS1s.¹⁰² Thus, AT&T Michigan’s proposed language here is twenty-eight times more favorable to Sprint than the provision Sprint agreed to in the current ICA.

Moreover, most other Michigan carriers have agreed that it is reasonable to establish a traffic threshold for direct interconnection of transit traffic. Anglin at 49. And, this is the standard that applies between AT&T Michigan and its affiliates. *Id.*

AT&T Michigan’s position is supported by two Michigan decisions. The Arbitration Panel in the Michigan Level 3 Arbitration proceeding considered this precise issue and adopted the position of AT&T Michigan (then SBC):

The Panel concludes that the contract language proposed by SBC be adopted for this issue, as modified below. SBC proposed 60 days for Level 3 to establish direct trunking with other carriers once the level of traffic reaches a DS1 level of volume on a consistent basis while Level 3 proposed a “commercially reasonable” standard. The Panel agrees with SBC that a commercially reasonable standard is tantamount to imposing no direct trunking obligation. The Panel also agrees that a 60 day period is reasonable for Level 3 to establish direct trunks to those carriers not subject to Section 252 in the Act. For all ILECs however, Level 3 must follow the process defined in Section 252. The Agreement should be modified accordingly.

*Level 3 Arbitration DAP*¹⁰³ at 230. Notably, the Panel found for AT&T Michigan on both pertinent points, *i.e.*, that: (1) a DS1 is the appropriate traffic threshold for direct interconnection (AT&T Michigan proposes a more generous DS3 threshold here); and (2) 60 days is a reasonable time frame for the establishment of direct connections with other carriers (AT&T Michigan proposes a more flexible 90-day interval here).

On a closely related issue, the Commission held in its *Sprint CenturyTel Arbitration Order* that Sprint can indirectly connect with CenturyTel with a transit arrangement while traffic

¹⁰² Again, there are 28 DS1s in a DS3.

¹⁰³ *In the Matter of Level 3 Communications, LLC’s Petition for Arbitration Pursuant to section 252(b) of the Communications Act of 1934*, MPSC Case No. U-14152, Decision of the Arbitration Panel, December 10, 2004 (“*Level 3 Arbitration DAP*”).

volumes are low, but once traffic hits a DS1, Sprint must directly connect to CenturyTel.¹⁰⁴ The Commission thus recognized that it is reasonable to establish direct connections between two carriers once the volume of transit traffic between them reaches a DS1 level.

Sprint cites the *MCImetro Arbitration Order*¹⁰⁵ to support its position, but that case is readily distinguishable. There, the Commission considered a traffic threshold of one (1) DS1, not the 28-fold higher threshold AT&T Michigan proposes here. This is a critical difference, because the Commission relied heavily upon MCI's specific complaints regarding the economics of setting the threshold at a DS1 level. Furthermore, MCI itself suggested that the appropriate threshold is a DS3 ("MCI would rarely install hardware for an interconnection at less than a DS3 level"). *MCImetro Arbitration Order* at 46. Moreover, MCI conceded a critical point that Sprint contests in this proceeding, *i.e.*, that "at some point, it is more economical to directly connect with another carrier than to go through SBC Michigan's tandem." *Id.* For both these reasons, the case actually supports AT&T Michigan's position.

Decisions from other regulatory bodies likewise support AT&T Michigan's position. For example, there is at least one FCC bureau order and two decisions from neighboring states that adopt a DS1 threshold for establishing direct connections for transit traffic:

- A similar provision was approved in the *Virginia Arbitration Order*, where the FCC's Wireline Competition Bureau found that "Verizon's proposed 60-day transition period is reasonable, providing AT&T Illinois adequate time to arrange to remove its transit traffic from Verizon's tandem switch once the traffic meets the DS1 threshold." 17 FCC Rcd 27030, par. 115.
- The Indiana Utility Regulatory Commission recently adopted AT&T Indiana's proposal to require Big River to establish direct trunks when traffic through an AT&T tandem to another carrier exceeds 23 trunks (*i.e.*, a DS1). Order, *Re Big*

¹⁰⁴ *Sprint CenturyTel Arbitration Order* at 11-13.

¹⁰⁵ *MCImetro Access Transmission Services, LLC*, MPSC Case No. U-13758, Opinion and Order, August 18, 2003 ("*MCImetro Arbitration Order*").

River Telephone Company, LLC, Cause No. 44078 INT 01, February 1, 2012, 2012 WL 423831 (Ind. U.R.C.) at *7.

- Based on the evidence presented by AT&T Illinois, the Illinois Commission found that the DS1 limitation provides a reasonable limit on the obligation of AT&T Illinois to transit traffic originated by Big River. Arbitration Decision, *Re Illinois Bell Telephone Company*, Docket 11-0083, June 14, 2011, 2011 WL 3426251 (Ill.C.C.) at *35.

These precedents strongly support AT&T Michigan's position.

Sprint raises two red-herring arguments. First, Sprint argues that "AT&T has taken the opposite position" on this issue in a 2006 Wisconsin proceeding. Sprint Br. at 110. Sprint is mistaken, because the Wisconsin proceeding raised a completely different issue. There, the independent telephone companies ("ICOs") complained that when AT&T Wisconsin sent them traffic from other carriers over Feature Group C ("FGC") trunks, they could not identify the originating carrier for billing purposes.¹⁰⁶ The ICOs proposed that AT&T Wisconsin take the transit traffic off of the FGC trunks (which carry, *e.g.*, transit traffic, AT&T Wisconsin IntraLATA traffic, Extended Community Calling traffic) and deliver it over a separate (*i.e.* dedicated) trunk between the AT&T tandem and each ICO end office. AT&T Wisconsin argued that this was unnecessary because there are better ways for the ICOs to identify the originator of transit traffic for billing. AT&T Wisconsin never addressed the question whether carriers like Sprint should directly interconnect with other carriers when transit traffic reaches a certain level, like a DS1 or a DS3, and neither did the Wisconsin Commission.

Second, Sprint argues that third party carriers with which it exchanges traffic may not want to directly interconnect. Sprint Br. at 110-111. But section 251(a) applies to all carriers

¹⁰⁶ *Investigation on the Commission's Own Motion Into the Treatment of Transiting Traffic*; Public Service Commission of Wisconsin Docket No. 5-TI-1068; Staff Memorandum at 6, attached to AT&T Wisconsin Initial Brief on Legal Issues Relating to Transit Traffic, dated April 17, 2006, as Tab A.

and requires *direct* or indirect interconnection. Thus, Sprint has a legal right to require other carriers to receive Sprint's traffic directly from Sprint. Moreover, AT&T Michigan's proposal in section 5.7 does not require direct connection between Sprint and other carriers. It expressly allows for "alternate transit arrangement[s]." Thus, Sprint could just as well use the services of the competitive transit providers to connect with other carriers – transit providers such as Inteliquent, Level 3 and Peerless.

For all of the reasons set forth here and in the testimony of Bill Anglin, the Commission should adopt AT&T Michigan's language for section 5.7 of Attachment 2.

**II.E. INTERCONNECTION FACILITIES PRICING AND COST SHARING
(ISSUES 22, 23, 24 AND 25)**

ISSUE 22: SHOULD THE INTERCONNECTION FACILITIES PRICES BE APPLIED ON A "DS1/DS1 EQUIVALENTS BASIS" AS DESCRIBED IN SPRINT'S PROPOSED ATTACHMENT 2, SECTION 3.8.2.1?

AT&T Michigan Position: The Commission should reject Sprint's request that Sprint be allowed to use the same DS3 facility to carry both backhaul traffic and Interconnection traffic, with the price of that facility prorated between TELRIC-based prices and tariff special access pricing. Sprint's proposal was rejected in the *Sprint Illinois Arbitration Decision*, because it is contrary to the principle that TELRIC-priced Interconnection Facilities must be used exclusively for Interconnection and may not be used for non-Interconnection purposes like backhauling. Furthermore, Sprint's proposed method of prorating charges would result in below-cost pricing for Interconnection Facilities, would not properly apportion spare capacity, and would require AT&T to develop new billing systems for the sole benefit of one carrier in one state. (Pellerin at 64-80.)

Under Sprint's proposed "DS1/DS1 Equivalents Basis" pricing methodology, AT&T Michigan would be required to allow Sprint to use the same DS3 entrance facility to carry both Backhaul traffic and Interconnection traffic, with the price of that facility to be determined by allocating the total price of the DS3 facility between TELRIC-based prices and tariffed special access prices based on the percentage of DS1 channels riding over the DS3 facility that are

dedicated to Interconnection and Backhaul, respectively. The Illinois Commission rejected this same proposal, stating:

The explanation provided by Staff regarding the practical result of Sprint's DS1 equivalents proposal convinces the Commission that it is inappropriate. The per DS1 rate is lower when it is priced at a percentage of the DS3 rate, which the Commission finds inappropriate. Sprint can order DS1s at TELRIC pricing for its Interconnection traffic. Moreover, as discussed elsewhere in this Order, Interconnection Facilities are to be used exclusively for 251(c)(2) Interconnection. Sprint cannot send both non-Section 251(c)(2) traffic and Interconnection traffic over the same facilities and pro rate what it pays AT&T. This is especially inappropriate given the practical outcome of its proposal.

Sprint Illinois Arbitration Decision at 25. The Illinois Commission's findings apply equally to this case. For these and other reasons discussed below, Sprint's proposal is unlawful and unreasonable and must be rejected.

1. Sprint's proposal violates the FCC's rule limiting the use of Interconnection Facilities to Interconnection.

Sprint's proposal is directly contrary to the principle, established by the FCC and recognized by the Supreme Court in *Talk America*, that "entrance facilities leased under § 251(c)(2) can be used *only* for interconnection," *i.e.*, "to link the incumbent provider's telephone network with the competitor's network for the mutual exchange of traffic." *Talk America* at 2257, 2264 (emphasis added). See discussion of Issue 9. Thus, as the Seventh Circuit Court of Appeals has made clear, ILECs have the right to "*block* any attempted use of [a TELRIC-priced] entrance facility for backhauling." *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1071 (7th Cir. 2008) (emphasis added). See also, *Southwestern. Bell Telephone, L.P. v. Missouri Pub. Serv. Comm'n*, 530 F. 3d 676, 684 (8th Cir. 2008) (entrance facilities are to be "used *solely* for interconnection purposes within the meaning of § 251(c)(2)" (emphasis added)).

Sprint (Br. at 79) acknowledges that "Backhaul" does not constitute Interconnection under section 251(c)(2) and has agreed to ICA language that prohibits Sprint from purchasing

Interconnection Facilities for Backhaul. Attachment 2, section 3.5.3. Thus, if Sprint wishes to use the same DS3 facility purchased from AT&T Michigan for the transport of both Interconnection traffic *and* Backhaul traffic, it will need to purchase an access facility for that purpose; it is not entitled to purchase a TELRIC-priced Interconnection Facility for that purpose because the facility would not be used only for Interconnection.

Sprint asserts that AT&T Michigan's position is based on an "unduly narrow understanding of word 'facility'" and argues that each of the separate DS1 channels of a DS3 facility is itself a "facility." Sprint Br. at 137; Farrar at 44-45. Because it does not intend to use the same DS1 channel (or, in Mr. Farrar's words, DS1 "facility") for both Interconnection and Backhauling, Sprint contends that its proposal complies with *Talk America. Id.* Sprint's argument is nonsense. Even if a DS1 channel could be considered to be a "facility," Sprint's proposal still involves the use a single DS3 "entrance facility" for both Interconnection and Backhaul. Pellerin at 69.

Moreover, the DS1 channels on a DS3 entrance facilities are *not* themselves "entrance facilities," which *Talk America* defines in terms of their physical attributes: "transmission facilities (typically wires or cables) that connect the competitive LECs' networks with incumbent LECs' networks." *Talk America* at 2258. As the terms are commonly understood and used in the telecommunications industry, a "DS1 facility" is a standalone physical facility between two points with a capacity of 24 logical channels. Each of the 24 channels of the DS1 is called a DS0, and each DS0 can carry one phone call. Thus, a DS1 facility may carry a maximum of 24 simultaneous calls. Each DS0 channel is a logical allocation of bandwidth on the DS1, and is not itself a "facility." Similarly, a "DS3 facility" is a standalone physical facility between two points with a capacity of 28 DS1 channels, each of which has 24 DS0 channels, for a total capacity of

672 simultaneous calls (28x24). Like the DS0 channels on a DS1 facility, each DS1 channel on a DS3 facility is a logical allocation of bandwidth on the DS3 facility and is not itself a “facility.” Pellerin at 64-65, 68-69.¹⁰⁷

The conclusion that DS1 channels on a DS3 do not constitute “facilities” is also supported by the parties’ agreed upon Pricing Sheets for the ICA, which include rate elements associated only with DS1 and DS3 “Entrance Facilities” (*i.e.*, Interconnection Facilities), not channels.¹⁰⁸ Consistent with the agreed Pricing Sheets, if Sprint ordered a DS3 entrance facility, only the DS3 entrance facility rate would apply. If each of the DS1 channels of that DS3 facility that is used for Interconnection were considered to be separate “facilities,” as Sprint suggests they should be, AT&T Michigan would be entitled to assess the agreed-upon DS1 Entrance Facilities charge for each of the DS1 channels *in addition* to the charge that it assesses for the DS3 Entrance Facility. AT&T Michigan, however, is not able to assess such DS1 facilities charges because the DS1 channels are not, in fact, considered to be facilities. They are channels of one facility (*i.e.* a DS3 facility). Pellerin at 69-70.

In sum, there is no logical or lawful basis for Sprint’s position that its proposal to use the same DS3 entrance facility for both Interconnection and Backhaul traffic complies with the rule that “entrance facilities leased under § 251(c)(2) can be used *only* for interconnection.” *Talk America* at 2257, 2264 (emphasis added).

2. Sprint’s “pro rata” pricing proposal would result in below-cost pricing for Interconnection Facilities

¹⁰⁷ This conclusion is supported by the FCC’s definition of a “facility” as meaning “the *physical components* of the telecommunications network that are used in the transmission or routing of the services that are designated for support.” *CAF Order* at n. 69. A DS1 channel is a logical allocation of bandwidth on a DS3 facility; there is nothing “physical” about it. Pellerin at 69, n. 64.

¹⁰⁸ See page 16, lines 322 -328 of the Pricing Sheets attached to the Pricing Schedule. These rates were approved by the Commission in Case No. 13531. The Commission did not approve separate rates for DS1 channels because such channels are not facilities. Pellerin at 70, n. 66.

Sprint's proposal to apply rates on a pro rata basis would inappropriately require AT&T Michigan to provide Interconnection Facilities *below* the TELRIC-based rates approved by the Commission (and hence below the rates that all other carriers would pay for the same facilities). Sprint's own example shows how this would work. Sprint Br. at 133-134. Sprint posits an example where it uses seven DS1 channels of a single DS3 facility as "Interconnection Facilities" subject to TELRIC-based rates and twenty-one DS1 channels as tariffed "facilities" (e.g., for Backhaul). In such circumstances, the appropriate result is clear: Sprint should order seven DS1 Interconnection Facilities from the ICA, and pay the Commission's established TELRIC-based rate for seven DS1s, and Sprint should obtain twenty-one DS1s from AT&T Michigan's tariff and pay the tariffed rate for twenty-one DS1s. Sprint proposes to pay neither rate. Instead, it proposes to pay some "blended" rate based upon the TELRIC-based and tariff rates for a DS3 (which can carry twenty-eight DS1s). However, Sprint in this example will not be purchasing a DS3 Interconnection Facility, or a DS3 tariffed facility, so those DS3 rates are simply inapplicable.

In addition, because DS1s and DS3s are priced differently, Sprint's proposal would result in Sprint paying *less* than the approved TELRIC-based rate for seven DS1 facilities. Under that proposal, AT&T Michigan would bill each of these seven DS1 channels at a price equal to 1/28 of the DS3 Interconnection Facility rate. Using Zone 1 as an example, the DS3 Interconnection Facility rate is \$201.73. Dividing \$201.73 by 28 DS1 channels results in a rate of \$7.20 per DS1 channel, which is equal to only 22% of the \$32.36 TELRIC-based rate the Commission established for a DS1 Interconnection Facility and that the parties have agreed to include in the ICAs' Pricing Sheets. Pellerin at 74.¹⁰⁹ Thus, not only would Sprint avoid the Commission's

¹⁰⁹ To add insult to injury, Sprint's proposal that the parties share the cost of the Interconnection Facilities 50/50 (Issue 24(b)) would mean that AT&T Michigan could only charge \$3.60 per DS1 channel (one/half of the per DS1

TELRIC-based rates for DS1 facilities, it would be allowed to pay less than other carriers that purchase seven DS1 facilities. The same is true of the tariffed facilities purchased by Sprint – instead of paying the same tariffed rates that all others would pay for twenty-one DS1s, Sprint would pay some special “pro rata” rate based upon a fraction of the DS3 price. The Commission should not countenance such a discriminatory result.

3. Sprint’s “network efficiency” argument is without merit

In an attempt to distract the Commission’s attention from the law, Sprint argues that AT&T Michigan’s position would require Sprint to maintain an “inefficient network design,” placing it at a “competitive disadvantage.” Sprint Br. at 134. As discussed in response to the same argument made by Sprint for Issue 11(a), that argument is without merit because Sprint could easily avoid any need to maintain separate transport facilities for Interconnection and Backhaul traffic simply by agreeing to maintain the current, voluntarily negotiated CMRS model interconnection arrangement.

In any event, Sprint has failed to demonstrate that a proper application of the *Talk America* decision will, in fact, necessarily lead to an “inefficient” network design. For two reasons, the hypothetical example presented by Sprint (Br. at 134-35) does not support its argument.

First, Sprint’s example does not take into account the efficiency Sprint would gain by rearranging its network to consolidate its traffic by type. Pellerin at 71. Suppose Sprint currently has two DS3 entrance facilities (purchased from the access tariff), each of which has 12 DS1 channels used for Backhaul, 12 DS1 channels used for Interconnection, and four spare DS1 channels. Sprint could rearrange the traffic such that one DS3 entrance facility (priced at access)

channel rate of \$7.20), which is equal to only 11% of the Commission approved rate of \$32.36 for a DS1 Interconnection Facility. *Id.* at 75.

would have 24 DS1 channels used for Backhaul with four spare channels, and the second DS3 entrance facility (priced based on TELRIC) would have 24 DS1 channels used for Interconnection with four spare channels. *Id.* The net result of Sprint's traffic rearrangement would be a requirement for the same two DS3 facilities it needed under the current interconnection model, which is hardly inefficient. *Id.* In this regard, according to Sprint witness Felton, Sprint has proactively initiated a "comprehensive" network rearrangement "that will necessitate the reconfiguration and likely elimination of existing POIs." Felton at 13-14. This will necessarily result in changes to the facilities Sprint leases from AT&T Michigan, providing Sprint with the opportunity to separate its Interconnection Facilities from its access facilities in order to enjoy TELRIC-based pricing for Interconnection. *Id.* at 73.

Second, based on a purported "break even" analysis, Sprint's example assumes that it would make economic sense for Sprint to purchase an entire DS3 facility even if it had a need for only seven DS1 Interconnection channels. Farrar at 32-33. This assumption, however, is fatally flawed because it fails to account for the cost of multiplexing, which would be necessary if Sprint were to use a DS3 entrance facility for Interconnection. Pellerin at 72. Taking these costs into account, the "breakeven" point is 19, not seven, DS1s, *i.e.*, the cost of a single DS3 entrance facility with multiplexing is virtually the same as the cost of 19 individual DS1 entrance facilities. *Id.* at 72-73. Accordingly, if Sprint only needed the seven DS1s used in its hypothetical example, it would only make sense for Sprint to purchase seven DS1 entrance facilities, rather than to incur the cost of a DS3 facility and multiplexing. *Id.* at 73.

4. Sprint's proposal does not price spare capacity appropriately

Another fatal flaw in Sprint's proposal is that it apportions spare capacity on a DS3 facility between Interconnection and Backhaul "according to the actual total currently utilized capacity." Farrar at 37. As an example, if Sprint has 10 DS3s with a total of 280 DS1 channels

and uses 100 channels for Interconnection and 100 channels for backhaul, it would have 80 spare channels. In this example, 50% of the working channels are used for Interconnection (100/200) and 50% for backhaul. Under Sprint's proposal, this same percentage would be applied to the spare channels, thereby requiring AT&T Michigan to provide 40 of the spare DS1 channels at a below TELRIC-based rate with no assurance that those channels will, in fact, be used only for Interconnection and not for Backhaul. Pellerin at 77. The fact that Sprint may use 50% of active DS1 channels for Interconnection at one snapshot in time does not mean that Sprint's future use of channels will be reflect the same 50/50 breakdown between Interconnection and Backhaul. *Id.* Even if Sprint were allowed to combine Backhaul and Interconnection on the same DS3 facilities (and it should not for all the reasons previously discussed), Sprint should only be entitled to enjoy (below) TELRIC-based prices on channels actually used for Interconnection; all spare channels should be priced as an access service. *Id.*

5. Sprint's proposal lacks sufficient detail to allow for implementation

Sprint's proposal does not provide a mechanism for the initial apportionment of facilities between access and Interconnection. Pellerin at 78. Nor does Sprint's language consider future order activity for DS3s or activation / rearrangement / deactivation of DS1 channels. Such activity will certainly occur and could dramatically affect the apportionment and related billing. *Id.* While Sprint suggests that the parties would meet periodically to recalculate the ratio, there is nothing in Sprint's language that would obligate the parties to do so. *Id.*

6. Sprint's proposal would require AT&T to develop a new billing system for the sole benefit of Sprint.

What Sprint is proposing would require a major change in AT&T's billing systems. Pellerin at 78. AT&T should not be required to invest the time and expense necessary for major billing system rewrites simply to benefit a single carrier in a single state. Furthermore, if the

current billing system cannot be revised for the pro rata pricing method Sprint demands, AT&T Michigan would be forced to manually adjust Sprint's bill every single month for every single DS3 facility. Such a result would be unduly burdensome and would cause AT&T Michigan to incur manual billing costs that are not included in AT&T Michigan's TELRIC-based rates. *Id.* at 78-79.

Sprint asserts that its proposal is consistent with pro rata pricing provisions of existing ICAs that Sprint has with AT&T Michigan's ILEC affiliates in AT&T's nine state Southeast region. Sprint Br. at 135-136; Farrar at 41-42. Even if Sprint's assertion were correct, it would be irrelevant because whatever Sprint and AT&T ILECs may have voluntarily agreed to in the past has no bearing upon whether Sprint's current proposal to pay sub-TELRIC-based prices can lawfully be forced upon AT&T Michigan. Sprint's assertion, however, is not correct. Under the ICAs referenced by Sprint, it leases special access facilities from AT&T that Sprint uses for both interconnection and backhaul, just as it currently does in Michigan. Thus, contrary to what Sprint is proposing in this case, the pricing provisions of those ICAs do not involve a blending of TELRIC-based and tariffed pricing. Pellerin at 79.

For all the reasons discussed, the Commission should reject Sprint's proposed "DS1/DS1 Equivalents Basis" pricing methodology and its proposed language for Attachment 2, sections 3.8.2 and 3.8.2.1.

ISSUE 23: SHOULD SPRINT BE ENTITLED TO NEW TELRIC BASED RATES FOR INTERCONNECTION FACILITIES THAT ARE DIFFERENT THAN THE RATES SET FORTH IN THE PRICING SHEET WITHOUT AMENDING THE ICA?

AT&T Michigan Position: The Commission should reject Sprint's proposal to require that any change in TELRIC-based prices that the Commission may order in a future proceeding be immediately available to Sprint, without an ICA amendment. Either party may request an ICA amendment to incorporate a change in rates pursuant to the ICA's

Intervening Law provisions. Sprint's position is contrary to Commission precedent. It was also expressly rejected in the *Sprint Illinois Arbitration Decision*. (Pellerin at 81-82.)

Sprint's proposed Attachment 2, section 3.8.3 would require that any change in TELRIC-based prices for Interconnection Facilities that is ordered by the Commission in a future proceeding "be immediately available to and binding on Sprint and AT&T Michigan without an amendment to the Agreement and or Pricing Sheets." The Commission should reject this proposal. Neither Sprint nor AT&T Michigan should be automatically entitled to different rates without amending the ICA. If the Commission were to establish different TELRIC-based prices for Interconnection Facilities in a generic cost proceeding, either party could request an ICA amendment to include those rates in accordance with the Intervening Law provisions of GT&C, section 21 of the ICA. Pellerin at 81. This is the standard procedure for implementing Commission-ordered changes in TELRIC-based rates. Thus, for example, when the Commission ordered changes to AT&T Michigan's UNE rates in Case No. U-13531, AT&T Michigan and the CLECs were required to amend their ICAs to incorporate the revised rates. See *Opinion and Order*, Case No. U-13531, Jan. 25, 2005 at 8 (ordering that "all SBC and all CLECs with which it has approved interconnection agreements shall file joint applications for approval of an amendment to their current interconnection agreements, incorporating the revised pricing schedule approved by the Commission, as set forth in Exhibit A.") *Id.*

Contrary to Sprint's suggestion, the requirement of an amendment to memorialize the rates pursuant to which AT&T Michigan will provide Interconnection Facilities to Sprint is not "costly and wasteful." Sprint Br. at 139. Negotiating an amendment to incorporate a Commission-ordered change in rates should be a simple process taking minimal time and effort. Pellerin at 82. Even if the process were more complex, however, it is necessary that the rates, terms and conditions applicable to the ICA be included within the ICA. AT&T Michigan cannot

be obligated to provide service pursuant to extra-ICA rates that conflict with the rates in the ICA itself. *Id.*

The Illinois Commission rejected the same Sprint proposal, stating as follows:

[I]f the Commission determines new TELRIC rates, the parties must negotiate the inclusion of the new rates into the ICA. The parties then file the negotiated amendment to the agreement with the Commission. The Commission then must act within three months or it is deemed to have been approved. Accordingly, any approval of a negotiated agreement takes at most three months. Sprint's argument that the process can be time consuming is not consistent with the reality of the approval process for a negotiated agreement. Moreover, the Commission is concerned that Sprint's language is more likely to lead to disputes regarding which rates should be updated automatically.

Sprint Illinois Arbitration Decision at 25. Sprint has offered no valid reason for this Commission to reach a different result.

ISSUE 24(a): SHOULD AT&T BE REQUIRED TO SHARE THE COST OF INTERCONNECTION FACILITIES LOCATED ON SPRINT'S SIDE OF THE POI?

AT&T Michigan Position: Sprint's proposal that AT&T Michigan be required to bear half of the cost of the Interconnection Facilities it is required to provide to Sprint pursuant to section 251(c)(2) of the 1996 Act is directly contrary to the Supreme Court's ruling in *Talk America* that "AT&T must lease its existing entrance facilities for interconnection at cost-based rates"—not at one-half of a cost-based rate. Furthermore, the Interconnection Facilities at issue in this case are located entirely on Sprint's side of the POI and, therefore, are part of Sprint's network. Accordingly, Sprint should be financially responsible for the full cost of those facilities. The Commission and FCC orders relied on by Sprint do not support its position because those cases all involved application of FCC rules governing the calculation of charges for transport and termination under section 251(b)(5) of the 1996 Act -- rules no longer applicable given the CAF Order's adoption of "bill-and-keep" for LEC-to-CMRS non-access traffic -- and do not apply to an ILEC's recovery of the costs of the Interconnection Facilities that it is required to provide to competing carriers pursuant to section 251(c)(2). (Pellerin at 82-97.)

This issue concerns Sprint's proposal to require AT&T Michigan to bear half the cost of TELRIC-priced Interconnection Facilities on Sprint's side of the POI. For the reasons discussed

below, the Commission should reject that proposal, just as the Illinois Commission did. *Sprint Illinois Arbitration Decision* at 27-28.

In *Talk America*, the Supreme Court held that, as part of its obligation to provide for Interconnection under section 251(c)(2) of the 1996 Act, an incumbent LEC must provide its existing Interconnection Facilities to competitors (such as Sprint) at TELRIC-based rates. Sprint, however, takes the position that when it elects to lease Interconnection Facilities from AT&T Michigan, the Commission-approved TELRIC-based price billed by AT&T Michigan should be reduced by 50% in order to force AT&T Michigan to “share” in the cost of that facility. (See Sprint proposed language for Attachment 2, section 3.9.3.1 and Pricing Schedule, section 1.3.3). In support of this position, Sprint states that an Interconnection Facility “exists for the benefit and use of each party,” *i.e.*, for the mutual exchange of traffic. Farrar at 19-20. That statement, however, describes the only type of facility that was the subject of *Talk America’s* TELRIC pricing ruling. Accordingly, if, as Sprint asserts, the cost of any such facility must be shared by the ILEC, one would have expected the Supreme Court, or the FCC’s *amicus* brief upon which the Supreme Court relied, to say so. Pellerin at 87. They did not. Instead, the Supreme Court agreed with the FCC that “AT&T must lease its existing entrance facilities for interconnection at cost-based rates” (131 S.Ct. at 2260) – not at one-half of a cost-based rate.

Furthermore, it is undisputed that Sprint has “responsibility for providing its owned or leased Interconnection Facilities to route calls to the POI” and that it has the option of meeting that responsibility by either (i) constructing its own facilities; (ii) purchasing or leasing facilities from a third party; or (iii) purchasing or leasing Interconnection Facilities from AT&T Michigan, if they are available. Attachment 2, section 3.3. It is also undisputed that the POI represents the “physical demarcation point between [AT&T Michigan’s and Sprint’s] networks.” Sprint Br. at

57. Accordingly, regardless of how Sprint chooses to acquire the Interconnection Facilities that it has the responsibility for providing, those facilities become part of Sprint's network once Sprint has acquired them. Pellerin at 83-86. As such, Sprint should be fully responsible for the cost of those facilities, just as AT&T Michigan is fully responsible for the cost of the transport and other facilities included in its network and located on its side of the POI. *Id.* at 84-85. And this responsibility should apply whether the facilities are self-provided by Sprint, leased or purchased from a third party, or acquired from AT&T Michigan at TELRIC-based rates.¹¹⁰

In support of its position, Sprint relies on the Commission's 2003 *MCImetro Arbitration Order* (Case No. U-13758)¹¹¹ and the Commission's 2005 *TelNet Arbitration Order* (Case No. U-13931).¹¹² Sprint Br. at 58. These orders, in turn, relied on the FCC's 2001 *TSR Wireless* decision. Sprint also cites the FCC's *MAP Mobile* decision.¹¹³ *Id.* at 60. Sprint's reliance on these cases is misplaced, because they all involved the application of FCC Rules 51.703(b) and 51.709(b) (and language from the *First Report and Order* adopting those rules), which are rules governing reciprocal compensation for the transport and termination of traffic under section

¹¹⁰ See Memorandum Opinion and Order, *TSR Wireless, LLC v. U S West Communications, Inc.*, FCC 00-194 (rel. Jun. 21, 2000) ("*TSR Wireless Order*") at n. 70 (stating that "the paging carrier would be responsible for paying charges for facilities ordered from the LEC to connect points on the paging carrier's side of the point of interconnection.") (emphasis added); *Sprint Illinois Arbitration Decision*, at 28 (requiring "each party to be responsible for the facilities on their side of the POI").

¹¹¹ In addition to all of the other reasons discussed herein, the *MCImetro Arbitration Decision* is irrelevant because MCImetro's ICA provides that the parties will interconnect using a fiber meet architecture, which means that the POI is somewhere between the parties' switch locations. Pellerin at 89-90. By contrast, Sprint has specifically said it will *not* use a fiber meet architecture, and the ICA omits language providing for such an arrangement (Farrar at 14), making any comparison between Sprint and MCImetro inappropriate. *Id.*

¹¹² Case No. U-13931, *In the matter of the Application of Telnet Worldwide, Inc., for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Verizon North Inc. and Contel of the South, Inc. d/b/a/ Verizon North Systems*, Order on Rehearing (Feb. 24, 2005).

¹¹³ *MAP Mobile Communications, Inc. v. Illinois Bell Telephone Company, et al.*, File No. EB-05-MD-013, Memorandum and Order, DA 09-1065 (rel. 5/13/09).

251(b)(5) of the 1996 Act.¹¹⁴ 47 C.F.R. §§ 51.703(b), 51.709(b). As the Commission staff has explained, *Telnet* “focuses on whether a reciprocal compensation charge provided adequate compensation consistent with proportional use” as required by Rule 51.709(b).¹¹⁵ And as the Commission has expressly recognized, Rule 51.709(b) “was promulgated pursuant to section 251(b)(5), the reciprocal compensation provision ... there is no other provision under which Part 709(b) could logically have been promulgated.”¹¹⁶

Because Rules 51.703(b) and 51.709(b) were promulgated to implement section 251(b)(5), they do not apply to an ILEC’s recovery of the costs of the Interconnection Facilities that it is required to provide to competing carriers pursuant to section 251(c)(2) of the 1996 Act. This conclusion is supported by *Talk America*, where the Supreme Court emphasized that compensation for the “transport and termination of traffic” is “subject to different regulatory treatment” and “governed” by different “statutory provisions and regulations” than the regulatory treatment, statutory provisions and regulations applicable to compensation for Interconnection. 131 S. Ct. 2254, 2263. Consistent with this analysis, the Supreme Court noted that a CLEC “typically pays one fee for interconnection – ‘just for having the link’ – and then an additional fee for the transport and termination of telephone calls.” *Id.* It is the “additional fee for the transport and termination of telephone calls,” not the “one fee for interconnection,” that is subject to the FCC’s Subpart H rules, including Rules 51.703 and 51.709. In accordance with

¹¹⁴ 51.703(b) and 51.709(b) appear in Subpart H (entitled “Reciprocal Compensation for Transport and Termination of Telecommunications Traffic”) of 47 C.F.R. Part 51.

¹¹⁵ Case No. U-16802, *In the matter of the complaint of Lucre, Inc. against Verizon North Inc. and Contel of the South, Inc. d/b/a/ Verizon North Systems*, Opinion and Order, 2010 WL 1806769 (Mich. PSC, April 27, 2010) (“*Lucre, Inc.*”) at 4 (emphasis added)..

¹¹⁶ *Lucre, Inc. v. Verizon North*, 2011 WL 5008582 (Mich. App. Ct., Oct. 20, 2011) at 5. Sprint’s assertion (Br. at 58) that the court decision affirming the Commission’s *Telnet Arbitration Decision* relied on FCC Rule’s 51.507 and 51.509 is wrong. The *Telnet* court relied on Rule 51.709(b) and other reciprocal compensation rules, with no mention of Rules 51.507 or 51.509. *Verizon N Inc v. Telnet Worldwide, Inc.*, 440 F. Supp 2d 700, 707-710 (W.D. Mich. 2006).

the Supreme Court's decision, the "one fee" that Sprint should be required to pay for Interconnection Facilities (*i.e.*, for "just having the link") is equal to the TELRIC-based price of those facilities, not a fraction of that price, as proposed by Sprint. The "additional fee for transport and termination of telephone calls" that Sprint was formerly required to pay through a rate for reciprocal compensation has been replaced by the FCC with a bill-and-keep arrangement. 47 C.F.R. 51.705(a).

For the reasons discussed above, the Commission and FCC decisions cited by Sprint do not support a requirement that AT&T Michigan "share" in the cost of Interconnection Facilities leased to Sprint pursuant to section 251(c)(2). At most, these cases suggest that, *at the time the cases were decided*, FCC Rule 51.709(c) allowed the "carrier providing transmission facilities dedicated to the transmission of non-access traffic between two carriers' networks" (which, in this case, would be Sprint) to recover through its reciprocal compensation charges a portion of the cost of those facilities based on the "the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network." 47 C.F.R. 51.709(b).¹¹⁷ Pellerin at 92-93. *See Lucre Inc.*, 2010 WL 1806769 at 4 ("Staff notes that 47 C.F.R. 51.709(b) simply establishes that a providing carrier may only charge an interconnecting customer for its proportionate use of the facilities.....the TelNet order is not applicable to this case because that order focuses on whether a reciprocal compensation charge provided adequate compensation consistent with proportional use").

¹¹⁷ Because Sprint is the party with "responsibility for providing its owned or leased Interconnection Facilities to route calls to the POI" (Attachment 2, section 3.3), Sprint, not AT&T Michigan, is the "carrier providing transmission facilities dedicated to the transmission of non-access traffic between two carriers' networks" within the meaning of Rule 51.709(b). This is true whether Sprint self-provides the facilities, purchase or leases them from a third party or obtains them from AT&T Michigan.

Today, however, Rules 51.703(b) and 51.709(b), and the Commission and FCC orders applying those rules, have no possible applicability to the transport facilities used to exchange traffic between ILECs and CMRS providers. This is because the *CAF Order* adopted “bill-and-keep” for IntraMTA traffic exchanged between ILEC and CMRS carriers (47 C.F.R. §51.705(a)), which means that “carriers exchanging telecommunications traffic do not charge each other for specific transport and/or terminating functions or services.” 47 C.F.R. §51.713. Consistent with this rule change, Sprint and AT&T Michigan have agreed to language in Attachment 2, section 6.3.1 that precludes the Commission from assessing AT&T Michigan any reciprocal compensation charges for the recovery of transport and termination costs (and vice versa). Pellerin at 96. This necessarily precludes Sprint from relying on Rule 51.709(b) (or any other rule governing the calculation of transport and termination rates) to assess AT&T Michigan for costs associated with AT&T Michigan’s use of transmission facilities on Sprint’s side of the POI. *Id.* As is clearly indicated by Rule 51.709(a) (as revised by the *CAF Order*), Rule 51.709(b) applies *only* in setting “*initial* rates for transport and termination” of non-access traffic where such a rate “does not exist as of December 29, 2011.” 47 C.F.R. 51.709(a)(emphasis added).¹¹⁸

Moreover, the bill-and-keep system is premised upon a policy determination that carriers should recover their costs from their own end-users, “rather than from other carriers.” *CAF Order* at ¶ 775. Here, while AT&T Michigan agrees that it must entirely bear the cost of facilities on its side of the POI, Sprint wants to shift half the cost of the facilities on its side of the

¹¹⁸ Thus, even for LEC-to-LEC non-access traffic, which is on a six-year “glide path” to elimination of reciprocal compensation, the Commission would not be able increase the reciprocal compensation rates between LECs to incorporate a relative use factor for the recovery of facility transport costs where no such factor already existed as of December 29, 2011. Pellerin at 96.

POI (facilities that Sprint agrees it has the responsibility to provide) to another carrier – namely, to AT&T Michigan. Sprint’s proposal plainly is inconsistent with the premise of the *CAF Order*.

In addition to the reasons discussed above, Sprint’s reliance on the FCC’s *TSR Wireless* and *MAP Mobile* decisions is misplaced because those cases simply interpreted Rules 51.703(b) and 51.709(b) to mean that an incumbent LEC may not assess reciprocal compensation charges for the recovery of the costs of transport facilities located on the *LEC’s side of the POI*. In *TSR Wireless*, for example, the FCC interpreted Rules 51.703(b) and 51.709(b) to mean that incumbent LECs may not charge “for the delivery of LEC-originated, intraMTA traffic *to the paging carrier’s point of interconnection.*” *TSR Wireless Order* at ¶ 18 (emphasis added). In a subsequent order in the same docket, the FCC explained that “we found that LECs may not charge one-way paging carriers for the delivery of intra-MTA LEC-originated traffic *to the paging carrier’s point of interconnection.*” *Metrocall, Inc. v. Southwestern Bell Tel. Co. et al.*, FCC 01-279 at ¶ 5 (Oct. 2, 2001)(emphasis added). Similarly, in the *MAP Mobile Order*, the FCC ruled that the incumbent LECs could not charge for “interconnection facilities and service” “to the extent such facilities and service were used to deliver intraMTA traffic originated on their networks *to MAP’s point of interconnection.*” *MAP Mobile Order* at ¶ 31 (emphasis added). Consistent with the FCC’s reciprocal compensation rules, as interpreted in *TSR Wireless*, *Metrocall, Inc.* and *MAP Mobile*, AT&T Michigan has never charged Sprint for that portion of the transport facilities located on AT&T Michigan’s side of the POI which are used to deliver AT&T originated IntraMTA traffic to the POI; nor does AT&T Michigan propose to do so in this case. Pellerin at 91.

More to the point, in the *TSR Wireless Order*, the FCC explained that while Rule 51.703(b) “affords carriers the right not to pay for delivery of local traffic originated by the other

carrier,” “the paging carrier would be responsible for paying charges for facilities ordered from the LEC to connect points *on the paging carrier’s side of the point of interconnection.*” *TSR Wireless Order*, n.70 (emphasis added). Thus, the *TSR Wireless Order* supports AT&T Michigan’s position that Sprint should be fully responsible for the cost of the Interconnection Facilities that it orders from AT&T Michigan in order to meet Sprint’s obligation under Attachment 2, section 3.3 to provide for the facilities located on its side of the POI.

Sprint’s reliance on an arbitration decision in Case No. U-15534 involving Sprint and CenturyTel is also misplaced. Sprint Br. at 59; Farrar at 16-17. In fact, that case supports AT&T Michigan’s position, since the Commission approved language, similar to language proposed by AT&T Michigan for the definition of POI, which expressly states that “[e]ach Party is responsible for the facilities to its side of the POI(s)” and “[e]ach Party is responsible for the appropriate sizing, operation, maintenance *and cost* of the transport facility to the POI(s).”¹¹⁹ In addition, the Commission interpreted the arbitration panel’s decision on “sharing” to mean only that “costs for facilities built to a meet point outside either of the party’s networks should be shared.” *Id.* at 9; Pellerin at 88-89. The proposed ICA between AT&T Michigan and Sprint at issue in this case does not involve an arrangement for a “meet point outside of either party’s network.” *Id.* at 89. Accordingly, the decision in Case No. U-15534 to require sharing in the context of a meet point arrangement has no relevance to this case.

Finally, lacking any support in the law, Sprint attempts to construct an argument based upon the parties’ existing ICA. Sprint Br. at 60-61. That is entirely beside the point. As previously discussed, while AT&T Michigan agreed in the existing agreement to share some facility costs, that agreement was voluntarily negotiated and resulted in a very different

¹¹⁹ Case No. 15534, *In the matter of the petition of Sprint Communications Company L.P. for arbitration pursuant to Section 252(c)(2) of the Telecommunications Act of 1996 to establish an interconnection agreement with CenturyTel Midwest of Michigan, Inc.*, Order (Oct. 7, 2008) at 9-11 (emphasis in original).

arrangement than that contemplated by the current ICA to implement the requirements of section 251(c)(2). Among other things, that agreement expressly and unambiguously resulted in a “dual POI” arrangement, with POIs located at AT&T Michigan’s switch for “mobile to land” traffic, and another at Sprint’s point of presence for “land to mobile” traffic. Pellerin at 4. Sprint asserts (Br. at 61) that “there is no such thing under federal law as a ‘dual POI’ arrangement,” but that only proves AT&T Michigan’s point. In voluntarily negotiating an agreement, the parties may mutually agree to terms that depart from the standards of section 251. 47 U.S.C. § 252(a)(1). The fact that the parties previously agreed to a dual-POI arrangement, and that AT&T Michigan agreed in connection with that arrangement to share certain facility costs, when there is “no such thing” under the FCC’s rules, demonstrates the fallacy of Sprint’s attempt to rely upon that voluntary agreement.

For all the reasons discussed, the Commission must reject Sprint’s proposal to require AT&T Michigan to “share” in the cost of Sprint’s Interconnection Facilities.

ISSUE 24(b): IF AT&T IS REQUIRED TO SHARE IN THE COST OF INTERCONNECTION FACILITIES LOCATED ON SPRINT’S SIDE OF THE POI, SHOULD THAT SHARING BE ON A 50/50 BASIS?

AT&T Michigan Position: If, as it should, the Commission rejects Sprint’s position for Issue 24(a), there is no need for the Commission to address Issue 24(b). In the event that the Commission needs to decide Issue 24(b), it should reject Sprint’s proposed 50% factor because it is unsupported by actual usage data and is based on a misreading of the CAF Order, which actually supports a decision that there be no sharing factor. Rather, the Commission should adopt a 20% Interconnection Facilities Sharing factor. Alternatively, if the Commission decides for Issue 11(c) that Sprint should be allowed to use Interconnection Facilities for IXC traffic, the Commission should adopt a 15% Interconnection Facilities sharing factor. These factors are both supported by actual usage data and the proper assignment to Sprint of responsibility for transit and IXC traffic. (Pellerin at 97-103.)

This issue involves the question of what Interconnection Facility “sharing factor” should be applied in the event that the Commission adopts Sprint’s position for Issue 24(a) that AT&T

Michigan should be required to “share” in the cost of Interconnection Facilities. For all the reasons discussed above, there is no lawful basis for Sprint’s “sharing” proposal and it should be rejected. If, as it should, the Commission rejects Sprint’s position for Issue 24(a), there is no need for the Commission to address Issue 24(b).

For Issue 24(b), Sprint argues that AT&T Michigan be required to bear 50% of the cost of the Interconnection Facilities without regard to the AT&T Michigan’s actual proportional use of those facilities. Sprint Br. at 140-141. Incredibly, Sprint argues that its position is somehow supported by the *CAF Order*’s adoption of “bill-and-keep.” This argument stands logic and the plain meaning of the *CAF Order* on its head. For the reasons discussed for Issue 24(a), above, the adoption of “bill-and-keep” means that the FCC’s transport and termination cost recovery rules on which the Commission previously relied as support for its “sharing” decisions are no longer applicable. Moreover, the bill-and-keep system is premised upon a policy determination that carriers should recover their costs from their own end-users, “rather than from other carriers.” *CAF Order*, ¶ 775. Sprint’s proposal to arbitrarily shift to AT&T Michigan half the cost of the facilities on Sprint’s side of the POI -- facilities that Sprint agrees it has an obligation to provide -- is plainly inconsistent with the premise of the *CAF Order*. Accordingly, the *CAF Order*’s adoption of “bill-and-keep” mandates the conclusion that there should not be any “sharing” at all, much less 50% sharing.

As an additional argument in support of its proposed 50% sharing factor, Sprint asserts that the volume of the traffic that each party delivers to the other is “approximately equal.” Farrar at 18-19. Sprint, however, provides no data to support that assertion. Moreover, Sprint’s assertion is grossly misleading because it fails to account for the different types of traffic that are exchanged between the parties’ networks. In addition to traffic exchanged between the end users

of AT&T Michigan and Sprint, AT&T Michigan has also voluntarily agreed to allow Sprint to use Interconnection Facilities for transit traffic, *i.e.*, IntraMTA traffic exchanged between Sprint and other local carriers. Pellerin at 99.

If there is to be an Interconnection Facilities “sharing factor” (and there should not be), that factor should be calculated based on the amount of traffic that is originated by end users of AT&T Michigan and terminated with end users of Sprint. Pellerin at 99. AT&T Michigan should not be held responsible for the cost of the facilities to the extent that they are used to carry transit traffic. Such traffic, regardless of the direction in which it goes, should be Sprint’s responsibility.¹²⁰ Thus, just as a call that is originated with Sprint and transited by AT&T Michigan to a third party should be attributed to Sprint for purpose of calculating any sharing factor, so too should a call that originates with a third party and is transited by AT&T Michigan to Sprint. AT&T Michigan has no stake in either type of call, because neither the calling party nor the called party is AT&T Michigan’s customer. Moreover, the reason that AT&T Michigan must transit the call is that Sprint has elected not to directly interconnect with the third party.¹²¹ Also, the originating carrier does not compensate AT&T Michigan for transporting the call to Sprint from the last point of switching on the AT&T Michigan network. *Id.* at 100.

Consistent with the above discussion, if there is to be an Interconnection Facility sharing factor (and there should not be), that factor should be no more than 20%. As shown in Confidential Exhibit PHP-7, this factor was calculated based on consolidated usage data between AT&T Michigan and Sprint from AT&T Michigan tandems during three periods: early 2012,

¹²⁰ This logical conclusion is supported by several FCC orders. See Pellerin at 100-102.

¹²¹ This relates indirectly to Issue 15, addressed by Mr. Anglin. Sprint argues that AT&T Michigan can never request that Sprint directly interconnect with any third party carrier – even when Sprint and the third party carrier exchange in excess of a DS3’s worth of traffic through AT&T Michigan. Sprint should not be permitted to receive massive amounts of transit traffic from third parties, while making AT&T Michigan responsible for the cost of the facilities AT&T Michigan must use to deliver that traffic to Sprint. Pellerin at 100, n. 92.

mid to late 2012, and early 2013. As indicated, the factor was calculated based on a fraction in which the numerator equals the amount of Interconnection traffic originated by end users of AT&T Michigan and the denominator equals the sum of all traffic riding over Interconnection trunks originated by end users of both AT&T Michigan and Sprint plus transit traffic. Pellerin at 102.

In the event that the Commission rules in Sprint's favor on Issue 11(c) and allows Sprint to use Interconnection Facilities for IXC traffic (*i.e.*, traffic that Sprint sends to, and receives from, IXCs), the Interconnection Facilities sharing factor needs to be adjusted to reflect the inclusion of such traffic in the denominator, but not the numerator, of the fraction. As with transit traffic, IXC traffic, regardless of direction, should be entirely Sprint's responsibility because Sprint is in complete control of how this traffic is routed. Pellerin at 99, n. 90.¹²² Taking IXC traffic into account, the Interconnection Facilities sharing factor should be no more than 15%, as calculated in Confidential Exhibit PHP-8. *Id.* at 102.

For all the reasons discussed, in the event that the Commission needs to decide Issue 24(b), it should adopt AT&T Michigan's alternative proposed language for this issue, which reflects adoption of a 20% Interconnection Facilities sharing factor in the event that AT&T Michigan prevails on Issue 11(c) and a 15% factor in the event that Sprint prevails on Issue 11(c).

ISSUE 24(c): SHOULD THE ICA OBLIGATE SPRINT TO PAY THE FULL PRICE FOR AT&T TO PROCESS SPRINT'S SERVICE ORDERS?

AT&T Michigan Position: The Commission should reject Sprint's proposal to require AT&T Michigan to "share" in the non-recurring costs incurred as a result of Sprint's

¹²² IXCs route Sprint's traffic to AT&T Michigan based on information Sprint populates in the LERG. AT&T Michigan has no choice but to deliver this IXC traffic to Sprint, and AT&T Michigan does not bill the IXCs for the link to Sprint. *Id.* See also Issue 12(b).

orders for Interconnection Facilities Charges. As the “cost causer,” Sprint should be fully responsible for such costs and should pay the full amount of all applicable non-recurring charges. Furthermore, Sprint’s proposed language for this issue is extremely confusing and will almost certainly lead to disputes. (Pellerin at 103-105.)

This issue involves Sprint’s proposal that any nonrecurring charges for the Interconnection Facilities that Sprint elects to order from AT&T Michigan to meet Sprint’s obligation to provide such facilities should be shared 50/50 – in other words, Sprint would only pay one-half of the TELRIC-based charges for AT&T Michigan to process an order for an Interconnection Facility and to install it. Sprint’s language also suggests that if Sprint voluntarily orders an Interconnection Facility, or if it does so at AT&T Michigan’s request, AT&T Michigan would be required to install it at no charge to Sprint. Sprint’s proposals should be rejected.

First, even if AT&T Michigan is obligated to share in the recurring costs of Interconnection Facilities (and it should not be, for the reasons discussed for Issue 24(a)), Sprint fails to demonstrate that the nonrecurring costs to process an order for and to install (or disconnect, rearrange, or change), an Interconnection Facility should be shared by AT&T Michigan. These are real costs that AT&T Michigan incurs for real work it performs in response to Sprint’s orders. Pellerin at 104. Thus, Sprint (which has the option of self-providing interconnection facilities or leasing or purchasing them from a third party) is clearly the “cost causer” and, as such, should bear the entire non-recurring cost. This conclusion is further supported by the fact that it is Sprint, not AT&T Michigan, that elected to seek a change from the existing CMRS interconnection arrangement that has been in place for many years. AT&T Michigan should not be obligated to share the nonrecurring costs to implement Sprint’s unilateral decision. *Id. see Sprint Illinois Arbitration Decision* at 30 (“It is entirely appropriate that Sprint,

as the cost causer, be required to issue standard ordering ASRs to effectuate the transition and bear the cost of processing those orders.”)

Second, as discussed for Issue 24(b), even if the Commission were to conclude that AT&T Michigan should share in the nonrecurring costs associated with Interconnection Facilities, the applicable sharing factor should be set at either 20% or 15% (depending on the outcome of Issue 11(c)), not 50% as proposed by Sprint. Pellerin at 104.

Third, Sprint’s proposed language is extremely confusing and difficult to interpret. Sprint’s proposed language for Pricing Schedule, section 1.4.2 states:

Except as otherwise provided in this Agreement, or for orders initiated in response to a request by AT&T MICHIGAN, Sprint shall pay its equal share of any applicable service order processing/administration charges for each service order submitted by Sprint to AT&T MICHIGAN to process requests for installation, disconnection, rearrangement, change, or record order as appropriate under this Agreement. For orders initiated in response to requests by AT&T MICHIGAN for which Sprint does not otherwise have an obligation under this Agreement, Sprint is not responsible for any applicable service order processing/administration charges.

What does that mean? Does Sprint pay 50% of the charges for orders AT&T Michigan requests it place, or must AT&T Michigan process those orders for free? Could AT&T Michigan charge Sprint for orders AT&T Michigan would have to place (because Sprint refused to) as a result of an independent auditor’s conclusion that Sprint misused the Interconnection facilities (Issue 13(b))? What, if anything, could AT&T Michigan charge if Sprint places an order to install, disconnect, rearrange, or change an Interconnection Facility, but it does so voluntarily for its own reasons, independent of any “obligation” of the ICA? Who could possibly keep track of which orders were which? Sprint’s convoluted language will most certainly lead to disputes. Pellerin at 104-105.

For all the reasons discussed, the Commission should reject Sprint's proposal to require AT&T Michigan to "share" in the non-recurring costs incurred as a result of Sprint's orders for Interconnection Facilities Charges. As the "cost causer," Sprint should be fully responsible for such costs and should pay the full amount of all applicable non-recurring charges.

ISSUE 25: WHAT ARE THE APPROPRIATE TRANSITION RATES, TERMS AND CONDITIONS?

AT&T Michigan Position: The transition provisions AT&T Michigan proposes for Attachment 2, sections 1.2 through 1.2.1.2.3 and 3.5.4, are necessary because of differences between the parties' existing CMRS model network interconnection arrangement and the section 251(c)(2) model Interconnection arrangement that Sprint has requested for the new ICA. Under its existing interconnection arrangement, Sprint uses the same transport facilities, obtained from AT&T Michigan's access tariff, to carry all of its traffic, including both Interconnection traffic (*i.e.*, traffic exchanged between Sprint's and AT&T Michigan's end users) and non-Interconnection traffic (*e.g.*, 911 traffic, traffic between Sprint and IXCs, and backhaul traffic). However, the Interconnection Facilities that Sprint seeks to obtain at TELRIC-based prices pursuant to section 251(c)(2) may be used only for Interconnection traffic. Thus, before it is entitled to obtain TELRIC-based pricing, Sprint must obtain Interconnection Facilities under the terms of the ICA that are separate from the transport facilities used for backhaul and other non-Interconnection purposes. AT&T Michigan's proposed transition language is necessary to provide for an orderly transition to a section 251(c)(2) Interconnection arrangement and to maintain the status quo during the period between the ICA's Effective Date and the time when the transition is complete. Transition provisions very similar to those proposed by AT&T Michigan were approved in the *Sprint Illinois Arbitration Decision*. For a number of reasons, Sprint's competing transition language does not accomplish these goals. (Pellerin at 106-116; Anglin at 51-52.)

The transition provisions that AT&T Michigan proposes for Attachment 2, sections 1.2 through 1.2.1.2.3 and 3.5.4 are necessary because of the differences between the parties' existing CMRS model interconnection arrangement and a section 251(c)(2) model Interconnection arrangement. Pellerin at 109. When the ICA resulting from this arbitration goes into effect, the parties will still be interconnected pursuant to the existing arrangement. It is not possible to "flash cut" from the existing arrangement to the new arrangement at the moment the ICA becomes effective. *Id.* This is because under the existing CMRS model network arrangement, Sprint uses the same transport facilities, obtained from AT&T Michigan's access tariff, to carry

all of its traffic between its location(s) and AT&T Michigan's locations, including traffic that is not exchanged with customers of AT&T Michigan, *i.e.*, non-Interconnection traffic.

Consequently, as part of the transition from the existing CMRS interconnection model to a section 251(c)(2) interconnection model, Sprint will have to obtain Interconnection Facilities that are dedicated to Interconnection traffic, and that are separate from the transport facilities used for backhaul and other forms of traffic that are not eligible for transport over TELRIC-priced Interconnection Facilities. *Id.* at 109-110.

As AT&T Michigan witness Bill Anglin discusses, this will require extensive work by AT&T Michigan's Network Planning and Engineering ("NP&E") organization to ensure that the transition does not impact customer service. For example, NP&E will have to determine the availability of the transport facilities and the equipment needed to activate fiber, perform multiplexing, and terminate the Interconnection Facilities. Other tasks, such as providing additional power, floor space and HVAC needed for any new equipment, may also be required. Anglin at 52-53.

AT&T Michigan's proposed transition language is required to maintain the status quo during the period between the ICA's Effective Date and the time when the conversion to a section 251(c)(2) Interconnection arrangement is complete. Pellerin at 109. Transition provisions very similar to those proposed by AT&T Michigan were approved in the *Sprint Illinois Arbitration Decision* (at 30-31). For the following reasons, AT&T Michigan's proposed transition provisions are reasonable and should be adopted.

First, AT&T Michigan's proposal recognizes that it is Sprint's choice whether to proceed with the transition to a section 251(c)(2) model or continue operating pursuant to the parties' existing arrangement. Until Sprint makes such a request, the parties will maintain the status quo

interconnection and billing arrangement. Accordingly, AT&T Michigan's language (GT&C, section 2.100, Attachment 2, sections 1.2.1, 1.2.1.1, 1.2.1.1.1; Pricing Schedule, section 1.2.1, Pricing Sheets, Line 310) provides that AT&T Michigan will continue to bill Sprint for special access facilities just as it does today, using the same shared facility factor ("SFF") the parties use today. Either party can request a review of the SFF, just as they can in the current ICA. Sprint has the option of ending the SFF arrangement at any time (Attachment 2, section 1.2.1.1.2).

Pellerin at 107.

Second, AT&T Michigan's language provides that, once Sprint notifies AT&T Michigan that it intends to transition to TELRIC-based pricing, the parties will meet to establish a mutually agreeable transition plan over a reasonable period of time (Attachment 2, section 1.2.1.2).

Unless otherwise agreed by the parties, the transition plan will include all of Sprint's facilities currently subject to the SFF. If the parties cannot agree on a transition plan, the parties may use the ICA's dispute resolution process. AT&T Michigan proposes that the transition itself not begin until the plan is in place and that Sprint will follow the plan (section 1.2.1.2.1). The transition plan is important because it will provide the parties with a roadmap to follow that will permit them to complete the transition in an orderly manner without exceeding AT&T Michigan's ability to handle the volume of orders required. This is consistent with AT&T Michigan's proposal to handle the transition as a "project" (section 3.5.4). Pellerin at 107-108.

Third, AT&T Michigan's proposal provides that once the transition has begun (or has been completed), Sprint cannot revert to the existing CMRS arrangement, including application of the SFF, unless mutually agreed (section 1.2.1.2.2). AT&T Michigan has agreed to provide Sprint with a section 251(c)(2) compliant interconnection arrangement upon Sprint's request, and has voluntarily agreed to maintain the existing CMRS interconnection arrangement pending the

completion of a requested transition. But AT&T Michigan is not willing to go back and forth between the two models; in other words, once the transition has begun, AT&T Michigan no longer volunteers to provide the existing arrangement.¹²³ Pellerin at 108.

Sprint's competing transition language proposals are unreasonable and should be rejected.

First, Sprint proposes that the existing SFF of 20% be replaced by a sharing factor of 50% immediately upon the Effective Date of the ICA. Sprint would not need to do anything; AT&T Michigan would simply reduce Sprint's special access bill (Attachment 2, sections 1.2.1, 3.5.1). This proposal is unreasonable and unlawful. Under section 251(c)(2) of the 1996 Act, AT&T Michigan is not obligated to bear 50% (or any other percentage) of the cost of Sprint's existing special access facilities that are used for interconnection. The voluntarily negotiated network interconnection provisions of the currently effective ICA between AT&T Michigan and Sprint vary from the requirements of section 251(c)(2). Pellerin at 111-112. Until the parties transition to the section 251(c)(2) model, under which AT&T Michigan is required to provide Sprint with access to existing Interconnection Facilities at TELRIC-based pricing, but under which sharing is not a requirement, AT&T Michigan is willing to maintain the status quo, pursuant to which the parties voluntarily negotiated provisions that support the currently effective 20% SFF. Once the parties are interconnected pursuant to section 251(c)(2), however, AT&T Michigan does not agree to be responsible for any facility costs on Sprint's side of the

¹²³ AT&T Michigan's language in section 1.2.1.2.2 leaves open the possibility that AT&T Michigan might volunteer to revert to the former arrangement at the time Sprint so requests.

POI, much less 50%. Moreover, for the reasons discussed in connection with Issue 24(a), there is no lawful basis for imposing such a sharing requirement on AT&T Michigan.¹²⁴ *Id.* At 112.

Second, Sprint's proposed language for Attachment 2, section 3.8.1 is unduly vague and could be interpreted to improperly require that AT&T Michigan change its billing for an existing special access facility from access rates to the ICA's TELRIC-based rates immediately upon the receipt of a Sprint request to transition the facility, but before the processing of the request has been completed and before the facility has actually been converted to an Interconnection Facility. Pellerin at 115. This language must be rejected because Sprint must do more than simply make a "request" in order to qualify for TELRIC-based pricing. As previously discussed, Sprint currently uses the same access facilities to carry both Interconnection and non-Interconnection (*i.e.*, Backhaul) traffic. Accordingly, if Sprint intends to use the same physical facilities for Interconnection that it is currently using for Interconnection, Sprint will also need to order separate access facilities for its non-Interconnection traffic (or lease from another carrier or self-provision) in addition to submitting an ASR to convert an existing facility from access tariff pricing to ICA pricing. AT&T Michigan should not be required to change its billing for a facility from access to TELRIC-based until (i) the processing of an ASR to convert a special access facility has been completed; and (ii) all non-Interconnection traffic has been removed from the facility. *Id.* The Illinois Commission agreed:

Sprint currently sends Section 251(c)(2) and non-251(c)(2) traffic over the same facilities. In order to qualify for TELRIC pricing, both Sprint and AT&T will need to perform network work to separate the facilities. Until this work has been done it is appropriate that the Sprint [sic] continue to be

¹²⁴ Furthermore, as explained for Issue 24(b), to the extent the Commission requires AT&T Michigan to share the cost of the Interconnection Facilities at all (and it should not) the appropriate sharing factor is either 15% or 20%, depending on whether Sprint is allowed to use Interconnection Facilities for IXC traffic.

billed according [to] AT&T's access tariffs. AT&T's transition language is adopted with the exception of 1.2.1.1.2.¹²⁵

Sprint Illinois Arbitration Decision at 31.

Third, Sprint's proposals related to conversion orders and the charges for such orders are confusing, internally inconsistent and unreasonable. For example, while Sprint's sections 1.2.1.2.1 and 3.8.1 state that AT&T Michigan may charge and Sprint will pay for the conversion orders it submits, those sections are contradicted by Sprint's proposed section 3.8.4, which states that AT&T Michigan will implement changes to existing Interconnection Facilities as "non-chargeable record-keeping billing adjustments at its own cost" and that *AT&T Michigan will not impose any charges of any type* on facilities for which Sprint has requested conversion to TELRIC-based ICA pricing. This would include any network costs associated with shifting Sprint's services from one facility to another so that only eligible services use TELRIC-priced Interconnection Facilities. In addition, Sprint's proposed section 3.8.4 would prohibit AT&T Michigan from charging Sprint any "rearrangement, disconnection, termination or other non-recurring fees that may be associated with" the conversion to the new Interconnection arrangement. Pellerin at 112-113.

Sprint's proposed language must be rejected because Sprint is the party seeking to change the parties' existing arrangement in order to avail itself of TELRIC-based pricing for Interconnection Facilities. Accordingly, as the Illinois Commerce Commission found, and as provided for in AT&T Michigan's proposed sections 1.2.1.2.1 and 3.5.4, Sprint should issue the required ASRs and, as the "cost causer," should bear the full cost of processing those orders,

¹²⁵ The Illinois Commission rejected AT&T Illinois' version of section 1.2.1.1.2 on the grounds that it allowed AT&T Illinois, as well as Sprint, to initiate a transition from the CMRS arrangement to a section 251(c)(2) arrangement. The Illinois Commission found that only Sprint should have ability to initiate such a transition. *Sprint Illinois Arbitration Decision* at 30. AT&T Michigan's proposed transition language gives Sprint sole discretion to initiate the transition and, therefore, does not include the language that was rejected by the Illinois Commission.

including the cost of any network connections and/or disconnections.¹²⁶ Pellerin at 113; *Sprint Illinois Arbitration Decision*, at 30 (“It is entirely appropriate that Sprint, as the cost causer, be required to issue standard ordering ASRs to effectuate the transition and bear the cost of processing those orders.”) (See also the above discussion for Issue 24(c)). In addition, there may be termination liability associated with the disconnection of existing access facilities – facilities for which Sprint would have received a lower price by committing to a term plan. Such term plans typically have early termination fees, and Sprint should not be exempt from those fees simply because it is voluntarily converting to a different arrangement with AT&T Michigan. Pellerin at 113.

Fourth, Sprint’s proposal contains no requirement for an agreed-upon transition plan. Instead, Sprint would be able to issue as many (or as few) ASRs as it chooses for whatever facilities it chooses and whenever it chooses. In support of this omission, Sprint incorrectly suggests that the transition will be very simple and easy to implement. That is simply not the case for AT&T Michigan, which must manage Sprint’s conversion orders and handle 100% of the various billing permutations. As previously discussed, a transition plan is important because it will allow AT&T Michigan to handle Sprint’s conversion orders on an orderly basis without exceeding AT&T Michigan’s ability to handle the volume of orders required. Without a plan, AT&T Michigan cannot commit to being able to satisfy Sprint’s orders on time, a result that will serve no one. Pellerin at 114.

Fifth, under Sprint’s proposed language, it would be permitted to bounce back and forth on a facility-by-facility basis between two very different interconnection models. Handling a

¹²⁶ Sprint uses the term “rearrangement” in section 3.8.4. However, there is no single activity that constitutes “rearrangement.” Rather, there are connections, disconnections, and ordering activities that may collectively result in a different network arrangement.

transition between interconnection models, which has never been done before, with the potential billing complexities Sprint has introduced, will be challenging enough.¹²⁷ Requiring AT&T Michigan to maintain both models indefinitely and permitting Sprint to switch back and forth between them is unworkable and unreasonable. Furthermore, the Commission cannot *require* AT&T Michigan to provide an interconnection arrangement that does not comply with section 251(c)(2). Pellerin at 114. Therefore, once Sprint transitions from the voluntarily negotiated CMRS interconnection arrangement to a section 251(c)(2) arrangement, AT&T Michigan should not, and cannot legally, be forced to go back to the CMRS arrangement.

For all the reasons discussed, the Commission should approve AT&T Michigan's proposed transition language in Attachment 2, section 1.2, entitled "Transition," which includes subsections 1.2.1 through 1.2.1.2.3 and the related definitional and pricing provisions, as well as section 3.5.4.

III. RATING AND ROUTING ISSUES (ISSUES 16, 17 AND 18)

ISSUE 16: WHAT PROVISIONS SHOULD BE INCLUDED IN THE ICA REGARDING THE TRANSMISSION AND ROUTING OF TRAFFIC TO OR FROM AN IXC?

AT&T Michigan Position: Traffic between Sprint and IXCs is switched access traffic that should continue to be routed over equal access facilities. (Pellerin at 125-132.)

Issue 16 raises the question of whether IXC traffic in two closely-related scenarios should be routed over Interconnection Facilities or equal access (*i.e.*, switched access) facilities. The analysis for each scenario is the same.

¹²⁷ The billing complexities will be even more extensive if the Commission adopts Sprint's proposal for pro rata pricing between tariffed special access charges and the ICA's TELRIC-based rates (Issue 22).

1. Traffic from an IXC to Sprint to AT&T Michigan – Section 4.8.9

AT&T Michigan Position – Route over Access Facilities
Sprint Position – Route over Interconnection Facilities

Section 4.8.9 concerns traffic that Sprint receives from an IXC and hands off to AT&T Michigan for termination to an AT&T Michigan end user. Pellerin at 129. This is traditional switched access traffic and should continue to be routed over equal access facilities. As we explain in Issues 11 and 14, nothing in the FCC’s *CAF Order* changes that result. While the *CAF Order* establishes a nationwide plan to reduce and eliminate some (but not all) access charges, it does so in a “gradual, measured transition that will facilitate predictability and stability.” *CAF Order* at ¶ 35. Some changes to switched access take as long as nine years to implement. *Id.* Sprint’s proposal would eliminate the transport components of switched access charges immediately and would thereby interfere with the FCC’s nation-wide transition plan. The Illinois Commission agreed with AT&T on this point and adopted the same language that AT&T Michigan proposes here (“Sprint shall not route traffic it receives from or through an IXC...over the Interconnection Trunks...”). *Sprint Illinois Arbitration Decision* at 19-20.

The ICC Staff strongly supported AT&T’s position on this point and argued that if Sprint were “to deliver such traffic over Interconnection Trunks rather than Switched Access Service Trunks under the ICA, then Sprint would be able to avoid certain switched access charges that would otherwise be appropriate.” *Id.* This would lead all IXCs to do the same thing to avoid switched access charges. “This outcome would be counter to the *CAF Order*, because it would result in a relatively immediate elimination of certain access charges when the *CAF Order* created a transition period.” *Id.* Finally, the Illinois staff argued that “the FCC has long restricted the ability of carriers to obtain 251(c)(2) interconnection for interexchange purposes and nothing in the *CAF Order* or any other Order would remove these restrictions and permit

Sprint to use 251(c)(2) interconnection trunks acquired from AT&T priced at TELRIC for interexchange purposes.” *Id.*

Sprint argues that the IXC traffic qualifies as Interconnection traffic and can therefore be placed over Interconnection Facilities. For all the reasons explained in the discussion of Issues 11 and 14, above, this is not Interconnection traffic subject to section 251(c)(2) because calls between IXCs and AT&T Michigan’s end users are not the “mutual exchange of traffic” between Sprint and AT&T Michigan. Therefore, section 4.8.9 should state that any calls Sprint receives from an IXC that are destined for an AT&T Michigan end office switch should not be routed to Interconnection trunks, which ride facilities obtained at TELRIC-based pricing. Those calls should be routed to trunks riding tariffed switched access service facilities.

There is another reason to adopt AT&T Michigan’s language – it addresses the traffic arbitrage scheme that arose in the “Halo” dispute.¹²⁸ This is described in the *CAF Order* at ¶¶ 1003-1008 and is explained in Issue 2, above. Halo engaged in a classic rate-arbitrage scheme in which it received *wireline*, interexchange traffic that was unquestionably subject to switched access charges and claimed it was *wireless* traffic because it was “re-originated” as it passed through Halo’s network. The FCC rejected Halo’s argument and found that this traffic was subject to switched access charges. *CAF Order* at ¶1006.

AT&T Michigan’s language would minimize the opportunity for such a scheme because it would stop carriers from routing traffic they receive from an IXC to Interconnection Trunks.

AT&T Michigan is not suggesting that Sprint would engage in the type of access avoidance scheme in which Halo engaged. But interconnection agreements can be adopted by

¹²⁸ AT&T Michigan filed a complaint against Halo on April 9, 2012. *In the matter of the complaint of Michigan Bell Telephone Company d/b/a AT&T Michigan against Halo Wireless, Inc. to authorize AT&T Michigan to discontinue service to Halo Wireless, Inc. and for other relief*, MPSC Case No. U-17018. The matter was resolved through mediation and was not fully litigated in Michigan.

other carriers under section 252(i) of the 1996 Act (47 U.S.C. § 252(i)), so it is appropriate to make sure that no carrier can use this agreement for access avoidance. In any event, if Sprint is not going to engage in that conduct, it should have no objection to placing section 4.8.9 in the ICA.

Sprint argues that it agrees to AT&T Michigan’s proposal for section 4.8.9, subject to “two small clarifications.” Felton at 57. The first “clarification” is not small and would, in fact, gut the proposal. That is because Sprint proposes to limit section 4.8.9 to *wireline*-originated traffic that routes from or through an IXC and is forwarded by Sprint to AT&T Michigan. This is no limit at all, because Sprint has already agreed that it will not deliver wireline-originated traffic to AT&T Michigan. See GT&C, section 3.11.2.1.1; Pellerin at 130. Sprint’s “clarification” would make section 4.8.9 meaningless.

The second “clarification” would have the same effect. Sprint proposes to add the words “Subject to Section 3.11.2.1.2 of the General Terms and Conditions....” This language is presumably intended to give Sprint the ability to re-litigate this issue in the event Sprint exercises its right under section 3.11.2.1.2 to negotiate an amendment to cover wireline traffic. This is not a reasonable request. Issue 16 calls for the Commission to decide whether Sprint can route IXC traffic over Interconnection Facilities. If the answer is that Sprint cannot, Sprint should not be permitted to re-litigate that question if it later on decides to seek an amendment to add wireline traffic to the ICA.

2. **Traffic Between an IXC and Sprint that Goes Through AT&T Michigan – Section 4.10.3**

AT&T Michigan Position – Route over Access Facilities
Sprint Position – Route over Interconnection Facilities

Section 4.10.3 concerns traffic between an IXC and Sprint that is routed through an AT&T Michigan access tandem. Here again, AT&T Michigan’s language makes clear that – consistent with historical practice – Sprint traffic to or from an IXC via AT&T Michigan’s access tandem must be routed over equal access (*i.e.*, switched access) trunks. Sprint’s language would allow it to “elect” whether or not to route this traffic over equal access trunks. For all the reasons explained above and in Issues 11 and 14, nothing in the *CAF Order* eliminates the requirement to treat IXC traffic as switched access traffic. Moreover, contrary to Sprint’s claim, IXC traffic is not section 251(c)(2) (*i.e.*, “Interconnection”) traffic because there is no mutual exchange of traffic between AT&T Michigan and Sprint. The Commission should therefore reject Sprint’s language for section 4.10.3.

In the Illinois proceeding, the Illinois Staff agreed with AT&T that Sprint traffic to and from an IXC that passes through the AT&T network *must* be (not *may* be) routed over equal access trunk groups.¹²⁹ While Staff recommended some minor changes to AT&T’s language, the main thrust of AT&T’s position on this issue was adopted and the Illinois Commission required Sprint to route IXC traffic over equal access trunks.¹³⁰

Sprint argues that AT&T Michigan would “reap a financial windfall” if it prevails on this issue (Felton at 58) but that cannot be true. Sprint is treating IXC traffic as switched access traffic today and is routing such traffic over equal access trunks. Pellerin at 129. Preserving the *status quo* with respect to switched access services will not produce a financial windfall for AT&T Michigan.

¹²⁹ *Sprint Illinois Arbitration Decision* at 18-19. In Illinois, the disputed language appeared in section 4.10.3.1, not 4.10.3.

¹³⁰ *Sprint Illinois Arbitration Decision* at 20.

Sprint also argues that IXC-to-Sprint traffic is “for AT&T’s benefit” and should therefore be placed on Interconnection Facilities. Sprint Br. at 113. Sprint is wrong. The traffic in question is from an IXC bound for a Sprint customer, and AT&T Michigan is following Sprint’s instructions in the LERG by handing off the call to Sprint, where it belongs. Pellerin at 126. In any event, Sprint’s argument is completely beside the point because even if AT&T Michigan somehow benefits from handling this traffic, it does not change the fact that it is IXC traffic that must continue to be treated as switched access.

Finally, Sprint argues that it should not be required to route IXC traffic over switched access facilities because it will not send any such traffic to AT&T Michigan. Sprint Br. at 113. The simple answer, of course, is that if Sprint is not going to send such traffic to AT&T Michigan, then it should have no objection to putting AT&T Michigan’s language in the ICA. In fact, Sprint’s argument amounts to an admission that it will not be affected by AT&T Michigan’s language, so the language should be included.

In any event, Sprint’s argument does not address the very real concern that the ICA can (and likely will) be adopted by other carriers, so Sprint’s representations about its own future conduct, even if true, should not persuade the Commission to reject AT&T Michigan’s proposal that Sprint send traffic to and from an IXC over switched access transport facilities rather than the Interconnection Facilities.

Section 4.10

AT&T Michigan is willing to accept Sprint’s language for section 4.10 as it appears in Sprint’s Proposed ICA and in Sprint’s DPL. Pellerin at 132. This language reads as follows:

“4.10 Miscellaneous *Transmission and Routing*”

Sprint's brief discusses different language. Sprint Br. at 112. Just to be clear, AT&T Michigan is not agreeing to the language in Sprint's brief. This should not be a concern, however, since it is the language in the Proposed ICA and the DPL that is being arbitrated, and not the superfluous language Sprint mentions for the first time in its brief.

In sum, AT&T Michigan's proposals for section 4.8.9 and section 4.10.3 should be adopted because they preserve the status quo with respect to the treatment of switched access traffic and because they provide reasonable protection against access avoidance schemes. The Commission should include this language in the ICA.

ISSUE 17:

SPRINT ISSUE STATEMENT: SHOULD EITHER PARTY BE ALLOWED TO ROUTE ANY OF THEIR RESPECTIVE ORIGINATING INTERMTA TRAFFIC TO THE OTHER PARTY OVER INTERCONNECTION FACILITIES?

AT&T ISSUE STATEMENT:

ISSUE 17(a): SHOULD SPRINT BE ALLOWED TO ROUTE ITS ORIGINATING INTERMTA TRAFFIC TO AT&T OVER INTERCONNECTION FACILITIES?

ISSUE 17(b): SHOULD AT&T BE ALLOWED TO ROUTE OVER INTERCONNECTION FACILITIES TRAFFIC TO SPRINT THAT IS INTERMTA BECAUSE THE SPRINT CUSTOMER HAS ROAMED OUTSIDE THE MTA?

AT&T Michigan Position: Sprint mobile-to-land InterMTA traffic is switched access traffic that should be routed over equal access facilities. Land-to-mobile traffic that appears to be IntraMTA at the start of the call, but which turns out to be InterMTA because the Sprint wireless customer roamed outside the MTA, may be routed over Interconnection facilities. (Pellerin at 133-137.)

Issue 17 raises the question of whether two different types of traffic exchanged between the parties should be routed over Interconnection Facilities or equal access (*i.e.*, switched access) facilities. Both traffic types are discussed below.

1. Sprint InterMTA Traffic Terminating to AT&T Michigan – Section 4.10.4

AT&T Michigan Position – Route over Access Facilities

Sprint Position – Route over Interconnection Facilities

This is Sprint-originated traffic that originates and terminates in different Major Trading Areas (“MTAs”). This traffic is properly treated as switched access traffic, *i.e.*, it is subject to switched access charges and must be carried over switched access (*i.e.*, equal access) facilities. See Issue 20, below. Accordingly, AT&T Michigan’s proposed language in section 4.10.4 correctly requires Sprint to route this traffic over switched access trunks and transport facilities.

An MTA is the geographic area within which a CMRS call is considered “local” for purposes of reciprocal compensation. Calls that originate and terminate within the same MTA were previously subject to reciprocal compensation (and under the *CAF Order* are now subject to bill-and-keep). Calls that originate and terminate in different MTAs were (and still are) subject to switched access charges, as the FCC has explained.¹³¹ This is the way InterMTA traffic has been exchanged between AT&T Michigan and Sprint (and all other wireless carriers) for years, and the way it is exchanged pursuant to the existing ICA. Pellerin at 133, 160. Nothing has happened to change this long-standing practice.

Sprint argues that its InterMTA traffic should not be treated as switched access traffic because it is not “toll” traffic, and therefore is not “exchange access” traffic under section 153(16) of the Act. Felton at 60. This issue is thoroughly addressed in Issue 20, so AT&T Michigan will not repeat those arguments here. Suffice it to say that Sprint’s creative theory has not been adopted by the FCC and has been rejected by at least two courts. *Global NAPs, Inc. v.*

¹³¹ *Local Competition Order* at ¶1036. (“Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.”)

Verizon New Eng., Inc., 454 F.3d 91, 98 (2d Cir. 2006); *Line Systems, Inc. v. Sprint Nextel Corporation*, 2012 WL 3024015, at **3, 4, Civil Action No. 11–6527 (E.D. Pa. July 24, 2012). It was also rejected by the Illinois Commission. *Sprint Illinois Arbitration Decision at 19*. (“Sprint’s argument that this is section 251(c)(2) traffic because Sprint offers its customers nationwide local calling plans is without merit.”)

Nor has the *CAF Order* changed the fact that InterMTA traffic is properly considered to be switched access traffic. On the contrary, immediate implementation of bill-and-keep in the *CAF Order* applies only to “non-access telecommunications traffic,” defined in 47 C.F.R. §51.701(b)(2) as “telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in §24.2029a) of this chapter,” *i.e.*, IntraMTA traffic. The FCC did not abandon the treatment of InterMTA traffic as switched access during the transition to bill-and-keep, for terminating traffic. Instead, the FCC preserved existing access arrangements, while stepping down the rates over six years. *CAF Order* at ¶ 995. It is only with respect to non-access (*i.e.*, IntraMTA) traffic that the FCC singled out the traffic between LECs and CMRS providers for special treatment, *i.e.*, the immediate implementation of bill-and-keep. Access (*i.e.*, InterMTA) traffic between LECs and CMRS providers is subject to the same “glide path to a bill and keep methodology for access charges generally” to which IXC-to-LEC access traffic is subject.¹³²

The Illinois Commission adopted AT&T Michigan’s position on this issue. *Sprint Illinois Arbitration Decision at 19*. According to the Illinois Commission “[t]he *CAF Order* does not change the way InterMTA traffic is handled.”

¹³² As Illinois Staff witness Dr. Rearden pointed out, “The FCC made it quite clear in its *CAF Order* that InterMTA traffic was to be viewed as access traffic for purposes of intercarrier compensation. In particular, the FCC’s reform timeline does not make sense if it simply wanted all CMRS traffic, including InterMTA traffic, immediately reset to bill and keep.” Direct Testimony of Dr. David Rearden in ICC Docket No. 12-0550 (Feb. 2, 2013) at 26.

Sprint raise two additional arguments in support of its position. First, it asserts that AT&T Michigan’s proposal could require it to maintain three sets of trunking and transport facilities. Felton at 60. As Ms. Pellerin explains, Sprint can combine intraMTA and IXC traffic over “combined equal access trunks,” so the most it would need are two sets of trunks. Pellerin at 134. This would be reduced further to just one trunk group if Sprint routed its interMTA traffic through an IXC. Ultimately, it is up to Sprint to Decide how many sets of trunks and transport facilities it will establish.

Second, Sprint argues that AT&T Michigan’s language is “technically infeasible” because “there will always be some interMTA mobile-to-land calls that are delivered ... along with intraMTA calls.” Sprint Br. at 114; Felton at 61. AT&T Michigan recognizes that because mobile service is used by customers that are physically moving from place-to-place, it can be difficult to know whether some calls are InterMTA or IntraMTA. This is addressed in AT&T Michigan’s proposal for Attachment 2, sections 6.5.1.2 and 6.5.1.3, which call for development of an “InterMTA Factor” to identify the amount of terminating InterMTA traffic that Sprint sends to AT&T Michigan along with IntraMTA traffic over Interconnection Facilities. Thus, the ICA already addresses and resolves this Sprint argument. Stated another way, AT&T Michigan’s language is correct; all InterMTA traffic should be routed over switched access services trunks and facilities. To the extent Sprint cannot do this for traffic that is difficult to identify, the ICA has a built-in mechanism to allow proper treatment of that traffic from a billing and compensation perspective.

2. AT&T Michigan Incidental InterMTA Traffic Terminating to Sprint – Section 4.10.5

AT&T Michigan Position – Route over Interconnection Facilities
Sprint Position – Route over Interconnection Facilities

The dispute in section 4.10.5 involves AT&T Michigan-originated calls that appear to be *IntraMTA* based on the calling and called parties' telephone numbers, but are in fact *InterMTA* because the called party has roamed out of the MTA associated with his/her telephone number. In this situation, AT&T Michigan does not know that the Sprint end user is located outside of the MTA and that the call is actually an InterMTA call. Accordingly, AT&T Michigan routes the call over the Interconnection Facilities as though it were a normal IntraMTA call. Pellerin at 135.

AT&T Michigan and Sprint have been routing incidental land-to-mobile InterMTA traffic in this way for years, and there is no reason to change this practice now. There is only a small amount of InterMTA traffic that is handled this way. The vast majority of InterMTA traffic from AT&T Michigan to Sprint is routed over access facilities to a customer's selected IXC. *Id.*

Sprint does not oppose this routing of traffic, in concept. On the contrary, Sprint's position is that "all calls between the Parties' switches" should be carried over Interconnection Facilities. Sprint Br. at 96. Nonetheless, Sprint does not affirmatively agree to include the language in the ICA. It simply asserts that the language in section 4.10.5 is "unnecessary." Sprint Br. at 115.

Sprint's only substantive argument against the proposed language is that it would be a "gross inequity" to allow AT&T Michigan to route land-to-mobile traffic over the Interconnection facilities while requiring Sprint to route mobile-to-land traffic over switched access facilities. Felton at 61. The difference is that Sprint knows where its customer is located at the beginning of a mobile-to-land call because it knows the cell tower its customer uses to initiate the call and it knows the location of the terminating end office that serves the non-mobile

AT&T Michigan customer. The situation is different when an AT&T Michigan customer calls a Sprint customer. In that situation, AT&T Michigan knows the location of its end user (that location does not change), but has no way of knowing the location of the Sprint customer being called. That customer could be in his or her home MTA, or could be travelling thousands of miles away.

The Illinois Commission understood this distinction and adopted AT&T's language. ("For these types of calls, AT&T cannot tell that it will ultimately be an InterMTA call and, therefore, AT&T may route these over Interconnection Facilities as though it were a normal IntraMTA call.") *Sprint Illinois Arbitration Decision* at 20. Nothing has changed since the June 26, 2013 date of the Illinois order and the Michigan Commission should make the same determination in this case.

ISSUE 18: SHOULD THE ICA STATE THAT THE PARTIES WILL ABIDE BY THE ORDERING AND BILLING FORUM'S GUIDELINES REGARDING JIP?

AT&T Michigan Position: The existing ICA relies on cell-site data to develop traffic studies so AT&T Michigan will know whether to bill traffic as InterMTA or IntraMTA, and that process needs to continue. Accurate JIP information helps to verify whether the traffic studies are accurate and should be provided by Sprint in accordance with industry guidelines. (Pellerin at 137-140.)

AT&T Michigan proposes language that would require both parties to abide by the 2004 resolution of the Ordering and Billing Forum's ("OBF") Issue 2308 ("Recording and Signaling Changes Required to Support Billing"). The OBF is an industry group that provides a forum for customers and providers in the telecommunications industry to identify and resolve national issues that affect ordering, billing, provisioning and exchange of information about services.

Both AT&T and Sprint participate in the OBF, and each company has a representative on the Board of Directors of ATIS, the entity that oversees the OBF.¹³³

OBF Issue 2308 addresses the rules associated with the population of the Jurisdictional Information Parameter (“JIP”) in call data records. Pellerin at 139. JIP is a field in the call data record that can be used as a validation tool for classifying mobile-to-land traffic as either IntraMTA or InterMTA. Pellerin at 137-138. While JIP data, standing alone, does not identify whether a call is IntraMTA or InterMTA, it is a valuable tool when used in conjunction with cell site data that identifies the location of the originating caller (which Sprint does provide) to validate the amount of mobile-to-land InterMTA traffic that Sprint sends to AT&T Michigan. Pellerin at 138. Simply stated, this data would assist AT&T Michigan to more accurately jurisdictionalize Sprint’s traffic and, therefore, to more accurately bill Sprint for switched access services.

Sprint opposes AT&T Michigan’s language, not because it would be difficult or expensive to provide the data, but because it would assist AT&T Michigan in distinguishing between IntraMTA and InterMTA traffic – something that Sprint argues is irrelevant because, in Sprint’s view, all traffic is treated the same for purposes of the intercarrier compensation that must be paid and the transport facilities that may be used. Felton at 62. As AT&T Michigan has explained, however, Sprint is fundamentally mistaken in this view. The parties must continue to distinguish between IntraMTA and InterMTA traffic, both for purposes of the intercarrier compensation to be paid and the transport facilities to be used. Since accurately populating JIP in call data records (*i.e.*, in accordance with OBF guidelines) would assist in making this distinction, it should be required.

¹³³ <http://www.atis.org/about/board.asp>

Sprint also opposes AT&T Michigan's proposal on the grounds that the OBF determined in 2004 that the use of JIP is an "unworkable solution" for identifying the jurisdiction of the call. Again, this is beside the point. AT&T Michigan does not ask for the JIP data to be used to conclusively determine whether a particular call is InterMTA or IntraMTA. Rather, the information is to be used to *validate* other (*i.e.*, cell site) information provided by Sprint for this purpose.

Sprint's language is not appropriate because it does not obligate Sprint to follow the OBF guidelines when populating the JIP, making its JIP data completely unreliable. If Sprint does not follow the guidelines (which would identify the originating *switch*), whatever Sprint places in the call records will be unreliable for any purpose, including data validation. Pellerin at 138-139. Further, it affirmatively interferes with the use of that data by requiring an "agreement" by AT&T Michigan that the data is no good for certain purposes. That is unreasonable. The data is what the data is. To the extent that the data is correct and reliable, the ICA should not prevent a party from relying on it for purposes of verifying the accuracy of bills.

Finally, Sprint itself recognizes the value of JIP data. In fact, it successfully urged the Kentucky Public Service Commission to require a Kentucky ILEC to populate the JIP data field to determine whether traffic is InterMTA or IntraMTA. Order, *In the Matter of Complaint of Sprint Communications Company L.P. Against Brandenburg Telephone Company for the Unlawful Imposition of Access Charges*, Case No. 2008-00135, 2009 WL 9041701, (Ky. Pub. Serv. Comm'n Nov. 6, 2009), at 6, 7. There, Sprint argued that "use of the JIP field is the most appropriate method for verifying the jurisdiction of a wireless call." As a result of Sprint's advocacy, the Kentucky Commission ordered the parties to use JIP data for their InterMTA

billing. Having praised the value of JIP in Kentucky, Sprint cannot call it unnecessary in Michigan.

For these reasons, section 4.10.6 is commercially reasonable and the Commission should order that it be included in the ICA.

IV. TRAFFIC COMPENSATION AND RELATED TERMS AND CONDITIONS

(ISSUES 19, 20, 21, 22, 23, 24 AND 25)

ISSUE 19: SHOULD THE ICA IDENTIFY TRAFFIC THAT IS NOT SUBJECT TO BILL-AND-KEEP? IF SO, WHAT TRAFFIC SHOULD BE EXCLUDED?

AT&T Michigan Position: The Commission should adopt AT&T Michigan's proposed language that lists the types of traffic that are not subject to bill-and-keep under the ICA. (Pellerin at 155-58.)

As defined by the FCC, "bill-and-keep" refers to an arrangement in which "carriers exchanging telecommunications traffic do not charge each other for specific transport and/or terminating functions or services" (47 C.F.R. §51.713), *i.e.*, carriers do not charge each other reciprocal compensation. Rather, bill-and-keep requires each carrier to recover its costs of transport and termination from its own end users. In the *CAF Order* (§ 978), the FCC adopted bill-and-keep as the "default compensation for non-access traffic exchanged between LECs and CMRS providers." The bill-and-keep requirement applies only to "non-access" traffic, which is defined as "[t]elecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in §24.202(a) of this chapter." 47 C.F.R. §51.701(b)(2). Pellerin at 155-56.

The ICA should clearly identify traffic that is not subject to bill-and-keep to eliminate ambiguity and minimize disputes. Accordingly, AT&T Michigan proposes to include, in Attachment 2, sections 6.2.3 through 6.2.3.1.6, a list of traffic types that are not subject to bill-and-keep, including non-CMRS traffic, Toll-free calls, Third Party Traffic, InterMTA Traffic,

IXC Traffic, and any other types of traffic that is found to be exempt from bill-and-keep by the Commission or the FCC. Pellerin at 156.

“Non-CMRS Traffic” is properly included on this list because bill-and-keep should apply only to the transport and termination of IntraMTA Traffic between an AT&T Michigan end user and a Sprint end user. Further, with the exception of the traffic of third party wholesale customers of Sprint that use Sprint NPA-NXXs and any other CMRS providers’ roaming traffic, both of which are treated as Sprint end user traffic, there should not be any traffic exchanged pursuant to the ICA that does not either originate from or terminate to a Sprint end user. To the extent there is any such traffic, however, it would not be classified based on MTA boundaries and would therefore not be eligible for IntraMTA bill-and-keep compensation. Pellerin at 156-57.

“Toll free calls” are properly included on the list because they are access calls that remain subject to the existing access charge regime and are therefore exempt from bill-and-keep. Pellerin at 157.

“Third Party Traffic” is properly included because, by agreed definition, it is “traffic carried by AT&T MICHIGAN acting as an intermediary that is originated and terminated by and between Sprint and a Third Party Telecommunications Carrier.” As such, this traffic is not subject to reciprocal compensation with respect to AT&T Michigan and Sprint. It is therefore appropriate to also exclude it from the bill-and-keep provisions of the ICA. Pellerin at 157.

“InterMTA Traffic” is properly included on the list because the FCC adopted bill-and-keep only for IntraMTA traffic. Contrary to Sprint’s claim, the FCC did not establish bill-and-keep as the compensation mechanism for so-called Non-Toll InterMTA Traffic. (See discussion of Issues 3, 20 and 22, below). Similarly, the FCC did not adopt bill-and-keep for IXC traffic,

which continues to be subject to the FCC's access charge regime. Accordingly, it is appropriate to expressly exclude "IXC traffic" from the traffic subject to bill-and-keep. Pellerin at 157-58.

ISSUE 20: WHAT TERMS SHOULD BE INCLUDED IN THE ICA GOVERNING COMPENSATION FOR TERMINATING INTERMTA TRAFFIC?

AT&T Michigan Position: AT&T Michigan's proposal to continue to apply access charges to terminating InterMTA traffic is consistent with the terms of the parties' currently effective ICA, universally accepted industry practice, and the rules and orders of the FCC. Sprint, on the other hand, argues that all InterMTA traffic that it delivers to AT&T Michigan should be exempt from switched access charges, and instead should be subject to bill-and-keep, based on a purported distinction between "toll" and "non-toll" InterMTA traffic. Sprint's position is inconsistent with the FCC's orders and rules governing intercarrier compensation, including the *CAF Order*, which make no distinction between "toll" and "non-toll" InterMTA traffic, and Sprint's arguments have been expressly rejected by the courts. (Pellerin at 158-181.)

Issue 20 concerns the appropriate compensation when AT&T Michigan terminates InterMTA mobile-to-land calls delivered to it by Sprint. AT&T Michigan's proposed language maintains the *status quo*, whereby such traffic is subject to tariffed terminating access charges. Sprint, on the other hand, proposes that all InterMTA traffic be made subject to bill-and-keep, immediately upon the ICA's effective date. The Commission should reject Sprint's proposal and adopt AT&T Michigan's.

A. Access Charges Apply To InterMTA Traffic.

There is no question that Sprint's proposal to evade access charges on InterMTA traffic is unprecedented. Under established industry practice – which is reflected in the parties' current ICA – CMRS providers pay local exchange carriers ("LECs") terminating access charges for mobile-to-land InterMTA calls, just as wireline long distance carriers pay those charges for the termination of long distance calls. That is because, when a CMRS provider transports its traffic across MTA boundaries, it is essentially acting as an interexchange carrier for its end users. Just like a traditional wireline long distance carrier, it thus obtains "access" from the LEC (here,

AT&T Michigan) to complete the call, and is subject to access charges to reimburse the LEC for its costs in completing the call. *See Pellerin* at 159-60.

This established industry practice reflects the FCC's long-standing rules regarding access charges. In 1996, the FCC held that "[t]he Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic." *Local Competition Order*, ¶ 1033. It concluded that, pursuant to section 251(g) of the 1996 Act (47 U.S.C. § 251(g)), "LECs must continue to offer tariffed interstate service as they did prior to the enactment of the 1996 Act," and found that the "reciprocal compensation provisions of Section 251(b)(5) for transport and termination of traffic do not apply to the transport and termination of interstate or intrastate interexchange traffic." *Id.* ¶ 1034. Applying this to CMRS traffic, the FCC concluded that the MTA should be used to define which traffic is treated as interexchange traffic subject to access charges (InterMTA traffic), and which is treated like local traffic subject to reciprocal compensation charges (IntraMTA traffic):

[I]n light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under section 251(b)(5). Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA). Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. *Accordingly, traffic to or from a CMRS network*

that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.

Id. ¶ 1036 (emphasis added). The FCC made clear that “the geographic locations of the calling and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate and intrastate access charges.” *Id.* ¶ 1044. *See also id.* ¶ 1043 (“We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties’ locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges.”).

The FCC preserved this distinction in its *CAF Order*. *See CAF Order*, ¶ 987 (the intraMTA rule “provides that traffic between a LEC and a CMRS provider that originates and terminates within the same Major Trading Area (MTA) is subject to reciprocal compensation obligations rather than interstate or intrastate access charges”). The *CAF Order* rules divide the universe of telecommunications traffic into two basic categories: (1) “Non-Access Telecommunications Traffic,” and (2) “Access” traffic. (The former is addressed in Subpart H of the Part 51 Rules, and the latter in Subpart J.) Sprint’s InterMTA traffic must fall into one of these two categories and, contrary to Sprint’s position, it is crystal clear that InterMTA traffic is *not* Non-Access Telecommunications Traffic subject to bill-and-keep. With respect to CMRS traffic, the rules specify that “Non-Access Telecommunications Traffic means . . . Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area,” and provide that such “Non-Access Telecommunications Traffic exchanged between a local exchange carrier and a CMRS provider . . . shall be pursuant to a bill-and-keep arrangement.” 47

C.F.R. §§ 51.701(b)(2), 51.705(a). Thus, only *Intra*MTA CMRS traffic is included within the scope of Non-Access Telecommunications Traffic subject to bill-and-keep. As a result, *Inter*MTA traffic can only be classified as “Access” traffic.

In short, as the Illinois commission recently concluded in rejecting Sprint’s proposal to avoid access charges, “the FCC made it quite clear in its *CAF Order* that *Inter*MTA traffic was to be viewed as access traffic for purposes of intercarrier compensation.” Illinois Arbitration Decision at 62. This Commission should reach the same conclusion. As explained in more detail below, none of Sprint’s arguments to the contrary hold water.

1. Sprint’s argument regarding “locally-dialed” mobile-to-land *Inter*MTA traffic is a red herring.

In an attempt to garner superficial support for its position, Sprint points to some prior Commission decisions holding that reciprocal compensation charges, rather than access charges, applied to certain “locally-dialed” *wireline* calls, and it asserts that the issue here is “locally-dialed” mobile-to-land *Inter*MTA traffic. *See* Sprint Br. at 116-119. That is a red herring, because Sprint’s proposed language is not limited to “locally-dialed” *Inter*MTA traffic. Rather, Sprint seeks to avoid access charges on *all* *Inter*MTA traffic. This would include, for example, a call to an AT&T Michigan customer placed by a Sprint customer in California with a California telephone number – an *Inter*MTA call that is in no way “locally-dialed.”

While Sprint does not come out and say it, it may be that Sprint means to suggest that *all* its wireless traffic nationwide is “locally-dialed” in light of Sprint’s nationwide flat-rate calling plans. Any such suggestion would be baseless. For purposes of intercarrier compensation, the FCC has already established the local calling area of Sprint (and every other CMRS carrier), and defined it as the MTA. As noted above, in 1996 the FCC held that “in light of this Commission’s *exclusive authority* to define the authorized license areas of wireless carriers, *we*

will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation.” *Local Competition Order*, ¶ 1036 (emphases added). The FCC held that “the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation,” and hence “traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.” *Id.*

As a matter of federal law, neither Sprint nor this Commission have the authority to re-define Sprint’s local calling area for purposes of intercarrier compensation as anything other than the MTA, irrespective of what calling plans Sprint may choose to offer its customers. The FCC’s exclusive authority over such matters distinguishes this case from the prior Commission decisions cited by Sprint (at pages 117-119 of its brief) regarding certain types of “locally-dialed” wireline calls. In the wireline context, the Commission has authority to determine what areas are “local” for purposes of reciprocal compensation, and it previously concluded (until the enactment of Section 304(9) of the Michigan Telecommunications Act) that FX or VNXX traffic should be treated as “local” traffic. But that authority does not extend to CMRS traffic. Indeed, as the federal court noted in the very case Sprint relies upon, “[w]ith the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered “local areas” for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions’ historical practice of defining local service areas for wireline LEC’s.” *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 121 F. Supp. 2d 1104, 1110 (W.D. Mich. 2000) (emphases added) (quoting *Local Competition Order*, ¶ 1035). That state commission authority does not extend to CMRS traffic

and, as a result, the Commission must reject Sprint's invitation to re-define Sprint's InterMTA traffic as "local."

2. Whether Sprint charges its customers a separate "toll" for InterMTA calls is irrelevant.

The crux of Sprint's argument is that, according to Sprint, access charges should apply only to InterMTA traffic where Sprint charges its customer a separate "toll" (which, according to Sprint, it infrequently does in light of its nationwide flat-rate calling plans). Sprint relies upon a definition of "telephone toll service" in the Communications Act, dating from 1934, to argue that only "toll" InterMTA traffic with a "separate charge" can be "interstate or intrastate exchange access, information access, or exchange services for such access" subject to access charges. *See* Sprint Br. at 120-21. Sprint is wrong, because under the FCC's rules the applicability of access charges does not depend upon whether a "separate charge" is assessed.

The only courts that appear to have addressed the issue have *rejected* Sprint's argument that exchange access charges apply only to interexchange or InterMTA traffic that is "toll" traffic for which a "separate charge" is assessed. In particular, in *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 98 (2d Cir. 2006), the federal Court of Appeals for the Second Circuit expressly rejected the argument that long distance traffic is exempt from access charges if a carrier "imposes no separate toll charges." That argument "is beside the point" because "what really mattered in determining whether an access charge was appropriate was whether a call traversed local exchanges, not how a carrier chose to bill its customers." *Id.* Sprint argues (at 123) that the Second Circuit failed to "distinguish between calls with an 'extra charge' and calls within a 'home calling area,'" but that is precisely the point – the Court concluded that that purported distinction is immaterial to the applicability of access charges to non-local traffic. And, again, the FCC has conclusively ruled that the MTA is the local service area for CMRS

carriers for intercarrier compensation purposes, meaning InterMTA traffic is, by definition, non-local.¹³⁴ See also *Verizon Wireless (VAW) LLC v. Sahr*, 457 F. Supp. 2d 940, 951 (D.S.D. 2006) (“[i]nterMTA calls are non-local calls, whether intrastate or interstate, and are subject to access charges”).

Similarly, in *Line Systems, Inc. v. Sprint Nextel Corp.*, 2012 WL 3024015, *4 (E.D. Pa. July 24, 2012), the court rejected Sprint’s argument “that its decision not to charge its customers separate fees means that Line Systems does not provide Sprint ‘exchange access.’” “Sprint’s billing methods are . . . ‘beside the point,’” because “[t]he type of phone call, not Sprint’s approach to charging its customers, controls.” *Id.* The court deferred to the FCC’s “distinction between interMTA and intraMTA calls,” under which “InterMTA calls . . . are subject to tariff-based access charges.” *Id.* Sprint asserts (at 122) that *Line Systems* should be disregarded because it was “preliminary” and the case settled, but there was nothing tentative about the Court’s conclusion that “InterMTA calls, like the ones at issue in this case [*i.e.*, where Sprint did not charge its customers separate fees], are subject to tariff-based access charges” (2012 WL 3024015 at *4), and the fact that Sprint chose not to litigate the issue further is no basis to disregard the Court’s analysis.

Moreover, contrary to Sprint’s suggestion, these cases plainly were correctly decided. While Sprint relies upon an old definition from the Communications Act of 1934 referring to a “separate charge” (Sprint Br. at 120), those definitions are expressly inapplicable where “the context otherwise requires.” 47 U.S.C. § 153. This is precisely the case in the access charge context, because such charges have never been limited to traffic upon which a “separate charge”

¹³⁴ Sprint also observes (at 122) that the FCC subsequently concluded that ISP-bound traffic falls within the scope of section 251(b)(5), but that has no bearing on the Court’s conclusion that the applicability of access charges to non-local traffic does not turn upon a “separate charge.”

is made. The phrase “exchange access, information access, or exchange services for such access” comes from 47 U.S.C. § 251(g), which the FCC has explained was intended to preserve the access charge regime created by the 1982 AT&T Consent Decree. *ISP Remand Order*, ¶ 36 n.64. Under the AT&T Consent Decree, “exchange access” was not limited to the origination or termination of “toll” service. To the contrary, it was defined as “the provision of exchange services for the purpose of originating or terminating interexchange telecommunications,” as opposed to local traffic. *Id.* ¶ 37 n.65 (quoting *United States v. AT&T*, 552 F. Supp. 131, 228 (D.D.C. 1982)).

Consistent with the AT&T Consent Decree’s definition, in its 1996 *Local Competition Order* (¶ 1034) the FCC pointed to section 251(g) to conclude that “the reciprocal compensation provisions of section 251(b)(5) . . . do not apply to the transport or termination of interstate or intrastate interexchange traffic.” That is, the FCC drew a line between local and interexchange traffic, not between local and “toll” interexchange traffic. And applying this to CMRS traffic, the FCC drew a bright line between IntraMTA and InterMTA traffic. In particular, it held that “traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.” *Id.* ¶ 1036. Since 1996, the FCC has consistently hewed to this line. *See, e.g., ISP Remand Order*, ¶ 47 (“reciprocal compensation, rather than interstate or intrastate access charges, applies to LEC-CMRS traffic that originates and terminates within the same Major Trading Area”); *Developing a Unified Inter-carrier Compensation Regime*, 16 FCC Rcd. 9610, ¶¶ 6-7 (2001) (“access charge rules . . . govern the payments that [IXCs] and CMRS carriers make to LECs to originate and terminate long distance calls,” and CMRS carriers “pay access charges to LECs for CMRS-to-LEC traffic that is not considered local”); *Developing a*

Unified Intercarrier Compensation Regime, 20 FCC Rcd. 4685, ¶ 135 (2005) (“The purpose of the intraMTA rule is thus to distinguish access traffic from section 251(b)(5) CMRS traffic.”).

In short, the courts in *Global NAPs* and *Line Systems* reached the correct result. In the access charge context, since the AT&T Consent Decree, exchange access (to which access charges apply) has always meant the provision of exchange services for originating or terminating interexchange or non-local telecommunications. “[W]hat really mattered in determining whether an access charge was appropriate was whether a call traversed local exchanges, not how a carrier chose to bill its customers.” *Global NAPs*, 454 F.3d at 98.

Finally, contrary to Sprint’s suggestion, nothing in the *CAF Order* changed this distinction between access and non-access traffic. Rather, in the *CAF Order* the FCC retained its IntraMTA rule to distinguish between the CMRS traffic that is and is not subject to access charges. *CAF Order*, ¶ 987 (the IntraMTA rule “provides that traffic between a LEC and a CMRS provider that originates and terminates within the same Major Trading Area (MTA) is subject to reciprocal compensation obligations rather than interstate or intrastate access charges”). As explained above, the *CAF Order* establishes separate rules for “Non-Access Telecommunications Traffic” (addressed in Subpart H of the Part 51 Rules) and for “Access” traffic (addressed in Subpart J). InterMTA traffic *cannot* be classified as “Non-Access Telecommunications Traffic” subject to bill-and-keep, because the FCC’s rule specifically defines Non-Access Telecommunications Traffic to include CMRS traffic only when it “originates and terminates within the same Major Trading Area.” 47 C.F.R. § 51.701(b)(2). Thus, consistent with years of past precedent and industry practice, InterMTA traffic can only be classified as “Access” traffic.

3. Sprint’s remaining arguments are without merit.

Sprint also asserts (at 121) that “the FCC has recognized, in both its Universal Service docket and in the *CAF Order*, that whether a wireless carrier provides a ‘toll service’ depends on what it charges its end user.” Neither of those orders helps Sprint.

In the universal service order upon which Sprint relies, the FCC expressly stated that its “discussion of ‘toll services,’ ‘toll traffic,’ and ‘toll revenues’ in this order pertains *solely* to universal service contribution obligations,” and “[n]othing in this order is intended to address intercarrier compensation.” *In the Matter of Universal Service Contribution Methodology*, 23 FCC Rcd. 1411, n.29 (2008) (emphasis added). Sprint’s attempt to apply this order to intercarrier compensation thus is refuted by the order itself. In addition, the mere fact that the FCC made this comment, making clear that its analysis of “toll” service in the universal service context says nothing about intercarrier compensation, only reinforces that the FCC’s intercarrier compensation rules have never turned upon the “toll” distinction. Indeed, in the *CAF Order* proceeding, Sprint expressly urged the FCC to extend its analysis of toll services in the universal service order to the intercarrier compensation context, just as it asks the Commission to do here. The FCC refused to adopt Sprint’s analysis, and this Commission should do the same. *See Pellerin* at 176-77.

Similarly, Sprint’s argument (at 121) that footnote 1902 of the *CAF Order* “confirm[s] that ‘toll’ does in fact require a separate charge” is wrong. In fact, in that passage the FCC was addressing what it called “‘toll’ VoIP-PSTN traffic,” and after noting the Act’s definition of “telephone toll service,” it explained that it “has described toll services as ‘services that enable customers to communicate outside of their local exchange calling areas,’ and that, for wireless providers, this means outside the customer’s plan-defined home calling area.” *CAF Order*, ¶ 944 n.1902. Nowhere in this passage did the FCC focus on any “separate charge” requirement, much

less hold that a “separate charge” was required before access charges applied. To the contrary, in another footnote to the same paragraph (fn. 1904), it reiterated that “[i]n the case of traffic to or from a CMRS network, section 251(b)(5) applies to traffic that originates and terminates in the same Major Trading Area” – not, as Sprint would have it, to intraMTA traffic *and* interMTA traffic that does not involve a “separate charge.”¹³⁵

In addition, in the section of the *CAF Order* specifically devoted to “Intercarrier Compensation for Wireless Traffic,” the FCC not only reaffirmed its “intraMTA rule,” but it also specifically rejected proposals to modify the rule to encompass a larger geographic area. *CAF Order*, ¶ 979. Perhaps most importantly, this same IntraMTA/InterMTA distinction is reflected in the actual regulations adopted by the FCC, under which, as explained above, only IntraMTA traffic is defined as Non-Access Telecommunications Traffic subject to bill-and-keep rather than access charges. For these reasons, the Commission should adopt AT&T Michigan’s proposed language, and reject Sprint’s proposed language.

B. The Commission Should Reject Sprint’s Proposed 1% Factor Language, And Adopt AT&T Michigan’s Language.

Attempting to hedge its bet, Sprint proposes language for sections 6.5.1.3 and 6.5.1.4 of Attachment 2 that would allow it to avoid access charges even if the Commission agrees that access charges continue to apply to InterMTA traffic. The Commission should reject Sprint’s gambit.

Sprint proposes to adopt a 1% factor for its InterMTA traffic, pursuant to which 1% of the traffic Sprint delivers over the Interconnection trunks would be deemed InterMTA traffic,

¹³⁵ Even if the FCC’s rules did draw such a distinction, Sprint’s proposal (at 128) to make “toll” InterMTA traffic subject to bill-and-keep, even though Sprint concedes such traffic is subject to access charges under the FCC’s rules, because Sprint contends it would be “administratively [in]efficient” to pay access charges is baseless. The FCC’s access charge rules do not contain any “out” for carriers simply because they would rather not take the administrative steps necessary to comply with those rules.

with that factor subject to change only upon the production of “an actual cell site location specific traffic study.” This proposal, however, would effectively permit Sprint to deliver significant amounts of InterMTA traffic (far in excess of 1%) over the Interconnection trunks, and avoid paying access charges on that traffic. AT&T Michigan, by definition, does not have the ability to conduct an “actual cell site location specific traffic study” upon Sprint’s traffic, because the cell sites and data belong to Sprint. As a result, Sprint could significantly increase the volumes of InterMTA traffic it delivers over the Interconnection trunks, to, *e.g.*, 25% of its traffic, while paying access charges upon just 1% of the traffic and avoiding access charges on the vast majority of its InterMTA traffic. AT&T Michigan would have no way to modify the factor, because it lacks Sprint’s cell-site data, and Sprint would have no incentive to conduct such a study itself. *See Pellerin* at 179-81. Sprint’s proposal is merely another thinly-veiled attempt to avoid access charges, and should be rejected.

There are at least two additional problems with Sprint’s proposed language for section 6.5.1.3. First, in section 6.5.1.3.1, Sprint proposes to mandate that a traffic study “will not use JIP to classify traffic for the purposes of compensation.” However, irrespective of the status of industry discussions associated with ATIS-Issue #2308 regarding population of the JIP field, there is no basis for the Commission to *prohibit*, under any circumstances, the use of JIP data in a traffic study. Whether or not JIP data is 100% accurate in identifying the originating location of a wireless call, that data may provide useful information, alone or in conjunction with other data. Moreover, industry standards could change, and, irrespective of industry standards, Sprint itself may use or begin to use the JIP field in such a way that it provides useful information in a traffic study – in which case there would be no basis to bar its use.

Indeed, Sprint Communications Company L.P. submitted testimony to the Kentucky commission stating that while “no jurisdiction methodology is 100% accurate,” “Sprint uses the industry standard method of identifying the originating location of wireless calls, which is the NPA-NXX assigned to the wireless switch (which is the functional equivalent of Jurisdictional Information Parameter *i.e.* JIP).” Rebuttal Testimony of Julie A. Walker, *In the Matter of Complaint of Sprint Communications Company L.P. Against Brandenburg Telephone Company for the Unlawful Imposition of Access Charges*, Case No. 2008-00135 (Ky. Pub. Serv. Comm’n Aug. 6, 2009), at pp. 7-8. Based on Sprint’s testimony that “use of the JIP field is the most appropriate method for verifying the jurisdiction of a wireless call,” the Kentucky commission ordered the parties to use JIP data for their interMTA billing. Order, Case No. 2008-00135 (Nov. 6, 2009), at pp. 9, 11. Here, whether or not the Commission orders the parties to use JIP data for InterMTA billing, there is certainly no basis to flatly prohibit its use, as Sprint proposes.

Second, Sprint’s proposed language in section 6.5.1.3 inappropriately purports to make the obligation to pay terminating access charges for InterMTA traffic apply to both parties. Sprint does not even attempt to defend this proposal in its brief, and in its testimony merely states that “if either party is going to bill the other for terminating InterMTA Traffic, then as a matter of fairness both parties should be entitled to bill for such traffic.” Felton at 81. There is no lawful basis, however, for Sprint’s suggestion that AT&T Michigan should pay terminating access charges to Sprint for InterMTA traffic originated by AT&T Michigan.

When Sprint delivers InterMTA traffic to AT&T Michigan, Sprint is subject to terminating access charges because it is providing a non-local, InterMTA service. That is, in effect it is acting like a long-distance carrier. But the same is not true when AT&T Michigan originates a call that it delivers to Sprint, which Sprint then transports to its customer in a

different MTA. In this circumstance, AT&T Michigan is not providing any non-local service or acting as an interexchange carrier. Rather, as Sprint's witness acknowledges, AT&T Michigan "delivers the call to Sprint *at the nearest point of interconnection* and Sprint hauls the call to the terminating customer" in a different MTA. Felton at 84 (emphases added). Thus, Sprint, not AT&T Michigan, is acting as the interexchange carrier. There is no lawful basis to require AT&T Michigan to pay terminating access charges in such circumstances. *See, e.g., Union Tel. Co. v. Public Serv. Comm'n of Utah*, 2009 WL 2019062, *3 (D. Utah July 6, 2009) ("when a Qwest customer makes a non-local call to a Union wireless customer, Qwest does not have to pay Union" access charges, because "[a]ccess charges for non-local calls are to be paid . . . by the IXC . . . , not by the LEC providing originating access").

In contrast to Sprint's proposed language regarding a terminating InterMTA factor, AT&T Michigan's proposed language affords the parties the flexibility to agree upon an accurate factor based upon the available data. In particular, AT&T Michigan proposes in section 6.5.1.3 that the parties mutually agree upon a factor. If they are unable to agree, AT&T Michigan "may rely upon the best data reasonably available to bill Sprint" (§ 6.5.1.3), but this language does not give AT&T Michigan the "unilateral" right to set a factor, as Sprint erroneously suggests (at 129). To the contrary, if Sprint does not agree with the factor AT&T Michigan uses to bill, AT&T Michigan's language expressly provides that Sprint may "challenge the data and amount billed, pursuant to the Agreement's dispute resolution procedures." AT&T Michigan's proposal that the parties use traffic studies and attempt to agree upon an appropriate factor is more appropriate than Sprint's flat 1% proposal, because it will minimize the opportunity for Sprint (or an adopting carrier) to avoid legitimate access charges.

Finally, AT&T Michigan's proposed section 6.5.1.4 indicates that Sprint will populate the JIP field (which it has agreed to do), and states that AT&T Michigan will use JIP "as the preferred method to validate data used to develop the InterMTA Factor." As explained under Issue 18, Sprint's complaints concerning JIP are much ado about nothing. *See Pellerin* at 177-78. Here, while AT&T Michigan's proposed language says that AT&T Michigan will use JIP as the "preferred method," nothing prevents Sprint from challenging AT&T Michigan's study or conclusions. Again, under section 6.5.1.3, if the parties are unable to reach an agreement and Sprint contests the factor applied by AT&T Michigan, Sprint remains free to dispute the matter via the ICA's dispute resolution process.

ISSUE 21: WHAT TERMS SHOULD BE INCLUDED IN THE ICA GOVERNING COMPENSATION FOR ORIGINATING INTERMTA TRAFFIC?

AT&T Michigan Position: The Commission should approve AT&T Michigan's proposed language, which provides for the application of originating access charges to land-to-mobile InterMTA traffic routed by AT&T Michigan to Sprint over Interconnection trunks. AT&T Michigan's language is consistent with the FCC's rules and maintains the status quo with respect to originating access, as the FCC intended in the *CAF Order*. In support of its position that originating switched access charges are not applicable to land-to-mobile traffic, Sprint relies on the same purported "toll" versus "non-toll" distinction that it makes with respect to terminating switched access. Sprint's argument should be rejected for the same reasons discussed under Issue 20. (*Pellerin* at 181-91.)

For largely the same reasons discussed above with respect to Issue 20, the Commission should adopt AT&T Michigan's proposed language for Issue 21 concerning InterMTA land-to-mobile traffic that AT&T Michigan originates and delivers to Sprint. In particular, AT&T Michigan seeks to collect originating access charges where an AT&T Michigan customer calls a Sprint customer that ordinarily would be an IntraMTA call, but is carried by Sprint outside the originating MTA (making it an InterMTA call) because the Sprint customer is "roaming" outside

the MTA. *See* Pellerin at 182-83. Sprint argues that no originating access charges are due in such circumstances, but its arguments misconstrue the FCC's rules.

A. Originating Access Charges Apply To Land-To-Mobile InterMTA Traffic.

The FCC has already addressed the scenario at issue here, in paragraph 1043 of its 1996 *Local Competition Order*. There, the FCC explained that “most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, *with the exception of certain interstate interexchange service provided by CMRS carriers*, such as some ‘roaming’ traffic that transits incumbent LEC’s switching facilities, which is subject to interstate access charges.” (Emphasis added.) In a footnote, the FCC reiterated its prior conclusion that “[s]ome cellular carriers provide their customers with a service whereby a call to a subscriber’s local cellular number will be routed to them over interstate facilities when the customer is ‘roaming’ in a cellular system in another state,” and “[i]n this case, the cellular carrier is providing not local exchange service but interstate, interexchange service,” and “[i]n this and other situations where a cellular company is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access to an interexchange carrier and may expect to be paid the appropriate access charge.” *Id.* n.2485 (quoting *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 RR2d 1275, 1284-85 n.3 (1986)).

This passage disposes of Sprint’s objections to AT&T Michigan’s proposed language. It makes clear that when Sprint transports a call to one of its roaming subscribers in another state, it is deemed to be providing interexchange service (*i.e.*, is acting as an interexchange carrier) for purposes of the FCC’s access charge rules. And it makes clear that “the local telephone company providing interconnection is providing exchange access” and “may expect to be paid

the appropriate access charge.” *Id.* While Sprint suggests that access charges do not apply because these are “locally dialed” calls (Sprint Br. at 124, 130), nothing in the FCC’s holding turns upon whether the calls are “locally dialed.” To the contrary, the FCC expressly contemplated the application of access charges where the call was to a “*local* cellular number,” but was “routed . . . over interstate facilities when the customer is ‘roaming.’” *Id.* (emphasis added). And, in any event, as explained under Issue 20, the FCC has conclusively held that InterMTA calls are *not* local.

Sprint’s argument (at 130-31) that AT&T Michigan is providing “telephone exchange service” to its own customer on these calls is a red herring. The dispositive point is that AT&T Michigan is providing “exchange access” – *i.e.*, “the provision of exchange services for the purpose of originating or terminating interexchange telecommunications” (*AT&T*, 552 F. Supp. at 228) – to Sprint, because by transporting the call outside the MTA, Sprint is deemed to be acting as an interexchange carrier, just as if the call had been delivered by AT&T Michigan to a third-party interexchange carrier.

Sprint’s suggestion (at 131) that the rationale for paying access charges does not apply here also misses the mark. Sprint cites nothing to support its suggestion that “[c]onceptually, an IXC pays originating access to a LEC in order to establish and maintain a customer relationship with th[e] originating caller.” In fact, the rationale for access charges is to compensate a LEC for the use of its network in another carrier’s provision of a long distance service – precisely what occurs when AT&T Michigan originates a call that Sprint transports out of the originating MTA to deliver to its customer. *See, e.g., AT&T Corp. v. YMax Commns. Corp.*, 26 FCC Rcd. 5742, ¶ 40 (FCC April 08, 2011) (“End office switching [access] charges were and are authorized by law

to allow local exchange carriers to recover the substantial investment required to construct the tangible connections between themselves and their customers throughout their service territory.”)

For these reasons, the Commission should reject Sprint’s proposed language, and adopt AT&T Michigan’s language regarding originating access charges.

B. The Commission Should Reject Sprint’s Proposed 1% Factor Language, and Adopt AT&T Michigan’s Language.

The parties have also proposed competing language to determine the proportion of traffic originated by AT&T Michigan and delivered to Sprint that shall be treated as InterMTA traffic. Since the parties cannot directly measure this traffic on a real-time basis, both propose to use a factor. In particular, AT&T Michigan proposes in section 6.5.2.2 that the factor be set at 5% “[u]ntil such time as the Parties can measure originating landline-to-Sprint InterMTA Traffic.” Sprint, on the other hand, proposes to use a factor of 1% “unless and until a Party produces an actual cell site local specific traffic study to establish [an] actual terminating InterMTA Traffic Factor.”

As Ms. Pellerin explains (at 182, 187-188), a 5% factor is what the parties currently use, based upon mutual agreement after a traffic study. Sprint has presented no evidence that this factor is no longer accurate. Nor has Sprint presented a shred of evidence that a 1% factor would be more accurate. As a result, the Commission should adopt AT&T Michigan’s proposed factor.

Further, Sprint’s proposed language in section 6.5.2.2 suffers from the same flaws as its language regarding the mobile-to-land InterMTA factor (addressed under Issue 20). First, it permits a change to the factor only upon the production of “an actual cell site location specific traffic study,” but AT&T Michigan lacks access to such data. Second, it suggests that AT&T Michigan is obligated to pay originating access charges when it terminates InterMTA traffic originated and delivered to it by Sprint. However, there is no lawful basis for that proposal.

When Sprint originates an InterMTA call and delivers it to AT&T Michigan, Sprint, not AT&T Michigan, is acting as an interexchange carrier and transporting the call across MTAs. Sprint plainly is not providing any exchange access service to AT&T Michigan that AT&T Michigan uses in order to provide some interexchange service. Thus, in such circumstances AT&T Michigan is no more subject to originating access charges than it is when an ordinary wireline long distance carrier delivers a call to it for termination. *See Pellerin* at 187-88.

V. BILL AND PAYMENT ISSUES (ISSUES 26, 27, 28, 29, 30, AND 31)

V.A. DEPOSITS

Introduction to Issues 26(a) through 26(f)

When AT&T Michigan provides services to Sprint pursuant to the ICA, it is providing those services on credit, because Sprint does not pay AT&T Michigan until after the services are provided. Like other businesses that sell on credit, AT&T Michigan, and other carriers, typically wish to be able to obtain a deposit from their customers – especially customers that are a credit risk – in order to be assured that they will receive the payment that is due. Testimony of William E. Greenlaw (“Greenlaw”) at 2. In principle, Sprint does not disagree with this. However, Sprint proposes language for the ICA that would render the deposit provisions practically worthless. As a result, the parties have five disagreements concerning the deposit language:

First, in Issue 26(a), Sprint proposes to limit the Billing Party’s right to obtain credit information from the Billed Party by exempting Billed Parties that have five years’ payment experience with the Billing Party. AT&T Michigan opposes that limitation.

Second, the parties disagree in Issue 26(b) about the deposit “triggers,” *i.e.*, the circumstances under which a deposit may be required.

Third, the parties disagree in Issue 26(d) about the maximum amount the Billing Party can demand as a deposit. (Issue 26(c) has been resolved.)

Fourth, the parties disagree in Issue 26(e) about the interest rate the Billing Party should pay on a cash deposit that it returns to the Billed Party.

Finally, the parties disagree in Issue 26(f) about the remedies that should be available to the Billing Party if the Billed Party fails to provide a required deposit.

As the Commission considers these disagreements it should bear in mind that deposits (sometimes called “assurances of payment) are a critically important protection against excessive losses resulting from non-payment of bills. Greenlaw at 4. Under the ICA the parties are arbitrating, which may be adopted by other carriers, AT&T Michigan must terminate Sprint’s (or an adopting carrier’s) calls and provide other services before it is paid for those services. Some carriers simply do not pay their bills. Others dispute the bills and lose the disputes, but are by then in bankruptcy, or are otherwise unable or unwilling to pay what they owe. *Id.* at 3-4.

Just as any company that sells on credit may reasonably ask purchasers for a deposit, and is most apt to want a deposit from customers whose financial condition is uncertain, so AT&T Michigan reasonably asks carriers that do not have an established credit history with AT&T Michigan or whose financial condition is shaky to make appropriate deposits. *Id.* at 2. Michigan law recognizes that deposits are an appropriate measure to protect service providers against unwarranted losses by providing, in MCL § 460.651, that carriers may require ratepayers to “pay a deposit as a guaranty for the payment of the utility's services.”

AT&T Michigan needs the protection that deposits provide. Over the last eleven years, the five AT&T ILECs in the Midwest region (Michigan, Illinois, Indiana, Ohio and Wisconsin) wrote off almost \$114 million in uncollectible losses to carriers that did not pay their bills, of which more than \$23 million was attributable to Michigan. Greenlaw at 4.

Sprint, while willing to include some limited deposit provisions in the ICA, argues that there is no reason for such provisions, because Sprint is not a credit risk.¹³⁶ Sprint Br. at 150. Sprint is mistaken, because there are two compelling reasons for including robust deposit provisions in Sprint's ICA, even if one assumes Sprint is not a credit risk today. First, Sprint's financial condition could deteriorate. In fact, in its 2013 second quarter earnings report, Sprint reported a net loss of approximately \$1.6 billion and a net loss of 1.05 million subscriber lines.¹³⁷ The deposit provisions could therefore become a more important protection for AT&T Michigan vis-à-vis Sprint than they are now. Second, carriers that are less financially sound than Sprint may adopt Sprint's ICA, so it is essential that the ICA include deposit provisions that would be appropriate for those carriers.

Sprint also argues that the Commission should resolve the parties' disagreements about the deposit language in Sprint's favor because AT&T Michigan "does a poor job of billing accurately." Sprint Br. at 151. AT&T Michigan does not agree with Sprint's premise. More important, however, the accuracy of AT&T Michigan's bills has nothing to do with how the Commission should resolve the parties' disagreements about deposit language. The ICA allows a party to dispute bills it believes are inaccurate (see GT&C section 10.8), and disputed amounts play no role in the determination whether a deposit is required. The Commission will see when it examines these five issues that the accuracy of AT&T Michigan's bills has no bearing whatsoever on the virtues of either party's proposed language.

ISSUE 26(a): SHOULD THE ICA EXEMPT A BILLED PARTY WITH FIVE OR MORE YEARS PAYMENT EXPERIENCE WITH THE BILLING PARTY FROM THE OBLIGATION TO

¹³⁶ Sprint Br. at 150.

¹³⁷ WSJ Online, "Sprint Loss Deepens as Defections Continue." Available at <http://online.wsj.com/article/SB10001424127887324354704578636731175057770.html>

PROVIDE INFORMATION REGARDING ITS CREDIT AND FINANCIAL CONDITION THAT WOULD APPLY IF THE BILLED PARTY DID NOT HAVE THAT PAYMENT EXPERIENCE?

AT&T Michigan Position: No. Any party that buys services under the ICA should be required to provide information upon request concerning its credit and financial condition, because that information may play an important role in the other party's decision whether to request a deposit. Sprint agrees with this, but only if the Billed Party whose credit information is requested has less than five years payment experience with the Billing Party. There is no sound basis for that limitation. Once one accepts – as Sprint has – that the Billing Party should be able to obtain credit information from the Billed Party, there is no good reason for exempting a party with more than five years payment experience from the requirement – particularly because that payment experience may have been bad. (Greenlaw at 6-9.)

The parties have agreed to language in GT&C section 9.1 that requires the Billed Party to provide information regarding its credit and financial condition to the Billing Party upon request. AT&T Michigan needs to be able to obtain this information in order to assess the possible need for a deposit and the deposit amount. Greenlaw at 7. The ICA will set forth specific circumstances under which AT&T Michigan may request a deposit (deposit “triggers”), and will also specify a maximum deposit amount. If one of the triggers is satisfied, so that AT&T Michigan has the right to ask for a deposit, the credit information is a major determinant of whether AT&T Michigan actually asks for a deposit, and of the amount of a deposit. *Id.*

Sprint, however, proposes to exempt the Billed Party from providing credit and financial information if that party has five or more years of payment experience with the Billing Party. Specifically, Sprint proposes to add the language shown in bold italics to GT&C section 9.1:

If a Billed Party has less than five (5) years payment experience with the Billing Party, uUpon request by the Billing Party, the Billed Party will provide information on the Billing Party's Credit Profile form regarding the Billed Party's credit and financial condition.

Sprint's proposal is unreasonable. Once one accepts that the Billing Party can obtain credit information from the Billed Party, as the agreed language provides, there is simply no

reason for exempting the Billed Party just because it has five years payment experience with the Billing Party – *especially because that may be five years of bad payment experience.*¹³⁸

Under Sprint’s proposed language, AT&T Michigan would *never* be able to obtain credit information from Sprint. Sprint already has more than five years’ payment experience with AT&T Michigan. As a result, even if Sprint started short-paying its bills (which is an agreed deposit trigger), Sprint would refuse a request for credit information on the ground that it has more than five years’ payment experience – and it would maintain that position under its proposed language no matter how bad Sprint’s payment record might become. AT&T Michigan hopes it will never need to ask Sprint for a deposit, but if Sprint’s circumstances change, AT&T Michigan might need Sprint’s credit information, and the ICA should not prohibit AT&T Michigan from obtaining that information from Sprint, as Sprint proposes.¹³⁹

ISSUE 26(b): UNDER WHAT CIRCUMSTANCES SHOULD A DEPOSIT BE REQUIRED?

AT&T Michigan Position: There are two disagreements concerning the circumstances under which a deposit may be requested (“deposit triggers”). The first is whether an inadequate Standard & Poor’s credit rating should be one of the triggers. It should be. The essence of the deposit requirement is that if the Billed Party’s financial condition is not sufficiently strong, the Billing Party should be allowed to demand a deposit in order to be assured it will be paid what it is owed. Standard & Poor’s debt ratings are an established and objective measure of a company’s creditworthiness, and if the Billed Party does not have a sufficiently favorable debt rating, it should be subject to a deposit requirement. The second disagreement concerning deposit triggers is whether subsection 9.2.3, which provides for a deposit request if a party does not timely pay its bills, should

¹³⁸ Sprint witness Burt would have the Commission believe that Sprint is asking for an exemption for a carrier with “a five year *responsible* payment history.” Burt at 81 (emphasis added). That is not what Sprint’s proposed language says, however. And if it were, it would be unacceptable because the use of the vague term “responsible” would be guaranteed to engender disputes.

¹³⁹ In its brief, Sprint complains about the possibility of repeated requests for credit information that “could lead to abuse.” Sprint Br. at 151. Sprint offers no evidence to suggest that AT&T Michigan repeatedly requests credit information. Furthermore, if Sprint was concerned about repeated requests, it should have proposed language for section 9.1 that would limit requests – to once per year, for example. Sprint, having proposed no such language, cannot properly be heard to complain about hypothetical repeated requests.

permit a deposit request if a party is a chronically late payer. It should. (Greenlaw at 9-18.)

The ICA identifies the circumstances in which the Billing Party can request a deposit from the Billed Party in GT&C section 9.2.3. Since the purpose of the deposit triggers is to identify the circumstances in which a deposit request is warranted, the triggers should be designed to cover all the reasonably foreseeable circumstances in which the Billed Party's creditworthiness is uncertain.

AT&T Michigan and Sprint agree on two deposit triggers but disagree about two others. The competing contract language is as follows, with the AT&T Michigan language to which Sprint objects bold and underlined:

- 9.2 Assurance of payment may be requested in writing, including the basis for such request by the Billing Party if:
 - 9.2.1 the Billed Party has not established satisfactory credit by making at least twelve (12) consecutive months of timely payment to the Billing Party for charges incurred as a CLEC, ILEC or CMRS provider; or
 - 9.2.2 **the Billed Party has not maintained a BBB or better long term debt rating or an A-2 or better short-term debt rating by Standard and Poor's for the prior six months; or,**
 - 9.2.3 the Billed Party fails to pay by the Bill Due Date charges due under this Agreement (other than charge subject to a good faith dispute as to which the Billed Party has complied with the applicable requirements) and does not cure such failure to pay (*i.e.* pay or file good faith dispute) within ten (10) Business Days of Billing Party's subsequent written notice to Billed Party of such non-payment. **Provided, however, that the Billing Party may request a deposit if the Billed Party fails on three occasions in a twelve-month period to pay charges due under this Agreement by the Bill Due Date (other than charges subject to a good faith dispute as to which the Billed Party has complied with the applicable requirements), without regard to whether the Billed Party cures such failures as provided in the preceding sentence; or,**
 - 9.2.4 the Billed Party admits its inability to pay its debts as they become due; has commenced a voluntary case (or has had an involuntary case commenced against it) under the U. S. Bankruptcy Code or any other law relating to insolvency, reorganization, winding-up, composition or

adjustment of debts or the like, has made an assignment for the benefit of creditors or is subject to a receivership or similar proceeding, however, the Billing Party's request for an assurance of payment and Billed Party's duty to provide an assurance of payment under this Section 9.0 shall be subject to the requirements and limitations of bankruptcy or other applicable law.

Thus, the parties agree that the Billing Party can request a deposit if the Billed Party has not made at least twelve (12) consecutive months of timely payments (9.2.1) or if the Billed Party is in bankruptcy or the like (9.2.4). The disagreements are in 9.2.2, where AT&T Michigan proposes a trigger that Sprint opposes, and 9.2.3, where there is partial agreement on a trigger in the event of a failure to timely pay a bill.

Section 9.2.2

AT&T Michigan's proposed subsection 9.2.2 addresses the situation in which the Billed Party has failed to maintain a satisfactory Standard & Poor's credit rating during the prior six months. Standard & Poor's is an American financial services company that is known for its stock market indices, such as the S&P 500. Greenlaw at 11. According to the company's website, "A credit rating is Standard & Poor's opinion on the general creditworthiness of an obligor, or the creditworthiness of an obligor with respect to a particular debt security or other financial obligation. Over the years credit ratings have achieved wide investor acceptance as convenient tools for differentiating credit quality."¹⁴⁰

According to the glossary of Standard & Poor's credit ratings, "BBB" (a rating referenced in AT&T Michigan's language) represents "Adequate capacity to meet financial commitments, but more subject [than A] to adverse economic conditions. "BBB" is one grade above "BBB-" – which is "[c]onsidered the lowest investment grade by market participants." With respect to the short-term debt ratings referenced in AT&T Michigan's language, "A-2"

¹⁴⁰ <http://www.standardandpoors.com/ratings/en/us/>

signifies that “An obligor rated ‘A-2’ has satisfactory capacity to meet its financial commitments. However, it is somewhat more susceptible to the adverse effects of changes in circumstances and economic conditions than obligors in the highest rating category.”¹⁴¹

Sprint does not argue that the Standard & Poor’s ratings in AT&T Michigan’s proposed subsection 9.2.2 are too demanding.¹⁴² In fact, Sprint offers no cogent criticism of section 9.2.2 in its brief.¹⁴³ In testimony, Sprint witness Burt asserts that he “fails to see any basis for a deposit request premised on an unrelated third party’s opinion.” Direct Testimony of James R. Burt on Behalf of Petitioner Sprint Spectrum L.P. (“Burt”) at 85. But Standard & Poor’s ratings are not the mere opinion of any old third party. They are the respected assessments of a highly regarded financial services company, and firms and individuals make major financial decisions every day based on Standard & Poor’s ratings. It makes all the sense in the world for AT&T Michigan to be allowed to demand a deposit based on these ratings.

Furthermore, Sprint’s objection to having a trigger “premiered on an unrelated third party’s opinion” is directly at odds with Sprint’s position in the recent arbitration between Sprint and AT&T Illinois. There, AT&T Illinois’ proposal did not include what AT&T Michigan is proposing here as GT&C subsection 9.2.2. Instead, AT&T Illinois proposed that a deposit could be requested “If, based on AT&T Illinois’ analysis of the AT&T Credit Profile and other relevant information regarding Sprint’s credit and financial information, there is an impairment of the credit, financial health, or credit worthiness of Sprint.” Greenlaw at 13. In his testimony in

¹⁴¹ <http://www.crmz.com/Help/SNPGlossary.asp>

¹⁴² If that were Sprint’s objection, Sprint could have proposed different ratings.

¹⁴³ See Sprint Br. at 152-153. Sprint does state (at 152) that a Standard & Poor’s debt rating is “far removed from direct payment history.” But that is hardly a criticism of section 9.2.2, unless one accepts Sprint’s absurd premise that the *only* thing that bears on whether a deposit is appropriate is the Billing Party’s “direct payment history” – a premise that is (a) inconsistent with Sprint’s agreement to subsections 9.2.1 and 9.2.4 and (b) contrary to common sense.

Illinois, Mr. Burt objected to that provision, arguing that “AT&T’s proposed language . . . allows AT&T to be the ‘judge and jury’ in the determination of whether changes to a Billed Party’s credit worthiness or a Billed Party’s financial condition constitute the need for a deposit This proposed language ‘based on AT&T Illinois’ analysis . . . and other relevant information’ leaves the door wide open for AT&T to subjectively determine if and when a deposit is required, with absolutely no input from Sprint or any other source.”¹⁴⁴

AT&T took Mr. Burt’s criticism to heart and modified the trigger so that it is now based solely on an objective measure – the Standard & Poor’s credit rating – and not on AT&T’s analysis, as AT&T Illinois’ language was. It is disingenuous for Mr. Burt, having complained in Illinois about the lack of input from “any other source” but AT&T, to now complain that the trigger is now based on an “unrelated third party’s opinion.”

AT&T Michigan’s proposed subsection 9.2.2 is supported by this Commission’s arbitration decision in Docket No. U-13758. In that case, the Commission arbitrated a disagreement about deposit triggers and approved the very same trigger that AT&T Michigan proposes here for section 9.2.2.¹⁴⁵

Remarkably, Sprint contends that its position is supported by the Commission’s decision in Case No. U-12460, in which the Commission rejected deposit language proposed by SBC Michigan because it was “too subjective.”¹⁴⁶ But a Commission decision rejecting deposit

¹⁴⁴ Supplemental Verified Written Statement of James Burt, ICC Docket No. 12-0550 (Feb. 12, 2013), at 51-52 (Exhibit WEG-1).

¹⁴⁵ See Greenlaw at 14, discussing Decision of the Arbitration Panel, Docket No. U-13758, *Michigan Bell Telephone Company d/b/a SBC Michigan’s Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with MCI Metro Access Transmission Services, LLC Pursuant to Section 252(b) of the Telecommunications Act of 1996* (June 26, 2003) (“U-13758 DAP”), at 4, and Opinion and Order, Docket No. U-13758 (Aug. 18, 2003) (“U-13758 Order”), at 2.

¹⁴⁶ See Sprint Br. at 152, quoting the Commission’s Order in Case No. U-12460.

language as “too subjective” does not remotely support Sprint’s opposition to AT&T Michigan’s proposed language here, which is in all respects objective.

Section 9.2.3

The parties agree in subsection 9.2.3 that the Billing Party can demand a deposit if “the Billed Party fails to pay by the Bill Due Date charges due under this Agreement (other than charge subject to a good faith dispute as to which the Billed Party has complied with the applicable requirements) and does not cure such failure to pay (*i.e.* pay or file good faith dispute) within ten (10) Business Days of Billing Party’s subsequent written notice to Billed Party of such non-payment.”

This agreed language makes obvious sense. If a party does not timely pay its bills, it is a credit risk. The Commission recognized this in Docket No. U-13758, an arbitration in which the Commission adopted language that allowed for a deposit demand when “[t]he Party fails to timely pay a bill rendered to it (except such portion of a bill that is subject to a good faith, bona fide dispute and as to which the Non-Paying Party has complied with the billing dispute requirements set forth herein.” Greenlaw at 17.

The language the parties have agreed on for section 9.2.3 includes an “out” for the Billed Party that was not included in the language the Commission adopted in U-13758, namely, that if the Billed Party cures its default within ten days after receiving a reminder from the Billing Party, no deposit can be demanded. AT&T Michigan agreed to this in its negotiations with Sprint because it recognized that there is a possibility that the Billed Party might not pay a bill on time because of an oversight, in which event a deposit might not be warranted.

This, however, creates a potential loophole: If section 9.2.3 included only the agreed language, the Billed Party could *never* pay on time, and simply wait for a notice from the Billing

Party and then pay ten days after receiving that notice. This would effectively extend the time for paying a bill from the agreed 30 days (see GT&C section 10.1) to 45 days – or longer if the Billing Party is not nimble enough to send the non-payment notice immediately after the Bill Due Date passes with no payment having been received.

To guard against this, AT&T Michigan proposes the additional sentence for section 9.2.3 that Sprint opposes, namely: **“Provided, however, that the Billing Party may request a deposit if the Billed Party fails on three occasions in a twelve-month period to pay charges due under this Agreement by the Bill Due Date (other than charges subject to a good faith dispute as to which the Billed Party has complied with the applicable requirements), without regard to whether the Billed Party cures such failures as provided in the preceding sentence.”**

With that language, the ICA appropriately recognizes that a carrier may inadvertently miss a Bill Due Date once or twice in a twelve-month period, but that a carrier is not going to – or at least should not – late pay three times in a year by mistake. The proposed language essentially says that if there is a third instance of late payment within a year, the billing party can demand a deposit.

Sprint does not explain in its brief why AT&T Michigan should not be allowed to demand a deposit from a carrier that is a chronic late payer. All Sprint’s brief says on the subject is that AT&T Michigan’s language could allow a deposit to follow from immaterial, inadvertent oversight.” Sprint Br. at 152. Sprint’s position is untenable. AT&T Michigan’s language allows for two inadvertent oversights. But three?¹⁴⁷

¹⁴⁷ Furthermore, Sprint is in no position to quibble about how many inadvertent oversights should be tolerated. If Sprint thought the threshold should be a bit higher, it could have proposed to draw the line at three, or four – and it is possible AT&T Michigan might have accepted. Instead, Sprint decided to stake out the position that there should be no limit on how many times a carrier can late pay in one year.

AT&T Michigan's position on section 9.2.3 is supported by the precedents. As discussed above, this Commission adopted in Case No. U-13758 a deposit trigger that was tougher on the billed party than the one AT&T Michigan is proposing here, because it allowed a deposit demand if even one payment was late, rather than allowing two late payments, as AT&T Michigan's current proposal does. In addition, Sprint and AT&T Illinois disputed deposit triggers in their recently concluded arbitration in the Illinois Commerce Commission ("ICC"). The ICC adopted AT&T Illinois' proposed deposit triggers, with the exception of one trigger that AT&T Illinois is not proposing here. *Sprint Illinois Arbitration Decision* at 71. The triggers the ICC approved included one that permitted a deposit demand if "Sprint fails to timely pay a bill rendered to Sprint by AT&T Illinois (except such portion of a bill that is subject to a good faith, bona fide dispute and as to which Sprint has complied with all [billing dispute] requirements." This provision, like the one this Commission adopted in Docket No. U-13758, is tougher on the Billed Party than AT&T Michigan's proposed section 9.2.3 in this case.

Sprint asserts that its position is supported by the Commission's decision in Case No. U-12460 (Sprint Br. at 152), but that is not so. As noted above, and as Sprint's discussion of the case reveals, the Commission's concern in that case was that Ameritech Michigan's proposed deposit triggers were too subjective. AT&T Michigan's proposed language for subsection 9.2.3 is objective.

For all of these reasons, the Commission should resolve Issue 26(b) in favor of AT&T Michigan.

ISSUE 26(c): SHOULD THE ICA GIVE THE PARTY FROM WHICH A DEPOSIT IS REQUESTED SOLE DISCRETION TO CHOOSE WHETHER TO PROVIDE A CASH DEPOSIT, A LETTER OF CREDIT OR A SURETY BOND?

This issue has been resolved.

ISSUE 26(d): WHAT SHOULD BE THE MAXIMUM DEPOSIT AMOUNT?

AT&T Michigan Position: The maximum deposit amount should be three months' anticipated billings. The reason for this is that if a carrier stops paying its bills, the timeline in the ICA provisions that allow AT&T Michigan to discontinue service to that carrier effectively require AT&T Michigan to continue to provide service even to the non-paying carrier for approximately three months. The amount on deposit should be sufficient to cover this period. (Greenlaw at 19-23.)

Under AT&T Michigan's proposed GT&C section 9.5, the deposit amount is capped at three months' anticipated billings. Sprint's proposed section 9.5, in contrast, would limit the deposit to "the lesser of the undisputed unpaid amount that is triggering the request for assurance of payment or two (2) months anticipated charges."

AT&T Michigan's proposal has strong support in the precedents. In Docket No. U-13758, SBC Michigan proposed a maximum deposit amount based on three months' billings, just as AT&T Michigan proposes here, and MCI proposed an amount based on one month's billings. The Arbitration Panel resolved the disagreement in favor of SBC Michigan (U-13758 DAP at 4), and the Commission affirmed (U-13758 Order at 2).

Also, in the recent Sprint/AT&T Illinois arbitration, the parties disputed the maximum deposit amount, and the ICC resolved the issue in favor of AT&T Illinois, stating, "the Commission agrees with Staff that Sprint's deposit proposals regarding when a deposit may be required and the amount of the deposit offer no significant protection to the Billing Party." *Sprint Illinois Arbitration Decision* at 71. The maximum deposit amount that ICC adopted is the same as the amount AT&T Michigan proposes here.

The rationale for AT&T Michigan's proposal is straightforward: Under the ICA, if a carrier stops paying its bills, AT&T Michigan must continue to provide service to the carrier until (i) the Bill Due Date has passed, (ii) AT&T Michigan has issued a Discontinuance Notice, and (iii) additional time has passed without the non-paying carrier curing its default. Given the

time frames for the events in that sequence, AT&T Michigan's exposure to a carrier that stops paying its bills is approximately equal to three months' billings. Greenlaw at 20. Accordingly, in order to avoid loss, AT&T Michigan should be able to obtain a deposit in an amount up to three months' anticipated billings. *Id.*

Sprint's two-month measure is objectionable, because it leaves AT&T Michigan exposed to a loss equal to one month's billings. But the most unreasonable aspect of Sprint's proposal is that it would limit the deposit to the lesser of two months' anticipated billings *or the "undisputed unpaid amount that is triggering the request for assurance of payment."*

The latter language would completely undermine the purpose of the deposit requirement. Bear in mind the reason for this deposit trigger: If Sprint (or a carrier that adopts Sprint's ICA) fails to timely pay its undisputed bills, that gives AT&T Michigan reason to be insecure about receiving future payments. Sprint agrees with that. In fact, Sprint argues that the only real justification for a deposit requirement is non-payment. With that in mind, the following illustration demonstrates how unreasonable Sprint's proposal is:

Assume that AT&T Michigan sends Sprint a bill every month for \$400,000. Sprint, in response to one such bill, pays \$250,000 and does not dispute the remainder. And that "does not dispute" is important – in subsection 9.2.3, we are talking about charges that the Billed Party does not pay and does not dispute – so there is no excuse for the non-payment. Bear in mind, too, that AT&T Michigan has sent Sprint the reminder notice referenced in subsection 9.2.3, and Sprint still does not pay or dispute the \$150,000 it owes.

Now, under those circumstances, AT&T Michigan has reason to be insecure about more than the \$150,000 Sprint has not paid.. With Sprint having defaulted to the tune of \$150,000 with no excuse, AT&T Michigan is insecure about whether Sprint will pay its future bills at all.

Accordingly, AT&T Michigan should have the option to protect itself by demanding a deposit equal to the three months' billings that are coming up and that may not be paid. Sprint's proposal to limit the deposit amount to \$150,000 is unreasonable, because there is no correlation between the amount Sprint failed to pay and the amount of AT&T Michigan's exposure in the future.

Sprint argues that AT&T Michigan's proposed cap of up to three month's anticipated billings "opens the door for the Billing Party to use the deposit requirements as a competitive weapon." Burt at 90. There is no basis in reality for that concern. AT&T Michigan has always taken a very measured approach to deposit requests. Greenlaw at 22. Through second quarter 2013, AT&T Michigan had active ICAs with 161 carriers that were subject to deposit requests, but it held a deposit from only twenty-five of them, and the total amount of "security" from these carriers was \$434,909. *Id.* at 22-23. The average deposit in Michigan is thus only about \$17,400, and only three carriers have had to provide a deposit over \$20,000. *Id.* at 23. This demonstrates that AT&T Michigan does not use its deposit rights as a competitive weapon, because it rarely if ever asks for a deposit in the maximum permissible amount.

ISSUE 26(e): AT WHAT RATE SHOULD INTEREST ON A CASH DEPOSIT ACCRUE?

AT&T Michigan Position: The parties agree that if the Billing Party returns a cash deposit to the Billed Party, the Billing Party will pay interest on the funds it has been holding. The interest rate should be the rate that one would expect the funds to earn while the Billing Party is holding them. The most reasonable basis for projecting that rate is the Prime rate, not the arbitrary (and overstated, in today's market) 6% rate that Sprint proposes. (Greenlaw at 23-26.)

The parties agree in GT&C section 9.12 that if the Billed Party provides a deposit, the deposit will be returned under certain circumstances. The parties also agree, in GT&C section 9.7, that if the deposit is in cash (rather than a bond or a letter of credit), the Billing Party will

pay the Billed Party interest on the deposit it has been holding. The disagreement is over the interest rate. Sprint proposes 6%, and AT&T Michigan proposes the Prime Lending Rate.

The reason for the interest requirement sheds light on why AT&T Michigan's proposal is more reasonable than Sprint's. The deposit is the Billed Party's money, which the Billing Party has been holding as security. During the period while the Billing Party was holding the deposit, the Billing Party was in a position to earn money with the deposit – for example, by placing the deposit in an interest-bearing account. Meanwhile, the Billed Party has not had the use of its money, and has thus lost the opportunity to earn interest on that money. In fairness, the Billing Party in effect turns the time/value of the money over to the Billed Party. Greenlaw at 23 The ideal interest rate, therefore, would be the rate that most accurately measures the earnings the Billing Party was potentially able to make, and that the Billed Party was prevented from making, during the period while the Billing Party was holding the deposit. *Id.* at 24.

AT&T Michigan's proposed use of the Prime rate is more reasonable than Sprint's proposed 6%, because in today's marketplace, 6% is not a good estimate of the time/value of money; an investor cannot reasonably expect to earn that high a return. *Id.* The Prime rate, however, fluctuates with the market, and is always a reasonable estimate of the time/value of money. *Id.*

The Prime Lending Rate as reported by the Wall Street Journal index is currently at 3.25%, as it has been for the last five years. *Id.* at 25. Thus, if one accepts that the Prime Lending Rate is an accurate indicator of the time value of money (which the financial industry does, as Sprint does not dispute), Sprint's proposed 6% is about twice as high as it should be.

In its brief, Sprint says two things in support of its proposal, and neither is persuasive. First, Sprint states that its proposed 6% rate is consistent with other ICAs in Michigan. Sprint

Br. at 154. But that is only because AT&T Michigan agreed to the 6% years ago, when interest rates were higher than they are today. Greenlaw at 25. Sprint also states that its proposal “provides an additional reasonableness check on a Billing Party’s decision to require a deposit.” Sprint Br. at 154. That cryptic statement is explained in Sprint’s testimony: What Sprint is actually suggesting is a punitive interest rate designed to discourage deposit demands. Greenlaw at 25-26. This confirms that Sprint’s proposed rate does not even attempt to be an accurate measure of the actual time value of money, and so should be rejected.

ISSUE 26(f): WHAT REMEDIES SHOULD THE ICA MAKE AVAILABLE TO THE PARTY THAT REQUESTS A DEPOSIT IF THE OTHER PARTY WRONGFULLY FAILS TO COMPLY WITH THE DEPOSIT REQUEST?

AT&T Michigan Position: AT&T Michigan’s proposed remedies in section 9.10 are reasonable and appropriate. Sprint’s proposed language, in contrast, has a glaring defect: It inexplicably fails to provide a remedy for a wrongful failure to provide a deposit in many instances. (Greenlaw at 27-32.)

The parties agree that if the Billed Party fails to remit a required deposit, the Billing Party should have remedies available to it. In GT&C section 9.10, each party has proposed remedy language. The question presented by Issue 26(f) is which party’s language is more reasonable.

We begin our discussion by examining Sprint’s proposal, which reads as follows:

9.10 In the event the Billed Party fails to provide the Billing Party with a suitable form of security deposit or additional security deposit as required herein, when a deposit is required pursuant to subsections 9.2.3 and 9.3 above in the manner and within the time required, the service for which the Billed Party has failed to pay the undisputed charges may be suspended, discontinued or terminated in accordance with the terms set forth in Section 11.0 below. Upon termination of such services, the Billing Party shall apply any security deposit to the Billed Party’s final bill for its account(s).

That language is patently defective, because it only provides a remedy if the Billed Party fails to provide a deposit required under subsection 9.2.3 (the trigger that allows for a deposit in

the event of non-payment or late payment).¹⁴⁸ Sprint’s language provides no remedy if the Billed Party fails to provide a deposit triggered by *agreed* subsection 9.2.1 (failure to establish good credit by making at least twelve consecutive months of timely payments) or *agreed* subsection 9.2.4 (bankruptcy and the like). Under Sprint’s proposal, in other words, the Billing Party could make a proper request for a deposit based on one of those two triggers; the Billed Party could refuse to provide the deposit; and the Billing Party would have no remedy. This failing disqualifies Sprint’s language from serious consideration.¹⁴⁹

Since the Commission generally adheres to “baseball” arbitration, it presumably would not undertake to fix Sprint’s defective language. Note, however that Sprint’s language could not be fixed merely by inserting references to subsections 9.2.1 and 9.2.4.¹⁵⁰ This is because the remedy Sprint proposes in the event the Billed Party fails to make a required deposit is that “the service for which the Billed Party has failed to pay the undisputed charges may be suspended, discontinued or terminated.” That does not work if the deposit is required under subsection 9.2.1 or 9.2.4,¹⁵¹ because those triggers do not involve a failure to pay.

There is another gap in Sprint’s language: Because it is framed in terms of suspending, discontinuing or terminating service, Sprint’s language does not take into account the situation where the Billed Party is a new entrant, to which AT&T Michigan has not yet started to provide service. For such a carrier, the appropriate remedy for a failure to provide a required deposit is

¹⁴⁸ There is a reference to section 9.3 in Sprint’s language, but section 9.3 is not one of the deposit triggers.

¹⁴⁹ Sprint’s language also provides no remedy if the Billed Party fails to make a deposit properly requested under subsection 9.2.2 (inadequate Standard & Poor’s credit rating). This omission, unlike the others, has a plausible explanation, namely, that Sprint opposes subsection 9.2.2. Assuming the Commission resolves Issue 26(b) in favor of AT&T Michigan, however, this is another defect in Sprint’s proposal for section 9.10.

¹⁵⁰ And subsection 9.2.2 if the Commission resolves Issue 26(b) in favor of AT&T Michigan.

¹⁵¹ Or 9.2.2.

that AT&T Michigan does not have to perform under the ICA until the new entrant provides the deposit. While Sprint is not a new entrant, it is reasonable to include language in the ICA that is appropriate for parties that adopt Sprint's ICA, and the inclusion of such language does Sprint no harm.

AT&T Michigan's proposed language fills the gaps in Sprint's proposal. It reads as follows:

9.10 Notwithstanding anything else set forth in this Agreement, if the Billing Party makes a request for assurance of payment in accordance with the terms of this Section 9.0 and the Billed Party does not furnish the requested assurance of payment in the manner and within the time required, then:

9.10.1 if the Billed Party is a new entrant that is not yet exchanging traffic with the Billing Party, the Billing Party shall have no obligation to perform under this Agreement until such time as the Billed Party has furnished the Billing Party said assurance of payment; and,

9.10.2 if the Billed Party is not a new entrant and is exchanging traffic with the Billing Party; then,

9.10.2.1 if the deposit request was based on subsection 9.2.1, 9.2.2, or 9.2.4, until such time as the Billed Party has furnished said assurance of payment, the Billing Party may exercise all rights and remedies set forth in Section 11.0 below; and,

9.10.2.2 if the deposit request was based on subsection 9.2.3 above, the service for which the Billed Party has failed to pay the undisputed charges may be suspended, discontinued, or terminated in accordance with the terms set forth in Section 11.0 below

9.10.3 Upon termination of such services pursuant to Sections 9.10.1 and 9.10.2 above, the Billing Party shall apply any security deposit to the Billed party's final bill for its account(s).

Subsection 9.10.1 appropriately provides for the new entrant that adopts Sprint's ICA. Most important, though, AT&T Michigan's language, unlike Sprint's, provides (in subsection

9.10.2.1) a remedy if the Billed Party fails to provide a deposit required under subsection 9.2.1 or 9.2.4 – and those are *agreed* deposit triggers that Sprint’s language fails to account for.¹⁵²

Sprint’s brief utterly fails to come to grips with section 9.10. All Sprint says about it is that AT&T Michigan’s language “would allow a Billing Party to disconnect or discontinue all services simply because a Billed Party failed to provide a required assurance of payment, without any overarching limitation based upon whether or not a Billed Party is making its payments.” Sprint Br. at 155. Sprint is wrong. Under AT&T Michigan’s proposed subsection 9.10.2.2, if the deposit was requested under subsection 9.2.3 because of a non-payment, the only services that can be terminated are those for which payment was not made. If the deposit was requested pursuant to one of the other triggers, the Billing Party, under subsection 9.10.2.1, “may exercise all rights and remedies set forth in Section 11.0 below.” Those rights and remedies are subject to a separate disagreement (Issue 29(e)). However the Commission resolves Issue 29(e), that resolution will effectively carry through to subsection 9.10.2.1. The Commission therefore need not, and should not, concern itself with the scope of the remedies provided in Section 11.0 when it is deciding Issue 26(f).

Furthermore, Sprint’s complaint that AT&T Michigan’s language would allow for a disconnection of all services – to the extent that Section 11.0 will so allow in light of the Commission’s resolution of Issue 26(f) – is unpersuasive. If a buyer fails to provide a deposit that it is contractually required to provide because it is a demonstrated credit risk, the most reasonable remedy is for the seller to discontinue sales until the deposit is made. And

¹⁵² AT&T Michigan’s language also provides (again in subsection 9.10.2.1) a remedy if the Billed Party fails to provide a deposit required under subsection 9.2.2 – the inadequate credit rating trigger that will be included in the ICA if the Commission resolves Issue 26(b) in favor of AT&T Michigan. Note that the reference to 9.2.2 in subsection 9.10.2.1 would not be problematic if the Commission were to resolve Issue 26(b) in favor of Sprint, because in that event, subsection 9.2.2 would read “**INTENTIONALLY LEFT BLANK.**” As a result, there will be no confusion or operational problem under AT&T Michigan’s proposed subsection 9.10.2.1 regardless how the Commission resolves Issue 26(b).

indisputably, AT&T Michigan's language is superior to Sprint's which proposes *no* remedy for a failure to make a deposit required by subsection 9.2.1 or 9.2.4 (or, if it becomes part of the ICA, 9.2.2).

ISSUE 26(g): SHOULD THE ICA AUTHORIZE THE BILLING PARTY TO DRAW DOWN THE FULL AMOUNT OF ANY LETTER OF CREDIT OR TAKE ACTION ON ANY SURETY BOND PROVIDED BY THE BILLED PARTY IF THE BILLED PARTY DEFAULTS ON ITS ACCOUNT(S) OR OTHERWISE FAILS TO MAKE A REQUIRED PAYMENT IN THE MANNER AND WITHIN THE TIME SET FORTH IN THE AGREEMENT?

This issue has been resolved

V.B. ESCROW

ISSUE 27: WHAT IS THE APPROPRIATE DEFINITION OF "UNPAID CHARGES"?

AT&T Michigan Position: The word "undisputed" should not be included in the definition of "Unpaid Charges," as Sprint proposes, because if it is, then agreed GT&C Section 11.3, which uses the term "Unpaid Charges," is rendered nonsensical. (Greenlaw at 33-35.)

The parties agree on the definition of "Unpaid Charges," except for one word: The definition refers to "charges," and Sprint proposes to insert the word "undisputed" before "charges." AT&T Michigan opposes the addition of that word. Thus, AT&T Michigan would define "Unpaid Charges" to mean any charges billed to the Billed Party that are not paid by the Bill Due Date. Sprint, on the other hand, contends that only undisputed charges not paid by the Bill Due Date should be defined as Unpaid Charges.¹⁵³

Because this disagreement concerns a definition, there is only one way to analyze it, and that is to examine how the defined term is used in the ICA and to ask which party's definition

¹⁵³ Issue 27 is addressed in DPL Section V.B, concerning Escrows, even though the parties have now settled the actual issue relating to escrows (Issue 28). Issue 27 remains in dispute and presents a stand-alone question that is now unrelated to escrow.

yields the appropriate result. AT&T Michigan's definition of "Unpaid Charges" should be adopted, because it is only then that other language in the ICA – *agreed language* – works as it is supposed to work.

Specifically, agreed GT&C section 11.3 states: "If the Billed Party desires to dispute any portion of the Unpaid Charges, the Billed Party must complete all of the following actions" To make that sentence work properly, "Unpaid Charges" must include charges that are disputed, as well as charges that are undisputed. If "Unpaid Charges" were defined to excluded disputed charges, as Sprint proposes, section 11.3 becomes nonsense; it would be talking about what the Billed Party should do if it desires to dispute charges that it does not dispute.

Sprint offers no sound basis for its position on this issue. Sprint contends that "a party is entitled to dispute bills it deems to be unjustified and to withhold payment on such bills." Sprint Br. at 156. That is correct, but it has nothing to do with this issue. This is not some sort of philosophical or moral question, as one would think it is based on Sprint's argument. Rather, it is a question about contract language, and there is no denying that AT&T Michigan's definition of "Unpaid Charges" makes the contract language work the way it is supposed to, while Sprint's does not.

Sprint asserts that "When a party properly disputes and withholds, the charges should not be characterized as 'unpaid,' and doing so would tend to take away from its dispute rights under the ICA." *Id.* That is incorrect (as Sprint unintentionally signals by using the words "tend to"). The Commission's adoption of AT&T Michigan definition of "Unpaid Charges" will have no effect whatsoever on Sprint's right to dispute its bills under the ICA. If it did, Sprint would point to the dispute language in the ICA and would show how it doesn't function properly if the word

“undisputed” is not inserted in the definition of “Unpaid Charges.” But Sprint does not do that, because it cannot.

The inescapable fact of the matter is that no untoward result will be produced by the Commission’s resolution of this disagreement in favor of AT&T Michigan. The *only* impact the Commission’s resolution of this issue will have on the parties’ rights under the ICA is that if the Commission were to accept Sprint’s proposed insertion for GT&C section 2.128, GT&C section 11.3 would turn to gibberish.

ISSUE 28: SHOULD A PARTY THAT DISPUTES A BILL BE REQUIRED TO PAY THE DISPUTED AMOUNT INTO AN INTEREST-BEARING ESCROW ACCOUNT PENDING RESOLUTION OF THE DISPUTE?

This issue has been resolved

V.C. DISCONNECTION FOR NON-PAYMENT

Introduction to Issues 29(a) through 29(e)

The parties agree that AT&T Michigan will be permitted to cease providing service to Sprint (or a carrier that adopts Sprint’s ICA) if (i) the carrier fails to pay undisputed charges by the date they are due; (ii) AT&T Michigan sends the carrier a notice stating that service may be discontinued if the carrier does not cure its breach; and (iii) the carrier fails to cure the breach within the time period specified in the ICA. *See* GT&C Section 11.0 However, the parties have three disagreements about the language in the ICA governing termination of services due to non-payment.

ISSUE 29(a): SHOULD AT&T MICHIGAN’S PROPOSED GT&C SECTION 10.14 BE INCLUDED IN THE ICA?

AT&T Michigan Position: Yes. AT&T Michigan’s proposed section 10.14 is reasonable on its face, and Sprint has offered no cogent objection to that provision. (Greenlaw at 36-37.)

AT&T Michigan’s proposed GT&C section 10.14 states:

Failure by the Billed Party to pay any charges determined to be owed to the Billing Party within the time specified in section 10.12 above shall be grounds for termination of the interconnection services provided under this Agreement.

Neither Sprint's brief nor its testimony specifically addresses that provision. However, Sprint argues generally that the Billing Party should only be allowed to terminate the services for which payment was not made (Sprint Br. at 155), and that may well be the reason for Sprint's objection to section 10.14. If it is, the objection should be rejected, for three reasons:

First, Sprint should have proposed contract language that reflects its position, such as, "Failure by the Billed Party to pay any charges determined to be owed to the Billing Party within the time specified in Section 10.12 above shall be grounds for termination of the *interconnection services for which the Billed Party did not pay.*" But Sprint proposed no such provision. As a result, the Commission has to choose between AT&T Michigan's language and no language for section 10.14, and given that choice, and the fact that Sprint agrees in principle that termination of *some* services is a proper remedy for a failure to pay, the Commission should adopt AT&T Michigan's language.

Second, if a party fails to pay its bills, the other party should be allowed to terminate the entire ICA, not just the service(s) for which payment was not made. Under settled Michigan law, if a party materially breaches a contract, the other party may terminate the contract *in its entirety*. "[W]hen one party to a contract commits a material breach, the nonbreaching party is entitled to terminate the contract." 5A Mich. Civ. Jur. Contracts § 214. *See also, e.g., Blazer Foods, Inc. v. Restaurant Properties, Inc.*, 259 Mich. App. 241 n.7 (Mich. App. 2003) ("When one party to a contract materially breaches the contract by failing to perform duties under it, the other party can either consider the contract terminated and sue for total breach, or he can continue his performance and sue for partial breach."). Thus, when amounts owed under a

contract are not paid, the non-breaching party may abandon the contract. *See, e.g., Fricke v. Forbes*, 294 Mich. 375, 381 (Mich. 1940) (evidence supported finding that debtor's failure to pay creditor at agreed time was a material breach of compromise agreement, authorizing creditor to rescind compromise agreement and sue on original obligation); *Ringelberg v. Kawka*, 242 Mich. 665, 667 (Mich. 1928) (contractor justified in terminating contract for home remodeling based on plaintiff's failure to make required installment payment); *Breakie v. Ivonyx Group Services, Inc.*, 2003 WL 1440098, at *2-3 (Mich. App. 2003) (defendant materially breached settlement agreement with plaintiff by failing to make payments required under agreement). There is no reason that this generally applicable rule of contract law should not apply to an interconnection agreement.

Third, Sprint's position is not reasonable. The disconnection at issue arises only in the event of non-payment of *undisputed* amounts, and following a Discontinuance Notice, which gives the Non-Paying Party fair notice that it has failed to pay and must pay. If, after receiving such a notice, the Non-Paying still does not pay its bill in full, even though it does not dispute it (as it is permitted to do after it receives a Discontinuance Notice (*see* GT&C § 11.3)), there is no justification for requiring AT&T Michigan to continue to provide service to a party whose behavior establishes that it is a deadbeat.

ISSUE 29(b): HOW SHOULD THE ICA DESCRIBE THE FAILURE TO PAY CHARGES THAT IS A GROUND FOR DISCONNECTION?

AT&T Michigan Position: Sprint's proposed language (charges "for which payment was required") is too general and imprecise. AT&T Michigan's proposed language, in contrast, provides needed clarity by using terms defined in the ICA that govern billed amounts that are not paid and those that are disputed, and by appropriately referencing late payment charges. (Greenlaw at 37-38.)

GT&C Section 11.1 reads as follows, with AT&T Michigan's language underscored and Sprint's language italicized:

11.1 Failure to pay undisputed charges in accordance with this Agreement will be grounds for disconnection of Interconnection products and/or services furnished under this Agreement *for which payment was required*. If a Party fails to *make such payment* pay any Unpaid Charges billed to it under this Agreement, including but not limited to any late payment charges excluding Disputed Amounts, and any portion of such Unpaid Charges remain unpaid after the Bill Due Date, the Billing Party may send a Discontinuance Notice to such Billed Party. The Billed Party must remit all Unpaid Charges, excluding Disputed Amounts, to the Billing Party within *forty-five (45) fifteen (15)* calendar days of the Discontinuance Notice.

This Issue 29(b) concerns the disputed language in section 11.1 other than the disagreement concerning the time period at the end of section 11.1, which is the subject Issue 30.

The first difference between the two proposals appears in the first sentence, where Sprint proposes to add the phrase, “*for which payment was required.*” There is simply no need for that additional verbiage, because payment of undisputed charges is always required.¹⁵⁴

The second difference is in the next sentence, where Sprint proposes to say only “*make such payment*” instead of spelling out that the failure in question is a failure to “pay any Unpaid Charges billed to it under this Agreement, including but not limited to any late payment charges, excluding Disputed Amounts, and any portion of such Unpaid Charges remain unpaid after the Bill Due Date.” In this instance, AT&T Michigan’s language is superior because it spells out with appropriate specificity the charges that, if not paid, may result in termination.

Sprint does not specifically address the language that is the subject of this issue, either in its testimony or in its brief. The Commission should therefore, and for the reasons discussed above, resolve this issue in favor of AT&T Michigan.

¹⁵⁴ Although Sprint’s proposed language does not so state, Sprint’s intent may be that only those services for which payment was not made should be subject to disconnection. If so, the Commission should reject Sprint’s language for the reasons discussed above in connection with Issue 29(a).

ISSUE 29(c): WHEN THE ICA ALLOWS THE BILLING PARTY TO DISCONTINUE SERVICES DUE TO NON-PAYMENT, SHOULD THE BILLING PARTY BE REQUIRED TO PETITION THE COMMISSION FOR AN ORDER AUTHORIZING THE DISCONTINUATION OF SERVICE?

AT&T Michigan Position: No. There is no sound reason to require a party that is entitled to discontinue services pursuant to the terms of an ICA to seek the Commission's permission to do so. If the breaching party that is subject to disconnection believes it has a basis for opposing disconnection, it can bring its case to the Commission and ask the Commission to prohibit disconnection. (Greenlaw at 39-44.)

AT&T Michigan's proposed language for subsection 11.2 provides:

AT&T MICHIGAN will also provide any written notice of disconnection to any Commission as required by any State Order or Rule.

Sprint's proposed language for subsection 11.2 provides:

Disconnection for non-payment will only occur as expressly ordered by the Commission.

Thus, the disagreement is that Sprint wants a requirement that service can be discontinued only with the Commission's approval, which AT&T Michigan must solicit, while AT&T Michigan opposes that requirement, and instead would notify the Commission of disconnection to the extent (if any) required by a Michigan Order or Rule.

Note that the question here is *not* whether the Commission should play a role when a carrier is threatened with termination of an ICA. If Sprint (or a carrier that adopts Sprint's ICA) is threatened with disconnection, it is free to petition the Commission to stop AT&T Michigan from discontinuing service for a time and to investigate whether disconnection is warranted. And the Commission can be sure that any bona fide carrier that believes disconnection is not warranted will take that initiative. Thus, the question presented by this issue is simply whether, in a situation where the ICA allows AT&T Michigan to terminate the agreement due to the other party's material breach, AT&T Michigan should be required to ask the Commission's permission

to do so or the other carrier should initiate a Commission proceeding to enjoin AT&T Michigan from terminating.¹⁵⁵

There are three reasons that once the non-payment of bills has reached the point that warrants discontinuance of service, AT&T Michigan should not be required to initiate a Commission proceeding to obtain permission to act:

First, the Commission has adopted language in at least one arbitration that provides for disconnection for non-payment with no prior Commission approval. Greenlaw at 41. As a result, interconnection agreements in Michigan typically do not require AT&T Michigan to obtain Commission approval before discontinuing service based on a material breach, such as a wrongful failure to pay. In fact, it appears there is no AT&T Michigan ICA that imposes such a requirement. *Id.*

Second, as discussed above, when a party materially breaches a contract, Michigan law allows the other party to terminate the contract – and that includes the situation in which a party fails to pay its bills. No state agency needs to approve termination for breach of a commercial contract in general, and there is no good reason for a different regime to apply to an interconnection agreement.

Third, if a carrier does not pay its undisputed bills and still fails to do so even after receiving a Discontinuation Notice, AT&T Michigan would be seriously injured if it were required to continue providing service to the carrier, possibly for many months, during which the carrier continues not to pay its bills, while awaiting a green light from the Commission.

Greenlaw at 41.

¹⁵⁵ Assuming the Commission answers that question in the negative, not only should Sprint's proposed language be rejected, but also AT&T Michigan's should be adopted. Sprint has not voiced any objection to AT&T Michigan's language mandating notice to the Commission as required by any State Order or Rule, and Sprint surely has no such objection.

The precedents support AT&T Michigan's position. In its August 18, 2003 U-13758 Order, at pages 11-12, the Commission held:

The Commission finds that the arbitration panel's determination on this issue [in favor of SBC Michigan] should be affirmed with the understanding that it adopted SBC Michigan's language as modified by the position taken in its PDAP to provide 60 days' notice to MCIIm *SBC Michigan should have the ability to cease providing new service, or discontinue service to a provider that is not paying undisputed amounts. The required notice would permit MCIIm an opportunity to either rectify the problem or seek appropriate intervention, should SBC Michigan improperly determine to cease service.* (Emphasis added.)

Plainly, the Commission contemplated that if a party failed to pay its undisputed bills, the ILEC should have the ability to terminate service, *and that the burden to bring the matter to the Commission's attention properly lay with the non-paying party.*

In addition to this MPSC precedent, other state commissions have concluded that an ILEC that is entitled to terminate an ICA due to the other party's breach need not obtain commission approval to do so. In the recently concluded arbitration between Sprint and AT&T Illinois, the ICC ruled in favor of AT&T Illinois on this issue. The ICC stated, "While the Commission agrees that discontinuation of service is an extreme remedy, we will not require the parties to receive a Commission Order prior to discontinuation of service. The Commission notes, as AT&T asserts, nothing in AT&T's language would prevent Sprint from filing a complaint with the Commission." *Sprint Illinois Arbitration Decision* at 80.

Finally, in an arbitration between TDS and Ameritech Wisconsin, the Public Service Commission of Wisconsin decided precisely this issue in a manner that strongly supports AT&T Michigan's position here. Exactly as Sprint does here, TDS contended that its ICA with Ameritech Wisconsin should be subject to termination only with a Commission order. TDS

made essentially the same argument that Sprint does here, and the Arbitration Panel rejected it,¹⁵⁶
ruling:

This Panel should be reluctant to insert the influence of the Commission into the competitive relationship of the parties. Either party under Ameritech's proposed language has the power to invoke the Commission's intervention when a threat to competition exists or appears to exist. Further, . . . either party may ask the Commission to intervene when a controversy exists as to compliance with the terms of the agreement. Creating a requirement that the Commission involve itself in the termination of an agreement pre-supposes anti-competitive conditions surrounding termination before such an accusation is made.

. . . . In a competitive market the termination of an agreement should take place where a competitor is unwilling and/or unable to efficiently compete in the market. Requiring the Commission to approve all terminations regardless of circumstance places an artificial and arguably anti-competitive impediment to the efficient operation of the market. This Panel's responsibility is to prevent anti-competitive terms and conditions that may lead to harm. TDS has not demonstrated that the language proposed by Ameritech establishes such anti-competitive terms and conditions.¹⁵⁷

Accordingly, the Panel awarded the language proposed by Ameritech Wisconsin, which, like AT&T Michigan's proposed language here, clearly spelled out the circumstances under which termination for a material breach may occur and, appropriately, did not require Commission involvement.

Sprint's brief offers nothing in support of Sprint's position on this issue. Sprint states that the Commission's decisions in two arbitrations support Sprint's position (Sprint Br. at 160), but that is not correct. As Sprint's discussion of the cases reveals, the only thing the Commission decided about disconnection in those cases that was adverse to the ILEC had to do with the timing of disconnection – and that has nothing to do with whether Commission approval

¹⁵⁶ In the PSCW, Arbitration Panels render final arbitration decisions.

¹⁵⁷ Arbitration Decision, PSCW Docket No. 05-MA-123, *TDS Metrocom Petition for Arbitration of Interconnection Terms, Conditions and Prices from Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin* (March 12, 2001), at 8-9

should be required before AT&T Michigan can terminate service to a defaulting carrier.¹⁵⁸ And, as we demonstrated above, one of the two decisions Sprint cites, the U-13758 Order, affirmatively supports AT&T Michigan's position.

Sixteen years into arbitrating and approving interconnection agreements that do not make AT&T Michigan seek prior Commission approval a pre-requisite for disconnection based on non-payment of undisputed bills, the Commission should not now, for the first time, impose such a requirement.

ISSUE 29(d): WHEN THE BILLED PARTY DISPUTES A BILL, SHOULD IT BE REQUIRED TO DEPOSIT THE DISPUTED AMOUNT IN ESCROW?

This issue has been resolved.

ISSUE 29(e): SHOULD THE ICA PROVIDE THE BILLING PARTY WITH THE REMEDIES PROPOSED BY AT&T MICHIGAN FOR GT&C SECTIONS 11.5 THROUGH 11.8.3 FOR FAILURES OF THE BILLED PARTY TO FULFILL ITS CONTRACTUAL DUTIES?

AT&T Michigan Position: Yes. The remedies proposed by AT&T Michigan are appropriate to the breaches to which the remedies pertain, and Sprint has offered no cogent argument to the contrary. Also, AT&T Michigan's proposed remedies in Section 11.5 promote a graduated approach in which the first action AT&T Michigan takes is not disconnection, but is instead a mere suspension of the delinquent party's ability to add services until it has paid for the services AT&T Michigan is already providing. (Greenlaw at 44-47.)

AT&T Michigan's proposed GT&C sections 11.5 through 11.8.3 set forth remedies that would be available to the Billing Party if the Billed Party fails to live up to its obligations under the ICA. Sprint opposes all of this language, which reads as follows:

11.5 If the Billed Party fails to:

11.5.1 pay any undisputed Unpaid Charges in response to the Billing Party's Discontinuance Notice as described in Section 11.1 above;

¹⁵⁸ Nor does it have anything to do with Issue 29(a), (b) or (e).

11.5.2 INTENTIONALLY LEFT BLANK

11.5.3 timely furnish any assurance of payment requested in accordance with Section 9.0 above; or

11.5.4 make a payment in accordance with the terms of any mutually agreed payment arrangement, the Billing Party may, in addition to exercising any other rights or remedies it may have under Applicable Law, provide written demand to the Billed Party for payment of any of the obligations set forth in the above Sections 11.5.1, 11.5.2 and 11.5.4 within ten (10) Business Days. On the day that the Billing Party provides such written demand to the Billed Party, the Billing Party may also exercise any or all of the following options:

11.5.4.1 suspend acceptance of any application, request or order from the Billed Party for new or additional Interconnection under this Agreement;

11.5.4.2 and/or suspend completion of any pending application, request or order from the Billed Party for new or additional Interconnection Service under this Agreement.

11.6 Where required, a copy of the demand provided to Sprint under Section 11.5 will also be provided to the Commission at the same time.

11.7 Notwithstanding anything to the contrary in this Agreement, the Billing Party's exercise of any of its options under Section 11.5 above, and Sections 11.5.4.1 above and 11.5.4.2 will not delay or relieve the Billed Party's obligation to pay all charges on each and every invoice on or before the applicable Bill Due Date; and

11.8 For AT&T MICHIGAN, if the Billed Party fails to pay the Billing Party on or before the date specified in the demand provided under Section 11.5 above of this Agreement, the Billing Party may, in addition to exercising any other rights or remedies it may have under Applicable Law:

11.8.1 cancel any pending application, request or order for new or additional Interconnection products and/or services and network elements, under this Agreement; and

11.8.2 disconnect any interconnection products and/or services furnished under this Agreement.

11.8.3 Discontinue providing any Interconnection products and/or services furnished under this Agreement.

Those provisions should be included in the ICA. They give the Billing Party appropriate remedies in the event of the specified defaults by the Billed Party, and the availability of these remedies actually benefits not only the Billing Party, but also the Billed Party. This is because sections 11.5 through 11.8 provide multiple opportunities for the Billed Party to cure payment delinquencies before it faces the ultimate remedy of disconnection of services. If AT&T Michigan's proposed language were omitted from the ICA, the only remedy for non-payment would be disconnection, and if the Billed Party failed to pay, AT&T Michigan would have no alternative but to invoke that remedy. Proposed subsections 11.5.4.1 and 11.5.4.2 provide an intermediate step by allowing the Billing Party to stop processing the Billed Party's order for additional services, and thus to limit its possible losses to a non-paying party. That is a much more mild remedy than discontinuing existing services, and it will often be sufficient to persuade the non-paying party to pay. Greenlaw at 46-47.

Sprint does not discuss these provisions in its brief (*see* Sprint Br. at 159-160). Subsections 11.8.2 and 11.8.3 are presumably objectionable to Sprint because they permit disconnection or discontinuation of all services, rather than the services for which payment was not made (*see id.*). That objection is not well-founded, for the reasons we explained above. Other than that, Sprint has left the Commission to guess at why it disputes sections 11.5 through 11.8.

For the foregoing reasons, the Commission should resolve Issue 29(e) in favor of AT&T Michigan.

ISSUE 30: SHOULD THE PERIOD OF TIME IN WHICH THE BILLED PARTY MUST REMIT PAYMENT IN RESPONSE TO A DISCONTINUANCE NOTICE BE FORTY-FIVE (45) OR FIFTEEN (15) DAYS?

AT&T Michigan Position: AT&T Michigan's proposed 15 days from the Discontinuance Notice is sufficient time for the Non-Paying Party to remit payment –

particularly since the charges at issue here are charges the Billed Party does not dispute. Since the Discontinuance Notice cannot be sent until the Non-Paying Party is already past due (over 30 days), the Non-Paying Party actually has 46 days (at a minimum) from the invoice date to pay the charges it owes. Sprint's proposed 45-day timeframe would actually give the Non-Paying Party 76 days (at a minimum) to pay after the invoice date, which is unreasonably long. There is no sound reason for not expecting the Billed Party to pay its undisputed bills within a minimum of 46 days in order to avoid a suspension of its ability to order new or additional services. (Greenlaw at 47-50.)

AT&T Michigan proposes that if the Billed Party receives a Discontinuance Notice for failure to pay its bills, the Billed Party must remit payment within 15 days. Sprint proposes an excessive 45-day limit.

AT&T Michigan's proposed 15-day period is sufficient time after receiving a Discontinuance Notice for a Non-Paying Party to pay Unpaid Charges that are not subject to a Billing Dispute. Since the Discontinuance Notice cannot be sent to the Non-Paying Party until after the charges are already Past Due (meaning the carrier has already had at least 31 days to pay), the carrier actually has a minimum of 46 days from the invoice date to avoid service disruption. That is certainly sufficient time for a carrier to pay its undisputed charges, properly dispute such charges per the terms and conditions of the ICA, or make mutually satisfactory payment arrangements to avoid such action.

Sprint's proposal for a 45-day period to pay undisputed charges after the Discontinuance Notice is sent would actually give the Billed Party a minimum of 76 days after the invoice date to pay its undisputed bills before facing any consequences for its delinquency, because the Discontinuance Notice is not sent until the Billed Party fails to pay the bill by the Bill Due Date, 30 days after the bill is sent. Sprint maintains that such a long period is justified because "disconnection of service is a drastic remedy. Sprint Br. at 160. Sprint is confused. The time period at issue here is *not* for disconnection.

As AT&T Michigan witness Greenlaw explains (at 48-49), and as the language in the General Terms and Conditions makes clear, the sequence of events in the event of nonpayment, assuming AT&T Michigan's 15-day proposal is adopted, is as follows:

- Payment of undisputed amounts is due by the Bill Due Date (section 10.1), which is thirty days after the bill is sent (section 2.14).
- If payment is not made by the Bill Due Date, the Billing Party may send a Discontinuance Notice, and the Billed Party must then pay undisputed amounts within fifteen calendar days (under AT&T Michigan's proposal). Section 11.1.
- **If payment is not made within the specified period, however, the Billing Party may not disconnect.** Rather, the Billing Party may stop processing orders for new or additional services from the Billed Party. Section 11.5.3. In addition, the Billing Party may send the Billed Party a second notice – a “written demand . . . for payment . . . within ten (10) *Business Days*. *Id.*
- Only then, if the Billed Party still fails to pay the undisputed charges, may the Billing Party terminate services. Section 11.8.

Thus, disconnection cannot occur under AT&T Michigan's proposed language until, *at the very soonest*, 29 days (*i.e.*, the 15 calendar days in section 11.1 plus the ten *business* days = 14 calendar days in section 11.5.3) after the Discontinuance Notice is sent. Moreover, that 29 days is 59 days after the bill was sent *at the very soonest* (since the notice cannot go out until the Bill Due Date is missed). We say “at the very soonest” because the foregoing numbers assume that the Discontinuation Notice actually goes out just one day after the Bill Due Date passes, *and* that the second notice actually goes out just one day after the initial 15-day period elapses. In the real world, this is not going to happen.

Even if the Billing Party moves as quickly as possible, it is reasonable for AT&T Michigan to be in a position to terminate service to a customer that (i) fails to pay its *undisputed* bill on the Bill Due Date, as required by the parties' contract; (ii) fails to pay or dispute its bill within 15 days of receiving a Discontinuation Notice bringing to its attention the fact that it is in arrears; and (iii) still fails to pay or dispute its bill within 10 business days (two weeks) of

receiving a second notice. Sprint's proposal to string out the 59 days a carrier would have to pay its bills under AT&T Michigan's proposal to 89 days (by extending the initial 15-day period to 45 days) is unreasonable and should be rejected.

V.D. BILLING DISPUTES

ISSUE 31: SHOULD THE ICA REQUIRE THE DISPUTING PARTY TO USE THE BILLING PARTY'S PREFERRED FORM IN ORDER TO DISPUTE A BILL?

This issue has been resolved.

Dated: August 16, 2013

Respectfully submitted,

By: /_____

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