ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF SPRINT COMMUNICATIONS COMPANY L.P.'S PETITION FOR ARBITRATION PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996, AND THE APPLICABLE STATE LAWS FOR RATES, TERMS AND CONDITIONS OF INTERCONNECTION WITH LIGONIER TELEPHONE COMPANY, INC.	**Cause No. 43052-INT-01 (consolidated with 43053-INT 01 and 43055-INT 01)** **APPROVED:** SEP 0 6 2006

BY THE COMMISSION:
Larry S. Landis, Commissioner
Aaron A. Schmoll, Administrative Law Judge

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- **What change of law provisions are necessary to address an agreement that is resolved pursuant to involuntary arbitration?**

Introduction

On May 16, 2004, Sprint Communications Company, LP ("Sprint") filed Petitions with the Indiana Utility Regulatory Commission ("Commission") for arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996, (47 U.S.C. § 151 *et seq.*) ("TA 96" or "Act"), to establish an Interconnection Agreement ("ICA" or "Agreement") with Ligonier Telephone Company, Inc. ("Ligonier"), Citizens Telephone Corporation ("Citizens"), and Craigville Telephone Company, Inc. ("Craigville") (collectively, "RTCs" or "Respondents"). Section 252(b)-(c) of the Act directs this State commission to arbitrate unresolved issues related to the obligations imposed on local exchange carriers by Section 251(b)-(c) of the Act. The Petitions enumerated numerous issues as unresolved between Sprint and the Respondents.

In accordance with 47 U.S.C. § 252(b)(3), Respondents filed their Response to Sprint's Petitions for Arbitration on June 12, 2006.

1. Procedural History.

On November 9, 2005, Sprint sent individual requests for negotiation of an interconnection agreement under the provisions of the Act to each of the Respondents. Sprint agreed to enter negotiations collectively with the Respondents, and on April 10, 2006, the parties agreed to a thirty-day extension of the period after which, according to the Act, a party may petition a state commission to arbitrate any open issues. The extension effectively established April 22 through May 17, 2006, as the time-period within which either Sprint or the RTCs could petition the Commission to arbitrate any open issues.

Sprint's Petitions were filed on May 17, 2006, and were substantively identical. For convenience, we will reference the Petition filed against Ligonier for purposes of this decision.

After an informal attorneys' conference was conducted on June 6, 2006, the Presiding Officers established the procedural schedule and granted the parties' Joint Motion for Consolidation of these proceedings by docket entry dated June 9, 2006. On June 12, 2006, RTCs filed their Motion to Dismiss Sprint's Petitions for Arbitration along with their Response to Sprint's Arbitration Requests. On June 22, 2006, Sprint filed its Response to the RTCs' Motion to Dismiss. On June 23, 2006, RTCs filed the direct testimony Steven E. Watkins, Don Johnson, Lee VonGunten, and Joan Paxson. The same day, Sprint filed the direct testimony of Peter N. Sywenki. On June 20, 2006, Respondents filed the reply testimony of Mr. Watkins, and Sprint filed the reply testimony of Mr. Sywenki and James R. Burt. With respect to the Watkins Reply Testimony, the Respondents filed a "public" version of this testimony, from which information alleged to be confidential by Sprint was redacted.

On June 29, 2006, Respondents filed a Motion to Compel Production of Document seeking an order requiring Sprint to produce an unredacted copy of Sprint's agreement with MCC Telephony, a/k/a Mediacom ("MCC"). Sprint responded on July 5, 2006, and filed a Motion for Confidential Treatment and Supporting Affidavit relating to the information addressed in Mr. Watkins Reply Testimony, Respondents' Motion to Compel and an unredacted version of the MCC contract, which the Presiding Officers granted, on a preliminary basis, through its July 10, 2006 Docket Entry. Respondents offered their reply at the evidentiary hearing on July 11, 2006, and thereafter, the Presiding Officers granted the Motion to Compel in part, ordering Sprint to produce an unredacted copy of a portion of the MCC contract and further ordering that, due to its confidential nature, review of said portion of the MCC contract must be restricted to Respondents' counsel and its expert witness, Mr. Watkins. Sprint provided the unredacted, confidential portion of the MCC contract to Respondents' counsel and Mr. Watkins, as ordered, during the evidentiary hearing.

On July 5, 2006, the Commission issued a docket entry concerning the parties' respective proposed orders. As permitted by the procedural schedule in this matter, the Respondents filed their Objections to Prefiled Testimony on July 6, 2006. The parties agreed at the hearing that the Commission would resolve the RTCs' Objections at the time of its decision in this proceeding, and that acceptance of testimony on issues noted in the July 6 submission was subject to continuing objection on the record. *See* Tr., at A16-17.

On July 10, 2006, the Commission entered an additional docket entry containing a series of questions to the witnesses in this matter (the "July 10 Docket Entry") that, as discussed below, were addressed by them during the July 11, 2006 hearing.

An evidentiary hearing was held in this Cause on July 11, 2006, at 9:00 a.m., in Room E306, Indiana Government Center South, Indianapolis, Indiana. At the hearing, Petitioner and Respondents presented their respective cases-in-chief. The prepared testimony and exhibits of Petitioner's witnesses were admitted into the record subject to continuing objection. Mr. Burt responded to questions from the Presiding Officers, and Bench Exhibits 1, 2, and 3 were admitted into evidence without objection. Sprint also offered Petitioner's Ex. 4, which consisted of Mr. Burt's and Mr. Sywenki's responses to the July 10 Docket Entry. Petitioner's Ex. 4 was admitted into evidence over objection. Respondents offered the prepared testimony and exhibits of Respondents' witnesses, which were admitted into evidence without objection. No member of the general public was present at the hearing.

2. **Jurisdiction.** Sprint and each of the Respondents are "public utilities" within the meaning of I.C. 8-1-2-1. Pursuant to I.C. 8-1-2.6-1.5(b)(2), this Commission has jurisdiction to arbitrate disputes pursuant to Section 252(b) of the Act.

3. **Petitioning Party's Organization and Business.** Sprint is a Delaware limited partnership with its principal place of business at 6200 Sprint Parkway, Overland Park, Kansas. Sprint is a telecommunications carrier providing facilities-based competitive local exchange, exchange access, and interexchange telecommunications services in this state pursuant to its Certificate of Territorial Authority issued by this Commission.

4. **Responding Parties' Organization and Business.** Respondents are each incumbent Local Exchange Carriers in Indiana within the meaning of Section 251(h) of the Act, and each is certificated to provide telecommunications service by this Commission. Within each of their respective operating territories, each Respondent has been the incumbent provider of telephone exchange service during all relevant times.

A. Ligonier

A summary of Ligonier's status, operations and network was provided by Ligonier's witness in this proceeding, Donald E. Johnson. Ligonier is a small incumbent telephone company operating approximately 2,600 access lines in a predominately rural area of northeast Indiana in portions of Noble and Elkhart Counties. *See* Johnson Testimony at 2. Its service area is about 25 air miles from Elkhart, Indiana. The Ligonier exchange serves the Town of Ligonier which has a population of approximately 3,500 and serves approximately 1,700 residential access lines and 900 business access lines. Ligonier's entire certificated area is approximately 42 square miles. Ligonier has been designated as an Eligible Telecommunications Carrier ("ETC") in its certificated area. Other than typical light industry and/or commercial business, the primary economic base of the area served by Ligonier is agricultural.

B. Citizens

A summary of Citizens' status, operations and network was provided by Citizens' witness in this proceeding, Joan Paxson. Citizens is a small incumbent telephone company operating approximately 2,500 access lines in predominately rural areas in portions of Huntington, Wells and Grant Counties in northeast Indiana. It operates two (2) exchanges–the Warren exchange and the Liberty Center exchange. The Warren exchange service area is about 31 air miles from Fort Wayne, Indiana Citizens' Liberty Center exchange service area is approximately 28 air miles from the Verizon-Fort Wayne tandem. Ms. Paxson testified that Citizens' Warren exchange (260-375) serves the town of Warren, which has a population of approximately 1,272, and small villages within the exchange of Buckeye, Dillman, Pleasant Plains and Plum Tree. She stated that the Warren exchange has some light industry and commercial businesses and a retirement home, with a predominantly agricultural economic base. Citizens' Liberty Center exchange (260-694) serves the rural village of Liberty Center (population est. 100), the town of Poneto (population est. 50), and the village of Mt. Zion (population est. 20). Ms. Paxson stated that this is a very rural exchange with very few commercial businesses; its primary economic base is agriculture. The entirety of Citizens' certificated area is approximately 135 square miles. Citizens has been designated as an ETC in its certificated area.

C. Craigville

A summary of Craigville's status, operations and network was provided by Craigville's witness in this proceeding, Lee VonGunten. Craigville is a small incumbent telephone company operating approximately 1,150 access lines in a predominately rural area of northeast Indiana in portions of Adams and Wells Counties. Craigville's service area is about 22 air miles from Fort Wayne, Indiana, which is the location of the tandem office operated by Verizon that the Craigville end office subtends. Craigville operates one exchange, and serves two small towns

(Craigville and Vera Cruz have populations of less than 200) and rural areas totaling a population of approximately 2000. *See id.* The entirety of Craigville's certificated area is approximately 50 square miles. Craigville has been designated as an ETC in its certificated area and, accordingly, provides service throughout its certificated area upon reasonable request. Mr. VonGunten testified that MCC provides service in Bluffton, Indiana, and extends out into selected rural areas including Craigville, Indiana and Vera Cruz, Indiana. Other than typical light industry and/or commercial business, the primary economic base of the area served by Craigville is agricultural.

5. Identification of Unresolved Issues. Pursuant to Section 252(b)(4)(A) of the 1996 Act, the Commission "shall limit its consideration" to the issues set forth in Sprint's Petition and Response.

6. Statutory Standards. The Commission "shall resolve each issue set forth in the petition and response, if any, by imposing appropriate conditions as required to implement 2(c)[1] upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section."[2] Section 252(b)(4)(B) further provides:

The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived. Here, neither party refused or unreasonably failed to respond to any request by us for information.

In resolving by arbitration any open issues and imposing conditions upon the parties to the Agreement, Section 252(c) provides:

> a State commission shall –
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to Section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
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> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

In light of the above standards and using the proposed orders submitted by the parties, we summarize the parties' positions on the open issues, as reflected in Sprint's Petition (Issues 1

[1] 47 U.S.C. § 252(c).
[2] 47 U.S.C. § 252(b)(4)(C).

through 11) and the additional issues included in Respondents' Response (Issues 12 and 13), and we resolve those issues as set forth below.

7. Outstanding Issues.

A. Respondents' Motion to Dismiss in Whole or In Part. In its June 12, 2006 Response, the Respondents raised certain preliminary matters that were incorporated by reference in their simultaneously filed Motion to Dismiss ("Motion"). We address those issues below.

1. Position of the Parties

a.) Respondents

In their Response, and by its Motion, the RTCs request that the Commission dismiss in whole or in part the Petitions. *See* Response at 3-20. The RTCs asserted in their Response that they had agreed to negotiate voluntarily with Sprint under the time frames of Section 252 of the Act solely with respect to the specific standards of Section 251(b) of the Act and attached to the Response, Appendix A demonstrating this fact. *See id.* at 4. The Respondents assert that at no time did they agree to negotiate without regard to those standards, and that the fact that they have provided comments on Sprint's proposals within the Response that fall outside of Section 251(b) is not a waiver of their position. According to the RTCs, those standards require a demonstration of telecommunications carrier status and/or specific attributes of such status, which Sprint has failed to present. The RTCs also asserted that, separate and apart from this issue, Sprint's efforts to arbitrate Section 251(a) interconnection, and its effort to expand its request for interconnection to propose terms and conditions for EAS traffic, which the Commission has already determined to be subject to state law and state policies,[3] cannot be sustained. Accordingly, the RTCs requested that the Petitions be dismissed, or the scope of the issues addressed in the arbitration be significantly curtailed.

b.) Sprint

Sprint argues that Respondent's Motion must be denied as the arguments posited by Respondents are merely aimed to prevent meaningful facilities-based competition in their territories. Sprint asks the Commission to recognize that it clearly is a telecommunications carrier under applicable law and there are no legal or policy reasons to prevent Sprint from providing services with MCC to be made available to customers in the territories of the Respondents.[4]

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[3] The RTCs cited to the following Commission decision in support of their position on EAS: *In re Petition of Smithville Telephone Company, Inc. Under I.C. 8-1-2-5(b) for an Investigation of (1) the Cancellation of Extended Area Service (EAS) Contracts by Indiana Bell Telephone Company d/b/a/ Ameritech Indiana and (2) the Maintenance of EAS Arrangements Between Local Exchange Carriers, Order,* Cause No. 40895 (Feb. 9, 2000) ["*Smithville Order*"].

[4] See Petition, ¶ 22.

Sprint further suggests that the Commission must diligently implement the policy articulated by the Indiana General Assembly in House Enrolled Act 1279, which Sprint contends supports new competition in telecommunications services.

Sprint claims as that it qualifies as a telecommunications carrier eligible to negotiate and enter into interconnection agreements. According to Sprint, Respondents argument that they should be forced into interconnection negotiations only with the entity who is directly serving the end user subscribers is unsupported. Sprint states that there is no "retail" requirement under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151 *et seq.*) (hereinafter, the "Act").

Furthermore, Sprint claims that the Respondents' assertion ignores that Sprint's network, not MCC's network, will physically interconnect with the Respondents. Sprint will provide switching, public switched telephone network ("PSTN") interconnection, numbering resources, administration and porting, domestic and international toll service, operator and directory assistance, and numerous back-office functions, and Sprint's systems will track and pay reciprocal compensation.[5] Sprint states that MCC cannot negotiate an interconnection agreement that will bind Sprint with respect to Sprint's own facilities and equipment. Only Sprint can. In support of its argument, Sprint included state commission orders from New York, Ohio, Illinois approving similar arrangements.

Moreover, Sprint argues that Respondents' assertions to narrow the scope of the arbitration must also be disregarded. Section 251(a) interconnections are commonly arbitrated at state commissions and Respondents' one supporting citation has been vacated by the D.C. Circuit Court of Appeals.[6] There is no legal restriction on the inclusion of CMRS traffic in the interconnection agreement and the Commission should not entertain Respondents' arguments otherwise. Finally, EAS traffic is not exempt from the FCC's definition of "telecommunications traffic" and thus should be considered in this arbitration.[7] Moreover, the EAS decision cited by Respondents deals with ILEC to ILEC compensation and does not relieve the Commission from deciding open issues in an arbitration proceeding.

Sprint states that the Respondents' arguments lead to the inescapable conclusion that the Respondents simply want to delay competition for as long as possible to preserve their respective market positions. While Respondents have been providing telephone service for more than 100 years, this is the first time real facilities-based competition is present in their territories. Sprint states that the Commission should see through the Respondents' legal maneuverings and join the other state commissions that have addressed this business model, and which have imposed upon ILECs a duty to interconnect with Sprint.

2. Commission's Decision

The Respondent's Motion raises five distinct issues, which we address below.

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[5] *See* Petition, ¶ 23.
[6] *SBC v. FCC*, 407 F.3d 1223, 1232 (D.C. Cir. 2005).
[7] *See* 47 C.F.R. § 51.701(b).

a.) Telecommunication Carrier

Respondents contend that Sprint is not entitled to interconnect under Section 251. Section 251(a)(1) requires each telecommunications carrier to "interconnect *directly or indirectly*" with other telecommunications carriers. In order to pursue interconnection under section 251(a), Sprint must qualify as a "telecommunications carrier" under 47 U.S.C. 153(44). A "telecommunications carrier" means "any provider of telecommunications services," which is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. 153(51).

"Telecommunications carrier" and "common carrier" have been effectively interpreted in the same manner, using the two-step process utilized in *National Assn. of Regulatory Util. Comm'rs v. FCC,* 525 F.2d 630 (D.C. Cir. 1976), *cert. denied,* 425 U.S. 992 [*NARUC I*]; *see also United States Telecom Association v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002); *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1997). In order to determine whether an entity qualifies as a common carrier, we must first consider whether the carrier holds itself out to serve potential users indiscriminately. *See USTA*, 295 F.3d at 1329. Second, we must consider whether the carrier alters the content of the users' transmissions. *Id.* Because there is no dispute over whether Sprint is altering the content of the communications it carries, our decision turns on the question of whether Sprint's services are offered indiscriminately.

In this case, it is undisputed that Sprint is not directly serving MCC customers or end users. Instead, MCC will provide "last mile" services from the Sprint switch. Accordingly, such last mile providers are the class of users at issue in this case. The evidence demonstrates that MCC will provide retail telecommunications services directly to its customers or end users, and thus is making Sprint's services to MCC directly available to the public. Although MCC is currently the only last mile provider utilizing Sprint's services, nothing prevents Sprint from contracting with other last mile providers as the market develops, and Sprint witnesses have testified that they will hold themselves out to serve these providers and offer Sprint's services indiscriminately.

We would note that in addition to the state commissions that have approved interconnection agreements in similar circumstances, the Nebraska commission rejected Sprint's attempt to interconnect with a rural ILEC when Time Warner was the last-mile service provider. *See In re Sprint Communications Company L.P., Overland Park, Kansas, Petition for Arbitration Under the Telecommunications Act, of Certain Issues Associated with the Proposed Interconnection Agreement Between Sprint and Southeast Nebraska Telephone Company, Falls City*, Docket No. C-3429 (Sept. 13, 2005). However, the facts are distinguishable from the present case in that Time Warner, the last-mile provider, had its own switching capability—a soft switch. While Sprint argued to the Nebraska Commission that such a difference was immaterial, we need not resolve that issue today, as MCC does not have its own switch.

Finally, we are mindful that the Agreement between Sprint and MCC contains provisions pertaining to pricing and termination that could be construed to limit Sprint's willingness and ability to indiscriminately offer services to other last mile providers who would provide similar

services in the area already served by MCC. Accordingly, such limitations would argue against common carrier–telecommunication provider status for Sprint in this proceeding.

While such provisions might seem on their face to be discriminatory, we find that the common carrier (telecommunication carrier) requirement to indiscriminately offer service status turns on the presence of simple indiscriminate offering of service, rather than on the offering of services of identical terms and conditions. Different retail carriers have different characteristics that can reasonably result in differing prices, terms, and conditions under which a carrier, like Sprint, offers its wholesale services. Therefore, it is conceivable that the terms and conditions offered by Sprint to its varied wholesale services customers could very well differ.

The key determinant as to common carrier status is the indiscriminate offering of service, i.e., an absence of refusal to provide service. We find that there is no indication that Sprint intended to refuse service to a retail carrier requesting its wholesale services. Indeed, the provisions of the Sprint/MCC Agreement fully contemplate that Sprint would be offering services (i.e., not refusing it s services in a discriminatory fashion) to entities other than MCC. If it were Sprint's intention to not do so, such provisions would be unnecessary. Moreover, these provisions in no way require Sprint to refrain from providing service to carriers besides MCC (or at any point cease providing services); they merely lay out changes to the terms and conditions applicable to MCC and provide MCC with the *option* to terminate the agreement. Any suggestion that these provisions would prevent Sprint from providing service to other carriers besides MCC (i.e., discriminate service offering) is speculative.

Thus, we find that Sprint is, in fact, offering its wholesale services in an indiscriminating fashion, consistent with common carrier and telecommunications provider definitions.

b.) Local Exchange Carrier

Respondents next assert that Sprint's petition must be dismissed because Sprint is not entitled to enforce 251(b) requirements. Section 251(b) refers to requirements of local exchange carriers. 47 U.S.C. 153(26) defines local exchange carrier as "any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332 (c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term." The term "telephone exchange service" means:

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or
>
> (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. 153(47).

In the present case, the evidence of record shows that Sprint will perform number porting and provide dialing parity on MCC's behalf. Further, it is Sprint, not MCC, which owns the switch through which MCC traffic will travel. As such, we find that Sprint is providing "comparable service," which allows MCC customers to originate and terminate service, and thus qualifies as a local exchange carrier. In fact, without Sprint, MCC customers would be unable to place or receive telephone calls that would require switching to or from the public switched telephone network.

c.) 251(a) Issues

Respondents also claim that the Sprint may not include Section 251(a) issues as part of a Section 252 arbitration proceeding. The only authority to which Respondents cite for this proposition is *In re CoreComm Communications, Inc., and Z-Tel Communications, Inc. v. SBC Communications, Inc.*, Order on Reconsideration, FCC 04-106 (May 4, 2004) [*Z-Tel Order*]. However, as Sprint notes, the *Z-Tel Order* has since been vacated by the D.C. Circuit Court of Appeals. *See SBC v. FCC*, 407 F.3d 1223 (D.C. Cir. 2005). Moreover, the FCC has determined that arbitration is available for issues arising through interconnection between CMRS providers and ILECs. *See Local Competition First Report and Order*, 11 FCC Rcd. at 15991, para. 997 (rel. Aug. 8, 1996) (defining interconnection obligations under section 251(a)). Accordingly, Respondents' request to remove Section 251 issues is denied.[8]

d.) CMRS Issues

Respondents further claim that CMRS issues should be dismissed because they were not included in Sprint's original November 9, 2005 request for negotiations. Instead, Sprint included a request to include CMRS issues in this proceeding through its March 30, 2006 proposal to Respondents.

Section 252(b)(1) provides that any party to a negotiation may petition a State commission to arbitrate "any open issues." We note that the Act does not contain an explicit requirement that all issues be presented in the initial request for negotiation. In fact, it seems reasonable that issues may arise during the course of negotiations which were not included in the initial request for negotiations. However, the inclusion of new issues in a negotiation should not unfairly prejudice the other party.

Here, the petition was filed on June 12, 2006, more than two months following Sprint's inclusion of CMRS issues. We believe this time period provides sufficient notice to Respondents so that these issues may be included in Sprint's petition for arbitration. Accordingly, we deny Respondents' motion on this issue.[9]

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[8] Because we are not dismissing the 251(a) issues, we also overrule Respondent's objection to the admission of Mr. Sywenki's testimony on that issue and deny Respondent's motion to strike with respect to the 251(a) testimony.

[9] Because we are not dismissing the CMRS issues, we also overrule Respondent's objection to the admission of Mr. Sywenki's testimony on that issue and deny Respondent's motion to strike with respect to the CMRS testimony.

e.) EAS Issues

Finally, Respondents contend that Expanded Area Service Issues should be dismissed. Respondents claim that the *Smithville Order* determined that EAS compensation was a state-only issue not subject to reciprocal compensation under 251(b)(5). Sprint argues that *Smithville* is inapplicable here as that decision related to reciprocal compensation of EAS traffic between two ILECs.

In the proposed interconnection agreement, the only sections relating to EAS are Sections 2.9, 2.10, and 2.12, all of which are in the definitions section of the proposed agreement. We further note that this negotiation does not involve questions concerning compensation for EAS traffic. Accordingly, we find that, to the extent EAS traffic relates to the interconnection of Sprint and the RTCs, it is appropriate to address EAS in the interconnection agreement. We therefore deny the Respondents' motion on this issue.

B. Resolution of Arbitration Issues. We now turn to the arbitration issues presented by the parties.

Issue 1: Should the definition of End User in this Agreement include end users of a service provider for which Sprint provides interconnection, telecommunications services or other telephone exchange services?

Related Agreement provisions: 2.6, 3.5, 38.2, and as the term is used throughout the Agreement in 3rd Recital, 1.9, 1.10.2, 1.11, 2.9, 12.1, 12.8, 12.10, 12.11, 12.13, 13.3, 14.1, 16.3, 17.4, 18.2, 18.3, 18.4, 18.5, 18.6, 18.7, 18.8, 18.9, 18.10, 18.11, 18.13, 18.14, 18.16 and Schedule IV.

1. Position of the Parties

The parties' positions with respect to Issue 1 are identical to those previously set forth under Section A, *supra*. These issues include whether Sprint is a Telecommunications Carrier and what type of traffic can be included in the agreement. The only issue that is not addressed here is the CMRS compensation rate, which we address in Issue 12.

2. Commission's Decision

We resolve this issue in the same manner that we resolved the Motion to Dismiss filed by Respondents. We rule that Sprint's language for Issue 1 should be included in the agreement, with the exception of CMRS compensation, which is addressed in Issue 12.

Issue 2, as stated by Sprint in its Petition: Should the Interconnection Agreement permit the Parties to combine all wireline, wireless and IP-PSTN traffic on interconnection trunks?

*** **Issue 2, <u>as clarified and explained by Sprint in its written response to the Commission's July 9 Docket Entry and in oral testimony and remarks at the July 11 hearing for these consolidated causes</u>: Should the Interconnection Agreement permit the Parties to combine all wireline traffic not subject to access charges, all intraMTA wireless traffic, and all IP-PSTN traffic [which Sprint asserts is subject to Section 251(b)(5)][10] on the same multi-use interconnection trunk(s)?**

Related Agreement provisions: 1.1, 1.12, 2.3, 2.16, 2.18, 2.19, 2.20, 2.21, 2.22, 2.24, 2.32, Section 10, 38.2, as the term Telecommunications Traffic is used throughout the Agreement in 1.1, 2.2, 2.25, 2.28, 6.5.1, 8.1, 8.1.1, 8.2.2, 14.1.

1. Position of the Parties

a.) <u>Sprint</u>

Sprint asked the Commission to adopt multi-use trunks to allow it to combine wireline traffic not subject to access charges, intraMTA wireless traffic, and IP-PSTN traffic on the same interconnection trunks. Sprint witness Peter Sywenki testified that Sprint is seeking to establish efficient network interconnection and that the combination of traffic on multi-use interconnection trunks, regardless of the technology employed (wireless or wireline) in the origination of the traffic, provides network efficiencies that the parties will not realize if required to segregate the traffic onto separate trunks. (Sywenki Direct, at 9). Mr. Sywenki stated that multi-use trunks permit greater trunk utilization. Essentially, he argued that when different traffic types are permitted to ride the same interconnection trunks rather than being segregated on separate trunks, to the extent different traffic types peak at different times, more overall traffic can be placed on fewer trunks. (Sywenki Direct, at 10).

Mr. Sywenki testified that wireless and wireline traffic patterns exhibit different peaks. For example, based on nationwide average usage characteristics of certain Sprint internal traffic (both wireline and wireless) gathered by Sprint's network operations group within the last two years, business wireline traffic usage peaks fall between 10 a.m. and 2 p.m., residential wireline peaks occur between 6 p.m. and 7 p.m., and wireless usage peaks occur between 7 p.m. and 8 p.m. Mr. Sywenki argued that with multi-use trunks this traffic can be distributed across fewer trunks. He further argued that "Fewer trunks mean fewer trunk ports on both the ILEC and Sprint switches. Fewer trunks and trunk ports also mean less trunk orders required to be processed. And fewer trunks also means that the capacity of the interconnection facility carrying these trunks may be less than if required to segregate the traffic onto separate trunks." (Sywenki Direct, at 10).

Mr. Sywenki stated that another reason for Sprint requesting to combine different types of traffic onto the same trunks was that advancements in switching technology enable Sprint to combine different types of traffic onto a common switching platform. Mr. Sywenki testified that "It would be highly inefficient for Sprint to combine the different traffic types onto a common

[10] *See, e.g.*, Section 2.24 of the May 16 disputed Interconnection Agreement filing; Tr. A-75.

switching platform but then have to segregate the traffic onto separate trunks where it interfaces with the ILEC." (Sywenki Direct, at 10-11). The Presiding Officers asked in its July 10 Docket Entry whether Sprint's proposal on this issue depended on whether its network or the RTCs' networks were converged. Mr. Sywenki responded that the convergence of Sprint's network is ongoing but "multi-use trunking is not dependent on the completion of that convergence. Sprint can combine the wireless and wireline traffic within its network and place it on the trunks for delivery to the other carriers." (Tr. A-78). Mr. Sywenki also stated that the RTCs in a sense already have a converged switching platform because today they are terminating both wireless and wireline traffic on their switches. (Tr. A-79). In other words, Sprint argued the Respondents are seeking to prevent Sprint from utilizing multi-use trunking when they utilize such trunking already.

Mr. Sywenki stated that there is no technical reason to segregate the traffic and the types of traffic Sprint proposes the parties be permitted to combine on multi-use trunks, i.e., intraMTA CMRS to wireline traffic and wireline to wireline non-access traffic (Sywenki Direct, at14). Mr. Sywenki further pointed out that the Commission has addressed the issue of combining all traffic types on interconnection trunks in the Level 3 and SBC Indiana arbitration in Cause No. 42633 INT-01. There the Commission found that different types of traffic can be combined on interconnection trunks. (Sywenki Direct, at 15-16). Overall, Sprint argued that the Commission should adopt its language on Issue 2 due to the network efficiencies and lower costs that will result for both parties from combining different types of traffic on the same trunks. (Sywenki Direct, at 16).

b.) <u>Respondents</u>

As discussed below, the RTCs oppose Sprint's proposal to combine "non-access" wireline traffic, intraMTA wireless traffic, and IP-PSTN traffic on the same multi-use interconnection trunks. The RTCs have stated they will agree to include in the agreement with Sprint only traffic they characterize as "properly defined local traffic" exchanged between one LEC competing with another LEC such as one of the RTCs, within an exchange of an RTC.[11] The Respondents contend that CMRS providers are not LECs and that Sprint did not request interconnection for CMRS providers. The RTCs assert that therefore, the "CMRS interconnection issue" is beyond the scope of arbitration. (Respondents' Response [hereinafter, "Response"], at 23).

The Respondents also assert that so-called IP-PSTN traffic is no different than any other local exchange traffic, and to the extent that the originating and terminating points of such IP-PSTN traffic are within the geographic scope of a local exchange (*i.e.,* local calling area), then they believe such traffic should be treated as any other local traffic of a LEC and can be included in the agreement. (Response, at 23). From the RTCs' perspective, to the extent that Sprint intends to apply the concept of IP-PSTN to allow Sprint to originate or terminate traffic to geographic points beyond the scope of "local traffic" or traffic that is within the scope of Section

[11] As indicated above, the Respondents contend that the Commission has already determined that EAS is not required to be included in an agreement to implement the federal directives under the Act for reciprocal compensation. Thus, the Respondents take the position that the terms and conditions for EAS are subject to state law and state public policy objectives. *See generally Smithville Order.*

251(b)(5) of the Act, the Respondents indicated that they do not agree that such treatment is allowed or required of the RTC.[12] (Response, at 23).

The Respondents contend that an examination of the FCC's Subpart H rules demonstrates that there are *regulatory, jurisdictional, technical and definitional differences* that make CMRS traffic that is subject to Section 251(b)(5) of the Act dramatically different from wireline traffic under that section. (Response, at 24.) The RTCs noted that the specific applicable FCC rules under Section 251(b)(5) define the scope of traffic subject to the transport and termination reciprocal compensation framework in the context of whether the two carriers are two LECs[13] or a LEC and a CMRS provider.[14]

According to the Respondents, if the two carriers are a LEC and CMRS provider, then the Major Trading Area ("MTA") geographic distinction applies. However, if the two carriers are both LECs, then the RTCs assert that some other geographic area applies for the purpose of defining the scope of traffic that a carrier may choose to transmit to a terminating carrier on the basis of a reciprocal compensation arrangement. (Response, at 24). The RTCs argue that, while a rural LEC such as an RTC has network facilities in a specific and relatively small defined area, a wireless carrier is authorized by the FCC to consider a very large area – an MTA – as its operating area for purposes of transport and termination of traffic. These MTAs are often many times larger than the typical wireline local calling area (Response, at 24), and can even be larger than a single state.[15] The RTCs asserted that a wireless carrier can originate a call anywhere within an MTA and utilize "local" transport and termination services to terminate calls on a rural LEC's network, thereby avoiding the payment of higher access charges that would otherwise be associated with the same call.[16] (Response, at 25).

Second, the RTCs also asserted *factual* differences between wireline and CMRS services. The Respondents noted that wireline users are served in fixed locations, but the location of the mobile user is not known for CMRS calls. (Response, at 24). Accordingly, the wireline LEC exchanging calls with a CMRS provider has no ability to determine the location of the mobile user and must rely on representations from the CMRS provider and statistical evidence of the nature of CMRS calls and their jurisdiction. (Response, at 24).

The RTCs also take the position that Sprint has provided no information about what CMRS providers it would intend to include, or what the geographic scope of service and traffic of these CMRS providers may be involved. (Response, 26.)

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[12] The RTCs noted that Attachment H includes the FCC's Subpart H rules that determine the scope of traffic that is subject to Section 251(b)(5) of the Act. *See* Response at n.24. The RTCs also contended that the FCC's Subpart H rules are the sole and exclusive rules that address the terms and conditions for the transport and termination of traffic that is subject to Section 251(b)(5) of the Act. *See id.*

[13] *See* 47 C.F.R. §51.701(b)(1).

[14] *See* 47 C.F.R. §51.701(b)(2).

[15] There are 51 MTAs in the United States, including four that are wholly or partially in Indiana; by contrast, there are at least 161 LATAs in the U.S., including ten LATAs or LATA equivalents in Indiana.

[16] The RTCs also noted that MTAs often span large areas that cover multiple states. For example, the northern portions of the State of Indiana are included in the Chicago MTA that also includes most of the State of Illinois. The Indianapolis MTA includes portions of Illinois and Ohio. *See id.* at 26, n.85.

For these reasons, and assuming, *arguendo,* that CMRS traffic were to be included in the agreement, the RTCs conclude that the traffic should be segregated on separate trunks apart from wireline local traffic so that accurate measurement and compensation terms and conditions can be applied to CMRS traffic and the proper differences from wireline traffic recognized. (Response, at 26). If CMRS traffic is to be combined with other forms of traffic, then the RTCs also note that there are a large number of issues that remain unresolved with respect to traffic identification, measurement, segregation of interMTA and intraMTA components of the combined CMRS traffic, the ability to audit traffic, and proper compensation to address out of balance considerations for the CMRS component of traffic. (Response, at 26, 27; see also, Watkins Reply, at 9). Mr. Watkins also noted that opportunities for undetected misrepresentation of traffic are increased with traffic combined on a trunk group. Accordingly, Mr. Watkins testified, there may be a need to rely more on estimation factors. (Watkins Reply, at 8.)

Mr. Watkins also addressed Mr. Sywenki's positions regarding the combination of traffic types. (Watkins Reply, at 10.) He stated that, if one reads the Virginia arbitration proceeding order cited by Mr. Sywenki on page 15 of his testimony (in the paragraphs surrounding paragraph 182 where footnotes 608 and 609 appear), one will find that the "non-local exchange traffic" being discussed by the FCC is "*busy line verification* and *emergency intercept*" traffic related to operator services. (Watkins Reply, at 10) (emphasis in original). Mr. Watkins stated that he did not know what relevance that portion of the Virginia order has here, because neither type of traffic is under review here. (Watkins Reply, at 10)

Further, Mr. Watkins stated that the Level 3 matter upon which Mr. Sywenki relies was vacated by the Commission. (Watkins Reply, at 10). Mr. Watkins also observed that matter involved an arbitration with SBC Indiana, a large non-rural company, where the facts and circumstances of the request, negotiation, and arbitration are related solely to the parties to the arbitration; he further contended that it does not and cannot create requirements for any party not subject to that proceeding, including the RTCs. Mr. Watkins testified similarly concerning the proceeding in Michigan that was referenced by Mr. Sywenki, for which the details of issues are not known to the RTCs, in which the RTCs did not and could not participate. He stated that the Michigan case likewise cannot create requirements for the RTCs in Indiana. (Watkins Reply, at 10).

2. Commission's Decision

Sprint's arguments on the general issue of whether the Interconnection Agreement permits the combination of differing types of traffic on the same multi-use interconnection trunks are persuasive. No technical reasons have been raised by the RTCs why Sprint's proposal here should not be adopted. Mr. Sywenki's testimony indicates that Sprint and the RTCs will gain efficiencies from putting wireless, wireline and IP-PSTN traffic on the same trunks. We agree that the combination of wireline, wireless, and IP-PSTN traffic as the parties have defined it in the proposed interconnection agreement would create network efficiencies for both parties. Mr. Watkins could not identify any costs to the RTCs for implementing the Sprint proposal. (Tr., B-102).

We further agree with Sprint that the intercarrier compensation aspects do not pose roadblocks to combining the different types of traffic on the same trunks. All of the traffic going over these trunks is considered telecommunications traffic compensable under 47 U.S.C. § 251(b)(5) and 47 C.F.R. §51.701(b)(1) and (2). Sprint and the RTCs have agreed to a bill and keep compensation arrangement for all traffic that is not CMRS, except for IP to PSTN traffic that originates or terminates outside of their local calling area.

Moreover, we have addressed this very issue in a previous arbitration. In an arbitration order addressing interconnection between Level 3 and SBC Indiana, the Commission decided that interconnection trunks can be used for all forms of traffic. Nothing has changed, in our view, about the ability and efficiencies to be gained from combining traffic on interconnection trunks.

However, the Commission is concerned about: identifying and measuring traffic that goes over one trunk; the use of factors; issues associated with phantom traffic; and auditing provisions. We believe the best mechanism for identifying and measuring all the traffic is one in which both parties agree on the type, jurisdiction, and amount or volume of traffic; however, if parties cannot agree, the dispute resolution process in Section 32 of the agreement should be invoked. For example, Section 6.5.2 does not allow for mutual agreement on factors.

Therefore, we order that the use of multi-use interconnection trunks is appropriate, but the Interconnection Agreement needs to be altered such that any use of measurement of traffic must be agreed-upon by the parties. If parties cannot agree, the dispute resolution outlined in the Interconnection Agreement will be used. Furthermore, Sections 3.6, 13.1, and 13.2 should be included in the Agreement to account for phantom traffic, subject to the modifications described herein.

In addition, and at a minimum, we find that the parties shall make the following changes to, and/or correct the following problems identified in the May 16 draft agreement language. This list of problems and required changes is not exhaustive, and parties should look to our general statements to resolve other disputed language.

Affected Sections[17]

2.24 The definition of "Telecommunications Traffic in § 2.24 of the Agreement shall be changed to read: "Telecommunications Traffic is as defined in 47 C.F.R., Part 51, Subpart H, § 51.701(b), subject to 47 U.S.C. §§ 251(b)(5) and 252(d)(2)."

2.32 The RTCs' definition of "Local Traffic" is rejected. All other sections or portions of the Agreement that refer to, or rely upon, Section 2.32, shall be revised accordingly.

3.6 Section 3.6 shall be included in the conforming agreement, subject to the modifications discussed, herein. First, because we are not adopting the RTCs' definition of "Local Traffic" in Section 2.32; Section 3.6 shall be edited to account for the exclusion of the RTCs' definition of

[17] The Commission found much cross-over between Issues 2 and 3 and so as not to duplicate the affected sections, we only list a section once. The parties should look at both issues to determine how to alter the language.

"Local Traffic" in Section 2.32, and for all other relevant changes we are ordering to the agreement. Second, Section 3.6 shall be modified, as needed, to accommodate our decision on Issue No. 2. Third, Section 3.6 does not explain the responsibilities of the originating carrier.[18] Section 3.6 shall be modified to make it clear whether the originating carrier may alter or remove carrier identification codes or information, and if so, the type of codes or information the originating carrier may alter or remove and under what circumstances.

6.5.1. The reference to the "cost sharing provisions as provided in this Section 14 and Attachment 1" is confusing; we were unable to locate any cost sharing provisions in Section 14. We were unable to locate Attachment 1.

6.5.2 Section 6.5.2 shall be included in the conforming agreement, with the following modifications. First, Section 6.5.2 would need to be made explicitly subject to the audit provisions mentioned in Section 6.5.3 and/or to other audit provisions of the agreement. Second, Section 6.5.2 does not explain the responsibilities of the originating carrier.[19] Section 6.5.2 shall be modified to make it clear whether the originating carrier may alter or remove carrier identification codes or information, and if so, the type of codes or information the originating carrier may alter or remove and under what circumstances.

6.5.3 We note that Section 6.5.3 is not listed as related to any particular disputed Issue. If and to the extent that Section 6.5.3 is relevant to Issue 2, e.g., to the differentiation between intraMTA and interMTA CMRS traffic, then the following applies. Section 6.5.3 is approved, so long as it is consistent with our findings in this Order regarding the audit provisions of the Agreement. If and to the extent necessary, parties shall modify Section 6.5.3 to be consistent with the final negotiated set of audit provisions in the conforming agreement they file with the Commission. Furthermore, we note that that the reference to Section 5 is incorrect and was modified during the evidentiary hearing. The correct reference is to Section 13.4, as Mr. Sywenki indicated during the hearing, in response to the Commission's July 10 docket entry. Section 6.5.3 shall be amended, as follows: The audit provisions mentioned in the final version of Section 6.5.3, as amended to correct the reference to Section 5, shall be invoked prior to invoking the dispute resolution process in Section 32.

8.1.1 Sprint's proposed addition to Section 8.1.1, "Regardless of whether the Parties interconnect directly or indirectly," shall be included in the conforming agreement. Sprint's proposed addition to Section 8.1.1, "Telecommunications Traffic", is rejected and shall not be included in the conforming agreement. Instead, in regard to the scope of traffic to which Section 8.1.1 shall apply, the parties shall revise Section 8.1.1 to conform with our decisions regarding Issues 12 and 9 (and our decisions regarding other Issues, if and to the extent applicable.)

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[18] We note Sprint's apparent willingness to identify itself as the originating carrier of traffic terminating on the RTCs' respective networks (Pet. Ex. No. 4, Mr. Sywenki's response to Question # 11 (Issue No. 2) in the Commission's July 7 docket entry in this proceeding).

[19] We note Sprint's apparent willingness to identify itself as the originating carrier of traffic terminating on the RTCs' respective networks (Pet. Ex. No. 4, Mr. Sywenki's response to Question # 11 (Issue No. 2) in the Commission's July 7 docket entry in this proceeding).

8.2.2 The reference to Section 5.5 is incorrect, as Section 5.5 does not exist in the May 16 agreement. The correct reference is to Section 6.5, as Mr. Sywenki indicated during the hearing. Parties shall make the appropriate correction in the conforming agreement they file with the Commission.

14.1 The RTCs' proposed addition to Section 14.1, "based on the standards set forth below", shall be included in the conforming agreement. Sprint's proposed addition to Section 14.1, "Telecommunications [Traffic]", shall be included in the conforming agreement; the RTCs' proposed addition to Section 14.1, "Local [Traffic]", shall be excluded.

Issue 3: Should the Interconnection Agreement permit the Parties to combine traffic subject to reciprocal compensation charges and traffic subject to access charges onto the interconnection trunks?

Related Agreement provisions: 1.1, 1.2, 2.25, and as the term Traffic is used throughout the Agreement in 3rd Recital, 1.1, 1.2, 1.3, 1.12, 2.13, 2.15, 2.22, 4.1.1.2, 5.1, 5.2.2, 5.2.3, 5.2.4, 5.2.5, 6, 6.1, 6.2, 6.5, 6.5.1, 6.5.2, 7.1, 7.2, 7.3, 13, 13.3, 2.26, 2.27, 7.2, 8.2.2, 2.11, 3.4, 3.6, 13.1, 13.2.

1. Position of the Parties

a.) Sprint

Sprint claimed that this issue is similar to Issue 2 in that adoption of Sprint's language will further Sprint's goals of seeking to establish efficient network interconnection. Mr. Sywenki stated that in addition to multi-use trunks in the previous issue, Sprint is requesting that the interconnection agreement permit the parties to realize the network efficiencies of combining different "types" of traffic (in this case, traffic subject to access charges with traffic subject to reciprocal compensation). Mr. Sywenki referred to this arrangement as "multi-jurisdictional" trunking. (Sywenki Direct, at 17).

Mr. Sywenki asserted that multi-jurisdictional trunking permits trunk utilization efficiencies similar to those for multi-use trunks described by Sprint for Issue 2. As with multi-use trunking, multi-jurisdictional trunking can reduce the number of trunks required, reduce the number of trunk ports on each party's switch, and reduce trunk order processing. In addition, reduced trunk requirements can reduce the capacity of the interconnection facility on which the trunks ride, e.g., the parties may be able to provision a less expensive DS1 (24 trunks) between their switches instead of a DS3 (672 trunks) if they require fewer interconnection trunks. (Sywenki Direct, at 17-18).

Sprint also stated that the reason why the RTCs object to Sprint's proposal is concern related to obtaining access charges for access traffic. Mr. Sywenki acknowledged that different compensation applies to the types of traffic that will ride on multi-jurisdictional trunks, and that Sprint has proposed language that would ensure proper compensation for the 251(b)(5) traffic

and the access traffic on the trunks. (Sywenki Direct, at 18). Sprint claims that its proposed language in the agreement adequately ensures that the RTCs will obtain access charges when applicable, as Sprint will be responsible for the appropriate compensation for all traffic that Sprint delivers to the ILECs over the interconnection trunks. Sprint stated that it will provide industry standard call records which can be used for billing purposes. (Sywenki Direct, at 18). Sprint also stated that sections 13.3 and 13.4 of the proposed interconnection agreement adequately cover any concerns that the RTCs may have regarding intercarrier compensation, in that those sections state respectively that accurate call records must be provided and broad audits are permitted to ensure proper intercarrier compensation. (Sywenki Direct, at 18-19).

Moreover, Sprint argued that the agreed upon Section 7.3 from the proposed interconnection further ensures accurate intercarrier compensation, as that provision requires each party to provide calling party number ("CPN") or automatic number identification ("ANI") on at least 95% of the traffic delivered and that on calls where it is not delivered, then "the Parties agree that that the Party receiving such traffic shall assess, and the delivering Party shall pay to the receiving Party, the applicable intrastate terminating access charges. Finally, Sprint suggests, these provisions will permit both parties to bill the appropriate charges and protect against exposure from either party not providing appropriate information upon which to base intercarrier compensation. Moreover, to the extent a terminating party lacks the ability to categorize the traffic into the appropriate jurisdiction, Sprint has proposed language that requires the sending party to supply traffic factors to the terminating party which can be used for billing purposes, specifically a Percent Local Usage ("PLU") factor to distinguish reciprocal compensation traffic (intraMTA CMRS to wireline, wireline to wireline traffic not subject to access charges) from access (interMTA CMRS to wireline and traditional wireline to wireline long distance) and a Percent Interstate Usage ("PIU") factor to distinguish the access traffic subject to interstate access from access traffic subject to intrastate access. While the RTCs claimed in testimony and at the hearing that factors are not commonly used for billing in the telecommunications industry, Sprint argued that it showed in cross examination of Mr. Watkins for the RTCs that factors are used in an interconnection agreement that one of the RTCs has with a wireless carrier (Cross Ex. 7) and in its own NECA tariff. (Tr., B116-18).

In sum, Sprint asks the Commission to adopt the language proposed by Sprint for Issue 3 identified in the Decision Point List ("DPL"), Appendix C to its Arbitration Petition as that will permit both parties to combine reciprocal compensation traffic and traffic subject to access charges on interconnection trunks. The lower costs realized from the network efficiencies will benefit both parties and their customers. (Sywenki Direct, at 20).

b.) <u>Respondents</u>

According to the Respondents, the terms and conditions applicable to the RTCs' origination and termination of access traffic under Section 251(g) of the Act are mutually exclusive from the terms applicable to "local" traffic within the scope of Section 251(b)(5) of the Act.[20] (Response, at 27; see also, Watkins Reply, at 10, 11). Thus, the RTCs take the position

[20] The RTCs noted that, as the FCC has explained, Section 251(g) excludes certain traffic from the scope of Telecommunications subject to Section 251(b)(5) of the Act. See Response at n.87, citing In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Intercarrier

that the arbitration Sprint requests in this proceeding must be confined solely to traffic within the scope of Section 251(b)(5) of the Act.[21] The RTCs state that the terms and conditions under which the RTCs provide access services for the origination and termination of access traffic are set forth in interstate and intrastate tariffs, and that the terms of these tariffs are not subject to negotiation or arbitration under Section 252 of the Act. The Respondents also state that the terms of access services as set forth in the interstate and intrastate access tariffs are not consistent with, and are conceptually incongruent with, the terms that apply with respect to local traffic and the terms Sprint seeks,[22] and the FCC has explicitly not required so-called shared access arrangements.[23] Thus, the RTCs requested this issue be dismissed because they contend the terms and conditions of access are not within the scope of Section 251(b)(5) of the Act, and are not subject to arbitration under the Act. (Response, at 27, 28).

Likewise, Mr. Watkins testified that the terms under which access traffic is terminated by LECs are conceptually inconsistent with the terms under which Section 251(b)(5) traffic is exchanged. (Watkins Reply, at 11). Mr. Watkins stated that IXCs are responsible for the payment of compensation to LECs for both the origination and termination of IXC service traffic. Mr. Watkins asserted that IXCs pay to LECs the LECs' respective access charges; LECs do not pay IXCs compensation. Mr. Watkins contended that IXCs are responsible for the payment of charges to other carriers to which the IXC terminates its traffic, and that IXCs cannot negotiate or arbitrate the terms of access with the RTCs. (Watkins Reply, at 11). With respect to this latter point, Mr. Watkins further asserted that the terms and conditions under which LECs (like the Respondents) provide originating and terminating access services are contained in access tariffs. Thus, the terms of such access services, in Mr. Watkins' view, are not subject to negotiation requirements of the Act, are not within the scope of Section 251(b) of the Act, and cannot be the subject of arbitration. Rather, as Mr. Watkins' testified, the terms of the tariffs apply, and no other terms can apply. The RTCs must provide originating and terminating access services pursuant to the terms of their tariffs. (Watkins Reply, at 11). As the FCC has stated, interexchange services are subject to Section 251(g) of the Act. (Watkins Reply, at 11).

Mr. Watkins disagreed with Mr. Sywenki's testimony on pages 18-20 that the issue of

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Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, CC Docket Nos. 96-98 and 99-68, FCC 01-131 ("ISP Remand Order"), released April 27, 2001 at ¶¶30-41. The RTCs also referenced the following quote from the FCC: "This limitation in section 251(g) makes sense when viewed in the overall context of the statute. All of the services specified in section 251(g) have one thing in common: they are all access services or services associated with access .... [B]oth the Commission and the states had in place access regimes applicable to this traffic .... Accordingly, Congress excluded all such access traffic from the purview of section 251(b)(5)." See id. quoting ISP Remand Order at ¶37 (footnotes omitted).

[21] According to the RTCs, the interconnection obligations of the RTCs to transport and terminate traffic is solely with respect to the application of Section 251(b)(5) of the Act and the traffic that is within the scope of this statutory provision. It is only this traffic, within the scope of Section 251(b)(5), for which the terms and conditions of transport and termination can be negotiated and arbitrated. *See* Response at n.88.

[22] The RTCs provided the following example -- IXC "interconnection" for purposes of switched access services must be at the single access tandem designated by the RTCs or at each of the end offices of an RTC. The facilities for access connection (at either a tandem or end office) are entrance facilities dedicated to access service. *See* Response at n.89.

[23] The RTCs cited to the following FCC order in support of this proposition --*In the Matter of Transport Rate Structure and Pricing, Resale, Shared Use and Split Billing, Report and Order*, CC Docket No. 91-213, FCC 98-30, released March 5, 1998 ("*Shared Transport Order*"). *See* Response at n.90.

combining access traffic with local traffic is merely a compensation issue. *See id.* Mr. Watkins contended that interexchange traffic is subject to the mandatory terms of access tariffs. (Watkins Reply, at 11). Nevertheless, Mr. Watkins testified that the RTCs are indeed properly concerned about access compensation. When an IXC establishes access service with an RTC, Mr. Watkins contended, every minute of use that the IXC originates or terminates is subject to access charges regardless of any "factors," and regardless of what claims the IXC may make about the nature of the traffic. In these circumstances, according to Mr. Watkins, every single minute is subject to the same charge where intrastate and interstate access charge rates are the same. As a result, he indicated that the LECs do not have to resort to acceptance of the customer's representation of traffic, do not have to undertake investigation to determine components of traffic, and do not have to rely on the customer to tell the LECs how much the LECs should charge the customer (and, therefore, do not have to undertake the expense of doing so). (Watkins Reply, at 11, 12).

Mr. Watkins also indicated that the audit provisions cited by Mr. Sywenki on pages 18-19 of his testimony are unacceptable, potentially ineffective in determining misrepresentation of traffic, burdensome to apply, and uncertain if multiple types of traffic subject to very different compensation were combined. (Watkins Reply, at 12). Mr. Watkins stated, however, that auditing provisions are necessary for properly designed trunk groups with traffic divided. Mr. Watkins stated that the audit provisions the RTCs have in mind are those applied with the understanding between the parties that access traffic will not be sent over the local interconnection trunks in the first place. Likewise, Mr. Watkins stated that, even if it would be technically feasible to track and identify each minute delivered by Sprint to an RTC (which Sprint has not demonstrated), the cost to do so is unknown. Mr. Watkins testified that by segregating traffic subject to significantly different compensation levels, the necessary investigation work is limited. Mr. Watkins stated that while separate trunking arrangements may cost a little more for facilities, that would be less costly in the end to the RTCs by assuring proper and more accurate compensation. (Watkins Reply, at 12).

Further, Mr. Watkins testified that he has considerable experience in the area of access and is not aware of any so-called common practice to use traffic factors to distinguish access traffic from "local" traffic because, as he indicated before, access traffic is exchanged over dedicated access facilities. (Watkins Reply, at 12). Based upon this experience, he also stated the RTCs do not participate in any practice which relies solely on IXCs to self-certify the portion of traffic subject to access compensation versus the portion not subject to access. He concluded that because access traffic is subject to dramatically different compensation terms, IXCs have been required to provision dedicated trunking arrangements for access service purposes. (Watkins Reply, at 12).

2. Commission's Decision

As we ruled in Issue 2, we find no reason why Sprint should not be allowed to combine different types of traffic on the same interconnection trunks. It makes no difference whether the traffic is all subject to section 251(b)(5) as in Issue 2 or is section 251(b)(5) traffic combined with access traffic, as is the issue here. We find that there are no technical impediments to implementing a clearly more efficient network solution.

As in Issue 2 we have the same concerns regarding measuring the traffic and order the parties to work together to mutually agree on using factors or other mechanisms to identify, measure, and audit traffic appropriately. For example, Section 8.2.2 does not allow for the parties to agree on the Percentage Local Use and Percentage Interstate Use.

We note Mr. Watkins' statement that Sprint's proposed audit language is "unacceptable" but would also be "applied with the understanding between the parties that access traffic will not be sent over the local interconnection trunks in the first place." (Watkins Reply, 12.) In light of our acceptance of the use of single trunks to resolve Issues No. 2 and 3, parties shall attempt to negotiate audit language consistent with the use of single trunks and that they would both find "acceptable". If parties cannot agree, dispute resolution in Section 32 will be used.

In addition, and at a minimum, we find that the parties should make the following changes to, and/or correct the following problems identified in, the May 16 draft agreement language. This list of problems and required changes is not exhaustive, and parties should look to our general statements to resolve other disputed language.

Affected Sections

6.5.3 We note that Section 6.5.3 is not listed as related to any particular disputed Issue; however, we believe to be related to Issue 3 and shall consider it to be so. Section 6.5.3 is approved, so long as it is consistent with our findings in this Order regarding the audit provisions of the Agreement. If and to the extent necessary, parties shall modify Section 6.5.3 to be consistent with the final negotiated set of audit provisions in the conforming agreement they file with the Commission. Furthermore, we note that that the reference to Section 5 is incorrect and was modified during the evidentiary hearing. The correct reference is to Section 13.4, as Mr. Sywenki indicated during the hearing, in response to the Commission's July 10 docket entry. Section 6.5.3 shall be amended, as follows: The audit provisions mentioned in the final version of Section 6.5.3, as amended to correct the reference to Section 5, shall be invoked prior to invoking the dispute resolution process in Section 32.

7.2 The RTCs proposed addition to Section 7.2, "Jurisdictional Indicator Parameter ("JIP") and," is approved and shall be included in the conforming agreement. The other disputed language in Section 7.2 shall be resolved consistent with our resolution of Section 7.1.

8.2.2 The reference to Section 5.5 is incorrect, as Section 5.5 does not exist in the May 16 agreement. The correct reference is to Section 6.5, as Mr. Sywenki indicated during the hearing. Parties shall make the appropriate correction in the conforming agreement they file with the Commission.

13.1 Section 13.1 does not explain the responsibilities of the originating carrier.[24] If included in the agreement, Section 13.1 shall be modified to make it clear whether the originating carrier

[24] We note Sprint's apparent willingness to identify itself as the originating carrier of traffic terminating on the RTCs' respective networks. (Pet. Ex. No. 4, Mr. Sywenki's response to Question # 11 [Issue No. 2] in the July 10 Docket Entry in this proceeding).

may alter or remove carrier identification codes or information, and if so, the type of codes or information the originating carrier may alter or remove and under what circumstances. Section 13.1 should be included in the agreement, unless replaced by negotiated, mutually acceptable language in the conforming agreement, as discussed above.

13.2 Section 13.2 does not explain the responsibilities of the originating carrier.[25] If included in the agreement, Section 13.1 shall be modified to make it clear whether the originating carrier may alter or remove carrier identification codes or information, and if so, the type of codes or information the originating carrier may alter or remove and under what circumstances. Section 13.2 should be included in the agreement unless replaced by negotiated, mutually acceptable language in the conforming agreement, as discussed above. We also note that the reference to Section 7.4 was corrected during the evidentiary hearing. Parties shall make the appropriate correction in the conforming agreement they file with the Commission.

Issue 4: Should the Interconnection Agreement contain provisions for indirect interconnection consistent with Section 251(a) of the Act?

Related Agreement provisions: Section 6, 8.1.

1. Position of the Parties

a.) <u>Sprint</u>

Sprint described "indirect interconnection" as an arrangement that uses a third party tandem transit provider to deliver traffic to the terminating LEC. (Sywenki Direct, at 21). Sprint asserted that telecommunications carriers have a duty to interconnect indirectly under Section 251(a)(1) of the Act, which states: "Each telecommunications carrier has the duty to interconnect directly or *indirectly* with the facilities and equipment of other telecommunications carriers." (emphasis added) (Sywenki Direct, at 21). Sprint noted that indirect interconnection is widely used in the industry because it would be impractical and economically inefficient for every carrier to establish direct interconnection with every other carrier in the nation. (Sywenki Direct, at 21). Sprint maintained that its interconnection agreement with the RTCs should reflect its right to interconnect indirectly and the agreement should spell out the provisions for traffic exchange between the parties when indirect interconnection occurs. (Sywenki Direct, at 22). Sprint stated that indirect interconnection is technically feasible and an efficient way for carriers to interconnect and deliver traffic to each other when their customers call each other, especially when the traffic volumes are too small to justify the establishment of a direct interconnection. (Sywenki Direct, at 22). Sprint's proposal allows the RTCs to choose to indirectly interconnect to Sprint through a tandem that its end offices subtend or to directly interconnect using dedicated interconnection facilities for traffic the RTCs send to Sprint. (Sywenki Reply, at 2-3).

[25] We note Sprint's apparent willingness to identify itself as the originating carrier of traffic terminating on the RTCs' respective networks (Pet. Ex. No. 4, Mr. Sywenki's response to Question # 11 (Issue No. 2) in the Commission's July 7 docket entry in this proceeding).

Sprint further underscored recent arbitrations where the Iowa Utilities Board and the Illinois Commerce Commission both recognized Sprint's rights to interconnect indirectly with ILECs.[26] Additionally, on cross-examination, Sprint demonstrated that all three of the RTCs have interconnection agreements with wireless carriers that allow for indirect interconnection. (Tr., B-11-12, B-26, B-40) Ultimately, Sprint urged the Commission to adopt language that permits the parties to indirectly interconnect and establish terms and conditions under which the parties deliver traffic in an indirect interconnection scenario. (Sywenki Direct, at 23).

b.) Respondents

As indicated in their Response, the RTCs indicated that Sprint's Issue 4 actually represents several interrelated issues, listed as follows:

4.1 -- What obligations or standards does Section 251(a) require, if any, of Sprint and the RTCs?

4.2 -- Are the RTCs already in compliance with Section 251(a) of the Act?

4.3 -- Does Section 251(a) create any requirements for the delivery, exchange or termination of traffic?

4.4 -- Does Section 251(a) of the Act require the RTCs to provision extraordinary arrangements to deliver their own local service traffic to distant locations to fulfill a request of a competing carrier such as Sprint?

4.5 -- If the RTCs are already in compliance with the general duties set forth in Section 251(a) of the Act, is there anything to arbitrate in this proceeding?

(Response, at 29).

The RTCs stated that they are already in full compliance with the requirements of Section 251(a) of the Act, which the RTCs maintained simply establishes the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications providers. The RTCs explained that they are connected with other carriers and are willing to interconnect with any other carrier that may request interconnection. According to the Respondents, Section 251(a) of the Act sets forth the "general duty" of interconnection and is separate and distinct from the specific interconnection and the transport and termination of traffic requirements found in Section 251(b)(5) of the Act and the FCC's Subpart H rules. Thus, in the Respondents' view, Section 251(a) creates no obligation whatsoever for a LEC to originate or exchange traffic, to provision a particular local service for its end users, or to transport local traffic to some distant point at some other carrier's choice. To the extent that Sprint's request in this case suggests requirements that go beyond the simple and limited requirements of Section 251(a) of the Act, the RTCs urged dismissal of this issue as beyond the scope of interconnection requirements and

[26] *See* Illinois Commerce Commission, Docket No. 05-0402; Iowa Utilities Board, Docket Nos. ARB-05-2, ARB-05-5, ARB-05-6.

beyond the scope of arbitration. (Response, at 29, 30 and Watkins Testimony, at 4, 7, 14).

Additionally, the Respondents claimed that there is no requirement for tandem providers to provide transiting services, citing the absence of the term in the FCC's original Interconnection Order and a FCC arbitration decision,[27] which found no such requirement. The RTCs indicated that the absence of a requirement for tandem providers to provide transiting services indicates that the RTCs cannot be expected to involuntarily participate in such a transiting arrangement as a carrier of originating local traffic. (Response, at 33).

The RTCs noted, however, that this does not mean that the parties may not negotiate a voluntary transiting arrangement. The Respondents noted that any such three-party transit arrangement involving a tandem provider, the RTCs, and Sprint would, however, require the establishment of mutually agreeable terms and conditions between the tandem provider and the RTCs and between Sprint and the RTCs for such arrangement. Further, Mr. Watkins testified that no carrier has the right to deliver traffic to the networks of the RTCs without obtaining the proper authorization and contractual right to do so. If that were not the case, Mr. Watkins warned that chaos could ensue, with the larger carriers taking advantage of the smaller carriers by dumping traffic to them over existing arrangements established for access purposes. Mr. Watkins also indicated that an additional complication with the Sprint proposal is that Sprint has failed to identify the transit provider. In any event, the RTCs indicated that they will not agree to voluntary terms for transiting under which they would incur additional expense for the transport of their local exchange service calls to some distant point beyond the local exchange area or beyond their incumbent networks. The RTCs contended that they have no obligation to provision some extraordinary and superior service arrangement at additional cost solely at the request of, and for the convenience and benefit of, Sprint. (Response, at 33, 34; Watkins Reply Testimony, at 14).

Citing Section 251 (c)(2) of the Act, the FCC's First Report and Order on Interconnection and the FCC's Subpart H rules, the Respondents also contended that no more is required of ILECs than the establishment of an interconnection point, which is technically feasible for the ILEC receiving the request, and on the ILEC's network. (Response, at 34, 35; Watkins Reply, at 14)

The Respondents indicated that they are willing to establish a direct interconnection point at the boundary of their certificated service territory. According to the RTCs, a competitive carrier may utilize its own facilities to establish an interconnection point pursuant to these rules or, alternatively, the competitive carrier may utilize another carrier's facilities indirectly to establish an interconnection point for the purposes of transmitting traffic to and from the LEC's network. The RTCs pointed out, however, that the potential use of another carrier's facility to establish an interconnection point with a terminating carrier is factually distinct from requiring the RTCs to buy transit services from another carrier. (Response, at 36, 37 and Watkins Direct, at 7)

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[27] *Petitions of WorldCom, Inc., Cox Virginia Telcom, Inc., and AT&T Communications of Virginia, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.*, Memorandum Opinion and Order, FCC 02-1731 (rel. July 17, 2002) (CC Docket Nos. 00-218, 00-249, and 00-251).

Additionally, the Respondents contended that Sprint's request for indirect interconnection would impose an improper superior interconnection requirement on the RTCs greater than any previously applied to any other ILEC and is impermissible under the Eight Circuit opinion on remand in *Iowa Utilities Board v. Federal Communications Commission*, which remanded FCC rules requiring an ILEC to provide interconnection arrangements superior to those it provided to itself.[28] Furthermore, the RTCs averred that even under the FCC's invalidated superior quality rules, the FCC recognized that if the ILEC were to provision a superior interconnection arrangement in response to a request from a competing carrier, the requesting carrier would be responsible for any extraordinary costs. (Response, at 39, 40, 41 and Watkins Reply, at 13, 14).

2. Commission's Decision

Based upon the plain language of Section 251(a) of the Act, which clearly requires carriers to interconnect indirectly, we find in favor of Sprint on this issue. We find the RTCs' position, which would require direct interconnection, both impractical and inefficient. We further find that Sprint's proposal is reasonable because it allows the RTCs to interconnect through a tandem that their end offices subtend, or to directly interconnect using dedicated interconnection facilities. Because Sprint's proposal further limits the RTCs' transport by providing the RTCs an interconnection point within the LATA to which the RTCs may deliver their originated traffic, we find RTCs' criticisms of the indirect interconnection arrangement are without merit. Our conclusion is further supported by the fact that the RTCs allow wireless carriers to indirectly interconnect with the RTCs' networks. The RTCs failed to show why indirect interconnection is appropriate for wireless carriers but not for Sprint as a CLEC.

Accordingly, we adopt Sprint's proposed language under Issue 4, with one exception. We believe the RTCs should have the flexibility to determine its point of interconnection at a LATA level or higher. Therefore, we require the following language to be added to Section 4.1.1: "For the traffic originated on its network, the TELCO may choose to establish outside the LATA a Point of Interconnection for direct interconnection. Under such an arrangement the TELCO would be financially responsible for the transport of its originated traffic to this more distant Point of Interconnection."

Issue 5: In an indirect interconnection scenario, is the ILEC responsible for any charges related to delivering its originating traffic to Sprint outside of its exchange boundaries?

Related Agreement provisions: 6.3, 6.4.

1. Position of the Parties

a.) <u>Sprint</u>

[28] 219 F.3d 744 (8th Cir. 2000).

Sprint offered a proposal that would require a symmetrical financial obligation of both carriers for delivering traffic originated by its customers to the network of the terminating party. (Sywenki Direct, at 23) Sprint disagreed with the RTCs' position that the RTCs should not have responsibility for delivering its customers' originated traffic outside of its exchange boundary. (Sywenki Direct, at 23). Under Sprint's proposal, each party would be permitted to deliver traffic it sends to the terminating party through a third-party tandem transit provider. (Issue 4, supra). Each party would be responsible for making arrangements, including any compensation due, for the traffic it sends through the tandem transit provider to the other party. (Sywenki Direct, at 24).

Sprint noted that under the FCC's Calling Party Network Pays ("CPNP") regime, the originating party is responsible for payment of reciprocal compensation to the terminating network party and responsible for all costs associated with the delivery of its originated telecommunications traffic to the terminating party. Sprint pointed to 47 C.F.R. § 51.703(b), which states, "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." (Sywenki Direct, at 24).

Sprint noted that if it interconnects indirectly with the RTCs through a tandem transit provider, Sprint would be willing to abide by this rule and pay transit charges assessed by the tandem transit provider for traffic Sprint sends through the tandem to the RTCs. Sprint contended that the RTCs should also pay any transit charges assessed by a tandem transit provider for traffic the RTCs send through a tandem to Sprint, in instances when the RTCs choose to indirectly interconnect to Sprint. (Sywenki Direct, at 24).

Sprint further noted that the Illinois Commerce Commission issued an arbitration decision concluding that the originating party is responsible for paying transiting fees. Specifically, the Illinois Commission concluded:

> "When indirectly interconnecting through a third party ILEC switch each party should be financially responsible (that is financially responsible for its own installed facilities or for compensating another party for facilities it uses) for interconnection facilities on its side of the third party ILEC switch. Costs associated with tandem switching should be paid by the carrier sending the traffic. This, in effect, creates two POIs[29] – one on either side of the third party ILEC tandem – demarcating the carriers' financial responsibilities for interconnection facilities. When the ILEC is delivering traffic to Sprint then the POI will be on the Sprint side of the third party ILEC tandem. When Sprint is delivering traffic to the ILEC then the POI will be on the ILEC side of the third party ILEC tandem. This is the most efficient and equitable means of allocating costs.[30] (Sywenki Direct, at 24).

[29] Point of Interconnection.

[30] *See, Sprint Communications L.P. d/b/a Sprint Communications Company L.P. Petition for Consolidated Arbitration with Certain Illinois Incumbent Local Exchange Carriers pursuant to Section 252 of the*

Sprint also pointed to arbitration decisions in Pennsylvania and Tennessee where the state commissions expressly found that an originating carrier has the obligation to pay the costs associated with its originating traffic, and that this obligation extended to the payment of transiting fees imposed by an intervening tandem owner in an indirect interconnection arrangement.[31] Sprint also noted the Georgia Commission's decision that ILECs have an obligation to compensate the transit provider when indirectly interconnecting with CLECs.[32] (Sywenki Direct, at 25, 26, 28).

Sprint urged the Commission to adopt its proposed language so that each party: a) may indirectly interconnect and send its originating traffic to the other party through a tandem transit provider if it chooses; and b) is responsible for any charges incurred in delivering traffic originated by its customers to the other party.

b.) Respondents

To the extent that indirect interconnection is achieved through a transiting provider, the RTCs believe they do not have a financial obligation for this type of interconnection that extends beyond the boundary of its local service area. Respondents contend that to the extent that Sprint requests such a superior arrangement, and to the extent that the RTCs are willing to accommodate the superior arrangement, Sprint would be responsible for the extraordinary costs. (Response, at 42)

The Respondents indicated that before the FCC's reciprocal compensation rules are applied, the two carriers establish the interconnection point between them. According to the RTCs, there is no requirement that an ILEC pay any other carrier (or even use the transport services of some other carrier) to transport local exchange calls originating and terminating within a specific local exchange to a point far beyond the local exchange. In reference to Sprint's reliance on the FCC rule that an originating carrier cannot charge any other LEC for traffic that originates on the originating carrier's network, the RTCs indicate they do not intend to charge Sprint for local calls that originate on the RTCs' networks, which are subject to the Subpart H rules. However, the RTCs maintained that Sprint would have to be responsible for the payment of any charges that the transit provider assessed for transiting these calls.[33] In such a case, the RTCs contended that Sprint would be providing compensation to the intermediary

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Telecommunications Act of 1996, Arbitration Decision, Docket 05-0402 (November 8, 2005) [*Illinois Arbitration Order*].

[31] *See, Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish and Interconnection Agreement With Alltel Pennsylvania, Inc.*, Opinion and Order, Docket A-310489F7004 (January 13, 2005) [*Pennsylvania Arbitration Order*]; *Petition for Arbitration of Cellco d/b/a Verizon Wireless,* Tennessee Regulatory Authority Case No. 03-00585, at 30 (January 12, 2006) [*Tennessee Arbitration Order*].

[32] *Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies*, Docket No. 16772-U (March 24, 2005).

[33] In support of its position, the RTCs relied upon (*see* Response at n.122) the following FCC decision: *Texcom, Inc., d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications*, Order on Reconsideration, FCC 02-96, at ¶4 (rel. March 27, 2002) (File EB-00-MD-14) (The charges for the facility that connects the CLEC network to the incumbent's Point of Interconnection are borne by the CLEC just as the incumbent LEC bears the costs of its dedicated facilities to the Point of Interconnection.).

carrier, not the originating carrier, and the compensation would be for the provisioning of the superior interconnection arrangement for the benefit of Sprint. Thus, according to the RTCs, Sprint is responsible for the superior, extraordinary costs. (Response, at 43, 44 and Watkins Reply, at 16, 17)

Respondents challenged the notion that the RTCs will have a choice of transit provider it uses, as Sprint indicated would be the case under its proposal. Mr. Watkins testified that Sprint intends to be the only party that makes a choice, and then Sprint intends to force the RTCs to comply with that choice. Mr. Watkins stated that if Sprint refuses to establish an Interconnection Point with an RTC within the incumbent network area of an RTC, and Sprint connects to a third-party tandem provider, the incumbent RTC will have no other option than to be forced to use the transit services of a potential competitor–another LEC providing a tandem function to Sprint–in order to complete local exchange calls to Sprint. (Watkins Reply, at 15)

Mr. Watkins also stated that other state actions regarding indirect interconnection have no bearing on the instant proceeding, as he believes these are incorrect determinations and urges the Commission to not duplicate them in this proceeding. (Watkins Reply, at 18)

Mr. Watkins also challenged the efficiency of transporting local exchange traffic originating and terminating within a specific local exchange area to points at a significant distance from the local calling area, and then transporting these calls back again, thereby incurring extraordinary transport costs. He indicated that transport is interchangeable with switching, so the most efficient arrangement must be viewed in the context of the combined functions. (Watkins Reply, at 20, 21)

2. Commission's Decision

Consistent with our findings in Issue 4, we agree with Sprint on this issue. We find that each party should have the ability under the agreement to interconnect indirectly and send traffic through a tandem transit provider. We also find that each party shall be responsible for any charges incurred in delivering traffic originated by its customers to the other party. We find this conclusion is consistent with the public interest because it requires competitively neutral terms for interconnection by placing symmetrical traffic delivery obligations on both parties.

Our conclusion is also consistent with the competitively neutral regime created by the FCC (which has been followed by at least four other state commissions[34]) under which interconnecting carriers are required to pay the costs associated with transporting calls to the ILEC and the ILEC has the obligation to pay the costs associated with transporting calls to the interconnecting carrier. As the Pennsylvania Commission noted, "There is a strong pronouncement on the part of the FCC to unwaveringly adhere to the principle that the originating carrier bears the costs of delivering traffic which originates on its network."[35]

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[34] *See Illinois Arbitration Order, supra*; *Pennsylvania Arbitration Order, supra*; *Tennessee Arbitration Order, supra*; *see also, In re Arbitration of Sprint Communications Company L.P. v. Ace Communications Group, et. al.*, State of Iowa Department of Commerce Utilities Board Docket Nos. ARB-05-2, ARB-05-5, ARB 05-6, at 12 (March 24, 2006).

[35] *Pennsylvania Arbitration Order, supra*, at 33.

Moreover, the RTCs failed to present any compelling evidence to support a deviation from this established regime. In fact, as our discussion of Issue 4 indicated, two of the RTCs admitted on cross-examination that each has interconnection agreements with various wireless carriers that require the originating party to pay for charges incurred in delivering traffic originated by its customers to the other party. (Tr., B-12, B-28) When asked on cross-examination why Citizen's Telephone was willing to allow its wireless interconnection agreements to have the originating party pay, but not allow the same arrangement for Sprint, the witness was unable to explain Citizen's position. (Tr., B-28) Although the RTCs argued that consideration of the relationship between them and wireless providers is not relevant to our inquiry here, we disagree. We see no logical reason why the calling party pays regime should apply in the wireless context and not here. We therefore adopt Sprint's proposed language on Issue 5, and order the parties to conform the Interconnection Agreement accordingly.

Issue 6: What are the appropriate terms and conditions for Direct Interconnection?

Related Agreement provisions: 2.14, Section 4, 5.1, 5.2, 7.1, Section 3, 2.31, 14.1, 14.2, 2.4, 2.9, 2.10, 2.12, 2.30, 2.36.

1. Position of the Parties

a.) <u>Sprint</u>

Sprint proposes that if it chooses to directly interconnect with the RTCs, Sprint will be responsible for the direct interconnection facilities used to deliver traffic originated by Sprint's customers to a point on the RTCs' network, and if an RTC chooses direct interconnection for its originated traffic, the RTC will be responsible for the interconnection facilities used to deliver traffic originated by the RTC's customers to a point on Sprint's network. (Sywenki Direct, at 29).

Under Sprint's proposal, Sprint may select one interconnection point per LATA for delivery of its traffic to the ILEC within that LATA. If the ILEC chooses direct interconnection for the delivery of traffic originated by its customers, it will be responsible for the interconnection facility necessary to deliver its originated traffic to a technically feasible point designated by Sprint within the LATA. In addition, Sprint proposes that the parties may use a two-way interconnection facility for which each party is responsible for its proportionate use of the facility. (Sywenki Direct, at 30). Sprint proposes that the cost of the two-way facility be allocated based on the proportion of the facility used to carry each party's originated traffic. For example, if traffic is balanced, each party would be responsible for 50% of the cost of the two-way interconnection facility. (Sywenki Direct, at 30).

Sprint maintains that its proposal ensures equitable responsibilities for both parties because when a party chooses to interconnect directly, it will be responsible for the interconnection facility necessary to deliver traffic to the other party's network. (Sywenki

Direct, at 30). Sprint stated that it is willing to assume responsibility for delivery of traffic from its customers to the ILEC's network and suggested that, to ensure symmetrical obligations, the RTC should have the same requirement if it chooses direct interconnection for delivery of traffic originated by its customers. (Sywenki Direct, at 30). Sprint argued that the RTC proposal would disproportionately burden Sprint by requiring Sprint to assume both the costs of interconnection facilities for delivering traffic to the RTC's network and the costs of interconnection facilities for traffic originated by the ILEC's customers. (Sywenki Direct, at 30). Finally, Sprint noted that its proposal accommodates any RTC concern about the distance between the RTC switches and the Sprint switch by establishing a network interconnection point within the LATA to which the RTCs may deliver the traffic their customers originate. (Sywenki Direct, at 31). Under this proposal Sprint and the RTCs would share the cost of the interconnection facility within the LATA and Sprint would be responsible for the costs outside the LATA for originating and terminating the traffic.

Sprint noted that its proposal is consistent with FCC interconnection rules, which state: "A LEC may not assess charges on another telecommunications carrier for telecommunications traffic that originates on the LEC's network." (47 C.F.R. §51.703(b)). Sprint went on to note that 47 C.F.R. §51.709(b) states that: a) the rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network; and b) that such proportions may be measured during peak periods. (Sywenki Direct, at 31).

Sprint also states that other state commissions have reviewed this issue and found that the costs of the interconnection facility must be shared, including the Maryland Public Service Commission,[36] the Missouri Public Service Commission,[37] and the Michigan Public Service Commission.[38]

b.) <u>Respondents</u>

In their Response, the RTCs indicated that the only local traffic exchanged between the parties will be local exchange traffic originating and terminating within a local exchange area of the incumbent LEC RTC.[39] The RTCs stated that their position on this issue is that the parties must meet at a mutually convenient Interconnection Point on the network of the RTC within that

[36] *Arbitration of US LEC of Maryland Inc. vs. Verizon Maryland Inc.*, Md. P.S.C., 2005 Md. PSC LEXIS 6, Order No. 79813, Case No. 8922 (2005); *see also, Petition of AT&T Communications of Maryland, Inc. for Arbitration*, 2004 Md. PSC LEXIS 13, Order No. 79250, Case No. 8882 (2004).

[37] *SBC Missouri's Petition for Compulsory Arbitration*, 2005 Mo. PSC LEXIS 963, Case No. TO-2005-0336 (2005).

[38] *Application of Telnet Worldwide, Inc. for Arbitration with Verizon North, Inc.*, 2005 Mich. PSC LEXIS 39, MPSC Case No. U-13931 (2005).

[39] The RTCs reference the Commission's Smithville Order at 21 in support of this position. (Response, at 45) In his initial testimony, Mr. Watkins indicated that the terms and conditions for EAS are determined by the Commission with respect to state policy, not under arbitration of Section 251 and 252 of the Act. The RTCs are willing to exchange EAS calls with other carriers under equivalent technical and financial arrangements they have in place with the other incumbent LECs. These terms do not, however, involve any responsibility for the transport of EAS calls beyond the service territory borders of the RTCs. (Watkins Direct, at 4, 5).

exchange area where local calls will originate and terminate. In his Direct Testimony, Mr. Watkins stated that the RTCs are willing to establish an Interconnection Point within their incumbent service area where Sprint and an RTC can link their networks. Under this approach, Mr. Watkins contended that both parties will be providing local service to end users geographically located in the local exchanges, both parties will have to originate and terminate calls to those end users physically located within those exchanges, and both parties will have facilities physically located in those exchanges for such purposes. Mr. Watkins also asserted that the end users served by either party will be scattered across the geographic area constituting the local exchange. Mr. Watkins testified that under the most extreme conditions, no originating and terminating calls within that exchange, between Sprint and one of the RTCs, would need to be transmitted to any point other than those within that exchange. (Watkins Direct, at 7). Given these facts, he testified that the RTCs are willing to meet Sprint at an Interconnection Point anywhere within the exchange, even at an existing trunk route point at the extreme border of the exchange area, and the RTCs are willing to be responsible for all of the costs on their side of that Interconnection Point, all the way to the most extreme distant point within their incumbent network area.

The RTCs stated that, while the discussion in the Response cited the Section 251(c) rules regarding the requirements to establish an Interconnection Point , these rules apply only to those ILECs that are subject to the Section 251(c) requirements. (Response, at 45) As explained in the Response, the RTCs noted that carriers not subject to the most onerous Section 251(c) requirements cannot be found to be subject to other requirements going beyond those that apply to carriers subject to the Section 251(c) requirements. Yet that is, in the RTCs' view, exactly what Sprint seeks,[40] even though each of the Respondents is a Rural Telephone Company, and is subject to less burdensome requirements than other incumbents.[41] Nevertheless, the RTCs' position in the negotiations is that each is willing to establish a mutually agreeable and technically feasible Interconnection Point at a point on its existing telecommunications network where trunking facilities are available, such as a point on those facilities currently used to

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[40] In support of their position on this point, the Respondents relied upon the FCC's *Atlas Decision*. To that end, the RTCs noted that, in the *Atlas Decision*, *supra*, the FCC makes the same conclusion:

> The structure of section 251 supports this conclusion. Section 251(a) imposes relatively limited obligations on all telecommunications carriers; section 251(b) imposes moderate duties on local exchange carriers; and section 251(c) imposes more stringent obligations on incumbent LECs. . . . As explained above, section 251(a) does not require incumbent LECs to transport and terminate traffic as part of their obligation to interconnect. *Accordingly, it would not be logical to confer a broader meaning to this term as it appears in the less-burdensome section 251(a).*

Response, at 45, n.125, *quoting Atlas Decision* at ¶25 (emphasis added). According to the RTCs, it also would not be logical to confer a broader interpretation for requirements on Rural Telephone Companies which are subject to less burdensome interconnection requirements than the interpretation and requirements that apply to the much larger, non-rural telephone companies. Response, at 45, n.125.

[41] For example, the RTCs noted that the interconnection point on the network of the Rural Telephone Company incumbent should be as designated by the Rural Telephone Company with respect to already available points. Response, at 46, n.126.

transport and terminate traffic.[42] It is the RTCs' position that even though they are not subject to the more onerous conditions or requirements that may be imposed on other ILECs under Section 251(c) of the Act, their offer here complies more than sufficiently.

To the extent it is technically feasible, the RTCs indicated their willingness to establish a single Interconnection Point per LATA at an available Interconnection Point on their incumbent LEC network. (Response, at 45). The Respondents made clear, however, that they are not legally "in" a LATA, but are simply associated with LATAs for the purpose of the break-up of the former Bell system over two decades ago, and each RTC is associated only with a single LATA. Therefore, the RTCs questioned what, if any, significance or any additional consideration Sprint's LATA issue presents. (Response, at 46).

Mr. Watkins stated that Sprint wants to "distort" the rules and requirements to suggest that if local exchange traffic has to be hauled to some distant location to be switched by Sprint, and hauled back to the local exchange by Sprint within which both the originating and terminating end users reside, that the RTC should somehow be responsible for the costs caused by Sprint's choice of network design. Mr. Watkins testified that for all of the reasons stated in the Response, the RTCs are not obligated "to transfer wealth" to Sprint in order to fund Sprint's competitive service, which is exactly what Sprint is proposing. Sprint's language would assign a disproportionate amount of facilities costs to the RTC, because Sprint apparently wants to transport this traffic over facilities to some distant point well beyond the point to which any other local exchange traffic is transported, simply to accommodate Sprint's network design. (Watkins Reply, at 21).

Finally, the RTCs noted their concerns that Sprint appears to intend to dictate to the RTCs the location of the Interconnection Point for the delivery of its originating traffic, as well as RTC-originated local traffic. (Response, at 46-47). The Respondents made clear that this "one-sided approach" is not applicable to the Respondents, which are Rural Telephone Companies. The RTCs stated that the rights and obligations that emerge for the exchange of local traffic under Section 251(b)(5) do not differ between Sprint and the RTCs; the same obligations exist for both parties. In any event, the Respondents stated that, even under the most onerous requirements, the RTC's obligation to establish an Interconnection Point is only with respect to its existing incumbent LEC network. Accordingly, the RTCs made clear that, if Sprint establishes that proper Interconnection Point, the RTCs are willing to exchange properly defined local traffic, in both directions, at that point. (Response, at 47).

c) Commission's Decision

We find that Sprint's language is more reasonable, giving each carrier the ability to design its own network. Sprint's proposal of using one-way trunks permits each party to provision at its own expense sufficient trunk groups to handle the traffic volume it forwards to

[42] The Respondents noted that the Ninth Circuit Court of Appeals, in the context of CMRS interconnection, also confirmed that interconnection obligations are established with respect to the LEC's existing network. *See* Response, at 46-47, n.127, *citing U.S. West v. Wash. Utils. & Transp. Common*, 255 F.3d 990, 992 (9th Cir. 2001) ("Sections 251 and 252 of the Act require ILECs to allow CMRS providers to interconnect with their existing networks in return for fair compensation.").

the other party. Under Sprint's language, a two-way interconnection facility can be established by mutual agreement of both parties.

Interconnection pursuant to Section 251 (a) applies to all telecommunications carriers and assumes the absence of market power. Therefore, direct or indirect interconnection should be based upon "their most efficient technical and economic choices."[43] In this case, the Commission must balance the most efficient technical and economic choices of two very different types of networks; the networks of the three Respondent ILECs which serve smaller service territories, and the network of a CLEC which serves a large service territory.

The RTCs' language required the Interconnection Point to be at a single meet point "at or within the TELCO's certificated area boundary." Service area boundaries are not necessarily relevant to the interconnection obligations found in 251(a). We find that Sprint's language is more reasonable and consistent with 47 C.F.R. § 51.100, which states that each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Sprint agrees to establish at least one Interconnection Point per LATA on each of the RTC's networks. This will limit the facilities costs and transiting distance of calls from the RTCs' networks to Sprint's network, which has a switch located in Chicago. While we note Sprint's language is appropriate, we have already determined in Issue 2 that Section 3.6 is required, subject to certain modifications.

Issue 7: What are the appropriate rates for direct interconnection facilities? Related Agreement provisions: 5.3, Section 11.

1. Position of the Parties

a.) <u>Sprint</u>

Under Sprint's proposal for direct interconnection rates, Sprint may lease interconnection facilities from the RTCs to fulfill Sprint's responsibility to deliver traffic originated by its customers and when it does, Sprint is willing to pay a forward-looking cost-based rate. (Sywenki Direct, at 32). The RTCs propose that to the extent any charges apply for facilities, the forward looking TELRIC pricing principles and rules adopted by the FCC do not apply. Sprint claims that the RTCs' interconnection proposal inappropriately shifts a disproportionate amount of interconnection costs to Sprint and should therefore be rejected. (Sywenki Direct, at 32).

Sprint's witness Mr. Sywenki testified that access charges have traditionally been set well-above cost as a subsidy mechanism. (Sywenki Direct, at 33). While this practice may have been applied for monopoly-era public policy, Sprint contends that it is not appropriate for such prices to be used for interconnection. (Sywenki Direct, at 33). According to Sprint, the Act established a policy of cost-based rates for interconnection because ILEC inflated access rates would present a barrier to competition. (Sywenki Direct, at 33). Sprint notes that the FCC concluded that ILEC rates for interconnection must be based on efficient forward-looking costs

[43] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, at ¶997 (1996) (CC Docket No. 96-98).

to be consistent with the Act and to "prevent incumbent LECs from inefficiently raising costs in order to deter entry."[44] Sprint also pointed to a recent FCC decision that reaffirmed that ILEC interconnection facility rates be cost-based.[45] (Sywenki Direct, at 33). Consistent with the intent of Congress and the FCC that interconnection not be permitted to be a barrier to competition, Sprint maintains that the Commission should require ILECs to provide direct interconnection facilities at rates based on a forward-looking pricing methodology. (Sywenki Direct, at 86).

In support of its recommendation, Sprint noted that it is not aware of any legal or regulatory requirement or any appropriate public policy rationale that would cause the Commission to require Sprint to pay access tariff rates for interconnection facilities carrying non-access traffic if Sprint leases interconnection facilities from the ILEC. (Sywenki Direct, at 34). Sprint also noted that it has requested cost studies from the RTCs to establish cost-based rates for RTC interconnection facilities but has not yet received cost studies.[46] (Sywenki Direct, at 34).

In the July 10 Docket Entry, Sprint was asked to clarify how Section 251(c) of the Act is relevant in setting rates if Sprint leases interconnection facilities from the RTCs where Sprint is not seeking to trigger any Section 251(c) obligations. In response, Sprint indicated that interconnection facilities, whether under 251(a) or 251(c), should be based upon forward-looking cost rather than access charges. Sprint noted that if access charges were to be applied to interconnection, then Congress would not have needed to adopt Section 251 interconnection. Sprint clarified in its response that it is not seeking to implement 251(c) rules. Sprint noted that it has requested interconnection pursuant to 251(a) and it is Sprint's position that there is nothing in the Act that prohibits the Commission from adopting forward-looking cost as the basis for interconnection facilities for 251(a) interconnection, for the same reason as cost-based rates apply to 251(c) interconnection, i.e., non-cost-based interconnection presents a barrier to competitive entry.

b.) <u>Respondents</u>

The RTCs contend that if the Interconnection Point between the parties is established somewhere on the incumbent LEC network of an RTC, within the area in which local exchange traffic will be originated and terminated, there will be a sufficient balance of responsibility of facilities (the parties are effectively meeting in the "middle" in the area in which they will provide facilities-based services to end users in competition with each other, and in the area in which local calls will be exchanged) such that there will not need to be any charges for interconnection facilities between the parties. (Response, at 47). Likewise, the RTCs contend

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[44] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, at ¶743 (1996) (CC Docket No. 96-98).

[45] *In the Matter of Unbundled Access to Network Elements, Order on Remand*, 20 FCC Rcd 2533, at ¶140 (2005) (Triennial Review Remand Order) (WC Docket No. 04-313) ("We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus competitive LECs will have access to these facilities at cost-based rates to the extent they require them to interconnect with the incumbent LEC's network.").

[46] *See* Sprint Communications Company L.P.'s First Set of Data Requests to Respondents, Request 1-20, June 16, 2006, attached as *Exhibit PNS-1 to the Direct Pre-filed Testimony of Sprint witness Peter Sywenki.*

that Sprint's position is also inconsistent with its stated position in the previous issue. In Issue No. 6, Sprint states at page 19 (¶42) of its Petition that "each party is responsible for the costs and any requirements on its side of the Interconnection Point." That statement, in the RTCs' view, is consistent with the RTCs' position: if each party is to be responsible for the costs on its side of the Interconnection Point, there are no charges to apply with respect to those facilities on each party's side of the Interconnection Point. (Response, at 47 – 48).

The RTCs also contend that, to the extent that any charges were to apply for facilities, the forward-looking, TELRIC pricing principles and rules adopted by the FCC do not apply to Rural Telephone Companies as Sprint suggests. (Response, at 48). The RTCs noted that the FCC, in at least eight separate places throughout its *First Report and Order*, stated in response to rural company concerns that the FCC's pricing mechanism would be harmful to small LECs—or in response to alternative proposals of small and rural LECs different from the forward-looking TELRIC proposed approach, that carriers exempted (or suspended) pursuant to Section 251(f) are not subject to the FCC's pricing rules.[47]

In light of these FCC actions, the Respondents concluded, therefore, that they are not automatically subject to the FCC's specific TELRIC pricing rules by virtue of the protections afforded Rural Telephone Companies under Section 251(f)(1) of the Act. (Response, at 48-49).

The RTCs contended that there need not be any facilities charges between the parties if the Interconnection Point is established at a reasonable "middle" point for the competing carriers within the geographic area in which local calls are originated and terminated. (Response, at 48-49). If some other approach is applied, then the RTCs indicated that the pricing for facilities should be based on the same just and reasonable pricing the RTCs already use to establish charges for facilities. (Response, at 48-49).

In his reply testimony, Mr. Watkins testified that Mr. Sywenki's inference at page 34 of his testimony that the RTCs have demanded access charge payment from Sprint for local traffic is incorrect. (Watkins Reply, at 22). Mr. Watkins asserted that the RTCs have simply stated that in the determination of costs for switching and transport, the cost methodology used for the determination of switching and transport for exchange access is equally applicable here.

Finally, Mr. Watkins testified that, since TELRIC does not apply, some costing methods will need to be used to determine the cost of switching and transport the RTCs provide. (Watkins Reply, at 22). Mr. Watkins stated that the cost methods used to determine access switching and access transport are just as reasonable as those employed in the determination of cost for the same functions, when transporting and terminating local traffic. He also stated that as a result of the proceedings addressing its "mirroring" policies, interstate (and thus intrastate) access charges have been significantly reduced over the last several years, and those rate levels are below the

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[47] The RTCs referenced (see Response at 48, n.129) the following aspects of the FCC's First Report and Order as support for this position: 11 FCC Rcd at 15858 (¶706), 15891 (¶783), 15964 (¶934), 15973 (¶957), 16026 (¶1059), 16031 (¶1068), 16041-16042 (¶1088), and 16056 (¶1115). The Respondents also stated that, in each case, in response to concerns about the TELRIC approach to pricing that small and rural LECs voiced, the FCC stated that because of the rural exemption, the rural carriers are not subject to the FCC's rules under discussion at those sections of the order. (Response, at 48, n.129).

levels that prevailed when the FCC first developed its interconnection rules. Thus, the witness stated that there is no reason why the same costing methods used to determine switching and transport costs for access should not be deemed reasonable for the determination of the costs of switching and transport of other forms of traffic. (Watkins Reply, at 22).

2. Commission's Decision

We find that the RTCs' language for Issue 7, as modified below, should be adopted:

Sprint ~~should~~ may *lease facilities from TELCO in order to achieve connection at the Interconnection Point* or Points~~, as specified in Section 3.2 above,~~ *Sprint agrees to pay TELCO the applicable published or price listed tariff rates or such rates as established under separate agreement for the lease of such facilities.*

ILEC pricing obligations are enumerated in Section 251(c)(2)(D) of the Act. The "Additional Obligations of Incumbent Local Exchange Carriers" under Subsection (c) apply to all ILECs "with the exception of rural companies until i) such company has received a bona fide request for interconnection services or network elements; and ii) the State Commission determines [ ] that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 [ ]". Likewise the Commission's 39983 Order issued August 21, 1996, requires a bona fide request and/or an affirmative decision by the State that the 251 (c) exemption has expired.

The January 30, 2006 letter to Thomas Moorman, legal counsel for Respondents, from Bob Ederly, Sr. Contracts Negotiator for Sprint–Nextel, specifically stated that Sprint did not intend to "trigger" 251(c) requirements. (Respondents' Response to Sprint's Arbitration Request, Appendix E).

The three companies in this consolidated cause are in varied situations regarding suspensions under Section 251(f) of the Act. While this Commission explicitly stated that one company's 251(c) suspension expired in its CLEC CTA Order, no such explicit finding has been made for the other two companies.[48] Therefore, due to the fact that Sprint did not seek interconnection under 251(c), we must look to the obligations under Section 251 (a) and (b) of the Act. We find that there is no obligation in Section 251(a) or (b) for telecommunications carriers to provide forward-looking costs of facilities that may be leased for interconnection purposes, and we decline to require forward-looking cost studies of the RTCs, or to require interconnection rates based upon forward-looking costs or cost studies, at this time.

Sprint is concerned that rates from the rural companies' tariffs will not be just and reasonable because, according to Sprint, access rates have historically been a subsidy-mechanism set well above costs. We find that this concern, to the extent it is valid, is abated by the Commission's default policy of intrastate mirroring of the FCC's rate structure and rates for access charges and the FCC's implementation of a series of access charge reform orders. For

[48] Craigville Telephone Company, Inc obtained a Certificate of Territorial Authority for its CLEC affiliate AdamWells Telecom on November 3, 2004 under Cause No. 42669. This order explicitly stated that Craigville's 251(c) suspension had expired.

example, the MAG Plan, released 2001, was designed to rationalize the common line rate structure and move per-minute switched access rates towards lower, cost-based levels.[49] This is not intended as a statement of the Commission's position(s) regarding either the existence or magnitude of any subsidies existing in RTCs' current intrastate access charges, or the specific merits or details of the MAG Plan. However, because of the Commission's mirroring policy, those changes in interstate access rate structures and rates that did occur, *did* generally flow through in identical, or similar, changes to the corresponding intrastate access rate structures and rates.

Finally, as indicated above, the Commission's modified language for Issue 7 does not prevent Sprint from negotiating leased rates that are more favorable than the tariffed rates.

Issue 8: Should Sprint and the ILEC share the cost of the Interconnection Facility between their networks based on their respective percentages of originated traffic?

Related Agreement provisions: 5.2.4, 5.2.5, 5.4.

1. Position of the Parties

a.) <u>Sprint</u>

The disagreement reflected in Issue 8 concerns the establishment of interconnection points and the traffic delivery responsibilities when direct interconnection is used specifically for an interconnection facility that is sized to carry two-way traffic. As described in Issue 6 above, the RTCs propose that the parties meet at some point "within that exchange area where local calls will originate and terminate" whereas Sprint proposes that if a party chooses direct interconnection for delivery of its traffic, it is responsible for the cost of that facility. (Sywenki Direct, at 35). Mr. Sywenki testified that it is willing to establish an interconnection facility that has the capacity to carry the trunks necessary for traffic originated by the RTC customers and traffic originated by Sprint's customers, i.e., two-way traffic trunks, so long as the parties share the cost of the interconnection facility based on each party's relative originated traffic percentage. (Sywenki Direct, at 35). Mr. Sywenki asserts that allocating the cost of the two-way facility based on the relative percentage of originated traffic will ensure each party will assume the cost associated with carrying its traffic. (Sywenki Direct, at 36).

Mr. Sywenki also noted that its proposal for interconnection facility cost sharing is also consistent with FCC rules. (Sywenki Direct, at 36). Sprint points to 47 C.F.R. §51.703(b), which states: "A LEC may not assess charges on another telecommunications carrier for telecommunications traffic that originates on the LEC's network." Mr. Sywenki indicates that 47 C.F.R. § 51.709(b) states that:

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[49] *In re the Multi-Association Group Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers*, CC Docket No. 00-256, CC Docket No 96-45, CC Docket No. 98-77, CC Docket No. 98-166, at ¶40 (rel. Nov. 8, 2001).

> the rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.
> (Sywenki Direct, at 36-37).

Sprint also points to the decisions reached by the Michigan, Missouri and Maryland commissions, which it cites in Issue 6, as further support for sharing the cost of the interconnection facility.

Mr. Sywenki testified that the RTC proposal would disproportionately burden Sprint by requiring Sprint to assume both the costs of interconnection facilities for delivering traffic to the RTCs' network and the costs of interconnection facilities for traffic originated by the RTCs' customers. (Sywenki Direct, at 36). Sprint notes that, as with Issue No. 6, Sprint's proposal accommodates any RTC concern about the distance between the RTC switches and the Sprint switch, by agreeing to establish a network interconnection point in the LATA in which the RTC originating switch resides.

b.) <u>Respondents</u>

According to the Respondents, if the Interconnection Point between the parties is established somewhere on the incumbent LEC network of the RTC, within the area in which local exchange traffic will be originated and terminated, there will be a sufficient balance of responsibility of facilities (the parties are effectively meeting in the "middle") such that there will not be any need for charges for any interconnection facilities between the parties. In Issue 6, Sprint states at page 19 (¶42) of its Petition that "each party is responsible for the costs and any requirements on its side of the Interconnection Point." That statement, in the RTCs' view, is consistent with the RTCs' position: if each party is to be responsible for the costs on its side of the Interconnection Point, there are no charges to apply with respect to those facilities on each party's side of the Interconnection Point. (Response, at 51).

The RTCs contended that their proposal to meet reasonably in the middle ensures rough justice of equal facilities for the origination and termination of local exchange traffic. (Response, at 51). And if wireline local exchange traffic is expected to be roughly balanced, there is no need for charges between the parties (in contrast to CMRS traffic with LECs). (Response, at 51). Likewise, and notwithstanding the inapplicability of any charges with respect to the anticipated arrangement, the RTCs indicated that they do not accept Sprint's notion that, if facilities costs are to be shared based on a party's relative originating portion of local traffic, the costs of such facilities to be shared are unbounded by distance, without regard to the area in which local exchange calls will be exchanged. For calls that originate and terminate within a specific exchange area, to the extent that Sprint may need to transport such calls to a switch at considerable distance beyond the local exchange area to accommodate its network design, and then transport these calls back to terminate to the end user actually located within the local exchange area, the RTCs contend that Sprint does so at its expense. The cost to transport to some distant location and back again is not the responsibility of the RTCs, in their view. The

RTCs noted that their exposure to unnecessary costs arising from Sprint's position is demonstrated when one considers that Sprint may have facilities that extend to Kansas. (Response, at 51-52).

Further, as discussed earlier by the Respondents, the RTCs' interconnection obligations do not extend to areas in which they are not ILECs. (Response, at 52). The Respondents stated that the Interconnection Point must be within the ILEC area and must be at a point within the network of the incumbent. To that end, the RTCs noted that a local exchange call must be transported no more than to the most distant point within an exchange in order to terminate a local exchange call. To the extent that Sprint may want, because of its network design, to transport a local call from a particular exchange where it is originated, to Kansas and back to that specific exchange area, for termination to the called end users, the RTCs stated that Sprint does so for its own convenience. The RTCs made clear their position that they have no obligation to fund what, for them is a more costly network design, in order to establish a more cost-efficient design for Sprint.[50] Sprint's position that the RTCs may be responsible for costs to transport local calls over facilities that go well beyond the point that any other local call must be transported (and well beyond a point that any other incumbent has been required) is, in the Respondents' view, just another example of a request for an extraordinary, superior arrangement that the RTCs are not required to provision at the request of Sprint. (Response, at 52).

Mr. Watkins testified that Sprint's position is another example of the attempt by Sprint to impose costs unfairly on the RTCs by suggesting that the RTCs should compensate Sprint for facilities that Sprint chooses to provision to some distant point. (Watkins Direct, at 8). Referencing the explanation provided in the Response, Mr. Watkins testified that there is no requirement for the RTCs to fund this Sprint choice and costs caused by Sprint.

2. Commission's Decision

Issue 6 and 8 are related. By finding for Sprint in Issue 6, we now must determine how to share the cost of the Interconnection Facility. We find that Sprint's proposal is consistent with the FCC's rules and is equitable for both parties. The evidence reflects that if the parties use direct interconnection that carries two-way trunks, the facility will be sized to accommodate both the RTC's traffic and Sprint's traffic. Where this occurs, we agree that allocating the cost of the two-way facility based on the relative percentage of originated traffic will ensure each party will assume the cost associated with carrying its traffic. This is consistent with *both* the FCC rule prohibiting a LEC from assessing charges on another telecommunications carrier for telecommunications traffic originating on the LEC's network[51] *and* the FCC rule requiring that

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[50] The RTCs stated that Sprint's unilateral decision to transport traffic at significant distance from the area in which end users originate and terminate local calls, in one respect, saves Sprint's resources because Sprint probably deploys fewer and larger switches, but increases its costs of having to transport calls from, and then back to, the local area where end users are actually served. (Response at 52, n.141). The RTCs also noted that how Sprint evaluates the trade off between these conflicting cost considerations is not a concern of the RTCs and cannot create obligations for the RTCs. According to the RTCs, Sprint appears to want the RTCs to help finance the more costly trade-off in its network design (the long distance transport for local exchange calls) without consideration of the offsetting savings and without any evaluation of any public interest merits. (Response at 52, n.141).

[51] 47 C.F.R. §51.703(b).

rates of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.[52]

We reject the RTC proposal also because we find that it would disproportionately burden Sprint by requiring Sprint to assume both the costs of interconnection facilities for delivering traffic to the RTCs' network and the costs of interconnection facilities for traffic originated by the RTCs' customers. Additionally, we note that Sprint's proposal accommodates any RTC concern about the distance between the RTC switches and the Sprint switch, by agreeing to establish a network interconnection point in the LATA in which the RTC originating switch resides. We agree that Sprint's proposal fairly accommodates two-way traffic trunks and facilities, ensures each party assumes its proportionate cost of the facility associated with its originated traffic, and provides a reasonable limitation on the transport distance between the RTC network and the Sprint network. For all these reasons, we adopt Sprint's language for Issue 8.

Issue 9: What is the appropriate compensation rate for the termination of IP-PSTN Traffic, as defined by Sprint in the Agreement?

Related Agreement provisions: 2.2, 8.1.

1. Position of the Parties

a.) Sprint

Sprint argues that the appropriate compensation rate for Internet-Protocol traffic destined to the Public Switched Telephone Network ("IP-PSTN traffic"), i.e., Internet Protocol traffic that uses the public switched network facilities of any LEC for origination or termination, is bill and keep, the reciprocal compensation methodology agreed upon by the parties for other 251(b)(5) traffic. IP-PSTN traffic represents traffic that is initiated using internet protocol technology and that is terminated to the PSTN using traditional TDM circuit switching protocol. IP-PSTN also includes traffic that is initiated as a traditional TDM call but is directed at an end-user that utilizes internet protocol technology at their premises.

Sprint states that this traffic is properly classified as 251(b)(5) traffic subject to reciprocal compensation. There is no rule and no basis for the application of access charges to IP-PSTN traffic where the origination and termination point are in different local calling areas defined by the ILECs. (Sywenki Direct, at 38). While the FCC has ruled on IP-IP traffic finding that access charges do not apply, and the FCC has ruled on long distance PSTN-IP-PSTN traffic finding that access charges do apply, the FCC, having had many opportunities to do so, has not applied the access charge regime to IP-PSTN traffic. In the absence of a definitive ruling, Sprint argues that it is reasonable for the Commission to conclude that IP-PSTN traffic is subject to 251(b)(5) of the Act and within the scope of 51.701(b). (Sywenki Direct, at 38).

[52] 47 C.F.R. §51.709(b).

Furthermore, Sprint cites that the Commission has already squarely addressed this issue. In an arbitration between Level 3 and SBC Indiana, the Commission decided bill and keep was appropriate for IP-PSTN traffic. Specifically, the Commission found as follows:

> At the same time, we are unable to find any FCC rule or regulation that specifically applies access charges to IP-PSTN traffic. In fact, the FCC states in the *AT&T IP Order* that, "[in the *IP-Enabled Services NPRM*] we sought comments on, among other things, whether access charges should apply to VoIP or other IP-enabled services." As such, we conclude that there is no established federal policy to govern intercarrier compensation for IP-PSTN traffic. This should not be surprising since VoIP services have only emerged in the last few years.
>
> Since there is no federal policy to guide us, we must do our best to determine which proposal is more consistent with federal policies. Based on a review of all relevant FCC decisions and the record before us, we conclude that Level 3's position is closer to currently-established FCC policy and therefore shall be adopted until such time as the FCC clearly articulates a policy position on this matter. To be clear, we are adopting the position that there should be no compensation for IP-PSTN until the FCC determines otherwise.[53]

Sprint states that the FCC has not provided any rulings on this issue since the Commission's decision in the Level 3 arbitration, and has specifically not ruled in the interim that access charges should apply to IP-PSTN traffic. (Sywenki Direct, at 39). In the absence of any countervailing FCC position, the appropriate treatment is to exchange this traffic as bill and keep in conformity with the Commission's previous decision.

b.) Respondents

The RTCs' position with respect to IP-PSTN traffic is that it be treated no different than any other traffic that uses the public switched network. The Respondents contend that the jurisdictional treatment of traffic is based on the originating and terminating points of the calling and called party. Thus, according to the RTCs, the fact that one party to a call may use a technical connection based on Internet protocol technology does not change the fact that a telecommunications call between two human beings has taken place, does not change the originating and terminating points of the calling and called parties (Response, at 53), and does not change the jurisdictional treatment of such calls. As applied to this proceeding, therefore, the Respondents state that, to the extent that Sprint or some other carrier originates a call using Internet Protocol technology for an end user located outside of the local calling area, and Sprint

[53] *In re Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Indiana Bell Telephone Company d/b/a SBC Indiana*, Arbitration Order, Cause No. 42663 INT-01, at 10-11, (December 22, 2004). This Order was vacated by the Commission on March 10, 2005, in response to a joint motion by Level 3 and SBC Indiana to vacate the decision, when those parties reached a thirteen-state agreement after the Commission issued its Arbitration Order, but before the parties filed a conforming agreement.

seeks to terminate that call on the public switched network of the RTC, then Sprint owes terminating switched access charges.

The RTCs also noted that there has been no ruling to change the jurisdictional treatment of such traffic. (Watkins Reply, at 24). Consequently, the RTCs assert, "The fact that there may be different regulatory treatment of information services or enhanced services, or that the jurisdictional authority for certification over providers of Internet Protocol-based services has been addressed, does not alter the jurisdiction of voice traffic that terminates on an RTC's public switched incumbent network." (Response, at 54).

The RTCs challenged Sprint's claim at page 24 (¶54) of its Petition that there is no FCC rule that specifically applies to IP-PSTN calls, and stated that such claim is "misleading." (Response, at 54). The Respondents stated that interstate calls between end users, when terminated on the incumbent LEC networks of the RTCs, have always been subject to interstate terminating switched access charges pursuant to the FCC's long-standing Part 69 rules. According to the RTCs, Sprint cannot claim otherwise simply because the FCC has not yet addressed any new differences that the FCC might want to consider for Internet Protocol calls. The RTCs assert that, unless and until the jurisdiction of calls is changed, and the access charge treatment of such calls changes, the FCC's rules apply terminating interstate access charges to IP-PSTN calls that originate in other states and terminate on the PSTN incumbent networks of the RTCs. Similarly, they assert that an intrastate call within the State of Indiana that originates on an Internet Protocol-based connection somewhere in the state not within the "local calling area" of the RTCs' exchanges, when terminated on the PSTN incumbent networks of the RTCs, is subject to intrastate terminating access charges. The fact that the FCC may be considering new definitions or different treatment of these voice calls, in light of Internet Protocol technology, does not, in the Respondents' view, change the current treatment under current law. (Response, at 54).

In support of their position, the RTCs cited to the following FCC statement:

> . . . any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.

(Response, at 55, quoting *IP-Enabled Services,* Notice of Proposed Rulemaking, FCC 04-28, at ¶33 (rel. Mar. 10, 2004) (WC Docket No. 04-36). Therefore, the Respondents state that, regardless of what status the services of IP-enabled providers are determined to have in the future, for service providers that offer and provide intrastate and interstate long distance calls identical to calls provided by other IXCs that may not use Internet Protocol technology, the FCC has already acknowledged (after carriers asked for confirmation) that access charges always applied in one example of Internet Protocol-enabled IXC calls that use the PSTN for origination and termination. (Response, at 55).

Mr. Watkins stated that if one were to accept Sprint's interpretation, Sprint would be able

to terminate traffic that originates from any cable operators that Sprint suggests are to be included in the "last mile provider" classification it describes, and that these cable providers could terminate all of that traffic, regardless of where it originated, without the payment of access charges. Mr. Watkins further asserted that, if that were to be the result of this proceeding, Sprint would single-handedly undermine the carefully balanced compensation framework under which local carriers recover the costs of their networks partly from access sources, partly from local service charges, and partly from Universal Service funding. With this testimony as background, Mr. Watkins stated the Respondents' position that the FCC's failure to prescribe regulations for Internet Protocol-PSTN traffic would not prohibit the Commission from applying the same end-to-end analysis to the call, based upon the location of the end users. (Watkins Reply, at 23).

2. Commission's Decision

We agree with the Respondents and find that the application of switched access charges should apply for all IP-PSTN traffic that originates and/or terminates outside of the certificated service area of the individual RTC.

Before addressing the main issue, we clarify the definition of IP-PSTN traffic. Mr. Sywenki states that "Sprint's proposed interconnection agreement includes the exchange of IP-PSTN traffic. IP-PSTN traffic represents traffic that originates using Internet Protocol and terminates to the Public Switched Telephone Network ["PSTN"] using traditional TDM [Time Division Multiplexing] circuit switching." (Sywenki Direct, at 37). It appears that Mr. Sywenki's definition of "IP-PSTN traffic" is incomplete, and possibly misleading, because it suggests that the focus of Issue 9 is solely upon "IP traffic" of some sort that terminates on the PSTN. However, that view is inconsistent with Sprint's proposed definition of IP-PSTN traffic in the May 16 draft version of the interconnection agreement: "IP-PSTN traffic includes traffic originating on the PSTN and terminating utilizing an internet protocol technology, *as well as the converse* [emphasis added]" (May 16 draft agreement, Section 2 ("Definitions"), Paragraph 2.16). We note that the RTCs did not propose an alternative definition of "IP-PSTN traffic" in Section 2 of the Agreement, or any modifications to Sprint's definition, although they did take substantive positions on Issue No. 9 in several of their filings, as described earlier.

We note that there are several disputed references to various types of "IP" traffic or other IP-or Internet-related matters, in addition to Sprint's disputed definition of IP-PSTN traffic in Section 2.16 of the May 16 agreement: "Information Service Provider or ISP" (proposed by the RTCs in Section 2.11); "ISP-Bound Traffic or Internet Traffic" (proposed by the RTCs in Section 2.12); "Internet Protocol connection or IPC" (proposed by the RTCs in Section 2.18); "IPC Service" (proposed by the RTCs in Section 2.19); "Internet VOIP" (proposed by the RTCs in Section 2.20); "Internet Protocol" (proposed by the RTCs in Section 2.21); and "Voice over Internet Protocol Traffic or VOIP Traffic" (proposed by the RTCs in Section 2.36). We find that Parties shall delete all such definitions in the conforming agreement that are unnecessary in light of, or inconsistent with, our findings, conclusions, and statements in this order (or modify the definitions to make them consistent).

The issue can be succinctly restated as: What are the intercarrier compensation

obligations that apply to the traffic originating or terminating on the Public Switched Telephone Network ("PSTN") that uses Internet Protocol technology at one end of the call? The positions of the Parties are clear: Sprint states that Internet Protocol-PSTN traffic should be subject to reciprocal compensation since there is no FCC rule specifically applying access charges to IP-PSTN traffic (see generally, Petition, at 24; Sywenki Direct, 37-39); the Respondents state that the intercarrier compensation arrangements should be subject to the same "end-to end" analysis it argues has traditionally been used for all circuit switched traffic. (Response, at 53-54; Watkins Direct, at 8-9; Watkins Reply, at 23-24).

We do not find compelling evidence in this arbitration that IP-PSTN traffic should be subject to different jurisdictional treatment than wireline traffic. We do not agree with Sprint that the absence of FCC action specifically requires us to default to the application of reciprocal compensation. If there is a future change in law applicable to this issue, we would expect the parties will follow the applicable change of law provisions of the agreement that we ultimately approve in this proceeding, to the extent possible.

The Commission recently ruled on this issue in Cause No. 42893-INT-01. There we said:

> The Commission agrees with SBC Indiana that the regulatory status quo requires the payment of access charges, and not reciprocal compensation or the ISP-bound traffic rate, for IP-PSTN and PSTN-IP-PSTN traffic that is interexchange in nature. Under the FCC's existing rules at 47 C.F.R. 5 69.5(b), access charges apply to all interexchange traffic that uses the local exchange switching facilities of the PSTN.[54]

Accordingly, we direct the Parties to implement these directives in a conforming agreement and to make all changes necessary within Sections 2.2 and 8.1 (as well as any other appropriate section) to implement such directives. We next turn to Sections 3.7 (including 3.7.1 and 3.7.2) and 3.8, all of which were proposed by the RTCs. We note that the *entire* Section 3 appears to be an affected section for Issue 6. Nevertheless, these sections, while listed under the section heading "Interconnection Arrangements," may also affect IP-PSTN compensation, which is the subject of Issue No. 9. We have generally resolved Issue No. 6 in favor of Sprint; absent any further explanation or clarification on our part, this would suggest that Sections 3.7 (including 3.7.1 and 3.7.2) and 3.8 should not be included in the agreement. However, we have generally resolved Issue No. 9 in the RTCs' favor. Thus, we find that Sections 3.7 (including 3.7.1 and 3.7.2) and 3.8 should be included in the conforming agreement. We further find that these sections should be modified to comply with our resolution of both Issue No. 6 and Issue No. 9 (to the extent they affect IP-PSTN compensation). Finally, where applicable, we find that Sections 3.7 (including 3.7.1 and 3.7.2) and 3.8 will also need to be made consistent with our rejection of the RTCs' definition of "Local Traffic" in Section 2.32.

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[54] *Indiana Bell Telephone Company, Incorporated d/b/a SBC Indiana Petition for Arbitration of Interconnection Rates Terms and Conditions and Related Arrangements with MCIMetro Access Transmission Services LLC, Intermedia Communications LLC, and MCI WorldCom Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Arbitration Order, Cause No. 42893-INT 01, at 59 (Jan. 11, 2006).

Issue 10: Should Sprint be required to pay a Service Order Charge for Local Number Portability?

Related Agreement provisions: 12.2.

1. Position of the Parties

a.) Sprint

Sprint contends that there should be no Service Order Charge for Local Number Portability ("LNP"). LNP allows a customer of telecommunications services to switch providers and retain their telephone number. It is instrumental in fostering competition because consumers are more likely to change providers if they know that they can continue to use their existing telephone number. Any detriment to LNP, including "service order" charges, will impede competition as it increases the cost of obtaining new customers.

Furthermore, Sprint claims that Mr. Watkins admitted that the LECs had not performed any cost studies to support these charges (Tr., B-113). Accordingly, the ILECs have not demonstrated that any charge is warranted in conjunction with a customer's change to another provider.

Mr. Sywenki asserts that neither party should assess a service order charge for LNP. (Sywenki Direct, at 40). Sprint is willing to port numbers to the ILEC without assessing a separate service order charge. *Id.*

Finally, Sprint argues, when confronted with the question of LNP cost-recovery, the FCC decided that incumbent LECs should recover their carrier-specific costs directly related to providing number portability through a federal charge assessed on end-users.[55] When addressing this issue, the FCC considered operational support system costs,[56] such as the costs associated with administratively processing a port request. To the extent the incumbent LEC chose not to automate its port request processes and recover costs through charges assessed to end users, this does not justify charging the competitive carrier for these costs.

Mr. Sywenki states even if the Commission determines that a service charge is appropriate for LNP, that charge should be no more than $1.25 per port, the safe harbor charge adopted by the FCC for an electronic PIC-change. *Id.* The functions associated with a PIC-change are similar to those necessary to implement a change in local provider, so the same safe harbor would be appropriate.

b.) Respondents

The Respondents indicated that each party should be required to provide compensation to the other party for the typical service order activity costs incurred when one Party (the new service provider) requests that the other Party (the former service provider) port a telephone

[55] *In re Telephone Number Portability*, Third Report and Order, FCC 98-82, ¶ 135.
[56] *See, e.g., id.*, at ¶ 38, 137.

number. (Response, at 55). According to the RTCs, if each carrier is required to absorb Local Number Portability service order activity costs, the entire body of users will be subjected to the costs associated with specific porting customers. The RTCs stated that, by charging the new service provider, the new service provider can recover these costs from the end user that has "caused" the costs to be incurred. (Response, at 56).

Mr. Watkins stated that the service order activity rates that the RTCs would assess are as follows: [57]

	Initial Request	Each Additional Request
Citizens	$ 12.00	$ 6.00
Craigville	10.00	5.00
Ligonier	21.00	10.50

During the hearing, Mr. Watkins offered to eliminate the rate proposed for each additional request. (Tr., at B-111). Mr. Watkins stated that the proposed charges (which were also included in their discovery responses) are those the RTCs charge for their respective service order activity associated with similar end user requests, and are the charges the RTCs have historically used. (Watkins Reply, at 25). Therefore, Mr. Watkins stated that the service order charge would be intended to recover the business office personnel time and effort to process each number portability request that one party may receive from the other party. *Id.*

Mr. Watkins testified that the RTCs anticipate that the service order and central office functions of implementing end user service requests associated with the current service order charges will be the same as those the RTCs anticipate incurring for completing the LNP order processing functions necessary to fulfill a LNP from a qualified entity. *Id.* Accordingly, Mr. Watkins stated that the RTCs believe that the proposed charges are modest, and reasonably compensate the parties for the costs of these activities. Likewise, Mr. Watkins testified that, since the RTCs do not utilize electronic processing of PIC requests, Mr. Sywenki's statements regarding Sprint's proposed default rate has no basis. *Id.*

2. Commission's Decision

The ability of a customer to change local telephone service providers is a critical component of true competition. Local Number Portability ensures that customers can change providers without the inconvenience of acquiring a new telephone number. Any impediment to LNP, including service charges, necessarily impedes competition. Additionally, Mr. Watkins admits that no cost studies have been performed to support the assessment of a service order charge for processing LNP orders. Further, we question the appropriateness of using the service order charge as a proxy for LNP service order charges, since the rate disparity among the three companies is so great for a service that should be similar across the RTCs. Accordingly, we

[57] During the hearing, Mr. Watkins corrected the rates for Citizens that were provided previously to Sprint. (Tr., B-53-54). The table included in this portion of the decision reflects those revised rates. The Commission understands that discovery responses were also changed to reflect this correction.

determine that the Agreement will state that LNP service orders will be processed by both carriers at no charge.

Issue 11: Should the Agreement contain language to continue in full force during negotiation of a new Agreement?

Related Agreement provisions: 39.2.

1. Position of the Parties

a.) Sprint

Mr. Sywenki contends that the existing Interconnection Agreement, whether the original or a renewal agreement, should remain in effect while the parties are in the process of negotiating or arbitrating a replacement agreement. (Sywenki Direct, at 41). Sprint has proposed the following language in Section 39.2:

> Either Party may seek to terminate this Agreement by providing written notice to the other party at last sixty (60) days prior to expiration of the initial term or any succeeding term. If ILEC sends a timely notice to terminate and Sprint replies with a timely notice for re-negotiation under section 39.1, this Agreement will continue in full force and effect until a new Agreement is effective through either negotiation, mediation or arbitration under 47 U.S.C. 252.

Mr. Sywenki testified that it is standard practice to continue under the terms of the Interconnection Agreement that is the subject of re-negotiations. (Sywenki Direct, at 41). According to Mr. Sywenki, this allows the parties to continue exchanging traffic without interruption to their business or to consumers as the companies move to a new agreement. (Sywenki Direct, at 41). Sprint noted that, to the extent the RTCs are concerned about the length of time necessary to complete re-negotiation, the same concern would apply to Sprint. However, Mr. Sywenki stated the Act provides strict time limits for negotiations and arbitration of interconnection agreements which can be invoked by either party. (Sywenki Direct, at 41). Mr. Sywenki also indicated that Sprint is confident in the Commission's ability to meet the time constraints of arbitration under the Act should re-negotiations fail. (Sywenki Direct, at 42).

b.) Respondents

Mr. Watkins testified that the RTCs have proposed that the agreement terms remain in place while the parties negotiate and arbitrate a new agreement (see Section 39.3 of Sprint's version of the draft agreement filed with Sprint's Arbitration Petition). (Watkins Reply, at 25). Mr. Watkins stated, however, that the RTCs have also proposed that this ongoing interim arrangement be allowed for twelve months after the termination date. In light of this proposal, and because the parties would be required by Section 39.1 to provide notice of termination at least 60 days prior to the expiration date of the then-current term, Mr. Watkins testified that there would be fourteen months in which to resolve another agreement. Mr. Watkins contended that this time period is ample to resolve a new agreement, and exceeds the time frame available under

the Act to resolve a new Agreement. Therefore, Mr. Watkins testified that Sprint's interests are already addressed by the RTCs' proposal. (Watkins Reply, at 25).

In addition, Mr. Watkins contended that the result of Sprint's proposal would be that there would be no definitive end point to the contract. (Watkins Reply, at 25). Mr. Watkins stated that the RTCs are not willing to agree to such a proposition. They believe that there is no rational public policy basis (and Sprint has provided none) for the Commission to impose such a requirement upon either Sprint or the RTCs. To the extent that for some unforeseen reason a new agreement is not resolved in 14 months, then the RTCs would not, as stated by the witness, want to continue to be bound by the existing terms. Should this occur, Mr. Watkins asserted that the parties should be released from the terms, and some new interim arrangement would need to be established. Mr. Watkins also stated that the possibility exists that the interim arrangement could be the same, but the RTCs cannot determine with sufficient certainty how the terms of this agreement would apply, and/or whether continuation could be harmful and potentially threatening to the RTCs. Therefore, Mr. Watkins stated that the RTCs cannot commit to words that do not provide for a specific end date to the agreement, particularly in light of today's frequent market changes. Mr. Watkins stated that the terms the RTCs have proposed address Sprint's concern about putting a new agreement in place, and also address the RTCs' concerns that they not be involuntarily committed to existing terms for an indeterminate time period. (Watkins Reply, at 25, 26).

2. Commission's Decision

After reviewing the RTC's Exceptions to the Proposed Order filed on July 28, 2006, it appears as though the RTC's do not object to 39.2. Specifically the RTC's state "Thus, Section 39.2 can be adopted as long as Section 39.3 remains for the reasons stated by the RTC in their proposed Order." (RTC's Exceptions to Proposed Order, at 44). Since 39.3 is agreed-upon language, it remains whether 39.2 is adopted or not adopted. Based upon the RTC position, Section 39.2 will be incorporated into the Agreement.

Issue 12: What charges should apply for the termination of traffic that is within the scope of Section 251(b)(5) of the Act?

(RTCs specified this issue deals with reciprocal compensation for CMRS traffic that is not in balance.)[58]

Related Agreement provisions:

1. Position of the Parties

a.) Sprint

Issue 12 was first raised by the RTCs as "Additional Issue 11" in the RTCs' Response to Sprint's Arbitration Requests, filed by the RTCs on June 12, 2006. The RTCs questioned what charges should apply for CMRS traffic if it is covered in the Agreement. Mr. Sywenki states as

[58] Response, at 56.

set forth in Issue 2 that to allay the concerns of the RTCs regarding a potential traffic imbalance with the inclusion of CMRS traffic:

> Sprint is willing to compromise with the ILECs regarding the compensation of CMRS to wireline traffic. Sprint's proposal is to agree to pay a reciprocal compensation rate of $0.0007 per minute of terminating usage on CMRS to wireline traffic that is out of balance. CMRS to wireline or wireline to CMRS traffic would be deemed out of balance if a Party originated more than 60% of all traffic exchanged between the Parties for three consecutive months. All other traffic exchanged between the Parties would be subject to bill and keep."

(Sywenki Direct, at 14).

Sprint further argues that while RTCs ask the Commission to apply a rate for CMRS traffic they have not proposed a rate. (Tr., B-90). Moreover, Sprint argues that the 2.5 cents-per-minute rates that RTCs have in place with other wireless carriers is excessive. (Cross Exhibits 1-3, 5-7).

b.) Respondents

The Respondents indicated that, to the extent Sprint is allowed to use the interconnection arrangement for the termination of CMRS traffic, then the RTCs will have no choice but to impose terminating reciprocal compensation charges for CMRS traffic that is not in balance. (Response, at 56).

Mr. Watkins characterized Sprint's proposal regarding potential compensation as not being "rational." (Watkins Reply, at 14). He testified that he has reviewed interconnection agreements the RTCs have in place with CMRS providers for which the rate for compensation for transport and termination of calls is $0.025 per terminating minute of use. Mr. Watkins indicated that the cost to transport and terminate a call on the networks of small and rural LECs such as the RTCs is in the range of 14 to 50 times greater than the compensation rate Sprint is proposing in this proceeding ($0.0007 per minute of use). (Watkins Reply, at 14). The costs to transport and terminate a CMRS provider's call, in Mr. Watkins' opinion, should be no different than the cost to transport and terminate an interexchange carrier ("IXC") call. Because the MTA is so large, both CMRS providers and IXCs will be terminating similar calls. Mr. Watkins also testified that interstate and intrastate access charge rates have been reduced in recent years and, except for carrier common line and end user subscriber line charges, it was his understanding that the Commission has ordered changes in intrastate levels of access charges to mirror interstate levels.

During the evidentiary hearing, Mr. Watkins indicated that if the CMRS compensation rate is part of this arbitration, the RTCs are willing to enter into the same agreements that RTCs currently have with other wireless carriers. These Interconnection Agreements have a compensation rate of $0.025. (Tr., B-91)

2. Commission's Decision

At this time we believe the existing framework for determining CMRS compensation rates is appropriate. The existing framework set out by the FCC in the *T-Mobile Order*[59] states that ILECs and wireless carriers should negotiate arrangements for the exchange of traffic where they are interconnected indirectly. Specifically, the FCC has ruled that:

> An incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. A commercial mobile radio service provider receiving a request for interconnection must negotiate in good faith and must, if requested, submit to arbitration by the state commission. Once a request for interconnection is made, the interim transport and termination pricing described in Sec. 51.715 of this chapter shall apply.[60]

We support this framework for two reasons. First, neither Sprint's wireless affiliate nor any wireless company is a party to this arbitration, and an arbitration between Sprint and the RTCs is not the appropriate forum in which to set a CMRS compensation rate. The record contains examples of current interconnection agreements between wireless carriers and the RTCs.

Second, the FCC is in the middle of a proceeding to reform intercarrier compensation which may determine certain aspects of CMRS compensation. For example, The Rural Alliance, several large ILECs, and other companies (including Cingular Wireless) have negotiated a detailed intercarrier compensation, interconnection, and revenue replacement plan, called the Missoula Plan. At this juncture, the Commission has not taken a position on the Missoula Plan.

Issue 13: What change of law provisions are necessary to address an agreement that is resolved pursuant to involuntary arbitration?

Related Agreement provisions:

1. Position of the Parties

a.) Sprint

Issue 13 was first raised by the RTCs as "Additional Issue 12" in the RTCs' Response to Sprint's Arbitration Requests, filed by the RTCs on June 12, 2006. The RTCs framed the issue as: what provisions should apply to allow the RTC to discontinue the interconnection service or arrangement prescribed by the arbitrated agreement, if applicable law changes and the RTCs are subsequently shown not to be required to perform the obligations imposed by the arbitrated

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[59] *In re Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (February 24, 2005, Released) (CC Docket No. 01-92, FCC 05-42) ["*T-Mobile Order*"].

[60] 47 C.F.R. § 20.11(e).

agreement.[61] In response, Sprint indicated that section 38.9 of the proposed interconnection agreement provides the necessary change of law provisions to govern an agreement that is resolved pursuant to involuntary arbitration. (Sprint's Responses to Questions Posed In July 10, Docket Entry, at 10-11). That language provides as follows:

> 38.9 Regulatory Changes. If a Federal or State regulatory agency or a court of competent jurisdiction issues a rule, regulation, law or order (collectively, Regulatory Requirement") which has the effect of canceling, changing, or suspending any material term or provision of this Agreement then the Parties shall negotiate in good faith to modify this Agreement in a manner consistent with the form, intent, and purpose of this Agreement and as necessary to comply with such Regulatory Requirement. Should the Parties be unable to reach agreement with respect to the applicability of such order or the resulting appropriate modifications to this Agreement, either Party may invoke the Dispute Resolution provisions of this Agreement.

Sprint further responded that the parties should continue to provide service and negotiate in good faith and proceed to dispute resolution if necessary. Sprint indicated that the language proposed by the RTCs would allow the parties to discontinue service or force a party to "prevailing Tariffs," which Sprint indicated will sidestep the negotiation/arbitration process and timelines. Sprint noted that it is not in the public interest to disrupt service, nor is it appropriate to force parties to "prevailing Tariffs" especially since interconnection is required to be accomplished pursuant to an interconnection agreement, not a tariff.

b.) Respondents

In their Response, the RTCs stated that, to the extent that terms in the Agreement are the result of arbitration decisions and conclusions that are subsequently shown not to be required of the RTCs under the interconnection requirements, then there must be a provision in the Agreement allowing the RTC to discontinue that interconnection service or arrangement if the applicable law changes. (Response, at 56). If a particular interconnection service or arrangement has been required by virtue of the arbitration, but is subsequently found not to be an interconnection requirement, the Respondents stated that the requirement can no longer exist. An arbitration decision can only impose a requirement that is required by Section 251 of the Act. (Response, at 56). To address this possibility, therefore, the RTCs would include the following language in the proposed Agreement:

> xx Notwithstanding any other provision of the Agreement, neither Party shall be obligated to offer or provide any service, facility, or interconnection arrangement to the other Party that is not required by Applicable Law. To the extent that some service, facility, or interconnection arrangement provided by one Party to the other Party under this Agreement is determined not to be required by Applicable Law, then the providing Party upon 90 days written notice to the other Party may discontinue the provision of such service,

[61] RTC Response to Sprint Arbitration Request, filed 6/12/06, at 56.

facility, or interconnection arrangement. To the extent the discontinued service or interconnection arrangement is available under prevailing Tariffs from the Providing Party, then the Purchasing Party, may, at its option, obtain such services, facilities, or interconnection arrangements pursuant to the terms of such Tariffs. If the other Party disputes the providing Party's interpretation of what may be required under Applicable Law under the relevant facts, the Parties will resolve the disagreement pursuant to the processes set forth in Section 15 ("Dispute Resolution"), or either Party may, without delay and without participating in the dispute resolution process pursuant to Section 15, immediately pursue any available legal or regulatory remedy to resolve any question regarding what the providing Party is required to provide under Applicable Law.

(Response, at 56-57).

2. Commission's Decision

After reviewing the language proposed by the RTCs, we find the agreed-upon language in Section 38.9 appropriately covers the "change of law" contingency the RTCs describe and the additional language is not in the public interest. Section 38.9 calls for a two-step approach when a party believes a change of law has occurred: 1) good faith negotiations to modify the Agreement "in a manner consistent with the form, intent and purpose of this Agreement and as necessary to comply" with the change of law; and 2) absent agreement, the parties follow the Agreement's Dispute Resolution procedures. By contrast, the RTCs' proposal calls for: 1) service termination 90 days after the RTCs' notify Sprint of the "change of law" claim; and 2) upon dispute, the parties either go to dispute resolution or pursue "any available legal or regulatory remedy." The RTCs' proposal initiates service termination, while Section 38.9 initiates negotiation. While both proposals ultimately allow for dispute resolution and/or determination by regulatory or legal authority, Section 38.9 requires the parties to first attempt negotiation before service is disrupted. We believe this course is less likely to result in service disruptions, and find that it better reflects the public interest than the RTCs' proposal. Accordingly, we reject the language proposed by the RTCs.

C. Procedural Matters. Any pending objections, motions or appeals not previously ruled upon in this matter are hereby deemed to be denied. Further, all contentions and proposed findings of the parties not herein specifically determined are hereby rejected, the Commission having given full consideration to all evidence of record and arguments made in arriving at the findings and conclusions of this Order.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. The disputed issues between the parties are resolved in accordance with the findings and conclusions set forth herein.

2. The parties shall jointly submit for the Commission's approval a single Interconnection Agreement (also referred to as a "conforming agreement") reflecting our resolution of the disputed issues as described in this Order, as well as the agreed upon provisions that emerge as a result of the negotiations we are directing the parties to undertake. Such Interconnection Agreement shall be submitted to the Commission as set forth herein by the parties within thirty (30) calendar days following the issuance of this Order.

3. The Confidential Information submitted in this matter as Exhibit 3 Confidential shall continue to be held as confidential and excepted from public disclosure in accordance with Indiana Code 5-14-3.

4. This Order shall be effective on and after the date of its approval.

HARDY, LANDIS, SERVER, AND ZIEGNER CONCUR; HADLEY ABSENT:
APPROVED: SEP 0 6 2006

I hereby certify that the above is a true and correct copy of the Order as approved.

Brenda A. Howe

Brenda A. Howe
Acting Secretary to the Commission