PUC DOCKET NO. 31577

PETITION OF SPRINT COMMUNICATIONS COMPANY, L.P. FOR COMPULSORY ARBITRATION UNDER THE FTA TO ESTABLISH TERMS AND CONDITIONS FOR INTERCONNECTION TERMS WITH CONSOLIDATED COMMUNICATIONS OF FORT BEND COMPANY and CONSOLIDATED COMMUNICATIONS COMPANY OF TEXAS	§	PUBLIC UTILITY COMMISSION OF TEXAS

ARBITRATION AWARD

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ARBITRATION AWARD

This Arbitration Award (Award) resolves various Interconnection Agreement disputes between Sprint Communications, L.P. (Sprint) and Consolidated Communications of Fort Bend Company (CCFB) and Consolidated Communications Company of Texas (CCFB), (CCTX and CCFB collectively referred to as Consolidated; Sprint and Consolidated are each a Party). As detailed in this Award, the Arbitrators have determined that:

- The Arbitrators adopt the definition End User as proposed by Sprint with modifications;
- There is no requirement to name last-mile providers in the Interconnection Agreement;
- Compensation for traffic exchanged between the Parties should be treated in the same manner as any other voice traffic;
- There is no requirement for Sprint to "warrant" that it is a telecommunications carrier;
- The service provided to last-mile providers under wholesale arrangement does not constitute transit traffic;
- The initial term of the Interconnection Agreement shall be for two (2) years;
- The Local Service Request (LSR) charges proposed by the Parties are unsupported by the evidence submitted, and so there shall be no charge for porting a telephone number;
- Definitions of IP-PSTN, Responsible Party, Sprint-Last Mile Provider, and Unclassified traffic are appropriate to include in the Interconnection Agreement.
- Proposed Attachment No. 10 that addresses IP-PSTN Termination Traffic is necessary and should be included in the Interconnection Agreement.

I. JURISDICTION

The Federal Communications Act of 1934 (FCA)[1] as amended by the Federal Telecommunications Act of 1996 (FTA)[2] authorizes state commissions to arbitrate open issues between an incumbent local exchange carrier (ILEC) and a requesting telecommunications carrier.[3] The FTA also invests state commissions with authority to approve or reject interconnection agreements (ICAs) adopted by negotiation or arbitration.[4] The FTA's authorization to approve or reject these interconnection agreements carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.[5] The Public Utility Commission of Texas (Commission) is a state commission responsible for arbitrating interconnection agreements approved pursuant to the FTA.

II. PROCEDURAL HISTORY

On September 1, 2005 Sprint filed a petition for compulsory arbitration under the FTA to establish interconnection terms and conditions for interconnection terms with CCFB (Docket No. 31577) and CCTX (Docket No. 31578). The two petitions are identical except for the names of the Parties. On September 23, 2005 CCTX and CCFB each filed its response to motion for consolidation, motion to dismiss, request for a threshold issue and response. On September 23, 2005 the Commission issued its Order No. 1[6] in Docket No. 31577 and 31578, abating the proceedings and invited CCTX and CCFB to brief the threshold issues as part of the Commission's proceedings in Docket No. 31038, *Petition of Sprint Communications, L.P. for*

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[1] Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

[2] Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in various sections of 47 U.S.C.).

[3] 47 U.S.C. § 252(b).

[4] 47 U.S.C. § 252(e).

[5] *Southwestern Bell Tel. Co. v. Public Util. Commission of Texas*, 208 F.3d 475, 479-480 (5th Cir. 2000); *see also, Verizon Maryland, Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364-365 (4th Cir. 2004); *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 583 (6th Cir. 2002); *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-338 (7th Cir. 2000); Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 (8th Cir. 1997), aff'd in part, rev'd in part on other grounds, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999); Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc., 235 F.3d 493, 496-497 (10th Cir. 2000); BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Servs., Inc., 317 F.3d 1270, 1277-1278 (11th Cir. 2003).

Compulsory Arbitration under the FTA to Establish Terms and Conditions for Interconnection Terms with Brazos Telecommunications, Inc. On December 2, 2005 the Commission denied Sprint's appeal of the Commission's Order No. 1[7] in Docket No. 31038. That order required Sprint to petition to lift Brazos Telecommunications, Inc.'s (BTI) rural exemption under FTA § 251(f)(1)(a) before proceeding to negotiate and arbitrate an interconnection agreement with BTI and finding that BTI was not obligated to negotiate and arbitrate an interconnection with Sprint until such time, if ever, the Commission determined that BTI's rural exemption should be lifted. Sprint filed a petition seeking to terminate Consolidated's FTA § 251 rural exemption on March 31, 2006 (Docket No. 32582). On April 14, 2006, CCFB filed its motion to dismiss Sprint's petition for compulsory arbitration in Docket No. 31577 and CCTX did the same in Docket No. 31578, each arguing that pursuant to Order No. 1 in Docket No. 31038, Consolidated had no obligation to negotiate or arbitrate interconnection terms until the Commission made a determination regarding Consolidated's rural exemption status in response to Sprint's petition in Docket No. 32582. Sprint filed its response to the CCTX/CCFB motions to dismiss in Dockets No. 31577/31578 on April 21, 2006. Consolidated replied, Sprint rebutted and on May 23, 2006 the arbitrator issued Order No. 2[8] in Dockets No. 31577/31578, finding that Sprint was required to obtain a ruling from the Commission terminating Consolidated's rural exemption status before Consolidated would have an obligation to negotiate and arbitrate interconnection terms.

On June 12, 2006 Sprint appealed Order No. 2 in Docket Nos. 31577/31578. Consolidated responded and Sprint replied, and on June 29, the Commission considered the matter at an Open Meeting on June 29, 2006. On July 28, 2006 the Commission issued its Order on Appeal of Order No. 2[9] in Docket Nos. 31577/31578, vacating Order No. 2 in both dockets and reinstating and abating the proceedings in Docket Nos. 31577/31578 pending the resolution of Docket No. 32582. Docket Nos. 31577/31578 were again considered at an Open Meeting of

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[6] Order No. 1, Docket No. 31577, Notifying Parties of Briefing (Sept. 23, 2006) and Order No. 1, Docket No. 31578, Notifying Parties of Briefing (Sept. 23, 2006).

[7] Order No. 1, Docket No. 31038, Granting Motion to Dismiss (Dec. 2, 2005).

[8] Order No. 2, Docket No. 31577, Dismissing Proceedings (May 23, 2006) and Order No. 2, Docket No. 31578, Dismissing Proceedings (May 23, 2006).

[9] Order on Appeal of Order No. 2, Docket No. 31577, Vacating Order No. 2, Reinstating Arbitration Proceedings and Abating (Jul. 28, 2006) and Order on Appeal of Order No. 2, Docket No. 31578, Vacating Order No. 2, Reinstating Arbitration Proceedings and Abating (Jul. 28, 2006).

the Commission on August 10, 2006, and the draft order proposed in Docket No. 32582 was adopted. On August 14, 2006, the Commission issued its Final Order in Docket No. 32582.[10] Paragraph 2 of the ordering paragraphs of that Final Order held that the arbitration of the terms of interconnection in Docket Nos. 31577/31578 were to proceed pursuant to a procedural schedule to be set by the arbitrator in those dockets. On August 28, 2006, the Arbitrators in Docket Nos. 31577/31578 issued a notice of prehearing conference by Order No. 3[11] to be held on August 31, 2006. On August 31, 2006 the prehearing conference was held and dates for a procedural schedule were discussed. On August 25, 2006, the Parties filed a joint proposal for adoption of a scheduling order and protective order. On September 5, 2006, the Parties filed a joint motion to consolidate Docket Nos. 31577/31578. On September 11, 2006, Sprint filed its amended petition for arbitration. On September 29, 2006, the Arbitrators issued Order No. 4[12] setting the procedural schedule and entering a protective order. On October 2, 2006, Consolidated filed a motion to dismiss, motion to abate and its first amended response to Sprint's amended petition for arbitration, arguing that the Commission erred in reinstating Docket Nos. 31577/31578 and that the Commission should have instead required Sprint to file a new arbitration petition and start the arbitration clock anew, or in the alternative, that the proceedings should be abated until such time as the FCC issues a decision on an action seeking a declaratory ruling filed by Time Warner Cable with the FCC.[13] On October 5, 2006, Order No. 5[14] was issued consolidating Docket Nos. 31577/31578 into Docket No. 31577. On October 9, 2006, Sprint filed its response to Consolidated's motion to dismiss and motion to abate. On October 12, 2006, the Parties filed direct testimony. The Parties filed rebuttal testimony on October 23,

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[10] Final Order, Docket No. 32582, Terminating Consolidated's Rural Exemption (Aug. 14, 2006).

[11] Order No. 3, Docket No. 31577, Notice of Prehearing Conference (Aug. 28, 2006) and Order No. 3, Docket No. 31578, Notice of Prehearing Conference (Aug. 28, 2006).

[12] Order No. 4, Docket No. 31577, Setting Procedural Schedule and Entering Protective Order (Sept. 29, 2006) and Order No. 4, Docket No. 31578, Setting Procedural Schedule and Entering Protective Order (Sept. 29, 2006).

[13] Fed. Communications Comm'n, *Petition of Time Warner for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecomms. Servs. To VoIP Providers,* Petition for Declaratory Ruling, WC Docket No. 06-55 (filed Mar. 1, 2006).

[14] Order No. 5, Docket No. 31577, Consolidating Proceedings (Sept. 29, 2006) and Order No. 5, Docket No. 31578, Consolidating Proceedings (Sept. 29, 2006).

2006. On October 31, 2006 the Arbitrators issued Order No. 8[15] denying Consolidated's motion to dismiss and its motion to abate, finding that the issues raised by Consolidated in its motion to dismiss and motion to abate had been considered and ruled upon by the Commission in Docket No. 32582, and also because Time Warner Cable had informed Sprint that it no longer had in interest in pursuing the proposed business arrangement that in part gave rise to the present controversy and this docket. The Arbitrators conducted a hearing on the merits on November 2, 2006. The Parties filed their post-hearing briefs on November 10, 2006.

III. RELEVANT STATE AND FEDERAL PROCEEDINGS

Relevant Commission Decisions

Docket No. 32582

In Docket No. 32582, the Commission terminated Consolidated's FTA § 251 rural exemption, thereby obligating Consolidated to negotiate and arbitrate the terms of interconnection with Sprint.[16]

Docket No. 31038

In Docket No. 31038 the Commission found that Sprint was required to seek and obtain the termination of Brazos Telecommunications, Inc.'s (BTI) FTA § 251 rural exemption status before BTI would be obligated to negotiate and arbitrate terms of interconnection with Sprint.[17] Sprint successfully sought to terminate Consolidated's FTA § 251 rural exemption status in Docket No. 32582.

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[15] Order No. 8, Docket No. 31577, Denying Consolidated's Motion to Dismiss/Abate (Oct. 31, 2006).

[16] *Petition of Sprint Communications Company L.P. to Terminate Rural Exemption as to Consolidated Communications of Fort Bend Company and Consolidated Communication of Texas Company*, Docket No. 32582, Final Order (Aug. 14, 2006).

[17] *Petition of Sprint Communications Company L.P.for Compulsory Arbitration under the FTA to Establish Terms and Conditions for Interconnection Terms with Brazos Telecommunications, Inc.*, Docket No. 31038, Order Denying Sprint's Appeal of Order No. 1 (Dec. 2, 2005).

Docket No. 32917

In Docket No. 32917 Consolidated Communications of Fort Bend Company and ETS Telephone Company Inc. jointly submitted an interexchange agreement that contained provisions relating to VoIP traffic to the Commission for approval. The Commission approved the interconnection agreement on July 25, 2006.[18]

Docket No. 24547

In Docket No. 24547 the Commission ruled that OSS functions are unbundled network elements (UNEs) and that prices for UNEs should be based on total element long run incremental cost (TELRIC). The docket was an arbitration for interconnection between 1-800-4-A-Phone and Southwestern Bell Telephone Company.[19]

Relevant Federal Communications Commission Decisions

In re Universal Service Contribution Methodology

This FCC order established that "interconnected VoIP service" providers are obligated to make universal service fund contributions and that such providers are reaching the public switched telephone network through arrangements with telecommunications carriers.[20]

PIC Change Charge Order

The *PIC Change Charge Order* established a $1.25 safe harbor charge for an electronic presubscribed interexchange carrier (PIC) charge and a safe harbor charge of $5.50 for manually processed PIC changes. PIC change charges are federally tariffed charges imposed by local

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[18] Docket No. 32917, *Joint Application of Consolidated Communications Company of Fort Bend Company and ETS Telephone Company, Inc. for Approval of an Interconnection Agreement under the Federal Telecommunications Act of 1996 and the Public Utility Regulatory Act*, Attachment 3, *Affidavit of Representative of Consolidated Communications of Fort Bend Company* (July 10, 2006).

[19] Docket No. 24547, *Arbitration for Interconnection between 1-800-4-A-Phone and Southwestern Bell Telephone Company*, Arbitration Award at 8 and 10 (Jan. 25, 2002)

[20] *In re Universal Service Contribution Methodology*, WC Docket No. 06-122, FCC 06-94, ¶¶24-45 (rel. June 28, 2006).

exchange carriers (LECs) on end user subscribers when such subscribers change their presubscribed interexchange carriers (IXCs).[21]

Relevant Court Decisions

Qwest Corp v. PSC of Utah

FTA Section 252 permits interconnection on just, reasonable, and nondiscriminatory terms. Public filing of an interconnection agreement gives CLECs that are not parties to the agreement the opportunity to resist discrimination by allowing them to fully evaluate and request the same terms given to the contracting CLEC.[22]

Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc.

Arbitrators may properly find that no rates need be set for OSS (operations support systems) elements where the parties have failed to file cost studies for such elements. OSS elements are unbundled network elements and thus rates for such elements must be cost-based. The arbitrators may find that such rates will be subject to revision and replacement after the parties' cost studies have been filed and reviewed.[23]

IV. Discussion of DPL Issues

This proceeding addresses the issues in the Joint Decision Point List (DPL) filed by the Parties on February 10, 2006:

Sprint Issue No. 2 - Consolidated Issue No. 15

Sprint - Should the definition of End User be modified to permit wholesale services?

Consolidated - Should the definition of "End User" specifically include the subscribers of last-mile providers in addition to the end users of Sprint and Consolidated?

Sprint's Position:

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[21] *Presubscribed Interexchange Carrier Charges*, WC Docket No. 02-53, Report and Order, FCC 05-32 (rel. Feb. 17, 2005)(*"PIC Change Charge Order"*).

[22] *Qwest Corp v. PSC of Utah*, 2005 U.S. Dist. LEXIS 38306 (D. Utah 2005).

[23] *Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc.*, 1998 WL 657717 at 4 (W.D. Texas, 1998).

Sprint's proposed definition of End User is:

> "End User" - means, whether or not capitalized, the residence or business subscriber that is the ultimate user of Telecommunications Services provided directly to such individual or entity by ILEC or CLEC. Such subscribers shall be physically located within the Rate Center within the ILEC's certificated area either directly or by means of a dedicated facility from the subscriber's physical location to a location within the Rate Center (such as FX service).[24]

Sprint argued that its definition contemplates Sprint entering into relationships with last-mile providers to provide competitive voice services within Consolidated's service territory.[25] Sprint expressed concern that by excluding its definition of end user, Consolidated would effectively deprive Sprint of the ability to support its business model.[26] Sprint claimed that without its proposed definition of end user, the agreement could be interpreted to preclude its use in support of the wholesale services Sprint offers.[27] Sprint argued that when other definitions of "End User" have been incorporated into interconnection agreements in Texas, Consolidated has taken the position that these agreements may not be used in support of wholesale services.[28]

Sprint claimed its definition of "End User" makes the Agreement suitable for Sprint to support of both wholesale and retail service.[29] According to Sprint, Consolidated's refusal to accept Sprint's proposed "End User" definition is but one in a series of assaults against Sprint's business model.[30] Sprint contends this Commission has given clear direction that interconnection may not be denied on the basis that it is sought to support wholesale services, and Sprint asserted it cannot accept language that does not explicitly allow wholesale traffic to be exchange with Consolidated.[31]

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[24] Sprint Ex. No. 1, Attachment No. 5 - "Definitions" at Pg. 2. (October 12, 2006)

[25] Direct Testimony of James R. Burt, Sprint Ex No. 1 at 16 (November 2, 2006).

[26] Direct Testimony of James R. Burt, Sprint Ex No. 1 at 16.

[27] Direct Testimony of James R. Burt, Sprint Ex No. 1 at 16.

[28] Direct Testimony of James R. Burt, Sprint Ex No. 1 at 16 – 17.

[29] Direct Testimony of James R. Burt, Sprint Ex No. 1 at 17.

[30] Direct Testimony of James R. Burt, Sprint Ex No. 1 at 17.

[31] Direct Testimony of James R. Burt, Sprint Ex No. 1 at 17.

Sprint noted that Consolidated witness Shultz stated he would agree to Sprint's definition of End User if the additional "qualifiers" suggested by Mr. Shultz were included.[32] According to Sprint, however, those "qualifiers" are already included elsewhere in the agreement.[33] Specifically, Sprint notes that the Parties have agreed in Section 10.3 that the traffic will be non-nomadic and that in Section 1.5 Sprint makes clear it intends to enter into business arrangements with other entities and that Sprint will be financially responsible for the traffic sent to Consolidated.[34]

Consolidated's Position:

Consolidated objected to Sprint's proposed definition of End User and argued in the absence of the qualifying language proposed by Consolidated, it would be inappropriate to define an End User as a customer of a third party provider that is not a party to the interconnection agreement.[35] Consolidated claimed its proposed definition of End User recognizes the following: (1) the ultimate End User is the customer of the so-called "last-mile provider" customer of Sprint; (2) Sprint has a business arrangement with that "last-mile provider"; (3) the End User is being provided Telecommunications Services; (4) the Telecommunications Services are non-nomadic; and, (5) the third party last-mile provider for whom the CLEC is providing services is authorized by the interconnection agreement.[36]

Consolidated argued that these five (5) points are important for the following reasons: First, Consolidated argued that the definition of End User, as that term is commonly used, means the retail customer.[37] According to Consolidated, the End User would be a retail customer of some "last-mile provider" and Consolidated asserted that there is no disagreement between Consolidated and Sprint that the End User is a retail customer.[38] Second, Consolidated argued the definition of End User should recognize that Sprint has a business relationship with the last-

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[32] Sprint Post-hearing Brief at 5 (Nov. 10, 2006).

[33] Sprint Post-hearing Brief at 5

[34] Sprint Post-hearing Brief at 5

[35] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 7 (Nov. 2, 2006).

[36] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 7.

[37] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 7.

[38] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 7.

mile provider. Consolidated asserted the importance of defining End User fully so as to detail the business relationship between Sprint and the last-mile provider, noting that the End User will be at least two companies removed from Consolidated.[39] Third, Consolidated contended that the definition should include the fact that Telecommunications Services are being provided to the End User. Consolidated contended that this is important because Consolidated believes that a company may not do indirectly what it cannot do directly. Consolidated argued that since Sprint is seeking interconnection with Consolidated under the FTA (which requires the company requesting interconnection to be a Telecommunications Carrier) Sprint may not seek interconnection under the pretext of providing Telecommunications Services only to turn around and provide or ultimately provide something that is not a Telecommunications Service to the End User via a last-mile provider.[40] Fourth, Consolidated claimed it is important for the Telecommunications Services to be non-nomadic considering that the End User will be provided service in Voice-over-Internet Protocol (VoIP) format.[41] Consolidated argued that unlike Time Division Multiplex (TDM) or Public Switched Telephone Network (PSTN) traffic, VoIP can be originated from locations that are not fixed, *e.g.*, that are nomadic.[42] Consolidated noted that although Sprint has represented that the VoIP services of its (Sprint's) customers are non-nomadic, Sprint has failed to demonstrate that the Internet Protocol (IP) device with a Sprint telephone number cannot be used at another fixed location.[43] Consolidated argued that because VoIP service is inherently nomadic, the fact that Sprint represents that the service provided to Time Warner is non-nomadic is of concern to Consolidated. Consolidated argued that it is important that the definition of End User include language that clearly indicates that the service at issue is non-nomadic.[44] Finally, Consolidated argued that the phrase "for interconnection services authorized by this Agreement" is important because it obligates the Parties to amend the

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[39] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 8.

[40] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 8.

[41] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 8.

[42] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 8.

[43] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 9

[44] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 9.

agreement if and when Sprint enters into a commercial arrangement with another last-mile provider.[45]

Consolidated argued that Sprint's claims that Consolidated is preventing Sprint from supporting its business model by not agreeing to Sprint's definition of "End User" is not supported by the facts. According to Consolidated, it offered two compensation approaches for Sprint's last-mile provider traffic, neither of which depends on Sprint's definition of "End User."[46]

Arbitrators' Decision

The Arbitrators adopt the definition of "End User" proposed by Sprint as modified by the qualifying language proposed by Consolidated. The Arbitrators recognize the business model proposed by Sprint is sufficiently different from the standard business model that a variation of the traditional definition of End User is needed. The following definition of End Use is adopted by the Arbitrators:

> "End User" means, whether or not capitalized, the residence or business subscriber that is the ultimate user of Telecommunications Services provided directly to such individual or entity by ILEC or CLEC, including the ultimate subscriber of non-nomadic voice services when CLEC has a business arrangement with a third party Last Mile Provider for interconnection services. Such subscribers shall be physically located within the Rate Center within the ILEC's certificated area either directly or by means of a dedicated facility from the subscriber's physical location to a location within the Rate Center (such as FX service).

Sprint's business model obviously contemplates a business relationship between Sprint and last-mile providers where such last-mile providers provide direct service to the End Users. The adopted definition of End User is concise and comprehensive, and addresses the reality of the proposed business model. The Arbitrators note that the definition of End User adopted for this agreement is narrowly tailored for use in interconnection agreements where one party utilizes the services of last-mile providers to provide voice services directly to end users.

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[45] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 9.

Sprint and Consolidated Issue No. 3

Sprint *- Should the Agreement contain language that requires Sprint to name a single wholesale customer and requires Sprint to effect Amendments to provide services to additional customers?*

Consolidated *- Should the Agreement contain language that limits the Interconnection Arrangement to be established pursuant to this agreement solely to Sprint's business arrangement with Time Warner unless the Agreement is amended by the Parties, which such amendment should not be unreasonably withheld?*

Sprint's Position:

Sprint stated that despite Consolidated's knowledge that Sprint intends for its wholesale services to be available to any interested cable company or other last-mile provider, Consolidated nonetheless insists that the interconnection specify and be limited to a single, named Sprint wholesale customer.[47] Sprint argued that Consolidated's proposed additions to sections 1.5 and 1.6 should be excluded from the Agreement because no carrier requesting interconnection is customarily required to identify its customers in the interconnection agreement. Sprint further contended that carriers are not required to amend their interconnection agreements each time additional customers are to be served.[48] Sprint asserted that Section 1.6 gives Consolidated the power and ability to prevent Sprint from serving any other last-mile providers until Consolidated gives its consent for these additional competitors to enter Consolidated's markets.[49] Sprint claimed its experience of battling Consolidated on multiple legal fronts for the past two years to obtain a signed interconnection agreement makes it extremely improbable that Consolidated will consent to an amendment for another last-mile provider competitor.[50]

Moreover, Sprint questioned Consolidated's proposed language that, according to Sprint, appears to reflect Consolidated's concern that Sprint's traffic will somehow constitute so-called "phantom traffic" and that Consolidated appears to be concerned that it will not be able to

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[46] Consolidated Post-hearing Brief at 3 (Nov. 10, 2006).

[47] Direct Testimony of James R. Burt, Sprint Ex.1 at 19.

[48] Direct Testimony of James R. Burt, Sprint Ex.1 at 19.

[49] Direct Testimony of James R. Burt, Sprint Ex.1 at 19.

[50] Direct Testimony of James R. Burt, Sprint Ex.1 at 19-20.

identify or bill the traffic as Sprint-originated traffic.[51] Sprint argued that phantom traffic arises in a situation where the party delivering the traffic does not accept the responsibility for such traffic.[52] Sprint, however, claimed it has already stated it will be responsible for all traffic Sprint delivers to Consolidated, and according to Sprint, that means that there will be no "phantom traffic." Furthermore, Sprint noted that if Consolidated is concerned about so-called "phantom traffic," Sprint has offered to include the following language in the agreement: "CLEC represents that it has or may enter into business arrangements with last-mile providers regarding traffic to be exchanged in according with this Agreement. CLEC will be financially responsible for all traffic sent to ILEC under such business arrangements."[53] Additionally, Sprint argued it has proposed language that Sprint will not act as a transit provider. Therefore, Sprint contends that Consolidated has more than adequate assurance that all traffic it receives from Sprint will be solely Sprint's traffic.[54]

Sprint claimed that Consolidated admitted that if the Parties had successfully negotiated a final agreement three months ago specifying that Time Warner Cable would be the last-mile provider, the interconnection agreement would already be stale and would require amendment.[55] Sprint noted that circumstances change and in particular ownership of cable companies can and does change.[56] According to Sprint, that has been demonstrated by the recently announced plans of Time Warner Cable to transfer cable facilities that might otherwise have been used to service customers in Consolidated's territory.[57] Moreover, Sprint claims that recent history demonstrates that acquisitions of new business partners by Sprint are not hypothetical situations as demonstrated by its recently executed Sprint/SuddenLink wholesale agreement.[58]

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[51] Direct Testimony of James R. Burt, Sprint Ex.1 at 19-20.

[52] Direct Testimony of James R. Burt, Sprint Ex.1 at 21.

[53] Direct Testimony of James R. Burt, Sprint Ex.1 at 21.

[54] Direct Testimony of James R. Burt, Sprint Ex.1 at 21.

[55] Sprint Post-hearing Brief at 7.

[56] Tr. at 135 (Burt) (Nov. 2, 2006).

[57] Tr. at 135 (Burt)

[58] Sprint Post-hearing Brief at 7.

Sprint also expressed concern about Consolidated's representation that it will not unreasonably withhold an amendment to add a new or different last-mile provider noting that terms such as "reasonable" or "unreasonable" are subjective. Sprint expressed concern about having to renegotiate the terms of the agreement and bring it back before the Commission to get approval and believes such a requirement is extraordinary and unnecessary.[59]

Sprint claimed that if it is required to obtain Consolidated's approval to amend the agreement, Consolidated could delay or at least control the timing of introduction of competition.[60] Sprint further noted that in Illinois Consolidated agreed to a solution whereby the agreement does not name any last-mile provider with whom Sprint has a wholesale commercial agreement, but states instead that "the CLEC will identify to ILEC all last-mile providers."[61] Sprint stated that it is willing to accept the identical language included in the Consolidated Illinois agreement on this issue but stressed that this language only obligates Sprint to "identify to ILEC all last-mile providers" and does not mandate any advance notification or require any amendment to the interconnection agreement.[62]

Consolidated's Position

Consolidated claimed that Sprint should be required to state that it intends to exchange traffic on behalf of Time Warner Cable (TWC).[63] Consolidated asserted that transparency is one of the principal tenants of the FTA and in this case the forthright treatment of the IP-PSTN termination traffic sent to Consolidated through the private arrangement between TWC and Sprint is critical to the proper evolution of the proposed interconnection agreement in the event the FCC addresses Sprint's business arrangement in one or more of the various proceedings currently under consideration.[64] Moreover, Consolidated argued that Sprint should be required to amend the interconnection agreement in the event Sprint were to enter into a private

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[59] Sprint Post-hearing Brief at 7.

[60] Sprint Post-hearing Brief at 7.

[61] Tr. at 141 (Burt) & Sprint Ex. 1 (Burt Direct Testimony), Attachment JRB-1, Section 1.5 (Sprint Consolidated Agreement).

[62] Sprint Post-hearing Brief at 9.

[63] The Arbitrators are aware that at this point in time Sprint and TWC have discontinued negotiations and that TWC is used here for explanatory purposes only.

commercial agreement with another cable provider. Consolidated noted that Sprint has only identified four last-mile providers operating in the service areas of Consolidated.[65] Consolidated claimed that amendments to the Agreement should not be burdensome and should be extremely rare. Consolidated claimed it would fully cooperate with Sprint and would not unreasonably withhold approval of any such amendment.[66]

Consolidated offered a second option of notification that would not require Consolidated's approval, but would instead require Sprint to provide written notice of any other last-mile provider within Consolidated's local calling area with which Sprint establishes a business relationship for interconnection services.[67] Consolidated stressed that its first choice was for Sprint to file an amendment to the agreement if and when Sprint has an agreement with another cable provider.[68]

Consolidated argued that its knowledge and understanding of the last-mile providers it is indirectly serving, and the service areas and prospective end users such last-mile providers may serve, is of critical importance in ensuring that the interconnection arrangement Sprint seeks remains reliable for end users. Consolidated maintained that in order to ensure the agreement remains current and accurate, Sprint and Consolidated should amend the agreement to reflect the addition of any last-mile providers.[69] According to Consolidated there is not much likelihood of Sprint needing to make numerous amendments to the agreement to include additional last-mile providers during the term of the agreement, and any accompanying burden would be insignificant.[70] Furthermore, according to Consolidated, the disclosure of each originating last-mile provider of Sprint's traffic and the amendment of the Agreement to reflect such additional providers would not harm Sprint's business processes in any material way.[71]

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[64] Direct Testimony of Michael Shultz, Consolidated Ex.3, at 9-10.

[65] Direct Testimony of Michael Shultz, Consolidated Ex.3, at 9-10.

[66] Direct Testimony of Michael Shultz, Consolidated Ex.3 at 9-10.

[67] Direct Testimony of Michael Shultz, Consolidated Ex.3 at 11.

[68] Direct Testimony of Michael Shultz, Consolidated Ex.3 at 11.

[69] Consolidated Post-hearing Brief at 6.

[70] Consolidated Post-hearing Brief at 6.

[71] Consolidated Post-hearing Brief at 6.

Arbitrators' Decision

The Arbitrators adopt Consolidated's second choice of notification procedures and find that (1) Sprint must provide Consolidated notice before it adds an additional last-mile provider or before it discontinues providing service to a last-mile provider; (2) there is no requirement to amend the Interconnection Agreement when last-mile providers are added or removed and (3) there is no requirement for Sprint's last-mile providers to be memorialized in the agreement.

The Arbitrators note that Section 1.5 of the Illinois Sprint/Consolidated Interconnection Agreement does not require that the identification of Sprint's last-mile providers be memorialized in the Agreement, nor does Section 1.6 of that agreement require an amendment when last-mile providers are added or removed.[72] In addition, the Arbitrators note that the Interconnection Agreement between Consolidated and ETS does not contain Sections 1.5 and 1.6 or language comparable to these provisions.[73]

The Arbitrators agree with Sprint that a requirement to amend the agreement for Sprint to begin or end a business relationship with a last-mile provider limits the scope of the agreement and unnecessarily inhibits Sprint's ability to enter into relationships with additional last-mile providers. The Arbitrators note that Sprint agreed to the identical language included in its agreement with Consolidated Illinois[74] and neither Sprint nor Consolidated offered a compelling argument as to why such language should not be adopted in this case.

The Arbitrators adopt the following language:

> 1.5 CLEC has indicated that it has or intends to enter into business arrangements with "last-mile" providers and such business arrangements give CLEC the authority to interconnect with ILEC for traffic associated with such arrangements. CLEC will identify to ILEC all "last-mile" providers within ILEC's Local Calling Area with which CLEC establishes a business relationship for interconnection services. CLEC will be financially responsible for all traffic sent to ILEC under such business arrangements. Neither Party may use services obtained under this Agreement to provide services to other "last-mile" providers without written notification to the other Party. Provided, that CLEC may not use

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[72] Direct Testimony of James R. Burt, Sprint Ex. 1, Attachment JRB 1, General Terms and Conditions, Page 1, Section 1.5 and 1.6. (Bates Page 54).

[73] Direct Testimony of James R. Burt, Sprint Ex. 1 Attachment JRB 2, (Bates Pages 106)

[74] Tr. at 140, 144 (Burt)

this Agreement to provide interconnection services to a "last-mile" provider that is a CMRS carrier.

1.6 CLEC warrants that the services it provides to "last-mile" providers serving End Users in ILEC's Local Calling Area, by tariff or contract, require the service provided to the End Users to be only from a fixed location at each End User's principal service address located in ILEC's Local Calling Area. CLEC agrees to conduct audits or take other commercially reasonable steps to verify that each of the "last-mile" providers serving End Users in ILEC's Local Calling Area is acting in compliance with this requirement. CLEC agrees that if the services are no longer exclusively applicable to End Users at fixed locations, then CLEC will reasonably notify ILEC such that the Parties can negotiate arrangements for handling such traffic.

Sprint Issue 4 - Consolidated Issue 5

Sprint - Should the same compensation terms apply regardless of which entity originates or terminates the call, and should traffic that utilizes VoIP protocol be treated differently if it is exchanges using TDM format?

Consolidated - Should VoIP traffic be treated separately for compensation and other purposes in the Agreement?

Sprint's Position:

Sprint argued that the traffic being exchanged between the Parties should be handled in the same manner as other voice traffic and the fact that a call may initiate or complete at the retail end users' premises using IP technology is not relevant to how Sprint and Consolidated exchange the traffic at the interconnection point or how they should compensate each other.[75] Sprint stated that Consolidated's three concerns regarding this issue are baseless.[76] First, Sprint argued that Consolidated's concern regarding nomadic service rate arbitrage is unfounded. Although Sprint acknowledged that there is a form of VoIP service (which Sprint refers to as Internet based VoIP) that can be nomadic, the service provided by Sprint and the last-mile provider is not a nomadic service. Thus, Sprint argued, the provisions Consolidated proposes to mitigate the risk of access arbitrage associated with nomadic service are unnecessary and inappropriate. Sprints stated that Consolidated need not take Sprint's word that the voice

[75] Direct Testimony of James. R. Burt, Sprint Ex.1, at 22.

[76] Direct Testimony of James. R. Burt, Sprint Ex.1, at 22.

services contemplated under that agreement will be non-nomadic; Sprint has expressly agreed to include language in the agreement that mandates that the traffic will be non-nomadic[77]

Second, Sprint argued that certain of the requirements proposed by Consolidated erroneously presuppose that Sprint's position as a wholesale provider increases rather than eliminates the so-called "phantom traffic" concern.[78] Sprint claimed that its ownership of the traffic at issue and its financially responsibility for such traffic eliminates any need for Consolidated to "go behind" Sprint in order to track and associate traffic with some other responsible party.[79]

According to Sprint, the Commission's emphasis was on the fact that Sprint and Consolidated, at the point of interconnection, would be exchanging ordinary TDM traffic.[80] According to Sprint, this observation undermines Consolidated's position that it is entitled to lopsided interconnection terms because traffic to be exchanged with Sprint may originate or terminate using IP protocol.[81]

In Sprint's opinion Consolidated's proposed Attachment 10 includes a collection of discriminatory, burdensome, and one-sided terms, including a novel approach whereby Sprint pays Consolidated whether the call originates or terminates with Sprint's wholesale customer's end user and Consolidated never pays, even when its customers make intraLATA toll calls terminating to the end user of a Sprint wholesale customer.[82] Sprint claimed that any of the legitimate topics included in Consolidated's proposed Attachment 10 are already covered elsewhere in the Agreement and recommended that Attachment 10 be rejected in its entirety.[83]

Sprint argued it has gone to great lengths to address Consolidated's articulated concerns regarding "phantom traffic" and notes it has agreed to include language in Section 10.3 of the Agreement that precludes either Party from exchanging traffic that is nomadic, at least until such

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[77] Direct Testimony of James. R. Burt, Sprint Ex.1 at 22-23.

[78] Direct Testimony of James. R. Burt, Sprint Ex.1 at 23.

[79] Direct Testimony of James. R. Burt, Sprint Ex.1 at 23.

[80] Direct Testimony of James. R. Burt, Sprint Ex.1 at 23.

[81] Direct Testimony of James. R. Burt, Sprint Ex.1 at 23-24.

[82] Direct Testimony of James. R. Burt, Sprint Ex.1 at 24.

time as the Parties agree to the terms of such traffic exchange.[84] Sprint proposed Section 10.2 language that also addresses Consolidated's arbitrage concerns, noting that the proposed language states that all traffic, regardless of whether the Internet protocol is used, will be compensated like circuit switched calls which, according to Sprint, is an approach in line with the Sprint/Consolidated Illinois agreement and Consolidated/ETS agreement.[85] Sprint claimed that while there is an argument that VoIP traffic is not subject to access charges, Sprint is not making that claim here and is explicitly stating that it will pay access for VoIP traffic if that same traffic would be subject to access charges if it were circuit switched or non-VoIP traffic.[86] Sprint argued that because of its position on this issue, the Arbitrators need not reach what would otherwise be one of the most controversial compensation topics: whether access charges apply to VoIP traffic that is non-local in nature.[87]

Sprint noted that the Parties have agreed to several issues that address arbitrage concerns. According to Sprint, the Parties have agreed to language in Attachment 3 that identifies the industry standards the Parties will use concerning exchange of call identifying information, e.g., calling party number (CPN).[88] Sprint noted that the Parties have also agreed to language in Attachment 2, Section 2.0 that specifically addresses CPN and Automatic Number Identification (ANI).[89]

Sprint claimed that it has addressed Consolidated's wholesale arrangement with the last-mile providers by offering language in Section 1.5 that makes Sprint financially responsible for all traffic sent to Consolidated.[90] Sprint disagrees with Consolidated's position that unique terms are justified because calls may originate or terminate as VoIP Traffic. According to Sprint, Consolidated's obligation to interconnect on reasonable and nondiscriminatory terms does not

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[83] Direct Testimony of James. R. Burt, Sprint Ex.1 at 24.

[84] Direct Testimony of James. R. Burt, Sprint Ex.1 at 24.

[85] Direct Testimony of James. R. Burt, Sprint Ex.1 at 25.

[86] Direct Testimony of James. R. Burt, Sprint Ex.1 at 25.

[87] Direct Testimony of James. R. Burt, Sprint Ex.1 at 25.

[88] Direct Testimony of James. R. Burt, Sprint Ex.1 at 25.

[89] Direct Testimony of James. R. Burt, Sprint Ex.1 at 25-26.

[90] Direct Testimony of James. R. Burt, Sprint Ex.1 at 26.

change because the traffic that Sprint may exchange with Consolidated may initiate or complete as VoIP.[91] Sprint called attention to Consolidated's admission that it cannot tell whether traffic it exchanges with a carrier does or does not originate as VoIP traffic.[92] Sprint further noted that Consolidated acknowledged the traffic that it will exchange with Sprint is traditional TDM traffic.[93] Sprint also claims that because Consolidated has its own VoIP offering in Texas, the Commission can conclude, at the very least, that Consolidated does exchange its own VoIP originated and terminated traffic.[94] Sprint argued that the fact that a Sprint wholesale customer may have an IP-enabled VoIP product is entirely irrelevant to the issue of whether and on what terms Sprint is entitled to interconnection with Consolidated. Sprint claimed the FCC's recent decision on the obligation of VoIP providers interconnected to the PSTN to make USF contributions expressly acknowledges that VoIP providers are reaching the PSTN through arrangements with telecommunications carriers.[95] Sprint also pointed to the FCC statement that "The telecommunications carriers involved in originating or terminating a communication via the PSTN are by definition offering 'telecommunications service.'"[96]

Sprint stated that although what Time Warner Cable is offering is a VoIP product, what Sprint has asked for in the instant proceeding, is telecommunications service. According to Sprint, regardless of what sorting out remains to be done as to regulations that may or may not apply to VoIP providers, the Commission need not even consider that in terms of what obligations the two carrier have to exchange TDM traffic under this agreement.[97]

Sprint acknowledged that in Docket No. 32528, Commission Staff witness Klaus expressed two concerns about arbitrage and "phantom traffic" but claimed Sprint has demonstrated that phantom traffic is not an issue under this agreement because Sprint will be responsible for all traffic it delivers to Consolidated, that Sprint will not act as a transit provider,

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[91] Direct Testimony of James. R. Burt, Sprint Ex.1 at 26.

[92] Direct Testimony of James. R. Burt, Sprint Ex.1 at 26.

[93] Direct Testimony of James. R. Burt, Sprint Ex.1 at 26.

[94] Direct Testimony of James. R. Burt, Sprint Ex.1 at 26.

[95] Direct Testimony of James. R. Burt, Sprint Ex.1 at 27; *see also In re Universal Service Contribution Methodology*, WC Docket No. 06-122, FCC 06-94, ¶¶24-45 (rel. June 28, 2006).

[96] Direct Testimony of James. R. Burt, Sprint Ex.1 at 27, *citing*, Fn 18, *Id. ¶41.*

and that there are provisions in the agreement that preclude arbitrage.[98] Sprint expressed its confidence that the language either agreed to by the Parties in this arbitration or proposed by Sprint addresses the concerns raised by Mr. Klaus in Docket No. 32582.[99]

Sprint explained that although it is true that the retail service to be provided utilizes IP, all traffic exchanged between Sprint and Consolidated will utilize TDM protocol.[100] Sprint also argued that unless there is something inherent about the protocol at the customer premises that makes the exchange of traffic between the two carriers unique, the use of a particular protocol should not dictate the terms of an agreement between two carriers[101] Moreover, Sprint maintained that there is nothing about the use of Internet protocol that calls for special treatment. First, the service is jointly provided by Sprint and any last-mile provider as a direct substitute for the service a customer presently receives from Consolidated. Second, the service provided at the subscriber's residence is non-nomadic. Third, calls to 911 will identify the customer's physical location as the address where they reside. Fourth, calls exchanged between Consolidated and Sprint/last-mile provider subscribers will be carried over TDM interconnection trunks following industry standards.[102]

Sprint drew a distinction between the VoIP services being provided by Sprint/last-mile providers and Internet-based VoIP providers and provided a matrix depicting those differences, as follows:[103]

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[97] Direct Testimony of James. R. Burt, Sprint Ex.1 at 28.

[98] Direct Testimony of James. R. Burt, Sprint Ex.1 at 28.

[99] Direct Testimony of James. R. Burt, Sprint Ex.1 at 28-29.

[100] Direct Testimony of James. R. Burt, Sprint Ex.1 at 29.

[101] Direct Testimony of James. R. Burt, Sprint Ex.1 at 29.

[102] Direct Testimony of James. R. Burt, Sprint Ex.1 at 30-31.

[103] Direct Testimony of James. R. Burt, Sprint Ex.1 at 30-31.

Sprint/Last-Mile Provider VoIP Service	Internet-Based VoIP
No transport over the public Internet.	Transported over the public Internet
Subscriber location does not change	Subscriber may utilize service from virtually any broadband connection to the Internet.
Telephone numbers are assigned to subscribers based on the rate center in which they physically reside	Telephone numbers can be assigned from any rate center in which the provider has access to telephone numbers. There is no correlation between the telephone number and the physical location of the subscriber
Conventional E911 service is provided using the subscriber's serving address to populate 911 database.	Allows subscriber to provide the "registered location" to its service provider that indicates where emergency services would be dispatched. If the customer changes locations, a new "registered location" should be provided.[21]

Sprint alleged it does not make sense to relieve one party to an interconnection agreement from reciprocal compensation obligations based on what the other party's customer may pay.[104] Sprint claimed that by definition reciprocal compensation allows a carrier to recover its costs for transporting and terminating traffic of another carrier.[105] Moreover, according to Sprint, federal rules state that reciprocal compensation rates are symmetrical unless the CLEC can provide evidence that its costs exceed the ILEC's costs.[106] Sprint claimed that Consolidated, solely on the basis that the retail end user's voice services initiate and complete as VoIP, is attempting to pervert an industry accepted and codified intercarrier compensation scheme.[107] Sprint argued that Consolidated does not insist on this compensation in Consolidated's agreement with ETS where, according to Sprint, bill and keep applies for local traffic and access charges apply to non-local traffic.[108]

Sprint noted that Consolidated Illinois agreed to the same compensation terms with Sprint that Sprint has proposed in this arbitration and further noted that Consolidated has been unable to

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[104] Direct Testimony of James. R. Burt, Sprint Ex.1 at 33.

[105] Direct Testimony of James. R. Burt, Sprint Ex.1 at 33; *see aslo* 47 C.F.R. §51.801(e).

[106] Direct Testimony of James. R. Burt, Sprint Ex.1 at 33; *see also* 47 C.F.R. §51.71(b).

[107] Direct Testimony of James. R. Burt, Sprint Ex.1 at 33

[108] Direct Testimony of James. R. Burt, Sprint Ex.1 at 33.

identify any state arbitration award approving intercarrier compensation terms identical or substantially similar to the compensation terms Consolidated proposes here.[109]

Sprint claimed that the fact Consolidated offered VoIP compensation terms to ETS that are identical to those Sprint proposes, but that Consolidated is opposed to interconnecting with Sprint under the same terms is plain proof that Consolidated is in violation of its duty not to discriminate against carriers in providing terms of interconnection.[110] Sprint also claimed Consolidated's excuse that ETS VoIP traffic was expected to be "incidental" is neither credible nor relevant. According to Sprint, nothing in the ETS agreement defines when VoIP traffic has grown to the point where it is no longer "incidental" and thus where Section 10.2 VoIP compensation terms no longer apply. Furthermore, Sprint noted, nothing in the ETS agreement limit the quantity or percentage of traffic that is expected to be VoIP.[111] Sprint claimed the intercarrier compensation scheme for VoIP traffic proposed by Consolidated in this arbitration is ambiguous. Sprint suggested that rather than struggle with how Consolidated's proposed terms would work in practice, the Commission should reject the proposed terms in their entirety.[112] Sprint recommended the Commission accept Sprint's proposed contract language for Section 10.2.[113]

Sprint argued that VoIP traffic should not be subject to more onerous terms than TDM traffic and noted there are several million VoIP subscribers in the United States that interconnect in one form or another with the PSTN. Further, Sprint noted that when it exchanges its traffic with Consolidated the traffic will be in TDM format and will look just like other telecommunications traffic.[114] Sprint claimed there is no cost-related basis for Consolidated's proposed asymmetrical compensation scheme and asserted that Consolidated admitted that it has

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[109] Direct Testimony of James. R. Burt, Sprint Ex.1 at 33.

[110] Sprint Post-hearing Brief at 11; *see also Qwest Corp v. PSC of Utah*, 2005 U.S. Dist. LEXIS 38306 (D. Utah 2005) (discussing Section 252 statutory language and Congressional policy to permit interconnection or just, reasonable, and nondiscriminatory terms; public filing "gives the CLECs that are not parties to the agreement the opportunity to resist discrimination my allowing them to fully evaluate and request the same terms given to the contracting CLEC.")

[111] Sprint Post-hearing Brief at 11.

[112] Sprint Post-hearing Brief at 12.

[113] Sprint Post-hearing Brief at 13.

[114] Sprint Post-hearing Brief at 14.

not included in the record any cost study to support its one-way $0.004931 proposed termination charge.[115] According to Sprint, there is no record evidence to support Consolidated's proposed terms of compensation.[116]

Consolidated's Position

Consolidated argued VoIP should be treated separately for compensation and other purposes in the Agreement. First, Consolidated contended the Commission has no jurisdiction to address VoIP issues in this docket because the FCC has preempted state action in regard to VoIP. Second, Consolidated stated that assuming the Commission intends to proceed with this arbitration, notwithstanding the FCC's order preempting action on VoIP, it is important that the agreement separately address VoIP issues given the regulatory uncertainty and unique nature of that service.[117]

Consolidated argued that Sprint wants to improperly treat VoIP traffic as telecommunications service and to "shoehorn" its wholesale provider VoIP-based business model into what looks like a retail PSTN-to-PSTN interconnection agreement.[118] Consolidated argued Sprint's approach ignores the fact that the issue of whether or not VoIP is even a Telecommunications Service under Title II of the FTA has yet to be decided by the FCC.[119] Consolidated argued that it does not believe that a requesting carrier, such as Sprint, may force an ILEC to interconnect under section 251 of the FTA primarily for non-telecommunications services.[120] Consolidated argued that the FCC has not determined VoIP-originated traffic to be a Telecommunications Service and has taken exclusive jurisdiction over VoIP. Yet, according to Consolidated, the Commission has decided to address this issue in this arbitration.[121] Consolidated proposed that VoIP be addressed as a separate attachment, with the objective of isolating VoIP and VoIP-related issues to avoid the situation the Commission experienced in the

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[115] Sprint Post-hearing Brief at 14.

[116] Sprint Post-hearing Brief at 14.

[117] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 11-12.

[118] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

[119] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

[120] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

[121] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

UTEX/SBC arbitration. Consolidated claimed that in Docket No. 26381, *Petition by UTEX Communications Corporation for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act, and PURA for Rates, Terms, and Conditions of Interconnection Agreement for Southwestern Bell Telephone, L.P. d/b/a SBC Texas,* the Commission had no choice but to ultimately abate the entire proceeding, noting as a reason for abatement that the FCC intended to address the VoIP issues raised in that proceeding.[122] According to Consolidated, in the event the VoIP provisions of the interconnection agreement have to be undone, it would be easier to do so if those provisions are in a stand-alone attachment as Consolidated has proposed.[123]

Consolidated argued that there is no "standard" interconnection agreement that addresses the compensation mechanism for VoIP traffic and there is no "standard" interconnection agreement that sets forth the protection for both parties, given the inherently nomadic nature of VoIP traffic.[124] Consolidated claimed its interconnection agreement with ETS contemplates the exchange of VoIP-originated traffic on an incidental basis. Consolidated believes Sprint's reliance on Section 10.2 General Terms and Conditions of the Consolidated/ETS agreement as a basis for Sprint's contention that Consolidated has already agreed to exchange VoIP traffic is misplaced. Consolidated argued that Section 10.1 of the Consolidated/ETS agreement expressly provides that nothing in that agreement shall be construed to determine the appropriate treatment of VoIP traffic. Consolidated highlighted contract language in the Consolidated/ETS agreement that states "...nothing in this Agreement or in any Attachments hereto constitutes agreement or shall be construed to affect or determine the appropriate treatment, for compensation and other purposes, of Voice Over Internet Protocol or other Internet protocol-enabled ("VOIP") traffic under this Agreement or any further Interconnection Agreements."[125] Consolidated argued that Sprint should not selectively rely solely on Section 10.2 which, provides a compensation mechanism in the event there is incidental VoIP traffic.[126]

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[122] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

[123] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

[124] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 13-14.

[125] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 14.

[126] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 15.

Consolidated avers that Section 10.2 is important because it clarifies that notwithstanding any compensation mechanisms in the agreement for non-VoIP traffic, the Parties acknowledge that VoIP will be compensated under the provisions of Attachment 10.[127] Section 10.4 requires Sprint's last-mile provider customers to offer VoIP service from fixed locations. According to Consolidated, Section 10.4 is important because the last-mile provider, not Sprint, has control of the originating network.[128]

Consolidated called specific attention to Attachment 2, Section 3, Footnote 6 of its proposed Interconnection Agreement. According to Consolidated, Attachment 2 addresses compensation for traffic to be exchanged by the parties and Section 3 of that attachment covers compensation for local traffic, EAS traffic, and local ISP-bound traffic. Consolidated's footnote 6 to Section 3 states that reciprocal compensation and/or bill and keep are not appropriate for VoIP traffic unless and until the FCC orders otherwise. Consolidated argued that in the event the language of Attachment 10 is not adopted and Consolidated is not compensated for IP-PSTN terminating traffic under Attachment 10, this footnote sets forth the compensation for VoIP traffic.[129]

Consolidated explained that the compensation mechanism in footnote 6 to Section 3 would require Sprint to pay Consolidated $0.004931 per minute of use for terminating VoIP on Consolidated's network. Furthermore, Consolidated stated that it should not compensate Sprint for PSTN-to-IP traffic (*i.e.*, traffic from Consolidated to Sprint) as, according to Consolidated, the last-mile provider is already compensating Sprint for both originating and terminating such traffic. Consolidated argued that reciprocal compensation should not apply because, under FCC rule 51.701(e), reciprocal compensation applies only if the parties are exchanging traffic originating over their own networks. Consolidated argues that the traffic at issue here does not originate on Sprint's network, it originates on the network of the last-mile provider. [130]

Consolidated's proposed compensation mechanism for wholesale VoIP traffic is that Sprint will pay Consolidated the greater of either $0.004931 per minute of use or *x*-percent of

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[127] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 16.

[128] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 16.

[129] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 16-17.

Sprint's terminating services charge to the applicable last-mile provider. Consolidated noted that the alternative *x*-percent rate has not been calculated as the details of the Sprint-Time Warner agreement have not been provided. Consolidated argued that the purpose of its proposed alternate rate is to reflect that the last-mile provider is paying Sprint to terminate the traffic to Consolidated' network and that the compensation should be allocated in part to Consolidated for performing the termination services for Sprint and the last-mile provider. Consolidated states that in the event Sprint does not disclose its compensation arrangements with the last-mile provider the compensation rates will be $0.004931.[131]

Consolidated described its proposed Section 10 of the agreement as a stand-alone attachment that contains seven sections addressing VoIP-related matters. According to Consolidated, addressing VoIP and VoIP related issues in one attachment is important for the following reasons: Sub-Section 1 sets out the scope and purpose of Attachment 10 and specifically acknowledges that Sprint is acting as a wholesale provider for last-mile providers. Sub-Section 2 provides that VoIP traffic and other traffic may be exchanged over the same facility. Sub-Section 3 covers the compensation rate and the promise that the traffic will not be nomadic. Sub-Section 4 specifies the traffic identifiers to be included as well as the call detail record information required to accurately classify the traffic. Sub-Section 5 provides for the correction and treatment of traffic not proper classified and also contains a dispute resolution provision. Sub-Section 6 addresses situations in which there is either unidentified or unclassified IP-PSTN Termination Traffic and it also contains a "safe harbor rule" that limits the application of Section 6.2 so long as 90% of the traffic contains the traffic identifiers. Sub- Section 7 contains the change of law provisions.

Consolidated also argued that part of its proposed Section 1.5 of the General Terms and Conditions is important to Issue 4 because Section 1.5 is intended to state as a general matter the state of regulatory affairs regarding VoIP and to state that compensation for VoIP is addressed in Attachment 10 of the agreement.[132]

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[130] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 12-13.

[131] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 18-19.

[132] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 19-24.

Consolidated argued that the same compensation terms will apply regardless of which entity originates or terminates a call and that traffic that utilizes VoIP should be treated differently if it is exchanged using TDM format.[133] Consolidated argued that the compensation exchanged between the Parties for terminating traffic should not be the same for the following reasons: (i) Sprint is proposing a wholesale/retail arrangement versus an arrangement between facilities-based, retail carriers; (ii) compensation for IP-to-PSTN termination traffic is currently under FCC consideration, has not been defined, and is not currently compensable on a reciprocal compensation basis; (iii) FCC rules do not contemplate a reciprocal compensation/bill and keep arrangement in the context of Sprint's business model; (iv) the undisputed terms of the Agreement do not authorize reciprocal compensation/bill and keep arrangements in the context of Sprint's business model; and (v) Sprint has not offered any proposed language for compensation as an alternative to Consolidated's alternative compensation models described in Attachment 2, Section 8 and Attachment 10 of the Agreement.[134]

Consolidated asserted it has offered two alternatives for compensation for last-mile provider traffic in which Sprint compensates Consolidated for last-mile provider (local and EAS) traffic terminated to Consolidated at limited rates commensurate to the rates that would be charged for transit traffic under the Agreement. According to Consolidated, it arrives at the same result whether the compensation structure is based on the VoIP or wholesale nature of the traffic.[135]

Consolidated pointed to the direct testimony of Sprint witness Burt in which Mr. Burt cites 47 C.F.R. §51.701(e) as the applicable FCC rule defining a reciprocal compensation arrangement. Section 51.701(e) provides:

> (e) *Reciprocal compensation.* For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunication traffic ***that***

[133] Consolidated Post-hearing Brief at 8.

[134] Consolidated Post-hearing Brief at 8.

[135] Consolidated Post-hearing Brief at 9.

***originates on the network facilities of the other carrier** [emphasis supplied by Consolidated].*[136]

Consolidated argued that Sprint's arrangement with its last mile provider does not support a reciprocal compensation arrangement under Section 51.701(e) of the FCC rules. According to Consolidated, Sprint cannot transport and terminate traffic on Sprint's network facilities, nor does Sprint's traffic originate on its network facilities. Instead, Consolidated argued, an agreement between Consolidated and the last-mile provider might support a reciprocal compensation arrangement, but Sprint's proposed arrangement does not.[137]

Arbitrators' Decision

The Arbitrators find that compensation for traffic exchanged between the parties should treated in same manner as any other voice traffic. Specifically, the Arbitrators find that the compensation the parties shall pay each other for Local and EAS traffic shall be bill and keep and shall be consistent with the compensation arrangement set forth in the current Consolidated/ETS Interconnection Agreement in Attachment No. 2, Section 3.2.[138] The Arbitrators' finding is also consistent with the treatment of traffic exchanged addressed in the Illinois Sprint/Consolidated Interconnection Agreement.[139]

The Arbitrators agree with Sprint that there is no basis for an alternative compensation treatment of traffic that originates from or terminates to an end user customer that is provisioned as a VoIP service offering. As noted by Sprint, at the point at which traffic is exchanged between Sprint and Consolidated, the traffic will be in TDM format and will be indistinguishable from traditional TDM traffic, a view that has previously been shared with the Commission in Docket No. 32582.[140]

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[136] Consolidated Post-hearing Brief at 11.

[137] Consolidated Post-hearing Brief at 11.

[138] Direct Testimony of James C. Burt, Sprint Ex. 1, JRB-2, Attachment 2 - Compensation, Page 2, Section 3.2 (Bates 132).

[139] Direct Testimony of James C. Burt, Sprint Ex. 1, Ex. JRB 1, Attachment No 2 - Compensation, Page 2, Section 3.2 (Bates 81).

[140] Docket No. 32582, Direct Testimony of Randy Klaus, Public Utility Commission of Texas Staff at 18 (June 13, 2006).

The Arbitrators find the bill and keep compensation option for local and EAS traffic exchange between the Parties to be the only viable compensation option presented. The per-minute-of-use (MOU) rate of $0.004931 proposed by Consolidated is based on the MOU rate Consolidated charges for "transit traffic." As explained in Issue Number 5 below, the Arbitrators do not agree with Consolidated's position that Sprint is performing a transit function on behalf of last-mile providers. Accordingly, the Arbitrators find no basis to justify the per MOU compensation rate proposed by Consolidated for terminating local and EAS traffic. The Arbitrators note that Consolidated did not enter any cost documentation into the record that supports the proposed per MOU rate.

The Arbitrators do not agree with Consolidated's proposal that asymmetrical compensation rates should apply to the local and EAS traffic exchanged between the Parties. The Arbitrators are unaware of any compensation arrangements for the exchange of local traffic between local exchange companies where only one of the parties receives compensation. The Arbitrators do not agree with Consolidated that the FCC's current consideration of VoIP-related issues somehow justifies Consolidated's proposed asymmetrical local compensation rates based on Consolidated's theory that the FCC has yet to determine the regulatory status of VoIP services.

The fact that the FCC has not specifically addressed Sprint's proposed business model does not mean that the Commission is precluded from approving an interconnection agreement based on Sprint's VoIP over last-mile provider business model. The Arbitrators find the business model proposed by Sprint to be a method by which facilities-based competition can be introduced into areas where such competition would not otherwise exist.

The Arbitrators agree with Consolidated's expressed concerns regarding arbitrage, and are also aware of the problems that a bill and keep arrangement can create in the context of the proposed business model. However, as discussed in Issue No. 5 below, in recognition of the potential of arbitrage issues associated with bill and keep compensation arrangements, the Arbitrators have adopted audit provisions that will permit the Parties to address the arbitrage issues.

The Arbitrators also note Consolidated proposed an Attachment 10 to the Interconnection Agreement to specifically address Voice over Internet Protocol Traffic. The Arbitrators find

Section 10 is necessary to recognize and manage the VoIP related issues that are central to this Interconnection Agreement. Certain modifications to Attachment 10 are required to ensure it does not conflict with the bill and keep compensation arrangement described and to harmonize Section 10 with other findings in this Arbitration Award. The Arbitrators note that Sprint claims that the inclusion of Attachment 10 as proposed would create conflict with terms contained elsewhere in the approved and agreed-upon language. The Arbitrators disagree with Sprint's claim and note that the single example that Sprint cites of conflicting terms references "agreed upon records to be exchanged with traffic...." The reference is presumably to language in Section 2.2 of the Interconnection Agreement that addresses call identifiers. The Arbitrators do not find that the provisions of Attachment 10 are in conflict with Section 2.2 of the Interconnection Agreement or any other provision of the Interconnection Agreement. Furthermore, the Arbitrators find that the inclusion of Attachment 10 produces an interconnection agreement that accurately reflects the business arrangement at issue in this arbitration. However, in order to address Sprint's concern and in an abundance of caution, the Arbitrators have included language in Attachment 10 that makes clear that the text of Attachment 10 is intended to supplement, and not conflict with, the text of the Interconnection Agreement. The Arbitrators have also edited Attachment 10 in order to ensure no apparent conflicts are created by its inclusion. Therefore, the Arbitrators adopt Attachment 10, for IP-Enabled Services (VoIP) with the modifications indicated below. Text deleted is stricken; text added is bolded and underlined.

ATTACHMENT 10
IP-PSTN TERMINATION TRAFFIC

1.0 Attachment to Apply to IP-PSTN Termination Traffic

1.1 This attachment applies solely to IP-PSTN Termination Traffic exchanged between CLEC and ILEC on behalf of ~~authorized~~ Last Mile Providers under this Agreement. The Parties acknowledge that CLEC is providing certain wholesale functions for ~~TWC~~ **Last Mile Providers** including the conversion, interconnection and exchange of IP-PSTN termination traffic pursuant to this Agreement pursuant to ~~the~~ **a** Sprint-~~TWC~~ - **Last Mile Provider** Arrangement. Such ~~traffic and any other~~ IP-PSTN Termination Traffic ~~of other authorized of other authorized Last Mile Providers under this Agreement~~ shall be subject to the terms of this Attachment and to the extent applicable, the other Attachments to this Agreement. **The terms of this Attachment 10 are supplemental; to the extent any term or provision of this Attachment 10 conflicts with any term or provision in the instant Interconnection Agreement, the term or provision in the instant Interconnection Agreement shall control.**

1.2 This Attachment provides a compensation arrangement between the Parties for the exchange of IP-PSTN Termination traffic pending further clarification of regulator issues under Applicable Law (as hereafter defined). Upon the issuance of a final, non-appealable order or other determination pursuant to those proceedings described as *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket 01-92, established in Notice of Proposed Rulemaking Order No. 01-132 (April 27, 2001), *In the Matter of IP Enabled Services,* WC Docket 04-36, FCC Docket No. WC 06-55, *In re Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers may Obtain Interconnection pursuant to Section 251 of the Communications Act of 1934, as Amended to Provide Wholesale Telecommunications Services to VoIP Providers,* or any other FCC proceeding or other legislative administrative or judicial decision that determines the classification of interconnection rights and/or compensation obligations of the Parties with respect to the IP-PSTN Termination Traffic, the Parties shall upon written request of a Party, promptly renegotiate in good faith and amend in writing this Attachment in order to make such mutually acceptable revisions to this Attachment as may be required in order to conform the Attachment to such changes in Applicable Law. During the pendency of such negotiations, the Parties shall continue to perform in accordance with the terms and conditions of this Attachment until amended or superseded by a successor agreement or is otherwise terminated in accordance with Section 4.0 of the General Terms and Conditions of this Agreement. The Parties will endeavor to complete the negotiations as soon as possible and in all events within one hundred twenty (120) days of determination by the FCC or other Applicable Law.

1.3 The obligations of the Parties with respect to IP-PSTN Termination Traffic under this Attachment shall be in addition to the obligations generally applicable to traffic exchanged under this Agreement and as set forth elsewhere in the Agreement and its other attachments. Except as otherwise expressly stated in this Attachment 10, the terms of the Agreement and all attachments shall apply to IP-PSTN Termination Traffic.

2.0 Interconnection Facilities

2.1 IP-PSTN Termination Traffic will be exchanged over the same facilities as Telecommunications Services delivered by either Party under the terms of the Agreement.

3.0 Compensation for IP-PSTN Termination Traffic

3.1 Notwithstanding anything in this Agreement to the contrary, **bill and keep shall be the compensation method by which** the Party responsible for IP-PSTN Termination Traffic that would be considered Local Traffic or EAS traffic if originated as Telecommunications Services on the Party's network will be compensate the other Party for such IP-PSTN Termination Traffic ~~at the rate of $.004931 per MOU~~. With respect to all other IP-PSTN Termination Traffic, the responsible Party will compensation the other Party at the appropriate tariffed switch access rate for such traffic.

3.2 The Party responsible for IP-PSTN Termination Traffic for purposes of 3.1 above (the "Responsible Party") is the Party converting traffic from IP to PSTN for termination to the PSTN network or converting PSTN traffic to IP to for termination through the authorized Last Mile Providers as VoIP traffic. CLEC is the Responsible Party with respect to traffic originated by or terminated to CLEC for the Sprint-~~TWC~~ **Last Mile Provider** Arrangement.

3.3 None of the IP-PSTN Termination Traffic will be Nomadic Traffic unless otherwise certified in writing in advance by the Responsible Party and the Parties have agreed on a mutually-agreeable rate of compensation for Nomadic Traffic.

3.4 At such time as another rate of compensation is determined by the FCC or other Applicable Law for the IP-PSTN Termination Traffic, the parties agree to renegotiate the compensation rate ~~per MOU~~ as then required.

4.0 Additional Information Delivered by Responsible Party

4.1 In addition to the Parties' obligation to deliver IP-PSTN Termination Traffic with accurate Traffic Identifiers as set forth in Section 2.0 of Attachment 2, each month, the Responsible Party for any IP-PSTN Traffic will provide, in electronic format acceptable to the other Party, a call detail record for each IP-PSTN Termination Traffic call delivered by the Responsible Party. Such call detail records shall contain, at a minimum, the following information: Message Date (MM/DD/YY); Originating Number; Terminating Number; Terminating LRN; Connect Time; and Elapsed Time. Additionally the Responsible Party agrees to provide information sufficient to accurately classify the traffic (Local Traffic, EAS, Intrastate Switched Access (includes IntraLATA TOLL), Interstate Switched Access, and such other information as may be reasonable required by the terminating Party to classify the traffic.

5.0 Correction and Treatment of Traffic that is Not Properly Classified

5.1 Nothing herein shall in any manner reduce or otherwise limit or discharge the Responsible Parties' obligations under the Agreement to properly classify IP-PSTN Termination Traffic delivered under the Agreement in accordance with the terms of this Agreement and its Attachments, included but not limited to Section 1.4 of Attachment 2.

5.2 If the terminating Party determines in good faith in any month that any IP-PSTN Termination Traffic originated by the Responsible Party is classified by the Responsible Party (1) as IP-PSTN Traffic when it is not IP-PSTN Traffic (e.g. it is PSTN-IP-PSTN traffic), or (2) as traffic subject the compensation rate for Local Traffic or EAS traffic when in reality the traffic is subject to the terminating Party's state or federal switched access tariff, the Parties agree.

5.2.1 The terminating Party will provide sufficient call detail records or other information (including the reasons that the terminating Party believes the IP-PSTN Termination Traffic is misidentified) to permit the Responsible Party to investigate and identify the traffic the terminating Party has determined is misidentified;

5.2.2 The Responsible Party shall correct the classification for such traffic and pay the appropriate tariffed switched access rates for the applicable traffic going forward, including for traffic terminated but not yet billed, and/or in a true-up amount, for traffic already billed and paid; and,

5.2.3 Where the appropriate classification of such traffic is indeterminable, such traffic will be rated in accordance with Section 6.0 or 7.0 of this Attachment as appropriate.

5.2.4 In the event the Responsible party disagrees with the terminating Party's determination that traffic has been misidentified, the Responsible Party will provide written notice of its dispute within sixty (60) days of notification under 5.1.1 and provide all documentation that is the basis for Responsible Party's challenge of the terminating Party's claim. If the parties are not able to mutually agree as to the proper treatment of the traffic based on the documentation produced, the dispute resolution procedures of this Agreement shall apply.

6.0 Unidentified and Unclassified IP-PSTN Termination Traffic.

6.1 The Parties acknowledge that certain IP-PSTN Termination Traffic, due to the technical nature of its origination, may be properly transmitted without all Traffic identifiers. In such instances, the Parties agree that such IP-PSTN Termination Traffic shall be considered "Unclassified Traffic" if the traffic can be affirmatively demonstrated to be missing Traffic Identifiers by means other than the Traffic Identifiers being stripped, altered, modified, added, deleted, changed, and/or incorrectly assigned. Otherwise, the traffic shall be considered "Misclassified Traffic" as described below.

6.2 Provided that the percentage of IP-PSTN Termination Traffic calls transmitted under this Agreement with accurate Traffic Identifies in a given month is greater than or equal to 90%, any remaining calls (those transmitted without accurate Traffic Identifiers) will be billed at rates calculated consistent with, and in proportion to, the IP-PSTN Termination Traffic exchanged with accurate Traffic Identifiers under this Agreement. If, however, the percentage of total IP-PSTN Termination Traffic calls transmitted with accurate Traffic Identifiers (including for this purpose any Misclassified Traffic) in a given month falls below 90%, the Originating Party agrees to pay the terminating Party's intrastate access rates for all Unclassified Traffic for the applicable month

6.3 Notwithstanding anything herein to the contrary, all Misclassified Traffic will be billed at intrastate access rates.

7.0 Change in Compensation Rate under Applicable Law

7.1 At such time as another rate of compensation is determined by the FCC or other Applicable Law for IP-PSTN Termination Traffic, the parties agree, as soon as possible and in all events within one hundred twenty (120) days of the applicable determination by the FCC or other Applicable Law, to amend the compensation rates set forth in this Agreement to the new rates of compensation to be effective prospectively from the date of mutual signature of the amendment or, if an effective date for such rates is explicitly ordered by the FCC in its final ruling, then as of such date. In the event adjustments need to be made retroactively to comport with Applicable Law, the Parties agree to true up any rates in a retroactive manner to the FCC-ordered effective date.

Sprint Issue 5 - Consolidated Issue 8-A

Sprint - Should Sprint be required to provide audit rights beyond industry standards?

Consolidated - Should each party's traffic be subject to audit?

Sprint's Position

Sprint contended it should not be required to provide extraordinary audit rights beyond industry standards that would include access to last-mile provider information that may be proprietary or competitively sensitive.[141] According to Sprint, Consolidated admits that it will be

[141] Direct Testimony of James R. Burt, Sprint Ex.1 at 35-35.

receiving traffic from Sprint in the TDM format and according to Sprint, Consolidated's request is akin to Sprint asking to see Consolidated's traffic reports and data as well as the traffic reports and data of each of the ILECs, CLECs, IXCs and CMRS carriers behind Consolidated's tandem.[142] Sprint alleged that Consolidated does not need to see the traffic reports and data from the last-mile provider to ensure accurate traffic reporting from Sprint.[143] Moreover, Sprint claimed that the Parties have agreed to share SS7 signaling in accordance with Attachment 3, which is the standard protocol used throughout the industry for the exchange of traffic information, and Sprint claimed it has not encountered any problems with its interconnection counterpart through the use of SS7 signaling.[144]

Sprint claimed that if it were the retail provider in this interconnection agreement the information provided by Sprint would be exactly the same as it is here where Sprint is the wholesale provider.[145] Sprint explained that Consolidated is implying that because of the wholesale model the traffic is not Sprint's, an implication that Sprint disputed. According to Sprint, the call information signal (SS7) is created at Sprint's switch and is not information generated by another entity that Sprint simply passes along.[146] Moreover, Sprint stated that other sections of the contract already address Consolidated's auditing concerns about VoIP-based traffic using only Sprint's data. Sprint specifically pointed to Section 1.5, 10.2 and 10.3 that from its perspective address audit concerns. Sprint claimed that Section 1.5 states that "CLEC will be financially responsible for all traffic sent to ILEC under the agreement." Thus Sprint claims it will be responsible for 100% of the traffic.[147]

Sprint claimed that Consolidated's proposed language would allow Consolidated to see not only the local traffic that the last-mile provider sends to Sprint, but Sprint's interexchange toll traffic as well. Sprint claimed Consolidated should only be concerned about traffic that Sprint delivers to Consolidated and traffic that Sprint delivers from the last-mile provider that

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[142] Direct Testimony of James R. Burt, Sprint Ex.1 at 35.

[143] Direct Testimony of James R. Burt, Sprint Ex.1 at 35.

[144] Direct Testimony of James R. Burt, Sprint Ex.1 at 35-36.

[145] Direct Testimony of James R. Burt, Sprint Ex.1 at 36.

[146] Direct Testimony of James R. Burt, Sprint Ex.1 at 36.

[147] Direct Testimony of James R. Burt, Sprint Ex.1 at 36.

by-passes Consolidated's network is of no concern to Consolidated.[148] Also, according to Sprint, Consolidated does not impose the same onerous audit requirements on other providers that carry VoIP traffic such as ETS even though ETS is a VoIP-based telecommunication provider. Sprint notes that the Consolidated/ETS interconnection agreement does not contain additional restrictive language in its "Section 31 -Verification Reviews."[149] Sprint suggested that Consolidated's refusal to offer Sprint the same audit terms Consolidated agreed to with ETS is blatantly discriminatory and contradicts sworn assurances in the Joint Motion for Approval of the Consolidated/ETS agreement filed with the Commission that the Consolidated/ETS Agreement does not discriminate against other carriers.[150]

Consolidated's Position

Consolidated noted that schemes that purposely disguise the originating location of the call in order to benefit from lower compensation charges have been uncovered over the last several years.[151] Consolidated points to NTS as an example of a long distance provider that improperly reported its intrastate minutes of use in order to avoid paying intrastate access rates, claiming all of its traffic was interstate in order to pay the lower access charges.[152] According to Consolidated, history has led it to conclude that it can no longer count on an industry "code of honor" to ensure all traffic identifiers will be accurate in order to receive the proper compensation for use of its network and that traffic audits are but one means of discouraging behavior that would seek to deploy arbitrage schemes that disguise the originating location.[153]

Consolidated argued that it is not sure what Sprint is referring to as an "industry standard" for audit rights and claims that it appears to be yet another example of Sprint

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[148] Direct Testimony of James R. Burt, Sprint Ex.1 at 37.

[149] Direct Testimony of James R. Burt, Sprint Ex.1 at 37.

[150] Docket No. 32917, *Joint Application of Consolidated Communications Company of Fort Bend Company and ETS Telephone Company, Inc. for Approval of an Interconnection Agreement under the Federal Telecommunications Act of 1996 and the Public Utility Regulatory Act*, Attachment 3, *Affidavit of Representative of Consolidated Communications of Fort Bend Company* (July 10, 2006).

[151] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 3.

[152] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 3.

[153] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1at 3.

attempting to make its business model look like a PSTN-to-PSTN arrangement.[154] Moreover, Consolidated asserted that Sprint's claim that it is taking responsibility for the traffic is insufficient.[155]

Consolidated claimed that audit rights should not be restricted only for the purpose of evaluating the accuracy of the other party's billing and invoicing. Consolidated noted that while such an audit is important it is only useful to ensure that the Party receiving a bill really owes the amount billed. However, according to Consolidated, this type of evaluation does not ensure that the *invoicing* company has received accurate information in order to *charge* the terminating carrier the appropriate rates.[156] Consolidated claimed that audit rights that do not extend to traffic information (*i.e.,* information regarding the true geographic location of the origin of the call) would not give the *invoicing Party* (in this case Consolidated) the protection it needs to assure it the information sent to it (*i.e.,* sent to it from Sprint) was accurate so that it could collect the proper amounts.[157]

Consolidated drew a distinction between a strictly wireline TDM environment and a VoIP-to-PSTN environment. According to Consolidated, in a wireline TDM environment the wholesale provider would receive signaling from the originating carrier that would be passed through to the terminating carrier and the wholesaler would not have control over what was signaled; it would merely pass what it received.[158] Consolidated pointed to what it claims are signaling rules and strong penalties at the federal level for all parties sending traffic to the PSTN. According to Consolidated, absent those strong rules and penalties, contracting parties would need strong contract provisions to ensure the wholesale provider could and would be responsible for what its customers send to it, whether or not the wholesale provider is taking responsibility for payment once it has been determined the calls have accurate identifiers for rating.[159]

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[154] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1 at 4.

[155] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1 at 4.

[156] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1 at 4.

[157] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1 at 5.

[158] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1 at 5.

[159] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1 at 5.

Moreover, Consolidated claimed that the nomadic nature of VoIP traffic has to be dealt with appropriately. Consolidated claimed that in the VoIP environment the telephone number associated with a device can be provisioned to work at locations other than a fixed location and even if the telephone number sent as the CPN accurately represents the terminal device the party is using, it does not necessarily represent the origination location of the call as represented by the rate center associated with the calling number. Consolidated claimed that audit rights would need to extend to information only the Party actually provisioning the service would have in order to determine if the service was provisioned as a fixed or nomadic service.[160]

Consolidated expressed concern regarding the ability of other carriers to MFN into this agreement. Consolidated noted that such carriers are unknown to Consolidated at this time, but without the audit protections in place requested by Consolidated the company may fall prey to the practices of less scrupulous carriers who seek to take advantage of an interconnection agreement with weak or non-existent audit provisions. [161]

Arbitrators' Decision

The Arbitrators agree with Consolidated regarding the necessity of adequate audit provisions. The Arbitrators note that concern about arbitrage problems was discussed in the direct testimony of Commission Staff witness Randy Klaus in Docket No. 32582, wherein Mr. Klaus stated, "the issue of the 'phantom traffic' problem can be alleviated or mitigated by carefully crafting an interconnection agreement that specifically addresses such concerns."[162] The Arbitrators have no doubt that Sprint intends to oversee and enforce the provisions in its contracts with its last-mile providers. However, the Arbitrators also understand that other carriers will have the option to MFN into this agreement and such carriers may seek to take advantage of weak audit rights to the detriment of Consolidated. The Arbitrators find in the context of this arbitration and the business model that underlies it that clear and enforceable contract language supporting strict audit rights that will tend to prohibit, or at least strongly discourage, arbitrage is necessary in this agreement.

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[160] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1 at 6.

[161] Direct Testimony of Brenda E. Gerstemeier, Consolidated Ex. 1 at 6.

[162] Docket No. 32582, Direct Testimony of Commission Staff Witness Klaus at 18 (June 13, 2006).

The Arbitrators agree with Consolidated that the signaling rules and calling party number transmission requirements applicable to traditional voice TDM message do not apply to the traffic to be exchanged by the Parties. The Arbitrators note that Sprint represented that its switches will originate the calls that will be passed to Consolidated; however, the calls originated by Sprint's switches will be a function of signals passed to that switch from its last-mile providers. Without access to and knowledge of the information passed by the last-mile providers Consolidated's audits will be limited to verification of the accuracy of the bills generated by Sprint's switch. Such an audit would be limited of value and could not be used to determine with any accuracy the originating location of the call. Therefore, the Arbitrators grant in total the audit provisions as outlined in the contract language proposed by Consolidated in DPL No. 5 as set out below for convenience:

> 31.1 Subject to each Party's reasonable security requirements and except as may be otherwise specifically provided in this Agreement, either Party may audit the other Party's relevant books, records and other documents pertaining to services provided under this Agreement once in each Contract Year and/or following termination of the Agreement to evaluate the accuracy of the other Party's billing, data and invoicing, including usage data, source data, and other information and documents in accordance with this Agreement. The relevant books, records and other documents include, but are not limited to, usage data, source data, traffic reports and associated data (including such traffic reports and associated data from ~~TWC and other~~ Last Mile Providers) and other information and documents in accordance with this Agreement. Such audit will take place at a time and place agreed on by the Parties no later than sixty (60) days after notice thereof.
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> 31.2 The review will consist of an examination and verification of data involving usage data, records, systems, procedures and other information related to the traffic delivered or services performed by either Party as related to settlement charges or payments made in connection with this Agreement as determined by either Party to be reasonably required. Each Party shall maintain reasonable records for a minimum of twelve (12) months and provide the other Party with reasonable access to such information as is necessary to determine amounts receivable or payable under this Agreement. Such records shall include usage records for the traffic delivered by the Party to the Other Party.
>
> 31.4 Each Party will cooperate fully in any such audit, providing reasonable access to any and all appropriate employees, subcontractors and other agents and books, records and other documents reasonably necessary to assess the accuracy the Party's billings, data and invoices. With respect to authorized Last Mile Providers, such as traffic associated with the Sprint-~~TWC,~~ **Last Mile Provider** Arrangement, the Responsible Party will obtain and provide access to all books, records, documents and other information reasonably necessary to assess the accuracy of the data applicable to that traffic.

Sprint Issue 6 – Consolidated Issue 9

This issue has been resolved.

Sprint Issue 7 - Consolidated Issue 10

***Sprint** - Should Sprint be required to warrant that it is a telecommunications carrier?*

***Consolidated** - Should each Party warrant that it has the authority to enter into and utilize this agreement for authorized purposes? Specifically, should each Party warrant that it is a Telecommunications Carrier providing Telecommunications Services in accordance with the Federal Telecommunications Act. ?*

Sprint's Position

Sprint claimed it is willing to represent that it is a "Telecommunications Carrier" but that it is unwilling to provide a "warranty" as to its status as a Telecommunications Carrier. Sprint argued that Consolidated is unwilling to accept a representation in lieu of a warranty because Consolidated believes that Consolidated may not have a legal cause of action for breach of a representation where it believes it would for breach of a warranty.[163] Sprint further asserted that it believes Consolidated's insistence on the proffered warranty language is a transparent improper attempt to keep alive an issue already decided in Sprint's favor in Docket No. 32582, wherein the Commission terminated Consolidated's rural exemption. Sprint claimed that from its perspective only a change of law could cause it not to continue to qualify as a Telecommunications Carrier and neither Party should be required to warrant that the law will never change.[164] Sprint's witness Burt stated that he believed that a warranty seemed to be in the nature of a guaranty and he believes a party cannot and should provide a guaranty on an issue that it does not control.[165]

Consolidated's Position

Consolidated claimed that warranties in sections 47.1 and 47.2 are in Consolidated's standard interconnection agreement and have been accepted without protest by other

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[163] Direct Testimony of James R. Burt, Sprint Ex. 1 at 40.

[164] Direct Testimony of James R. Burt, Sprint Ex. 1 at 40.

[165] Direct Testimony of James R. Burt, Sprint Ex. 1 at 40.

interconnecting carriers.[166] Consolidated claimed the proposed language only imposes a duty to warrant what the FTA requires to enter into an interconnection agreement: namely that a CLEC be and continue to be a Telecommunications Carrier providing Telecommunications Services and have appropriate certifications required for its activities.[167]

Consolidated claimed warranties are usual and customary for such agreements and consistent with other terms contained in the agreement. Consolidated claimed Sprint has resisted discovery requesting examples of warranties it has made in other agreements, but Consolidated stated it believes Sprint has made the same or substantially similar warranties in contexts applicable to the services to be utilized by Sprint.[168] Consolidated found it curious that Sprint has agreed to warrants in other sections of the interconnection agreement but insists on removing the warrants from Section 47.1 and 47.2 of the proposed agreement.[169]

Consolidated claimed that Sprint must be a Telecommunications Carrier providing Telecommunications Services in order to interconnect with Consolidated under the FTA and that being a Telecommunications Carrier is a continuing requirement.[170] Consolidated argued that Sprint's proposed contract language throughout the contract relieves Sprint from that obligation.[171] Consolidated claimed that Sprint has made warranties similar to those sought by Consolidated in other interconnection agreements and points to Docket No. 26978 which dealt with interconnection between SBC (as an ILEC) and Sprint (as the CLEC), wherein, Consolidated alleges that Sprint warranted that it is authorized to provide "Telecommunications Services."[172] Consolidated claimed that a requesting carrier must be a "Telecommunications Carrier" to make an interconnection request and notes that no other carriers seeking interconnection with Consolidated have had difficulties making such warranties.[173]

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[166] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 25.

[167] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 25.

[168] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 25.

[169] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 25.

[170] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 26.

[171] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 26.

[172] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 26.

[173] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 27.

Arbitrators' Decision

The Parties' dispute here turns on the distinction between the words "warrant" and "represents." Consolidated wants Sprint to "warrant" that it "...is, and at all times will remain, a Telecommunications Carrier providing Telecommunications Services in accordance with the Act" and "...that it will have obtained by the Effective Date and maintain all necessary jurisdictional certification(s) required in Texas to perform its obligations under this Agreement."[174] Sprint wants to instead "represent" that it "...is a Telecommunications Carrier providing Telecommunication Services in accordance with the Act" and "...that it will have obtained by the Effective Date and maintain all necessary jurisdictional certification(s) required in Texas to perform its obligations under this Agreement."[175]

Black's Law Dictionary defines "warranty" under the subheading "contracts" as "[a]n express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties...."[176] Interestingly, the Black's definition of "warranty" provides a note of explanation of the difference between the terms "warranty" and "representation":

> A warranty differs from a representation in four principal ways: (1) a warranty is an essential part of a contract, while a representation is usually only a collateral inducement, (2) a warranty is always written on the face of the contract, while a representation may be written or oral, (3) a warranty is conclusively presumed to be material, while the burden is on the party claiming breach to show that a representation is material, and (4) a warranty must be strictly complied with, while substantial truth is the only requirement for a representation.[177]

So, then, Consolidated is seeking Sprint's strict compliance with a material term of the agreement, namely that Sprint guarantee, on pain of potential liability for material breach of the agreement, that Sprint *is and shall at all times remain* a Telecommunications Carrier providing Telecommunications Services and that *it will have* obtained by the Effective Date and maintain all necessary jurisdictional certification(s) required in Texas to perform its obligations under this Agreement.

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[174] Jointly-filed DPL at 28-29 (Oct. 26, 2006).

[175] Jointly-filed DPL at 28-29 (Oct. 26, 2006).

[176] Black's Law Dictionary 1581 (7th ed. 1999).

[177] Black's Law Dictionary 1581 (7th ed. 1999).

The Arbitrators find that Consolidated is asking Sprint to guarantee, for the life of the agreement, something that is in both instances beyond Sprint's exclusive control. Obviously, and as noted by Sprint's witness Burt, regulatory authorities have the power to define the terms at issue and the parties do not.[178] A federal court or the Federal Communication's Commission could issue a ruling at some point in the future that could bring Sprint's status as a "Telecommunications Carrier providing Telecommunications Services" into question or doubt. Neither party can reasonably be expected to predict whether and to what extent federal laws and regulations may change in regard to the definition of the terms in question. Accordingly, the Arbitrators decline to subject either Party to a potential claim of breach of warranty for matters that are beyond that Party's exclusive control. Likewise, neither Party can reasonably be expected to guarantee that it will have all necessary jurisdictional certifications by a date certain. Whether or not a Party has such certifications by a date certain often lies beyond the exclusive control of that Party. The Arbitrators note that adopting the language proposed by Sprint here will not prejudice either Party's right to seek an appropriate remedy in an appropriate forum if federal laws or regulations change with respect to the definition of "Telecommunications Carrier," "Telecommunication Services," or some other related matter, or if one Party fails to obtain its necessary jurisdictional certifications in a timely manner.

For the reasons discussed above, the Arbitrator's find Consolidated's position unreasonable, Sprint's position reasonable, and adopt the language proposed by Sprint for Section 47.1 and Section 47.2 of the agreement as set out below for convenience:[179]

> 47.1 Each Party represents that, for the purposes of this Agreement and the utilization of services provided pursuant to this Agreement, the Party is a Telecommunications Carrier providing Telecommunications Services in accordance with the Act.
>
> 47.2 Each Party represents that it will have obtained by the Effective Date and maintain all necessary jurisdictional certification(s) required in Texas to perform its obligations under this Agreement. Upon request each Party shall provide proof of certification to the other Party.

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[178] Tr. at 243 (Nov. 2, 2006).

[179] Jointly-filed DPL at 28-29.

Sprint Issue 8 - Consolidated Issue 13

***Sprint** - Does service provided under wholesale arrangements to a last-mile provider constitute transit traffic?*

***Consolidated** -Should last-mile provider traffic exchanges between parties under the agreement be excluded from the definition of Transit Traffic generally or be excluded for compensation purposes only?*

Sprint's Position

Sprint asserted that transit traffic is traffic that is exchanged between the Parties that originates or terminates on the network of a third party. Sprint claimed the Parties disagree on the definition of transit traffic and it is Sprint's position that Sprint is not acting as a transit provider for the traffic originating from and terminating to the subscribers of the Sprint last-mile provider's service. Sprint noted that it does not believe that Consolidated seriously contends that Sprint is a transit provider, but the problem lies in the breadth of the definition of transit traffic that Consolidated proposed to include in the agreement. Sprint stated that in order to avoid any potential for future controversy, it proposes that the agreement reflect the Parties' understanding that Sprint is not functioning as a transit provider[180]

Consolidated's Position

Consolidated noted the Parties agree that the provisions of the agreement applicable to transit traffic should not apply to the last-mile provider for purposes of compensation. However, according to Consolidated, the Parties disagree as to the rationale for such exclusion. According to Consolidated, Sprint's proposed definition of transit traffic without the disputed language is the same as Consolidated's. However, Consolidated claimed that Sprint's proposed language takes Consolidated's proposed definition and grafts onto it an artificial assertion that Sprint is originating the last-mile provider traffic. Consolidated claimed that Sprint's approach makes no

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[180] Direct Testimony of James R. Burt, Sprint Ex. 1 at 41-42.

sense because if effectively butchers the definition of transit traffic in order to make that definition fit Sprint's wholesale VoIP business model.[181] Consolidated explained that its proposed language specifically excludes wholesale VoIP traffic as transit traffic for compensation purposes and further explained that while Consolidated believes such traffic originates on a third party's VoIP network, Consolidated does not believe such traffic should be compensated as transit traffic under this agreement.[182] Consolidated claimed its definition should be used in the agreement because it accurately recognizes and defines such traffic and does not unduly restrict what is and is not transit traffic.[183]

Arbitrators' Decision

The Arbitrators find that Sprint it is not acting as a transit provider in the context of this agreement. Moreover, the Arbitrators note that Sprint has stated that it will not act as a transit provider in its business relationship with Consolidated. The Arbitrators find Sprint's role in the serving arrangement described in Sprint's business model as simply providing a part of the line-side circuits between the local switch and the end user premises, *i.e.*, the local loop and switching required to provide local exchange service. Furthermore, the Arbitrators distinguish Sprint's function here from that of "a transit traffic provider." The transmission provided by Sprint is a line-side transmission link that enables the End User to access Sprint's local switch in order to make and receive calls. Transit traffic is trunking traffic passed between two network switches by a third-party.

The Arbitrators find that the traditional "transit traffic" definition does not apply to business models that use a last-mile provider to complete calls to end users. The Arbitrators adopt the definition of Transit Traffic proposed by Sprint with the modification indicated below:

> Attachment 5. Definition. "Transit Traffic" means the delivery of Local Traffic or ISP Bound Traffic by CLEC or ILEC originated and/or terminated by the End User of one Party and originated and/or terminated to a third party ILEC or CLEC over the interconnection trunks. When CLEC has a business arrangement with last-mile providers for interconnection services, ~~CLEC is the originator and~~

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[181] Direct Testimony of Michael Shultz, Consolidated Ex 3 at 28.

[182] Direct Testimony of Michael Shultz, Consolidated Ex 3 at 28.

[183] Direct Testimony of Michael Shultz, Consolidated Ex 3 at 28.

~~terminator of the traffic~~, CLEC is not a Transiting Party and such traffic is not Transit Traffic Under this Agreement.

The deleted text reflects the Arbitrators' finding that although Sprint is not providing "transit traffic" under this specific business model, the CLEC will not in all instances be the originator and terminator of the traffic.

Sprint Issue 9 - Consolidated Issue 4

Sprint - What should be the length of the initial term of the Agreement?

Consolidated -Should the interconnection agreement have a one-year term or a two-year term?

Sprint's Position

Sprint proposed a two-year initial term under the agreement before having to initiate negotiations for a replacement agreement or an extension. According to Sprint, the one-year term proposed by Consolidated is too short; Sprint notes that the negotiating process requires substantial time and resources and argues that the Parties and the Commission would benefit from a longer-term agreement.[184] Further, Sprint claimed that the Change of Law provisions of the agreement would allow for modification of the agreement in the event of a relevant regulatory change.[185]

Consolidated's Position

Consolidated argued that the agreement's initial term should be one year with automatic renewals every six months, unless either Party requests renegotiation. Consolidated noted that should the FCC issue its decisions in its VoIP dockets during the initial term of the agreement, the Parties will have guidance on how to treat VoIP in the subsequent agreement. Consolidated asserted a one year term is prudent given the uncharted territory of crafting an agreement for a wholesale VoIP provider. Consolidated pointed out that the FCC currently has two VoIP proceedings before it that could impact many substantive provisions of this agreement.[186]

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[184] Direct Testimony of James R. Burt, Sprint Ex. 1 at 42-43.

[185] Direct Testimony of James R. Burt, Sprint Ex. 1 at 43.

Arbitrators' Decision

The Arbitrators adopt Sprint's proposal that the term of the agreement is two years. As noted by Sprint, the time required to negotiate this agreement is approaching two years. The Arbitrators also note that the term of the Interconnection Agreement in Docket No. 28821 which was the successor of the T2A Interconnection Agreement is five (5) years. The first sentence of Section 4.1 shall read:

> The Parties agree to the provisions of this Agreement for an initial term of two (2) years from the Effective Date of this Agreement, unless terminated or modified during such initial term pursuant to the terms and conditions of this Agreement.

Sprint Issue 10 - Consolidated Issue 24-A and 25

Sprint - Should an LSR charge apply when porting a telephone number currently in ILEC's billing system, but otherwise at no charge?

Consolidated -Should either party be allowed to charge a service order charge for a Local Service Request and should Directories Price List include the correct reference to the phone directory to be provided?

Sprint's Position

Sprint claimed that the combined service order charge for number portability and directory service request should not apply when Sprint only requests porting a number but does not request directory service. Sprint found no reason to allow Consolidated to recover the cost of local number portability (LNP) and also the cost of local service requests (LSR). Sprint argued its position is consistent with the intent of the FCC that carriers bear their own costs directly related to LNP. Moreover, Sprint claimed it is willing to port a telephone number to Consolidated without assessing a separate LNP service order charge.[187] Sprint argued that Consolidated is already recovering the cost of LNP via the Local Number Portability (LNP) charge it bills to all of its customers each month and cites Consolidated's own customer literature as evidence. According to Sprint, Consolidated provides information to its customers that explains the LNP charge and that information makes clear that the customer is being charged for

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[186] Direct Testimony of Michael Shultz, Consolidated Ex 3 at 29.

[187] Direct Testimony of James R. Burt, Sprint Ex. 1 at 44.

local number portability. Sprint argued Consolidated should not be allowed to levy an additional charge to recover its cost of LNP beyond what it has already been approved to recover.[188]

Consolidated's Position

Consolidated claimed that the Party's should be allowed to charge a service order charge for an LSR because it is an administrative cost incurred by Consolidated that is caused by Sprint. Consolidated claimed the charge is a standard part of its interconnection agreements, and argued that the cost causer should be charged for the services being rendered. Consolidated claimed Sprint's proposal that Sprint will not charge Consolidated does not make sense and Sprint's forbearance does not justify imposing the same approach on Consolidated as Sprint is the party that will be placing most of the LSR orders, at least in the short term. Consolidated stated there is no "double dipping" by Consolidated charging Sprint a non-recurring charge for processing Sprint's LSRs simply because it recovers its cost for LNP.[189] Consolidated claims an LSR of $15.03 is justified and the amount is a reasonable approximation of its costs for performing the LSR function.[190]

Arbitrators' Decision

The Arbitrators note at the outset that they believe that each Party is entitled to impose a "just and reasonable" charge to the other Party for porting a customer to that Party, so long as that charge is based on the actual, forward-looking cost of performing the function and is nondiscriminatory.[191] The Arbitrator's agree in principle with Consolidated's witness Shultz that the "cost-causer" should bear the costs of LSRs.[192]

However, the Arbitrators must also take note of Sprint's observation that Consolidated has failed to enter, or even attempt to enter, a TELRIC cost study or any documentation or testimony of any kind into evidence in this proceeding that supports an LSR charge of $15.03 or

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[188] Direct Testimony of James R. Burt, Sprint Ex. 1 at 44.

[189] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 30-31.

[190] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 43.

[191] 47 U.S.C. 252(d); *See also* Docket No. 24547, *Arbitration for Interconnection between 1-800-4-A-Phone and Southwestern Bell Telephone Company*, Arbitration Award at 8 and 10 (Jan. 25, 2002) where the Commission notes that OSS functions are UNEs and that prices for UNEs should be based on TELRIC; *accord Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc.*, 1998 WL 657717 at 4 (W.D. Texas, 1998).

any other amount.[193] Thus no evidence exists in the record to inform the Arbitrators on the issue of whether an LSR of $15.03 is just, reasonable, forward-looking, or cost-based. Consolidated argued in its post-hearing brief that Consolidated's witness Shultz "...specifically discusses the LSR charge, the cost supporting it, and why it must be assessed."[194] The Arbitrators carefully reviewed Shultz's cited testimony and find nothing in the record that could be construed to reveal with any level of certainty Consolidated's cost of performing an LSR.

Consolidated also argued in its post-hearing brief that Consolidated has tariffs on file with the Commission for Consolidated's Texas ILECs showing an LSR charge that is comparable to the LSR charge that Consolidated asks the Arbitrators to impose in this proceeding. Consolidated argued that the Arbitrators can take judicial notice of the fact of the tariffs and implied that the Arbitrators can invoke judicial notice to find justification to adopt the requested LSR.[195] Consolidated argued that sufficient information must have been provided to the Commission to support the referenced tariffs, or the Commission would never have approved the tariffs.[196]

The Arbitrators disagree as a threshold matter that a tariff on file at the Commission may serve as a sufficient basis to substitute for a TELRIC study, and note that Consolidated has offered no authority to support its contention that it can or should. In any event, the Arbitrators decline to take judicial notice of the referenced tariffs at this stage of these proceedings. The Arbitrators note that P.U.C SUBST. R. 21.95(i) indicates that "[t]he Texas Rules of Civil Procedure, Texas Rules of Civil Evidence, Texas Administrative Procedure Act §2001.081, and Chapter 22 of this title (relating to Practice and Procedure) may be used as guidance in proceedings under this chapter."[197] The Arbitrators further note that P.U.C. SUBST. R. 21.95(m) indicates that the "...presiding officer shall provide notice of his decision on whether or not to apply strict rules of evidence (or any other rules) as to the admissibility, relevance, or weight of

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[192] Shultz Direct at 30-31.

[193] Sprint's Post-hearing Brief at 31. (November 10, 2006).

[194] Consolidated's Post-hearing Brief at 33 (November 10, 2006).

[195] Consolidated's Post-hearing Brief at 33-34.

[196] Consolidated's Post-hearing Brief at 33-34.

[197] P.U.C. SUBST. R. 21.95(i).

any material tendered by a party on any matter of fact or expert opinion."[198] The Arbitrators did not indicate to the Parties prior to the deadline for filing direct testimony that the rules of evidence would be strictly applied in these proceedings, so the Arbitrators have conducted these proceedings without resort to requiring strict adherence to Texas evidentiary rules in regard to matters of admissibility, relevance or weight. Even so, the Arbitrators must be informed by the Texas Rules of Evidence in the conduct of these proceedings and ensure that such rules are applied fairly, even while being construed liberally.

While TEX. R. EVID. 201, "Judicial Notice of Adjudicative Facts" subsection (c) indicates that a court may take judicial notice of a fact "...whether requested or not...," subsection (e) indicates the opposing party "...is entitled upon timely request to an opportunity to be heard as the propriety of taking judicial notice and the tenor of the matter noticed."[199] The Arbitrators note that Consolidated did not, during the course of the hearing in this arbitration, make any request for the Arbitrators to take judicial notice of Consolidated's tariffs for Consolidated's Texas ILECs. The first time the issue was raised was in Consolidated's post-hearing brief,[200] and even there Consolidated did not ask the Arbitrators to take judicial notice of the tariffs, but merely noted that the "...Commission can take judicial notice..." of the tariffs. As mentioned previously, Consolidated cites no authority in support of the proposition that the referenced tariff may suffice as a replacement for a cost study supporting an LSR charge, or that a tariff may suffice as a replacement for a cost study in any relevant context. Because Consolidated did not move the Arbitrators to take judicial notice of the referenced tariffs during the course of the pre-hearing or the hearing in this case, Sprint had no opportunity to be heard on the matter.

Consolidated has offered no reason why it failed to enter evidence in this case regarding the requested LSR charge, and Consolidated has offered no reason why it waited until after the hearing on the merits to point out that the Arbitrators can take judicial notice of the referenced tariffs. Because Sprint would be denied an opportunity to be heard on the matter if the Arbitrators take judicial notice of the referenced tariffs at this time, and because no authority has been cited in support of the proposition that the referenced tariffs may suffice as a substitute for a

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[198] P.U.C. SUBST. R. 21.95(m).

[199] TEX. R. EVID. 201(c) and (e).

cost study in support of the requested LSR charge, the Arbitrators decline to take judicial notice of the referenced tariffs for the purpose of establishing an appropriate LSR rate. Even though the Arbitrators believe that a cost-based LSR is appropriate under the circumstances of this arbitration, the Arbitrators find the evidentiary record in this proceeding wholly inadequate to support the LSR rate requested by Consolidated.

Sprint urged the Arbitrators to adopt an LSR of no more than $1.25 per port, a charge that Sprint contends is consistent with the safe-harbor charge that the FCC adopted for an electronic PIC-change.[201] Sprint witness Burt did make reference to the fact in his direct testimony that Sprint had requested a relevant cost study from Consolidated, but that Consolidated had provided only a one-page report that was, in Sprint's estimation, inadequate for the purpose of determining the reasonableness of the proposed charge.[202] The Arbitrators note that Consolidated did provide the one-page cost information to Sprint in response to a Sprint RFI, but did not enter the one-page cost information into the record evidence in this arbitration. The Arbitrators note that Sprint did make reference in its direct testimony to service order rates from other cases that evidently Sprint believes to be sufficiently analogous to this case that the Arbitrators may adopt those rates as appropriate here.[203] However, the Arbitrators note that Sprint has introduced no cost study of its own that would, in the Arbitrators view, support the adoption of a cost-based LSR in this case.

The Arbitrators are not free to invent an LSR charge that they believe is fair or equitable without regard to the pertinent evidentiary record, or lack thereof, in this proceeding. While the Arbitrators believe that an LSR charge is appropriate under the facts of this arbitration, the Arbitrators simply have no evidence on which to based an LSR that is just, reasonable, forward-looking, or cost-based. However, the Arbitrators are persuaded that adopting an LSR charge of zero in this arbitration is not appropriate because the "cost-causer" party would not bear the cost of LSRs under such an arrangement. The Arbitrators conclude that the appropriate LSR charge

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[200] Consolidated's Post-hearing Brief at 33.

[201] Direct Testimony of James R. Burt, Sprint Ex. 1 at 44; *see also Presubscribed Interexchange Carrier Charges*, WC Docket No. 02-53, Report and Order, FCC 05-32 (rel. Feb. 17, 2005)(*"PIC Change Charge Order"*).

[202] Direct Testimony of James R. Burt, Sprint Ex. 1 at 45.

[203] Direct Testimony of James R. Burt, Sprint Ex. 1 at 45-46.

must be based on the actual, forward-looking cost of performing the function. As mentioned above, the Arbitrators do not have the benefit of evidentiary support for adopting such an actual, forward-looking LSR cost. Therefore, the Arbitrators adopt the following text for Attachment 8, Section 2.5 so that each party has an opportunity to conduct an appropriate cost study for LSRs under this Agreement and obtain Commission approval for its inclusion in the Agreement:

> **2.5 ILEC and CLEC shall each be entitled to collect a non-recurring service order charge for each Local Service Request ("LSR") submitted to the other Party. The LSR shall initially be $0.00. However, the ILEC may at any time subsequent to the Commission's approval of the Parties' Interconnection Agreement, submit a TELRIC-based LSR cost study that reflects its cost of performing an LSR to the Commission for approval. On the Commission's approval of such cost study, each Party shall be entitled to charge the other Party the Commission-approved charge for LSRs. The ILEC shall be entitled to submit such LSR cost study for Commission approval only once during the initial term of this Agreement. The ILEC shall submit such LSR cost study under Docket No. 31577, and the ILEC shall provide CLEC of notice of such filing and CLEC shall have the opportunity to file a response within twenty (20) calendar days. On the Commission's approval of the ILEC's LSR cost study, the Parties shall file jointly submit, for the Commission's approval, an amendment to this Interconnection Agreement that reflects the Commission-approved LSR charge.**

The charge reflected in Attachment 7, Exhibit A shall be conformed to reflect the appropriate LSR charge in effect pursuant to the language of Attachment 8, Section 2.5 as set out above.

Sprint and Consolidated Issue 11

Sprint - Definitions of IP-PSTN, Responsible Party, Sprint-TWC Arrangement, Unclassified Traffic?

Consolidated -Should these definitions be included in the agreement?

Sprint's Position

Sprint noted that this issue is a disagreement between the Parties regarding several definitions that are contained or used in Attachment No. 10, and that the inclusion of Attachment No. 10 is disputed as Issue No. 4. Thus, Sprint argued that the resolution of this issue should be tied to Issue No. 4. Sprint acknowledged the disputed definitions include IP-PSTN, Responsible Party, Sprint-TWC Agreement, and Unclassified Traffic. Sprint argues that the terms are not necessary and need not be included in the agreement. However, Sprint also noted that should the

Commission agree with Sprint on Issue 4 that Attachment No. 10 is not necessary for the exchange of traffic between the Parties, Issue 11 should be decided in favor of Sprint.[204]

Consolidated's Position

Consolidated claimed the definitions of (1) IP-PSTN Termination Traffic, (2) Responsible Party, (3) Sprint-TWC Arrangement and (4) Unclassified Traffic are important definitions that should be included in the interconnection agreement and be a clear as possible.[205]

Arbitrators' Decision

A. The Arbitrators adopt Consolidated's definitions of: IP-PSTN Termination Traffic, Responsible Party, and Unclassified Traffic, as described below:

> "IP-PSTN Termination Traffic" - means traffic of last-mile provider scriber provided by CLEC for termination to ILEC's network. (Attachment 5, Definitions.)
>
> "Responsible Party" - The Party responsible for IP-PSTN Termination Traffic for purposes of 3.1 above (the "Responsible Party") is the Party converting traffic from IP to PSTN for termination to the PSTN network or converting PSTN traffic to IP for termination through the authorized last-mile provider as VoIP traffic. CLEC is the Responsible Party with respect to traffic originated by or terminated to CLEC for the Sprint/last-mile provider Arrangement. (Attachment 10, Section 3.2)
>
> "Unclassified Traffic"- The Parties acknowledge that certain IP-PSTN Traffic, due to the technical nature of its origination may be properly transmitted without all Traffic identifiers. In such instances, the Parties agree that such IP-PSTN Termination Traffic shall be considered "Unclassified Traffic" if the traffic can be affirmatively demonstrated to be missing Traffic Identifiers by means other than the Traffic Identifiers being stripped, altered, modified, added, deleted, changed, and/or incorrectly assigned. Otherwise the traffic shall be considered "Misclassified Traffic" as described below. (Attachment No. 10, Section 6.1)

B. The Arbitrators adopt Sprint's proposed definition of Sprint/TWC (Sprint/Last Mile Provider) Arrangement described in 1.5 of the Interconnection Agreement, as follows:

> 1.5 CLEC represents that it has or may enter into business arrangements with last-mile providers regarding traffic to be exchanged in accordance with this agreement. CLEC will be financially responsible for all traffic sent to ILEC.

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[204] Direct Testimony of James R. Burt, Sprint Ex. 1 at 46-47.

[205] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 31.

V. CONCLUSION AND IMPLEMENTATION SCHEDULE

The Arbitrators conclude that the decisions outlined in this Award, as well as the conditions imposed on the Parties by these decisions, meet the requirements of FTA § 251 and any applicable regulations prescribed by the FCC pursuant to FTA § 251. The Arbitrators note that Docket Nos. 31577 and 31578 were consolidated on October 5, 2006, for the ease of administration, and that the decisions outlined in this Award apply to Sprint's petition for compulsory arbitration to establish interconnection terms and conditions with each Consolidated Communications of Fort Bend Company (Docket No. 31577) and Consolidated Communications of Texas Company (Docket No. 31578). Unless the parties agree to a later date, the Arbitrators order that this Interconnection Agreement be fully implemented by no later than March 1, 2007. "Fully implemented" means all provisioning and testing is completed and the parties have the ability to exchange traffic.

SIGNED AT AUSTIN, TEXAS on the 19 day of DECEMBER, 2006.

FTA § 252 PANEL

for Larry H Barnes
MARK HALLMARK, ARBITRATOR

Larry H Barnes
LARRY BARNES, ARBITRATOR

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Re Sprint Communications Company, L.P.
Cause No. 43052-INT-01
(Consolidated with 43053-INT 01 &
43055-INT 01)

[redacted]
September 6, 2006

Before Hardy, Landis, Server, and Zeigner (all concurring), commissioners, and Schmoll, administrative law judge.

BY THE COMMISSION:

Introduction

*1 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.

***2** 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.

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).

***38** 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. [FN54]

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.

Issue 10: Should Sprint be required to pay a Service Order charge for [illegible]

[redacted] 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.

***39** 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, [redacted] [FN55] [redacted] 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.

[redacted] 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 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: [FN57]

	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.

***40** 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 charges as a proxy for LNP service order charges since the cost disparity among the three companies is supposed to reflect that should be similar across the RTCs. Accordingly, we 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

***41** 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.

***42** 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.) [FN58]

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 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

DOCKET NO. 31577

PETITION OF SPRINT COMMUNICATIONS COMPANY, L.P. FOR COMPULSORY ARBITRATION UNDER THE FTA TO ESTABLISH TERMS AND CONDITIONS FOR INTERCONNECTION TERMS WITH CONSOLIDATED COMMUNICATIONS OF FORT BEND COMPANY AND CONSOLIDATED COMMUNICATIONS COMPANY OF TEXAS	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER APPROVING ARBITRATION AWARD WITH MODIFICATION

This Order approves the Arbitration Award issued on December 19, 2006 by the Arbitrators assigned to this proceeding, with modification. As discussed in this Order, the Commission adopts the Arbitration Award, except for the provision regarding Sprint Issue 10 – Consolidated Issue 24-A and 25, which would have provided Consolidated the opportunity to submit a TELRIC-based local service request (LSR) cost study subsequent to the conclusion of, and the Commission's approval of the Parties' Interconnection Agreement in this arbitration.

The Commission finds that Consolidated had the burden and the opportunity to introduce an LSR cost study into evidence in this proceeding, and that it failed to do so. Given the lack of an evidentiary record in this arbitration upon which to establish a cost-based LSR rate, the Commission adopts a $0.00 LSR rate for the term of the instant interconnection agreement. The Commission also forecloses the opportunity for the submission a LSR cost study in this arbitration. Accordingly, the Commission adopts the following text for Attachment 8, Section 2.5:

> 2.5 ILEC and CLEC shall each be entitled to collect a non-recurring service order charge for each Local Service Request ("LSR") submitted to the other Party. The LSR shall be $0.00.

All other motions, requests for relief, general or specific, not expressly granted, are denied.

SIGNED AT AUSTIN, TEXAS the _____ day of _____, 2007.

PUBLIC UTILITY COMMISSION OF TEXAS

_____
PAUL HUDSON, CHAIRMAN

_____
JULIE PARSLEY, COMMISSIONER

_____
BARRY T. SMITHERMAN, COMMISSIONER