

I(C). Transit Traffic:**Transit Traffic**

"Transit traffic" is traffic that originates on the network of one carrier, which hands it off to a second carrier, which in turn transports the traffic to a third carrier for termination on that carrier's network. The carrier in the middle is said to provide "transit service."¹

1. Should the ICA include Transit Traffic?

AT&T Network A-C 11 Issue 3: *May AT&T arbitrate language relating to a non-251/252 service such as Transit Service that was not voluntarily negotiated by the parties?*

AT&T Network A-C 11 Issue 4(c): *Should a non-251/252 service such as Transit Service be negotiated separately?*

Charter GT&C Issue 18(a): *Should Transit Traffic be defined in the ICA?*

CLEC Coalition IC Issue 1: *Should non 251/252 services such as Transit Services be negotiated separately?*

CLEC Coalition ITR Issue 4: *Should non 251(b) or (c) services such as transit be negotiated separately?*

CLEC Coalition NIA Issues 5(a) and 5(b): *(a) Should a non-251 (b) or (c) service such as Transit Service be negotiated separately? (b) If not, is it appropriate to include transit traffic in the definition of Section 251(b)(5)/IntraLATA Toll Traffic?*

CLEC Coalition NIA Issue 8: *Should the interconnection agreement require SBC to interconnect with CLEC via a third party carrier and send traffic destined to CLEC through a third party transit provider?*

MCI NIM/ITR Issue 26: *Should a non-section 251/252 service such as Transit Service be arbitrated in this section 251/252 proceeding?*

MCI RC Issue 18: *Should non 251/252 services such as Transit Services be negotiated separately?*

Sprint GT&C Issue 7: *Should the ICA contain a specific definition for Transit Traffic?*

¹ McPhee Direct, p. 48.

Sprint IC Issue 7: Is Transit Service outside the scope of Section 251/252 and thereby not subject to this IAC?

WilTel ITR Issue 1b: Should non 251(b) or (c) services such as Transit Services be negotiated separately?

Discussion:

SBC states that the Commission should reject the CLECs' proposed language, which concerns transit traffic,² because transit traffic is neither governed by the 1996 Act, nor subject to negotiation and arbitration under the 1996 Act. The only issues that are subject to arbitration under § 252 of the 1996 Act are those that arise out of the parties' negotiations concerning the "terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection [251](b) and this subsection [251](c)."³ Thus, unless the issue concerns the duties imposed by §§ 251(b) and (c) of the 1996 Act, it is not arbitrable. This is confirmed by § 252(c) ("standards for arbitration"), which provides that in resolving the arbitration issues, the State commission must "ensure that such resolution . . . meet[s] the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to Section 251" and "establish any rates for interconnection, services, or network elements according to subsection [252](d)."

However, the Missouri Public Service Commission has already decided that transiting is a § 251 obligation.⁴ In its *Chariton Valley Order*, the Commission stated, "Transit service falls within the definition of interconnection service. . . . [b]ecause the

² The transit traffic at issue here is traffic for which SBC would be performing the transiting function. (McPhee Direct, p. 48.)

³ 47 U.S.C. § 251(c)(1); MCPhee Direct, pp. 47-51; MCPhee Rebuttal, pp. 10-19.

⁴ *Application of Chariton Valley Communications Corporation, Inc. for Approval of an Interconnection Agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Missouri pursuant to Section 252(e) of the Telecommunications Act of 1998*, Case No. TK-2005-0300 (Order Rejecting Interconnection Agreement, issued May 19, 2005) ("Chariton Valley Order").

transit agreement is an interconnection service, it must be filed with the Commission for approval." Section 252 ICAs are negotiated or arbitrated for the purpose of implementing § 251 obligations.⁵ Thus, transiting service is a necessary part of these ICAs and is a matter within the jurisdiction of the Commission and thus of the Arbitrator.

What is the source of SBC's transiting obligation? Section 251(a)(1) requires all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Local exchange carriers (LECs) are required to "establish reciprocal compensation arrangements for the transport . . . of telecommunications."⁶ An incumbent LEC (ILEC), like SBC, is additionally obliged to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection . . . (A) for the transmission and routing of telephone exchange service and exchange access[.]"⁷

As explained in the Commission's *Chariton Valley Order*, the existence of the obligation of indirect interconnection imposes by implication a transiting obligation – how else can there be indirect interconnections? Indirect interconnection is effected by the fact that the two carriers in question are each directly interconnected to an intermediary carrier. This intermediary carrier, for the purposes of the present discussion, is a dominant ILEC like SBC. SBC is not indirectly interconnected to the two carriers in question, it is directly interconnected. Its duties are set out in § 251(c)(2). That section requires SBC to interconnect with any requesting carrier for the purpose of exchanging traffic. The statute

⁵ See 47 U.S.C. § 252(a).

⁶ 47 U.S.C. § 251(b)(5).

⁷ 47 U.S.C. § 251(c)(2).

does not specify that the traffic must be intended for termination, or that it must have originated, on the two interconnected networks.

Decision:

For the reasons stated above, the Arbitrator determines that the CLECs' language is preferable.

2. How should the ICA define "transit traffic"?

Charter GT&C 18(b): *Which Party's definition for "transit traffic" is correct?*

Discussion:

SBC states that, in the event that the Commission determines that transit traffic should be addressed in the ICA, SBC's transit services agreement should be adopted. The definition for "transit traffic" in that agreement is more specific and should be adopted.⁸

Charter responds that it seeks to include "transit traffic" within the types of traffic that might constitute "OE-LEC" traffic, which is basically traffic where one end is inside SBC's service territory and the other is outside of it. This would arise in a case where, for example, a third-party LEC, with territory next to SBC's, might send SBC a call destined for a Charter customer, or vice versa. The fact that three LECs are involved instead of two does not change the classification of the traffic as "OE-LEC" or not. Charter also contends that SBC's claim that transit traffic is not addressed in the ICA, is factually inaccurate.⁹ Again, SBC is plainly wrong and its position is therefore not credible. Transit traffic is addressed in the agreement, repeatedly, and it is therefore appropriate to define such traffic in the manner proposed by Charter.

⁸ McPhee Direct, Sch. JSM-1, p. 3.

⁹ Compare McPhee Direct, at p. 74, to Barber Rebuttal, at p. 10.

Decision:

Charter's proposed definition is as follows:

1.1.158 "Transit Traffic" is traffic that either (a) originates on the network of a third party, is carried across the network of a Party, and is then delivered to the other Party for termination, or (b) originates on the network of a Party, is carried across the network of the other Party, and is then delivered to a third party for termination.

SBC's proposed definition is as follows:

2.19 "Transit Traffic" means all Section 251(b)(5) Traffic, ISP-Bound Traffic, IntraLATA Toll Traffic, CMRS provider-bound traffic and/or 800 IntraLATA Toll Traffic delivered via the Transit Traffic Service.

The Arbitrator concludes that Charter's language is preferable because it describes transit traffic in a functional manner.

3. What rates should the ICA set for the transiting service?

AT&T Network A-C 11 Issue 3: *May AT&T arbitrate language relating to a non-251/252 service such as Transit Service that was not voluntarily negotiated by the parties?*

AT&T IC Issue 3(a): *What is the proper method of intercarrier compensation for transit traffic?*

AT&T IC Issue 3(b): *What other obligations exist between the Parties concerning transit traffic?*

MCI NIM/ITR Issue 26: *For transit traffic exchanged over the local interconnection trunks, what rates, terms and conditions should apply?*

MCI Price Issue 33: *Should the price schedule include Transit Compensation?*

Discussion:

SBC states that, in the event the Commission determines that transiting is an arbitrable issue over SBC's objection and that the ICA should include transiting terms and conditions, SBC has provided appropriate contract language.¹⁰

¹⁰ Schedule JSM-1 to the Direct Testimony of SBC witness McPhee.

AT&T responds that SBC proposes to provide transit service at market-based rates. It is apparent to AT&T that SBC's objection is not to the actual transiting of traffic, but instead to having to transit traffic as a § 251 obligation and at TELRIC rates. However, because transit service is an obligation imposed on SBC pursuant to §§ 251(c)(2) and (3) of the Act, the applicable pricing standard is TELRIC. The FCC pricing rules make clear that TELRIC pricing applies to both interconnection and UNEs.¹¹ Moreover, AT&T points out that there is no "market" for transit service and thus market-based rates for the service cannot exist. AT&T asserts that there is a risk that SBC will be able to set and raise its transit rates with no limitation and AT&T will have no choice but to either pay those rates or to directly connect with third party carriers, which is objectionable and not in the public interest.

MCI asserts that the Commission should reject SBC's so-called Transit Appendix. This appendix is actually a separate, non-section 251/252 agreement, which is inapplicable given that the Commission does have the jurisdiction to arbitrate this matter. MCI states that this appendix was presented to MCI for the first time in the testimony of SBC witness McPhee, giving MCI very little time to conduct a meaningful review of its substantive provisions.

Decision:

Based on the foregoing, the Arbitrator determines that transit service is a § 251(c) obligation for SBC and that it therefore must be provided at TELRIC rates. The Texas PUC evidently recently reached the same conclusion: "[T]he Commission finds that

¹¹ 47 C.F.R. § 51.501(b).

SBC Texas shall provide transit services at TELRIC rates."¹² SBC's proposed Transit Appendix is inappropriate because it was drafted to reflect SBC's position that transit is an optional service that SBC can offer at market-based rates.

4. Should the ICA allow the CLECs to offer a transit service?

AT&T IC Issue 3(c): *Should the ICA include terms addressing AT&T as a transit provider?*

Discussion:

SBC states that the Commission should reject AT&T's proposed language, which provides terms for AT&T's transit of third party-originated traffic to SBC, because (1) the Commission cannot properly impose transiting language on the parties' ICA over SBC's objection, and (2) SBC has not agreed to receive transited traffic from AT&T and cannot lawfully be required to do so.

AT&T responds that SBC has an obligation under Section 251(c)(2) to permit AT&T to interconnect with SBC's network for the purpose of exchanging traffic with other carriers besides SBC. As long as AT&T interconnects with SBC and accepts traffic from SBC, then AT&T and SBC are mutually exchanging traffic. In addition, AT&T mutually exchanges traffic with other carriers who interconnect with SBC's network. This allows AT&T to effect an indirect interconnection with other carriers, which is expressly authorized by § 251(a)(1) of the Act, as well as ¶ 997 of the *Local Competition Order*.¹³ Paragraph 997 specifically refers to indirect interconnection as a scenario where two CLECs

¹² Docket No. 28821, Arbitration Award, pg. 23.

¹³ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report & Order*, CC Docket No. 96-98; CC Docket No. 95-185, 11 FCC Rcd 15499 (Adopted Aug. 8, 1996) ("*Local Competition Order*").

interconnect *through* the RBOC's network. However, SBC's proposal would effectively read out of the Act indirect interconnection via an RBOC's network.

SBC replies that AT&T is asking the Commission to require SBC to receive transited traffic from AT&T at the parties' point of interconnection, but identifies no statute, rule or other source of law that requires this. The 1996 Act requires the Commission to resolve the arbitration issues in a manner that "meet[s] the requirements of Section 251, including the regulations prescribed by the [FCC]," and the Commission cannot resolve this issue in AT&T's favor and at the same time adhere to that mandate, because AT&T does not tie its request to any requirement in § 251. Instead, AT&T relies solely on a policy argument, and its policy argument does not, SBC asserts, "hold water."

AT&T contends it should be afforded the opportunity to offer CLECs, CMRS providers and independent telephone companies' transit service . . . in competition with transit services offered by SBC."¹⁴ SBC does not disagree with that, but AT&T has that opportunity, regardless of whether it can transit traffic to SBC. AT&T maintains, however, that in order for its transit offering to be "viable," such carriers "must be able to have incidental amounts of traffic terminated to SBC."¹⁵ AT&T does not explain why that is, however, or how it could even be true. If a third party carrier is directly interconnected with SBC, why would that carrier ever route traffic to SBC -- even in "incidental amounts" through AT&T? All that would accomplish would be to increase the originating carrier's costs.¹⁶ SBC states that it prefers to directly interconnect with all other carriers, and has

¹⁴ Schell Direct, p. 126.

¹⁵ Schell Direct, p. 127.

¹⁶ McPhee Direct, p. 53.

the necessary ICAs agreements in place to be able to exchange traffic directly with such third party carriers.¹⁷

Decision:

The Arbitrator concludes that the Act, at § 251(a)(1) and § 251(c)(2), obligates SBC to receive transit traffic from AT&T at their point of interconnection. For this reason, AT&T's language is preferable.

¹⁷ McPhee Direct, p. 52.