

XV. OUT OF EXCHANGE TRAFFIC ("OE-LEC") ISSUES

1. Does the ICA require an Out-of-Exchange Traffic Appendix to cover traffic that either originates or terminates outside of SBC's incumbent service area?

SBC's Statement of the Issues: *Does SBC have an obligation to provide services outside of its serving area? Does the OE-LEC appendix obligate SBC to offer services outside its Incumbent Exchange Area? Should terms and conditions relating to Section 251(a) Interconnection be addressed in a separate out of exchange appendix?*

AT&T Network Interconnection Architecture Issue 16: *When both parties are providing service in LATA, should the parties be required to open each other's NPA-NXX codes, including NPA-NXX codes from and into exchanges that are not within SBC Missouri's incumbent local exchange area?*

CLEC Coalition OE-LEC Issue 1: *Should CLEC be required to have an Out of Exchange Appendix when CLEC is seeking Section 251(a) interconnection with SBC Missouri so that CLEC may serve exchanges which are not in SBC Missouri's incumbent exchange areas?*

CLEC Coalition Intercarrier Compensation Issue 3: *Should this agreement require SBC to exchange "out of exchange traffic" if the Parties have not agreed to the appropriate terms and conditions to address a Party operating as an Out of Exchange LEC?*

CLEC Coalition Network Interconnection Architecture Issue 6: *Should terms and conditions relating to Section 251(a) Interconnection be addressed in a separate out of exchange appendix.?*

Sprint OE-LEC Issue 1: *Should the Out of Exchange Appendix be included in the agreement or is it redundant information already adequately addressed in the ITR and NIM appendices?*

Sprint Interconnection Trunking Requirements Issue 8: *Should CLEC be required to have an out of exchange appendix when CLEC is seeking Section 251(a) Interconnection with SBC Missouri so that CLEC may serve exchanges which are not in SBC Missouri's incumbent exchange areas?*

WilTel OE-LEC Issue 1(b): *Should SBC be bound by the agreed upon contractual terms in the Appendix?¹*

¹ WilTel OE-LEC 1(a) is addressed under WilTel UNE 1.

WilTel General Terms & Conditions Issue 3: Should the ICA contain language that allows SBC to restrict WilTel's use of UNEs or other services under the ICA in violation of the FCC's rules?

Discussion:

SBC states that its proposed Out-of-Exchange Traffic (OE-LEC) Appendix, which provides terms and conditions for the exchange of traffic outside of SBC's incumbent exchanges, is necessary because the exchange of such traffic is not covered within the terms of the ICA. SBC's position is that SBC's obligations under § 251(c) are limited to those areas in which it is the ILEC. Therefore, the ICA does not cover circumstances in which the parties wish to exchange traffic in the areas where SBC is not the ILEC. SBC does not believe it is appropriate to address Out-Of-Exchange Traffic in the Interconnection Appendix because the Interconnection Appendix applies only to SBC's incumbent territory. SBC has therefore offered CLECs the Out-of-Exchange Traffic (OE-LEC) Appendix to govern this type of Out-of-Exchange traffic.²

AT&T responds that SBC is wrong with respect to the scope of its § 251(c) obligations. AT&T states that its proposed language addresses the situation where SBC's tandem serves non-SBC territories in a particular LATA. In that case, in order for AT&T's customers in the exchange of an ILEC whose switch subtends SBC's tandem to have the same calling scope as that ILEC's customers and to be callable by SBC's customers, SBC must open AT&T's NPA-NXX codes in the SBC tandem serving the exchange in question. SBC argues that because the traffic involved either originates or terminates outside of SBC's ILEC territory, SBC has no obligation to provide interconnection for exchange of this traffic. Therefore, SBC's proposed language requires AT&T to agree to a separate Out-of-

² McPhee Direct, p. 65-66.

Exchange Traffic (OE-LEC) Appendix if it wants its NPA-NXX codes opened in SBC's tandems. The only rationale provided by SBC is its contention that its obligations under the Act are only as extensive as its ILEC territory.

The CLEC Coalition responds that "[t]he effective purpose of the appendix is to require a direct interconnection with SBC for CLECs that operate in exchanges served by incumbent local exchange carriers other than SBC."³ SBC is attempting to require CLECs that operate in exchanges where SBC is not the incumbent LEC and which also operate in exchanges where SBC is the incumbent LEC to enter into a separate appendix for the exchange of traffic that originates or terminates in an exchange where SBC is not the ILEC. The Coalition states that it opposes the OE-LEC Appendix because it "is completely unnecessary."⁴ The interconnection and compensation provisions for this type of traffic are already covered, either by the relevant interconnection and compensation provisions of the ICA, the Commission's decisions regarding the exchange of MCA traffic, or by each carrier's access tariffs. The Coalition asserts further that this appendix is contrary to § 251(a) because it requires the CLEC to establish a direct connection with SBC within SBC's network and actually prohibits an indirect interconnection. By requiring a direct interconnection, it is also contrary to the requirements of the MCA plan, which specifically contemplates local MCA traffic being routed via indirect interconnections between LECs. The Coalition's witness, Kohly, testified that "[t]hese additional conditions increase the CLECs' operating costs and place the CLECs at a competitive disadvantage relative to the ILECs they compete with."⁵

³ Kohly Direct, p. 8.

⁴ *Id.*, at p. 9.

⁵ *Id.*, at p. 10.

Sprint states that the terms and conditions contained within SBC's proposed Out-of-Exchange Traffic (OE-LEC) Appendix are redundant and that they fully addressed in the Interconnection Trunking Requirements (ITR) and Network Interconnection Methods (NIM) Appendices. Sprint points out that it exchanged traffic with SBC in Missouri under the M2A without the existence of such an appendix and there is no reason that the existing arrangements cannot continue to function.⁶ Sprint believes that Foreign Exchange or Transit Traffic, as identified in "General Terms & Conditions", Sections 1.1.48 and 1.1.138, respectively, is equivalent to what is being called "Out of Exchange Traffic." Sprint states that this appendix represents an attempt by SBC to limit by contract its obligations to provide 251(c) services.

WilTel is willing to accept the Out-of-Exchange Traffic (OE-LEC) Appendix with certain modifications. WilTel seeks to add the phrase "except as provided in this Appendix" because, in each case, SBC's language states that SBC is not obligated to do something that this Appendix "Out of Exchange Traffic" is specifically designed to address. WilTel urges the adoption of its proposed language in order to make it clear that SBC is bound under this appendix. WilTel states further that, contrary to SBC's assertion, its proposed language does not require SBC to provide service outside its territory. SBC's proposed language could potentially allow SBC to unlawfully restrict WilTel's use of UNEs or interconnection services under this ICA. For example, SBC's "only to the extent" language could be interpreted to allow SBC to cease providing a UNE to WilTel to the extent it is also being used to provide exchange access service, a use permitted pursuant to FCC rules, provided that the UNE is not purchased solely for that purpose.

⁶ Knox Rebuttal, pp. 2-3.

Decision:

The Act, at § 251(c), imposes certain additional duties upon ILECs such as SBC. It is true, as SBC points out, that the Act at § 251(h)(1) defines "ILEC" as a LEC that has a particular relationship or function "with respect to an area." However, it does not follow that the ILEC's duties under § 251(c) are similarly limited to a geographical area. Such a limitation exists only if Congress so intended.

Section 251(c)(2)(B) requires SBC to interconnect with a requesting carrier "at any technically feasible point within the carrier's network." Nothing in this language refers explicitly to the ILEC's service area. An SBC tandem that is located outside of SBC's service area is nonetheless "within" its network and it follows that SBC is obligated to permit interconnection there. Likewise, § 251(c)(3) requires SBC to provide access to UNEs "at any technically feasible point." As in the case of interconnection, nothing in this language requires that this point be located within the area for which SBC is the ILEC. SBC must provide access to UNEs outside of its service area if it is technically feasible to do so. Feasibility, not geography, is the basis of the limitation that Congress placed on this duty. SBC's obligation to provide collocation under § 251(c)(6) is also not geographically limited to its service area. Referring to the example used above of a SBC tandem located outside of its service area, § 251(c)(6) requires SBC to provide collocation there to a requesting carrier.

Resale is somewhat different because it is the sale to "subscribers who are not telecommunications carriers" of "any telecommunications service that the [ILEC itself] provides at retail[.]"⁷ It is reasonable to suppose that Congress intended such reselling to

⁷ 47 U.S.C. § 251(c)(4)(A).

occur within the same geographic area in which the ILEC is selling the service in question at retail. To the extent that SBC provides a retail service outside of its incumbent area, the Act requires SBC to allow the resale of that service outside of SBC's incumbent area. The ICA should so provide.

For these reasons, the Arbitrator determines that the Act requires, and the ICA should provide, for SBC's provision of UNEs, collocation and interconnection outside of its incumbent local exchange area. However, the Act does not require, and the ICA need not provide for, the resale of SBC's retail services outside of SBC's incumbent local exchange area, except to the extent that SBC itself is engaged in such sales.⁸

Given that SBC's obligations to interconnect and to provide access to UNEs and collocation are not restricted to its incumbent area, SBC's obligation to carry traffic is also not geographically restricted. For this reason, the Arbitrator agrees with the CLECs that the Out-of-Exchange Traffic (OE-LEC) Appendix is unnecessary.

Because the Arbitrator here finds for the CLECs on Out-of-Exchange Traffic (OE-LEC) Issue 1, above, the CLEC Coalition's other seven OE-LEC issues are moot and need not be decided.⁹

⁸ SBC asserts that it does not operate outside its own incumbent territory in Missouri. McPhee Direct Testimony, pp. 66-67.

⁹ CLEC Coalition OE-LEC Issues 2 through 8.