BEFORE THE PUBLIC SERVICE COMMISSION OF MISSOURI

Southwestern Bell Telephone, L. P. d/b/a/ SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A")	**)**	**Case No. TO-2005-0336**

POST-HEARING BRIEF OF AT&T COMMUNCATIONS OF THE SOUTHWEST, INC., TCG ST. LOUIS AND TCG KANSAS CITY, INC.

COMES NOW AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc. and files this its Post-Hearing Brief, and in support whereof, would show as follows:

INTRODUCTION

The focus of this proceeding is on what has turned into the Holy Grail of local exchange competition: "facilities–based competition." Even with the UNE issues, with the recent delisting of certain unbundled network elements, many of the issues focus on the ability to use UNEs to provide facilities-based service. Consequently, the decisions in this case are crucial to the *ongoing development* of facilities-based competition. Both the CLECs and SBC have made similar arguments about not fixing things that aren't broke. Obviously there are disagreements about what's broken and what's not, about what could maybe use a little tweaking and what is maybe broken beyond repair. AT&T believes that it has provided better reasons for why the status quo should change, or should remain. Most of AT&T's proposed changes discussed in this brief focus on issues where there have been developments in the law since prior Commission decisions that require those decisions to now change. For some of those issues, AT&T has been

arguing for its position since the very first arbitrations, and in recent years the FCC has provided guidance confirming that AT&T's interpretation of the FCC's regulations is correct.

For other issues, for example in General Terms and Conditions, SBC is the party primarily seeking changes from the status quo. SBC's arguments are less grounded in the law and regulations, and are based more on SBC's assertions about what "works" for SBC. Typically, on these issues, the entire CLEC industry is telling the Commission that the status quo works for them and SBC's proposals will hinder competition by shifting more costs and burdens to competitors. The Commission must keep in mind who the parties are, and their relative strengths in the market place, and that the goal is not to create another SBC but to provide alternatives. After 100 plus years of no competition for local exchange services, competition needs to be *fostered,* it doesn't just happen on its own.

AT&T's approach to this brief is to roughly follow the order of issues as they were raised in the numerically in the ICA: General Terms and Conditions, UNEs, Network Interconnection, Reciprocal Compensation, Collocation and Right of Way, Comprehensive Billing and Pricing. Of course, all of the disputed issues were important enough to AT&T to bring to the Commission for a resolution, and any failure to discuss an issue in this brief is not an indication that AT&T is acquiescing or has abandoned its original position. To the extent possible, AT&T has tried to consolidate related issues and note where issues are interrelated so that separate briefing of similar issues can be minimized. Finally, AT&T has provided an issue statement for each issue discussed. The

issue statement is generally the one proposed by AT&T in the Final DPLs filed shortly before the hearing.

GENERAL TERMS & CONDITIONS

GTC Issue 1:

(a) Should the Inter-connection Agreement obligate SBC to provide interconnection, UNEs, collocation and resale services outside SBC MISSOURI'S incumbent local exchange area?

(b) Should the Agreement include obligations under Section 271 of the Act or should it only cover Section 251?

AT&T provided the direct and rebuttal testimony of Richard Guepe in support of its position on General Terms and Conditions ("GT&Cs") issues. In regard to GT&C Issues 1(a) and 1(b), Mr. Guepe explained that AT&T only seeks to make clear that SBC's obligations are not merely limited to those contained in § 251 of the Act, but also those set forth in § 271 and state law.[1] SBC's proposed language would limit its obligations to § 251 requirements only.

AT&T's Mr. Guepe also explained that AT&T's proposed language is intended to avoid the situation in which SBC attempts to use geographic borders to deny service to AT&T. This issue relates to AT&T's right to interconnect with SBC through another ILEC's tandem switch in a LATA where SBC does not have a tandem. For example, SBC attempts to use its language to limit its obligations to open NPA-NXX codes assigned to AT&T in exchanges outside SBC's franchised territory but within SBC-deployed tandem switches.[2] By refusing to do anything to facilitate traffic exchange with AT&T where that traffic originates or terminates outside of SBC's service territory, SBC's position threatens the ubiquitous service that Missouri consumers expect and

[1] Guepe Direct at 3.
[2] Guepe Direct at 4.

deserve and otherwise violates the requirements of Section 251, which requires SBC to take such steps. AT&T further refers to its position of the NPA-NXX issue addressed in Network Architecture Issue 16.

SBC's proposed language would limit its obligation to provide UNEs to Section 251 of the Act: "The Parties acknowledge that SBC MISSOURI is ***only obligated*** to make available" Interconnection , UNEs and resale services under Section 251 of the Act. (SBC Proposed Section 1.1 (emphasis added)). SBC's language would effectively vacate Missouri law, Missouri Commission orders, and even Section 271 unbundling obligations by specifically stating that SBC has "no obligation" to provide UNEs or interconnection except as enumerated in Section 251.

SBC's proposed language is contrary to the Missouri Commission's authority, and SBC's obligations, under both state and federal law. This Commission is fully empowered, pursuant to state and federal law, to impose unbundling and interconnection obligations on SBC. The Missouri Commission is therefore authorized to establish or enforce pro-competitive state law requirements in an interconnection agreement in addition to implementing federal requirements. *See also* 47 U.S.C. § 252(e)(3) (making it explicit that, subject to § 253,[3] "nothing in [§ 252] shall prohibit a State commission for establishing or enforcing other requirements of State law in its review of an agreement."). SBC's language would unlawfully negate the authority to impose such requirements, as well as SBC's obligation to obey them.

Section 271 of the federal Act provides unbundling obligations independent of § 251 of the Act. State commissions, in the context of resolving interconnection disputes

[3] Section 253 prohibits states from imposing legal requirements that create barriers to entry.

under § 251 of the Act, plainly retain authority to set the prices and terms for all elements listed in § 271. The federal Act expressly contemplates that the unresolved negotiations issues in § 252 arbitrations would include determinations regarding the rates, terms, and conditions of § 271 checklist items. SBC, after all, can only comply with its § 271 obligations by entering into interconnection agreements "under section 252."[4]

Given the unlawful restrictions that SBC's proposed language contains, the Commission should adopt AT&T's proposed language.

GTC Issue 2: If AT&T orders a Product or Service not covered by this Agreement, should the Parties have to negotiate the applicable rates, terms and conditions or should SBC's tariff or generic contract apply to such Product or Service?

This issue involves whether and how AT&T may order products or services from a valid SBC tariff or general contract. AT&T is proposing that it be able to order products or servces from an SBC tariff or general contract without first being required to amend its ICA. AT&T is not seeking the ability to mix or match tariff prices with terms and conditions for products and services contained in the ICA. AT&T is also willing to amend the ICA in connection with its proposed section 30.2.1 of the GTCs. AT&T simply asks that it not be required to amend the ICA prior to ordering products or services from either an SBC tariff or contract of general availability. Such a requirement would serve no purpose but to inject delay in AT&T's ability to serve its customers. AT&T urges that the Commission adopt AT&T's position and proposed language in GT&C Section 4.4.1 and also reject SBC's proposed language for GT&C Sections 4.4.1, 4.4.1.1 and 4.4.1.2.

[4] 47 U.S.C. § 271(c)(1)(A).

GTC Issue 3: Where this Agreement shows a rate, price or charge marked as "To be Determined," "TBD," or otherwise not specified, should the applicable rate be established in accordance with Section 4.1.1 or should SBC be allowed to apply generic rates for any such products and services?

The parties have significantly narrowed the dispute in this issue since the filing of the Arbitration Petition. The issue now centers around the treatment of products or services for which there are terms or conditions in the ICA but which include a dash or a blank for the price. SBC's proposed language would provide that when a price is established by SBC and incorporated in its generic contract, that price shall apply retroactively. AT&T has agreed to this process if the price is listed as TBD, but objects to this retroactive treatment for rates that are listed as a dash or blank. As Mr. Guepe testified, dashes or blanks can result from word processing errors, or even quirks associated with popular word processing programs.[5] AT&T therefore urges the Commission to adopt AT&T's proposed GT&C Section 4.5 and 4.5.1 and reject SBC's proposed GT&C Section 4.5 and 4.5.1.

GTC Issue 4: Should the assignment provision be reciprocal?

The terms and conditions concerning assignment of contractual obligations and rights should be reciprocal. AT&T relies on SBC-provided UNEs and interconnection to provide services to its customers. It is therefore reasonable for AT&T to have the right to reasonably ensure that any such third party chosen by SBC has the ability to perform in accordance with the Agreement.[6] AT&T's proposal—requiring consent of the other party for an assignment and providing that such consent "may not be unreasonably withheld, conditioned or delayed"—is reasonable. AT&T urges the Commission to adopt

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5 Guepe Rebuttal at p. 13.
6 Guepe Direct at 15.

its proposed language, which provides a reciprocal assignment provisions requiring the other party's consent, which "may not be unreasonably withheld, conditioned, or delayed." AT&T Proposed GT&C Section 5.1.1 and 5.1.2. Like SBC, AT&T has a reasonable interest in ensuring that any party chosen by SBC to perform its obligations under the Agreement has the ability to do so.

GTC Issue 5: Should the Billing Party be permitted to discontinue Collocation or interconnection related functions, services, products, or facilities if the Billed Party fails to pay following receipt of the second notice or must the Billing Party rely on other remedies provided under this Agreement?

Since the hearing, AT&T and SBC have settled this issue.

GTC Issue 6: Must SBC obtain an order from the Commission prior to terminating this Agreement or suspending or discontinuing any services provided under this Agreement?

Since the hearing, AT&T and SBC have settled this issue.

GTC Issue 7: What are the appropriate terms surrounding AT&T ordering products or services from an SBC MISSOURI tariff?

Where SBC voluntarily makes a tariff offering, AT&T should be able to choose to order services from the tariff and subject itself voluntarily to the tariffed terms and conditions for such services. Assuming SBC makes a voluntary tariff offering available to AT&T, and AT&T wishes to purchase that offering from the tariff (and abide by the terms and conditions associated with that offering as found in the tariff), there is no reason that AT&T must also amend the Agreement to allow it to do so, as SBC argues.[7] AT&T has a separate option requesting that SBC negotiate terms and conditions to make available a tariff offering per the Agreement. Accordingly, AT&T requests that the Commission adopt AT&T's proposed language found in GT&C section 30.2.1.

[7] Guepe Direct at p. 9.

UNES

UNE Issue 1: Is it appropriate for the ICA to include the term "lawful" UNE?

At the crux of this issue is what UNEs SBC is required to provide to AT&T. According to AT&T, SBC is required to provide UNEs as required by federal law and state law (as discussed above) and as required by its Section 271 obligations as the quid pro quo for SBC's in-region interLATA long distance authority. AT&T also proposes that to the extent the permanent unbundling rules and other relevant regulatory, judicial and legislative decisions affect the proposals and issues raised herein, the Parties should invoke the "change of law" provisions of the Parties' ICA to work together to interpret and implement those changes of law. If the Parties cannot agree, AT&T proposes that any disputes be brought to the Commission's attention pursuant to and in compliance with the ICA's dispute resolution procedures. After all, as AT&T contends, this is precisely why the ICA has change of law and dispute resolution provisions.

SBC, on the other hand, candidly contends it should have not only the last, but the only word on how the *TRO*,[8] the *USTA II*[9] decision and the more recently issued *TRRO*[10] and FCC permanent rules ought be interpreted and implemented. What SBC essentially proposes is that it only be required to provide what it terms as "Lawful UNEs" and it proposes to include the "Lawful UNEs" phrase throughout the ICA.

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8 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338); *Implementation of the Local Competition Provisions of the Telecommunications* Capability (CC Docket No. 98-147), FCC No. 03-036, (rel. Aug. 21, 2003) (the "*TRO*" or "*Triennial Review Order*").

9 *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

10 Order on Remand, *In the Matter of Unbundled Access to Network Elemnts Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338), FCC No. 04-290 (rel. Feb. 4, 2005)

Stated simply, SBC's proposal is that if the Commission gives SBC carte blanche to interpret and implement the FCC's rules and gives SBC carte blanche to avoid its Section 271 obligations, then there is a clear understanding of the rulings – i.e., SBC's understanding -- and, therefore, no need for the Parties to engage in negotiation and change of law at all, because what SBC says, goes. In reality, of course, SBC has obligations over and above its section 251 unbundling obligations arising from the FCC's rules. Moreover, not once have the Parties been able to agree upon and implement the FCC's unbundling rules immediately upon issuance. Rather, the Parties have been required to invoke the change of law provisions of their ICA and to renegotiate the ICA based on those rules, with all disputes coming to the Commission for resolution. While SBC may not like that process, the correct answer is certainly not to strip AT&T of its rights under the federal rules and under the ICA.

The Illinois Commission, deciding the very same issue in the SBC Illinois/XO arbitration -- was deeply troubled by SBC's proposal – as this Commission also undoubtedly is – and rejected it outright:

> **The Commission rejects SBC's proposal to insert the term "lawful" in the sections of the amended ICA … and in connection with any other disputed issue in this arbitration as well. Such language is unnecessary, likely to trigger future disputes between the parties, and could be readily abused to delay XO's access to SBC services. Since XO cannot hope to successfully demand access to "unlawful" UNEs, inclusion of this term serves no constructive purpose. Indeed, if such inclusion were necessary to the identification of what is permissible under the ICA, the "lawful" modifier would have to be inserted before every material noun in the ICA.**
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> **Similarly, SBC proposes to place the "lawful" modifier before references to the orders and/or rules of the FCC, the courts and this Commission. Unless they are under stay by a superior authority, such orders and rules are inherently lawful and effective. In effect, SBC's proposed language would empower SBC to implement the ICA by second-guessing – outside regular appellate processes – the viability of**

regulatory and judicial rulings.

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It is entirely reasonable for SBC to propose ICA language that will assure that SBC is not obligated to provide services at TELRIC prices unless those services, and the carriers requesting them, are entitled to such prices. It is entirely unreasonable to achieve that objective by empowering SBC to unilaterally adjudge the content, validity and viability of non-stayed judicial and administrative authorities. Moreover, by arrogating such power, SBC will elicit disputes with XO and delay XO's access to competitive services. The far better course is to employ language providing that when SBC is relieved of the obligation to furnish a UNE under federal and state law, its corresponding obligation under the ICA will also be relieved. …

The answer, then, … is that SBC is not obligated to continue providing UNEs under the ICA when no such obligation exists under federal or state law. However, SBC's "unlawful" UNE scheme is ill-suited to excluding that obligation from the ICA.[11]

UNE Issue 2:

2(a) How should the parties reflect the declassification of certain UNEs by the FCC in its TRO, as affirmed by the USTA II decision and TRRO?

2(b) Should the Agreement require SBC MISSOURI to provide UNEs when they are not required under Section 251 of the Act (i.e. when they are arguably required under state law or Section 271)?

This issue involves the process and notice that will apply for UNEs that are declassified.[12] SBC's contract language in Attachment 6: UNE at sections 1.7.1.1 through 1.7.5.4 and related sections identified in the DPL would give SBC unprecedented opportunity to decide unilaterally what elements will be unbundled and which ones will not. Further, if SBC were to decide that an element is declassified or delisted, it would

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[11] *Amendatory Arbitration Decision*, ICC Docket No. 04-0371, *XO Illinois, Inc. Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended* (hereafter, *XO Illinois Arbitration Order*), October 28, 2004, pp. 46-47.

[12] AT&T notes that a section of its proposed contract language in this UNE Issue 2 overlaps with its proposed contract language in UNE Issue 1. Specifically, AT&T's proposed section 1.1 is listed both for UNE Issue 1 and UNE Issue 2. Section 1.1 is only tangentially related to UNE Issue 2. If the Commission decides in favor of AT&T's section 1.1 in UNE Issue 1, that decision should be carried forward to UNE Issue 2.

have additional rights to modify or terminate AT&T's access to and use of such elements on only 30-days notice. The process set up by SBC in these paragraphs is one-sided and totally inappropriate.

SBC lists three instances that trigger declassification of UNEs in section 1.7.1.2:

> (a) the issuance of a legally effective finding by a court or regulatory agency acting within its lawful authority that requesting Telecommunications Carriers are not impaired without access to a particular network element on an unbundled basis; or (b) the issuance of any valid law, order or rule by the Congress, FCC or a judicial body stating that an incumbent LEC is not required, or is no longer required, to provide a network element on an unbundled basis pursuant to Section 251(c)(3) of the Act; or (c) the absence, by vacatur or otherwise, of a legally effective FCC rule requiring the provision of the network element on an unbundled basis under Section 251(c)(3).

These descriptions are an important part of SBC's construct of "lawful UNEs." Of critical concern is SBC's assertion through its definition of "declassification" that it would only take, for example, a vacatur of an existing FCC unbundling rule, to permit SBC to begin its very short (30-day) process of terminating AT&T's access to the affected UNEs. Had SBC's proposed language been in effect in the M2A agreements, SBC could have terminated access to UNE-P on July 16, 2004, 30 days after the *USTA II* Order vacating certain of the FCC's *TRO* rules. This action would have been premature, as demonstrated by the FCC's subsequent decision in the *TRRO*. SBC's proposed process would eviscerate the change-of-law process. On its face, this is an unreasonable outcome and AT&T strongly urges the Commission to reject SBC's proposed transition and notification language reflected in sections 1.7.1.1 through 1.7.5.4.

SBC's proposed unilateral transition process is inconsistent with the transition process envisioned by the FCC. The transition provisions established by the FCC in both the *TRO* and *TRRO* specifically require the parties to follow Section 252 processes

to implement changes in SBC's unbundling obligations.[13] Further, the FCC insisted upon the Section 252 process over the express request by several Regional Bell Operating Companies ("RBOCs") that the process be overridden to "permit unilateral change to all interconnection agreements to avoid any delay associated with negotiation of contract provisions."[14]

Instead of the transition language proposed by SBC, AT&T proposes that the parties utilize instead the agreed-to change-of-law language in the General Terms and Conditions for any future declassification of UNEs.[15] Prospectively, we cannot know exactly what circumstances might trigger further delisting or whether any such future delisting will be accompanied by mandated transition periods as were adopted in the *TRRO*. Thus, AT&T strongly recommends against adoption of SBC's proposed transition language in favor of using the contractual change-of-law process.

In addition to opposing SBC's transition language, AT&T proposes language addressing the "wire center list" in this issue. *See* AT&T's proposed section 1.7.2.7 et seq. The *TRRO* set out criteria that are used to determine whether certain loop types and/or interoffice transport services remain available as UNEs or are delisted. AT&T proposes contract language in sections 1.7 through 1.7.2.7.4 that acknowledges the FCC's definitions and rules and specifies how and when AT&T may challenge SBC's wire center list if the list has not been reviewed and approved by the Missouri Commission. The language also specifies SBC's obligation to process orders for service placed by

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13 TRO at ¶ 701; TRRO at ¶¶ 143, 196 & 227.

14 TRO at ¶ 701.

15 As to the present list of UNEs that have been declassified or delisted, AT&T agrees that it is appropriate to incorporate these into the successor interconnection agreement and, as discussed below, the SBC-AT&T proposed Temporary Rider to Attachment 6: UNE. AT&T and SBC have already agreed to contract language incorporating the delisting of UNEs such as dark fiber, OCn loops, unbundled switching, etc.

AT&T if there is a challenge to SBC's list after a "reasonably diligent inquiry" into AT&T's eligibility to place such orders.[16] AT&T's proposed contract language provides, however, that if the wire center list has been independently verified by the Commission, then will not request unbundled access to high capacity loops and transport in wire centers in which CLECs have been found not to be impaired. AT&T also proposes contract language that provides that once approved by the Commission, the wire center list cannot be changed by SBC during the term of the ICA. This language is necessary in order to preserve certainty in the ICA throughout its term.

The Commission should adopt AT&T's proposed language as best reflecting the FCC's *TRO* and *TRRO* decisions and resulting rules, and reject SBC's proposed language.

UNE Issue 3: Should SBC MISSOURI provide UNEs to AT&T without use or access restrictions, except for those provided in 47 CFR 51.318, and as otherwise provided in the ICA?

This issue is subsumed with UNE Issue 2. The only disputed contract language (AT&T proposed section 1.2 and SBC proposed section 1.7.5.4) is also raised in UNE Issue 2 above.

UNE Issue 4: Must AT&T meet certain conditions in order to access and use any UNEs?

UNE Issue 5:

(a) May AT&T combine UNEs with other services (including access services) obtained from SBC MISSOURI?

(b) May AT&T use the functionality of a UNE "without restriction"?

[16] *See TRRO* paragraph 234.

UNE Issue 12: Under what circumstances is SBC obligated to perform the functions necessary to commingle a UNE or combination?

UNE Issue 14: Is SBC MISSOURI's language in 2.11.6 sufficiently covered in other areas of this Attachment and therefore unnecessary?

Together, these issues address the basic manner in which SBC is obligated to provide UNEs, both in combination and on a commingled basis. AT&T's proposed contract language (contained in Attachment 6, §§ 1.8, 2.4, 2.11.2, 2.11.3) simply obligates SBC to provide UNEs without restriction or limitation, except as provided in 47 C.F.R. § 51.318. That is exactly what the law requires.[17] AT&T's language therefore obligates SBC to provide AT&T with UNE combinations, as provided by law, as well as allow AT&T to "combine" or "commingle" UNEs purchased from SBC with other facilities and services, including (i) one or more other network elements, no matter how purchased, (ii) AT&T-owned or third-party-provided facilities, and/or (ii) other services (including special access services) obtained from SBC.[18] AT&T's language is consistent with applicable law, as confirmed in the *TRO*, in which the FCC removed commingling restrictions from its rules and held that CLECs can commingle UNEs with non-UNEs.

Commingling allows competitive carriers to use some of the spare capacity they have on their leased special access trunk groups to carry local traffic such that competitors do not have to maintain two under utilized trunk groups (one for local traffic and one for toll traffic) where one would suffice. Prior to the issuance of the *TRO*, the FCC placed certain restrictions on when competitive carriers could "commingle" or

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[17] *See* 47 C.F.R. §51.309(a)("Except as provided in § 51.318, an incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements for the service a requesting telecommunications carrier seeks to offer.")

[18] *See* AT&T Proposed Attachment 6, § 2.4. The parties have a separate issue regarding the ability to commingle 271 elements addressed in UNE Issue 10 below.

combine "loops or loop-transport combinations with tariffed special access services."[19] The *TRO* eliminated these restrictions. Instead, the FCC modified the rules to "affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (e.g. switched and special access services offered pursuant to tariff), and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request."[20] SBC is now required to permit CLECs like AT&T to commingle UNEs or UNE combinations it obtains from Verizon with other wholesale facilities.

These provisions are particularly important since commingling helps level the playing field for CLECs to compete with SBC in the local exchange market. The FCC agreed with several state commissions "that the commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them either to operate two functionally equivalent networks – one network dedicated to local services and one dedicated to long distance and other services – or to chose between using UNEs and using more expensive special access services to serve their customers."[21] Because SBC and the other incumbents place no such restrictions on themselves, the FCC found that restricting commingling by the CLECs was unjust, unreasonable, and discriminatory.[22]

In contrast to the FCC rules that obligate SBC obligated to provide commingling or combinations without restrictions, *see* 47 C.F.R. §51.309(f), SBC's proposed language at section 2.1.1 et seq. would severely limit the utility of any UNE that AT&T obtains from SBC by imposing a number of restrictions. For example, SBC proposes to limit

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19 Supplemental Order Clarification, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,June 2, 2000 at ¶ 22.

20 *TRO* at ¶ 579.

21 *TRO* at ¶ 581.

22 *Id*.

AT&T's right to access UNEs by requiring AT&T to use UNEs for the provision of "telecommunications services."[23] AT&T has a right to purchase UNEs to provide telecommunications services *along with other services*, and therefore objects to this language.[24]

AT&T also objects to SBC's proposed language (in its proposed § 2.1.1 in AT&T UNE Issue 4) that would obligate AT&T to immediately notify SBC if AT&T is no longer a telecommunications carrier. Although AT&T acknowledges that it must be a certificated carrier to purchase UNEs, AT&T believes it should have a reasonable timeframe (e.g., 60 days) to notify SBC of a change in its certification status.

AT&T's language, on the other hand, is consistent with 47 C.F.R. § 51.309(a)-(g), which, among other things, provides that "[e]xcept as provided in § 51.318" an ILEC "shall not" impose any "limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements." The FCC's commingling rules explicitly provide that SBC must allow AT&T to commingle UNEs and non-UNEs. To begin, 47 C.F.R. §51.309(f) provides that: "Upon request an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or a combination of unbundled network elements *with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC*." (Emphasis added). And "commingling" itself is defined by the FCC as the "connecting, attaching, or otherwise liking of an unbundled network element, or a combination of unbundled network elements" to any "facilities or services" that a CLEC "has "obtained

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[23] *See* SBC Proposed Language, Attachment 6 §§2.1.1 (UNE Issue 4).

[24] *See TRO* at ¶148 ("The statute does not require that access be provided *exclusively* for telecommunications service.")

at wholesale from an incumbent LEC."[25] Indeed, in adopting these rules, the FCC found that "[A]n incumbent LEC shall permit a requesting telecommunications carrier to commingle a UNE or a UNE combinations with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method *other than unbundling under section 251(c)(3) of the Act*."[26]

Because SBC's proposed language repeatedly and consistently imposes limitations on its obligations to provide combinations and commingling, the Commission should adopt AT&T's proposed language on the UNE Issues 4, 5 and 12 as found in Attachment 6, §§ 1.8, 2.4, 2.11.2, and 2.11.3. AT&T's language accurately captures SBC's legal obligations to provide AT&T UNEs, UNE combinations, and commingling without restrictions, except as provided in 47 C.F.R. § 318.

Finally, and relatedly, UNE Issue 14 raises the question of whether SBC's proposed language for § 2.11.6 of Attachment 6 is redundant and unneeded. AT&T objects to SBC's proposed § 2.11.6 in Attachment 6 (UNE Issue 14) as both redundant and unlawful. The SBC proposed language in this section again unlawfully seeks to limit SBC's commingling obligations to so-called Section 251(c)(3) UNEs, and should be rejected. For the reasons discussed above, the Commission should reject SBC's proposed §2.11.6 in Attachment 6 and adopt AT&T's proposal on UNE Issue 14.

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[25] 47 C.F.R. § 51.5.
[26] *TRO* at ¶579.

AT&T UNE Issue 6: Should SBC MISSOURI's obligation to provide UNEs, if they can be made available via routine network modification, be dependent upon SBC's determination of whether spare facilities exist?

AT&T UNE Issue 18:

How should routine network modifications be described in the ICA?

Is SBC entitled to charge AT&T for routine network modifications?

While some of the subsequent text of Attachment 6: UNE is in dispute, AT&T and SBC have agreed in section 4.8.2 to the following basic definition of what constitutes a routine network modification:

> A routine network modification is an activity that SBC MISSOURI regularly undertakes for its own customers. Routine network modifications include, rearranging or splicing of existing cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that SBC MISSOURI ordinarily attaches to activate such a loops to activate for its own retail customers under the same conditions and in the same manner that SBC MISSOURI does for its own retail customers. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. SBC MISSOURI will place drops in the same manner as it does for its own customers.

The Parties' disagreement in AT&T UNE Issue 6 centers on whether SBC should be permitted to condition its obligation to provide UNEs on its unilateral determination of whether "spare facilities" exist within its network. The "spare facilities" loophole that SBC has inserted in its proposed language at Section 2.5 would permit SBC to establish (or maintain) a practice that discriminatorily reserves unused facilities for SBC's own use. Under this proposal, it is very likely that the "spare facilities" available to AT&T and other CLECs would end up being only those unused facilities that exceed SBC's current and projected needs.

If SBC is allowed to restrict access to only those UNE facilities that it deems to be "spare," then AT&T and other CLECs will be unfairly kept from otherwise accessible and available UNEs. This will deprive AT&T and other CLECs of the facilities necessary to provide service to end users, resulting in less competition and fewer customer choices. Moreover, it will unreasonably interfere with CLECs' non-discriminatory access to UNEs as required by the Act.

SBC's contract language in section 2.5 proposes that AT&T use the BFR process to obtain facilities where none are deemed to be spare. However, the BFR process is time-consuming, often unproductive and favors the ILEC. While the BFR process has *bona fide* applications and should be part of the ICA, its misapplication here is certainly no substitute for the non-discriminatory access to UNEs provided for under the Act.

The "spare facilities" limitation that SBC would place on its obligation to provide UNEs is not the same as acknowledging that SBC is not required to construct new outside plant facilities for requesting CLECs. AT&T agrees that SBC's obligation to provide UNEs does not extend to new construction of aerial or buried cable. However, the limitation that SBC is attempting to impose here is very different, allowing, as it does, a discriminatory reservation of existing facilities for SBC's use that is not at all the same as a duty to construct new outside plant.

With regard to AT&T UNE Issue 18, the primary remaining issues are related to SBC's proposed individual case basis ("ICB") pricing for routine network modifications. SBC's language to which AT&T objects is in sections 4.8.7, 8.5.7.6, and 15.12.6.

SBC is not entitled to impose additional charges on AT&T to perform routine network modifications. The FCC has noted that the costs of routine network modifications are most often already included in existing TELRIC rates:

> We note that the costs associated with these modifications often are reflected in the recurring rates that competitive LECs pay for loops. Specifically, equipment costs associated with modifications may be reflected in the carrier's investment in the network element, and labor costs associated with modifications may be recovered as part of the expense associated with that investment (*e.g.*, through application of annual charge factors (ACFs)). The Commission's rules make clear that there may not be any double recovery of these costs (*i.e.*, if costs are recovered through recurring charges, the incumbent LEC may not also recover these costs through a NRC).

TRO, ¶ 640. This means that, in most instances, existing non-recurring and recurring UNE rates have been set at levels that fully recover an ILEC's forward-looking cost of performing routine network modifications and, as a consequence, no further cost recovery would be justified. Certainly, no ILEC should be permitted to add these charges to an ICA without Commission review and approval of underlying cost studies. Accordingly, SBC's attempt to impose additional charges here, without benefit of a commission cost proceeding should be rejected, and all SBC proposed language specifying extra charges for routine network modifications should be eliminated.

Mr. Rhinehart submitted testimony that based on his review of cost studies that were used to establish SBC's UNE rates that the costs of routine network modifications were already included in SBC's recurring and non-recurring UNE rates. As part of Mr. Rhinehart's work in the previous TELRIC cost cases, he analyzed and developed cost factors that were key to the development of the rates that were adopted. Based on that work, Mr. Rhinehart testified that SBC's costs to build, operate and maintain its network were fully captured in the adopted rates. Specifically, routine network modifications are

the types of work that would be recorded on SBC's books as either maintenance or repair costs. Both of these types of costs were explicitly captured in SBC's recurring UNE rates and in its non-recurring rates. Thus, Mr. Rhinehart testified that SBC should not be allowed to establish new separate charges for routine network modifications because such charges would represent a double recovery.[27]

The Commission should resolve these related network modification issues by rejecting SBC's proposed section 2.5 because the "spare facilities" carve-out proposed by SBC provides it with an inappropriate loophole to avoid providing UNEs requested by AT&T, and finding that SBC's current recurring rates and non-recurring charges adequately compensate SBC for routine network modifications and rejecting SBC's proposed language in sections 4.8.7, 8.5.7.6, and 15.12.6.

AT&T UNE Issue 7: Should AT&T's use of UNEs and UNE combinations be limited to end user customers?

SBC's proposed language would prohibit AT&T from using a UNE, alone or in combination, "to provide service to CLEC for other administrative purposes(s)." AT&T objects to this restriction. AT&T seeks to use UNEs to provide service its own employees, as well as to set up administrative UNE circuits. The federal Act provides that UNEs are to be used to provide telecommunications services, and that is exactly how AT&T intends to use the UNEs it purchases, including the UNEs it purchases for servicing its own employees and for administrative circuits.[28] There is no restriction on use of UNEs to provide services exclusively to "end user" customers, as SBC contends.[29]

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27 Rhinehart Direct at pp. 57-58.

28 *TRO* at ¶148 ("The statute does not require that access be provided *exclusively* for telecommunications services.")

29 Even if there were, as SBC witness Roman Smith acknowledged in his rebuttal testimony at p. 26, the FCC's definition of "end user" includes a carrier using a telecommunications service for administrative

The FCC's interconnection rules provide that "[e]xcept as provided in § 51.318, an incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements for the service a requesting telecommunications carrier seeks to offer."[30] AT&T urges the Commission to adopt AT&T's proposed language in sections 2.7 and 3.1 that eliminate the "end user" qualifier.

AT&T UNE Issue 8: What terms should the ICA provide for the conversion of wholesale, i.e. special access, service to UNEs?

With the FCC's reaffirmation of the elimination of commingling restrictions and the elimination of qualifying services criteria in the *TRRO*, AT&T needs to have the ability to convert potentially higher-priced special access and wholesale services to UNEs, unless precluded by service eligibility criteria, so that AT&T can be cost competitive with SBC. Because these conversions are essentially nothing more a mere billing change, SBC should, consistent with 47 C.F.R. § 51.316, make the conversion to UNEs without the imposition of non-recurring charges, seamlessly and without customer disruption. While the conversion processes may be relatively new to SBC, AT&T believes it is reasonable to request that conversions be processed by SBC on the basis of a single service request from AT&T. These requirements are expressed in AT&T's proposed language in Section 2.10.5.

UNE conversions are important because until recently, AT&T has had virtually no scalable choice for establishing connectivity between its network and its customers other than through high-priced special access arrangements with SBC. In fact, the FCC recognized the difficulty of using special access in the *TRRO*, where the Commission

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purposes. *See* 47 C.F.R. § 69.2. SBC's proposed language would expressly preclude the use of UNEs for administrative purposes.

30 47 C.F.R. 51.309(a)

declined to use the availability of special access as a basis for denying access to UNEs in the local exchange market as proposed by some of the incumbents.[31] Now that the FCC has removed commingling restrictions, AT&T is free to combine UNEs with non-UNEs. Such engineering flexibility affords AT&T the efficiency of combining its local and non-local traffic onto the same UNE loops and UNE transport (and EELs), just as SBC can do with its own traffic (e.g., local and long distance).[32]

In contrast to AT&T's proposed conversion language in section 2.10.5, SBC's proposed language is overbroad. SBC's section 2.10.1 essentially restates SBC's "Lawful UNE" and "statutory conditions" terminology that was discussed above in connection with UNE Issue 1, and also requires services converted to UNEs to meet "eligibility criteria that may be applicable." SBC's "eligibility criteria" language in section 2.10.1 is unnecessary given AT&T's agreement in its proposed section 1.2 to abide by the FCC's eligibility rules in 47 C.F.R 51.318 and 51.319.

SBC also proposes a series of sections numbered 2.10.6 through 2.10.6.4 that are objectionable. In section 2.10.6, SBC assumes the unilateral right to determine whether AT&T is in compliance with the FCC's use restrictions and to convert UNE services to "the equivalent wholesale service, or group of wholesale services upon written notice to AT&T." Section 2.10.6.1 expands SBC's unilateral review authority to every combination of UNEs sold to AT&T, regardless of whether they had originally been converted from other services to UNEs. Section 2.10.6.2 addresses audit rights that are expressly defined under section 2.12. Section 2.10.6.3 requires AT&T to follow unspecified "guidelines and ordering requirements" for converting services to UNEs.

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31 *TRRO* ¶¶46-65.

32 Rhinehart Direct at 26.

Finally, section 2.10.6.4 specifies that AT&T may not "supercede or dissolve existing contractual arrangements" and that SBC may enforce existing tariff, contractual or other provisions, including those that provide for early termination liabilities or similar charges.

Each of these additional provisions is objectionable to AT&T. Provisions that grant SBC unilateral authority that could potentially circumvent either change of law or dispute resolution processes are inappropriate (as in sections 2.10.6 and 2.10.6.1). Section 2.10.6.2 is surplusage, given that audits are discussed more fully in both AT&T's and SBC's proposed section 2.12 *et seq*. Section 2.10.6.3 provides SBC with an opportunity to game the system and make conversions to UNEs difficult or impossible to accomplish without customer disruption. Section 2.10.6.4 could be read to mean that SBC reserves the right to require AT&T to complete the full term of certain contracts or tariff arrangements and deny AT&T's right to convert certain service arrangements to UNEs. Given these concerns, the Commission should adopt AT&T's straightforward language in section 2.10.5 and expressly reject SBC's proposed sections 2.10.1 and 2.10.6 through 2.10.6.4 as contrary to the public interest.

AT&T UNE Issue 9: Under what terms must SBC MISSOURI provide EELs to AT&T?

An EEL, or Enhanced Extended Link, is the combination of one or more segments of unbundled Dedicated Transport with unbundled loops (DS1s, DS3s, etc.) and, at the option of AT&T, may include multiplexing. EELs are essentially long loops -- loops that have been extended from the legacy ILEC wire center to a location where AT&T has a switch or some other network appearance. As such, EELs are important to AT&T's delivery of competitive services because they provide the natural bridge

between resale or UNE-P and UNE-L, recognizing that it is not practical or prudent for AT&T to establish physical collocation in every SBC wire center in Missouri. If volumes of AT&T's dedicated transport traffic (and the transport component of EELs) cross the economic break-even point to warrant self-provision given a particular transport route's construction cost (driven by rights-of-way, distance, and other cost factors), AT&T can then establish collocation in that end office, construct its own transport facilities, and roll service from EELs to UNE-L.[33]

SBC should be obligated to provide EELs to AT&T as fully outlined in the *TRO*. Non-discriminatory access to unbundled loops and transport (i.e., EELs), either with or without multiplexing, is critical for AT&T to be able to make optimum utilization of the loop and transport facilities it leases from SBC. The language that AT&T proposes in sections 2.12, 2.12.1.1, 2.12.1.2, 2.12.2 and 2.12.2.1 Attachment 6: UNE fully incorporates the mandatory eligibility criteria of the *TRO* and should be adopted. AT&T's language in section 2.12.1.1 defines EELs. AT&T's section 2.12.1.2 defines "commingled EELs." In section 2.12.2, AT&T expressly agrees to apply the eligibility criteria for EELs found in 47 C.F.R. 51.318[34] and then self-certify its eligibility for the requested EEL. Section 2.12.2 also specifies auditing procedures to be followed consistent with the requirements of the *TRO* (paragraphs 626 to 628). AT&T's proposed section 2.12.2.1 provides billing parameters for conversions to EELs.

AT&T's proposed certification process for EELs mirrors the *TRO* and provides adequate processes for ensuring compliance with the service eligibility requirements. Though SBC argues for certifications from AT&T on every EEL combination AT&T

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[33] Rhinehart Direct at pp. 28-30.

[34] These criteria apply on a circuit by circuit basis, are set forth in Mr. Rhinehart's Direct Testimony.

orders or converts to UNEs, a global written notification attesting to the eligibility of multiple, or even all, AT&T EELs orders/conversions suffices and is consistent with the structure set forth in the TRO.

In contrast, SBC's proposed language, in addition to being salted with references to "lawful UNEs" and "End User" requirements, is overreaching, impermissibly goes beyond FCC rules, and reserves to SBC unilateral rights to the detriment of AT&T and competition generally. For example, in SBC proposed section 2.12.2.2.1, SBC would require telephone numbers assigned to EELs to be associated with local service in the SBC local service area and within the LATA in which the circuit is located. The FCC's rule 47 C.F.R. § 51.318(b)(2)(i) requires only that the customer be assigned a local number – and the rule does not specify that the local number must be associated either with the incumbent LEC or with the LATA within where the service is provided. Given the availability of local number portability and the rapid deployment of voice over IP services, SBC's requirement is overreaching and does not comport with FCC rules. Similarly, SBC's proposed section 2.12.4 requires that an interconnection trunk be located in the same LATA as the end user premises served by the EEL arrangement. The FCC rule 51.318(d) has no such requirement and only requires that the competitive carrier transmit the calling party's number in connection with calls exchanged over the trunk.

SBC's proposed language would also require that AT&T submit "proof" of number assignments (section 2.12.5), certification on a circuit-by-circuit basis on a form provided by SBC (section 2.12.6), prompt updates to every certification when information in the certification changes (section 2.12.6.1). Each of these procedures can

create bottlenecks to the prompt servicing of CLEC customer accounts and are of questionable value given SBC's audit rights.

Regarding audit rights, while SBC's proposed contract language addressing audit rights is similar in most respects to AT&T's competing language, SBC oversteps again by claiming in section 2.12.7.4 a unilateral non-consensual right to convert services provided to AT&T from UNEs to other services if the auditor's report concludes that AT&T failed to comply with SBC's proposed EEL requirements. If AT&T were to fail an audit, SBC also seeks via section 2.12.7.4.1 to extract from AT&T not only the cost of the independent auditor but also SBC's internal administrative costs of the audit, even though the FCC only requires that AT&T reimburse SBC for the cost of the auditor.[35]

Finally, SBC's proposed section 2.12.9[36] states that SBC will develop and implement processes for combining and/or commingling at unspecified prices. It is AT&T's view that SBC should not be permitted to unilaterally set such prices. In section 2.12.10, SBC impermissibly seeks to limit its combining and/or commingling obligations. Finally, in section 2.12.11 SBC seeks to have AT&T and its affiliated entities "irrevocably waive any right or ability" to purchase UNEs through tariffs offered by SBC. While there is no evidence that SBC offers any UNEs via tariff in Missouri at the present time, AT&T should not be required to waive in advance this opportunity, should SBC subsequently develop such tariff offerings.[37]

The Commission should conclude that AT&T's proposed contract language sets forth the appropriate certification process for EELs and provides adequate processes to

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35 TRO at ¶627.

36 SBC's proposed sections 2.12.9 – 2.12.11 is also teed up in Issue 15, and is discussed in more detail below.

37 SBC also reserves the unilateral right to reject all orders for tariffed UNEs placed by AT&T.

ensure AT&T's compliance with the eligibility requirements. Specifically, AT&T's proposed language tracks the requirements of the *TRO*[38] and provides for AT&T to self-certify compliance with the EELs eligibility criteria, and allows SBC the opportunity to conduct an annual comprehensive audit of AT&T's compliance. The Commission should also conclude that SBC's proposed language is overbroad, overreaching and inconsistent with the FCC's orders and rules and should be rejected. AT&T's language for UNE Issue 9 should therefore be accepted and SBC's language should be rejected.

UNE Issue 10: Is SBC MISSOURI obligated to allow commingling of 47 U.S.C. § 271 checklist items with UNEs?

Based upon the plain terms of governing FCC rules, SBC is obligated to provide commingling and combinations of UNEs (and UNE combinations) with any facility or service that AT&T has obtained from SBC on a wholesale basis, including special access services and network elements provided pursuant to § 271.[39] Contrary to SBC's erroneous contentions and proposals, SBC's commingling obligations are not limited to only those UNEs required to be unbundled pursuant to § 251(c)(3) of the federal Act. SBC's proposed language is not only contrary to its legal obligations, it is also contrary to public policy. In order to encourage facilities-based competition, it is important for CLECs to be able to combine and commingle UNEs with non-UNEs, including its own facilities and the facilities of other third-party carriers. And, as the FCC has found, it is equally important that CLECs be able to commingle wholesale facilities with UNEs and non-UNEs in order to place local, long-distance, and other services over the same facilities, thereby optimizing obligation of network assets, just as SBC does.[40] SBC's

38 *TRO*, ¶¶ 623-629.
39 *TRO*, ¶¶ 581-84.
40 *See TRO* at ¶581.

proposed language would prevent AT&T from combining UNE loops with switching provided by SBC pursuant to section 271, despite the fact that it would be unreasonably discriminatory for SBC to deny AT&T a right to such combinations that it ordinarily provides to itself.

UNE Issue 11: What is the appropriate commingling order charge that SBC MISSOURI can charge AT&T?

SBC's Proposed Section 2.11.1.4 seeks to impose an undefined commingling order charge on AT&T. AT&T believes that, absent Commission-approved commingling order charges, SBC should be allowed to charge AT&T the same charge associated with an electronic service order charge (flow-through, simple record change). As AT&T witness Mr. Rhinehart explained, this charge would be an appropriate cap on the fees SBC can seek to levy on its competitors for tasks that are essentially record-keeping.[41] SBC has proposed no specific commingling order charge, ostensibly leaving to itself the right to impose whatever charge it deems appropriate, or stalling AT&T's orders until such time as a charge could be manufactured and implemented by SBC. The Commission should not grant SBC such an unfettered blank check.

Moreover, there should be no charge for converting special access facilities to commingled UNEs (e.g., EELs). In fact, in the *TRO*, the FCC rejected the application of such charges, finding that they would "unjustly enrich" an ILEC: "Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable,

[41] Rhinehart Direct Testimony at 37.

and nondiscriminatory terms, and conditions."[42] SBC's proposed language (providing that commingling requests including "existing services sought to be converted to Commingled Arrangement" will be "subject to any associated rates, terms, and conditions" deemed appropriate by SBC) contravenes this unequivocal FCC rejection of charges for conversion from wholesale services to UNEs. Because converting wholesale services (e.g., special access) to commingled arrangements (e.g., EELs) is essentially a billing change and should not be subject to any connection fees (*see* 47 C.F.R. § 51.316(c)), SBC's proposed language should be rejected. Moreover, as a legacy of SBC's refusal to previously make these arrangements available as UNEs, imposing charges for these circuits now would be blatantly discriminatory. Accordingly, they should be rejected.

Finally, AT&T objects to SBC's language (in Attachment 6 Section 2.11.1.4), which provides that commingling "rates, terms, and conditions" shall be controlled by the Change Management Process. While AT&T agrees that this process is the vehicle used to communicate with CLECs regarding OSS changes in its region, SBC should not be given the unilateral right to dictate OSS changes, nor has the Change Management Process been used to establish rates. The *TRO* specifically directs the parties (emphasis on plural) to establish procedures for conversions from wholesale to UNE services, not just one of the parties.[43] Accordingly, the Commission should reject SBC's proposed language and adopt AT&T's proposed section 2.11.1.4.

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42 *TRO* at ¶ 587; 47 C.F.R. § 51.316(c).
43 *TRO* at ¶585.

UNE Issue 13:

Should the ICA specifically list the types of Commingled Arrangements for which SBC has developed processes instead of just referring to the CLEC website?

What rates should apply to the Commingling Arrangements that SBC has made available for ordering?

SBC's proposed Sections 2.11.4.1 through 2.11.4.3 of UNE Attachment 6 set up a process whereby commingled arrangements that are available for ordering would be listed in the CLEC Handbook and on CLEC On-line. For those arrangements not listed on CLEC On-line, AT&T would be required to submit a BFR While AT&T believes in general that this is a workable approach, AT&T has concerns about SBC's ability to delay the provision of commonly requested commingled arrangements by simply refusing to list them on the CLEC website.[44] Additionally, AT&T does not believe that SBC should have the power to unilaterally control whether a commingling arrangement can be ordered or must be submitted through a BFR simply by modifying the arrangements listed on the CLEC website. Instead, the commonly requested commingled arrangements should be referenced in the ICA, as well as listed on CLEC On-line.

AT&T also has concerns with the manner in which SBC proposes to charge for commingled arrangements. SBC proposes in section 2.11.4.3 to assess some charges on the basis of Time and Materials charges and others on a "market-based" rate. In fact, AT&T believes that most commingling arrangements do not justify charges beyond those included in the non-recurring and recurring charges for the facilities involved.[45] This should absolutely be the case for the common commingling arrangements identified in the ICA and on CLEC On-line. In those more unusual cases submitted through a BFR,

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44 Rhinehart Direct Testimony at p. 44-45.

45 *Id*. at 46-47.

AT&T would anticipate that the BFR process would include the identification of appropriate charges based on the hourly rates for Time and Materials that have been approved by the Commission.[46] Finally, AT&T is not aware of any "market" that would provide benchmarks for the other functions "not required by this section." Without a market to constrain SBC's prices, SBC could use the opportunity to charge a "market-based" rate to simply kill CLEC innovation.

AT&T's proposed language modifies SBC's contract language to address the concerns with SBC's proposed language discussed above. The Commission should resolve this issue by adopting AT&T's proposed modifications to SBC's language as set forth in the DPL.

UNE Issue 15:

1) **Should SBC be permitted to impose additional charges (beyond the applicable UNE rates) on AT&T simply to establish the processes it needs to perform its obligation to provide UNEs in the ICA?**
2) **Should SBC be obligated to follow the change of law terms within the ICA, when SBC believes a change of law occurs?**

AT&T urges the Commission to reject SBC's proposed language for UNE Issue 15. First, SBC's proposed section 2.12.9 would allow it to impose additional charges – beyond those approved by the Commission – for the provision of UNEs. No additional charges are justified absent Commission review and approval, however. Second, SBC's proposed language would give SBC the open-ended authority to assert that the provision of UNEs or combinations is subject to a new process, and then define that new process with additional rates, terms, and conditions. SBC's proposed language provides SBC far too much discretion to modify the terms of the agreement and is therefore contrary to the

[46] *Id*.

purpose behind entering into a contract – i.e., to establish identified and stable rates, terms, and conditions.

Similarly, SBC's proposed Section 2.12.10 would allow SBC to unilaterally determine that a UNE is no longer required under the law and would allow SBC – again unilaterally – to cease to provide it. Such fundamental changes to the Agreement should be governed by the change of law provisions, and not by SBC's one-sided interpretation of the law. In addition, SBC's proposed Section 2.12.10 unlawfully limits SBC's obligation to provide UNEs, UNE combinations, and commingling arrangements to only those UNEs requires under § 251(c)(3), thereby wholly ignoring federal law on commingling as well as its other federal obligations, including its Section 271 obligations and its state law obligations. As discussed above, SBC's proposal is unlawful and must be rejected.

UNE Issue 16: What UNE loops must SBC provide to AT&T and under what terms and conditions?

UNE Issue 17: Under what terms and conditions must SBC provide loops to AT&T?

These two issues originally contained four sections of AT&T proposed contract language that were disputed by SBC: sections 4.2, 4.2.1, 4.3.1, and 4.7. However, AT&T has withdrawn its proposed language for sections 4.2.1 and 4.3.1, settling these issues (which were also separately raised as AT&T UNE Issues 21 and 22 in the revised UNE DPL). With respect to disputed language in section 4.2, AT&T proposes a simple statement that the "local loop UNE includes, but is not limited to DS1, DS3, fiber, and other high capacity loops to the extent required by applicable law." SBC's competing language is lengthier, lists a number of different types of loops and is stated in the negative (i.e., loop types are "limited" to …).

AT&T's proposed language in section 4.2 is preferable to SBC's because it is permissive and not restrictive. AT&T is entitled to the full functionality and capabilities of UNEs that it acquires from SBC in a non-discriminatory manner. In the spirit of fostering creative, competitive telecommunications services, AT&T should not be limited by the types of signals and transmission protocols it provides between its network and its customers, provided that no harm or interference is caused to other loops or services within the same cable. SBC's prescriptive and limiting language limits AT&T's use of loops to copper-based technology and precludes AT&T's use of loops and loop facilities based on fiber. SBC's language also has the potential of limiting legitimate competitive use of SBC's loop facilities.

AT&T should be able to access "fiber and other high capacity loops to the extent required by applicable law." *See* AT&T proposed section 4.2. At a minimum, this means that AT&T should have access to loops that utilize loop fiber to the full extent required by FCC rules (i.e., in "brownfield" situations where SBC has overbuilt its copper facilities and then retired the copper loops). AT&T's proposed language is not intended to provide access to dark fiber loops, because the FCC has made a specific finding that requesting carriers are not impaired on a nationwide basis without access to unbundled dark fiber loops. *TRRO* ¶ 182. The parties have settled their dispute regarding dark fiber loops, and have elsewhere agreed to language incorporating this agreement for inclusion in the ICA.

The other disputed section of contract language is section 4.7. AT&T proposes the following language:

> **Notwithstanding the foregoing, SBC MISSOURI loops that employ Next Generation Digital Loop Carrier (NGDLC), technology may**

include one or more transmission facilities between one or more distribution frames, digital loop carriers (DLC) and remotely deployed DSLAM, owned or controlled by SBC MISSOURI. Access to the unbundled Local Loop network element shall also include the use of all test access functionality, including without limitation, smart jacks, for both voice and data.

AT&T's language is required to make clear that although SBC is free to introduce new architectures and loop electronics into the network, those efforts should not in any way be permitted to nullify SBC's obligation to unbundle the non-packetized features and capabilities of SBC's loops, including test access points. Such loop types may employ various devices along the path between the wire center and the customer premises.

AT&T witness Mr. Rhinehart explained why this language is important to AT&T.[47] AT&T is seeking to preserve SBC's unbundling obligations for loops, specifically TDM-based loops (e.g., DS0, DS1, DS3, ISDN loops), so that AT&T can expand its facilities-based reach to end-user customers. As loop technologies continue to rapidly evolve, and SBC upgrades its network with new electronics, it is important that SBC's underlying obligation to unbundle TDM-based loops be maintained.

AT&T does not seek to squelch SBC's deployment of new technologies or to obtain access to the packet-based features and functionalities of next generation loops. The above-cited language simply acknowledges that the delivery of TDM-based loops can be accomplished by a number of different technologies, that SBC is free to choose the type and timing of such technology deployments, but that SBC should not be granted the freedom to abuse that discretion to impede AT&T's access to the full functionality of legacy TDM loop types. In sum, AT&T's proposed language affirming SBC's obligation to unbundle the non-packetized features and capabilities of the loop, including test access

[47] Rhinehart Direct at pp. 52-55.

points, is fully consistent with SBC's legal obligations. Far from requiring the unbundling of SBC's packet network, as SBC contends, AT&T's language would only give it access to the TDM capabilities of a hybrid loop. Moreover, AT&T's proposed language appropriately allows AT&T to provide its own facilities to provide both voice and data over the loop. Accordingly, the Commission should reject SBC's proposal and adopt AT&T's proposal.

UNE Issue 19:

Should SBC be required to provide unbundled access to unbundled dedicated transport, and, if so, under what terms and conditions?

What process should be used to confirm the identification of relevant wire centers?

What are the appropriate terms for the conversion of Transitional Declassified Network Elements?

AT&T and SBC have resolved this issue.

UNE Issue 20: Should SBC be required to provide access to DCS, and, if so, under what terms and conditions?

To the extent SBC still has an obligation to provide access to dedicated transport an on unbundled basis, it remains obligated to provide access to DCS as a UNE, pursuant to Section 251 of the Act. The continued availability of Dedicated Transport at cost-based rates is essential to the continuation of competition in the local phone market and would promote consumer choice. A DCS (Digital Cross-connect System) is a device that enables access to, and management of, the digital signals of loop and transport facilities. Often a DCS will also provide multiplexing functions and test access capabilities. Because the DCS enables a carrier to groom facilities, thereby optimizing trunk and facility utilization, access to the functionality of a DSC is important to AT&T.[48] As a

[48] Rhinehart Direct Testimony at p. 61.

functionality that is part of the unbundled Dedicated Transport UNE, SBC should be obligated to provide access to DCS.

SBC apparently does not dispute that it is obligated to continue to provide access to DCS to CLECs. *See* UNE DPL Issue 20, SBC Preliminary Position. However, under SBC's proposed contract language, SBC is only obligated to provide access to DCS in accordance with the terms of its federal tariff. SBC witness Smith suggests that this is because SBC is only obligated under FCC Orders to provide DCS in the same manner as provided to interexchange carriers. Smith Direct, p. 34. As SBC has often done in this case, however, it has taken the FCC's words out of context. However, looking back to the FCC's own language when it first considered DCS in the context of the First Report and Order in CC Docket 96-98, the FCC stated at paragraph 444, we see the meaning is much different.

> In addition, as a condition of offering unbundled interoffice facilities, we require incumbent LECs to provide requesting carriers with access to digital cross-connect system (DCS) functionality. A DCS aggregates and disaggregates high-speed traffic carried between IXCs' POPs and incumbent LECs' switching offices, thereby facilitating the use of cost-efficient, high-speed interoffice facilities. AT&T notes that the BOCs, GTE, and other large LECs currently make DCS capabilities available for the termination of interexchange traffic. We find that the use of DCS functionality could facilitate competitors' deployment of high-speed interoffice facilities between their own networks and LECs' switching offices. Therefore, we require incumbent LECs to offer DCS capabilities in the same manner that they offer such capabilities to IXCs that purchase transport services. (Emphasis added, footnote omitted).

Additionally, SBC has not demonstrated that the rates contained in the tariff are TELRIC-based rates, nor has it provided the terms and conditions of that tariff to the Commission for review. Additionally, SBC is free to modify its federal tariff at any time. SBC should not be permitted to avoid its unbundling obligations by providing alternate

access through federal tariffs. Because of these limitations with SBC's language, the Commission should adopt AT&T's language instead.

TEMPORARY RIDER ISSUES

Rider Issue 1: Should the ICA, including the Rider, only include 251 (c) (3) obligations or should it include all 251, 271, and state law obligations?

In connection with AT&T Rider Issue 1, there are also some discrete portions of the contract language in section 1.1 of the Rider disputed by the Parties that are not directly related to the Section 271 issue (which is discussed above in connection with UNE Issue 1). Section 1.1 contains the following language:[49]

1.0 TRO-Declassified Elements.

1.1 Pursuant to the *TRO*, nothing in this Agreement requires SBC MISSOURI to provide to CLEC any of the following items on an unbundled basis pursuant to Section 251(c)(3) of the Act**,** either alone or in combination (whether new, existing, or pre-existing) with any other element, service or functionality:

(i) entrance facilities**, defined as dedicated transport that does not connect a pair of SBC MISSOURI wire centers which includes, but is not limited to, transmission facilities that connect CLEC's network with SBC MISSOURI's network, regardless of the purpose of the facilities);**

(ii) **DSO** or OCn level dedicated transport;

….

The above-listed items are referred to in this Amendment as "TRO Declassified Elements." Nothing in this section shall limit AT&T's ability to commingle a facility or service previously acquired as a UNE with a UNE or combination of UNEs pursuant to Attachment 6, Section _2.11_ of the Parties' ICA.

With regard to the phrase "on an unbundled basis pursuant to section 251(c)(3) of the Act," AT&T proposes that language because the FCC's actions in delisting certain unbundled network elements only removed them from the list of elements required to be provided pursuant to Section 251(c)(3) of the Act. Each of the elements, often by an

[49] Bolded language is proposed by SBC and opposed by AT&T; underlined language is proposed by AT&T and opposed by SBC.

identical name, is either offered by SBC by tariff or SBC is required to provide pursuant to or applicable law (e.g. Sec. 251(c)(2) or Sec. 271). Thus, AT&T objects to a blanket exemption being granted to SBC not to provide the listed elements.

With regard to SBC's proposed definition of entrance facilities, AT&T opposes that definition because it is overbroad, especially considering that the facilities described by SBC could be "entrance facilities" under SBC special access tariffs or they could be interconnection facilities that SBC must lawfully continue to offer to AT&T at TELRIC rates pursuant to Section 251(c)(2) of the Act. Through the use of this definition, SBC could deny AT&T access to services and elements far beyond the delisted unbundled transport entrance facilities. The issue regarding AT&T's access to interconnection facilities pursuant to Section 251(c)(2) of the Act is separately teed up in the Network Interconnection issues, and SBC should not be allowed to preclude such access through the backdoor of a Rider to the UNE Attachment.

AT&T also opposes the inclusion of DS0 transport in the list of TRO-declassified elements. Simply put, the FCC made no non-impairment findings with respect to DS0 service. Thus, SBC should remain obligated to provide DS0 transport as UNEs at TELRIC rates on request.

Finally, AT&T proposes language in section 1.1 clarifying that the Rider doesn't limit AT&T's ability to commingle facilities or services previously provided as a UNE with UNEs or UNE combinations. As discussed in more detail above, the FCC's commingling rules, which have withstood judicial review, expressly permit broad commingling and indeed require SBC to perform the combining tasks on request in most instances. In section 1.2.1, AT&T proposes language that conforms with the FCC's

rules. SBC's proposed language is overly broad and would exempt it from its lawful duties to combine UNEs and non-UNEs.

The Commission should adopt AT&T's proposed language in section 1.1 of Attachment 6 and reject SBC's proposed Section 1.7. Similarly, the Commission should adopt AT&T's proposed language in section 1.1 of the Rider.

AT&T Rider Issue 2: Should SBC be required to convert delisted elements at the end of the transitional period to analogous services at rates available under term and/or volume discount agreements that the parties have already entered?

This issue relates to the default provisions by which SBC will convert delisted elements at the end of the transitional period. AT&T currently acquires numerous access services from SBC under tariffed Optional Payment Plans ("OPPs") or term and/or volume discount plans. AT&T's proposed language in sections 1.2.4(ii) , 2.2(C), and 2.4.3 of the Rider would simply require SBC to convert delisted UNEs, at the end of the transition period, to analogous access or resale services, at rates that are appropriately discounted, if the parties have entered into applicable discount arrangements. SBC should afford AT&T the lowest available rates at the time of conversion from UNEs consistent with the terms of other relevant agreements between the companies. To do otherwise would increase administrative burdens on both companies and unjustly enrich SBC at AT&T's expense.[50] Accordingly, the Commission should approve AT&T's proposed language.

[50] Rhinehart Direct at pp. 66-67.

Rider Issue 3:

(a) Is AT&T able to obtain UNE-P access lines after March 11, 2005 in contravention to the TRO Remand Order?

(b) Should SBC's obligation to provide delisted UNEs during the transition period be limited to an "as is" basis, which terms is undefined in the ICA?

(c) Should SBC Missouri only be required to provide ULS switching features under this Rider subject to the extent that they are loaded and activated in the switch?

This issue is perhaps the most controversial of the issues involving the Rider. It concerns the provision of switching and UNE-P during the transition period. First, AT&T has proposed language in section 3.1 allowing it to add UNE-P lines to serve its embedded base of customers. AT&T's proposed language is completely consistent with the FCC's rules. 47 C.F.R. 51.319(d)(2)(iii) clearly provides that CLECs are entitled to continue to use UNE-P to serve their embedded base of **customers**: "Notwithstanding paragraph (d)(2)(i) of this section, for a 12-month period from the effective date of the Triennial Review Remand Order, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers." If the FCC had intended that the use of UNE-P be restricted to the current embedded base of lines, it could have easily so provided in its rules.

The other significant dispute included in this issue surrounds language that SBC proposes in sections 2.2 and 3.2 of the Rider that it would provide elements during the transition on only an "as is basis." SBC's use of the phrase "as is" only serves to inject ambiguity into the ICA and virtually assures the possibility of conflicts during the transitional period. "As is" is not defined in the ICA, and leaves open the possibility that SBC would refuse to even maintain or repair delisted elements that it provides during the transition period. Nothing in the federal rules or the *TRRO* supports a position that

SBC's obligation to provide delisted elements during the transition period has been modified in such a manner.

Rider Issue 4:

(a). Should SBC be allowed to pick and choose among prices established by a state commission between June 16, 2004 and March 11, 2005?

(b). Should the Rider contain language regarding the manner in which SBC converts delisted elements?

The disputed language associated with this issue involves the rates that should apply during the transition period, and the manner in which SBC converts delisted UNEs at the end of the transition period. With regards to the transitional rates, AT&T's proposed language at sections 2.3 and 3.3 of the Rider would prevent SBC from "cherry picking" among rates established by a state commission between June 16, 2004 and March 11, 2005, as required by the *TRRO* at footnote 630. If SBC chooses to use rates established by the Commission during this interim period for some elements, it should be required to use them as the basis for pricing during the transitional period for all elements.

AT&T and SBC also have a dispute in sections 2.3.1 and 3.3.1 of the Rider. It is AT&T's position that SBC is permitted to obtain revenues for transitional elements back to the effective date of the FCC's permanent rules, but that SBC should not be permitted to bill (or back bill) those rates until the parties have a lawfully executed contract. AT&T's proposed Section 2.3.3 is a companion to the disputed language in section 2.3.1.

The parties also have a significant dispute with regards to the conversion process itself of elements that were delisted by the FCC. In the *TRRO*, the FCC, recognizing that the order was removing significant unbundling obligations that had formerly been placed on SBC, found it important to provide for an orderly transition for competitive carriers

and their customers from UNEs to alternative facilities or arrangements. Thus, for mass market local switching, dedicated interoffice transport and high capacity loops, the FCC gave competitive providers twelve months from the effective date of the TRRO to modify their interconnection agreements.[51] In the case of dark fiber loops and transport, the transition period was set at eighteen months.[52] During these periods transitional prices would apply to the embedded base of customers. The *TRRO* further specified that "at the end" of these periods, the requesting carriers must transition the affected UNEs to alternative facilities and arrangements.[53]

In order to implement these provisions – and to ensure an orderly transition for its customers – AT&T's proposed section 2.3.4 includes provisions that will permit AT&T to submit orders to convert UNEs to alternative facilities or arrangements at any time before the end of the respective transitional period. However, under AT&T's proposed language, those orders will not take effect until the date marking the end of those transitional periods – March 11, 2006 for mass market local switching, dedicated interoffice transport and high capacity loops, and September 11, 2006 for dark fiber loops and transport. Moreover, the transitional rates adopted by the FCC will apply to these elements for the entire length of these transitional periods.

These proposals are fully grounded in the language and spirit of the *TRRO*, and are specifically designed to provide for the orderly and nondisruptive transition that the FCC envisioned. And, not surprisingly, SBC opposes them, proposing instead to improperly shorten the *TRRO*'s transitional periods. Specifically, SBC appears to be

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51 *TRRO* ¶¶ 142, 195 and 226.

52 *TRRO* ¶¶ 142 and 195.

53 *TRRO* ¶¶ 143 and 196.

arguing that a CLEC's orders for converting UNEs to alternative facilities should take effect before the end of the transitional period, at which point those arrangements would no longer be subject to transitional rates.

SBC's approach to implementing the *TRRO* would undermine the FCC's purpose in establishing those transitional periods for discontinued UNEs. The transitional rates were set for specifically defined periods to prevent potential disruption of a flash cut to commercial pricing.[54] SBC's scheme, however, would create the potential for such disruption by discouraging CLECs from submitting conversion orders in a timely and efficient manner. Indeed, if SBC were permitted to automatically convert UNEs and impose higher rates than those provided for in the *TRRO* before the end of the transitional period, CLECs would be incented to refrain from submitting such orders until a time at or near the end of the respective twelve or eighteen month transition periods, only to unload them on SBC at that time in one fell swoop.

This makes no sense, and is plainly not what the *TRRO* contemplates. The Order in fact expressly provides that it is the CLEC that will initiate the orders for converting their UNE customers to alternative arrangements – and gives them the full transitional period to accomplish that task.[55] CLECs and their customers are also entitled to the benefit of the transitional rates specified in the *TRRO* during that entire period.[56] There is thus no basis in the Order for SBC's effort to improperly short-circuit those important transitional provisions. AT&T's proposed language in section 2.3.4 ensures that AT&T receives the transitional UNE rates through the entire transition period. Unless AT&T

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[54] *See TRRO* at ¶¶145, 198 and 228.

[55] *See TRRO* ¶227.

[56] *TRRO* ¶¶145, 198 and 228.

purposely elects an earlier effective date for the conversion, it should be permitted to obtain the full benefit of the Transitional UNE rates as long as they are lawfully available. Accordingly, AT&T's proposed language for implementing those requirements should be adopted.

With regard to the conversions themselves, AT&T proposes language in section 2.3.4.1 that would ensure that such conversions are seamless, in section 2.3.4.3 to prevent SBC from physically rearranging or disconnecting the physical facilities unless requested by AT&T, and in section 2.3.4.4 that would require SBC to suppress line loss data on conversions. These provisions are necessary to ensure that AT&T's customers are not negatively impacted by the conversion process.

AT&T also proposes language in section 2.3.5 that would prevent SBC from imposing any termination, reconnection or other nonrecurring charges, except for record change charges, on AT&T in association with the conversion or discontinuance of transitional declassified network elements. This language is reasonable and consistent with the basic principles of the federal Act that the cost-causer should pay. In this instance, with regard to the conversion of customers to alternate arrangements at the end of the transitional period, AT&T is not the cost-causer, SBC is. Nothing in the federal rules or *TRRO* precludes SBC from continuing to offer delisted UNEs after the end of the transitional period, and AT&T certainly has no interest in converting its customers from the UNE Platform, high capacity loops or high capacity transport, but is only doing so because of SBC's insistence. Because SBC is the entity causing the conversion of AT&T's customers, SBC should absorb any costs associated with the conversions.

Rider Issue 5: Should non-transitioned Embedded Base UNE-P automatically be rate changed to resale pricing at the end of the transition period?

This issue involves how any UNE-P or ULS arrangements should be handled at the end of the transition period if AT&T has failed to submit an order to convert or disconnect the arrangement. AT&T proposes language in section 3.4.1 of the Rider that would require SBC to reprice such arrangements at resale rates. SBC, in contrast, proposes that such arrangements be priced at market-based rates. Because there is no market for UNE-P or Mass Market ULS, the concept of a market-based rate is a fiction. Instead of allowing SBC complete latitude to set whatever rate it wishes, under the guise of a market-based rate, SBC should reprice such arrangements at the analogous resale price.[57] The Commission should resolve this issue by adopting AT&T's proposed language and rejecting SBC's proposed language.

Rider Issue 6: Should the general reservation of rights and change of law provisions in the ICA govern SBC's provision of delisted UNEs?

This issue is very straightforward. SBC proposes in section 5 of the Rider a separate reservation of rights provision. AT&T opposes this language, proposing instead that the general reservations of rights provision contained in the General Terms & Conditions should control. The parties have already agreed to general reservation of rights and change of law provisions in the General Terms & Conditions. Including additional, potentially contradictory language in the UNE attachment (even in the Temporary Rider) only serves as a source of confusion.[58] SBC's proposed language should be rejected.

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[57] Rhinehart at p. 71.
[58] *Id.*

NETWORK ARCHITECTURE / INTERCONNECTION

Network Architecture/Interconnection issues tend to be complex and often technical, but stepping back from an issue-by-issue analysis a distinct pattern emerges: SBC is attempting in myriad ways to increase AT&T's interconnection costs (either out-of-pocket or in the form of payments to SBC), while at the same time reducing or attempting to avoid its proper payments to AT&T, and SBC is employing both network architecture/interconnection and intercarrier compensation proposals in that effort. Moreover, many of its proposals SBC seeks to change the status quo in Missouri, without presenting one shred of factual, legal, or policy evidence that such change is at all necessary.

The majority of the Network Architecture issues in this arbitration address (1) how the points of interconnection or POIs will be determined, (2) the trunking arrangements the Parties will use, and (3) the types of traffic that will be carried on the interconnection trunk groups. SBC is proposing major changes in Missouri to how the locations of POIs are determined, in the trunking arrangements the Parties use, in the types of traffic carried on the interconnection trunk groups. SBC's proposals, for example, would curtail the ability of CLECs to interconnect with it (and to exchange traffic with others, such as other ILECs, CMRS providers and other CLECs) or render it uneconomic to do so by eliminating transiting under the Act. (Network Architecture/Interconnection Issue 3.) Similarly, SBC would wrongly limit the points at which AT&T can interconnect (Network Architecture/Interconnection Issues 2 and 4.), and it is asserting what amounts to veto rights over the form of permissible interconnection. (See Network Architecture/Interconnection Issues 7, 15).

As to the financial responsibilities applicable to interconnection arrangements generally, the legal framework is entirely clear. Competitive LECs have the right to interconnect at any technically feasible point they may select (ILECS have no reciprocal right), and CLECs have the option to interconnect at only one point in each LATA if they so choose.[59] Incumbents are required to adapt their facilities, at least to a reasonable extent, to interconnection and use by competitive LECs. *Local Competition Order* at ¶ 202. Finally, the FCC's rules provide that an originating LEC may not assess charges on any other carrier for local telecommunications traffic that originates on the LEC's network. 47 C.F.R. § 51.703(b). Based on these clear precepts, AT&T's positions on these core issues embody the principle that the originating carrier has financial responsibility for delivering its originating traffic up to the Point of Interconnection ("POI"),[60] and that it is to pay reciprocal compensation for the transport and termination of its traffic to the other carrier's end user premises.

SBC in its corresponding proposals pays lip service to the right of the new entrant to specify the POI, but it proceeds to render that "right" meaningless from a financial perspective. SBC's proposed definitions and language require CLECs to establish POIs at SBC-specified locations at specified traffic thresholds within specified time frames, thereby usurping AT&T's lawful right under the Act and FCC rules to determine the location of its POI(s) and to interconnect at any technically point on SBC's network. The financial result is much as if SBC were allowed to dictate AT&T's Points of Interconnection.

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[59] *E.g. Application by SBC Communications, et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC NO. 00-65 (rel. June 30, 2000)("Texas 271 Order") at ¶ 78 (citing *Local Competition Order* at ¶¶ 172, 209).

[60] The originating carrier can self-supply or lease these facilities from the incumbent or another carrier.

The Commission should not countenance this renewed effort by SBC to relieve itself of its responsibilities with respect to both originating and terminating traffic and the associated intercarrier compensation obligations. The Commission should not lose sight, in all of the technical and sometimes arcane discussion of these network architecture issues, that SBC is simply trying to make it more difficult (if not impossible) or at least more costly for AT&T to interconnect with SBC's legacy monopoly network, and it is pursuing that objective in multiple and often redundant ways. AT&T urges the Commission in reaching its determinations in these areas to exercise care not to deny SBC an advantage it seeks in one area (e.g., network architecture), only to give it back inadvertently in the other (reciprocal compensation). And we urge the Commission unambiguously to endorse AT&T's positions on these important issues.

Network Issue 1: Should Attachment 11 include definitions of terms used in SBC MISSOURI'S proposed language? If so, are SBC MISSOURI'S proposed definitions appropriate?

The direct and rebuttal testimony of AT&T witness John Schell provide clear and persuasive arguments why a number of SBC's proposed definitions are objectionable.[61] The key points to be made here are that SBC's proposed definitions are specifically tailored to advance SBC's unlawful positions on other network and reciprocal compensation issues and that the AT&T/SBC interconnection agreement has never contained (nor obviously required) such definitions. Finally, the Kansas Commission recently rejected SBC's proposed definitions in Phase 1 of the Mega-Arbitration recently conducted there.[62]

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[61] AT&T, Schell Direct, at 5 – 11, Schell Rebuttal, at 17 – 25.

[62] *See, In the Matter of the Petition of the CLEC Coalition for Arbitration against Southwestern Bell Telephone L.P. d/b/a SBC Kansas Under Section 252(b) of the Telecommunications Act of 1996 et al.,* Docket Nos. 05-BTKT-365-ARB, 05-BTKT-366-ARB, 05-BTKT-369-ARB, and 05-BTKT-370-ARB

SBC contends that its definitions should be adopted because they somehow would minimize confusion and any resulting disputes. As Mr. Schell explained in his testimony, AT&T opposes SBC's definitions because the basic telephony terms used in the interconnection agreement ("ICA"), i.e., access tandem, local tandem, end office, trunk, trunk group, meet point and intraLATA, are commonly used and understood terms within the industry and are defined in Newton's Telecom Dictionary. These terms do not need to be "clarified".[63] Beyond that, the definitions proposed by SBC are either inconsistent with generally accepted industry definitions and those promulgated by the FCC, or they are specifically tailored to support SBC's inappropriate network architecture and intercarrier compensation proposals. In all events, SBC's proposals should be rejected. SBC proposes definitions and language that inappropriately shift a significant part of its financial responsibility for transporting traffic originating on its network to AT&T. For example, SBC's proposed definitions and language require AT&T to establish multiple, specific points of interconnection ("POIs") in a LATA, or to compensate SBC as if it had, which contravenes AT&T's right to select the POI and increases AT&T's cost of entering into and competing in a market.[64]

Mr. Schell also noted that some of SBC's definitions are objectionable standing alone. For example, SBC's proposed definition of End Office excludes host switches that support remote switching modules. SBC uses numerous remote switching modules in Indiana, and SBC's language can be construed to require AT&T to provide facilities to,

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(Kansas Corporation Commission, Arbitrator's Determination of Issues, February 16, 2005, and Order 13, Commission Order on Phase 1, May 16, 2005) (hereinafter referred to as "Kansas Arbitration Decision"). The Commission's Order on May 16, 2005 either affirmed or reversed aspects of the Arbitrator's Determination, so both the Order and Determination taken together constitute Kansas Arbitration Decision.

63 Schell Direct at 10.

64 Schell Direct at 5 – 6, Schell Rebuttal at 10 - 14.

and interconnect at, remotely located switching modules that support direct connection instead of at a centrally located host.[65]

In particular, as AT&T witness Schell addressed in detail in his direct testimony, SBC has proposed definitions for the key terms "Section 251(b)(5) Traffic" and "ISP-Bound Traffic" that conflict with the FCC's definitions in the *ISP Remand Order,* and SBC imbedded those erroneous definitions in its definition of "Local Interconnection Trunk Groups", "Local Only Trunk Groups", and "Local Only Tandem Switch," as a result of which the traffic that can be exchanged over the local interconnection groups would be incorrectly defined.[66] Therefore, SBC's definitions are not included to produce "clarity" but instead are included solely to support SBC's intercarrier compensation and network interconnection proposals that are inconsistent with SBC's obligations under the Act and the FCC's implementing rules.

While SBC witness Mr. James Hamiter devoted considerable testimony to explaining SBC's network in terms of switch types, trunking arrangements and traffic routing,[67] SBC's use of switches, trunks and other network components is not materially different from the fashion in which the rest of the industry uses these network components. Accordingly, the agreement does not require detailed definitions, particularly in light of the apparent close connection between SBC's definitions and its proposals regarding network architecture and intercarrier compensation, which should also be rejected.

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65 Schell Direct at 9 – 10.
66 *Id*. at 7.
67 Hamiter Direct at 12 - 33.

Network Issue 2: Should the ICA preserve AT&T's right to interconnect with SBC MISSOURI in accordance with applicable law, rules and regulations?

The key point here is that SBC's proposed language would unlawfully restrict the number of places on SBC's network where AT&T can interconnect. SBC's language does this by unlawfully limiting the definition of SBC's "network" for purposes of interconnection. SBC's proposed language limits interconnection to any technically feasible location at an SBC tandem or end office building. Although SBC has attempted to cast the issue as one where CLECs are trying to force SBC to interconnect at places that are not on SBC's network, but that is just an attempt by SBC to confuse the issue. The issue is what constitutes SBC's "network" for purposes of interconnection under § 251(c)(2)? AT&T's proposed language allows for interconnection at any technically feasible point on SBC's network, including outside plant facilities and customer premises (where SBC has extended its facilities).

The only support that SBC cites to for its position is the *TRO,*[68] which narrowed the definition of "unbundled dedicated transport" based on the FCC's definition of an ILEC's "network" for unbundling purposes under § 251(c)(3). In the *TRO* the FCC did not say anything about what constitutes an ILEC's "network" for interconnection purposes under § 251(c)(2). More importantly, the FCC's decision on the definition of "unbundled dedicated transport" in the *TRO* was reversed by the FCC in its subsequent *TRRO.* In the *TRRO* the FCC abandoned its "definitional" basis for eliminating access to unbundled dedicated transport (and instead relied on a finding of non-impairment to find that unbundled dedicated transport no longer had to be provided in many circumstances), and as a result eliminated the entire basis of SBC's arguments for limiting the definition

[68] Hamiter Direct at 99 – 101. (Although in the Network DPL SBC shows this issue addressed in Hamiter Rebuttal, in fact Mr. Hamiter's Rebuttal testimony never addresses Network Issue 2.)

of its "network."[69] In contrast, AT&T witness Schell provided clear and unrebutted evidence that interconnection at SBC outside plant facilities, and at customer premises where SBC has facilities, is technically feasible.[70] AT&T seeks only to interconnect with facilities that are clearly part of SBC's network - - they certainly do not belong to other carriers. As stated in Mr. Schell's direct testimony:

> SBC's network includes not only its switch locations, but also other locations where SBC has deployed its own network facilities; for example, locations to which SBC has deployed synchronous optical network ("SONET") interoffice transmission facilities, e.g., OC-3, OC-12 or OC-48 network facilities, which are the same facilities that comprise SBC's network between and among its tandem and end office switches. Thus, SBC's network consists of all of its switches, interoffice transmission facilities, and loop facilities that are offered to the public. SBC installs, operates, maintains, repairs, depreciates and generally exercises ownership prerogatives with respect to these facilities, which are part and parcel of SBC's plant-in-service and in SBC's rate base. In short, it is clear that SBC's outside plant facilities and network facilities that SBC has extended to customer locations including carrier hotels are perfectly legitimate points "on SBC's network."[71]

This was unrebutted by SBC, and SBC's legal argument based on the *TRO* is invalid. Finally, both the FCC, in its *Virginia Arbitration Order,*[72] and the Kansas Commission, have found that AT&T's proposed language allowing for interconnection at outside plant locations and customer premises is appropriate under § 251(c)(2).[73] The Kansas Commission specifically rejected the same proposal that SBC is making in this

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69 Schell Direct, at 15 – 18.
70 Id. at 14 – 15.
71 *Id*. at 13 – 14.
72 The Wireline Competition Bureau of the FCC, under delegated authority of the FCC, preempted the jurisdiction of the Virginia State Corporation Commission to arbitrate disputes between Verizon Virginia, Inc. and WorldCom, Inc., Cox Virginia Telecom, Inc., and AT&T Communications of Virginia, Inc. in a consolidated docket. *Petition of WorldCom, et al.*, *Memorandum Opinion and Order*, CC Docket Nos. 00-218, 00-249, 00-251, DA 02-1731 (rel. Jul. 17, 2002) ("*Virginia Arbitration Order*").
73 *Id*., at 15, 18.

case.[74] The Commission should reject SBC's position and adopt AT&T's proposed language.

Network Issue 3: Should the ICA include obligations for the provision of transit services?

The simple fact of this issue is that after 8 years of providing transiting services under § 251 interconnection agreements in Missouri, SBC has now decided that transiting is not a § 251 obligation and SBC does not have to provide such a function.[75] Consequently, SBC believes it can impose whatever terms, conditions, and rates that it wants on CLECs in order to allow traffic to transit SBC's ubiquitous network. SBC refused to negotiate the issue of providing a transit function, so it claims that the Commission cannot arbitrate the issue, yet SBC wants to have its cake and eat it too by proposing its own transiting language in the event the Commission decides that transiting is a § 251 obligation.[76] SBC cannot even begin to argue that its proposed language is designed to be compliant with § 251 or that this language is what was negotiated. The key point here is that the Commission has already decided that transiting is a § 251 obligation. On May 19, 2005 the Commission issued its Order Rejecting Interconnection Agreement in Case No. TK-2005-0300.[77] In its Order the Commission found that transit service falls within the definition of interconnection service, and that interconnection services must be provided in § 252 interconnection agreements submitted for

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74 Kansas Arbitration Decision, Arbitrator's Determination, at 99 – 100.
75 McPhee Direct at 47 – 51.
76 McPhee Direct, Schedule JSM-1.
77 *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,* Order Rejecting Interconnection Agreement (Issued May 19, 2005). ("*Chariton Valley Order")*

Commission approval.[78] Section 252 interconnection agreements are negotiated and/or arbitrated for the purpose of implementing § 251 obligations.[79]

As the Staff in the *Chariton Valley* case pointed out, a LEC cannot obtain indirect interconnection without a transit provider, and indirect interconnection is a form of interconnection explicitly recognized and supported by the Telecommunications Act.[80] The Staff also pointed out that the availability of transit service is increasingly critical to establishing indirect interconnection.[81] These exact points were echoed in Mr. Schell's direct and rebuttal testimony, where he pointed out the public interest benefits of transiting services, and noted that SBC's position is totally lacking in any consideration of public interest impacts.[82] For example, there are currently no competitive alternatives to SBC's transiting service, and if SBC is allowed to impose uneconomic monopoly rates for its service then CLECs would be forced into direct interconnections with other LECs, which would increase the number of interconnection arbitrations. In addition, in the Kansas City LATA alone the number of trunk groups necessary to allow carriers to interconnect would jump from a minimum of 59 to a minimum of 1,770 trunk groups.[83] This is patently inefficient from the standpoint of network resources.

In light of the *Chariton Valley Order*, the precedent of treating transiting service as a § 251(c)(2) interconnection obligation (including its inclusion in the M2A), the federal requirement to permit indirect interconnection, and the public interest benefits of

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78 *Id*. at 3.
79 *See* 47 U.S.C. § 252(a).
80 *Chariton Valley Order,* at 2.
81 *Id*.
82 Schell Direct at 21 – 23, Schell Rebuttal at 26 – 27.
83 Schell Direct at 23.

requiring transiting services to continue to be provided at economic TELRIC rates, SBC's position should be rejected and AT&T's proposed language should be adopted.

Network Issue 4: Should SBC be permitted to limit AT&T's right to interconnect at any technically feasible point?

As stated in Mr. Schell's direct testimony, where AT&T and SBC could not agree on an issue statement, AT&T has grouped its testimony under AT&T's statement of the issue. In the Network DPL for this particular issue, SBC has broken the issue out into three sub-issues, presumably because SBC's proposed language also touches on other issues. However, some of those sub- issues are already substantively addressed under other discrete issues. For example, SBC Issue 4(a) deals with the definition of SBC's network, and that is already covered by Network Issue 2. SBC Issue 4(c) deals with transit service, and that issue is already covered by Network Issue 3. From AT&T's perspective, only SBC's Issue 4(b) is relevant here, and as reflected in AT&T's issue statement, this issue is really about SBC's attempt to limit AT&T's interconnection rights. Specifically, this issue has to do with SBC's proposal to unilaterally impose a uniform and arbitrary threshold at which AT&T will no longer be able to interconnect at a single Point of Interconnection ("POI") in a LATA.[84] It is well established that CLECs may interconnect at a single POI in a LATA,[85] and SBC does not *appear* to seriously dispute this.

However, after repeated rejections by multiple state commissions and courts of its and other RBOCs' attempts to limit CLEC's right to select a single POI per LATA by

[84] SBC's proposal is to require an additional POI when the traffic through a given POI to another SBC tandem switch reaches a 24 DS-1 volume of traffic.

[85] Schell Direct at 33 – 34.

requiring the CLEC to unlawfully pay for transport of the RBOC's traffic to the POI,[86] SBC has taken a different, but equally unlawful approach.

SBC's has now created the fiction that a single POI per LATA is a right the FCC intended to only grant "new entrants," and that at some point in time that right goes away and a CLEC has to establish additional POIs.[87] Although SBC can point to some language in FCC orders where the term "new entrant" was used, that term was used generically to refer to CLECs and has never been used by the FCC to classify certain CLECs for purposes of their interconnection rights. SBC can cite to no law nor FCC order nor regulation where CLECs are classified as "new entrants" but then cease to be "new entrants" for interconnection purposes under § 251(c)(2). There is no legal support for SBC's "new entrant" argument.

The only legal grounds for an ILEC to limit a CLEC's interconnection rights is on the basis of "technical infeasibility," i.e., the legal grounds require a technical showing. The FCC has set the bar quite high for an ILEC to refuse a CLEC's requested point and method of interconnection on the basis of technical infeasibility: *the incumbent LEC "must prove to the state commission, with clear and convincing evidence, that specific and significant adverse impacts would result from the requested interconnection or access."*[88] The legal standard of proof required is clear and convincing evidence, not the usual and lower standard of "preponderance of the evidence" that is applied to contested cases. The factual standard is equally high, and SBC cannot just point to "network efficiency" or *generalized* concerns about what may result from a single POI in a LATA.

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86 *Id*. at 35 – 39.

87 Hamiter Direct, at 85 – 90.

88 *Local Competition Order* at ¶ 203 (emphasis added); 47 C.F.R § 51.5 (definition of "technically feasible"). (emphasis added)

And that is all that SBC really has been able to do, point to generalized concerns about network reliability and tandem exhaustion.[89]

SBC witness Hamiter's testimony provided a single example of one SBC Kansas City tandem that faces exhaustion concerns by the end of this year.[90] Yet Mr. Hamiter's testimony never explains when the tandem was installed, whether it is an ancient analog tandem that was "born" with limited capacity, or a newer digital switch with capacity that is truly being taxed by traffic volumes. It could be that this one SBC tandem is approaching exhaustion rather naturally and SBC should simply be investing in a new tandem under its existing rate base[91] (after all, it's not like SBC never deployed additional tandems, prior to local exchange competition being introduced, in order to accommodate growth). Furthermore, even with regard to this one tandem, SBC has not provided any evidence of CLEC trunk growth rates. SBC has not provided any evidence of the percentage of trunks deployed by CMRS (wireless) carriers. SBC has not provided any evidence of the percentage of trunks deployed by IXCs. SBC has not provided any evidence of the percentage of trunks deployed by other ILECs. In short there is no evidence whatsoever that it is CLECs that are primarily responsible for even the alleged exhaustion of this one SBC Kansas City tandem switch. Clearly then, SBC has <u>not</u> provided clear and convincing evidence of specific and significant adverse network

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89 SBC also points to a recent Texas PUC decision which adopted SBC's proposal. Texas PUC Docket No. 22315. The Texas PUC's decision was predicated on an older MCI/SBC arbitration (Docket No. 21791) where the 24 DS-1 threshold was the result of a compromise between MCI and SBC. AT&T believes that the Texas PUC's decision is in error, but more to the point, even the Texas PUC's arbitration award in Docket No. 21791 asserts that the decision was based "on this record" (i.e., the record in Texas Docket No. 21791). The record from Texas Docket No. 21791 is not before this Commission, and this Commission must reach its decision based on the record in this case. And the factual record in this case does not satisfy the FCC's standard for finding technical infeasibility and limiting AT&T's interconnection rights. As it so happens, the Kansas Arbitration Decision also adopted AT&T's position on this issue (Arbitrator's Determination, at 104 – 105).

90 Hamiter Direct at 58.

91 *See* Schell Direct at 73 (SBC is fully compensated for CLEC traffic placed on SBC's network, and SBC simply must invest in its network to accommodate growth).

impacts to justify an arbitrary and uniform threshold for requiring additional POIs in *every LATA and for every SBC tandem that a CLEC interconnects with!* Because the evidence clearly establishes that it is technically feasible to have a single POI per LATA,[92] and SBC has not met the legal standard for limiting that right, SBC's position must be rejected and AT&T's language should be adopted.

Network Issue 5: May AT&T establish one or more POIs anywhere in the LATA?

This issue addresses how the Parties would interconnect in the situation where SBC chooses to have its end office switch subtend the tandem switch of another incumbent local exchange carrier. SBC objects to AT&T's proposed language in Section 1.2 of Attachment 11, Part A, which gives AT&T the right to exchange traffic through the third party's tandem switch that SBC chooses to have its end office subtend and AT&T objects to SBC's proposed language in Section 1.1 of Attachment 11.

Today, according to the April 2005 LERG, six of SBC's end offices subtend a Sprint tandem switch in Missouri. AT&T believes it should have the choice to route local and intraLATA toll traffic originating on AT&T's network destined to such SBC end offices via the ILEC's tandem switch, which SBC chooses to have its end offices subtend. Likewise, SBC would deliver local and intraLATA toll traffic originating on its network that is destined to AT&T through the same ILEC tandem for delivery to AT&T.

AT&T's position is that AT&T may fulfill its obligation under §251(a)(1) of the Act by using indirect interconnection and the interconnecting carrier, AT&T in this case, may select the method of interconnection that it finds to be most efficient. SBC's position is that such indirect interconnection is not allowable. SBC's position would require AT&T to establish a trunk group to each such SBC end office even if there is a

[92] Schell Rebuttal at 40.

minimal volume of traffic that would not justify a dedicated trunk group to that location (i.e., AT&T must use direct interconnection).

SBC argues that AT&T's position requires the establishment of POIs outside of SBC's network. This is not the case. Where SBC elects to subtend another incumbent LEC's tandem, SBC must be interconnected with that incumbent LEC's network and SBC must establish a point of interconnection between SBC and the incumbent LEC. Where AT&T and SBC interconnect indirectly, as AT&T proposes under this issue, AT&T and SBC would utilize the points of interconnection each has with the incumbent LEC providing the transiting service. In such a case, AT&T would not have a direct POI with SBC, because AT&T would not be interconnecting directly with SBC. Rather AT&T would exchange traffic with SBC utilizing the POI AT&T has established with the transiting carrier and the POI that the transiting carrier has with SBC *that lies within SBC's territory*. Accordingly, AT&T is not asking SBC to establish a POI or to accept AT&T's traffic outside of its incumbent LEC's territory. In fact, this is the same traffic exchange arrangement SBC uses with IXCs.[93]

As the *Chariton Valley Order* observes at page 3, indirect interconnection is sanctioned form of interconnection under the Telecommunications Act. All AT&T's proposed language attempts to do is allow for this form of interconnection when AT&T determines that this is the most efficient and economic form of interconnection, which is AT&T's right under the Act. AT&T has established that this form of interconnection is technically feasible,[94] and the Commission should reject SBC's position and adopt AT&T's language.

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[93] Schell Direct at 48.
[94] *Id*. at 45.

Network Issue 7: Should the Parties mutually agree to the method of obtaining interconnection or should AT&T be able to solely specify the method of interconnection?

This issue is related to Issue 4 in that it involves the same legal standard for establishing a POI, i.e., technical feasibility. Whereas Issue 4 deals with the location of the POI, this issue deals with the actual method of physically interconnect AT&T's and SBC's facilities. Specifically, it involves the designation of the "interface" between the two companies' networks, which includes the transmission protocol (optical or electrical), the transmission speed (optical: OC3, OC12 or OC48 and electrical: DS-1 or DS-3) and the physical connection.[95] The FTA clearly gives AT&T the right to unilaterally designate any technically feasible method of interconnection, as demonstrated by FCC Rule 47 C.F.R. § 51.321(a), which states:

> Except as provided in paragraph (e) of this section [concerning collocation], an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, *any technically feasible method of obtaining interconnection* or access to unbundled network elements at a particular point upon a request by a telecommunications carrier. (emphasis added).

This rule should conclusively resolve the matter.[96] AT&T and SBC have been able to agree on multiple "technically feasible" methods of interconnection. The dispute is over whether the language in § 1.7 should allow any other technically feasible method requested by AT&T, or only other technically feasible methods "agreed to by the Parties" (SBC's proposed language). Both parties' language only address methods of interconnection that are admittedly technically feasible, yet SBC unlawfully seeks to

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[95] *Id*. at 51.

[96] The Kansas Arbitration Decision also adopted AT&T's position and language (Arbitrator's Determination at 107). The Texas Commission also adopted AT&T's position although it ordered contract language that differed from AT&T's. (Docket No. 22315, Arbitration Award – Track 1 Issues, Network DPL Addendum, Issue 10.)

impose a further requirement that SBC must also agree to the requested method. SBC's position should be rejected and AT&T's language should be adopted.

Network Issue 8:

8a. May AT&T use Interconnection Dedicated Transport, at a TELRIC rate, for interconnection trunking?

8b. May AT&T combine Interconnection Dedicated Transport with Special Access Facilities provided by SBC MISSOURI for the provision of Interconnection Trunking?

Sub-issue (a) is the key issue here. SBC provided scant testimony on this issue, and basically argues that it has no obligation to provide interconnection facilities under the FTA, and therefore has no obligation to provide such facilities at TELRIC rates.[97] The testimony also says this issue will be addressed in SBC's brief. In contrast, AT&T's testimony provides a cogent discussion of the FCC's rules and orders.[98] Where AT&T has not deployed its own network facilities, it may wish to lease facilities from SBC for network interconnection. These interconnection facilities would be used to provision local network interconnection trunks between AT&T's and SBC's switches for the exchange of traffic between the parties. CLECs are entitled to interconnect with and use the incumbent LEC's network at prices based upon the cost of providing interconnection, *i.e.,* TELRIC-based rates,[99] and SBC may not restrict AT&T's right to obtain interconnection facilities at TELRIC-based rates. Section 252(d)(1) of the Act states:

> **Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 [i.e., network interconnection],… shall be based on the cost (determined without reference to a rate-of-return or other rate based proceeding) of providing the interconnection network element . .**

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97 Silver Direct at 23.
98 Schell Direct at 57 – 59.
99 47 U.S.C. ¶ 252(d)(1).

Section 51.501(b) of the FCC's pricing rules defines "element" as:

> As used in this [TELRIC Pricing] subpart, the term "element" includes network elements, *interconnection,* and *methods of obtaining interconnection* and access to unbundled elements.[100]

Therefore, it should be clear that the FCC's rules require SBC to provide AT&T with interconnection transport facilities at TELRIC-based rates. SBC tries to confuse the issue by pointing to FCC determinations regarding access to unbundled dedicated transport facilities, first in the *TRO* and then in the *TRRO*. At the point, only the *TRRO* is truly relevant, and in ¶ 140 of the *TRRO* the FCC reinforced the requirement that ILECs have under § 251(c)(2) to provide interconnection facilities at TELRIC-based rates

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service.[101] Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network. (footnote included)

Thus, the Act clearly requires that CLECs can interconnect with and use the ILEC's network at prices based upon the cost of providing interconnection.[102] SBC nevertheless proposes to charge access rates that far exceed the economic cost of such interconnection facilities. The FCC has recognized that access charges are not based on forward looking economic cost, but are generally well above economic cost.[103] AT&T witness Schell attached a chart to his direct testimony, Schedule JS-3, which details the significant difference between TELRIC-based DS-1 and DS-3 interconnection facility rates in Missouri and SBC's proposed access rates.

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100 47 C.F.R. § 51.501(b).
101 *Triennial Review Order*, 18 FCC Rcd at 17204, para. 366.
102 47 U.S.C. ¶252(d)(1).
103 *First Report and Order, Access Charge Reform,* 12 FCC Rcd 15982, ¶¶ 258-84. (1996).

The key point here is that in both the *TRO* and the *TRRO* the FCC was only addressing access to unbundled network elements under § 251(c)(3), and the FCC did not address interconnection obligations under § 251(c)(2), which are separate and distinct from unbundling obligations. The only exceptions in these two FCC orders are in paragraphs, such as ¶ 140 in the *TRRO*, where the FCC explicitly sought to preserve the ILECs' § 251(c)(2) interconnection obligations by distinguishing them from the § 251(c)(3) unbundling obligations that the FCC was curtailing. Despite this effort by the FCC, SBC simply argues that interconnection facilities are no longer required, and that the interconnection facilities the FCC was referring to in these orders must be something other than what AT&T is requesting. Those arguments do not pass the smell test when ¶ 140 of the *TRRO* is given a plain reading. SBC's position on Issue 8(a) should be rejected and AT&T's language adopted.

Issue 8(b) addresses AT&T's right to connect entrance facilities leased from SBC at TELRIC-based rates to interoffice facilities leased from SBC at special access rates, and vice versa, solely for purposes of interconnection under Section 251(c)(2) of the Act. Said another way, AT&T seeks the right to use facilities leased from SBC's special access tariff for interconnection when it makes economic sense for AT&T to do so.[104] This involves the last sentence in AT&T's proposed § 1.2, which ensures that SBC cannot refuse to provide the necessary cross-connects. AT&T is unable to find any SBC testimony, direct or rebuttal, that specifically addresses Issue 8(b). Consequently, the Commission should reject SBC's position and adopt AT&T's proposed language.

[104] Schell Direct at 60 – 61.

Network Issue 9: In central office buildings where both parties have a presence, may AT&T use intra-building cable for interconnection?

Intra-building interconnection is a method of interconnection when both parties have broadband facility terminals within a building and thus can interconnect in that building using intra-building cable. Such cable could be a DS-1 or DS-3 cable, a fiber optic cable or another technically feasible interface, but with respect to AT&T, the most frequently used intra-building cable is the DS-3 coaxial cable. Most frequently, intra-building interconnection would be accomplished where SBC and AT&T each have central office space within the same building. This arrangement is sometimes referred to as a condominium arrangement, where as a result of AT&T's status prior to the divesture of the RBOCs, AT&T is the owner of space within certain ILEC central offices. Today those spaces are used for interconnection between AT&T's IXC operations and SBC. AT&T's proposal is to allow it to use those spaces to house local interconnection facilities and directly connect to SBC from those condo spaces, rather than via a separate and expensive collocation arrangement.

SBC opposes AT&T's position ostensibly on the grounds that AT&T's language presents network reliability and management concerns, and on the grounds that it is discriminatory against other CLECs who do not share the historical advantage of AT&T's legacy position in some central offices.[105] As to the second argument, the FCC clearly disposed of that in the *Virginia Arbitration Order:*

> **"Technically feasible interconnection is the right of every competitive entrant. The fact that AT&T in some instances, by the development of historical events, maintains wire centers on the same premises as Verizon hardly renders its proposed language discriminatory against**

[105] Hamiter Direct at 109 – 112.

other carriers."[106]

As to the first argument, SBC has to strain to put the most unreasonable spin imaginable on AT&T's proposed language that requires intrabuilding cabling to use the "shortest practical route." SWB witness Hamiter asserts that AT&T may insist on making unsafe cuts into SBC floors, overloading risers, or using cable that is inappropriate for the distance involved. First of all, AT&T's proposed language in § 1.5.1 for designating the type of cable to be used is explicitly subject to § 4.5 of Part B of the Network Attachment, where the parties have agreed to using only technically feasible forms of interconnection, and AT&T is certainly not going to insist on using a type of cable that will be inadequate for the interconnection is requires. Secondly, SBC completely ignores AT&T's use of the word "practical" in the proposed language. AT&T has used the word "practical" to try to provide some limiting factor that will comfort SBC[107] - - there is really not much more that AT&T can do in its language to address SBC's concerns except to agree that SBC will have total control over the manner of interconnection, and that is clearly unacceptable. Rather than propose alternative language, SBC quite simply proposes no language and totally opposes allowing AT&T to do this at all. It is undeniable that AT&T's proposal is technically feasible; just because SBC can imagine scenarios in which it *might* not be technically feasible, or might create safety concerns, does not justify banning this method of interconnection entirely.

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[106] *Virginia Arbitration Order* at ¶ 57. In addition, in his rebuttal testimony Mr. Hamiter criticizes Mr. Schell for providing an "incomplete" cite to the Illinois Commission decision that adopted AT&T's position on this issue. Because SBC was a party to the Illinois arbitration, one might expect Mr. Hamiter to be familiar with the decision. The full cite is *AT&T of Illinois, Inc., TCG Illinois, and TCG Chicago, Verified Petition for Arbitration of Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (SBC Illinois) Pursuant to Section 252(b) of the Telecommuncations Act of 1996,* Case No. 03-0239, Arbitration Decision, pgs. 25 – 26 (Aug. 26, 2003). Finally, the Kansas Arbitration Decision also adopted AT&T's position on this issue (Arbitrator's Determination at 109).

[107] Schell Rebuttal at 61 – 62.

Moreover, AT&T's proposal is that it will bear the entire cost of providing, installing and maintaining the intra-building cables it requests, assuming it has exclusive use of such cabling.[108] SBC constantly complains about CLECs not deploying their own facilities, and this is an example of where AT&T is seeking to install its own interconnection cabling (either do the installation itself or use an SBC-approved contractor), yet SBC opposes AT&T's efforts. As Mr. Schell suggests in rebuttal, the most likely reason for SBC's opposition is that they would prefer to charge AT&T an ongoing and inflated monthly recurring charge for leasing a special access transport facility, rather than let AT&T incur a one-time charge for laying its own cable.[109] No doubt SBC would also like to avoid losing the collocation fees that AT&T would no longer have to pay.

AT&T's proposal is technically feasible, there is no legal basis to deny it, and SBC has had to resort to extreme hypotheticals in order to justify its extreme position of total rejection of this form of interconnection. The Commission should reject SBC's position and adopt AT&T's language.

Issue 10: Should interconnection trunks carry all 251(b)(5) traffic, including ISP bound and transit traffic, as well as intraLATA exchange traffic?

The Parties disagree on the traffic that can be delivered over the interconnection trunk groups. Consistent with positions it has taken on other issues, SBC's proposed language in Section 1.0 of Attachment 11, Part C, specifically excludes transit traffic, which SBC believes should be subject to a separate "commercial" agreement (Issue 3) and SBC's definition of Local Only Trunk Groups and Local Interconnection Trunk Groups would exclude other traffic that does not meet SBC's definition of Section

[108] *Id*. at 62. AT&T proposed language § 1.5.3.
[109] *Id*. at 63 – 64.

251(b)(5) Traffic and Section 251(b)(5)/IntraLATA Traffic, respectively. As explained above under Network Issue 3, AT&T believes SBC has a continuing obligation to provide transit service and that the public interest is clearly served by SBC's doing so. Under Intercarrier Compensation Issue 1a, discussed below, AT&T will address the definition of Section 251(b)(5) Traffic and explain why SBC's definition is incorrect and should not be adopted by the Commission. SBC seeks to require the Parties to have multiple interconnection trunk groups, e.g., one trunk group for traffic that fits its definitions of 251(b)(5) Traffic or 251(b)(5)/IntraLATA Traffic and another trunk group for transit traffic under a commercial agreement. This is clearly an unnecessary and inefficient use of both Parties' resources and should be rejected by the Commission irrespective of how the Commission decides any of the related interconnection issues.[110]

At a time when the FCC is looking to develop a *unified* intercarrier compensation scheme[111] in an effort to rationalize such compensation and eliminate incentives for arbitrage, SBC's proposal to further balkanize various traffic types is a step in the wrong direction. More trunks equals more or larger facilities, which equals more costs for CLECs who are sending traffic to SBC. This sort of expense is unreasonable in light of the ongoing compensation reform efforts at the FCC, and insofar as traffic that SBC is being compensated for, this kind of extreme separation and categorization of traffic on different trunks has never been required in the past.

It appears that SBC's testimony does not explicitly address this issue anywhere - - although some of SBC's witnesses' direct testimony lists an Issue 10, none of the

[110] Schell Direct at 67.

[111] *See* In the Matter of Developing a Unified Intercarrier Compensation Regime, *CC Docket No. 01-92, Notice of Proposed Rulemaking,* (Rel. April 27, 2001) *(*"*Unified Intercarrier Compensation* NPRM")

testimony actually addresses this issue.[112] The only near exception is on rebuttal where SBC witness Douglas cites to recently published Commission rules in Case No. TX-2003-0301 (4 CSR 240-29).[113] However, the rules Ms. Douglas cites to, and her specific testimony, only address the placement of IXC traffic on local interconnection trunks when that traffic properly belongs on Feature Group A, B, or D trunks. That is not the issue here. The issue here is that SBC's proposed language would prohibit AT&T from acting as a transit provider and sending *any* third party traffic to SBC, local or intraLATA toll (also the subject of Intercarrier Compensation Issue 3c). In addition, SBC's position is that AT&T should have to establishment separate trunk groups under a commercial agreement for transit traffic (see Network Issue 3). AT&T's proposed language does not provide for placing IXC originated, or interLATA, traffic on the LEC-to-LEC network, and its does not appear to AT&T that it's proposed language is conflict with the new Chapter 29 rules, nor that those new rules require SBC's proposed language. At most it appears that the new rules would permit a terminating LEC to require separate trunk groups for IXC-originated traffic, and that would implicate SBC's trunking obligations from the tandem switch to the terminating LEC.[114] In addition, this Commission's precedent from prior Mega-Arbitrations has been to permit the efficient combining of multi-jurisdictional traffic on the same trunk group. The Commission previously determined in Case Nos. TO-97-40 and TO-98-115 that AT&T may combine all traffic types (local, intraLATA and interLATA toll) on a single trunk group over its

[112] *See* Schell Rebuttal at 66.
[113] Douglas Rebuttal at 4 – 6.
[114] Proposed 4 CSR 240-29.50.

interconnection facility with SWBT.[115] Any concerns that the Chapter 29 rules are meant to address should be dealt with on a case-by-case basis resulting from implementation of the rules, and should not serve to undermine the Commission's precedents established under the Act.

As AT&T's proposed language makes clear, it does not route IXC nor interLATA traffic to SBC over local interconnection trunks. Consequently the new rules provide no justification for SBC's proposed language for this issue, and therefore SBC has provided no justification whatsoever in its testimony. SBC's proposed requirement is completely unnecessary and inefficient and relies on improper definitions of the traffic that may be placed on local interconnection trunks, and the Commission should reject it. If there are subsequent conflicts with the new Chapter 29 rules, perhaps as a result of some LEC request for separate trunks (although, as noted above, such would not appear to conflict with AT&T's proposed language), then that can be addressed as a matter of compliance with the rules if such a conflict does in fact arise, and the Commission's rules make clear that interconnection agreements must be amended to comply with the new rules, as necessary. The Commission should adopt AT&T's recommended language for this issue as set forth in the DPL.

[115] *See, e.g., In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company,* Case No. TO-98-115, Report and Order, pgs. 34 – 35 (December 23, 1997).

Network Issue 11: Should AT&T be required to establish local interconnection trunks to every local calling area in which AT&T offers service?

Network Issue 12: Should AT&T be required to establish direct end office trunk groups if the traffic exchanged between the Parties to a SBC MISSOURI end office exceeds one DS-1 for a period of one month, with traffic adjusted for anomalies?

Network Issue 13: Should AT&T be required to establish a two-way IntraLATA toll trunk group to the SBC MISSOURI Access Tandem, when SBC MISSOURI has a separate Local tandem and Access Tandem in the same local exchange area?

Issues 11, 12 and 13 address the same basic issue: who determines the interconnection trunking arrangement the Parties will use. As interconnection trunking is simply an aspect of interconnection, the choice of trunking methodologies and arrangements belong to the CLEC, not the RBOC.[116] Like many of its network architecture proposals in this arbitration, SBC's trunking proposals seek to dismantle the existing interconnection arrangements between the Parties and impose a new model. According to AT&T witness Schell, the existing arrangement has worked well for years.[117]

SBC's language (1) requires AT&T to establish trunk groups to <u>every</u> local exchange area in which AT&T offers service, (2) requires AT&T to establish trunk groups to multiple tandem switches in the same local exchange area when SBC has separate local and access tandem switches, and (3) establishes a trigger point at which AT&T must trunk to SBC's end offices. SBC's language not only interferes with AT&T's right to specify the method of interconnection, it requires AT&T to establish inefficient interconnection arrangements, which are not cost effective.[118] SBC's proposals are not efficient or cost effective because SBC's proposed language requires

[116] 47 C.F.R. § 51.321(a).
[117] Schell Direct at 67.
[118] *Id*.

AT&T and SBC to use many small inefficient trunk groups as opposed to fewer, larger, more efficient trunk groups. The Commission should keep in mind that trunks ride over facilities and therefore facilities and switch ports must be in place to support the trunk groups. Therefore, AT&T and SBC will have to bear the cost of additional facilities as well as the cost of the additional switch ports that will be required to support the splintered, inefficient trunking arrangement required by SBC's proposed language.[119] SBC's proposed language for Issue 11 would require AT&T to establish trunk groups to every local calling area, even if AT&T only has a *de minimus* amount of traffic to that area, with the end result that AT&T will potentially have to bear the cost of additional facilities and switch ports notwithstanding the fact that the traffic can efficiently ride on existing trunk groups until traffic volume merits a separate trunk group.[120] Regarding I Issue 13, SBC's network proposals in Missouri are based on its an inefficient design that is inconsistent with SBC's network in the Ameritech states where SBC end offices subtend combined local/access tandems that limit the amount of trunking a CLEC must deploy in order to exchange traffic with SBC.[121]

Moreover, as much as SBC might like to require every CLEC to model SBC's network design, the FCC has made clear that ILECs are required to reasonably modify their networks to accommodate the interconnection requests of CLECs - - not the other way around. The FCC addressed this requirement in its *Local Competition Order*, ¶ 202:

> **Thus, it is reasonable to interpret Congress's use of the term "feasible" in sections 251(c)(2) and 251(c)(3) as encompassing more than what is merely "practical" or similar to what is ordinarily done. That is, use of the term "feasible" implies that interconnecting or providing access to a LEC network element may be feasible at a**

[119] *Id*.
[120] Schell Rebuttal at 70 -71, 74 – 75.
[121] *Id*. at 73.

particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment. This interpretation is consistent with the fact that incumbent LEC networks were not designed to accommodate third-party interconnection or use of network elements at all or even most points within the network. ***If incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of sections 251(c)(2) and 251(c)(3) would often be frustrated.*** **For example, Congress intended to obligate the incumbent to accommodate the new entrant's network architecture by requiring the incumbent to provide interconnection "for the facilities and equipment" of the new entrant. Consistent with that intent, the incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements. [emphasis added]**

The Commission essentially addressed all 3 of these issues, at least at a conceptual level, in the last AT&T/SBC arbitration, Case No. TO-2001-455.[122] Issue 12 was specifically addressed. At pages 41 – 42 of the Arbitration Order the Commission discussed these issues, and ultimately adopted AT&T's position and language, stating: "SWBT is obligated to interconnect with AT&T at any technically feasible point, without regard to traffic volume. AT&T is free to design its own network and to capitalize on any competitive advantages conferred by its network architecture in conjunction with SWBT's interconnection duty." SBC has not raised any new factual or policy arguments that would warrant changing the Commission's decision, particularly with regard to the direct trunking requirement under Issue 12. Issue 12 is subject to the same technical feasibility standard as described above in Issue 4, and mere assertions about warding off tandem exhaustion do not satisfy that standard. As in the case of Issue 4, here SBC also argues that alleviating tandem exhaustion is a justification for requiring direct end office

[122] *In the Matter of Application of AT&T Communications of the Southwest, Inc., for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Case No. TO-2001-455, Arbitration Order (June 7, 2001).

trunks at a threshold of 24 DS-0 (or one DS-1 - - 24 voice grade paths) traffic volume to an SBC end office. However, other than simply asserting that one of its Kansas City tandems is nearing exhaust, SBC provides no evidence that the condition at that tandem is not a naturally occurring one or that CLEC traffic is in any way responsible for the alleged exhaust situation at that tandem. Furthermore, SBC has provided absolutely no evidence regarding network impacts at any of its other tandems that would justify a uniform system-wide requirement of direct end office trunks at a 24 DS-0 level.

Finally, the FCC addressed the issue of direct end office trunking in its *Virginia Arbitration Order*. There, the FCC rejected Verizon's proposed language to AT&T and Cox requiring the establishment of direct end office trunks when traffic to a particular Verizon end office exceeds a DS-1 level. The FCC stated:

> **We reject Verizon's proposed language to AT&T and Cox requiring the establishment of direct end office trunks when traffic to a particular Verizon end office exceeds a DS-1 level. It appears that competitive LECs already have an incentive to move traffic off of tandem interconnection trunks onto direct end office trunks, as their traffic to a particular end office increases. By such direct trunking, a competitive LEC may avoid charges associated with Verizon's tandem switching. Indeed, it would appear that, just like Verizon does, competitive LECs have the incentive to move their traffic onto direct end office trunks when it will be more cost-effective than routing traffic through the Verizon tandems. The record indicates that competitive LECs already move their traffic onto direct end office trunks as their traffic volumes increase. Verizon has neither alleged nor established that this incentive is insufficient to alleviate its tandem exhaustion concerns.[123] (Two footnotes omitted.)**

SBC would like to denigrate the *Virginia Arbitration Order* as not being an order of the FCC because the order was issued by the Wireline Competition Bureau.[124]

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[123] *Virginia Arbitration Order* at ¶ 88.

[124] It is important to note that all arbitrations conducted by the FCC under § 252(e) are delegated to the WCB to conduct. 47 C.F.R. § 51.807(d). "Consistent with [§ 51.807(d)], we authorize the Chief, [Wireline Competition Bureau], to serve as the arbitrator in section 252(e)(5) proceedings." *In the*

Alternatively, SBC points out that the *Order* is not binding on this Commission. SBC's first argument is wrong, and its second misses the point. The *Virginia Arbitration Order* was issued by the Wireline Competition Bureau on the full delegated authority of the FCC, and there is no question that a decision of the Bureau has the same force and effect as decision of the full FCC unless that Bureau's decision is modified or overturned by the FCC, as demonstrated by these excerpts from the Act and the FCC's rules:

> When necessary for the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions [. . . .] to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter;[125]
>
> > Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided [below], *shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission*.[126] (emphasis added)
>
> The Wireline Competition Bureau advises and makes recommendations to the Commission, *or* <u>*acts for the Commission*</u> *under delegated authority*, in all matters pertaining to the regulation and licensing of communications common carriers and ancillary operations (. . . .).[127] (emphasis added)

The *Virginia Arbitration Order* was issued in July 2002 and has never been modified or overturned. The FCC issues *hundreds* of orders on a monthly basis through the delegated authority of its various Bureaus, which is the only way that the FCC could function, and SBC would ask this Commission to believe that none of those orders has the same effect as if the FCC had issued them. And although the *Virginia Arbitration*

Matter of Procedures for Arbitrations Conducted Pursuant to Section 252(E)(5) of the Communications Act of 1996, 16 F.C.C.R. 6231, 6233, ¶ 8, FCC 01-21, 2001 WL 46669 (Jan. 19, 2001). Consequently, the full FCC will most likely never actually hear and decide a § 252(e) arbitration.

125 47 U.S.C. § 155(c)(1) (in part)

126 47 U.S.C. § 155(c)(3)

127 47 C.F.R. § 0.91 (in part)

Order is not binding on this Commission inasmuch as it constituted the FCC's determination in a bilateral arbitration other than this proceeding, there is no denying the fact that the *Virginia Arbitration Order* is the FCC interpreting and applying its own rules. Such a decision is certainly persuasive if not binding. The 5th Circuit found it persuasive when overturning the Texas PUC's POI decision from the 2001 AT&T/SBC arbitration (Docket No. 22315).[128] Just as this Commission applies its decisions from one bilateral arbitration to another even though the initial decision may not be a "binding precedent," so too should this decision of the FCC be considered precedential and persuasive when applying the FCC's own regulations to this arbitration.[129] The record in this case also establishes, as it did in the *Virginia Arbitration,* that AT&T moves its traffic off of SBC's tandems and onto direct end office trunk groups when it makes economic sense to do so.[130]

The Commission should reject SBC's position on Network Issues 11, 12, and 13, as they infringe on AT&T's interconnection rights and would result in an inefficient and uneconomic interconnection arrangement. The Commission should follow the precedent it established in Case No. TO-2001-455 and reject SBC's positions, particularly SBC's "one size fits all" requirement for direct end office trunking, and the Commission should adopt AT&T's proposed language for these issues.

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[128] *See Southwestern Bell Tele. Co. v. Pub. Util. Comm'n of Texas,* 348 F.3d 482, 487 (5th Cir. 2003). *See also MCIMetro Transmission Services, Inc. v. BellSouth Telecommunications, Inc.,* 352 F.3d 872 (4th Cir. 2003).

[129] At the hearing SBC counsel routinely cited to the Commission's decision in the last AT&T/SBC Arbitration, Case No. TO-2001-455, as support for some of SBC's position in this proceeding vis-à-vis CLECs other than AT&T. Consequently, AT&T will point out that the Kansas Arbitration Decision adopted AT&T's position on these issues (Arbitrator's Determination at 105).

[130] Schell Direct at 76.

Network Issue 14:

a. Should the agreement contain terms and conditions for Feature Group B and D traffic?

b. Should SBC be required to provide transport between the AT&T switch and the SBC MISSOURI Access Tandem?

c. Should AT&T be solely responsible for the Meet Point Trunk Groups and the facilities used to carry them?

Issue 14 deals with the provision of Meet Point Trunk Groups and addresses whether the interconnection agreement should address terms and conditions for such trunk groups including how such trunk groups are provided.

With regard to Issue 14a, although SBC appears to oppose the inclusion of Feature Group B and D traffic in the ICA, SBC itself is proposing language in Sections 2.1 and 2.1.4 that addresses the transmission and routing of IXC Feature Group B and D traffic on Meet Point Trunk Groups between AT&T's switch and SBC's access tandem switch. SBC also proposes a definition for Meet Point Trunk Groups in Section 6.14 of Attachment 11. Thus, SBC has proposed language in the agreement governing the transmission and routing of Feature Group B and D traffic. It is also clearly appropriate to address the handling of meet point traffic in the Parties' interconnection agreement since Meet Point Trunk Groups constitute the joint provision of switched exchange access services to IXCs by AT&T and SBC, both operating as LECs.

With regard to Issues 14b and c, as explained in Mr. Schell's prefiled testimony,[131] AT&T will agree to forego its discretion to either provide the transport facility for the Meet Point Trunk Group between AT&T's switch and SBC's access tandem switch or to have SBC provide such transport and be financially compensated for

[131] Schell Direct at 80 – 81.

doing so under the industry approved MECAB Guidelines.[132] AT&T proposes to substitute the following language for the language it previously proposed for Sections 2.1.2 and 2.1.3 in Attachment 11, Part C:

> **2.1.2 AT&T will provide local switching and transport between each AT&T Switch (or equivalent facility) and the applicable ILEC access tandem of Feature Group B and D calls.**
>
> 2.1.3 SBC MISSOURI will provide, tandem switching and transport between the ILEC access tandem and the IXC POP, if so requested by the IXC, of Feature Group B and D calls.

With this modification, the language in 2.1.2 now specifies that AT&T will provide the facilities that carry the Meet Point Billing Trunk Group between AT&T's switch and SBC's access tandem switch and should resolve SBC's Issues 19b and c.

However, as pointed out in AT&T's proposed language for 2.1.5, AT&T may utilize the interconnection methods set forth in Attachment 11, Part B, except Fiber Meet Point, to establish the Meet Point Trunk Groups, including leasing the transport facility from SBC at TELRIC-based rates. This is true because the Meet Point Trunk Groups are subject to the interconnection requirement of 251(c)(2) and AT&T can obtain such transport from SBC at TELRIC-based rates. The FCC confirmed this in the Virginia Arbitration between Verizon and MCI (WorldCom Inc.). In the *Virginia Arbitration Order*, the Wireline Competition Bureau specifically stated that CLECs have a right to purchase such facilities at TELRIC-based rates:

> **We agree with WorldCom that the services in question [Meet Point Trunking Arrangements]** ***constitute the joint provision of switched***

[132] Multiple Exchange Carrier Access Billing ("MECAB") Guidelines. The MECAB document is copyrighted, printed and distributed by the Alliance for Telecommunications Industry Solutions (ATIS) on behalf of the ATIS-sponsored Ordering and Billing Forum (OBF).

> ***exchange access services to IXCs by WorldCom and Verizon, both operating as LECs.*** **Therefore, we agree with WorldCom that, when the parties jointly provide such exchange access, Verizon should assess any charges for its access services upon the relevant IXC, not WorldCom.** ***We further agree with WorldCom that it has the right to purchase unbundled dedicated transport from Verizon to provide IXCs with access to WorldCom's local exchange network. Therefore, Verizon may not require WorldCom to purchase trunks out of Verizon's access tariffs in order for WorldCom to provide such exchange access.*** **Accordingly, we reject Verizon's proposed language, and we adopt WorldCom's proposed language.[133] (footnotes omitted, emphasis added)**

Thus, the FCC has rejected the position espoused by SBC witness Douglas in her direct testimony.[134] Moreover, SBC's position in Mr. Hamiter's direct testimony that these meet point trunks are simply "ancillary" trunks and that SBC's end users derive no benefit from them therefore SBC does not have to include provisions for them in the interconnection agreement defies logic.[135] Not only did the FCC reject this view in the *Virginia Arbitration Order*, but providing access to an IXC is a fundamental part of basic local exchange service, and not something "ancillary" that AT&T can or cannot chose to provide. And obviously SBC's end users to derive benefits from the establishment of these trunk groups because the allow SBC's end users to originate interLATA calls to and receive interLATA calls from AT&T's end users, which is clearly valuable.[136] SBC's hyper-narrow view of the purpose of this interconnection agreement is not in the public interest, and the Commission should reject SBC's position on Issue 14a and adopt AT&T's proposed language.

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[133] *Virginia Arbitration Order* at ¶ 177. The Kansas Arbitration Decision also rejected SBC's position in favor of AT&T's position. (Arbitrator's Determination at 111.)

[134] Douglas Direct at 9 – 10.

[135] Hamiter Direct at 67 – 68.

[136] Schell Rebuttal at 80 – 81.

In resolving this issue, the Commission should keep in mind that Issue 14 is interrelated with Issue 18. In Issue 14, the Parties also disagree on wording in Section 2.1, which is related to Issue 18. SBC's proposed language would require AT&T to establish a Meet Point Trunk Group to every SBC access tandem in the LATA, whereas AT&T's proposed language would only obligate AT&T to establish a single Meet Point Trunk Group to the SBC access tandem that AT&T's switch subtends in the LERG. It is only necessary that AT&T's switch subtend a single access tandem in the LERG. That is all that is necessary to tell all IXCs how to route their access traffic to AT&T, i.e., through the specified SBC access tandem.

However, with its proposed language Section 2.1 of Attachment 11, Part C, SBC is trying to fix an infrequent problem that arises when an IXC is routing a call to the carrier serving the called party and the IXC fails to perform a local number portability ("LNP") database query and routes the toll call to the Party that was serving the number before it was ported to the other Party. For example, if an SBC customer ports his number to AT&T and the SBC end office serving that customer subtended SBC access tandem A and the AT&T switch subtends SBC access tandem B, the IXC will route the call to SBC access tandem A instead of B and vice versa if the customer number was ported from AT&T to SBC. AT&T believes the Parties agree that that this is an infrequent occurrence and does not justify the expense of installing Meet Point Trunk Groups to every access tandem in the LATA. This is the very issue that the Parties are addressing in Issue 18 and AT&T believes the issue should be resolved by the language

the Parties are adjudicating in Issue 18. SBC should not be attempting to apply a belt and suspenders approach to the same issue.[137]

AT&T believes the Commission's decision on the language in Section 2.1 in Issue 14 should be conformed to the Commission's decision on Issue 18. If the Commission adopts AT&T's position on Issue 18, as it should, it should also adopt AT&T's proposed language in Section 2.1 in Issue 14.

Network Issue 15:

a. May AT&T combine originating 251(b)(5) Traffic and intraLATA Exchange Access with interLATA Exchange Access Traffic on Feature Group D exchange access trunks AT&T obtains from SBC MISSOURI?

b. If AT&T is permitted to combine Section 251(b)(5) traffic, IntraLATA exchange access traffic and interLATA exchange access traffic, will the Parties utilize factors to determine proper billing?

This issue involves a single AT&T service, AT&T Digital Link ("ADL"), which is a local service provided to multi-line business customers using a PBX.[138] The service takes advantage of AT&T's massive investment in its long distance network (switching and transport) to provide local calling to a limited number of business customers. Consequently, this service involves the routing of local traffic over Feature Group D ("FGD") trunks groups (IXC "long distance" trunks to which switched access charges typically apply). In order to properly compensate SBC for terminating this traffic, AT&T has developed a factor to identify the ADL "local" traffic that is routed over the FGD trunks and this traffic is subject to TELRIC-based reciprocal compensation termination charges rather than access charges. This service has been available to businesses, and this interconnection arrangement has been authorized by the AT&T/SBC Missouri interconnection agreement, for over six years. SBC has not filed a complaint with any

[137] Schell Direct at 82 – 83.
[138] Tr. at 535 – 536.

state commission, nor did SBC raise this issue in Case No. TO-2001-455. In addition, to Missouri, this interconnection arrangement is used in California, Connecticut, Texas, Oklahoma and Arkansas, and in Verizon, BellSouth, and Qwest territories.[139]

This method of interconnection for the routing of local traffic is technically feasible, as evidenced by its existence in multiple jurisdictions over the last six-plus years, and the use of factors for compensation purposes is a reasonable accommodation by SBC.[140] AT&T provides SBC with the Calling Party Number ("CPN") necessary to determine the local nature of the calls and, in those situations where the customer's PBX does not provide the CPN, AT&T populates the CPN field with the customer's local Automatic Number Identification ("ANI") number representing the customer's physical location. Thus, SBC will have information in the CPN Parameter field of the SS7 message for a local call 100% of the time to (1) verify the validity of the PLU factor that AT&T provides to SBC, (2) verify the true jurisdictional nature of the traffic, and (3) ensure there is no fraud.[141] As Mr. Schell testified at hearing, AT&T uses the same process to develop its factor as it would to jurisdictionalize local and interexchange calls that it routes over separate trunk groups,[142] so AT&T's factor is just as accurate as if AT&T routed the calls over separate trunk groups.

The current ADL interconnection is efficient and cost-effective for both parties. If the Commission does not rule that the Parties can do this, AT&T will be forced either to create numerous additional interconnection trunk groups requiring additional, unnecessary, duplicative facilities, trunks and trunk terminations, which simply serves to

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139 *Id*. at 86.
140 *Id* at 84 – 85.
141 *Id*. at 87.
142 Tr. at 516 – 517.

needlessly increase AT&T's and SBC's cost of providing interconnection facilities and trunking, or to compensate SBC at access rates for such local traffic.[143] Aside from assertions about inaccurate compensation, which has not been borne out by the experience of the last six years, SBC points to the Commission's recently published rules in 4 CSR 240-29, and specifically 4 CSR 240-29.50, which allows a LEC to request that separate LEC-to-LEC trunks and IXC trunks be established from a tandem provider, such as SBC, to the terminating LEC. First of all, the new Chapter 29 rules are clearly concerned primarily with situations were interexchange traffic has been inappropriately placed on local trunk groups, i.e., IXC traffic placed on the LEC-to-LEC network, and the impetus for the rule was *not* the situation presented by the ADL service where local traffic is placed on the FGD long distance network. Under the new rule, a LEC first has to ask for separate trunks to be put in place, and there is no evidence to support that occurring. Even if that request is made, Mr. Schell testified that inasmuch as ADL is a local service the amount of ADL traffic terminating to third-party ILECs will be minimal.[144] Moreover, as should be obvious, unless AT&T has an interconnection agreement with the ILEC that also provides for this form of local interconnection, any ADL traffic terminated by that ILEC is going to be identified as interexchange traffic and AT&T is going to pay switched access to terminate those calls.[145] No small ILEC is going to complain about receiving switched access for what are actually local calls.

Consequently, the Commission should reject SBC's position that attempts to thwart AT&T's attempt at bringing facilities-based competition to local business

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[143] *Id*. at 84.
[144] Tr. at 536 – 537.
[145] *Id*.

customers, and the Commission should maintain the status quo by adopting AT&T's proposed language.

Network Issue 16: When both Parties are providing service in a LATA, should the Parties be required to open each other's NPA-NXX codes, including NPA-NXX Codes from and to exchanges that are not within SBC MISSOURI'S incumbent local exchange area?

This dispute is related to SBC's position that none of its § 251(c) obligations apply in any form or fashion beyond the borders of SBC's ILEC service territory. SBC is wrong. AT&T's proposed language addresses the situation where SBC's tandem serves non-SBC territories in a particular LATA. There are numerous instances in Missouri where another ILEC's exchange, i.e., an Independent Company's, is served by an SBC tandem switch. In order for AT&T's customers in one of these exchanges to have the same calling scope as the incumbent's customers, and be reachable by SBC's customers, SBC must open AT&T's NPA-NXX codes in the SBC tandem serving the exchange in question. Indeed, unless SBC opens AT&T's NPA-NXX codes in its tandem, SBC's customers will not be able to call AT&T's customers in such exchanges. Considering the fact that AT&T's customers can be in a mandatory expanded local calling area, SBC would arguably be violating its retail tariffs if its does not allow its customers to reach AT&T's customers in such instances.[146]

SBC has a duty to provide interconnection on terms that are nondiscriminatory under Section 251(c)(2)(D) of the Act. Since SBC opens NPA-NXX codes in its switches all of the time so its customers can reach, and be reached by, other SBC and small ILEC customers, it would be blatantly discriminatory and a violation of Section 251(c)(2)(D) for SBC to refuse to open an NPA-NXX code for AT&T. Thus, pening

[146] Schell Direct at 88.

codes is a critical function that SBC is obligated to provide under Section 251(c) of the Act.

In its testimony SBC did not address this issue with any specificity. The direct testimony of SBC witness McPhee simply grouped this issue under a number of issues that relate to SBC's position that anything that remotely has to do with providing service outside of SBC's territory is not something that SBC has an obligation to provide.[147] Therefore, in some instances, like here, SBC offers to provide the function or service but at terms or rates that are not compliant with § 251. SBC takes the contortionist's approach, i.e., SBC doesn't have to make the service available as part of a § 251 interconnection agreement, and SBC won't agree to negotiate or arbitrate the issue, but SBC will offer its preferred rates, terms and conditions for the service in a separate appendix to the § 251 interconnection agreement and SBC asks the Commission to approve that appendix.

The Commission should see this for the farce it is and reject SBC's position. Opening another carrier's NPA-NXX codes when that carrier operates in an area served by SBC's tandem is absolutely essential to provision of local exchange service, both in SBC's territory and in an adjacent ILEC's territory that share an expanded mandatory local calling scope. As noted above, SBC's own customers will not be able to reach the CLEC's customers in the same manner that they would be able to reach the customers of the adjacent LEC. And, as the Kansas Commission recently noted, SBC's tandem, where

[147] McPhee Direct at 64 – 68.

the codes reside, is clearly within SBC's network.[148] The Commission should adopt AT&T's proposed language.

Network Issue 17: Should AT&T be required to establish a segregated trunk group for mass calling for less than 2500 access lines?

In this issue, the Commission is asked to decide whether AT&T will be required to establish choke trunks, even where no threat exists to either party's network. The dispute concerns what AT&T believes to be excessive engineering requirements by SBC that ignore reality and deny acceptable levels of flexibility in how to avoid call blocking. When local service is established in an exchange for even a single business customer, SBC requires installation of a separate trunk group with only two trunks activated to serve as a "choke group."[149] Requests for waivers of this requirement have consistently been denied by SBC. AT&T believes this type of trunking is not warranted below a threshold at which no network threat exists. In an effort to seek a compromise on this issue, AT&T is willing to agree to a choke trunk requirement where AT&T has 2,500 or more access lines. Above this threshold, AT&T would adhere to the choke trunks schedule proposed by SBC.[150]

SBC's position is simply based on their own overly cautious engineering standards that do not impose the same costs on SBC as they do on smaller facilities-based carriers. Mr. Hamiter's rebuttal testimony challenges AT&T's 2,500 line threshold with the following indecipherable comment: "[in a scenario where AT&T deploys fewer switches and more facilities] these few customers for each rate center will most likely be

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[148] Kansas Arbitration Decision (Order 13, at 22). Not surprisingly, the Kansas Commission adopted AT&T's position.

[149] The Parties install a 24-channel DS-1 facility between the AT&T switch and SBC's tandem switch and activate only two of the 24 channels available to serve as choke trunks.

[150] Schell Direct at 90.

served by the same switch and the aggregate of those few customers (2,500 per rate center), can very likely add up to a larger sum with greater abilities than what is portrayed." Even if you ignore the various suppositions, e.g., "most likely," very likely", one still has to ask "What is SBC witness Hamiter saying?" Or, "huh?" AT&T's proposed language says that it will not establish choke trunks for each "serving area" in which AT&T has less than 2,500 lines. "Serving area" in AT&T's view means local calling area, not rate center, and a local calling area can include multiple rate centers. The aggregation "threat" hypothesized by Mr. Hamiter is greatly reduced when the 2,500 line threshold is applied to a local calling area rather than to rate centers, as he supposes.

As Mr. Schell's testimony pointed out, SBC's position is simply extreme in the case of a small number of access lines. In the case of AT&T Communications' interconnections for its AT&T Digital Link ("ADL") service. AT&T Communications' ADL service is sold only to business customers who use intelligent PBXs. Some of these business customers are the sole service location within the service area. If AT&T sells 24 PBX trunks to provide local exchange service to such a customer, SBC's proposal would require AT&T to install one DS-1 for local interconnection to SBC and a second DS-1 to SBC for a choke trunk group. AT&T's interconnection costs would be doubled, even though there is absolutely no threat to SBC's network from AT&T's interconnection.[151] Furthermore, even below this 2,500 line limit, AT&T does employ call gapping to handle mass calling events, and the nature of AT&T's facilities-based service, which is limited to multi-line business customers, also reduces or virtually eliminates the risks from mass

[151] Schell Direct at 92.

calling events.[152] SBC did not dispute Mr. Schell's testimony that AT&T has deployed these choke trunks at SBC's insistence and they have gone totally unused for years.[153]

The Kansas Commission found AT&T's position more reasonable.[154] AT&T's position is a reasonable compromise to address the issue of call blocking from mass calling events balanced against the costs of SBC's inflexible position. The Commission should reject SBC's position and adopt AT&T's language.

Network Issue 18: Should parties be permitted to send 251(g) traffic delivered to [either party from] an IXC where the terminating number is ported to another CLEC and the IXC fails to perform the Local Number Portability (LNP) query over interconnection trunks?

As discussed above, this issue is also related to Issue 14. However, this is only the issue as defined by AT&T, which corresponds to SBC's Issue 18(b). SBC's proposed Issue 18(a) is the same statement as SBC's Intercarrier Compensation Issues 1(b) and 1(c), and AT&T will address those issues in the Intercarrier Compensation portion of this brief. The disagreement between the Parties under AT&T's Issue 18 deals with SBC's proposed language in Section 7.2 of Attachment 11, Part C, which addresses how the Parties handle IXC toll traffic that has been delivered to one of the Parties but should have been delivered to the other Party. This occurs when an IXC fails to perform the Local Number Portability ("LNP") database query to determine the carrier that is now serving the called telephone number and instead routes the call to the Party that was serving the number before it was ported to the other Party. AT&T believes the Parties agree that this is an infrequent occurrence and AT&T does not agree with SBC's draconian language requiring such calls to be blocked, or would presumably require that

[152] *Id*. at 91, 92 – 93.
[153] *Id*. at 92
[154] Kansas Arbitration Decision (Order 13 at 23).

separate trunks be established.[155] AT&T does not want calls to its customers blocked, thereby creating the impression that AT&T's network or service is somehow inferior.[156]

The problem with SBC's language is that it focuses inappropriately on the local exchange carrier, and imposes burdens on the wrong party. The root cause of the problem in this situation is the IXC who fails to perform the LNP query and so misroutes the call. In addition, SBC's language is inaccurate because it refers to a third party CLEC when it should be referring to an IXC. As Mr. Schell explained, if a third party CLEC really were originating this traffic, then in almost every case the CLEC routes the traffic to AT&T through SBC's tandem switch. If the third party CLEC has not done the LNP database query, SBC, as the N-1[157] carrier, will do the database query and will route the call to the local exchange carrier serving the called telephone number. This issue does not exist where the database query is performed. Thus, in this issue, the Parties are really addressing those infrequent calls where the IXC does not do the LNP database query and misroutes the call to the Party that was serving the number before it was ported to the other Party.[158]

Once again, the Kansas Commission found AT&T's position more reasonable.[159] The Commission should reject SBC's erroneous contract language and adopt AT&T's position.

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155 SBC's proposed language in Section 7.2 begins "In the limited circumstances….."
156 Schell Direct at 94 – 95.
157 N-1 is pronounced N minus one. This term is used in central office (also called exchange) switching. It refers to the central office switch just before the last one, i.e., the penultimate switch. Newton's Telecom Dictionary, 17th Update and Expanded Edition, February 2001.
158 Schell Direct at 95.
159 Kansas Arbitration Decision (Order 13 at 24).

INTERCARRIER COMPENSATION

AT&T's briefing of Intercarrier Compensation issues will generally follow the order of issues in the AT&T/SBC Intercarrier Compensation DPL. However, AT&T will group some issues that have a logical relationship and some cases that has resulted in the issues being addressed slightly out of order.

A. Section 251(b)(5) traffic[160]

Joint Intercarrier Compensation Issue 1a: What is the proper definition and scope of § 251(b)(5) traffic?

The Telecommunications Act of 1996 established that *all* telecommunications traffic exchanged between LECs is subject to reciprocal compensation *except* for traffic expressly exempted from that requirement. In other words, the legal presumption is that traffic is subject to reciprocal compensation, and not access charges, unless there is specific statutory language stating that a particular kind of telecommunications traffic is not subject to reciprocal compensation. AT&T's proposed contract language uses this same approach and should be adopted.

47 U.S.C. §251(b)(5) obliges all local exchange carriers (including SBC) to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. §251(g) creates a limited exception to §251(b)(5) for certain services – including information access and exchange access traffic – that were subject to access obligations prior to the enactment of the Telecommunications Act of 1996. Thus, *all* telecommunications traffic is subject to § 251(b)(5) unless it is expressly excluded by 47 U.S.C. § 251(g).

[160] AT&T does not address AT&T Recip Comp Issue 1d because it is the same as SBC's Network Architecture Issue 18B, which AT&T addressed above in the brief under AT&T Network Issue 18.

As discussed below with respect to Issues 1(b) and 1(c), the reciprocal compensation obligation for all telecommunications traffic extends to IP-Enabled Services traffic, with one well-defined exception that is accounted for in AT&T's proposed contract language.

AT&T's proposed ICA language with respect to this issue in Attachment 12 mirrors the express language of 47 U.S.C. §251(b)(5), including the carve out in §251(g), and requires SBC and AT&T to enter into reciprocal compensation arrangements for *all* traffic except Exchange Access Traffic and certain other enumerated exceptions, including the phone-to-phone IP telephony traffic discussed below. SBC's proposed language, in contrast, adopts the opposite approach by limiting the services subject to reciprocal compensation to those specifically listed in the ICA. As such, SBC's approach is in direct conflict with the approach taken by the 1996 Act. In addition, SBC's proposed language excludes Information Services and Enhanced Services traffic from reciprocal compensation in violation of clear and direct FCC authority.

AT&T's proposed language is entirely consistent with the approach and scope of §251(b)(5) and should be adopted.

1. IP Enabled Traffic

Recip Comp Issue 1b: What IP Enabled Traffic should be excluded from the § 251(b)(5) reciprocal compensation and subject to access in accordance with the FCC's Phone-to-Phone IP Telephony Order, FCC 04-97 (rel. April 21, 2004)?

Recip Comp Issue 1c: Should IP Enabled traffic that does not meet the criteria set forth in the FCC's Phone-to-Phone IP Telephony Order, FCC 04-97 (rel. April 21, 2004), be addressed within the context of this arbitration?

All IP Enabled Services Traffic, with the limited exception of traffic subject to the *Phone-to-Phone Telephony Order*, is Information Services Traffic that also falls within the scope of the FCC's Enhanced Services Exemption to access charges. For both

reasons, such traffic is subject to reciprocal compensation under 47 U.S.C. § 251(b)(5). The only IP-Enabled Services Traffic that should be excluded from §251(b)(5) is traffic that meets the criteria established by the FCC's *Phone-to-Phone Telephony Order*.[161] The ICA language proposed by AT&T specifically provides for this exception in Section 2.1.1 of Attachment 12.

IP-Enabled Services Traffic is Subject to Reciprocal Compensation Under 47 U.S.C. §251(b)(5).

IP Enabled Services, under the contract language proposed by AT&T, includes "services and applications that rely on Internet protocol for all or part of the transmission of a call." (Attachment 12, Section 1.1(ii).) All such traffic, with the exception of traffic not meeting the requirements of the *Phone-to-Phone Telephony Order*, is subject to reciprocal compensation under 47 U.S.C. § 251(b)(5) for two reasons. First, IP-Enabled Services traffic is Information Services traffic that is not subject to the 47 U.S.C. §251(g) carve out for access charges. Second, providers of IP-Enabled Services are subject to the FCC's Enhanced Service Provider's exemption that has exempted Enhanced Services traffic from access charges since 1983.[162]

AT&T's proposed ICA language specifically includes IP-Enabled Services within the scope of traffic subject to reciprocal compensation at Attachment 12, Section 1.1, and it specifically carves the "IP-in-the-middle traffic" identified under the *Phone-to-Phone Telephony Order* out off that scope at Attachment 12, Section 2.1.1. SBC's proposed

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[161] Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket 02-361, FCC 04-97 (rel. April 21, 2004) (the "*Phone-to-Phone Telephony Order*").

[162] Schell Direct at p. 10.

ICA language, in contrast, purports to subject all IP-Enabled Services traffic to access charges[163] in direct violation of the 1996 Act and the FCC precedents discussed below.

IP-Enabled Services are Information Services.

IP-Enabled Services fall squarely within the statutory definition of Information Services. 47 U.S.C. § 153(20) provides that an "information service" is the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." The FCC's rules further provide that any service "which employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, provide the subscriber additional, different, or restructured information, . . . or involve subscriber interaction with stored information," 47 C.F.R. § 64.702(a), are "enhanced" and therefore "information" services.[164]

IP-Enabled Services are plainly "information services" within the meaning of section 3(20) because they offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." For example, AT&T CallVantage Voice over Internet Protocol ("VoIP") service is analogous in all relevant respects to the pulver.com service that the FCC recently found to be an information service.[165] Like pulver.com, the AT&T CallVantage service offering is a "bring your own broadband" service.[166] AT&T

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163 *See* SBC Proposed Language for Section 1.0 (including subsections) of Attachment 12.

164 *See Non-Accounting Safeguards Order*, 11 FCC Rcd. 21905, ¶ 102 (1996) (statutory category of "information services" is broader than "enhanced services" but includes everything previously deemed to be enhanced services); *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, ¶ 33 (1998) ("*Report to Congress*") (same).

165 Memorandum Opinion and Order, *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27, ¶ 11 (rel. Feb. 19, 2004) ("*Pulver.com Order*").

166 *Cf. Pulver.com Order* ¶ 9; Schell Direct Testimony, at 105.

CallVantage service end-users, like pulver.com's, use their own end-user devices (their computers and telephone adapters) to "establish the actual connection" with others through their pre-existing connection to the Internet.[167] Like pulver.com, AT&T CallVantage service facilitates connections to others who are connected to the Internet (so-called "computer-to-computer" communications), and it provides numerous data storage features that allow its end-users to manage these communications.[168]

AT&T CallVantage service provides additional information services, of course, that pulver.com does not provide. Most prominently, AT&T CallVantage service provides additional protocol conversion services that allow its end-users to establish communications with others who are still connected to the PSTN.[169] Specifically, VoIP customers use CPE that originates voice communications in IP format at the point they enter the network. To allow these subscribers to communicate with telephone subscribers that are connected to the PSTN using traditional wireline facilities, AT&T's service includes "computer processing applications" that convert the customer's IP-based communications to the traditional analog format of POTS services.[170] The FCC has repeatedly recognized that services that include such net protocol conversions are "information services."[171]

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167 *Cf. Pulver.com Order* ¶ 6; Schell Direct Testimony, at 105.

168 Schell Direct Testimony, at 105.

169 *See id*.

170 *Id.*

171 *Non-Accounting Safeguards Order* ¶ 104; *BOC Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd. 13758, ¶ 51 (1995); *Computer III Phase II Order*, 2 FCC Rcd. 3072, ¶¶ 64-71 (1987). The FCC has likewise repeatedly made clear that when a "comprehensive service offering" includes such data processing capabilities, it is an "information service," "regardless of whether subscribers use all of the [information service] functions provided as part of the service." *Cable Modem Declaratory Order* ¶ *38*; *id.* ¶ 35 (statutory definition of information service "rests on the function that is made available") (emphasis added). *See also Report to Congress* ¶ 59 ("[i]f the user can receive nothing more than pure transmission, the service is a telecommunication service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.")

Both the Act and FCC precedent make clear that a service can be classified as a telecommunications service only if it provides nothing more than pure transmission of the end-user's information; if the service includes any enhancement, it is an information service. Today's IP-Enabled Services generally provide much more than pure transmission. Indeed, many VoIP end-users have obtained telecommunications separately elsewhere, and their interaction with the VoIP provider includes generating, exchanging and manipulating a wide variety of stored information. Accordingly, IP-Enabled Services are classic enhanced, or information, services.[172]

IP-Enabled Services are also Enhanced Services

As the FCC noted in its *ISP Remand Order*,[173] the 1996 Act definition of Information Services, discussed above, is the same as the FCC's traditional definition of Enhanced Services.[174] The FCC's definition of Enhanced Services, which can be found at 47 C.F.R. §64.702(a), is:

> **services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.**

Thus, for the reasons set forth above, IP-Enabled Services are both Information Services under the 1996 Act and Enhanced Services under 47 C.F.R. §64.702(a).

Because IP-Enabled Services are Information Services and Enhanced Services, IP-Enabled Services Traffic is Subject to Reciprocal Compensation Under 47 U.S.C. § 251(b)(5).

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172 *See, e.g., Computer II*, 77 F.C.C.2d 384, ¶ 97 (1980) ("*Computer II*") ("[a]n enhanced service is any offering over the telecommunications network that is more than a basic transmission service").

173 Order on Remand*, In the Matter of Intercarrier Compensation for ISP-Bound Traffic*, FCC 01-131 (April 27, 2001) (the "*ISP Remand Order*").

174 *ISP Remand Order*, fn. 16. *See also Universal Service Report to Congress*, 13 FCC Rcd at 11516 (the "1996 Act's definitions of telecommunications service and information service essentially correspond to the pre-existing categories of basic and enhanced services.").

47 U.S.C. §251(b)(5) obliges all local exchange carriers (including SBC Missouri) to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." As noted above, 47 U.S.C. § 153(20), provides that an "information service" is the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." Thus, information services like IP-Enabled Services are services carried via telecommunications, and local exchange carriers are required to provide for reciprocal compensation for IP-Enabled Services traffic unless there is a specifically identified exception to the statute. As discussed below, the only exception that applies to IP-Enabled Services traffic – for a specific type of IP-Enabled Service identified by the FCC in the *Phone-to-Phone Telephony Order* – is clearly stated in the language proposed by AT&T.

IP-Enabled Services Traffic is not Subject to the Section 251(g) Exception to the Reciprocal Compensation Requirement.

47 U.S.C. §251(g) creates a limited exception to the reciprocal compensation obligation set forth in §251(b)(5) for services that were subject to access obligations prior to the enactment of the Telecommunications Act of 1996. That exception, however, does not apply to IP-Enabled Services traffic because such traffic was not subject to access charges prior to the enactment of the Act.

In *WorldCom, Inc. v. FCC*, 288 F. 3rd 429 (2002), the Court of Appeals for the District of Columbia Circuit rejected the FCC's reliance on Sec. 251(g) to exempt ISP-bound traffic from reciprocal compensation. In doing so, it found that "[o]n its face Sec. 251(g) appears to provide simply for the "continued enforcement" of certain pre-Act regulatory interconnection restrictions and obligations." Thus, § 251(g) cannot be used to

develop a new pricing scheme that did not exist before enactment of the Act; Sec. 251(g) is meant solely to grandfather pricing schemes that existed prior to 1996 until the FCC develops a different compensation scheme to apply to the services covered by the pre-existing pricing schemes. Because IP-Enabled Services traffic did not exist before 1996 (there was certainly no pricing scheme for it), it was not subject to access charges before the 1996 Act became law, and it cannot be subject to §251(g) and therefore must be subject to reciprocal compensation under §251(b)(5).

IP-Enabled Services also are subject to the Enhanced Services Providers Exemption to Access Requirements.

Even if the Commission determines that § 251(g) applies to IP-Enabled Services, those services would not be subject to access requirements because they are Enhanced Services and the FCC has specifically exempted Enhanced Service Providers ("ESP's") from paying access charges since 1983. Even if § 251(g) applied to IP-Enabled Services traffic, therefore, such traffic would still be exempt from access charges because (a) § 251(g) preserved the access regime in place before the 1996 Act, and (b) the ESP exemption precluded access charges for such traffic even before the 1996 Act.

The FCC created this Enhanced Service Providers exemption (the "ESP exemption") in the *MTS/WATS Market Structure Order*, 97 FCC 2d at 715, finding that ESPs had historically been paying local business service rates for their interstate access and would experience rate shock if full access charges were instead applied. The FCC re-affirmed the exemption in the *ESP Exemption Order*.[175] More recently, in the *Access Charge Reform Order*, the FCC found that "maintaining the existing pricing structure …

[175] Order, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket 87-215, 3 FCC Rcd 2631, 2633 (1988) ("*ESP Exemption Order"*).

avoids disrupting the still-evolving information services industry."[176] These policy decisions have not been reversed by the FCC. Because IP-Enabled Services are Enhanced Services, the companies that provide such services are subject to the ESP exemption from access fees.

AT&T's Proposed ICA Language Specifically Excludes "IP-in-the-Middle" Traffic from Reciprocal Compensation.

The one kind of IP-Enabled Service traffic that is subject to access charges is the "IP-in-the-middle" traffic identified by the FCC in the *Phone-to-Phone Telephony Order*. In that order, the FCC determined that a specific type of interexchange service using IP in the middle of the transmission, but not at either end, is not an information service and is therefore subject to access charges under 47 U.S.C. §251(g).[177]

The FCC identified the service as one that: "(1) uses ordinary customer premise equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology." [178]

As discussed above, AT&T's CallVantage VoIP service does not meet these criteria. Specifically, AT&T's service does not use "ordinary customer premise equipment." Instead, it uses special CPE that attaches to the end-user's broadband modem and uses IP to transmit a communication. CallVantage calls begin on the

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[176] First Report and Order, *Access Charge Reform*, CC Docket No. 96-262, , 12 FCC Rcd 15982, 16133 (1997) ("*Access Charge Reform Order*"), *aff'd, Southwestern Bell Telephone Co.* v. FCC, 153 F.3d 523 (8th Cir. 1998).

[177] The FCC issued its order in response to a petition for a declaratory ruling filed by AT&T regarding its "IP-in-the-middle" interexchange service. As discussed below in the text, AT&T no longer offers this product and has proposed ICA language to specifically identify such traffic as being subject to access charges. Schell Rebuttal at 106.

[178] *Phone-to-Phone Telephony Order*, ¶ 1.

Internet, not on the PSTN. And CallVantage calls undergo a net protocol conversion from the end-user, beginning as IP and converting to a traditional analog POTS protocol before delivery to the terminating end-user.[179]

AT&T no longer provides the kind of IP-in-the-middle services that the FCC identified in the *Phone-to-Phone Telephony Order*.[180] Because AT&T's proposed ICA language governing reciprocal compensation uses the same broad approach that is embodied in the 1996 Act, however, AT&T also proposed specific ICA language, at Section 2.1.1 of Attachment 12, expressly stating that IP-Enabled Services traffic meeting the three criteria set forth by the FCC and discussed above are subject to access charges.

2. ISP-Bound Calls

Intercarrier Compensation Issue 1f: (SBC) What is the appropriate routing, treatment and compensation of ISP calls on an Interexchange basis, either IntraLATA or InterLATA?

Intercarrier Compensation Issue lg: (Joint) What is the correct definition of "ISP-Bound Traffic" that is subject to the FCC's ISP terminating compensation plan?

ISP-Bound Traffic is Section 251(b)(5) traffic, is interstate traffic subject to the FCC's jurisdiction, and is traffic for which the FCC has established the compensation regime. The FCC has expressly stated that *all* traffic is subject to Section 251(b)(5) reciprocal compensation unless is it exempted under Section 251(g) of the Act.[181] Although the FCC initially applied the 251(g) carve out to ISP-bound traffic, the D.C. Circuit Court of Appeals rejected the FCC's rationale for exempting ISP-bound traffic from 251(b)(5) reciprocal compensation. Therefore, this traffic is subject to 251(b)(5). (The D.C. Court did not vacate the FCC's pricing scheme, and, therefore, the

[179] Schell Direct Testimony, at 105. The issue of net protocol conversion is only important when a call terminates on the PSTN. As discussed above, calls that go directly from one VoIP customer to another never touch the PSTN and are not an issue in this proceeding.

[180] Schell Rebuttal Testimony, at 111.

[181] *ISP Remand Order* at ¶¶ 32 and 46.

compensation mechanism that the FCC established for ISP-bound traffic currently remains in effect.) On remand, however, it is quite possible that the FCC will acknowledge its earlier statement that *all* telecommunications traffic (except 251(g) traffic) is subject to reciprocal compensation and, therefore, all ISP-Bound Traffic also is subject to reciprocal compensation. Adopting SBC's proposal would lock AT&T into paying access charges on ISP-bound traffic that fits the definitions SBC has proposed in Section 1.2 of Attachment.

Next, neither the FCC nor the D.C. Circuit Court of Appeals decisions distinguished between local and non-local ISP-Bound Traffic. Therefore, SBC has no basis for arguing that certain types of ISP-bound traffic should be subject to a pricing scheme different than that established by the FCC. As a practical matter, AT&T pays access charges on some ISP-bound traffic, i.e., ISP-bound traffic exchanged over Feature Group D trunks. These practical limitations, however, should not be construed to mean that AT&T is *obligated by law* to pay access charges on ISP-bound traffic. Therefore, AT&T should not be required by the terms of its interconnection agreement to pay access on ISP-Bound Traffic as SBC has proposed in Section 1.2 of Attachment 12. All ISP-bound traffic that is routed over local interconnection trunks, including Foreign Exchange ("FX"), should be subject to reciprocal compensation. It would appear that SBC's proposed language is focused on applying access charges to ISP-bound traffic delivered over an FX-arrangement because SBC's definition of ISP-bound traffic would exclude ISP FX traffic.

SBC's position results from a mis-reading of the *ISP Remand Order*. The page limitations for issues in this brief will not permit a full treatment of the policies behind

the *ISP Remand Order*. However, if the *Order* is read closely it is obvious that the FCC defines the problem it is addressing in the *ISP Remand Order* as one involving exchange of traffic between originating LECs and terminating LECs who serve ISPs that take advantage of the ESP Exemption and are therefore users of local services rather than payers of access charges. In other words, the problem is unlimited flat-rated local calling between locally interconnected LECs.

The FCC was concerned about a regulatory arbitrage problem that affects both the local exchange *and* the exchange access markets. A close reading of the *ISP Remand Order*, and the accompanying *Unified Intercarrier Compensation NPRM,* demonstrates that in the *ISP Remand Order* the FCC was attempting to deal with an arbitrage problem that resulted from the nature of ISP-bound traffic. The specific aspects of ISP-bound traffic's nature that created the problem were two-fold: 1) the inbound only, high volume character of the traffic, and 2) the fact that ISPs are exempt from access charges as a result of the *ESP Exemption Order*. These two things are closely interrelated. The FCC included a discussion of the ESP access exemption when it provided the "background" to the problem its *ISP Remand Order* addresses:

> ISPs, one class of enhanced service providers (ESPs), also may utilize LEC services to provide their customers with access to the Internet. In the *MTS/WATS Market Structure Order*, the Commission acknowledged that ESPs were among a variety of users of LEC interstate access services. Since 1983, however, the Commission has exempted ESPs from the payment of certain interstate access charges. Consequently ESPs, including ISPs, are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network (PSTN). Thus, despite the Commission's understanding that ISPs use *interstate* access services, pursuant to the ESP exemption, the Commission has permitted ISPs to take service under *local* tariffs.[182]

[182] *ISP Remand Order*, ¶ 11 (emphasis in original) (original citations omitted).

ISPs have "the option of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs rather than from interstate access tariffs used by IXCs. Typically, [ISPs] have used this exemption to their advantage by choosing to pay local business rates, rather than the tariffed interstate access charges."[183] Of course, it is unlikely that any ISPs ever purchase their access out of interstate access tariffs. As the FCC also stated in the *Access Reform Order*: "ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state lines."[184]

If ISPs were themselves not exempted from the interstate access charge regime then there would be no problem to be addressed regarding the intercarrier compensation scheme between two LECs who collaborate to complete a call to an ISP. If ISPs were paying inefficient and non-cost based access charges then the inbound only, high volume nature of IBT would preclude the arbitrage problems that the FCC describes in the *ISP Remand Order*. Or, put another way, there would be no inbound only, high volume traffic to ISPs if they were paying inefficient and non-cost based access charges to receive that traffic. Economically, ISPs could not sustain such a cost of doing business without passing the cost on to their subscribers. Subscribers today would not be making 60, 120, 240 minute or more "calls" to their ISPs if they were paying the equivalent of toll rates to do so. The whole point of the ESP access exemption was to make access to computers, and eventually the Internet, affordable for end users by ensuring that ESPs,

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183 *ISP Remand Order,* ¶ 27 (emphasis in original)

184 Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 15998-99, ¶ 342 (1997) (*Access Reform Order*), *aff'd, Southwestern Bell Telephone Co. v. FCC,* 153 F.3d 523 (8th Cir. 1998). (emphasis added).

and eventually ISPs, were not subject to inefficient non-cost based access charges.[185] The arbitrage problem arose because ISPs are permitted to take service under a LEC's *local* tariffs, which spared them from the access charge regime and means there is no artificial and regulatory-imposed uneconomic restraint from using telecommunications resources to access the Internet. Making ISPs "local" customers also brings the problem within the ambit of local interconnection between LECs. Compensation disputes therefore arose in the context of § 252 arbitrations between two LECs regarding compensation for traffic delivered to ISPs *that are subject to the ESP Exemption.* Consequently, the *ISP Remand Order* addresses compensation for all ISP-bound traffic that suffers from the type of arbitrage problems inherent in allowing ISPs to take advantage of the ESP access exemption. This includes ISP traffic delivered over an FX arrangement, which is a flat-rated call to the originating end user. The FCC prescribed a remedy for this situation, and it is a reduced form of intercarrier compensation. The FCC did not prescribe the imposition of access charges.

As a matter of public policy, applying access charges to ISP-bound traffic that originates as a flat-rated "local" call to the end user is simply a bad idea. *Extending* the current access charge regime in any form seems extremely questionable. Such an approach here is inconsistent with the FCC's stated desire to move toward bill and keep in general, or towards a uniform cost-based scheme. In addressing interstate access reform in its 1997 *Access Reform Order* the FCC was quite clear about the "non-cost based rates and inefficient rate structures" inherent in interstate access charges.[186] (And interstate access charges, both in 1997 and now, are dramatically lower than intrastate

[185] *Id.* at ¶ 342 – 345.
[186] *Access Reform Order,* ¶ 344.

access charges.) Accordingly, the FCC has allowed ISPs to avoid access charges for over 20 years. The FCC stated in the *Access Reform Order* that preserving the ESP Exemption from access charges for ISPs "advances the goals of the 1996 Act"[187] regarding the development of the Internet. The FCC cited to Section 230(b) of the 1996 Act, which defines the United States' policy regarding the Internet:

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
>
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and State regulation;

SBC's position treating ISP-bound traffic as not subject to § 251(b)(5), and thus potentially subjecting some ISP-bound traffic to access charges, is totally inconsistent with these federal policies.

Using its authority under § 201 of the Act, the FCC developed an intercarrier compensation mechanism that provides for two payment options for ISP-bound traffic. An ILEC may offer to exchange both voice traffic subject to § 251(b)(5) and ISP-bound traffic at rate caps established for certain periods – currently $.0007 per MOU from June 14, 2003 until the FCC issues a further order on intercarrier compensation. If an ILEC chooses not to exchange both traffic subject to § 251(b)(5) and ISP-bound traffic under the FCC rate cap mechanism, then the FCC requires that the ILEC and CLEC exchange ISP-bound traffic at the state-adopted reciprocal compensation rate. In addition, the FCC previously imposed a cap on the total ISP-bound minutes for which a local exchange carrier (LEC) may receive intercarrier compensation. SBC has offered to

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[187] *Id.*

exchange both voice traffic and ISP-bound traffic at the rate caps established by the FCC. There is no reason to subject any locally routed ISP traffic to access charges.

The Commission should confirm that ISP-bound traffic is § 251(b)(5) traffic and is subject to the FCC's jurisdiction and the intercarrier compensation mechanism set forth by the FCC in its *ISP Remand Order*. Thus, the Commission should approve AT&T's proposed language in Sections 1.1, 1.7.1, 1.8.2, 1.9.2.1, 1.9.3.1, 1.11.1, 1.11.6, 1.11.7, 1.12.1.1, 1.12.1.2 and 8.5.1 of Attachment 12, which conforms the parties' interconnection agreement to compensation framework established by the FCC.

3. FX Traffic

Recip Comp Issue lh: What is the appropriate form of intercarrier compensation for interLATA FX traffic?

This dispute is limited to one section of contract language that SBC proposes and which AT&T opposes. That section provides as follows: "2.2.3 InterLATA FX traffic will be subject to SBC's access tariffs, interstate or intrastate, whichever is applicable." AT&T does not believe that a local interconnection agreement should address compensation for interLATA traffic of any kind, including FX traffic. While AT&T does not dispute the application of access charges to interLATA FX traffic, AT&T disputes the appropriateness of addressing interLATA compensation in the Parties' local interconnection agreement. On its face, SBC's proposed language shows why it is unnecessary in an interconnection agreement. Switched access services are not local interconnection services. If they were, then the ICA would address the entirety of AT&T's relationship with SBC, including AT&T's relationship as an IXC. Of course, the ICA does not address AT&T as an IXC because the IXC relationship is not a § 251/252

local interconnection relationship. Therefore, it has no place in a local interconnection agreement between local exchange carriers.[188]

The Commission should reject SBC's proposed language in Section 2.2.2 of Attachment 12.

4. 8YY Traffic

Intercarrier Compensation Issue 5: What is the proper treatment and form of intercarrier compensation for IntraLATA 8YY traffic?

The present issue boils down to whether it is appropriate to assess exchange access charges on calls that are local in nature. Toll free calling is now offered using a number of area codes including 800, 888, 877, etc., collectively referred to as 8YY services. Residential and business subscribers purchase 8YY service from a provider so that distant family members or business clients may call the purchaser on a toll free basis. In most instances, 8YY calling is interexchange, originating in one calling area and terminating in another calling area, and is thus often subject to assessment of exchange access charges. However, some 8YY calls originate and terminate within the same mandatory local calling area.[189] The issue here involves the appropriate compensation for such calls.

IntraLATA 8YY traffic that originates and terminates within the same mandatory local calling area should be subject to reciprocal compensation using the same analysis that is applied to the rating of local calls generally. For example, if the NPA-NXX of the translated POTS telephone number associated with the 8YY number is within the originating party's local calling area as determined by the originating party's NPA-NXX, then the call should be rated as a local call for purposes of reciprocal compensation.

[188] Schell Direct at 124.
[189] *Id*. at 133.

There is no technical or legal justification for compensating local 8YY traffic as exchange access.[190]

AT&T's proposal is that the originating LEC does deserve compensation, both per-minute and per-query, from the 800 service provider. AT&T's proposal is that the originating carrier would be compensated for the query and would receive reciprocal compensation instead of access charges when the NPA-NXX of the translated POTS telephone number associated with the 8YY number is within the originating party's local calling area as determined by the originating party's NPA-NXX code.[191]

The law supports AT&T's position. As discussed above, under current Federal rules all telecommunications traffic, except traffic subject to §251(g) of the Act, is subject to reciprocal compensation. Exchange access is one of the types of traffic that is "carved out" by §251(g) and is excluded from reciprocal compensation. Clearly traffic that originates and terminates within the same mandatory local calling area and is exchanged directly between two local exchange carriers cannot be considered exchange access. As SBC witness Scott McPhee testified: "Section 251(b)(5) traffic originates from an end user and is destined to another end user that is physically located within the same ILEC mandatory local calling scope."[192] Mr. McPhee makes that statement as an absolute: he does not except out 8YY traffic. AT&T simply asks that this same principle be followed as to local 8YY traffic that originates and termites in the same mandatory local calling area. SBC's position is internally inconsistent with its other reciprocal compensation positions, is unsupported by the law and unsupportable as a matter of policy.

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190 *See* i*d*.
191 *Id*.
192 McPhee Direct at p. 5.

Accordingly, the Commission should adopt AT&T's proposed language in Section 7.1 of Attachment 12.

B. Rate Issues

Recip Comp Issue 9: Should AT&T be able to charge an intrastate IntraLATA Access rate higher than the incumbent?

SBC seeks to require that AT&T's intrastate intraLATA access rates be no higher than SBC's comparable intrastate intraLATA access rates contained in its Missouri tariff. AT&T, on the other hand, proposes that each party's respective tariffed rates will apply for intrastate intraLATA access. There is nothing in the Act or any other law or regulation that absolutely and irrevocably requires AT&T, as part of its interconnection agreement with SBC, to cap its intrastate intraLATA access charges at the level of SBC's comparable rates contained in its Missouri tariff. Indeed, CLEC access charges are not properly the subject of a Section 251 arbitration. AT&T duly follows the process for tariff filings in the state of Missouri, and AT&T is well aware of the Commission's decision in Case No. TR-2001-65, which generally requires a CLEC's intrastate switched access rates to be capped at the rates of the ILEC(s) in whose exchange(s) the CLEC is operating.

However, the Commission also determined in Case No. TR-2001-65 that a CLEC is permitted to petition the Commission for access rates above the cap upon a showing that the higher rates are cost-justified. This is an important exception to the general rate cap and one that is specifically authorized by the Commission's order in Case No. TR-2001-65. However, SBC's proposed contract language does not permit such an exception. Consequently, SBC's proposed language is inconsistent with the Commission's order. In contrast, AT&T's proposed language specifically refers to

AT&T's tariffed rates, and those tariffs must always be approved by the Commission so they will always be compliant with the Commission's decision in Case No. TR-2001-65.[193]

Finally, it is simply inappropriate to use language in the parties' interconnection agreement to set a cap for access rates. As Case No. TR-2001-65, and its predecessor Case No. TO-99-596, demonstrate, the issue of CLEC intrastate switched access rates is best addressed in a state law proceeding. Just as SBC would not agree to examine its switched access rates or otherwise agree to a cap on its intrastate rates as a result of this federal arbitration proceeding, neither should this proceeding be used as a vehicle to address SBC's concerns with a CLEC's intrastate switched access rates. SBC already has all of the relief it is entitled to as a result of the Commission's decision in Case No. TR-2001-65 and via the Commission's tariff-review process.[194]

Because SBC's proposed language is inconsistent with Case No. TR-2001-65, and AT&T's language is consistent with the decision in that case, SBC's language should be rejected and AT&T's language should be adopted.

C. Transit

Recip Compensation Issue 3a: What is the proper method of intercarrier compensation for Transit traffic?

Recip Compensation Issue 3b: What other obligations exist between the Parties concerning transit traffic?

These issues are related to Network Architecture Issue 3, which addresses the question: "Should the ICA include obligations for the provision of transit services?" In Intercarrier Compensation Issue 3, the Parties address the proper method of compensation

[193] *Id.*
[194] *Id.*

for transit traffic and the obligations between the Parties concerning transit service. However, SBC's position on compensation derives from the same position it takes on network interconnection, consequently AT&T's briefing on Network Architecture Issue 3 is applicable here.

SBC proposes that it provide transit service outside of the context of a Section 251 interconnection agreement, and at market-based rates. SBC has a clear obligation to transit traffic pursuant to Sections 251(c)(2) and (c)(3) of the Act, however. SBC apparently recognizes this obligation, because SBC witness Mr. McPhee testified "SBC Missouri will continue to offer a transit service for carriers that would prefer to use SBC Missouri's network to reach third party carriers."[195] Mr. McPhee also stated during the hearing that SBC has no intention of blocking CLECs' transit traffic. Indeed, SBC even proposed contract language regarding transit traffic (contract language that was not presented to AT&T during negotiations) if the Commission were to agree with CLECs that transit was required in the ICA.[196]

Accordingly, it is apparent 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. Because transit service is an obligation imposed on SBC pursuant to Sections 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. (47 C.F.R. §51.501(b).)

Moreover, there is no "market" for transit service – and thus market based rates cannot exist for transit service. Accordingly, there is a risk that SBC will be able to set

[195] McPhee Direct at p. 51.
[196] *Id.*

and/or raise its transit rates with no limitation, and AT&T will have no choice but to either pay those rates or to direct connect with third party carriers, which is objectionable and not in the public interest, as described in AT&T's briefing on Network Architecture Issue 3.. Thus, SBC' proposal is contrary both to the Act and to the development of competition. Furthermore, the Commission's *Chariton Valley Order* forecloses SBC's arguments about the nature of transit service, and thus requires rejection of SBC's position regarding the appropriate compensation for transit service.

AT&T therefore urges the Commission to adopt AT&T's proposed language relating to transit service and reject SBC's transit proposal.

Recip Compensation Issue 3c: Should the ICA include terms addressing AT&T as a transit provider?

AT&T proposes that it should be afforded the opportunity to offer CLECs, CMRS providers and independent telephone companies transit services in Missouri in competition with transit services offered by SBC. Although the preponderance of traffic would be exchanged with carriers other than SBC, AT&T does not believe it would have a viable transit offering unless it could also deliver transit traffic to SBC for termination. SBC objects to being required to accept transit traffic from AT&T.[197]

SBC is asserting in this proceeding that it has no obligation to provide transit service and is seeking to provide such service through separate commercial agreements at "market-based" rates. It is not at all clear that any carrier will be able to offer a meaningful transit service in competition with SBC given Mr. McPhee's statements that "SBC prefers to interconnect directly with all other carriers" and "SBC Missouri does not

[197] Schell Direct at p. 126.

want AT&T to accept traffic from such carriers on SBC Missouri's behalf."[198] Thus, SBC is really saying that it will always require other carriers to interconnect directly to it whether they want to or not. This is inconsistent with the FTA's authorization under §251(a)(1) for carriers to indirectly interconnect, which the Commission recognized in the *Chariton Valley Order*. SBC must permit direct interconnection with its network under § 251(c)(2), but SBC cannot insist on direct interconnection and it must permit indirect interconnection with its network under § 251(a)(1).

Furthermore, SBC cannot have it both ways. It cannot claim the existence of competitive alternatives for transit service should allow it to implement "market pricing" for the services (when the evidence irrefutably shows a complete absence of any competition today), and at the same time oppose AT&T's effort to try to compete so that an actual market might emerge.

Accordingly, AT&T respectfully requests that the Commission adopt AT&T's proposed language for Section 3.3 of Attachment 12.

Recip Compensation Issue 3d: If either AT&T or SBC, as the transit provider, fails to transmit the necessary carrier identification for the terminating party to bill the originating carrier, may the terminating carrier bill the transit provider?

AT&T receives both traffic that originates on SBC's network and transit traffic on the same interconnection trunk groups. When AT&T receives traffic from SBC without the necessary traffic identifiers, AT&T has no way of knowing whether the traffic is SBC's traffic or is transit traffic. Thus, without the traffic identifiers, AT&T has no way to know whether it should bill SBC or not. All AT&T does know is that the traffic came from SBC, so it is fair to assume that the traffic is SBC's, absent some other credible information from SBC demonstrating that the traffic originated from another carrier.

[198] McPhee Direct at 53.

Moreover, SBC knows if the traffic originates on its network or if it is transiting traffic. Therefore, given that SBC has the ability to identify both the traffic and the carriers for which it provides transit service, AT&T's proposal reasonably assumes that the unidentified traffic is SBC's traffic. SBC has it within its control to avoid the imposition of billing of transiting traffic simply by ensuring that transit traffic is properly identified. All AT&T is proposing is that SBC ensure that the information SBC receives from third party carriers is passed through to AT&T so that AT&T can identify the originator of the traffic and implement the appropriate billing. AT&T, as the receiver of the transit traffic, has no ability to control the passage of this information. If the Commission does not place this obligation on SBC, then AT&T is without any means of identifying the source of the traffic it receives via the interconnection trunks, with the net result being that AT&T cannot properly bill for traffic termination.[199] If SBC's position is adopted, it can simply contend that the traffic is not SBCs and that it was delivered to SBC without any means of identification, which is absurd.

SBC has the information needed by AT&T to properly bill for this traffic. Indeed, SBC admits this fact. In the recent Texas Arbitration in Docket No. 28821, in response to a question from Staff, SBC admitted that even in situations where SBC does not have the calling party number ("CPN"), it can always identify the originating carrier based on the trunk group on which the traffic arrives.[200] Hence SBC should be required to provide this information to AT&T. Accordingly, the Arbitrator should adopt AT&T's proposed language in Section 3.2 of Attachment 12.

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[199] *See* Schell Rebuttal at 126.
[200] Schell Rebuttal at 127; *See also* Schell Direct, Schedule JS-5.

D. Billing

Recip Compensation Issue 2a: Should SBC be permitted to dictate in this interconnection agreement a requirement that AT&T enter into agreements with third party carriers?

The question here is whether SBC can avoid an obligation to provide AT&T with the information necessary for AT&T to bill, or be billed by, third party carriers when SBC is the sole possessor of that information. The issue relates both to AT&T's use of unbundled switching to serve its customers and to calls terminated by AT&T switches after delivery from SBC.

When AT&T terminates calls on its own switches or uses unbundled switching to serve its customers, AT&T is entitled to assess either access charges or reciprocal compensation on terminating carriers. [201] When SBC provides the switching, however, it is the only party that possesses the information necessary to identify the terminating carrier for billing purposes.[202] Likewise, when SBC transmits a call to AT&T switches for termination, that call appears as an SBC-originated call. In other words, in this latter situation, AT&T has no way of identifying the originating carrier of a call, if it is not SBC, unless SBC provides the information to AT&T.[203]

SBC's proposed ICA language for Section 8.8 of Attachment 12 appears to be an attempt to remove SBC's obligation to provide that information. It specifically states that "SBC Missouri will not be required to function as a billing intermediary, e.g., clearinghouse. SBC Missouri may provide information regarding such traffic to other telecommunications carriers or entities as appropriate to resolve traffic compensation issues." SBC's proposed language also purports to require AT&T to enter into

[201] *See* 47 U.S.C. §§ 251(b)(5), 251(g).
[202] *See* Guepe Rebuttal at 38
[203] *Id.*

compensation agreements with third parties, and to have AT&T indemnify SBC for failing to provide the information that, as described above, is solely in the possession of SBC.

None of these results should be accepted by the Commission. SBC cannot be allowed to include language in the interconnection agreement that excuses it from providing call information for which it is the sole source. If SBC can avoid both its obligation to provide such information and any legal penalty for failing to do so, then the interconnection agreement would create an incentive for SBC to simply not provide AT&T with any call information, thereby avoiding paying legally assessed charges for even SBC's own terminating traffic. Moreover, SBC does not have the right to dictate agreements AT&T must reach with third parties. AT&T expects to appropriately bill (and be billed by) third party carriers, however, formal agreements with such parties are not required by law and cannot be mandated by SBC. AT&T does not propose any language for this issue, and simply opposes SBC's language that would unlawfully free SBC from providing necessary information to AT&T as well as impose unnecessary and unlawful obligations and liabilities on AT&T.

Recip Compensation Issue 2b: Should SBC be protected from liability when carriers depend on SBC for records with all relevant information needed to bill the correct party and to validate bills they receive?

This issue is related to Issue 2(b) above and deals with the same SBC proposed language – Section 8.8, Attachment 12. Not only does SBC seek to require AT&T to enter into arrangements with third party carriers, SBC's proposal would require AT&T to indemnify SBC when AT&T has not entered into such arrangements.

SBC should not be relieved of liability and indemnified by AT&T when SBC fails to provide information necessary (e.g., identifying information of the third party carrier

or complete set of call detail records) to allow AT&T to bill the appropriate carrier. As discussed above, SBC is the only party possessing that information.

Moreover, this issue is already addressed in at least two places in the interconnection agreement being arbitrated. First, Attachment 28, Comprehensive Billing, contains detailed language regarding the obligation of SBC to provide records, which are necessary for AT&T as the purchaser of a UNE switching element to bill other carriers. In addition, when a third party carrier uses an SBC UNE switch to provide service, AT&T must have records from SBC in order to bill the proper carrier for call termination. These issues are addressed in Attachment 28. The second place where the SBC California proposed Section 8.8 is already addressed is in the indemnification provisions in Section 7 of the General Terms and Conditions. The separate indemnification provided in SBC's proposed Section 8.8 is self-serving and misleading because SBC seeks indemnification here without being willing to accept the responsibilities associated with proving the record information AT&T needs to bill, as set forth in Attachment 28.[204]

For the reasons set forth here and in the discussion of Issue 2(a), AT&T respectfully requests that the Arbitrator reject SBC's proposed language in Section 8.8 of Attachment 12.

E. CPN

Recip Comp Issue 6a: What terms and conditions should govern the compensation of traffic that is exchanged without the CPN necessary to rate the traffic?

AT&T and SBC disagree on the proper mechanism for compensation when traffic sent without calling party number ("CPN") information. AT&T and SBC use this

[204] Guepe Direct at 37.

information to ascertain the jurisdiction of traffic and thus whether the calls in question are subject to access charges or reciprocal compensation. Generally speaking, the parties agree on the treatment of traffic if the percentage of calls passed with CPN is 90% or greater; in those circumstances calls passed without CPN will be billed as either local or intraLATA toll in direct proportion to the percent local usage ("PLU") factor determined in accordance with Section 9.0 of Attachment 12. However, if the percentage of calls passed with CPN drops below 90%, SBC proposes that all calls passed without CPN be billed at intrastate access rates.

AT&T, on the other hand, proposes that if the percentage of calls passed without CPN drops below 90%, the terminating party will so inform the originating party and the parties will coordinate and exchange data as necessary to determine the cause of the failure and to assist in its correction. Under AT&T's proposed language, however, calls passed without CPN would continue to be billed as either local or intraLATA toll in direct proportion the percent local usage ("PLU") factor, whereas under SBC's proposed language, all calls without CPN would be billed at access charges.[205]

AT&T agrees that CPN should be passed wherever possible. All AT&T switches provide CPN on all calls where AT&T has control over provision of CPN. AT&T's business operations and processes rely on this information just as much as SBC's do. However, AT&T should not be penalized for circumstances beyond its control. AT&T's proposed language states that the parties will coordinate and exchange data as necessary to determine the cause of the CPN failure (or shortfall) and to assist in its correction; it does not require the originating carrier to pay access charges on all of the calls passed without CPN, however, which SBC's language would require. AT&T believes that in the

[205] Schell Direct at 135 - 136.

absence of CPN information, the jurisdiction of the traffic should have a basis in fact, i.e., the PLU factor, rather than an arbitrary designation of all such calls as toll traffic subject to access charges.

This issue was one of WorldCom's issues addressed by the FCC in the *Virginia Arbitration*.[206] In that proceeding, as in this proceeding, Verizon and WorldCom agreed that they would exchange CPN data for at least 90% of the calls but disagreed on what should happen when a party passes CPN information on less than 90% of its originating calls. Verizon proposed to charge access charges for all traffic below the 90% CPN threshold. That proposal was less onerous than SBC's proposal in this case, which is to charge access charges for all calls without CPN. On the other hand, WorldCom proposed that the parties use the PLU factors to jurisdictionalize the traffic below 90%. The FCC adopted WorldCom's proposal.[207] This Commission should reach a similar result and adopt AT&T's proposed language for Section 8.3.1.

Recip Comp Issue 6b: Should CPN be sent with all categories of traffic, including Section 251 (b)(5) Traffic, IntraLATA Toll Traffic, Switched Access Traffic and Wireless Traffic?

Recip Comp Issue 6e: (SBC) Should Interconnection Trunk Groups only carry Section 251(b)(5) IntraLATA traffic?

These two issues do not reflect a substantive disagreement between the Parties. The issue has arisen because AT&T and SBC disagree on what traffic falls within the scope of "251(b)(5) Traffic" as that term is used in AT&T's proposed language for Section 8.1. The language the Commission adopts in this section should be conformed to

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206 *Virginia Arbitration Order*, Issue IV-11, Usage Measurement, ¶¶ 186-191.
207 *Id.*, ¶ 190.

the Commission's decision on Intercarrier Compensation Issues 1 and 7, as well as Network Architecture Issue 10.[208]

Recip Comp Issue 6c: Should a Party use commercially reasonable efforts to prohibit the use of its local exchange services for the purposes of delivering interexchange traffic?

As Mr. Schell testified, AT&T is unable to tell the exact nature of the dispute involved with this issue. Mr. Schell stated for the record in prefiled testimony that "AT&T uses commercial reasonable efforts to prohibit the use of the local exchange services it sells to others for delivery of traffic that is subject to access charges."[209] Mr. Schell also stated that SBC has not proposed specific contract language for this issue. SBC witness Douglas in her direct testimony on this issue stated that SBC has proposed specific language regarding the proper routing of interexchange traffic, but she does not cite to specific language and the language SBC has included under this issue in the Intercarrier Compensation DPL does not contain such language, which would more properly be language for the Network Architecture Attachment. Accordingly, AT&T does not believe an outstanding dispute exists for this issue, and there is no contract language for the Commission to adopt.

Recip Compensation Issue 7: When Enhanced and IP Enabled Traffic is commingled with other traffic should the parties rely on factors for billing purposes rather than CPN?

As with the previous intercarrier compensation issues relating to IP Enabled Traffic, this issue involves the underlying dispute regarding the appropriate regulatory classification and treatment of IP Enabled Traffic. SBC proposes that all IP Enabled

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208 *See* Schell Direct at 139.
209 *Id* at 140.

Traffic – even IP Enabled Traffic that is clearly Information Services traffic - be treated as access traffic.

Accordingly, from a network perspective SBC proposes that such traffic be routed over exchange access trunks and not local interconnection trunks. AT&T's position, on the other hand, is that IP Enabled Traffic is Information Services Traffic that meets the requirements set forth in its language in Section 1.1 of Attachment 12, is 251(b)(5) Traffic and like all other 251(b)(5) Traffic, should be routed over local interconnection trunks.

As was explained in Mr. Schell's testimony addressing Intercarrier Compensation Issue 1b and 1c, AT&T's position on treating this category of IP Enabled Traffic as 251(b)(5) Traffic is consistent with the Enhanced Services Exemption that provides for local treatment of such traffic. SBC's position completely ignores the current state of the law on the Enhanced Services Exemption and proposes to change the status quo so that it can begin to receive access charges on traffic that should be treated as local (i.e., 251(b)(5) Traffic).

SBC's proposal, moreover, is neither efficient nor rational. From an engineering perspective, larger trunk groups are more efficient than smaller trunk groups. That is, a larger trunk group can carry a greater amount of traffic on a channel-by-channel basis than a smaller trunk group. Because the parties today combine local and intraLATA toll traffic on local interconnection trunk groups, SBC's proposal would require that the parties establish unique ESP traffic trunk groups. Because ESP traffic volumes are relatively small, these groups would be highly inefficient[210] and would require additional

[210] It would increase the volume of traffic routed through SBC's tandem switch, because this traffic would be removed from the end office groups it current uses and placed on tandem-trunked ESP trunk groups

trunk ports on both parties' switches. This should be troublesome to SBC, which has repeatedly complained about alleged trunk port exhaustion on its tandem switches.[211]

AT&T's testimony also addresses a rating/billing issue associated with IP Enabled Traffic. AT&T proposes in Section 9 of Attachment 12 to use a factor to ensure accurate billing of IP Enabled Traffic. As set forth in that Section, the process will be based on a factor methodology that uses a statistically valid sample of call records or other relevant data. Moreover, the factor process is subject to audit so that the Party who is relying on the factor can, if it so chooses, confirm the accuracy of the factors. A factor approach is commonly used for determining the appropriate rating for billing when the traffic jurisdiction for telecommunications traffic is otherwise undeterminable – such as when a telecommunications call lacks CPN (Calling Party Number).

CPN is inappropriate to identify the jurisdictional nature of Enhanced or IP Enabled Traffic. As Mr. Schell testified, IP Enabled Services originate from a preexisting connection to the Internet and customers can make calls from their computers at any geographic location where they establish a connection to the Internet. Thus, an originating customer's phone number (CPN) has no geographic significance at all with respect to the originating location. Moreover, Mr. Schell testified, since an IP originated call begins in IP protocol, the originating portion of the call begins on an IP network, not on the PSTN. The telecommunications portion of the call begins when the enhanced service provider converts the call from IP protocol to TDM protocol. As Mr. Schell explained, this means that the CPN of the calling party has no relationship to the location of the calling party or to the actual beginning of the telecommunications transmission associated with that call. In addition, using CPN would make some IP Enabled calls

[211] Schell Direct at 142.

appear to be interexchange calls, even though they are local calls by virtue of the Enhanced Service Exemption. Thus, rating an IP Enabled call based on CPN is not appropriate.[212]

The industry recognizes that CPN is not an appropriate way to jurisdictionalize An IP enabled call for intercarrier compensation purposes. The industry forum, Alliance for Telecommunications Industry Solutions ("ATIS"), has been examining this issue. An open issue statement that was accepted unchallenged by the OBF Billing Forum committee of ATIS for discussion and resolution in May 2004 reads as follows:

> **Voice Over Inter Protocol (VoIP) traffic that originated on the IP network and terminates on the Public switched network (IP-PSTN) presents a connectivity billing challenge. The 10 digit Calling Party Number does not reveal the IP enabled nature of the originating caller and may provide inappropriate results when used for determining intercarrier compensation billing. Additional information is needed to support/explain the Local Interconnection Trunks for call delivery to the terminating LEC and to enable appropriate intercarrier billing treatment. (ATIS Committee/Forum – Issue Identification Form (Submission date May 19, 2004).)**

Thus, the industry has acknowledged the problem with CPN and is still examining the issue and discussing various signaling stream solutions to both assist in identifying the traffic as IP and to assist in jurisdictionalizing the traffic. [213]

Until a signaling solution is developed, or until some other method to rate this traffic is developed, it is necessary to use something other than CPN to ensure that the IP Enabled Traffic is appropriately treated consistent with the current state of the law on intercarrier compensation. AT&T's proposal is reasonable, consistent with general industry practices, and provides the billing party with the ability to ensure that the factors are accurate via auditing rights. Factors have been used for various traffic types and

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[212] *Id*., at 144 - 145.
[213] *Id*. at 145 – 146.

situations for years, yet SBC uniformly resists factors in lieu of expensive and inefficient trunking "solutions" that benefit no one but SBC.

The Commission should approve AT&T's factor language set forth in Section 9 of Attachment 12 and reject SBC's language for imposing access charges on IP enabled traffic that is Information Services Traffic based on CPN.

COLLOCATION

Issue 1: Should CLECs be allowed to implement power metering in their collocation space residing in SBC Missouri's locations?

Power metering is a cost-based and efficient alternative that charges CLECs for the DC Power that CLECs actually use. It is AT&T's position that CLECs should be billed for DC power based on the amount of power they use, and not on any other basis. Power metering is the optimal, fairest way of enabling CLECs to pay for power on a usage basis. It is akin to the manner in which consumers pay for electrical power. Judge Thompson captured the CLEC rationale behind metering perfectly when he noted during the hearing, "I mean, as a layperson, obviously is what I am, when the CLECs tell me they only want -- they want meters so they pay for the power they use, that makes sense. I think I said that at the beginning of this issue, right? As a homeowner, I don't want to pay for power I don't use. I only want to pay for what I use." Tr. at 1153.

Not only is metering the most precise manner in which to assure that AT&T is only billed for the DC Power that it actually uses or consumes, it is also consistent with the manner in which SBC and other ILECs design and use DC Power infrastructure in central offices. The DC Power Plant consists of a collection of components that are all designed to provide uninterruptible DC Power sufficient for the peak *usage* of the

telecommunications equipment within the central office.[214] Each component (batteries, rectifiers, backup generator, controllers, and power distribution service cabinets) is rated or evaluated based on the number of DC amps of power that the component can provide. The DC power engineer is responsible for monitoring the use of the DC Power Plant, noting the peak DC power usage that occurs on the power plant. It is the responsibility of the DC power engineer to ensure that there is sufficient power capacity (through the batteries, rectifiers, and backup generator) to meet this peak demand on the power plant.[215]

SBC criticizes AT&T's power metering proposal as not being accurate because it does not provide for continuous measurement.[216] SBC's concern that a reading taken at a particular point or points in time is not representative of a CLEC's total cumulative power usage over a month is wholly unfounded. First and foremost, electrical current in a collocation arrangement typically remains static and varies very little over time. In fact, the List 1 Drain reporting option will not vary at all from month to month so long as the equipment in the CLEC cage does not change. In addition, because the "per amp" charge compensates SBC for one amp delivered for one month, it is the *average* current flow to the collocation arrangement that is relevant, rendering continuous metering unnecessary. Moreover, under AT&T's proposal, readings can be taken as frequently as required to assure an accurate accounting of the DC power being used. In Illinois, for example, SBC remotely takes readings once a day. Such data can be used to assess instantaneous power

[214] Henson Direct at p. 24.
[215] *Id.*
[216] *E.g.* Pool Direct at 3-4, 12-13.

usage as well as average consumption over various time periods (i.e., daily, weekly, monthly) as needed.[217]

Nor is SBC correct that power metering is expensive and inaccurate. As Mr. Henson testified, these criticisms are limited to the shunt based metering conducted on the return side. That is not the primary form of metering that AT&T is recommending.[218] Moreover, while AT&T disagrees with SBC regarding the accuracy of return side metering, AT&T's power metering methods can be implemented on the supply side as well as on the return side, and SBC has raised no concerns about the accuracy of supply side metering.

SBC's "power reduction proposal" does nothing to alleviate the CLECs' concerns because, even if the CLECs were willing or able to pay SBC's exorbitant charges to reduce the power arrangements they may ultimately need to reinstall at some future time, SBC's proposal results in the CLECs paying for DC power using the same flawed method SBC currently proposes, except that the CLECs will have fewer fused amps in place. SBC's recommendation does nothing to achieve the goals of power metering, i.e., to accurately measure and bill AT&T for the power it consumes.[219]

SBC contends that its "per amp method" is the most reasonable and reliable method for charging for collocation power. Lest this statement cause unnecessary confusion, AT&T clarifies that its power metering proposal is also a "per amp" method – the difference is that SBC proposes that CLECs pay for DC power on a per *fused* amp basis while AT&T proposes that CLECs pay for DC power on a per amp basis for the number of amps of DC power the CLEC *actually uses*. There is no dispute in the

[217] Henson Rebuttal at p. 19.
[218] Henson Rebuttal at 14-15.
[219] *Id*. at 22.

arbitration regarding the appropriate per amp rate for DC Power, only a dispute as to how that rate is applied.

SBC also misstates the status of power metering in Texas and Illinois – two of SBC Missouri's sister states. The Texas Commission has already rejected SBC's proposal to charge the per amp charge on 100 percent of both the A and B feed amps. In fact, while the Texas Commission originally ordered SBC to calculate its monthly recurring charge for DC power consumption based on its choice of three options (List 1 Drain, the maximum current carrying capacity of either the A or B feed or a mutually agreeable metering arrangement[220]), the Texas Commission subsequently determined that in the successor arbitration proceeding that the first two options may overstate the power usage rate. Therefore, the Texas Commission directed the parties "to work collaboratively to establish the metering arrangement and present a solution within 60 days from the final order in this proceeding."[221] Thus, contrary to SBC's Comments, power metering will soon be implemented in Texas.

As far as power metering in Illinois is concerned, it is SBC – and only SBC – who deems Illinois "a failure." Power metering has been in place in Illinois for four years, without a single negative incident, thereby belying SBC's hollow cries of failure.

SBC also expresses concern that if the Commission adopts AT&T's proposed language, the CLECs will have an incentive to provision their power supply inefficiently by ordering more than they currently need. SBC's arguments are flawed in two

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[220] Texas PUC Docket No. 27559, *Complaint of Birch Telecom of Texas Ltd., L.L.P., AT&T Communications of Texas, L.P., TCG Dallas, Teleport Communications of Houston, Inc. Against Southwestern Bell Telephone Company, LP for Post-Interconnection Dispute Regarding Overcharges for Power Under SBC-Texas' Physical Collocation Tariff,* Arbitration Award at p. 10 (September 15, 2003).

[221] Texas PUC Docket No. 28821, 28821-Collocation-Jt. DPL-Final, p. 2.

important respects. *First*, from an efficiency standpoint, it is much more efficient for the CLEC to design and install its Power Delivery arrangement (spanning from the BDFB to its collocation cage) to accommodate the CLEC's *ultimate* demand rather than to install a lesser Power Delivery infrastructure arrangement and to augment it from time to time as its actual power demand increases – a process which is extremely expensive and inefficient. *Second*, SBC's argument also falsely implies that its own costs increase as the size of a CLEC's Power Delivery arrangement increases. That is not the case. The CLEC pays SBC a nonrecurring charge for the design and installation of its Power Delivery arrangement, whatever its size, that is separate and apart from the monthly recurring charge for DC Power Consumption. Tr. 1161-62. The charge for the pipe is separate and distinct from the charge for the power running across it. And as SBC's lawyer Mr. Gryzmala admitted, SBC is paid for its costs in providing the power delivery arrangement. *Id*.

The DC Power Plant is not engineered (as SBC mistakenly asserts) to meet the cumulative total power that the wiring to CLECs' collocation cages can accommodate at maximum capacity. If the CLEC orders a 200 amp power delivery arrangement (pipe) but uses only 6 amps, SBC engineers will not design the DC Power Plant any differently or bigger than if the CLEC orders a 100 amp power delivery arrangement (pipe) but still uses 6 amps because the peak power usage is based on the 6 amps actually used. Thus, whether the CLEC orders 100 amps or 200 amps does not affect the size or the cost of the DC Power Plant. Said more simply, the size of the pipe has little to do with the volume running through or across it. Once again, Judge Thompson cogently noted this distinction during the hearing:

> But see, here in the utility world we know that the pipe has to be big enough for a peak day, but that doesn't mean that the volume the pipe is delivering is always at peak. Right? That's how it works in the water industry, that's how it works in the electric industry, that's how it works in the sewer industry. You have to size the pipe for the largest flow you expect ever.
> . . . .
> But that doesn't mean it's always flowing at that level. And, in fact, those other industries I mentioned, they have a complicated way of coming up with rates where you pay both for the large capacity that you've got for your peak day, but you also pay based on what your average volume is. [222]

It is crucial that any reasonable ordering process for DC Power recognize the important distinction between the initial, upfront ordering of the *DC Power Delivery* arrangement and the *separate* request for the amount of DC Power that the equipment in the collocation arrangement actually uses on a monthly basis. In other words, AT&T's DC power capacity on the cables extending from the BDFB to AT&T's collocation arrangement will not match its actual DC power usage except in those *very rare* instances where the collocation arrangement is fully built out and operating under peak conditions. Therefore, any attempt by SBC to equate the size of AT&T's *DC Power Delivery* arrangement with AT&T's actual usage of DC Power and to charge AT&T for DC power on that basis is inappropriate and not cost-based.[223]

SBC also wrongly contends that power metering will increase its installation and administration costs without any corresponding increase in CLECs' costs because the use of power metering will require the purchase and installation of metering equipment and some data conversion activity. AT&T's proposal makes quite clear that it will compensate SBC for the purchase and installation of the metering equipment and for the costs incurred to read the meters: "Non-recurring charges for the establishment of a

[222] Tr. at 1160-1161.
[223] Henson Direct at 33.

metered power usage system and recurring charges for meter reading will be paid by Collocator." *See* AT&T proposed language, section 19.2.3.6.

Finally, SBC's assertion that AT&T's power metering proposal puts network reliability at risk is contrary to the record evidence. As AT&T witness Mr. Henson testified, the split core transducer and the handheld meter (two of AT&T's options) are placed around the DC power cables without the need to disconnect the DC power cable, break the circuit or interrupt the circuit in any way.[224]

In sum, SBC's arguments are contrary to the record evidence, and should be rejected. The Commission should adopt AT&T's proposed power metering language.

POLES, DUCTS, CONDUITS & ROW

While not addressed in any great detail at the hearing, the issues in ROW Attachment 13 presented for resolution in this arbitration are significant issues to AT&T and the competitive landscape of wireline telecommunications in Missouri. As the Commission is well aware, the system referred to as a right-of-way ("ROW") is typically any system or pathway which carries or houses lines, facilities, or equipment used in the completion of local exchange and toll traffic. This system—which includes rights of way, conduits, pole attachments and other pathways—is an essential requirement in AT&T's ability to reach end users. Of course, these rights-of-way and outside plant structure are owned or controlled by the LEC, obtained as a result of being the monopoly provider of local exchange service for the past century. SBC now jealously guards these strategic assets in a manner that allows it the ability to affect competition.

The federal Act, however, mandates that LECs provide full, non-discriminatory access to "poles, ducts, conduits, and rights-of-way" to competing carriers. *See* FTA §

[224] Henson Rebuttal at 18.

251(b)(4).[225] In the disputed ROW Attachment issues, SBC—while not refusing access to its poles, ducts, conduit or rights-of-way—takes positions on ROW issues that demonstrate its monopoly advantage and have the effect of hampering AT&T's ability to compete.

Issue 1: Should the Agreement include definitions for periodic and spot inspections to differentiate these types of inspections?

Issue 4: How should CLECs be required to compensate SBC MISSOURI for the costs associated with the Periodic Inspection when they are found in non-compliance?

These two issues are related, and involve SBC's proposal to include language regarding periodic and spot inspections, as well as language requiring AT&T to pay for these inspections in certain circumstances. AT&T believes that SBC's proposed language in 3.29, 3.41 and 16.01(a) is all superfluous and unnecessary. AT&T has already agreed to language in Section 16.01 that allows SBC the expansive right to "make inspections ***at any time*** . . . for the purpose of determining whether facilities attached to SBC MISSOURI's poles or placed in SBC MISSOURI's conduit system are in compliance." Given the broad right of SBC to inspect, including specific provisions regarding periodic and spot inspections is unnecessary. In fact, it is impossible to expand SBC's right to inspect "at any time." AT&T can only assume that the true purpose of SBC's language is to create distinct forms of inspections that SBC can charge for.

With regard to SBC's attempt in section 16.01(a) to charge AT&T for periodic inspections, AT&T does not deny that SBC MISSOURI should have a right to inspect

[225] Section 251(b)(4) imposes a general duty on all local exchange carriers to grant competing providers of telecommunications services access to "poles, ducts, conduits, and rights-of-way" on "rates, terms, and conditions that are consistent with section 224." Section 224(f)(1) imposes a specific duty on all "utilities" to provide "nondiscriminatory" access to any pole, duct, conduit, or right-of-way to any CLEC.

attachments to its poles and access to its conduits to ensure that AT&T's access to such facilities meet the standards set under the Agreement. However, SBC's newly proposed "fee" – which was not included in the current Agreement between AT&T and SBC – bears no relation to either actual or necessary costs caused by AT&T.

Affording SBC a right to make inspections "at any time" is only reasonable to the extent that SBC MISSOURI bears the cost of its determination to conduct such inspections. However, since SBC MISSOURI in its sole discretion is to determine the frequency and scope of such inspections, it is SBC that is the cost causer of these inspections. Certainly, if AT&T were to bear any portion of these expenses, AT&T should be afforded far greater protections than those proposed by SBC under the Agreement to ensure that SBC does not abuse its right to inspections in a manner that drives up related fees to AT&T in an unwarranted manner.

Besides the issue of whether AT&T ought to be charged for inspections at all, the formula that SBC proposes bears no relation at all to the cost of an inspection. For example, let's assume that AT&T is found to have exactly 2% of its pole attachments in violation during one of SBC MISSOURI's "periodic inspections". Even if AT&T's number of attachments paled in comparison to the number of attachments of other parties – and thus the number of "violations" also trailed those by other parties – AT&T could be billed for the entire cost of SBC's inspection. In fact, a single pole found to be "in violation" by SBC could subject AT&T to the entire cost of an expansive inspection covering many carriers and without any clear limitation on the scope of the inspection itself. Such a result would be utterly absurd.

Further, when read together with SBC's proposed Section 16.03 (which AT&T independently disputes) it appears that SBC is looking to charge for the same event twice. These fees bear no relation whatsoever to the cost of the work performed by SBC MISSOURI and should be rejected by the Commission.

Issue 2: Should the cost of a single SBC MISSOURI employee who will review AT&T's maintenance work be shared by the parties or paid for by AT&T?

There is no disagreement that AT&T's personnel working in SBC's conduit systems must be properly certified based on industry standards and that AT&T contractors will be pre-approved by SBC to do the type of work involved. This requirement is contained in the existing ICA between the parties at section 6.11(e) of the ICA Appendix Poles, Conduits, & ROW. The disagreement between the parties in this issue is who should incur the cost of additional personnel who SBC, in its own discretion, deems necessary to be present to review work performed by AT&T's properly qualified and trained personnel.

If SBC, at its own option and for its own reassurances, sends its employees to review the work performed by certified AT&T personnel, then SBC should, at a minimum, share in the costs associated with such employee or contractor.[226] SBC's proposed language allows it to drive up CLEC costs when it has not claimed or established that AT&T does not use good workmanship when performing work in manholes and the like.[227] If SBC voluntarily and without cause chooses to send personnel to observe AT&T's work, it should, in fact, bear the entire cost. Thus, AT&T has suggested a reasonable compromise in agreeing to pay half the cost of a cost that AT&T does not even believe is unnecessary.

[226] Henson Direct at 5.
[227] *Id.*

AT&T's proposed language in this issue is identical to the existing ICA language between AT&T and SBC at section 6.11(e) of the ICA Appendix Poles, Conduits, & ROW. In fact, AT&T's proposed language is also found in the M2A, which was a product of an industry collaborative that included SBC and was approved by the Missouri Commission and has been in place between SBC and CLEC's for at least the last several years. As such, SBC bears the burden to demonstrate why the existing language should be changed. SBC has provided no compelling reason to justify why all the costs associated with its own verification of AT&T's work should be borne solely by AT&T in all instances.

AT&T further notes that the Texas PUC recently adopted the language proposed by AT&T on this ROW issue as part of the Texas proceedings on a successor ICA between the parties.[228] AT&T thus urges the Commission to adopt its proposed language for ROW issue 2 that represents a compromise between the parties' positions.

Issue 3: If AT&T cannot determine whether pole is owned or controlled by SBC MISSOURI, and therefore is unable to identify all pole ownership in its application, should AT&T pay SBC MISSOURI to perform this function?

At times, SBC may be required to rearrange its facilities or perform make-ready work on non-SBC poles to accommodate AT&T's request for pole access. The AT&T-proposed language in this issue recognizes that SBC is in the best position to determine which poles it owns and controls and which poles it does not own or control.

SBC should be able to readily identify ownership and control of poles it does not own or control. SBC is without question in the superior position to determine which poles it owns and controls and which poles it does not own or control.[229] Requiring

[228] Texas PUC Docket No. 28821, Arbitration Award—Track 1 Issues, ROW Issue 3 (February 22, 2005).
[229] Henson Direct at 7-8.

AT&T to pay SBC to determine which poles it owns or controls saddles AT&T with additional costs. Furthermore, SBC would have unfettered discretion to determine the amount of such costs and would have no incentive to provide the requested information in an efficient manner. SBC has not demonstrated that there are any costs associated with providing information about its own facilities and, if there are such costs, has not provided a compelling reason to justify why AT&T should bear the costs of SBC accessing its own information.

Furthermore, AT&T's proposed language is identical to the language contained in the existing ICA between AT&T and SBC. AT&T's proposed language is also contained in the M2A, which was a product of an industry collaborative that included SBC and was approved by the Missouri Commission. This language has been in place for at least the last several years. Accordingly, AT&T requests that the Commission adopt AT&T's proposed language on ROW issue 3.

Issue 5: Should the ICA include post construction inspection language requiring AT&T to pay for SBC MISSOURI's expenses associated with such activity?

There is no rationale to support SBC's new additional language to add another inspection and impose a fee on AT&T for this additional inspection. The parties have agreed to language that already provides SBC assurances that AT&T's attachment to SBC's structure conforms to necessary standards.

As with other ROW issues, SBC seeks to take advantage of its incumbent status and impose additional fees on AT&T for inspections. SBC has submitted no evidence that such inspections are industry standard or necessary. There is simply no rationale to support SBC's new additional language to add another inspection and impose yet another fee on AT&T. AT&T has nonetheless agreed to language that provides SBC assurances

that its attachment to SBC's structure conforms to necessary standards. As with many other ROW positions adopted by SBC, the proposed language in this issue unnecessarily drives up costs.

AT&T further notes that the Texas PUC recently adopted the language proposed by AT&T on this ROW issue as part of the Texas proceedings on a successor ICA between the parties. With respect to the AT&T's proposed language in section 16.03, the Texas Commission stated:

> The [Texas] Commission adopts AT&T's position regarding this issue. The Commission agrees with AT&T that the SBC Texas' proposal unnecessarily drives up costs. It has submitted no evidence that such inspections are industry standard or necessary. SBC's proposal allows unlimited, unfettered inspections with potentially no useful benefit. There is no credible evidence that inspections of AT&T's post-construction work are necessary to protect "public safety." Nevertheless, AT&T has agreed to language that provides SBC assurances that its attachment to SBC's structure conforms to necessary standards.[230]

Accordingly, AT&T urges the Commission to adopt AT&T's proposed language for ROW issue 5.

COMPREHENSIVE BILLING

Issue 1: Should SBC have the unilateral ability to discontinue industry standard billing format?

Issue 2: Should SBC be required to correlate its recorded data to the Call Usage Record Daily Usage File sent to AT&T; and should it similarly be required to correlate its recorded data to the bill it sends to AT&T for the calls which generate those records?

As AT&T witness Mr. Guepe explained, SBC generates a call detail record, or CDR, for each call placed or received by AT&T's UNE-P customers (i.e., calls using SBC's switch). Each day, SBC provides to AT&T a Daily Usage File, or "DUF", which

[230] Texas PUC Docket No. 28821, Arbitration Award—Track 1 Issues, ROW Issue 11 (February 22, 2005).

contains the CDRs associated with originating or terminating traffic on a particular telephone line associated with AT&T's UNE-P customers for a particular day. The CDRs are introduced into SBC's CABS billing system and are ultimately posted to AT&T's UNE-P invoice. These CDRs contained in DUF form the basis for SBC's UNE-P bills to AT&T, in particular the usage-based billing elements. AT&T uses the DUF files it receives from SBC to verify the reasonableness of the usage-based rate elements on the UNE-P bills it receives from SBC. In addition, AT&T is entitled to bill SBC and other carriers for terminating access on UNE-P lines leased by AT&T under certain circumstances (e.g., long distance calls) and uses the call detail records in the DUF for that as well. AT&T requests a mapping of the billable elements (e.g., local switching, SS7 signaling, etc.) associated with each call type (intra-office, inter-office, IXC access, etc.) to the CDRs of its UNE-P customers. Specifically, SBC should be required to provide the logic of how the CDRs SBC provides in the DUF map or align to the usage billing elements SBC bills to AT&T on the wholesale bill. In effect, AT&T is asking SBC to provide the "roadmap" for how it creates AT&T's bills from the call detail/usage records in the DUF. AT&T can then compare this mapping logic with the CDRs in the DUF to determine if the usage based charges contained in AT&T's UNE-P invoice are correct.[231]

Mr. Guepe further explained that while SBC's current bills do not allow such mapping, SBC can accomplish this by mapping the AMA data contained in the DUF to the UNE-P bill. AT&T requires that SBC perform this fundamental task in order for AT&T to validate the bills it receives from SBC. It is imperative that the call detail records and the UNE-P bill correlate so that AT&T can use the call detail records to

[231] Guepe Rebuttal at 20-22.

verify the accuracy of the UNE-P billing and, as a corollary, use the UNE-P bill to confirm the completeness of the DUF records. AT&T relies upon call detail records to bill its customers (which could be an end user, or a third party carrier, including an IXC.) If the call detail records and the UNE-P bills do not correlate, it is difficult, without an enormous amount of reconciliation activity on behalf of both parties, to determine errors in SBC's bills to AT&T or in AT&T's bills to SBC and/or third parties.[232] There have been situations where, after exhaustive investigation and an inordinate amount of time, SBC admitted that the call detail records provided by SBC were incomplete and did not correlate with the UNE-P bill. Without mapping, the Parties are unable to understand the discrepancies with any level of detail or accuracy. AT&T needs that mapping initially to input into the AT&T validation process and will need it again each time SBC's billing logic changes. Since changes to billing logic are infrequent, AT&T's request is not burdensome to SBC.[233]

SBC contends that AT&T's request should be rejected because SBC records and sends the call records daily to AT&T in the Daily Usage File, yet SBC bills AT&T monthly for the use of its switch when calls are made or received by the AT&T UNE-P end-user. This timing issue is of no consequence. Allowing for a very slight difference primarily associated with timing, the minutes in the monthly DUF files should equal the minutes in the monthly CABS bill. In those cases where extreme differences in the number of minutes billed has occurred (including California, and to a lesser extent, Missouri), AT&T has a much better chance of being quickly able identify the error by knowing how the call records map to the billing elements, thereby allowing SBC to take

[232] Guepe Direct at 23.
[233] *Id*.

corrective measures much more quickly. As AT&T witness Mr. Guepe testified, without this mapping, the companies waste significant time and resources attempting to validate one another's collected discrepant data when billing discrepancies do occur. By implementing the mapping process AT&T proposes, errors can be easily recognized and parties can redirect their resources to constructive tasks.[234]

Mr. Guepe testified that -- contrary to SBC's representations – SBC's on-line DUF User Guide and call flows fail to provide the information necessary for AT&T to validate its bills. While the User Guide lists record types and information regarding the transmission of the records, including packaging and the return record process, it fails to provide any correlation between the CDRs provided to AT&T and the rate elements billed to AT&T. Additionally, SBC's on-line call flow diagrams are very high level and fail to specify the complete record types SBC provides for specific calls; they also fail to specify what rate elements SBC bills for those calls. Rather, most of the diagrams in SBC's on-line handbook list rate elements that *may or may not* apply – precisely the type of non-specificity that AT&T is trying to avoid by its mapping request.[235] AT&T's proposal is, therefore, the only workable one.

Unless AT&T has a way to tie or "map" the usage-based UNE-P charges it is billed by SBC to the call detail records it receives from SBC, AT&T is unable to verify the accuracy of its bills and is denied that basic right. That is not a fair result, and should not be condoned. SBC should be required to provide the logic underlying how the CDR records in the DUF map to the usage billing elements SBC bills to AT&T on the

[234] Guepe Rebuttal at 23.
[235] *Id.*

wholesale bill so that AT&T can validate the bills it receives from SBC and adopt AT&T's proposed language in Section 3.3.1 of Attachment 28.

Issue 3:

a. Should SBC MISSOURI be required to provide to AT&T the OCN or CIC, as appropriate, of 3rd party originating carriers when AT&T is terminating calls as an unbundled switch user of SBC MISSOURI?

b. Should SBC MISSOURI be billed on a default basis when it fails to provide the 3rd party originating carrier OCN or CIC, as appropriate, to AT&T when AT&T is terminating calls as the unbundled switch user?

As AT&T witness Mr. Guepe explained, it is imperative that SBC provide AT&T with the Operating Company Number, or OCN (in the case of a LEC-carried call) or the Carrier Identification Code, or CIC (in the case of a toll call) of the third party carrier originating the call when AT&T terminates calls originating from third party carriers using SBC's unbundled local switching. SBC records the call and knows the identity of the originating carrier in the various circumstances under which AT&T terminates traffic from SBC (e.g., when AT&T terminates a call that originates from (i) a CLEC purchasing SBC's unbundled local switching element or (ii) an IXC or LEC interconnected with SBC). The originating OCN and/or CIC of the third party carrier is a unique identifier, which distinguishes carrier ownership of the call. OCNs and CICs tell AT&T which carriers are originating calls that AT&T terminates as a facilities-based carrier or when AT&T leases UNE-P lines from SBC, and are required to enable AT&T to properly bill the originating company. In the case where AT&T purchases SBC's unbundled network elements, AT&T is totally reliant on SBC to record the call and provide the record from which AT&T will bill the originating carrier. As a purchaser of unbundled network elements, AT&T requires this information on all third party traffic.[236]

[236] Guepe Direct at 25.

AT&T is not seeking this information as a matter of convenience; it seeks this information because SBC is the only carrier that has this information and without it, AT&T cannot bill the originating third party carrier. In fact, SBC, as a member of the Ordering and Billing Forum of the Alliance for Telecommunications Industry Solutions, or OBF, has agreed to comply with the OBF's resolution of billing issues. The OBF develops consensus solutions to industry ordering and billing problems and is attended by both AT&T and SBC. After several years of effort, the OBF recently and finally resolved many of the issues (Issues 1921, 2309) relating to whether SBC must provide a CIC or originating OCN. The net result of these resolutions is that the recording company, SBC in the case of UNE-P, must provide to the terminating carrier, AT&T, on a per call basis, in the call detail record, the OCN of a carrier originating a local call. In addition, the OBF closed OBF Issue 2638 in mid-November relating to whether an ILEC (in this case, SBC) must provide to the terminating carrier (in this case, AT&T) the OCN of a CLEC originating a call using a UNE switch port leased from SBC. As a result of this "final closure" (i.e., has reached consensus resolution and can be implemented as an industry solution), SBC is required -- as the UNE switch provider -- to provide the terminating carrier ("AT&T") with the OCN of the originating carrier that has leased the switch port.[237] These decisions support AT&T's position that for non-IXC calls, SBC should include the OCN of the originating third party carriers in the usage records it provides to AT&T when AT&T terminates calls using SBC's unbundled network elements.

Despite these clear and final OBF resolutions requiring SBC to provide the OCN of the third party originating carrier, SBC's proposed language limits its obligation to

[237] Guepe Direct at 26-27..

provide the OCN to those instances where to do so is "technically feasible" and after SBC completes its "ULS Port project" – targeted for completion earlier this year. SBC's proposed language essentially allows it to implement this resolution at its whim and refuses to commit to a time or date certain. As AT&T witness Mr. Guepe testified, there is no question that SBC can implement this resolution – in fact, SBC has almost fully implemented this solution in most of its 13-state region.[238]

For an IXC-carried call, the long-established industry standard is that the official recording company (SBC, when it is interconnected with the IXC) shall identify for the terminating carrier (in this case, AT&T) the CIC of the IXC to be billed by AT&T. SBC has the relationship with the IXC to deliver the traffic and is aware of what IXC trunk it receives the call on, thereby enabling it to identify the third party IXC originating the call.[239] As the "official recording company" (as defined by the OBF in the MECAB Guidelines), SBC is the only entity with sufficient information to populate the CIC customer identifier for calls transported by IXCs to SBC's network. It is impossible for AT&T (or any recipient LEC) to derive a carrier's CIC code for any given call using other data in the billing record. The CIC *must* be provided as part of the detail billing record sent to AT&T for every IXC-carried call terminating to AT&T and recorded by SBC. This is not a new requirement but one that has existed since Meet Point Billing began in the mid-1980s.[240]

In the event SBC fails to provide the third party carrier's originating OCN and/or CIC consistent with these consensus industry standards, AT&T proposes to bill SBC on a

[238] Guepe Direct at 27.
[239] Guepe Rebuttal at 28-29.
[240] *Id*.

default basis. SBC has this information. If SBC does not provide it to AT&T then AT&T only knows that the call came in on SBC's network. Therefore, it is appropriate to bill SBC.[241]

During the hearing, SBC witness Chris Read confirmed both that SBC is able to identify the IXC that provides the traffic to provide the CIC, and that a CLEC cannot properly bill the call without the CIC:

> MS. BOURIANOFF: You mentioned that for IXC calls, CIC, a C-I-C, carrier dentification code, is provided. Do you recall that in responding to Staff questions?
> MR. READ: Yes.
> MS. BOURIANOFF: Is a CIC always provided to a CLEC on every IXC call?
> MR. READ: If it is an access record that would be charged to an IXC, then that -- that is our -- our goal, our anticipation that a CIC would be provided. We -- we've always agreed that we would provide CICs.
> MS. BOURIANOFF: You would agree with me, however, Mr. Read, that a CIC is not always provided in every instance. It's the agreed standard that it should be provided, but there are records passed sometimes that do not have a CIC on them; is that correct?
> MR. READ: Well, you never say never and always. I guess there could be anomalies, but -- that could happen, but I think they are just that. And it is our goal that if it's an IXC-charged call, that the CIC would be provided. Because we could identify the traffic as coming from that IXC, we would know what CIC to provide.
> MS. BOURIANOFF: And is the CLEC able to bill the call correctly if the CIC is not provided on the record?
> MR. READ: Well, it creates a dilemma. As I stated earlier, identification and jurisdiction are two of the top -- the largest issues that have been in the wholesale world, as -- as you know. And as many, many issues regarding identification and jurisdiction have been -- many discussions have happened in the industry. So it does create a problem. Is it impossible? I wouldn't go there. There may be other methods, there may be other avenues of information, but it does create a problem.[242]

AT&T is <u>not</u> demanding that SBC provide <u>both</u> a CIC and an OCN identifier for every call. Rather, in accordance with the industry/OBF view, AT&T requires the

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241 Guepe Direct at 28.
242 Tr. at 1018-1019.

originating OCN for LEC-carried calls and the originating CIC customer identifier for calls transported by IXCs to SBC's network.[243] With this clarification, there is no question that SBC possesses all relevant and sufficient information required to accurately identify the originating 3rd party carriers who terminate traffic to AT&T when AT&T is using SBC's unbundled local switching element. Perhaps most importantly, since SBC is the ***only*** carrier with a direct interconnection/interface to the 3rd party carrier, SBC is the ***only*** entity with sufficient information to accurately identify these 3rd party carriers. Consistent with the OBF directives, SBC should be required to provide this essential information.

Comprehensive Billing Issue 4:

a. Should the ICA include terms and conditions for billing and collection arrangements between the Parties for end user calls involving alternative billing mechanisms for resale services?

b. Should the ICA include terms and conditions for billing and collection arrangements between the Parties for end user calls involving alternative billing mechanisms for facilities based services?

c. Should the Agreement include Attachment 20: NICS?

An alternatively billed service (ABS) is a service that allows end-users to bill calls to accounts that may not be associated with the originating line. There are three types of ABS calls: calling card, collect and third number billed calls. As AT&T witness Mr. Guepe testified, the billing of ABS calls for resale services should not be part of the Parties' ICA, but should be covered in a separate agreement. The Parties completed a separate billing and collection agreement involving ABS calls for the UNE-P product that began in May of 2003 and is in the process of being extended through at least October 2005. That separate agreement should also cover ABS calls for resale services because

[243] *Id.*

the ABS calls received by the AT&T resale subscriber are no different than the ABS calls that are received by the AT&T UNE-P subscriber – which are already covered by the existing agreement between the parties. SBC and AT&T negotiated the UNE ABS agreement for over 18 months and it makes sense that the benefits resulting from that process and ABS settlement should be extended to resale services. In addition, broadening the parties' agreement to include resale services would save the time and expense of having to negotiate a new ABS agreement for resale services. If the interconnection agreement is going to reference the parties' ABS agreement, the ABS agreement should cover ABS for both the types of products (resale and UNE-P) because the handling of the calls is the same.[244]

As AT&T witness Guepe also explained, there is no need for the ICA to include terms and conditions for billing and collection arrangements for end user calls involving alternative billing mechanisms for facility-based services (as distinguished from UNE-P and resale services). While SBC apparently agrees that it is appropriate to have a separate agreement with AT&T for ABS calls for facilities-based services, SBC's proposed language in Section 16.2.1 of Attachment 28, Comprehensive Billing, nonetheless specifies an ABS billing and settlement process.

Arrangements for ABS calls are in the nature of billing and collection agreements. Interconnection agreements under section 252 of the Act are for the purpose of establishing interconnection for the exchange of traffic and the sale by the incumbent carrier of certain services such as UNEs and collocation to a CLEC.[245] A billing and collection agreement that makes AT&T SBC's agent for billing end users for retail

[244] Guepe Direct at 30-31.
[245] *See* TPUC Docket No. 24542, Revised Arbitration Award at p. 212 (October 3, 2002).

services provide by SBC, or other carriers, is not required by the Act. As a result, arrangements for ABS calls should not be included in an interconnection agreement and should not be the subject of an arbitration under section 252 of the Act. AT&T is not required by the Act to enter into a billing and collection arrangement with SBC for ABS calls.

Under the SBC proposal, AT&T would be required to automatically bill on SBC's behalf at a rate that doesn't begin to cover its costs. AT&T will then be required to collect those charges from its customer that accepted those charges when it has no ability to control call completion. As a result, SBC's proposal shifts to AT&T all the costs and risks of billing and collection for a service AT&T did not even provide. SBC's proposal exposes AT&T to costs of billing, costs of collection and the risk of being unable to collect. These are all topics that require negotiation.[246]

AT&T, in contrast, seeks to make these ABS processes subject to a separate negotiated agreement whereby all the details with respect to these billing and collection costs and responsibilities are part of a stand-alone defined agreement. AT&T is prepared to enter into such discussions with SBC at any time. Such an agreement should be separate from the interconnection agreement because billing and collection agreements for retail services provided by third parties are not required by the Act.

AT&T urges the Commission to recognize that arrangements for ABS calls do not belong in an interconnection agreement and are not subject to the arbitration requirement of section 252 of the Act. If the Commission does not make this finding, AT&T requests a reasonable period of time to negotiate the terms of such an arrangement with SBC.

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[246] Guepe Direct at p. 32.

PRICING

AT&T and SBC are in substantial agreement regarding the prices to be included in the successor ICA that will result from this case. (See Price List filed with Pricing DPL.) Generally, AT&T and SBC agree that the most recent Commission-approved rates should be used for the successor ICAs that result from this case. Where transitional rates are to be set for elements that have been delisted, both parties agree that the transitional rates should be set according to the rules set out by the FCC which modify existing rates by a fixed amount (i.e., $1 for UNE-P) or percentage (e.g., 15% for certain loops and transport elements). There were few areas of disagreement. What is noteworthy in the areas of disagreement is that AT&T's witnesses Dan Rhinehart and Jim Henson provided testimony and reasoning in support for each of the proposed rates. SBC did not. Instead, SBC simply laid out rates it proposed with no support or reasoning.

Pricing Issue 1: What are the appropriate cost-based rates for the elements in dispute between the Parties?

During the hearing, counsel for SBC attempted to discredit AT&T's proposed pricing for some elements because AT&T did not present supporting cost studies. Mr. Rhinehart responded that AT&T had no access to SBC's cost models for this case and that SBC itself had provided no cost studies in support of its proposed pricing. Tr. 946:3-6 Mr. Rhinehart also cited his extensive experience with SBC's cost modeling generally both in Missouri in previous cost proceedings and in other states[247] to support of his reliance on other nearby state determinations of SBC's costs in setting rates in dispute here. In 2001, in developing the M2A, the Missouri Commission itself previously used

[247] Tr. 957:19-25, 974:4-20

95 UNE rates from the Texas 271 Agreement.[248] The FCC itself has used Texas UNE rates as benchmarks by which to evaluate the reasonableness of Missouri UNE rates during the Missouri 271 proceeding.[249] In paragraph 56 of the Missouri 271 Order, the FCC stated:

> A comparison is permitted when the two states have a common BOC; the two states have geographic similarities; the two states have similar, although not necessarily identical, rate structures for comparison purposes; and the Commission has already found the rates in the comparison state to be reasonable. Here, we find that Texas meets this test and is a permissible state for comparison. The two states have a common BOC, similar rate structures, and sufficient geographical similarities, and the Commission has already found Texas rates to be within a reasonable TELRIC range.

DS3 Loops: AT&T proposes to use DS3 loop prices currently in use in the AT&T-SBC Texas ICA. (Schedule of Prices, lines 22 to 25). Mr. Rhinehart testified that Texas rates are cost based and that based on his personal knowledge of SBC's costs and processes that costs are similar in Texas and Missouri. Tr. at 944: 19-22; 947:23-948:3 SBC provided no support for its proposed DS3 loop rates. At hearing, SBC modified its proposal to set DS3 rates on an individual case basis ("ICB"), but this proposal is impractical because portions of the ICA expressly require SBC to provide DS3 loops on demand. Failure to adopt a price now could impede the use by CLECs of requested DS3 loops. Tr at 984:2-14.

DSL Capable Loops: SBC witness Silver proposes that analog loops and comparable DSL capable loops be price the same within each zone. Silver Direct, p. 69.

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[248] *See In the Matter of SBC Communications et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-region InterLATA Services in Arkansas and Missouri* ("Missouri 271 Order") CC Docket No. 01-194, Memorandum Opinion and Order at para. 49 (Nov. 19, 2001).

[249] Tr 985:5-19.

AT&T's proposed rates (Schedule of Prices, lines 28 to 55) reflect this proposal SBC's proposed rates do not conform to Mr. Silver's testimony.

IDSL Capable Loops: Similar to DSL capable loops, AT&T recommends pricing for IDSL capable loops match the pricing for comparable analog loops. (Schedule of Prices, lines 59 to 62) SBC agreed with AT&T's proposed recurring rates but did not match the non-recurring charges. The Commission should adopt AT&T's proposed recurring rates and non-recurring charges.

Mechanized Loop Qualification: AT&T proposes the use of rates in the current ICA. (Schedule of Prices, Line 65) SBC did not provide justification for its proposed rate.

XDSL Conditioning: AT&T's bases its proposed prices on rates established by this Commission in July 2002 in Case No. TO-2001-439. These rates supersede those shown in the existing AT&T-SBC ICA in Attachment 25 DSL that were set at $0. AT&T's Mr. Rhinehart clarified at hearing that the prices (Schedule of Prices, Lines 70 to 85) were identified in the March 15, 2002 Staff Pricing Report in Case No. TO-2001-439 and subsequently made available by SBC to the CLEC community by letter dated December 23, 2003. TR 951:21 – 952:14 Because Case No. TO-2001-439 rates are Commission-established rates and they previously have been offered to CLECs in Missouri, they should be adopted for this successor ICA. SBC's unjustified rates should be rejected.

Removal of All Bridged Tap: The Commission adopted removal of bridged tap rates in Case No. TO-2001-439 and those approved rates are included in AT&T's proposed pricing (Schedule of Prices, Lines 74 and 75). To AT&T's knowledge, there

are no Commission-approved rates that would replace the $0 rates in the present AT&T-SBC ICA Attachment 25 DSL for LST. At hearing, AT&T stipulated that it had not incorporated removal of all bridged tap as a part of the ICA. TR 955:10-12

Line and Station Transfer: Consistent with AT&T's overall approach, AT&T recommends adoption of line and station transfer rates from the existing ICA. (Schedule of Pricing, Lines 97 to 99.) SBC provided no support for their proposed LST rates and as such, the SBC-proposed rates should not be adopted. As there are no approved rates for LST, none should be included in the successor ICA without a cost-showing demonstrating that SBC would not be double-recovering costs included elsewhere.[250]

Select Dark Fiber Rates: AT&T supports the adoption of the present ICA rates for dark fiber. (Schedule of Prices, Lines 251 to 253.) SBC proposes the establishment additional rates that may be duplicative of the per-foot prices already reflected in the price list. SBC's additional dark fiber pricing elements should be rejected.

Pricing Issue 2: Should routine network modifications be assessed an ICB rate, or, are the costs for routine network modifications already included within the UNE rates?

See UNE Issue 18, discussed above.

Pricing Issue 3: Should DCS rates be included in the ICA or should the ICA reference SBC's federal tariff for these rates?

This issue is related to UNE Issue 20. If the Commission rules, as it should, that DCS should be provided by SBC, then pricing for DCS and related cross-connects should be included in the Schedule of Prices. As with other AT&T proposals, the suggested

[250] Rhinehart Direct, p. 74

rates come directly from the existing AT&T-SBC ICA and should be adopted. (Schedule of Prices, Lines 117 to 118 and 226 to 238.)

Pricing Issue 4: Should rates for entrance facilities be included in the ICA?

This issue is related to Network Interconnection Issue 8. If the Commission agrees with AT&T on Network Issue 8, it should also agree with AT&T on this Pricing Issue 4. As Mr. Rhinehart testified, interconnection facilities are required to be provided based on Section 251(c)(2) of the Act under the same pricing terms as UNEs (i.e., at TELRIC).[251] For this reason, AT&T proposes that entrance facilities used for interconnection between carriers must be included in the price list and the rates in the present AT&T-SBC ICA. (Schedule of Prices, Lines 160 to 178.)

Pricing Issue 5: Should rates for VG/DS0 transport be included in the ICA?

This issue is related to Temporary Rider Issue 1. As discussed above, the FCC has not delisted DSO transport, and SBC is still obligated to provide it as a UNE. Consistent with its overall approach to rates to be adopted in the successor ICA, AT&T proposes prices for VG/DS0 transport that are in the existing AT&T-SBC ICA. AT&T's Because there has been no finding of non-impairment for DS0 transport in either the *TRO* or *TRRO*,VG/DS0 pricing should remain in the price list for the successor ICA. (Price Schedule, Lines 181 to 195.)

Pricing Issue 6: Should the ICA include Attachment 20 and its corresponding rates?

AT&T opposes the inclusion of the rates proposed by SBC Missouri as we oppose the inclusion of Attachment 20 in its entirety. If Attachment 20 is not a part of the ICA,

[251] Rhinehart Direct, p. 76.

it makes no sense to include rates associated with Attachment 20. (Schedule Of Prices, Lines 319 to 321, 323 to 325, 336 to 341.)

Pricing Issue 7: Should the ICA include the UNE Rider Rates?

In rebuttal testimony, SBC witness Silver now agrees with AT&T that UNE Rider rates should be reflected as a separate worksheet in Attachment 30 Pricing. (Silver Rebuttal, p. 26) However, SBC made no showing of what should be included as transitional rates or exactly what should be included in the separate worksheet. AT&T proposed a specific list of elements and prices and filed the proposed transitional price list with the Pricing DPL in this case. Lacking an opposing showing by SBC, the price list proposed by AT&T should be adopted.

Pricing Issue 8: What rates should apply to SBC for its use of AT&T's space?

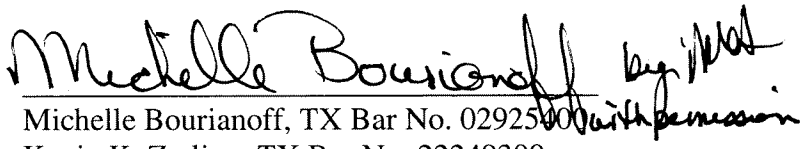
AT&T proposes to use the rates found in its Missouri tariff for access service. Specifically, the rates are found in P.S.C. Mo. No. 20, AT&T Communications of the Southwest, Inc., Access Service Tariff, Price List, Original Pages 10 and 11 (December 26, 2002). The rates in AT&T's tariff, which have been agreed to by SBC in a number of other states, are generally comparable to SBC's charges for the same capability.

AT&T has no obligation to make this type of collocation arrangement in AT&T's switching centers available to SBC. In the *Virginia Arbitration Order*, the FCC's Wireline Competition Bureau explicitly determined that non-incumbents do not have collocation obligations and characterized any such arrangements as "voluntary offer[s]." As a result, no particular pricing standard applies in this instance. Nevertheless, AT&T's proposed rates are comparable to those charged by SBC in its collocation tariff and

collocation appendices for the same functionality and should be adopted by the Commission.

WHEREFORE, PREMISES CONSIDERED, AT&T respectfully requests that the Commission enter an Arbitration Award consistent with the recommendations contained herein.

Respectfully submitted,



Michelle Bourianoff, TX Bar No. 02925400
Kevin K. Zarling, TX Bar No. 22249300
AT&T COMMUNICATIONS
OF THE SOUTHWEST,Inc.
919 Congress Avenue, Suite 900
Austin, Texas 78701-2444
512-370-1083/2010
512-370-2096 (FAX)
mbourianoff@att.com

Mark W. Comley #28847
Newman, Comley & Ruth P.C.
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102
(573) 634-2266
(573) 636-3306 (FAX)

ATTORNEYS FOR
AT&T COMMUNICATIONS
OF THE SOUTHWEST, INC., TCG
KANSAS CITY, AND TCG ST. LOUIS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served by U.S. mail, electronic transmission and/or facsimile on all parties of record on this the 7th day of June, 2005.

Michelle Bourianoff

Michelle Bourianoff

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