In the Matter of the Petition of CLEC Coalition for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b)(1) of the Telecommunications Act of 1996
In the Matter of the Application of AT&T Communications of the Southwest, Inc. and TCG Kansas City Inc. for Compulsory Arbitration of Unresolved Issues with SBC Kansas Pursuant to Section 252(b) of the Telecommunications Act of 1996
In the Matter of the Request of the CLEC Joint Petitioners for Arbitration with Southwestern Bell Telephone, L.P. d/b/a SBC Kansas for an Interconnection Agreement that Complies with Sections 251 and 271 of the Federal Telecommunications Act
In the Matter of the Petition of Navigator Telecommunications, LLC. for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996

Docket No. 05-BTKT-365-ARB; Docket No. 05-AT&T-366-ARB; Docket No. 05-TPCT-369-ARB; Docket No. 05-NVTT-370-ARB

Kansas Corporation Commission

2005 Kan. PUC LEXIS 868

July 18, 2005, Dated

PANEL: [*1] Before Commissioners: Brian J. Moline, Chair; Robert E. Krehbiel; Michael C. Moffet

OPINION: ORDER NO. 16: COMMISSION ORDER ON PHASE II INTERCARRIER COMPENSATION, SUBLOOP AND 911 ISSUES

The above-captioned matters come before the State Corporation Commission of the State of Kansas (Commission) for a decision. The Commission is familiar with its files and records and has been duly advised in the premises. The Commission finds and concludes as follows:

1. The Arbitrator's Determination on the Phase II Intercarrier Compensation, Subloop and 911 Issues was issued on June 6, 2005. Southwestern Bell Telephone L.P. (SBC) filed two sets of Comments on June 17, 2005. One set addressed Unbundled Network Element (UNE) Issues, the other addressed Intercarrier Compensation, Subloop and 911 Issues (IC Comments). AT&T Communications of the Southwest, Inc. and TCG Kansas City, Inc. (AT&T) filed Comments which addressed both UNE and Intercarrier Compensation issues. The CLEC Coalition filed Comments on UNE Issues only. Cox Kansas Telecom LLC (Cox) filed Comments on Subloop and 911 Issues. SBC filed three separate sets of Reply Comments. This Order will address its Reply Comments on Intercarrier Compensation [*2] Issues (SBC IC Reply) and its Reply Comments on Subloop Issues (SBC SL Reply). AT&T and the CLEC Coalition also filed Reply Comments on June 27, 2005. This Order will only address intercarrier compensation, subloop and 911 issues, in that sequence. A separate order will be issued on UNE issues at the same time as this order is issued.

2. The Commission will address each issue, beginning with the issues raised by SBC, followed by the issues raised

by AT&T and concluding with the issues raised by Cox, except when two parties raise the same issue. n1 In those few instances the Arbitrator will address that issue only once.

n1 The Arbitrator declined to decide a few issues because of her belief that both parties presented legally flawed language. It is in those few instances that more than one party may have commented on an issue.

Definition and Scope of Section 251(b)(5) Traffic

AT&T IC-1(a)

3. This issue has been raised by SBC and AT&T. The Arbitrator rejected SBC's and AT&T's proposed definitions and recommended [*3] the parties attempt to negotiate a new definition. Both parties state the agreement must contain a definition and the Arbitrator must decide the issue. n2

n2 SBC IC Comments P1, AT&T Comments pp. 14-15.

4. SBC argues the Commission should adopt its proposed definition, stating it is fully consistent with the law. SBC argues FCC Rule 701 provides for reciprocal compensation for traffic exchanged between a LEC and a CLEC ". . . except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access." n3 SBC further cites to P 37 of the *ISP Remand Order*, in which the FCC explains its decision to include ISP-bound traffic in the section 251(g) carve-out from section 251(b)(5) reciprocal compensation. n4 SBC states a decision must be made even if the Commission does not fully agree with SBC's definition and that the Commission could order the parties to adopt SBC's definition with the proviso that FX traffic is also subject to 251(b)(5) compensation. [*4] n5

n3 *47 C.F.R. § 51.701(b)(1)*.
n4 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996. Intercarrier Compensation for ISP-bound Traffic*. Order on Remand and Report and Order. Rel. April 27, 2001. *(ISP Remand Order.)*
n5 SBC IC Comments P7.

5. SBC's IC Reply reiterates that its definition complies with current federal law and asserts AT&T's reliance on *WorldCom* is misplaced, because although that Court remanded to the FCC, it expressly refused to vacate the FCC's rules. n6 SBC addresses AT&T's revised definition for 251(b)(5) traffic, claiming it contains multiple inconsistencies with federal law, such as inclusion of ISP-bound traffic. Further, AT&T's definition excludes only "exchange access traffic," although *47 C.F.R. § 51.701(b)(1)* excludes "interstate or intrastate exchange access, information access, or exchange services for such access." SBC urges the Commission [*5] to adopt its definition or the revised definition proposed in its Comments. n7

n6 *WorldCom, Inc. v. FCC, 288 F.3d 429 (2002) (WorldCom);* SBC IC Reply, PP 11-12.
n7 SBC IC Reply PP 9-14.

6. The Arbitrator declined to adopt AT&T's definition because of its inclusion of ISP-bound traffic in the definition. AT&T states, "the Arbitrator's conclusion that the *ISP Remand Order* remains the law is not clearly erroneous." AT&T then proposes a modified definition, in which it eliminates ISP-bound traffic, from its definition. n8

n8 AT&T Comments pp. 15-16.

7. In its Reply, AT&T states all telecommunications traffic is subject to 251(b)(5) unless it is specifically excluded by 251(g). AT&T argues its language is *more* consistent with the Federal Act than SBC's. (Emphasis added.) AT&T asserts SBC relies on an outdated [*6] definition of local traffic, noting that the FCC amended the definition, which previously limited reciprocal compensation to "telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within *a local service area established by the state commission.*" (Emphasis by AT&T.) After the FCC's amendment, the rule requires reciprocal compensation for "telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access or exchange services for such access." n9 AT&T argues unless a stated exception applies, all traffic is subject to compensation pursuant to section 251(b)(5). AT&T also asserts that in Michigan SBC agreed that the local/non-local distinction no longer applies. AT&T states it cited the Michigan case in its testimony and SBC did not address it. n10

n9 *47 C.F.R. § 51.701(b)(1).*
n10 AT&T Reply, pp. 7-8.

[*7]
Decision

8. The Commission appreciates the need for a decision on this issue, but finds it difficult to make one. It is obvious that the amendment of the rule to delete any reference to traffic within a local service area, indicates an intent by the FCC to no longer limit reciprocal compensation to traffic that originates and terminates in the same local calling area, yet SBC's definition ignores the amendment. Similarly, AT&T's language, including the revised language, provides for compensation for ISP-bound traffic, as if it were 251(b)(5) traffic, although the *ISP Remand Order* makes it clear ISP-bound traffic is subject to the interim compensation mechanism set out in that Order and the Commission is not clear on all ramifications of AT&T's revised language. Further, by only excluding exchange access traffic from compensation pursuant to section 251(b)(5), it appears AT&T's definition includes other traffic which is properly characterized as 251(g) traffic and excluded from 251(b)(5) compensation.

9. SBC and AT&T insist the Commission must decide this issue even if it means deviating from the "baseball style" arbitration. The Commission adopts SBC's language, provided [*8] SBC deletes all language limiting application of section 251(b)(5) to traffic for which the originating and terminating end user are both physically located in the same local calling area, deletes Section 2.1 which excludes FX traffic and includes language recognizing the only exclusion from section 251(b)(5) is 251(g) traffic, as spelled out in *47 C.F.R. § 51.701(b)(1).*

Definition of ISP-bound traffic

CLEC Coalition IC-5, AT&T IC-1(g), (h)

10. SBC argues the Arbitrator incorrectly determined that the *ISP Remand Order*'s interim compensation mechanism applies to all ISP-bound traffic and not just to traffic to an ISP located in the same local calling area as the call originator. SBC reiterates its argument that the order only applies to "local traffic," stating that before the FCC issued the *ISP Remand Order*, interexchange calls to ISPs were always treated as subject to access charges rather than reciprocal compensation. SBC continues that the FCC only created an interim compensation mechanism to govern local ISP-bound calls and that the order does not indicate that the FCC intended to except interexchange calls from access charges. [*9] n11 SBC again cites to P 13 of the *ISP Remand Order* to support its argument that the Order only applies to local calls and cites to the *Core Forbearance Order*, footnote 25, stating the FCC described the *ISP Remand Order*, as "an exception to the reciprocal compensation requirements of the Act for calls made to ISPs located within the caller's local calling area." n12

n11 SBC IC Comments PP 8-11.
n12 *Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*. WC Docket No. 03-171. Order Rel. October 18, 2004. *(Core Forbearance Order.)*, SBC IC Comments P 12.

11. AT&T's Reply asserts SBC's attempt to rely on the rejected "local traffic" limitation to ISP-bound traffic, for the purpose of limiting applicability of the interim compensation mechanism of the *ISP Remand Order*, cannot be considered. AT&T states SBC has no basis for its argument that only "local" ISP-bound traffic is subject to the interim [*10] compensation mechanism. AT&T's position is that all ISP-bound traffic routed over local interconnection trunks, including FX traffic is subject to interim compensation, citing *AT&T Communications of Illinois, Inc. v. Illinois Bell, 2005 WL 820412* (N.D. Ill.) *(Illinois Bell)*, which held that all FX traffic is subject to the interim compensation mechanism. n13

n13 AT&T Reply pp. 9-10.

12. AT&T asserts SBC misreads the *ISP Remand Order*. AT&T analyzes the Order in the context of the FCC's concerns regarding compensation for ISP-bound traffic at the time of that Order. AT&T states the FCC's concern about arbitrage resulted from the nature of all ISP-bound traffic based on the one-way nature of the high volume traffic and the ability of ISPs to purchase "interstate access services on a flat-rated basis from intrastate business tariffs rather than from interstate access tariffs . . ." n14 AT&T asserts it is the ISPs' ability to buy local service rather than pay interstate access rates [*11] that creates the arbitrage opportunity the FCC was trying to prevent with the interim compensation mechanism. The FCC draws no distinction based on where ISP-bound calls originate and terminate. AT&T also explains there is a public policy objective to promote the development of the Internet which cannot be achieved if access is not reasonably priced. AT&T cites to section 230(b) of the Federal Act which defines the United States' policy regarding the Internet, arguing it would be thwarted if access charges applied to traffic destined for the Internet. n15

n14 Id. p. 11, quoting *ISP Remand Order* P 27.
n15 AT&T Reply pp. 11-14.

13. The CLEC Coalition argues SBC's selective reading of the *ISP Remand Order* creates a different impression than a full reading of the Order. The Coalition addresses SBC's reliance on P 13 of that Order, quoting it in its entirety to make its point. The CLECs argue it is clear that paragraph explains the FCC's prior holding and is of no consequence today, as concluded by the Arbitrator. [*12] They rely particularly on the following excerpt from that paragraph. "The Commission determined at that time that resolution of this question turned on whether ISP-bound traffic originates and terminates within the local area' as set forth in our rule." The Coalition cites P 34, to further document the FCC's change of position and its elimination of "local" to define traffic subject to section 251(b)(5) compensation.

> This analysis differs from our analysis in the Local Competition Order, in which we attempted to describe the universe of traffic that falls within subsection (b)(5) as all "local" traffic. We also refrain from generically describing traffic as "local" traffic because the term "local," not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g).

The CLEC Coalition concludes the FCC has asserted jurisdiction over all ISP-bound traffic and eliminated its previous geographic limitations. n16

n16 CLEC Coalition Reply PP 12-17.

[*13]
Decision

14. The Commission has reviewed the Comments and the law on this issue. The Commission finds that SBC's argument that the interim compensation mechanism only applies to ISP-bound traffic that originates and terminates in the same local exchange is not supported by the record or the law. The FCC explicitly rejected the distinction based on "local" traffic and SBC's use of the definition of local traffic to determine compensation, is inapposite. SBC cites to no provision in the *ISP Remand Order* that supports such a distinction. SBC cites to footnote 25 of the *Core Forbearance Order*, to support its position. However, that footnote is only an FCC characterization of the *WorldCom* opinion. The opinion contains no such limitation. Further, a review of the text of the *Core Forbearance Order* reveals no such limitation. At P 4, the FCC states with respect to the *ISP Remand Order*,

> In that order, it [FCC] concluded that traffic bound for Internet Service Providers (ISPs) is not subject to reciprocal compensation requirements of section 251(b)(5). The Commission concluded that ISP-bound traffic is "information access" and, therefore, is "carved out" of the [*14] scope of section 251(b)(5) by section 251(g), ... It also affirmed its prior finding that ISP-bound traffic is jurisdictionally interstate and thus subject to the Commissions section 201 jurisdiction.

The FCC cites to P 52 of the *ISP Remand Order*. In that paragraph the FCC indicates that the Eighth Circuit has observed that "although some traffic destined for information service providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be reliably separated." Surely, in addressing the nature of ISP-bound traffic and concluding that it is interstate traffic and that components of that traffic cannot be reliably separated, the FCC would have indicated that only "local" ISP-bound traffic was subject to the interim compensation mechanism. No such language exists. Further, SBC does not address P 82 of the *ISP Remand Order*, cited in P 19 of the Determination, in which the FCC removed state authority over ISP-bound calls. If the FCC had decided to separate "local" ISP-bound calls from non-local ones, it would not have removed all ISP-bound traffic, including local calls, from state commission jurisdiction. With respect to the FCC's conclusion [*15] that these calls are interstate in nature, SBC only argues this does not mean they are subject to the interim compensation mechanism. SBC points to no language in the Order

supporting such a distinction. The Commission affirms the Arbitrator. Both AT&T and the CLEC Coalition have raised applicability of the interim compensation mechanism to ISP-bound FX calls. This issue is addressed in P 21.

FX traffic

AT&T IC-1(h), CLEC Coalition issue not identified in DPL

15. SBC points out that AT&T and SBC settled compensation for FX traffic, but addresses this issue in terms of the AT&T DPL number. SBC objects to the Arbitrator adopting the CLEC Coalition's position, which had not been listed on the DPL. n17 SBC asserts that if it had briefed the issue the Arbitrator might have adopted its position instead. SBC argues reciprocal compensation does not apply to FX calls because they are interexchange calls, although they look "local" to the caller. SBC states that these calls travel beyond the local exchange and they can therefore not be subject to reciprocal compensation. n18 SBC refers to orders of other Commissions and the Kansas Arbitrator's Award in Docket No. 04-L3CT-1046-ARB [*16] that have determined that FX traffic is not subject to reciprocal compensation. n19 SBC asserts an FX arrangement only makes calls appear local to customers. It is SBC's position that the section 251(g) carve-out removes FX calls from compensation pursuant to section 251(b). SBC admits that FX service may not fit the definition of "exchange access" but argues it is an interexchange service. n20

n17 The Determination noted that the CLECs had not included the issue on their DPL, but that testimony had been filed on the issue. The CLEC position was also subject to significant discussion at the hearing.
n18 SBC IC Comments PP 17-19.
n19 Id. PP 21-23.
n20 Id. P 21, citing *47 C.F.R. § 51.701(b)(1)* which incorporates the carve-out.

16. The CLEC Coalition addresses SBC's contention that it did not brief this issue because the CLEC Coalition had not included it in its DPL. The CLECs note that they informed all parties by e-mail the day before the hearing that this issue [*17] had been omitted, although they had filed testimony on it and SBC had filed responsive testimony. They further point out that they raised the omission of this issue at the beginning of the hearing and that considerable time was devoted to it at the hearing. n21

n21 CLEC Coalition P 5.

17. The Coalition states developing contract language on this issue is not a complex undertaking. If FX traffic is also ISP-bound traffic, it should be treated as all ISP-bound traffic, and if it is not it is 251(b)(5) traffic. n22

n22 Id. P 6.

18. With respect to the substance of this issue the Coalition states SBC relies on FCC rules that have been superseded by new rules. The CLECs point out that FX traffic is not singled out in any of the FCC's orders. They reference the *Further Notice of Proposed Rulemaking*, n23 P 141, where the FCC states: "It is standard industry [*18] practice for telecommunications carriers to compare the NPA/NXX codes of the calling and called party to determine the proper rating of a call." They add the NPA/NXX for FX traffic identifies those calls as local.

n23 *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92. Further Notice of Proposed Rulemaking. Rel. March 3, 2005. *(Further Notice of Proposed Rulemaking)*.

Decision

19. SBC did not object at the hearing when counsel for the CLEC Coalition brought the omission of this issue to the parties' attention. n24 SBC provided testimony responsive to that of the CLECs and also did not voice an objection during the relatively lengthy discussion of this issue at the hearing. n25 The Commission finds SBC has waived any objection it might have had by not raising it at the hearing.

n24 Tr. Phase II, Vol. 1, pp. 7-8.
n25 Id. pp 37-44, 109-117.

[*19]

20. The Commission observes SBC has not provided any legal support for its argument that FX calls should be treated as interexchange calls. Nor has the Commission been able to find any FCC order explicitly addressing this issue. Although the language regarding standard use of NPA/NXX from P 141 of the *Further Notice of Proposed Rulemaking*, cited by the CLECs, is set out under the heading of CMRS calls, in P 143, the FCC requests comments on whether it should modify rating obligations and asks whether this issue is unique to CMRS carriers or also applies to other competitive carriers. It is clear the FCC's observation is not limited to CMRS carriers and that the FCC will address this issue in the not too distant future.

21. The Commission finds the *Illinois Bell* order, cited by AT&T with respect to ISP-bound FX traffic instructive, although it realizes it is not bound by that order. That court held, based on the *ISP Remand Order*, that SBC had to charge "the same rate for ISP-bound traffic, FX or otherwise, as it does for traffic that is subject to section 251(b)(5)." n26 With respect to voice FX traffic the *Illinois Bell* court held that FCC rules no longer restrict [*20] reciprocal compensation to "local" traffic and that the only traffic exempted from reciprocal compensation is that identified by section 251(g). The court concluded voice FX traffic is not 251(g) traffic. n27 The Commission finds this analysis persuasive and affirms the Arbitrator. Based on this decision, the Commission finds that ISP-bound FX traffic is subject to the interim compensation mechanism that applies to all other ISP-bound traffic.

n26 *Illinois Bell*, Slip Copy p. 3.
n27 Id. pp. 3-4.

Tandem Reciprocal Compensation Rate Elements

AT&T IC-5(a), (b)

22. SBC states AT&T and SBC resolved this issue before the Determination was issued and requests the Order recognize the parties have resolved the issue and the Arbitrator's determination of this issue is moot. n28 The

Commission finds the discussion of this issue in the Determination at PP 59-61 is moot.

n28 SBC IC Comments P 25.

[*21]
Internet Protocol Enabled Traffic

CLEC Coalition IC-21(a), (b), AT&T IC-1(b), (c)

23. SBC seeks reversal of the Arbitrator's decision to reject both SBC's and AT&T's positions and to agree with the CLEC Coalition to put this issue on hold until the FCC decides it. SBC refers to the Arbitration decisions in Dockets No. 04-L3CT-1054-ARB and 05-ABIT-507-ARB, which adopted SBC's position. n29

n29 Id. P 27.

24. SBC disagrees with the Arbitrator's conclusion that SBC attempted "to expand the *AT&T Phone to Phone Order* beyond its explicit limitations," stating that order has never been the basis for its proposed language, but was only used to make the point that IP-PSTN traffic should be treated like all other traffic. n30

n30 Id. PP 28-29.

25. SBC also asserts the Determination relies on misinformation. Contrary to the CLEC representation [*22] that SBC agreed to settle this issue in Texas and not include the disputed language on this issue in the agreement at this time, SBC states the Texas PUC excluded this issue from the arbitration. SBC also states access charges apply to interexchange traffic in Texas. n31 SBC distinguishes its exhortation to not decide whether this service involves a protocol conversion from the CLECs' position that the compensation issue should not be addressed, because whether the service involves a protocol conversion is legally irrelevant. Access charges apply regardless. n32 SBC also argues the FCC will never decide what compensation should apply to this service at this time, only on a going forward basis. n33

n31 Id. P 30.
n32 Id. P 32.
n33 Id. P 31.

26. In its IC Reply, SBC addressed AT&T's position on this issue. SBC stated the Arbitrator was correct that AT&T's proposal to treat IP-enabled services pursuant to section 251(b)(5) is inconsistent with current federal law. SBC asserts current federal law applies access [*23] charges to all interexchange traffic regardless of the technology used to deliver that traffic. *47 C.F.R. § 69.5(b)*. SBC argues although IP-PSTN traffic may not have existed before the Act, and thus would not be subject to section 251(g), application of the existing intercarrier compensation rules merely continues a past practice regardless of technology. SBC cites to the *AT&T Phone-to Phone Order*, n34 in which the FCC

addressed "IP in the middle" traffic and required the application of access charges to that traffic when it is interexchange, even though a different technology was used in the middle. n35

n34 *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*. Order. WC Docket No. 02-361. Rel. April 21, 2004. *(AT&T Phone-to-Phone Order.)*
n35 SBC IC Reply PP 3-7.

27. AT&T also addresses this issue in its Comments, since the Arbitrator rejected its language as well as SBC's. AT&T asserts [*24] a decision must be made and that its language should be adopted. AT&T argues the rejection of its language because of its "inclusion of IP-enabled services traffic as 251(b)(5) traffic" is wrong as a matter of law. AT&T again cites to the *WorldCom* case, arguing that its rejection of the FCC's reliance on section 251(g) to exempt ISP-bound traffic means that such traffic must be subject to 251(b)(5) compensation.

28 In is Reply, AT&T addresses this issue at length, arguing its definition includes information services traffic which includes some forms of IP-enabled services. AT&T argues it includes information services as 251(b)(5) traffic because those services are exempt from access charges. AT&T argues SBC's attempt to impose access charges on certain IP calling is a dramatic change from current practice in Kansas. AT&T cites to the testimony of its witness Schell, which asserts that some IP-enabled services are enhanced services because the *AT&T Phone-to-Phone Order* determined that the IP-enabled services addressed in that Order were not information services, thus all others must be and information services are not subject to access charges. n36 (In the Reply, AT&T refers [*25] to this as the ESP-exemption.) AT&T also argues FCC compensation rules are not technology neutral. n37

n36 Schell Direct pp. 15-17.
n37 AT&T Reply pp. 14-20.

29. The CLEC Coalition supports the Arbitrator's determination to not address this issue at this time, since the FCC will be addressing it. The CLECs disagree that SBC's position reflects current federal law. They do not point to any contrary statutes, rules or orders, but rely on the fact that the FCC has not addressed the issue and will do so in the *IP-Enabled Services NPRM*. n38 The CLECs explain the FCC is hesitant to apply high cost access charges to new technologies. They state the parties can operate under the current provisions approved by this Commission, which is what will happen in Texas.

n38 *In the Matter of IP-Enabled Services*, CC Docket No 104-36. Notice of Proposed Rulemaking. (Mach 10, 2004) *(IP-Enabled Services NPRM)*

[*26]
Decision

30. The Commission notes the parties' positions and the evidence in other arbitration dockets, may be different from those presented in this docket. Thus, they are not necessarily on point. The Commission will first address AT&T's and SBC's positions. AT&T provides no support for its argument that the *AT&T Phone-to-Phone Order* in establishing

that PSTN-IP-PSTN was not an information service somehow also established that IP-PSTN service therefore was an information service. AT&T cites to no language in the Order for this proposition, which is not surprising, because there is no such language. Rather, that Order limited its decision to the particular AT&T service it addressed and makes it very clear that any other IP-enabled services will be addressed in the *IP-Enabled Services* proceeding. See f. ex. PP 1, 2, 15. AT&T's argument that this is an information service is wrong and even if it were an information service, AT&T would be wrong that this makes it 251(b)(5) traffic, since the ESP-exemption allows the information service provider to buy services from the local service tariff rather than pay access charges. In addition, that exemption applies to the information [*27] service provider, not to carriers, such as AT&T, that provide service to ESPs and other customers. AT&T's evidence does not demonstrate that its services are those of an information service provider.

31. Finally, P 19 of the *AT&T Phone-to-Phone Order*, confirms the limitation of that Order and also addresses technological neutrality:

> Commenters argue that it is inequitable to impose access charges on AT&T's specific service if access charges do not apply to other types of IP-enabled voice services. The Commission is sensitive to the concern that disparate treatment of voice services that both use IP technology and interconnect with the PSTN could have competitive implications. We note that all telecommunications services are subject to our existing rules regarding intercarrier compensation. Consequently, when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges.

Footnote 80 to that paragraph, states: "Depending on the nature of the traffic, carriers such as [*28] commercial mobile radio service (CMRS) providers, incumbent LECs and competitive LECs may qualify as interexchange carriers for purposes of this rule." It seems clear the current state of federal law is that access charges apply to interexchange traffic, barring a specific exemption. AT&T has not demonstrated that it qualifies for any exemption. With respect to AT&T's reliance on *WorldCom*, the Commission has held this reliance is misplaced since the court did not vacate the *ISP Remand Order*. The Commission adopts SBC's position.

32. With respect to the positions of SBC and the CLEC Coalition, the Commission notes that both parties argue for maintenance of the status quo, but SBC proposes language that requires application of access charges for interexchange calls, maintaining it is consistent with the status quo and countering the CLEC argument that the Texas Commission has deferred this issue with its statement that access charges apply currently in Texas. The CLEC Coalition does not specify how IP-PSTN traffic is compensated today. It only argues that no rules should be put in place before the FCC makes its decision in the *IP-Enabled Services* docket and that current [*29] rules should continue to apply.

33. The Commission finds SBC's argument persuasive. SBC is correct that the FCC will only decide compensation on a going-forward basis and the evidence in this proceeding as well as the law, convinces us that access charges should apply to IP-PSTN traffic. If the FCC decides that a different compensation mechanism should apply in the future, change of law provisions of the agreement should operate to modify this provision of the agreement.

Misrouted Switched Access Traffic

AT&T IC-1(d)

34. SBC states the Arbitrator misread the Commission's Order in Phase I and asserts it is necessary to review the relevant portions of the Phase I and II DPLs and the Phase I Order to avoid a miscarriage of justice. n39 SBC explains that in the Phase I Order, with respect to AT&T NIA-23, the Commission agreed with the Arbitrator's adoption of AT&T's proposal for cooperation rather than SBC's blocking, but adopted SBC's definitions. n40 In the Arbitrator's Phase II Determination, the Arbitrator decided the issue did not need to be addressed based on AT&T's Brief that this issue was identical to NIA-23. This ignores the deferral in the Commission's Phase I Order [*30] of one part of SBC's

proposed language on this issue, namely subsection 7.1. SBC states the Commission needs to address its proposed definition of "Switched Access Traffic." n41 SBC explains that its language for NIA-23 in subsections 7.1 and 7.2 is duplicated in subsections 10.1 and 10.2 for IC-1(d) and a decision on the merits of the language in 7.1 was deferred to Phase II, thus a decision now needs to be made on that identical language in 10.1. SBC asserts its language is appropriate and AT&T did not brief the issue. n42

n39 SBC IC Comments P 34.
n40 Id. P 36.
n41 Id. PP 37-38.
n42 Id. PP 39-40.

35. SBC also addresses the Commission's decision in Phase I (NIA-23) to adopt AT&T's position based on its understanding that AT&T proposes cooperative resolution, while SBC proposes blocking the misrouted traffic. SBC states AT&T has provided no language on this issue. SBC sets out its language for 10.2 (identical to the rejected 7.2 language), explaining that it requires the parties to work cooperatively [*31] to identify the traffic with the goal of removing it from the Local Interconnection Trunk Groups. If that cooperative effort fails, SBC's language requires the parties to file a joint complaint with the Commission requesting approval to remove the traffic, including blocking, and obtain compensation. n43

n43 Id. PP 42-43.

36. Finally, SBC proposes the Commission could resolve this issue by "clarifying that the issue encompasses only subsection 10.2, and by either approving or rejecting that subsection alone. . . ." n44

n44 Id. P 46.

37. AT&T's Reply disagrees with SBC's analysis of the Phase I Order. AT&T argues the Commission sustained the Arbitrator's Determination and that it is clear the Arbitrator addressed both SBC's 7.1 and 7.2 language, rejecting both sections. AT&T cites the Arbitrator's Determination at p. 117:

> SWBT contends that the [*32] local interconnection trunk groups are solely for the exchange of local traffic and intraLATA traffic not presubscribed to an IXC. According to SWBT, a CLEC might occasionally improperly route interexchange traffic over a local trunk. SWBT's proposal would permit the party receiving this traffic to deliver it to the terminating party via local trunk groups. But, SWBT wants the parties to cooperatively remove or block such traffic from the local trunk groups in the future.

AT&T asserts this language makes it clear the Arbitrator rejected SBC's language in both 7.1 and 7.2 "because SBC's language requiring that switched access traffic be passed over feature group trunks is found in section 7.1, and SBC's blocking language is found in section 7.2." n45 AT&T argues Order 13 did not modify the Arbitrator's determination, nor is there any indication in that Order or in the Arbitrator's Determination that any part of this issue was deferred to Phase II. n46

n45 AT&T Reply pp. 22-23.
n46 Id. pp. 23-24.

Decision [*33]

38. The Commission has considered the arguments of the parties and reviewed the Arbitrator's Determination of NIA-23 again. First, it is clear the Arbitrator considered and addressed both 7.1 and 7.2. His discussion of NIA-23 begins with the definition language of 7.1. SBC may be relying on his reluctance to define switched access traffic for the entire agreement in one isolated section for its argument that the Arbitrator deferred this issue. It is not important whether the Arbitrator intended to defer the definition or simply denied it. The Commission finds SBC's proposal in P 46 reasonable. Subsection 10.2 requires SBC and AT&T to work cooperatively to remove the switched access traffic from the local interconnection trunk groups, and if that fails to file a joint complaint with the Commission requesting approval to remove the traffic and if necessary block it. Based on the clarifications provided on this issue, the Commission adopts SBC's 10.2 language only.

Transit Service

CLEC Coalition IC-3, AT&T IC-8 (AT&T Schedule of Price 3)

39. SBC in PP 47-61 sets out its case why transit issues are not subject to arbitration. In a nutshell, SBC argues that transit service is [*34] not governed by *47 U.S.C. § 251*(b) or (c) and disputes regarding transit service can therefore not be arbitrated pursuant to *47 U.S.C. § 252*, since it only provides for arbitration of issues set out in those two 251 subsections. n47 SBC argues that since it is not explicitly required, the Commission cannot decide to arbitrate it even if it believes the objectives of the Federal Act demand it. n48 SBC cites three cases to support its argument that "it is unlawful to extend statutory requirements beyond their explicit bounds on the theory that to do so will serve the objectives of the statute." n49 Further, SBC affirms it will provide transit service through a commercial agreement and that the Commission "is [not] without authority to regulate the service, only that it cannot do so in a proceeding under the Act. n50

n47 SBC IC Comments P 50.
n48 Id. P 59.
n49 Id. P 60.
n50 Id. P 57.

40. The CLEC Coalition notes SBC has provided [*35] transit service pursuant to the K2A and other interconnection agreements throughout the 5-state region. The CLECs also remind the Commission that the Texas PUC rejected SBC's attempt to exclude transit service from the successor to the T2A and inform the Commission that the Missouri Arbitrator similarly decided on June 21, 2005, that transit service is a § 251(c) obligation. They further assert the FCC's decision in the *Intercarrier Compensation Further NPRM*, requesting comments on transit service, should persuade the Commission to refrain from altering the *status quo* and await the FCC's decision on this issue. n51

n51 CLEC Coalition PP 23-27, FCC acknowledges, in its request for Comments that ILECs assert that the Act

does not require them to provide transit service.

41. The CLECs assert the cases cited by SBC are not on point because the Arbitrator's determination does not extend the law beyond the reach of its terms, rather it continues a practice under the law, because transit is a form of indirect interconnection [*36] as recognized by the FCC. n52 They assert the cases cited by SBC do not support SBC's argument because those decisions make clear that "a statute cannot be interpreted beyond its bounds to support a "general theory" that is not incorporated into the statutory language." n53 They assert that continuation of an existing practice does not so expand the statute.

n52 Id. PP 27-29, citing P 125 of *Intercarrier Compensation Further NPRM*.
n53 Id. P 28.

42. AT&T also asserts its proposal is a continuation of current practice. AT&T reiterates that the lack of competition for transit service demonstrates that there is no market price and that the lack of competitive pressure will allow SBC to set its price without any market restraint. n54

n54 AT&T Reply pp. 24-26.

Decision

43. After a thorough review of Comments and Reply Comments on this issue [*37] and applicable law, the Commission affirms the Arbitrator. First, SBC's proposal not to include transit service in the interconnection agreement is a departure from existing practice. SBC has not provided any evidence that there has been a change in the law affecting this issue since the K2A was approved and SBC had no objection to including it at that time. Further, although the Federal Act does not explicitly require provision of transit service, it also does not preclude it. The Act is not, generally, so specific as to specify inclusion or exclusion of specific services. Rather, it requires that carriers interconnect directly or indirectly. The cases cited by SBC are not persuasive. *Rodriguez v. United States, 480 U.S. 522, 526, 107 S.Ct. 1391, 94 L.Ed. 2d 533,* (1987) held, "where, as here, "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . [there is no occasion] to examine the additional consideration of "policy" . . . that may have influenced the lawmakers in their formulation of the statute."' (Citations omitted) In this case there is no "clear" [*38] language, in fact, there is no language. *United States v. Talley, 16 F.3d 972, 976 (1994)* rejects an interpretation by the government "because it is inconsistent with the statutory language." Again, there is no language regarding transit service, so there can be no inconsistency. Finally, *Wisconsin Bell v. Bie, 340 F.3d 441, 445 (2003)* n55 involved a situation the Wisconsin commission ordered Wisconsin Bell to file interconnection tariffs instead of arbitrating a disagreement over interconnection terms. The court determined that because the federal act provided for a procedure (negotiation and arbitration), ordering a tariff filing instead bypassed federally ordained procedure. The Commission reiterates that there is no language addressing transit traffic, thus the Commission is not bypassing any federal act provision. The Commission finds that continuing an existing practice until such time as the FCC, which has scheduled this issue for consideration, addresses it cannot be categorized as going beyond the language of the Act to support a general theory. Finally, as has been noted by the CLEC Coalition, both the Texas Commission [*39] and the Missouri arbitrator have determined that SBC must continue to provide transit service pursuant to the interconnection agreement. The Commission affirms the Arbitrator.

n55 Cited *by SBC as 340 F.2d 441,* SBC IC Reply P 60.

Traffic Missing CPN

AT&T IC-11(a)

44. SBC disagrees with the Arbitrator's decision to not adopt its position which would assess access charges on all traffic without CPN if less than 90 percent of the traffic is passed without CPN. As long as 90 percent or more of the traffic is passed with CPN that traffic is billed on the basis of the percent of local usage (PLU) of the traffic. SBC's position gives the party not passing CPN one month to cure the problem. SBC argues its position continues the manner in which this was handled in the K2A and there is no compelling reason to alter this procedure. SBC asserts AT&T's language would make it easier for parties to delay correcting CPN problems or to engage in arbitrage. SBC argues AT&T's language contains no [*40] time frame for remedying the problem, and if a less scrupulous carrier adopts AT&T's agreement, it could misuse this provision. n56

n56 SBC IC Comments PP 62-67.

45. AT&T asserts SBC's concern that "hypothetical less scrupulous" CLECs may . . . opt into the SBC-AT&T ICA and "intentionally strip CPN[.]" does not justify adoption of SBC's punitive language. AT&T asserts its proposed application of the PLU to all traffic without CPN is reasonable and consistent with the Wireline Competition Bureau's decision in the *Virginia Arbitration Order*. n57

n57 AT&T Reply p. 26.

Decision

46. The Commission finds SBC's arguments on this issue persuasive. Specifically, the Commission agrees that the omission of any time line to remedy passing traffic without CPN is a concern. SBC states its proposal continues that of the K2A. AT&T has provided no evidence [*41] that the current language has created problems, even though one month to take corrective action may be short, no time frame is not an alternative the Commission is prepared to accept. Further, the evidence shows that the 10 percent of traffic without CPN benchmark has never been triggered. The Commission reverses the Arbitrator and adopts SBC's position.

Commingling of Traffic on Local Interconnection Trunks

AT&T IC-12

47. AT&T requests the Commission reverse the Arbitrator's decision adopting SBC's position on this issue. AT&T's argument requires that the Commission agree with AT&T that IP-enabled traffic is section 251(b)(5) traffic. AT&T states the Arbitrator is wrong as a matter of law because IP-enabled traffic is information services traffic. AT&T

refers to its legal arguments set out for AT&T IC-1(a) and (c). AT&T states if the Commission reverses the Arbitrator and finds that IP-enabled traffic is 251 (b)(5) traffic, then the Commission should also reconsider the Arbitrator's determination on this issue. AT&T also asserts commingling of traffic on one trunk group is more efficient than separating the traffic onto different trunk groups. n58

n58 AT&T Comments pp. 16-17.

[*42]

48. SBC refers to its Reply Comments on AT&T NIA-1(b) and (c) for its position that AT&T is wrong in classifying all IP-enabled traffic as section 251(b)(5) traffic. SBC reiterates that interexchange IP-PSTN traffic is subject to access charges. n59

n59 SBC IC Reply PP 15-16.

49. The Commission affirms the Arbitrator. The Commission has already decided that IP-enabled traffic is not an information service and is not section 251(b)(5) traffic. See PP 30-31. Although it may be more efficient to commingle traffic on one trunk group, AT&T's arguments that all IP-enabled traffic is section 251(b)(5) traffic do not convince the Commission.

SUBLOOP ISSUES

MTE Subloop Access

Cox UNE-1

50. Cox requests the Commission reconsider the Arbitrator's determination to adopt SBC's position on this issue and deny Cox direct access to SBC's inside wire subloops. Cox reiterates the arguments made in its prefiled testimony, evidence provided at the hearing and in its Brief. That evidence has been set out in considerable [*43] detail in the Arbitrator's Determination, PP 116-120. The Commission will not restate that evidence again in this Order.

Cox argues:

> If direct competitive LEC access to MTE wall terminals in sixteen other states, including Virginia, does not constitute an unreasonable risk to network security or reliability when the wall terminals are labeled a NID, direct competitive LEC access to the same terminals and the same wires, using the same methods, tools, and equipment, to perform the same procedures, cannot possibly constitute an unreasonable risk to network security or reliability in Kansas, simply because the first jack in the apartments or offices is labeled a NID instead of the wall terminal. n60

Cox cites the *Virginia Arbitration Order*, P 422, n61 which determined that when the demarcation point and the Network Interface Device (NID) are not at the same point, the CLEC still has access on the customer side of the NID. Cox also argues the FCC's definition of NID supersedes that of SBC's tariff. Cox points to *47 C.F.R. § 51.319(c)* which defines a NID as:

> . . . any means of interconnection of customer premises wiring to the incumbent [*44] LEC's distribution

> plant, such as a cross-connect device used for that purpose. An incumbent LEC shall permit a requesting telecommunications carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's network interface device, or at any other technically feasible point.

Cox points to testimony of SBC's witness Weydeck, stating: "in an MTE environment, you have another piece of plant there between the distribution facilities and the end of the customer premise wiring and that is the inside wire subloop. n62 Cox argues this testimony makes it clear SBC's distribution facilities end at the accessible terminal and that it therefore is a cross-connect device for interconnection to customer premises wiring. Further, the accessible terminal fits FCC's definition of a NID. n63

n60 Cox Comments p. 4.
n61 *In the Matter of Petitions of WorldCom, Inc., Cox VirginiaTelecom, Inc., and AT&T Communications of Virginia Pursuant to Sec. 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*. CC docket Nos. 00-218, 00-249, and 00-251. *Memorandum Opinion and Order, 17 FCC Rcd. 27029 (2002).* (*Virginia Arbitration Order.)*

[*45]

n62 Cox Comments, p. 6, citing Tr. Phase II, Vol. 2, p 351, 11. 16-19.
n63 Id. pp. 7-8.

51. SBC's SL Reply addresses this issue in PP 4-32. SBC asserts the Arbitrator made the correct decision on this issue and reiterates many of the arguments it presented in prefiled testimony, at the hearing and in its Brief. The Arbitrator addressed those arguments in some detail in the Determination, PP 121-127. The Commission will not include a full restatement of that evidence, but incorporates it herein. In summary, SBC argues the *Virginia Arbitration Order* does not support direct access to SBC's network for Cox because Virginia is a Minimum Point of Entry (MPOE) state where the property owner generally owns the inside wire subloop beginning at the MPOE which is the NID. Kansas is not a MPOE state and the NID is at each customer premise. SBC argues that order only supports a competitor's access to the customer side of the NID. n64

n64 SBC SL Reply PP 6-10.

[*46]

52. SBC next addresses Cox' claim that footnote 1031 of the *TRO* supports direct access asserting that the Arbitrator and the Oklahoma Arbitrator correctly found that it was not reasonable to conclude that the FCC would modify a policy as important as allowing a competitor direct access to the incumbent's network in a footnote. n65

n65 Id. PP 11-13.

53. Next, SBC argues that even if 16 states allow direct access, at least some may be MPOE states, and it means 34 states do not allow direct access. SBC cites to P 422 of the *Virginia Arbitration Order*, which states, "AT&T's

technician would handle wire dedicated to a single customer." SBC continues:

> In Kansas, however, Cox does not seek access at the NID and therefore is not seeking access to the point where only one customer's service could be affected. Instead, Cox seeks access at the outside building terminal, where there is no NID and where handling any wire could affect all the customers in that MTE building. n66

n66 Id. P 19.

[*47]

54. SBC disagrees with Cox' position that the outside building terminal is the NID, because although this may be the case in a MPOE state, in Kansas, the customer premises wiring interconnects with the network at the NID, which is placed at the individual office or apartment. n67

n67 Id. P 21.

55. SBC addresses Cox' argument regarding technical feasibility and proposes that the Arbitrator's finding that direct access is "technically feasible" is not a determination of "technical feasibility" in the legal sense, but only in the sense that such access is possible. SBC cites the *47 C.F.R. § 51.5* definition for "technically feasible," to support its argument that the Arbitrator only addressed possibility of direct access, not the defined term. SBC focuses on the words "access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or *operational concerns*. . . ." (Emphasis SBC's) n68 SBC further argues that access to its network [*48] without its consent violates its property rights. n69

n68 Id. P 24.
n69 Id. P 28.

56. SBC states the evidence it provided regarding Cox's unauthorized access in Oklahoma and the damage caused by Cox provides the clear and convincing evidence of "specific and significant adverse network reliability impact" Cox says is necessary to deny direct access to the network. n70

n70 Id. PP 29-30.

Decision

57. The Commission finds the evidence supports the Arbitrator's determination. SBC has provided evidence that its NID which separates the network from inside wire subloops in MTE buildings is located at the customer premises and that allowing access at the outside wall terminal would give Cox access to subloops for all customers in the building.

The *Virginia Arbitration Order* and the *TRO*, cited by Cox, do not support such access to the incumbent's [*49] network, only the "wire dedicated to an individual customer." These orders are clear that the incumbent has the right to control its network.

58. The evidence of the network damage in Oklahoma also convinces the Commission that network security and reliability are at stake. n71 Cox's photographic evidence regarding the state of the network at locations where Cox does not serve is harder to assess, because it does not include evidence of interference with network reliability, as provided by SBC. Cox has provided no evidence that it, or any other CLEC, has been authorized direct access to the network side of the NID, let alone in any state where evidence of damage, such as occurred in Oklahoma, has been provided. Case No. CIV-03-0495-T. The Commission finds this evidence rises to the level of clear and convincing evidence of specific and significant adverse network reliability impact and justifies denial of direct access based on operational concerns.

n71 Tr. Phase II, Vol. 2 pp. 320-329.

59. The Commission agrees with [*50] SBC's interpretation of the Arbitrator's finding that direct access is technically feasible. It is addressed simply to acknowledge that direct access is possible based on the fact that Cox had directly accessed the network in Oklahoma and another CLEC had done so in Kansas. It is clear from the remainder of the Determination on this issue that the statement does not represent a finding that such access is technically feasible in the legal sense. The Arbitrator is affirmed.

Maintenance and Repair

Cox UNE-3

60. Cox also requests the Commission reverse the Arbitrator's decision not to allow Cox to perform repairs of SBC's network. Cox argues the Commission should reverse for the same reasons set out with respect to UNE-1. n72

n72 Cox Reply p. 10.

61. SBC argues the Commission should affirm the Arbitrator for the same reasons set out in its Reply to UNE-1. n73

n73 SBC SL Reply P 33.

[*51]
Decision

62. If the Commission were to allow Cox to maintain and repair SBC's network, Cox would be granted the direct access to the network that the Commission denied with respect to UNE-1. The Commission affirms the Arbitrator for the reasons set out with respect to UNE-1.

Definitions for Use of and Access to Subloops

Cox UNE-4

63. Cox requests the Commission reverse the Arbitrator and adopt its definitions if the Commission reverses the Arbitrator regarding direct access. Cox notes the Arbitrator based her determination on the inclusion of language regarding direct access in Cox's definitions. n74

n74 Cox Reply p. 10.

64. SBC's Reply again urges the Commission to affirm the Arbitrator for the reasons set n75 out in its discussion of UNE-1.

n75 SBC SL Reply P 34.

Decision

65. Consistent with its decisions on UNE-1 and UNE-3, [*52] the Commission affirms the Arbitrator.

E911 ISSUES

CLEC Coalition 911-5, -9, -10, Cox 911-8

66. Cox argues it is not proposing elimination of Attachment 15, only the requirement that the E911 customer sign it. Cox states it has no objection to furnishing the information required on the form, only to SBC's insistence that the E911 customer sign the form. Cox argues requiring such approval is unnecessary because Cox will "engage in successful 911 call testing." n76 Cox asserts the objective should be to ensure proper routing of 911 calls and once Cox has demonstrated that it can properly deliver 911 calls to SBC's selective router, it has fulfilled its role because SBC then delivers the 911 call to the PSAP. SBC's insistence that its E911 customer sign the form, enables the E911 customer to reject competition, unless the CLEC agrees to certain concessions. n77

n76 Cox Reply p. 11.
n77 Id. pp. 11-13.

67. Cox asserts the record provides no evidence regarding any requirements imposed by any municipality, [*53] because there are no such requirements. Cox argues the requirement that the form be signed by the E911 customer is only a bureaucratic roadblock imposed by SBC. Cox asserts the Commission should order SBC to accept Attachment 15 once it contains complete and accurate information, without the signature of the E911 customer. n78

n78 Id. pp. 14-15.

68. Cox disagrees with the Arbitrator's determination that Cox had the burden of providing evidence that there are no 911 engineering requirements or that those requirements are irrelevant to the provision of 911 service, since it would require Cox to prove a negative and that SBC should instead have the burden of supporting its unreasonable administrative requirements. n79

n79 Id. p. 13.

69. SBC asserts the Arbitrator correctly rejected Cox's request that the authorization from the E911 customer for facilities-based [*54] CLECs be eliminated and that the information only be provided to SBC. SBC references the Rebuttal testimony of its witness Chapman and the transcript to explain that testing between SBC and Cox assures that a 911 call routes correctly, but it does not ensure compliance with engineering requirements, such as volume criteria, established by the E911 customer. n80

n80 SBC SL Reply PP 35-37.

Decision

70. First, the Commission acknowledges Cox has not requested elimination of Attachment 15. Availability of 911 service is critical for customers. The Commission has reviewed the evidence on this issue and finds the evidence demonstrates that E911 customers may have engineering requirements that service providers must meet. It is reasonable for SBC to require authorization from the E911 customer before routing 911 calls to the Public Service Answering Point. SBC testified that it is not sufficient to ensure that the call routes correctly. With respect to the Arbitrator's allocation of the burden of proof, Cox complains [*55] that it would have to prove a negative. However, Cox seeks to change the existing process and should bear the burden to show that is unnecessary or unworkable. Cox testified that the City of Andover is withholding authorization "until they [sic] have extracted certain unrelated concessions . . .," n81 but never provided any evidence as to what these unrelated concessions were. The Commission thus has no way to determine whether, in fact, those "concessions" are unrelated to 911 service or whether there might be some relationship. Either way, the evidence demonstrates that an E911 customer may establish requirements that service providers must meet. To the extent even one E911 customer has such requirements, it seems reasonable for SBC to require authorization by the customer. Clearly, SBC should not determine whether a service provider meets the E911 customer's requirement. To the extent Cox has issues with "concessions" demanded by the city, those must be addressed in another forum. The Commission affirms the Arbitrator.

n81 Cox Brief p. 27.

[*56]

71. As the Commission observed in the Phase I Order, the Federal Act does not set out procedural requirements for arbitrations. The Commission has established certain procedures and generally followed its customary procedures. The Commission cannot conclude that a petition for reconsideration is required before seeking judicial review, if any party is considering such a step. Nevertheless, if any party wishes to petition for reconsideration the usual procedural requirements are applicable.

IT IS, THEREFORE BY THE COMMISSION ORDERED THAT:

A. The Arbitrator is affirmed or denied as set out above.

B. As stated above, any party wishing to seek reconsideration, has fifteen days, plus three days if service of this order is by mail, from the date this order was served in which to petition the Commission for reconsideration of any issue or issues decided herein.

C. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order, or orders, as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Krehbiel, Com.; Moffet, Com.

Dated: July 18, 2005

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemands & RemittitursCommunications LawTelephone ServicesMobile Communications ServicesComputer & Internet LawInternet BusinessInternet & Online ServicesU.S. Federal Communications Commission Regulations