STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	**:**	
	:	
Petition for Arbitration of	**:**	**11-0083**
Interconnection Agreement with Big	**:**	
River Telephone Company, LLC.	**:**	

ARBITRATION DECISION

DATED: June 14, 2011

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By the Commission:

I. PROCEDURAL HISTORY

On January 27, 2011, Illinois Bell Telephone Company (hereafter "AT&T Illinois") filed, with the Illinois Commerce Commission ("Commission"), a Petition seeking arbitration of an interconnection agreement ("ICA") with Big River Telephone Company LLC ("Big River") pursuant to Section 252(b) of the federal Telecommunications Act of 1996, 47 U.S.C. 252(b). In the Petition, AT&T Illinois represents that AT&T Illinois and Big River attempted to negotiate terms and conditions of an ICA between them, but failed to reach agreement with respect to several points, and AT&T now requests Commission arbitration of these open issues.

On February 10, 2011, pursuant to Section 761.210(b) of the Commission rules on "Arbitration Practice," 83 Ill. Adm. Code 761, AT&T Illinois filed the direct testimony of J. Scott McPhee and Carl C. Albright, Jr.

On February 24, 2011, a pre-arbitration conference or hearing was held before an Administrative Law Judge. Appearances were entered by respective counsel for AT&T Illinois, Big River and the Staff of the Commission ("Staff"), and a schedule for the proceeding was established. The parties also agreed to extend the due date for entry of an arbitration decision to June 22, 2011.

Big River filed its response to the Petition, and the direct testimony of Gerard J. Howe. Thereafter, the Staff of the Commission ("Staff") submitted the direct testimony of Dr. James Zolnierek. On April 1, 2011, in response to Dr. Zolnierek's testimony, AT&T filed the rebuttal testimony of Mr. McPhee and Big River submitted the rebuttal testimony of Mr. Howe.

On April 5, 2011, an evidentiary hearing was held. At the conclusion of the hearing, the record was marked "Heard and Taken." Thereafter, initial briefs ("IBs") and reply briefs ("RBs") were filed by AT&T Illinois, Big River and Staff.

A Proposed Arbitration Decision was issued by the Administrative Law Judge. A brief on exceptions ("BOE") was filed by Big River. Reply briefs on exceptions ("RBOEs") were filed by AT&T Illinois and Staff.

II. APPLICABLE AUTHORITY

In Section III of its initial brief, titled "Applicable Statute," Staff cites the following provisions in Section 252(b)-(d) of the federal Telecommunications Act of 1996, 47 U.S.C. Sec. 252(b)-(d):

> (b) Agreements arrived at through compulsory arbitration.
> (1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.
> (2) Duty of petitioner.
> (A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--
> (i) the unresolved issues;
> (ii) the position of each of the parties with respect to those issues; and
> (iii) any other issue discussed and resolved by the parties.
> (B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.
> (3) Opportunity to respond. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.
> (4) Action by State commission.
> (A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).
> (B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.
> (C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9

months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 [47 USCS § 251], including the regulations prescribed by the Commission pursuant to section 251 [47 USCS § 251];

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards.

(1) Interconnection and network element charges. 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 [47 USCS § 251(c)(2)], and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section [47 USCS § 251 (c)(3)]--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic.

(A) In general. For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) [47 USCS § 251(b)(5)], a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction. This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

As noted above, the Commission's rules applicable to arbitration proceedings required by Section 252(b) of the federal Communications Act, 47 U.S.C. 252(b), are set forth in 83 Ill. Adm. Code 761 ("Part 761").

III. ISSUES IN DISPUTE

In the disputed point list ("DPL") attached to its Arbitration Petition, AT&T Illinois identified five issues in dispute. No additional disputed issues were identified in the response. Accordingly, Staff states, pursuant to Section 252(b)(4)(A) of the federal Telecommunications Act, 47 U.S.C. 252(b)(4)(A), the issues presented for resolution in this proceeding are the following:

1. Should the ICA provide for a bill-and-keep arrangement for traffic that is otherwise subject to reciprocal compensation but is roughly balanced?

2. If so, what terms and conditions should govern such bill-and-keep arrangements?

3. Should AT&T be required to provide transit traffic service under the ICA?

4. If the Commission requires the inclusion of transit in the ICA, what are the appropriate rates that AT&T should charge for such service?

5. If the Commission requires the inclusion of transit in the ICA, what are the appropriate terms and conditions for transit traffic?

IV. RECIPROCAL COMPENSATION -- BILL-AND-KEEP

A. Issue 1: Should the ICA provide for a bill-and-keep arrangement for traffic that is otherwise subject to reciprocal compensation but is roughly balanced?

1. Introduction

Under Section 252(d)(2) of the Federal Act, the terms and conditions for reciprocal compensation shall not be considered to be just and reasonable unless they "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."

In its rules implementing Section 252(d)(2) of the Federal Act, the FCC specifies in part:

> Section 51.713 Bill-and-keep arrangements for reciprocal compensation.
> (a) For the purposes of this subpart, bill-and-keep arrangements are those in which neither of the two inter-connecting carriers charges the other for the termination of telecommunications traffic that originates on the other carrier's network.
>
> (b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to § 51.711(b).
>
> (c) Nothing in this section precludes a state commission from presuming that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.

47 CFR 51.713

According to AT&T Illinois, this issue involves the question of whether the ICA should provide for the parties to pay each other reciprocal compensation for the transport and termination of Section 251(b)(5) Traffic and ISP-Bound Traffic (referred to as "local traffic"), as proposed by AT&T Illinois, or whether the Commission should instead order the adoption of a bill-and-keep arrangement, as proposed by Big River. (AT&T IB at 6)

Big River contends that a bill-and-keep arrangement is the most efficient method for capturing the economic impact of reciprocal compensation while limiting administrative costs. (Big River IB at 5)

Staff believes AT&T Illinois' position should be adopted. In Staff's view, the only reliable evidence points to traffic being extremely out of balance over the last year. (Staff IB at 5)

2. Staff summary of the law governing reciprocal compensation

In Staff's view, a detailed summary of the law governing reciprocal compensation, as it affects this proceeding, is warranted. (Staff IB at 6) The summary below is from Staff's initial brief and except as otherwise noted, is not intended to be a finding of the Commission. It is noted that Staff's position and recommendations on Issues 1 and 2 are summarized in later sub-sections of this order below.

Reciprocal compensation has its genesis in the federal Telecommunications Act of 1996. Section 251(b)(5) of that enactment provides in relevant part that: "[e]ach local exchange carrier has … [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. Sec. 251(b)(5). It was Congress' intent that the principal manner in which telecommunications carriers would interconnect and exchange traffic would be pursuant to the terms of interconnection agreements arrived at through negotiation. 47 U.S.C. Sec. 252(a). Procedures for resolution of disputes through arbitration by state Commissions were also established. 47 U.S.C. Sec. 252(b). With respect to arbitrating disputes regarding reciprocal compensation, as noted above, the Act affords state Commissions the following pricing guidelines:

> For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) [of this Act], a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
>
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
>
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.
>
> 47 U.S.C. Sec. 252(d)(2)(A)

To further guide state Commissions in setting reciprocal compensation rates, and otherwise resolve reciprocal compensation disputes, the Federal Communications Commission ("FCC") issued its Local Competition Order, promulgating rules governing these matters, on August 8, 1996. (Staff IB at 7, citing "*First Report And Order*, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, FCC No. 96-325, CC Docket No. 96-98; CC Docket No. 95-185, 11 FCC Rcd 15499; 1996 FCC Lexis 4312; 4 Comm. Reg. (P & F) 1 (August 8, 1996) (hereafter '*Local Competition Order'*)") According to Staff, that Order, with its associated rules, bears directly upon matters at issue here.

The FCC recognized that "bill-and-keep" arrangements, pursuant to which carriers neither pay reciprocal compensation to carriers for traffic terminated on their networks, nor seek reciprocal compensation for traffic terminated on their own networks, might be appropriate in certain cases. *Local Competition Order* at 1096. In the *Local Competition Order*, the FCC accordingly found:

> [S]tate commissions may impose bill-and-keep arrangements if neither carrier has rebutted the presumption of symmetrical rates and if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating

> traffic flowing in the opposite direction, and is expected to remain so, as defined below.
> *Local Competition Order* at Sec. 1111

Based upon this determination, the FCC promulgated a regulation which permits “bill-and-keep," which is to say that carriers neither pay reciprocal compensation to other carriers for traffic terminated on the latters’ networks, nor seek reciprocal compensation for traffic terminated on their own networks. *See, generally*, 47 C.F.R. Sec. 51.713. This section further provides that:

> (b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to Sec. 51.711(b).
>
> (c) Nothing in this section precludes a state commission from presuming that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.
>
> 47 C.F.R. Sec. 51.713(b-c)

According to Staff, the FCC’s endorsement of bill-and-keep was not unqualified. (Staff IB at 8-9) In the *Local Competition Order*, the FCC found that:

> Section 252(d)(2)(A)(i) provides that to be just and reasonable, reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination." [fn] In general, we find that carriers incur costs in terminating traffic that are not de minimis, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs. In addition, as long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient because they distort carriers' incentives, encouraging them to overuse competing carriers' termination facilities by seeking customers that primarily originate traffic. On the other hand, when states impose symmetrical rates for the termination of traffic, [fn] payments from one carrier to the other can be expected to be offset by payments in the opposite direction when traffic from one network to the other is approximately balanced with the traffic flowing in the opposite direction. In such circumstances, bill-and-keep arrangements may minimize administrative burdens and transaction costs. We find that, in certain circumstances, the advantages of bill-and-keep arrangements outweigh the disadvantages, but no party has convincingly explained why,

> in such circumstances, parties themselves would not agree to bill-and-keep arrangements. We are mindful, however, that negotiations may fail for a variety of reasons. We conclude, therefore, that states may impose bill-and-keep arrangements if traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates.
>
> *Local Competition Order*, Sec. 1111 (footnotes from original omitted)

In this passage, Staff states, the FCC determined that a cardinal principle of reciprocal compensation, deriving from statute, is the proposition that reciprocal compensation "must 'provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination[,]'" if it is to satisfy the statutory "just and reasonable" standard. "*See* 47 U.S.C. §201(b) ('All charges, practices, classifications and regulations for and in connection with [federally regulated] telecommunications services shall be just and reasonable, and any … charge, practice, classification or regulation that is unjust or unreasonable is … unlawful;') *see also* 220 ILCS 5/9-101, 9-250 (all rates charged by Illinois telecommunications carriers must be just and reasonable)." It follows, Staff asserts, that any reciprocal compensation arrangement that does not result in "mutual and reciprocal recovery by each carrier of costs associated with transport and termination" is therefore not just and reasonable, and is therefore unlawful. (Staff IB at 9)

Staff states that the Illinois Commerce Commission has likewise grappled in several proceedings with the issue of whether it is reasonable to impose a bill-and-keep arrangement for reciprocal compensation given various traffic balances. Most recently, in its Order in Sprint Communications L.P., et al. -vs- Illinois Bell Telephone Company: Complaint and Request for Declaratory Ruling pursuant to Sections 13-514, 13-515, 13-801, and 10-108 of the Illinois Public Utilities Act, ICC Docket No. 07-0629 (July 30, 2008) ("*Sprint Order*"), Staff submits that the Commission declined to find a 60%/40% traffic balance "roughly balanced" within the meaning of FCC Rule 51.713(c). (Staff IB at 9-10, citing *Sprint Order* at 23)

3. AT&T Position

The summary below is from AT&T Illinois' briefs. Except as otherwise noted, the statements in the summary of AT&T Illinois' position on this issue, as well as the summaries of AT&T Illinois' position the other issues below, are not intended to be findings of the Commission.

Section 251(b)(5) of the 1996 Act requires all local exchange carriers ("LECs") to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). Reciprocal compensation refers to compensation for the cost an LEC incurs when it transports and terminates on its network a local call that originates on the network of another LEC. (AT&T IB at 6-7)

Reciprocal compensation charges are addressed in Section 252(d)(2) of the 1996 Act, which provides that a "State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. 252(d)(2)(A). Section 251(d)(2) further states that nothing in that section shall be construed to "preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." (AT&T IB at 6-7, citing 47 U.S.C. 252(d)(2)(B)(i))

As it relates to the issue in this case, Section 251(d)(2) is noteworthy for two reasons, in AT&T Illinois' view. First, that section makes clear that AT&T Illinois and Big River are both entitled to recover the costs they incur to transport and terminate traffic that originates on the other party's network; otherwise, the Commission cannot "consider the terms and conditions for reciprocal compensation to be just and reasonable." Second, there are no circumstances in which the adoption of a bill-and-keep arrangement is required under federal law. To the contrary, the law merely provides that the requirements of Section 251(d)(2) do not preclude the adoption of a bill-and-keep arrangement, so long as it is consistent with the requirement for the mutual and reciprocal recovery of transport and termination costs. (AT&T IB at 7)

Consistent with this requirement, the FCC's rule implementing the bill-and-keep language of Section 251(d)(2) strictly limits the ability of a state commission to impose bill-and-keep arrangements to those situations in which the state commission "determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to §51.711(b)." 47 C.F.R. § 51.713(b). In adopting this rule, the FCC recognized that, as long as the cost of terminating traffic is positive, bill-and-keep arrangements are "not economically efficient, because they distort carrier's incentives, encouraging them to overuse competing carriers' termination facilities by seeking customers that primarily originate traffic." Consequently, a "bill-and-keep" is appropriate only in "certain circumstances," where traffic is roughly in balance and the savings in "administrative burdens and transaction costs" outweigh the termination charges that one carrier or the other would be foregoing. (AT&T IB at 7-8, citing *Local Competition Order* at Para 1112)

The rule, like the statute, is permissive; even if a state commission does find that local traffic is roughly in balance and expected to remain so, the commission is not required to impose a bill-and-keep arrangement in lieu of the payment of reciprocal compensation. The only requirement is that the commission ensures the ICA provides for "the mutual and reciprocal recovery by each carrier of cost associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." 47 U.S.C. 252(d)(2)(A). Obviously, AT&T Illinois

argues, the best and most direct way to ensure that this requirement is satisfied is to approve terms and conditions requiring the payment of reciprocal compensation charges on all local traffic exchanged between the parties. (AT&T IB at 8)

There is no evidence in this case, AT&T contends, that would permit the Commission to make the required finding that local traffic exchanged between AT&T Illinois and Big River is currently in balance, much less that such traffic can be "expected to remain" in balance. (AT&T IB at 9)

According to AT&T, this Commission has made it clear that in a dispute as to whether a bill-and-keep arrangement should be adopted in lieu of the payment of reciprocal compensation, it is the proponent of bill-and-keep that has the burden of proving by a preponderance of the evidence that the traffic is in balance. (AT&T IB at 9, citing *Sprint* Order at 23 "(rejecting Sprint's bill-and-keep proposal where 'Sprint has not demonstrated by a preponderance of the evidence that' that 'traffic is sufficiently in balance to warrant imposition of a bill-and-keep arrangement in this case')." Imposition of the burden of proof on Big River is particularly appropriate in this case, AT&T argues, because it is Big River that seeks to alter the currently effective contractual arrangement for the payment of reciprocal compensation. (AT&T IB at 9)

According to AT&T, Big River failed to meet its burden of proof. (*Id*.) In response to a discovery request asking Big River to provide support for its assumption that the local traffic exchanged between the parties is in balance, Big River failed to provide any documentation, data or empirical evidence to support that assumption. Nor did Big River provide any such data or empirical evidence in its direct testimony filed on February 22, 2011, despite the requirement that such testimony set forth the evidence on which Big River intended to rely in support of its positions on the disputed issues in this arbitration. (AT&T IB at 9, citing 83 Ill. Adm. Code 761, Section 761.110(e)) When Staff asked both Big River and AT&T Illinois to provide information on the numbers of minutes of local traffic exchanged between AT&T Illinois and Big River, Big River responded that it does not possess such data. (AT&T IB at 9-10, citing Tr. 60-61) Unlike Big River, AT&T Illinois was able to provide Staff with local traffic data for the 12 months of February, 2010 through January 2011. Staff witness Dr. Zolnierek testified that this data shows the "traffic flows between the parties have consistently been out-of-balance in recent months." (AT&T IB at 10, citing Staff Ex. 1.0 at 10)

Furthermore, AT&T argues, it would be inappropriate for the Commission to impose a bill-and-keep arrangement even if the evidence did permit a finding that the traffic is currently in balance, which it does not. In considering this issue, AT&T believes it is important for the Commission to recognize that if it requires the inclusion of a bill-and-keep arrangement in the ICA at issue in this case, that ICA, including the "bill-and-keep" provision, may be adopted by other carriers pursuant to Section 252(i) of the 1996 Act. (AT&T IB at 11)

AT&T Illinois also claims it will not realize any administrative cost savings from a bill-and-keep arrangement. AT&T Illinois' witness Mr. McPhee testified that regardless

of whether local traffic is billed at reciprocal compensation rates or is subject to bill-and-keep, the costs associated with call processing, including recording and processing of call usage data, remain the same. Such data is used either for billing charges if reciprocal compensation applies, or for monitoring the balance of traffic when a bill-and-keep arrangement is in effect. Either way, the call data processing and data storage capacity remain the same. Any additional cost to add a reciprocal compensation billing line, including to an electronic invoice is *de minimus*. As a result, AT&T argues, any revenue that AT&T Illinois would lose under a bill-and-keep regime would necessarily outweigh any administrative savings. (AT&T IB at 11)

On the other hand, AT&T asserts, there is no evidence that Big River would save any significant amount of administrative costs if a bill-and-keep arrangement were to replace the reciprocal compensation payment provisions of the currently effective ICA. (AT&T IB at 12) Big River's witness, Mr. Howe, agreed that under a bill-and-keep arrangement, Big River would be required to periodically monitor local traffic exchanged between the parties to determine whether that traffic is in balance by capturing call records, sorting those records as incoming and outgoing and then summing them up to determine the relative balance. (*Id*., citing Tr. 62-63) Mr. Howe further admitted, ATT Illinois avers, that Big River has not estimated the cost savings, if any, that it would experience if it followed this procedure for determining whether traffic is in balance, but did not bill AT&T Illinois for reciprocal compensation. (*Id*., citing Tr. 63-64)

AT&T Illinois is also concerned that if the ICA at issue in this case allows for bill-and-keep, carriers (including those which may adopt the ICA pursuant to Section 252(i) of the 1996 Act), would have a strong incentive to maximize the amount of traffic they send to AT&T Illinois for termination. (AT&T Ex. 1.0 at 8, 9)

These concerns of AT&T Illinois are not satisfied by Big River's proposed "bill-and-keep" language that includes a provision to "negotiate new terms" for intercarrier compensation once a party has notified the other party that the traffic has been out-of-balance by more than 5% for a period of more than 3 consecutive months. Subsequent to negotiations, assuming they are concluded within Big River's proposed 30-day time frame, the new negotiated terms would not become effective until after the ICA has been amended. In the event the parties disagree on new terms for the treatment of traffic, then Big River proposes that the parties use the reciprocal compensation rates and terms already contained in the ICA and agreed upon by the parties, beginning with the second billing period after notice of a traffic imbalance is provided by one party to the other party.

Big River's proposed language serves to further delay application of reciprocal compensation to imbalanced traffic, thus extending the period of time a carrier may benefit from free traffic termination on the other's network. (AT&T Ex. 1.0 at 12) By comparison, AT&T Illinois' proposed alternative "bill-and-keep" language (which AT&T Illinois asks the Commission to consider only if it rejects AT&T Illinois' principal position that there should be no bill-and-keep language in the ICA) provides that once local traffic has been determined to have been out-of-balance by more than 5% for three

consecutive months, the agreed-upon reciprocal compensation rate "shall immediately apply" to local traffic, without the need to "negotiate new terms" for the exchange of local traffic. (AT&T IB at 13, citing AT&T Ex. 1.0 at 12, Sch. JSM-1)

In its reply brief, AT&T Illinois responds to arguments in Big River's initial brief, noted below, where Big River contends that AT&T Illinois' position regarding bill-and-keep is inconsistent with the position of the Intercarrier Compensation Forum ("ICF"), of which certain AT&T Illinois affiliates are members, as set forth in a brief submitted by the ICF in an FCC proceeding, Docket 01-92. AT&T Illinois characterizes such comments by Big River as "an improper and irrelevant extra-record argument about a brief filed with the FCC seven years ago…." (AT&T RB at 2-3) According to AT&T Illinois, the FCC has yet to adopt any plan to reform the current intercarrier compensation system, and until it does, the Commission is bound to comply with existing law, including the FCC's rule allowing state commissions to impose "bill-and-keep" only when there has been a determination that local traffic exchanged between the parties is in balance and is expected to remain in balance. (AT&T RB at 3-4)

4. Big River's Position

The summary below is from Big River's briefs. Except as otherwise noted, the statements in the summary of Big River's position on this issue, as well as the summaries of Big River's positions on the other issues below, are not intended to be findings of the Commission.

Big River opted into the existing interconnection agreement between AT&T Illinois and MCI in September 2008. The two parties have been operating under that agreement since that time. The parties also signed an amendment to the Agreement. That amendment provided that reciprocal compensation would apply to the exchange of local traffic. Since the agreement was signed, however, the parties have been operating as if it were a bill-and-keep arrangement. Neither company had sent the other a bill for the exchange of local traffic until AT&T Illinois sent one to Big River in December 2010, when the parties were in the midst of negotiating a new ICA. (Big River IB at 8)

In the case at hand, Big River states, AT&T Illinois opposes bill-and-keep primarily because it creates an opportunity for arbitrage, but has failed to provide any examples of arbitrage occurring under a bill-and-keep system. (Big River IB at 8) The one example provided by AT&T witness McPhee actually occurred under a reciprocal compensation arrangement. The Commission must ask the question that if AT&T Illinois is so concerned about arbitrage, why it did not enforce the reciprocal compensation amendment attached to the Agreement. The answer, in Big River' is that the compensation scheme is inconsequential to AT&T Illinois and that it must not be truly concerned about arbitrage.

Big River claims it will avoid significant administrative burdens under a bill-and-keep arrangement. Big River witness Howe testified that "it is not cost efficient to

accumulate all of the records for local calls that terminate on our network, rate those records, prepare and send an invoice and then collect and apply the payment while doing the same for call originating on our network to audit the accuracy of bills received from another local carrier." (Big River IB at 9, citing Big River Ex. 1 at lines 33-36) Mr. Howe went on to explain that to avoid those costs, Big River has bill-and-keep provisions in all but one of its ICAs. Further, Big River has bill-and-keep arrangements in all of its existing ICAs with AT&T in other states.

Staff requested data from both parties regarding the relative parity of traffic exchanged between the two parties. Big River was unable to provide the requested information because it does not routinely maintain those figures. AT&T Illinois, however, did provide data that purported to show the traffic exchanged between the parties both in Missouri and Illinois. Staff's recommendation that the Commission impose reciprocal compensation is based, in part, on the numbers presented by AT&T Illinois which purport to show the traffic is significantly out-of-balance. (Big River IB at 9-10)

The problem, in Big River's view, is that the data offered by AT&T Illinois is, on its face, unreasonable. (*Id*. at 10) Having seen the numbers submitted by AT&T Illinois, Big River performed a one-day capture of traffic data as a comparison. Based on his experience in the industry, Big River witness Mr. Howe testified that he would expect that the minutes of outbound traffic would fall within a range of 10 to 20 minutes of use per line per day. The traffic that AT&T Illinois showed as originating on its network fell within that expected range. On the other hand, that data indicated that Big River customers essentially made no calls which terminated on AT&T Illinois' network. The data is so unreasonable that it should be ignored, in Big River's opinion. The "unreliable numbers" provided by AT&T Illinois are the very thing that Big River hopes to avoid under bill-and-keep. (*Id*.)

In its initial brief, Big River also contends that AT&T Illinois' position regarding bill-and-keep is inconsistent with the position of the Intercarrier Compensation Forum ("ICF"), of which certain AT&T Illinois affiliates are members, as set forth in a brief submitted by the ICF in an FCC proceeding, Docket 01-92. (Big River IB at 5-8) AT&T Illinois' response to Big River's argument is summarized above in the summary of AT&T Illinois' position. The Commission observes that the ICF brief was not part of the evidentiary record in the instant proceeding, and there is no indication that it is a document or authority that may properly be cited in a post-hearing brief.

In its reply brief, Big River takes exception with AT&T Illinois' position regarding burden of proof. (Big River RB at 3) According to Big River, AT&T Illinois' assertion that Big River has the burden of proof to show that the traffic exchanged is in balance is incorrect. AT&T Illinois relied on a Commission finding in a prior case that stated that "Sprint has not demonstrated by a preponderance of the evidence" that the traffic exchanged was sufficiently in balance. In that case, however, Sprint had filed a complaint against AT&T Illinois. The Commission noted that Sprint brought its complaint under 220 ILCS 13-515, rather than Section 252 of the federal

Telecommunications Act. Accordingly, Sprint had the burden of proof on every allegation. The present case, however, was brought under Section 252, and that section does not assign the burden of proof to either party.

On the contrary, Rule 51.713(c) permits a state commission to presume that traffic is roughly in balance "unless a party rebuts such a presumption." Here, Big River believes the Commission should make such a presumption. (Big River RB at 3)

5. Staff's Position

The summary of Staff's position below is from Staff's testimony and briefs. Except as otherwise noted, the statements in the summary of Staff's position on this issue, as well as the summaries of Staff's positions on the other issues below, are not intended to be findings of the Commission.

In Staff's view, AT&T Illinois' position should be adopted. The only reliable evidence points to traffic being extremely out of balance over the last year. (Staff IB at 5)

There is no question of traffic being roughly, or indeed even remotely, in balance. (Staff IB at 10) According to Staff, "Data regarding traffic volumes produced by AT&T Illinois demonstrate that traffic flowing between the two carriers is profoundly out of balance." (Staff IB at 10; Staff Ex. 1.0 at 9-10; Staff RB at 2) That is, the data indicated almost no calls from Big River customers that terminated on the AT&T Illinois network. (*See* Big River IB at 10) The imbalance shown by AT&T Illinois data markedly exceeds the +/- 5% benchmark for imbalance that both parties apparently accept. (Staff Ex. 1.0 at 10, citing Petition, Ex. B at 2; Staff RB at 2)

In contrast, Big River was unable to produce traffic flow volumes between it and AT&T Illinois because it does not maintain such information. (Staff Ex. 1.0 at 9) Big River attempted to argue that the AT&T data failed somehow to pass a so-called "reasonableness test," but this reasonableness test was shown to have a number of significant flaws, not the least of which being the fact that Big River's surrogate figures (based on one day's traffic data, Big River Ex. 2 at 6, in contrast to the 12 months' traffic data provided by AT&T Illinois, Staff Ex. 1.0 at 9-10) included traffic originated by carriers other than Big River and terminated to carriers other than AT&T Illinois. (Staff IB at 10-11, citing Tr. at 66-67, 144-145) This, Staff argues, renders the Big River analysis useless for purposes of determining traffic volumes subject to reciprocal compensation. (Staff IB at 11)

In Staff's view, what fails to pass any sort of reasonableness test is Big River's position regarding proposed contract language. Big River asserts that its ICA proposal "allows for the institution of reciprocal billing when traffic is out-of-balance by a mere 5% of the total local traffic exchanged." (Staff IB at 11, citing Big River Ex. 1.0 at 3) This, Staff submits, indeed might work well under other circumstances. However, Big River: (a) considers AT&T Illinois' data regarding the total local traffic exchanged to be

inherently unreliable; and (b) maintains no such data itself. Accordingly, Staff argues, "Big River's ICA proposal appears – due to Big River's own position – difficult or impossible to implement, and moreover has been superseded by events, in light of the best available data showing that traffic is out of balance by far more than 5%." (Staff IB at 11)

In its reply brief, in response to certain arguments in Big River's initial brief, Staff asserts that "the issue of whether Big River will incur costs associated with traffic capture and billing if the parties move to a billed compensation regime is, under the circumstances, not relevant." (Staff RB at 4-5)

In its reply brief, Staff also responds to arguments in AT&T Illinois' initial brief regarding burden of proof. Although Staff concurs generally in AT&T Illinois' position insofar as it relates to the imposition of a bill-and-keep regime and other issues, Staff takes issue with AT&T Illinois' statements on burden of proof. (Staff RB at 11-13)

With respect to apportioning the burden of proof, the *Sprint* case cited by AT&T Illinois' is not apposite here, in Staff's opinion. In the Sprint proceeding, the various Sprint entities filed a complaint against AT&T Illinois under the authority of Sections 10-108 and 13-515 of the Public Utilities Act, which authorize the filing of complaints before the Commission. In that Order, the question of which party bore the burden of proof was before the Commission, as Sprint argued that notwithstanding its status as complainant, it did not have the burden with respect to most issues. The Commission rejected this position, stating as follows:

> Sprint contends that it should be permitted to import the Kentucky ICA substantially without revision into Illinois, and that, to the extent that AT&T proposes any state-specific revisions to the Kentucky ICA, it bears the burden of proving that such revisions do in fact constitute required revisions under Merger Commitment 7.1. AT&T and Staff separately argue that Sprint, as the complainant here, bears the burden of proving the allegations necessary to entitle it to the relief sought in its complaint.
>
> With respect to this question, the following is clear: Sprint has elected to bring this matter before the Commission as a complaint under the authority of Section 13-515, rather than as an arbitration proceeding under Section 252 of the federal Act. We assume this to be a conscious election on the part of Sprint, and the election to bring a complaint under Section 13-515 affords Sprint certain advantages that it would not enjoy were it to have sought relief by seeking arbitration under the federal Act.
>
> …
>
> However, by seeking relief through the Section 13-515 complaint process, Sprint has, as AT&T and the Staff both argue, accepted the burden of pleading and proving each and every allegation necessary to entitle it to the relief it seeks. The proposition that a complainant has the

> burden of proof is a long-standing tenet of law, and one which, as the Staff notes, applies fully to administrative proceedings in Illinois.
>
> *Sprint Order* at 31

In Staff's view, "It is clear from the *Sprint Order* that Sprint bore the burden of proof associated with imposing a bill-and-keep arrangement in that proceeding because it was the complainant, not because the Commission believes that the proponent of a bill-and-keep arrangement has the burden of proving the propriety of such an arrangement in all proceedings, including mandatory arbitrations under Section 252 of the federal Act." Staff adds, "Section 252(b)(4) of the federal Act does not assign the burden of proof to either party to a Section 252 arbitration; see, generally, 47 U.S.C. §252(b); and Section 51.713(c) of the FCC's Rules states that a state Commission may presume that traffic is roughly balanced for purposes of imposing a bill-and-keep arrangement: 'unless a party rebuts such a presumption. 47 C.F.R. §51.713(c)." (Staff RB at 12-13)

In the instant case, Staff asserts, any presumption that traffic is roughly balanced has been fully and unequivocally rebutted. Staff believes the overwhelming weight of evidence shows that traffic is not remotely in balance. Accordingly, Staff argues, this issue should be decided in AT&T Illinois' favor. It should not, however, be decided based upon the notion that the Commission has enunciated an evidentiary presumption against bill-and-keep. (Staff RB at 13)

6. Exceptions and Replies

In its BOE, Big River argues, for the first time, that AT&T Illinois should be "required [by Section 13-801(b)(2) of the Act] to utilize the bill-and-keep arrangement in Missouri between Big River and AT&T Missouri." (Big River BOE at 3-4) That Section provides, "An incumbent local exchange carrier shall make available to any requesting telecommunications carrier, to the extent technically feasible, those services, facilities, or interconnection agreements or arrangements that the incumbent local exchange carrier or any of its incumbent local exchange subsidiaries or affiliates offers in another state under the terms and conditions, but not the stated rates, negotiated pursuant to Section 252 of the federal Telecommunications Act of 1996."

In their RBOEs, AT&T Illinois and Staff contend that this new position advanced for the first time in Big River's BOE should be rejected as untimely. (ATT RBOE at 2; Staff RBOE at 4) The Commission agrees that in the context of an arbitration proceeding, this new position was not raised in a timely manner, and Big River offers no explanation for waiting until its BOE to present it.

AT&T Illinois and Staff further argue that Section 13-801(b)(2) is inapplicable to AT&T Illinois. Section 13-801(a) provides, in part, "A telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act shall not be subject to the provisions of this Section, to the extent that this

Section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 and regulations promulgated thereunder." (emphasis added)

Staff and AT&T Illinois argue, and the Commission agrees, that imposing obligations on AT&T Illinois which exceed federal interconnection requirements (as Big River's new proposal would do) would not be required under Section 13-801 since AT&T Illinois is no longer subject to regulation under an alternative regulation plan pursuant to Section 13‑506.1. (Staff RBOE at 2-3; ATT RBOE at 2-3)

Staff and AT&T Illinois also argue, and the Commission agrees, that even if Section 13-801(b)(2) were applicable to AT&T Illinois, it would not obligate AT&T Illinois to offer a bill-and-keep arrangement to Big River since 13-801(b)(2) does not apply to "stated rates." As noted by Staff and AT&T Illinois, the Commission has determined that "reciprocal compensation, whether in the form of a bill-and-keep arrangement, or an arrangement whereby the parties pay one another based on volume of traffic terminated by each, is inherently state specific pricing." (Staff RBOE at 5-6, AT&T RBOE at 3, both citing the *Sprint Order, supra.*)

B. Issue No. 2: If a bill-and-keep arrangement is adopted, what terms and conditions should govern such bill-and-keep arrangements?

AT&T Illinois proposes terms and conditions to govern bill-and-keep arrangements in the event the Commission requires inclusion in the ICA of language for a bill-and-keep arrangement over AT&T Illinois' and Staff's objections. AT&T Illinois' proposed language is intended to provide specific terms and timelines for the implementation of reciprocal compensation terms and conditions – already agreed-upon by the parties, and contained in the ICA – once local traffic falls out-of-balance. (AT&T IB at 15; AT&T Ex. 1.0 at 16)

Staff witness Dr. Zolnierek agreed that, in the event that the Commission imposes bill-and-keep in this case, the Commission should adopt AT&T Illinois' proposed language rather than the language initially proposed by Big River. (Staff Ex. 1.0 at 11-12)

Although Big River initially opposed the language proposed by AT&T Illinois, Big River's current position is that if bill-and-keep is adopted by the Commission, Big River is willing to accept the language presented by AT&T Illinois. (Big River IB at 11)

C. Analysis of and Conclusions on Bill-and-Keep Issues

In the disputed points list attached to its Arbitration Petition, AT&T Illinois identified five issues in dispute. No additional disputed issues were identified by Big River in its response. Accordingly, pursuant to Section 252(b)(4)(A) of the federal Telecommunications Act, the issues presented for resolution in this proceeding are the

five identified in AT&T Illinois' petition. The first two issues identified in the petition are as follows:

> Issue 1: Should the ICA [interconnection agreement] provide for a bill-and-keep arrangement for traffic that is otherwise subject to reciprocal compensation but is roughly balanced?
>
> Issue 2: If so, what terms and conditions should govern such bill-and-keep arrangements?

The positions of the parties on these issues are summarized at some length above and will not be repeated in detail in this section of the order. Positions raised in Big River's BOE are discussed above in the "Exceptions and Replies" section for Issue No. 1, and are not further addressed below.

> **Issue No. 1: Should the ICA provide for a bill-and-keep arrangement for traffic that is otherwise subject to reciprocal compensation but is roughly balanced?**

Under Section 252(d)(2) of the Federal Act, the terms and conditions for reciprocal compensation shall not be considered to be just and reasonable unless they "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier…."

In its rules implementing Section 252(d)(2) of the Federal Act, the FCC specifies in part:

> Section 51.713 Bill-and-keep arrangements for reciprocal compensation.
>
> (a) For the purposes of this subpart, bill-and-keep arrangements are those in which neither of the two inter-connecting carriers charges the other for the termination of telecommunications traffic that originates on the other carrier's network.
>
> (b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to § 51.711(b).
>
> (c) Nothing in this section precludes a state commission from presuming that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic

> flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.
>
> 47 CFR 51.713

According to AT&T Illinois, this issue involves the question of whether the interconnection agreement ("ICA") should provide for the parties to pay each other reciprocal compensation for the transport and termination of Section 251(b)(5) Traffic and ISP-Bound Traffic (collectively referred to as "local traffic"), as proposed by AT&T Illinois, or whether the Commission should instead order the adoption of a bill-and-keep arrangement, as proposed by Big River. (AT&T Initial Brief at 6)

Big River contends that a bill-and-keep arrangement is the most efficient method for capturing the economic impact of reciprocal compensation while limiting administrative costs. (Big River IB at 5)

Staff believes AT&T Illinois' position should be adopted. In Staff's view, the only reliable evidence points to traffic being extremely out of balance over the last year. (Staff IB at 5)

As noted above, Staff requested traffic flow data from both carriers, but only AT&T Illinois was able to provide traffic flow volumes between the two carriers. (Staff Ex. 1.0 at 9) According to Staff, "Data regarding traffic volumes produced by AT&T Illinois demonstrate that traffic flowing between the two carriers is profoundly out of balance." (Staff IB at 10; Staff Ex. 1.0 at 9-10; Staff RB at 2) That is, the data indicated almost no calls from Big River customers that terminated on the AT&T Illinois network. (*See* Big River IB at 10)

Big River took issue with AT&T Illinois' data, characterizing it as unreliable. Among other things, Big River contends that its analysis of the AT&T Illinois' data showed that such data did not pass a reasonableness test. As observed by Staff, however, the analysis described on lines 55-78 of Big River's rebuttal of Staff was based on only one-day's traffic data in contrast to the 12-months' traffic data provided by AT&T Illinois. (Staff IB at 11)

Based on the evidence presented, the Commission finds that the data provided by AT&T Illinois is a more accurate measure of the traffic at issue than that used by Big River. As indicated by Staff, the evidence shows the traffic flowing between the two companies is significantly out of balance. As further noted by Staff, the traffic is well outside the +/- 5% benchmark proposed by Big River. In the Commission's opinion, a benchmark of +/- 5% would not provide an appropriate basis for imposing bill-and-keep where the traffic is not roughly balanced in the first place.

Regarding burden of proof, AT&T Illinois argues that Big River has the burden of proof on the bill-and-keep issue, citing the Commission's *Sprint Order* discussed above. As indicated by Staff and Big River, however, the *Sprint* case was a complaint

proceeding, not an arbitration proceeding. There, the Commission found that Sprint, by seeking relief through the Section 13-515 complaint process, accepted the burden of proof. As observed by Staff, Section 252(b)(4) of the federal Act does not assign the burden of proof to either party to a Section 252 arbitration. In any event, the *Sprint Order* does not stand for the proposition that Big River has the burden of proof in the current arbitration proceeding.

According to the FCC's rules, a state Commission is not precluded "from presuming that the amount of…traffic…is roughly balanced…and is expected to remain so, unless a party rebuts such a presumption." In the instant proceeding, the Commission agrees with Staff that even if the Commission were to make such a presumption, the presumption has been clearly rebutted by evidence showing that the traffic is not remotely in balance.

In conclusion, the Commission finds that AT&T Illinois should not be required to utilize a bill-and-keep arrangement in its ICA with Big River.

Issue No. 2: If a bill-and-keep arrangement is required, what terms and conditions should govern such bill-and-keep arrangements?

AT&T Illinois proposes terms and conditions to govern bill-and-keep arrangements in the event the Commission requires inclusion of such an arrangement in the ICA over AT&T Illinois' objections.

Staff witness Dr. Zolnierek agreed that, in the event that the Commission imposes bill-and-keep in this case, the Commission should adopt AT&T Illinois' proposed language rather than the language initially proposed by Big River.

Although Big River initially opposed the language proposed by AT&T Illinois, Big River's current position is that if bill-and-keep is adopted by the Commission, Big River is willing to accept the language presented by AT&T Illinois.

On this issue, the Commission finds that since AT&T Illinois is not being required to utilize a bill-and-keep arrangement in its ICA with Big River, the Commission need not decide what terms and conditions should govern such an arrangement.

V. TRANSIT TRAFFIC SERVICE

A. Issue No. 3: Should AT&T Illinois be required to provide transit traffic service under the ICA?

AT&T Illinois describes transit traffic as "telecommunications traffic that originates on the network of Big River (or a third party), transits AT&T Illinois' network, and is terminated on the network of a third party (or Big River)." (AT&T IB at 16) The service that AT&T Illinois provides with respect to such traffic -- the routing and transmission of

the traffic from Big River to the third party or vice versa -- is called transit service. (*Id*.; AT&T Ex. 2.0 at 2-3)

AT&T Illinois' position is that transit traffic service is not required by Section 251 of the 1996 Act and, therefore, is not a service that AT&T Illinois can be required to provide pursuant to an interconnection agreement negotiated and arbitrated pursuant to Section 252 of the 1996 Act. (AT&T IB at 18) Nonetheless, AT&T Illinois has agreed to include transiting service in a separate Transiting Appendix to the ICA with Big River, subject to the rates, terms and conditions which have been proposed by AT&T Illinois in connection with Arbitration Issues 4 and 5. (*Id*.)

Big River's position is that transit traffic service should be included in the ICA because it is integral to AT&T Illinois' duty to interconnect. (Big River IB at 11) AT&T Illinois' so-called "agreement" to include transiting service in the ICA is not acceptable to Big River because such agreement is subject to conditions that are unacceptable to Big River. (Big River RB at 5)

Staff's position is that The Commission need not reach this issue, since AT&T has agreed to provide transit services to Big River. (Staff IB at 12)

1. AT&T Illinois' Position

AT&T Illinois makes transit service generally is available to CLECs, including Big River, pursuant to its tariff. In addition, AT&T Illinois makes transit service available to CLECs pursuant to negotiated commercial agreements, not subject to regulation under the 1996 Act. (AT&T IB at 16; AT&T Ex. 1.0 at 30; AT&T Ex. 2.0 at 4)

Initially, AT&T Illinois opposed the inclusion of transit service in the ICA. In AT&T Illinois' view, because transit traffic is not originated or terminated on AT&T Illinois' network, transit traffic service is not a service that AT&T Illinois is required to provide under Section 251(c)(2) or by any other provision of Sections 251(b) or 252(c) of the 1996 Act. Section 251(c)(2) requires AT&T Illinois to provide "interconnection with the local exchange carrier's network." 47 U.S.C. Sec. 251 (c)(2). It does not, however, require AT&T Illinois to furnish a connection between Big River's network and the networks of third parties, in AT&T Illinois' view. (AT&T IB at 16)

There is no mention of transiting in the 1996 Act or in the FCC's *Local Competition Order* implementing the requirements of the 1996 Act. Moreover, any contention that an incumbent carrier's duty to provide interconnection with its own network implies a duty to provide transiting to third party networks was foreclosed by the *Local Competition Order*, in which the FCC concluded that "the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic" and that interconnection does not include the transport or termination of traffic. That language, coupled with the absence of any other provision in the 1996 Act that requires transiting, leads to the conclusion that transiting is not required by the 1996 Act, in AT&T Illinois' opinion. (AT&T IB at 17)

The FCC has repeatedly declined to rule that the 1996 Act or its implementing rules and orders require transiting to be included as part of an interconnection agreement. (AT&T IB at 17) Similarly, the FCC's Wireline Competition Bureau was called upon to decide whether Section 251 requires transit service in an arbitration where the Bureau stood "in the shoes" of a state commission. The Bureau, recognizing the FCC's repeated statements that there is no "clear Commission precedent or rules declaring such a duty," and noting that it was acting "on delegated authority" as a state commission, declined "to determine for the first time" that transiting was required under section 251. (AT&T IB at 17, citing Petition of WorldCom, Inc. Pursuant to Section 252(e)(5), 17 FCC Rcd. 27039, Para. 117 (Wireline Competition Bureau, 2002))

This Commission has also consistently recognized that transiting is not required under the 1996 Act. (AT&T IB at 17-18) The Commission first addressed the issue in its November 26, 1996, Arbitration Decision in AT&T Communications of Illinois, Inc., Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech Illinois, Docket Nos. 96 AB-003 et al. The Commission there stated, at page 10: "Is transiting required by the Act, the [First Report and] Order or state law? It is not." AT&T Illinois adds, "*See also* Arbitration Decision, Sprint Communications L.P., d/b/a Sprint Communications Company, L.P., Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech, Illinois, ICC Docket No. 96 AB-008, at p. 11 (Jan. 6, 1997) ('The Act does not require transiting')." (AT&T IB at 18)

Nonetheless, AT&T Illinois states, it "has voluntarily agreed to include transiting service in a separate Transiting Appendix to the ICA with Big River, subject to the rates, terms and conditions which have been proposed by AT&T Illinois in connection with Arbitration Issues 4 and 5…." (*Id*.)

2. Big River's Position

This Commission, while not specifically deciding that transit is a required service, has found that transit should be subject to an interconnection agreement. The Commission has stated, "Public policy may support the imposition of a transiting requirement if transiting were refused." (Big River IB at 12, citing Arbitration Decision at 11, Sprint Communications L.P, Docket No. 96 AB-008 (January 8, 1997)) It has also held, "If transit service is not provided, nonincumbent carriers might be forced to establish costly direct connections to other carriers before traffic volumes justified that expense," and that "at a minimum, transiting will facilitate the indirect interconnection contemplated by Section 251(a)(1) of the 1996 Act." (Big River IB at 12, citing Arbitration Decision at 18, 20, MCI Telecommunications Corporation (December 17, 1996))

AT&T Illinois has offered to provide transit even if it is not included in the ICA. The service would be provided, though, pursuant to a commercial agreement. Such an

agreement would be beyond the scope of the Commission's oversight. (Big River IB at 13)

In its reply brief, Big River indicates that AT&T Illinois' "agreement" to include transiting service in the ICA is not acceptable to Big River because such agreement is subject to approval of conditions that are unacceptable to Big River, namely the rates, terms and conditions which have been proposed by AT&T Illinois in connection with Arbitration Issues 4 and 5. (Big River RB at 5; Big River BOE at 4)

3. Staff's Position

As indicated in its initial brief, Staff's recommendation is that the Commission need not reach this issue, since AT&T Illinois has agreed to provide transit services to Big River. (Staff IB at 12)

In his testimony, Staff witness Dr. Zolnierek stated that the FCC has repeatedly indicated that it has not resolved the question of whether the Federal Act does require incumbent local exchange carriers to provide transit service. (Staff Ex. 1.0 at 13, 15-16, 22-23)

In 2005, the FCC released a "Further Notice of Proposed Rulemaking" in which it stated, "Although many incumbent LECs, mostly BOCs, currently provide transit service pursuant to interconnection agreements, the Commission has not had occasion to determine whether carriers have a duty to provide transit service." (Staff Ex. 1.0 at 14-15, citing Further Notice of Proposed Rulemaking, Para 20-121, In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Released March 3, 2005)

Dr. Zolnierek stated that on February 9, 2011, the FCC in another "Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking" again specifically indicated that it had not decided the transit issue. In particular, the FCC stated, "[W]e invite parties to refresh the record with regard to the need for the Commission to regulate transiting service, and the Commission's authority to do so." (Staff Ex. 1.0 at 15)

Dr. Zolnierek also stated that the ICC has not determined whether it can require incumbent local exchange carriers to provide transit service. (*Id*. at 16) He discusses several Commission arbitration decisions form 1996 and 1997 which in his opinion "do not stand for the proposition that the Commission cannot require AT&T Illinois to provide transit service or that it cannot require the AT&T Illinois to include transit service in the interconnection agreement." (*Id*. at 19)

Dr. Zolnierek also stated that in an arbitration proceeding involving MCI Metro and SBC Illinois in 2004, the Commission required SBC Illinois to include transit services in its interconnection agreement with MCI Metro. It is Dr. Zolnierek's understanding, however, that the circumstances in the prior arbitration are different than

in the current proceeding, in that SBC Illinois had negotiated transit rates, terms, and conditions in the course of negotiation of the interconnection agreement, whereas in the instant case AT&T Illinois did not do so. (Staff Ex. 1.0 at 20-21)

In any event, as indicated in its initial brief, Staffs position is that "[w]hether or not AT&T Illinois must provide transit service to Big River, is a determination that the Commission need not make in this proceeding." (Staff IB at 12-13) AT&T Illinois has agreed to voluntarily provide transit service to Big River subject to the rates, terms, and conditions proposed by AT&T Illinois in connection with Arbitration Issues 4 and 5.

4. Exceptions and Replies

In its BOE, Big River argues, for the first time, that AT&T Illinois is required by Section 13-801(b)(2) of the Act "to offer transit services in its ICA with Big River on terms and conditions consistent with the interconnection agreement between AT&T Missouri and Big River." (Big River BOE at 4-5) This argument is similar to the one appearing in Big River's exception regarding Issue No. 1.

In their RBOEs, AT&T Illinois and Staff contend that this new position, which was advanced for the first time in Big River's BOE and involves conditions not of record, should be rejected as untimely. (Staff RBOE at 7; ATT RBOE at 5) The Commission agrees that in the context of an arbitration proceeding, this new position was not raised in a timely manner, and Big River offers no explanation for waiting until its BOE to present it. Further, Big River relies on terms and conditions not in evidence.

Staff and AT&T Illinois further argue, and the Commission agrees, that imposing obligations on AT&T Illinois which exceed federal interconnection requirements (as Big River's new proposal would do) should not be required under Section 13-801 since AT&T Illinois is no longer subject to regulation under an alternative regulation plan pursuant to Section 13‑506.1, as discussed above.

B. Issue No. 4: If the Commission requires the inclusion of transit in the ICA, what are the appropriate rates that AT&T Illinois should charge for such service?

AT&T Illinois' position is that the transit rates included in the ICA should be the rates in AT&T's Commission-approved tariff, identified below. (AT&T IB at 18-27)

Big River's position is that the Commission should adopt the rate used by the parties under their ICA in Missouri because AT&T Illinois uses a rate that is unreasonable and discriminatory. (Big River IB at 13-16)

Staff's recommendation is that AT&T Illinois' proposed rates have been approved by the Commission and should be adopted. (Staff IB at 13-18)

1. AT&T Illinois' Position

The transit service rates that AT&T Illinois proposes to include in the ICA are the Commission-approved rates that are currently contained in its Tariff No. 22, Part 23, Section 2, 1st Revised Sheet 4. (AT&T Ex. 1.0 at 31, Sch. JSM-2) They are also the same as the transit service rates contained in Big River's currently effective ICA with AT&T Illinois. (AT&T IB at 18-19; AT&T Ex. 1.0 at 32)

In its Second Interim Order in Docket 96-0486/96-0560 (Consolidated) (the "TELRIC Investigation"),dated February 17, 1998, the Commission directed AT&T Illinois (then Ameritech Illinois) to include transiting language in its compliance tariff and provide supporting cost studies. The tariffed transit rates and supporting cost study filed by AT&T Illinois in accordance with this directive (along with rates and cost studies for other services and network elements) were subject to Commission review in Docket 98-0396 (the "TELRIC Compliance Case"). Based on its review of the transit rates and supporting cost study in Docket 98-0396, the Commission, in an Order issued on October 16, 2001, approved those rates with one exception. Specifically, the Commission directed AT&T Illinois to remove an adjustment that it had made as part of the cost study in the calculation of the Tandem Transport Facility rate. AT&T Illinois has made no additional modifications to its tariffed transit service rates since then. Accordingly, the currently effective transit tariffed rates are the same as the ones approved in Docket 98-0396. (AT&T IB at 19; AT&T Exhibit 1.0 at 32-33)

More recently, the Commission expressly ordered that the tariffed transit rates be applied to transit service provided pursuant to an interconnection agreement. In an arbitration proceeding involving AT&T Illinois (then SBC Illinois) and MCI, MCI argued that the Commission should reject the use of the tariffed transit rates and adopt a lower rate that MCI argued was TELRIC-based. The Commission rejected MCI's proposal and approved the use of the tariffed transit rates, stating:

> [N]o current rule requires SBC to provide transit services at TELRIC prices. The Commission sees no reason to require SBC to offer transit services at TELRIC prices. We note that SBC currently offers transit services under its state tariff. We agree with SBC that the appropriate rates for transit services should be those in SBC's tariff, not those rates that MCI proposes.
> (ATT IB at 20, citing SBC Illinois/MCI Arbitration, Docket 04-0469, Arbitration Decision at 160-161 (Nov. 30, 2004))

Pursuant to its most-favored nation rights under Section 251(i) of the 1996 Act, Big River adopted as its own the AT&T Illinois/MCI ICA arbitrated in Docket 04-0469. As a result, Big River's currently effective ICA contains the same Commission-approved transit service rates as those contained in AT&T Illinois' tariff and which AT&T Illinois proposes to include in the parties' new ICA. Big River's currently effective ICA with AT&T Illinois was filed for Commission approval in September of 2008. (ATT IB at 20, citing AT&T Ex. 1.0 at 32 and Tr. 82)

According to AT&T Illinois, Big River now asks the Commission to arbitrarily reject the use of the Commission-approved tariffed transit service rates to which Big River agreed less than three years ago, even though in his direct testimony, Big River's witness failed to even address the transit rate issue, much less provide evidence in support of Big River's proposed rate. Thus, AT&T Illinois contends, Big River failed to comply with Section 761.110 of the Commission's rules governing procedure in ICA arbitration cases, which requires that the respondent to an arbitration petition submit "verified written statements and exhibits constituting respondent's support" for its positions on the disputed issues. 83 Ill. Adm. Code 761.110. For this reason alone, AT&T Illinois argues, Big River's transit rate proposal should be disregarded and AT&T Illinois' proposal should be approved. (ATT IB at 20-21)

In his rebuttal testimony, in response to Staff testimony, Mr. Howe made a "belated" attempt to weigh in on the transit rate issue for the first time, AT&T Illinois complains. (ATT IB at 21) Noticeably absent from that testimony, AT&T Illinois claims, is any evidence that actually supports the specific transit service rate proposed by Big River. Rather, Mr. Howe simply took unsupported "pot shots" at the transit service cost study that was presented by AT&T Illinois in support of the transit rates approved in Docket 98-0396 and the Commission's review of those rates. (*Id*.)

According to AT&T Illinois, Mr. Howe's analysis was based on the erroneous assumptions that (i) transit service is a service that the FCC has required ILECs to provide pursuant to the 1996 Act and the rules promulgated by the FCC pursuant to that Act and (ii) ILECs are required to provide transit service at rates established based on TELRIC cost pricing standards. (ATT IB at 21, citing Big River Ex. 2.0 at 9-10 and Tr. 75-76). Each of these assumptions is wrong, in AT&T Illinois' view. Furthermore, AT&T Illinois argues, this Commission expressly held in the 2004 AT&T Illinois/MCI arbitration that whether or not ILECs are required to provide transit service, the rate for such service "is not required to be cost-based under either federal or state law." (ATT IB at 22, citing SBC Illinois/MCI, Arbitration Decision at 123)

Even if transit rates were required to be cost-based, Mr. Howe presented no basis for the Commission to adopt Big River's proposed rates, as opposed to AT&T Illinois' tariffed rates, which were approved by the Commission based on its review of the transit cost study presented in Docket 98-0396. In its Response to the Arbitration Petition, page 4, Big River claimed that its proposed rate is the "arbitrated transit rate between the parties in Missouri." In AT&T Illinois' view, there is no lawful basis for the Commission to arbitrarily substitute a rate used in another state for the Illinois state-specific transit rates approved by this Commission. Furthermore, the transit rate approved in the Missouri arbitration proceeding referred to by Big River was unsupported by any cost of service study in that case. Instead, the source of that transit rate was the arbitrated transit rate established by the Public Utility Commission of Texas in an order issued on December 19, 1997, four years prior to the ICC's Order in Docket 98-0396 establishing AT&T Illinois' currently effective tariffed transit rates. (ATT IB at 22-23)

In contrast to AT&T Illinois' tariffed transit rate, Big River's proposed rate is far outside the range of the rates per minute of use ("MOU") charged by other transit service providers in Illinois, including two ILECs (Illinois Consolidated Telephone Company ("ICTC") and Frontier Citizens Communications of Illinois ("Frontier") with which Big River entered into negotiated interconnection agreements in 2008, around the same time that it entered into the currently effective ICA with AT&T Illinois. (ATT IB at 23, citing Tr. 84) As shown by the chart below, the transit service rates that Big River agreed to pay ICTC and Frontier are approximately equal to or higher than the composite transit service rate included in AT&T Illinois' tariff. Big River's proposed rate, on the other hand, is more than five to six times lower than the transit rates of AT&T Illinois and the other three carriers.

Carrier	Rate per MOU
AT&T Illinois	$0.005034
Neutral Tandem	0.005118
Frontier Citizens Communications of Illinois	0.0061854
Illinois Consolidated Tel Co	0.004931
Big River Proposed	0.00096

(AT&T IB at 23-24, citing Cross Exam Ex. 5; Tr. 88-89, 93-96, 98-101)

In its initial brief, AT&T Illinois also responds to assertions by Mr. Howe, based on the absence of what he considered to be appropriate "marginal symbols" on the transit tariff filed by AT&T Illinois on April 3, 1998, in compliance with the Commission's Second Interim Order in Docket 96-0496/0569 Consolidated (the "TELRIC Order"), that "normal Commission review and oversight" of the rates set forth in that tariff "was probably averted." (AT&T IB at 24, citing Big River Ex. 2.0 at 13-14) Mr. Howe's assertion is incorrect, in AT&T Illinois' view, in light of the fact that the Commission devoted an entire section of its Order in Docket 98-0396, the proceeding initiated to review AT&T Illinois' compliance with the TELRIC Order, to a discussion of its review of AT&T Illinois' tariffed transit rates and supporting cost studies. Based on that review, the Commission ordered a reduction in the price for one of the transit rate elements, which AT&T Illinois implemented.

AT&T Illinois next argues that Mr. Howe's criticisms of the TELRIC cost study presented in Docket 98-0396 and the resulting rates were unsupported. (AT&T IB at 25) Mr. Howe asserted that the tariffed rates for each of the individual transit rate elements do not match the corresponding TELRIC costs for those rate elements, as identified in the cost study, leading Mr. Howe to erroneously conclude that the tariff rates are

"inconsistent" with the results of the cost study. (Big River Ex. 2.0 at 10-12) In making this assertion, AT&T Illinois states, Mr. Howe completely overlooked the fact that the tariffed rates are equal to the sum of the TELRIC costs that he observed in the TELRIC study plus the shared and common costs properly allocable to transit service. (Tr. 116-121, 166-167; AT&T Cross Exam Ex. 6) According to AT&T Illinois, "Unlike TELRIC costs, which are costs specific to a particular service, shared costs represent costs shared among two more services and UNEs, while common costs represent costs common to all services provided by the ILEC (Tr. 168-169 (Zolnierek)), facts that Mr. Howe would have known if he were at all familiar with the development of TELRIC-based rates." (AT&T IB at 25)

Mr. Howe also asserted that certain billing and accounting cost categories including "billing expense," which were included in the development of the tandem switching rate element (one of the three transit service rates elements), were allocated to AT&T Illinois based on the total number of transit minutes of use. Mr. Howe then purported to recalculate the cost of the tandem switching rate based on an assumption that the current volume of transit minutes is 12.9 times higher than the number of transit minutes used in developing the cost study. (AT&T IB at 25-26, citing Big River Ex. 2.0 at 15-16). On cross-examination, however, Mr. Howe stated that there is nothing in the cost study to show that the total number of transit minutes were actually used in calculating the "billing expense" (Tr. 127), and, therefore, he was "not sure" if the development of the "billing expense" was driven by total transit minutes. (Tr. 128) Yet is it clear, AT&T Illinois argues, that Mr. Howe's "recalculated rate" for tandem switching erroneously assumed that all cost categories (including "billing expense" and "tandem") were driven by transit minutes. (AT&T IB at 26)

Finally, AT&T Illinois argues, Mr. Howe's attempt to "recalculate" the approved transit service rates based on a change in one factor (total transit minutes) completely ignored the impact of offsetting changes in other cost study inputs and assumptions that may have occurred since the cost study was performed. (AT&T IB at 26-27)

In its reply brief, AT&T Illinois responds to an argument in Big River's brief that AT&T Illinois' tariffed rate is defective because it was "derived from a cost study based on data from Ohio." According to AT&T Illinois, the only "data from Ohio" that appears in the cost study presented in Docket 98-0396 was the labor cost associated with one Ameritech (now, AT&T Midwest) employee position that happened to be located in Ohio and which performed centralized transit-related customer billing functions on behalf of all of the ILECs, including AT&T Illinois, located in the five states of the Ameritech region. (AT&T RB at 9)

AT&T Illinois also responds to an argument in Big River's brief that its proposed rate "more closely approximates the proxy tandem switching rate of .0015 set out in 47 CFR § 51.513." (AT&T RB at 9-10; Big River IB at 13) According to AT&T Illinois, the "proxy rates" in Rule 51.513 have nothing whatsoever to do with transit service. Rather, those rates were adopted by the FCC immediately after the enactment of the 1996 Act as rates that a state commissions could apply to unbundled network elements ("UNEs")

on an interim basis, subject to being "superseded once the state commission has completed review of a cost study that complies with the" TELRIC cost standard applicable to UNEs. 47 C.F.R. Sec. 51.513.

In AT&T Illinois's view, the tandem switching proxy rate included in Rule 51.513 is irrelevant to any issue in this case since under the FCC's 2005 Triennial Review Remand Order, ILECs are no longer required to provide local switching (which includes tandem switching) as a UNE; transit service consists of more than just tandem switching but, rather, represents a service involving the routing and transmission of traffic from Big River to a third party and vice versa; rates for transit service are not required to be cost-based and are, therefore, not subject to the TELRIC pricing standard; and the Commission, in Docket 98-0396, "completed a review of a [transit service] cost study that complies" with the TELRIC cost standard and, therefore, the rates that were approved by the Commission based on that review would necessarily "supersede" the Rule 51.513 proxy rate for tandem switching even if that proxy rate might otherwise be applicable, which it is not. (AT&T RB at 9-10)

2. Big River Position

Big River contends that AT&T Illinois' rate for transit service is unreasonable. (Big River IB at 13; Big River BOE at 5-7) Big River recommends instead that the Commission adopt the rate of .0096. This rate is based on an ICA arbitrated in Missouri between Big River and AT&T Missouri. The rate suggested by Big River also more closely approximates the proxy tandem switching rate of .0015 set out in 47 CFR Sec. 15.513. Also, while AT&T Illinois and Staff object to importing a rate from another state, the rate proffered by AT&T Illinois and recommended by Staff "is derived from a cost study based on data from Ohio." (Big River IB at 13)

It is Big River's position that transit traffic is no different than regular tandem switching. (*Id*. at 14) Big River witness Mr. Howe stated that "the respective tandem switch port for each of the AT&T local switches provides it with connectivity to all local switches connected to the tandem switch, regardless of the underlying carrier." (Big River Ex. 1 at 9) AT&T Illinois "provides the full functionality of its tandem switches to its own local switches by completing calls to all subtending local switches." (*Id*. at 10) Applying a different approach to calls from Big River's network that terminate on a third party network "results in discrimination and an impairment in the service capability that AT&T provides on the tandem switch port to which competitive LECs connect." (*Id*.)

Yet, the AT&T Illinois rate for tandem transit traffic is four times that of "regular" tandem traffic. (Big River IB at 14) AT&T Illinois defends its rates, Big River states, by pointing out that transit rates are not required to be cost-based and that its rates are included in its Commission-approved tariff.

While no statute or rule requires that transit rates be cost-based, the Commission required that AT&T Illinois provide a cost basis for its transit rates. (Big River IB at 14) The Commission ordered AT&T Illinois to provide cost studies to support its rates.

AT&T Illinois provided the cost study that the Commission demanded. Staff witness Zolnierek relied on that cost study to conclude that AT&T Illinois' transit rates are reasonable because they are based upon the cost of providing transit in Illinois.

The cost study in question, however, was prepared prior to SBC's acquisition of AT&T Illinois. (Big River IB at 15) In support of that acquisition, SBC and AT&T Illinois argued that it would result in significant cost reductions resulting from increased efficiencies. The cost study submitted by AT&T Illinois, and relied upon by Witness Zolnierek, does not account for those increased efficiencies. Nor does it account for the fact that the costs are now divided over a much larger volume of calls. (Big River IB at 15, citing Big River Ex. 2 at 14-15)

The process through which the rates were approved by the Commission also raises questions. (Big River IB at 15) The transit rates were not included in the initial tariff filing but were in the subsequent amendment. The amended tariff sets forth that new material will be identified by appropriate marginalia. As mentioned, the transit rates were new to the amended tariff but no marginalia identified them as such. A footnote states that they were included in the original tariff. This scenario, Big River asserts, raises the possibility that the transit rates may not have been subject to proper scrutiny.

The simple fact of the matter, Big River argues, is that AT&T Illinois is charging one group of customers four times as much as another group for the same service. The network functionality involved in completing a transit call is identical to that required to complete local tandem calls. (Big River IB at 15-16; Big River RB at 7)

3. Staff's Position

Staff's position is that AT&T Illinois' proposed rates have been approved by the Commission and should be adopted. (Staff IB at 13-18) The rates AT&T Illinois proposes are the TELRIC rates that the Commission, in its Second Interim Order, "Investigation into forward looking cost studies and rates of Ameritech Illinois for interconnection, network elements, transport and termination of traffic," ICC Docket Nos. 96-0486/96-0569 (consol.) (February 17, 1998) ("*TELRIC Order*"), directed AT&T Illinois to develop. (*Id*. at 13)

These rates were reviewed and finalized by the Commission in its Order, "Illinois Commerce Commission On Its Own Motion: Investigation into the compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/0569 Consolidated regarding the filing of tariffs and the accompanying cost studies for interconnection, unbundled network elements and local transport and termination and regarding end to end bundling issues," ICC Docket No. 98-0396 (October 16, 2001) ("*TELRIC II Order*"); and its Order on Rehearing, "Illinois Commerce Commission On Its Own Motion: Investigation into the compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/0569 Consolidated regarding the filing of tariffs and the accompanying cost studies for interconnection, unbundled network elements and local transport and

termination and regarding end to end bundling issues," ICC Docket No. 98-0396 (April 30, 2002). The rates are currently included in AT&T Illinois' tariffs. (Staff IB at 13-14)

The rate Big River proposes is purportedly "the arbitrated transit rate in between the parties in Missouri." (Staff IB at 14, citing Big River Response at 3) Other than this representation, Staff argues, Big River provides no support for its proposed rate. Big River does not explain whether the rate it proposes is cost based or what cost methodology if any was used to develop the rate; nor does it provide cost support of any description for its proposed rate. Big River provides no evidence, apart from an assertion of such in its petition, that its proposed rate was adopted through arbitration in Missouri. Nor does Big River explain why it was adopted by the arbitrator.

Big River's witness in this proceeding, Mr. Howe, makes no mention of Big River's proposed transit rates in his direct testimony. While he does discuss transit rates in his rebuttal testimony, it is only to collaterally attack the TELRIC rates developed under the direction and scrutiny of this Commission throughout the course of several proceedings. Absent from any of Mr. Howe's testimony is any cost support for the rate proposed by Big River. (Staff IB at 14-15)

In his rebuttal testimony, Mr. Howe advances several arguments in support of his contention that AT&T's tariffed rates should not be used. These arguments are unavailing, in Staff's opinion.

As an initial matter, Staff asserts, Mr. Howe makes no reference to transit rates in his direct testimony. (Staff IB at 15) Furthermore, while Big River proposed a transit rate in its Response to the Petition and in its proposed contract language, it provided no cost support at all for its proposed rates, other than Mr. Howe's unsupported assertion that the rate Big River proposes reflects cost savings resulting from the acquisition of Ameritech by SBC. (Staff IB at 15)

AT&T Illinois witness Mr. McPhee, however, demonstrated that the rate proposed by Big River was developed before Ameritech was acquired by SBC. (*Id*., citing AT&T Ex. 1.1 at 3) Also, the rates proposed by Mr. Howe are older than the Commission-approved tariffed AT&T rates that he criticizes for obsolescence. (Staff IB at 15, citing AT&T Ex. 1.1 at 3, noting that Big River's proposed rate was set by order of the Missouri PUC dated December 17, 1997; and *TELRIC II Order* issued October 16, 2001) Further, Mr. McPhee states that "no cost of service evidence of any kind [was] presented in [the Missouri] case by any party." (AT&T Illinois Ex. 1.1 at 3)

The other arguments advanced by Mr. Howe seeking to demonstrate that the Commission should adopt the rate proposed by Big River over those proposed by AT&T Illinois are presumably intended to demonstrate that AT&T Illinois' existing tariffed transit rates are defective. Staff argues, "As with his inability to support the Big River rate, Mr. Howe's attempts to identify defects with AT&T Illinois' existing rates do not, in fact, prove any defects." (Staff IB at 16)

Mr. Howe first argues that the rates contained in the AT&T Illinois transit tariff are inconsistent with the cost study provided by AT&T Illinois in response to a Staff data request. (Big River Ex. 2 at 10-11) In an attempt to support this assertion, Mr. Howe provides a table which compares each of the transit rates with the companion rate element. Mr. Howe, however, fails to include shared and common costs that are, pursuant to FCC rules, added to TELRIC costs in order to produce rates. (Staff IB at 16, citing See 47 C.F.R. Sec. 505(a)(1)-(2) (rate charged for a UNE includes TELRIC cost of the UNE plus a reasonable allocation of common costs)) When shared and common costs are added to the TELRIC costs upon which Mr. Howe relies, Staff states, the result is the tariffed rates filed by AT&T Illinois. (Staff IB at 16, citing AT&T Cross Ex. 6 (Conf.); Tr. at 116-121; 166)

Mr. Howe next argues that AT&T filed the transit rates in such a way that they somehow were not subjected to proper Commission review and oversight. However, the record in the TELRIC II proceeding demonstrates that both the Commission and Staff reviewed the cost studies supporting transit rates with care. The TELRIC II proceeding was a compliance docket opened for the purposes of whether AT&T Illinois developed certain TELRIC rates in compliance with the *TELRIC Order* and TELRIC principles. In fact, transit rates were among the rates at issue in the TELRIC II proceeding. (Staff IB at 17, citing *TELRIC II Order* at 52-53) Further, in the *TELRIC II Order*, the Commission noted that Staff had reviewed, and identified certain defects in, the transit rates developed pursuant to the TELRIC docket. Staff claims Mr. Howe's assertions regarding the failure of the Staff or the Commission to properly review AT&T Illinois' transit rates are simply incorrect. (Staff IB at 17)

Finally, Mr. Howe argues that the cost study does not capture changes in AT&T Illinois operations after its existing transit rates were developed, and that changes in transit traffic volumes subsequent to SBC's acquisition of Ameritech would cause AT&T Illinois' costs to differ from those relied on to develop the existing rates. (Big River Ex. 2 at 11, 15-17)

According to Staff, Mr. Howe offers no evidence that the rate proposed by Big River better reflects these purported developments than the AT&T tariffed rate, or indeed reflects them at all. With respect to traffic volumes, Mr. Howe offers no evidence as to what transit volumes, if any, Big River's proposed rate is based upon. As noted above, the record is clear that Big River's proposed rate also fails to account for the cost effect of the acquisition by SBC of Ameritech, since Big River's proposed rates are actually close to two years older than the Commission-approved tariffed rates. (Staff IB at 17-18)

In its reply brief, Staff takes issue with assertions in Big River's brief that the network functionality involved in completing a transit call is identical to that required to complete local tandem calls. (Staff RB at 9-10) In Staff's view, Big River's argument ignores certain differences and the costs associated therewith.

Staff also takes exception to Big River's criticism of AT&T Illinois' tariffed transit rates as "derived from a cost study based on data from Ohio." (Staff RB at 8-10) The AT&T Illinois cost study was used, Staff asserts, after undergoing a significant number of Commission-ordered changes in no fewer that three Orders. Further, Staff argues, what evidence is directly included within the cost study suggests that the inclusion of data from Ohio in an Illinois cost study is for Illinois-specific work performed in Ohio and, thus, entirely appropriate to include in an study designed to measure the costs of providing service in Illinois. In Staff's view, "Big River does not make clear why a Missouri rate, supported by no cost data or cost study whatever, … should be preferred to a rate developed under careful Commission oversight, using Illinois TELRICs that include – quite properly – a modicum of Ohio data." (Staff RB at 9-10)

The Commission, Staff states, is offered two choices here. The first is to adopt a rate based on Illinois-specific TELRIC studies that it and the Staff have thoroughly reviewed in several contested proceedings. The second is to adopt a rate from another state, supported by no cost information. In Staff's view, the Commission should follow the former course. (Staff IB at 18)

4. Exceptions and Replies

In its BOE, Big River argues, for the first time, that pursuant to Section 13-801(b)(2), the "transit rates recommended by Big River [should be] accepted on an interim basis until AT&T Illinois has established cost based rates pursuant to Section 13-801(g)." (Big River BOE at 7)

In their RBOEs, AT&T Illinois and Staff contend that this new position, advanced for the first time in Big River's BOE, should be rejected as untimely. The Commission agrees that in the context of an arbitration proceeding, this new position was not raised in a timely manner, and Big River offers no explanation for waiting until its BOE to present it.

The Commission's findings on the appropriateness of the transit rates proposed by AT&T Illinois compared to those proposed by Big River, and cost components thereof, are contained in Section V.D below.

C. Issue No. 5: If the Commission requires the inclusion of transit in the ICA, what are the appropriate terms and conditions for transit traffic?

AT&T Illinois' position is that its language reflects the same terms and conditions as provided in AT&T's standard commercial transit agreement, and should be incorporated into the ICA. (AT&T IB at 27-30)

Big River's recommends, among other things, that the Commission adopt Big River's language because AT&T Illinois would require direct interconnection if Big River's transit traffic exceeds 24 or more trunks. (Big River IB at 16)

Staff's recommendation is that AT&T Illinois' position be adopted.

1. AT&T Illinois' Position

AT&T Illinois proposes that the terms and conditions for transit service be included in a separate "Transit Traffic Service Attachment" to the ICA. The language proposed by AT&T Illinois for that attachment is set forth in AT&T Illinois Exhibit 1.0, Schedule JSM-4. AT&T's proposed language addresses a number of issues, such as where AT&T Illinois offers its transit traffic service, the types of traffic AT&T Illinois transits, the rates that apply, and how transit rates will be imposed on the originating carrier. There also are terms addressing the need for all parties in a transit arrangement to send and deliver accurate and complete information to facilitate billing between the originating and terminating carriers. (AT&T IB at 27; AT&T Ex. 1.0 at 36)

By comparison, AT&T Illinois asserts, Big River's proposed transit terms, which it proposes to include in sections 2.31 and 6.14 of the ICA's Interconnection Attachment, consists in its entirety of two sentences. One sentence provides a definition for "Transit Traffic," and the other states only that a party providing transit service under the ICA will charge the originating party the applicable transit rate for "Local Traffic, as defined in Section 2.3.1," but which is not defined by that section or anywhere else in the ICA. In contrast to AT&T Illinois' proposal, Big River's proposed language comes nowhere close to providing the detail that is necessary to govern one party's provision of transit service to another. (AT&T IB at 27; AT&T Ex. 1.0 at 37-38)

For example, Big River's proposed language is silent as to financial obligations between the call originator and call terminator. This contractual gap may be incorrectly construed by Big River to mean that AT&T Illinois is the default payor on transit traffic it sends to Big River, thereby allowing Big River to bill AT&T Illinois for call origination (reciprocal compensation) rather than the carrier that actually originated the call. By comparison, AT&T's proposed language for transit addresses intercarrier compensation payment obligations when Big River originates traffic that transits AT&T Illinois' network and is terminated to a third party carrier (Section 4.0), as well as when Big River terminates traffic originated by a third party carrier that is transited by AT&T Illinois (Section 5.0). (AT&T Ex. 1.0 at 36)

Similarly, AT&T Illinois complains, Big River's proposal contains no terms governing the ordering, provisioning and servicing of trunking pertaining to transit service. Without such terms, the parties would have no way to track and treat transit traffic. Section 6.0 of AT&T's proposed transit language addresses that subject. (AT&T IB at 28; AT&T Ex. 1.0 at 36-37)

In its Response to the Petition for Arbitration and in its direct testimony, Big River did not address the issue of what terms and conditions should apply to transit traffic. It neither supported its own two-sentence proposal nor offered any criticism of the terms

and conditions proposed by AT&T Illinois. Accordingly, AT&T argues, there is no basis for the Commission to do anything but approve AT&T Illinois' proposals. (AT&T IB at 28)

In his rebuttal testimony, Mr. Howe, for the first time in this proceeding, took issue with Section 7.0 of AT&T Illinois' proposed transit terms and conditions, which provides that when the transit traffic originated by Big River requires 24 or more trunks, Big River shall, upon 60 days written notice from AT&T Illinois, establish a direct trunk group or alternative transit arrangement between itself and the third party terminating carrier. (Big River Ex. 2.0 at 18) By waiting until its rebuttal testimony to argue against this provision, AT&T Illinois argues, Big River violated Section 761.110(e) of the Commission's arbitration rules, which required Big River to provide evidence supporting its position on the disputed issues as part of its direct testimony. (AT&T IB at 28-29, citing 83 Ill. Adm. Code 761.110) For this reason alone, AT&T Illinois submits, Mr. Howe's argument about the 24 trunk provision should be disregarded.

Moreover, Mr. McPhee testified, in his direct testimony, that the 24 trunk limitation provides a reasonable limit on the obligation of AT&T Illinois to transit traffic originated by Big River. Once that limit is reached, the two carriers that use AT&T's transit service to exchange traffic should have enough traffic to warrant a direct interconnection with one another. (AT&T IB at 29, citing AT&T Ex. 1.0 at 37) Mr. McPhee said "this provision allows AT&T Illinois to effectively manage its network in order to offer transit services to all CLECs and CMRS providers as an alternative to directly interconnecting with smaller carriers." (AT&T Ex. 1.0 at 37) Mr. McPhee's testimony in this regard was unrebutted.

Furthermore, AT&T Illinois argues, the same 24 trunk limitation proposed by AT&T Illinois in this case is already included in the parties' currently effective ICA. (Tr. 138-139) That provision was approved by the Commission in the arbitration that resulted in the AT&T Illinois/MCI ICA that Big River adopted as its own. (AT&T IB at 29-30, citing *Order*, Docket 04-0469 at 120, 124 (Nov. 30, 2004)) AT&T Illinois adds, "A similar provision is included in AT&T Illinois' transit service tariff. (Staff Cross-Exam Ex. 1, Ill.C.C. No. 22, Part 23, Section 2, 1st Revised Sheet 23, Section 4.2(H) ('If the traffic volumes between a carrier and any third party central office switch at any time exceeds the CCS busy hour equivalent for one (1) DS1 (500 ccs), the parties shall, within sixty (60) days after such occurrence, establish new direct trunk groups to the applicable end office(s)')." (AT&T IB at 29-30) A similar provision was approved in the Virginia Arbitration Order, where the FCC's Wireline Competition Bureau found that "Verizon's proposed 60-day transition period is reasonable, providing AT&T Illinois adequate time to arrange to remove its transit traffic from Verizon's tandem switch once the traffic meets the DS-1 threshold." 17 FCC Rcd 27030, par. 115.

2. Big River's Position

The terms proposed by Big River in the DPL adequately cover the conditions for both parties to exchange transit traffic. (Big River IB at 16) In fact, Big River asserts, the terms outlined by Big River exceed the terms included in AT&T Illinois' Tariff No. 22.

Further, AT&T Illinois attempts to impose limitations on Big River's use of transiting by forcing Big River to connect directly to third party carriers when traffic to any individual carrier exceeds 24 or more trunks.

In Big River's view, "This condition is i) not supported by any facts, ii) in the event Big River does exceed the 24 trunk limit, it imposes no requirement on AT&T Illinois beyond that which it is legally required to provide, and iii) is also inconsistent with the conditions it provides pursuant to its Tariff No. 22." (*Id*. at 16)

3. Staff's Position

Staff recommends that the Commission adopt AT&T Illinois' proposed language to resolve Issue 5. Of the two parties' proposed terms and conditions for transit service, AT&T Illinois' proposed terms and conditions are, according to Dr. Zolnierek, more consistent with what AT&T Illinois offers in the tariff and appropriately conform the tariffed offering with the terms and conditions of local exchange interconnection in the parties interconnection agreement. (Staff Ex. 1.0 at 23)

Staff responds to the contention of Big River witness Mr. Howe that AT&T Illinois' proposed terms and conditions exceed the terms for transit service included in AT&T Illinois tariff. (Staff IB at 19, citing Big River Ex. 2 at 18) Mr. Howe supports this statement by referring to AT&T Illinois' proposed language that imposes volume limits on transit traffic sent by Big River to AT&T Illinois. According to Staff, Mr. Howe fails to explain how this volume limitation is inconsistent with AT&T Illinois' transit tariff.

AT&T Illinois' tariff contains a traffic volume limitation of: "the CCS busy hour equivalent for one (1) DS1 (500 ccs)." (Staff IB at 19-20, citing Staff Cross Ex. 1 (ILL. C.C. No. 22, Part 23, Section 2, 1st Revised Sheet 23, Section 4.2H) Big River's proposed language provides for no volume limitation. AT&T Illinois' proposed language provides for a limitation of "twenty-four (24) or more trunks," which is the volume equivalent of a DS1. (Petition, Ex. B at 5; AT&T Illinois Proposed Contract Provision, Issue 5) AT&T Illinois' language, which provides for a limitation that is comparable to that found in the tariff, is more consistent with the tariff than is Big River's proposed language, which omits the tariffed transit volume limitation altogether. Mr. Howe's unsupported criticism is, thus, incorrect and should be rejected, in Staff's view. (Staff IB at 20)

4. Exceptions and Replies

As in the other exceptions in its BOE, Big River advances a new position based on Section 13-801(b)(2), that the Commission should find "that the terms and conditions for transit service shall be the same as those included in the ICA between Big River and AT&T Missouri." (Big River BOE at 8)

In their RBOEs, AT&T Illinois and Staff contend that this new position, which was advanced for the first time in Big River's BOE and involves conditions not of record,

should be rejected as untimely. (Staff RBOE at 7; ATT RBOE at 5-6) The Commission agrees that in the context of an arbitration proceeding, this new position was not raised in a timely manner, and Big River offers no explanation for waiting until its BOE to present it. Further, Big River relies on terms and conditions not in evidence.

Staff and AT&T Illinois further argue, and the Commission agrees, that imposing obligations on AT&T Illinois which exceed federal interconnection requirements (as Big River's new proposal would do) would not be required under Section 13-801, since AT&T Illinois is no longer subject to regulation under an alternative regulation plan pursuant to Section 13‑506.1.

D. Analysis of and Conclusions on Transit Traffic Service Issues

Issues 3, 4 and 5 concern transit traffic service. These issues were identified in the petition as follows.

> Issue 3: Should AT&T be required to provide transit traffic service under the ICA?
>
> Issue 4: If the Commission requires the inclusion of transit in the ICA, what are the appropriate rates that AT&T should charge for such service?
>
> Issue 5: If the Commission requires the inclusion of transit in the ICA, what are the appropriate terms and conditions for transit traffic?

The positions of the parties on these issues are summarized at some length above and will not be repeated in detail in this section of the order. Positions raised in Big River's BOE are addressed above in the "Exceptions and Replies" section for each issue, and are not further discussed below.

Issue No. 3: Should AT&T be required to provide transit traffic service under the ICA?

AT&T Illinois describes transit traffic as telecommunications traffic "that originates on the network of Big River (or a third party), transits AT&T Illinois' network, and is terminated on the network of a third party (or Big River)." The service that AT&T Illinois provides with respect to such traffic, namely the routing and transmission of the traffic from Big River to the third party or vice versa, is called transit service. (AT&T Initial Brief at 16)

AT&T Illinois' position is that transit traffic service is not required by Section 251 of the 1996 Act and, therefore, is not a service that AT&T Illinois can be required to provide pursuant to an interconnection agreement negotiated and arbitrated pursuant to Section 252 of the 1996 Act. (AT&T IB at 18) Nonetheless, AT&T Illinois has agreed to include transiting service in a separate Transiting Appendix to the ICA with Big River,

provided that the rates, terms and conditions which have been proposed by AT&T Illinois in connection with Arbitration Issues 4 and 5 are adopted.

Big River's position is that transit traffic service should be included in the ICA because it is integral to AT&T Illinois' duty to interconnect. (Big River IB at 11) AT&T Illinois' "agreement" to include transiting service in the ICA is not acceptable to Big River because such an agreement is subject to conditions that are unacceptable to Big River. (Big River RB at 5)

Staff's position is that the Commission need not reach this issue, since AT&T Illinois has agreed to provide transit services to Big River. (Staff IB at 12)

The Commission has reviewed the positions of the parties on transit traffic issues. The Commission observes that the rates, terms and conditions for transit traffic as proposed by AT&T Illinois, and supported by Staff, are approved below in the conclusions on issues 4 and 5. The Commission finds that AT&T Illinois shall offer transit services in its ICA with Big River, subject to those rates, terms and conditions.

Issue No. 4: If the Commission requires the inclusion of transit in the ICA, what are the appropriate rates that AT&T Illinois should charge for such service?

AT&T Illinois' position is that the transit rates included in the ICA should be the rates in AT&T's Commission-approved tariff, identified above.

Big River's position is that the Commission should adopt the rate used by the parties under their ICA in Missouri because AT&T Illinois uses a rate that is outdated and unreasonable.

Staff's position is that AT&T Illinois' proposed rates have been approved by the Commission and should be adopted in this proceeding.

Having reviewed the record, the Commission agrees with Staff and AT&T Illinois that the transit rates proposed by AT&T Illinois are preferable to those proposed by Big River. As explained by Dr. Zolnierek, the AT&T Illinois rates were developed based upon AT&T Illinois' cost of providing service in Illinois, while those proposed by Big River were not. (Staff Ex. 1.0 at 22)

Although Big River criticizes the rates proposed by AT&T Illinois as outdated, AT&T Illinois and Staff point out that the rates proposed by Big River are even older and are not supported by cost data.

Further, to the extent Big River is contending that the AT&T Illinois rate is based on data from Ohio, that argument has been refuted by AT&T Illinois and Staff, as summarized above.

Big River also argued that the rates in the AT&T Illinois transit tariff are inconsistent with the cost study provided by AT&T Illinois. As pointed out by Staff and AT&T Illinois, however, when appropriate cost elements omitted in the Big River comparison are included, the resulting rates are consistent with the tariffed rates filed by AT&T Illinois.

In conclusion, the Commission finds that the transit rates recommended by AT&T Illinois and Staff are reasonable and should be adopted.

Issue No. 5: If the Commission requires the inclusion of transit in the ICA, what are the appropriate terms and conditions for transit traffic?

AT&T Illinois' position is that its language reflects the same terms and conditions as provided in AT&T Illinois' standard commercial transit agreement, and should be incorporated into the ICA. (AT&T IB at 27-30) AT&T Illinois notes that Big River first expressed its objection to the 24-trunk limit in its response to Staff testimony, even though the Staff witness did not discuss this issue.

Big River's position is that the Commission should adopt its language because AT&T Illinois would require direct interconnection if Big River's transit traffic exceeds 24 or more trunks. (Big River IB at 16)

Staff's recommendation is that AT&T Illinois' position should be adopted. AT&T Illinois' proposed terms and conditions for transit service are, according to Dr. Zolnierek, more consistent with what AT&T Illinois offers in the tariff and appropriately conform the tariffed offering with the terms and conditions of local exchange interconnection in the parties' interconnection agreement.

The Commission has reviewed the record on this issue. Of the two competing proposals, the Commission finds that the AT&T Illinois language is more complete. As asserted by Staff, it is also more consistent with what is offered in the tariff, and it conforms the tariffed offering to the terms and conditions of local exchange interconnection in the parties' ICA.

Regarding the 24-trunk limitation, AT&T Illinois witness Mr. McPhee testified that once this limit is reached, the two carriers that use AT&T's transit service to exchange traffic should have enough traffic to warrant a direct interconnection with one another. He said this provision allows AT&T Illinois to effectively manage its network in order to offer transit services to all CLECs and CMRS providers as an alternative to directly interconnecting with smaller carriers. (AT&T Ex. 1.0 at 37) Based on the evidence presented, the Commission finds that the 24-trunk limitation provides a more reasonable limit on the obligation of AT&T Illinois to transit traffic originated by Big River than would no limit at all.

VI. ARBITRATION STANDARDS

Under Section 252(c) of the Federal Act, the Commission is required to resolve open issues, and impose conditions upon the parties, in a manner that comports with three standards. The Commission finds that the analysis in this arbitration decision satisfies that requirement.

First, Section 252(c)(1) directs the state commissions to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." In this arbitration, the Commission hereby directs the parties to include provisions in their interconnection agreement that fully comport with Section 251 requirements and FCC regulations.

Second, Section 252(c)(2) requires that the Commission "establish any rates for interconnection, services or network elements according to subsection [252(d)]." Here, most of the pertinent rates were already established by the parties through mutual agreement. Insofar as the Commission's resolution of open issues affects rates in the parties' interconnection agreement, the Commission requires, and expects the parties to establish, rates that are in accord with Section 252(d) of the Federal Act.

Third, pursuant to Section 252(c)(3), the Commission must "provide a schedule for implementation of the terms and conditions by the parties to the agreement." Accordingly, the Commission directs that the parties file, within 14 calendar days of the date of service of this arbitration decision, their complete interconnection agreement for Commission approval pursuant to Section 252(e) of the Federal Act.

VII. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having reviewed the record, is of the opinion and finds that:

(1) the Commission has jurisdiction over the parties and the subject matter of this proceeding;

(2) the determinations made and conclusions reached in the prefatory portion of this decision are supported by the record and are hereby adopted as findings, and the arbitration issues are resolved accordingly.

IT IS THEREFORE ORDERED by the Commission that the arbitration issues before the Commission in this proceeding are resolved in accordance with the determinations made and conclusions reached above.

IT IS FURTHER ORDERED that this arbitration decision is final.

By decision of the Commission this 14th day of June, 2011.

(SIGNED) DOUGLAS P. SCOTT

Chairman