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0000023658

July 19, 2005

Via UPS Overnight Delivery
Arizona Corporation Commission
Docket Control
1200 West Washington
Phoenix, AZ 85007

Re: ***Docket No.*** T-03632A-04-0425
T-01051B-04-0425

Dear Sir/Madam:

Enclosed please find the original and 15 copies of Covad's Notice of Supplemental Authority in the above referenced docket. The appropriate cover sheet is also enclosed.

Please feel free to contact me if you have any questions.

Very truly yours,

Lynn Hankins

Lynn Hankins

Encls.

cc: Service list (*w/encls.*)

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BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
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Commissioner

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IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS, INC., D/B/A COVAD COMMUNICATIONS COMPANY, FOR ARBITRATION TO RESOLVE ISSUES RELATING TO AN INTER-CONNECTION AGREEMENT WITH QWEST CORPORATION	)	Docket No. T-03632A-04-0425 T-01051B-04-0425

COVAD'S NOTICE OF SUPPLEMENTAL AUTHORITY

Dieca Communications, Inc. d/b/a Covad Communications Company ("Covad") provides this notice of supplement authority:

1. On July 11, 2005, the Missouri Public Service Commission entered an arbitration order regarding the arbitration of an interconnection agreement for SBC pursuant to section 251 of the Telecommunications Act of 1996. *Southwestern Bell Telephone d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement*, Case No. TO-2005-0336, Arbitration Order, (July 11, 2005) (A copy of this order is attached as Exhibit 1).

2. In this order, the Missouri Commission held that Section 271 elements must be included within SBC's interconnection agreement. *Id*, p. 28 – 30. The Commission concluded that, "Unless an interim rate is established and CLECs can actually purchase § 271 UNEs out of their ICAs [interconnection agreements], SBC's obligation to offer § 271 UNEs under the M2A successor agreements [interconnection agreements] will be illusory." *Id.,* p. 30 (emphasis added). The Missouri Commission then in fact set interim rates for Section 271 elements. *Id.*

3. This decision is consistent with and supports Covad's argument in its petition for arbitration and supporting briefs that the Arizona Corporation Commission does have authority to require Qwest to include Section 271 elements within the parties' interconnection agreement in the context of a section 251 arbitration. Moreover, the decision also supports the Commission's authority to set rates for such elements.

RESPECTFULLY SUBMITTED,

Dated: July 18, 2005

Dieca Communications, Inc.

By: _____

Gregory Diamond
Senior Corporate Counsel
Covad Communications Company
7901 Lowry Boulevard
Denver, CO 80230
(720) 670-1069
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of **COVAD'S NOTICE OF SUPPLEMENTAL AUTHORITY** was electronically mailed this 19th day of July, 2005, to the following:

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EXHIBIT 1

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

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

ARBITRATION ORDER

Issue Date: **July 11, 1005**

Effective Date: **July 11, 2005**

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

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

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ADAM KUPETSKY, Regulatory Counsel, WilTel Local Network, L.L.C., One Technology Center TC-15H, Tulsa, Oklahoma 74103, for WilTel Local Network, L.L.C.

REGULATORY LAW JUDGE: **Kevin A. Thompson, Deputy Chief.**

Arbitration Advisory Staff:

Natelle Dietrich, Regulatory Economist III, Utility Operations Division, Missouri Public Service Commission.

Mick Johnson, Utility Operations Technical Specialist II, Utility Operations Division, Missouri Public Service Commission.

Adam McKinnie, Regulatory Economist II, Utility Operations Division, Missouri Public Service Commission.

Mike Scheperle, Regulatory Economist II, Utility Operations Division, Missouri Public Service Commission.

Nathan Williams, Senior Counsel, Office of the General Counsel, Missouri Public Service Commission.

ARBITRATION ORDER

Procedural History

Petition for Arbitration:

This arbitration commenced on March 30, 2005, when Southwestern Bell Telephone, L.P., doing business as SBC Missouri, filed its Petition for Arbitration with the Commission pursuant to Section 4.2 of the M2A, Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code ("the Act"), and Commission Rule 4 CSR 240-36.040. SBC's petition asked the Commission to arbitrate unresolved issues in the negotiation of interconnection agreements ("ICAs") between SBC and various competitive local exchange carriers ("CLECs") to replace the M2A, the generally-available interconnection agreement approved by the Commission on March 15, 2001, in conjunction with its recommendation to the

United States Federal Communications Commission ("FCC") that SBC be approved to provide in-region long distance service in Missouri pursuant to Section 271 of the Act.[1]

The procedural history of this case up to the filing of the Arbitrator's Final Report are set out in that report and need not be repeated here.

The Arbitrator's Final Report:

Due to the shortened schedule for this arbitration, the Arbitrator did not issue a Draft Report as called for by Rule 4 CSR 240-36.040(19). Instead, the Arbitrator filed his Final Arbitration Report of some 2,075 pages on June 21.[2] The report included the Decision Points ("DPs") formulated by the parties, grouped topically so far as possible, a discussion of pertinent points on each DP and a decision. The report also included both summary and detailed matrices showing the proposed contractual language selected for inclusion in each ICA.

The Parties' Comments:

The parties filed comments on the Final Arbitrator's Order on June 24. Rule 4 CSR 240-36.040(20) concerns the parties' comments on the draft arbitration report. In the present case, there was no draft arbitration report and the parties filed comments on the Final Arbitration Report instead. Rule 4 CSR 240-36.040(20) states:

> Each party and any member of the public may file comments on the arbitrator's draft report within ten (10) days after it is filed with the commission. Such comments shall not exceed twenty (20) pages, unless otherwise authorized by the arbitrator, and shall be directed to perceived

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[1] In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, Case No. TO-99-227, (Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A), issued March 15, 2001).

[2] The Arbitrator issued his Final Arbitration Report on the 26th day following the end of the hearing and on the 15th day after the parties filed their Briefs.

> factual, legal or technical errors made in the draft report. Commenters shall make specific references to the record to support each claim of error. Comments that merely reargue positions taken in briefs will be accorded no weight. Reply comments, if permitted by the arbitrator, shall be limited to identifying misrepresentations of law, fact or condition of the record contained in comments.

Generally speaking, the parties' comments fell into certain categories. First, parties asserted that the Arbitrator had overlooked certain Decision Points ("DPs"), either by failing to provide a decision where the issue remained open or by providing a decision where the issue had been settled. Second, parties complained that certain of the Arbitrator's decisions were inconsistent, either because the Arbitrator's decision on one DP appeared to contradict his decision on another DP elsewhere in his report or because the selected contractual language appeared to be inconsistent with the Arbitrator's stated decision. In some cases, such inconsistencies appear to reflect the fact that none of the offered language was appropriate or desirable. Third, parties objected to various of the Arbitrator's decisions as being contrary to law. Fourth, parties objected to various of the Arbitrator's decisions as being a bad policy choice.

With respect to those DPs that the parties contend the Arbitrator should not have decided because they were already settled, the Commission points out that it need take no action because the parties are free, under the Act, to substitute their negotiated resolution for any decision of the Arbitrator. Therefore, the parties should simply file their ICA containing the language on which they mutually agree.

Oral Arguments:

The Commission heard oral arguments on June 29 and 30. Each party was permitted to argue affirmatively in support of its comments and in opposition to the comments filed by other parties.

The Commission's Decision:

Rule 4 CSR 240-36.040(24), "Commission's Decision," provides:

> The commission may conduct oral argument concerning comments on the arbitrator's final report and may conduct evidentiary hearings at its discretion. The commission shall make its decision resolving all of the unresolved issues no later than the two hundred seventieth day following the request for negotiation.[3] The commission may adopt, modify or reject the arbitrator's final report, in whole or in part.

In modifying the Final Arbitration Report, the Commission may, as necessary, "[adopt] a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the commission and the Federal Communications Commission pursuant to that section."[4]

Like the Arbitrator, the Commission must be guided by Section 252(c) of the Act, which provides:

> In resolving by arbitration under subsection (b) of this section 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 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

---

[3] The M2A provides that negotiations on successor ICAs must start by the 135th day prior to its expiration and, where negotiations are ongoing, that the M2A will remain in effect for 135 days following its expiration, making a total of 270 days.

[4] Rule 4 CSR 240-36.040(5)(E).

With respect to the public interest in the regulation of telecommunications, the Missouri General Assembly has provided an express statement of public policy to guide the Commission:[5]

> The provisions of this chapter shall be construed to:
>
> (1) Promote universally available and widely affordable telecommunications services;
>
> (2) Maintain and advance the efficiency and availability of telecommunications services;
>
> (3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;
>
> (4) Ensure that customers pay only reasonable charges for telecommunications service;
>
> (5) Permit flexible regulation of competitive telecom-munications companies and competitive telecommunications services;
>
> (6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;
>
> (7) Promote parity of urban and rural telecommunications services;
>
> (8) Promote economic, educational, health care and cultural enhancements; and
>
> (9) Protect consumer privacy.

The Role of the Arbitrator in the Ongoing Proceedings:

At the Oral Argument on June 29, a member of the Commission raised a question concerning the propriety of the participation of the Arbitrator in the second step of the two-step arbitration proceeding contemplated by the Commission's rule.[6] In the first step, the Arbitrator independently conducted proceedings that culminated in the Final Arbitrator's

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[5] Section 392.185, RSMo Supp. 2002.

[6] Tr. 1192.

Report. In the second step, the parties have addressed written comments and oral arguments to the Commission in an effort to modify portions of the Final Arbitrator's Report. Commissioner Gaw questioned whether it was appropriate for the Arbitrator to preside given the fact that it was his decision that was the subject of the parties' various objections.

The Arbitrator polled the parties on June 29, and none expressed any objection to his presiding at the Oral Argument.[7] However, SBC's counsel stated:

> MR. LANE: I certainly don't have any objection to your presiding. I think when the Commission goes to reach its decision, if it needs assistance from someone in the General Counsel's office, or more appropriately maybe in the Regulatory Law Judges' office, it would probably be better to at least have somebody else involved in that process. But I certainly don't have any objection to your presiding over this.
>
> * * *
>
> MR. LANE: And to clarify my remarks before we go on, I think our view of it is that the Commission's review here is de novo, and that's a critical factor, and that's where my comments go.[8]

The Commission's Arbitration Rule does not expressly address this point. However, it does provide that the Arbitrator shall merely produce a report to the Commission, as he has done here. This report is not a decision and will not become one, although it may be embodied by the Commission into its decision, in whole or in part. The Commission's proceedings on the Arbitrator's Report, consequently, are not in the nature of an appeal or review. It is, instead, an original proceeding.

For these reasons, the Commission concludes that there is no reason why the Arbitrator cannot participate in the Commission's proceedings.

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[7] *Id.*, at pp. 1192-1194.

[8] *Id.,* 1192-1193, 1194.

Further Proceedings:

The Procedural Schedule called for this Commission's Order to be issued by July 6, and provides for subsequent proceedings as follows:

Successor Interconnection Agreements All Parties	July 13, 2005 4:00 p.m.
Commission Approval of Successor Interconnection Agreements	July 19, 2005 4:00 p.m.

DECISION

The Missouri Public Service Commission hereby adopts the Final Arbitrator's Report as its decision on each unresolved issue, except as that Report is expressly modified below. The Final Arbitrator's Report is incorporated into this Order by reference.

DETAILED ANALYSIS OF COMMENTS

The Commission addresses only those comments here that, in its opinion, required some modification of the Arbitrator's Final Report. All other requested modifications have been considered and rejected.

A. AT&T's Comments:

1. Routine Network Modifications:

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

AT&T UNE Issue 18: How should routine network modifications be described in the ICA? Is SBC entitled to charge AT&T for routine network modifications?

Discussion:

AT&T contends that the Arbitrator erred in adopting SBC's proposed language limiting its obligation to perform routine network modifications to spare facilities and by also

including language in the UNE Attachment regarding ICB prices for routine network modifications. The Arbitrator found as follows:

> SBC Missouri may not limit "routine network modifications" to the attachment of electronics to DS1 Loops. SBC Missouri may recover the costs of such routine network maintenance through either recurring or nonrecurring rates. To the extent that it has an unbundling obligation under §251(c)(3), it must provide the service at TELRIC rates; to the extent that the obligation remains under §271, then the service must be provided at just and reasonable rates.[9]

AT&T states that the purported inconsistencies are found in the Detailed Matrix attached to the UNE section of the Arbitrator's Final Report, which indicates that the Arbitrator adopted SBC's proposed language for section 2.5, including the spare facilities language, as well as SBC's proposed ICB language in sections 4.8.7, 8.5.7.6 and 15.12.6. AT&T states that the Commission should (1) delete the word "spare" from section 2.5 of the language selected by the Arbitrator and (2) delete SBC's proposed language at sections 4.8.7, 8.5.7.6, and 15.12.6 of the UNE attachment.

Decision:

The Commission agrees with AT&T. The language AT&T objects to is indeed inconsistent with other parts of the Arbitrator's Report as AT&T has pointed out. The Commission therefore modifies the Report by deleting the word "spare" from section 2.5 of the language selected by the Arbitrator and deleting SBC's proposed language at sections 4.8.7, 8.5.7.6, and 15.12.6 of the UNE attachment.

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[9] Arbitrator's Report, Section III at p. 59.

2. Access to Digital Cross-connect System (DCS):

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

Discussion:

AT&T states that the Arbitrator erred by adopting SBC's language limiting access to DCS to that provided under SBC's federal tariff. The Arbitrator's Final Report on this issue simply stated that it had been discussed above. The attached Detailed Matrix adopted SBC's proposed language. AT&T asserts that the Arbitrator thereby erred because, to the extent that SBC still has an obligation to provide access to dedicated transport an on unbundled basis, SBC is also obligated to provide access to DCS as a UNE pursuant to § 251 of the Act. AT&T thus alleges an error of law.

AT&T contends that the continued availability of Dedicated Transport at cost-based rates is essential to competition in the local phone market. AT&T explains that DCS is a device that enables a CLEC to access and manage the digital signals of loop and transport facilities and may also provide multiplexing functions and test access capabilities. AT&T points to testimony showing that the DCS confers upon a carrier the significant abilities to groom facilities and optimize trunk and facility utilization.[10] AT&T argues that SBC should be obligated to provide access to DCS as a functionality that is part of the unbundled Dedicated Transport UNE.

SBC's position with respect to DCS is that there is no requirement that SBC Missouri provide access to DCS as a UNE since the FCC has found that DCS is required only with an entrance facility and both the *TRO* and *TRRO* clearly state that entrance facilities are not UNEs. According to SBC, the FCC requires only that DCS be offered: "in the same

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[10] Rhinehart Direct Testimony at p. 61.

manner that the incumbent LEC provides such functionality to interexchange carriers."[11] Since services are not offered to IXCs as UNEs, there is no rationale for SBC Missouri being required to provide the DCS to CLECs as UNEs either.[12]

Decision:

AT&T points out that the Arbitrator determined, elsewhere in his Report, as follows:

> The Arbitrator notes that the *TRO* and *TRRO* limited dedicated transport to facilities between ILEC offices, so DCS need not be provided as part of that UNE but rather on a wholesale basis as SBC suggests.[13]

Similarly, at page 6 of the Pricing Section of the Report, the Arbitrator found the following with regards to cross connects to DCS 4-Wire:

> SBC does not propose to include these services in the contract as they are not Section 251(c)(3) elements. Under the FCC rules, DCS is not a UNE; instead it is a special access functionality which is available under the special access tariff to CLECs and IXCs on an equal basis as required by the FCC rules. Decision: The Arbitrator agrees with SBC for the reasons stated above."[14]

The Commission concludes that the Arbitrator did not err.

3. Should the Temporary Rider contain language regarding the manner in which SBC converts delisted elements?

<u>AT&T Temporary Rider Issue 4b</u>: Should the Rider contain language regarding the manner in which SBC converts delisted elements?

Discussion:

AT&T states that, with regards to UNE Rider Issue 4, the Arbitrator adopted SBC's language in places and adopted AT&T's language in other places. AT&T comments on two sections of its proposed language that the Arbitrator rejected, as well as three related

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[11] With the First Report & Order 47 C.F.R. §51.319(d)(2)(iv) and again with the UNE Remand Order §51.319(d)(2)(D).

[12] Silver Direct, pp. 122-125; Smith Direct, pp. 32-34; Smith Rebuttal, pp. 12-14..

[13] Final Arbitrator's Report, Section IV Pricing, p. 15.

[14] *Id.*, p. 6.

sections of SBC's proposed contract language that the Arbitrator adopted, that are "arguably" inconsistent with other determinations the Arbitrator made.

First, the Arbitrator rejected AT&T's proposed sections 2.3.4.1 and 2.3.4.2 in their entirety. The language in section 2.3.4.1 would ensure that conversions from transitional elements would take place "in a seamless manner without any customer disruption or adverse effects to service quality." The language further provides that the parties will work together to develop a mutually agreeable conversion process. The end of AT&T's proposed section 2.3.4.1 provides that if the parties cannot agree on a mutually agreeable conversion process, the deadline for conversions is extended and SBC will continue to bill the transitional rates. The language in section 2.3.4.2 rejected by the Arbitrator is a companion to this language at the end of section 2.3.4.1, and provides that SBC may true-up to collect the difference between the transitional rates and the rates for the applicable alternative arrangement between the end of the transition period and the date the conversion requests are completed. Thus, AT&T's proposed section 2.3.4.2 ensures that SBC will be able to bill the full amount for post-transition services and will not suffer any monetary shortfall by being required to provide elements at the transitional rates past the end of the transitional period.

AT&T states that the language in section 2.3.4.1 and 2.3.4.2 is necessary to ensure that its customers are not negatively impacted by the conversion process. AT&T contends that it is also consistent with the principles behind the *TRRO,* in which the FCC, recognizing that the order was removing significant unbundling obligations that had formerly been placed on SBC, stressed the need for an orderly transition for competitive carriers and their customers from UNEs to alternative facilities or arrangements.

AT&T asserts that the Arbitrator also erred in adopting SBC's proposed language at sections 3.3, 3.3.1 and 3.3.2. The language in sections 3.3 and 3.3.2 is identical, and provides as follows:

> CLEC shall be fully liable to SBC Missouri to pay such pricing under the Agreement, including applicable terms and conditions setting forth interest and/or late payment charges for failure to comply with payment terms, notwithstanding anything to the contrary in the Agreement.

Section 3.3.1 is related, and provides:

> Regardless of the execution or effective date of this Rider or the underlying agreement, CLEC will be liable to pay the Transitional Pricing for Mass Market ULS Element(s) and Mass Market UNE-P, beginning March 11, 2005.

AT&T claims that the language adopted in these sections is potentially inconsistent with other language that the Arbitrator adopted, which provides:

> Regardless of the execution or effective date of this Rider or the underlying Agreement, CLEC agrees that the Transitional Pricing for all Affected Loop-Transport Element(s), shall apply beginning March 11, 2005, SBC Missouri will not bill AT&T for such rates, nor shall the difference in the Transitional Prices be due, prior to the execution of this rider.

In making this determination, the Arbitrator rejected SBC's proposed section 2.3.1, which is analogous to SBC's section 3.3.1, which the Arbitrator adopted.

AT&T states that the net effect of the Arbitrator's decision on sections 2.3.1, 3.3, 3.3.1 and 3.3.2 is that for Transitional Loop-Transport elements, although AT&T agrees to pay the transitional pricing for loop transport elements beginning March 11, 2005, SBC is not allowed to bill for the transitional rates until after the Rider has been executed. Because SBC cannot bill until after execution of the Rider, late charges and interest cannot apply until after that date. However, for transitional switching elements and UNE-P, AT&T is liable for the transitional rates beginning March 11, 2005, and SBC is entitled to impose late payment charges and interest beginning on that date. These conflicting results should

be reconciled by adoption of AT&T's sections 3.3 and 3.3.1 and rejection of SBC Missouri's sections 3.3, 3.3.1 and 3.3.2.

Decision:

First, with respect to AT&T's comments regarding sections 2.3.4.1 and 2.3.4.2, the Commission finds that AT&T's assertion of error is that the Arbitrator has made a bad policy choice. That assertion of error is not within the scope permitted by Rule 4 CSR 240-36.040(20) and will be disregarded.

Second, with respect to AT&T's argument that its sections 3.3 and 3.3.1 should be adopted in place of SBC Missouri's sections 3.3, 3.3.1 and 3.3.2 in order to avoid an "arguable" inconsistency, the Commission finds that the provisions in question are indeed inconsistent. The Commission will modify the Report to provide that, regardless of the date of execution of the Rider or the date when SBC may bill, AT&T shall be liable for the transitional rates beginning March 11, 2005, and SBC shall be entitled to impose late payment charges and interest beginning on that date. SBC's proposed section 3.3.1 is adopted in place of AT&T's proposed section 2.3.1.

4. DCS Pricing:

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

AT&T Pricing Issue 3: Should DCS rates be included in the ICA or should the ICA reference SBC's federal tariff for these rates?

Discussion:

AT&T states that the Arbitrator erred in determining that rates for DCS and DCS cross-connects need not be included in the ICA. AT&T explains that these issues are related to AT&T UNE Issue 20. AT&T states that, if the Commission reconsiders the

Arbitrator's determination on AT&T UNE Issue 20, then pricing for DCS and related cross-connects should be included in the Schedule of Prices.

Decision:

The Commission finds that the Arbitrator did not err in his decision with respect to AT&T UNE Issue 20. For this reason, pricing for DCS and related cross-connects need not be included in the Schedule of Prices.

5. Voice Grade Dedicated Transport Cross-Connects:

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

Discussion:

AT&T states that the Arbitrator erred in determining that rates for voice grade dedicated transport cross-connects need not be included in the ICA. The Arbitrator noted in Pricing Issue 1 that "SBC proposes no prices as the provision of these cross connects is not subject to Section 251(c)(3) as no finding of impairment has ever been made by the FCC on voice grade dedicated transport. Decision: The Arbitrator agrees with SBC for the reasons stated above." This finding, however, is inconsistent with the Arbitrator's finding on Pricing Issue 5, regarding whether rates for voice grade/DS0 dedicated transport should be included in the ICA. The Arbitrator, at page 17 of the Pricing Section of the Report, agreed with AT&T that rates for voice grade dedicated transport should be included. That finding is consistent with his ruling on a related UNE Issue. Given that the Arbitrator has determined that voice grade dedicated transport is a UNE, and that rates for it should remain in the ICA, AT&T argues that the Commission should reverse the inconsistent determination that voice grade dedicated transport cross-connects are not available under the ICA. Voice grade dedicated transport is of little utility without corresponding cross-connects.

Decision:

The Commission concurs with AT&T. Because the Arbitrator determined that voice grade dedicated transport is a UNE and that rates for it should remain in the ICA, it follows that the ICA must also include rates for voice grade dedicated transport cross-connects. The Final Arbitrator's Report is modified in this respect. The parties shall incorporate the language proposed by AT&T in their ICA.

6. SBC's Section 6.1:

<u>AT&T NIA Issue 10</u>: Should interconnection trunks carry all 251(b)(5) traffic, including ISP bound and transit traffic, as well as intraLATA exchange traffic?

Discussion:

AT&T states that the Arbitrator erred by adopting only a part of SBC's proposed language that was found to be consistent with the Report. For this particular issue, as it does for other Network issues, the Arbitrator's Report points to the Commission's recently adopted Enhanced Record Exchange rules in 4 CSR 240-29.10 *et seq*. AT&T asserts that those rules cannot be applied in circumstances where they conflict with the Act. The Detailed Decision Matrix indicates that all of AT&T's proposed language for this issue is consistent with the Arbitrator's Report. The Matrix, however, also indicates that SBC's proposed language for Attachment 11, Part C, § 6.0, is consistent with the Report, but goes on to state that SBC's proposed language for Attachment 11, Part C, § 6.1 is not consistent with the Report. It is unclear to AT&T why the Report considers § 6.1 to be inconsistent with the Report. AT&T states that it would be an error to include § 6.0 in the ICA without also including § 6.1.

AT&T states that §§ 6.0 and 6.1 are companion paragraphs that operate in a reciprocal fashion. Section 6.0 addresses AT&T's routing of traffic to SBC and § 6.1

addresses SBC's routing of traffic to AT&T and from AT&T's perspective they impose reciprocal obligations. AT&T does not object to the inclusion of SBC's language for § 6.0 as long as § 6.1 is also included, since it would be discriminatory against AT&T to only include § 6.0. Therefore, the Arbitrator's Report should be corrected to also find that § 6.1 should be included in the ICA. AT&T thus alleges an inconsistency.

Decision:

The Commission concurs with AT&T. The Arbitrator's Report is modified to provide that the parties' ICA shall also include SBC's § 6.1, as follows:

> SBC MISSOURI shall route Section 251(b)(5)/IntraLATA Toll Traffic destined for the AT&T Switch Center over a Local Interconnection Trunk Group from an SBC MISSOURI Local Tandem or when AT&T agrees to establish DEOTs over a direct end office Local Interconnection Trunk Group from an SBC MISSOURI End Office. SBC MISSOURI shall route Section 251(b)(5) Traffic and ISP–Bound Traffic destined for the AT&T Switch Center over a Local Only Trunk Group from an SBC MISSOURI Local Only Tandem Switch.

B. <u>Charter Fiberlink's Comments</u>:

1. At what point must a CLEC establish additional POIs with a LATA?

<u>Charter NIM Issue 1</u>: (c) When CLEC selects a single POI, should this appendix contain language detailing the need for CLEC to establish additional POIs when CLEC reaches the appropriate threshold of traffic?

Discussion:

Charter states that the underlying issue here is the establishment of physical points of interconnection ("POIs") where Charter and SBC will physically link up their networks in order to exchange traffic.[15] The Arbitrator held – correctly, in Charter's view -- that CLECs

[15] The parties' competing contract language on this point is set out in the Charter-SBC NIM DPL, Issue No. 1(c) at pp. 2-3.

may establish a single, LATA-wide POI to exchange all traffic with SBC.[16] He also noted that, under 47 U.S.C. § 251(c)(2), interconnection must be "technically feasible."[17] Charter states that it follows that SBC may reasonably require an additional POI if SBC can show that it is technically infeasible to keep using the POI or POIs already in place.

Charter states that, given the Arbitrator's decision, it follows that Charter's proposed contract language is to be preferred. However, the Detailed Matrix attached to Section V of the Arbitrator's Final Report states that it is SBC's language that is more consistent with the Arbitrator's substantive rulings. Charter urges the Commission to correct this inconsistency.

Decision:

The Commission concurs with Charter that the Detailed Matrix is inconsistent with the Arbitrator's stated decision. The Arbitrator's Final Report is modified to state that the parties shall adopt Charter's proposed language.

C. <u>The CLEC Coalition's Comments</u>:

1. Maintenance and repair of commingled arrangements:

<u>CLEC Coalition UNE Issue 68</u>: (1) Should references to Commingled Elements be included in this Attachment? (2) Should the Attachment include an express obligation for SBC to conform with any performance metrics the Missouri Commission may order during the term of the Agreement?

Discussion:

The Coalition states that the Arbitrator approved the Coalition's proposed language in Sections 1.1 and 3.1, but apparently rejected it in Section 2.1. The Coalition states that this appears to be an inadvertent error that should be corrected in the Commission's order

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[16] *See* Final Arbitrator's Report at § V (Interconnection) at pp. 6 & 8, Case No. TO-2005-0336 (rel. June 21, 2005) (hereinafter *Final Arbitrator's Report*). *See also* In the Matter of Developing a Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking*, FCC 01-132 (released April 21, 2001) at ¶ 112 (footnote omitted) (an ILEC "must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA.")

[17] *See Final Arbitrator's Report* at § V (Interconnection) at p. 3.

through a clarification of the Final Arbitrator's Report affirming that the CLECs' proposed language is approved for Section 2.1.

Decision:

The language proposed by the Coalition is as follows (the underlined portions are those objected to by SBC):

> 2.1 SBC MISSOURI will provide maintenance for all Unbundled Network Elements Combinations and Commingled Elements ordered under this Agreement at levels equal to the maintenance provided by SBC MISSOURI in serving its end user customers, consistent with Attachment 6 UNE, Section 2.4.1, and will meet the requirements set forth in this Attachment. Such maintenance requirements will include, without limitation, those applicable to testing and network management. The maintenance to support these services will be provided in a manner which meets the performance metrics provided for in Attachment 17 or any MISSOURI Commission-ordered performance measures.

The language proposed by SBC and selected by the Arbitrator is as follows (the language in bold is that objected to by the Coalition):

> 2.1 SBC MISSOURI will provide maintenance for all **Lawful** Unbundled Network Elements **and Lawful** Combinations ordered under this Agreement at levels equal to the maintenance provided by SBC MISSOURI in serving its end user customers, consistent with Attachment 6 UNE, Section 2.4.1, and will meet the requirements set forth in this Attachment. Such maintenance requirements will include, without limitation, those applicable to testing and network management. The maintenance to support these services will be provided in a manner which meets the performance metrics provided for in Attachment 17

Having considered the foregoing, the Commission concurs with the Coalition. Its proposed language is consistent with the other decisions made by the Arbitrator and his rejection of it here seems to be an error. The Final Arbitrator's Report is hereby modified and the parties are directed to include the Coalition's proposed version of Section 2.1 in their ICA.

2. Billing for unbundled switching where billing is based on usage.

<u>CLEC Coalition UNE Issue 58</u>: Given the TRRO, should CLEC be allowed to purchase UNE switching in this ICA?

Discussion:

The Coalition explains that the Arbitrator concluded that SBC must provide the 271 checklist items of local switching, local loops and local transport in the parties' ICA, and the decisions in his Report regarding access to databases, AIN and other services associated with unbundled local switching are consistent with that determination. That is, the terms and conditions governing the provision of all the associated services that make CLECs' access to 271 unbundled local switching meaningful will be part of this agreement.

However, the Coalition states, in what appears to be an inadvertent error, the Final Arbitrator's Report rejects the Coalition's language set forth in Section 2.3 of the Appendix Pricing to UNE Attachment 6 that states how SBC will bill CLECs for such unbundled switching when the rates are based on minutes-of-use ("MOU"). The Arbitrator, through his resolution of CLEC Coalition UNE Issue 1, determined Coalition UNE Issue 58 in its favor as well. For this reason, the Coalition states that the disputed language shown below should be retained in the Appendix in order to provide complete terms for the billing of unbundled local switching:

> Where rates will be based on minutes of use (MOU), usage will be accumulated at the end office and are rounded to the next higher minute per monthly billing cycle. In the long term usage will be measured beginning when the facilities are seized (excluding network failures) and ending when the facilities are released. SBC MISSOURI is currently unable to measure busy/don't answer (by/da), but SBC MISSOURI intends to develop such capability. SBC MISSOURI will provide CLEC not less than 30 days notice when SBC MISSOURI begins to measure by/da. No related true up will occur.

The Coalition urges the Commission to correct this apparent error as a clarification to the Final Arbitrator's Report.

Decision:

The Commission concurs with the Coalition. Its proposed language is consistent with the other decisions made by the Arbitrator and his rejection of it here is an error. The Final Arbitrator's Report is hereby modified and the parties are directed to include the Coalition's proposed version of Section 2.3 in their ICA.

3. Restrictions on equipment used by CLECs:

<u>CLEC Coalition UNE Issue 37</u>: Is a general statement referring to regulatory requirements helpful to understanding?

Discussion:

The Coalition states that a review of the detailed matrix accompanying the Arbitrator's Report revealed that one important issue was not decided. The Coalition requests clarification with respect to the following language proposed by SBC and rejected by the Coalition:

> 2.35 CLEC will connect equipment and facilities that are compatible with the SBC MISSOURI Unbundled Network Elements and will use Unbundled Network Elements in accordance with the applicable regulatory standards and requirements referenced in Section 2.20.

In its Brief, SBC states that the Commission should adopt its proposed language (set out above), which requires CLECs to connect equipment and facilities compatible with SBC Missouri's UNEs and to use UNEs in accordance with the applicable regulatory standards referenced in the ICA, because SBC Missouri's position is reasonable in that it can only support equipment that currently exists and is approved for use within SBC Missouri's network. SBC contends that it would be unreasonable to require SBC Missouri to be responsible for installing, provisioning, and maintaining equipment that is not established in

its network.[18] Moreover, although the Coalition objects to SBC Missouri's proposal, it provides no competing language.

The Coalition did address this issue in its Brief. However, in its Position Statement, the Coalition objected that SBC's proposed language is "vague" and "general" and "raises more questions than [it] answers." For example, the Coalition asks rhetorically, "What is meant by compatible? What is meant by use in this context?" The Coalition states that, if SBC means that CLEC's equipment will meet FCC rules or industry requirements set by testing organizations, then it agrees that that is what should be here. Otherwise, the Coalition asserts, SBC's language only creates confusion for the reader without adding anything concrete and potentially allows SBC to declare some equipment or facility that a CLEC has connected, or is using, to be violating the parties' agreement. The Coalition requests that the Commission rule on this disputed issue.

Decision:

The Commission concurs with SBC and thus modifies the Final Arbitrator's Report to direct the parties to include SBC's Section 2.35 in their ICA. The Commission does not find the provision to be either vague or confusing and is of the opinion that it is indeed reasonable as argued by SBC.

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[18] Hatch Direct, p. 42.

4. **Rates:**

(A) **Rate Increases for Rural UNE Loops:**

<u>CLEC Coalition Pricing Issue A 1</u>: What are the appropriate cost-based rates for the elements in dispute between the Parties?

Discussion:

The Coalition states that the Arbitrator rejected the CLEC Coalition's proposal that the ICA maintain the UNE rates the parties have been operating under during the term of the M2A. The CLEC Coalition urges the Commission to reconsider this decision because it is contrary to Commission precedent and because approval of SBC's unsupported rate increases will have a very deleterious effect on competition in Missouri, particularly with regard to 2-wire analog (DS0)[19] voice-grade loops in Zones 2 and 3 in rural Missouri ("Rural UNE Loops").

The Coalition points out that, in this arbitration, SBC did not present cost studies justifying any rate changes, much less rate increases for Rural UNE Loops. SBC states that it will no longer offer current prices because they are the result of its M2A "voluntary" commitments. As the following chart taken from the Coalition's Comments demonstrates, the impact of SBC's proposals is particularly evident in the rural rates where prices will increase by 11% in Zone 2 and 69% in Zone 3.

[19] DS0 voice-grade loops were not declassified as UNEs under § 251 in any U.S. market by the FCC's *TRRO* rulings. DS0 loops remain a fundamental building block that CLECs using their own switches need to reach residential and small business customers. Therefore, under governing law, DS0 loops, whether in rural or urban zones, must be offered at TELRIC rates.

Retail Rate Group	UNE Rate Zone	# of access lines	Rates under Arb. Decision	Current M2A Rates	% Increase
D	1	> than 230,000	$12.71	$12.71	0%
B	2	5,000-59,999	$20.71	$18.64	11%
A	3	0-4,999	$33.29	$19.74	69%
C	4	60,000-229,000	$18.23	$16.41	11%

SBC claims that these much higher rates meet TELRIC standards because they were approved by the Commission in cost proceedings conducted just after the passage of the 1996 Act.

The Coalition states that, in a prior case, the Commission faced the question of whether to apply M2A UNE rates in the place of rates based on similarly-outdated SBC cost studies. In a 2001 AT&T arbitration that occurred after the M2A was in place, SBC urged that the Commission apply pre-M2A rates based on outdated cost studies that were of "1996 vintage."[20] The Commission contrasted the outdated rates proposed by SBC with the M2A rates, which were "the product of a lengthy proceeding and close scrutiny."[21] The Commission concluded that it was appropriate to apply M2A rates in the AT&T-SBC agreement, although they had not been litigated in the parties' arbitration proceeding. The Commission expressed confidence in the M2A rates as being "compliant with both the Act and the FCC's regulations," and noted that the Commission "has already determined that [the M2A] complies with all of the standards applicable to interconnection agreements,

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[20] *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc. and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455 (*Arbitration Order*, issued June 14, 2001) at 14.

[21] *Id.*

including the 14-point checklist in Section 271."[22] Given the absence of current cost studies filed by either SBC or AT&T, the Commission adopted the M2A rates.

Similarly, the Coalition points out, in this case SBC has not presented cost support for departing from the M2A rates. While SBC claims certain rates were "voluntary," SBC ignores the FCC's findings in the Missouri 271 proceeding. The FCC there held that rates such as the Rural UNE Loop rates had to be reduced in order for SBC to attain interLATA long distance entry. As this Commission noted in the AT&T-SBC arbitration order cited above, the FCC was troubled by the fact that "[r]ecurring charges in Missouri are two to six times those in Texas, Kansas, and Oklahoma."[23] When SBC sought long distance authority, it lowered the rates to the current levels. Now, SBC is seeking to raise the same rates back to the levels the FCC found unreasonable, without presenting updated cost support to show that the rates are compliant with TELRIC standards. The Coalition urges the Commission to follow its precedent and reject SBC's unsupported changes to the M2A rates.

The Coalition further states that, if the Commission is reluctant to maintain the *status quo*, the Coalition urges the Commission to reconsider the Arbitrator's ruling approving price increases specifically for the Rural UNE Loop rate. At the current M2A rural prices, Missouri CLECs like Big River Communications and Socket Telecom have been able to offer facilities-based alternatives to Missouri residential and small business customers. CLECs have installed their own switches, connected them to Rural UNE Loops to reach residential and business customers, and thereby made competitive alternatives available to rural customers who otherwise would not have choices for their telecommunications

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[22] *Id.*

[23] *Id.* at 11.

services. Without the availability of affordable voice-grade UNE loops, such service offerings simply are not financially viable.

The Coalition contends that SBC offered the M2A Rural UNE Loop rates as part of its effort to enter the Missouri interLATA long distance market, an effort that required SBC to demonstrate that the Missouri local exchange market was irreversibly open to competition. However, the Coalition points out, now that SBC is not only dominating the Missouri interLATA market, but is on the verge of absorbing its largest competitor -- AT&T, SBC is moving to raise the UNE rates that have made limited local competition possible for rural residents in Missouri. The Coalition argues that SBC should, at a minimum, be held to the commitment it made in the M2A, which has yielded tangible results for rural areas in Missouri.

Decision:

In its Brief, SBC stated that its proposed rates are generally those contained in prior arbitrations or the M2A, but modified (1) to eliminate "certain voluntary offerings made in the M2A that are not required under the Act," (2) to remove certain elements that have been declassified by the FCC in its *TRO* and *TRRO* decisions since the M2A was adopted, and (3) to add rates for certain services which were not part of the M2A but which were negotiated by the parties. Nowhere in this discussion did SBC candidly advise the Arbitrator of the size or effect of the rate changes it proposed. Indeed, the scale and impact of these rate changes has only become apparent with the filing of the Coalition's Comments containing the chart reproduced above.

The Commission will modify the Final Arbitrator's Report and direct the parties to use the M2A rates in their ICA. As the Coalition correctly argues, SBC has utterly failed to

support these rate increases with current cost studies. In the absence of such studies and an adequate opportunity to review them, this Commission will not approve rate increases.

(B) Interim Rates for Section 271 UNEs:

<u>CLEC Coalition Pricing Issue A 2</u>: Should those elements declassified by the FCC be contained in a 251 Pricing Schedule?

<u>CLEC Coalition Pricing Issue A 3</u>: Should the Pricing Schedule be limited to network elements classified as UNEs under Sections 251 and 252?

Discussion:

The Coalition states that the Final Arbitrator's Report correctly held that unbundled elements required by the § 271 competitive checklist ("§ 271 UNEs") must be included in the M2A successor interconnection agreements. The Coalition further states that the Arbitrator also properly held that the pricing standard for § 271 UNEs is a "just and reasonable" standard rather than a TELRIC standard. However, until the Commission determines what constitutes a "just and reasonable" rate for § 271 UNEs, the industry will need an interim rate for checklist items that are no longer available at TELRIC rates due to declassification under the *TRRO,* that is, switching, loop, and transport elements that have been declassified under § 251 but remain available under the new price standard under § 271.

The CLEC Coalition's proposed contract language contemplated that the interim rates be established at TELRIC levels until the Commission can set a permanent rate. The Arbitrator rejected this proposal, apparently finding it inconsistent with the recommendation that all § 271 UNEs be priced at "just and reasonable" rather than TELRIC rates.[24] The

[24] Final Arbitrator's Report, Attachment III.A, Part 1, Detailed Language Decision Matrix, CC UNE Issue 1, proposed Section 1.2.6 (Coalition) and 2.18.6.2 (SBC).

Arbitrator also rejected SBC's proposed language, which did not include any rate for § 271 UNEs.

The Coalition sponsored an interim rate compromise proposal in testimony that was not reflected in the Final Arbitrator's Report. In rebuttal testimony, Ms. Mulvany Henry of Birch Telecom testified on behalf of the Coalition:

> Specifically, we ask the Commission to clearly recognize that the only difference between § 271 and § 251 elements . . . is the applicable price. Although SBC is not required to charge TELRIC-based rates, it is also not permitted to charge rates that exceed just and reasonable levels. The arbiter of the appropriate price remains the Missouri Public Service Commission. **Because there is no information to establish such rates in this phase of the proceeding, we recommend that the Commission adopt the transitional rates adopted by the FCC as interim § 271 rates until it can arbitrate this issue in the next phase of the proceeding**. . . . Section 1.2.6 as proposed by the Coalition provides for these network elements to be priced at TELRIC rates until the Commission sets new "just and reasonable" rates. The Coalition concurs in my recommendation that the Commission adopt the transitional rates on an interim basis.[25]

The Coalition contends that this proposal recognizes that the rate for § 271 UNEs will be higher than current TELRIC rates. It adopts, strictly on an interim basis, the higher transitional UNE prices that the FCC adopted for declassified § 251 UNEs. If the transitional rates adopted by the FCC are adopted, it will provide the parties a rate at which § 271 UNEs may be purchased via the ICA while permanent just and reasonable rates are being determined.[26]

Rather than leave the parties no guidance on the appropriate interim § 271 UNE rate to be included in the M2A successor ICAs, the Coalition urges that the Commission adopt

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[25] Mulvaney Henry UNEs Rebuttal, at 21-22 and n.38 (emphasis supplied).

[26] The Coalition's interim rate proposal was also discussed in the Coalition's post-hearing brief: "[T]he CLEC Coalition interim rate proposal for switching, and all other network elements 'delisted' under the *TRRO* is the higher rate approved for the *TRRO* Transition Period by the FCC. If the Coalition proposal is accepted in its entirety, rates for § 271 checklist switching will increase and will stay at that level until the parties agree to a § 271 'just and reasonable' rate or the Commission approves an arbitrated § 271 rate." CLEC Coalition Post-Hearing Brief, at 37 (referencing Ms. Mulvany Henry's testimony).

the compromise proposal the Coalition offered in record testimony and in its post-hearing brief. Adoption of an interim rate will provide certainty and encourage SBC and the CLECs to expeditiously engage in negotiations toward establishing permanent rates for § 271 UNEs. Unless an interim rate is established and CLECs can actually purchase § 271 UNEs out of their ICAs, SBC's obligation to offer § 271 UNEs under the M2A successor agreements will be illusory. This is certainly not the outcome contemplated by the Final Arbitrator's Report.

Decision:

The Arbitrator's decision with respect to both CLEC Coalition Pricing Issues A-2 and A-3 was that "The Arbitrator agrees that the ICA must include prices for § 271 UNEs." However, the Arbitrator failed to specify what those rates would be. SBC offered no rates because its view is that these ICAs should not contain prices for § 271 UNEs. Likewise, the Coalition's original suggestion that TELRIC rates be continued is not appropriate given that the appropriate standard is now "just and reasonable." However, the Commission concurs that the Coalition's compromise position – rates patterned on the FCC's transition period rates for declassified UNEs – constitutes a suitable interim rate structure for § 271 UNEs. The Final Arbitrator's Report is so modified and the parties are directed to use such rates in their ICAs.

5. Types of Section 251(b)(5)/ IntraLATA Toll Traffic:

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

<u>CLEC Coalition NIA Issue 6</u>: Should terms and conditions relating to Section 251(a) Interconnection be addressed in a separate out-of-exchange appendix.?

Discussion:

The Coalition states that it proposed the following language, which the Arbitrator approved twice[27] and rejected once[28] in the Detailed Language Decision Matrix:

> "Section 251(b)(5)/IntraLATA Toll Traffic" shall mean for purposes of this Attachment, (i) Section 251(b)(5) Traffic, (ii) ISP-Bound Traffic, (iii) <u>Optional EAS traffic, (iv) FX or virtual FX traffic (that may also fall under (i), (ii), or (iii)), (v) Transit Traffic, (vi) out of area traffic,</u> (iii) IntraLATA Toll Traffic originating from an end user obtaining local dialtone from CLEC where CLEC is both the Section 251(b)(5) Traffic and intraLATA toll provider, and/or (iv) IntraLATA Toll Traffic originating from an end user obtaining local dialtone from SBC-MISSOURI where SBC-MISSOURI is both the Section 251(b)(5) Traffic and intraLATA toll provider.

The Coalition explains that the single rejection of the Coalition's language in the OE-LEC Decision Matrix appears to reject the reference to out-of-area traffic in the same way that the Arbitrator rejects SBC's proposed OE-LEC Attachment. The Coalition supports the Arbitrator's decision that the separate OE-LEC attachment is not required, but the reference to out-of-area traffic should remain in the definition of Section 251(b)(5)/IntraLATA Toll Traffic. The fact that the Coalition members do not support SBC's OE-LEC document does not change the fact that out-of-area traffic will continue to be exchanged between the parties under the ICA and is properly included in the definition.

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[27] *See* Attachment Transit. A, CC NIA 5a and 5b and Attachment V.A. Part 2, CC NIA 5.

[28] *See* Section XIV.A, OE-LEC issues, CC NIA 6.

In its Brief, SBC Missouri asserted that its statutory obligations to offer most Sections 251/252 services is limited to those areas in which it is the incumbent LEC and that the ICA thus does not cover services offered when the parties wish to exchange traffic in the areas where SBC Missouri is not the incumbent LEC. SBC Missouri does not believe it is appropriate to address Out-Of-Exchange-LEC ("OE-LEC") traffic in the interconnection appendix because the interconnection appendix applies only to SBC Missouri's incumbent territory. It therefore offered CLECs the OE-LEC appendix to govern this type of Out of Exchange traffic.[29]

Decision:

The Arbitrator rejected SBC's argument that its interconnection obligation is limited to its incumbent territory and also rejected SBC's proposed OE-LEC Appendix. However, the Commission concurs with the Coalition here because the fact is that the parties will continue to exchange out-of-area traffic. Its definition is thus appropriately included in the ICA and the Final Arbitrator's Report is so modified.

6. The Metropolitan Calling Area:

<u>CLEC Coalition NIA Issue 2</u>: Is a "Metropolitan Calling Area" considered a "Local Calling Area?"

Discussion:

SBC states that "MCA Traffic" is traffic exchanged throughout the "Metropolitan Calling Area", a calling scope plan established by Public Service Commission Orders in Case No. TO-92-306 and Case No. TO-99-483. Calls within an MCA are rated as "local" to an end-user and the call is § 251(b)(5) Traffic based on the calling scope of the originating party pursuant to the MCA Orders. Either party providing MCA service shall offer the full

[29] McPhee Direct, p. 65-66.

calling scope prescribed in Case No. TO-92-306 without regard to the identity of the called party's local service provider. For compensation purposes, MCA Traffic shall be exchanged on a bill-and-keep, intercompany compensation basis as provided in the Intercarrier Compensation Appendix.

SBC Missouri states that it does not object to the MCA as defined by the Commission, nor the rating of traffic to an end-user, nor the inter-company compensation due for traffic within the MCA. However, an "MCA" is *not* the same as a "Local Calling Area" for a very important reason. A "Local Calling Area", for purposes of this Agreement and Attachment, is limited to those areas in which SBC Missouri is the incumbent local exchange provider. Should a CLEC wish to operate outside SBC Missouri's incumbent territory — even when the territory is within the same MCA — the terms of such OE-LEC traffic must be established. Consequently, there is a very real difference between an MCA and a Local Calling Area and SBC Missouri proposes that the definition of Local Calling Area in the ICA should reflect this distinction.

The Coalition states that its proposed language only addresses those situations in which a CLEC is providing service in an MCA. SBC's proposed language has the effect of requiring a CLEC to establish a POI within SBC's network even if the CLEC only offers service in another incumbent LEC's territory within the LATA but competes with SBC in another LATA.

The Coalition states that, in previous cases concerning the MCA, the Commission defined MCA calls as local calls, ruled that inter-company compensation must be bill-and-keep between companies, and that the calling scope and dialing pattern did not vary based upon the identity of the called party's local service provider. It is simply a Local Calling

Area that involves multiple LECs. The present M2A agreement specifically states, "For purposes of interconnection and inter-company compensation, "Exchange Area" shall be defined consistent with SWBT's Missouri Retail Tariffs, except that the entirety of a Metropolitan Calling Area shall be considered a single Exchange Area." The M2A also includes provisions that prohibited Transit Charges from being applied to MCA traffic.

Decision:

The Arbitrator failed to address this issue. The Commission determines that the parties' ICA shall treat this issue in the same manner as did the M2A.

7. PSTN-IP-PSTN And IP-PSTN Issues:

<u>CLEC Coalition ITR Issue 5a:</u> What is the proper routing, treatment, and compensation for Switched Access Traffic including, without limitation, any PSTN-IP-PSTN Traffic and IP-PSTN Traffic?

<u>CLEC Coalition IC Issue 15a:</u> Should reciprocal compensation arrangements apply to Information Services traffic, including IP Enabled Services Traffic?

<u>CLEC Coalition IC Issue 15b:</u> What is the proper routing, treatment, and compensation for Switched Access Traffic including, without limitation, any PSTN-IP-PSTN Traffic and IP-PSTN Traffic?

Discussion:

The Coalition states that the "PSTN-IP-PSTN" and "IP-PSTN" issues relate to intercarrier compensation for traffic that traverses both the traditional "Public Switched Telephone Network" ("PSTN") as well as advanced networks based on "Internet Protocol" ("IP"). The Coalition urged that the Arbitrator not accept SBC's contract proposal on the Coalition issues listed above related to PSTN-IP-PSTN and IP-PSTN traffic, but the Arbitrator nonetheless did accept SBC's language. The Coalition requests clarification on one part of the Arbitrator's ruling on these issues, that dealing with IP-PSTN traffic compensation.

The Arbitrator ruled in favor of SBC's proposed contract language that would subject both PSTN-IP-PSTN traffic and IP-PSTN traffic to switched access charges in all circumstances. The Coalition understands that the Arbitrator based the decision regarding switched access compensation for PSTN-IP-PSTN traffic on the FCC's order in the AT&T "Phone to Phone" petition. The FCC addressed compensation for a specific form of interstate interexchange traffic in the AT&T "Phone-to-Phone" IP order.[30] The AT&T IP Order was specifically limited to the type of service offered by AT&T and the FCC stressed that it was not attempting to resolve compensation for IP-PSTN traffic in its ruling. As the Arbitrator recognized, several additional issues related to compensation for IP-enabled traffic are being addressed in the pending IP-enabled services rulemaking.[31]

In the ruling on the intercarrier compensation issue designated "MCIm RC 15," the Arbitrator also addressed compensation for IP-PSTN traffic.[32] On that issue, the Arbitrator ruled in favor of MCI's proposal. MCI argued that, unlike PSTN-IP-PSTN traffic, "IP-PSTN traffic, on the other hand falls squarely within the 'net-protocol change' portion of the FCC's multi-part enhanced service definition and is therefore appropriately charged at reciprocal compensation rates instead of switched access rates."[33]

The Coalition requests clarification because the ruling on the Coalition's issue involving IP-PSTN compensation approved SBC-proposed language that would apply switched access to IP-PSTN traffic. The ruling on the MCI issue, however, identifies

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[30] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order (rel. April 21, 2004) ("*AT&T IP Order*").

[31] *See In the Matter of IP-Enabled Services*, WC Docket 04-36, Notice of Proposed Rulemaking (rel. March 10, 2004).

[32] Final Arbitrator's Report, Section VI, – pp 21-22.

[33] *Id.* at 22.

reciprocal compensation "instead of switched access" as the appropriate compensation mechanism for IP-PSTN traffic. If reciprocal compensation is to be applied to such traffic in the MCI-SBC ICA, it should be applied to the ICA approved for companies in the CLEC Coalition as well. While the Coalition would prefer, as discussed in our testimony and post-hearing brief, that the Commission defer a decision on IP-PSTN compensation until the FCC has definitively ruled, if the Commission chooses to address the issue here, it should addressed in a consistent manner.

Decision:

As asserted by the Coalition, the Arbitrator held with respect to MCI RC Issue 15 that "[t]he IP-PSTN traffic, on the other hand falls squarely within the 'net-protocol change' portion of the FCC's multi-part enhanced service definition and is therefore appropriately charged at reciprocal compensation rates instead of switched access rates." The Commission agrees that this traffic should be treated consistently and the Final Arbitrator's Report is thus modified to provide that the Coalition's ICA will also provide that IP-PSTN traffic be charged under the reciprocal compensation regime rather than be subject to access charges.

8. Should the terms, conditions and price of interconnection facilities be included in the ICA or should the ICA refer to SBC's access tariff?

<u>CLEC Coalition E-911 Issue 3</u>: The language in the ITR addresses only 911 trunk interconnections. There is no language specific to 911 in the NIM.

Discussion:

The Coalition states that the Arbitrator agreed with SBC that the "Coalition's proposed language incorrectly mixes the concepts of facilities and trunking. Section 2.3.2 of the E-911 Attachment merely states that SBC will provide the facilities required to establish the interconnection to the SBC 911 selective routers 'as specified in the State access

tariff.'" The Coalition contends that the Arbitrator erred on this issue by failing to determine that the interconnection facilities that enable the CLEC to provide 911 service to its customers are interconnection facilities as set forth in §§ 251(a) and (c) of the Act that must be made available at cost-based rates. Consequently, interconnection facilities upon which 911 trunks ride must be available at cost-based rates.

In its testimony and during the hearing, the Coalition states that SBC contended that 911 trunks are ancillary trunks and that 911 traffic is not the mutual exchange of telecommunications.[34] SBC opined that, because 911 is not actual interconnection of two carriers for the exchange of traffic, CLECs should purchase facilities from the access tariff rather than at cost-based prices. The Coalition asserts that SBC is wrong at both the state and federal levels because 911 services are part of local service and 911 facilities are used to interconnect the parties' networks. At the state level, Missouri statutes and rules include 911 service as part of basic local telecommunications service.[35] SBC also provides Universal Emergency Number Services (9-1-1) to 911 entities as a local service via its General Exchange Tariff, P.S.C. Mo. No. 35. 911 entities purchase these services for the ability to receive emergency calls from all telecommunications customers, regardless of which company provides telecommunications services to that customer. At the federal level, the FCC addressed 911 interconnection in a recent Order requiring VoIP providers to provide 911 service to their customers.

> We note that the Commission currently requires LECs to provide access to 911 databases and interconnection to 911 facilities to all telecommunications carriers, pursuant to sections 251(a) and (c) and section

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[34] Hamiter Direct, at 67 and Tr. at 429-30: "But for the purpose of whose end users are benefiting from this, you know, we see that your meet point trunk groups, your 911 trunk groups, et cetera are solely for the benefit of your customers, you know, they're really not going to interconnect with us over those trunk groups."

[35] Section 386.020(4)(c), RSMo Supp. 2004.

> 271(c)(2)(B)(vii) of the Act. We expect that this would include all the elements necessary for telecommunications carriers to provide 911/E911 solutions that are consistent with the requirements of this Order, including NENA's I2 or wireless E911-like solutions.[36]

Contrary to SBC's assertions, 911 facilities are interconnection facilities under both state and federal law and CLECs are therefore entitled to lease 911 facilities at cost-based rates.

The Coalition further states that an additional problem arises with the Arbitrator's approval of a *state* access tariff as the source for pricing of interconnection facilities. SBC's intrastate access tariffs are an insufficient source from which to purchase facilities for the provision of all 911 services in Missouri. For example, the selective router that provides service to more than thirty counties in Western and Central Missouri is located in Kansas City, Kansas. CLECs providing service to Missouri exchanges served by the Kansas router may not order from SBC's intrastate special access tariff to obtain facilities to the selective router located in Kansas. Unbundled network elements and interconnection facilities, however, may be purchased from SBC on an interstate basis, which would allow Missouri CLECs to obtain facilities to access the Kansas selective router to serve Missouri customers.

The Coalition points out that the Arbitrator seemed generally reluctant to make any change to the current M2A 911 process.[37] However, requiring that CLECs purchase 911 facilities from SBC's State access tariff is a change from the current M2A that CLECs believe will result in substantially higher costs and possible pass-through of costs to the PSAPs. Under the M2A, the current $85.00 per DS0 rate specified in Attachment E-911

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[36] WC Docket No. 04-36, WC Docket No. 05-196 *In the Matters of IP-Enabled Services E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking at ¶ 38 (footnote omitted).

[37] *See, e.g.,* Final Arbitrator's Report, Section IX at 3.

MO (M2A) includes both the trunk and the facility charge. Under the Arbitrator's ruling, CLECs must continue to pay this existing rate as a trunk charge plus purchase underlying facilities under the access tariff. This is therefore a major departure from the current process in the M2A.

Under the published rates in SBC's intrastate special access tariff, the rate for the transport facility will be minimum of $450 per month, even when the CLEC is located in the same central office as the selective router and needs nothing more than a cross-connect. Even worse, if the competitive classification provisions contained in pending state legislation that is expected to take effect in August are found to apply to special access, SBC will be free to set these rates at whatever level it chooses. Although no CLEC has tariffed charges for providing 911 service to PSAPs, the Coalition contends that the specter of unrestricted SBC prices and of no alternative providers for facilities to SBC's selective routers may cause CLECs to pass through increased 911 facility charges to the state's PSAPs.

Decision:

The Coalition did not bother to address this issue in its Brief or in testimony. The only assistance it offered the Arbitrator on this point was the following Position Statement: "The Interconnection Agreement itself is a better place for the parties to have reliable, consistent references for information. Tariff information is subject to change with little notice." Consequently, the Arbitrator was unable to foresee the significant adverse economic impact that would result from the position he adopted.

The Commission is of the opinion that the Arbitrator was right to be reluctant to depart from the M2A. The Commission considers that that is also the right answer to this

issue. The Final Arbitration Report is modified to require that the parties' ICA incorporate the language of the M2A on this point.

D. <u>MCI's Comments</u>:

1. Entrance facilities:

<u>MCI NIM Issue 13</u>: Should facilities used for 251(c)(2) interconnection be priced at TELRIC rates?

<u>SBC's Statement of the Issue</u>: Should a non-section 251/252 service such as Leased Facilities be arbitrated in this section 251/252 proceeding?

Discussion:

MCI states that the Final Arbitrator's Report is inconsistent in that the Arbitrator ruled that "entrance facilities are part of SBC Missouri's network. To the extent CLECs desire to obtain interconnection facilities described above, they may do so at cost-based (TELRIC) rates."[38] However, the attached Detailed Language Decision Matrix states that "MCI's language is not consistent with the Arbitrator's Report."[39] MCI states that the decision column of that matrix should reflect that MCI's proposed language is most consistent with the Arbitrator's Report.

Decision:

The Commission concurs with MCI. The Detailed Matrix does not accurately reflect the Arbitrator's decision. The Commission will therefore modify the Arbitrator's Final Report and direct the parties to adopt MCI's proposed language.

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[38] Final Arbitrator's Report, Section V, page 16.

[39] Attachment V, Part 1, Detailed Language Decision Matrix, page 57.

E. Navigator's Comments:

1. Who should bear any costs arising from assignments, mergers, name changes, and the like?

Navigator GTC Issue 6: Should CLEC be responsible for the cost associated with changing their records in SBC's systems when CLECs enter into an assignment, transfer, merger or any other corporate change?

Discussion:

Navigator contends that the Arbitrator overlooked its GTC Issue No. 6, set out above. The Arbitrator listed this DP under his GT&C Issue 3(b).

Navigator states that the Arbitrator noted that it raised the issue of charges imposed by SBC for changing OCN/ACNA information. As noted by the Arbitrator, Navigator does not object to compensating SBC for those functions, but does object to SBC's practice of imposing a separate charge for each resale line while imposing only a single charge for an entire block of UNE lines. The Arbitrator quoted Navigator witness LeDoux: "As a substantial number of our lines are resale, this practice could have a substantial impact on Navigator. We simply believe that SBC should impose the same block charges for both UNE and resale lines."[40]

The Arbitrator found that SBC may impose a reasonable charge for database corrections, but he did not address the issue raised by Navigator, that is, disparate charges for UNE and resale lines.[41] Navigator states that it does not seek a "free ride," that is, the right to demand that SBC impose no charge for performing these functions. Rather, Navigator asks the Commission to find that the charges be imposed in a nondiscriminatory fashion.

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[40] Report, Section 1(A), p. 22.

[41] Report, Section 1(A), p. 23.

Although SBC addressed, in its post-hearing brief, the issue of requiring CLECs to pay for costs incurred in changes of CLEC company identifiers, SBC did not address Navigator's discriminatory charges issue.[42] Navigator contends that SBC provided no testimony to justify this practice. For this reason, Navigator urges the Commission to find that its language, which would eliminate the practice, should be incorporated into the ICA.

SBC's position is that the CLECs must be responsible for the costs associated with any assignments, transfers, mergers, acquisitions, or other corporate changes.[43] ACNAs and OCNs, which are assigned by industry agencies such as Telcordia and NECA, appear on each end user account and circuit. These codes are used in all ILECs' directory databases, network databases (LMOS, TIRKS, INAC, RCMAC, etc.), and billing systems to identify inventory and appropriately bill the services provisioned on each service order. Any change to a company code requires service order activity on each and every end user account and circuit in order to update the multitude of systems. Not only are these company codes utilized within the ILEC but also throughout the industry in such databases as the LERG, which allows the industry as a whole to properly bill routed calls. When a company code change is associated with a transfer of assets, it is no different than a CLEC-to-CLEC migration that requires a service order to be submitted by a winning Carrier.

Decision:

Navigator's proposed language states: "For resale or any other products not billed in CABS, to the extent a record order is available, a record order charge will apply per

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[42] SBC's Brief, pp. 13-15.

[43] SBC's Statement of Position, Navigator's GT&C DPL, Issue 6.

Resale BAN,"[44] while SBC's proposed language states: "For resale or any other products not billed in CABS, to the extent a record order is available, a record order charge will apply per **end user record.**" The difference lies only in the final words of this sentence.

SBC's witness, Suzette Quate, testified: "To implement an OCN/ACNA change for a CLEC, SBC Missouri must, at the CLEC's direction, update the accounts of each of the CLEC's end users in the SBC Missouri databases to reflect the correct company name, OCN/ACNA, or other CLEC company identifier."[45] Navigator's witness, LeDoux, testified in turn: "SBC imposes a single charge for changing the Billing Accounts Number (BAN) for UNE lines billed in CABS, but imposes a per-line charge for resale lines. We believe that this is discriminatory, and there is no business reason to justify this practice."[46]

It appears from the testimony that every resale line end-user account must be modified in the event of an OCN/ACNA change, while the testimony is silent as to UNE lines. Navigator, however, does not challenge the treatment of UNE lines, it challenges the per-line charge levied on resale lines. The record shows that SBC incurs per-line costs for resale lines because each end-user record must be changed. For this reason, the Commission concludes that SBC's language is preferable. The parties are directed to incorporate SBC's proposed language in their ICA.

2. Escrow deposits:

<u>Navigator GT&C Issue 10</u>: Which party's language regarding grounds for termination for non-payment should be included in this agreement?

<u>Navigator/SBC MO GT&C 11(b)</u>: Should the GT&Cs contain specific guidelines for the method of conducting business transactions pertaining to

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[44] "BAN" means Billing Account Number.

[45] Quate Direct, pp. 10-11.

[46] LeDoux Rebuttal, p. 4.

the rendering of bills, the remittance of payments and disputes arising thereunder? Is it appropriate to require Party's to escrow disputed amounts?

Discussion:

Navigator states that the Final Arbitration Report is inconsistent in that the Arbitrator sided with Navigator on its GT&C Issue 11, finding that CLECs need not escrow disputed amounts while pursuing the dispute resolution process, but agreed with SBC on Navigator's GT&C Issue 10, ruling that SBC could force Navigator to pay disputed amounts into escrow under pain of complete termination of all services. Navigator urges the Commission to resolve this inconsistency by finding that Navigator's proposal for GT&C Issue 10 should be adopted.

Decision:

The Commission agrees that the Final Arbitration Report is inconsistent as alleged by Navigator. However, none of the proposed language is appropriate in view of the Arbitrator's decision that disputed amounts need not be escrowed. SBC's proposed language, adopted by the Arbitrator, states:

> 14.2.4 if the nonpaying party is required to deposit Disputed Amounts into an interest bearing escrow account, it must provide written evidence that it has established an interest bearing escrow account that complies with all the terms set forth in Section 9.4 and deposited a sum equal to the Disputed Amounts [other than disputed charges arising from Appendix Reciprocal Compensation] into that account. **Until evidence that the full amount of the Disputed Charges [other than disputed charges arising from Appendix Reciprocal Compensation] has been deposited into an escrow account that complies with Section 9.4 is furnished to the Billing Party, such Unpaid Charges will not be deemed to be "disputed" under Section 10.**

Navigator's proposed language states:

> 14.2.4 if the nonpaying party is required to deposit Disputed Amounts into an interest bearing escrow account, it must provide written evidence that it has established an interest bearing escrow account that complies with all the terms set forth in Section 9.4 and deposited a sum equal to the Disputed

Amounts [other than disputed charges arising from Appendix Reciprocal Compensation] into that account.

The Commission will modify the Final Arbitration Report to reflect that neither party's Section 14.2.4 shall be incorporated into their ICA.

F. Sprint's Comments:

1. Unresolved GT&C Issues Number 4, 5, 7 and 13:

Sprint GT&C Issue 4: Should Sprint be required to have an out of exchange appendix when CLEC is seeking Section 251(a) interconnection with SBC so that CLEC may serve exchanges which are not in SBC's incumbent exchange areas?

Sprint GT&C Issue 5: Should this appendix utilize the term LEC or Telecommunications Carrier?

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

Sprint GT&C Issue 13: (a) Should SBC be allowed to require CLEC to use a specific form for submitting billing disputes? (b) Should SBC be obligated to review all CLEC billing disputes if the disputed amount is not placed in escrow?

Discussion:

Sprint states that these disputed issues were properly resolved by the Arbitrator in favor of Sprint. Therefore, Sprint states, the Commission should order that Sprint's position be adopted and that Sprint's proposed language pertaining to these issues be included in the ICA; SBC's proposed language that was disputed by Sprint should be rejected.

Decision:

Sprint's GT&C Issue 7 was listed and resolved in Sprint's favor in Section 1(C).1 of the Final Arbitrator's Report. Sprint's GT&C Issue 13 was listed and resolved in Sprint's favor in Section I(A).4(e) – Issue 13(a) – and Section I(A).4(d) –Issue 13(b). The parties shall incorporate Sprint's proposed language in their ICA and the Final Arbitrator's Report is modified to the extent that it is inconsistent.

Sprint's GT&C Issues 4 and 5 were omitted from the Final Arbitrator's Report. However, Sprint's ITR Issue 8 is identical to its GT&C Issue 4 and was decided in Sprint's favor at Section XV.1 of the Final Arbitrator's Report. The Report is modified to include Sprint's GT&C Issue 4 at Section XV.1 and the parties are directed to adopt Sprint's language in their ICA.

Sprint did not list its GT&C Issue 5 in its Brief as an issue still requiring a decision by the Arbitrator. This fact explains its absence from the Arbitrator's Report, but does not explain its presence in Sprint's Comments. Having advised the Arbitrator that the point was settled, it is odd that Sprint now requests relief from the Commission.

The disputed language concerns the definition of "routing point." SBC's proposed language states (the contested language appears in bold):

> 1.1.99 "Routing Point" is a location which a **LEC** has designated on its own network as the homing or routing point for traffic inbound to **Exchange** Service provided by the **LEC** which bears a certain NPA-NXX designation. The Routing Point is employed to calculate mileage measurements for the distance-sensitive transport element charges of Switched Access services. The Routing Point need not be the same as the Rating Point, nor must it be located within the Rate Center area, but must be in the same LATA as the NPA-NXX.

Sprint's proposed language states:

> 1.1.99 "Routing Point" is a location which a **Telecommunications Carrier** has designated on its own network as the homing or routing point for traffic inbound to **Telecommunication** Service provided by the **Telecommunications Carrier** which bears a certain NPA-NXX designation. The Routing Point is employed to calculate mileage measurements for the distance-sensitive transport element charges of Switched Access services. The Routing Point need not be the same as the Rating Point, nor must it be located within the Rate Center area, but must be in the same LATA as the NPA-NXX.

SBC stated in its Brief that the Commission should adopt SBC Missouri's proposed language, which utilizes the term "Local Exchange Carrier" ("LEC") as defined in the Act

because this term excludes persons who provide services other than telephone exchange or exchange access services, particularly, commercial mobile radio service ("CMRS").[47] SBC states that Sprint's proposal, to use the term "Telecommunications Carrier," is "an attempt to combine Sprint's non-251 wireless traffic into this ICA which is improper as this is a Section 251/252 ICA under which UNEs are offered and the provision of such UNEs is limited to LECs, to the exclusion of certain other services, including CMRS providers."[48]

Sprint's position is that the definition of "routing point" should not be not limited to LECs because LERG and industry standards allow for all telecommunications carriers to specify routing points for their numbers.

Having considered the foregoing, the Commission determines that SBC's proposed language should be adopted. In an agreement between two LECs, it is immaterial that other, uninvolved carriers also may have routing points. The Arbitrator's Report is so modified and the parties are directed to incorporate SBC's language in their ICA.

2. Should each party be financially responsible for the facilities on its side of the POI?

<u>Sprint ITR Issue 6</u>: Should each party be financially responsible for the facilities on its side of the POI?

Discussion:

Sprint states that, on pages 9-10 of the Final Arbitrator's Report pertaining to Interconnection, the Arbitrator erroneously suggests the adoption of SBC's proposed language on this issue. Sprint contends that the SBC language logically contradicts the Arbitrator's rulings on other interconnection issues in this arbitration and that the Sprint

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[47] McPhee Direct, pp. 27 (footnote 12) and 71-72.

[48] SBC's Brief, pp. 61-62; McPhee Direct, p. 72.

language should be adopted instead. In addition, Sprint has found additional authority from another jurisdiction supporting its position on this issue.

Sprint states that the Arbitrator's ruling on ITR Issue 6 on cost sharing for the interconnection facilities is not logically consistent with his rulings on other related interconnection issues. The first sentence of the rationale on page 10 of the Arbitrator's Report on Interconnection states that: "Each Party is financially responsible for facilities on its side of the POI." The Arbitrator also ruled on page 6 of the report that a CLEC must establish a POI within SBC's network, and indeed, Sprint agreed with SBC on this issue. If both of these rulings are adopted by the Commission as proposed by the Arbitrator, it seems Sprint would be forced to absorb 100% of the cost of the transport facility that physically joins Sprint's network with SBC's network since this interconnection facility resides on Sprint's side of the POI.

However, the conclusion above is undercut by the second sentence of the Arbitrator's rationale on page 10 of the Arbitrator's Report on Interconnection. There, the Arbitrator states: "A Party that agrees to carry traffic that originated on or transited its network to the terminating carrier's nearest tandem may require the other Party to reciprocate." This sentence clearly indicates that when Sprint carries its originating traffic to SBC's tandem, Sprint may require SBC to "reciprocate" and deliver SBC's originating traffic to Sprint's tandem or switch, resulting in both parties being financially responsible for the transport costs necessary to deliver its originated traffic to the terminating carrier's switch. This shared-cost concept can be implemented in a few ways. Both parties may establish one-way trunks to deliver the traffic onto the terminating party's network or the parties may establish shared, two-way facilities that carry traffic originated by both parties. If shared,

two-way facilities are established, Sprint contends that the law, logic and fairness dictate that the cost of this facility must be shared by both parties. It is not acceptable to require Sprint to absorb 100% of the cost of a transport facility that carries both parties' originating traffic. The Commission should reconcile this conflict by adopting the Sprint language proposed for ITR Issue 6 and ruling that the cost of a two-way interconnection facility should be shared.

The FCC rules require each party to assume the costs associated with its originating traffic. Specially, 47 C.F.R. 51.709(b) states "the rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of the trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network." In addition, 47 C.F.R. 51.703(b) states that "a LEC may not assess charges on any other telecom carrier for telecom traffic that originates on the LEC's network." These two FCC rules make clear that the FCC's intent is not for Sprint to be burdened with 100% of transport costs relating to interconnection facilities used to carry both parties' originating traffic even though that facility is physically located on Sprint's side of the POI.

Sprint states that the Maryland Commission agreed with this Sprint position and decided this issue between AT&T and Verizon.[49] Specifically, the Maryland Commission stated that:

> Each Party is responsible for the cost of delivering its traffic through its network and into the interconnection facility that connects the two networks. The cost of the interconnection facility itself is shared consistent with the rules set for by the FCC in paragraph 1062 of 1996 First Report and Order.

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[49] *See In the Matter of the Petition of AT&T Communications of Maryland, Inc. Pursuant to 47 U.S.C. 252(b) Concerning Interconnection Rates, Terms and Conditions* (Order No. 79250), Case No. 8882 (Public Serv. Comm. of Maryland, July 7, 2004).

> In sum, those rules require that the carriers share the cost of the interconnection facility based upon each carrier's percentage of the traffic passing over the facility.[50]

Furthermore, the Maryland Commission states that:

> Each carrier is responsible for the cost of transporting its traffic through its network. Both carriers then equitably share the cost of the interconnection facility which connects the two networks, based on each carrier's share of the traffic that passes over the interconnection facility.[51]

Finally, Sprint points out that SBC's position in this docket is notably inconsistent with the interconnection arrangements it has with other carriers, including the interconnection arrangement it has with Sprint PCS as well as the arrangement it has with its own affiliate, Cingular. SBC finds the FCC rules applicable in a wireless context and will acknowledge a responsibility to share interconnection facility costs with CMRS carriers, yet SBC claims without basis that those same FCC rules do no apply to interconnection arrangements with CLECs.

Sprint asks that the Commission find that SBC must share the cost of the interconnection facility that physically links the Sprint network with the SBC network and not allow SBC to burden Sprint with 100% of the cost. Sprint's proposed language requires that the cost be shared 50%/50% by both Parties assuming an equal balance of traffic. Sprint would also accept contract language that allows for cost sharing to be based on a proportionate use of the facility -- language which is acceptable to SBC when negotiating and interconnecting with CMRS carriers and its own affiliate.

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[50] *Id.*, pp. 9-10.

[51] *Id.*, p. 10.

Decision:

The Arbitrator ruled as follows:

> Each Party is financially responsible for facilities on its side of the POI. A Party that agrees to carry traffic that originated on or transited its network to the terminating carrier's nearest tandem may require the other Party to reciprocate. Any language pertaining to reciprocal compensation will be addressed in that portion of the agreement.

In its Brief, SBC stated that Section 252(c) and the FCC's implementing rules in the *TRO* and *TRRO* imply that each party should be solely responsible for its facilities on its side of the POI. Moreover, the Commission has previously approved interconnection agreements wherein the two parties have agreed that "CLEC will be responsible for engineering and maintaining its network on its side of the Physical POI. Sprint will be responsible for engineering and maintaining its side of the Physical POI."[52] No different result should follow here.[53]

Sprint states in its Brief that the FCC defines § 251 interconnection as "the physical linking of two networks for the mutual exchange of traffic."[54] The transmission facility that physically links the two networks is the interconnection facility and it is a shared-cost responsibility of the two interconnected networks. The FCC interconnection rules clearly establish that the cost of the transmission facility is a shared-cost responsibility of the two carriers whose networks are being interconnected. First, 47 C.F.R. 51.709(b) states

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[52] *See,* Case No. IK-2005-0152, *Order Approving Interconnection Agreement* (between Sprint and Intermedia Communications, Inc.), January 28, 2005 (Interconnection Agreement, Part F, at pp. 40-41); Case No. IK-2005-0151, *Order Approving Interconnection Agreement* (between Sprint and FamilyTel of Missouri, LLC), January 28, 2005 (Interconnection Agreement, Part F, at p. 55).

[53] Moreover, Charter's witness stated that "contrary to Mr. Land's testimony, in a fiber meet arrangement, wherever that fiber does meet becomes the POI, and I think it has to be given the responsibilities of each party on their side of the POI." Tr. 685.

[54] In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98. 95-185, First Report and Order, FCC 96-325, (August 8, 1996), ¶ 176 (Local Competition Order).

> [T]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of the trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.

Second, 47 C.F.R. 51.703(b) states that "a LEC may not assess charges on any other telecom carrier for telecom traffic that originates on the LEC's network." Together, these rules dictate that both carriers bear a cost responsibility for the interconnection facility because each party is using the interconnection facility to deliver traffic to the other party.

The Commission concurs with the Arbitrator's finding that, in general, each party is solely responsible for the facilities on its side of the POI. Nonetheless, the Commission agrees with Sprint that each party must be financially responsible for its own outgoing traffic. Where the interconnection is via a two-way trunk, the cost of that facility must necessarily be shared. The Arbitrator's Report is modified accordingly and the parties are directed to adopt Sprint's proposed language.

3. Should non-251(b) or (c) services such as Transit Services be negotiated separately?

<u>Sprint IC Issue 7</u>: Should non 251(b) or (c) services such as Transit Services be negotiated separately?

Discussion and Decision:

Sprint's IC Issue 7 was listed at Section I(C).1 of the Final Arbitrator's Report, but the description of the issue given there was evidently incorrect. Nonetheless, the Arbitrator did determine AT&T Network A-C 11 Issue 4(c), CLEC Coalition IC Issue 1, ITR Issue 4, and NIA Issue 5(a), and MCI RC Issue 18 in that section, all of which are identical to Sprint's IC Issue 7. Sprint is thus correct. The Arbitrator's Report is modified accordingly and the parties are directed to adopt Sprint's proposed language set out below:

> 17.2.1 Transit service providers are rightly due compensation for the use of their tandem switching and common transport elements when

providing a transit service. This compensation is based on TELRIC pricing and appears in Appendix PRICING.- All Traffic.

4. Future declassifications:

<u>SPRINT UNE 3</u>: Should changes in SBC MISSOURI'S unbundling obligation due to lawful action be incorporated into the terms and conditions pursuant to the change in law provisions in the agreements General Terms and Conditions?

Discussion:

Sprint states that there are important technical errors in the Arbitrator's decision matrix regarding UNE Issue 3 that appear to have caused a substantive error as well. The Commission should correct the technical error and adopt all Sprint's proposed language for Issue 3 while rejecting all SBC's proposed language that is disputed by Sprint.

The technical error begins on page 124-6 of the Arbitrator's UNE decision matrix, Attachment III. A. Part 1, where the Arbitrator ruled on proposed contract section 8.4.2. The Sprint language that appears on page 125 next to SBC's section 8.4.3 should actually be added to the end of Sprint's proposed Section 8.4.2 that appears in the Arbitrator's decision matrix and also in the joint DPL filed by the parties. The effect of splitting Sprint's proposed language for section 8.4.2 into two pieces in the Sprint column of the decision matrix is to throw off the alignment of the Sprint proposed language in the remainder of the Arbitrator's decision matrix. For instance, Sprint's proposed section 8.4.3 should be lined up with SBC's proposed section 8.4.3. Sprint's proposed section 8.4.3.1 gets pushed down the matrix and is improperly lined up with SBC's proposed 8.4.4 instead of SBC's proposed 8.4.3.1. Again, this should be remedied by tacking the language on page 125, which begins "If Sprint does not dispute the declassification" to the end of Sprint's section 8.4.2, and then realigning the remaining contract sections.

This misalignment may have inadvertently thrown off the Arbitrator's analysis and created a substantive error as well that the Commission needs to correct. The error creeps in where the Arbitrator rules on section 13.5.2.1 on page 128 of the decision matrix. The Arbitrator states that Sprint's language is not consistent with the Arbitrator's report, but Sprint believes this is inaccurate and likely an inadvertent mistake by the Arbitrator because he was comparing Sprint's proposed language for 8.4.4 to SBC's 13.5.2.1. However, Sprint's terms for section 13.5.2.1 (DS1 Dedicated Transport) are essentially identical to Sprint's terms at 13.5.3.1 (DS3 Dedicated Transport) and 14.11.1 (Dark Fiber Dedicated Transport), which the Arbitrator found entirely consistent with his recommendation. Accordingly, Sprint believes that all of its proposed language is consistent with the law and also the Arbitrator's report and should be adopted by the Commission. The conclusion that Sprint's language should be adopted for 13.5.2.1 is further bolstered by the Arbitrator's ruling for Sprint language on almost every other UNE issue. Sprint urges the Commission to adopt Sprint's proposed language in its entirety for the reasons argued in its brief and supported in its testimony.

Decision:

The Commission concurs with Sprint that the Arbitrator's Report contains technical and substantive errors as Sprint describes. The Report is modified accordingly and the parties are directed to adopt Sprint's language for Section 13.5.2.1.

G. WilTel's Comments:

1. Indemnification and Limitation of Liability:

WilTel GT&C Issue 12: Is it reasonable for SBC to seek to limit its liability if it violates the law?

Discussion and Decision:

WilTel complains that, although the Arbitrator found for WilTel in his discussion and decision on this issue,[55] the Detailed Matrix states incorrectly that SBC's language is most consistent with the Report.[56] SBC's language states that ". . . each Party's liability . . . whether in contract, tort or otherwise, including alleged breaches of this Agreement **and** causes of action alleged to arise from allegations that breach of this Agreement also constitute a violation of a statute, including the Act . . . shall not exceed in total the amount . . ." (emphasis added). WilTel's language, on the other hand, states that ". . . each Party's liability . . . whether in contract, tort or otherwise, including alleged breaches of this Agreement, **but excluding** causes of action alleged to arise from allegations that breach of this Agreement also constitute a violation of a statute, including the Act . . . shall not exceed in total the amount . . . ." (emphasis added). WilTel contends that its language is clearly most consistent with the Report and, therefore, the DLM incorrectly implements the Arbitrator's findings and conclusions in the Report. WilTel requests that the Commission correct the DLM and order that WilTel's proposed language be adopted.

Decision:

The Arbitrator ruled as follows (emphasis added):

> **[F]irst, that it is improper for this ICA to attempt to limit or alter damages available under a statute.** Second, the Arbitrator concludes that

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[55] *See* Report, Section 1(A), at 69.

[56] Attachment I.A., at 207.

it is contrary to public policy to cap liability for intentional, willful or grossly negligent conduct. Third, the Arbitrator concludes that liability and indemnity provisions should be reciprocal and symmetrical.

The Commission agrees with WilTel that its language more closely reflects the Arbitrator's decision. The parties are directed to adopt WilTel's language; to the extent that it is inconsistent, the Arbitrator's Report is modified accordingly.

2. Compliance audits:

<u>WILTEL UNE Issue 18</u>: Which party's auditing language for compliance with the FCC's eligibility is more reasonable and in compliance with FCC rules?

<u>SBC's Statement of the Issue</u>: What guidelines are appropriate for auditing of SBC's eligibility criteria?

Discussion:

WilTel's UNE Issue 18 deals with SBC's auditing rights and obligations pertaining to the eligibility criteria established by the FCC for access to enhanced extended links ("EELs"). WilTel complains that the Arbitrator's ruling on the audit issues stated only that "[t]o the extent that these issues relate to SBC Missouri's auditing functions concerning the eligibility criteria, SBC Missouri's proposed language is reasonable."[57] The Commission's rules require a "reasoned articulation of the basis for the decision on each issue, including how the decision meets the standards set in sections 251 and 252 of the Act."[58] WilTel evidently believes that the Arbitrator's Report does not meet that standard with respect to

[57] Report, Section III, at 39-40.

[58] Commission Rule 4 CSR 240-36.040(19).

this issue. Further, WilTel complains, many elements of SBC's proposed language are contrary to FCC rules as established in its *TRO*.[59]

The FCC addressed the rights and obligations pertaining to an ILEC's right to audit a CLEC's compliance with the FCC-mandated eligibility criteria set forth in FCC Rule 51.318(b).[60] Among other things, the FCC mandated that ILECs "should have a limited right" to audit compliance with the service eligibility criteria.[61] The language approved in the Report, however, provides SBC a virtually unlimited right to audit because of SBC's all-encompassing "in addition to any other rights" phrase.[62] Additionally, SBC's language in Section 2.18.7.4 of the Agreement (*see* DML Attachment III.B. Part 3, at 80) imposes a 100% compliance standard for the audit which is contrary to the FCC's rules which state clearly that "the concept of materiality governs this type of audit."[63] Finally, SBC's language would allow it to seek payment at wholesale rates even during any time period when WilTel was in fact in compliance with eligibility criteria, which is clearly contrary to the FCC's Rules and § 251 of the Act requiring SBC to provide access to UNEs at rates that are reasonable and nondiscriminatory.

SBC's proposed audit language goes beyond what is permitted by law in accordance with the FCC's rules and should not have been approved in the Report.

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[59] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17145, ¶ 278 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004) (hereafter referred to as the "*TRO*").

[60] *See TRO* at ¶¶ 625-629.

[61] *TRO* at ¶ 625.

[62] *See* DML Attachment III.B. Part 3, at 79 (Section 2.18.7 of language).

[63] *TRO* at ¶ 626, and n. 1905.

WilTel's proposed language, on the other hand, is consistent with the FCC's rulings in the *TRO*. WilTel requests that the Commission approve its language over SBC's language on this UNE Issue 18.

Decision:

In its Brief on this issue, SBC stated that the Commission should adopt its proposed language, related to audits for compliance with the service eligibility criteria, because it: (1) more closely tracks the *TRO* on audits, including the costs thereof; and (2) provides increased certainty on how audits are to be conducted and what is to be done with the results.[64] The FCC permits annual audits of EELs and high-cap commingled arrangements. The Commission should reject WilTel's proposed language because it improperly limits SBC Missouri's right to be compensated for WilTel's failure to meet the eligibility criteria for the period beginning on the first date of non-compliance of the non-compliant circuit rather than the date that the non-compliant circuit was established. By including this language, SBC Missouri would not be compensated for WilTel's non-compliance in situations where WilTel disconnected service or converted to a wholesale service.

The Commission has reviewed the parties' arguments and cited authorities and concludes that the Arbitrator's decision was correct. The Commission declines to modify the Report on this point.

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[64] Silver Direct, pp. 87-88.

H. SBC's Comments:

1. Changes in UNE offerings:

CLEC Coalition GT&C Issue 24: Should SBC MISSOURI be allowed to make changes in its UNE offerings that disrupt provisioning to CLEC without advance notice or written approval of CLEC?

Discussion:

SBC states that the Commission should reverse the Arbitrator's decision with respect to CLEC Coalition GT&C Issue 25 because the parties did not present an issue 25 to the Arbitrator for resolution. As such, SBC asserts, "the decision is arbitrary, capricious, and unlawful in that it is beyond the scope of his authority under the Act and 4 CSR 240-36.040." SBC further contends that, to the extent that the Arbitrator may have meant to refer to CC GT&C 24, the Commission should reverse the Arbitrator's decision as it is "arbitrary and capricious, against the weight of the competent and substantial evidence, and is unlawful for the reasons set forth in Section III [UNEs]."

Decision:

SBC contends that the Arbitrator's decision must be reversed because he referred to a DP by the wrong number. A review of the CLEC Coalition's GT&C DPL reveals what appears to be two issues 24 on successive pages. This is the second of those; perhaps the Arbitrator though the parties had misnumbered the DP. In any event, this scrivener's error does not require reversal or even correction – clearly, SBC is able to identify the DP in question.

SBC does not assert any substantive grounds for reversal except a general and unhelpful reference to " the reasons set forth in Section III." The Commission will not winnow through Section III of SBC's Comments in an effort to find support for its position. For these reasons, the Commission declines to modify the Arbitrator's Report.

2. **Arbitrator's Section 15: Provision of Service to End-Users:**

<u>Navigator GT&C ISSUE 15</u>: Whether to include language allowing end users to take services from SBC upon end user request?

Discussion:

SBC Missouri states that it seeks clarification with respect to this issue. Specifically, in the Final Arbitrator's Report, the Arbitrator states that he: "generally agrees with Navigator. Services offered by SBC to 'win back' Navigator's subscribers are subject to retail tariff rates, terms and conditions so far as applicable."[65] However, in the Arbitrator's Detailed Language Decision Matrix, the Arbitrator states that Navigator's language, which would require SBC Missouri to offer service to winback customers at the rates found in its retail tariff, is "most consistent with Arbitrator's Report." Since retail tariffs are not always applicable, Navigator's proposed language is inconsistent with the Final Arbitrator's Report. Thus, SBC Missouri seeks a modification, reflected in bold, to Navigator's proposed language as follows:

> CLEC acknowledges that SBC MISSOURI may, upon End User request, provide services directly to such End User similar to those offered to CLEC under this Agreement at the rates found it its retail tariff **to the extent that the service is offered pursued to a retail tariff.**

Decision:

The Commission agrees with SBC that the Detailed Matrix is inconsistent with the Arbitrator's decision. The Arbitrator's Report is modified accordingly and the parties are directed to adopt SBC's proposed language as set out above.

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[65] *See* Arbitrator's Final Report, Section 1(A), p. 77.

3. Arbitrator's Section 23: Accessible Letters:

<u>Navigator GT&C Issue 12</u>: Should the Interconnection Agreement incorporate the nondiscriminatory and commonly used Accessible Letter process as a form of communication between SBC Missouri and Navigator?

Discussion:

SBC Missouri states that it seeks clarification with respect to the above-referenced issue. While SBC Missouri agrees that it is simply incorrect that the Accessible Letter process is used to unilaterally change, revise, supersede, amend, modify or otherwise alter the provisions of the ICA, as the Arbitrator acknowledges with respect to Arbitrator's Section 2(b), Accessible Letters are also used to provide notice of tariff changes.[66] Thus, SBC Missouri contends that Navigator's proposed language should be modified by the language provided in bold:

> The parties acknowledge that the Accessible Letter Notification process in no way authorizes SBC Missouri to unilaterally change, revise, supersede, amend, modify or otherwise alter the provisions of this agreement **except provisions regarding services offered via tariff**.

Decision:

At Section I(A).2.(b) of his Report, the Arbitrator held:

> The Arbitrator agrees with SBC that any tariff provision or tariff rate incorporated into the ICA should automatically be updated as the referenced tariff is changed. As SBC points out, that is the reason that the ICA references certain tariffs. The Arbitrator further determines that the *quid pro quo* for such automatic incorporation is prior notice to the CLECs via the Accessible Letters process. The Arbitrator agrees with Charter, however, that SBC cannot use tariff modifications to alter the terms of the parties' ICA. The ICA always trumps contrary tariff provisions. Where a CLEC orders under a tariff rather than under the ICA, however, the CLEC is then stuck with the tariff.

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[66] Arbitrator's Final Report, Section 1(a), p. 14.

Thus, the modification sought here by SBC accords precisely with the Arbitrator's cited ruling and will be granted. The Arbitrator's Report is modified accordingly and the parties are directed to adopt SBC's proposed language as set out above.

4. GT&C Issues that It Appears The Arbitrator Failed to Address:

(a) What is the proper scope of SBC's obligations under the ICA? Should the ICA refer to "network elements" or "UNEs"?

<u>CLEC Coalition GT&C Issue 2</u>: (a) [Whereas clause and § 1.1 & 1.2] Should the reference to "network element" be maintained in the ICA, as distinguished from "unbundled network elements"?

<u>SBC's Statement of the Issue</u>: Should the Interconnection Agreement obligate SBC to provide UNEs, collocation and resale services outside SBC Missouri's incumbent local exchange area?

Discussion and Decision:

SBC contends that the Arbitrator neglected to determine these DPs. If so, the Arbitrator addressed DPs identical to SBC's above at Section I(A).1.(b) of his Report as well as in Section III thereof. The Arbitrator determined that SBC's obligation to interconnect is not bounded by its ILEC service area, while its obligation to provide access to UNEs is so limited. To the extent that SBC offers services outside of its ILEC service territory, its resale obligations also extend outside of its service territory.

Likewise, the Arbitrator addressed the terminology issue raised by the CLEC Coalition at Section III.A.1.a.i of his Report, although he did not specifically address CLEC Coalition GT&C Issue 2(a) there or elsewhere. The Commission concludes that the Coalition's proposed language best expresses the Arbitrator's decision and the parties are directed to incorporate that language. The Arbitrator's Report is hereby modified accordingly.

(b) Force Majeure language:

<u>Navigator GT&C Issue 13</u>: Should SBC's additional sentence be included in the Force Majeure language in this Agreement?

Discussion and Decision:

Although the parties have generally agreed upon Force Majeure language which should be included in this ICA, the parties were unable to resolve this issue in its entirety and the Arbitrator did not address it. The area of disagreement is whether timely payments of invoiced amounts should be required during a Force Majeure event. In an effort to settle this issue, SBC Missouri proposed the following language, which is also set forth in the SBC Missouri Preliminary Issue Column of the Navigator/SBC Missouri DPL:

> Except as otherwise specifically provided in this Agreement, neither Party will be liable for any delay or failure in performance of any part of this Agreement caused by a Force majeure condition, including acts of the United States of America or any state, territory, or political subdivision thereof, acts of God or a public enemy, fires, floods, labor disputes such as strikes and lockouts, freight embargoes, earthquakes, volcanic actions, wars, civil disturbances, cable cuts, or other causes beyond the reasonable control of the Party claiming excusable delay or other failure to perform. Provided, Force Majeure will not include acts of any Governmental Authority relating to environmental, health, or safety conditions at work locations. If any Force Majeure conditions occurs the Party whose performance fails or is delayed because of such Force Majeure conditions will give prompt notice to the other Party, whereupon such Party's obligation or performance shall be suspended to the extent that the Party is affected by such Force Majeure Event. The other Party shall likewise be excused from performance of its obligations to the extent such Party's obligations relate to the performance so interfered with. Upon cessation of such Force Majeure condition, the Party whose performance fails or is delayed because of such Force Majeure conditions will give like notice and commence performance hereunder as promptly as reasonable practicable.

The Commission will adopt this language because it strikes a balance between the parties' interests by providing that if one party's performance is excused by a force majeure event, the other party need not perform its contractual obligations with respect to the item that is not provided during the time of the force majeure event.

5. Arbitrator's Section III(4): EELs Eligibility.

<u>CLEC Coalition UNE Issue 9</u>: How should the parties incorporate the mandatory eligibility criteria applicable to certain combinations of hi-cap loops and transport (EELs)? (e) Does SBC's example assist the reader in understanding the restrictions on EELs contained in the TRO?

<u>CLEC Coalition UNE Issue 15</u>: How should EELs be defined in the ICA in light of the TRRO?

Discussion:

SBC states that the Arbitrator's Report does not specifically address the language in Sections 2.20.2.2.6 and 2.20.2.2.7 of the Coalition's proposed language. Nevertheless, the Detailed Language Decision Matrix states that the CLEC Coalition language is consistent with the Arbitrator's Report. SBC Missouri seeks clarification that this is in error and that the Arbitrator's Final Report governs here. SBC Missouri notes that its language was noted as consistent with the Final Report in most sections of this issue and the wording of the Detailed Decision Matrix appears to be in error. This conclusion is further buttressed by page 27 of the Detailed Language Decision Matrix which expressly notes that SBC Missouri's proposed language in 2.20.2.2.7 is consistent with the order. Accordingly, SBC Missouri requests clarification that its proposed language is to be used here.

If it is not intended that SBC Missouri's language be used here, then SBC Missouri requests the Commission to overturn the Arbitrator's decision on the basis that it is unlawful and not supported by substantial and competent evidence. The Coalition's use of "loop" in 2.20.2.2.6, and of "EEL loop" in 2.20.2.2.7 is confusing, not defined, and might be argued to limit the application of the FCC's 51.318(b) criteria applicable to high-capacity EELs and commingled arrangements. The FCC Rule implemented by 2.20.2.2.6 uses the phrase "24 DS1 enhanced extended links or other facilities" (51.318(b)(2)(vi)), but the CC's language says "24 DS1 EELs loop or the other facilities". SBC Missouri's proposed

language follows the FCC Rule exactly in referencing "24 DS1 EELs or other facilities" and should be adopted. Similarly, in 2.20.2.2.7, the FCC Rule says "Each circuit" (51.318(b)(2)(vii), SBC Missouri's proposed language properly states "Each circuit" but the CC language uses the phrase "Each EEL loop circuit". No explanation is given for the insertion of "loop" other than Coalition's language, but the insertion (i) is contrary to the FCC's Rule 51.318(b) and the TRO; (ii) can only create confusion and, particularly with respect to 2.20.2.2.7, possible erroneous claims that this criteria only applies to EELs when FCC 51.318(b) expressly applies to both high-cap EELs and commingled arrangements; and (iii) is arbitrary and capricious, and not supported by the record. Accordingly, the inclusion of "loop" should be stricken from 2.20.2.2.6 and "EEL loop" stricken from 2.20.2.2.7.

Decision:

The language proposed by the Coalition is as follows (portions objected to by SBC are underlined):

> 2.20.2.2.6 For each 24 DS1 EELs loop or the other facilities having equivalent capacity, CLEC will have at least one active DS1 local service interconnection trunk for the exchange of local traffic. CLEC is not required to associate the individual EEL collocation termination point with a local interconnection trunk in the same wire center.
>
> 2.20.2.2.7 Switching: Each EEL loop circuit to be provided to each customer will be served by switching equipment that is a switch capable of switching local voice traffic.

The language proposed by SBC is as follows (portions objected to by the Coalition are in bold):

> 2.20.2.2.6 For each 24 DS1 EELs or other facilities having equivalent capacity, CLEC will have at least one active DS1 local service interconnection trunk **that meets the requirements of Section 2.20.4 of this Attachment; and**

2.20.2.2.7 Each circuit to be provided to each **End User** will be served by a switch capable of **providing** local voice traffic.

By way of example only, the application of the foregoing conditions means that a wholesale or retail DS1 or higher service/circuit (whether intrastate or interstate in nature or jurisdiction) comprised, in whole or in part, of a UNE local loop-Unbundled Dedicated Transport(s)-UNE local loop (with or without multiplexing) cannot qualify for at least the reason that the UNE local loop-Unbundled Dedicated Transport combination included within that service/circuit does not terminate to a collocation arrangement. Accordingly, SBC MISSOURI shall not be required to provide, and shall not provide, any UNE combination of a UNE local loop and Unbundled Dedicated Transport at DS1 or higher (whether as a UNE combination by themselves, with a network element possessed by CLEC, or pursuant to Commingling, or whether as a new arrangement or from a conversion of an existing service/circuit) that does not terminate to a collocation arrangement that meets the requirements of Section 2.18.3 of this Appendix Lawful UNE. Section 2.18.2 shall apply in any arrangement that includes more than one of the UNEs, facilities, or services set forth in that Section, including, without limitation, to any arrangement where one or more UNEs, facilities, or services not set forth in Section 2.18.2 is also included or otherwise used in that arrangement (whether as part of a UNE combination, Commingled Arrangement, or otherwise), and irrespective of the placement or sequence of them.

The Commission determines that SBC's language is most appropriate, except that the Commission finds the lengthy example at Section 2.20.2.2.7 to be unnecessary. The Report is modified accordingly and the parties are directed to adopt SBC's language as here modified.

6. Arbitrator's Section III(G)(8)(d): Navigator UNE 9:

<u>Navigator UNE Issue 9</u>: Which Party's language accurately describes the party in control of the inside wire on the End User's side of the NID?

Discussion and Decision:

The Commission agrees with SBC that clarification is necessary here. The Final Arbitrator's Report states that "SBC Missouri's language is accepted."[67] The Detailed

[67] Arbitrator's Final Report, p.69.

Language Decision Matrix, however, indicates that Navigator's language is "most consistent". The Commission modifies the Arbitrator's Report to consistently provide that SBC's language is to be adopted. The parties are directed to comply.

IT IS THEREFORE ORDERED:

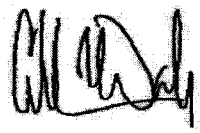
1. That the Final Arbitrator's Report, filed in this case on June 21, 2005, is incorporated into this Order by reference.

2. That the parties shall incorporate the Commission's resolution of each open issue as described in this Order into their interconnection agreements and shall file their interconnection agreements no later than 4:00 p.m. on Wednesday, July 13, 2005.

3. That the Staff of the Missouri Public Service Commission shall file a Memorandum and Recommendation advising the Commission that it has reviewed each such proposed interconnection agreement and determined that it complies with this Order and applicable statutes not later than 4:00 p.m. on Monday, July 18, 2005.

4. That this Order shall be effective on July 11, 2005.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Dated at Jefferson City, Missouri,
on this 11th day of July, 2005.