

STATE OF ILLINOIS

BEFORE THE ILLINOIS COMMERCE COMMISSION

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Sprint Communications L.P. d/b/a Sprint )  
Communications Company L.P. )  
 )  
Petition for Consolidated Arbitration with )  
Certain Illinois Incumbent Local Exchange )  
Carriers pursuant to Section 252 of the )  
Telecommunications Act of 1996. )

Case No. 05-0402

**INITIAL BRIEF OF SPRINT COMMUNICATIONS L.P. D/B/A  
SPRINT COMMUNICATIONS COMPANY L.P.**

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**INITIAL BRIEF OF SPRINT COMMUNICATIONS L.P. D/B/A  
SPRINT COMMUNICATIONS COMPANY L.P.**

NOW COMES Sprint Communications L.P. d/b/a Sprint Communications Company L.P. (“Sprint”), by and through its attorneys, and respectively submits its initial brief to the Illinois Commerce Commission (“ICC” or “Commission”) in support of its Petition for Arbitration of certain terms, conditions, and prices for interconnection and related arrangements with Harrisonville Telephone Company, Marseilles Telephone Company, and Metamora Telephone Company (collectively, the “Respondents”). Sprint timely filed its Petition, pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 (“1996 Act”)<sup>1</sup> and pursuant to Title 83, Part 761 of the Illinois Administrative Code, Arbitration Procedures.<sup>2</sup>

**A. INTRODUCTION**

In its July 13, 2005 Order in Docket Nos. 05-0259 *et al.*,<sup>3</sup> the Commission noted that, “Sprint and MCC’s [Sprint’s last-mile provider] interest in competing in certain of the more rural exchanges in Illinois is significant in that it represents one of the first, if not the first, competitive landline ventures into the relevant exchanges.”<sup>4</sup> In early 2005 Sprint made a request to each of the Respondents seeking, under Sections 251(a) and (b)(2) and (5) of the Act,<sup>5</sup> to negotiate terms and conditions for interconnection, reciprocal compensation, and local number portability that would permit Sprint to provide competitive local telecommunications services in the Petitioners’ rural local exchange service territories.

Rather than negotiate with Sprint, the Respondents responded with delay; including the filing of petitions requesting that the Commission find that they had no duty to negotiate with

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<sup>1</sup> 47 U.S.C. § 252(b).

<sup>2</sup> 83 Ill. Admin Code § 200.761.

<sup>3</sup> An Administrative amendment to the Order was made on July 19, 2005. This Amendment did not substantively modify the conclusions or holding of the Commission.

<sup>4</sup> Docket No. 05-0259 *et al.*, July 13, 2005, Order, p 11.

<sup>5</sup> 47 U.S.C. §§ 251(a) and (b)(2) and (5).

Sprint, because, in their opinion, Sprint was not a telecommunications carrier and, in their opinion, Sprint would “not be providing the interconnected services it seeks to negotiate directly to the public.”<sup>6</sup> The Commission reached a different conclusion, finding that

given the manner in which Sprint proposes to serve MCC, Sprint is a telecommunications carrier in this instance with which Petitioners must negotiate under subsections (a) and (b) of Section 251 of the Federal Act.<sup>7</sup>

and ordered

that because Sprint Communications, L.P. d/b/a Sprint Communications Company L.P. is a “telecommunications carrier,” Petitioners have an obligation to negotiate with Sprint Communications, L.P. d/b/a Sprint Communications Company L.P., or any similarly situated entity, under subsections (a) and (b) of Section 251 of the federal Telecommunications Act.<sup>8</sup>

From that Order, Sprint and the Respondents have conducted extensive negotiations, leaving only a few, but important, issues unresolved. Sprint respectfully requests that this Commission resolve those issues in its favor, allowing Sprint to enter into Interconnection Agreements with the Respondents and resulting in the first competitive landline offerings to Illinois telephone users living in the incumbent service territories of the Respondents.

## **B. PROCEDURAL HISTORY**

On June 29, 2005, Sprint filed this Consolidated Petition for Arbitration seeking arbitration of Interconnection Agreements with the following ten Illinois rural incumbent local exchange carriers:

Cambridge Telephone Company  
C-R Telephone Company  
The El Paso Telephone Company

Henry County Telephone Company  
Marseilles Telephone Company  
Metamora Telephone Company

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<sup>6</sup> Respondents’ Petitions for Suspension or Modification or in the Alternative Declaratory Order, April 20, 2005, Docket No. 05-0270 (Metamora Telephone Company), April 22, 2005, Docket No. 05-0275 (Harrisonville Telephone Company), and April 25, 2005, Docket No. 05-0277 (Marseilles Telephone Company), ¶ 27. (The Applicants’ Petitions were virtually identical).

<sup>7</sup> Docket No. 05-0259 *et al.*, July 13, 2005, Order, p 14.

<sup>8</sup> *Id.* at 15.

Geneseo Telephone Company  
Harrisonville Telephone Company

Mid Century Telephone Cooperative  
Reynolds Telephone Company

On July 8, 2005, Sprint filed an additional Petition for Arbitration for an Interconnection Agreement with Viola Home Telephone Company.

Following negotiation, Sprint reached negotiated Interconnection Agreements with all but three of the carriers against whom Sprint had filed Petitions for Arbitration. On September 2, 2005, Sprint and Cambridge Telephone Company, Geneseo Telephone Company, and Henry County Telephone Company,<sup>9</sup> and on September 9, 2005, Sprint and C-R Telephone Company, The El Paso Telephone Company, Mid Century Telephone Cooperative, Reynolds Telephone Company, and Viola Home Telephone Company<sup>10</sup> filed Notices of Resolution of Issues in this docket and filed Interconnection Agreements with this Commission for Approval. As part of the jointly filed Notices of Resolution of Issues, the parties agreed to hold their portions of this proceeding in abeyance pending the approval of their Interconnection Agreements, at which time the interconnection dispute would become moot and resolved. Approval of these eight Interconnection Agreements are pending before this Commission.

Sprint's only remaining Interconnection Agreement differences remain with Harrisonville Telephone Company, Marseilles Telephone Company, and Metamora Telephone Company. It is Sprint's differences with those Respondents that are addressed in this Brief.

Though the Commission, in its July 13, 2005 Order in Docket No. 05-0259 *et al.*, instructed the parties to address "whether or not the [Respondents] may receive waiver of its

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<sup>9</sup> On September 2, 2005, Sprint jointly filed Interconnection Agreements for Approval by this Commission with Cambridge Telephone Company, Docket No. 05-0569, Geneseo Telephone Company, Docket No. 05-0570, and Henry County Telephone Company, 05-0571.

<sup>10</sup> On September 9, 2005, Sprint jointly filed Interconnection Agreements for Approval by this Commission with C-R Telephone Company, Docket No. 05-0589, The El Paso Telephone Company, Docket No. 05-0590, Mid Century Telephone Cooperative, Docket No. 05-0584, Reynolds Telephone Company, Docket No. 05-0591, and Viola Home Telephone Company, Docket No. 05-0585.

251(b)(2) and (5) obligations under 251(f)(2).”<sup>11</sup> in this docket, the Respondents chose “not to pursue the suspension and modification options under 251(f)(2),”<sup>12</sup> thus rendering any consideration of those issues moot.

During the course of this arbitration proceeding, on July 14, 2005, the Respondents filed a Motion to Dismiss the Petition for Arbitration and joined in an additional Motion to Dismiss filed on July 1, 2005 by various other carriers.<sup>13</sup> On July 13, 2005, the Administrative Law Judges, John Albers and Stephen Yoder (“ALJs”), denied the July 1, 2005 Motion to Dismiss. The July 14, 2005 motion is pending and has been fully briefed by the parties.

On October 6, 2005, an evidentiary hearing was held in this matter at which the testimony and rebuttal testimony and exhibits of Sprint, the Respondents’ and Staff’s witnesses were introduced into the record and the witnesses were offered for cross-examination.

### **C. STATEMENT OF THE CASE**

By agreement of the parties, the Respondents received Sprint’s request for interconnection negotiations on January 21, 2005. Pursuant to Section 252(b)(1) of the Act, carriers may petition the state commission for arbitration of any open issues during the period from the 135<sup>th</sup> day to the 160<sup>th</sup> day (inclusive) after having served the bona fide request for negotiation of an Interconnection Agreement on the incumbent local exchange carrier. Sprint timely filed its Petition for Arbitration on June 29, 2005, the 159<sup>th</sup> day, commencing this proceeding. Pursuant to Section 252(b)(4)(C), the Commission has nine (9) months from the date of the carrier’s request to initiate negotiations to reach a decision on the unresolved issues.

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<sup>11</sup> Docket No. 05-0259 *et al.*, July 13, 2005, Order, p 13.

<sup>12</sup> Respondent Exhibit 2.0, ln. 400-403.

<sup>13</sup> Tr. 24. The carriers filing the July 1, 2005 Motion to Dismiss were Cambridge Telephone Company, C-R Telephone Company, The El Paso Telephone Company, Geneseo Telephone Company, Henry County Telephone Company, Mid Century Telephone Company, and Reynolds Telephone Company.

However, by stipulation of the parties, it has been agreed that this Arbitration is to be concluded, and a final Commission order issued, on or about November 15, 2005.<sup>14</sup>

Sprint, as the requesting telecommunications carrier, has negotiated in good faith in accordance with Section 251(c)(1) of the 1996 Act. Sprint has requested reasonable terms and conditions for a binding Interconnection Agreement with the Respondents in an effort to obtain the interconnection services and arrangements to which is entitled under Section 251 of the Act. Because the Respondents did not acknowledge that they were required to negotiate with Sprint until the Commission issued its July 13, 2005 Order in Docket Nos. 05-0259 *et al.*, Sprint was unable to identify nor to file a list of outstanding issues with its Petition. However, subsequent negotiations with the Respondents resulted in the filing of a Joint Disputed Points List on September 6, 2005, which lists the language proposed by each Party.<sup>15</sup> Since the Parties filed the Joint Disputed Points List, the Parties have reached agreement on a few of the issues included therein. The remaining issues for the Commission's Consideration in this proceeding are:

1. Is Sprint a telecommunications carrier in this instance, with which Petitioners must negotiate under subsections (a) and (b) of Section 251 of the Federal Act?
2. Should the definition of local traffic include traffic defined by the Commission as EAS traffic?
3. Is it appropriate for parties to unilaterally modify the Agreement to self effectuate a change-of-law?
4. Should the Agreement include language specifically requiring Sprint to indemnify the Respondents from the action of third-parties?
5. Should Sprint and the Respondents share the costs of the interconnection facility between their points of interconnection based on their respective percentages of originated traffic?
6. Should the parties exchange traffic on an indirect basis until such time that amount of traffic warrants a direct interconnection?

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<sup>14</sup> Tr. 112.

<sup>15</sup> Also admitted into evidence as Respondents' Exhibit 1.2.

- i. If the parties interconnect on an indirect basis what call records should be provided?
  - ii. If the parties interconnect on an indirect basis how should the transit and transport costs associated with the indirect interconnection be borne?
7. How should EAS traffic be compensated between the parties?
8. Should Sprint be required to pay for directory listings at the higher foreign exchange rate contained in the Respondents' tariffs?<sup>16</sup>

#### **D. STANDARD OF REVIEW**

Sprint filed its Petition with the Commission to preserve its rights under Section 252(b) of the Act, and to seek relief from the Commission in resolving the outstanding disputes between the Parties. This arbitration must be resolved under the standards established in Sections 251 and 252 of the Act,<sup>17</sup> the rules adopted and orders issued by the Federal Communications Commission ("FCC") implementing the, and the applicable rules and orders of this Commission, including but not limited to Title 83, Part 761 of the Illinois Administrative Code, Arbitration Procedures.<sup>18</sup>

The rates, terms, and conditions that the Commission prescribes in this arbitration proceeding must be consistent with the Requirements of Sections 251(a), (b) and (c) and 252(d) of the Act.<sup>19</sup> As is set forth in greater detail below, approval of the Interconnection Agreement proposed by Sprint, meets this standard. The counterproposals of the Respondents do not.

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<sup>16</sup> This issue was not included in the Petition for Joint Disputed Points list because it was apparently first brought into dispute upon receipt of the Respondents' Direct Testimony. Tr. 246-247.

<sup>17</sup> 47 U.S.C. §§ 251 and 252

<sup>18</sup> 83 Ill. Admin Code § 200.761.

<sup>19</sup> 47 U.S.C. §§ 251(a), (b),(c) and 47 U.S.C. § 252(d).

**E. ARGUMENT**

**1. This Commission has already determined that Sprint is a telecommunications carrier with which Petitioners must negotiate under subsections (a) and (b) of Section 251 of the Federal Act.**

A little more than three months ago, in ruling on a request for a declaratory ruling brought by the Respondents in this proceeding, the Commission found that

given the manner in which Sprint proposes to serve MCC, Sprint is a telecommunications carrier in this instance with which Petitioners must negotiate under subsections (a) and (b) of Section 251 of the Federal Act.<sup>20</sup>

and ordered

that because Sprint Communications, L.P. d/b/a Sprint Communications Company L.P. is a “telecommunications carrier,” Petitioners have an obligation to negotiate with Sprint Communications, L.P. d/b/a Sprint Communications Company L.P., or any similarly situated entity, under subsections (a) and (b) of Section 251 of the federal Telecommunications Act.<sup>21</sup>

Less than two months ago, the Commission “denied the Application for Reconsideration and Rehearing by Metamora Telephone Company, Harrisonville Telephone and Marseilles Telephone Company filed on August 12, 2005,”<sup>22</sup> seeking to overturn the Commission’s July 13, 2005 Order.

Now, in this docket, the Respondents seek yet a third bite at the apple.

Q. Do the ILECs continue to maintain their positions that Sprint is not a telecommunications carrier in relation to the services it proposes to offer to MCC/Mediacom?

A. Yes they do. . . .<sup>23</sup>

This issue is the identical issue to that considered by this Commission and raised by these same Respondents against Sprint in consolidated Docket Nos. 05-0259 *et al.*, and thus the

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<sup>20</sup> Docket No. 05-0259 *et al.*, July 13, 2005, Order, p 14.

<sup>21</sup> *Id.* at 15.

<sup>22</sup> Docket No. 05-0259 *et al.*, Aug. 26, 2005, Notice of Commission Action.

<sup>23</sup> Direct Testimony of Robert C. Schoonmaker, Respondent Exhibit 1.0, ln. 68-71.

Respondents should be barred from relitigating the fact that the Commission found Sprint to be a telecommunications carrier under the doctrines of *collateral estoppel*, and *res judicata*, as well as law of the case.

The doctrine of *collateral estoppel* bars re-litigation of the same issue, but in a subsequent case, when, as is the case in the instant proceeding: (1) the issue decided in the prior case is identical to the one in the second case; (2) the party against whom *estoppel* is being asserted was a party to the prior adjudication; and (3) there was a final judgment on the merits.<sup>24</sup> The doctrine of *res judicata* provides that a final judgment on the merits by a court of competent jurisdiction acts as an absolute bar to a subsequent action between the same parties, when that judgment is between the same parties, and it involves the same claim, or the same cause of action.<sup>25</sup> This doctrine promotes judicial economy by preventing repetitive litigation.<sup>26</sup>

While recognizing that the Commission is not rigidly bound by principles of *res judicata*, and *collateral estoppel*,<sup>27</sup> Sprint nevertheless contends that they should apply to the instant proceeding. It would be arbitrary and capricious for the Commission to change direction at this juncture without some compelling new evidence. As Staff's witness, Dr. Genio Staranczak noted in his rebuttal testimony, "I am unaware of any new circumstances that could cause the commission [to depart from its previous decision finding Sprint is a telecommunications carrier]."<sup>28</sup>

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<sup>24</sup> *Nowack v. St. Rita High School*, 197 Ill.2d 281, 390; 757 N.E.2d 471 (2001); See also, *DuPage Forklift Service v. Material Handling Services*, 195 Ill.2d 71, 77; 744 N.E.2d 845 (2001)).

<sup>25</sup> *Ariva v. Madigan*, 209 Ill.2d 520, 533, 809 N.E.2d 88 (2004); *Nowack*, 197 Ill.2d at 389.

<sup>26</sup> *Ariva*, 209 Ill.2d at 533.

<sup>27</sup> *United Cities Gas Co. v. ICC*, 163 Ill.2d 1, 22-23 (1994); *Illinois American Water Co. v. ICC*, 772 N.E. 2d 390, 395 (2nd Dist. 2002).

<sup>28</sup> Staff Exhibit 3.0, ln.89-95.

While the Respondents argue that the Commission made its decision in consolidated Docket No. 05-0259 *et al.*, “without the benefit of testimony,”<sup>29</sup> they once again fail to acknowledge that the only sworn evidence filed in consolidated Docket No. 05-0259 *et al.* were two signed and sworn affidavits entered by Sprint; one executed on April 28, 2005 by James R. Burt, Sprint’s Director-Regulatory Policy; and, an additional affidavit executed on May 19, 2005, by James D. Patterson, Sprint’s Vice President – Carrier and Wholesale Markets. These affidavits were filed along with, and as part of, Sprint’s pleadings in that docket and thus were part of the record upon which the Commission based its conclusions.<sup>30</sup> Mr. Burt reiterated in this matter that Sprint continues to make services available to last mile providers on an indiscriminate basis.<sup>31</sup> Consequentially, the Commission’s logic in the Declaratory Ruling finding that Sprint is providing telecommunications services, and as such is a telecommunications carrier, remains unchallenged.<sup>32</sup>

The Respondents have not presented any new evidence that was not already presented to this Commission in the affidavits of Mr. Burt and Mr. Patterson in consolidated Docket No. 05-0259 *et al.* In fact the evidence presented in the instant proceeding, especially that of Mr. Burt,<sup>33</sup> elaborated on those affidavits and further demonstrate that “given the manner in which Sprint proposes to serve MCC, Sprint is a telecommunications carrier in this instance with which Petitioners must negotiate under subsections (a) and (b) of Section 251 of the Federal Act.”<sup>34</sup>

The Commission made the correct determination in consolidated Docket Nos. 05-0259 *et al.* In anticipation that the Respondents will attempt to relitigate the Commission’s conclusion

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<sup>29</sup> Respondent Exhibit 1.0, In.75.

<sup>30</sup> 83 Ill Adm. Code 200.700.

<sup>31</sup> Tr. 197.

<sup>32</sup> In fact, Sprint filed a tariff on October 18, 2005 making its interconnection services available. The Commission may take administrative notice of this tariff filing.

<sup>33</sup> *See, in general*, Burt Direct Testimony, Sprint Exhibit 1.0, In. 92-773 and Burt Rebuttal Testimony, Sprint Exhibit 1.1.

<sup>34</sup> Docket No. 05-0259 *et al.*, July 13, 2005, Order, p 14.

“that because Sprint Communications, L.P. d/b/a Sprint Communications Company L.P. is a “telecommunications carrier,” [the Respondents] have an obligation to negotiate with Sprint,”<sup>35</sup> Sprint incorporates by reference its pleadings filed in consolidated Docket Nos. 05-0259 *et al.*, and specifically calls to the Commission’s attention the following pleadings:

- Response to the Verified Petitions for Declaratory Relief and/or Suspension or Modification, April 28, 2005;
- Brief on Exceptions, May 19, 2005;
- Brief in Reply to Exceptions, May 25, 2005;
- Response to Emergency Motion for Leave to Cite Additional Authority, June 29, 2005;
- Response in Opposition to First Petition for Reconsideration, August 12, 2005; and,
- Response in Opposition to Applications for Reconsideration and Rehearing, August 19, 2005;

To the extent that the Respondents attempt to argue that this Commission has no jurisdiction to order arbitration because the service Sprint will be providing will utilize the Voice Over Internet *Protocol*, Sprint calls the Commission’s attention to Sprint’s Response in Opposition to Motions to Dismiss, filed on August 19, 2005. Further, the direct testimony of Mr. Burt specifically discusses, without contradiction or rebuttal, that the differences between utilizing the Voice Over Internet *Protocol* versus offering a VoIP Service (which Sprint is not offering), is that “the terms Internet Telephony and/or VoIP are usually used to describe voice services that utilize the public Internet. . . . By contrast, the proposed service does not use the public Internet as its transport mechanism.”<sup>36</sup> In fact, Mr. Burt testified, the service [which Sprint will be offering] does not require the customer to invest in a broadband connection and a

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<sup>35</sup> *Id.*

<sup>36</sup> Sprint Exhibit 1.0, ln. 527-530.

computer, which the customer would have to purchase to utilize an Internet-based Voice over Internet Protocol (“VoIP”) service.”<sup>37</sup>

As Mr. Burt testified,

The proposed service is not cable modem service, and does not provide connection to the public Internet as is the case with cable modem service. Cable modem service provides customers with high speed access to the Internet, over the fixed cable network of the cable company. In contrast, the proposed services are local voice telephone services that are indistinguishable from the Plain Old Telephone Service (“POTS”) provided by the RLECs and other local exchange carriers. Customers can use the same type of telephones used by the RLECs’ customers. The customers of the proposed service will only be able to originate and terminate calls from the customer’s premises as the RLECs’ customers currently do. The proposed services do not require the customer to have broadband Internet connection, and do not require a computer at either end of the potential voice telephone call. The customer’s “telephone number” is fixed to his or her physical location, and therefore, the proposed services are not “mobile.”<sup>38</sup>

Unlike Vonage customers, Sprint’s customers will *not* “have a device that they can take anywhere in the world and connect to a broadband Internet connection anywhere in the world.”<sup>39</sup> The service Sprint will be offering with Mediacom “by definition is non-nomadic, meaning you can’t transport it around. You can’t move it around. In fact, the Mediacom tariff on file in the state of Illinois specifically restricts customers” from moving their service from one location to another.<sup>40</sup>

Thus, for the reasons stated in Sprint’s Response in Opposition to Motions to Dismiss, filed on August 19, 2005, and Mr. Burt’s testimony, Sprint’s service is not a Broadband or VOIP Service, as that term is commonly used and as addressed in the FCC’s *Vonage Order*<sup>41</sup> or in the

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<sup>37</sup> Sprint Exhibit 1.0, ln.109-111.

<sup>38</sup> *Id.*, ln. 510-522.

<sup>39</sup> Tr. 133.

<sup>40</sup> Tr. 135.

<sup>41</sup> *FCC Memorandum Opinion and Order, In the Matter of Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Adopted: November 9, 2004, Released: November 12, 2004 (“Vonage Order”).

United States Supreme Court's recent decision in *National Cable & Telecomms. Ass'n v. Brand X Internet Services*.<sup>42</sup>

On July 13, 2005, this Commission took an important step towards ensuring that rural telephone customers in the state of Illinois will have the benefits of landline competition and customer choice when it found that

given the manner in which Sprint proposes to serve MCC, Sprint is a telecommunications carrier in this instance with which Petitioners must negotiate under subsections (a) and (b) of Section 251 of the Federal Act.<sup>43</sup>

and ordered

that because Sprint Communications, L.P. d/b/a Sprint Communications Company L.P. is a "telecommunications carrier," Petitioners have an obligation to negotiate with Sprint Communications, L.P. d/b/a Sprint Communications Company L.P., or any similarly situated entity, under subsections (a) and (b) of Section 251 of the federal Telecommunications Act.<sup>44</sup>

As Staff's witness, Dr. Staranczak testified there have not been "any new circumstances that could cause the commission [to depart from its previous decision that Sprint is a telecommunications carrier]."<sup>45</sup> Thus, Sprint respectfully requests that the Commission continue to find it a "telecommunications carrier," with which the Respondents have an obligation to negotiate and enter into an Interconnection Agreement.

2. **Should the definition of local traffic include traffic defined by the Commission as EAS traffic?**

At the evidentiary hearing, Sprint and the Respondents were able to resolve this issue.<sup>46</sup>

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<sup>42</sup> \_\_\_ U.S. \_\_\_, 125 S. Ct. 2688; 162 L. Ed. 2d 820 (2005).

<sup>43</sup> Docket No. 05-0259 *et al.*, July 13, 2005, Order, p 14.

<sup>44</sup> *Id.* at 15.

<sup>45</sup> Staff Exhibit 3.0, ln.89-95.

<sup>46</sup> Tr. 179.

3. **Is it appropriate for parties to unilaterally modify the Agreement to self effectuate a change-of-law?**

*Relevant Contract Language: Section 18.6*

Sprint and the Respondents have agreed on the first portion of Section 18.6 of the Interconnection Agreement,<sup>47</sup>

18.6. Change-of-law. If a federal or state regulatory agency or a court of competent jurisdiction issues a rule, regulation, law or order which has the effect of canceling, changing, or superseding any material term or provision of this Agreement then the Parties shall negotiate in good faith to modify this Agreement in a manner consistent with the form, intent, and purpose of this Agreement and as necessary to comply with such change-of-law.

Under this language, if there were to be a change in the law or in the interpretation of the law by “a federal or state regulatory agency or a court of competent jurisdiction,” the parties would be required to “negotiate in good faith” a modification to the Interconnection Agreement.

The Respondents, rather than allow for negotiation to modify the agreement, seek additional language which upon

(i) any such action staying this Agreement or the ICC orders that precipitated the execution of this Agreement by the Parties; (ii) any such action reversing, overturning or materially altering the ICC orders that precipitated the execution of this Agreement by the Parties; (iii) any such action having the effect of clarifying or changing the law with respect to ILEC’s obligations to negotiate, interconnect and/or pay reciprocal compensation under Section 251 of the Act in connection with the type of traffic contemplated by Sprint’s business arrangement with MCC Telephony of Illinois, Inc.; or (iv) any such action granting ILEC a suspension of such obligations,<sup>48</sup>

as the Respondents’ witness testified, terminate the Agreement automatically.<sup>49</sup>

The Respondents suggested language, giving them the unilateral right to terminate service to Sprint (and consequently to Sprint’s customers) has some very real issues and

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<sup>47</sup> Sprint Exhibit 1.0, ln. 912-913; Respondents Exhibit 1.2.

<sup>48</sup> For the full text of the Respondents proposed language for Section 18.6.1, please see Respondent Exhibit 1.1.

<sup>49</sup> Respondents Exhibit 2.0, ln. 231-233.

problems, with which the Commission should be concerned. Staff's witness, Dr. Staranczak, expressed just such a concern that "customers served by Sprint or MCC under the agreement might be deprived of service in the event that the RLECs were permitted to summarily cease their performance under the agreement as a result of one these events."<sup>50</sup> As Sprint's witness, Mr. Burt testified, if any of the events that the Respondents suggest including in Section 18.6.1 were to happen,

the RLECs would like to be sole judge and jury regarding the interpretation and implementation of any such change, it's totally conceivable that the RLECs could immediately stop the flow of voice traffic between Sprint and the RLECs based on their own interpretation of an order. It is Sprint's position that any order be appropriately interpreted and implemented to minimize end-user impact.<sup>51</sup>

At the hearing, Respondents questioned whether traffic between Sprint and the Respondents would continue to flow and suggested that traffic could be exchanged on a non-local access basis. Mr. Burt dispelled that notion, stating that routing the calls over the toll network would result in higher costs for Mediacom and Sprint, and that the "customer experience" would be different in that both the Respondent's end-users and the Sprint/Mediacom end-users would have to make toll-calls and incur toll charges for traffic originating and terminating within the same local calling area.<sup>52</sup> While the Respondents' proposal "has certain very disturbing implications,"<sup>53</sup> it is also contrary to FCC and Commission determinations.

The FCC's rules have placed an affirmative obligation on the Respondents, as incumbent local exchange carriers to "include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission

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<sup>50</sup> Staff Exhibit 3.0, ln. 135-138.

<sup>51</sup> Sprint Exhibit 1.0, ln. 963-968.

<sup>52</sup> Tr. 171.

<sup>53</sup> Staff Exhibit 3.0, ln. 138.

or state rules.”<sup>54</sup> A refusal to include such, and Sprint considers a self effectuating change-of-law termination clause such a refusal, is, if proven to a state commission, a violation of the duty to negotiate in good faith.<sup>55</sup>

This Commission has, on at least two occasions rejected proposals similar to that put forth by the Petitioners in the instant proceeding. In the Interconnection Arbitration between SBC and Sage Telecom, Inc., SBC’s proposed change-of-law language that would have rendered “the affected Provision(s) shall be immediately invalidated, modified or stayed consistent with the action” that invoked the change of law provision.<sup>56</sup> The Commission rejected SBC’s proposal stating:

In contrast to the *immediate* disability imposed by the foregoing text, Sage’s intervening law provisions provide for good faith renegotiation between the parties, at the discretionary request of either party. Because it would not immediately disrupt the working relationship created by the ICA, Sage’s proposal is markedly superior. It would allow the parties a reasonable opportunity to consider the ramifications of regulatory change and arrange for a smooth transition accommodating such change. Moreover, no transition may be warranted, since changes to regulatory requirements and standards do not always obligate carriers to rearrange the rights and duties they established by contract.<sup>57</sup>

The Commission found likewise in the arbitration between MCI Metro Access Transmission Services, Inc. and SBC, concluding,

As we previously have held, to effectuate intervening law events, change-of-law procedures should require the parties to enter into negotiations regarding an appropriate contract amendment. *Sage Arbitration Order*, 03-0570, at 26. They should not, as SBC proposes here, permit a party to unilaterally impose its own interpretation of an intervening law event. Negotiations between the parties are essential to

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<sup>54</sup> 47 C.F.R. § 51.301(c)(3).

<sup>55</sup> 47 C.F.R. § 51.301(c).

<sup>56</sup> *Sage Telecom, Inc. Petition for Arbitration with SBC Illinois*, ICC Docket No. 03-0570, Arbitration Decision, Dec 9, 2003, p. 25.

<sup>57</sup> *Id.* at 27 (emphasis in original).

define the parameters of the law and translate them into contract language.<sup>58</sup>

Sprint also asks the Commission, as it did in the Docket 04-0469,<sup>59</sup> to reject language that would lists specific events that would automatically constitute a change of law. As Mr. Burt explained in his testimony,

[f]irst, the RLECs' proposed language is vague and ambiguous. The first subpart (i) and the second subpart (ii) of the RLECs' proposed 18.6.1 both reference "ICC orders that precipitated the execution of this Agreement by the Parties." That phrase in both of the subparts is not specific to any particular docket and could be interpreted to mean any ICC order that is overturned or stayed as long that order was issued before the execution of the Agreement. In subpart (iii), Sprint also is unclear as to the meaning of an action 'clarifying the law.' Sprint is unsure as to whether there is a true change of law if an order or court decision is merely clarified. The confusion raised by the language proposed by the RLECs demonstrates why a specific list of change of law events is inappropriate. Sprint's position is that if one party believes a change of law has occurred then it should utilize the procedures set forth in 18.6 to implement the change. If there is disagreement about whether an event constitutes a change of law, then the dispute resolution provisions of the Agreement should be utilized.<sup>60</sup>

The agreed upon language in Section 18.6 of the Interconnection Agreement provides for the negotiations between the parties, essential to define the parameters of the law and translate them into contract language, in the event of a change of law. Sprint respectfully requests that the Commission reject the Petitioners' additional language that would allow the Petitions to unilaterally terminate the Interconnection Agreement and service to Sprint and Sprint's customers and also reject language that would define specific "change of law" events.

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<sup>58</sup> MCI Metro Access Transmission Services, Inc. *Petition for Arbitration with SBC Illinois*, ICC Docket No. 04-0469, Arbitration Decision, Nov. 30, 2004, p. 23.

<sup>59</sup> *Id.* at 72-73.

<sup>60</sup> Sprint Exhibit 1.0, ln. 980-994.

**4. Should the Agreement include language specifically requiring Sprint to indemnify the Respondents from the action of third-parties?**

*Relevant Contract Language: Section 18.7*

In consolidated Docket No. 05-0259, the Commission found that “given the manner in which Sprint proposes to serve MCC, Sprint is a telecommunications carrier in this instance.”<sup>61</sup> Despite this ruling, the Respondents would like to treat Sprint differently from the way most requesting competitive carriers are treated in Interconnection Agreements regarding indemnification from the actions of third-parties.

Sprint and the Respondents have agreed on the first portion of Section 18.7 of the Interconnection Agreement,

18.7 No Third-Party Beneficiaries. This Agreement shall not be deemed to provide any third party with any benefit, remedy, claim, right of action or other right.<sup>62</sup>

The Respondents seek to add additional language that specifically requires Sprint to indemnify the Respondents for actions of third-parties, in some case third-parties which are the last mile providers.

The first line proposed to be added by the Respondents is:

Sprint has indicated that it has or intends to enter into business arrangements with “last mile” providers.<sup>63</sup>

This line, as Mr. Burt testified, would hamper Sprint by limiting how it may provide service under this agreement.<sup>64</sup> The agreement, as written, does not require Sprint to use a third-party last mile provider. However this line could cause an element of confusion if Sprint eventually offers service on its own facilities, or through resold services of the incumbent

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<sup>61</sup> Docket No. 05-0259 *et al.*, July 13, 2005, Order, p 14.

<sup>62</sup> Sprint Exhibit 1.0, ln. 1008-1010; Respondent Exhibit 1.1.

<sup>63</sup> Sprint Exhibit 1.0, ln. 1038-1039; Respondent Exhibit 1.1.

<sup>64</sup> Sprint Exhibit 1.0, ln 1061-1065.

carriers.<sup>65</sup> Thus, this line is superfluous and should be rejected. For the same reasons, Sprint disagrees with the suggestion made by Staff witness Hoagg that the term “last mile providers” be deleted throughout the contract and replaced with MCC.<sup>66</sup> Adoption of that language would complicate matters significantly if Sprint were either to offer service in its own name or sell services to additional last mile providers. Sprint sees no reason to make Sprint renegotiate, submit for approval and otherwise incur administrative costs when offering its services indiscriminately as required by the Commission Order in consolidated Docket No. 05-0259 *et al.*.

The second line proposed to be added by the respondents is:

Sprint represents and warrants that, in regard to the terms of this Interconnection Agreement, such business arrangements give Sprint the authority to act as if the facilities and end-user customers associated with those business arrangements are Sprint’s own facilities and end-user customers.<sup>67</sup>

This line inaccurately depicts the services Sprint will be offering. As Mr. Burt testified,

Sprint under this interconnection agreement is not “acting as if” certain facilities and end-user customers are its own facilities and customers. Under its arrangements with MCC, Service is provided in MCC’s name. MCC is responsible for marketing and sales, end-user billing, customer service and the “last mile” portion of the network which includes the MCC hybrid fiber coax facilities, the same facilities it uses to provide video and broadband Internet access. Sprint provides all public switched telephone network (PSTN) interconnection utilizing Sprint’s switch (MCC does not own or provide its own switching), and the interconnection agreements it has or is negotiating with incumbent local exchange carriers. Sprint also uses existing numbers or acquires new numbers and provides all number administration functions including filing of number utilization reports (NRUF) with the North American Numbering Plan Administrator (NANPA) and performs the porting function whether the port is from the RLEC or a CLEC to MCC or vice versa. Sprint is also responsible for all inter-carrier compensation including exchange access and reciprocal compensation. Sprint

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<sup>65</sup> Tr. 155.

<sup>66</sup> Staff Exhibit 2, ln. 34-44.

<sup>67</sup> Sprint Exhibit 1.0, ln. 1039-1044; Respondent Exhibit 1.1.

provisions 911 circuits to the appropriate Public Safety Answering Points (PSAP) through the ILEC selective routers, performs 911 database administration and negotiates contracts with PSAPs where necessary. Finally, Sprint places MCC directory listings in the RLEC or third party directories. Accordingly, Sprint is not “acting as if” it owns the last mile facilities. Its business partner in a commercial relationship owns those facilities. Moreover, Sprint is not “acting as if” the end-user customers are Sprint’s own end-user customers. There is no fiction created in the arrangement with MCC that the end-user customer is a Sprint customer. Sprint’s relationship with MCC is set forth in the agreement between those two entities. That arrangement is inconsequential to the interconnection, reciprocal compensation and other duties and obligations set forth in the interconnection agreements between Sprint and the RLECs. Sprint has consistently maintained that it is the responsible party in the interconnection agreements with the RLECs. It is inappropriate to characterize Sprint’s duties and obligations in the interconnection agreement in a manner inconsistent with Sprint’s commercial arrangements. As such, sentence (2) must be rejected.<sup>68</sup>

Staff agrees with Mr. Burt’s assessment of proposed sentence 2. Without assessing the accuracy of the sentence’s characterization of Sprint’s service offering, Jeffery Hoagg testified that “the ILEC’s legitimate purpose can be achieved without resort to specific characterization of the Sprint/MCC business arrangement.”<sup>69</sup> Mr. Hoagg agreed that this sentence should be eliminated.<sup>70</sup>

The third line proposed to be added by the Respondents is:

ILEC denies that such arrangements are the proper subject of interconnection and reciprocal compensation under Section 251 of the Act.<sup>71</sup>

Section 1.4 of the Interconnection Agreement, which has been agreed to by both Sprint and the Respondents, provides:

1.4. The Parties enter into this Agreement without prejudice to any positions they have taken previously, including without limitation ILEC's position that it is not legally obligated to negotiate or enter this

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<sup>68</sup> Sprint Exhibit 1.0, ln. 1068-1099.

<sup>69</sup> Staff Exhibit 2.0, ln. 91-93.

<sup>70</sup> *Id.*

<sup>71</sup> Sprint Exhibit 1.0, ln. 1044-1046; Respondent Exhibit 1.1.

Agreement, or any position they may take in the future in any legislative, regulatory, judicial or other public forum addressing any matters, including matters related specifically to this Agreement, or other types of arrangements prescribed in this Agreement.<sup>72</sup>

Sprint contends that Section 1.4 provides the reservations requested by the Respondents. There is no compelling rationale nor reason to repeat the reservation in this section. Staff concurs in this position.<sup>73</sup>

The fourth line proposed to be added by the Respondents is:

For traffic originated or terminated by ILEC that is delivered pursuant to such an arrangement, ILEC's responsibilities shall be only to Sprint and not to any such "last mile" provider or its subscribers.

This line is unnecessary. "Since the agreement is between Sprint and the specific RLEC and MCC is not a signatory, it is clear that the RLEC's responsibility [is] to Sprint and not to any last mile provider or end-user customer. Sprint objects to sentence (4) because it is superfluous."<sup>74</sup>

The fifth line proposed to be added by the Respondents is:

Correspondingly, Sprint shall be obligated to comply with all provisions of this Agreement for traffic it originates from and terminates to such "last mile" provider or its subscribers and, notwithstanding any limitation of liability in Section 6 or indemnification of Section 7, Sprint shall be liable to ILEC in the case that ILEC suffers any loss by any action of such "last mile" provider or its subscribers that is inconsistent with Sprint's obligations under this Agreement.

Again this line is superfluous. The Respondents expressed concerns regarding the relationship between Sprint and the last-mile provider, in this case MCC. However, as Mr. Burt testified, for example, regarding reciprocal compensation,

Sprint is the proper party to pay and receive reciprocal compensation with the RLECs under the Interconnection Agreement and the language

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<sup>72</sup> Respondent Exhibit 1.1.

<sup>73</sup> Staff Exhibit 2.0, ln. 97-100.

<sup>74</sup> Sprint Exhibit 1.0, ln. 1111-1113.

proposed by the RLECs in Section 18.7 should be rejected. As I stated in my September 13 Verified Statement, Sprint is not “acting as if” facilities and customers are its own. The interconnection facilities and equipment actually are Sprint’s facilities and equipment. Section 20 of the Agreement provides the terms and conditions between Sprint and the RLECs for reciprocal compensation. The RLECs thus will look to Sprint and Sprint alone for issues regarding intercarrier compensation. If the RLECs are concerned about MCC asking the RLECs for payment of reciprocal compensation, they should not be.<sup>75</sup>

Sprint will be executing the Interconnection Agreement and not a third-party. Because Sprint will be executing the document, it is automatically presumed to know the contents of, and its responsibilities under, the contract to which it has chosen to be bound, the standard Third-Party Beneficiaries, the language agreed to between Sprint and the Respondents, should be the only language recommended by the Commission for this section of the Interconnection Agreement.

**5. Should Sprint and the Respondents share the costs of the interconnection facility between their points of interconnection based on their respective percentages of originated traffic?**

*Relevant Contract Language: Sections 19.2.3, 19.2.6, 19.2.10, 19.2.13, 19.2.13.1, and 19.2.13.2*

In an Interconnection Agreement between Sprint PCS and Respondent Harrisonville Telephone Company, Harrisonville agreed to share the costs of interconnection facilities with Sprint PCS based on each carrier’s proportionate use of the facilities.

4.2 Shared Facilities Factor

Where facilities are used for two-way traffic, the applicable recurring and non-recurring charges (if any) will be reduced by an agreed upon percentage of traffic terminated on the network of the Party purchasing the ‘shared’ facilities. This percentage is referred to as the Shared Facilities Factor and is set forth on Attachment 1. The Parties will review this factor on a periodic basic and, if warranted by the actual usage, revise the factor appropriately.<sup>76</sup>

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<sup>75</sup> Sprint Exhibit 1.1, ln. 291-300.

<sup>76</sup> Sprint Cross-Exhibit 5.

Despite the fact that it is common for ILECs to share the cost of interconnection facilities based on a carrier's proportionate use of the facility when entering into an Interconnection Agreement with a wireless carrier,<sup>77</sup> as Harrisonville did above, the Respondents have taken the position that Sprint must absorb 100% of the cost of the transport facilities that physically join Sprint's network with those of the Respondents. However, such a position is inconsistent with federal law.

The FCC's rules place the onus on this Commission to "establish rates for the transport and termination of telecommunications traffic that are structured consistently with the manner that carriers incur those costs, and consistently with the principles in §§ 51.507 and 51.509."<sup>78</sup>

The rules further provide:

"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 that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods."<sup>79</sup>

When read in conjunction with Section 51.703(b), which provides, "a LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network,"<sup>80</sup> it becomes clear that the cost of the transmission facility is a shared-cost responsibility of the two carriers whose networks are being interconnected. As Mr. Burt testified, "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."<sup>81</sup>

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<sup>77</sup> Sprint Exhibit 1.0, ln. 1183-1184.

<sup>78</sup> 47 C.F.R. § 51.709(a).

<sup>79</sup> 47 C.F.R. § 51.709(b).

<sup>80</sup> 47 C.F.R. § 51.703(b).

<sup>81</sup> Sprint Exhibit 1.0, ln. 1178-1179.

In another Interconnection Arbitration, this Commission ordered terms where a wireless carrier and an ILEC share the costs of interconnection facilities, based on the usage of such facilities. In Docket No. 01-0007, the Commission “adopt[ed] Verizon [Wireless]'s proposal to charge Ameritech the average rate Ameritech charges Verizon [Wireless] for DS-1 facilities, for that portion of the facilities used to transport Ameritech's traffic. We find that the pricing methodology proposed by Verizon [Wireless] is a reasonable approximation of the cost of the facilities.”<sup>82</sup> However, when confronted with a similar allocation of costs between a competitive carrier and an incumbent, the Commission, in Docket No. 04-0569, reached a much different result, finding that to find as it did in the Verizon Wireless Arbitration, or to adopt the methodology used in most wireless interconnection agreements “would depart from the well-established methodology of apportioning the costs to LECs for facilities on their side of the POI.”<sup>83</sup> In Docket 04-0469, this Commission expressed concern that “nothing would limit MCI from over-building capacity and charging for all of it, whether or not it is needed. MCI did not refute that contention.”<sup>84</sup> Sprint’s witness, Mr. Burt testified that “[i]t is unfortunate that MCI did not rebut that assertion.”<sup>85</sup> Mr. Burt testified, under Sprint’s proposed language, the Respondents would only be responsible for the cost associated with traffic originated on its network. Therefore, “even if Sprint ‘over-builds,’ its network, the RLEC will not be required to pay for that overbuilding.”<sup>86</sup>

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<sup>82</sup> *Verizon Wireless Petition for Arbitration with Ameritech*, Docket No. 01-0007, Order, May 1, 2001, p 24.

<sup>83</sup> *MCI Metro Access Transmission Services, Inc. Petition for Arbitration with SBC Illinois*, ICC Docket No. 04-0469, Arbitration Decision, Nov. 30, 2004, p. 104.

<sup>84</sup> *Id.*

<sup>85</sup> Sprint Exhibit 1.1, ln. 402.

<sup>86</sup> *Id.* at ln. 403-411.

Other states have found that costs should be allocated, on a balanced basis, between interconnecting carriers. The Maryland Public Service Commission has found in an interconnection arbitration between landline carriers 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 forth by the FCC in P 1062 of the 1996 First Report and Order. 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.<sup>87</sup>

The Missouri Public Service Commission also agreed that parties should be financially responsible for traffic originating on that party's network.

The Commission concurs . . . 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.<sup>88</sup>

The Michigan Public Service Commission

has consistently held that the parties to an interconnection agreement must share the cost of the facilities that run between their networks on a proportional basis based on the traffic each sends over those facilities. See, e.g., the August 18, 2003 order in Case No. U-13758, in which the Commission quoted from *TSR Wireless, LLC v US West Communications, Inc*, FCC 00-194, as follows:

The Local Competition Order requires a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of its co-carrier, who then terminates that traffic and bills the originating carrier for termination compensation. In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end-user, and is responsible for paying the cost of delivering the call to the network of the co-carrier, who will then terminate the call. Under the [FCC's] regulations, the cost of the facilities used to deliver this traffic is the

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<sup>87</sup> *Arbitration of US LEC of Maryland Inc. vs. Verizon Maryland Inc.*, Md. P.S.C., 2005 Md. PSC LEXIS 6, Order No. 79813; Case No. 8922 (2005); See also, *Petition of AT&T Communications of Maryland, Inc. for Arbitration*, 2004 Md. PSC LEXIS 13, Order No. 79250; Case No. 8882 (2004).

<sup>88</sup> *SBC Missouri's Petition for Compulsory Arbitration*, 2005 Mo. PSC LEXIS 963, Case No. TO-2005-0336 (2005).

originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. This regime represents the "rules of the road" under which all carriers operate. *Id.*, p 34.<sup>89</sup>

As Mr. Burt testified,

the concept of sharing the cost of the transmission facilities that join the two interconnection networks is not a “novel approach” in the industry. While it may not be as well of an established concept in ILEC-CLEC interconnections, it is clearly a well-established practice in ILEC-CMRS interconnections and there is simply no justification for treating the two types of carriers differently with respect to interconnection obligations.<sup>90</sup>

Thus, the Commission should adopt the language proposed by Sprint and allocate costs on a balanced basis between the interconnecting carriers, as required by Federal Law and recognized by other state commissions.

**6. Should the parties exchange traffic on an indirect basis until such time that amount of traffic warrants a direct interconnection?**

*Relevant Contract Language: Sections 19.3.1, 19.3.2, 19.3.3, 19.3.4, 19.3.5, 19.3.6, 19.3.7, 19.3.8, 19.3.9, 19.3.11, 19.3.12*

When it enacted the Act, Congress delegated to this and other state commissions the duty to enforce the interconnection obligations set forth in the Act, subject to federal court review. In doing so, Congress did two things that make plain its intent, as applied to the issues here. First, it made clear that it was passing the Act to open up monopolized markets to competition. Second, mindful that it could not foresee all the innovative arrangements that free competition might unleash, Congress stated the interconnection duty in language that was both broad and flexible enough to accommodate new business models that were unheard of when the Act was passed. Section 251(a) of the Act obligates each telecommunications carrier “to interconnect

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<sup>89</sup> *Application of Telnet Worldwide, Inc. for Arbitration with Verizon North, Inc.*, Mi. P.S.C. 2005 Mich. PSC LEXIS 39, MPSC Case No. U-13931 (2005).

<sup>90</sup> Sprint Exhibit 1.1, ln. 393-398.

directly or indirectly with the facilities and equipment of other telecommunications carriers.” Thus, the Act provides that all telecommunications carriers, including the Respondents, have a duty to connect “directly or indirectly” with other carriers.

As described by Mr. Burt,

Indirect interconnection allows parties to interconnect and exchange traffic through a third party tandem provider. Specifically, indirect interconnection describes the scenario that exists when the CLEC is physically connected by a dedicated transport facility to a third-party ILEC’s tandem to which the RLEC is also typically physically connected by a common transport facility. In an indirect interconnection scenario, there is no dedicated transport facility between the CLEC and the subtending RLEC.<sup>91</sup>

This is similar to the arrangement that Respondents Marseilles Telephone Company<sup>92</sup> and Metamora Telephone Company<sup>93</sup> have with U.S. Cellular for the exchange of local traffic:

4.1 The Parties shall exchange local and or incidental non-local traffic under this Agreement by each Party physically connecting its network to a third-party LEC(s), which shall transit the traffic between the two Parties. Each Party shall be responsible for establishing appropriate contractual relationships with this third-party LEC(s) for interconnecting with its network and transiting local traffic over that network to the other Party. Each Party shall be responsible for providing the trunks from its network to the point of interconnection with the third-party LEC(s) network and for paying the third-party LEC(s’) network provider for the costs of transiting local calls that the Party originates.<sup>94</sup>

Yet despite such an offering to the wireless carriers, the Respondents, through their witnesses’ testimony, state that they “don’t believe they should exchange local traffic via indirect interconnection with Sprint under any circumstance.”<sup>95</sup>

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<sup>91</sup> Sprint Exhibit 1.0, ln. 1290-1296.

<sup>92</sup> Interconnection Agreement between Metamora Telephone Company and U.S. Cellular, submitted to the Commission for Approval in ICC Docket No. 05-0567, Sprint Cross Exhibit 3.

<sup>93</sup> Interconnection Agreement between Metamora Telephone Company and U.S. Cellular, submitted to the Commission for Approval in ICC Docket No. 05-0568, Sprint Cross Exhibit 4.

<sup>94</sup> Sprint Cross Exhibit 3; Sprint Cross Exhibit 4.

<sup>95</sup> Respondent Exhibit 1.0, ln. 499-500 (emphasis added).

As noted by Staff's Witness, Mr. Hoagg, indirect interconnection, an option guaranteed by Section 251 of the Act, can result in cost savings and efficiencies where the traffic exchanged by the parties is rather low.<sup>96</sup> In the present instance, Sprint proposed to exchange a small amount of traffic with the Respondents over an indirect connection,<sup>97</sup> while limiting indirect interconnection to only those instances when 1) Sprint is directly interconnected to the tandem which the RLEC subtends; 2) traffic remains low; and 3) when and "if volumes of traffic exchanged between the Parties increases over time making a direct interconnection feasible, Sprint would establish direct connections with the RLEC end offices."<sup>98</sup> However, under Section 251(a), Sprint has a right, and the Respondents have an affirmative duty, "to interconnect directly *or indirectly* with the facilities and equipment of other telecommunications carriers."<sup>99</sup> The Commission should adopt Sprint and Staff's position and mandate that indirect interconnection be made available in the agreement.

***a. If the parties interconnect on an indirect basis, what call records should be provided?***

The Respondents claim that if indirect interconnection is allowed, they will be subject to a "traffic identification problem [ ] frequently referred to as 'phantom traffic,'"<sup>100</sup> or traffic which is received at a terminating end office but cannot be billed to the appropriate carrier. To remedy this alleged problem, the Respondents are asking the Commission to require Sprint to create custom monthly summary traffic report language proposed by the Respondents.<sup>101</sup>

However, there are alternative, and less burdensome, ways of getting the appropriate call origination information. In their direct testimony, the Respondents discuss "equipment that can

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<sup>96</sup> Tr. 290.

<sup>97</sup> Sprint Exhibit 1.0, ln. 1308.

<sup>98</sup> *Id.* at ln. 1313-1318.

<sup>99</sup> 47 U.S.C. § 251(a) (emphasis added).

<sup>100</sup> Respondent Exhibit 1.0, ln. 580-583.

<sup>101</sup> Respondent Exhibit 1.0, ln. 648-649.

access the SS7 signaling information that can give the company additional information to verify the origin of the traffic it receives.”<sup>102</sup> However, the Respondents failed to mention, in either their direct or rebuttal testimony, that Marseilles Telephone Company had already purchased this equipment.<sup>103</sup> While a complete list of the capabilities of this equipment is contained on a copy of the invoice, provided in discovery, it is clear that this software would “give the opportunity to verify [the origin] of traffic.”<sup>104</sup> Though it may be possible that Metamora and Harrisonville’s tandem or SS7 providers might be able to provide the information that the Respondents are demanding from Sprint, the Respondents’ witness did not investigate whether or not such reports are available and did not contact the providers nor research the contracts between the Respondents and their providers.<sup>105</sup> However, the Witness admitted that “in some parts of the country, RLECs do provide detailed call records” to their tandem customers.<sup>106</sup> Staff’s witness, Russell W. Murray testified that if “Feature Group D” were installed, the Respondents themselves could also gain access to the various billing information the Respondents seek.<sup>107</sup>

As discussed below, if the parties interconnect on an indirect basis, and if the originating party pays for the transit of a call, call records become important to determine both transiting charges and reciprocal compensation. Clearly, the Commission should require transit provider to provide adequate call detail records/usage information for the terminating provider, whether it is an RLEC or a CLEC, as opposed to mandating the implementation of more costly arrangements, such as the Respondent-suggested summary reports.

Mr. Burt testified that,

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<sup>102</sup> Respondent Exhibit 1.0, ln. 608-609.

<sup>103</sup> Sprint Cross Exhibit 8.

<sup>104</sup> Tr. 244.

<sup>105</sup> Tr. 245

<sup>106</sup> Tr. 240.

<sup>107</sup> Tr. 261-262.

Sprint fully agrees that unless the Parties have agreed to a bill and keep arrangement, the terminating carrier is due terminating reciprocal compensation for any local traffic that terminates on its network. Likewise, the transit provider should be compensated for the transit services it provides to allow this form of indirect interconnection. Further, Sprint recognizes that unidentified/unbillable traffic (sometimes referred to as phantom traffic) is an industry-wide problem; however, Sprint believes that the volume of traffic associated with this problem is likely overstated. Nonetheless, to the extent carriers exchange traffic on an indirect basis (the most efficient method for small volumes of traffic) it is Sprint's position that the transit provider has an obligation to provide call detail records to the terminating carrier to allow that carrier to identify all carriers that terminate traffic onto its network. No carrier should terminate traffic for free.

When the Respondents terminate traffic from such Wireless carriers as AT&T Wireless, Cingular, First Cellular of Southern Illinois, Nextel, Sprint PCS, T-Mobile, U.S. Cellular, and Verizon Wireless, the Respondents rely on monthly summary reports from their tandem (and transiting) carrier SBC.<sup>108</sup> With these carriers, the Respondents do not require customized reports, but as indicated in Section 6.1 of the Interconnection Agreements Metamora and Marseilles have with U.S. Cellular,

6.1 The Parties will work cooperatively to exchange billing records in standard industry formats regarding calls they originate that terminate on the other Party's network. . . . Neither Party shall be obligated as a result of this Agreement to develop or create new billing formats or records to satisfy any duty or obligation hereunder.<sup>109</sup>

The same should apply to Sprint. Mr. Burt testified, "Sprint is not willing nor should Sprint be required to agree to the creation of billing records/summary report that is not imposed on other carriers."<sup>110</sup> Other less intrusive methods exist for billing originating carriers, than forcing the originating carrier to develop customized reports. Staff's witness, Russell Murray discussed additional, and acceptable, methods for accurately billing originating call detail on

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<sup>108</sup> Sprint Cross Exhibit 7.

<sup>109</sup> Sprint Cross Exhibits 4 & 5, § 6.1.

<sup>110</sup> Sprint Exhibit 1.0, ln. 1487-1488.

cross-examination. These include summary reports, call detail records, pass through “Feature Group D Trunking” and equipment used to measure and bill calls.<sup>111</sup>

***b. If the parties interconnect on an indirect basis how should the transit and transport costs associated with the indirect interconnection be borne?***

Similar to the arrangement the Respondents have with the wireless carriers,<sup>112</sup> Sprint would abide by the Calling Party Network Pays (“CPNP”) regime, developed by the FCC for indirect interconnection.

Under this regime, when either an RLEC or Sprint is an originating party, it is responsible for all costs of delivering its originated local traffic to the terminating party. For Sprint-originated indirect traffic routed through a third-party transit provider, Sprint acknowledges its responsibility to pay the transit provider for the costs associated with delivering its traffic to the terminating party’s network. These costs typically include a tandem switching charge and charges associated with the common transmission facilities to the subtending RLECs’ network. Likewise, the RLECs are obligated to pay any third-party transit costs associated with delivering their originated traffic to Sprint, in addition to compensating Sprint for the use of its network.<sup>113</sup>

This regime has been upheld by numerous courts and commissions. In *Atlas Telephone Company v. Corporation Commission of Oklahoma*,<sup>114</sup> the United States Court of Appeals for the Tenth Circuit affirmed the Oklahoma Corporation Commission’s decision approving interconnection agreements that required the originating carrier to bear the cost of transporting telecommunications traffic to the terminating carrier without regard to whether the calls were delivered via an intermediate carrier. In other words, the court rejected the RLEC argument that the CMRS providers should be required to pay the additional expense of transporting traffic bound for a CMRS provider across the tandem provider’s network. Respondents’ proposal here

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<sup>111</sup> Tr. 263-264.

<sup>112</sup> Sprint Cross Exhibits 4 and 5, § 4.1.

<sup>113</sup> *Id.* at ln 1324-1332.

<sup>114</sup> 400 F.3d 1256 (10<sup>th</sup> Cir 2005).

to require Sprint to pay all transiting charges, regardless of which party, Sprint or the Respondents, originate the call, likewise should be rejected.

In *Mountain Communications Inc. v. Qwest Communications*,<sup>115</sup>, the FCC addressed the issue of transit costs in a situation involving three carriers. Specifically, the Commission was addressing whether Qwest, a transit provider, would be permitted to charge a portion of those transit costs to the terminating CMRS carrier or whether Qwest should be required to charge all of these costs to the originating LEC. The FCC held that Qwest was clearly not responsible for the costs associated with this traffic because the traffic had not originated on Qwest's network. Accordingly, the Commission found that nothing prohibited Qwest from imposing these transit fees on the terminating wireless carrier. However, the Commission went on to note, that in this circumstance, "[t]he CMRS carrier may then seek reimbursement of the costs associated with transport and termination of that traffic from the carriers that originated the transiting traffic in question."<sup>116</sup> On appeal,<sup>117</sup> the United States Circuit Court of the D. C. Circuit expressed confusion over why the FCC would not require Qwest to charge the originating carrier directly. It observed, however, that the net result was the same. "In any event, by indicating that Mountain could charge the originating carrier, it [the FCC] suggested that Mountain was essentially correct in claiming that the originating carrier should bear *all* the transport costs."<sup>118</sup>

Earlier this year, the Pennsylvania Public Utility Commission expressly found that an originating carrier has an obligation to pay the costs associated with its traffic, and that this obligation extended to the payment of transiting fees imposed by an intervening tandem owner in an indirect interconnection arrangement. The Pennsylvania Commission specifically noted that

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<sup>115</sup> 17 FCC Rcd 2091 (2002)

<sup>116</sup> *Id.* at 2095.

<sup>117</sup> *Mountain Communs., Inc. v. FCC*, 355 F.3d 644 (D.C. Cir. 2004).

<sup>118</sup> *Id.*, at 649 (emphasis in original).

“[t]here is a strong pronouncement on the part of the FCC to unwaveringly adhere to the principle that the originating carrier bears the costs of delivering traffic which originates on its network.”<sup>119</sup>

Only a few days ago, the Missouri Public Service Commission, in a case involving a small rural carrier, found that,

[s]ection 251(b)(5) imposes on the Petitioners the duty to establish ‘*reciprocal* compensation arrangements for the transport...of telecommunications.’ FCC rules define ‘transport’ as the transmission of traffic ‘from the interconnection point between the two carriers to the terminating carrier’s end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.’ If a rural LEC and wireless carrier were to interconnect directly, the interconnection point ordinarily would be located at the edge of the rural LEC’s network. Under a rural LEC’s reciprocal compensation obligation, which applies to both ‘transport and termination,’ the rural LEC would be responsible for that portion of the facility to the extent it is used for land-to-mobile traffic – just as the wireless carrier would be responsible for that portion of the facility to the extent it is used for mobile-to-land traffic. As the FCC General Counsel explained recently to a federal appellate court:

Under current intercarrier compensation rules, then, when a wireless customer calls a rural LEC customer, the wireless carrier is responsible for transporting the call and paying the cost of this traffic. And, conversely, when a rural LEC customer calls a wireless customer, the rural LEC is responsible for transporting the call and paying the cost of this transport.

The FCC has made clear that the cost of a direct interconnection facility is to be shared between the two carriers. . . . If rural LECs must bear the cost of transport for land-to-mobile calls with indirect interconnection, it necessarily follows that they must bear the cost of transport for land-to-mobile calls when direct interconnection is utilized.<sup>120</sup>

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<sup>119</sup> *Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration with Alltel Pennsylvania*, Pa. P.U.C. Docket No. A-310489F7004, Jan. 13, 2005 available on the Internet at <<http://www.puc.state.pa.us/PcDocs/516746.doc>> , p. 33.

<sup>120</sup> *Petition of Alma Telephone Company for Arbitration with T-Mobile*, Mo. P.U.C. Case No. IO-2005-0468, Oct. 6, 2005, available on the Internet at <<http://www.psc.state.mo.us/orders/10065468.htm>>.

Sprint respectfully requests that the Commission adopt Sprint’s language in this matter, which is consistent with Federal Law and the actions taken in other states.

**7. How should EAS traffic be compensated between the parties?**

At the evidentiary hearing, Sprint and the Respondents were able to resolve this issue.<sup>121</sup>

**8. Should Sprint be required to pay for directory listings at the higher foreign exchange rate contained in the Respondents’ tariffs?**

*Relevant Contract Language: Sections 24.4, 24.5.*

While not raised in negotiations, and not raised in the Respondents response to Sprint’s Petition for Arbitration,<sup>122</sup> and not raised in the Joint Disputed Points List,<sup>123</sup> in the Respondent’s Initial Testimony a new issue was raised for the first time—that it is “the position of the RLECs that Sprint should pay the tariff rate, as it may be amended from time to time, for foreign listings in connection with the MCC customers in addition to the ILEC’s actual cost of distribution.”<sup>124</sup>

It is Sprint’s position that this issue is improperly raised. Section 252(b)(4) of the Act limits state commission authority to the issues set forth in the petition and the response to the petition.<sup>125</sup> As noted in the Respondents’ Exhibit 1.1, Sprint and the Respondents agreed to language that reads:

24.4 Primary listing information of End-users served through Sprint in the telephone directories will be provided at no charge. Sprint will pay ILEC’s Tariffed charges for additional and foreign telephone directory listings.

This agreed to language is consistent with § 251(b)(3) of the Act which requires “the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listings.” As observed by Sprint Witness Mr. Burt,

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<sup>121</sup> Tr. 179.

<sup>122</sup> Tr. 247.

<sup>123</sup> Tr. 246.

<sup>124</sup> Respondent Exhibit 1.0, ln. 724-726.

<sup>125</sup> 47 U.S.C. § 252(b)(4).

Per the ILEC's tariffs for Directory Listings they do not charge their own End-users for the Primary listing therefore it would be discriminatory to charge Sprint for a Primary listing. See Attachment JRB-2. In addition the ILEC's own tariff is perfectly clear that the Foreign Exchange Directory Listing charge applies to a listing that is included in the directory of another exchange and not the exchange in which the End-user is provided local service. To charge Sprint for the Primary listing would be contradictory to ILECs own tariffs and the Act. The ILEC's tariffed rates for a Foreign Exchange Listing should not apply to Sprint's Primary listings.

Staff witness Robert F. Koch agreed that the foreign exchange listing charge should not apply when the Sprint/MCC customer is located within one of the Respondents' exchanges.<sup>126</sup> Sprint has offered the Respondents language, for Section 24.5, that "allows for the ILEC's recovery of any demonstrable incremental costs of the directory distribution."<sup>127</sup> Sprint's proposed language allows for recovery of the Respondents directory costs in a fair and nondiscriminatory manner and should be adopted.

## **F. CONCLUSION**

Since the Commission issued its Declaratory Ruling in consolidated Dockets No. 05-0259, there have not been "any new circumstances that could cause the commission [to depart from its previous decision that Sprint is a telecommunications carrier]."<sup>128</sup> Thus, Sprint requests that the Commission continue to find it a "telecommunications carrier," with which the Respondents have an obligation to negotiate and enter into an Interconnection Agreement.

In Sprint's Proposed Interconnection Agreement, Sprint has presented reasonable solutions to the issues upon which the Respondents and Sprint disagree. These solutions are consistent with the Act, this Commission's precedence, the FCC's Rules and public policy. Sprint's Proposed Interconnection Agreement is consistent with the public interest, convenience,

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<sup>126</sup> Tr. 273

<sup>127</sup> Sprint Exhibit 1.1, ln. 615-617.

<sup>128</sup> Staff Exhibit 3.0, ln. 89-95.

and necessity. Sprint's proposed Interconnection Agreement will allow Sprint to enter into Interconnection Agreements with the Respondents, resulting in the first competitive landline offerings to Illinois telephone users living in the incumbent service territories of the Respondents, helping benefit the evolving telecommunications services and economic development within the state, long stated goals of the Illinois Commerce Commission, the Legislature, and Governor.

WHEREFORE, Sprint Communications L.P. d/b/a Sprint Communications Company L.P. respectfully requests that the Arbitration Panel and the Commission adopt Sprint's Proposed Interconnection Agreement with Harrisonville Telephone Company, Marseilles Telephone Company, and Metamora Telephone Company.

Respectfully submitted,

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Dated: October 18, 2005

**STATE OF ILLINOIS**

**BEFORE THE ILLINOIS COMMERCE COMMISSION**

Sprint Communications L.P. d/b/a Sprint )  
Communications Company L.P. )  
)  
Petition for Consolidated Arbitration with )  
Certain Illinois Incumbent Local Exchange )  
Carriers pursuant to Section 252 of the )  
Telecommunications Act of 1996. )  
)  
Plaintiff, )

Case No. 05-0402

**NOTICE OF FILING**

To: Parties of Record

You are hereby notified that on October 18, 2005, I filed, via the electronic e-docket system, with the Chief Clerk of the Illinois Commerce Commission, the Initial Brief of Sprint Communications L.P. d/b/a Sprint Communications Company L.P., in the above-captioned docket.

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Initial Brief of Sprint Communications L.P. d/b/a Sprint Communications Company L.P., in the above-captioned proceeding, was served upon the parties on the attached service list via Electronic Mail on October 18, 2005.

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Petition of Sprint Communications L.P. d/b/a Sprint Communications Company L.P.'s for  
Consolidated Arbitration with Certain Illinois Incumbent Local Exchange Carriers

Docket Nos. 05-0402 and 05-0433

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Petition of Sprint Communications L.P. d/b/a Sprint Communications Company L.P.'s for  
Consolidated Arbitration with Certain Illinois Incumbent Local Exchange Carriers

Docket Nos. 05-0402 and 05-0433

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