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The Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, and pursuant to Section 766.300 of the Commission’s Rules of Practice, 83 Ill. Adm. Code 766.300, respectfully submits its Reply Brief in the above-captioned matter.

The Staff first notes that its Initial Brief addressed the great majority of arguments raised in the other parties’ Initial Briefs. The Staff will, accordingly, refrain from reiterating in detail, and stand on, the arguments raised in its Initial Brief. Staff notes that failure to specifically respond to any argument raised in any party’s Initial Briefs should not be construed as a waiver. Three arguments raised by the parties, however, warrant a specific response here. These arguments are: (1) Sprint’s arguments regarding allocation of the burden of proof; (2) Sprint’s arguments regarding construction of the FCC’s Merger Order; and (3) AT&T’s arguments regarding the proper jurisdictional classification of 1+dialed intraMTA traffic. All of these arguments are defective, and the Commission should reject them for the reasons set forth in this Reply Brief.

I. Sprint Bears the Burden of Proof in this Proceeding

As both Staff and AT&T noted in their respective Initial Briefs, Sprint bears the burden of proof as complainant in this proceeding. Staff IB at 11-15; AT&T IB at 5-6.

Sprint argues that, Sprint’s status as complainant notwithstanding, AT&T should be required to bear the burden of proof in this proceeding with respect to any amendments or alterations AT&T proposes to the Kentucky ICA. Sprint IB at

10, *et seq.* Its basis for this perplexing assertion, apart from an irrelevant dissertation on the economic benefits of the BellSouth merger to AT&T, is as follows:

Any contention by AT&T that the Interconnection Agreement is not subject to porting under the Merger Commitments and any contention that additional changes are necessary to the Interconnection Agreement prior to its adoption in the State of Illinois are in effect AT&T's affirmative defenses to Sprint's Complaint. "Though not identical in scope to the common law plea in confession and avoidance, the affirmative defense essentially takes the same approach of admitting all of the allegations of a complaint, but of then going on to explain other reasons that defendant is not liable to plaintiff anyway (or, as with comparative negligence or non-mitigation of damages, may be liable for less than plaintiff claims)." [fn to case citation] In the present situation, AT&T is arguing that if they [sic] are required to allow Sprint to port the Kentucky ICA into Illinois, then the Kentucky ICA should be modified to suit AT&T's purposes, allegedly under the guise of conforming it to Illinois "state-specific pricing and performance plans and technical feasibility."

Sprint IB at 12-13 (footnote omitted)

This is wishful thinking on Sprint's part, and completely without support in Illinois law, or the law of any other jurisdiction known to the Staff.

In Illinois, affirmative defenses are defined as follows:

The criteria to be applied in determining if a defense is or is not of an affirmative nature is whether, by the raising of it, a defendant gives color to his opponent's claim **and then asserts new matter** by which the apparent right is defeated.

Horst v. Morand Bros. Beverage Co., 96 Ill. App. 2d 68, 80; 237 N.E.2d 732, 738; 1968 Ill. App. Lexis 1149 at 13 (1st Dist. 1968); *see also, e.g.,* Campbell v. White, 187 Ill. App. 3d 492; 543 N.E.2d 607; 1989 Ill. App. Lexis 1322; 135 Ill. Dec. 224 (4th Dist. 1989); Space v. E.F. Hutton Co., Inc., 188 Ill. App. 3d 57; 544 N.E.2d 67; 1989 Ill. App. Lexis 1324; 135 Ill. Dec. 710 (4th Dist. 1989); Zeiger v. Manhattan Coffee Co., 112 Ill. App. 3d 518; 445 N.E.2d 844; 1983 Ill. App. Lexis 1465; 68 Ill. Dec. 200 (5th Dist. 1983)

Illinois courts have found that any assertion by a defendant that does not give color to the plaintiff's claim, but rather attacks the sufficiency of that claim, is not an affirmative defense. Worner Agency, Inc. v. Doyle, 121 Ill. App. 3d 219, 222; 459 N.E.2d 633, 635; 1984 Ill. App. Lexis 1400 at 7 (4th Dist. 1984).

Here, of course, AT&T does not raise an affirmative defense, because its defense – that the various amendments it proposes to the Kentucky ICA are required by Merger Commitment 7.1 – do not give color to Sprint's claim and are not in fact “new matters”. In its *Complaint*, Sprint cites Merger Commitment 7.1, and asserts that AT&T is attempting to impose improper state-specific requirements. Complaint, ¶¶33, 48, 51, 52, 57. AT&T flatly denies any allegation that the state-specific requirements it wishes to impose are not properly required by Merger Commitment 7.1. Answer, ¶¶38, 41, 42, 45, 47, 48, 57, 67, 69. In other words, AT&T's assertion that Sprint takes an improper and unwarranted view of what constitutes a state-specific requirement within the meaning of Merger Commitment 7.1 is scarcely a “new matter that defeats [Sprint's] claim”; rather it is a disputed issue of fact squarely framed by the parties' respective pleadings, and AT&T's assertions directly challenge the factual and legal sufficiency of Sprint's claim for relief. As such, AT&T does not raise an affirmative defense, as affirmative defenses are defined by Illinois law.

To further understand why AT&T's proposed amendments to the Kentucky ICA do not constitute an affirmative defense in Illinois law, it is useful to consult the provision in the Illinois Code of Civil Procedure that governs affirmative

defenses. Section 2-613 of the Code gives numerous examples of affirmative defenses, including:

payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that the negligence of a complaining party contributed in whole or in part to the injury of which he complains, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of nondelivery, [and] want or failure of consideration in whole or in part[.]

735 ILCS 5/2-613(d)

It is apparent that each of the affirmative defenses specifically available to an Illinois litigant share one characteristic: they all require the allegation and proof of some fact extraneous to the conduct alleged in the complaint.

Here, Sprint's right to import the Kentucky ICA is specifically and explicitly "subject to state-specific pricing and performance plans and technical feasibility[.]" Merger Condition 7.1 (emphasis added). Further, AT&T:

shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made[.]

Id. (emphasis added)

Sprint's argument that AT&T's proposal constitutes an affirmative defense thus fails utterly. Sprint's assertion that AT&T invokes what is "in effect an affirmative defense" requires acceptance of the premise that Sprint has some unconditional right to import the Kentucky ICA, and that AT&T's position constitutes an attempt to bar that right based on some extraneous matter.

This premise is completely defective. By the terms of Merger Condition 7.1, Sprint very clearly does not have such an unconditional right. It may import

the Kentucky ICA “subject to” certain very significant changes, and only under certain conditions. AT&T and Sprint are, at this point, at issue regarding the proper interpretation of the language - Merger Commitment 7.1 - that affords Sprint any rights that it has here, and which simultaneously places conditions upon the exercise of those rights. This matter falls squarely within the four corners of Sprint’s complaint, and AT&T’s position directly challenges the sufficiency of Sprint’s complaint by asserting that the Merger Commitment does not afford Sprint any right to the relief it seeks. AT&T’s position is thus simply not an affirmative defense.

Sprint first relies upon State Farm Mutual Auto Ins. Co. v. Riley, et al., 199 F.R.D. 276; 2001 U.S. Dist. Lexis 1956 (N.D. Ill. 2001), apparently as authority for the definition of an affirmative defense in Illinois. State Farm Mutual, however, is particularly inapposite here, because, as the case citation suggests, the case is one dealing in part with interpretation of the Federal Rules of Civil Procedure, in this case F.R. C.P. 8(c)¹. State Farm Mutual, 199 F.R.D. at 279; 2001 U.S. Dist. Lexis 1956 at 6-7. As noted above, it is a tenet of Illinois law that an affirmative defense “gives color to” an opponent’s claim, rather than “admitting”, see Sprint IB at 12-13, quoted, *supra* at 2, it, and then asserts “new matter” defeating the claim, rather than “going on to explain other reasons that defendant is not liable to plaintiff anyway”. *Id.*

In further support of its argument, Sprint refers the Commission to, *inter alia*, Roy v. Coyne, 259 Ill. App. 3d 269; 630 N.E.2d 1024; 1994 Ill. App. Lexis

¹ F.R.C.P. 8(c) is somewhat similar to Section 2-613(d) of the Illinois Code of Civil Procedure, in that both recite a list of extraneous matters that constitute affirmative defenses, and both require such defenses to be clearly set forth. F.R.C.P. 8(c); 735 ILCS 5/2-613(d).

201; 196 Ill. Dec. 859 (1st Dist. 1994), which, Sprint suggests, stands for the proposition that “when a defendant attempt to justify its actions in defense”, whatever that means, the burden of proof should in all cases be laid at the door of the defendant. Sprint IB at 13. Such a conclusion, however, does not survive even the most casual review of Roy v. Coyne itself.

In Roy v. Coyne, the Circuit Court dismissed a count of the appellant’s complaint sounding in the unlawful interference with contract. Roy, 259 Ill. App. 3d at 273; 630 N.E.2d at 1027; 1994 Ill. App. Lexis 201 at 4. The Appellate Court felt itself compelled² to resolve a legal issue that was then in a state of confusion in Illinois: whether a plaintiff claiming intentional interference with a contract must allege, in addition to the other required elements of a *prima facie* case, that the defendant’s interference with contract was without legal justification. Id., 259 Ill. App. 3d at 277; 630 N.E.2d at 1029; 1994 Ill. App. Lexis 201 at 15. Previous Illinois decisions had held that plaintiffs were indeed required to plead and prove that the defendant-tortfeasor acted without legal justification when interfering with the plaintiff’s contractual relations. Id. at 278; 630 N.E.2d at 1030; 1994 Ill. App. Lexis 201 at 17.

The Roy court found that alleging justification for the intentional interference with contract was an affirmative defense which the defendant was required to plead and prove, reasoning that the requirement that the plaintiff plead lack of justification arose from the relative newness of the tort of intentional

² This was not a universally-held view. See Roy, 259 Ill. App. 3d at 288; 630 N.E.2d at 1036; 1994 Ill. App. Lexis 201 at 41 (Harman, J., dissenting in part) (dissent stated that the question of whether plaintiff should be required to plead and prove justification need not have been reached)

interference with contract, and the careless use of the word “malice” in a seminal English decision. Id., at 281; 630 N.E.2d at 1032; 1994 Ill. App. Lexis 201 at 25. However, and significantly, the Roy court also determined that, if the plaintiff’s complaint raises the issue of privilege or justification on its face, then the plaintiff has the burden of pleading and proving lack of justification. Id., at 283; 630 N.E.2d at 1033; 1994 Ill. App. Lexis 201 at 30.

Roy is completely inapplicable here. “Justification”, as used in Roy, is a term of art, meaning “without legal malice”. Roy at 277; 630 N.E.2d at 1029; 1994 Ill. App. Lexis 201 at 14-15. “Justification” does not mean, as Sprint suggests it does, any factual matter or legal theory that would defeat a plaintiff’s claim. In short, Sprint is attempting here to take an Illinois decision relating to the finer points of pleading requirements in the arcane world of tortious interference with economic advantage, and turn it into a burden-shifting rule of general application that requires a defendant who advances any legal theory or factual matter barring recovery – within or without the scope of the complaint – to prove by a preponderance of the evidence that the plaintiff is not entitled to recover. Sprint, in other words, wants the Commission to reject the well-settled principle that the plaintiff has the burden of pleading and proving his case, so that Sprint can be relieved of the consequences of its own election of remedies.

Moreover, to the extent that the decision in Roy has any application by analogy here, Sprint has indeed raised the issue of justification, by suggesting that AT&T is attempting to impose unjustified state-specific requirements. Complaint, ¶¶33, 48, 51, 52, 57. Having raised this issue of justification (a term

the Staff uses advisedly here, for the reasons outlined above), Sprint is now obliged to plead and prove it under the holding in Roy. Staff notes that the Roy court's finding that a plaintiff raising justification must plead and prove it has been followed by other Illinois courts. See, e.g., Strosberg v. Brauvin Realty Services, Inc., et al., 295 Ill. App. 3d 17; 691 N.E.2d 834; 1998 Ill. App. Lexis 92; 229 Ill. Dec. 361; 35 U.C.C. Rep. Serv. 2d (Callaghan) 539 (1st Dist. 1998).

The fact remains, notwithstanding Sprint's sophistry that, as Staff noted in its Initial Brief, Staff IB at 12, courts have uniformly imposed on administrative agencies the common-law rule that the party seeking relief has the burden of proof. Scott v. Dept. of Commerce and Community Affairs, 84 Ill. 2d 42, 53; 416 N.E.2d 1082, 1088; 1981 Ill. Lexis 229 at 14; 48 Ill. Dec. 560 (1981). The common-law rule has worked effectively throughout the English-speaking world for a few centuries, and the Staff sees no reason to depart from it here.

II. Merger Commitment 7.1 is Clear and can be Construed without Resort to Extrinsic Sources

Sprint advances an extended argument regarding the proper construction of Merger Commitment 7.1,³ the FCC's intent with respect to it, and the manner in which, Sprint alleges, it came into existence. Sprint IB at 17, *et seq.* Sprint argues that Merger Commitment 7.1 exists almost entirely for the purpose of allowing competing carriers to import a bill-and-keep arrangement. Id. Sprint,

³ See Appendix F, *Memorandum Opinion and Order, In the Matter of AT&T Inc. and BellSouth Corporation: Application for Transfer of Control*, FCC No. 06-189, WC Docket No. 06-74, 22 FCC Rcd 5662; 2007 FCC Lexis 2363; 40 Comm. Reg. (P & F) 1017 (March 26, 2007 Released; Adopted December 29, 2007) (hereafter "Merger Order")

indeed, asserts that: “[t]here can be no question that the conditions were imposed in order to allow the porting of bill-and-keep arrangements.” Id. at 18.

There is little more to Sprint’s argument than this resounding statement. Sprint advances a chronology that purports to demonstrate AT&T’s acquiescence in certain objections advanced in comments by cable provider complaining of AT&T’s refusal to permit the importation of bill-and-keep arrangements in certain states. Sprint IB at 18-19. This, according to Sprint, argues in favor of the Merger Commitment being primarily a vehicle for the importation of bill-and-keep.

As an initial matter, Sprint appears to have been compelled to include a great deal of extra-record facts in support of this argument. Staff declines to interpose any formal objection to this, although it is informed and believes that AT&T likely will do so. However, Sprint’s argument is meritless for reasons unrelated to the extra-record matters required to advance it.

First, Sprint’s argument assumes that, because one event – the cable providers’ FCC comments – occurred before another event – the adoption of Merger Commitment 7.1 – it somehow follows that the one directly caused the other. This is a logical fallacy: *post hoc ergo propter hoc*. Illinois courts routinely reject the assertion that a mere temporal relationship between two events implies any sort of causation, viewing *post hoc ergo propter hoc* arguments as “one of the classic logical fallacies.” Hussung v. Patel, 369 Ill. App. 3d 924, 933; 861 N.E.2d 678, 685-86; 2007 Ill. App. Lexis 19 at 19-20; 308 Ill. Dec. 347 (2nd Dist. 2007), *citing* Manias v. Peoria County Sheriff’s Department Merit Comm’n, 109 Ill. App. 3d 700; 440 N.E.2d 1269, 65 Ill. Dec. 253 (1982). The mere fact that a party

filed comments in an FCC proceeding does not in any way prove that the FCC acted in reliance upon those comments.

Second, and related, the *Merger Order* itself in no way suggests that the FCC relied on the cable providers' comments in imposing Merger Commitment 7.1. The *Merger Order* makes no reference to Merger Commitment 7.1 in its body, and does not cite anywhere the cable providers' comments to which Sprint ascribes such importance. See, generally, Merger Order. In adopting the Merger Commitments, the FCC's findings, in their entirety, were as follows:

In addition, on December 28, 2006, AT&T made a series of voluntary commitments that are enforceable by the Commission and attached as Appendix F. [fn] These conditions are voluntary, enforceable commitments by AT&T but are not general statements of Commission policy and do not alter Commission precedent or bind future Commission policy or rules.

Merger Order, ¶222 (footnote omitted)

The footnote, which presumably cites the matters upon which the FCC relied in imposing the Commitments, states as follows in its entirety:

See Appendix F. AT&T filed on December 28, 2006, a letter describing its voluntary commitments. See Letter from Robert W. Quinn, Jr., Senior Vice President – Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. (filed Dec. 28, 2006). On January 4, 2007, AT&T filed an erratum to make two minor corrections to the commitment language and to correct certain building identification codes set forth in the attachment to the Dec. 28, 2006 letter. See Letter from Joan Marsh, Executive Director – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. (filed Jan. 4, 2007) (AT&T Jan. 4, 2007 *Ex Parte* Letter). Appendix F includes the corrections set forth in the AT&T Jan. 4, 2007 *Ex Parte* Letter, as that letter accurately reflects the voluntary commitments offered by AT&T.

Id., n.614

In other words, there is no evidence that the FCC relied upon the cable providers' comments, or even considered them. The FCC appears to have relied exclusively on several AT&T *ex parte* letters. The *Merger Order* indicates that the FCC in any case viewed the Merger Commitments as an entirely voluntary offering from AT&T. Merger Order, ¶¶49, 57, 60, 204, 222, 223, Appendix F, *generally*. Since the FCC considered the commitments to be voluntary, it appears to have taken the view that it had no authority to alter them, but could merely adopt them or not adopt them. There is nothing from which to infer that the FCC concerned itself in the least with what was said in comments made regarding the commitments, especially since the FCC declined to cite such comments or refer in any way to such comments. Sprint's argument is based entirely upon speculation as to why the FCC might have done what it did, and unnecessary speculation at that.

Third, by advancing a construction of Merger Commitment 7.1 based on a vague agglomeration of comments and *ex parte* letters, Sprint must argue by implication that Merger Commitment 7.1 is somehow insufficiently clear that there is a need, or indeed a proper legal basis, for resorting to extrinsic aids to Merger Commitment 7.1's construction. This is because it is well established that, where the language of an order is clear and unambiguous, it is generally not subject to construction and cannot be controlled by an alleged intent not expressed in it. Comdisco, Inc. v. Dun & Bradstreet Computer Leasing, Inc., et al., 285 Ill. App.

3d 796, 799; 674 N.E.2d 902, 904; 1996 Ill. App. Lexis 946 at 7; 221 Ill. Dec. 109 (1st Dist. 1996).

Sprint's assumption that Merger Commitment 7.1 is unclear, however, is flatly wrong. The Merger Commitment is not ambiguous. It permits importation of out-of-state ICAs "subject to state-specific pricing". As Staff noted in its Initial Brief, the term "state-specific pricing" very clearly includes reciprocal compensation, in light of the fact that both Section 252(d)(2)(A) of the federal Telecommunications Act, and Sections 51.709(a), 51.711(a)-(b), and 51.713 authorize state commissions, and state commissions alone, to set reciprocal compensation rates, or impose bill-and-keep arrangements where, as here, the parties cannot agree to them. Staff IB at 26-27; *see also* 47 U.S.C. §252(d)(2)(A); 47 C.F.R. §§51.709(a); 51.711(a)-(b); 51.713. To prevail in its argument, therefore, Sprint must argue here that the FCC has, in using the term "state-specific pricing", adopted a definition of that term which is contrary to the statute it enforces and the rules it promulgated. There is no reason, however, from the plain language of the *Merger Order*, or indeed any other source, to conclude that the FCC did any such thing.

Thus, there is no need to resort to some tenuous relationship between comments, *ex parte* letters, and the offering of the Merger Commitments; "state-specific pricing" is what the Congress, through the Act, and the FCC, through its rules, have stated that it is, and under the Act and rules "state-specific pricing" clearly includes reciprocal compensation.

Sprint's argument that the Kentucky ICA's bill-and-keep arrangement is not "state-specific pricing" because Sprint and BellSouth adopted it throughout the BellSouth region fails for the same reason. What Sprint contends that it and BellSouth intended and believed regarding the formation of their contract in 2000 is irrelevant to the construction of the term "state-specific pricing" as used in a 2006 FCC order. As noted above, what is relevant to construing the *Merger Order* is the specific language of the *Merger Order* itself, and not an interpretation, six years after the fact, of the intent with respect to contract formation, of two contracting parties, rendered by one of those parties. Accordingly, Sprint's arguments should be rejected.

III. 1+ Dialed intraMTA Traffic is Subject to Reciprocal Compensation

AT&T, in its Addendum to its Initial Brief, argues that, where intraMTA traffic originated by a landline carrier is carried by an IXC for termination to a CMRS provider, it is therefore not subject to reciprocal compensation and should not be accounted for as such. *See, generally, Addendum*. In support of this argument, it relies, in essence, on Texas and Kentucky PUC decisions. *Addendum* at 5, *et seq.* It also urges the Commission to misread and misapply FCC orders. *Id.* at 1-5.

AT&T's arguments are futile. AT&T does not give the Commission any insight into why it should ignore its own decisions in favor of those of the Texas PUC. As the Staff noted in its Initial Brief, the Commission's decision in Verizon

Wireless, LLC, et al. v. Adams Telephone Co-Operative, et al., ICC Docket No. 04-0040 (April 7, 2004) (hereafter “Verizon Wireless Order”)⁴, found that intraMTA traffic originated by a landline carrier and terminated by a wireless carrier was indeed subject to reciprocal compensation, notwithstanding the fact that the traffic was carried by an intervening IXC. Verizon Wireless Order at 8. In so finding, the Commission described as “patently spurious”, “illogical”, “disingenuous”, and “contrary to FCC rules”, the argument that carriage of the traffic by an intervening IXC somehow attenuated the originating landline carrier’s liability for reciprocal compensation to the terminating wireless carrier. Id. at 6, 7, 8. This argument, however, is precisely the one that AT&T advances here, and it is every bit as spurious, illogical, disingenuous, and contrary to FCC rules today as it was when the Commission so described it in the Verizon Wireless Order.

Moreover, the matter has been resolved, at least at the level of the federal Courts of Appeals. As Staff noted in its Initial Brief, the two published⁵ Court of Appeals decisions relating to the matter of whether intraMTA traffic originated by a landline carrier carried by an IXC for termination to a CMRS provider is subject to reciprocal compensation have decided that question in the affirmative. Staff IB at 37-38.

⁴ The Commission’s decision was affirmed by the Appellate Court for the Fifth District in Alhambra-Grantfork Telephone Co., et al. v. Commerce Comm’n, 358 Ill. App. 3d 818; 832 N.E.2d 869; 2005 Ill. App. Lexis 605; 295 Ill. Dec. 419 (5th Dist. 2005)

⁵ The Circuit Court of Appeals for the Fifth District affirmed a Texas PUC decision upon which AT&T relies in Fitch v. Texas PUC, 2008 U.S. App. Lexis 919 (5th Dist. 2008). Addendum at 5, and n.11. However, the Fifth Circuit Court of Appeals considered the decision insufficiently important to publish, and accordingly ordered that it not be published. Fitch, 2008 U.S. App. Lexis 919 at 1. Its value as precedent is therefore little bordering on none. See 5th Cir. R. 47.5.3 (stating that only those unpublished decisions issued prior to January 1, 1996 constitute precedent and that all precedential decisions are published). Accordingly, the Fitch decision is not a basis upon which to challenge the existing Circuit Court decisions.

AT&T further argues that the ISP-Bound Traffic Remand Order, see *Order on Remand and Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, FCC No. 01-131. CC Docket No. 96-98; CC Docket No. 99-68, 16 FCC Rcd 9151; 2001 FCC Lexis 2340; 23 Comm. Reg. (P & F) 678 (Rel. April 27, 2001) (hereafter “ISP-Bound Traffic Remand Order”), provides authority for the proposition that 1+ dialed intraMTA traffic is exempt from reciprocal compensation. Addendum at 4. However, the ISP-Bound Traffic Remand Order does no such thing.

The FCC’s decision in the ISP-Bound Traffic Remand Order applied, perhaps unsurprisingly, to ISP (internet service provider) – bound traffic. See ISP-Bound Traffic Remand Order, ¶1 (“In this Order, [the FCC] reconsider[s] the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers ... [.]”) Needless to say, the question of the proper intercarrier compensation arrangement for ISP is a matter not remotely at issue here. Further, whatever pronouncements the FCC may have made regarding the interrelationship between Sections 251(b)(5) and 251(g) of the federal Telecommunications Act, it took no steps to amend its rule regarding what sort of traffic exchanged between a wireless carrier and landline carrier is subject to reciprocal compensation. As the Circuit Court of Appeals for the Tenth District found, four years after issuance

of the ISP-Bound Traffic Remand Order, “[n]othing in the text [of FCC rules] ... provides support for the [rural ILEC’s] contention that reciprocal compensation requirements do not apply when traffic is transported on an IXC network.” Atlas Telephone Co., et al. v. Oklahoma Corporation Commission, et al., 400 F.3d 1256, 1264; 2005 U.S. App. Lexis 4020 at 18; 35 Comm. Reg. (P & F) 1047 (10th Cir. 2005). Moreover, as the Atlas Telephone court made clear, reciprocal compensation rules governing wireline-to-wireline calls specifically exempt IXC traffic from their application, while the rule governing wireline-wireless calls does not:

[FCC Rule] 51.701(b)(1) specifically excludes from reciprocal compensation requirements landline traffic exchanged between a LEC and a non-CMRS carrier “that is *interstate or intrastate exchange access*” in nature. *Id.* [47 C.F.R.] §51.701(b)(1) (emphasis added). Significantly, the [FCC] did not carry forward that same exception into [FCC Rule] 51.701(b)(2) [applying to wireless traffic], the operative definition in this case.

Atlas Telephone, 400 F.3d at 1265; 2005 U.S. App. Lexis 4020 at 18-19 (emphasis in original)

The operative definition in that case is the operative definition here. As the Commission noted in its Verizon Wireless Order, in determining whether wireline-wireless traffic is subject to reciprocal compensation, “the relevant fact is where the traffic is initiated and where it terminates.” Verizon Wireless Order at 8. If origination and termination are within the same MTA, the traffic is subject to reciprocal compensation regardless of whether it is carried at some point by an IXC. *Id.* at 7-8.

AT&T criticizes this decision as containing little analysis of the argument raised by rural ILECs there, and AT&T here, that 1+ dialed intraMTA traffic is not

originated by the calling party's carrier. Addendum at 7-8. However, the Commission found – as the Atlas Telecommunications court found – that FCC rules were clear and applied to the situation. This remains the correct reasoning and outcome, and extended analysis of meritless arguments is scarcely necessary.

In summary, the FCC's rules, the Commission's prior rulings, and all published decisions by federal Courts of Appeals support the Staff's position. The Commission should adopt it as its own.

IV. Conclusion

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein, and in Staff's Initial Brief herein.

Respectfully submitted,

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